INTERSTATE WATER ALLOCATION COMPACTS: WHEN THE VIRTUE OF PERMANENCE BECOMES THE VICE OF INFLEXIBILITY

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INTRODUCTION

An upper state on an interstate river cannot consume all of the streamflow within its borders to the detriment of downstream states.[1] Each state in the river basin has the right to an equitable portion of benefits resulting from the streamflow.[2] Although the Supreme Court can decree an equitable apportionment[3] or Congress can legislate one,[4] states have preferred to make their own apportionments by entering into water allocation compacts.[5] Varying groups of states have formed twenty-four such compacts.[6]

Western states are the main participants in water allocation compacts.[7] At least one western state is a party to every compact except the two most recent ones,[8] and western states comprise all of the signatory parties in eighteen compacts.[9] Western states negotiated most of their compacts between the

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1. Kansas v. Colorado, 206 U.S. 46, 98 (1907).
2. *Id.* at 118.
3. *See id.* at 95–98.
4. Arizona v. California, 373 U.S. 546, 564–65 (1963).
5. *See* Douglas L. Grant, *Water Apportionment Compacts Between States, in* 4 WATERS AND WATER RIGHTS § 46.01 (Robert E. Beck, ed. 1996) [hereinafter *Water Compacts*].
6. *See id.*, at 640–41 (Table of Water Apportionment Compacts). In contrast, the Court has decreed apportionments for only three rivers, *infra* note 382, and Congress has legislated apportionments only twice, *infra* text accompanying notes 385–391.
7. *See id.* Every western state except North Dakota and Washington is a party to at least one compact.
8. *See id.*
9. *See id.*

1920s and 1960s,[10] an era when westerners widely viewed water as a commodity that should be used to promote economic development.[11] Not surprisingly, the compacts of that era focused mainly on allocating water between states for present and future uses related to economic development, mainly irrigation but also industrial and municipal uses.[12]

Since states formed these compacts, the West has undergone some dramatic changes affecting water use. First, some cities have experienced once-unimagined population explosions that show few signs of slowing.[13] Of course, growing populations need water. Second, although the doctrine of Indian reserved water rights predates the compacts,[14] compact negotiators generally underestimated the magnitude of these rights[15] and largely ignored them.[16] Now Indian reserved water rights

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10. The breakdown by decade for the compacts involving western states is as follows: 1920s—three; 1930s—one; 1940s—six (though one was amended in the 1960s); 1950s—six (though one was amended in the 1960s and another in the 1980s); 1960s—two. *See id.* (Table of Water Apportionment Compacts).

11. *See* SARAH F. BATES ET AL., SEARCHING OUT THE HEADWATERS 4, 35–42 (1993) (discussing pro-development era in the West).

12. *See, e.g.,* Canadian River Compact arts. I & II(d), 66 Stat. 74, 75 (1952) (stating that a "major purpose[] of this Compact [is] . . . to provide for the construction of additional works for the conservation of the waters of the Canadian River," and using the term "conservation" to refer to "the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses"); Colorado River Compact art. I, 70 CONG. REC. 324, 324 (1928) (stating that a "major purpose[] of this compact [is] . . . to secure the expeditious agricultural and industrial development of the Colorado River Basin"); Republican River Compact art. I, 57 Stat. 86, 86 (1943) (stating that two "major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin . . . for multiple purposes [and] to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use").

13. *See* PAMELA CASE & GREGORY ALWARD, U.S. DEP'T OF AGRIC., PATTERNS OF DEMOGRAPHIC, ECONOMIC AND VALUE CHANGE IN THE WESTERN UNITED STATES 7–10, 25–31 (Report to the Western Water Policy Advisory Commission, 1997).

14. *See* Winters v. United States, 207 U.S. 564 (1908).

15. Not until 1963 did the Supreme Court make it clear that (a) tribes are entitled to water for irrigation based not on the small Indian populations residing on the reservations but on the relatively large number of "practicably irrigable acres" within the reservations and (b) the doctrine of reserved rights applies also to variety of non-Indian federal reserved lands. Arizona v. California, 373 U.S. 546, 600–01 (1963).

16. If they were mentioned at all, they were left for future resolution. For example, the Upper Colorado River Basin Compact, one of the few compacts to say anything about Indian rights, merely provides: "Nothing in this Compact shall be construed as . . . [a]ffecting the obligations of the United States of America to Indian tribes . . . ." Colorado River Basin Compact art. XIX, 63 Stat. 31, 42 (1958).

loom over water planning in much of the West.[17] Third, public opinion has changed regarding desirable uses of water. Modern public sentiment supports maintaining instream flows to promote recreational and ecological values,[18] and this has led to environmental legislation such as the federal Endangered Species Act[19] and state minimum streamflow laws.[20] In surveying the last thirty-five years of federal environmental programs, an expert on interstate water allocation recently said "many of the allocation compacts, most of which are at least forty years old, are so environmentally outdated in many respects that, in my opinion, it is unlikely that most of them should or would currently receive congressional consent."[21]

The expanding water demands for urban, Indian, recreational, and ecological uses create a major challenge for western water managers. They must find ways to meet these demands despite overallocation of water in many areas.[22] They are responding to the challenge with various innovative measures

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17. *See* WESTERN WATER POLICY REVIEW ADVISORY COMM'N, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 2-28, 3-45 to -51 (1998) [hereinafter WATER IN THE WEST]; David E. Lindgren, *The Colorado River: Are New Approaches Possible Now That the Reality of Overallocation is Here?*, 38 ROCKY MT. MIN. L. INST. 25-1, 25-25 (2000) ("tribal rights constitute a substantial 'wild card'" on the Colorado River). Many Indian reserved water rights remain not only unexercised but unquantified; and when they are exercised, they will have priority over many existing private water rights in western states. WATER IN THE WEST at 3-45.

18. *See* Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History,* 88 CAL. L. REV. 2375, 2377–78 (2000) (identifying three stages in the development of twentieth century environmental law: first, the protection of enclaves such as national parks and wildlife refuges; second, pollution control; and third, biodiversity protection and restoration).

19. 16 U.S.C. §§ 1531–1544 (1994).

20. *E.g.,* IDAHO CODE §§ 42-1501 to -1505 (1990 & Supp. 2001); OR. REV. STAT. §§ 537.332 to -.360 (1999); WYO. STAT. ANN. §§ 41-3-1001 to -1010 (2001). *See generally* A. Dan Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights,* 25 ROCKY MT. MIN. L. INST. 24-1 (1979).

21. *Developments Pursuant to the Alabama-Coosa-Tallapoosa River Basin and Apalachicola-Chattahoochee-Flint River Basin Interest Water Allocation Compacts: Hearing of the Subcommittee on Commercial and Administrative Law of the House of Representatives Judiciary Committee*, 107th Cong. (Dec. 19, 2001) (statement of Jerome C. Muys), *available at* http://www.house.gov/judiciary/muys_121901.htm. The Compact Clause of the Constitution requires the consent of Congress to interstate water allocation compacts. *See infra* note 265.

22. WATER IN THE WEST, *supra* note 17, at 2-13 to -14, 2-27 to -28.

that involve mainly water conservation and water marketing.[23] Although these measures are important and desirable, they may prove inadequate to cope with increasingly outdated compact water allocations. Even if the measures fulfill demands for a time, they may fail after decades of further changes, some now foreseeable and others surely not. And even in the shorter term, the social, political, and economic costs of coping with outdated compact allocations may become inordinate from any perspective other than that of a state advantaged by an old compact. Therefore, it is worth inquiring whether interstate allocations made long ago by compact can be modified to facilitate regionally desirable solutions to changing water needs.

At the root of the inquiry is the widely held view that interstate compacts—not only water allocation compacts but compacts in general—are characterized by their permanence.[24] According to the conventional wisdom, a signatory state to a compact cannot unilaterally modify its obligations or withdraw from the compact unless the compact expressly so provides.[25] No western water allocation compact expressly provides for that. When western states negotiated their compacts, they sought permanent water allocations to encourage the private and governmental investments needed to put water to use for economic development within their borders.[26] Some compacts

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23. For a description of innovative collaborative efforts underway to address the challenge regarding the Colorado River, see David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 608–28 (1997). *See also* WATER IN THE WEST, *supra* note 17, 2-6 (cataloging various strategies, including but going beyond conservation and marketing, to stretch supplies).

24. FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS 40 (1961) ("the interstate compact is the instrument best suited for the establishment of permanent arrangements among the states"). *See generally* Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1 (1997).

25. Hasday, *supra* note 24, at 3. *See also* 72 AM. JUR. 2D *States* § 16 (2001) (compacts "cannot be unilaterally nullified"); *but cf.* Frederick L. Zimmerman & Mitchell Wendell, *The Interstate Compact and* Dyer v. Sims, 51 COLUM. L. REV. 931, 940 (1950) (suggesting that if a compact is silent as to its termination and its subject matter does not make permanence important, it should be construed to be revocable after the passage of a reasonable time).

26. Two leading figures in the history of water allocation compacts urged the negotiation of compacts rather than resort to litigation to apportion interstate waters because compacts are "not susceptible of arbitrary change or revocation or modification without the consent of the contracting parties, which tends for greater stability as against Court decisions which are susceptible of reversal or such modifications as may seem meet and proper to the Court)." M.C. Hinderlider

even declare that termination requires unanimous agreement of the signatory states and that all rights established under the compact will continue unimpaired upon termination,[27] though established rights probably would continue without such language.[28]

This Article challenges the conventional wisdom regarding compact permanency, at least for water allocation compacts. It seeks to show that the development-era virtue of permanence in interstate water allocation need not become the vice of inflexibility in a time of changing water needs. Part I illustrates the permanency problem by describing developments under several water allocation compacts. Parts II, III, and IV address the three purported sources of compact permanence: the Contract Clause of the Constitution, the "law of the case" doctrine, and the "law of the Union" doctrine under the Compact Clause of the Constitution. Each of these Parts examines one of the sources of compact permanence and argues that it should not preclude a state's withdrawal from a water allocation compact. Part V explores how a state might seek to use the theory developed in this article to escape an unsatisfactory compact allocation and obtain a more favorable one. Part V also shows that the theory does not broadly threaten to destabilize water allocation compacts because it is viable only when a state disadvantaged by an old compact faces dire circumstances. Finally, Part V explains how the theory may operate to induce compact renegotiation in those circumstances.

I. THE PROBLEM OF WATER COMPACT PERMANENCY—THREE ILLUSTRATIONS

The Pecos River Compact, the Rio Grande Compact, and the Colorado River Compact were signed by the participating states and approved by Congress more than half a century

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& R.I. Meeker, *Interstate Water Problems and Their Solutions*, 90 TRANSACTIONS AM. SOC'Y CIVIL ENG'RS 1035, 1049 (1927).

27. *E.g.*, Arkansas River Compact art. IX.B, 63 Stat. 145, 151 (1949); La Plata River Compact art. VI, 43 Stat. 796, 798 (1925); Pecos River Compact art. XIV, 63 Stat. 159, 165 (1949).

28. JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 20 (National Water Commission, Legal Study 14, 1971) ("Such provisions simply appear to state the obvious effect which would flow from the agreement absent any express provision to the contrary.").

ago.[29] Recent implementation of the Endangered Species Act has created significant water supply problems for New Mexico under the Pecos River and Rio Grande Compacts. Various factors affecting Colorado River states—the Endangered Species Act, exploding populations in parts of the river basin, judicial and congressional recognition of large Indian water rights, miscalculation of the water supply by compact negotiators, and ambiguities in the Colorado River Compact—likely will soon produce serious problems for some basin states under the compact.

A. The Pecos River Compact

The Pecos River begins in New Mexico and flows south into Texas, where it ultimately joins the Rio Grande. The two states allocated the Pecos River by compact in 1949.[30] The compact adopted a formula for quantifying New Mexico's water delivery obligation that proved to be seriously flawed and eventually led to litigation between the states. In 1987, the U.S. Supreme Court found that New Mexico had failed to deliver 340,100 acre-feet to Texas over the preceding thirty-five years.[31] Thereafter, the parties settled the case for fourteen million dollars.[32] To avoid future compact shortfalls due to overappropriation of the river within its borders, New Mexico spent nearly thirty million dollars more to purchase and retire water rights and to lease water for delivery to Texas.[33]

About the time the two states settled the compact lawsuit, the U.S. Fish and Wildlife Service began a process that imposed an entirely new burden on New Mexico's water supply. The agency listed the Pecos bluntnose shiner as a threatened species under the Endangered Species Act and also designated sections of the river as critical habitat.[34] In 1998, the agency established minimum flow requirements needed to provide

29. *See infra* notes 30, 44, and 64 and accompanying text.

30. Pecos River Compact, 63 Stat. 159 (1949).

31. Texas v. New Mexico, 482 U.S. 124 (1987).

32. Texas v. New Mexico, 494 U.S. 111 (1990) (stipulated judgment). *See* ROCKY MTN. MIN. L. FOUND., WATER LAW NEWSL., Vol. 22, No. 1, at 8 (1989).

33. *State Should Act to Ease Pecos Pressures*, SANTA FE NEW MEXICAN, Feb. 13, 2000, at F8 (nearly thirty million); Ben Neary, *Without Water, Pecos Bluntnose Shiner's in Jeopardy*, THE SANTA FE NEW MEXICAN, Feb. 6, 2000, at A8 (about twenty-seven million in recent years).

34. Notropis simus pecosensis (Pecos Bluntnose Shiner), 52 Fed. Reg. 5295 (Feb. 20, 1987).

critical habitat for the fish.[35] Prior to these requirements, water was released from dams for New Mexico irrigators in large, short bursts followed by longer periods during which no water was released and the river dwindled to mud puddles in drought years.[36] Now, water must be released more continuously at lower rates to maintain the required habitat flows, and this results in greater in-transit losses of water due to evaporation and other system losses.[37]

So far, the federal government has replaced the increased losses by leasing water and paying some irrigators to forego using water,[38] but nothing guarantees that the federal government will continue to do so.[39] To comply with the compact on its own, New Mexico faces three options: develop a conservation program and deliver the saved water to Texas, lease or purchase more water for storage and release to Texas, or shut off junior water users under the "first in time, first in right" principle of the appropriation doctrine[40]—a regulatory action that might cause over two hundred million dollars of economic damage in the state.[41]

The president of a New Mexico irrigation district has urged a different approach to compliance: change New Mexico's compact obligation to Texas. He argued: "If water has to be released from our storage and taken out of New Mexico for the blunt-nosed shiner, Texas should have to share their appropri-

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35. *Hearing on H.R. 3160, To Reauthorize and Amend the Endangered Species Act of 1973, "Common Sense Protections for Endangered Species Act" Before the House Comm. On Resources*, 106th Cong. 68 (2000) (statement of Bennett W. Raley, National Water Resources Ass'n) [hereinafter Raley].

36. Neary, *supra* note 33, at A8; *Use This Green Year to Provide for Future*, SANTA FE NEW MEXICAN, May 2, 2001, at A7.

37. Raley, *supra* note 35.

38. Tania Soussan, *Agreement to Protect Pecos Shiner Ends Lawsuit*, ALBUQUERQUE J., Apr. 28, 2001, at E3.

39. Raley, *supra* note 35, *Pact Provides Water for Threatened Fish*, ALBUQUERQUE J., Oct. 14, 2000, at E3 (federal replacement of losses through irrigation season ending Oct. 31, 2000); *Litigation/Environment*, WESTERN STATES WATER (Western States Water Council, Midvale, Utah), Issue No. 1408, May 11, 2001 (litigation settlement providing for federal replacement of losses during the 2001 irrigation season).

40. Marvin Tessneer, *Area Official Says Farmers, Ranchers Can Help Each Other*, KNIGHT-RIDDER TRIB. BUS. NEWS, NOV. 28, 2001, *available at* 2001 WL 31006201.

41. Ben Neary, *Pecos River Users Could Feel Pinch Soon*, SANTA FE NEW MEXICAN, Oct. 4, 2001, at A1 (two hundred million); Tania Soussan, *N.M. May Default on Water Debt*, ALBUQUERQUE J., June 12, 2001, at A1 (two hundred-forty million).

ate share of it . . . ."[42] The underlying idea seems to be that because water for the bluntnose shiner is an added burden on the river imposed by the federal government to achieve national benefits, New Mexico should not have to bear all of it and Texas none of it.

B. The Rio Grande Compact

The Rio Grande begins in Colorado, flows south through New Mexico, and then enters Texas, where it ultimately forms the international boundary with Mexico. A treaty between Mexico and the United States allocates some of the flow to Mexico.[43] The Rio Grande Compact allocates the rest of the flow among the three American states.[44] The compact obligates New Mexico to make water available to Texas annually in quantities that vary with the size of upstream flows.[45] Under an unusual provision, the compact does not obligate New Mexico to deliver the water to Texas but to the Elephant Butte Reservoir, located in New Mexico about one hundred miles above the Texas state line, for later release into Texas.[46] The compact also created a commission to administer the compact, which consists of one commissioner from each state plus a nonvoting federal representative.[47] The compact became operative in 1939,[48] and all the water allocated to New Mexico has long been appropriated.[49]

As with the Pecos River, the Endangered Species Act recently imposed a new legal demand on New Mexico's share of the Rio Grande. The U.S. Fish and Wildlife Service listed the Rio Grande silvery minnow as an endangered species[50] and designated 163 miles of the Middle Rio Grande as critical habi-

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42. Ben Neary, *Down the Drain*, SANTA FE NEW MEXICAN, Aug. 19, 2001, at A1 (statement of L.A. Johnson, president of the Carlsbad Irrigation District).

43. Convention-Mexico, May 21, 1906, United States-Mexico, art. I, 34 Stat. 2953, 2954 (1906) (sixty thousand acre-feet annually at the Old Mexican Canal above Juarez).

44. Rio Grande Compact, 53 Stat. 785 (1939).

45. *Id.* at 788.

46. *Id.*; Paul Elliott, *Texas' Interstate Water Compacts*, 17 ST. MARY'S L.J. 1241, 1246–47 (1986).

47. Rio Grande Compact, arts. I(b), XII, 53 Stat. at 785, 791.

48. 53 Stat. at 785.

