Vanderbilt Law Review

Volume 32
Issue 4 *Issue 4 - May 1979*

Article 3

5-1979

The Negative Commerce Clause and State Environmental Legislation-Externalities Suggest Application of the Tax Standard to Environmental Regulations

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I. INTRODUCTION

The growing concern for environmental quality in this country reflects a fundamental change in the common perception of the natural environment. Initially, the abundance of the American wilderness combined with a commitment to rapid economic growth to form an environmental attitude one author has called the "Assumption of Inexhaustible Resources."[1] Environmental waste and pollution were considered irrelevant when balanced against a genuine need for economic development and a desire for short-term profits.[2] Nature was to be overcome, not preserved. The commerce of the United States, much of it with an interstate character, devel-

1. Laitos, *A Leap of Faith: Some Observations on Law's Effect Upon the Earth's Natural Resources*, 25 AM. U. L. REV. 131, 132 (1975).

2. *See id.* at 132-35, 133 n.7; Tarlock, *A Comment on Meyer's* Introduction To Environmental Thought, 50 IND. L.J. 454, 456 (1975).

oped under these precepts of resource exploitation and the Inexhaustible Assumption. This commerce was protected by the negative commerce clause[3] which served to void state protectionist legislation that would have created an economic "Balkanization"[4] detrimental to national economic growth.

The cumulative effects of environmental change have spawned a new perception of the environment as a finite, exhaustible entity requiring protection. States have responded with environmental protection legislation, which inevitably conflicts with the commerce of resource exploitation developed under the Assumption of Inexhaustible Resources. Enterprises operating in interstate commerce have challenged such legislation under the negative commerce clause, which has traditionally defended resource exploitation commerce against state protectionism.

Judicial negative commerce clause analysis is both confused and confusing, particularly when applied to state environmental legislation. As a threshold requirement, the Supreme Court prohibits all state legislation that discriminates against interstate commerce.[5] The definition of discrimination, however, is unclear. While precedent exists that arguably supports uneven treatment of interstate commerce on environmental grounds,[6] the Court in the recent case *City of Philadelphia v. New Jersey*[7] held such a statute discriminatory. This Note posits the theory that in certain cases interstate commerce actually discriminates against the state, thus justifying protectionist legislation.

If a statute is deemed nondiscriminatory, the Court then differentiates between taxation and regulatory statutes. In evaluating regulatory statutes, the Court attempts to determine whether a statute's benefits to the state outweigh its burdens on interstate commerce. The nature of this balancing process, the factors to be considered, and the degree to which benefits must outweigh burdens have been stated in so many contrasting ways by the Supreme Court that a precise articulation of the test is impossible. Generally, the Court considers legitimacy of the local purpose of a statute, whether the means adopted achieve that purpose, and whether alternate means would impose less burden on interstate commerce. In addition, the Court weighs the statute's benefits and burdens under a

3. U.S. CONST. art. I, § 8, cl. 3. The term "negative commerce clause" refers to judicial scrutiny of state action under the commerce clause in the absence of congressional action.

4. *See* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 807-08 (1975).

5. *See* notes 14-69 *infra* and accompanying text.

6. *See* notes 18-44 *infra* and accompanying text.

7. 98 S.Ct. 2531 (1978).

heavy presumption of the statute's validity.[8] Yet in some instances the Court has determined that the balancing component of the analysis is unnecessary when the statute protects health and safety.[9] Still other cases have emphasized a statute's effect on the required uniformity of state regulations affecting interstate commerce.[10] When these contrasting and conflicting standards are applied to state environmental legislation, the result has been a confusing combination and misapplication of the various standards.[11]

In contrast, negative commerce clause analysis of state tax legislation is relatively straightforward. Current analysis requires a state to show the absence of discrimination against interstate commerce, a sufficient connection between the state and the taxed activity, a fair apportionment of the tax, and a fair relation to the benefits provided the taxpayer.[12] A balancing of benefits and burdens is avoided because a state is entitled to impose a proportionate share of its costs on interstate commerce. The only relevant issue is whether the dollar amount of the tax is justifiable in relation to state costs.

This Note advocates judicial application of this tax analysis not only to tax environmental legislation, but also to regulatory environmental legislation. The theoretical justification for this thesis is provided by the economic concept of externalities.[13] Externalities are elements used in the production of a marketed item without cost to the producer, but at a cost to others. The term "externality" stems from the fact that the use of the element of production is not included in the market price of the item. Undesirable environmental impact has been recognized as an externality—a cost to those people adversely affected by it that is not reflected by the market price of the item. State legislation can respond to the externality of environmental impact in one of two ways: taxing the impact or prohibiting it. A tax directly internalizes the externality by raising the cost of bringing an item to market. This Note advances the theory that a prohibition accomplishes the same result of internaliz-

8. This test was recently expressed in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

9. *See, e.g.*, Brotherhood of Locomotive Firemen & Eng'rs v. Chicago, Rock Island & Pac. R. R., 393 U.S. 129 (1968); Breard v. Alexandria, 341 U.S. 622 (1951).

10. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

11. *See, e.g.*, Procter & Gamble v. City of Chicago, 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975); American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691 (Ct. App. 1973). These two cases, which are the principal decisions examining regulatory state environmental legislation and the negative commerce clause, will be discussed below. *See* notes 94-122 *infra* and accompanying text.

12. This standard was cited approvingly in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

13. *See* notes 141-75 *infra* and accompanying text.

ing the externality of environmental impact; instead of adding the cost to the item as a tax, a prohibition forces a producer to alter internal methods of production to eliminate the impact. Both methods include the cost of the externality in the item's ultimate market price. The actual impacts of a prohibition and a tax do suggest some differing treatment. The difference, however, is one of degree rather than of inherent characteristics. Application of the tax analysis to both tax and regulatory state environmental legislation would reflect this fundamental similarity and avoid the inconsistency and confusion resulting from negative commerce clause analysis of regulatory legislation.

II. NEGATIVE COMMERCE CLAUSE ANALYSIS OF REGULATORY STATE ENVIRONMENTAL LEGISLATION

Negative commerce clause analysis of regulatory legislation requires a two-step process. The first step is a threshold determination that the statute does not discriminate against interstate commerce. If the statute is deemed nondiscriminatory, the Court employs some form of balancing process to weigh the statute's benefits to the state against its burdens on interstate commerce. Both steps of this process have resulted in confusion when applied to state environmental legislation.

A. Discrimination

The most rigid requirement in negative commerce clause analysis is the prohibition against any form of state discrimination against interstate commerce.[14] Supreme Court opinions indicate that state legislation is invalid not only when its purpose is discriminatory, but also when it has an *effect* that discriminates against interstate commerce.[15] This focus on discriminatory effect evidences a judicial awareness that facial evenhandedness can mask deliberate or unintentional discrimination, while facial discrimination itself is generally the result of artless drafting.

The fact that the Court evaluates a statute's effect in addition to its purpose and facial structure demonstrates that the label

14. Some cases, however, indicate that a finding of discrimination will not of itself invalidate a state statute. The Court in Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977), stated that "[w]hen discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.* at 353. *See also* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

15. *See e.g.*, Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977); Douglas v. Seacoast Prods., 431 U.S. 265 (1977).

"discrimination" is a judicial conclusion, and not an objective, discernible fact.[16] The Supreme Court routinely has reached the conclusion that state legislation is discriminatory if it creates *economic* advantages for the protectionist state. When a state enacts uneven legislation for the perceived purpose of *avoiding* a detrimental *burden* created by interstate commerce, however, two different lines of Supreme Court analysis have indicated that this type of uneven legislation is *not* discriminatory.[17] These lines of analysis are particularly relevant in determining whether state environmental legislation should be labeled "discriminatory."

(1) Articles Not Legitimately in Interstate Commerce

In a number of relatively older cases, the Court held that commerce clause concerns did not require invalidation of state regulation of interstate transport of impure or diseased foods.[18] These cases apparently conclude that certain articles are beyond the scope of legitimate commerce, and thus outside any protection afforded by the commerce clause. Therefore they are considered wholly within the scope of legitimate state regulation. These cases fall into two basic categories.

The first group of cases permit the unequal treatment of commerce that is valueless and a health hazard. In *Clason v. Indiana*[19] the Supreme Court upheld a ban on the out-of-state disposal of large dead animals assumed to have no commercial value.[20] In *Bowman v. Chicago & Northwestern Ry.*[21] the Court approved a similar importation prohibition.[22] This conclusion that interstate commerce in valueless health hazards may be unequally treated is supported by *Texas v. Pankey*,[23] a recent Tenth Circuit decision in which the state of Texas sued to enjoin New Mexico ranchers from

16. A similar view is expressed in L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-5, at 327 n.7 (1978).

17. *See* notes 18-48 *infra* and accompanying text.

18. Clason v. Indiana, 306 U.S. 439, 444 (1939) (statute barring out-of-state disposal of large dead animals had no discriminatory intent and was not an impermissible burden on interstate commerce); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 525 (1935) (regulation of milk distinguished from regulation of items "not proper subjects of commerce"); Sligh v. Kirkwood, 237 U.S. 52, 59-60 (1915) (inedible, immature citrus fruits); Crossman v. Lurman, 192 U.S. 189, 196 (1904) (deceptively adulterated coffee beans); Plumley v. Massachusetts, 155 U.S. 461, 472 (1894) (deceptively colored margarine would defraud buyers intending to purchase butter); Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 489 (1888) (state permitted to regulate articles potentially spreading disease).

