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FORGING A MORE COHERENT GROUNDWATER POLICY IN CALIFORNIA: STATE AND FEDERAL CONSTITUTIONAL LAW CHALLENGES TO LOCAL GROUNDWATER EXPORT RESTRICTIONS

Gregory S. Weber*

I. INTRODUCTION

Groundwater is a vital component of California's precious water resources.1 Despite its critical role in the state's economy, outside of a few special districts, the state has largely left it unmanaged.2 Thus, the state's laissez-faire groundwater management "policy" has been virtually incoherent. As a result, extensive groundwater overdraft has occurred in many areas of the state.3 At the same time, the uncertainties inherent in the common-law-based system governing the acquisition and transfer of private rights to groundwater likely impede more rational reallocation of groundwater in response to changing state and local economic needs.4

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1. See, e.g., CAL. DEP'T OF WATER RESOURCES, BULLETIN 160-87, CALIFORNIA WATER: LOOKING TO THE FUTURE 31 (1987) (39% of California's applied water needs come from groundwater pumping) [hereinafter BULLETIN 160-87]. The role of groundwater in the state, as well as the history of state and local efforts to regulate it, is explored in much greater detail in an article to be published in early 1994. See Gregory S. Weber, Twenty Years of Local Groundwater Export Legislation in California: Lessons from a Patchwork Quilt, 34 NAT. RESOURCES J. No. 3 (forthcoming Spring 1994) [hereinafter Patchwork Quilt].

For consistency's sake, following the similar convention adopted in Patchwork Quilt, this article will spell "groundwater" as one word, even if the quoted or cited materials spell it as two words, or one hyphenated word.

2. See, e.g., BULLETIN 160-87, supra note 1, at 34.
3. Id. at 31-34.
4. See infra text accompanying notes 14-38.
In response to the state regulatory void, over the last twenty years, numerous local governments in California have attempted to regulate groundwater extraction in their jurisdictions. The principal feature of these local regulations has been restrictions upon the exporting of groundwater from the local jurisdictions. In a separate article, this author has critically surveyed the texts of eight county ordinances in their hydrogeological, common law, and statutory contexts. That article concludes that the local efforts, to date, have largely reinforced the already incoherent state of groundwater law in California.

This article examines the same California local groundwater export restrictions in their constitutional context. It explores in detail an important question left largely unexplored in the earlier work: the authority of local governments, under the state and federal constitutions, to restrict groundwater exports. In particular, it raises state constitutional questions of preemption and reasonable use, and federal constitutional questions of conflicts with the Dormant Commerce Clause. To date, these questions have been addressed by a series of four trial court decisions, the most recent decided in August 1993. No appellate court, however, has yet definitively answered these critical issues. As a result, those local government agencies contemplating groundwater management have little authority to guide their decisions about whether or how to regulate groundwater exports. With the passage of 1992's A.B. 3030, the pace of local groundwater management efforts is likely to accelerate rapidly. Consequently, an updated and expanded examination of the constitutionality of local government efforts to restrict groundwater exports is overdue.

Section II of this article summarizes the common law and state statutes addressing groundwater, and introduces the eight export ordinances. Section III considers the constitutionality, under articles X and XI of the California Constitu-
tion, of the local groundwater export ordinances.\textsuperscript{11} Section IV considers the constitutionality, under the federal Constitution’s Dormant Commerce Clause, of the local groundwater export ordinances.\textsuperscript{12} Section V draws some broad conclusions about the difficulties and appropriateness of constitutional litigation in advancing the goal of a more coherent groundwater policy.\textsuperscript{13}

II. CALIFORNIA GROUNDWATER LAW

A. Common Law Rights

Judicial decisions have established the scope of private rights to use groundwater in California.\textsuperscript{14} Three classes of such rights exist: (1) overlying rights, (2) appropriative rights, and (3) prescriptive rights.\textsuperscript{15} “Overlying rights” refer to the right of a landowner to pump groundwater from beneath the land for use on, or in connection with, the land that overlies the aquifer.\textsuperscript{16} An “appropriative right” is the right to take groundwater that is surplus to the needs of overlying users and use it on land that does not overlie the groundwater basin from which it was extracted.\textsuperscript{17} “Prescriptive rights” attach to pumping that continues for the prescriptive

\textsuperscript{11} See infra text accompanying notes 39-326.
\textsuperscript{12} See infra text accompanying notes 327-534.
\textsuperscript{13} See infra text accompanying notes 535-544.
\textsuperscript{14} See Wells A. Hutchins, The California Law of Water Rights 431-61, 503-06 (1966). See also generally Anne Schneider, Groundwater Rights in California, (Governor’s Comm’n to Review Cal. Water Rights Law, Staff Paper No. 2, 1977). For an extended treatment of the materials in this section of the article, see Patchwork Quilt, supra note 1, at §§ III & IV.
\textsuperscript{15} Hutchins, supra note 14, at 431-61, 503-06.
\textsuperscript{17} See, e.g., Hutchins, supra note 14, at 454-58. “Surplus” occurs “when the amount of water being extracted from a groundwater basin is less than the maximum that could be withdrawn without adverse effects on the basin’s long term supply.” Los Angeles v. San Fernando, 537 P.2d 1250, 1307 (Cal. 1975). An extraction by a municipality for local water supplies is always an appropriative use, even if the municipality overlies the aquifer. See Hutchins, supra note 14, at 458-60.
period after prior rights-holders have notice that a basin is "overdrafted."\(^{18}\)

Case law has also established the relative priorities between and among the three classes of groundwater rights-holders. As between overlying users, no temporal priority exists. Rather, in times of shortage, each is entitled to a reasonable share of the common supply.\(^{19}\) As between appropriators, temporal priority exists; the rights of a pumper first in time are senior to those of a later appropriator.\(^{20}\) As between overlying users and appropriators, overlying users have priority, regardless of the date of the inception of the overlying use.\(^{21}\) Prescriptive rights-holders can quantify their rights as against both prior appropriators and overlying owners under formulas developed by the courts.\(^{22}\)

Uncertainty reigns under this common law system.\(^{23}\) Since there is no centralized, state-administered system for obtaining private rights to groundwater, a rights-holder can quantify its right only by suing to adjudicate the rights of all basin pumpers.\(^{24}\) Such lawsuits are costly, time-consuming, and require the collection of extensive information about prior pumping patterns and basin hydrogeological characteristics. Given these limitations, in the short run, it may appear more rational to pumpers to allow a basin to become overdrafted. Similarly, no centralized mechanism exists for reviewing the desirability of a transfer of groundwater from an existing use to a new place of use.\(^{25}\) Lack of such a centralized process creates additional uncertainty that further inhibits the reallocation of groundwater to new uses.

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18. See, e.g., Hutchins, supra note 14, at 503-06. "Overdraft" occurs "whenever extractions increase, or the withdrawable maximum decreases, or both, to the point where the surplus ends." San Fernando, 537 P.2d at 1307. To trigger the running of the prescriptive period, a prior rights-holder must have notice of "adversity in fact caused by the actual commencement of overdraft." Id. at 1311.

19. See, e.g., Hutchins, supra note 14, at 440-41.

20. See, e.g., Schneider, supra note 14, at 16 (citing Katz v. Walkinshaw, 74 P. 766, 772 (Cal. 1903)).

21. See, e.g., id. at 14-16.

22. See, e.g., id. at 10-12 (citing Los Angeles v. San Fernando, 537 P.2d 1250, 1258, 1318 n.61).


24. See, e.g., id.

25. See id. at 163-65.
B. State Groundwater Legislation

No comprehensive state legislation addresses the acquisition and transfer of private rights to groundwater in California. Similarly, no comprehensive state legislation addresses the management of the resource. Rather, the sparse state groundwater management legislation has taken one of three forms. First, the Legislature has endowed several classes of water agencies with power to manage groundwater. Second, the Legislature has created several specific groundwater management districts to manage groundwater resources in identified basins. Finally, in recent years, the Legislature has granted existing local water agencies increased powers to manage groundwater resources.

C. County Efforts to Restrict Groundwater Exports

In response to the lack of centralized state groundwater legislation over the last twenty years, eight California counties have enacted ordinances restricting the acquisition of groundwater rights. In general, the ordinances follow a

27. See, e.g., FINAL REPORT, supra note 23, at 145.
28. In addition to these three groups of statutes, the Legislature has also included groundwater within water quality statutes, authorized groundwater studies, and assisted with groundwater recharge projects. See, e.g., CAL. WATER CODE §§ 13050(e), (j) (West 1971 & Supp. 1993) (groundwater included within Porter-Cologne Water Quality planning process); id. §§ 12920-24 (Porter-Dolwig Groundwater Basin Protection Law affirms importance of groundwater and requires a study of the resource); id. §§ 12925-28.6 (groundwater recharge projects funded).
29. See, e.g., id. §§ 60000-449 (groundwater replenishment districts). The Legislature has created the possibility of such districts; local citizens must still establish them.
31. See, e.g., CAL. WATER CODE §§ 1220(b) (West Supp. 1993) (counties within specified area authorized to prepare groundwater management plans); id. § 10753 (specified local public agencies authorized to manage groundwater).
32. In chronological order, these include: Imperial County, Cal., Ordinance 420 (July 18, 1972), 432 (Nov. 21, 1972); Butte County, Cal., Ordinance 1859 (Aug. 23, 1977); Glenn County, Cal., Ordinance 672 (Sept. 6, 1977); Modoc County, Cal., Ordinance 255 (Mar. 6, 1978); SACRAMENTO COUNTY, CAL. CODE ORDINANCES no. 410, § 2 (1980); Inyo County, Cal., Referendum Measure A (passed Nov. 4, 1980); Nevada County, Cal., Ordinance 1365 (Jan. 27, 1986), 1370 (Mar. 24, 1986); Tehama County, Cal., Ordinance 1552 (Feb. 4, 1992), 1553 (Feb. 18, 1992).

In addition to these counties, as of late 1992, at least six other counties were considering groundwater export policies. See infra note 49.
uniform format. They announce findings, define terms, and establish permit schemes authorizing the export of groundwater in limited circumstances from defined areas under their jurisdiction. In addition, several ordinances absolutely restrict water export under certain circumstances.

The circumstances and motivations surrounding the enactment of these ordinances are controversial. Considered in the worst light, these ordinances appear to hoard local groundwater to protect local interests at the expense of competitors from outside the respective counties. Considered in the best possible light, these ordinances attempt to do three things. First, they attempt to add certainty to local groundwater rights by ensuring that sufficient “surplus” groundwater exists to permit exports. By providing a locally administered process, they can avoid the need for expensive, time-consuming groundwater basin adjudication. Second, as a corollary to the first goal, in determining the availability of “surplus” water, the ordinances allow the permitting authorities to consider the environmental consequences of a proposed extraction for export. Finally, and most controversially, they function as local “area of origin” protections. Such protections aim to conserve a supply for future local economic development.

III. STATE LAW PREEMPTION

Absent a comprehensive state legislative scheme for groundwater regulation in California, can California counties

33. The principal exception is the short Sacramento ordinance, which lacks separate legislative findings and definitions, summarily considering the factors relevant to the granting of the permit. SACRAMENTO COUNTY, CAL., CODE § 15.08.095.

34. See, e.g., BUTTE COUNTY, CAL., CODE § 33-1 (findings); IMPERIAL COUNTY, CAL., CODIFIED ORDINANCES § 56200 (findings).

35. See, e.g., BUTTE COUNTY, CAL., CODE § 33-2 (definitions); IMPERIAL COUNTY, CAL., CODIFIED ORDINANCES § 56200 (findings); TEHAMA COUNTY, CAL., CODE § 9.40.010 (definitions).

36. See, e.g., BUTTE COUNTY, CAL., CODE § 33-4 (permit needed); IMPERIAL COUNTY, CAL., CODIFIED ORDINANCES § 56302; TEHAMA COUNTY, CAL., CODE § 9.40.030 (permit). See also supra note 232.

37. See BUTTE COUNTY, CAL., CODE § 33-3 (groundwater mining banned if water exported from “basin”); GLENN COUNTY, CAL., CODE § 20.04.400 (groundwater mining banned if water exported from county); TEHAMA COUNTY, CAL., CODE § 9.40.020 (groundwater mining banned if water exported from county).

enact their own home-grown provisions? In particular, can they restrict groundwater export from their counties? Article XI, section 7, of the California Constitution states: "A county . . . may make and enforce within its limits all local, police, sanitary, and other ordinances not in conflict with general laws." The California Supreme Court has long held that "[e]ven in matters of statewide concern, the city or county has police power equal to that of the state so long as the local regulations do not conflict with general laws." That court has developed an extensive analysis to determine whether such "conflict with general laws," i.e., "preemption," has occurred in a given legislative arena. Over ten years ago, in the only major article addressing local groundwater regulation, Antonio Rossman and Michael J. Steel concluded that the Inyo County groundwater management ordinance did not conflict with the "general laws," and hence was not preempted by state law. This section of the article updates the

39. CAL. CONST., art. XI, § 7 (West Supp. 1993). Prior to 1970, as article 11, § 11, the provision read: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Id. (West 1954). This provision, in its earlier wording, had been in the Constitution since its adoption in 1879. See Coleman Blease, Civil Liberties and the California Law of Preemption, 17 Hastings L.J. 517, 518 n.6 (1966). "When this provision was written into the constitution in 1879, it was unique and the California courts had to interpret the section 'unaided by anything that went before.'" James E. Allen, Jr. & Laurence K. Sawyer, Comment: The California City Versus Preemption By Implication, 17 Hastings L.J. 603, 604 (1966) (footnote omitted) (quoting John C. Peppin, Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution, 32 Cal. L. Rev. 341, 342 (1944)). Professor Peppin elaborated: "The origin and purposes of the provision are exceedingly obscure. It was adopted without debate in the Convention and apparently without public discussion of any kind. It does not appear to have been taken from any other state although it was subsequently adopted by three." Peppin, supra, at 341-42 (footnote omitted).

Similar provisions are currently found in the constitutions of Idaho, Ohio, Utah, and Washington. See IDAHO CONST. art. XII, § 2 (1993); OHIO CONST. art XVIII, § 3 (1979); UTAH CONST. art. XI, § 5; WASH. CONST. art. 11, § 11 (1988).


42. Antonio Rossman & Michael J. Steel, Forging the New Water Law: Public Regulation of "Proprietary" Groundwater Rights, 33 Hastings L.J. 903, 936-43 (1982). In addition to "preemption" under article XI, § 7, Rossman and Steel analyzed the Inyo ordinance under state equal protection and municipal affairs law. Id. at 943-49. This article will reexamine only the preemption analysis.
preemption analysis in light of the substantial developments that have occurred in the decade since Rossman and Steel first addressed the matter. In addition, it considers conflicting authorities not addressed by Rossman and Steel. Ultimately, it concludes that, although strong policy reasons support a conclusion that county groundwater export ordinances should be preempted, the legal case for such preemption is weak. Only a court willing to base its ruling on a combination of appeals to policy and to common law power to declare "general" law could conclude that state law preempted the local groundwater export ordinances.

In its application to county groundwater export regulations, the preemption analysis framework has remained virtually unchanged over the last dozen years. The principal developments have occurred on two fronts. First, and most importantly, in California Water Code sections 1220 and 10753, the Legislature has authorized certain counties to enact groundwater management plans. Section 1220 expressly and exclusively applies to counties. In contrast, section 10753 applies only to counties that meet its specific requirements. In combination, however, these two statutes greatly expand the express power of counties to control groundwater exports. This express legislative recognition of county power contrasts with the second development over the last ten years. In three separate cases since Rossman and Steel wrote their article, the California Superior Court has addressed counties' general power to enact groundwater ex-


44. CAL. WATER CODE §§ 1220, 10753 (West Supp. 1993).

45. Id. § 1220(b).

46. Section 10753(a) authorizes "local public agencies," defined in section 10752(g) as water service providers, to adopt groundwater management plans. See id. §§ 10752(g), 10753(a). In addition, § 10753(b) allows local public agencies that do not provide water service to manage groundwater if no other local public agency provides water service in the area, and the agency provides "flood control, groundwater quality management, or groundwater replenishment." Id. § 10753(b). See also 1993 Cal. Stat. ch. 320, § 3 (1993 A.B. 1152 [Costa]) (amending § 10753(b)). The 1993 A.B. 1152 is noted infra, note 60.
port restrictions. Although without precedential authority, the conclusion of the first two of these decisions has influenced at least two counties to seek special legislation rather than risk losing a judicial challenge to a home-grown ordinance.47

A. Legislative Authorization of County Groundwater Management

The 1984 enactment of California Water Code sections 1215 to 1222, and the 1992 enactment of Water Code sections 10750 to 10755.4, have greatly broadened the power of certain counties to enact groundwater management plans. Yet these provisions are far from general legislative authority for county groundwater export restrictions. Although both sets of statutes address groundwater management, neither expresses any legislative intent regarding the proper role that groundwater export controls may play within a county groundwater management scheme. Moreover, both acts apply only to a select group of counties. In addition, apart from the uncertain role that groundwater export controls may play within these schemes, the two sets of statutes raise a host of interpretive questions.48 This portion of the article analyzes the scope of these statutes by looking at their application to those counties that have attempted to enact groundwater export regulations without relying upon express state authorization.

Over the past twenty years, eight California counties have enacted or proposed ordinances restricting the export of

47. See Letter from James S. Reed, County Counsel, Mono County, California, to Gregory S. Weber (Oct. 27, 1992) (on file with author) ("It was my opinion that a county ordinance regulating groundwater export would likely be found to be preempted, as Superior Courts in Inyo and Nevada counties have ruled"); Telephone Interview with Joanne Yeager, Deputy County Counsel, Imperial County, California (Feb. 1992) (based on discussions with the Department of Water Resources on the Inyo and Nevada ordinances, the County concluded that it ran a substantial risk of having a home-grown ordinance declared preempted).

Over the last four decades, appellate decisions involving California water law have become increasingly rare. The California water bar is often left with little more to guide it than unpublished trial court orders and decisions. Indeed, the pages of the California Water Law & Policy Reporter are filled primarily with reports of such otherwise unpublished materials. See, e.g., 1 CAL. WATER L. & POL'Y RPTR. 13-16, 32-38 (1990).

48. For an extended introduction to these statutes, see Patchwork Quilt, supra note 1.
groundwater. In chronological order, these counties are: Imperial, Butte, Glenn, Modoc, Sacramento, Inyo, Nevada, and Tehama. Six of these counties are authorized at least partially by section 1220(b) to regulate groundwater. Arguably, some of the eight are also authorized to regulate groundwater under section 10753.

1. California Water Code Section 1220(b)

California Water Code Section 1220(b) authorizes counties that contain "part of the combined Sacramento and Delta-Central Sierra Basins" to adopt groundwater management plans. Twenty-seven counties overlie a portion of the "combined basins." These include six of the eight counties that have enacted groundwater export restrictions: Butte, Glenn, Modoc, Sacramento, Nevada, and Tehama. Inyo and Imperial can take no advantage of Section 1220.

49. See supra note 32. In addition to the eight counties that have enacted groundwater export ordinances, six counties have taken steps toward developing new groundwater transfer regulations. In 1992, Sutter County circulated a proposed groundwater export ordinance. Letter from James Scanlon, Deputy County Counsel, Sutter County, to Sutter County Water Districts (Aug. 27, 1992) (on file with author). Since 1991, Imperial County has been reviewing legislation to create a special district similar to the Mono County district. Letter from Joanne L. Yeager, Assistant County Counsel, Imperial County, to Gregory S. Weber (1992) (on file with author). Yuba County has indicated interest in enacting water transfer ordinances. Letter in response to survey of 58 California County Counsels from Yuba County to Gregory S. Weber (Nov. 1992) (on file with author). In 1992, San Joaquin County announced a general policy opposing any transfers of water from San Joaquin County where the water had not been offered first to other San Joaquin county users, or where affected water agencies had not yet consented. San Joaquin County, Cal., Resolution 4-92-236 (Apr. 7, 1992). Yolo County has created a new county-wide water agency charged with developing a water export policy. See County to Form Water Agency, DAVIS ENTERPRISE, Oct. 14, 1992, at A1, A5. Finally, Napa County has indicated that it is working on a formal water export policy statement. Letter in response to survey from Napa County Flood Control and Water Conservation District, to Gregory S. Weber (Nov. 12, 1992).

50. CAL. WATER CODE § 1220(b) (West Supp. 1993).

Even if a county initially appears within the scope of section 1220(b), section 1220 further limits its applicability. Section 1220(b) limits the power to those plans that will "implement the purposes of this section." This section," i.e., section 1220, addresses export pumping from within the combined basins. Thus, the power conferred by subsection (b) is apparently limited in two ways. First, an overlying county can enact groundwater management plans in order to limit "exports" from within the combined basin. There does not appear to be any direct authority, however, to allow counties to regulate "exports" that may leave their counties, but that do not leave the combined basins. Second, section 1220 does not directly authorize counties that partially overlie the "combined basins" to regulate groundwater in those portions of their territory that do not overlie the combined basins. As noted above, of the twenty-seven counties that overlie at least a part of the basin, seventeen also extend beyond the combined basins. These seventeen counties, however, appear to have groundwater management power over only the portions of their land surface that overlie the combined basins.

Of the six counties that have enacted groundwater export ordinances and that overlie the combined basins, only Butte, Tehama, and Sacramento entirely overlie the combined basins. Thus, Glenn, Modoc, and Nevada have only limited power under section 1220(b) to regulate groundwater within their counties.

52. CAL. WATER CODE § 1220(b) (West Supp. 1993).
53. Id.
54. Thus, section 1220 was not really at issue in the litigation involving groundwater exports from Tehama County to Colusa County. See, e.g., Brief of Defendant at 21, Baldwin v. County of Tehama, No. 34447 (Super. Ct. Tehama County, Cal.) ("[section] 1220 deals only with exports from the groundwater basin").
55. See supra note 51.
56. Arguably, if a county that only partially overlies the protected basin could establish some nexus between groundwater management in the portion of the county overlying the combined basins and the portion not so overlying, it might be able to extend its groundwater management power to the areas beyond the combined basins. Absent some hydrologic or engineered connection between such areas, it seems unlikely that a county could make such a showing.
2. California Water Code Section 10753

As noted above, Water Code Section 10753, part of 1992's A.B. 3030, does not on its face apply to "counties." Rather, subsection (a) authorizes a "local agency" that provides "water service to all or a portion of its service area" to manage groundwater in a basin identified in California Department of Water Resources Bulletin 118-75. Thus, only counties that provide such "water service" can take direct advantage of section 10753(a). Phone calls to various counties that have enacted, proposed, or reviewed groundwater export restrictions indicate that few, if any, provide water service.

Alternatively, section 10753(b) extends groundwater management powers to local public agencies that do not provide water service, but that provide "flood control, groundwater quality management, or groundwater replenishment." This subsection also requires that no other local agency provide water service. Subsection (b) thus extends the authorization beyond the limited circumstances addressed by subsection (a). Nevertheless, the extension is not universal. Again, a survey of eight counties, predominantly in the Sacramento Valley, indicated that four of the eight might fit within subsection (b).

57. See supra note 46.
58. CAL. WATER CODE §§ 10752(b), 10753(a) (West Supp. 1993).
59. As a former Sacramento County resident who paid county utilities bills for three years, the author can attest that Sacramento County does, indeed, provide water service. The author's research assistant spoke with representatives of Tehama, Yuba, Yolo, Glenn, Butte, Modoc, Inyo, and Sutter counties. See Memorandum from Brad Epstein to Gregory S. Weber (Mar. 5, 1993) (on file with author) [hereinafter, Memo]. Of these counties, only Sutter indicated that it provided water service; its delivery area was limited to "two communities." Id. at 3.
60. CAL. WATER CODE § 10753(b) (West Supp. 1993). In 1993, the governor signed A.B. 1152, 1993 Cal. Stat. ch. 320 (amending § 10753(b)). The new version extends the rights to regulate to "a local agency formed under [the Water Code] for the principal purpose of providing water service that has not yet provided that service." Id. § 3. The new provision also clarifies the geographic area of the regulatory authority of these non-water-providing agencies. They may regulate either in any portion of their jurisdiction not receiving water service from a defined "local agency" or in any portion of their jurisdiction "served by a local agency whose governing body, by a majority vote, declines to exercise the authority of [A.B. 3030, as codified and amended,] and enters into [a management] agreement with the local public agency..." Id.
61. See Memo, supra note 59. The inquiry did not address the other requirement of section 10753(b), namely, whether any other local agency provides water service. Irrigation districts exist in many of the surveyed counties. On its face, subsection (b) applies only if no other local agency provides water ser-
Of course, even if these counties might take advantage of A.B. 3030, that bill would not validate existing water export restrictions. The bill grants no express authority for water export restrictions. Arguably, such a ban is implicit in the groundwater management authority provided. Nevertheless, an ordinance that contained only an export ban would hardly seem to be a "management plan." Section 10752(d) defines a "groundwater management plan" as a "document that describes the activities intended to be included in a groundwater management program." Subsection 10752(e), in turn, defines a "groundwater management program" as "a coordinated and ongoing activity . . . pursuant to a groundwater management plan . . . ." A simple export ban, without more,
would lack any sense of “coordination.” Finally, Water Code sections 10753.2 to 10753.6 detail notice, hearing, and majority protest procedures required of groundwater management plans enacted under the bill. At a minimum, a county otherwise within section 10753 would seem to have to reenact its export ban under the A.B. 3030 procedures.

B. Three Trial Courts Find Preemption

Although the Legislature has thus extended some counties' groundwater management powers, the preceding discussion demonstrates that these extensions are limited and fraught with legal uncertainties. Moreover, neither Water Code sections 1220 nor 10753 expressly authorize the particular export ordinances enacted to date in the eight counties that have legislated in this area. The question remains: absent state legislative authorization, do counties have the power to enact such ordinances, or are such efforts preempted under state law? The remainder of this section discusses the preemption litigation to date and reviews the preemption analysis.

In all three cases that have reached judgment to date, the superior courts have found the particular ordinances at issue were preempted by state law. All three courts issued short decisions that contain few clues to the respective judges' reasoning. Still, as noted above, in the practicing water bar, these decisions have circulated and are influen-

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66. Id. §§ 10753.2-.6.
67. Although the recent Tehama County decision does not address that county’s ability to proceed under A.B. 3030, the court’s holding appears to support this conclusion. See infra note 77.
68. To date, three export ordinances have been challenged in court as in conflict with “the general laws.” All three superior courts have concluded that state law did preempt the ordinances before them. Ruling on Motion for Summary Judgment and Judgment on the Pleadings, City of Los Angeles v. County of Inyo, No. 12908 (Super. Ct. Inyo County, Cal., July 8, 1983); Ruling on Motion for Summary Judgment, Truckee Donner Public Utility Dist. v. County of Nevada, No. 35920 (Super. Ct. Sutter County, Cal., Jun. 21, 1988); Ruling on Motion for Summary Judgment, Myers v. County of Tehama, Nos. 34147 & 34446, (Super Ct. Tehama County, Cal., filed Aug. 11, 1993, appeal filed, Cal. Ct. App. No. 3 Civil C017301, Dec. 3, 1993). Myers was originally filed in Colusa County as Superior Court case number 18498. The defendant County transferred the case to Tehama where it was renumbered Tehama number 34147. There, it was consolidated with Petition for Writ of Mandate, Baldwin v. County of Tehama, No. 34446 (Super. Ct. Tehama County, Cal., filed May 27, 1992.) Baldwin involved a challenge to the Tehama County ordinance by a different group of irrigators.
ing counties in their approaches to legislative solutions to groundwater export issues.\textsuperscript{69}

In the Inyo County litigation, the City of Los Angeles challenged the groundwater management ordinance adopted by Inyo County voters in a referendum.\textsuperscript{70} On July 13, 1983, the trial court ruled on the County's motions for summary judgment and judgment on the pleadings, and the City's motion for partial summary judgment.\textsuperscript{71} The court concluded:

\begin{quote}
[T]he legislature of this state and the courts of this state, together, have created a comprehensive scheme of legislative acts and decisional law dealing with the acquisition, appropriation, use, control, and conservation of the waters of this state, including groundwater, which constitutes a general law of the state within the meaning of article XI, section 7, and which preempts the application of Inyo County's ordinances which are the subject of this litigation.\textsuperscript{72}
\end{quote}

In the Nevada County litigation, the Truckee-Donner Public Utility District challenged the groundwater export ordinance adopted by the Nevada County Board of Supervisors.\textsuperscript{73} On December 8, 1988, the trial court issued its order

\begin{footnotesize}
\begin{enumerate}
\item[69.] See supra notes 47, 68.
\item[70.] In City of Los Angeles v. County of Inyo, No. 12883 (Super. Ct. Inyo County, Cal., filed Dec. 30, 1980), the City raised CEQA and Election Code claims against the ordinance's procedural enactment; these claims were rejected. In City of Los Angeles v. County of Inyo, No. 12908 (Super. Ct. Inyo County, Cal., filed Jan. 16, 1981), the city raised its substantive arguments against the ordinance . . . .
\item[71.] Ruling on Motion for Summary Judgment and Judgment on the Pleadings, City of Los Angeles v. County of Inyo, No. 12908 (Super. Ct. Inyo County, Cal., July 13, 1983).
\item[72.] Id. at 4 (emphasis omitted). The court explained its conclusions:
\begin{quote}
The state clearly has preempted the field. And rightly so. The welfare of the state requires that its water resources be controlled for the best interests of all of its citizens. To allow each county to make its own rules as to the amount of water which can be used and for what purposes, could well jeopardize the reasonable distribution of the state's water supply to its people. The state's most vital assets, such as its water, must be thought of as assets of the entire state, not just of the areas in which they arise. Otherwise, the source counties, with but a portion of the state's people, are in a position to hold the state hostage.
\end{quote}
\end{enumerate}
\end{footnotesize}
on the parties' cross-motions for summary judgment. In that order, the court ruled that the Nevada Ordinance:

is inconsistent with Article 10, section 2 of the State Constitution and provisions of the Water Code; and that the Ordinance is preempted by California law. Local legislation such as Ordinance 1370 purporting to regulate the acquisition and use of the waters of the state is prohibited by the law and policy expressed in the Constitution, statutes, and decisions of California.\(^74\)

In the Tehama County litigation, several groups of farmers challenged the groundwater export ordinance adopted by the Tehama County Board of Supervisors.\(^75\) On August 11, 1993, the trial court ruled in the challengers' favor.\(^76\) In a short but rambling opinion, the trial court concluded that:


The population centers of the state may require large quantities of water not available to such centers locally. In periods of water shortage, a drought, it may be necessary to pump from ground water sufficient water to sustain the economy and population of the state. Inyo County may be the most obvious example as of the present time. However, this principle, with or without overdraft, will require statewide planning, not county of origin control. The state's future economy and growth pattern will be determined by where and in what quantity the water can be supplied.

This does not lend itself to 58 different statutes all of which will naturally be attempting to protect its own domain. The County here bases its right to control the ground water within its boundaries, the ordinance purports to apply to the Martis Valley ground water basin, on its police power, Constitution Article XI § 7. However, the County's police power is limited to areas of legislation which had not been preempted by the state.

The Court finds that the legislature, Constitution, and the Courts have in fact undertaken and created a comprehensive scheme for the control, acquisition, use and conservation of the waters of this state, including surface and ground water. That is to say, the state has occupied and preempted Ordinance No. 1370, which attempts to regulate and restrict exportation of water from Martis Valley Basin.


Tehama's ordinance is invalid because it conflicts with [Water Code] § 10750. . . . Tehama chose to ignore [the management procedure authorized by A.B. 3030]. There were no discussions with other agencies who may be affected by the basin which is the subject of the groundwater which is itself the issue in this litigation.  