49. Raley, *supra* note 35, at 68.

50. Final Rule to List the Rio Grande Silvery Minnow as an Endangered Species, 59 Fed. Reg. 36,988 (July 20, 1994).

tat.[51] The need to maintain critical habitat flows prevents New Mexico from taking steps to reduce in-transit evaporation and evapotranspiration of water it delivers to the Elephant Butte Reservoir. If New Mexico were not required to maintain the habitat flows, it could reduce in-transit losses by drying up the river temporarily to perform channel maintenance or by transporting water to Elephant Butte through an existing artificial riprap-lined conveyance channel.[52]

New Mexico is coping for now with the added burden on its compact share of the Rio Grande. The compact provides that if New Mexico delivers more water than required to Elephant Butte in a given year, it receives a credit for the excess against its delivery obligations for other years.[53] In 2000, New Mexico accrued a credit of one hundred thousand acre-feet toward future delivery obligations.[54] The credit resulted largely from New Mexico's release of stored water to provide habitat for the silvery minnow[55]—an action the state engineer declared unrepeatable.[56] New Mexico has devised a plan to use this credit to help meet habitat flow requirements for a few years while the state seeks to find a long-term solution. Taking advantage of the credit, New Mexico stored an extra one hundred thousand acre-feet in upstream reservoirs during the spring and early summer of 2001. It plans to release this water as necessary during dry periods over three years to maintain required habitat flows.[57] The compact required that the compact commission approve the plan before New Mexico could implement it.[58] The commission did approve the plan, but only with a condition allowing Texas to rescind its approval if it has been or will be harmed.[59] The Texas commissioner explained: "We are sympa-

51. Final Designation of Critical Habitat for the Rio Grande Silvery Minnow, 64 Fed. Reg. 36,274 (July 6, 1999).

52. *See* Raley, *supra* note 35, at 69 (reporting in-transit losses of perhaps two hundred sixty thousand acre-feet per year due to evapotranspiration from riparian vegetation and evaporation from the river, canals, and sand bars); Tania Soussan, *Uses Battle for Middle Ground*, ALBUQUERQUE J., July 18, 2000, at A1.

53. Rio Grande Compact, arts. I(h), VI, 53 Stat. at 785.

54. *N.M. Offers New Plan For Minnow Habitat*, ALBUQUERQUE J., Mar. 26, 2001, at A6.

55. *Id.*

56. *Id.*

57. Tania Soussan, *Water Reserve to Aid Minnow Approved*, ALBUQUERQUE J., Apr. 12, 2001, at D3.

58. *Id.*

59. *Id.*

thetic to your environmental problems and we want to be good neighbors, but we have to first make sure it does no harm to our stakeholders and users below Elephant Butte Dam."[60]

Former Interior Secretary Bruce E. Babbitt, speaking in Albuquerque shortly after leaving office, recognized the seriousness of New Mexico's long-term water supply situation.[61] Although he believed New Mexico could adopt more efficient irrigation practices to solve its Rio Grande supply problems in the short term,[62] he did not see improved efficiency as a panacea. Instead, in an apparent reference to both the Pecos River Compact and the Rio Grande Compact, he said that "in the longer run, I think it's going to be necessary to look at ways to make revisions in the compacts in New Mexico's favor."[63] New Mexico is in a weak bargaining position with Texas for such revisions, however, if the compact is permanent rather than unilaterally revocable.

C. The Colorado River Compact

The Colorado River begins in Colorado and flows southwest through Utah and Arizona, then along the Arizona-Nevada and Arizona-California borders, and finally into Mexico. In addition, tributaries enter the river from New Mexico and Wyoming. Overall, then, the river basin encompasses seven states. In 1922, the seven states negotiated the Colorado River Compact.[64] The compact does not allocate water to the basin states individually. Instead, it breaks the system into an Upper Basin and a Lower Basin, divided on the river at Lee's Ferry, Arizona,[65] and allocates water between the two basins.

The Upper Basin includes Colorado, New Mexico, Utah, and Wyoming;[66] the Lower Basin includes Arizona, California,

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60. *Id.*

61. *See* Tania Soussan, *Efficiency Called Key to Protecting River,* ALBUQUERQUE J., June 23, 2001, at E1.

62. *Id.*

63. *Id.*

64. NORRIS HUNDLEY, JR. WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST 212–14 (1975).

65. Colorado River Compact, art. II(e)–(g), 70 CONG. REC. 324, 324–25 (1928).

66. *Id.*, art. II(c), (f), at 325. A small part of Arizona is also in the Upper Basin.

and Nevada.[67] The compact apportions an average of 7.5 million acre-feet (m.a.f.) per year for beneficial consumptive use to each basin in perpetuity.[68] It allows the Lower Basin to increase its consumptive use by one m.a.f. in years when flows permit.[69] In anticipation that Mexico would be entitled to a share of the Colorado River, the compact says Mexico's share shall come first from any surplus, and in case of a supply deficiency, the obligation to Mexico should be borne equally by the two basins.[70] A treaty later fixed the delivery obligation to Mexico at 1.5 m.a.f. annually.[71] Together, the compact and treaty allocate in total an average of 17.5 m.a.f. annually.

Various forces are creating or threatening to create water supply problems for some Colorado River states that will generate tensions under the compact. These include demands under the Endangered Species Act, varying rates of growth in consumptive water uses among compacting states, fuller exercise of Indian reserved water rights, overestimation of the river's average annual flow by compact negotiators, and compact ambiguities that will eventually require resolution.

First, as with the Pecos River and the Rio Grande, the Endangered Species Act creates new demands for minimum instream flows in the Colorado River system. The Upper Basin states have had to develop a recovery program for several fish species listed as endangered.[72] The Lower Basin states are developing a multi-species conservation program aimed at conserving eighty-eight species, most of which are not listed but might become threatened or endangered with further consumptive-use water development.[73] Recently, several American and Mexican organizations filed suit for an order under the Endangered Species Act requiring the U.S. Bureau of Reclamation and the federal agencies that administer the Act to consider

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67. *Id.*, art. II(d), (g). Small parts of New Mexico are also in the Lower Basin.

68. *See id.*, art. III(a), (d).

69. *Id.*, art. III(b).

70. *Id.*, art. III(c).

71. Treaty between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mex., 59 Stat. 1219.

72. Lindgren, *supra* note 17, at 25–28.

73. David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?*, 20 STAN. ENVTL. L.J. 3, 45 (2001).

the effects of river management decisions on listed species in Mexico.[74]

Second, levels of consumptive use vary greatly among the basin states, mainly due to uneven patterns of population growth[75] and the lack of federal funding in recent decades for once-anticipated irrigation projects.[76] The Upper Basin currently consumes only about 4.7 m.a.f. of its 7.5 m.a.f. allocation.[77] The Lower Basin regularly has exceeded its 7.5 m.a.f. allocation in recent years, with consumption reaching as high as 8.2 and 8.3 m.a.f.[78] When Congress approved the Colorado River Compact, it also provided a mechanism for dividing the Lower Basin's 7.5 m.a.f. among the individual states.[79] This later resulted in the following division: California 4.4 m.a.f., Arizona 2.8 m.a.f., and Nevada 0.3 m.a.f. For many years, California has used more than its 4.4 m.a.f. share, enabled partly by Arizona and Nevada's inability to use their full shares.[80] But Nevada reached full use in 2000,[81] and Arizona is approaching full use.[82]

California's practice of using more water than its share has long concerned the other six states of the Colorado River basin. In 2001, the Secretary of Interior, who oversees water delivery from federal reservoirs to the Lower Basin states, addressed their concerns. The Secretary issued interim guidelines for determining when surplus water exists for delivery to California of more than 4.4 m.a.f.[83] The guidelines require California

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74. Lindgren, *supra* note 17, at 25–31.

75. John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 215 (2001).

76. *See* GEORGE A. GOULD & DOUGLAS L. GRANT, CASES AND MATERIALS ON WATER LAW 668 (6th ed. 2000).

77. *California Water Issues Hearing Before the Subcomm. on Water and Power of the House Resources Comm.*, 107th Cong. 6 (2001) (statement of Wayne Cook, Exec. Dir., Upper Colo. River Comm'n).

78. U.S. Bureau of Reclamation, Annual Colorado River Water Use Since 1906, *available at* http://www.lc.usbr.gov/g4000/use.txt (last visited Oct. 15, 2002) (on file with the author).

79. Boulder Canyon Project Act of 1928, Pub. L. No. 642, 45 Stat. 1057, 1060, 1064 (1928) (partially codified, as amended, at 43 U.S.C. §§ 617–617(t) (1994); Arizona v. California, 373 U.S. 546, 564–84 (1963).

80. Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 7772, 7774 (Jan. 25, 2001) [hereinafter Surplus Guidelines].

81. *Monthly Water Intelligence*, WATER STRATEGIST, Sept. 2001, at 12.

82. Lindgren, *supra* note 17, at 25-7.

83. *See* Surplus Guidelines, *supra* note 80, at 7772.

gradually to reduce its consumptive use to 4.4 m.a.f. by 2016.[84] Whether California will in fact achieve the reduction remains to be seen. The Assistant Secretary of Interior for Water and Power commented recently: "With each passing day, [Interior Secretary Gale Norton] and I grow more concerned about the ability of the entities of California to comply with the commitments in the California 4.4 Plan."[85]

Third, future exercise of reserved Indian water rights that are now largely dormant could seriously strain states' water supplies. The Supreme Court has awarded five Lower Basin reservations rights to consume more than five hundred thousand acre-feet per year.[86] Congress has approved Indian water rights settlements that allocate water to other reservations in the Upper and Lower Basins.[87] Furthermore, the Navajo Nation holds unquantified claims that, according to a Navajo advocate, may exceed five m.a.f.[88] To whatever extent reserved Indian water rights are newly exercised in the future, the uses will come out of the individual states' shares of the Colorado River.[89]

Fourth, the compact negotiators greatly overestimated the average annual flow of the river. Data available to them indicated an average annual flow of 16.4 m.a.f. at Lee's Ferry between 1899 and 1920.[90] Recent data, produced by new scientific techniques, reveal an average annual flow of only 13.5 m.a.f. over three centuries.[91] Furthermore, dry cycles have occurred during which flows fell significantly below the long-term

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84. *Id.* at 7782. In 2000, California used 5.3 m.a.f. Ben Fox, *Farmers Could Reap Cash from Fallow Fields*, SAN DIEGO UNION-TRIB., July 7, 2001, at A3.

85. *Water Resources: California/Colorado River*, WESTERN STATES WATER (Western States Water Council, Midvale, Utah) Issue No. 1473, August 9, 2002, *available at* http:www.westgov.org/wswc/1473.html.

86. *See* Arizona v. California, 376 U.S. 340 (1964), *amended by* 531 U.S. 1 (2000) (the Chemehuevi, Cocopah, Yuma, Colorado River, and Fort Mohave Reservations); Lindgren, *supra* note 17, at 25-24.

87. *See* Lawrence J. MacDonnell & David H. Getches, *Colorado River Basin, in* 6 WATERS AND WATER RIGHTS 30–36 (Robert E. Beck, ed. 1994).

88. WATER EDUCATION FOUNDATION, 75TH ANNIVERSARY COLORADO RIVER COMPACT SYMPOSIUM PROCEEDINGS 60 (1997) (remarks of Stanley Pollack, Water Rights Counsel, Department of Justice, Navajo Nation) [hereinafter 75TH SYMPOSIUM].

89. Arizona v. California, 373 U.S. 546, 601 (1963) (reserved rights within a state are charged against the state's apportionment).

90. Hundley, *supra* note 64, at 192–93.

91. David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413, 419 (1985).

average. For example, the average annual flow for the period between 1953 and 1964 was only 11.6 m.a.f.[92]

Finally, the Colorado River Compact contains ambiguities that the Supreme Court might resolve in ways unsettling to one or more states.[93] For example, many observers read the compact as entitling the Lower Basin to an annual average of 7.5 m.a.f. regardless of the amount of water left for the Upper Basin.[94] Thus, if a dry cycle should again produce a decade of flows averaging 11.6 m.a.f. per year, the Lower Basin would receive an average of 7.5 m.a.f. annually, and the Upper Basin would get an average of only 4.1 m.a.f. annually (except so far as the supply could be increased temporarily by depleting reservoir storage). Some Upper Basin advocates, however, reject that view. They read the compact as intending an equal apportionment between the two basins predicated on an assumed flow supporting fifteen m.a.f. of consumptive use. They argue that once one adjusts for the mistaken flow assumption, the compact divides the supply—whatever it might be—equally between the two basins.[95] They claim that during a dry decade with an average annual flow of 11.6 m.a.f., the Lower Basin would receive an average of only 5.8 m.a.f. annually (except for temporary increase of the supply by depleting reservoir storage). This result would be highly disruptive for the Lower Basin and could prompt calls for compact modification or revocation.

Despite these various sources of tension, the Colorado River system is not presently in crisis. Existing water storage can buffer the effects of drought if the shortfall does not last too long.[96] Within the Lower Basin, a recent interstate groundwa-

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92. UPPER COLORADO RIVER COMM'N, THIRTY-SEVENTH ANNUAL REPORT, Sept.30, 1985, at 24–27.

93. *See* JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 694 (3d ed. 2000); 75TH SYMPOSIUM, *supra* note 88, at 66–81.

94. *See* Lindgren, *supra* note 17, 25-9 to -10; John U. Carlson & Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries Between the Upper and Lower Basins*, 32 ROCKY MT. MIN. L. INST. 21-7 (1986) (rejecting that view).

95. Carlson & Boles, Jr., *supra* note 94, at 21–33; Glenn Saunders, *Reflections on Sixty Years of Water Law Practice*, 2 U. DEN. WATER L. REV. 1, 22–23 (1998).

96. The Colorado River reservoirs were at eighty-three percent of capacity as of September 30, 2000, and were expected to remain relatively full with average inflow during 2001. Bureau of Reclamation, 2001 Annual Operating Plan for Colo. River Sys. Reservoirs 3, *at* http://www.uc.usbr.gov/wrg/aop/01aop.fin.html (last visited Oct.16, 2002) (on file with the author).

ter-banking agreement between Nevada and Arizona should meet Nevada's rapidly growing water needs for several more decades.[97] California hopes to reduce its annual use of Colorado River water to 4.4 m.a.f. through measures such as conservation, intrastate water transfers from agricultural use to municipal use,[98] increased groundwater pumping,[99] and possibly groundwater banking with Arizona.[100] Careful planning, along with infusions of money to build strategically located water storage, could solve endangered species concerns in California.

Moreover, voluntary water transfers from the Upper Basin may help meet growing water needs in the Lower Basin.[101] The Upper Colorado River Basin Compact, signed in 1948, apportioned to each Upper Basin state a specified percentage of the Upper Basin's 7.5 m.a.f. share of the river.[102] No Upper Basin state wants to sell any of its unused apportionment to Lower Basin states or users, but Utah has expressed interest in leasing some of its unused water until its own water needs increase.[103]

Although none of the seven Colorado River Compact states presently wants to modify the compact, attitudes could change.

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97. Michael Weissenstein, *Nevada-Arizona Water Compact Made Official,* LAS VEGAS REV. J., July 4, 2001, at 1B. Under that agreement, Arizona will store presently unused water from its 2.8 m.a.f. annual allocation underground during the immediate future. Over the longer term, Nevada will be able to divert extra water from the Colorado River that otherwise should go to meet growing needs in Arizona, and Arizona will replace the loss by pumping the previously stored groundwater. All this is made possible by Nevada's agreement to pay Arizona an estimated one hundred-seventy million. *Id.* The agreement was authorized by regulations issued by the Secretary of the Interior: Offstream Storage of Colorado River Water and Development and Release of Intentionally Created Unused Apportionment in the Lower Division States, 43 C.F.R. § 414 (2001).

98. Secretary of the Interior Bruce Babbitt, Remarks at the Colorado River Water Users Association Meeting (Dec. 14, 2000) *available at* http://crwua.org/news/babbitt2000.htm [hereinafter Babbitt]. However, a recently proposed transfer has generated strong opposition from environmentalists concerned about its effects on the Salton Sea and threatened and endangered species. *Water Resources, California/Colorado River,* WESTERN STATES WATER, (Western States Water Council, Midvale, Utah) Issue No. 1473, Aug. 9, 2002.

99. Dan Nowicki & John Howard, *Quenching California's Thirst,* ORANGE COUNTY REG., June 9, 2001, at A3.

100. Weissenstein, *supra* note 97.

101. *See* David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution,* 68 U. Colo. L. Rev. 573, 609–23 (1997); Lindgren, *supra* note 17, at 25–36 to 25–41.

102. UPPER COLORADO RIVER BASIN COMPACT, 63 Stat. 31 (1949).

103. 75TH SYMPOSIUM, *supra* note 88 at 80–81.

Some of the contemplated solutions noted above might not be implemented or might not work as well, or as painlessly, as expected. For example, the Lower Basin states have yet to resolve important issues surrounding their multi-species conservation plan, including cost-sharing and finding sufficient water to support new habitat.[104] Similarly, some water experts in the Upper Basin believe that interbasin sale or lease of water would violate the Colorado River Compact, the Upper Colorado River Compact, and a Supreme Court decree regarding the Lower Basin.[105] Finally, regardless of how well the various solutions work, other events might overwhelm their effectiveness. Continued Lower Basin population growth could impose new strains on the water supply, and global warming could significantly reduce the river flows.[106]

In summary, the Pecos River Compact and the Rio Grande Compact illustrate problems of water compact permanency arising mainly from the Endangered Species Act. New Mexico is struggling under both compacts to accommodate a national concern that the signatory states never anticipated when they negotiated and approved the compacts. The Colorado River Compact illustrates how multiple post-compact developments could create serious water supply problems for some signatory states that would affect millions of people. If compact water allocations are truly permanent, states seriously disadvantaged by outdated compacts possess little bargaining power to pursue compact revisions. The following discussion seeks to improve their bargaining leverage by arguing that a state can unilaterally withdraw from a seriously outdated compact.

II. THE CONTRACT CLAUSE AS A SOURCE OF COMPACT PERMANENCE AND THE RESERVED POWERS ANTIDOTE

The Contract Clause of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[107] The Supreme Court established early on that the prohibition applies not just to contracts be-

104. Babbitt, *supra* note 98.

105. The arguments for this view are spelled out in James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River, Part I: The Law of the River*, 4 U. DENV. WATER L. Rev. 290, 322–29 (2001).

106. SAX ET AL., *supra* note 93, at 702.

107. U.S. CONST. art. I, § 10, cl. 1.

tween private parties but also to those between a state and a private party.[108] Then, in *Green v. Biddle,*[109] the Court extended the prohibition to compacts between states.[110] The Court reasoned that a compact is still a contract,[111] notwithstanding congressional consent to it under the Compact Clause.[112] *Green* is the basis for the widely held view that the Contract Clause makes compacts permanent absent express contrary agreement.[113] In the words of a leading work on interstate compacts: "Since a state is forbidden by the Constitution to impair the obligation of contracts, it cannot unilaterally renounce an interstate compact except as agreed by the parties."[114]

Soon after the Court established that the Contract Clause prohibits a state from impairing its own contractual obligations, the Court realized that applying the clause broadly to state contracts could impede a state's ability to enact measures necessary to fulfill its sovereign responsibilities.[115] For example, if a state were bound by its agreement to allow a private corporation to operate a lottery, the state could not change public policy by banning lotteries because the ban would impair the state's contractual obligation to allow the corporation to operate a lottery.

In response to this difficulty, the Court developed two doctrines limiting the impact of the Contract Clause on states.[116] First, the unmistakability doctrine creates a rebuttable presumption against implied governmental obligations in state contracts.[117] This doctrine reduces the number of governmental

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108. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810). *Accord,* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); New Jersey v. Wilson, 11 U.S. (7Cranch) 164 (1812).

109. 21 U.S. (8 Wheat.) 1 (1823).