19. 306 U.S. 439 (1939).

20. *Id.* at 444.

21. 125 U.S. 465 (1888).

22. *See* Baldwin v. G.A.F. Seelig, Inc. 294 U.S. 511 (1935).

23. 441 F.2d 236 (10th Cir. 1971); *see* Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

using a pesticide that polluted Texas drinking water. Although not a commerce clause decision, *Texas v. Pankey* suggests a state right under federal common law to be free from extraterritorial pollution (a valueless health hazard) regardless of unequal treatment of interstate commerce.[24] In contrast is the older case *Missouri v. Illinois,*[25] in which the Supreme Court held that in-state polluting activities set the performance standard for out-of-state polluters. While interstate commerce was not at issue, *Missouri v. Illinois* suggests that discriminatory treatment of out-of-state undesirable materials would be invalid.[26]

The second group of cases permitting uneven treatment of articles not legitimately in interstate commerce focuses on articles that are inherently fraudulent to the public. The Supreme Court has upheld prohibitons barring interstate trade in butter-colored margarine in *Plumley v. Massachusetts,*[27] adulterated coffee beans in *Crossman v. Lurman,*[28] and inedible citrus fruits in *Sligh v. Kirkwood*[29] because they were inherently deceptive items that would defraud the public. This quality of inherent fraud was held to place the articles under full state regulatory control without commerce clause protection because they were not "legitimate commerce."[30] Similarly, in *Morgan's S.S. Co. v. Louisiana Board of Health*[31] the Court validated a charge on interstate and foreign shipping levied to defray the costs of quarantine inspection to protect health in New Orleans. The Court suggested that health concerns not only supported quarantine inspection charges on interstate and foreign commerce, but also would validate appropriate confiscatory and quarantine treatment of out-of-state shipping if health hazards were discovered.[32] The statute in *Morgan's S.S. Co.* was aimed specifically at out-of-state health hazards; the Court did not indicate whether comparable restrictions were imposed on intra-state shipping to check the local spread of disease.

The common element in all these cases is the absence of a

24. *See* Garton, *The State Versus Extraterritorial Pollution — States' "Environmental Rights" Under Federal Common Law,* 2 ECOLOGY L.Q. 313, 314 (1972).

25. 200 U.S. 496, 522 (1906).

26. *Accord,* Kansas v. Colorado, 206 U.S. 46, 104-05 (1907). *But see* Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931) (equal division of the waters of an interstate stream among the states through which it flows not required).

27. 155 U.S. 461 (1894).

28. 192 U.S. 189 (1904).

29. 237 U.S. 52 (1915).

30. 192 U.S. at 200.

31. 118 U.S. 455 (1886).

32. While the Court specifically cited the health threat from international shipping, it is apparent that the statute applied equally to interstate shipping. *Id.* at 459-60.

motivation for economic advantage in the statutes. Rather than attempting to achieve an economic gain, the statutes were viewed as attempts to avoid detrimental effects (health hazards, fraud) to the general public resulting from interstate trade.

(2) Quasi-Sovereignty

A second line of Supreme Court cases has permitted discriminatory treatment of interstate commerce under the doctrine of quasi-sovereignty.[33] Quasi-sovereignty is not based on a state's police power, but rather on its territorial interest and its role as the ultimate protector of the health and welfare of its inhabitants. Quasi-sovereignty serves as a substitute for the ultimate ability of a sovereign nation to resort to physical force.[34] Two lines of cases have emerged under the quasi-sovereignty doctrine. *Georgia v. Tennessee Copper Co.*,[35] a nuisance action to stop crop-damaging fumes from blowing across the Tennessee-Georgia border, is representative of one of those lines. Justice Holmes, writing for the Court, stated:

> In that capacity [quasi-sovereignty] the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.[36]

Although Justice Holmes' language in *Tennessee Copper* clearly articulates certain state extraterritorial environmental rights, this line of cases holds that a state generally cannot enforce standards stricter than those enforced within the state's own borders.[37]

The second arm of quasi-sovereignty theory suggests a rationale for uneven treatment of interstate commerce that is appropriate for analysis of environmental legislation. A line of cases beginning with *Geer v. Connecticut*[38] in 1896 establishes the principle that a state may prohibit exportation of wild game caught within its borders. On the theory that wild animals are under the "common ownership" of all state citizens, federal courts have permitted states to place restrictions on procurement of game by individual citizens. In *Silz v.*

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33. For a general discussion of the quasi-sovereignty doctrine, see Bison, *Economic Protective Powers of States Under the Commerce Clause*, 38 GEO. L.J. 590, 613-15 (1950); Garton, *supra* note 24, at 314-20.