A comparison of the three trial court opinions reveals substantial similarities in form. All three are relatively short and not terribly specific in identifying either the particular type of preemption or the particular conflicts with the general law that lead to preemption. The basis for each opinion differs. On the one hand, the Inyo and Nevada decisions strongly resemble each other. Despite these two courts' lack of specificity in identifying a particular legal theory, both found a "comprehensive scheme." Both cited article X, section 2, of the California Constitution, although only the Nevada County decision found a direct contradiction between the ordinance at issue and the constitutional provision. Both included decisional law within the realm of "general laws" with preemptive power. Both opinions defined the preempted "field" broadly to include the entire realm of the control, acquisition, use, and conservation "of the waters of this state." Finally, both decisions relied heavily on a policy against the balkanization of the state's water resources.

77. Id. at 4. The trial court's decision does not mention that Tehama County had enacted its groundwater management ordinance over six months prior to the enactment of Water Code § 10753. Tehama County, Cal., Ordinance 1552 (Feb. 4, 1992). The court also noted without discussion that section 10750.4 does not make A.B. 3030 the exclusive authority for local groundwater management. Myers v. County of Tehama, at 2 (decision filed Aug. 11, 1993). The court cited Cohen v. Board of Supervisors, 707 P.2d 840 (Cal. 1985), to outline the preemption analysis, but did not indicate which elements of the preemption test supported its ruling. Myers v. County of Tehama at 3-4 (decision filed Aug. 11, 1993). Finally, the court cited Water Code § 1220 and § 10750 as apparent legislative implementation of § 104 and § 105. Id.

78. For a discussion of the preemptive effect of this provision, see infra text accompanying notes 147-244.

79. For a discussion of the role of decisional law in preemption analysis, see infra text accompanying notes 293-301.

80. For a discussion of the impact of narrow and broad "field" definitions, see infra text accompanying notes 276-288.

81. Thus, the Inyo County decision states:

The welfare of the state requires that its water resources be controlled for the best interests of all of its citizens. To allow each county to make its own rules as to the amount of water which can be used and for what purposes, could well jeopardize the reasonable distribution of the state's water supply to its people. The state's most vital assets, such as
The recent Tehama decision also cited the constitutional provision, although, like the Inyo decision, it did not expressly find a direct contradiction between that provision and the ordinance at issue. Like the two prior trial courts, the Tehama court also apparently defined the “field” broadly. Similarly, the court implicitly adopted an “anti-balkanization” rationale for its holding. Unlike the other two decisions, however, the court grounded this rationale in the express statutory consultation procedure set up by section 10753. Finally, unlike either prior opinion, the Tehama court neither found a comprehensive scheme for water resources development nor cited the common law as part of the preemptive “general law.”

C. Contradiction-Based Preemption: California Water Code Sections 104 and 105

Given these three trial court opinions and their unequivocal, if implicit, rejection of the arguments of Rossman and Steel, a revisititation of the preemption analysis is in order. However appealing this author finds the trial courts’ anti-balkanization rationale, the paucity of discussion in the three

its water, must be thought of as assets of the entire state, not just of the areas in which they arise. Otherwise, the source counties, with but a portion of the state’s people, are in a position to hold the state hostage.

Ruling on Summary Judgment Motions at 3, Los Angeles v. County of Inyo, No. 12908 (Super Ct. Inyo County, Cal., filed July 13, 1983). Similarly, referring to the 58 different counties in the state, the Nevada County court opined: “This does not lend itself to 58 different statutes all of which will naturally be attempting to protect its own domain.” Decision on Summary Judgment at 3, Truckee-Donner Pub. Util. Dist. v. Board of Supervisors, No. 35920 (Super. Ct. Sutter County, Cal., filed June 21, 1988).

82. Decision at 2, Myers v. County of Tehama, Nos. 34147 & 34446 (Super. Ct. Tehama County Cal. filed Aug. 11, 1993). The court’s discussion of the constitutional provision was simply: “if one reads the provisions of Article X, § 2 . . . together with § 10004 (the State Water Plan) it appears that the State has involved itself in water planning and by virtue of § 10750 has given counties a clear path to protect and manage groundwater.” Id. at 2-3. In context, the court appeared to use the constitutional provision simply as authority for the cited state legislation.

83. Although the trial court did not expressly identify the “field” at issue, it apparently found that field to be “management of water” or “water planning.” Id. at 2.

84. Id. at 4.

85. Id.
trial court opinions belies the difficulty of the preemption analysis.

The preemption analysis usually begins with the frequently quoted passage from Lancaster v. Superior Court:86

Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a "municipal affair."87


87. Id. (citations omitted). This passage implicates two related inquiries: "municipal affairs" and "police powers." The last portion of the Lancaster quotation points to a related "home-rule" area: charter cities' exclusive power to legislate on "municipal affairs." Article XI, § 5, subdivision (a), of the California Constitution grants charter cities "sovereignty over 'municipal affairs.'" California Fed. Savings & Loan Ass'n v. City of Los Angeles, 812 P.2d 916, 917 (Cal. 1991). See also Sho Sato, "Municipal Affairs" in California, 60 CAL. L. REV. 1055 (1972); Peppin, supra note 39, at 371-76. Article XI, § 3 and § 4, authorize counties to adopt charters. CAL. CONST., art XI, §§ 3, 4 (West Supp. 1993). The county charter provisions, however, do not contain the "municipal affairs" language found in the city charter provisions. Compare id. §§ 1(b), 3(a) (county charters supersede "all laws inconsistent") and id. § 4(g) (county charters supersede general laws governing county powers and officers) with id. § 5(a); cf. id. § 8(b) (if authorized by charter, counties "may agree with a city within it to assume and discharge specified municipal functions") (emphasis added).

Because this article focuses solely on counties, the "municipal affairs" language, and its occasionally confusing overlap with preemption analysis, does not apply. See Cawdrey v. City of Redondo Beach, 15 Cal. App. 4th 1212, 1221-22 (Cal. Ct. App. 1993). See also David R. McEwen, Comment, Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict, 8 Loy. L.A. L. REV. 432, 433-34 n.10 (1975) ("Any statements in cases referring to municipal affairs of a county must be viewed as clearly erroneous.") Cf. Johnson v. Bradley, 841 P.2d 990 (Cal. 1992). But cf. Los Angeles County Safety Police Ass'n v. County of Los Angeles, 237 Cal. Rptr. 920, 923-24 (Cal. Ct. App. 1987) (charter county actions analyzed under municipal affairs cases). Thus, absent a special clause in a county charter addressing groundwater management, the power of a county to regulate groundwater exports does not appear to be impacted by the constitution's chartering provisions. To date, none of the litigation involving county groundwater exports has involved county charter provisions. The application of the "municipal affairs" language, if any, to charter city groundwater management efforts is beyond the scope of this article. Cf. FINAL REPORT, supra note 23, at 151 ("The City of Grass Valley enacted an ordinance which restricts new wells that are intended to provide water for land outside the city limits.")
The strongest indication of legislative intent to preempt local law comes from an express preemption provision. No state legislation expressly bans counties from enacting groundwater export restrictions. Similarly, as discussed in section

In addition to the explicit "municipal affairs" language, the Lancaster quotation specifically, and preemption analysis generally, presupposes local police power to legislate in a given arena. This article considers the extent of local police power over groundwater below, in the discussion of California Constitution article X, § 2. See infra text accompanying notes 161-222. This section of the article, discussing the preemptive effect, if any, of Water Code § 104 and § 105, assumes arguendo that police power exists in theory over at least some aspects of groundwater regulation. The focus becomes whether a local exercise of police power otherwise conflicts with these two statutes as statewide "general" law.

According to an early preemption case, an express preemption clause, without more, cannot displace local law. Ex parte Daniels, 192 P. 442, 445 (Cal. 1920). In Daniels, the court considered a highway speed regulation that made the state-enacted limits "exclusive of all other limitations fixed by any law of this state or any political subdivision thereof." Id. at 445. The act then expressly preempted any "ordinance, rule or regulation" of local authorities. Id. The court noted:

It must, of course, be conceded that a mere prohibition of the state Legislature of local legislation upon the subject of the use of the streets, without any affirmative act of the Legislature occupying that legislative field, would be unconstitutional and in violation of the express authority granted by the state Constitution to the municipality to enact local regulations.

Id. The court explained that such a bare preemption clause, without more, would simply aim at nullifying the constitutional grant of power to local government from what is now article XI, § 7. Id. In the act before it, the court found that the preemption provision at issue merely reiterated the provisions of article XI, § 7; general law prevails over conflicting local law. Id.

No case since Daniels has struck legislation as a naked preemption provision, unclothed by any "affirmative act of the Legislature occupying that legislative field." Id. Although this portion of Daniels has never been overturned or even criticized, its practical effect appears greatly limited by In re Porterfield, 168 P.2d 706 (Cal. 1946). In Porterfield, the California Supreme Court found that a general policy statement, without any other "affirmative act," preempted an ordinance. See id. at 721-22. Porterfield is discussed at length infra text accompanying notes 121-134.

Despite Porterfield, a county seeking to uphold the constitutionality of a groundwater export ordinance when faced with a challenge based on Water Code §§ 104 and 105, might attempt to bring those two statutes in effect, if not literally, within the Daniels rule. See infra notes 92-93 and accompanying text.

89. Indeed, the Legislature has expressly left undecided the ability of counties to legislate in this arena. For example, in California Water Code § 1220(b),
II of this article, there has been so little state legislation on groundwater that it is hard to find state legislation that local ordinances may "contradict" or "duplicate." Nevertheless, the Legislature granted certain counties the power to regulate groundwater "notwithstanding any other provision of law." CAL. WATER CODE § 1220(b) (West Supp. 1993). This language at least weakly acknowledges that "other provisions of law" might prohibit such powers. In contrast, in newly-enacted Water Code § 10750.10, the Legislature gave local agencies groundwater management powers "in addition to, and not [in] limitation [of], the authority granted to a local agency pursuant to other provisions of law." Id. § 10750.10. See also CAL. WATER CODE app. § 119-402.

The rights and powers granted to the counties and the districts by this act are in addition to those powers which they already have or those which may be granted. No provision of this act shall be interpreted as denying to the counties or the districts any rights or powers they already have or those which they may be granted, except as specifically provided for in this act.

Id.

90. In Sherwin-Williams v. City of Los Angeles, 844 P.2d 534, 536 (Cal. 1993), the court stated that "contradiction" occurs when local legislation is "inimical" to general law. The court, however, gave no gloss on "inimical." The classic "contradiction" involves local permission for something prohibited by state law, or local prohibition of something permitted by state law. See, e.g., Peppin, supra note 39, at 380 nn.123-24 and accompanying text (summarizing early cases). In the broadest sense, however, as the Lancaster quote indicates, "contradiction," "duplication," and "occupation of the field" preemption are only subsets of "conflict" preemption. See Bravo Vending v. City of Rancho Mirage, 20 Cal. Rptr. 2d 164, 170(Cal. Ct. App. 1993). The opinion in Pipoly v. Benson, 125 P.2d 482 (Cal. 1942), helps explain the overlap between concepts as seemingly divergent as "contradiction" and "duplication." Courts had traditionally explained that duplicate local legislation falls under the preemption doctrine not because it permits something prohibited by state law, or prohibits something permitted by state law, but because double jeopardy would bar a subsequent prosecution under state law of an offense earlier tried under municipal law. See, e.g., Cohen v. Board of Supervisors, 707 P.2d 840, 848 n.12 (Cal. 1985); In re Sic, 14 P. 405, 407 (Cal. 1887). See also generally Blease, supra note 39, at 521-24 (summarizing the development and critiquing the Sic rationale). Thus, local prosecution of a crime would prevent subsequent prosecution using allegedly superior state prosecutorial resources. Id. In Pipoly, while discussing local legislation in a field already occupied by state legislation, the court gave a jurisdictional explanation that explains the "no duplication" rule in terms of "conflict":

Paradoxical as it may seem, it is apparent that an ordinance and a statute may be identical . . . and yet the ordinance is invalid because within the constitutional provision it is in conflict with the statute. The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation.

Pipoly, 125 P.2d at 485. Cf. Abbott v. City of Los Angeles, 349 P.2d 974, 979-80 (Cal. 1960) ("The denial of power to a local body when the state has pre-empted the field is not based solely upon the superior authority of the state. It is a rule
challengers have argued that two statutes and the 1928 constitutional amendment do contradict (i.e., conflict directly with) county ordinances.\textsuperscript{91}

Water Code sections 104 and 105 represent the most express state legislative pronouncements on the state's power over groundwater. Section 104 states: "It is hereby declared that the people of the State have a paramount interest in the use of all water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection."\textsuperscript{92} Section 105 adds:

It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit.\textsuperscript{93}

\textsuperscript{91} of necessity, based upon the need to prevent dual regulations which could result in uncertainty and confusion.

In \textit{Abbott}, the court recognized that "conflict" thus had, on the one hand, a "conventional" and "strictest" sense, and on the other hand, a "liberal" definition. \textit{Id.} at 983-84. It used "conflict" in the narrow sense to denote "contradiction-based" preemption: i.e., the traditional rule against varying state and local permission and prohibition. \textit{See id.} In the broader sense, it allowed "conflict" to denote overlapping jurisdictions. \textit{Id.}

The very recent case of \textit{Bravo Vending} distinguishes two senses of "contradiction." \textit{Bravo Vending}, 20 Cal. Rptr. 2d at 170. One sense involves the classic situation where state and local governments differ over permission and prohibition. \textit{Id.} "The other form occurs when the . . . passage of the ordinance itself contradicts the Legislature's intent, expressly stated in the statute, that no local government shall regulate conduct within that same 'field' or subject matter." \textit{Id.} To avoid this conceptual ambiguity, \textit{Bravo Vending} proposes recasting the three-step \textit{Lancaster} analysis into a four-step process, stated, according to the court:

in order of increasing difficulty . . . (1) Does the ordinance duplicate any state law? (2) Does the ordinance contradict any state law? (3) Does the ordinance enter into a field of regulation which the state has expressly reserved to itself? (4) Does the ordinance enter into a field of regulation from which the state has implicitly excluded all other regulatory authority?

\textit{Id.}


92. \textbf{CAL. WATER CODE} § 104 (West 1971) (emphasis added).

93. \textit{Id.} § 105 (emphasis added).
Together, these two statutes announce unequivocally state policy pertaining to water resources. Beyond a policy statement, however, their preemptive effect is uncertain.

The Nevada County challengers claimed that these provisions directly conflicted with the Nevada County ordinance. The commissioners who compiled the Water Code, however, concluded that these two sections have "little operative effect." Rossman and Steel argued that these two sections create no obstacle, direct or implicit, to county groundwater regulation. Rather, they concluded that the two sections "express a general legislative policy that public values rather than proprietary concerns govern and control water use. These broad policy declarations suggest that, absent specific state regulation, counties hold not only the po-

94. Plaintiffs Points & Authorities in Support of Summary Judgment at 18-20, Truckee-Donner Pub. Util. Dist. They attempted to discount the code commissioner's comments by arguing that the two statutes reserve jurisdiction to the state even if the state has not exercised that jurisdiction. Id. at 20. See also infra notes 95 and 99. Moreover, they argued that this reservation of jurisdiction was equivalent to the Dormant Commerce Clause analysis under the federal constitution. Plaintiffs Points & Authorities at 20 n.11, Truckee-Donner Pub. Util. Dist.

The Tehama County challengers did not claim that these sections created a direct conflict between state and local law; rather, they relied upon the two statutes as evidence of implied preemption by partial legislative occupation of the field. Plaintiffs Points & Authorities in Support of Petition at 11-14, Baldwin v. County of Tehama, No. 34446 (Super. Ct. Tehama County, Cal., filed May 27, 1992).

95. For example, in their comments to § 104, the commissioners stated: "This provision has little operative effect. However, it was referred to as stating a continuing policy in Sawyer v. Board of Supervisors (1930) 291 P. 892 [sic] . . . which involved the constitutionality of the statute relating to dams." CAL. WATER CODE § 104 (West 1971) (Code Commission Notes) (citation omitted). In that latter note, the commissioners stated:

This provision has little operative effect but appears to be a statement of general policy quite similar to that contained in the next preceding section. The two statements are taken from acts providing for the investigations which resulted in the State water plan.

Note also the references to underground water in the above two sections, and the implied assertion of jurisdiction to regulate such water. While little statutory regulation exists as to "ground" water, as distinguished from water in streams whether surface or underground, there may be some value in preserving these assertions of jurisdiction on the subject.

Id. § 105 (Code Commission Notes) (emphasis added).

96. Rossman & Steel, supra note 42, at 940.
lice power authority, but also the responsibility to provide needed public regulation."\(^9\)

At first glance, Water Code sections 104 and 105 seem much too vacuous to conflict in the sense of "contradicting" the county groundwater ordinances at issue. By themselves, the two statutes do not set up directly or, in their own language, "determine" a groundwater development scheme. In the narrowest sense, they simply introduce a series of state statutes that principally allocate rights to surface waters.\(^9\) In a broader sense, they announce at least an attempt to reserve some public jurisdiction over the state's groundwater.\(^9\) But, whether considered as introduction or as reservation, they do not permit private conduct otherwise prohibited by local legislation.\(^10\) Thus, in this classic, narrow sense of "conflict" preemption, the two statutes apparently lack any substance with which to create a "contradiction."

Nevertheless, despite the apparent lack of "substance" to the two statutes, broad readings of four California Supreme Court cases suggest that simple policy statements, even without an accompanying legislative scheme, might support a "contradiction-based" preemption finding. In two of these cases, the court based preemption findings at least partially

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97. *Id.* They reinforced their conclusions by reference to article X, § 2: "This conclusion appears inescapable in light of the self-enforcing mandate of the constitution that all waters be devoted to reasonable and nonwasteful uses." *Id.* The conclusions of Rossman and Steel may not be as "inescapable" as they argue. As noted below, ordinance challengers raise the same constitutional provision as grounds for invalidation. *See infra* notes 147-244 and accompanying text.

98. *But see infra,* text accompanying note 122.

99. To the extent that § 104 and § 105 arguably "reserve" exclusive jurisdiction over groundwater to the state, at the expense even of its legal subdivisions, a "conflict" does, indeed, develop between general and local law. This type of jurisdictional conflict more closely resembles the broad meaning of conflict noted by *Abbott* as opposed to the narrower sense of "contradiction." *See supra* note 90. As such, the differences in the "narrow" and "broadest" readings of § 104 and § 105 mirrors the distinction noted by Justice Blease between a conflict based on a contradiction with an implied general law and a conflict based on an implicit occupation of the legislative field. *See Blease,* *supra* note 39, at 529, 531, 533 (discussing *Ex Parte* Daniels, 192 P. 442 (Cal. 1920) and *In re Porterfield,* 168 P.2d 706 (Cal. 1946)). In keeping with that distinction, it makes more sense to examine the jurisdictional reservation argument in the context of "occupation of the field." *See infra* notes accompanying text 263-326. That section ultimately concludes that the state has occupied the field of groundwater allocation.

100. Similarly, no argument readily suggests that the two statutes prohibit private conduct otherwise permitted by local ordinance. *See supra* note 90.
upon judicial perceptions of a need for uniform, statewide treatment of the given subject matter. In three of the cases, it based its findings at least partially upon conflicts with legislatively declared general policies. In combination, the language from these cases can support a preemption finding based on Water Code sections 104 and 105.

The "uniform treatment" cases include Abbott v. City of Los Angeles and Chavez v. Sargent. In Abbott, the court considered an ordinance that required criminals to register with local authorities. Citing its earlier decisions in Tolman v. Underhill and Chavez, the court noted that both cases involved needs for "uniform treatment throughout the state." So, too, with the criminal registration scheme before it in Abbott, where the court concluded: "[i]t is equally true that any legislation that would deprive a class of citizens from moving freely between localities within the state is such a subject as requires uniform treatment."

Even stronger than Abbott is language from one of the cases upon which it relies: Chavez. In Chavez the court considered a local ordinance affecting jurisdictional strikes and union shop or security agreements. As with Abbott, Chavez found that many portions of the challenged ordinance did indeed duplicate or conflict with specific state legislation on point. In addition, however, the court noted: "Furthermore, and of significance in impelling a conclusion that no part of the local ordinance can be effective, is the fact that in aspects wherein it does not substantially either parallel or


104. Chavez, 339 P.2d at 801.


106. Tolman, 249 P.2d at 280-82 (regarding University of California loyalty oaths).


109. Id. at 983.

110. Chavez, 339 P.2d at 801, 809.

111. Id.

112. See id. at 810, 825-29, 832-34 (Cal. 1959).
breach specific state legislation it conflicts, as hereinafter explained, with a general legislative declaration of policy.”

Chavez thus involves both “uniform treatment” and conflict with general policy.

Taken out of context, the “uniform treatment” and “general policy” language from Abbott and Chavez is not too far from the statements in Water Code sections 104 and 105 that “the State shall determine” how best to develop the state’s waters. For two reasons, however, the “uniform treatment” cases do not truly support the groundwater ordinance challengers’ direct conflict theory of preemption. First and foremost, both cases involved legislative occupation of the field; thus, they involved “conflict” preemption in the broader, jurisdictional sense. Second, both cases involved detailed legislative enactments. For example, in Abbott, the court noted the “enactment of a detailed scheme by the state Legislature” addressing the “field” of crime prevention and detection. Even in Chavez, although the Legislature had not enacted a “completely detailed scheme of regulation of the ‘field,’” it had “declared both a general policy and basic regulations in implementation thereof which ... are fully comprehensive of the field.”

The strongest language supporting a holding that a general policy statement may preempt local law comes from a third landmark case: In re Porterfield. In that case, the court struck down a City of Redding ordinance that, among other things, required union organizers to pay a license tax. The court found that this tax conflicted with the Legislature’s declaration in Labor Code section 923 that “the individual workman has full freedom of association, self-organ- 

113. *Id.* at 809 (citation omitted). To support its conclusion that conflict with “a general legislative declaration of policy” preempts a local ordinance, the court cited *In re Porterfield*, 168 P.2d 706 (Cal. 1946). See also infra text accompanying notes 121-134 for a detailed discussion of Porterfield.

114. By analogy to the legislation in Abbott, local groundwater export ordinances thus appear “to deprive a class of citizens from moving [water] freely between localities within the state” and thus, the analogy continues, address such “a subject as requires uniform treatment.” Abbott v. City of Los Angeles, 349 P.2d 974, 982-83 (Cal. 1960). See also supra text accompanying note 109.

115. *See Abbott*, 349 P.2d at 979-81; *Chavez*, 339 P.2d at 810-11. See also supra notes 90, 99.


119. *Id.* at 722.
zation, and designation of representation of his own choosing, to negotiate the terms and conditions of his employment . . . ."120 The conflict arose because the tax unduly burdened workers' exercise of the legislatively recognized freedoms.121

Like Water Code sections 104 and 105, Labor Code section 923, as construed in Porterfield, is a general declaration of policy. The two sets of statutes share two additional similarities. First, as noted above, the two water code sections are set forth at the beginning of the Code, helping to introduce fundamental concepts applicable to the code in general.122 Similarly, the first line of Labor Code section 923 unequivocally announces its "introductory" character: "[i]n the interpretation and application of this chapter [concerning contracts against public policy], the public policy of this State is declared as follows . . . ."123 Despite the Legislature's apparent invitation to confine Labor Code section 923, Porterfield refused to limit the section's scope to the mere "interpretation and application" of this chapter. Rather, Porterfield found preemptive substance in section 923.124 By analogy, the court could similarly read preemptive substance into the otherwise introductory policy language of Water Code sections 104 and 105.

A second similarity between the two sets of statutes comes from the paucity of implementing legislation. Unlike the legislative schemes in Abbott and Chavez,125 the preemption ruling in Porterfield did not depend upon a "detailed" legislative scheme that implemented broad policy language. By analogy, the court could similarly read preemptive substance into Water Code sections 104 and 105, even without a detailed legislative scheme addressing groundwater rights.

120. Id. at 721-22 (quoting CAL. LAB. CODE § 923 (West 1989)). This section is unchanged from the version construed in Porterfield. Compare 1937 Cal. Stat. ch. 90, § 923.
121. In re Porterfield, 168 P.2d at 711.
122. See supra text accompanying note 98.
123. CAL. LAB. CODE § 923 (West 1989).
124. See Porterfield, 168 P.2d at 721-23. See also Chavez v. Sargent, 339 P.2d 801, 819 (Cal. 1959) (Porterfield "established that the policy declared in § 923 of the Labor Code is not limited to the interpretation of the chapter of the code of which that section is a part, but is a general independent declaration of state policy, and local legislation in conflict therewith is void.").
125. See supra notes 116-117 and accompanying text.
Porterfield thus presents the strongest case for basing preemption on a broad legislative policy declaration. Nevertheless, for at least three reasons, the analogy between Labor Code section 923 and Water Code sections 104 and 105 is not perfect. First, although Porterfield did not turn on a preemptive "detailed" legislative scheme, Labor Code section 923 does have at least some companion provisions that implement its broad policy language. Through such companion provisions, the Legislature reinforced concretely its broad policy concerns. Such reinforcement, in turn, lends coherence and substance to the broad policy language. In contrast, other than A.B. 3030, no statutes implement the "groundwater" references in Water Code sections 104 and 105. The Legislature's almost total failure to implement the relevant portions of the two Water Code sections deprives the sections broad policy language of any reinforcing coherence and sub-

126. Several cases from other jurisdictions also base preemption findings upon broad policy declarations. Of these, many suggest that an ordinance may be preempted if it is contrary to the "spirit" of the law or repugnant to the state's general policy. See, e.g., Fox v. City of Racine, 275 N.W. 513, 514 (Wis. 1937) (regarding dance marathons); City of Marengo v. Rowland, 105 N.E. 285, 286 (Ill. 1914) (examining local blue laws). Of these two cases, however, only City of Marengo invalidated the ordinance before it. Id. Although that case cites the "spirit" and "general policy" language, the preempting state statute was a specific criminal "disturbing the peace" law, and not a broad policy statement such as California Labor Code § 923. Id. at 286. A more recent Wisconsin case invalidated a local ordinance requiring landlords to rent to unmarried persons. See County of Dane v. Norman, 497 N.W.2d 714 (Wis. 1993). In that case, the court found the ordinance violated "the public policy of this state which seeks to promote the stability of marriage and family." Id. at 716. The court found legislative expressions of this policy in the broad policy language found in the statute that introduced three chapters of the Wisconsin Statutes. Id. at 716-17 (citing Wis. Stat. § 765.001(2)-(3) (1993)). Although the broad language of this Wisconsin statute parallels California Labor Code § 923, the Wisconsin statute introduces three full chapters of related statutes in which that state's legislature had detailed its policy. Wis. Stat. § 765.001(2)-(3) (1993).

Several New York cases also contain language suggesting that an ordinance is invalid if it contradicts a legislatively declared policy. See, e.g., New York State Club Ass'n. v. City of New York, 505 N.E.2d 915, 917 (N.Y. 1987), aff'd 487 U.S. 1 (1988) (upholding anti-discrimination ordinance). In most of these cases, however, the Legislature had detailed its policy concerns in specific statutes. See, e.g., ILC Data Device Corp. v. County of Suffolk, 588 N.Y.S.2d 845 (N.Y. App. Div. 1992) (holding comprehensive state and federal workplace safety laws preempted local ordinance).

stance. The deprivation is even more apparent given the extensive legislative attention to surface water.

Second, *Porterfield* and Labor Code section 923 implicate fundamental, personal constitutional rights.\(^{128}\) Section 923 expressly mentions "liberty of contract" and "freedom of association."\(^{129}\) The Redding ordinance reviewed in *Porterfield* affected constitutionally protected freedom of speech and rights to engage in a business or economic activity.\(^{130}\) Thus, even if these fundamental personal liberties did not themselves directly compel the conclusion that Labor Code section 923 preempted the license tax, they provided a powerful context that heightened the court's concerns over the local legislation.\(^{131}\) In contrast, Water Code sections 104 and 105 do not occur in the same context of heightened concern over personal liberties.\(^{132}\)

Finally, *Porterfield* is now nearly fifty years old. Although it remains cited by recent cases,\(^{133}\) outside of Labor Code section 923, it has not been used recently by the courts to justify preemption based on legislative statements of broad, general state policy. Similarly, courts have not cited recently the "conflict with broad policy" portion of *Chavez* that the court based upon *Porterfield*.

The most recent preemption case from the California Supreme Court that looks at legislative policy statements is ambiguous about such statements' preemptive effect when standing alone. In *Metromedia, Inc. v. City of San Diego*,\(^{134}\) the court reviewed the constitutionality of a city ordinance

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129. CAL. LAB. CODE § 923 (West 1989).
131. The court likened the local tax upon union solicitors to a smothering tax on "breathing." *Id.* at 722.
132. Actually, in terms of constitutionally protected interests, the analogy to *Porterfield* may not be so strained as suggested in the immediately preceding discussion. In the water-scarce west, the lack of water may "smother" individual property owners and local economies. Government conduct that induces such scarcity implicates fundamental rights of property ownership and economic association. Moreover, as discussed more fully below, Californians have constitutionalized the importance of nonwasteful water use. CAL. CONST., art. X, § 2 (West Supp. 1993). See also infra note 148. The role of the constitutional amendment is discussed more fully below. See infra text accompanying notes 147-244.
133. See, e.g., *County Sanitation Dist. No. 2 of Los Angeles County v. Los Angeles Employees Ass'n*, Local 660, 699 P.2d 835, 853 (Cal. 1985).
banning offsite advertising billboards. Among other claims, the court considered the preemptive effect of the state “Outdoor Advertising Act.” One section of that act, Business and Professions Code section 5226, presented sweeping policy language similar in scope to the language of Water Code sections 104 and 105. On its face, the court found “not clear” the significance of the policy language: “The section states broad policy objectives but neither expressly authorizes billboards in business areas nor explicitly limits the authority of municipalities to prohibit billboards in such areas.” The court noted that it could construe section 5226 “literally to authorize maintenance of billboards in commercial areas despite any contrary local prohibition.” Nevertheless, it found that such an interpretation would conflict with two additional sections of the Outdoor Advertising Act that authorized at least some local regulation of outdoor advertising in business districts. In summary, the court concluded that

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136. As quoted by the court, § 5226 states:

   The regulation of advertising displays adjacent to any interstate highway or primary highway . . . is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

   (a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

   (b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest.


138. Id. (footnote omitted). The court did not cite Porterfield.
139. The court cited § 5229 and § 5230. Metromedia, Inc. v. City of San Diego, 610 P.2d 407, 420-21 (Cal. 1980), rev’d on other grounds, 453 U.S. 490 (1981). As quoted by the court, § 5229 states: “The provisions of this chapter shall not be construed to permit a person to place or maintain in existence . . . any outdoor advertising prohibited by . . . any ordinance of any city . . .” Cal. Bus. & Prof. Code § 5229 (West 1990), quoted in Metromedia, Inc., 610 P.2d at 421. As quoted by the court, § 5230 states: “The governing body of any city, county, or city and county may enact ordinances, including, but not limited to, land use or zoning ordinances, imposing restrictions on advertising displays adjacent to any street, road, or highway equal to or greater than those imposed by
[v]iewed in context, section 5226 appears to be a statement of policy, adopted to explain why the Legislature enacted a statute providing for the eventual elimination of outdoor advertising displays [in certain locations, but not in others] . . . . The section does not constitute a substantive limitation on the police power of the municipality, and thus should not be construed to preempt municipal authority. 140

The Metromedia, Inc. court's discussion of section 5226 sheds a little light on the general policy-based contradiction preemption analysis. At a minimum, it demonstrates that policy statements, standing alone, do not necessarily preempt local law. Like any other statute, expressions of general policy must be read in context. Beyond those points, however, Metromedia, Inc. does not resolve directly the interpretation of Water Code sections 104 and 105. In context, the Metromedia, Inc. court found no preemption because two other portions of the same act permitted some local regulation. Absent those companion provisions, the Metromedia, Inc. court acknowledged that it could read the broad policy language of section 5226 literally to authorize outdoor advertisements of the type prohibited by the local regulation. 141 Such a reading would have been consistent with Porterfield.