110. The compact in *Green* obligated Kentucky to recognize private land titles within its borders granted by Virginia before Kentucky was formed as a state from part of Virginia. The Court held that a later Kentucky statute rejecting those titles violated the Contract Clause.

111. *Id.* at 92.

112. *Id.* at 85–87.

113. *See, e.g.,* ZIMMERMAN & WENDELL, *supra* note 24, at 40; Paul Elliott, *Texas' Interstate Water Compacts,* 17 ST. MARY'S L.J. 1241, 1243–44 (1986); Hasday, *supra* note 24, at 2–3.

114. ZIMMERMAN & WENDELL, *supra* note 24, at 40.

115. United States v. Winstar Corp., 518 U.S. 839, 874 (1996).

116. *Id.*

117. *Id.* at 874–75; Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

contract obligations the Court finds by requiring them to be unmistakably clear. Second, the reserved powers doctrine prohibits a state from contracting away its essential sovereign powers.[118] This doctrine makes a state's promise, though unmistakably clear, nonbinding if it would hinder the future exercise of an essential sovereign power.[119] Because the state is not bound, it can later repudiate the promise without violating the Contract Clause.

A state's ability to withdraw unilaterally from a water allocation compact notwithstanding the Contract Clause depends on the reserved powers doctrine.[120] Subsection A below explains the reserved powers doctrine, and subsection B argues that the doctrine should apply to water allocation compacts.

A. Basics of the Reserved Powers Doctrine

1. Illustration and Rationale of the Doctrine

Stone v. Mississippi[121] provides "the classic example"[122] of the reserved powers limitation on the Contract Clause. In *Stone*, the Mississippi legislature granted a charter that empowered a private corporation to conduct a lottery for twenty-five years.[123] A few years later, the legislature exercised its police power to outlaw lotteries.[124] Corporate charters constitute contracts within the meaning of the Contract Clause,[125] so when the state tried to close the lottery under the new statute, the corporation defended by arguing that closure would unconstitutionally impair the state's contractual obligation.[126] The

118. *Winstar*, 518 U.S. at 888; United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977).

119. *E.g., United States Trust Co.*, 431 U.S. at 23: The reserved powers "doctrine requires a determination of the State's power to create irrevocable contract rights .... [T]he Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."

120. The unmistakability doctrine is of no significance, however, because water allocation compacts unmistakably create water delivery obligations.

121. 101 U.S. 814 (1880). For the pre-*Stone* history of the doctrine, see BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 195–203 (1938).

122. *Winstar*, 518 U.S. at 888 (1996).

123. *Stone*, 101 U.S. at 814, 817.

124. *Id.* at 815.

125. Planters' Bank v. Sharp, 47 U.S. (6 How.) 301 (1848); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

126. *Stone*, 101 U.S. at 816.

Court rejected this argument. It reasoned that lotteries affect the public health and public morals and "[n]o legislature can bargain away the public health or the public morals."[127] Because the legislature that granted the lottery franchise could not obligate later legislatures to allow lotteries, the subsequent statute outlawing them did not impair any contractual obligation.

To justify the critical proposition that no legislature can bargain away the public health or the public morals, the Court said:

> The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.[128]

The Court explained further:

> [T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals .... These several agencies can govern according to their discretion ... while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances.[129]

In short, sovereign powers over certain matters are inalienable because they inherently require continuing governmental supervision to address changing circumstances.[130]

The Court made an additional remark in *Stone* that enables a deeper understanding of the reserved powers doctrine.

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127. *Id.* at 819.

128. *Id.*

129. *Id.* at 820 (internal quotation marks omitted).

130. It may be worth noting that the Court said in the *Stone* passage quoted in the text that sovereign agencies "can govern according to their discretion ... while in power." *Id.* at 819. This implies that a legislative action within the scope of the reserved powers doctrine is not void but rather voidable, i.e., revocable, by a later legislature that in its discretion rejects the earlier action. If the next legislature agrees with the earlier action, it would continue in force (since not revoked) but would remain voidable by an even later legislature.

After saying that no legislature can bargain away the public health or public morals, the Court added: "The people themselves cannot do it, much less their servants [in the legislature]."[131] In other words, one body politic cannot bargain away the public health or public morals to the detriment of a later body politic. Although the Court did not explain the basis for this constraint, the ultimate rationale for the reserved powers doctrine—in limiting a body politic and therefore limiting what powers it can delegate to its elected representatives—seems to lie in the democratic principle of majority rule. As two scholars have observed: "If majority rule means anything, it means rule by the current majority and not by a majority of the past. That is the point of elections."[132]

2. Formative Cases on the Scope of the Doctrine

In a series of cases commencing shortly before *Stone* was decided in 1880 and extending into the early twentieth century, the Court developed the basic contours of the reserved powers doctrine.[133] These cases established that the doctrine protects most, but not all, future exercises of a state's police power.[134] Because not all police power exercises come within the reserved powers doctrine, it is important to examine which do and which do not.

Stone established that the reserved powers doctrine protects a state's exercise of the police power to promote public health and public morals. That principle will seldom help a western state wanting to withdraw from a water allocation compact. Its withdrawal would have nothing to do with public morals, and it could seldom assert credibly that its withdrawal would promote public health—i.e., the survival and physical well-being of its citizens. Although a western state with a

131. *Id.*

132. David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 533 (1999).

133. *See* BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION ch.VIII. (1938).

134. *See id.* Similarly, a state cannot contract away its power of eminent domain. W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848). At least that is how the Court recently characterized *Dix,* United States v. Winstar Corp., 518 U.S. 839, 874 (1996), though it has been argued that *Dix* was decided on the ground that the state did not intend to give up its eminent domain power. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 214 n.102 (1985).

growing population will require more water for public health, the additional water usually will be a small fraction of the amount already used within a state's borders for irrigation and other economic uses.[135] In that situation, the state could obtain more water for public health through modest internal reallocation. The state's decision instead to withdraw from the compact and seek interstate reallocation would seem motivated mainly by a desire to promote the public economic welfare, i.e., the continued economic well-being of existing water users. It is important, therefore, to consider whether the reserved powers doctrine encompasses a state's exercise of its police power to promote the public economic welfare.

The Supreme Court raised doubt about the scope of the reserved powers doctrine in *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*[136] Although the Court invoked the doctrine there to reject a Contract Clause challenge to a public health measure,[137] it added in dictum that it was "not prepared to say" the reserved powers doctrine extends to "the largest definition of the police power."[138] Moreover, the Court explained that the doctrine protects exercise of the police power to promote public health and public morals because "[t]he preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."[139] The Court's remarks suggest that the reserved powers doctrine may protect only police power exercises that affect public matters reaching some threshold of importance to the best interests of society. This suggestion raises the question of when, if ever, an exercise of the police power to promote the public welfare—and in particular, the public economic welfare—would reach the threshold.

Other Supreme Court cases indicate that the public welfare component of the police power, including public economic welfare, does meet any required threshold. In fact, the Court's

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135. Irrigation accounts for eighty percent of the total United States water consumption for urban, industrial, and agricultural purposes. MARC REISNER & SARAH BATES, OVERTAPPED OASIS: REFORM OR REVOLUTION FOR WESTERN WATER 30 (1990).

136. 111 U.S. 746 (1884).

137. *Id.* at 750–53.

138. *Id.* at 750–51.

139. *Id.* at 751.

first public welfare case even predated *Butchers' Union*. In *Newton v. Mahoning County Commissioners*,[140] the Ohio legislature created a new county and specified that the county seat would be located permanently in the town of Canfield if the town met certain requirements.[141] Although the town met the requirements and became the county seat,[142] the state legislature later passed an act moving the county seat.[143] Canfield residents sued to enjoin the move, arguing that the new act impaired the contractual obligation that the earlier legislature created.[144] The Court found no violation of the Contract Clause. It reasoned that the location of a county seat falls in the category of "governmental subjects" affecting "public interests" and that "legislative acts concerning [such subjects] are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to it as its predecessors."[145]

Newton involved public welfare in the form of convenient citizen access to the seat of government, rather than citizen economic welfare, but it laid the foundation for a case that did involve public economic welfare. In *Illinois Central Railroad Co. v. Illinois*,[146] the Illinois legislature granted state land beneath Lake Michigan to a railroad company.[147] A later session of the legislature revoked the grant.[148] In ensuing litigation, the railroad company argued that the revocation violated the Contract Clause.[149] The railroad company relied on *Fletcher v. Peck*,[150] which held that a state legislature's attempt to rescind sales of state land made in a prior session violated the Contract Clause.[151] In *Fletcher*, the Court declared that the Contract Clause applies to completed land grants because the grants necessarily imply the grantor's continuing contractual obliga-

140. 100 U.S. 548 (1879).
141. *Id.* at 549.
142. *Id.* at 549–50.
143. *Id.* at 550.
144. *Id.* at 552.
145. *Id.* at 559.
146. 146 U.S. 387 (1892).
147. *Id.* at 448–51, 454.
148. *Id.* at 449.
149. *Id.* at 418 (Mr. Ayer's argument for the railroad company); *id.* at 432 (Mr. Jewett's argument for the railroad company).
150. 10 U.S. (6 Cranch) 87 (1810).
151. *Id.* at 87–89, 136–37.

tion not to revoke them.[152] The Court thus held that the legislation rescinding the grants violated the state's continuing contractual obligation not to revoke.

In *Illinois Central*, however, the Supreme Court upheld the Illinois legislature's revocation of the grant of submerged state land.[153] Without mentioning *Fletcher* by name, the Court implicitly distinguished it by explaining that a state's title to the beds of navigable waters

> is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[154]

To substantiate this distinction between submerged state land and state land intended for sale, the Court referred to federal and state cases concerning public rights to use navigable waters for navigation, commerce, and fishing.[155] The Court said these cases established that a state holds its submerged lands and the overlying navigable waters "in trust for the public."[156] The Court said further that ownership of these lands and waters "is a subject of public concern to the whole people of the state,"[157] and that "[t]he trust with which they are held, therefore, is governmental."[158]

These principles enabled the Court to rely on *Newton*. It described *Newton* as holding that

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152. *Id.* at 136–37 ("A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.").

153. 146 U.S. at 463–64.

154. *Id.* at 452. The Court could not have used the unmistakability doctrine to avoid *Fletcher*. Although the Court developed that doctrine in the decades between *Fletcher* and *Illinois Central*, *see* United States v. Winstar Corp., 518 U.S. 839, 874 (1996) (unmistakability doctrine surfaced in the 1830s), the doctrine is only a presumption against implied state obligations, not a prohibition of them; and the Court strongly indicated in *Fletcher* that a state land grant necessarily implies an obligation not to revoke it. *Fletcher*, 10 U.S. (6 Cranch) at 136–37.

155. *Illinois Central*, 146 U.S. at 455–59.

156. *Id.* at 455.

157. *Id.*

158. *Id.*

> there could be no contract and no irrepealable law upon governmental subjects . . . ; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so in the nature of things; that it is vital to the public welfare that each one should be able, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require . . . .[159]

After thus summarizing the holding in *Newton,* the *Illinois Central* Court stated:

> [I]f this is true doctrine as to the location of a county seat it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right as an incident of their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances.[160]

Because the reserved powers doctrine rendered the grant of submerged land nonbinding, a later session of the Illinois legislature could revoke it without violating the Contract Clause.[161]

Illinois Central concerned public welfare benefits arising not only from public use of the harbor for navigation and fishing but also from commercial use of the harbor. The Court noted the public welfare benefits from commercial use when it explained why an irrevocable land grant could impede future legislatures' power to promote the public welfare. The Court expressed concern that the railroad company might construct too many docks and other improvements, might improperly locate them, or might "delay indefinitely the improvement of the

159. *Id.* at 459.

160. *Id.* at 459–60.

161. The railroad company also raised a Due Process Clause challenge, but since the grant to it was revocable the legislature's revocation did not constitute a taking of property in violation of that clause. *See* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849, 860 n.74, 861 n.81, 861–62 nn.85–86 (2001) (and accompanying text).

harbor."[162] These potential problems troubled the Court because "[t]he harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce."[163] Here, the Court focused on the state's need for optimum harbor improvements to promote the economic welfare of its people.

As the formative era for the reserved powers doctrine drew to a close, the Court applied the doctrine in two more cases involving a state's exercise of the police power to promote public economic welfare. In *Atlantic Coast Line Railroad v. City of Goldsboro*,[164] the Court rejected a Contract Clause challenge to municipal regulations that limited railroad operations within a city. Although the regulations mainly promoted public health and safety, they also served the economic purpose of protecting private property against damage.[165] The railroad company argued that its corporate charter, as a contract with the state, in-

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162. *Ill. Cent.*, 146 U.S. at 451. The grant to the railroad company stated "nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation." *Id.* at 406 n.1 (section 3 of the legislation). Perhaps the Court was not convinced that this language would cover all forms of overdevelopment or badly located improvements; in any event, the language did nothing to address delay in the building of improvements.

Regarding overdevelopment and badly located development, land use law at the time left it unclear whether the state could have avoided these problems by regulation. Although *Parker v. People*, 111 Ill. 581, 587–88 (1884), had established that a grantee of submerged land is not immune from police power regulation and that the legislature can prevent the erection and maintenance of obstructions in navigable streams, it was not until several decades after *Illinois Central* that the United States Supreme Court held that comprehensive zoning to control density, location, and kind of use passed muster under the federal constitution. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Regarding delayed improvement of the harbor, the Court had no basis for thinking the state could have used its police power to avoid this. No land use regulatory tool was available in 1892 or exists now that can do much to speed up undesirably slow development. Other sovereign powers might be available instead, but they have their limitations, too. One example would be the taxing power. If *ad valorem* property taxes could be levied on the submerged land based on its value as a site for intensive development, that might create an economic incentive for the owner to develop it into income-producing property more rapidly. Similarly, tax incentives for development expenditures might induce speedier improvement of the land. Still, taxation sticks and carrots fall short of guaranteeing optimally speedy development. Another available sovereign power would be eminent domain to reacquire the land and transfer it to another grantee subject to development covenants. Of course, the drawback of this would be the expense of paying just compensation for the reacquisition.

163. *Ill. Cent.*, 146 U.S. at 454.

164. 232 U.S. 548 (1914).

165. *Id.* at 559–61.

sulated it from the new regulations. The Court upheld the regulations, however, because the Contract Clause does not prevent new "regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community."[166] Given the factual context of this statement, the Court's reference to the general welfare included property owners' economic well-being.

In *Chicago & Alton Railroad v. Tranbarger*,[167] which again involved railroad regulation, the Court took a similar approach. There, the challenged legislation required railroad companies to provide adequate drainage in their rights of way and roadbeds.[168] The legislation sought to prevent flooding that would cause "unnecessary and wide-spread injury to property."[169] In rejecting the railroad company's Contract Clause challenge, the Court initially said the railroad's corporate charter did not promise immunity from new drainage requirements,[170] but then it advanced a "more satisfactory"[171] justification for rejecting the challenge. The Court reasoned that the Contract Clause does not override a state's police power "to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community" because "this power can neither be abdicated nor bargained away, and is inalienable even by express grant . . . ."[172] Thus, in *Tranbarger*, as in *City of Goldsboro*, the Court applied the reserved powers doctrine to uphold a state's exercise of its police power to promote the public welfare by protecting private property owners against economic injury.

Remaining for consideration are the formative-era cases in which the Court did not apply the reserved powers doctrine to protect exercises of the police power. These cases fall into three categories. First, the Court did not apply the reserved powers doctrine when a state or local government contractually undertook a financial obligation.[173] The Court's apparent ra-

166. *Id.* at 558.
167. 238 U.S. 67 (1915).
168. *Id.* at 71.
169. *Id.* at 76.
170. *Id.*
171. *Id.*
172. *Id.* at 77.
173. WRIGHT, JR., *supra* note 133, at ch. X; Note, *The Contract Clause of the Federal Constitution*, 32 COLUM. L. REV. 476, 488 (1932). For example, a state cannot authorize a municipality to borrow money and then invoke the reserved powers doctrine to restrict the municipality's taxing power so the debt cannot be

tionale was that applying the doctrine to government financial obligations would unduly compromise the public sector's ability to obtain credit needed to operate.[174] Second, the Court did not apply the doctrine when a state or local government contracted that a public utility's service franchise should be exclusive and later the government sought to grant a competing franchise—allegedly to promote the public health, safety, and welfare.[175] The Court saw no need to apply the reserved powers doctrine because competition is not necessary to protect the public. The government can do that by regulating rates and service even though a public utility's franchise is exclusive.[176] Third, the Court did not apply the reserved powers doctrine when a municipality contracted with a public utility regarding matters such as permissible rates for service[177] or utility use of municipal property for equipment like electric poles or railroad tracks.[178] The Court's refusal to apply the reserved powers doctrine in this third category of cases seems to defy explanation.[179]

None of the three categories of cases in which the Court refused to apply the reserved powers doctrine undercuts the arguments made above for applying the doctrine to water allocation compacts. The first two categories depend on rationales not remotely applicable to water compacts, and the third is suspect for lack of any rationale.

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repaid. Louisiana *ex rel.* Hubert v. City of New Orleans, 215 U.S. 170, 175–78 (1909); Wolff v. City of New Orleans, 103 U.S. 358, 365–69 (1881).

174. *Cf.* United States v. Winstar Corp., 518 U.S. 839, 883–84 (1996) (Souter, J., plurality opinion) (declining to expand the unmistakability doctrine, *see supra* Part II & note , to government financial obligations for that reason).

175. *See* WRIGHT, JR., *supra* note 133, at 145–46; Robert L. Hale, *The Supreme Court and the Contract Clause: II*, 57 HARV. L. REV. 621, 663, 677–78 (1944); Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 677 (1988).

176. *E.g.*, New Orleans Gas Co. v. Louisiana Light. Co., 115 U.S. 650 (1885), and cases discussed therein; WRIGHT, JR., *supra* note 133, at 145–46.

177. Hale, *supra* note 175, at 663. Additional cases are collected in WRIGHT, JR., *supra* note 133, and Sterk, *supra* note 175, at 677 n.107.

178. Sterk, *supra* note 175, at 677–78 n.108 and accompanying text.

179. *See* WRIGHT, JR., *supra* note 133, at 136–37 ("Just why the difference in attitude [between state contracts and municipal contracts with public utilities] it is difficult to say, but it is at least apparent that, although the Court has never held a railroad rate statute unconstitutional under the contract clause, it has held void almost every municipal ordinance providing for the regulation of street railway rates brought before it under that clause."); Sterk, *supra* note 175, at 678 ("Opinions in many of these cases generally assumed, without much discussion, the municipality's power to bind itself.").

The full body of reserved powers cases from the formative era yields several general principles important to the issue of water compact permanence. The first principle derives from the Court's rationale for the reserved powers doctrine as articulated in *Stone*: the doctrine protects exercise of the police power when the subject matter is public and by its nature will change over time with varying circumstances so the sovereign may need to deal with it differently later. The second principle, which elaborates on the first, derives from dictum in *Butchers' Union*: the doctrine applies only to exercises of the police power that affect public matters reaching some threshold of importance to the best interests of society. The third principle concerns what meets the threshold: the reserved powers doctrine protects, among other things, exercises of the police power to promote the public welfare, including public economic welfare.