34. Missouri v. Illinois, 180 U.S. 208, 241 (1901). *See* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907); Garton, *supra* note 24, at 319.

35. 206 U.S. 230 (1907).

36. *Id.* at 237.

37. *See* Garton, *supra* note 24, at 324-27.

38. Geer v. Connecticut, 161 U.S. 519 (1896); *accord*, Toomer v. Witsell, 334 U.S. 385, 404-05 (1948); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928). *See also* Johnson v. Haydel, 278 U.S. 16 (1928).

Hesterberg[39] quasi-sovereignty was held to permit a ban on *imports* of game to effectuate an in-state closed season on hunting certain animals. A comparable result was reached in the recent case *Baldwin v. Fish & Game Commission,*[40] in which a difference of $216 in the cost of resident and nonresident elk hunting licenses was held not to violate either the equal protection or the privileges and immunities clauses.[41] Although state attempts to limit resource use for perceived economic advantage invariably have been invalidated as commerce clause violations,[42] the Supreme Court ruled in *Hudson County Water Co. v. McCarter*[43] that the state has a dominant interest in fresh water sufficient to prevent exportation for private gain. The underlying theory of the Court in *Hudson County Water Co.* was that "[f]resh waters . . . constitute an important part of the natural advantages of the [state] upon the faith of which the population has multiplied in numbers and increased in material welfare."[44]

Environmental quality compares with wild game and fresh water in its aspects of common enjoyment and "ownership" among all state citizens. *Geer* and *Hudson County Water Co.* support the theory that the state should be allowed to determine the method of reduction of environmental quality without the interposition of such federal commerce clause concerns as discrimination against interstate commerce.

The current vitality of the quasi-sovereignty doctrine is uncertain. In the recent case *Douglas v. Seacoast Products,*[45] the Court dismissed quasi-sovereignty as "a nineteenth century legal fiction."[46] Two dissenting Justices challenged the majority's treatment

39. 211 U.S. 31 (1908).

40. 98 S.Ct. 1852 (1978).

41. The court declared:

> Appellants contend that the doctrine on which . . . *Geer* . . . relied has no remaining vitality. We do not agree. Only last Term, in referring to the "ownership" or title language of those cases and characterizing it "as no more than a 19th-century legal fiction," the Court pointed out that that language nevertheless expressed " 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' " *Douglas v. Seacoast Products, Inc.*, 431 U.S., at 284, 97 S.Ct., at 1751, citing *Toomer v. Witsell*, 334 U.S., at 402, 68 S.Ct., at 1165. The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence.

Id. at 1861.

42. *See, e.g.*, Douglas v. Seacoast Prods., 431 U.S. 265 (1977); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

43. 209 U.S. 349 (1908).

44. *See* Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 258 (1911).

45. Douglas v. Seacoast Prods., 431 U.S. 265 (1977).

46. *Id.* at 284. *See also* Toomer v. Witsell, 334 U.S. 385, 402 (1948).

of the doctrine, arguing that a state maintains "substantial proprietary . . . [and] regulatory interests" beyond commerce clause concerns in the subject matter covered under the quasi-sovereignty doctrine.[47] This dissenting view seems to have gained support in the more recent case *Baldwin v. Fish & Game Commission,*[48] when the strength of the apparent meaning of *Douglas v. Seacoast Products* was eroded by a renewed emphasis on quasi-sovereignty concerns.

Quasi-sovereignty functions in a manner similar to those cases holding that certain items are not legitimate articles of commerce. The doctrine has been invoked to validate arguably discriminatory state legislation when it is perceived to counteract a burden placed on the state by interstate commerce, rather than create an economic advantage. The not-legitimate-article-of-commerce cases operate against the burdens of health hazards and potential fraud. The quasi-sovereignty cases operate in areas in which state citizens are said to share a common resource that is threatened by interstate commercial activity. Both types of cases serve to uphold legislation which would otherwise be labeled "discriminatory" because they are perceived to operate against the burdens of interstate commerce rather than for the benefit of the enacting state. This perception is clearly a matter of characterization rather than a substantive difference in the operation of the legislation considered in these two types of cases. Avoiding a burden imposed by interstate commerce always results in a benefit to the enacting state. To this extent, differentiating between probenefit and antiburden statutes is not a useful tool of logical analysis. The difficulty lies in identifying the point at which the characterization should shift from probenefit to antiburden. The not legitimate article of commerce and quasi-sovereignty cases do suggest a valid reason for the Court's antiburden characterization. The distinguishing element of these cases is the legislations' subject matter of valueless health hazards, commercial fraud, or commonly shared natural resources such as wildlife, water, and air. Commercial activity in these areas can be accompanied by a widespread adverse impact that is difficult or impossible to quantify. The cost of this adverse impact, or externality[49] (such as an epidemic caused by a health hazard, a crop failure due to the loss of a water supply, or ecological imbalance caused by overhunting game), is not included in the final market price of the article and must be borne by the state. When commerce affecting these areas is *intra*state, the external costs are absorbed by the same state that