Unlike Business and Professions Code section 5226, Water Code sections 104 and 105 have no companion provisions that restrict their broad language. The best evidence of the context of their enactment remains the Water Code commissioners' comments noted above. 142 The literal source of the policy language in section 104 comes from a 1921 statute that merely authorized the predecessor of the Department of Water Resources to investigate and develop a state

...
water plan.144 Nothing in that 1921 act otherwise purports to restrict local regulation of water at all.145 Similarly, the language in Water Code section 105 also came from an act authorizing a state water plan.146 Thus, in context, neither Water Code section 104 nor 105 evince legislative intent to preclude local regulation of groundwater. Rather, these two broad policy statements simply serve to introduce the public importance of resource planning. Moreover, they affirm, as against private rights-holders, the public's claim to regulatory jurisdiction. Unlike the broad policy announced by Labor Code section 923 and confirmed in Porterfield, nothing in sections 104 and 105 suggests a contradiction-based preemption of local groundwater regulation.

D. Contradiction Preemption: California Constitution

Article X, Section 2

In addition to the two California Water Code provisions discussed above, litigants have claimed that the 1928 amendment to the California Constitution, now known as "article X, section 2," also creates a direct contradiction with local groundwater regulations.147 In general, article X, section 2, prohibits wasteful and unreasonable water use.148 In addi-

144. Id. Section 3 of the act stated:
It shall be the duty of the state engineering department to determine the maximum amount of water which can be delivered to the maximum area of land, the maximum control of flood waters, the maximum storage of waters, the effects of deforestation and all possible and practicable uses for such waters in the state of California.

Id. § 3. Section 4 of the act required the State Engineer: "To determine a comprehensive plan for the accomplishment of the maximum conservation, control, storage, distribution and application of all the waters of the state, and to estimate the cost of constructing dams, canals, reservoirs or other works necessary in carrying out this plan . . . ." Id.

145. Indeed, the only references to localities in the 1921 act speak of cooperation between state and local entities in sharing data, reviewing proposals, and receiving contributions from "any political subdivision of the state." Id. § 5.


148. This section states in full:
It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable
tion, the provision states: "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . ."\textsuperscript{149} It asserts that water conservation is "in the interest of the people and for the public welfare."\textsuperscript{150} Finally, it expressly, if ambiguously, rejects any intent to deprive riparians and appropriators of the water to which they are entitled.\textsuperscript{151}

method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.


\textsuperscript{149} Id. (emphasis added).

\textsuperscript{150} Id.


On its face, this last noted portion of the amendment, coming in its penultimate line, does not expressly eschew any intent to deprive groundwater pumpers, whether holders of overlying or appropriative rights, of their rights to the water of which they are "lawfully entitled." Indeed, the amendment does not mention "groundwater" anywhere. Nevertheless, its express, open-ended application to "the water resources of the State" led the courts early on to include groundwater within the amendment's ambit. See, e.g., Peabody v. City of Vallejo, 40 P.2d 486, 494 (Cal. 1935). Nothing in the history of the amendment suggests an intent to limit groundwater rights, at least not in any way not otherwise applicable to surface water rights. See Schulz & Weber, \textit{supra}, at 1065-71 (no mention of groundwater). Absent any indication of an intent to single out groundwater rights for limitation, such rights should be considered at least implicitly protected by the referenced language preserving legal entitlements to reasonably exercised riparian rights and lawfully diverted appropria-
The origins and meaning of the 1928 amendment that added these provisions has been the subject of some recent discussion. Whatever its background, its potential sweep under current interpretations is quite broad. Nevertheless, no appellate case has yet applied the constitutional provision in circumstances at all similar to those raised by local groundwater regulations.

Reduced to their essentials, the ordinance challengers claim that the export ordinances "hoard" groundwater for local users in violation of the constitution's mandate that water be put to beneficial uses to the fullest extent possible. For
tive rights. At the very least, although it appears in passages that seem to address only diversions from surface watercourses, arguably the amendment's reference to appropriative rights encompasses appropriative groundwater rights. Extension of such protection, whether implicit or explicit, would arguably set up a potential conflict with those local ordinances that appear to restrict groundwater pumping rights.

152. See Schulz & Weber, supra note 151, at 1065-71; Gray, supra note 151 (article responding to Schulz & Weber article).


154. See supra note 97. "Hoard" is intended to connote a retention of supply beyond that needed for current uses. Constitutionally permissible, i.e., non-hoarding, groundwater uses should include more than mere economic uses. For example, in recent years, California water law has recognized that beneficial uses of surface waters for fish, wildlife, aesthetics, and recreation can be consistent with article X, § 2's, mandate that waters be used to "the fullest extent capable." See, e.g., CAL. WATER CODE § 1243 (West Supp. 1993); National Audubon Soc'y v. Superior Court, 658 P.2d 709, 725-26 (Cal. 1983). By analogy, conservation of groundwater to preserve environmental values is equally consistent with the constitutional mandate. Just as it is no longer necessarily "wasteful" to keep surface water instream for nonconsumptive or noneconomic beneficial uses, it should not be considered automatically "wasteful" to keep groundwater in an aquifer if appropriate to maintain surface vegetation or to prevent land subsidence.

To the extent that local ordinances legitimately aim to preserve such nonconsumptive values, they should survive an article X, § 2 challenge. As used in this article, "hoarding," however, involves more than mere attempts to keep water in the ground for nonconsumptive uses. "Hoarding" involves the retention of groundwater solely to protect local economic uses. Such protection may occur in at least two ways. First, regulations may attempt to prevent the conversion of existing local groundwater uses to groundwater export uses. Second, regulations may attempt to prevent the initiation of entirely new pumping for export uses, in order to preserve water for future local economic uses. In individual aquifers, limits of hydrogeological knowledge, coupled with varying perceptions of adequate margins of safety to account for the limited knowledge, may make difficult the initially regulatory or ultimately judicial task of draw-
their part, the ordinance supporters have argued that the regulations are permissible local exercises of police power that further the constitution’s prevention of waste and unreasonable use by filling a regulatory void and preventing unregulated extractions harmful to the groundwater basin and its users. Moreover, the counties might argue that, on their face, the ordinances generally allow an export if potential exporters comply with permit procedures and receive permit approval. Again, the criteria for permit approval generally include factors rationally related to groundwater and basin conservation. Finally, a bolder county might challenge the very notion that “hoarding” is constitutionally impermissible. Such a county might argue that groundwater retention is permissible as an effort to preserve a local resource base for future local economic development. Such an unabashedly self-serving argument could draw by analogy from two lines of authority. First, several opinions allow extensive local regulation of the extraction of water and other natural resources critical to the state’s economy. Second, the Legislature itself has enacted several “area of origin” restrictions. By

ing the line between legitimate and illegitimate groundwater retention. Given the uncertainties over aquifer characteristics in many areas of the state, a danger remains, however, that “hoarding” may well be masquerading as preservation of environmental and other nonconsumptive values.

Some of the economic and policy arguments for and against such “hoarding” are considered in greater detail in Patchwork Quilt, supra note 1. This section of this article considers the legal power of counties, under article X, § 2, to restrict groundwater exports for any purpose.

155. See supra note 93. See also In re Maas, 27 P.2d 373, 374 (Cal. 1933).
156. See infra note 232 (ordinances have permit provisions).
157. Id.
extension, if the Legislature can so "hoard," then locally initiated "hoarding" might not necessarily be unconstitutional.

To determine whether local groundwater export ordinances "contradict," and are thus preempted by, article X, section 2, the analysis must examine that section's restrictions, if any, upon local police power regulations that retain groundwater in a basin. The examination begins by reviewing the extent of the local police power over natural resources extraction. The article then considers two potential limitations upon this power potentially imposed by article X, section 2. First, it considers whether any local groundwater regulation necessarily contradicts the 1928 amendment's key provisions against "waste" and "full devotion to beneficial uses." Second, assuming that some local groundwater extraction and export regulation is permissible, it considers the range of permissible local restrictions, including the propriety of unabashed local groundwater "hoarding."

1. Local Police Power Over Natural Resources Extraction

At the very least, under the law in effect prior to the 1928 amendment's adoption, the local police power permitted counties to enact ordinances that prohibited excessive groundwater pumping. As noted above, counties traditionally have police power as broad as the state's, so long as their ordinances do not contradict the general laws. Indeed, the constitution specifically acknowledges that California counties are "legal subdivisions of the state." Rossman and Steel based a county's power to manage groundwater on its

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160. Article X, § 2, separately prohibits "waste or unreasonable use or unreasonable method of use of water ...." Cal. Const., art. X, § 2 (West Supp. 1993). For convenience, this article ignores any distinctions between these three alternatives, and speaks solely of "waste" or "unreasonable use" interchangeably, to refer to all three specific constitutional proscriptions.

161. See In re Mass, 27 P.2d 373, 374 (Cal. 1933).


power to regulate the environment. As authority for their position, they cited In re Maas. Maas involved a challenge to an Orange County ordinance that prohibited the "waste" and "unnecessary flow" of groundwater from wells. The court easily rejected a challenge that the county lacked police power to conserve water. The court acknowledged that groundwater conservation was "a legitimate field for the exercise of the police power." Following earlier opinions, the court then framed and answered a two-part test to determine the validity of the ordinance. First, the court found the ordinance "local" to the county. Second, the court found that "[t]he ordinance does

164. Rossman & Steel, supra note 42, at 933-35 (citing In re Maas, 27 P.2d 373, 374 (Cal. 1933) (upholding county ordinance prohibiting wasteful groundwater extraction) and Alameda County Water Dist. v. Niles Sand & Gravel Co., 112 Cal. Rptr. 846, 854-55 (Cal. Ct. App. 1974) (upholding water district's right to enjoin gravel miner's groundwater pumping that interfered with district's conjunctive use storage)).

Rossman and Steel also grounded the county's police power in "the self-executing mandate of the 1928 amendment to the California Constitution." Id. at 936 (footnote omitted). As noted, that provision banned waste of water and applied reasonable limitations to all water uses. See Schulz & Weber, supra note 151, at 1064-71. Rossman and Steel argue that "local enforcement [of this amendment] by a political subdivision, such as a county, is appropriate when the state has not acted." Rossman & Steel, supra note 42, at 936. In contrast, ordinance challengers have claimed that the ordinances themselves violate the amendment by wastefully hoarding water. See, e.g., Plaintiff's Points & Authorities in Support of Summary Judgment at 21-22, Truckee-Donner Pub. Util. Dist. v. Board of Supervisors, No. 35920 (Super. Ct. Sutter County, Cal., Apr. 18, 1989); Plaintiff's Points & Authorities in Support of Motion for Summary Judgment at 6-7, Myers v. County of Tehama, No. 34147 (Super Ct. Tehama County, Cal., Mar. 3, 1993).

165. In re Maas, 27 P.2d 373, 374 (Cal. 1933).

166. Section 3 of the ordinance defined "waste," in effect, as any runoff of well water that was not used "for the beneficial purposes of irrigation . . . or for domestic use, or the propagation of fish." Id. at 373. It also banned as "waste" excess irrigation runoff, defined as runoff that exceeded five percent of the total groundwater applied for irrigation. Id. at 373-74. Apparently coincidentally, Maas was authored by Chief Justice Waste. Id. at 373.

167. Id. at 373.

168. Id. at 374 (citing Ex parte Elam, 91 P. 811 (Cal. Ct. App. 1907)).

169. Id. (following In re Isch, 162 P. 1026 (Cal. 1917) and People v. Velarde, 188 P. 59, 60 (Cal. Ct. App. 1920)). Discussing the Orange County groundwater ordinance, the Maas court elaborated: "It is purely local in character and operation, for it seeks to prevent the undue waste of the percolating waters within the county of Orange, thereby conserving said waters and materially benefiting the public welfare." Id.
no violence to any general law of the state to which our attention has been directed.”

Decided in 1933, five years after the enactment of article X, section 2, Maas seemingly supports a conclusion that a county’s police power extends to groundwater extraction regulation. Nevertheless, as the emphasized portion of the last quotation indicates, the opinion is hardly unequivocal. The court’s nineteen-word discussion of “conflict with the general laws” gives no hint as to the “general laws” to which its attention had been directed. Absent from the opinion is any mention of the 1928 constitutional amendment. As such, the case is silent about these local powers’ post-amendment survival.

Moreover, the opinion itself shows two signs of obsolescence. First, the “general law” addressed to the Maas court in 1933 could not have included Water Code sections 104 and 105 since, as noted, the Code itself was not enacted until ten years later. Second, current preemption cases involving county ordinances do not separately analyze the “local” nature of the ordinance’s subject. Rather, they simply look for “conflict” with the general laws.

The Nevada and Tehama County ordinance challengers seized upon Maas’ signs of obsolescence to reduce its impact. Indeed, the recent opinion in the Tehama County

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170. In re Maas, 27 P.2d 373, 374 (Cal. 1933) (emphasis added). The quoted sentence forms the court’s entire preemption discussion.
171. Id. at 374.
172. Maas predates by three years Peabody v. Vallejo, 40 P.2d 486 (Cal. 1935). Peabody held that the 1928 amendment applied to groundwater.

The absence of any reference to Water Code § 104 and § 105 is more explainable. The Water Code was not enacted until 10 years later. 1943 Cal. Stats. ch. 368, § 104. Nevertheless, the statutes upon which the Legislature based these two code sections had been on the books since the mid-1920’s.

174. See supra note 172.
176. Id.
177. In the Nevada County litigation, plaintiffs distinguished Maas in several ways. In particular, they argued that the holding in Maas had been overturned by later law, and that Maas failed to discuss article X, § 2 of the California Constitution. Points & Authorities in Support of Motion for Summary
case found *Maas* outdated by subsequent water legislation.\(^{178}\)

Nevertheless, by themselves, these two signs of being dated should not diminish *Maas’* precedential value. First, as the preceding section indicated, Water Code sections 104 and 105 do not by themselves directly contradict local groundwater ordinances.\(^{179}\) Thus, their post-*Maas* codification sets up no additional direct barrier to county legislation. Second, *Maas’* separate analysis of the groundwater ordinance’s “local” nature should require no reexamination of the “local” or “statewide” nature of groundwater conservation. At first glance, *Maas’* “local” test resonates with the confusing distinction between “statewide” and “local” or “municipal affairs.”\(^{180}\) To that extent, it seems to beg the question, since the characterization of a matter as one of “statewide” concern depends, in large part, on the Legislature’s conduct in acting to displace state law.\(^{181}\) Moreover, even on matters of statewide concern,

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Similarly, the plaintiffs in the recent Tehama County litigation also challenged the county’s police power to enact its ordinance. In an argument that was ultimately successful, they, too, distinguished *Maas* as inapplicable and outdated. See Plaintiff’s Reply to Respondent Brief at 3-4, *Myers v. County of Tehama*, Nos. 34147 & 34446 (Super. Ct. Tehama County, Mar. 17, 1993). In particular, they claimed that the ordinance in *Maas* attempted to increase the available supply for water users, while the Tehama ordinance attempts to restrict access to such supplies. *Id.* at 4. In addition, they claimed that the Tehama ordinance violates the “regional interest” limitations on local police powers adopted in the landmark land-use planning case. See *Associated Home Builders, Inc.* v. *City of Livermore*, 557 P.2d 473 (Cal. 1976). The trial court did not reach the *Associated Homebuilders* argument. Decision, *Myers v. County of Tehama*, Nos. 34147 & 34446 (Super. Ct. Tehama County, Cal., filed Aug. 11, 1993). The court’s discussion of *Maas* did not rely upon plaintiffs’ “supply increase” distinction. *Id.* at 2.


\(^{180}\) See *supra* text accompanying notes 92-146.

\(^{181}\) See *supra* note 87.

\(^{182}\) See, e.g., *California Fed. Savings & Loan Ass’n v. City of Los Angeles*, 812 P.2d 916, 925 (Cal. 1991) (holding that before municipal affairs doctrine triggered, there must be an actual conflict between a local ordinance and a state
local governments are free to legislate, so long as their ordinances do not conflict with general law. Thus, the question remains: do the groundwater ordinances "conflict with general law" as developed since Maas? More particularly, the question Maas leaves unaddressed also remains: do the ordinances contradict the 1928 amendment?

Maas remains the sole appellate case directly construing the power of counties to regulate wasteful groundwater extraction. The closest case involving other local governmental authorities' power over groundwater is Alameda County Water Dist. v. Niles Sand and Gravel Co., Inc. In Niles, the court found that a county water district had police power, under the 1928 amendment, to conserve groundwater. Niles, however, involved a public agency that the Legislature had expressly charged with authority to manage ground-

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statute). By extension, if the State has not legislated at all, there can be no conflict.  
182. See, e.g., Bishop v. City of San Jose, 460 P.2d 137, 140-41 (Cal. 1969).  
183. In an opinion ultimately depublished, the court of appeal declined to decide whether state law preempted a county groundwater ordinance. Patterson v. County of Tehama, 235 Cal. Rptr. 867, 895 (Cal. Ct. App. 1987), review denied, ordered not published. Section 11 of that ordinance expressly prohibited the county or any of its subordinate governmental units from restricting "the rights of the owner of privately owned real property to surface water, percolating water and underground water appurtenant thereto." Id. at 895 n.29.  
In County of Colusa v. Strain, 30 Cal. Rptr. 415, 418 (Cal. Ct. App. 1963), citing Maas, the court upheld the authority of a county to require a permit before any person changed "the natural course of any channel or waterway." Id. (citing In re Maas 27 P.2d 373 (Cal. 1933). The defendant, however, apparently failed to argue that the county lacked authority over water resources. Given that failure, the court eschewed a detailed preemption analysis. It explained:  
Not cited by defendant are various provisions of the Water Code by which the State has asserted control over water resources, the appropriation and to some extent the diversion of the water. In the absence of discussion by counsel, we are not disposed to explore this phase of the matter in any detail. Suffice it to refer to In re Maas, [citation], holding that the police powers of counties permit them to adopt ordinances for the conservation of water when such ordinances do not conflict with any general law of the State.  
Id. Given its admitted refusal to discuss "the matter in any detail," Strain provides only weak support for Maas' continued vitality. Id.  
185. Id. In another portion of the opinion, the court spoke of the district's "public (and undisputed) duty to prevent waste of underground water in [the relevant] basin." Id. at 854.
water resources. As such, its broad police power language only applies weakly to counties. 

Although there is thus a paucity of authority construing county police power to conserve water resources, several opinions construe municipal power over the extraction of water and other natural resources. In several zoning cases, the California Supreme Court has upheld local prohibitions of water-well-drilling, oil-well-drilling and gravel-quarrying. In Sunny Slope Water Co. v. City of Pasadena, the court considered the combined effects of a zoning ordinance and a “boiler” ordinance upon a water company’s rights to drill a water well within an area zoned for residential development. The zoning ordinance banned all commercial uses within that residential area, including the water company’s water production activities. The court concluded that the local legislative body could properly determine that the commercial activity ban bore “some reasonable relation to the public interest.” In reaching its decision, the court relied


187. The “county” in “county water district” simply identifies a type of public agency; it has no necessary legal relation to any of the 58 California counties.

188. See Sunny Slope Water Co. v. City of Pasadena, 33 P.2d 672, 677 (Cal. 1934).

189. See Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865 (Cal. 1953); see also Pacific Palisades Ass’n v. City of Huntington Beach, 237 P. 538, 539 (Cal. 1925) (holding the city has “the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing”); cf. Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528, 532 (9th Cir. 1931), cert. denied, 284 U.S. 634 (1931) (finding “there can be no question of the inherent right of the city to control or prohibit such [oil] production, provided it is done reasonably and not arbitrarily”).


191. Sunny Slope Water Co., 33 P.2d at 672.

192. The “boiler” ordinance required a permit before any one could “install, set up, or commence the operation of any steam boiler.” Id. at 673. The water company needed such a boiler in order to operate its well-drilling rig. Id.

193. Id.

194. Id. at 675.
upon a similar case, *City of South Pasadena v. City of San Gabriel.* In *City of South Pasadena*, the court upheld a water-well-drilling ordinance that was not tied to a zoning scheme.

In *Beverly Oil Co. v. City of Los Angeles*, the court considered a zoning ordinance that made plaintiff's oil production a nonconforming use and forbade the development of new wells on its property. The court acknowledged that “[t]he policy in this state favors the conservation of oil deposits through statutory regulation.” It continued: “The people have a ‘primary and supreme interest’ in oil deposits. And it is recognized that oil production is a business which must operate, if at all, where the resources are found.”

Despite this confluence of state statutory regulation, state legislative acknowledgment of the people's “primary and supreme interest,” and recognition that oil must be developed where found, or not at all, the court concluded: “[n]evertheless city zoning ordinances prohibiting the production of oil in designated areas have been held valid.” The court found it “well settled that the enactment of an ordinance which limits the owner's property interest in oil-bearing lands located within the city is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city.”

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196. *City of South Pasadena*, 25 P.2d at 517.

197. 254 P.2d 865 (Cal. 1953).

198. *Id.* at 868 (citation omitted). The court cited chapter 1, division 3, of the Public Resources Code. *Id.* (citing CAL. PUB. RES. CODE §§ 3000-473 (West 1984 & Supp. 1993)).


201. *Id.* The court then concluded that the existence of a variance lessened the actual impact upon the plaintiff. *Id.* As such, the court found that the plaintiff had failed to demonstrate that the ordinance was “an unreasonable, oppressive or unwarranted interference with property rights” sufficient to invalidate it. *Id.* at 869. A “variance” is an exemption from general zoning requirements due to the specific circumstances of a particular tract. See *Matthews v. Board of Supervisors*, 21 Cal. Rptr. 914, 916 (Cal. Ct. App. 1962).
In Consolidated Rock Products Co. v. City of Los Angeles, the court upheld another Los Angeles zoning ordinance that prohibited the plaintiff from using its property for rock, sand, and gravel operations. The trial court had found that the property had no economic value for any purpose other than such quarrying. Despite its own finding that quarrying could be conducted without grave harm to surrounding residential communities, the trial court deferred to the city council's determination that quarrying should cease. The Supreme Court upheld the trial court's determination. Like the trial court, the Supreme Court concluded that this deference was appropriate because "reasonable minds could differ" over the necessity of the local legislative determination. In reaching its conclusion, the court expressly rejected plaintiff's suggestion, based on language from earlier cases, that local government could only regulate, but not prohibit entirely, natural resources development.

203. Id. at 344.
204. Id.
205. Id. at 352.
206. Id. at 347, 351.
207. Consolidated Rock Prods. Co. v. City of Los Angeles, 370 P.2d 342, 347-51 (Cal. 1962). Plaintiffs contended that "where property is primarily or preponderantly valued for the extraction therefrom of a natural resource . . . the legislative authorities may not constitutionally prohibit it altogether, although they [i.e., plaintiffs] admit that they may otherwise regulate the extraction and recovery of such natural resources." Id. at 347. The plaintiffs then cited several cases, including In re Kelso, 82 P. 241, 242 (Cal. 1905). The Consolidated Rock court admitted that "there is language in these cases, which pressed to its ultimate conclusion, and divorced from the facts of each particular case in which it was used, lends color to plaintiff's position." Consolidated Rock, 370 P.2d at 347 (citing Kelso, 82 P. at 242). Consolidated Rock distinguished plaintiff's authority. Id. at 347-50. It found that some of plaintiff's cases, such as Kelso, antedated the establishment of comprehensive zoning schemes designed to "protect others, and the general public, from uses of property which will, if permitted, prove injurious to others." Id. at 347-48. Finally, the court concluded:

Too many cases have been decided upholding the constitutionality of comprehensive zoning ordinances prohibiting the removal of natural products from lands in certain zones for us now to accept at full value the suggestion that there is such an inherent difference in natural products of the property that in a case where reasonable minds may differ as to the necessity of such prohibition the same power to prohibit the extraction of natural products does not inhere in the legislative body as it has to prohibit uses of other sorts.

Id. at 351 (citing cases from across the county involving oil and gas, sand and gravel, and topsoil).
Based on *Beverly Oil* and *Consolidated Rock*, the California Attorney General opined that Marin County could constitutionally enact an ordinance that prohibited “commercial logging, mining, quarrying, and drilling, together with all associated uses, activities and structures, in certain areas of the county.”\(^{208}\) The opinion noted the “numerous [state] laws regulating each of the activities prohibited by the proposed ordinance.”\(^{209}\) Nevertheless, following *Beverly Oil* and *Consolidated Rock*, it concluded: “these laws do nothing to preclude an otherwise valid zoning ordinance which prohibits the extraction of the resource in question.”\(^{210}\) As *Beverly Oil* had concluded that the manifest state interest in oil did not preclude a valid zoning ordinance prohibiting drilling, so too did the Attorney General conclude that state legislative expressions of the “public interest in the forest resources and timberlands of this state” did not “invalidate a zoning ordinance which prohibits logging where such prohibition is otherwise reasonable.”\(^{211}\) Remarkably, the Attorney General reached this conclusion despite an earlier opinion that the Legislature had occupied the field of “timber operations.”\(^{212}\) The opinion concluded that the ordinance reasonably promoted the “public health, safety, morals, and general welfare.”\(^{213}\) As a final point, it noted that although the Marin

\(^{208}\) 52 Ops. Cal. Att’y Gen. 138, 139 (1969). Subsection (d) of the ordinance under review banned “[d]rilling and the . . . removal . . . of any solid gaseous or liquid material naturally occurring or otherwise deposited below the surface of the ground . . . .” *Id.* Water appears to be within the ordinance’s scope.  

\(^{209}\) *Id.* at 139. The opinion cites examples from Public Resources Code provisions governing logging, mining, and drilling. *Id.* It does not, however, discuss groundwater.  

\(^{210}\) *Id.* at 139-40.  

\(^{211}\) *Id.* at 140 (quoting *CAL. PUB. RES. CODE* § 4541 (West 1984)).  

\(^{212}\) *Id.* (citing 28 Ops. Cal. Att’y Gen. 190 (1956)). After the earlier opinion, the Legislature expressly preempted local timber practice regulations. *See* *CAL. PUB. RES. CODE* § 4580 (West 1984). Nevertheless, the Attorney General concluded that this section’s preemptive effect did not extend to local zoning ordinances prohibiting timber harvesting altogether. The Attorney General’s distinction between preempted regulation of timber practice methods, but permitted prohibition of any timbering, seems sound. *See* Higgins v. City of Santa Monica, 396 P.2d 41, 46 (Cal. 1964) (holding although Public Resources Code statutes preempt mode and manner in which city may execute tidelands trust oil leases, they do not preempt the field of determining whether or not such lands should be developed for oil and gas at all).  

\(^{213}\) 52 Ops. Cal. Att’y Gen. 138, 140-41 (1969). The Attorney General noted that “the scope of these terms, . . . particularly that of ‘general welfare’ has grown to include such considerations as conservation, [and] economic effects . . . .” *Id.* at 140. In addition to listing advancement of several environmental
ordinance "appears valid on its face, the extent to which it can be factually justified and the manner in which it is applied would also weigh heavily in any eventual judicial evaluation of its validity."214

In combination, Sunny Slope, Beverly Oil, Consolidated Rock, and the 1969 Attorney General's opinion support county police power to regulate groundwater extraction. Consolidated Rock rules that natural resources development does not receive different regulatory treatment from other economic activity. Beverly Oil and the Attorney General's opinion conclude that state legislative expressions of the public's interest in resource conservation and development, even when coupled with an extensive legislative scheme occupying the field of regulation of that resource's development, do not preclude local resource development prohibitions. Finally, the Attorney General's opinion notes that local police power is broad enough to encompass environmental, resource conservation, and economic interests.215

Although the four opinions seemingly reinforce Maas, their support is not entirely on point. Maas remains the principal county police power case addressing water conservation. The other four cases involved not conservation, but "comprehensive zoning ordinances."216 In contrast, the county groundwater regulation ordinances, while ultimately intimately linked to land use practices, are not enacted under the general zoning laws. Those zoning laws address the compati-values, the Marin ordinance also listed as a goal prevention of "[a] diminution generally of private economic incentives for further investment in and development of recreational, residential, and agricultural uses; [and d]estruction or deterioration of public developments or improvements including but not limited to roads, parks, and marine facilities." Id. at 141 n.4 (quoting proposed MARIN COUNTY, CAL., CODE § 22.43.010 (e)-(f)).

214. Id. at 141.
215. Id. at 140-41.
216. City of South Pasadena, relied upon by Sunny Slope, upheld a water-well-drilling ordinance enacted apart from any general zoning law. Sunny Slope Water Co. v. City of Los Angeles, 33 P.2d 672, 676 (Cal. 1934) (citing City of South Pasadena v. City of San Gabriel, 25 P.2d 516 (Cal. Ct. App. 1933)). Nevertheless, the City of South Pasadena opinion uses zoning language to uphold the ordinance before it. City of South Pasadena, 25 P.2d at 517. That opinion focuses on the maintenance of a business in a residential area, and not on questions of water conservation. Id. (holding residential district "entitled . . . to be protected from the invasion of business establishments which, however lawful, are yet susceptible of a manner of operation injurious to the health, comfort, or general welfare of its inhabitants").
bility of different land uses. For their part, the water export ordinances address the legality of a particular water use under water rights law, or the reasonableness of that use under article X, section 2, vis-à-vis other potential water conservation or development options.\textsuperscript{217} Moreover, the hallmark of a zoning law is its comprehensiveness: its division of a jurisdiction's entire land surface into specific categories.\textsuperscript{218} The benefits and burdens of compatibility of uses are spread across the jurisdiction. To date, however, most of the groundwater export ordinances lack any such attempt at comprehensiveness in allocation of benefits and burdens of water conservation. To the extent that the groundwater ordinances exempt many local pumpers from any restrictions, or place harsher restrictions on groundwater exporters, the ordinances may be susceptible to charges of arbitrariness.\textsuperscript{219} Finally, \textit{Beverly Oil}, \textit{Consolidated Rock}, and the Attorney General's opinion did not involve water. There remains a strong feeling that "water is different" from other resources.\textsuperscript{220} Re-

\textsuperscript{217} Cf. \textit{Cal. Water Code} §§ 13700-806 (West Supp. 1993). These statutes establish minimum water-well-drilling standards to protect aquifers and water quality, and authorize additional county regulation to protect aquifer quality. State law thus determines \textit{how} a well is to be constructed, \textit{if} a well is otherwise permissible. The zoning ordinances simply determine \textit{whether} the maintenance of a well or well-drilling is compatible with the other surface uses. The groundwater export ordinances under review in this article address other inter-related matters: the acquisition of water rights and the economic or environmental appropriateness of the intended water use. Unlike the zoning or well-drilling standards laws, these latter issues necessarily involve an entirely different inquiry: a comparison of the intended water use vis-à-vis other actual or potential water uses. This inquiry necessarily implicates the statewide concerns with water resource allocation and triggers the preemption analysis quite apart from questions involving the legitimacy of a zoning or an aquifer-protection ordinance.


\textsuperscript{219} See infra text accompanying notes 239-244.

\textsuperscript{220} See, e.g., \textit{Chow v. City of Santa Barbara}, 22 P.2d 5, 16 (Cal. 1933) ("The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance."). \textit{See also} Decision at 3, \textit{Myers v. County of Tehama}, Nos. 34147 & 34446 (Super. Ct. Tehama County, Cal., filed Aug. 11, 1993) ("This court believes that it must be understood that water is unique."); \textit{Schulz & Weber, supra} note 151, at 1102-05 (discussing the "water is different" syndrome). Whether justified or not, water has received different treatment from other resources, particularly because it is not priced in conventional markets. These differences form some of the rationalizations for the area of origin laws. \textit{See, e.g., National Water Comm'n, Water Policies for the Future} 323-24 (1973) [hereinafter, \textit{Nat'l Water Comm'n}].
gardless of the legitimacy of the support for this "feeling," water is legally different from other resources in one critical respect: only water has a specific constitutional provision mandating its "beneficial use to the fullest extent possible."\(^{221}\) Like Maas, Sunny Slope was decided after the enactment of the 1928 amendment, but does not address its possible application to a well-drilling ban.\(^{222}\) The inquiry thus returns to the question left hanging by Maas: do local groundwater ordinances contradict article X, section 2?