3. Modern Cases on the Scope of the Doctrine

The Supreme Court no longer hears Contract Clause cases as often as it once did. Nonetheless, the Court decides such cases occasionally, and a few of these have involved the reserved powers doctrine.[180] Although the modern reserved powers cases do not depart substantively from those of the formative era, the Court has refined the language it uses to express the doctrine. The Court now says the doctrine prevents a state's surrender of "essential attributes of sovereign power"[181] so that the state "continues to possess authority to safeguard the vital interests of its people."[182]

The Court has continued to recognize that "[t]he economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."[183] Most recently, in *City of El Paso v. Sim-*

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180. The Court's post-Great Depression cases on the Contract Clause are discussed in RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.8, at 646–47 (3d. ed. 1999). The most significant reserved powers cases, *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *City of El Paso v. Simmons*, 379 U.S. 497 (1965), are discussed in this Part.

181. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934); *accord United States Trust*, 431 U.S. at 23 (noting there shall be no surrender of "an essential attribute of . . . sovereignty").

182. *Blaisdell*, 290 U.S. at 434; *United States Trust*, 431 U.S. at 15 (quoting *Blaisdell*).

183. *Blaisdell*, 290 U.S. at 437.

mons,[184] the Court rejected a Contract Clause challenge to legislation altering the reinstatement rights of installment contract purchasers of state land who defaulted on their payments. Prior to the new legislation, defaulting purchasers could pay the missed installments and reinstate their contract rights without time limit if the rights of third parties did not intervene.[185] The new legislation mandated that failure to pay missed installments within five years after default resulted in contract forfeiture.[186] The old system for reinstatement led to clouded titles and lost state revenues,[187] and the new legislation aimed "to restore confidence in the stability and integrity of land titles and to enable the State to protect and administer its property in a businesslike manner."[188] In applying the reserved powers doctrine to uphold the new legislation, the Court reiterated that the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts"[189] and added that a state "has the sovereign right to protect the general welfare of the people."[190] *Simmons* is another case in which the reserved powers doctrine enabled a state to exercise its police power to promote the public welfare in its economic dimension.[191]

The current law of reserved powers can be distilled to two principles that incorporate language from both the formative and the modern cases. First, the reserved powers doctrine protects only governmental powers that involve an essential attribute of sovereignty. Second, to involve an essential attribute of sovereignty, exercise of the police power must concern subject matter that (a) affects the vital interests of the state's peo-

184. 379 U.S. 497 (1965).
185. *Id.* at 498–99.
186. *Id.* at 499.
187. *Id.* at 511–16.
188. *Id.* at 511–12.
189. *Id.* at 508 (quoting Stephenson v. Binford, 287 U.S. 251, 437 (1932)).
190. *Id.* (quoting E.N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232–33 (1945)) (citation and ellipses omitted).
191. In what might be regarded as an alternative holding under the unmistakability doctrine, the Court also said it did not believe that purchasers interpreted the reinstatement right to be everlasting. *Id.* at 514. In summarizing *Simmons* in a later case, the Court referred only to the reserved powers basis for the decision and did not mention the possible alternative ground. *United States Trust*, 431 U.S. at 16.

ple and (b) inherently requires continuing supervision to deal with changing circumstances.

B. Reserved Powers as the Basis for State Withdrawal from a Water Allocation Compact

Before a state can employ the reserved powers doctrine to withdraw from a water allocation compact,[192] it must overcome several doctrinal hurdles. First, the Supreme Court has never applied the reserved powers doctrine to interstate compacts. Second, if the doctrine does apply to interstate compacts, the state still must show that its withdrawal involves the exercise of an essential attribute of sovereign power. Finally, the state likely would have to address the Court's refusal to apply the doctrine in its most recent reserved powers case, *United States v. Winstar Corp.*[193]

1. The Reserved Powers Doctrine and Interstate Compacts

Although the Supreme Court has long applied the reserved powers doctrine to contracts between a state and a private party,[194] it has never been asked to apply the doctrine to a contract between two states. The Court laid the foundation for doing that, however, in *Illinois Central* and *Stone*. In *Illinois Central*, it stated: "Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a *foreign State or nation* would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held."[195] Although *Illinois Central* involved a contract between a state and a private party, the Court's statement suggests that the reserved powers doctrine applies as readily to a contract between two sovereigns.

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192. The state legislature would be withdrawing from the compact, i.e., revoking the earlier state legislature's ratification of it, rather than claiming the compact was void from the outset. *See supra* note 130 for an explanation of why the earlier ratification was voidable rather than void.

193. 518 U.S. 839 (1996).

194. *See, e.g.*, City of El Paso v. Simmons, 379 U.S. 497 (1965) (discussed *supra* text accompanying notes 184–91); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) (discussed *supra* text accompanying notes 146, 162–63).

195. *Ill. Cent.*, 146 U.S. at 455 (emphasis added).

The *Illinois Central* statement may have been dictum, but it finds ample support in the rationale for the reserved powers doctrine. As the Court explained in *Stone*, government was organized to exercise sovereign powers over public matters that inherently require continuing supervision to deal with changing circumstances.[196] This rationale for reserved powers is as strong when a state contracts with another state as when it contracts with a private party. Thus, just as *Green v. Biddle* held that the Contract Clause applies to compacts between states because compacts are contracts,[197] the Court should treat compacts (i.e., contracts) between states the same as contracts between a state and a private party for purposes of the reserved powers doctrine.

2. Compact Withdrawal as the Exercise of an Essential Sovereign Power

Because the reserved powers doctrine protects only exercises of governmental power that involve an essential attribute of sovereignty,[198] a state seeking to withdraw from a water compact must demonstrate that withdrawal would constitute the exercise of an essential sovereign power. The Court has never squarely addressed whether a state's withdrawal from a water compact to seek a more favorable allocation by other means would meet this requirement. The issue turns on whether interstate water allocation is a public subject that affects the vital interests of the state's people and inherently requires continuing governmental supervision to deal with varying circumstances.[199] Resolution of this issue might depend on a state's reason for withdrawing from the compact. The following discussion first addresses a state's withdrawal for the purpose of seeking more water to support public rights of use and then considers withdrawal for the purpose of seeking more water for private consumptive use.

Illinois Central established that the reserved powers doctrine protects future legislative exercise of the police power to promote public welfare related to the public's use of navigable

196. *See supra* notes 128–29 and accompanying text.
197. *See supra* notes 109–12 and accompanying text.
198. *See supra* note 181 and accompanying text.
199. *See supra* notes 128–29 and 181–82 and accompanying text.

waters.[200] Although *Illinois Central* concerned a state grant of submerged lands, the Court indicated that the governmental trust obligation to protect public rights also extends to the navigable waters above those lands. The Court said that the trust "requires the government of the State to preserve such *waters* for the use of the public."[201] Thus, a state's efforts to preserve navigable waters for public use should fit within the reserved powers doctrine.

Although *Illinois Central* focused on public use of navigable waters for navigation, commerce, and fishing,[202] the modern reserved powers doctrine protects a broader array of public uses. The *Illinois Central* opinion foreshadowed this development by stating that a state holds the beds of navigable waters "in trust for public uses *for which they are adapted.*"[203] Other courts have since held that public rights to use navigable waters include recreation and the enjoyment of scenic beauty and ecological values.[204] Moreover, various courts correspondingly have expanded the concept of navigable waters to include waters not classically navigable but usable for recreation or valuable for their scenic beauty or ecological characteristics.[205] Thus, the modern reserved powers doctrine protects more kinds of public uses of water and applies to more waterways than formerly. The modern doctrine likely would reach most interstate waterways allocated by compact. Just as the reserved powers doctrine in *Illinois Central* enabled a state to revoke a contract obligation that interfered with its continuing ability to protect public uses of water, the modern doctrine should enable a state to revoke its ratification of a water allocation compact if the state's compact obligation interferes with its continuing ability to protect public water uses within its borders.

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200. *See supra* notes 146–63 and accompanying text.

201. *Ill. Cent.*, U.S. 387 at 453 (emphasis added).

202. *Id.* at 452.

203. *Id.* at 457–58 (emphasis added).

204. *E.g.,* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983) (scenic beauty); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (recreation and ecological values); Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) ("fishing, boating, swimming, water skiing, and other related recreational purposes . . . .") (quoting Wilbour v. Gallagher, 462 P.2d 232, 239 (Wash. 1969)).

205. *E.g., Nat'l Audubon Soc'y*, 658 P.2d at 720 n.17 (noting waters that do not meet the classic federal test of navigability if they meet a more encompassing state test of navigability); Selkirk-Priest Basin Ass'n v. State, 899 P.2d 949, 952–53 (Idaho 1995) (same).

The reserved powers doctrine is unlikely to be of much use to a state, however, if the doctrine allows compact withdrawal only when the state seeks to protect or promote public rights to use water. To illustrate why, suppose a state claims it wants to withdraw and seek a more favorable allocation because it needs water to maintain critical habitat flows mandated under the Endangered Species Act. Although more water for habitat flows should qualify as a public water use, the state's claimed purpose for withdrawing would be suspect if it could get the needed water through internal rather than interstate reallocation. Usually a state could obtain water for habitat flows internally by purchasing consumptive-use water rights from its citizens and retiring them so that more water remains in the river.[206] If the state could do that, its real purpose in seeking interstate reallocation would seem to be to avoid the adverse economic consequences of internal reallocation.

Therefore, the reserved powers doctrine will be much more useful to a state if it protects not only the state's power to promote public welfare through greater public use of waterways but also a state's power to promote public welfare in the form of citizen economic well-being. Several Supreme Court cases, when considered together, suggest that a state's withdrawal from an interstate water allocation compact for economic purposes should qualify as the exercise of an essential sovereign power protected by the reserved powers doctrine.[207]

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206. *See generally supra* Part I.A. (New Mexico's options on the Pecos River).

207. At the outset, this might seem odd compared to the Court's Dormant Commerce Clause jurisprudence. For purposes of that clause, the Court distinguishes between restrictions on interstate commerce in water that a state imposes to protect the health of its economy and those it imposes to protect the health of its citizens. Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956 (1982):

> [A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.

(citations omitted). A state can favor its own citizens when public health is at stake but not when economic health is at stake. City of El Paso v. Reynolds, 563 F. Supp. 379, 389 (D.N.M. 1983).

The Dormant Commerce Clause situation is quite different, however, from that where a state wants to withdraw from a compact and seek an equitable apportionment elsewhere. In Commerce Clause cases, the state is attempting to decide unilaterally that water shall stay within its borders, and it lacks power to do this because of the national interest in interstate commerce. In the compact situation, the state that withdraws from a compact under the reserved powers

As noted earlier, the Supreme Court has applied the reserved powers doctrine to uphold state exercises of the police power to protect private property from railroad damage[208] and enhance state revenues from the resale of state lands after default by initial purchasers.[209] These cases show that the reserved powers doctrine extends to exercises of the police power that promote public economic welfare. Although the economic benefits in those cases did not arise from water use, *Illinois Central* established that economic benefits to the public from water use also come within the reserved powers doctrine. As noted earlier,[210] the Court's concern in *Illinois Central* about safeguarding use of the harbor for navigation, commerce, and fishing had a significant element of economic benefit to the public. The Court applied the reserved powers doctrine to enable the legislature to protect a harbor "of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce."[211]

A critic might object that the *Illinois Central* situation differs from that where a state withdraws from a water allocation compact. *Illinois Central* involved exercise of the police power to enable non-consumptive water use that provided economic benefits to the general public. In contrast, the typical water compact withdrawal case will involve exercise of the police power to enable consumptive water use, e.g., for irrigation, that provides economic benefits mostly to the water right owners rather than the public generally.

Kansas v. Colorado,[212] however, answers this potential objection. It involved economic benefits from consumptive water use that accrued mostly to water right owners. Although the case concerned the equitable apportionment of interstate waters between states, rather than the reserved powers doctrine,

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doctrine is proceeding unilaterally in that action, but it is not trying to determine its future water supply unilaterally. Withdrawal is just the first step in a process to get a more favorable interstate apportionment, most likely from the Supreme Court. *See infra* Part V.A.1. The Court would apply principles of equitable apportionment to determine the state's future water supply. The Court's control removes any reason to allow the reserved powers doctrine to apply to compact withdrawal when public health is the reason but not when public welfare in the form of social and economic well-being is.

208. *See supra* notes 164–72 and accompanying text.

209. *See supra* notes 184–91 and accompanying text.

210. *See supra* notes 162–63 and accompanying text.

211. *Ill. Cent.*, 146 U.S. at 454.

212. 206 U.S. 46 (1907).

the Court made a point that is relevant to the concept of essential sovereign powers under the reserved powers doctrine. The Court said that a controversy between states over water for private consumptive use "rises . . . above a mere question of local private right and involves a matter of state interest" because the "prosperity" of private lands irrigated from the river "affects the general welfare of the State."[213] The Court's recognition of the link between private water use and general welfare suggests that a state's compact withdrawal to enhance the economic welfare of private citizens using water consumptively involves an essential attribute of sovereign power just as much as a state's withdrawal to enhance public economic welfare deriving from nonconsumptive water use. The economic interests of the state's people are no less vital, and the inherent need for continuing governmental supervision to deal with changing circumstances is no less in the former situation than in the latter.

In summary, the Supreme Court cases on protecting private property from railroad damage and state revenues from land sales demonstrate that the reserved powers doctrine protects a state's future exercise of the police power to promote public economic welfare. *Illinois Central* shows that the doctrine applies to economic benefits to the public arising from water use, albeit nonconsumptive water use. *Kansas v. Colorado* recognizes that the sovereign interests of a state include economic benefits enjoyed by private consumptive water users because their prosperity affects the general welfare. Viewed together, these cases suggest that a state's withdrawal from a water compact would involve the exercise of an essential sovereign power when the state seeks more water for the purpose of promoting citizen economic well-being.

3. The Reserved Powers Doctrine After *United States v. Winstar Corp.*

United States v. Winstar Corp.,[214] the Court's most recent reserved powers case, is an oddity because it does not comport with the considerable body of earlier reserved powers cases. The case raises some questions about a state's reliance on the

213. *Id.* at 99.
214. 518 U.S. 839 (1996).

reserved powers doctrine to withdraw from a water allocation compact.

Winstar arose from the federal savings and loan crisis of the 1980s. When federal banking agencies realized that the federal deposit insurance fund could not cover the losses of all the failing thrift institutions,[215] the agencies made promises to financially sound thrifts to induce them to merge with failing thrifts.[216] The federal banking agencies promised that certain favorable regulatory accounting rules designed to facilitate such mergers would continue to apply to the thrifts.[217] Later, however, Congress mandated stricter accounting rules.[218] Several thrifts that suffered losses from the stricter rules sued the United States for breach of contract and sought damages.[219] Among its defenses, the government argued that the reserved powers doctrine rendered the federal banking agencies' promises nonbinding.[220] A divided Court rejected the government's defenses and remanded the case for determination of damages. Two of the four opinions issued in the case discussed the reserved powers doctrine.

Justice Souter, writing for a plurality of four Justices, noted that the Contract Clause on its face applies to the impairment of contracts by a state, but he more or less assumed that the reserved powers doctrine is needed at the federal level as well to avoid the surrender of essential federal powers.[221] Souter concluded that the reserved powers doctrine did not apply, however, to the disputed federal agency promises.[222] He read the promises "as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence."[223] In other words, he transformed the agencies' promises to continue to apply lax rules into promises to indemnify the thrifts for

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215. *Id.* at 846–47.
216. *Id.* at 843, 847–56.
217. *See id.* at 859, 861–68.
218. *See id.* at 856–58.
219. *Id.* at 858, 923.
220. *Id.* at 860.
221. *See id.* at 888–89. He noted that the federal government has some capacity, somewhat obscure in its extent, to make agreements that bind it by creating vested rights. *Id.* at 876.
222. *Id.* at 888–89.
223. *Id.* at 868–69.

their losses should Congress later require stricter rules.[224] Souter saw no need to apply the reserved powers doctrine to the agencies' promises, as thus transformed, to protect future legislative discretion to mandate stricter regulation of the thrifts.[225] Stricter accounting rules would require the government to pay damages for breach of contract, but Souter said "a requirement to pay money supposes no surrender of sovereign power . . . ."[226]

A commentator on *Winstar* has pointed out that Souter's approach conflicts with established reserved powers precedent.[227] For example, in *Stone*, the Court did not refuse to apply the reserved powers doctrine by transforming the state's promise to allow a corporation to operate a lottery into a promise to indemnify it for lost profits should the state subsequently outlaw lotteries.[228] Similarly, in *Illinois Central*, the Court did not refuse to apply the doctrine though only money, not sovereign power, was at stake. The state could have condemned the submerged land when it later came to regret the grant.[229] Justice Shiras argued in *Illinois Central* that the availability of eminent domain eliminated any need for the reserved powers doctrine—in essence, Souter's point that a requirement to pay money entails no surrender of sovereign power—but Shiras wrote for the dissent not the majority.[230]

Justice Scalia wrote a concurring opinion in *Winstar*, joined by two other Justices, that took a different view of the reserved powers doctrine. He noted that the reserved powers doctrine has "not been well defined by our prior cases" but said it "seems to stand principally for the proposition that certain core governmental powers cannot be surrendered."[231] He declined to follow Souter in transforming the agencies' promises

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224. *Id.* at 889.

225. *Id.* at 888–89.

226. *Id.* at 881.

227. Joshua I. Schwartz, *Assembling* Winstar*: Triumph of the Ideal of Congruence in Government Contracts Law?*, 26 PUB. CONT. L.J. 481, 513–14 (1997).

228. *See supra* text accompanying notes 123–24 for a summary of the Court's reasoning in *Stone*.

229. Of course, eminent domain is available only to acquire property for public use, but reacquisition of the submerged land should meet that requirement if the purpose is to promote public use of navigable waters. *See generally* 2A NICHOLS ON EMINENT DOMAIN § 7.02[5], at 7-34 to -35, § 7.06[26] at 7-168 n.265 (rev. ed. 1999).

230. *Ill. Cent.*, 146 U.S. at 474.

231. *Winstar*, 518 U.S. at 922–23 (Scalia, J., concurring).

of continued lax regulation into indemnification promises.[232] Nonetheless, he found the reserved powers doctrine inapplicable because the thrifts sought only damages for breach of the agencies' promises rather than a stay against implementation of the congressionally mandated stricter rules.[233] In reaching this conclusion, Scalia did not adopt Souter's view that a governmental duty to pay money never supposes a surrender of sovereign power that would implicate the reserved powers doctrine. Instead, Scalia stated:

> To the extent this Court has suggested that the notion of 'reserved powers' contemplates, under some circumstances, nullification of even monetary governmental obligations pursuant to the exercise of the federal police power or some other paramount power, I do not believe that regulatory measures designed to minimize what are essentially assumed commercial risks are the sort of 'police power' or 'paramount power' referred to.[234]

When Scalia characterized the reserved powers doctrine as preventing the surrender of "certain core governmental powers," he probably was using the word "core" as a synonym for "essential." Nothing in his opinion suggests an intent to depart from the Court's precedents on governmental powers that cannot be surrendered because they involve essential attributes of sovereignty. Also, Scalia views the reserved powers doctrine as applicable in damage suits only to protect exercise of a certain "sort" of police power. But he gave little, if any, guidance on what constitutes the proper sort of police power exercise.[235] Moreover, it is unclear how his proper-sort test for damage suits compares to the core-powers test that he apparently accepts for suits seeking injunctive relief.