47. 431 U.S. at 287-88 (Rehnquist & Powell, JJ., concurring in part, dissenting in part).
48. *See* note 41 *supra.*
49. The concept of externalities is more fully developed in Part IV *infra.*

permits the market activity, and no recourse is needed against commerce to recover these unquantifiable costs. When the commerce is *inter*state, these adverse externalities are suffered by one state and its citizens, without compensation, for the direct benefit of the citizens of another. For example, one state could avoid the health risk of animal carcasses and transfer this risk to another state by purchasing an out-of-state disposal site. It may be argued that when these externalities clearly have outweighed the value of an article in commerce—when an article is a valueless health hazard, commercially fraudulent, or has an impact on a commonly shared natural resource—the Court appropriately changed its characterization from probenefit to antiburden, thus validating uneven legislation that otherwise would be labeled discriminatory.

(3) *City of Philadelphia v. New Jersey*

The recent Supreme Court decision in *City of Philadelphia v. New Jersey*[50] directly confronted the issue of state discrimination in environmental legislation. The challenged legislation in *City of Philadelphia* was a ban on the importation of out-of-state solid waste for disposal in New Jersey land fills. Unequal treatment of interstate commerce existed because New Jersey continued to use its land fills for disposing in-state garbage. While the matter is not free from doubt, the statute apparently was intended to mitigate the rapid exhaustion of existing landfill sites[51] and the attendant problems of finding suitable alternatives for garbage disposal.

The New Jersey Supreme Court found the statute constitutional.[52] The United States Supreme Court reversed, holding that the statute impermissibly discriminated against interstate commerce for protectionist reasons. In reversing the New Jersey decision, the Court failed to recognize the distinction between economic

50. 98 S.Ct. 2531 (1978).

51. Opponents to the ban on out-of-state waste contended that the New Jersey legislature's motivation was primarily financial. 98 S.Ct. at 2536-37. New Jersey had reached a critical situation in which existing landfill sites were being rapidly filled and an insufficient number of acceptable new sites were available. In the Hackensack area 10,000 tons of garbage per week out of a total 55,000 tons came from out-of-state sources. In 1971 a state survey estimated New Jersey buried 1.5 million tons of out-of-state solid waste. The same survey estimated that a ban on out-of-state solid waste would extend existing landfill life by an average of eight percent with the life of certain landfills as much as doubled. Extending the life of the landfills was deemed crucial to avoid despoiling new flood plains, tideland, and wetlands areas, and to give projected new techniques for handling solid waste a chance to be implemented. The court also mentioned that landfills limit future ability to build on the land. City of Philadelphia v. New Jersey, 68 N.J. 451, 465-72 (1975).

52. City of Philadelphia v. New Jersey, 68 N.J. 451 (1975), *remanded*, 430 U.S. 141 (1977), *reversed*, 98 S.Ct. 2531 (1978).

protectionist legislation and legislation seeking to avoid harm imposed by interstate commerce. The Court attempted to distinguish the line of cases permitting uneven state regulation of illegitimate articles of commerce, and failed even to mention the doctrine of quasi-sovereignty.[53]

The Court's distinction of the illegitimate articles of commerce cases seriously weakens their potential value as support for discriminatory state environmental legislation. The Court stated that an article's legitimacy in interstate commerce was a conclusion, not a threshold issue, and that"[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."[54] Consequently, the Court asserted that the New Jersey opinion "misread"[55] the illegitimate articles of commerce cases, which the Court claimed actually resulted from a balancing[56] of an article's worth in interstate commerce against "the dangers inhering in their very movement."[57] The Court concluded that "[t]hose laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin."[58]

Unfortunately, the Court's distinctions do not withstand analysis.[59] While the Court's "dangers inherent in their very movement" theory adequately differentiates such health hazard articles as dead carcasses[60] or potential spreaders of disease,[61] the relevant cases cover a number of different types of articles. For example, the "dangers inherent in the very movement" of unripe citrus fruit,[62] butter-colored margarine,[63] or deceptively colored coffee beans are not apparent.[64] Similarly, there is no clear indication in the cases that in-state traffic in the regulated articles was subject to the same restrictions as interstate traffic. The legislation singling out interstate commerce cannot be explained by a general fear of all traffic in the articles; enactments based on such a motive would logically include *intra*state traffic as well. Also, as Justice Rehnquist pointed

53. The New Jersey Supreme Court had employed quasi-sovereignty as a ground for their opinion. 68 N.J. at 477-78.

54. 98 S.Ct. at 2535 (emphasis added).