2. Local Groundwater Regulation After Article X, Section 2

As noted above, nothing in the history leading up to the enactment of the 1928 amendment demonstrates any particular concern over the amendment’s application to groundwater rights.\(^{223}\) Similarly, nothing in that history suggests that the amendment was meant to restrict local police power over groundwater.\(^{224}\) Rather, the amendment seems to have made two changes to the course of California water rights. First, as between private rights-holders, the amendment clarified that the reasonable use doctrine applied to disputes between riparians and appropriators.\(^{225}\) Second, as broadly interpreted in Chow v. City of Santa Barbara,\(^{226}\) as between all water rights holders and the public, the amendment asserted the public’s police power over water resources.\(^{227}\) Absent any indication that the amendment was meant to restrict the lo-


\(^{222}\) Notably, the Sunny Slope court stated: "We are not here presented with a situation where the only water bearing area available for [the water company's] purposes has been zoned for residential purposes. Such a situation would present questions not involved in this appeal." Sunny Slope Water Co. v. City of Los Angeles, 33 P.2d 672, 677 (Cal. 1934). On the one hand, the court may have merely been considering the "takings" implications of the complete deprivation of a business activity. Cf. Consolidated Rock, 370 P.2d at 347-51 (holding even severe natural resource development restrictions did not amount to regulatory taking). On the other hand, the "other questions" could well include the reasonableness, under article X, § 2, of a municipality's complete denial of access to an aquifer. In the case before it, the court noted that the water company involved owned drilling rights to 130 acres of land beyond the city limits that overlay the same aquifer. Id.

\(^{223}\) See supra note 151.

\(^{224}\) See Schulz & Weber, supra note 151, at 1065-71 (no mention of local police power restrictions).

\(^{225}\) See id. at 1055-58, 1064-65.

\(^{226}\) 22 P.2d 5, 16 (Cal. 1933).

\(^{227}\) Id. In oft-quoted language, the court expounded:
cal exercise of police power over water resources, unless local ordinances contradict specific constitutional text, courts should not presume a conflict with local ordinances.\textsuperscript{228}

Even if the passage of the amendment did not presumptively displace local power over groundwater resources, litigants have claimed that local legislative efforts necessarily contradict several of the amendment's critical provisions. In particular, they have claimed that the ordinances contradict both the proscription of waste and unreasonable use, and the prescription that state waters "be put to beneficial use to the fullest extent of which they are capable."\textsuperscript{2229} Litigants might also base an additional challenge on the portion of the amendment eschewing any intention to deprive appropria-

In the main, [the amendment] is an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource . . . . The conservation of other natural resources is of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of the state to protect it citizens and provide for the safety, good order, and well being of society. It is coextensive with the right of self-preservation in the individual. \textit{Id.} (emphasis added).

This quotation, and other portions of the passage, do speak collectively of "the state," "the people of the state," "our rivers and streams," "the great and increasing population of the state," "the conservation of the waters of the state," "[the state's] waters are the very lifeblood of [the state's] existence," "the duty of the state to protect its citizens . . . ." \textit{Id.} (emphasis added). Nevertheless, nothing in the passage addresses the intramural division of police power between the State and its political subdivisions. Any such discussion would have likely been dicta, since \textit{Chow} involved a dispute between downstream riparians and an upstream appropriator. \textit{See} Schulz & Weber, \textcopyright{} 151, at 1072-73 (arguably, much of the police power language also dicta). Similarly, the \textit{Chow} court's statement that the amendment's adoption "superseded all state laws inconsistent therewith," \textit{Chow}, 22 P.2d at 16, merely states a truism: any legislation, whether local or state, that conflicts with the article is necessarily unconstitutional. It says nothing about whether all local water conservation legislation necessarily contradicts the amendment.

\textsuperscript{228} This discussion foreshadows the discussion of "occupation of the field." \textit{See infra} text accompanying notes 263-326. As discussed there, even if there is no direct textual contradiction between the amendment and local groundwater ordinances, the amendment informs that portion of the implied preemption analysis that looks to the manifest strength of the state's interest in a subject and the inability to tolerate local regulation.

tors of "water to which the appropriator is lawfully entitled." 230

The local legislative efforts to regulate groundwater exports demonstrate a wide variety of statutory schemes. 231 Yet for purposes of assessing their constitutionality under the 1928 amendment, the range of local legislative goals implicitly, and occasionally explicitly, breaks down into three broad interests: protection of aquifer and environmental values, protection of existing rights-holders, and protection of the local economy. Similarly, the range of local legislative methods to obtain these goals breaks down into two main groups: permit schemes and outright pumping prohibitions. Given the variety of the ordinances, a complete analysis of each is beyond the scope of this article. Nevertheless, this portion of the article considers whether these local legislative goals and means contradict the amendment's operative passages.

Construction of two hypothetical ordinances, at opposite ends of a means-and-ends continuum, will focus the discussion. At one extreme, the likeliest ordinance to survive a facial challenge under article X, section 2 would be a comprehensive permit scheme that sought to prevent overdraft-induced aquifer or environmental damage. 232 At the other extreme, the toughest ordinance to justify would be a self-

230. See supra note 151.

231. See supra notes 32-37 and accompanying text. See also generally Patchwork Quilt, supra note 1, at § IV (surveying ordinances in detail).

232. All the ordinance schemes have some provisions for permits and can be read to prevent some aquifer or environmental harm. See, e.g., BUTTE COUNTY, CAL., CODE § 33-4 (permit required), id. § 33-7 (aquifer protection); GLENN COUNTY, CAL., CODE § 20.04.410 (permit required), id. § 20.04.440 (aquifer protection); IMPERIAL COUNTY, CAL., CODIFIED ORDINANCES §§ 56300 (aquifer protection), id. § 56302 (permit required), id. § 56213 (private rights unaffected); Inyo County, Cal., Referendum Measure A (approved Nov. 1980), adding § 7.01.010 (aquifer protection), id. § 7.01.040 (permit required) MODOC COUNTY, CAL., CODE § 13.08.020 (permit required), id. § 13.08.060 (aquifer protection); NEVADA COUNTY, CAL., LAND USE & DEVELOPMENT CODE §§ L-X 6.1 (aquifer protection), § 6.3 (permit required); SACRAMENTO COUNTY, CAL., CODE § 15.08.095 (permit and aquifer protection); TEBAMA COUNTY, CAL., CODE § 9.40.030 (permit required), id. § 9.40.060 (aquifer protection). Nevertheless, as discussed more fully below, they demonstrate an enormous range of comprehensiveness, i.e., inclusion of varying classes of pumpers. At least on its face, the Inyo County ordinance, applicable in part to all county pumpers, is the most comprehensive effort to date.
avowedly local protectionist ordinance that burdened only out-of-county exporters.\textsuperscript{233}

\textbf{a. Comprehensive Environmental Protection Ordinance}

A comprehensive environmental or aquifer protection ordinance should withstand a facial challenge that it contradicts the 1928 amendment's "waste," "full use," and "private rights protection" clauses. The stated purposes, i.e., to prevent aquifer damage or environmental harm from excessive pumping, do not contradict any of the amendment's three operative clauses under consideration.\textsuperscript{234} As for "waste," the ordinance's avowed purpose seeks to prevent wasteful overpumping that causes demonstrable harm to public and private values. Nothing suggests that the 1928 amendment was meant to shield local pumpers from either the law of nuisance or local police powers to address actual or threatened nuisances. Similarly, as for "full use," nothing suggests that retention of water in an aquifer to prevent subsidence or vegetative loss is not a beneficial use.\textsuperscript{235} Finally, as for private rights to pump groundwater, they are by no means unlimited.

\textsuperscript{233} Although not nearly as extreme as the hypothetical ordinance, portions of the Tehama County ordinance are the most similar. For example, the ordinance's largely unintelligible mining ban applies only to those pumpers who will export groundwater from the county. \textit{See Tehama County, Cal., Code} § 9.40.020 (mining ban applies only to out-of-county exporters); \textit{see also Patchwork Quilt, supra} note 1. Similarly, although the ordinance's uncodified preamble does devote considerable attention to the county's environmental concerns, it is more explicit than most in its attention to preservation of the local economy. Tehama County, Cal., Ordinance 1552, 1-7 (Feb. 4, 1992). As initially enacted, however, several other portions of the ordinance demonstrated far greater comprehensiveness than most other counties' efforts. \textit{See, e.g., Tehama County, Cal., Code} § 9.40.030 (permits required of all pumpers who use water on a parcel other than on, or contiguous to, the parcel where extracted), \textit{id.} § 9.40.040 (no pumper may extend the radius of influence of a well beyond the lines of the parcel where extracted, or a contiguous parcel). Soon after the ordinance's initial enactment, however, the county council greatly reduced its comprehensiveness by enacting a grandfather clause that shielded all pre-1992 pumpers from these last requirements. \textit{See Tehama County, Cal., Ordinance 1553, § 1} (Feb. 18, 1992).

\textsuperscript{234} Of course, as noted below, the circumstances surrounding the enactment or application of such an ordinance may call into question the \textit{bona fides} of the local legislature's stated purposes, or the necessity of the ordinance's enactment. \textit{See infra} text accompanying notes 465-466. \textit{See also} 52 Ops. Cal. Att'y Gen. 139, 142 (1969) (holding that even where facially permissible, local ordinance's reasonableness prevents fact questions upon application).

\textsuperscript{235} \textit{See supra} note 154.
Rather, the very laws governing acquisition of private rights to pump groundwater restrict pumpers from unfettered pumping.236

As for the ordinance's means, a comprehensive permit requirement, applicable to all pumpers, would also seem to survive facial challenge. Permit schemes have frequently been upheld when challenged as facially unconstitutional, arbitrary deprivations of private rights.237 A requirement that a pumper obtain a permit before pumping is no more "wasteful" than the state-administered permit scheme for surface diversions.238 The state scheme's constitutionality remains unquestioned. Similarly, the state surface water appropriative scheme belies any claim that a local groundwater permit scheme necessarily prevents use of water "to the fullest extent" possible. Finally, a comprehensive scheme, such as the comprehensive zoning schemes upheld in Sunny Slope, Beverly Oil, and Consolidated Rock, can further inoculate the ordinance from charges of arbitrariness. Such a scheme rationally spreads the burdens and benefits of groundwater regulation across the full spectrum of local society. In sum, this hypothetical ordinance should survive a facial challenge that it inherently contradicts article X, section 2. On its face, it does not permit waste, unreasonable water use, or private rights' impairment.

Of course, none of the ordinances enacted to date present our ideal construct. The most telling objection to most of the county schemes lies not in their stated purposes, but rather in their means. In some instances, however, the means chosen call into question the bona fides of the stated purposes.

Most of the ordinances enacted to date are under-inclusive, not over-inclusive. With a few exceptions,239 they place their principal or only regulatory burdens on appropriators: pumpers who use the water on land not overlying the basin.

236. See, e.g., Schneider, supra note 14, at 10-22.


239. For example, several of the ordinances, such as those of Inyo, Nevada, Butte, and Tehama, place some burden—usually a permit requirement—on out-of-county users who will be using the water on land not overlying the basin. See supra note 232.
Although at least some in-county appropriators need permits in some of the schemes, overlying owners and users, to a large extent, remain free to pump without any local oversight. In three counties, the regulatory burden is more squarely placed on an even more limited class of pumpers: appropriators for export beyond the county lines. Such a distinction between those appropriations for use in and out of the county appears to be based solely on the preservation of a local economic base. Absent a legitimate, conservation-based rationale for this distinction between in-county and out-of-county appropriations, these county-based export restrictions seem to exist primarily to retain resources for existing or future local uses. To this extent, they do appear to violate the constitution's express requirement that water be put to its fullest use possible.

240. Butte County, Cal., Code § 33-4 (permit required for water use “outside of area in which said pumping affects the natural available supply”); Imperial County, Cal., Codified Ordinances § 56201 (“appropriator” uses water outside of “area of influence” of extraction), id. § 56302 (appropriators need permits); Inyo County, Cal., Referendum Measure A (approved Nov. 1980), adding § 7.01.040 (permit required to extract water); Modoc County, Cal., Code § 13.08.020 (permit required to take water out of defined areas); Nevada County, Cal., Land Use & Development Code § L-X 6.2(D) (“groundwater export” defined as “removal . . . to any place outside the immediate groundwater basin”), id. § 6.3 (permit required to “export” groundwater); Tehama County, Cal., Code § 9.40.030 (permit required to use water anywhere but on parcel overlying or contiguous to parcel where extracted).

241. The Nevada County ordinance expressly announces: “It is not the intent of this ordinance to affect the withdrawal or use of groundwater by an overlying landowner or occupier which withdrawal is for domestic use or irrigation on the overlying parcel.” Nevada County, Cal., Land Use & Development Code § L-X 6.1. To date, only the Inyo ordinance substantially burdens overlying owners. See infra note 244. The Tehama “radius of influence” provision may also impact some overlying pumpers by preventing them from extending their wells’ cone of depression beyond their property lines. Tehama County, Cal., Code § 9.40.040. The later-enacted grandfather clause, however, greatly restricts the practical effect of this burden, as it exempts all overlying owners who were pumping prior to the ordinance’s enactment. Id. § 9.40.045.

242. See, e.g., Glenn County, Cal., Code § 20.04.400 (groundwater “mining” banned only if water taken outside of county), id. § 20.04.410 (permit required only if groundwater taken from county); Sacramento County, Cal., Code § 15.08.095 (permit required only if groundwater taken out of county); Tehama County, Cal., Code § 9.40.020 (“mining” banned only if water taken from county).

243. As used here, “legitimate” denotes a non-hoarding purpose. See supra note 154.

244. In this light, the Inyo ordinance is instructive. On its face, it requires all extractors to comply with well registration and extraction report requirements. Thus, the City of Bishop, an in-county municipal extractor, must also
Although such “hoarding” is constitutionally suspect, a local legislative decision to regulate only appropriators, and not overlying owners, more easily withstands a facial challenge under article X, section 2. The current law of private groundwater rights places a practical burden of preventing overdraft, however defined, upon a prior rights-holder. Without a centralized, state-supervised appropriation permit system, anyone is free to extract from the basin. An overlying owner or prior appropriator who wishes to challenge the subsequent appropriation must do so by filing a lawsuit. Even if the burden of determining “surplus” water is on the subsequent appropriator, the initiation of a lawsuit represents a major commitment of time and resources by the prior rights-holder. These practical burdens are a major disincentive to stop overpumping a basin; as a result, the current system encourages potential “waste” and “unreasonable use,” in violation of the 1928 amendment, by failing to provide a procedure for readily establishing the availability of water for export.

In contrast, a permit procedure required of all potential appropriators within a county would run the risk of discouraging water development by potential appropriators who would first have to bear the cost of hydrogeological or other studies necessary to establish the availability of water for appropriation (and ultimate “export.”) In such a scheme, resource development will occur only if the benefits of the extraction exceed the extraction and transaction costs spent to obtain the rights. Given a choice between “under-regulation” and corresponding wasteful overdevelopment in a basin, and “over-regulation” with corresponding wasteful underdevelopment, a county could rationally determine that the long-term consequences of potential overdevelopment are worse than potential underdevelopment. With overdevelopment, the water is lost forever. Moreover, permanent environmental or aquifer damage may occur. In contrast, with underdevelopment, at least the water still remains in the ground. Ultimately, as groundwater development continues throughout comply with the permit process. Rossman & Steel, supra note 42, at 944. However, then provides a de minimis exemption from the extraction permit review. INYO COUNTY, CAL., CODE § 7.01.070 (1980). These exemptions make the county's principal extractor, the City of Los Angeles, one of the only extractors that had to comply with the permit process. Of course, it is no coincidence that the city is the principal groundwater exporter from the county.

245. See supra text accompanying note 24.
the state, more and more basins may well be pushed to adjudication. At that point, all extractors, both appropriators and overlying users, face substantial transaction costs in establishing their rights. A county could well conclude that appropriators, who have no practical place-of-use limitations on the amount of water they can extract, are the class most likely to encourage overdevelopment and, ultimately, prompt basin adjudication. As such, it would be reasonable to require such appropriators to bear the transaction costs up front, at the initiation of their appropriation.

Of course, overlying users are entirely capable of overdrafting a basin themselves. A county permit scheme only for appropriators would not necessarily solve the long-term problems of under-regulating groundwater extractions in all basins. Nevertheless, it is not entirely irrational to begin to regulate by requiring appropriators to obtain a permit. The potential arbitrariness under the 1928 amendment of the three noted current schemes stems from the requirement that only extractors who use the water outside of the county of extraction bear the regulatory load.

b. Avowedly Protectionist “Hoarding” Ordinance

Does an avowedly protectionist local legislative effort to “hoard” groundwater for future local economic development by prohibiting all out-of-county exports necessarily contradict the 1928 amendment’s “waste,” “fullest use,” or “private rights” provisions? In effect, such an ordinance would be a locally enacted “area of origin” provision, attempting to reserve water for future development. A bold county might attempt to justify the avowedly protectionist elements of its ordinance by coupling police power language from the zoning cases with the existence of several state area-of-origin statutes. As in the preceding construct, both the legislative goals and the means of such an ordinance must withstand a constitutional challenge.

246. See Robie & Kletzing, supra note 38 (California state area-of-origin statutes).

247. Even the foremost champions of local groundwater regulation suggest that such an absolute export ban would likely contradict the “fullest extent” provision. Rossman & Steel, supra note 42, at 933 n.184.

248. See supra text accompanying notes 234-245.
Is reservation of water for future local economic development a constitutionally legitimate goal for local legislation? Such a goal is implicit in the State Legislature's area-of-origin provisions. The California Attorney General concluded that state area-of-origin legislation was constitutional. Implicit in that opinion is that it does not "waste" water or impede its "fullest use" to allow rural areas to use water that might otherwise be put to higher economic use in other areas of the state. Similarly, as discussed above, the Attorney General also noted that economic development is a legitimate goal of local police power. If protecting the local economy is a normal task for local legislative bodies, and if state legislation that reserves water for certain areas is constitutional, then a local "hoarding" ordinance does not appear to fail for lack of a proper purpose. Any such invalidity must, then, come from the means chosen to implement the legislative goals.

The three earliest state area-of-origin provisions—the County of Origin, the Watershed of Origin, and the Delta Protection Acts—bear little resemblance to a county's absolute export ban. Rather, in their cryptic provisions, they allow relevant counties or watershed areas some limited priority to receive water sufficient to meet their needs. Unlike an export ban, these three acts do not legally impede development of the water, or its use in some area outside of the area of origin, prior to that area's actual need for the water. Moreover, unlike a local export ban, these three initial acts were part of the statewide plan for water resources development that produced the State Water Project and the Central Valley Project. The State Legislature might well have concluded that sufficient water existed for everyone in the state, and that it needed to be moved from areas of surplus to areas of

249. 25 Ops. Cal. Att'y Gen. 8, 25-26 (1955). The Attorney General based that conclusion on the availability of the water for interim uses prior to need in the areas granted preference. Id. at 26. Riparian rights, with their limitations of water use to the riparian lands, also function as an area-of-origin restriction. See NAT'L WATER COMM'N, supra note 220, at 323. The provisions of article X, § 2 that protect riparian rights expressly shield that area-of-origin restriction from a challenge that it impedes "fullest use." See supra note 151.

250. See supra note 213 and accompanying text.

251. CAL. WATER CODE § 10505 (county of origin) (West 1971), id. § 11460 (watershed of origin), id. § 12200-04 (delta protection).

252. See, e.g., Robie & Kletzing, supra note 38, at 431-38.

scarcity, but that areas of plenty should not be unfairly deprived of the later opportunity to share in the state’s natural bounty.\textsuperscript{254} In contrast, a local export ban appears to succumb to a claim that it locks up water in violation of the “waste” or “fullest use” provisions of the state constitution.\textsuperscript{255}

The State Legislature’s 1984 enactment of Water Code section 1220, however, suggests that export bans may be an appropriate exercise of the police power. As noted above, in that section, the Legislature prohibited the pumping of groundwater for export from within the “combined Sacramento Valley/Delta Central Sierra Groundwater Basin.”\textsuperscript{256} Three conclusions about the constitutionality of export bans are thus possible. First, such bans might facially contradict the constitution’s “fullest use” provision, and thus are invalid, whether enacted by the State or by local legislatures. Second, at the opposite extreme, Water Code section 1220 could establish that “fullest use” requires neither most efficient nor most (temporally) immediate use.\textsuperscript{257} Such an interpretation would defer to a legislative determination that the “public welfare” required the ban.\textsuperscript{258} If the State wished to prevent local legislative export bans, it could simply enact its own legislation that preempted the field. Until such time, local legislative bodies could be free to enact their own export bans similar to Water Code section 1220. Finally, Water Code section


\textsuperscript{255} See, e.g., Robie & Kletzing, supra note 38, at 424-25 nn.28-29. Under any interpretation, a local export ban would likely not violate the “private rights” provisions, since water could otherwise be pumped and used within the county. Although the principal market for such water might well be outside the county, it is hard to imagine that land overlying groundwater would otherwise lose all of its value if an export market were denied. Absent such a deprivation, it is difficult to see how a local export ban would trigger a compensable “taking.”

\textsuperscript{256} See supra note 50.

\textsuperscript{257} No court has ever held that article X, § 2 required the most efficient water use possible. See Big Bear Municipal Water Dist. v. Bear Valley Mutual Water Co., 254 Cal. Rptr. 757, 765 (Cal. Ct. App. 1989); Schulz & Weber, supra note 151, at 1062-64, 1078-81. Arguably, if economic efficiency were required under the constitution, the entire nonmarket system of allocating water rights might fail.

\textsuperscript{258} See California Trout, Inc., 256 Cal. Rptr. at 208 (holding unless manifestly unreasonable, legislative determination entitled to deference under article X, § 2). Compare Consolidated Rock Prod. Co. v. City of Los Angeles, 370 P.2d 342 (Cal. 1962), discussed supra text accompanying notes 202-207.
1220 might be constitutional, but local export bans might be unconstitutional. On its face, section 1220(a) does not enact a permanent export ban. Rather, it bans only exports that are not in compliance with a local groundwater management plan. As such, it is but a temporary part of a state-approved regional effort to manage the important groundwater resource. Moreover, as a state legislative enactment, it represents but an additional step in the Legislature's extensive statutory efforts to determine how best to devote the state's water "to its fullest extent." Again, a local export ban lacks any semblance of comprehensive legislative adjustment of water development. As a permanent restriction, a local export ban potentially locks up resources forever. Finally, unlike section 1220, a pure "hoarding" ordinance does nothing to encourage basin management.

A complete analysis of the constitutionality of the state area-of-origin protections is beyond the scope of this article. Accordingly, since Water Code section 1220 provides at least superficial support for a local export ban, determination of the constitutionality of such local bans will have to wait. Whatever the ultimate resolution of that issue, the enactment of section 1220 certainly complicates the analysis. Of the three scenarios sketched above, local export bans fail in all but one. Most likely, a pure "hoarding" ordinance would fail for the reasons noted in the third possibility. A permanent resource lock-up, without any incentives for "management," and without any attempt at a comprehensive resource development scheme, should violate the constitution's "waste" and "fullest extent" provisions.

The preceding discussion thus denotes two ends of a continuum to examine the potential contradictions between the 1928 amendment and the local ordinances. All of the ordinances to date fall somewhere in the middle of the continuum. Beyond this brief facial review of the broad outlines of the eight ordinances, generalizations about their constitutionality are difficult; they demand separate analyses upon separate fact patterns. Nevertheless, some broad conclusions

259. It seems inconceivable how the converse might ever be true; i.e., local export bans are constitutional but § 1220 is unconstitutional.

260. In practice, for groundwater-rich counties jealous of their supplies, the ban may be a major disincentive to enacting groundwater management laws. See Patchwork Quilt, supra note 1.
seem possible. First, an outright export ban, without a permit process or an extremely sound and documented conservation or environmental protection rationale, seems unenforceable as impermissible hoarding under the 1928 amendment. Beyond that extreme, courts should look with great skepticism at the position that export bans take in the local groundwater regulatory schemes. The lesser the burden on in-district users, and the greater the relative burden on out-of-district users, the more suspicious the courts should be that the local regulatory body is impermissibly hoarding water. Similarly, the faster the local regulatory body adopts export restrictions without trying other management options, the more likely it is that the local bodies are impermissibly hoarding water that the constitution demands be made available to all potential users within the state.

Although courts should approach county groundwater export restrictions with a healthy dose of skepticism, nothing within article X, section 2 necessarily conflicts with even-handed, well-crafted, local groundwater regulation. Ultimately, the Legislature should assume a much larger role in framing a coherent policy on groundwater extraction, use, and transfer. Until such action occurs, barring a determination that general law has otherwise occupied the field of groundwater regulation, counties should be free to attempt to solve problems of waste and unreasonable water use. Although this article ultimately concludes that such occupation of the field has occurred, the textual case for such preemption is slim and ultimately depends upon judicial willingness to declare state policy. If a court were to reject the "occupation" analysis, then a county should remain free under article X, section 2 to conserve groundwater. In such circumstances, local regulatory solutions might include a permit procedure whereby an extractor who otherwise would have appropriative rights under state law bears the initial burden of establishing the availability of water for extraction. Under such a scheme, if the county treated all off-basin places of use equally, and looked solely to the availability of water for appropriation, the county would be preventing the possibility that a basin might become overdrafted simply because no single overlying owner wished to undertake the time

261. See id.
262. See infra text accompanying notes 264-326.
and expense of a lawsuit challenging the potential appropriation.

E. **Implied Preemption by Occupation of the Field**

In addition to express and contradiction-based preemption, preemption may occur where the Legislature has "occupied the field" to the exclusion of local legislation.\(^\text{263}\) The Legislature may occupy a regulatory field expressly or implicitly.\(^\text{264}\) Here, there is no statute by which the Legislature has expressly occupied the field to the exclusion of local regulation. Thus, the only remaining grounds for preemption is implicit legislative occupation of the regulatory field.

Under longstanding law, three tests exist to determine implied occupation of the field:

1. the subject matter has been so fully covered by general law as to clearly indicate that it has become exclusively a matter of state concern;
2. the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or
3. the subject matter has been partially covered by general law, and the subject is of such nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.\(^\text{265}\)

Two of these three tests do not help determine the validity of the groundwater export ordinances. The third test—adverse impact on transient citizens—simply has no application to county groundwater regulation. Although "transient" is vague enough to invite judicial interpretation, and the mobility of Californians is legendary, the Supreme Court has kept this third test narrowly confined.\(^\text{266}\) Under these narrow con-

\(^{263}\) See Lancaster v. Superior Court, 494 P.2d 681, 682 (Cal. 1972), and supra note 87.

\(^{264}\) See, e.g., People ex rel. Deukmejian v. County of Mendocino, 683 P.2d 1150, 1155 (Cal. 1982), rev'd on other grounds, 909 P.2d 929 (Cal. 1990).

\(^{265}\) Id. at 1155 (quoting In Re Hubbard, 396 P.2d 809, 814 (Cal. 1964)); accord Galvan v. Superior Court, 452 P.2d 930, 935-36 (Cal. 1969).

\(^{266}\) In most cases, the court simply notes this test's inapplicability to the case before it. For example, in IT Corp. v. Solano County Bd. of Supervisors, 820 P.2d 1023 (Cal. 1991), the court upheld a local planning commission's order requiring a "clean closure" of a hazardous waste facility. In considering whether state laws implicitly preempted the local order, the court simply stated: "Here, of course, there is no issue of the challenged order's undue effect
fines, transients simply are no more affected by the county

on 'transient citizens.'" Id. at 1028. In Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534 (Cal. 1993), the court upheld an ordinance prohibiting the sale of spray paint to minors and requiring retailers to post signs warning of criminal sanctions for graffiti. Again, the court simply stated:

Whether the statute partially covers the subject matter, however specified, proves to be of no consequence. This is because neither the prevention of graffiti nor the retail display of aerosol paint and broad-tipped marker pens is a "matter in which transient citizens of the state are peculiarly concerned, as they are or might be in regulation of traffic or registration of criminals."

Id. at 542 (quoting In re Hubbard, 396 P.2d 809, 814 (Cal. 1964) (finding gambling and gaming house regulations not matters that concern transients)). See also County of Mendocino, 683 P.2d at 1157 (holding ordinance governing herbicide application "has little effect on transient citizens, and it cannot be concluded that the effect on them outweighs the possible benefit to the municipality"); Candid Enters., Inc. v. Grossmont Union High Sch. Dist., 705 P.2d 876, 882 (Cal. 1985) (regarding school development fees: "Petitioner concedes, as it must, that the imposition of the [fees] does not satisfy the third test" (emphasis added)); Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 777 P.2d 157, 167 n.16 (Cal. 1989) ("Nor is there even an alleged adverse effect on transient citizens.").

The most recent California Supreme Court cases addressing this third test in any detail are Cohen v. Board of Supervisors, 707 P.2d 840, 854 (Cal. 1985) and Fisher v. City of Berkeley, 693 P.2d 261, 311 (Cal. 1984). In Cohen, the court partially upheld an ordinance requiring escort services to obtain licenses. Cohen, 707 P.2d at 854. The court began its discussion of the third test in typical conclusory fashion, finding it "clear" that the test did not apply. Id. The court then continued:

The legislative history also provides some guidance on this question. As Chief Murphy's letter of May, 1981, to the mayor reveals, there have been several instances where escort service employees have committed thefts against tourists. Thus, the ordinance may very well have some positive impact on the "transient citizens of the state" since it provides a means for identifying suspects in the event criminal activity is alleged to have occurred while escort services were being provided. Moreover, any negative impact occasioned by the period of time necessary to secure an escort permit before engaging in the business is shared by transients and residents of the city alike.

Id. Similarly, in Fisher, the court upheld major portions of the Berkeley rent control ordinance. Fisher, 693 P.2d at 311. The court first concluded that the ordinance's exemptions of hotels and other temporary lodgings shielded transients from most of the ordinance's impact. Id. In addition, "to the extent that transients might be affected, the [rent] withholding provision would likely have a positive effect, because it would help assure prospective newcomers that established maximum housing rents will be enforced." Id.

The modest discussion in Cohen and Fisher, together with the quick dismissal of the issue in most cases, demonstrates that this third test literally applies almost exclusively to travelers and tourists. Cf. Abbott v. City of Los Angeles, 349 P.2d 974, 983 (Cal. 1960) (holding criminal registration requires uniform treatment because it "would deprive a class of citizens from moving freely between localities within the state").
groundwater regulations than non-transients.\textsuperscript{267} Similarly, the first test has little application, either. In applying this test, the courts look to whether the Legislature has taken a "patterned approach" to the subject.\textsuperscript{268} As part II of this article notes, the Legislature has not comprehensively addressed questions of private rights to groundwater use and transfer.\textsuperscript{269} Any preemption by implication will have to be found under the second test.