Because *Winstar* produced no majority opinion, Souter's and Scalia's differing views may resurface in future reserved powers cases. Thus, the following discussion examines how their views might affect application of the reserved powers doctrine to interstate water allocation compacts. To set up the

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232. *Id.* at 919.

233. *Id.* at 923.

234. *Id.* (internal citation and quotation marks omitted).

235. Justice Scalia merely cited a case, *Lynch v. United States*, 292 U.S. 571, 579 (1934), that in turn cited other cases, *id.* n.7, where Congress used one of its constitutionally enumerated powers to promote public health, safety, or morals. *Winstar*, 518 U.S. at 923.

discussion, suppose upstream State A enters into a compact with downstream State B in which State A promises not to deplete the flow at the state line below a specified amount. Years later, State A asserts the reserved powers doctrine in an effort to withdraw from the compact and seek a more favorable allocation by another means.

Under Souter's view, the reserved powers doctrine would not apply to State A's attempt to withdraw from the compact if the Court were to transform State A's promise to deliver water into a promise merely to indemnify State B for losses should State A withdraw from the compact. In that event, only money would be at stake, and a requirement to pay money supposes no surrender of sovereign power. The key issue under Souter's approach would be whether the Court would transform State A's water delivery promise into an indemnity promise.

The Court's reasoning in *Texas v. New Mexico*[236] indicates that it probably would not do so. There, the Court found that New Mexico breached its water delivery promise to Texas under the Pecos River Compact, and it ruled that Texas was entitled to "a suitable remedy, whether in water or money."[237] The Court noted that the remedy in water bore "all the earmarks of specific performance."[238] Had the Court transformed New Mexico's water delivery promise into an indemnity promise, the only available remedy would have been in money. The availability of a remedy in water means the Court did not transform the water delivery promise into one of indemnity. Arguably, consistency should prevent the Court from transforming a water delivery promise into one of indemnity when the question is whether a state can escape from its compact promise under the reserved powers doctrine.

But even if the Court were to transform the promise and find the reserved powers doctrine inapplicable, that would not necessarily prevent State A from repudiating the compact and obtaining more water. As the upstream state, State A physi-

236. 482 U.S. 124 (1987).

237. *Id.* at 130. The Court returned the remedy issue to the Special Master because the record was insufficient for it to decide whether New Mexico should be allowed to elect a monetary remedy and, if so, its size. *Id.* at 132.

238. *Id.* at 131. While the Court noted that the water remedy was an equitable remedy requiring attention to the relative benefits and burdens to the parties, it also said that a decision to award damages "would only be on the basis that if the sum awarded is not forthcoming in a timely manner, a judgment for repayment in water would be entered." *Id.*

cally could divert more water notwithstanding the compact. If the Court transforms State A's promise to deliver water into an indemnity promise, State B could not specifically enforce the water delivery promise because it would have been transformed out of existence. State B could only recover money from State A under the indemnity promise. If State A could put the additional water it takes to more valuable use than State B would have, State A could indemnify State B for its losses and still come out ahead. Although State A's self-interest would produce this result, the result would be desirable in a broader sense. It would comport with the modern concept of "efficient breach" of contract by enhancing aggregate wealth.[239]

Turning to Scalia's view in *Winstar*, the analysis of State A's effort to withdraw from the compact would depend on what remedy State B seeks. If State B seeks to enjoin withdrawal and future breach, the reserved powers doctrine would apply if State A's withdrawal constitutes the exercise of a "core" sovereign power. To the extent that core powers correspond to essential sovereign powers,[240] the reserved powers doctrine should apply. If State B seeks only damages from State A, however, then the doctrine would not apply unless State A's withdrawal constitutes the proper sort of police power exercise. It is hard to say whether this puzzling requirement would be met. But even if it is not met and the reserved powers doctrine does not apply, State A could breach the compact and only have to pay State B damages—again enabling "efficient breach" if State A can use the water more productively than State B.

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239. "[B]reaches of contract that are in fact efficient and wealth-enhancing should be encouraged, and . . . such 'efficient breaches' occur when the breaching party will still profit after compensating the other party for its 'expectation interest.'" Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57, 63 (2d Cir. 1985). Absent transformation of a water delivery promise into an indemnity promise, the Court likely would not allow efficient breach. In *Texas v. New Mexico*, 482 U.S. at 132, the Court considered the possibility that a state might prefer to ignore its compact duty to deliver water and instead pay damages for breach. It responded to this possibility by saying that it had the authority to order delivery "shortfalls to be made up in kind, with whatever additional sanction might be thought necessary . . . ."

240. *See supra* notes 198–214 and accompanying text.

III. THE "LAW OF THE CASE" DOCTRINE AS A SOURCE OF COMPACT PERMANENCE AND ITS LIMITATIONS

Although the Contract Clause is widely regarded as the source of compact permanence,[241] the Court relied on a different source in an early boundary compact case. In *Rhode Island v. Massachusetts*,[242] the Court held that a compact between the two states settling a boundary dispute became "the law of the case binding on the states . . . as fully as if it had never been contested."[243] Recently, the Court quoted this language in another boundary compact case. [244] This is the full extent of the Court's use of the "law of the case" principle in interstate compact cases. The discussion below examines the "law of the case" principle and explains why it should not apply to water allocation compacts.

The "law of the case" is a litigation principle that prevents relitigation of issues decided in an earlier stage of the same case.[245] It functions to achieve consistency in the various phases of a lawsuit, to promote the efficient termination of litigation, and to preserve public confidence in the judicial system.[246] In *Rhode Island v. Massachusetts,* the Court did not explain why it extended a litigation management tool to the different role of making an agreement between states binding. That principle is not otherwise part of the law of contracts, so it seems odd that the Court would take a principle used to manage litigation and apply it to make a contract between states binding. If contract law does not use the "law of the case" principle to make contracts between private parties or between a state and a private party binding, why should the principle make contracts between states binding?

A possible explanation for the Court's "law of the case" reasoning in *Rhode Island v. Massachusetts* relates to the reserved powers doctrine and particularly to the Court's desire to avoid the revocability of boundary compacts under that doctrine. Although the Court did not embrace the reserved powers doctrine

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241. *See supra* note and accompanying text.
242. 37 U.S. (12 Pet.) 657 (1838).
243. *Id.* at 727.
244. New Jersey v. New York, 523 U.S. 767, 810–11 (1998).
245. Allan D. Vestal, *Law of the Case: Single Suit Preclusion*, 1967 UTAH L. REV. 1, 4.
246. *Id.* at 1.

until after *Rhode Island v. Massachusetts,*[247] state courts had already accepted the doctrine,[248] and the Court had heard argument on the doctrine (without reaching the issue) just a year before *Rhode Island v. Massachusetts*.[249] Therefore, the Court almost surely knew of the doctrine when it decided *Rhode Island v. Massachusetts*. The Court might have recognized that should it later adopt the reserved powers doctrine, states could withdraw from their boundary compacts unless some other principle would prevent that. By borrowing the "law of the case" principle from the field of litigation, the Court could preclude such withdrawal should it later embrace the reserved powers doctrine.

The "law of the case" source of permanence makes sense for boundary compacts if, as has been suggested, they present a greater need for permanence than most kinds of compacts.[250] But even if the "law of the case" principle properly makes boundary compacts permanent, that does not mean the doctrine should apply to water allocation compacts. Interstate boundaries and interstate water allocation differ in two important respects that bear on the propriety of applying the "law of the case" doctrine: the Supreme Court's power over them and the role compacts play regarding them.

The Court has no power to develop and apply federal common law to alter interstate boundaries.[251] A sovereign with territorial jurisdiction prescribed these boundaries in writing at or before statehood—by royal charter for the colonies that

247. *See* WRIGHT, JR., *supra* note 121, at 196.

248. *See id.* at 196–97.

249. *See id.* at 200. The case was *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

250. Zimmerman & Wendell, *supra* note 25, at 940 (it is "probably sound" that compacts with no stated duration should be revocable at will or after a reasonable time "if some types of interstate agreements (for example, those providing for boundary settlements) are excluded"). *See infra* text accompanying notes 252–258 for discussion of why boundary compacts should be permanent.

251. Washington v. Oregon, 211 U.S. at 135 ("The courts have no power to change the boundary thus prescribed" by act of Congress when Oregon was admitted to the Union.). Of course, a boundary prescribed in writing still must be translated into a line on the ground. Although the Court cannot alter a prescribed boundary, it can invoke the doctrine of acquiescence to settle the location on the ground if it was once uncertain, but the states had long treated a particular line as the boundary. *E.g.,* California v. Nevada, 447 U.S. 125, 131 (1980); Ohio v. Kentucky, 410 U.S. 641, 650–51 (1973).

became the original states,[252] by state legislation ceding territory to the United States for a new state or otherwise providing for specified territory to become a new state,[253] or by act of Congress admitting a state to the Union.[254] A boundary thus prescribed in writing cannot be altered without the consent of the states concerned and Congress.[255]

Because boundary compacts postdate prescribed written boundaries, they necessarily must perform some function other than setting initial boundaries. Although a compact can alter a boundary, usually a boundary compact merely implements the prescribed written boundary by resolving language ambiguities or practical difficulties in locating the boundary on the ground.[256] But whatever a boundary compact's function, if the

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252. *See, e.g.,* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 659–62 (1838) (charters for the colonies that became Rhode Island and Massachusetts).

253. *See, e.g.,* Ohio v. Kentucky, 444 U.S. 335, 338 (1980), Ohio v. Kentucky, 410 U.S. 641, 642 (1973) (cession by Virginia to the United States of the territory that became Ohio); Virginia v. Tennessee, 148 U.S. 503, 509–10 (1893) (cession by North Carolina to the United States of the territory that became Tennessee); Virginia v. West Virginia, 78 U.S. (11 Wall.) 39, 40–41 (1870) (discussing Virginia legislation leading to creation of West Virginia).

254. *See, e.g.,* Nebraska v. Iowa, 143 U.S. 359, 359–60 (1892) (acts of Congress admitting Iowa and Nebraska to the Union defined their common boundary).

255. Indiana v. Kentucky, 136 U.S. 479, 508 (1890) (although a different boundary than the one prescribed might later become more convenient, making the change "is a matter for arrangement and settlement between the States themselves, with the consent of Congress"). *See also* Washington v. Oregon, 211 U.S. 127, 130–31 (1908) ("The northern boundary of the State of Oregon was established [by act of Congress when the state was carved out of federal territory], and it is not within the power of the National Government to change that boundary without the consent of Oregon."). The requirement of agreement by the states may come from the contract concepts of offer and acceptance, and the requirement of congressional consent to their agreement may come from the Compact Clause. *See infra* note 265. The limit on the power of Congress to change a boundary without the consent of states concerned may come from a broad reading of the Statehood Clause, U.S. CONST. art. IV, § 3, which empowers Congress to admit new states to the Union but says no state shall be formed from parts of other states without the consent of those states as well as Congress.

256. *See, e.g.,* Rhode Island v. Massachusetts, 37 U.S. at 714–15 (discussing compact between Rhode Island and Massachusetts resolving boundary dispute arising from charters given by the crown of England to the colonies of Rhode Island and Massachusetts); New Jersey v. New York, 523 U.S. 767, 771–73 (1998) (compact between New York and New Jersey resolving ambiguity in grant by Duke of York to the proprietors of New Jersey). Only in unusual circumstances making it practically impossible to ascertain the original boundary has a compact established a new boundary that the parties knew differed from the previous one. *See* Nebraska v. Iowa, 406 U.S. 117 (1972) (compact permanently fixed the boundary between Iowa and Nebraska because the original boundary shifted with accretion but not avulsion of the Missouri River, and over time it became virtually

Court were to set it aside under the reserved powers doctrine, the Court could not apply federal common law to establish a new boundary.[257] As just noted, an initial prescribed boundary can be altered only with the consent of the states concerned and Congress. In resolving any controversy regarding the location of the boundary after setting aside a boundary compact, the Court could only interpret the language of the colonial charter, state legislation, or federal legislation that prescribed it.

In light of the Court's limited role regarding boundaries, a rational state legislature would withdraw from a boundary compact only if it held two beliefs. First, the legislature must believe the previous legislature that ratified the compact gave away too much in compromising on the meaning or application of the initial boundary language. Second, the legislature must believe the Supreme Court would make a more favorable interpretation of the initial boundary language. A state legislature's desire to revisit a compromise merely because it perceives a lack of shrewdness by its predecessor in ratifying the compact would amount to no more than second-guessing that deserves derision as Monday morning quarterbacking. This situation is appropriate for applying the "law of the case" principle to trump the reserved powers doctrine and make the compact binding. Just as the "law of the case" principle promotes efficient termination of litigation, its extension to boundary compacts promotes efficient termination of consensually resolved boundary uncertainties between states.

In contrast to interstate boundaries, states did not enter the Union with their respective rights to interstate waters prescribed in writing by a sovereign with territorial jurisdiction. Their shares were undetermined at statehood. Early in the twentieth century, the Supreme Court acted to fill the allocation void. It held that interstate water disputes present a jus-

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impossible to ascertain the original boundary on the ground because of difficulty in distinguishing between accretion and avulsion).

257. There would be an exception if the facts were found to come within the federal common law doctrine of acquiescence. *See supra* note 251. The exception, however, does not undercut the point that will be made in the next paragraph of the text regarding the circumstances under which a state would decide to withdraw from a boundary compact. A state deciding to withdraw and seek a new boundary under the doctrine of acquiescence would gain nothing from the acquiescence exception. If the Court were to apply the doctrine of acquiescence when the states had long acquiesced in the boundary established by compact, the outcome would be exactly the same as under the compact.

ticiable question that it can resolve by applying a federal common law of equitable apportionment.[258] Later, states tended to eschew apportionment litigation and instead negotiated compacts to allocate interstate waters.[259] Although the Court loses its power to apportion interstate waters using federal common law if states apportion by compact,[260] its power to apportion should revive if a state withdraws from a compact under the reserved powers doctrine.[261] The same lack of allocation would then exist that prompted the Court to create the federal common law doctrine of equitable apportionment.

If the Court exercises this power to make a new allocation by applying that doctrine, it could consider water supply and demand circumstances in the states that arose *after* they entered into the compact.[262] Unlike with a boundary compact, then, a state legislature that revokes its predecessor's ratification of a water compact and seeks a more favorable allocation from the Court would not be merely second-guessing a compromise made by its predecessor. Rather, the legislature would be seeking an equitable apportionment based on current circumstances, not those existing when the compact was ratified.

The disparity between the Supreme Court's power to reallocate water between states in light of current circumstances and its lack of power to relocate boundaries in light of current circumstances is significant. The state legislatures that ratified water compacts purporting to allocate water permanently[263] attempted, in effect, to deprive their successors of the power to seek a more favorable allocation from the Court under a legal doctrine—the doctrine of equitable apportionment—that

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258. Kansas v. Colorado, 185 U.S. 125, 141–44, Kansas v. Colorado, 206 U.S. 46, 117–18 (1907). Although the Court spoke of "interstate common law," 206 U.S. at 98, it later used the phrase "federal common law" interchangeably. *See* Colorado v. New Mexico, 459 U.S. 176, 183 (1982).

259. *See supra* notes 5–6.

260. Texas v. New Mexico, 462 U.S. 554, 564 (1983) (finding that unless a compact "is somehow unconstitutional, no court may order relief inconsistent with its express terms"). Similarly, the Court loses its power to decree an apportionment if Congress has legislated an allocation. Arizona v. California, 373 U.S. 546, 565 (1963).

261. *See id.* at 564 (noting, "this Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States.").

262. *See infra* text accompanying notes 363–.

263. *E.g.*, Arkansas River Compact, art. IX.B, 63 Stat. 145, 151 (1949); South Platte River Compact, art. X, 44 Stat. 195, 200 (1926); Yellowstone River Compact, arts. XI, XII, & XV, 65 Stat. 663, 669 (1951).

can take into account changed water supply and demand circumstances. This attempt to control the future should fail because the *raison d' être* of the reserved powers doctrine is to protect future legislatures against power grabs by their predecessors when the subject matter affects the vital interests of the state's people and inherently requires continuing supervision to deal with changing conditions.[264] In contrast, the state legislatures that ratified boundary compacts did not deprive their successors of power to seek judicial relocation of a boundary to reflect changed circumstances. That is because the Court lacks any such power.

In summary, boundary compacts and water allocation compacts present different situations regarding application of the "law of the case" principle. Applying the principle to make a boundary compact binding does not deprive a current legislature of power to seek judicial relocation of a boundary because the Court has no such power. In contrast, applying the principle to a water allocation compact would deprive a current legislature of power to seek, through apportionment litigation, reallocation of water under the doctrine of equitable apportionment. Thus, applying the "law of the case" principle to water allocation compacts would conflict with the reserved powers doctrine's long-recognized and necessary function of protecting a legislature's power to address changed circumstances affecting the public welfare, while applying the principle to boundary compacts does not. For that reason, the Court should not extend the "rule of the case" principle from boundary compacts to water allocation compacts.

IV. THE "LAW OF THE UNION" DOCTRINE AS A SOURCE OF COMPACT PERMANENCE AND ITS INAPPLICABILITY TO WATER COMPACTS

The Compact Clause of the Constitution requires congressional consent for states to form compacts,[265] and Congress has

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264. As argued earlier, interstate water allocation should meet this requirement. *See supra* text accompanying notes 198–214.

265. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."). Contrary to the literal language of this clause, not all agreements between states require the consent of Congress. Northeast Bancorp. v. Bd. of Governors, 472 U.S. 159, 175–76 (1985); Virginia v. Tennessee, 148 U.S. 503, 519 (1893). However, water allocation compacts do require such consent. Texas v. New Mexico, 462

consented to all the water allocation compacts.[266] The Supreme Court has stated that congressional consent transforms a compact into federal law[267] or, in other words, into a "law of the Union."[268] The discussion below first explains why the "law of the Union" doctrine, in conjunction with the Supremacy Clause,[269] could become a source of compact permanence. The discussion next argues, however, that no functional or conceptual necessity exists for the doctrine to apply to water allocation compacts. Then, after briefly revisiting the Supremacy Clause, the discussion proposes a cost-benefit approach for determining when the "law of the Union" doctrine should apply to water allocation compacts, and it suggests that the doctrine generally should not apply.