55. *Id.*

56. *See* text accompanying notes 77-93 *infra* (for an explanation of the balancing process).

57. 98 S.Ct. at 2535, 2538.

58. *Id.* at 2538.

59. Justice Rehnquist in dissent said that the illegitimate articles of commerce cases were indistinguishable. *Id.* at 2540.

60. Clason v. Indiana, 306 U.S. 439 (1939).

61. Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 489 (1888).

62. Sligh v. Kirkwood, 237 U.S. 52 (1915).

63. Plumley v. Massachusetts, 155 U.S. 461 (1894).

64. Crossman v. Lurman, 192 U.S. 189, 196 (1904).

out in dissent, it is difficult to perceive why garbage itself does not meet the new standard of "dangers inherent in its very movement."[65]

The basis for the Court's decision appears to rest on the finding that the statute was discriminatory because it affected the flow of commerce for protectionist reasons.[66] Asserting that a state may not "isolate itself from a problem common to many," the Court found the statute unconstitutionally discriminatory in that it placed the full *burden* of conserving landfill sites on out-of-state commercial interests.[67] This language parallels the traditional characterization in negative commerce clause analysis of economic protectionist legislation—restrictions on the *flow* of commerce are burdens on interstate commerce that benefit the enacting state.[68] When these restrictions are not evenhanded, they are deemed discriminatory.[69]

The *City of Philadelphia* Court is guilty of the same type of conclusory reasoning that it ascribed to the New Jersey court's determination that an item is not a legitimate article of commerce. The Court focused exclusively on the economic impact of the legislation on interstate commerce by looking at the *burden* of conserving landfill sites. From this perspective the Court inevitably concluded that the legislation perpetuated economic protectionism and was thus "discriminatory." While this conclusion is accurate, its application produces anomalous results. For example, if this perspective were applied to the *Morgan's S.S. Co.* quarantine case,[70] the Court would have found that the quarantine laws were invalidly discriminatory because they sought to avoid the economic consequences of cholera.

The adverse externalities of garbage and its lack of a market value warrant use of the same antiburden characterization for the *City of Philadelphia* legislation that the Court employed in the quasi-sovereignty and not-legitimate-article-of-commerce cases. The Court's focus on limitations to the free flow of commerce as burdens to commerce that benefit the state ignores the reciprocal

65. 98 S.Ct. at 2540 (Rehnquist, J., dissenting).

66. *Id.* at 2538.

67. *Id.*

68. *See* Part II(B) *infra.*

69. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

70. *See* notes 31-32 *supra* and accompanying text. It should also be noted that the Court's characterization of the "burden" as that of conserving landfill sites points out an inconsistency in the opinion. If landfill site conservation constituted the burden, then the Court should have referred to interstate commerce in landfill sites. This would have been an accurate reference, for it was not the garbage that was being bought and sold, but space in the landfill. The Court, however, consistently referred to interstate commerce in solid waste.

nature of the process. When garbage and similar articles in interstate commerce have adverse externalities clearly in excess of the price received by the disposing state, interstate commerce is burdening the state. In fact, landfill conservation is a burden only *because* garbage is a burden. The New Jersey court identified the adverse externalities of difficult disposal, exhaustion of finite landfill sites, and hazard to health that accompany garbage.[71] Any state that permits the exportation of garbage receives the direct economic benefit of avoiding these adverse externalities. The exporting state is thus guilty of economic protectionism, which in the legislative context has always produced a judicial finding of discrimination, by permitting or encouraging garbage to enter the flow of interstate commerce, thereby causing another state to bear the adverse externalities of the garbage it has created.[72] In the Court's words, the exporting state is seeking to "isolate itself from a problem common to many."[73] The exporting state's protectionism is easily obscured by the traditional reference to the abstract generality of "interstate commerce," rather than the movement of articles from one state into another.