The second test has two interrelated components. First, "general law" must have partially covered "the field." Second, it must have covered the field in such a way as to indicate that "a paramount state concern" will not tolerate local action. The Supreme Court has queried: "[are] substantial, geographic, economic, ecological or other distinctions . . . persuasive of the need for local control" and has "local need[ ] . . . been adequately recognized and comprehensively dealt with at the state level[?]"\textsuperscript{270}

In the litigation to date, the application of this second test has been a major battleground. Rossman and Steel found no preemption by implication under this second test.\textsuperscript{271} Citing the paucity of state groundwater legislation, they concluded that the Legislature had "abdicated its lawmaking function" over groundwater.\textsuperscript{272} They cited examples of ex-

\begin{itemize}
\item \textsuperscript{267} As Rossman and Steel explain, the "burden" "does not describe the final effect on all citizens, but rather the impact of [a] local ordinance on citizens passing through a locality; the 'burden' arises from punishment of citizens without their knowingly engaging in unlawful actions." Rossman & Steel, supra note 42, at 942-43 (citing Galvan, 452 P.2d at 939). The county ordinances can avoid any harm to transients by punishing local property owners who either drill themselves or allow "transient" pumpers to drill wells for appropriations.
\item \textsuperscript{268} See, e.g., Galvan v. Superior Court, 452 P.2d 930, 937 (Cal. 1969). The mere number of laws does not indicate a patterned approach. \textit{Id.} Moreover, the degree of detail itself does not indicate an intent to occupy the field. See, e.g., People v. Jenkins, 24 Cal. Rptr. 410, 412 (Cal. App. Dep't Super. Ct. 1962).
\item \textsuperscript{269} See supra text accompanying notes 14-38; see also Rossman & Steel, supra note 42, at 938-39.
\item \textsuperscript{270} Galvan, 452 P.2d at 938. \textit{See also} Fisher v. City of Berkeley, 691 P.2d 261 (Cal. 1984) (holding Berkeley demographics and property values involved "significant local interest . . . that may differ from one locality to another"); Gluck v. County of Los Angeles, 155 Cal. Rptr. 435 (Cal. Ct. App. 1979) (finding local tolerance to X-rated newspapers might vary from county to county). \textit{Cf.} Polis v. City of La Palma, 12 Cal. Rptr. 2d 322, 325 (Cal. Ct. App. 1992) (stating "there is nothing peculiar about La Palma to suggest that interest in term limits [for local government officials] is more significant here than elsewhere").
\item \textsuperscript{271} Rossman & Steel, supra note 42, at 940-41.
\item \textsuperscript{272} Id. at 940.
\end{itemize}
press preemption in other water law statutes, implying that absent such express preemption, no preemption by implication should be found.  

Finally, they concluded that the groundwater basin addressed by the Inyo County ordinance had unique features appropriate for local regulation. In contrast, the Nevada and Tehama ordinance challengers have argued strenuously that the general law has sufficiently encompassed the field in a way that displays "a paramount state concern" over water resource allocation. Resolution of the conflicting positions requires determination of the "field" at issue, identification of the applicable "general laws," and consideration of the "local distinctions" allegedly requiring local action.

Determination of the "field" may well determine the outcome of the preemption battle. In such an inquiry, courts separately characterize the subject matters of both the "general law" and the ordinance in question. Courts consider not only the legislation's face, but also its purposes. In Galvan, the court suggested that a "field" is "an area of legis-

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273. Id.
274. Id. at 941. Rossman & Steel argued that Inyo County’s location in the Sierra rain shadow "requires maintenance of a high water table to support flora and fauna. No other major basin in the state faces this unique ecological dilemma." Id. (footnote omitted).
276. See, e.g., Candid Enters., Inc. v. Grossmont Union High Sch. Dist., 705 P.2d 876, 882 n.4 (Cal. 1985) (citing California Water & Tel. Co. v. County of Los Angeles, 61 Cal. Rptr. 618, 626 (Cal. Ct. App. 1967)). See also David S. McLeod, Comment, The California Preemption Doctrine: Expanding the Regulatory Power of Local Governments, 8 U.S.F. L. Rev. 729, 733-34 (1974). "Characterizing the subject matter of the local law as something other than the 'field' preempted by the state scheme is the stronger of the two approaches for avoiding preemption." Id. The other approach found by McLeod involves a judicial balancing of respective state and local interests. Id. at 733.
278. See Bravo Vending, 20 Cal. Rptr. 2d at 175-79. Courts may find that a different purpose from a comparable statute helps an ordinance avoid preemption. See, e.g., Citizens for Uniform Laws v. County of Contra Costa, 285 Cal. Rptr. 456 (Cal. Ct. App. 1991); Kelly v. Yee, 261 Cal. Rptr. 568 (Cal. Ct. App. 1989). Yet, such a different purpose alone will not necessarily shield the local law from preemption if the ordinance “‘materially interfere[s]’ with the
lation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject. 279 In *California Water and Telephone Co. v. County of Los Angeles*, 280 the court elaborated on the importance of the determination: "One of the clouds in the crystal ball is the definition of the field which may ultimately be adopted in any particular case. If the definition is narrow, preemption is circumscribed; if it is broad, the sweep of preemption is expanded." 281 Although the *California Water and Telephone* court found it unnecessary to choose between the parties' self-serving wide characterizations of the "field," 282 other courts have devoted considerable attention to the appropriate characterization. 283

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281. Id. at 626.
282. Id. See also Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534, 541-42 (Cal. 1993) (holding there is no need to choose between narrow and broad definitions of ordinance, since the statute showed no intent to occupy either field).
283. See, e.g., In re Hubbard, 396 P.2d 809, 813 (Cal. 1964) (holding that despite extensive statutes, Legislature had not preempted entire field of gambling); Bravo Vending v. City of Rancho Mirage, 20 Cal. Rptr. 2d 164 (Cal. Ct. App. 1993). *Bravo Vending* involved an ordinance that, among other things, banned the sale of cigarettes in vending machines. Id. Plaintiff vending machine company claimed that California Penal Code § 308 preempted the ordinance. Id. at 166. That statute, among other matters dealing with sales of cigarettes to minors, addresses the criminal culpability of persons who sell cigarettes to minors via vending machines. CAL. PENAL CODE § 308 (West Supp. 1993). The court spent considerable time attempting to define the relevant fields covered by the statute and the ordinance. It rejected two broadly stated fields the plaintiff proffered for § 308 as "absurd" and "fantastic." *Bravo Vending*, 20 Cal. Rptr. 2d at 172-73. It similarly rejected the City's narrowly stated field. Id. at 173. Ultimately, it concluded that § 308 encompassed two aspects of the sale of cigarettes to minors: "To whom is it illegal to sell cigarettes, and what are the penal consequences of doing so?" Id. at 174. The court then turned its attention to the ordinance. It concluded that the ordinance's text did not include matters addressed by § 308. *Id.* Despite this lack of textual contradiction, the court considered evidence of the ordinance's purpose:

If the Legislature has indicated, either expressly or by implication, its intent to fully occupy a particular field . . . then local entities should not be allowed to frustrate that intent by enforcing ordinances which have the purpose and effect of intruding into that restricted subject matter, but which are so carefully drafted as to avoid the appearance of doing so. A city should not be permitted to hide the preempted substance of a regulation behind its nonpreempted form.
Determination of the "fields" of play in the groundwater regulation arena present the usual opportunities for widely divergent interpretations. For example, if, on the one hand, the "field" addressed by the ordinances is narrowly circumscribed to include only "groundwater exports," then there is simply little evidence of state legislative attention to groundwater exports. As noted above, aside from a handful of special district acts, Water Code sections 1220 and 10730 are the only state statutes that directly address local groundwater management, much less export control. As also noted above, in both these two acts and in the special district legislation, the Legislature has not indicated whether the powers granted by statute are exclusive of general county police powers. Even if the "field" involved is broadened to include "groundwater appropriation," virtually no state legislation exists on this topic. If, on the other hand, the "field" is broadly construed as "water resource allocation," then, as described above, the general law is quite extensive. Such a broadly construed "field" would encompass, at the very least, the Water Code's extensive legislative treatment of the acquisition of water rights and the development of the state water plan.

The three trial courts have generally eased their way to their preemption finding by defining the field broadly. Without addressing the matter squarely, the recent Tehama County decision scattered references to "management of water," "water planning," and "the subject of water, regard-

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Id. at 175-76. After reviewing extensive legislative history, the court concluded that the ordinance sought to "regulate the business of selling cigarettes in order to make illegal purchases of cigarettes by minors less likely by prohibiting the particular manner of sale most often used by minors." Id. at 178-79. Ultimately, citing Cohen, the court concluded that the ordinance and statute peacefully coexisted. Id. at 179-80.

284. See supra note 89.

285. Of course, as will be discussed below, if the "general laws" include "common law," then an extensive body of common law addresses the private acquisition of rights to extract groundwater. See infra text accompanying notes 293-301.

286. See, e.g., CAL. WATER CODE §§ 100-2900, 10008-11985 (West 1971 & Supp. 1993). In addition, if, as discussed more fully below, the "general law" includes the common law, then a field defined as broadly as "water resource allocation" would include the common law riparian and groundwater rights decisions. See infra text accompanying notes 293-301.
less of its source or intended use."287 Similarly, the Inyo and Nevada County trial courts both defined the field quite broadly.288 A broad definition likely dooms a local ordinance.

The various ordinances enacted to date demonstrate a range of possible "fields." The ordinances' virtually universal requirement for an export permit largely single out groundwater appropriators for regulatory attention.289 At a minimum, these permit requirements condition the common law appropriative right by at least requiring evidence of surplus prior to approval.290 Thus, all of the permit schemes address the field of acquisition of appropriative rights to groundwater. Because the acquisition of such rights requires determination of the basin-wide effects of pumping and export, the "field" of even these simple permit elements is broad enough to include a multitude of groundwater management issues.

At this point, tension develops between the apparently narrow focus of the permit schemes on exporters and the broader resource management considerations necessary to determining export rights under the permit schemes. Those ordinances, most notably Inyo County's,291 that at least superficially create a basin-wide resource management infrastructure clearly address the broader field of resource management. Those ordinances that focus on the tiny fraction of pumpers who seek only to export appear to address only the narrower issues of acquisition of appropriative rights. Ironically, since a broadly defined ordinance is more easily ensnared by the preemptive net, the more evenhandedly the ordinance treats local groundwater extractors, the more likely a court may find that the ordinance's "field" moves toward the heavily state-dominated "water resources management" field. Thus, using the continuum discussed above,292 the more protectionist the ordinance, the narrower the "field" addressed. In contrast, the more evenhanded the regulatory burden and the broader the local legislative objectives, the more the ordinance moves into the broader "water resources management" end of the definitional spectrum.

288. See supra note 80 and accompanying text.
289. See supra note 232 and accompanying text.
290. See supra notes 232-233 and accompanying text.
291. Inyo County, Cal., Referendum Measure A (passed Nov. 4, 1980).
292. See supra notes 232-233 and accompanying text.
Determination of the “field” necessarily interacts with determination of the “general laws” encompassing the various fields. Few opinions discuss the scope of “the general law.”\textsuperscript{293} As noted above, both the Inyo and Nevada County trial courts included common law decisions within the scope of preemptive “general laws.”\textsuperscript{294} In contrast, Rossman and

\textsuperscript{293} Professor Peppin did discuss the meaning of “general law” in the second of his groundbreaking articles on the California home rule doctrine. John C. Peppin, \textit{Municipal Home Rule in California: II}, 30 CAL. L. REV. 272, 282 (1942). His discussion, however, considered only whether all state legislative enactments were necessarily “general laws.” \textit{Id.} at 282-94. In particular, he focused on the validity of those state statutes “made applicable to less than all cities . . . .” \textit{Id.} at 282. He did not discuss whether the “general law” included common law.

In \textit{Blitch v. City of Ocala}, 195 So. 406, 407 (Fla. 1940), the Florida Supreme Court quoted from a leading treatise on municipal law:

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Ordinances such as the one here under consideration are enacted under the general police power and “they must not (1) infringe the constitutional guarantees of the nation or state [or] . . . . (2) must not be inconsistent with the general laws of the state, \textit{including the common law, equity and public policy}, unless exceptions are permitted . . . .”
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\textit{Id.} (emphasis added). \textit{See also} Miami Shores Village v. Post No. 124, 24 So. 2d 33, 35 (Fla. 1945) (quoting \textit{Blitch}, 195 So. at 406). \textit{Blitch’s} inclusion of the “common law,” however, is dicta, since \textit{Blitch} did not involve the conflict of an ordinance with common law. As its authority, \textit{Blitch} quoted 3 EUGENE MCQUILLIN, \textsc{Law of Municipal Corporations} 119 (2d ed. 1928). That treatise, however, does not give any authority for its inclusion of “common law” and “public policy” in its definition of “general law.” \textit{Id.} Rather, the quoted portion comes from the author’s summary of cases construing the police power. \textit{Id.} at 118-19. Although McQuillin notes many cases in the materials preceding his summary, none of these cases include ordinances invalidated because of their conflict with either “the common law” or other judicial “public policy” declarations. \textit{See id.} at 118 n.7.

The current edition now reads:

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At the risk of being struck down as invalid, ordinances must in general conform and not be inconsistent with the public policy of the state, as found in its constitution and statutes or, when the constitution and statutes are silent, \textit{in its judicial decisions} and the constant practice of its public officials.
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\textsuperscript{5} MCQUILLIN, \textsc{Law of Municipal Corporations} § 15.21, at 115 (3d ed. rev. 1989) (footnotes omitted) (emphasis added). It cites four cases as authority. \textit{Id.} at 116, 34 (Supp. 1992) (citing Marengo v. Rowland, 105 N.E. 285 (Ill. 1914); Zeigler v. Illinois Trust & Sav. Bank, 91 N.E. 1041 (Ill. 1910), Allin v. American Indem. Co., 55 S.W.2d 44 (Ky. 1932); City of Springfield v. $10,000 in U.S. Currency, 786 P.2d 723 (Or. 1990)). Again, none of these cases involve ordinances invalidated because of conflicts with either the “common law” or other judicial “public policy” declarations.

\textsuperscript{294} \textit{See supra} text accompanying note 79. The Tehama County court did not address the matter in its decision. \textit{See} Summary Judgment, Myers v. County of Tehama, Nos. 34147 & 34446 (Super. Ct. Tehama County, Cal., Aug. 11, 1993).
Steel argue that decisional law does not have preemptive force.\textsuperscript{295} To date, the California Supreme Court has raised but once and left undecided the role of decisional law in preemption analysis.\textsuperscript{296}

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\textsuperscript{295.} Rossman & Steel, \textit{supra} note 42, at 942. In addition, they argued that the body of decisional law addressing the acquisition of private rights to groundwater does not immunize private rights-holders from police power regulation. Rossman & Steel, \textit{supra} note 42 at 942-43 (analogizing to county zoning power over land acquired by adverse possession). This second argument has merit. \textit{See} Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1011 (Cal. 1976). In \textit{Birkenfeld}, the court considered the Berkeley rent control ordinance. \textit{Id.} Among other arguments, plaintiff landlords claimed that "rent control is not within the municipal police power because it is 'private law' purporting to regulate private civil relationships." \textit{Id.} The court rejected that sweeping claim: "The California Constitution contains no such 'private law' exception to municipal powers. The fact that municipal imposition of rent ceilings necessarily affects private civil relationships by no means makes it unique among city police regulations." \textit{Id.}


Since \textit{Chavez}, the closest the court has come to addressing this issue was in Fisher v. City of Berkeley, 693 P.2d 261 (Cal. 1984). In \textit{Fisher}, the court construed the Berkeley rent control ordinance. \textit{Id.} One provision in that ordinance created an evidentiary presumption affecting the burden of proof in a retaliatory eviction defense. California Evidence Code § 500 states: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." \textit{CAL. EVID. CODE} § 500 (West 1966). Section 160 further defines "law" as including "constitutional, statutory and decisional law." \textit{Id.} § 160. The City claimed that its ordinance was a "law" for purposes of §§ 160 and 500. \textit{Fisher}, 693 P.2d at 303. The court framed the issue as "whether a local ordinance can be deemed a 'statute' for purposes of deviating from the established rules of evidence relating to burden of proof." \textit{Id.} The court stated:

The answer to this question would seem to be so settled that, like other firm rules of law, few courts have recently had occasion to address the issue. Long before enactment of Evidence Code sections 500 and 160, we suggested that municipal governments have no authority to depart from the common law of evidence . . . . [(A)n "ordinance is void . . . . [to the extent that it purports to] lay down rules of evidence . . . ."] Similarly, commentators have maintained that, "[w]ithout express authority the general rules of evidence or procedure may not be changed by ordinance by a municipal corporation."

\textit{Fisher}, 693 P.2d at 303 (citations omitted) (alteration in original). Because \textit{Fisher} arose in connection with the interpretation of a statute's meaning of "law," it is not directly on point. Moreover, its context as a trial procedure matter raises some separation of powers issues that might distinguish its discussion of contradiction between a local and a judicially made law. Finally, the decision in Orena v. City of Santa Barbara, 28 P. 268 (Cal. 1891) upon which \textit{Fisher} relies, does not itself answer the broader question: the inclusion of common law in article XI, § 7's "general law." Nevertheless, \textit{Fisher} is the most
The only extensive California discussion of this subject is a 1966 article by Coleman Blease. In that article, now-Jus-

recent California decision suggesting that local legislatures may not contradict common law.

297. Blease, supra note 39. When he wrote the article, Mr. Blease was, inter alia, the legislative representative for the Southern California Branch of the American Civil Liberties Union. Id. at 517. Since the late 1970's, now-Justice Blease has served on the California Court of Appeal for the Third Judicial District. In Wexner v. Anderson Union High Sch. Dist., 258 Cal. Rptr. 26 (Cal. Ct. App. 1989) (unpublished opinion), Justice Blease finally had the opportunity to address the matter upon which he had written almost a quarter-century earlier. Wexner involved a local school board's removal of five books by Richard Brautigan from the school library. Id. California Education Code § 35160 granted local school boards authority to "initiate and carry on any program... or otherwise act in any manner which is not in conflict with... any law...." Id. at 35 (quoting CAL. EDUC. CODE § 35160 (West 1993) (emphasis omitted)). This statute closely followed the language of article IX, § 14.

Wexner, 258 Cal. Rptr. at 258. That constitutional provision, governing the powers of a school board, in turn parallels the preemption language in article XI, § 7. Id. Justice Blease then drew upon cases construing the predecessor of article XI, § 7, that, he stated, "hold that the terms 'laws' or 'general laws' in Article XI... (now § 7) includes the common law." Id. at 34 n.5. Justice Blease then elaborated:

Analogously, "any law" includes not only the regulations of the State Board of Education but the common law as well. Hence, to the extent that our preemption analysis rests upon common law extrapolation of the pertinent statutes, it is sufficient to override the authority granted the Board by § 35160. "Any law" thus includes common law.

Id. at 35 (emphasis added).

Modestly, Justice Blease did not cite his exemplary article as authority for his conclusion. He did, however, generally cite In re Porterfield, Chavez and a third case, In re Koehne, 381 P.2d 633 (Cal. 1963), as authority for his conclusion that article XI, § 7's reference to the "general laws" includes the common law. Wexner, 258 Cal. Rptr. at 34 n, 35. None of these three cases, however, directly holds that "general laws" include the common law, in the broadest sense of purely judge-made law governing the acquisition of rights or the imposition of duties. Rather, these three confusing cases involve common lawmaking in a narrower sense: judicial interpretations of statutory or constitutional texts. As noted above, Chavez expressly declined to decide the issue. Chavez, 339 P.2d at 809. See also supra note 296; Blease, supra note 39, at 534. Similarly, as discussed above, Porterfield involved an express legislative declaration of policy; i.e., California Labor Code § 923, arising in the context of constitutionally protected freedoms, principally freedom of speech. Porterfield, 168 P.2d at 723, discussed supra text accompanying notes 121-133. See also Blease, supra note 39, at 533 (discussing Porterfield). While constitutional law is largely "judge-made," it is textually based; in contrast, the law of groundwater appropriation is entirely a judicial construction in the classic common law mode. Finally, in Koehne, the court invalidated a Los Angeles ordinance prohibiting intoxication in any place open to public view. Koehne, 381 P.2d at 633-34. The court concluded that California Penal Code § 647, governing public intoxication, preempted the ordinance. Id. It based its conclusion partially upon "the language of § 647... and the circumstances surrounding its enactment...." Id. at 634. In his article, Justice Blease had described this case as "a specific exercise of statutory construction," and thus "analogous to the reasoning in the
tice Blease distinguished cases involving conflicts with implied general laws, a category of cases that included those based on judicial declarations of public policy, with cases finding an implied legislative intent to occupy the field. Justice Blease concluded that policy-based judicial determinations of law had to be considered “general laws” within the meaning of article XI, section 7. A contrary holding would lead, he wrote, to the anomalous result that judges could invalidate state statutes criminalizing certain conduct on public policy grounds, although such decisions would not invalidate local ordinances proscribing the same conduct. In effect, he concluded, “[l]ocal governments would thus be invested with power to invade what had been recognized as a proper province of the courts.”

Justice Blease’s analysis seems sound in those cases where it applies. The opinions upon which he draws his con-
clclusions all implicated fundamental, constitutional rights. Given the rights involved, it is appropriate for courts to find or declare them "public policies" that neither state nor local legislature may contradict. The application of Justice Blease's "public policy as general law" analysis outside of the realm of fundamental or constitutional rights raises important separation-of-powers concerns. In our tripartite system of government, it simply is inappropriate for the courts to invalidate legislative determinations, be they state or local, simply on the grounds of some judicially declared public policy. Nevertheless, the constitutionalization of California water law through the 1928 amendment, and the repeated judicial recognition that water allocation decisions always take place against the backdrop of "statewide considerations of transcendent importance," justify the incorporation of judicially declared water law and policy into the groundwater preemption debate.

302. See, e.g., Blease, supra note 39, at 532-33 (discussing In re Porterfield, which involved union members' "full freedom of association and self-organization"); Id. at 534-35 (discussing Chavez, another case involving fundamental, constitutional rights). Similarly, Justice Blease's depublished opinion in Wexner, while it found evidence of public policy in Education Code provisions, see Wexner v. Anderson Union High Sch. Dist, 258 Cal. Rptr. 26, 36-37 (Cal. Ct. App. 1989) (unpublished opinion), also noted that "related, complex and closely balanced questions of state and federal constitutional law would be implicated if the Board's claim of lawful authority to remove non-obscene library books were upheld." Id. at 37.

303. See Wexner, 258 Cal. Rptr. at 32-33 (finding judicial lawmaking in preemption arena is a "purely defensive activism" that preserves the rights of the majoritarian branch to take "further considered action"). See also California Trout, Inc. v. State Water Resources Control Board, 255 Cal. Rptr. 184, 208 (Cal. Ct. App. 1989) (Blease, J.) (citation omitted):

Ordinarily, absent a plain constitutional mandate, a conflict in public policy between the judiciary and the Legislature must be resolved in favor of the latter. Where various alternative policy views reasonably might be held whether the use of water is reasonable within the meaning of article X, § 2, the view enacted by the Legislature is entitled to deference by the judiciary. An invitation to substitute the policy view of a court in this circumstance for a reasonable policy enacted in a statute is an invitation to return to the benighted days of substantive due process.

Id.


305. To focus attention on the role that judicial policy pronouncements can play in the implied preemption analysis, this article has addressed "common law as general law" here. If, however, common law is "general" law for pur-
As noted above, the case law addressing the acquisition of private rights to groundwater is substantial.\textsuperscript{306} Moreover, \textit{Joslin v. Marin Municipal Water District}\textsuperscript{307} demonstrates that there are no narrowly defined "fields" involving California water law; even the narrowest field arguably applicable here—rights to extract groundwater—necessarily implicates the "transcendent" field of statewide water resource allocation. Even if in some circumstances, as discussed above,\textsuperscript{308} a county groundwater export ordinance might not directly contradict either the 1928 amendment or Water Code sections 104 and 105, the implied occupation analysis under review here looks to the general law for expressions that "a paramount state concern will not tolerate further or additional local action."\textsuperscript{309} In combination, \textit{Joslin}; article X, section 2; and Water Code sections 104 and 105 highlight that "paramount state interest" in water resource allocation.

\begin{itemize}
\item posed of implied preemption, then, surely, nothing precludes similar consideration of common law for purposes of contradiction-based preemption. The addition of common law to the general law adds two bodies of decisional law that county ordinances might contradict. First, as noted above, an extensive body of case law addressed the acquisition of private rights to groundwater. To the extent that the local ordinances at issue merely set up permit requirements for local, nonjudicial determinations of the right to appropriate groundwater, they do not directly "contradict" these common law decisions. The local ordinances certainly do not permit something banned by common law. And, at least on their face, neither do they prohibit something permitted by decisional law. Rather, they simply set up a procedure for determining whether an applicant has met the case law set of criteria for an appropriation: the availability of "surplus" water. To the extent that local regulations unqualifiedly restrict a water use otherwise permitted by state common law, there may be some apparent contradiction. Nevertheless, since case law addresses only the acquisition of private rights to groundwater, local governments may regulate such private rights for the public welfare under their police powers. The validity of such local regulations is tested under a police power analysis.

Second, in addition to these core judicial decisions on private groundwater rights, the case law contains broad judicial policy statements about water's "transcendent importance" to the people of the state. See, e.g., \textit{Joslin v. Marin Mun. Water Dist.}, 429 P.2d 889, 894 (Cal. 1967); see also supra note 304. Again, on their faces, nothing in the local ordinances' permit requirements either permit something prohibited by these policy pronouncements, nor prohibit something permitted by the pronouncements.

Although these two groups of judicial decisions thus do not resolve the preemption inquiry upon "contradiction" grounds, they play an important role in the implied preemption analysis.
\textsuperscript{306} See supra text accompanying notes 14-22.
\textsuperscript{307} 429 P.2d 889 (Cal. 1967).
\textsuperscript{308} See generally supra text accompanying notes 92-244.
\textsuperscript{309} People ex rel. Deukmejian v. County of Mendocino, 683 P.2d 1150, 1155 (Cal. 1984), rev'd on other grounds, 909 F.2d 929 (Cal. 1990).
The strongest statement of the state’s inability to tolerate such balkanization can be found in *Joslin*: “Although, as we have said, what is a reasonable use of water depends upon the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from state-wide considerations of transcendent importance.”\(^{310}\) Of course, as noted above, absent preemption, counties are not prohibited from regulating on matters of statewide concern.\(^{311}\) And, as also noted above, evenhanded local groundwater regulation might not directly contradict article X, section 2.\(^{312}\) Nevertheless, as *Joslin* noted, the state’s paramount interest in “the ever increasing need for the conservation of water in this state, [is] an inescapable reality of life *quite apart from its express recognition in the 1928 amendment.*”\(^{313}\) The court noted that state policy regarding water “conservation and use” was “unanimous.”\(^{314}\)

The *Joslin* court’s statement, in turn, finds statutory support in Water Code sections 104 and 105.\(^{315}\) As noted above, construed most narrowly, those two statutes helped introduce the California water plan—the state’s broadest effort to manage its water resources.\(^{316}\) The language of these two statutes, however, echoes with overtones of the state’s reservation of jurisdiction over all water-resource allocation decisions. Even assuming, *arguendo*, that these two statutes do not technically reserve such jurisdiction, the overtones reinforce the primary role of the people of the state in allocating water resources. Moreover, the specific water projects ultimately developed by these code sections’ statutory predecessors form the ties that bind much of California. These ties concretely demonstrate the interdependence of Californians on water resources, and the needs of the state to speak with one legal voice on water allocation matters.\(^{317}\)

As noted above, the proponents of county groundwater ordinances claim that they are furthering the *Joslin* declared

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311. See supra note 40 and accompanying text.
312. See supra text accompanying notes 147-244.
314. Id.
315. See supra notes 92-93 and accompanying text.
316. See supra notes 98-99 and accompanying text.
317. See infra notes 325-326 and accompanying text.
policy of water conservation. And, as noted in the same discussion, this article concludes that some county groundwater regulations might indeed survive a “direct contradiction” analysis based solely on article X, section 2. Nevertheless, the ability to survive the direct contradiction analysis on a conservation rationale does not mean that the same ordinances survive the implied preemption challenge. Survival under the direct conflict analysis merely means that, given state legislative authorization, some well-crafted local groundwater schemes would not run afoul of the 1928 amendment. The implied preemption analysis, however, focuses not on the merits of any one local groundwater scheme to see whether it, by itself, leads to the waste or unreasonable use of water within the meaning of article X, section 2. Rather, the implied preemption analysis asks whether the general law manifests such statewide concerns that do not tolerate the possibility of local regulatory regimes. Absent state legislative approval, an ad hoc regulatory regime based on fifty-eight self-initiated county export controls will necessarily be incoherent, even if one or more of the fifty-eight schemes are evenhanded and well-crafted.

Moreover, the counties’ reliance on “conservation” to support their home-grown schemes cannot itself be addressed in vacuo. The water conservation policy expressed in Joslin is a

318. See supra text accompanying notes 155-244.

319. The implied preemption analysis looks also to whether “‘substantial, geographic, economic, ecological or other distinctions are persuasive of the need for local control and whether local needs have been adequately recognized and comprehensively dealt with at the state level.’” Galvan v. Superior Court, 452 P.2d 930, 933 (Cal. 1969) (quoting Robbins v. County of Los Angeles, 56 Cal. Rptr. 853, 859 (Cal. Ct. App. 1966)). Rossman and Steel argued that Inyo County’s unique setting in the Sierra rainshadow created peculiar ecological considerations suited for local regulation in the absence of a state scheme. Rossman & Steel, supra note 42, at 941. The shortest response is simply that these local needs are not “persuasive”: addressing them by county-initiated local groundwater management regimes inevitably leads to an incoherent water resources allocation policy that the state simply cannot tolerate. A fuller, more contemporary response, albeit not entirely satisfactory to many counties, is that the Legislature, first through Water Code § 1220, and more recently through A.B. 3030, has provided many counties with an opportunity to undertake some groundwater management efforts appropriate for their particular circumstances. See supra notes 50-61 (discussing counties’ powers under Water Code § 1220 and A.B. 3030). Thus, even though neither of these statutes expressly states that its provisions are the exclusive sources of law authorizing local groundwater management, collectively they represent at least a step towards a state-sanctioned comprehensive groundwater management scheme.
statewide policy intimately linked with the entire scheme of private rights to water use and the statewide plan for water resources conservation and development. The water conservation policies announced in the unauthorized county ordinances principally aim to conserve county supplies. The Inyo and Nevada ordinances most graphically demonstrate the local focus. While the Inyo ordinance requires consideration of “the needs and practices of all water users in the state, and the status of the state’s entire water resources” before a groundwater export permit may be issued, it makes clear that the overriding concern is not state water allocation, but the “paramount protection of Inyo County’s citizens, environment and economy.” The Nevada ordinance is even more explicit. To the identical text, it adds: “This finding shall be given paramount consideration over all other findings.” Even if each county “considered” the state’s overall water resources in each groundwater export permit decision, without giving local concerns paramount importance, fifty-eight separate views of these “overall resources” would likely emerge. Finally, the extension of the counties’ water conservation rationale leads to other potential water balkans. The same arguments justifying the ability to condition groundwater extraction could be used to regulate locally either riparian rights, pre-1914 appropriative rights, or the specific contours of the largely uncodified public trust doctrine. Surely, the State could not tolerate fifty-eight separate systems for acquiring, preserving, or transferring uncodified rights to surface waters solely in the name of local conservation efforts.

The recent legislative efforts under Water Code sections 1220(b) and 10753 to allow some local groundwater regulation do not themselves demonstrate that counties may, sua sponte, balkanize the state’s resources. To be sure, these two statutes do deserve criticism that they, too, encourage bal-

320. See Joslin v. Marin Mun. Water Dist., 429 P.2d 889, 894-95 (Cal. 1967) (citing Peabody v. City of Vallejo, 40 P.2d 486 (Cal. 1935); Chow v. City of Santa Barbara, 22 P.2d 5 (Cal. 1933)).
321. INYO COUNTY, CAL., CODE § 7.01.030(j).
322. Id. § 7.01.030(a) (emphasis added).
323. NEVADA COUNTY, CAL., LAND USE AND DEVELOPMENT CODE § L-X 6.7 (A) (Jan. 27, 1986). See also Tehama County, Cal., Ordinance 1552, 1-7 (Feb. 4, 1992) (preamble: local Tehama County economic interests in restricting groundwater exports).
Nevertheless, they are distinguishable from the ordinances at issue here in two principal respects. First, they are creatures of the state legislative process. Although that process does not in itself guarantee the attainment of a coherent policy, it does mean that all Californians have been represented in the decision to allow differing local groundwater regulations. One of the evils of balkanization is simply that locals preserve resources for themselves in a process by which those excluded from a resource's use are also excluded from the decision to exclude. Second, both statutes require some degree of basin-wide coordination. In contrast, the ordinances at issue here do not consider the multiplicity of jurisdictions that have some interest in a given basin's use.