A. The Reserved Powers Doctrine as State Law and the Supremacy of Federal Law

Although the federal Contract Clause is the source of the prohibition against state impairment of contract obligations, state law also plays a role in impairment cases. The Contract Clause does not create any contracts,[270] so a contract obligation must arise under other law before the Contract Clause can operate.[271] State contract law governs whether a binding contract arose and, if so, its terms.[272] The Supreme Court can deter-

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U.S. 554, 559 (1983) (dictum); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 105 (1938) (dictum).

266. *See Water Compacts, supra* note 5, at § 46.01, Table of Water Apportionment Compacts.

267. New Jersey v. New York, 523 U.S. 767, 811 (1998); Reed v. Farley, 512 U.S. 339, 347 (1994); Cuyler v. Adams, 449 U.S. 433, 438 (1981).

268. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1851). After initially wavering from the "law of the Union" doctrine, the Court returned to it in *Del. River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940). For a discussion of this history, see David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 991–1013 (1965).

269. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

270. Robert L. Hale, *The Supreme Court and the Contract Clause: II*, 57 HARV. L. REV. 621, 628 (1957).

271. Mun. Investors Ass'n v. City of Birmingham, 316 U.S. 153, 157 (1942).

272. *See, e.g.*, Jefferson Branch Bank v. Skelly, 66 U.S. (1 Black) 436, 443 (1861); Piqua Branch Bank v. Knoop, 57 U.S. (16 How.) 369 (1853); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 225 (1827) (resulting in a 4–3 decision, in

mine the content of relevant state law[273] if that law is unsettled or a state court decision defining it appears to constitute a strained effort to evade the Contract Clause.[274] But even when the Court does that, the governing law is still state contract law.[275]

When the promisor in an impairment case is a state and the state argues that its promise is nonbinding under the reserved powers doctrine, state law also governs this issue of contract existence.[276] The exact source of the reserved powers doctrine in state law is not entirely clear. Most likely, the source is the standard clause in state constitutions vesting "legislative power" in the legislature.[277] Of course, the "legislative power" clause operates with other constitutional clauses on executive power and judicial power to establish a separation of powers among the three branches of government. But the "legislative power" clause appears to establish an additional, temporal separation of powers within the legislative branch: today's legislature cannot bind a later one regarding the exercise of essential sovereign powers. Under this view, the "legislative power" clause allows the current legislature to legislate but not to bind the discretion of future legislatures regarding subjects that vitally affect the state's people and require continuing legislative supervision to deal with varying circumstances.

If state law governs the reserved powers doctrine but congressional consent transforms a compact into a "law of the Union," the Supremacy Clause would make the compact binding on each signatory state even though a state lacked power under its law of reserved powers to bind itself. The compact would bind the signatory states as would any other federal law. The Supremacy Clause would not operate, however, if the "law of

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which each member of the majority wrote separately and indicated expressly or implicitly that state contract law governed).

273. *E.g.*, Coolidge v. Long, 282 U.S. 582, 597 (1931); Kentucky v. Indiana, 281 U.S. 163, 176–77 (1930).

274. Robert L. Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852, 869 (1957). This is true of a state decision, at least, if it postdates the state legislation being challenged as an impairment of contract.

275. *Id.* ("The nature and extent of the [contractual] obligation . . . are federal questions only in the sense that federal courts must decide them, but they are federal questions of *state* law") (emphasis in original).

276. *See, e.g.*, Appleby v. City of New York, 271 U.S. 364, 379–84 (1926). This point is documented at length in Grant, *supra* note 161, at 869–71.

277. *See* Grant, *supra* note 161, at 871–74 (explaining why this is the likely source).

the Union" doctrine does not apply when a state seeks to withdraw from a water allocation compact under the reserved powers doctrine.

B. The "Law of the Union" Doctrine

The Court has not addressed whether the "law of the Union" doctrine would apply in a water compact withdrawal case. Conceivably, the Court might apply the doctrine because it performs a desirable function in that situation or because conceptual reasoning dictates that it should apply. Therefore, the following discussion examines the "law of the Union" doctrine both functionally and conceptually. It argues that no functional or conceptual necessity exists for the Court to apply the "law of the Union" doctrine in a water compact withdrawal case.

1. Functions of the Doctrine

The "law of the Union" doctrine can operate either jurisdictionally or substantively. It has two jurisdictional functions. First, it enables the Supreme Court to review state decisions interpreting interstate compacts. Because a compact is a "law of the Union," a state court decision interpreting the compact comes within the federal statute providing *certiorari* jurisdiction for any case involving a "title, right, privilege, or immunity . . . set up or claimed under the Constitution or the treaties or statutes of . . . the United States."[278] Second, the doctrine enables federal courts to hear *habeas corpus* cases in which state prisoners claim their custody violates an interstate compact.[279] An alleged compact violation falls within the federal statute creating *habeas* jurisdiction for "violation of the Constitution or laws or treaties of the United States."[280]

The "law of the Union" doctrine would not be needed to create federal jurisdiction, however, when a state seeks to withdraw from a water allocation compact. If litigation arises over the state's power to withdraw, the litigation would neces-

278. 28 U.S.C. § 1257(a) (1994). *See* Del. River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419, 427 (1940) (construing the almost identically worded predecessor of current § 1257(a)).

279. Reed v. Farley, 512 U.S. 339, 348–49 (1994).

280. 28 U.S.C. § 2254(a) (1994).

sarily include that state as a party. Furthermore, the other party or parties likely would include the other signatory state or states. The United States Supreme Court would have jurisdiction independent of the "law of the Union" doctrine because the Constitution grants it original jurisdiction of all suits in which a state is a party.[281]

In addition to its jurisdictional functions, the "law of the Union" doctrine accomplishes several substantive functions. First, it enables federal preemption of state laws that would encroach on federal prerogatives. For example, the doctrine preempted state law in *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[282] which was a nuisance action for the removal or alteration of a bridge that obstructed navigation. The bridge company argued that no nuisance existed because the state legislature had authorized the bridge. An interstate compact, however, specified that the river should remain free and common to citizens of the United States. The Court held that the compact constituted federal law and preempted the state from authorizing the bridge because obstructed navigation is not free.[283] Regarding the plaintiff's argument that no act of Congress prohibited obstruction of the river,[284] the Court re-

281. U.S. CONST. art. III, § 2, cl. 2. *See also* 28 U.S.C. § 1251 (1994) (granting exclusive jurisdiction to the Court when the suit is between two or more states).

282. 54 U.S. (13 How.) 518, 566 (1851). The Court noted the *Wheeling Bridge* origin of the transformation principle in *Cuyler v. Adams*. 449 U.S. 433, 438–39 n.7 (1981).

283. *Wheeling & Belmont Bridge*, 54 U.S. at 565.

284. *Id.* To appreciate *Wheeling Bridge* fully, it needs to be put in historical context. Earlier, the Court had ruled that the mere existence of congressional power to regulate navigable waters under the Commerce Clause, in its dormant state, did not preempt the states from obstructing navigation. Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 251–52 (1929). At the time of *Wheeling Bridge*, Congress had not yet enacted any general legislation (as it later would in the Rivers and Harbors Act of 1890, ch. 907, § 10, 26 Stat. 426, 454 (1890)) prohibiting obstructions to navigable waters without federal authorization. *See* Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 731–32 (1865) (noting the lack of such legislation). Similarly, the Court had not yet developed the navigation servitude doctrine, *see* Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 19–63 (1963), a doctrine that would have enabled Congress to remove the bridge to restore navigation without having to pay just compensation, *see, e.g.*, United States v. Rands, 389 U.S. 121 (1967). Thus, in *Wheeling Bridge*, the "law of the Union" doctrine enabled the Court to protect the national interest in navigation-based interstate commerce at a time when mechanisms of protection we now take for granted did not exist.

sponded: "This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired . . . ?"[285]

Second, the "law of the Union" doctrine can validate compact-imposed burdens on interstate commerce that would otherwise violate the Dormant Commerce Clause. For example, the Yellowstone River Compact provides that no water shall be exported from the river basin without the consent of all signatory states.[286] The consent provision was challenged as an unconstitutional burden on interstate commerce in water.[287] The Ninth Circuit rejected the challenge because congressional consent to the compact transformed the provision into federal law, and the Dormant Commerce Clause applies only to state laws burdening commerce.[288]

Third, the "law of the Union" doctrine enables uniform judicial interpretation of a compact that seeks nationally uniform treatment of a subject.[289] For example, the Interstate Agreement on Detainers, which forty-eight states and the District of Columbia have adopted,[290] seeks to provide a nationally uniform means of transferring temporary custody of prisoners between jurisdictions.[291] The Court has observed that this goal requires uniform interpretation of the agreement.[292] By treating the compact as federal law, the Court has made itself the definitive interpreter of the agreement. This enables the Court to resolve differing state-court interpretations of the compact.

Ironically, after the Court ordered removal or elevation of the Wheeling bridge in *Wheeling & Belmont Bridge*, 54 U.S. (13 How.) at 578, Congress legalized it. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430–32 (1855); *Gilman*, 70 U.S. (3 Wall.) at 732.

285. *Wheeling & Belmont Bridge*, 54 U.S. (13 How.) at 566. An additional reason for preemption that the Court found was that Congress had licensed vessels on the river, and "[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress." *Id.*

286. Yellowstone River Compact, art. X, 65 Stat. 663, 669 (1951).

287. Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 569 (9th Cir. 1985).

288. *Id.* at 569–70. The Dormant Commerce Clause limits the power of states but not of Congress. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423 (1946).

289. Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 HARV. L. REV. 1991, 2004 (1998) [hereinafter *Charting*].

290. *Cuyler*, 449 U.S. at 435 n.1.

291. *Reed*, 512 U.S. at 348.

292. *Id.*

Finally, even when a compact does not seek uniform treatment of a subject, the "law of the Union" doctrine enables the Court to avoid or overcome biased state-court interpretation of compact language.[293] For example, *Delaware River Joint Toll Bridge Commission v. Colburn*[294] concerned a compact between New Jersey and Pennsylvania that created a bridge commission and charged it with constructing and operating a toll bridge between the two states. A New Jersey landowner sued the commission in a New Jersey court for damages to his land resulting from construction of the bridge.[295] The New Jersey court interpreted the compact to require compensation.[296] On review, the United States Supreme Court found the state court's interpretation "strained and unnatural."[297] By treating the compact as federal law rather than state law,[298] the Court was free to make its own contrary interpretation. If the New Jersey court's interpretation had stood, the commission would have paid damages to the New Jersey landowner with tolls collected from bridge users,[299] who surely were not just from New Jersey but also from Pennsylvania and other states. Therefore, the New Jersey court's strained interpretation appears self-serving in that it would have enriched a state resident at the expense of nonresidents.

In summary, the "law of the Union" doctrine performs four federalism-related substantive functions: preserving federal prerogatives through preemption, immunizing a compact from the Dormant Commerce Clause, achieving uniform interpretation of a compact that seeks uniform treatment of a subject and avoiding or overcoming biased state-court interpretation of a compact.

The "law of the Union" doctrine is not needed, however, to perform any of these functions when a state seeks to withdraw from an interstate water allocation compact. Preserving federal prerogatives would not be a concern because withdrawal

293. *Charting*, *supra* note 289, at 2002–04.
294. 310 U.S. 419 (1940).
295. *See id.* at 426.
296. *Id.*
297. *Id.* at 432.
298. The Court's reliance on the "law of the Union" doctrine in *Colburn* is detailed in David E. Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987, 1005–10 (1965).
299. *See* N.J. STAT. ANN. § 32:8-3(k), (p) and Historical and Statutory Notes (1990) (statute in force at time of *Colburn* limited commission's source of revenues to charges for use of its property).

would not diminish Congress's power to apportion water between the states.[300] Immunizing a compact from the Dormant Commerce Clause would not be a concern when a state is seeking to withdraw from it because the compact would cease to be operative. Uniform interpretation of compact language would not be an issue because the suit would not concern compact language but rather the reserved powers doctrine located in the "legislative power" clause of the state's constitution.

Of course, a state's use of the reserved powers doctrine to withdraw from a water allocation compact does risk biased state-court interpretation of the state's "legislative power" clause. But this possibility does not require the Supreme Court to apply the "law of the Union" doctrine to render the state constitution irrelevant under the Supremacy Clause. The Court has available another solution that would be preferable because it intrudes less on state sovereignty.

This solution comes from *West Virginia* ex rel. *Dyer v. Sims*.[301] That case concerned an interstate water pollution compact among the eight states of the Ohio River basin, including West Virginia. The compact required certain minimum levels of sewage treatment and established a commission with the power to issue enforcement orders and impose higher levels of treatment as necessary to protect public health.[302] The compact also obligated each signatory state to appropriate funds to pay a proportionate share of the commission's annual budget.[303] The West Virginia Supreme Court held that the state legislation ratifying the compact violated the state constitution because it delegated the state's police power to an outside body and purported to bind future legislatures to appropriate funds for the commission.[304]

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300. The power of Congress to apportion interstate waters between states was established in *Arizona v. California*, 373 U.S. 546, 565–66 (1963). *See generally* Frank J. Trelease, Arizona v. California*: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158, 176–80 (arguing that the specific constitutional source of congressional power is the Commerce Clause). *See also* Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1431–32 (1966) (arguing that the Commerce Clause gives Congress power to modify or repeal interstate compacts).

301. 341 U.S. 22 (1951).

302. *Id.* at 24.

303. *Id.* at 25.

304. *Id.* at 26.

On *certiorari* review, the United States Supreme Court reversed.[305] Justice Frankfurter, writing for the majority, stated: "Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts."[306] Frankfurter did not dispute that the question of validity depended on the West Virginia Constitution. Instead, he reasoned that although a state supreme court "is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution . . . we are free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States."[307] He rejected the argument that a state court could nullify or give final meaning to the compact because "[a] State cannot be its own ultimate judge in a controversy with a sister State."[308] Frankfurter then made his own interpretation of the West Virginia Constitution and concluded that the state legislature's ratification of the compact did not violate any provision.[309]

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305. Interestingly, the United States filed an *amicus curiae* brief urging the Court to read the compact as revocable at will by any signatory state, partly because the compact stated no duration and partly because of the reserved powers doctrine. Brief of *Amicus Curiae* for the United States at 23–25, West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22 (1951). Frankfurter's opinion for the *Sims* majority did not expressly address this argument. His decision that West Virginia was bound by the compact does not necessarily imply, however, that he rejected the reserved powers doctrine for interstate compacts. The compact provisions setting minimum sewage treatment levels and empowering the commission to set higher treatment levels and issue enforcement orders did not prevent a future West Virginia legislature from deciding to allow a lower level of treatment within its borders. That is because the compact stated no enforcement order would become operative in any state "unless and until it receives the assent of not less than a majority of the commissioners from such state." Ohio River Valley Water Sanitation Compact, art. IX, 54 Stat. 752, 755 (1940). There seems to be no reason for the Court to have presumed that the West Virginia commissioners would be insensitive to ongoing legislative direction about assenting to enforcement orders. The compact enables considerable legislative control by allowing a state to choose its three commissioners "in the manner and for the terms" provided by its law and by allowing removal or suspension of a commissioner from office as provided by local law. Ohio River Valley Water Sanitation Compact, art. IV, 54 Stat. at 753. That being the case, *Sims* presented no real reason for the Court to apply the reserved powers doctrine to protect future legislative discretion.

306. *Sims*, 341 U.S. at 28.

307. *Id.*

308. *Id.*

309. More specifically, Frankfurter found nothing in the state constitution's conventional grant of legislative power "to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution." *Id.* at 31. Although he

In *Sims*, the Court handily avoided the problem of biased state-court interpretation of a state constitutional provision. It did so not by making the provision irrelevant, but by designating itself the final arbiter of the provision's meaning for the limited purpose of resolving the rights of other compacting states and of the United States. This approach finds support in the Supreme Court's Contract Clause jurisprudence. As noted earlier,[310] state law determines the existence and terms of contract obligations in impairment-of-contract cases, but the Court can make its own interpretation of state law if a strained state court interpretation looks like an effort to evade the Contract Clause.

In conclusion, the "law of the Union" doctrine performs both jurisdictional and federalism-related substantive functions. No established jurisdictional or substantive need exists for the doctrine, however, when a state seeks to withdraw from a water allocation compact.

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did not comment on the reserved powers doctrine, it might be noted that the compact provision empowering the commission to set higher sewage treatment levels than specified in the compact and to issue enforcement orders would not prevent a future West Virginia legislature from deciding to allow a lower level of treatment within its borders. That is because the compact stated no enforcement order would be operative in any state "unless and until it receives the assent of not less than a majority of the commissioners from such state." Art. IX , Ohio River Valley Water Sanitation Compact, Pub. L. No. 76-739, 54 Stat. 752, 755. There seems to be no reason for the Court to have presumed that the West Virginia commissioners would be insensitive to ongoing legislative direction about assenting to enforcement orders. The compact enables considerable legislative control by allowing a state to choose its three commissioners "in the manner and for the terms" provided by its law and by allowing removal or suspension of a commissioner from office as provided by local law. Art. IV, *id.* at 753. Thus, *Sims* presented no real need for the Court to apply the reserved powers doctrine to protect future legislative discretion.

Frankfurter also found no problem regarding future legislative appropriations for the commission. *See id.* at 32. Again, he did not mention any reserved powers issue, perhaps because the Court established long before *Sims* that the reserved powers doctrine does not apply to a state's contracted financial obligations. *Supra* note 173 and accompanying text. Instead, he focused only on a state constitutional provision that barred the state from contracting debt except for certain listed purposes, and he found no violation of this because the commission's annual budget required approval by the governors of the signatory states and because the commission could not pledge the credit of any signatory state without the authority of its legislature.

310. *Supra* note 272–275 and accompanying text.

2. The Conceptual Force of the Doctrine

Even if a compact withdrawal case does not functionally require the "law of the Union" doctrine, one might ask whether the doctrine would apply anyway by force of conceptual logic. In other words, does the doctrine transform a compact into federal law not just for selective purposes such as *certiorari* jurisdiction and judicial interpretation of compact language, but for all purposes? If so, the Supremacy Clause would make the compact binding on the states like any other federal law, without regard to state-law limits on a signatory state's capacity to compact.

Answering these questions requires careful scrutiny of *Petty v. Tennessee-Missouri Bridge Commission,*[311] which involved a compact between Tennessee and Missouri that created a bridge commission and empowered it to sue and be sued.[312] The issue before the Court was whether the "sue and be sued" clause applied only to contract liability or also waived the commission's sovereign immunity from tort liability.[313] The Eighth Circuit had ruled the clause did not waive tort immunity. It noted that prior to negotiation of the compact, courts of both states took the view that "sue and be sued" clauses did not waive tort immunity,[314] and it reasoned that "the drafters of the compact had in mind the interpretation of their courts."[315] In short, the Eighth Circuit determined the meaning of the compact by looking to the states' likely intent when they drafted and ratified it.