The Court instinctively recognized this fact under the not-legitimate-article-of-commerce rubric and in quasi-sovereignty cases. These cases appropriately differentiated between protectionism for economic gain and protectionism to avoid harm to the general public. Upholding a law banning burdensome articles of commerce forces the state with the potential burden to combat it internally, rather than releasing the objectionable article into interstate commerce and placing the burden ultimately upon another state. The quasi-sovereignty cases act similarly by demarking areas of concern in which the state's interests are sovereign to another state's ability to impose a burden, under the protection of the negative commerce clause. Both rationales have been invoked when the adverse externalities of a market activity clearly exceed the market price. The Court's present characterization of discrimination in *City of Philadelphia* is blind to the reciprocal nature of the effects of interstate commerce in articles that are valueless and/or present health or environmental hazards. The practical effect of *City of Philadelphia* is to limit severely the possibility of uneven state envi-

71. 68 N.J. at 460.

72. Justice Rehnquist in dissent pointed out that a state's need to combat local problems should not lead to a forced acceptance of out-of-state problems. 98 S.Ct. at 2540.

73. *Id.* at 2538.

ronmental legislation, thus encouraging the transportation of environmental problems rather than their solution.[74]

B. *Benefit-Burden Analysis*

(1) The Methods of Analysis

Once the Court determines that a statute operates without discrimination, the next stage in negative commerce clause analysis is a weighing of the legislation's benefits to the state against its burdens on interstate commerce. Because of the variety of factors used and the varying weight given to those factors, however, a consistent analytical approach cannot be found in the Supreme Court cases that engage in this balancing process. The Supreme Court itself has referred to benefit-burden analysis as "variously stated."[75] Other courts and commentators have used less restrained terminology.[76] The central unsettled question emerging from the Supreme Court cases is whether a candid, direct judicial weighing of benefits and burdens will occur; and if so, at what stage in the analysis.

For state environmental legislation, there are three important versions of benefit-burden analysis. The first was articulated by Justice Stewart for a unanimous Court in *Pike v. Bruce Church, Incorporated.*[77] Justice Stewart defined the "general rule that emerges" in benefit-burden analysis:

> Where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[78]

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74. *Id.* The Court stated that its decision also provided protection for any future New Jersey decision to export its garbage to Pennsylvania. The impact of this statement is unclear. Does it mean that a state must provide disposal facilities for out-of-state garbage, despite the fact that it exports all in-state garbage? At what point does out-of-state garbage become in-state garbage, so it can be "reexported" to the state of origin? When can the original state send it back? Can Pennsylvania dump all its garbage in Delaware and simply accommodate Delaware's garbage in return? Can a group of states select a single state as a dump? These vital questions remain unanswered.

75. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

76. Procter & Gamble v. City of Chicago, 509 F.2d 69, 75 (1975) ("difficult to discern"); American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691, 697 (Ct. App. 1973) ("not always consistent"); Note, *The Challenge to Oregon's Bottle Bill:* American Can Company v. O.L.C.C., 4 ENVT'L L. 419, 424 (1974) ("difficult to reconcile").

77. 397 U.S. 137 (1970).

78. *Id.* at 142.

Justice Stewart's statement articulates the five basic areas of benefit-burden analysis: discrimination ("evenhandedly"); a legitimate public purpose; statutory means related to the legislative purpose ("effectuate"); a direct weighing of burdens and benefits (here under a "clearly excessive" standard); and less restrictive alternatives to the legislation. While the *Pike* Court does not expressly admit to a balancing process of burdens and benefits, it is implicit in a determination that burdens are not "clearly excessive" in relation to local benefits. Although the Court attempted to differentiate between this test and those cases in which a balancing candidly occurred,[79] the practical effect of the last sentence of the test is the creation of a general benefit-burden balancing that negates the particularity of the rest of the test. Although the test purports to be a detailed analysis, the resulting decision in reality is nothing more than a judicial conclusion as to whether the state benefits justify the burden the statute imposes on interstate commerce.

A second version of the benefit-burden analysis suggests that the *subject matter* of the state legislation will determine if a balancing will take place.[80] Two years before *Pike,* the Court in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad (Firemen)*[81] expressly rejected a lower court finding that the financial burden of complying with an Arkansas full train crew law was " 'out of all proportion to the benefit, if any, derived' . . . . "[82] The Court stated that "the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause."[83] In explanation, the Court reasoned that the question of safety is a matter of public policy to be determined only by the legislature. The judiciary, the Court continued, is not authorized to resolve conflicts in the evidence against the legislature's conclusion, especially on inconclusive evidence.[84] The Court described the process of balancing financial losses against "lives and limbs" as "difficult at best," and concluded that "[w]e certainly cannot do so on this showing."[85]

Despite *Firemen's* language, it is apparent that the Court engaged in the same type of balancing process for which it criticized

79. *Id.* (citing Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945)).