The vast grid of dams and aqueducts that move water from and among many different portions of the state demonstrates concretely that Californians are truly interdependent. This interdependence was heightened by the recent drought, which required new levels of state and local cooperation in temporarily reallocating water needs. Water development policy is so vital to the overall interests of the people of the state as to require "uniform treatment throughout the state." As noted above, the trial courts that have invalidated county groundwater export ordinances based their decisions, in part, on the desire to avoid the incoherent, county-by-county balkanization of groundwater resources.

In conclusion, although the three trial court opinions are terse, they reach the right conclusion. Although not preempted by direct contradiction with constitutional or statutory provisions, the inclusion of decisional law into the calculus demonstrates preemption by implication under the second of the Hubbard tests. Even a well-crafted, even-handed county scheme, lacking direct legislative sanction, necessarily leads to the intolerable possibility of incoherence.

324. See Patchwork Quilt, supra note 1.
325. See Chavez v. Sargent, 339 P.2d 801, 810 (Cal. 1959) (finding possible significance, for preemption analysis, "that the subject is one which, in our view, . . . requires uniform treatment throughout the state") (citation omitted) (emphasis added). See also Chow v. City of Santa Barbara, 22 P.2d 5, 16 (Cal. 1933) (finding importance of water conservation and development to the future welfare of the state).
326. See supra note 81.
IV. DORMANT COMMERCE CLAUSE CHALLENGES

In addition to challenges under the California constitution, local groundwater export restrictions face challenges under the Dormant Commerce Clause of the United States Constitution. Such challenges apply even to those ordinances or special management districts expressly authorized by the State Legislature. In addition, such challenges potentially apply even to those ordinances that burden both in-state and out-of-state appropriators or transferees. To date, the Commerce Clause has been crucial in a challenge to the efforts of Imperial County, California to restrict groundwater movement out of the county. The Imperial County case, however, involved several peculiar circumstances that make its application to other local groundwater restrictions

327. See U.S. Const. art. I, § 8, cl. 3. That clause grants the Congress the power "[t]o regulate Commerce . . . among the several States." Id. The judge-made "Dormant" or "Negative" Commerce Clause doctrine restricts state actions that improperly burden interstate commerce even where Congress has not legislated in a given arena. See, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023-24 (1992).

In addition to Commerce Clause challenges, the federal Constitution provides other limits on a state's activity in the interstate water market. See, e.g., Ann B. Rodgers, The Limits of State Activity in the Interstate Water Market, 21 LAND & WATER L. REV. 357, 365-77 (1986) (Privileges & Immunities, Property, Commerce, and Equal Protection Clauses all restrict state activity). The following discussion focuses solely upon the Commerce Clause.

328. See, e.g., Fort Gratiot, 112 S. Ct. 2019, 2021-22 (discussing Michigan statute barring import of solid waste into a county unless the county authorized such importation).

329. See, e.g., Fort Gratiot, 112 S. Ct. at 2021-22, 2024-26 (holding it is irrelevant that the Michigan scheme "purports to regulate intercounty commerce in waste").

330. See, e.g., Munoz v. County of Imperial, 604 F.2d 1174, 1175 (9th Cir. 1979), cert. granted, 445 U.S. 903 (1980), judgment vacated, 449 U.S. 54 (1980), on remand, 636 F.2d 1189 (9th Cir. 1981), aff'd, 667 F.2d 811 (9th Cir. 1982), cert. denied, 459 U.S. 825 (1982). The district court agreed with the plaintiffs and entered a preliminary injunction restraining the county from enforcing the export restriction. Id., see Munoz, 510 F. Supp. at 882-86, App.: Order Granting Motion For Preliminary Injunction, 1977. See also Munoz v. County of Imperial, 667 F.2d 811, 813 (9th Cir. 1982) (noting that, in an unpublished decision later reversed on other grounds, California Court of Appeal concluded that Imperial County land use restrictions on water export, via tank trucks, to Mexico violated Commerce Clause).

In addition to the Imperial litigation, the successful Nevada County challengers analogized to the Commerce Clause restrictions when making their state law preemption arguments. See Points and Authorities in Support of Motion for Summary Judgment, Truckee-Donner Pub. Util. Dist. v. Board of Supervisors, No. 35920 (Super. Ct. Sutter County, Cal., Apr. 18, 1989).
uncertain. In addition, it predated the United States

331. The case involved the trucking of groundwater pumped from Imperial County, California, to Mexico. See County of Imperial v. McDougal, 564 P.2d 14, 16 (1977), reh'g denied, 564 P.2d 14 (Cal. 1977), application denied, 434 U.S. 899 (1977), appeal dismissed, 434 U.S. 944 (1977) (finding litigation lacked a substantial federal question). Thus, it involved two matters different from many potential Commerce Clause challenges: (1) water fully severed from the ground and transported by truck, and (2) international commerce. Even those commentators who would wish to preserve a state's power, post-Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 953-54 (1982), under authority of the Commerce Clause, to determine the circumstances under which water rights may be first allocated recognize Sporhase's applicability to movement of water after initial allocation. See Frank J. Trelease, Interstate Use of Water—Sporhase v. El Paso, Pike & Vermejo, 22 LAND & WATER L. REV. 315, 334, 345-46 (1987) [hereinafter, Trelease, Interstate Use]; Frank J. Trelease, State Water and State Lines: Commerce in Water Resources, 56 U. COLO. L. REV. 347, 361-68 (1985) [hereinafter, Trelease, State Water & Lines]. Moreover, the presence of an international boundary implicates peculiarly federal concerns over regulating commerce with different countries. See, e.g., Reeves, Inc. v. Stake, 447 U.S. 429, 437 n.9 (1980) ("Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446-450 (1979) (foreign commerce scrutiny seeks to avoid duplicative taxation and ensure ability of federal government to promote uniform national policies); Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 7-8 (1986) (regarding the same issue as Japan Line, Ltd.).

In addition to these two differences, the case involved the interpretation of certain land use restrictions reflected in zoning ordinances and land use permits. Imperial County v. McDougal, 564 P.2d at 16. Although Imperial County also sought to invalidate water export under its groundwater management ordinance, the only court to mention that ordinance found it unnecessary to rule on its validity. Id. at 16 n.1.

The final "peculiarities" raised by the Imperial litigation involve its complicated procedural history and its rather ambiguous resolution. Indeed, an entire course in civil procedure could be taught from the now-20-year-old efforts to stop these water sales. In 1972, Imperial County sought injunctive and declaratory relief in California Superior Court, against Donald C. McDougal, an owner and operator of a commercial water sales business on a tract of land, the Simpson Well property. Id. at 16. The county alleged that McDougal was violating a 1970 zoning law by exporting water outside Imperial County and by employing large numbers of trucks to carry away great amounts of water without a conditional use permit, was constituting a public nuisance by his business operation, and was violating the county's Groundwater Appropriations Ordinance. Id. at 16 n.1. The court enjoined McDougal from selling the water in violation of the zoning law, finding that any effect on international commerce due to the restriction was merely incidental to a valid exercise of police power designed to regulate local land use. Id. at 17. It made no findings on the nuisance claim and did not hold a trial on the ordinance issue. Id. at 16 n.1. Upon appeal, the California Court of Appeal held that the export permit restriction violated the United States Constitution's Commerce Clause, article I, § 8, cl. 3, and that McDougal's use permit was void. See Munoz v. County of Imperial, 667 F.2d 811, 813 (9th Cir. 1982).

McDougal appealed to the California Supreme Court, claiming that he had a vested right to this business operation and that the export permit restriction
was invalid. *Imperial County*, 564 P.2d at 16. The court affirmed that McDougal was prohibited from violating the export restriction because as a successor in title to one who acquiesced in the permit prohibition, he was estopped to assert its invalidity. *Id.* at 17-18. It reversed the injunction against using large numbers of trucks because of insufficient evidence, and remanded, allowing the trial court to consider evidence that McDougal's business operation was a nuisance. *Id.* at 18-19. The Court determined that, in view of its holding, it did not need to decide whether the permit's prohibition violated the Commerce Clause. *Id.* at 18 n.3.


The California Supreme Court then held McDougal in contempt for selling water outside the county, but stayed an order pending the county's appeal in the federal courts. *See Munoz*, 667 F.2d at 813. On appeal, the county claimed that under the Anti-Injunction Act, 28 U.S.C. § 2283, the existence of the *McDougal* state proceedings removed the court's power to issue the federal injunction. *Munoz*, 604 F.2d at 1176. The court of appeals disagreed with the county, and affirmed, holding that the Anti-Injunction Act did not bar the injunction since the *McDougal* proceedings had terminated and since third parties, such as the plaintiffs here, are not barred under this act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state courts. *Id.* The U.S. Supreme Court vacated and remanded, holding that the *McDougal* action was a pending state court proceeding, but indicated that the Anti-Injunction Act did not bar the federal suit if the Mexican plaintiffs were "strangers" to the state court litigation. *County of Imperial v. Munoz*, 449 U.S. 54, 59-60 (1980).

Upon remand, the district court found that the plaintiffs were indeed strangers to the *McDougal* proceedings and reentered the preliminary injunction. *Munoz v. County of Imperial*, 510 F. Supp. 879 (S.D. Cal. 1981). The Ninth Circuit Court of Appeals affirmed. *Munoz*, 667 F.2d at 811. In 1983, a permanent injunction restraining enforcement of McDougal's export restriction was entered. *McDougal v. County of Imperial*, 942 F.2d 668, 671 (9th Cir. 1991).

During this federal litigation, and after the California Supreme Court judgment enjoining McDougal from exporting water, the county, in 1978, successfully tried its public nuisance action against McDougal. *See County of Imperial v. McDougal*, 4 Civil No. D000540, 2 (4th Dist. 1988) (unpublished opinion). This judgment was reversed on appeal because the trial court made its findings based on evidence of nuisance submitted during the first trial in 1973 rather than on evidence of conditions at the time of trial in 1978. *County of Imperial v. McDougal*, 4 Civil No. 18248 (1979) (unpublished opinion). Upon remand, the trial court found that some of McDougal's activities constituted a nuisance and issued a permanent injunction abating those activities. *County of Imperial v. McDougal*, Civ. No. 43353 (1982) (unpublished opinion). The court of appeal affirmed. *County of Imperial*, 4 Civ. No. D000540.
Supreme Court's decisions in *Sporhase v. Nebraska*\(^{332}\) and, more recently, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources.*\(^{333}\) Using the same paradigm considered above in the state law preemption dis-

In the meantime, in 1977, McDougal extended the water operations to another tract of land he had purchased, the Clifford Well property. *See McDougal,* 942 F.2d at 671. Soon after, the county passed an ordinance providing that upon groundwater overdraft, the right to appropriate water should be denied or limited, and in 1978, the county denied McDougal's appropriation permit. *Id.*

Under a 1980 ordinance requiring a reasonable amortization period for nonconforming uses, the county determined that the Clifford Well property water operation was a nonconforming use, and that six years was a reasonable amortization period. *Id.* In 1987, the California Court of Appeal upheld this decision, and that same year, the county designated the Clifford Well property a floodway. *Id.* McDougal claimed this rendered his land useless for residential purposes, and then applied for a conditional use permit to continue water operations. *Id.* The county denied the permit application because McDougal was unable to comply with the county's requirement to submit an Environmental Impact Report including a verified groundwater model for that particular basin. *Id.*

In 1989, McDougal sued for civil rights violations under 42 U.S.C. §§ 1983 and 1985(3), alleging that the county conspired to deprive him of his right to operate his water business, and for inverse condemnation, alleging it deprived him of the total value of his land. *McDougal v. County of Imperial,* Civ. No. 89-1488-E, Memorandum Decision and Order (S.D. Cal. 1990). The district court granted the county's motion to dismiss, holding that the civil rights claims were barred by a one-year statute of limitations, and that McDougal failed to state a claim for inverse condemnation because the county's regulatory purpose was legitimate. *Id.* The court of appeals affirmed the dismissal of the civil rights claims, agreeing with the district court that the claims were barred by California's one-year general statute of limitations for personal injury actions. *McDougal,* 942 F.2d at 671-75.

It reversed dismissal of the takings claim because the trial court did not balance the substantiality of the public interest in the county's requirements against the severity of the private interference of the Clifford Well property. *Id.* at 675-80. The court remanded, allowing the district court to consider whether the takings claim was also barred by the one-year statute of limitations. *Id.* at 675 n.5.


discussion, this section of the article considers the vulnerability of local groundwater export restrictions in light of *Sporhase* and *Fort Gratiot*. Because the analysis encompasses several open questions of constitutional law, the discussion can only outline the contours of the arguments.

**A. The Dormant Commerce Clause and State Regulation of Natural Resources: An Overview**

The "dormant" or "negative" aspect of the Commerce Clause has received substantial attention from the Supreme Court over the last fifteen years. Although critics debate its foundation and merits, the Supreme Court has shown little inclination to abandon its now well-established doctrine. As more narrowly applicable to the local ground-

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334. See supra text accompanying notes 232-233.
water regulations under review here, the recent Fort Gratiot decision conveniently introduces the policy concerns behind the doctrine as well as a quartet of cases that sketch its relevant portions.337

In Fort Gratiot, the Court reviewed a Michigan statute that barred the importation of solid waste into any Michigan county unless authorized by the county's state-mandated and approved solid waste disposal plan.338 A landfill operator in

337. As discussed in more detail below, the quartet includes Maine v. Taylor, 477 U.S. 131 (1986) (upholding patent discrimination against interstate commerce); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (developing balancing test for state regulations of interstate commerce that do not discriminate based on commercial item's origin or destination); Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (holding county may not establish geographic barriers to trade); Sporhase v. Nebraska, 458 U.S. 941 (1982) (finding groundwater an item of interstate commerce).

St. Clair County, Michigan, sued the county and state after they denied him permission to accept out-of-state waste at its landfill.\textsuperscript{339} Both the federal district court and the court of appeals rejected the landfill operator's claim that the combined effect of the Michigan statute and the county solid waste management plan unconstitutionally discriminated against interstate commerce.\textsuperscript{340} Finding these decisions inconsistent with its earlier opinion in \textit{Philadelphia v. New Jersey},\textsuperscript{341} the Supreme Court reversed.

The Court began by noting that under \textit{Philadelphia v. New Jersey} an interstate market existed for commercial transactions involving solid waste.\textsuperscript{342} Next, the Court summarized the "long recognized" anti-protectionist policies underlying the dormant commerce clause: "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'"\textsuperscript{343} It then found that the combined effect of the Mich-
igan statutes and county management plan patently discriminated against interstate commerce.\textsuperscript{344} Due to the lack of any legitimate justification for such patent discrimination, the Court invalidated the waste import restrictions.\textsuperscript{345}

In reaching this conclusion, the Court rejected the state and county’s attempt to fit under the looser balancing test reserved for statutes that evenhandedly regulate commerce without regard to its place of origin or destination.\textsuperscript{346} In its often-quoted opinion in \textit{Pike v. Bruce Church, Inc.},\textsuperscript{347} the Court summarized its test:

\begin{quote}
Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation omitted.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.\textsuperscript{348}
\end{quote}

The \textit{Fort Gratiot} defendants argued that the Michigan waste-import restrictions evenhandedly regulated commerce “because they treat waste from other Michigan counties no differently than waste from other States.”\textsuperscript{349} Citing \textit{Dean Milk Co. v. Madison},\textsuperscript{350} the Court concluded that “a State (or one

\begin{itemize}
\item \textit{Id.} at 2024.
\item \textit{Id.} at 2027-28.
\item \textit{Id.} at 2024-26.
\item \textit{Id.} at 2024-25 (1992).
\item \textit{Id.} at 2027-28.
\item \textit{Id.} at 2024-26.
\item \textit{Id.} at 2024-26 (1992).
\item \textit{Id.} at 2024-25 (1992).
\end{itemize}

\textit{Dean Milk} involved a Madison, Wisconsin, ordinance that required milk sold within the city to have been processed within five miles of the city centers. \textit{Id.} at 350. The Court found that this geographic import barrier had the practical effect of excluding milk produced and pasteurized in Illinois and that the ordinance “plainly discriminate[d] against interstate commerce.” \textit{Id.} at 354.

\textit{Fort Gratiot} also cited Brimmer v. Rebman, 138 U.S. 78 (1891). \textit{Fort Gratiot}, 112 S. Ct. at 2025. In \textit{Brimmer}, the Court struck down “a Virginia statute that imposed special inspection fees on meat from animals that had been
of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.\^[351]

Seizing upon language from *Sporhase*, the *Fort Gratiot* defendants also argued that they had valid health and safety reasons for their waste-management scheme.\^[352] In *Sporhase*, discussed more fully below,\^[353] the Court reiterated its "well recognized difference between economic protectionism, on the one hand, and health and safety regulation, on the other."\^[354] Indeed, as demonstrated by *Maine v. Taylor*,\^[355] a well-substantiated health or environmental regulation may support patent discrimination against interstate commerce, if no nondiscriminatory alternative exists.\^[356] The *Fort Gratiot* defendants, however, failed to convince the Court that Michigan's proffered health and safety concerns could not "be adequately served by nondiscriminatory alternatives."\^[357]

slaughtered more than 100 miles from the place of sale." *Brimmer*, 138 U.S. at 82-83.

351. *Fort Gratiot*, 112 S. Ct. at 2024. The *Fort Gratiot* defendants also attempted to distinguish the patent discrimination cases by arguing that the state statute gave counties discretion to allow interstate waste imports. *Id.* at 2025. The Court, however, concluded that this discretionary permission "merely reduced the scope of the discrimination . . . . [I]n this case St. Clair County's total ban on out-of-state waste is unaffected by the fact that some other counties have adopted a different policy." *Id.*

352. *Id.* at 2026 (citing *Sporhase* v, *Nebraska ex rel. Douglas*, 458 U.S. 941, 955-56 (1982)).

353. See infra text accompanying notes 361-397.


356. *Id.* In *Maine v. Taylor*, the Court upheld Maine's complete ban against the importation of live baitfish. *Id.* Maine convinced the Court that the presence of parasites and other characteristics of nonnative species posed a serious threat to native fish that could not be avoided by available inspection techniques. *Id.* The Court concluded:

Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently . . . ."


357. *Fort Gratiot*, 112 S. Ct. at 2027. As its purpose, Michigan argued that the import restrictions enabled counties to plan "for the safe disposal of future waste." *Id.* The Court concluded that Michigan could meet this goal by nondis-
In summary, as outlined by Fort Gratiot, in reviewing a Dormant Commerce Clause challenge to a county ordinance, a court must first determine that the matters regulated involve items of interstate commerce. Second, a court must then determine if the local regulation discriminates against interstate commerce. Such discrimination may be patent, as in Fort Gratiot. Alternatively, such discrimination may be found in the regulation's effect, as in Dean Milk. Finally, such discrimination may exist if the legislature intended to discriminate against interstate commerce. If the court finds discrimination, then it closely examines the legitimacy of the purposes for the discrimination, and strictly considers the availability of nondiscriminatory alternatives. Although such scrutiny is "strict," Maine v. Taylor demonstrates that a state law may withstand the review if a strong record exists. If the court finds that the local law evenhandedly regulates intra- and interstate commerce, and only effects interstate commerce incidentally, i.e., as a consequence of a legitimate police power exercise, then it evaluates the law's validity under the looser Pike v. Bruce Church test. Ultimately, that test balances the local benefits with the burdens on interstate commerce.

B. Sporhase v. Nebraska

For two reasons, Sporhase v. Nebraska, forms the starting point for reviewing the California local groundwater discriminatory means. Id. For example, the Court noted that the State could permissibly limit the volume of waste that operators accept. Id. "There is, however, no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the State." Id.


360. The Supreme Court has been unable to draw a bright line between those "effects" on interstate commerce that are "discriminatory" and those that are merely "incidental." See Brown-Forman Distillers, Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). Cf. Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 400 n.18 (3rd Cir. 1987) (comparing Hunt, 432 U.S. at 333 (1977) (discrimination found) and Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (merely incidental burdens found)). In Norfolk Southern, the Third Circuit concluded that the distinction turns on whether the burden "evidences purposeful discrimination." Norfolk Southern, 822 F.2d at 401 n.18.

First, Sporhase determined that, at least under the circumstances presented by that case,

groundwater was an item of interstate commerce.\textsuperscript{363} Second, \textit{Sporhase} considered in detail a state groundwater export permit scheme. In a discussion that is arguably dicta, the Court upheld three elements of the statutory scheme.\textsuperscript{364} However, it invalidated a reciprocity provision.\textsuperscript{365}

1. \textit{Groundwater in Interstate Commerce}

The appellants in \textit{Sporhase} were farmers who jointly owned contiguous tracts of land that straddled the Nebraska and Colorado state lines.\textsuperscript{366} They pumped water from a well located on the Nebraska parcel to irrigate both the Nebraska and Colorado tracts.\textsuperscript{367} A Nebraska statute, however, required a permit to export groundwater across state lines.\textsuperscript{368} That statute permitted the export if the state "finds that the withdrawal of groundwater requested is \textit{reasonable}, is not contrary to the \textit{conservation and use} of groundwater, and is not otherwise detrimental to the \textit{public welfare}."\textsuperscript{369} As an additional condition to the issuance of a permit, however, Nebraska required that the state to which the groundwater was to be exported permit groundwater export from that state to

Because \textit{Sporhase} leaves so many questions unanswered, however, it cannot be the ending point of the analysis. See, e.g., Tarlock & Frownfelter, supra, at 28 (discussing that the case "raised more questions than it answered").


\textsuperscript{364} \textit{Id.} at 954-57. In the narrowest sense, the only two portions of \textit{Sporhase} necessary to the decision were the holdings that water is an item of interstate commerce and that the reciprocity clause was unconstitutional. See Corker, \textit{supra} note 362, at 414-15.

\textsuperscript{365} \textit{Sporhase}, 458 U.S. at 957-58.

\textsuperscript{366} \textit{Id.} at 944.

\textsuperscript{367} \textit{Id.}


\textsuperscript{369} \textit{Id.} (quoting \textit{Neb. Rev. Stat.} § 46-613.01 (1978) (emphasis added)). The complete statute reads:

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 ground water 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.

Nebraska.\textsuperscript{370} Nebraska sued to enjoin the unpermitted pumping.\textsuperscript{371} The Nebraska state courts rejected defendants' Commerce Clause challenges to the permit scheme, and enjoined the pumping.\textsuperscript{372}

On appeal, the United States Supreme Court reversed. In reaching its decision, the Court first concluded that groundwater was an item of interstate commerce.\textsuperscript{373} The Court did note "the desirability of state and local management of groundwater."\textsuperscript{374} In addition, the Court acknowledged that the "Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry."\textsuperscript{375} Finally, the Court left some room in its analysis for the states' claim of groundwater ownership.\textsuperscript{376} Nevertheless, the Court concluded that these concerns did not eliminate the "interstate dimension" of the groundwater at issue.\textsuperscript{377} Rather, the Court found that "these factors inform the determination whether the burdens on commerce imposed by state groundwater regulation are reasonable or unreasonable."\textsuperscript{378} In the Court's opinion, a decision to exempt groundwater from Dormant Commerce Clause analysis would necessarily restrict Congress' ability to address the "national problem" of groundwater overdraft.\textsuperscript{379}

\begin{itemize}
\item \textsuperscript{370} Sporhase, 458 U.S. at 944. See also supra note 369.
\item \textsuperscript{371} Sporhase, 458 U.S. at 944.
\item \textsuperscript{372} Id. See also State ex rel. Douglas v. Sporhase, 305 N.W.2d 614, 616 (Neb. 1981).
\item \textsuperscript{373} Sporhase, 458 U.S. at 953-54. In reaching this initial conclusion, the Court rejected contrary implications in its earlier opinion in Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908). Sporhase, 458 U.S. at 945-51. In Hudson County, an opinion that included a brief discussion of the Commerce Clause, the Court upheld New Jersey's restrictions on the interstate transfer of water to New York. Hudson County, 209 U.S. at 357. Sporhase found that Hudson County depended upon a state-ownership-of-natural-resources theory overruled in Hughes v. Oklahoma, 441 U.S. 322, 334 (1979). See Grant, State Regulation of Interstate Water, supra note 362, at 600-01.
\item \textsuperscript{374} Sporhase v. Nebraska ex. rel. Douglas, 458 U.S. 941, 952 (1982) (citing California v. United States, 438 U.S. 645, 648 (1978) and reiterating "some of the circumstances that support a general policy of local water management under differing legal systems."). Id. at 952 n.13 (emphasis added).
\item \textsuperscript{375} Id. at 953.
\item \textsuperscript{376} Id.
\item \textsuperscript{377} Id. at 952.
\item \textsuperscript{378} Id. at 953.
\item \textsuperscript{379} Sporhase v. Nebraska ex. rel. Douglas, 458 U.S. 941, 954 (1982). The Court stated:
As evidence of the groundwater's "interstate dimension," the Court cited two factors. First, the Court noted that much water is used for agricultural irrigation. It stated: "The agricultural markets supplied by irrigated farms are worldwide. They provide the archetypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation." Second, the Court noted that the particular aquifer involved in Sporhase—the Ogallala—underlies parts of six states. According to the Court, the Ogallala's "multistate character... confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource."

2. The Nebraska Groundwater Export Statute

After concluding that the groundwater before it was an item of interstate commerce, the Court examined the statutory scheme restricting groundwater export. The Court first found that the permit requirement's "reasonableness," "conservation," and "public welfare" provisions passed the Pike v. Bruce Church, Inc. test for nondiscriminatory, even-handed regulation. The Court accepted the importance, le-
giti, and genuineness of Nebraska’s proffered purpose for these provisions: groundwater conservation. 386 As evidence of the genuineness of Nebraska’s regulatory intent, the Court cited the extensive groundwater management regulations applicable to pumping for in-state purposes. 387 The Court concluded that the first three interstate transfer requirements “may well be no more strict in application than the limitations upon intrastate transfers imposed by [the State].” 388

The Court indicated that a “confluence of [several] realities” supported its conclusion that the first three export permit requirements were reasonable on their face. 389 The Court identified four such “realities.” First, reiterating the distinction between permissible local health regulations and impermissible economic protectionism, the Court located “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 citi-portion of the statute’s “explicit barrier to commerce between the two states.” Sporhase, 458 U.S. at 957. Following Hughes, Sporhase concluded that Nebraska failed to demonstrate “a close fit between the reciprocity requirement and its asserted local purpose.” Id. at 957-58 (citing Hughes, 441 U.S. at 336.)

The Sporhase Court acknowledged that “Commerce Clause concerns are implicated by the fact that [the Nebraska statute] applies to interstate transfers but not to intrastate transfers . . . .” Id. at 955. Nevertheless, the Court reviewed this seemingly patent discrimination under the looser Pike standards because of the substantial restrictions placed upon groundwater pumping for use within Nebraska. Id. at 954-56. In this context, the Court concluded that “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.” Id.

386. Sporhase, 458 U.S. at 944-45. Actually, the Court summarized the proffered purposes as “conserve and preserve.” Id. See also Trelease, Interstate Use, supra note 331, at 328-29 (discussing phrase’s import). These purposes, however, are ultimately contradictory. See, e.g., Corker, supra note 362, at 416 n.82 (citing Douglas L. Grant, Reasonable Groundwater Pumping Levels Under the Appropriation Doctrine: The Law and Underlying Economic Goals, 21 NAT. RESOURCES J. 1 (1981)). For convenience, this article will simply refer to the twin goals as “conservation.” Cf. Trelease, Interstate Use, supra note 331, at 330-35 (discussing promotion of local economy as a legitimate local purpose).

387. Sporhase, 458 U.S. at 955.

388. Id. at 956 (emphasis added). The Court noted that the regulations applicable to the area at issue in the case “strictly limit the intrastate transfer of groundwater; transfers are only permitted between lands controlled by the same groundwater user, and all transfers must be approved [a regional agency].” Id. at 955.

zens . . . [at the core of its] police power."390 Second, the Court noted that both its own equitable apportionment cases and interstate compacts had fostered "the legal expectation that under certain circumstances each State may restrict water within its borders . . . ."391 Thus, the Court stated, "[o]ur law has . . . recognized the relevance of state boundaries in the allocation of scarce water resources."392 Third, although state ownership claims to the groundwater at issue had not precluded the Court from including groundwater within Commerce Clause scope, it nevertheless found these ownership claims "may support a limited preference for its own citizens in the utilization of the resource."393 Fourth, the Court found that Nebraska’s groundwater conservation efforts gave such water "some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."394

After upholding these first three permit requirements, the Court turned to the reciprocity provision. It found that Nebraska had provided "no evidence that this restriction is narrowly tailored to the conservation and preservation rationale."395 The Court noted that the statute prevented the

390. Id. at 956.
392. Sporhase, 458 U.S. at 956.
393. Id. In support of this point, the Court cited Hicklin v. Orbeck, 437 U.S. 518, 533-34 (1978). In Hicklin, the Court used the Commerce Clause to strike down Alaska’s requirement that firms engaged in building the trans-Alaska oil pipeline hire a specified percentage of Alaskan residents to work on the project. Id.
394. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1982). In support of this point, the Court cited its “market participant” case, Reeves v. Stake, 447 U.S. 429 (1980). In Reeves, the Court approved South Dakota’s preference to state citizens for cement sales from a state-operated cement plant. Id. at 440. In so doing, the Court found that South Dakota was acting not as a market regulator, but as a “market participant.” Id. This “market participant” exception to the Dormant Commerce Clause has attracted substantial discussion in both cases and commentaries. See, e.g., Dan T. Coenen, Untangling the Market Participant Exemption to the Dormant Commerce Clause, 88 MICH. L. REV. 395 (1989); Stephanie Landry, Comment, State Immunity from the Dormant Commerce Clause: Extension of the Market-Participant Doctrine from State Purchase and Sale of Goods and Services to Natural Resources, 25 NAT. RESOURCES J. 515 (1985); Karl Manheim, New-Age Federalism and the Market Participant Doctrine, 22 ARIZ. ST. L. REV. 559 (1991).
movement of water from even a water-rich area in Nebraska for more valuable use in a water-deficient area in an adjoining state, simply because the adjoining state prohibited export to Nebraska.\textsuperscript{396} Absent evidence of the necessity for the reciprocity requirement, the Court found that this absolute “requirement does not survive the ‘strictest scrutiny’ reserved for facially discriminatory legislation.”\textsuperscript{397}

C. Is there “Interstate Commerce” in California Groundwater?

Although the Supreme Court had little difficulty finding that the groundwater at issue in \textit{Sporhase} involved interstate commerce, several potential distinctions exist between the Ogallala waters in that case and much of California’s groundwater. First, as noted by the Court, the Ogallala itself underlies several states, including both of the parcels at issue in \textit{Sporhase} \textsuperscript{398} Like the Ogallala, there are interstate aquifers that underlie both California and adjoining jurisdictions.\textsuperscript{399} But, both in absolute numerical terms and in relative com-

\textsuperscript{396} Id. at 958.
\textsuperscript{397} Id. In dicta, the Court stated:

\begin{quote}
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. 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.
\end{quote}

\textit{Id.} (emphasis added).

The Court also found that Congress’ deference to state water laws and approval of interstate compacts “do not indicate that Congress wished to remove federal constitutional constraints on . . . state [groundwater] laws.” \textit{Id.} at 959-60.

\textsuperscript{398} Id. at 953. \textit{But cf.} Corker, \textit{supra} note 362, at 426 (arguing \textit{Sporhase} only infers that interstate aquifer involved).