On *certiorari* review, however, the Supreme Court found that the "sue and be sued" clause did waive the bridge commission's immunity from tort liability. The Court disregarded the states' intent because "[t]he construction of a compact sanctioned by Congress . . . presents a federal question,"[316] upon which "state law as pronounced in prior adjudications and rules is not binding."[317] To interpret the "sue and be sued" clause, the Court examined what Congress intended when it

311. 359 U.S. 275 (1959).
312. *Id.* at 277.
313. *See id.* 277–279.
314. Petty v. Tennessee-Missouri Bridge Comm'n, 254 F.2d 857, 861 (8th Cir. 1958).
315. *Id.*
316. *Petty*, 359 U.S. at 278.
317. *Id.* at 279 n.4.

consented to the compact,[318] and the Court found that Congress intended a waiver of tort immunity.[319]

The Court's disregard of the signatory states' intent when interpreting the compact implies that congressional consent transformed the state agreement into federal law as fully as if Congress had enacted the identical provisions without any prior negotiated agreement between the states. In effect, the Court treated the agreement the states ratified as merged into the federal consent act so that the compact no longer was a product of the states.[320] If merger applies not just for the purpose of interpreting a compact but for all purposes, then congressional consent to a water allocation compact would render irrelevant not only a state's intent in ratifying the compact but also the state's incapacity under its reserved powers doctrine to bind itself. Only Congress's capacity to bind the signatory states would matter.[321]

Two reasons exist, however, to doubt that a compact merges for all purposes into the federal consent act and lacks continued existence as a product of the signatory states. First, the *Petty* opinion is dubious authority both functionally and conceptually. The opinion is dubious functionally because its use of the "law of the Union" doctrine did not serve any of the established substantive functions of the doctrine described earlier.[322] Of course, the Court's treatment of the compact as federal law served a pro-widow or pro-plaintiff function, but that hardly matches the lofty federalism purposes associated with

318. *Id.* at 280–81; Engdahl, *supra* note 268, at 1046.

319. This was partly because a federal case decided before the compact gave that meaning to a "sue and be sued" clause and partly because Congress included language in its consent act that the Court interpreted to condition consent upon such waiver of immunity. *Petty*, 359 U.S. at 280–81.

320. *See* Engdahl, *supra* note 268, at 1041–42.

321. The reserved powers doctrine might well limit the capacity of one Congress to bind a later one by consenting to a water compact, just as it limits the capacity of state legislatures to bind their successors by ratifying a water compact. *See supra* text accompanying note 221 (discussion of *United States v. Winstar*). *See also* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1855) ("The question here is, whether or not the compact can operate as a restriction upon the power of Congress under the constitution to regulate commerce among the several States? Clearly not. Otherwise Congress and two States would possess the power to modify and alter the constitution itself."). Even if the reserved powers doctrine limits Congress, that would not enable a state to withdraw from a compact once it becomes a law of the Union. Only a later Congress could undo the consent of the former Congress.

322. *See supra* text accompanying notes 282–299.

the doctrine. The opinion is dubious conceptually because it lacks internal consistency. Despite disregarding the state's intent in interpreting the "sue and be sued" clause, the opinion cited *Sims* for the proposition that "the meaning of a compact is a question on which this Court has the final say,"[323] and added "[t]hat is true even though the matter in dispute concerns a question of state law. . . ."[324] This part of the opinion accepted the *Sims* view that state law *does* remain operative after Congress consents to a compact, but with the Court becoming the final arbiter of state law for purposes of determining the rights of other states or the United States.

Second, in at least two post-*Petty* cases, the Court did not treat compacts as fully merged into the federal consent act. The Court regarded both compacts as contracts between states for purposes of resolving contract-related issues.[325] Interestingly, both cases involved water allocation compacts.

The first case, *Texas v. New Mexico,*[326] concerned the Pecos River Compact. After finding that New Mexico had breached its compact water delivery obligation to Texas for the years 1950–1983,[327] the Court had to decide upon the proper relief.[328] New Mexico sought to limit the remedy to prospective relief compelling future compliance.[329] It argued against retrospective relief—i.e., damages or specific performance making up the shortfall—on the ground that its breaches resulted from good-faith misinterpretations of unclear compact provisions.[330] In response, the Court said that "a compact when approved by Congress becomes a law of the United States, but a compact is, after all, a contract."[331] It then applied the contract principle

323. *Petty*, 359 U.S. at 278.

324. *Id.* n.4.

325. Of course, *Petty* concerned a contract-related issue, namely, what did the contracting parties intend, and yet the Court applied "the law of the Union" doctrine to make the intent of the states irrelevant. As noted in the text, *Petty* is a hard case to justify. Even the Court seemed to recognize this because after looking at the intent of Congress to determine the meaning of compact language, it then paid lip service to the states' intent by saying that when they acted under the compact subsequent to Congress giving its consent, they assumed the conditions that Congress attached to it. *Petty*, 359 U.S. at 281–82.

326. 482 U.S. 124 (1987).

327. *Id.* at 127–28.

328. *See id.* at 128.

329. *Id.* 128.

330. *Id.* at 128–29.

331. *Id.* at 128 (internal quotation marks, citations, and parenthetical omitted).

that a promisor's good-faith mistake about the scope of its contractual undertaking does not relieve it from liability for failure to perform.[332] Thus, regarding the issue of relief for breach, the Court did not perceive itself as dealing with federal legislation but with a contract promise.

The second case, *Kansas v. Colorado*,[333] concerned the Arkansas River Compact, which became operative in 1949.[334] In 2001, the Court held Colorado had long breached its compact water delivery obligation to downstream Kansas and awarded Kansas compensatory damages for the injury suffered.[335] The Court also considered whether to hold Colorado liable for prejudgment interest on the compensatory damage award and, if so, for how long.[336] The Court awarded prejudgment interest for a limited period before judgment, rather than for the entire period of the shortfall, which began in 1950.[337] It reasoned:

> [W]e cannot say that by 1949 our caselaw had developed sufficiently to put *Colorado on notice* that, upon a violation of the Compact, we would automatically award prejudgment interest from the time of injury. Given the state of the law at that time, Colorado may well have believed that we would balance the equities in order to achieve a just and equitable remedy, rather than automatically imposing prejudgment interest in order to achieve full compensation. While we are confident that, when it signed the Compact, *Colorado was on notice* that it might be subject to prejudgment interest if such interest was necessary to fashion an equitable remedy, we are unable to conclude with sufficient certainty that *Colorado was on notice* that such interest would be imposed as a matter of course.[338]

As the italicized phrases show, the Court focused on whether the caselaw as of 1949 put Colorado on notice that it

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332. *Id.* at 129.

333. 533 U.S. 1 (2001).

334. 63 Stat. 145 (1949). The two states negotiated and ratified the compact after Kansas twice failed to get an equitable apportionment decree from the Supreme Court. Kansas' first unsuccessful effort was in *Kansas v. Colorado*, 185 U.S. 125 (1902), 206 U.S. 46 (1907), and its second unsuccessful effort was in *Colorado v. Kansas*, 320 U.S. 383 (1943).

335. *Kansas v. Colorado*, 533 U.S. at 5–8.

336. *Id.* at 9–11.

337. *Id.* at 12–16.

338. *Id.* at 13–14 (internal citations and parentheticals omitted) (emphasis added).

would automatically owe prejudgment interest back to the time of injury. Had the Court followed the merger rationale of *Petty*, it would have ignored Colorado and instead inquired whether Congress was on notice from the caselaw when it consented to the compact. Of course, the body of caselaw would have provided the same notice to either Colorado or Congress, but the Court's focus on Colorado's understanding rather than Congress's implies that it did not treat the states' water allocation agreement as merged out of existence by the federal consent act. Rather, the compact survived as a contract in which the intent of the contracting parties guided interpretation.

These two cases demonstrate that the "law of the Union" doctrine does not always merge the contract element of a compact out of existence. The contract element survived for purposes of two contract-related issues—liability for breach and prejudgment interest—even though the doctrine presumably transformed the compacts into federal law for other purposes. Because the "law of the Union" doctrine did not apply to those two contract-related issues, no conceptual need exists for it to apply to the contract-related issue of a state's capacity to enter into a binding contract. A compact might be a "law of the Union" for one purpose but not for another.

Subsection D below will urge a cost-benefit approach for deciding when to treat a compact as a "law of the Union." Before proceeding to that, however, the Court's reference to "our caselaw" in the passage quoted above prompts a brief digression to consider the meaning of that phrase and to show that it should not prevent a state from invoking the reserved powers doctrine to withdraw from a water allocation compact.

C. Revisiting the Reserved Powers Doctrine as State Law and the Supremacy of Federal Law

The law governing Colorado's liability for prejudgment interest in *Kansas v. Colorado* was "our caselaw" at the time the states negotiated and ratified the compact. By "our caselaw," the Court meant its own cases on prejudgment interest rather than ones from either signatory state.[339] In those cases, the

339. *See id.* at 14 (relying on Board of Commn'rs of Jackson Cty. v. United States, 308 U.S. 343 (1939), and Miller v. Robertson, 266 U.S. 243 (1924)).

Court had applied federal common law.[340] In other words, the Court relied in *Kansas v. Colorado* on federal common law regarding prejudgment interest, not either state's common law.

This approach comports with the Court's use of the federal common law doctrine of equitable apportionment in suits between states regarding interstate rivers. There, the Court has said neither competing state can impose its water law on the other because they are equal sovereigns.[341] By the same reasoning, Colorado law could not govern Kansas's right to recover prejudgment interest, nor could Kansas law govern Colorado's duty to pay it.

With federal common law governing prejudgment interest for breach of an interstate compact, the question arises whether federal common law would also govern the signatory states' capacity to bind themselves by compact. If federal common law were to govern their capacity, and if it were to allow states to bind themselves in perpetuity (which, though unlikely, cannot be ruled out),[342] then any limit under state law on a state legislature's power to bind the state by compact would be irrelevant by virtue of the Supremacy Clause.[343]

Sims indicates, however, that federal common law would not govern the capacity of a state legislature to bind the state by compact. In *Sims*, federal common law on contracts did not govern the West Virginia legislature's capacity—or in constitutional terminology, power—to bind the state to the Ohio River water pollution compact. The state constitution governed, albeit with the United States Supreme Court as the final arbiter of the constitution's meaning insofar as other signatory states and the United States would be impacted by the interpretation.[344] If the state constitution governs a state legislature's

340. The Court was quite explicit about this is *Jackson County*, 308 U.S. at 351–52.

341. Kansas v. Colorado, 206 U.S. 46, 97 (1907).

342. *Cf.* CHARLES ALAN WRIGHT ET AL., 19 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4514 (2d ed. 1996), which states that in determining the content of federal common law, the Court can choose any rule it deems appropriate but has a strong preference for choosing the law of the forum state as the appropriate rule. While the concept of a "forum state" might not exactly fit the compact situation being discussed in this article, it seems likely that the Court would find the reserved powers doctrine to exist in the laws of all signatory states, see *infra* text accompanying note 360, and thus would find that doctrine to be appropriate as the content of applicable federal common law.

343. *See id.*

344. *See supra* text accompanying 306–309.

power to form a binding water pollution compact, as in *Sims*, the state constitution should also govern a state legislature's power to bind the state to a water allocation compact.

The *Sims* approach of using state law rather than federal common law to determine a state's power to compact does not conflict with the Supreme Court's use of federal common law on prejudgment interest in *Kansas v. Colorado*. The Court declared in *Erie Railroad Co. v. Tompkins*[345] that "[t]here is no federal general common law."[346] After *Erie*, federal common law exists only with congressional authorization or in special circumstances that require it.[347] In *Kansas v. Colorado*, each state had its own contract law on prejudgment interest. If the states' laws governing prejudgment interest were to conflict, no basis existed for choosing one state's law over the other's because of the parties' status as equal sovereigns. Given that special circumstance, the governing law necessarily had to be federal common law.[348]

In *Sims*, by contrast, no such necessity existed. None of the signatory states besides West Virginia had any law purporting to govern the power of the West Virginia legislature to bind its successors by the compact. Each of the other seven states doubtlessly had a "legislative power" provision in its own constitution, but none of these provisions purported to govern the power of the West Virginia legislature. For example, the constitution of Kentucky, a signatory state, provides: "The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the 'General Assembly of the Commonwealth of Kentucky.'"[349] Nothing in the Kentucky constitution refers to the power of the West Virginia legislature. More broadly, the West Virginia legislature's

345. 304 U.S. 64 (1938).

346. *Id.* at 78.

347. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (the special circumstances include "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases").

348. *Cf.* CHARLES ALAN WRIGHT, *supra* note 342, identifying three categories of cases in which federal common law governs after *Erie*: (1) where some federal policy or interest conflicts with using state law, (2) where the policy of the law in areas of judicial decision is dominated by the sweep of federal statutes, and (3) "where there is a strong national or federal concern originating from the Constitution, from tradition, or from *practical necessity*." (emphasis added).

349. KY. CONST. § 29.

power to bind the state by compact could not conceivably be governed by a "legislative power" provision in any other signatory state's constitution. Thus, while *Sims* presented a conflict between states, it did not present a conflict between the *laws* of different states regarding the power of West Virginia to bind itself. For that reason, no need existed to apply federal common law to resolve an impasse between conflicting laws of equal sovereigns.[350] The same would be true when a signatory state seeks to withdraw from an interstate water allocation compact under the reserved powers doctrine in the "legislative power" provision of its constitution.

In sum, the Court's reference in *Kansas v. Colorado* to "our caselaw" on prejudgment interest does not imply that federal common law on capacity to contract would supersede a state legislature's lack of power under its reserved powers doctrine to bind a future legislature. Therefore, it is appropriate to return to the relationship between the "law of the Union" doctrine and the reserved powers doctrine in the context of water allocation compacts.

D. The "Law of the Union" Versus Reserved Powers: A Functional Cost-benefit Approach to Choosing Between Conflicting Doctrines

The "law of the Union" doctrine and the reserved powers doctrine cannot both operate when a state seeks to withdraw from a water allocation compact. If the "law of the Union" doctrine were to make a compacting state's capacity to contract irrelevant, then the reserved powers doctrine could not protect future exercise of the state's police power discretion regarding the subject matter of the compact. Conversely, if the reserved powers doctrine were to enable a state to withdraw from a compact, then the "law of the Union" doctrine could not over-

350. The Court said in *Texas Industries* that federal common law governs in the special circumstance of "interstate . . . disputes implicating the conflicting rights of States." 451 U.S. at 641. It cited three cases in support of this dictum. *Id.* n.13. In all three cases, the litigating sovereigns had laws that could apply to the issue in dispute. In this situation, no basis exists to choose the law of one sovereign over the (at least potentially) conflicting law of another, equal sovereign. The *Texas Industries* dictum is overbroad for failing to note this factual context in the three cases, and its overbreadth puts it in conflict with *Sims*. *Sims* is the authority on point when only one of two or more sovereigns has law that by its terms could apply to the issue in dispute.

come the state legislature's incapacity to bind the state when it ratified the compact. Only one doctrine can operate when a state seeks to withdraw from a water allocation compact. In that situation, the two doctrines necessarily conflict.

As shown earlier, the "law of the Union" element of a compact does not always dominate the contract element.[351] This raises the question of when the "law of the Union" doctrine will operate to the exclusion of the reserved powers doctrine and when the reverse will be true. Conceptual reasoning, based on the internal logic of each doctrine, fails to answer the question because the issue requires choosing between conflicting concepts. Answering the question demands some other approach.

Generally, courts not under the spell of conceptual reasoning seek to maximize overall benefits when deciding between competing legal doctrines.[352] It would make sense to take the same approach in choosing between the "law of the Union" doctrine and the reserved powers doctrine. The most systematic way to choose would be to compare the costs and benefits of applying one doctrine to those of applying the other, and then select the doctrine that maximizes the net benefits.

Assessing the benefits of the "law of the Union" doctrine requires returning to the earlier discussion of its jurisdictional and substantive functions.[353] As noted, the doctrine is not needed to perform any of its standard functions, either jurisdictional or substantive, when a state seeks to withdraw from a water allocation compact. The doctrine is not needed even to avoid biased state-court interpretation of a state constitution. *Sims* solves that problem by designating the Supreme Court the ultimate interpreter of a state constitution when the rights of other compacting states and the United States will be affected.[354] The main potential benefit of applying the "law of the Union" doctrine in a compact withdrawal case might be stability in interstate water allocation. But that would be a regional or national benefit only if the facts make permanence of alloca-

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351. Oklahoma v. New Mexico, 501 U.S. 221 (1991), provides yet another example of tension between the dual aspects of a compact. The Court split 5 to 4 on whether the rules of statutory interpretation (the view of five Justices) or the rules of contract interpretation (the view of four Justices) should govern interpretation of a disputed provision of the Canadian River Compact.

352. *See generally* Frank J. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 NAT. RESOURCES J. 1, 3 (1965).

353. *See supra* text accompanying notes 278–299.

354. *See supra* text accompanying notes 301–310.

tion more desirable than detrimental to the interests of all the compacting states or the Nation.

Balanced against whatever benefit might result from applying the "law of the Union" doctrine to water compact withdrawal would be the cost of displacing the reserved powers doctrine. This cost is weighty because of that doctrine's long-recognized function of protecting future exercises of essential sovereign powers. This function is important because state governments were organized to exercise continuing power over public subjects that affect their citizens' vital interests and inherently require continuing supervision to adapt to varying circumstances.[355] This function ordinarily should outweigh any benefit conferred by applying the "law of the Union" doctrine.

A law review writer has advocated using cost-benefit analysis to decide whether federal common law or state common law should govern interstate agencies created by compacts between states.[356] The writer proposed that state law should govern if the compacting states' laws are consistent, federal interests are not paramount, and applying state law would not frustrate federal interests.[357] The writer did not discuss water allocation compacts, nor did he discuss the reserved powers doctrine. Nonetheless, his approach is of interest because the question of whether a state could invoke the reserved powers doctrine to withdraw from a water compact can be characterized as presenting a choice between federal law and state law. The "law of the Union" doctrine treats a compact as federal law, while the reserved powers doctrine has its source in state law, most likely in the standard state constitutional provision vesting "legislative power" in the state legislature.[358]

The law review writer's proposal would add an additional element to the cost-benefit approach advocated above for choosing between the "law of the Union" doctrine and the reserved powers doctrine. The new element would require that the compacting states' laws be consistent for state law to govern. In *Sims*, however, the Court did not appear to require this element, as it made no inquiry whether other states that ratified the water pollution compact had constitutional provisions similar to West Virginia's. The only requirement for West Virginia

355. *See supra* notes 128–129 and accompanying text.
356. *Charting, supra* note 289.
357. *Id.*, at 2005.
358. *See supra* text accompanying note 277.

law to govern that state's power to enter into the compact was that the Court act as the final arbiter of the meaning of West Virginia law.[359]

If, however, consistency of the compacting states' laws were required before state law could govern power to compact, one would expect the Court to interpret the standard "legislative power" language in the signatory states' constitutions to incorporate the reserved powers doctrine. The Court has applied the reserved powers doctrine to promises made by various state legislatures that are governed, of course, by different state constitutions.[360] Moreover, the Court has never interpreted the "legislative power" language in a state constitution to exclude the reserved powers doctrine.

In summary, the reserved powers doctrine is state law. Under the Supremacy Clause, the doctrine could not operate and enable a state to withdraw from a compact if federal law locks the state into the compact. The Supreme Court has held that congressional consent to a compact makes it a "law of the Union" for various jurisdictional and substantive purposes. However, the "law of the Union" doctrine would not serve any of its established jurisdictional or federalism-related substantive functions when a state seeks to withdraw from a water allocation compact. Furthermore, conceptual logic does not require applying the doctrine to compact withdrawal. The reserved powers doctrine and the "law of the Union" doctrine cannot both operate in that context. The choice of which operates should depend on functional cost-benefit analysis. Under the cost-benefit approach, the reserved powers doctrine ordinarily will yield greater overall benefits.

V. ACCOMPLISHING INTERSTATE REALLOCATION WHEN A COMPACT BECOMES OUTDATED

A state deciding whether to withdraw from a water allocation compact must assess its prospects of obtaining a more favorable allocation by some other means. The state's alternatives include (1) withdrawing and seeking a more favorable allocation from the Supreme Court, (2) withdrawing and seek-

359. *See supra* notes 301–310 and accompanying text.

360. *E.g.*, City of El Paso v. Simmons, 379 U.S. 497 (1965) (Texas); Chicago & Alton Railroad Co. v. Tranbarger, 238 U.S. 67 (1915) (Missouri); Stone v. Mississippi, 101 U.S. 814 (1879) (Mississippi).

ing a more favorable allocation from Congress, or (3) threatening to withdraw as leverage to seek favorable modification of the compact. The discussion below explains the perils of the first two alternatives and the attractiveness of the third, not only to the state contemplating withdrawal but to the other signatory state or states.

A. *Methods of Interstate Allocation*

As indicated earlier,[361] three methods exist to allocate interstate waters among states: Supreme Court decree, act of Congress, and interstate compact. The first two methods have special characteristics that must be noted before assessing the signatory states' differing positions under an outdated water allocation compact.

1. Allocation By Supreme Court Decree

The Supreme Court allocates interstate waters between states by applying the federal common law of equitable apportionment.[362] Equitable apportionment requires a "delicate adjustment of interests" that "calls for the exercise of an informed judgment on a consideration of many factors."[363] The Court once listed eight factors relevant to apportionment but added that the list was not exhaustive.[364] In its most recent apportionment case, *Colorado v. New Mexico*,[365] the Court emphasized three factors: (1) the equities of protecting existing uses, (2) a state's affirmative duty to take reasonable steps within its borders to conserve and augment the water supply of an interstate stream, and (3) the weighing of harms and benefits to the competing states if one receives the water in dispute and the

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361. See *supra* text accompanying notes 3–5.

362. Colorado v. New Mexico, 459 U.S. 176, 183 (1982) ("federal common law"); Kansas v. Colorado, 206 U.S. 46, 98 (1907) ("interstate common law").

363. *Kansas*, 206 U.S. at 117–18 (internal quotation marks omitted).

364. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945), listing:

> [P]riority of appropriation[,] physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

365. 467 U.S. 310 (1984); 459 U.S. 176 (1982).

other does not.[366] The weighing of harms and benefits may include not only traditional economic consequences but also recreational and environmental consequences.[367]

In *Colorado v. New Mexico*, the Court also considered the interrelationship of the three factors.[368] It indicated that despite the strong appeal of protecting existing water uses, the states' duty to conserve and the comparison of harms and benefits might enable a state to obtain water for new use that was previously allocated to another state and used there.[369] To succeed in this approach, the state seeking more water must show by clear and convincing evidence[370] that the benefits to it from reallocation would substantially outweigh the harms to the other state.[371]

Colorado v. New Mexico concerned a small interstate stream from which no diversions existed in Colorado, while New Mexico appropriators claimed the full streamflow.[372] Colorado sought a decree apportioning it a share of the flow for new uses within its borders.[373] In other words, it sought reallocation away from existing New Mexico water users.[374] Although the Court denied reallocation because Colorado failed to meet its burden of proof, the case did establish the legal feasibility of reallocation when the benefits to the state gaining water substantially outweigh the harms to the state losing water.

The stream in *Colorado v. New Mexico* had not previously been apportioned by interstate compact or otherwise.[375] The focus of this article is on a different situation, namely, reallocation of water previously allocated by a compact from which a signatory state withdraws under the reserved powers doctrine.

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366. *Colorado v. New Mexico*, 459 U.S. at 185–87.

367. *Water Compacts*, *supra* note 5, at § 45.06(c).

368. *Colorado v. New Mexico*, 459 U.S. at 187–88.

369. *Id.*

370. *Id.* at 187–88 & n.13; *Colorado v. New Mexico*, 467 U.S. at 31.

371. For example, a state might show that the other state could offset the loss of water through reasonable conservation measures. *Colorado v. New Mexico*, 459 U.S. at 187–88.

372. *Id.* at 177–78.

373. *Id.* at 177.

374. In the end, Colorado did not obtain a decree awarding it a share of the river because it failed to meet its burden of proving that its benefits from reallocation would substantially outweigh the harm to New Mexico. *Colorado v. New Mexico*, 467 U.S. at 317.

375. The Court would not have entertained a suit for equitable apportionment if the river system had been allocation by interstate compact or act of Congress. *See supra* note 260.

However, the desirability and legal feasibility of reallocation between states when the benefits would clearly and substantially outweigh the harms should be no less in that situation than in *Colorado v. New Mexico*.

Despite the doctrinal feasibility of reallocating water based on harm-benefit comparison, a state contemplating withdrawal from a compact cannot expect an easy time in the Supreme Court. It will face several obstacles. First, the United States might be an indispensable party to the suit—e.g., because navigable waters or Indian water rights are involved.[376] If so, the Court will dismiss the suit unless the government waives its sovereign immunity.[377] Second, if the state seeks reallocation of water that another state already uses productively, it faces a reality noted in *Colorado v. New Mexico*: "[T]he equities supporting the protection of existing economies will usually be compelling."[378] Finally, the state must face the Court's general unwillingness to exercise what it calls its "extraordinary power to control the conduct of one State at the suit of another."[379] The Court will not issue an apportionment decree unless the state seeking it clearly and convincingly proves a threat to its rights of a serious magnitude.[380] As a result of these obstacles, the Court has entertained eight equitable apportionment suits[381] but issued apportionment decrees in only three of them.[382]

2. Allocation By Act of Congress

When the Supreme Court created the doctrine of equitable apportionment for interstate rivers early in the twentieth cen-

376. Texas v. New Mexico, 352 U.S. 991 (1957) (Indian water rights); Arizona v. California, 298 U.S. 558 (1936) (navigable waters).

377. Texas v. New Mexico, 353 U.S. at 991; Arizona v. California, 298 U.S. at 568–71.

378. 459 U.S. at 187.

379. Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931).

380. Colorado v. New Mexico, 459 U.S. 176, 187 n.13 (1982); Nebraska v. Wyoming, 325 U.S. 589, 608 (1945); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931).

381. These concerned the Arkansas, Colorado, Connecticut, Delaware, Laramie, North Platte, Vermejo, and Walla Walla Rivers. Douglas L. Grant, *Equitable Apportionment Suits Between States*, *in* 4 WATERS AND WATER RIGHTS § 45.01 nn.7–15 (Robert E. Beck, ed. 1996), and accompanying text.

382. These are the Laramie, Delaware, and North Platte Rivers. *Id.* at § 45.07(a).

tury, it assumed that Congress lacked power to make an apportionment.[383] Water law experts assumed the same for decades thereafter.[384] In 1963, that assumption proved incorrect when a sharply divided Court held that Congress had allocated the lower Colorado River among Arizona, California, and Nevada when it enacted the Boulder Canyon Project Act.[385] The dissenters saw no indication that Congress had intended an interstate allocation,[386] and later research suggests they were right.[387] Even the Court majority implicitly acknowledged that Congress is generally averse to apportioning interstate waters. The majority opinion detailed a long history of intractable disputes between Arizona and California over the river to explain why Congress finally decided it had no choice but to step in and make an apportionment if badly needed federal water projects on the river were ever to be built.[388]

Congress's reluctance to legislate interstate water allocation has continued in the years since 1963. The only other congressional apportionment came in the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990.[389] The Senate committee report on the Act noted the existence of "special and unique circumstances" justifying congressional apportionment[390] and also stressed that the apportionment was voluntary between the affected states of California and Nevada.[391] Thus, the 1990 Act hardly serves as political precedent for Congress to apportion interstate waters routinely or to force an apportionment upon an unwilling state.

In short, Congress has not been eager to apportion interstate waters. Even if it did intend an apportionment in the Boulder Canyon Project Act, it acted only out of necessity to

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383. *See* Kansas v. Colorado 206 U.S. at 97; Douglas L. Grant, *Apportionment by Congress*, *in* 4 WATERS AND WATER RIGHTS § 47.01(a) (Robert E. Beck, ed. 1996).

384. JEROME C. Muys, *supra* note 28, at 7. *See* Howard R. Stinson, *Western Interstate Water Compacts*, 45 CAL. L. REV. 655, 656 (1957).

385. Arizona v. California, 373 U.S. 546, 565–66 (1963).

386. 373 U.S. at 604–07 (Harlan, J., dissenting), 628–30 (Douglas, J., dissenting).

387. HUNDLEY, *supra* note 64, at 270.

388. *Arizona v. California*, 373 U.S. at 560, 576–79.

389. Title II of the Act of Oct. 27, 1990, Pub. L. No. 101-618, 104 Stat. 3289 (1990).

390. S. REP. NO. 555, 101st Cong. 2d Sess. 19 (1990). The committee report is quoted and discussed in *Apportionment by Congress*, *supra* note 383, at § 47.01(b).

391. S. REP. NO. 555, *supra* note 390.

enable the construction of federal water projects on the Colorado River. Although Congress clearly intended an apportionment in the Truckee-Carson-Pyramid Lake legislation, that was the product of unique circumstances and the desire of both affected states that Congress enact it.

B. Assessment of Compacting States' Positions

The preceding background on interstate water allocation by Supreme Court decree and act of Congress affects the positions of the signatory states to an outdated compact.

1. The Dissatisfied State

A state that becomes dissatisfied with a water allocation compact and wants to withdraw from it faces potential difficulties in obtaining a larger allocation regardless whether it goes to Congress or the Supreme Court. If it appeals to Congress,[392] it will encounter the traditional reluctance of Congress to enact an apportionment over the objection of an adversely affected state. Success for the dissatisfied state in obtaining a larger allocation ordinarily would entail a smaller allocation for the other river basin state or states.[393] Of course, a state that would receive less water will oppose congressional enlargement of another state's share. Moreover, representatives from unaffected states likely will vote against an allocation not supported by all of the affected states because of fear that once the political precedent for that is set, their states might be on the receiving end next time.[394] Thus, a dissatisfied state's prospects of congressional reallocation appear extremely poor.

Instead of going to Congress, the dissatisfied state might seek a more favorable allocation from the Supreme Court under the federal common law of equitable apportionment. Al-

392. Perhaps the state could do this without first withdrawing from the compact. *See* Hasday, *supra* note 24, at 16 (arguing Congress always has power to amend or preempt a compact to which it has consented).

393. The other state or states will have less water unless Congress can increase the overall supply by funding water storage projects to capture snowmelt run-off and flood waters. Such projects might have been feasible historically but now are less viable because of waning congressional interest in funding them and modern environmental laws that may preclude many new projects that are feasible from an engineering standpoint. *See* WATER IN THE WEST, *supra* note 17, at 5-40, 5-46.

394. SAX ET AL., *supra* note 93, at 720.

though this path may be less bleak than the congressional one, it is hardly without difficulties. The state would face the obstacles noted earlier: federal sovereign immunity, the Court's desire to protect existing economies, and its general lack of eagerness to issue apportionment decrees.[395] In addition, the state must address several tactical complexities.

First, the state likely will not obtain a larger share from the Court than under the compact unless it has met its duty to take reasonable steps to conserve and augment its existing water supply.[396] Thus, before initiating equitable apportionment litigation, the state must devote careful attention to in-state water conservation and water supply augmentation.

Second, the apportionment litigation most likely will last many years.[397] This creates a problem if the withdrawing state lies downstream from the other signatory state or states. Being downstream, the state risks losing water during the litigation to an upstream state with superior physical access to the river. It would want the Court to enforce the compact from which it desires to withdraw until the litigation is completed. The state would be in the position of seeking a declaratory judgment from the Court announcing what its equitable apportionment would be if it revokes its ratification of the compact. The Supreme Court has never issued any declaratory water apportionment decrees, so the state lacks specific guidance on what might be required to induce the Court to hear such a case and grant declaratory relief.

Third, a dissatisfied state can more easily predict what will cause it to fail in its quest for more water from the Court than what will enable it to succeed. As noted earlier,[398] Court apportionment of an interstate river depends on balancing many factors. It has been said about multifactor tests in an analogous context: "The effect of many standards . . . is virtually the same as having none at all. . . . The existence of so many standards effectively allows . . . near total discretion . . . ."[399] This is no

395. *See supra* notes 376–382.

396. Colorado v. New Mexico, 459 U.S. 176, 185 (1982).

397. *Wyoming v. Colorado* was filed in 1911 and the apportionment decree was entered in 1922. Hinderlider & Meeker, *supra* note 26, at 1042. *Kansas v. Colorado* was filed in 1901, *id.* at 1041, and the suit was dismissed without an apportionment decree in 1907. 206 U.S. 46 (1907).

398. *Supra* note 364.

399. STEPHEN G. BREYER, REGULATION AND ITS REFORM 79 (1982) (discussing administrative regulation).

less true in the context of equitable apportionment, especially given the paucity of precedents in this area.[400] Consequently, a dissatisfied state must always reckon with the risk that its withdrawal from a water allocation compact will not ultimately improve its water supply situation.

For these reasons, a well-advised state would withdraw from a compact and seek a new allocation from the Supreme Court only if the existing compact allocation clearly appears to be seriously outdated in light of changed conditions since the compact was ratified. The state likely will succeed only in rather dire circumstances, and rightfully so. This Article does not advocate wholesale destabilization of water allocation compacts.

2. The Other Compacting State(s)

The dissatisfied state is not the only one that faces risk from the unpredictability of equitable apportionment litigation. The other signatory state or states also risk an unexpected and unpalatable Court decree. Surprisingly, this unpredictability may actually help the dissatisfied state achieve reallocation—not in the Supreme Court but through compact renegotiation.

When the Supreme Court decided that interstate water allocation presents a justiciable question resolvable by applying federal common law,[401] it anticipated that the newly announced judicial power of equitable apportionment would induce states to negotiate water allocation compacts.[402] The Court analogized interstate water allocation disputes to interstate boundary disputes. It quoted from a boundary case in which it noted that because the Constitution bars states from settling boundaries by war,

> [a] resort to the judicial power is the only means left for legally adjusting or persuading a state which has possession of disputed territory to enter into an agreement or compact relating to a controverted boundary. Few, if any, will be made when it is left to the pleasure of the state in possession; but when it is known that some tribunal can decide on

400. *See supra* note 382 and accompanying text.
401. Kansas v. Colorado, 185 U.S. 125 (1902).
402. *Id.* at 143–44.

> the right, it is most probable that controversies will be settled by compact.[403]

By deciding that it had power to apportion interstate waters, the Court changed the dynamics of water disputes between states. An upstream state having "possession" of waters within its borders due to its superior physical access is no longer left to its pleasure. It cannot ignore the possibility of successful apportionment litigation initiated by a downstream state. The upstream state has an incentive to control its own destiny by negotiating a water allocation compact.[404]

Whether by design or not, the Court later increased state incentives to negotiate water allocation compacts by developing its multifactor test for apportionment, thereby making it extremely hard for states to predict the outcome of litigation. The more unpredictable litigation is, the more the disputing states have an incentive to work out an allocation between themselves rather than take their chances in the Court.

Just as states would have negotiated few, if any, boundary and water compacts if the matter were left to the pleasure of the state in possession, a state advantaged by an old water allocation compact negotiated under different circumstances would have little, if any, incentive to renegotiate if left to its pleasure. But the advantaged state's situation changes dramatically if the Supreme Court would allow the dissatisfied state to withdraw from the compact and then apply the doctrine of equitable apportionment. Rather than face highly unpredictable apportionment litigation, the state advantaged by the old compact should then have a serious interest in renegotiating the compact.

Furthermore, the unpredictability of apportionment litigation can provide needed political cover for state officials engaged in renegotiating a compact. This was illustrated by the recent negotiated settlement of a claim by Nebraska against

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403. *Id.*, quoting from Rhode Island v. Massachusetts, 37 U.S. (Pet.) 657, 726 (1838).

404. *Cf.* Hinderlider & Meeker, *supra* note 26, 1038–39, 1043–44, 1048–49 (advocating compact allocation over equitable apportionment litigation in the Supreme Court because such litigation is slow and expensive, is an inferior method for gathering data about water supply and demand, often leaves issues important to water development unsettled, poses a risk of instability because the Court could later modify a decree in whatever ways it might deem proper, and might result in loss of state control of water allocation and administration).

Wyoming for violating a Supreme Court decree equitably apportioning the North Platte River. The Wyoming governor explained to Wyoming citizens why he approved the settlement by saying, in part, "while Wyoming's case was strong and I am confident that Wyoming's legal team would have put forward the very best defense possible to Nebraska' claims, there is always uncertainty in litigation."[405]

In summary, a state that is disadvantaged by an outdated water allocation compact is in a weak, if not hopeless, position to gain a larger share of the river if the compact is not unilaterally revocable. The state's position improves, however, if it can invoke the reserved powers doctrine to withdraw from the compact. The state might then be able to obtain a more favorable allocation from the Supreme Court that would address its current dire circumstances. This possibility poses a risk for the other signatory state or states, especially given the unpredictability of equitable apportionment litigation, that should stimulate mutual interest in trying to renegotiate the compact.

CONCLUSION

This article has developed a theory to enable a state that is seriously dissatisfied with an old water allocation compact to revoke its ratification of the compact and seek a better allocation. Distilled to its critical elements, the theory requires showing, first, that the reserved powers doctrine applies to water allocation compacts and, second, that a state's power under this doctrine to revoke its ratification is unaffected by either the "law of the case" doctrine or the "law of the Union" doctrine. Whether the extensive arguments advanced in support of these two propositions will gain judicial acceptance remains to be seen. Although their acceptance is not assured, neither is their rejection. As states shackled by outdated water allocation compacts experience increasingly desperate water supply circumstances, these arguments should have sufficient prospects of acceptance to spur other states advantaged by the compacts to think seriously about how intransigent they wish to be in opposing negotiated reallocation of water. And if renegotiation does not occur, compacting states in desperate circumstances

405. *States Approve Settlement of* Nebraska v. Wyoming, WATER STRATEGIST, May 2001, at 19.

have good reason to pursue the arguments in the Supreme Court.