\textsuperscript{399} For example, California Department of Water Resources Bulletin 118-75 notes that the Honey Lake Valley basin in Lassen County, the Fish Lake Valley basin in Inyo and Mono Counties, the Pahrump Valley basin in Inyo County, and the Ivanpah Valley basin in San Bernardino county all extend into Nevada. \textit{Cal. Dept Water Resources, Bulletin 118-75, California's Ground Water} 70, 74, 76 (1975) [hereinafter \textbf{Bulletin 118-75}]. Similarly, the Klamath River Valley basin in Modoc and Siskiyou counties extends into Oregon. \textit{Id.} at 30. The number of these interstate basins is tiny compared to the hundreds of purely intrastate basins identified in the Bulletin. \textit{Id.}
mmercial importance, the handful of interstate basins is insignificant compared to California's purely intrastate basins.\footnote{400} In particular, of the eight counties that have enacted groundwater export ordinances, five contain only intrastate aquifers.\footnote{401} In addition, virtually all of the precipitation that recharges the overwhelming majority of the intrastate aquifers falls solely on California lands.\footnote{402}

A second distinction between the \textit{Sporhase} export and most of the exports at issue in California to date involves a transfer across state lines.\footnote{403} In \textit{Sporhase}, Nebraska water flowed across the Colorado state line. Similarly, in California, concerns over potential interstate or international groundwater transfers have motivated at least two of the eight local ordinances enacted to date.\footnote{404} Nevertheless, much of the local concern in California over potential groundwater exports involves water pumped from one California county

\footnote{400. For example, all of the important aquifers underlying the Central Valley and the South Coast plain are entirely intrastate. \textit{Id.} at 3, 46, 56, 64.}{
\footnote{401. Tehama, Glenn, Butte, Sacramento, and Nevada counties show no interstate aquifers in Bulletin 118-75. \textit{Id.} at 56, 64, 68. Several basins in Imperial County appear to extend into Mexico. \textit{See id.} at 84. In addition, several more appear tributary to the Colorado River. \textit{Id.} Modoc County's ordinance, applicable only to five named aquifers, includes portions of three that appear to be interstate. \textit{Modoc County, Cal.}, Code § 13.08.020(B) (Surprise Valley, Goose Lake and Tule Lake (Klamath)). \textit{Compare Bulletin} 118-75, \textit{supra} note 399, at 28, 56. The Owens Valley groundwater basin, addressed by the Inyo County ordinance, appears to extend into Nevada from Mono County. \textit{Id.} at 72.}{
\footnote{402. The California Legislature has created special groundwater management districts to regulate water in two areas that straddle the California-Nevada line. Honey Lake Valley Groundwater Management Dist., \textit{Cal. Water Code} app. ch. 129 (West Supp. 1993) (Lassen County, Cal.); Long Valley Groundwater Basin legislation, \textit{Cal. Water Code} app. § 119-1301 (West Supp. 1993) (Sierra & Plumas Counties, Cal.). The Long Valley statute expressly authorizes the respective California counties to "enter into an agreement with the State of Nevada or the County of Washoe [Nevada], or both, for the purposes of groundwater management within the Long Valley Groundwater Basin." \textit{Id.} § 119-1301.}{
\footnote{404. As noted above, water transfers to Mexico sparked the Imperial County groundwater ordinance. \textit{See supra} note 331. Similarly, the Nevada County ordinance was enacted to regulate potential groundwater pumping down the Truckee River into Nevada. Letter from Melanie K. Wellner, Deputy County Counsel, to Gregory S. Weber (Oct. 29, 1992) (on file with author).}
for use in another California county. In addition, although the extensive local, state, and federal aqueduct system in California theoretically makes groundwater “purchases” possible by out-of-state users, to date, little evidence suggests the existence of any market for such out-of-state exports.

A third distinction exists between the Sporhase export and much of the possible groundwater exports from California counties. As noted by the Court, the water exporters in Sporhase intended to use it to irrigate agricultural land. The Court found that the resulting farm products represented the “archetypical” market appropriate to Dormant Commerce

405. Thus, groundwater exports to Southern California sparked regulatory efforts in both Mono and Inyo Counties. See Letter from James S. Reed, Mono County Counsel, to Gregory S. Weber (Oct. 27, 1992) (Mono County Tri-Valley ordinance inspired by proposals to export groundwater to Southern California) (on file with author); Rossman & Steel, supra note 42, at 916-30 (expansion of Los Angeles’ groundwater exports from Inyo County sparked Inyo County ordinance). Similar concerns over in-state competition for groundwater sparked the Tehama ordinance. See Tehama County, Cal., Ordinance 1552, preamble, ¶ 12 (Feb. 4, 1992). Given their geographic location and the lack of demand for their water in Nevada, similar concerns over in-state competition likely sparked the Butte, Glenn, and Sacramento counties’ efforts.

406. For example, the aqueduct network would allow Las Vegas, Nevada, to purchase Sacramento Valley groundwater and exchange it for Colorado surface water rights held by the Metropolitan Water District of Southern California (MWD). The MWD could pump the Sacramento Valley groundwater into the Sacramento River and send it, via the California aqueduct, to Southern California. In exchange, Las Vegas could pump an equivalent amount of water from the MWD’s Colorado River entitlement.

Indeed, by extension, since the City of Denver’s trans-Rocky-Mountain diversion system links the Colorado and Missouri/Mississippi/Ohio River drainage, Sacramento Valley groundwater could be purchased by Pittsburgh, Pennsylvania, through a series of exchanges. In neither case would Sacramento water ever physically leave California. Cf. Harnsberger et al., supra note 362, at 779-80 (discussing hypothetical transfers of Nebraska groundwater to Southern California via pumping and exchanges).

Although these exchanges are hydraulically possible, enormous economic, political, and legal obstacles have restricted their development to date. Moreover, California has been generally perceived as a purchaser of excess Colorado River water, not an exporter of its own. See, e.g., Simms & Davis, supra note 362, at 22-25 to 22-28 (noting “Galloway proposal” to transfer Colorado water to Southern California). Nevertheless, the growing Nevada thirst makes Nevada purchases of California water less theoretical. See Faith Bremner, Critics Attack Las Vegas-Area Groundwater Models, RENO GAZETTE-JOURNAL, Feb. 14, 1993, at 16A (Las Vegas seeking 250,000 acre-feet of groundwater from rural Nevada counties); Faith Bremner, Honey Lake’s Buried Treasure, RENO GAZETTE-JOURNAL, Feb. 14, 1993, at 1A, 16A-18A (Washoe County, Nevada, seeks to pump groundwater from beneath Honey Lake basin).

Clause scrutiny.\textsuperscript{408} Similarly, in California, at least one case has involved the pumping of groundwater by farmers to irrigate parcels in other counties owned by the same farming interests.\textsuperscript{409} Nevertheless, the bulk of the transfers in California probably would take water from irrigation and devote it to municipal or industrial uses.\textsuperscript{410}

In combination, these three distinctions set up a range of similarities to Sporhase. At one end of the continuum, an transfer of water across the state border from an interstate aquifer for agricultural irrigation would fall squarely under Sporhase. As such, a Dormant Commerce Clause analysis would dictate the propriety of any local regulation burdening such a transfer. At the opposite end of the continuum, however, an intrastate water transfer from an intrastate aquifer for nonagricultural uses offers substantial opportunity to distinguish Sporhase. If the distinctions are legally meaningful, then the Dormant Commerce Clause might not apply at all.

The uncertain application of Sporhase beyond its factual setting has drawn the attention of several commentators.\textsuperscript{411} In particular, three have written on the first of the three distinctions relevant to the local California groundwater restrictions: export from an interstate aquifer. Noting the Court's failure to limit its holding to the facts before it, two commentators concluded quickly that Sporhase extends beyond its factual setting, at least to include the interstate export of water from an intrastate aquifer.\textsuperscript{412} This rationale seems quite weak, since judicial holdings are by definition limited to the facts and arguments presented in the case before the deciding court, even if the court does not expressly so state.\textsuperscript{413}

\textsuperscript{408} Id.
\textsuperscript{410} Such transfers are typical of "Post-Reclamation Era" water reallocation. See, e.g., Tarlock & Frownfelter, supra note 362, at 42; Steven J. Shupe et al., Western Water Rights: The Era of Reallocation, 29 NAT. RESOURCES J. 413 (1989).
\textsuperscript{411} See, e.g., Grant, State Regulation of Interstate Water Export, supra note 362, at 601 n.61; Trelease, Interstate Use, supra note 331, at 326-27.
\textsuperscript{412} See Corker, supra note 362, at 426 (Court made no distinction between interstate and intrastate aquifers); Nelson, supra note 362, at 312 n.165 and accompanying text. See also Grant, State Regulation of Interstate Water Export, supra note 362, at 601 n.61.
\textsuperscript{413} See, e.g., Stone v. California, 165 Cal. Rptr. 339, 345 (Cal. App. 1980) (Watt, J., dissenting) ("Repeatedly it has been held that a case is not authority for a point not discussed.").
In an initial attempt to give a more solid doctrinal foundation, Professor Douglas Grant concluded that the Court's rejection of the state ownership theory "is quite likely powerful enough to support [Commerce Clause] scrutiny of state barriers to the export of water from any source that is attractive for interstate export." Upon further reflection, however, Professor Grant found the analysis "more complex."

The problem stems in large part from the Court's uncritical combination of the "agricultural products" and "interstate aquifer" characteristics in its conclusion that the Ogallala presented "interstate" water. Although the Court identifies both factors as evidence of the interstate dimension of the groundwater at issue, it merely hinted at the independent significance of the two factors. Further complications arise from the Court's decision to consider the Dormant Commerce Clause limitations upon state activity coextensive with the limitations placed by affirmative congressional legislation under the clause. Ultimately, Professor Grant draws

415. Grant, State Regulation of Interstate Water Export, supra note 362, at 601 n.62 and accompanying text.
417. The "multistate character of the Ogallala aquifer" appears to be a subsidiary factor in the Court's decision. The Court notes that this "multistate character" merely "confirms the view that there is a significant federal interest in conservation as well as fair allocation of this diminishing resource." Id. (emphasis added). The Court's use of "confirms" suggests that the groundwater's use in agricultural production independently demonstrated such a "significant federal interest." See Grant, State Regulation of Interstate Water Export, supra note 362, at 603.
418. See Grant, State Regulation of Interstate Water Export, supra note 362, at 602-04. Although Sporhase appears to equate the two powers, the Court has otherwise declined to identify expressly the degree of overlap between the dormant and active Commerce Clause limitations upon state activity. See Philadelphia v. New Jersey, 437 U.S. 617, 621-23 (1978) (declining to adopt a "two-tiered definition of commerce"). Cf. Trelease, Interstate Use of Water, supra note 331, at 325 ("The Court clearly intends that the negative commerce clause shall be coextensive with the power of Congress."). But see contra Tangier Sound Watermen's Ass'n v. Douglas, 541 F. Supp. 1287, 1304-06 (E.D. Va. 1982) (in holding that unharvested crabs are not items of interstate commerce, court refused to read the Dormant Commerce Clause as broadly as affirmative Commerce Clause). As noted above, many commentators who are critical of the Dormant Commerce Clause would prefer that the Court sharply curtail, if not outright eliminate, the dormant powers doctrine. See supra note 336. For a different view, see Roger Pilon, Freedom, Responsibility, and the Constitution:
heavily from the Court's preservation of room for Congress to address affirmatively the nationwide problem of groundwater overdraft to reaffirm his earlier conclusion that Sporhase applies to interstate exports from intrastate aquifers.\footnote{419}

Given the broad scope that the Court has given to the affirmative Commerce Clause powers, congressional groundwater overdraft legislation almost certainly could include purely intrastate aquifers.\footnote{420} If the Court continues to treat the dormant and active commerce powers as coextensive, then, as Grant notes, intrastate aquifers would fall within the dormant clause's scope. Indeed, such a broad reading of Sporhase and the dormant commerce power might make irrelevant not only the "multistate character" of the Ogallala aquifer, but also the other two distinctions noted above: a transfer across a state line, and end use in an agricultural product. The famous Minnesota home-grown wheat case demonstrates that a product need not cross a state line before Congress can regulate it under the affirmative Commerce Clause, if that product "affects" interstate commerce.\footnote{421}

\footnote{419. Grant, State Regulation of Interstate Water Export, supra note 362, at 602-04.}

\footnote{420. By analogy, under regulations implementing the Clean Water Act (CWA), 33 U.S.C. § 1251 (1977), the federal government regulates "nonnavigable intrastate waters whose use or misuse could affect interstate commerce." See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123-26 (1985) (upholding, as "waters of the United States" within the meaning of the CWA, Army Corps of Engineers' "wetlands" definition that included lands "adjacent to waters of the United States"). \textit{But see also id.} at 124 n.6, 131 n.8 (leaving open Corps' ability to regulate wetlands not adjacent to bodies of open water). \textit{Cf.} Harnsberger et al. supra note 362, at 801-02 (without distinguishing potential differences in scope of affirmative and negative powers, authors conclude that it is "difficult to imagine any activity that arguably could not satisfy the interstate nexus").}

\footnote{421. \textit{See} Wickard v. Filburn, 317 U.S. 111, 123-24 (1942). In \textit{Wickard}, the Court stated: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, by reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." \textit{Id.} at 125. Under \textit{Wickard}, a court would still have to determine whether the intrastate use of groundwater from intrastate aquifers "exerted a substantial economic effect on interstate commerce." \textit{Id.} The products and services produced in reliance upon such intrastate waters undoubtedly represent substantial economic activity. \textit{See, e.g.,} \textit{Cal. Dept of Water Resources, Ground Water Study, San Joaquin Valley} 1 (4th Progress Report, Sept. 1989) (the largest
Similarly, under the Commerce Clause, Congress regulates many more markets than the "archetypical" market for agricultural commodities.\footnote{422}

If the Court ultimately adopts the position of the dissent in \textit{Sporhase} and finds that the Dormant Commerce Clause sweeps less broadly than the active Commerce Clause, then the noted distinctions between \textit{Sporhase} and the California groundwater regulations become critical to delineating \textit{Sporhase}'s applicability. The third noted distinction—between agricultural and nonagricultural end use—seems insubstantial. Although \textit{Sporhase} emphasized the "archetypical" nature of the agricultural market for which the groundwater there formed a vital input,\footnote{423} an urban export restriction challenger should easily be able to demonstrate the value of groundwater to production of nonagricultural goods. In this context, the Court's emphasis on "archetypical" should not preclude comparison with other "typical" markets for which the Commerce Clause's Framers might well have envisioned scrutiny of protectionist state activity. Such other "typical" markets probably include products of urban areas.\footnote{424}

The second distinction—lack of a transfer across state lines—proves more difficult to dismiss. The application of \textit{Sporhase} to intrastate water transfers could subject longstanding state place-of-use restrictions to new scrutiny.\footnote{425} Moreover, \textit{Sporhase} implicitly accepts, and acknowledges that courts have fostered, a state's ability to restrict intrastate water transfers.\footnote{426} Yet this implicit acceptance occurs not in the portion of the case discussing \textit{whether} groundwater

\textit{state groundwater basin—the San Joaquin Valley basin—provides 50\% of all water used in "California's largest and most productive block of farmland"}. If the production of wheat in \textit{Wickard} "affected" interstate commerce, then the production of groundwater in the San Joaquin Valley—or other intrastate aquifers used for irrigation—surely affects interstate commerce.

\footnote{422}{Indeed, it is hard to consider a "market" that is not somehow regulated by congressional legislation.}
\footnote{423}{Sporhase v. Nebraska \textit{ex. rel.} Douglas, 458 U.S. 941, 953 (1982).}
\footnote{424}{See, \textit{e.g.}, Pilon, \textit{supra} note 418, at 533-34 n.108 and accompanying text (Commerce Clause aimed at preventing state protection of "local manufacturers and sellers from out-of-state competitors" (emphasis added)).}
\footnote{425}{See Nelson, \textit{supra} note 362, at 314-20 (discussing area-of-origin restrictions after \textit{Sporhase}).}
\footnote{426}{See \textit{Sporhase}, 458 U.S. at 955-56 (noting Nebraska's "severe withdrawal and use restrictions on its own citizens" and the partially court-fostered "legal expectation that . . . each State may restrict water within its borders").}
is an item of interstate commerce, but rather in the evaluation of the burden upon a recognized item of interstate commerce.\textsuperscript{427}

Ultimately, the fact that no state line has been crossed in many intrastate water transfers may indicate only the gravity of the burden and not whether one exists.\textsuperscript{428} Similarly, the present lack of an interstate market for purchases of California groundwater\textsuperscript{429} should not preclude application of \textit{Sporhase} to local California groundwater export restrictions. \textit{Sporhase} itself involved no groundwater “market.”\textsuperscript{430} No consideration apparently changed hands for use of the Nebraska groundwater in Colorado; rather, the same parties owned both the site of extraction and the site of use.\textsuperscript{431} Apart from the interstate nature of the aquifer there at issue, what convinced the \textit{Sporhase} Court that the groundwater was an item of interstate commerce was its importance as an input for the production of commodities that entered interstate commerce.\textsuperscript{432}

As discussed in \textit{Sporhase} and considered in more detail below, many intrastate restrictions on the acquisition and transfer of groundwater might easily survive a Dormant Commerce Clause analysis.\textsuperscript{433} Nevertheless, the ease with

\textsuperscript{427} Compare \textit{Sporhase} v. Nebraska ex. rel. Douglas, 458 U.S. 941, 945-54 (1982) (finding groundwater is an item of interstate commerce) \textit{with id. at} 954-58 (discussing Nebraska scheme’s impact on interstate commerce).

\textsuperscript{428} Compare \textit{Wyoming} v. \textit{Oklahoma}, 112 S. Ct. 789, 801 (1992) (“volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce”). \textit{See also} Grant, \textit{State Regulation of Interstate Water Export, supra} note 362, at 614-15. Professor Grant examines the ability of a riparian state to prevent interstate water exports under the riparian doctrine’s limitation of riparian water to riparian parcels. \textit{Id.} He concludes that a court would easily find that “the riparian rule is an evenhanded measure serving legitimate state interests and affecting interstate commerce only incidentally.” \textit{Id.} at 614.

\textsuperscript{429} See \textit{supra} notes 403-406.

\textsuperscript{430} See \textit{Sporhase}, 458 U.S. at 944.

\textsuperscript{431} \textit{Id.}

\textsuperscript{432} For this reason, a California resident groundwater appropriator or purchaser should have standing in federal court to challenge a local export restriction even if that resident intends to use the water in California. Under article III, to have standing, a plaintiff must demonstrate actual injury caused by governmental action and redressable by judicial decision. \textit{See, e.g.}, \textit{Lujan} v. \textit{Defenders} of \textit{Wildlife}, 112 S. Ct. 2130, 2136 (1992). Here, the “injury” involves the economic impact caused by the restricted availability of a production input, i.e., groundwater.

\textsuperscript{433} See \textit{infra} text accompanying notes 478-534.
which a well-crafted, nondiscriminatory scheme passes muster should not preclude a Commerce Clause challenge to discriminatory schemes merely because they involve an intrastate water export restriction. A court should be able to examine the circumstances giving rise to the intrastate restriction to determine whether the local legislature discriminated against interstate commerce. The Supreme Court's decisions in Dean Milk and Fort Gratiot, discussed above,\textsuperscript{434} buttress this conclusion. In both of those cases, the Court rejected challenges to geographic limitations upon goods imported into a municipality, even though those regulations substantially burdened intrastate sales as well as interstate sales.\textsuperscript{435} In both cases, the Court found discrimination against interstate commerce, even if intrastate users beyond the municipal boundary were also burdened.\textsuperscript{436} A California plaintiff challenging a local groundwater export restriction should have the opportunity to show that even intrastate export restrictions burden interstate commerce by raising the price or reducing the availability of water—often the most critical production input for agricultural or manufactured goods that themselves will travel in interstate commerce.

D. \textit{Affirmative Discrimination Against Interstate Commerce?}

Assuming that the water subjected to a particular local export restriction is an item of interstate commerce, the next step in the analysis examines whether the restriction “affirmatively discriminates against”\textsuperscript{437} interstate commerce. As noted above, an ordinance may patently discriminate, may discriminate in effect, or may manifest a discriminatory purpose.\textsuperscript{438} To date, none of the local California groundwater export restrictions facially limit their application to exports beyond the state's borders. Rather, as the “wall” beyond which they restrict export, they use either their local political borders or seemingly politically neutral hydrogeological borders.\textsuperscript{439} Thus, any affirmative discrimination will be found, if

\begin{itemize}
\item \textsuperscript{434} See supra text accompanying notes 349-351.
\item \textsuperscript{435} Id.
\item \textsuperscript{436} Id.
\item \textsuperscript{437} See, e.g., Maine v. Taylor, 477 U.S. 131, 138 (1986).
\item \textsuperscript{438} See supra text accompanying notes 358-359.
\item \textsuperscript{439} See infra text accompanying notes 440-442.
\end{itemize}
at all, by looking to discriminatory effects or purposes resulting from the placement of these "walls."

The likelihood of finding a discriminatory effect may well depend upon the type of boundary used to trigger pumping restrictions. The local regulations exhibit a range of express recognition of local political boundaries as a regulatory threshold. At one end of the spectrum, several of the ordinances burden only those who will move groundwater beyond the jurisdiction's political boundaries. At the other end of the spectrum, several jurisdictions burden all pumpers within their boundaries, whether or not they are exporting from that jurisdiction. In the middle, the rest of the jurisdictions burden only those泵ers who are exporting beyond some often undefined "basin."
This range of approaches to the relationship of the "walls" to political boundaries raises a conceptual wrinkle peculiar to local ordinances. When a court examines whether a state legislature has discriminated against interstate commerce, the court looks to whether the state has shielded intrastate interests from competition from out-of-state interests.\textsuperscript{443} When a local government acts to protect local businesses, however, it is as likely to be concerned with insulating the local economy from intrastate as well as from out-of-state competitors.\textsuperscript{444} A court analyzing whether a local ordinance discriminates purposefully or practically against interstate commerce must decide initially how to focus the inquiry. On the one hand, a court might focus the inquiry narrowly on whether the ordinance shields the local economy from out-of-state competition. Such a narrower focus would allow a relatively greater share of local ordinances to survive. On the other hand, a court might focus the inquiry on whether the ordinance shields the local economy from all non-local competition, by any competitor who is otherwise engaged in interstate commerce.\textsuperscript{445} Such a broader reading would make it easier to find discrimination, and thus trigger stricter scrutiny.

Neither of the two principal Supreme Court "local regulation" cases, \textit{Dean Milk} and \textit{Fort Gratiot}, address this point directly. Language in \textit{Dean Milk} suggests that the narrow focus is appropriate.\textsuperscript{446} \textit{Fort Gratiot} is ambiguous on the point.\textsuperscript{447}


\textsuperscript{444} For example, in \textit{Dean Milk}, the Madison, Wisconsin, ordinance protected local milk producers from competition from other, non-local Wisconsin producers, as well as from Illinois producers. \textit{See supra} note 350.

\textsuperscript{445} This distinction echoes the one between cases that examine the actual movement of goods across state lines, and cases such as \textit{Wickard}, where intrastate commerce merely "affected" interstate commerce. \textit{See supra} note 421.

\textsuperscript{446} \textit{Dean Milk Co. v. City of Madison}, 340 U.S. 349, 354 (1951). In that case, the Court found that the ordinance "erect[ed] an economic barrier protecting a major local industry against competition from without the State . . . ." \textit{Id.} (emphasis added).

\textsuperscript{447} \textit{See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources}, 112 S. Ct. 2019, 2024 (1992). In \textit{Fort Gratiot}, the Court initially announced its concern with restrictions on the movement of goods across state
The Ninth Circuit, however, has recently used the broader reading in a case arising out of a California city’s actions. In *Shell Oil Co. v. City of Santa Monica*, the court considered Santa Monica’s franchise fee agreement with an interstate pipeline company. The company claimed that the excessive fees improperly burdened interstate commerce. In rejecting the Dormant Commerce Clause challenge, the Ninth Circuit concluded that “Santa Monica has not acted to restrict the flow of goods or natural resources from being shipped into or outside of its boundaries in order to protect producers or suppliers within the city.” The court’s focus on the city’s acts to prefer local producers from competition from anywhere beyond the city’s borders implicitly adopts the broader focus. Had the city’s ordinance favored local producers over non-local competitors, discrimination against interstate commerce would have been found, and stricter scrutiny would have been justified.

As a Ninth Circuit case, *Shell Oil* would control the resolution of any dormant commerce challenge to a California local groundwater export restriction. Since *Shell Oil* involved no such local preference, however, its language is arguably dicta. Nevertheless, if a trial court were to adopt the *Shell Oil* language, then those California local groundwater management ordinances that burden pumpers who wish to export beyond county or management district borders demonstrate the strongest likelihood of finding “affirmative discrimination” against interstate commerce. Such ordinances favor local water users over non-local users, and give local producers, particularly irrigators, competitive advantages over non-local

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448. 830 F.2d 1052 (9th Cir. 1987), cert. denied, 487 U.S. 1235 (1988).
449. Id. at 1055.
450. Id. at 1058 (emphasis added). The court noted that there were neither local oil producers nor local oil pipeline operators within the city limits who might be favored by the city’s agreement. Id.
producers. Inevitably, these competitive advantages discriminate against interstate commerce by reducing the availability of a critical input into the production of agricultural and manufactured goods whether produced out-of-state or produced intrastate and sold out-of-state. This rationale justifies strict scrutiny under Hughes.\footnote{Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979).}

In contrast, absent evidence of a discriminatory purpose, ordinances that burden all pumpers within a jurisdiction equally, without regard to the water’s place of use, manifest no affirmative discrimination against interstate commerce. Where a political entity places the same transfer restrictions on both intra-jurisdictional pumping and export pumping, a court should not find affirmative discrimination against interstate commerce.\footnote{As Sporhase demonstrated, this distinction remains true even if the particular statute at issue on its face applies only to extra-jurisdictional exporters. See Sporhase v. Nebraska ex. rel. Douglas, 458 U.S. 941, 955-56 (1982). Thus, a court will examine the entire scheme to see if, on whole, it evenhandedly burdens intra- and extra-jurisdictional users.}

Like the first three provisions of the Nebraska export permit scheme upheld in Sporhase, these restrictions require examination under the less stringent Pike v. Bruce Church factors.\footnote{See supra note 348.}

Finally, ordinances in the middle group (i.e., those that place their burdens in reference to a hydrogeological boundary) defy easy categorization. On the one hand, they share similarities with evenhanded legislation. When an ordinance regulates the movement of water beyond a hydrogeological boundary (e.g., the surface area overlying an aquifer), it does not regulate pumpers in reference to a political boundary. Thus, commerce is not discriminated against simply because someone seeks to use water in another political entity. The regulatory burden falls on citizens of the state political subdivision itself, as well as other citizens of that state, and citizens of other states.\footnote{See Laney, supra note 362, at 1068-71 (1980 Arizona Groundwater Management law evenhandedly regulates groundwater exports from defined critical management areas); James A. Glasgow, Note, 9 Ariz. L. Rev. 334, 338 n.38 (1967) (discussing City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex. 1966), aff’d mem., 385 U.S. 35 (1966)) (“Conservation statutes are valid exercises of the police power only if they operate to restrict the depletion of the water supply within hydrological regions . . . .”)} No economic balkanization along state lines, or sub-state lines, would necessarily result. As
such, the burden on commerce resulting from such place-of-use restrictions would receive scrutiny under *Pike v. Bruce Church.* On the other hand, hydrogeologically based place-of-use restrictions are subject to manipulation. For example, a frequently used regulatory category is a groundwater "basin." This amorphous concept may be defined in reference to political boundaries. In such an instance, the hydrogeological and political borders will overlap. If the local legislative body intended to discriminate against nonlocals by adopting such a pseudo-political boundary, the discriminatory purpose alone would deserve scrutiny under the stricter *Hughes* test. Absent evidence of a discriminatory purpose, however, a court would probably find the use of a basin's boundaries a neutral device.

Nevertheless, even where a legislative body does not deliberately manipulate the definition of "basin" to escape a finding of "affirmative discrimination," the underlying local preference behind even hydrogeologically based place of use restrictions mandates stricter scrutiny. These preferences take the form of exemptions from regulatory burdens placed on those pumpers who use the water beyond the hydrogeologically defined area. These local preferences inevitably favor those pumpers who use the water within the political jurisdiction containing the hydrogeologically defined place-of-use at the expense of those who seek to use the water in any other political jurisdiction. The effect is the same as if the counties had said: wheat grown in a given field may only be converted to flour and baked on that field. The local political subdivisions can justify their aquifer-based or basin-based

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455. See Grant, *State Regulation of Interstate Water Export,* supra note 362, at 614 (discussing riparian doctrine “most likely . . . an evenhanded measure”). Although *Sporhase* implicitly approved intrastate place-of-use restrictions, they were not at issue in that case. Thus, the court did not indicate what level of scrutiny such restrictions receive. Conceivably, after *Maine v. Taylor,* an arid state might be able to demonstrate the validity of its intrastate place-of-use restrictions even under the tougher *Hughes* test.

456. See, e.g., *Butte County, Cal., Code* § 33-3 (groundwater “mining” banned when water transported from the “basin”). The ordinance does not, however, define “basin.”

457. See *Schneider,* supra note 14, at 101 (political boundaries are possible lateral boundaries of groundwater “basins”). *Compare Inyo County, Cal., Code* § 7.01.010(g) (“Owens Valley Groundwater basin” defined by reference to county boundary to indicate which portion of multi-county basin is relevant to the Inyo County groundwater management ordinance).

458. See supra note 454.
schemes, but the stricter scrutiny of the *Hughes* test should apply.

E. **Affirmative Discrimination: Hughes Strict Scrutiny**

1. **Proper Purpose?**

The preceding discussion highlights some of the conceptual difficulties in applying the Dormant Commerce Clause cases. Not only are the distinctions subtle, but the analyses overlap substantially.\(^{459}\) In particular, the determination of "discrimination" may well turn upon the determination of the ordinance's "purpose."\(^{460}\)

Either separately, or in conjunction with its examination of "discrimination," a court will examine those local regulations that affirmatively discriminate against interstate commerce in groundwater under the two-part *Hughes* test.\(^{461}\) Under that test, the court first asks if the local legislature had a legitimate purpose for its discriminatory legislation. Second, the court asks if the local legislature could have met its goals with less discriminatory legislation.

Section III's preemption discussion considered a range of local legislative justifications for groundwater export restrictions.\(^{462}\) At one end of the continuum lie ordinances based upon conservation; at the other end lie ordinances with an avowedly protectionist purpose. In the middle lie those that blend conservation and protectionist rationales.

To the extent that a local legislative body actually bases its groundwater export scheme on conservation and preservation of the resource, *Sporhase* affirms that the local purpose is "unquestionably legitimate and highly important."\(^{463}\) Similarly, the hypothetical, avowedly protectionist ordinance

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459. As noted above, a subtle, almost imperceptible line separates ordinances whose effects on interstate commerce are "discriminatory" from those whose effects are merely "incidental" to an evenhanded scheme. See supra note 360.

460. In attempting to reconcile seemingly similar Supreme Court cases involving discriminatory effects and incidental effects, the Third Circuit has concluded that the analysis turns on finding a discriminatory purpose. Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 400-01 n.18 (3rd Cir. 1987).


462. See supra notes 232-233 and accompanying text.

would unquestionably fall on this prong alone, as protection of local economies at the expense of the interstate market is anathema to the Dormant Commerce Clause.\textsuperscript{464} Where a local legislative body articulates a conservation purpose, but evidence exists of a protectionist purpose, the Court will likely defer to the articulated purpose unless that purpose could not possibly have been intended.\textsuperscript{465} Finally, even if evidence exists of an actual mixture of proper and improper purposes, a court will not strike the ordinance down unless it determines that the local legislative body would not have enacted it “but for” the improper purpose.\textsuperscript{466}

To date, none of the California ordinances or special district legislation evince purely protectionist goals.\textsuperscript{467} Rather, to the extent that they contain legislative findings, they demonstrate either purely conservationist purposes; or, more frequently, a mixture of conservationist and protectionist goals.\textsuperscript{468} Absent the strongest evidence of a purely protectionist purpose, all of these purposes should survive even Hughes scrutiny.

\textsuperscript{464} See also infra text accompanying note 480 (discussing potential scope of conservation rationale).


\textsuperscript{467} In equal protection cases, the Court has articulated this “but for” test for determining the propriety of conduct motivated by a mixture of proper and improper purposes. \textit{See} Hunter v. Underwood, 421 U.S. 222, 232 (1985). \textit{Cf.} Maine v. Taylor, 477 U.S. at 149-51 (in Commerce Clause challenge, Court upheld trial court determination that evidence of protectionist intent was inconclusive).

\textsuperscript{468} As long ago as \textit{Dean Milk}, the Court recognized that there are only “rare instance[s] where a state artlessly discloses an avowed purpose to discriminate against interstate goods.” \textit{Dean Milk} v. City of Madison, 340 U.S. 349, 354 (1951). Although \textit{Sporhase} and others demonstrate that patent discrimination against interstate trade is not unthinkable, much rarer are cases where the legislature has “artlessly” disclosed an avowedly protectionist purpose. \textit{Cf.} Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2898 n.12 (1992) (in takings analysis, inappropriate for analysis to turn on whether legislature enacted law to “prevent harms” rather than “conferr benefits upon public,” since latter easily recast as former, so that test would merely amount to “whether the legislature has a stupid staff”).
2. Less Discriminatory Alternatives?

Prior to Maine v. Taylor, the Court had crafted nearly a *per se* rule to invalidate affirmatively discriminatory state legislation. Although it has evaluated such statutes under the two-part Hughes test, it has not found one that survived such strict scrutiny. In Maine v. Taylor, however, the Court upheld a complete baitfish importation ban against charges that less-discriminatory alternatives existed.

In considering the application of Hughes and Maine v. Taylor to the local groundwater export ordinances, two situations apply. First, some of the ordinances place outright restrictions on exports. Second, all of the schemes require a permit.

Despite the Court's apparent partial softening of the Hughes test in Maine v. Taylor, many local groundwater export ordinances would still probably fail Hughes' second step. This failure is almost a certainty for the three outright-restriction ordinances noted above. If conservation is the admitted goal of these ordinances, little justification exists for singling out exporters to bear all the burdens of conservation. Among these three bans, the least justifiable are the two that burden only those who export beyond the jurisdiction's legal boundary. Those two ordinances would include someone who pumped from one portion of a basin in the subject county for use in another portion of the same basin in a different county.

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470. Maine v. Taylor, 477 U.S. 131, 146-47 (1986) (upholding trial court's determination that sampling and inspection procedures do not exist to determine whether imported baitfish were infected with parasites). See also D. Lee Shields, Note, 29 NAT. RESOURCES J. 291, 298-300 (1989) (reviewing Maine v. Taylor, and concluding that Court has relaxed its scrutiny).

471. See BUTTE COUNTY, CAL., CODE § 33-4 (groundwater mining prohibited if water taken out of area denoted by pseudo-hydrological terms); GLENN COUNTY, CAL., CODE § 20.04.400 (groundwater mining prohibited if water taken out of county); TEHAMA COUNTY, CAL., CODE § 9.40.020 (groundwater mining prohibited if water taken out of county).

472. See supra note 232.

473. See supra note 471.

474. See GLENN COUNTY, CAL., CODE § 20.04.400 (groundwater mining prohibited if water taken out of county); TEHAMA COUNTY, CAL., CODE § 9.40.020 (groundwater mining prohibited if water taken out of county).

protectionist interests. But even an ordinance that only singled out appropriators for regulation should also fail under this second *Hughes* test. The principal hydrological difference between an appropriator and an overlying user is that some water pumped by the overlying user will percolate back to the aquifer again. In most instances, however, this recharge is a relatively small component of overall water use; most of the water used in irrigation by either an appropriator or an overlying user will be lost from evapotranspiration. There seems no justification for allowing overlying users to pump freely simply because perhaps ten percent of the water they pump might return to the aquifer, at least not without a strong showing that no further conservation can be obtained from the ninety percent of evapotranspirative losses experienced by both appropriators and overlying users.

As for the permit schemes, facial challenges to such schemes rarely prevail. But here, these schemes single out exporters, as variously defined, for permits. The burden of providing the information necessary to pump for export may fall heavily on an applicant, particularly one seeking to export from a basin whose hydrogeological characteristics and prior withdrawal patterns are not well documented. Again, merely forcing such a potential pumper to obtain a permit poses a substantial burden not shared by other pumpers who may be wasting water. If the locality truly is interested in conservation, then it certainly has more evenhanded ways of spreading the regulatory burden.

476. "Evapotranspiration" is the "loss of water from the soil both by evaporation and by transpiration from the plants growing thereon." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 429 (1986). Experts estimate that about three-quarters of all water applied to an irrigated field is used by the plants for evapotranspiration. See letter of Baryohay Davidoff (Chief, Agricultural Water Conservation Section, Department of Water Resources) to Gregory S. Weber (Nov. 16, 1993) (72% of applied water) (on file with the author). The remaining quarter goes to surface water runoff, salt leaching, or deep percolation. Thus, at best, only a fraction of a quarter of the applied water might actually return to the groundwater basin.

477. In *Sporhase*, the Court allowed a facial challenge because there was no question that, under the reciprocity clause, Nebraska would not grant the export permit. *Sporhase v. Nebraska* ex. rel. Douglas, 458 U.S. 941, 944 n.2 (1982).
F. **Evenhanded Regulation: Pike v. Bruce Church**

To the extent that a local groundwater ordinance evenhandedly regulates, its validity will depend on the *Pike v. Bruce Church* factors. In this regard, *Sporhase* provides some initial guidance. As noted above, the Court easily concluded that the Nebraska groundwater export statute's reasonableness, conservation, and public welfare criteria passed muster.

Nevertheless, the Court's analysis leaves open many questions about the scope of its discussion.

Like the *Hughes* test, the *Pike v. Bruce Church* test first examines the purpose behind the local regulation. As noted above, *Sporhase* affirmed the constitutional validity of groundwater conservation and preservation. It also upheld a permit applicant's obligation to demonstrate that the proposed export would be reasonable, not contrary to conservation goals, and consistent with public welfare. At first glance, an evenhanded local California groundwater export permit scheme patterned after these three Nebraska provisions could also be upheld under *Sporhase***.

To support its conclusion, *Sporhase* cited a "confluence" of four "realities" that made it "reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage." These four "realities" included: (1) there is a "core" state police power to protect citizens' "health"; (2) there is a judicially fostered "legal expectation" that states may occasionally restrict water within their borders; (3) a state's groundwater ownership claims support "a limited preference for its own citizens"; and (4) state conservation

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478. Id. at 957.
479. See id. at 954-55, 957-58.
480. See supra notes 463-464 and accompanying text.
482. *Sporhase* emphasized that these restrictions on groundwater exports appeared no more onerous than intrastate export limitations imposed by the local water management district. *Sporhase* v. Nebraska ex rel. Douglas, 458 U.S. 941, 955-56 (1982). These intrastate restrictions limited transfers to "lands controlled by the same groundwater user," and required approval for all transfers from the local groundwater management district. *Id.* at 955.
483. *Id.* at 956 (quoting Hicklin v. Orbeck, 437 U.S. 518, 534 (1978)) (emphasis added).
484. *Id.*
485. *Id.*
486. *Id.* at 956-57.
efforts made groundwater akin to "a good publicly produced and owned in which a State may favor its citizens in times of shortage." Commentators have questioned how Sporhase applies in cases where these four realities may not "conflux" so similarly.

Fundamental to the Court's discussion is its reference to conservation "in times of severe shortage." Sporhase itself did not define "shortage." Moreover, as a facial challenge, the case proceeded without a record that fully developed the particular circumstances creating the "shortage" in the applicable area of southwestern Nebraska. As Professor Grant has discussed, the four supporting "realities" point in different directions for the role that economic protectionism can play in justifying a finding of "shortage." In particular, the first reality specifically distinguishes the state's core police power interest in "protecting the health of its citizens—and not simply the health of its economy." Nevertheless, both the second and fourth "realities" implicitly incorporate local economic content.

The second reality involved the twin interstate water allocation vehicles of equitable apportionment and interstate compacts. Under the equitable apportionment doctrine, the Court can consider claims for a state's future needs for water, although it requires a high evidentiary threshold before existing uses can be disrupted. The fourth reality

488. See, e.g., Grant, State Regulation of Interstate Water Export, supra note 362, at 607-12; Barnett, supra note 362, at 171-72 (discussing three alternative readings to the "realities").
489. The groundwater management district involved in the Sporhase transfer had been created by a state administrative officer's determination that groundwater was inadequate in the area "to meet present or reasonably foreseeable needs . . . ." Sporhase, 458 U.S. at 955 (quoting NEB. REV. STAT. § 46-658(1) (Supp. 1981)). Under district rules, the district further determined that the township in which the Sporhase farmers' land was located faced "critical" water table declines. Id. On the facial challenge, the Court did not discuss the validity of these two findings.
490. Grant, State Regulation of Interstate Water Export, supra note 362, at 609.
491. Sporhase, 458 U.S. at 956 (emphasis added).
492. See Grant, State Regulation of Interstate Water Export, supra note 362, at 609 (discussing the difficulty of giving meaning to the second and fourth realities without including economic content).
493. See generally Tarlock, supra note 391 at 381; Grant, The Future of Interstate Allocation of Water, supra note 414, at 977.
references the "market participant" exception to the Commerce Clause.\textsuperscript{495} Under this exception, where a state expends funds to create a product, it can favor its own citizens in the distribution of such a product. The Court's reference to this doctrine in \textit{Sporhase} is puzzling, since, if broadly extended, it could allow the market participant exception to swallow the Dormant Commerce Clause rule in numerous instances.\textsuperscript{496}

In its application to the local California ordinances at issue, these uncertainties in \textit{Sporhase} thus raise two important, interrelated questions. First, what criteria can a county or management district consider in determining whether a "shortage" is occurring? Second, several of the California localities that have enacted their groundwater export schemes have done so even though groundwater is otherwise in no danger of immediate shortage.\textsuperscript{497} In effect, these localities have attempted to head off the possibility of such shortages. How far in advance of a "shortage" can a California locality enact a Nebraska-styled conservation permit scheme? These two questions overlap substantially. In addition to these inquiries, application of \textit{Sporhase} also raises a question about

\textsuperscript{495} See, e.g., Reeves, Inc. v. Stake, 447 U.S. 429, 436-40 (1980) (holding that South Dakota, in operation of state-owned cement plant, could favor residents in cement allocation). \textit{See also supra} note 394 (listing recent "market participant" articles).

\textsuperscript{496} Arguably, any state restriction on development of any natural resource makes that resource's continued availability "not simply happenstance," at least where the state also claims some public "ownership" of this resource. \textit{See} Sporhase v. Nebraska \textit{ex. rel.} Douglas, 458 U.S. 941, 957 (1982). The market participant exception avoids Dormant Commerce Clause analysis entirely. Thus, if this "reality" independently supports the regulatory scheme, it may allow a reviewing court to bypass the \textit{Pike} test entirely. Since \textit{Sporhase} itself used that test despite its reference to the market participant cases, it cautions against overreading the meaning of the reference to this exception. Indeed, the Court admitted that the conserved groundwater had only "some indicia" of a good publicly produced and owned. \textit{Id.} Because the Court did not discuss the \textit{absent} indicia of such publicly produced and owned goods, this reference leaves the market participant exception less clear.

\textsuperscript{497} None of the counties that have enacted groundwater export ordinances are identified by the State as experiencing "critical conditions of overdraft." \textit{See} CAL. DEPT OF WATER RESOURCES, BULLETIN 118-80, GROUNDWATER BASINS IN CALIFORNIA 3-4 (1980). The State identified portions of Modoc and Inyo County as experiencing "special problems." \textit{Id.} Other "special problem" areas included the Sierra Valley and Long Valley basins, now under management by special district legislation. \textit{CAL. WATER CODE} app. ch. 119 (West Supp. 1993). Bulletin 118-75 generally indicates that Sacramento County has experienced overdraft. \textit{See} BULLETIN 118-75, \textit{supra} note 399, at 115 (fig. 16).
the criteria that a local district can use to determine whether an export is "reasonable" and consistent with conservation and public welfare needs.498

Two trial court decisions involving the long-standing feud between the City of El Paso, Texas, and New Mexico over New Mexico's efforts to restrict groundwater exports provide the only post-Sporhase discussions on point.499 In particular, in the second case, known as "El Paso II,"500 the court considered New Mexico's post-Sporhase revisions to the water export restrictions struck down in "El Paso I."501 El Paso II sent conflicting signals on the propriety of post-Sporhase state groundwater export restrictions.502 On the one hand, in El Paso II, the court struck down a two-year embargo on all appropriations from the relevant area of the state.503 Under the circumstances, it found that this facially neutral ban, applicable both to appropriations for in-state as well as interstate use, actually attempted to discriminate against interstate commerce.504 Similarly, the court struck down the portion of the statute that required special consideration of applications to export water from domestic and transfer wells.505 It found that this portion of the scheme facially discriminated against interstate commerce and failed the strict scrutiny test.506 On the other hand, the court upheld New Mexico's general criteria by which it examined applications for groundwater export.507

498. Sporhase, 458 U.S. at 957.
502. See infra text accompanying notes 503-507.
505. Id. at 703-04.
506. Id. The court noted that interstate transfers might be detrimental to the public welfare in some circumstances when an intrastate transfer might not be. Id. Nevertheless, the statute failed because it prevented the engineer from barring any intrastate transfers that might be contrary to the public welfare. Id.
507. Id. at 700-01. The conservation and public welfare criteria, and the six statutory factors discussed below, applied to "all interstate uses of groundwater—new appropriations from declared and undeclared basins, new surface water appropriations, transfers of water rights, and supplemental and domestic
In its decision, the court concluded that the statute’s Nebraska-like “public welfare” criterion directed the New Mexico State Engineer to consider not only economic considerations, but also “health and safety, recreational, aesthetic, [and] environmental . . . interests.”\(^{508}\) The court acknowledged that nearly all aspects of the “public welfare” had “economic overtones.”\(^{509}\) It reiterated that “public welfare” cannot serve as a subterfuge for economic protectionism.\(^{510}\) The court found indications, sufficient to avoid a facial challenge to the criterion, that the state considered such factors under a “public interest” rubric when acting on applications to appropriate surface water for in-state uses.\(^{511}\) Ultimately, the court announced a willingness to narrow the broad “public welfare” criterion to exclude impermissible economic protectionism criteria.\(^{512}\)

In its discussion, the court announced a reasonableness standard to govern a state’s ability to legislate in advance of a water crisis.\(^{513}\) To determine whether such regulation is “reasonable,” a court should consider: “The proximity in time of a projected shortage, the certainty that it will occur, its predicted severity, and whether alternative measures could prevent or alleviate the shortage. . . .”\(^{514}\) The court equated these reasonableness factors with the balancing test required

\(^{508}\) Id. at 700. This criterion was part of a trio of factors that also included the evaluation of the proposed export applicant’s impact both on existing water rights and on the conservation of water “within the state.” Id. at 697. The court did not separately discuss the “water rights” criterion. This criterion is inherent in the prior appropriation scheme, and that scheme applies to any appropriation, whether for in-state or export use. As to the conservation criterion, the court rejected El Paso’s claim that it required the State Engineer to keep water within the state. Id. at 698-99. It concluded that the reference to water use “within the state” referred only to the territorial limits of New Mexico’s jurisdiction over groundwater. Id. at 698.


\(^{510}\) Id. at 701.

\(^{511}\) Id. at 699-700.

\(^{512}\) Id. at 701-02.

\(^{513}\) Id. at 701.

under *Pike v. Bruce Church.* The court also indicated that additional reasonableness factors would include the third and fourth "realities" identified in *Sporhase.*

In addition to its consideration of the broad public welfare criterion, the court also upheld six factors that the statute required the State Engineer to consider before approving a permit to export water beyond New Mexico lines. Four of these factors addressed "the effect of the proposed export on in-state shortages." The last two involved the export applicant's water supply and demand patterns, and alternative water sources available to it. It upheld these factors even though the statutory scheme did not require the State Engineer to consider similar factors when reviewing applications for in-state water appropriations. Collectively, the court concluded, the first four factors simply allowed the State Engineer to collect information necessary to determine if an in-state shortage existed that could be alleviated by intrastate water transfers. The last two factors gave the State Engineer the information necessary to consider the burden on interstate commerce from an export restriction.

At first glance, *El Paso II* admirably attempts to accommodate the policy supporting wise natural resource management and the policy encouraging interstate commerce. Under *El Paso II*, a regulator need not wait until the basin is almost empty to begin basin management. At the same time, the probability, severity, and timing of an as-yet unrealized shortage circumscribes the appropriate range of regulatory responses. A regulator cannot resort to tough export restrictions before a genuine need arises.

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515. *Id.*

516. *Id.* In so doing, the court appeared to give these "realities" some independent significance. That is, they each had to be discussed as they applied to a given case. The court, however, refused to consider how they might apply absent a record on a challenge "as applied." *Id.*

517. *Id.* at 697, 702-03.

518. *Id.* at 697.


520. *Id.*

521. *Id.* at 702-03.

522. *Id.* at 703.

523. *Id.* at 701.

On closer examination, the vague *El Paso II* and *Sporhase* balancing tests strike the balance heavily in favor of local regulation. As with any balancing test, little predictability results. The burden of the unpredictability will likely fall most heavily on the permit applicant. True, *Sporhase* puts an initial burden on the regulators to justify the scheme. Given the indulgences granted government by the courts on a facial challenge, the only real burden placed on a regulator in a facial challenge is a showing of legitimate purpose and non-discriminatory application.\(^{525}\) Assuming that a local management scheme survives a facial challenge, an export applicant bears a heavy practical burden of applying for a permit and having it turned down, or being otherwise qualified, before it can challenge the regulatory scheme “as applied” to its case.\(^{526}\) Most of the California local export schemes to date explicitly require substantial information about basin conditions.\(^{527}\) The few that do not elaborate the required information expressly do so implicitly.\(^{528}\) In many basins in California, detailed pumping records and information about basin characteristics are unavailable.\(^{529}\) Given this lack of information, a permit applicant may have to shoulder substantial expense to document the effect of its intended extractions and exports on local hydrogeological conditions. Moreover, given the phrasing of many of these restrictions, the applicant bears the risk of an inadequate record.\(^{530}\)

525. Only portions of the regulatory schemes that patently or practically discriminated against interstate commerce were struck down in *Sporhase* and *El Paso II*; the did not court strike those portions after applying a balancing test in either case.


527. See, e.g., BUTTE COUNTY, CAL., CODE § 33-6; GLENN COUNTY, CAL., CODE § 20.04.430; INYO COUNTY, CAL., CODE § 7.01.041; MODOC COUNTY, CAL., CODE § 13.08-050; NEVADA COUNTY LAND USE & DEVELOPMENT CODE § L-X 6.7; TEHAMA COUNTY, CAL., CODE § 9.40.060.

528. See, e.g., IMPERIAL COUNTY, CAL., CODE § 56303 (hydrological information must be supplied as requested by reviewing officer); SACRAMENTO COUNTY, CAL., CODE § 15.08.095 (information must be supplied as requested by issuing officer).

529. See, e.g., BULLETIN 118-75, supra note 399, at 132-33 (figures 30-32); DAVID L. JAQUETTE & NANCY Y. MOORE, EFFICIENT WATER USE IN CALIFORNIA: GROUNDWATER USE AND MANAGEMENT 8 n.11 (1978) (few well records).

530. The schemes frequently require the permit-approving body to assure itself that the would-be export will not cause or otherwise aggravate any number of identified undesirable conditions. See, e.g., BUTTE COUNTY, CAL., CODE § 33-7
The application of the \textit{Pike v. Bruce Church} balancing test to California local groundwater management efforts will likely upset few well-crafted schemes. Local police power regulations affecting interstate commerce outside of the water resources areas have received Commerce Clause scrutiny for years.\textsuperscript{531} Where those regulations are truly evenhanded, and affect interstate commerce only as an incident to accomplishing a genuinely non-protectionist goal, courts are reluctant to restrike the balance struck by the local entities.\textsuperscript{532} The traditional deference accorded by the courts to local legislative bodies likely will lead to the judicial approval of many decisions about when and how to regulate groundwater withdrawals and transfer.

Buttressing the probable constitutionality of any scheme reviewed under the \textit{Pike v. Bruce Church} test is the minimal extent of an evenhanded scheme's impact on interstate commerce. There is little evidence of actual burdens upon California agricultural producers from existing ordinances.\textsuperscript{533} Perhaps the recent Tehama County litigation represents the start of a new trend as California farmers seek to move groundwater across local jurisdictional lines in response to the shrinking availability of surface water supplies. Until such time, however, the impact on California farmers' abilities to compete in interstate commerce may well be quite lim-

\textsuperscript{531} See, e.g., \textit{Transcontinental Gas Pipeline Corp. v. Hackensack Meadowlands Dev. Comm'n}, 464 F.2d 1358, 1362 (3rd Cir. 1972) (striking ordinance as unreasonable burden upon interstate commerce).

\textsuperscript{532} See, e.g., \textit{Wood Marine Serv., Inc. v. City of Harahan}, 858 F.2d 1061, 1065 (5th Cir. 1988) (finding not even an incidental burden on interstate commerce from local ordinance).

\textsuperscript{533} Indeed, Butte, Glenn, and Sacramento counties reported that no one has ever applied for export permits. Letter from Vance Severin, Program Manager, Division of Environmental Health, Butte County Dep't of Public Health, to Gregory Weber (Oct. 26, 1992) (on file with author); Letter from John Benoit, Planning Director, Glenn County, to Brad Epstein, Research Assistant to Gregory Weber (Oct. 22, 1992) (on file with author); Letter from Steven P. Rudolph, Deputy County Counsel, Sacramento County, to Gregory S. Weber (Nov. 13, 1992) (on file with author).

Of course, in theory, the cost and uncertainty attendant to the export permit programs might remove any incentive for the creation of groundwater exports. Under such a theory, the local ordinances create barriers to the creation of water markets or new appropriations. To date, there is no evidence to support such a theory.
Given such limited impact, an evenhanded local regulator should be able to establish that the local conservation benefits of its scheme outweigh what might be negligible or at least minimal burdens on interstate commerce.

V. CONCLUSIONS

At a minimum, a coherent California groundwater policy would have to address five points. First, it would fully integrate the laws governing the private rights to use groundwater with those laws governing the private rights to use surface waters. Second, it would remove incentives to waste water, either by overpumping or by leaving more water in the ground than necessary to meet environmental or users' needs. Third, it would reduce the uncertainty inherent in the current common law schemes by allowing easier quantifi-

534. A court does not examine the particularized burden upon an individual company; rather, it looks to the burdens upon interstate commerce in general. See Exxon Corp. v. Maryland, 437 U.S. 117, 125 (1978).

Additional evidence in support of local regulation may well come from the relative percentage of water extracted for overlying use within a regulatory district as compared with the percentage of water appropriated. Although a few actual or proposed long-distance transfers have received some attention, they represent a tiny portion of the total groundwater use in California, and an even smaller percentage of the total water use in the state. So far, the restriction of groundwater for exports may have only a tiny impact on the availability of water in the state. See supra notes 404-05 (discussing extra-jurisdictional transfers from Imperial, Nevada, Inyo, and Mono counties). The most frequently litigated transfer—from Inyo to Los Angeles—involved only an average export increase of 90 cubic-feet-per-second ("cfs") of groundwater. See Rossman & Steel, supra note 42, at 915 n.85 (proposed pumping increase from 90 to 180 cfs). One cfs, if pumped continuously, equals approximately two acre-feet per day, or 730 acre-feet per year. See, CHARLES J. MEYERS ET AL., WATER RESOURCE MANAGEMENT 17 (Table 2 (3d ed. 1988) (one cfs equals 1.98 acre-feet per day). Thus, the Inyo ordinance, and the litigation, was triggered by a proposal to export and average of 65,700 acre-feet per year. Total groundwater usage in California averages 16.6 million acre-feet per year. See BULLETIN 160-87, supra note 1, at 31. This figure represents about 40% of the state's total applied water needs. Id. Thus, by any measure, the most controversial groundwater transfer in California to date involved only a tiny fraction of the total water used annually in California.


536. See, e.g., DAVID L. JAQUETTE & NANCY Y. MOORE, EFFICIENT WATER USE IN CALIFORNIA: GROUNDWATER USE & MANAGEMENT 12-13 (1978) (discussing groundwater as a common pool resource).
cation of rights. Fourth, while setting forth broad, uniform criteria for basin management, it would recognize the wide variety of basin conditions prevalent throughout the state and provide enough regulatory flexibility to accommodate unique local conditions. Finally, it would prevent the balkanization of groundwater resources along the boundary lines of political subdivisions by affirming that groundwater is a resource of concern to all the people of the state, and that all citizens, be they local users or non-local users, must help conserve the supply.

No truly coherent groundwater policy will emerge until the Legislature acts. As a reactive body, limited to basin-by-basin adjudication, the courts are unequipped to forge a coherent law. Nevertheless, until the Legislature acts, the courts have an important, if limited, role to play in minimizing the extent of incoherence in the state's laissez-faire groundwater management schemes. In particular, under the constitutional doctrines addressed in this article, the courts can help prevent improper hoarding of groundwater for unspecified, future local uses, while current local users remain exempt from any practical duties to conserve groundwater. With a proper evidentiary record, in the limited circumstances noted in this article, state law preemption and federal Dormant Commerce Clause restrictions, singly or together, may preclude improper groundwater hoarding.

Nevertheless, only limited progress toward a more coherent groundwater policy can be achieved through the litigation-driven constitutionalization of the policy debate. As a practical matter, the current uncertain application of the laws of preemption under article XI, section 7; of reasonable use under article X, section 2; and of the Dormant Commerce Clause makes the outcome of any constitutional litigation quite unpredictable. This article's arguments and analysis


538. See, e.g., Final Report, supra note 23, at 146, 166-69 (wide variety of basin conditions supports strong local management strategies).

539. See Water Code §§ 104, 105 (West 1971); Patchwork Quilt, supra note 1.

540. Cf. Corker, supra note 362, at 413-14 (courts are the least useful government instrumentalities for deciding water allocation questions).
notwithstanding, the textual basis for the state law preemption decision on county export ordinances is slim. Similarly, few cases concretely document "waste" under article X, section 2. Finally, despite Sporhase's decade-long existence, almost no additional doctrinal development germane to local groundwater export controls has occurred. Collectively, the three very vague constitutional doctrines foster much uncertainty in application. The four lawsuits discussed in this article notwithstanding, this unpredictability is a disincentive to litigation.

Moreover, constitutionalizing the debate raises the ante for a court considerably. If a court concluded that a state or local groundwater control were unconstitutional under the Dormant Commerce Clause, it would take congressional action to overturn the decision. A similar result would occur for local regulations under the state preemption doctrine. Given the reluctance of both state and federal legislatures to address groundwater management, a judge's decision may well be the death knell of any management scheme. Moreover, a decision striking down a particular management option under article X, section 2 might preclude even the State Legislature from reversing it. Given such practical finality to its decision, a court will most likely weigh its decision very carefully.\textsuperscript{541} Finally, further counseling judicial caution, the constitutionalization of the debate under preemption or the Dormant Commerce Clause implicates intergovernmental rivalries, pitting locals against Sacramento or California against Washington, respectively.

In addition to these general concerns over the effects of constitutionalizing the efforts to structure a more coherent water policy, other concerns arise. In particular, under the implied preemption argument considered in this article, a local groundwater management scheme not otherwise authorized by Water Code sections 1220(b) or 10753 will fail even if genuinely motivated by conservation concerns that are even-handedly applied to local and non-local groundwater users alike. Thus, the implied preemption doctrine is a two-edged sword. To the extent that it furthers increased doctrinal co-

\textsuperscript{541} For example, the trial court in the recent Tehama County litigation took nearly four months to decide the matter after the parties' final arguments and briefs. Personal Communication from Janet Goldsmith, attorney for petitioners, to Gregory S. Weber (Aug. 13, 1993).
herence by preventing the possibility for disuniformity, it may strike down legitimate, evenhanded local conservation strategies that prevent waste.

Nevertheless, the pre-A.B. 3030 local efforts to "manage" groundwater suggest that the evenhanded conservation scheme is much less likely to be produced than the "beggar thy neighbor" hoarding scheme. Human nature dictates that local political entities are accountable only to local constituents. Groundwater exporters may not have a local surrogate to speak for them.

The recent passage of A.B. 3030 may well shift future litigation away from preemption toward article X, section 2 and the Dormant Commerce Clause. While A.B. 3030 does not authorize counties to manage groundwater directly, a fair number may well qualify under Water Code section 10753. For those that do not, the preemption analysis addressed in this article will still apply and should limit their ability to legislate in this area. Many other agencies, which would not otherwise have general police powers under article XI, section 7, will have express power to regulate groundwater under A.B. 3030. Given the political realities noted above, the possibility exists that the new crop of A.B. 3030 groundwater management programs will simply be thinly disguised "beggar thy neighbor" schemes masquerading as "conservation" programs. The enormous amount of discretion given to local agencies first to fashion and then to implement their management schemes invites opportunities to shift all the regulatory burdens onto outsiders and effectively lock up local resources.

The anti-waste provisions of article X, section 2 may provide relief to a potential exporter challenging an A.B. 3030 export control scheme, but only if a strong record exists to show that the local scheme improperly hoards groundwater. Of course, all legislative enactments, be they state or local, must pass the constitution's reasonable-use criteria. Nevertheless, as a practical matter, the Legislature's broad delegation of discretion to local groundwater management entities may provide at least a limited shield for post-A.B. 3030 locally initiated groundwater export restrictions. Arguably, it represents the same type of legislative blessing of area-of-ori-

542. See generally Patchwork Quilt, supra note 1 at § VI.
543. See Williams, supra note 362, at 91-92.
gin restrictions found constitutional by the Attorney General as part of the overall state water resources development plan.

In areas where the Legislature has given its statutory blessing to local water export restrictions, the Dormant Commerce Clause may well be the only challenge mountable to the restrictions. Given the doctrine's still-nascent nature in its application to groundwater export restrictions, the outcome of such a challenge is largely unpredictable. Nevertheless, the Dormant Commerce Clause adds a potentially important litigation tool that can help force a more coherent state groundwater management policy. To the extent that local groundwater regulators seek to preserve a priority for local citizens, the clause can force them to justify their conduct. In particular, it can force them to spread the regulatory burden to all water users. The more a scheme focuses on appropriators or exporters to bear the burden, the more likely such a scheme will fail.\footnote{The clause seeks to avoid the creation of miniature economic fiefdoms. The clause is equally applicable whether a state directly, or indirectly through a political subdivision, seeks to create local preferences for protectionist purposes. At the same time, the clause does not pose substantial obstacles to evenhanded regulation aimed at accomplishing a nonprotectionist goal. As a practical matter, the balancing test for evaluating such schemes is heavily weighted in favor of the regulation. A challenger's only real chance to prevail will be to convince a court that a local ordinance discriminates, intentionally or in effect, against interstate commerce.}

In summary, constitutional litigation, at best, is only a rear-guard action in the struggle to forge a more coherent groundwater policy. The true battleground remains the State Legislature. In A.B. 3030, the Legislature has addressed the state's groundwater policy concretely; it remains to be seen whether the fruits of that effort will meet the constitutional tests for coherence.

\footnote{Cf. Barnett, supra note 362, at 181-82 ("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").}