80. This process should not be confused with the weight given a legislation's benefits in the balancing process.

81. 393 U.S. 129 (1968).

82. *Id.* at 136.

83. *Id.*

84. *Id.* at 138-39.

85. *Id.* at 140.

the district court. In labeling the balancing process "difficult" and the evidence of the statute's safety "inconclusive," the Court demonstrated that it too was weighing the evidence of the statute's benefits. Had the Court deemed the balance of safety against financial losses less "difficult," or the evidence against the statute's safety "conclusive," it would have agreed with the district court. The Court employed a balancing process, but simply reached a different conclusion than the district court.[86]

In *Breard v. Alexandria,*[87] the Court purported to refrain from a balancing process because of the subject matter of the legislation. The Louisiana statute in question operated to protect the privacy of local residents from door-to-door solicitors, most of whom carried on an interstate trade. The Court upheld the statute, stating that "[w]hen there is a reasonable basis for legislation to protect the social as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana."[88] A balancing process is implicit in this statement, however, with social welfare benefits viewed as inevitably outweighing burdens on interstate commerce.

In addition to the balancing and subject matter approaches, a third variation of the benefit-burden standard was expressed in *Huron Portland Cement Co. v. Detroit,*[89] which considered a commerce clause challenge to environmental legislation. Justice Stewart, who later authored the *Pike* opinion, declared that the issue of burden on interstate commerce "needs no extended discussion. State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand."[90] In *Huron* the balancing of benefits and burdens was summarily dismissed.[91] This decision, however, can also be viewed as the result of a balancing process: in the absence of any disruption of uniform regulation of interstate commerce, the statute's burden was deemed not to outweigh its benefits to the state.

In interpreting these various benefit-burden tests, the lower courts have not acknowledged the balancing process inherent in

86. *See* Note, *supra* note 76, at 423 (reaching the same conclusion).

87. 341 U.S. 622 (1951). The challenged statute was a municipal ban on door-to-door solicitation of magazine subscriptions.

88. *Id.* at 640.

89. 362 U.S. 440 (1960). The boilers on two of appeallants' ships engaging in interstate commerce violated Detroit's Smoke Abatement Code.

90. *Id.* at 448.

91. *Id.*

each. Instead, they have attempted a literal application of the elements of the tests, resulting in a great deal of confusion and the frequent transposition of the elements of the various tests. This lack of clarity is apparent in the two most significant judicial treatments of negative commerce clause challenges to state environmental legislation—*American Can Co. v. Oregon Liquor Control Commission*[92] and *Procter & Gamble v. City of Chicago.*[93]

(2) Application of the Analysis to Environmental Legislation

(a) American Can

The landmark case *American Can Co. v. Oregon Liquor Control Commission* demonstrates the difficulties in applying commerce clause precedent and benefit-burden analysis to environmental legislation. The Oregon appellate court paralleled the *Firemen* decision, applying a balancing approach while purporting not to. The Oregon statute under attack imposed a deposit and refund system for all beer and soft drink containers and a total prohibition on pop-top cans for the stated legislative purpose of reducing litter, solid waste, and injuries from discarded pop-tops.[94] The Oregon court declared the statute to be a legitimate exercise of police power (thus satisfying the second concern of the *Pike* test[95]) with a conclusory approach typical of environmental commerce clause cases.[96] The weakness of this conclusory finding of a legitimate state purpose for benefit-burden analysis is that the mere presence of a legitimate state purpose is not significant; the significance lies in a *value* judgment by the court in evaluating the purpose's degree of legitimacy when balanced against the statute's burden on interstate commerce. The overriding significance of this value judgment is indicated in the final segment of the *Pike* test, in which the burden that will be tolerated is a function of the nature of the local interest served.[97] Thus judicial evaluation of the difference between burden and benefit requires a value judgment with regard to the importance of the benefit.

The Oregon court claimed that it was not engaging in a balancing process, however, stating that balancing was not compelled by

92. 517 P.2d 691 (1973).

93. 509 F.2d 69 (7th Cir.), *cert. denied,* 421 U.S. 978 (1975).

94. 517 P.2d at 694.

95. *See* text accompanying note 78 *supra. See also* notes 72-73 *supra* and accompanying text.

96. 517 P.2d at 698. *See also* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 442 (1960).

97. *See* text accompanying note 78 *supra.*

Pike and that *Firemen* rejected balancing in cases in which statutory benefits could not be successfully compared with the burdens imposed on interstate commerce.[98] The court determined that the economic loss to the beverage industry was incomparable with the benefits of reducing personal injury, litter, and solid waste.[99] The court did not acknowledge *Firemen's* unadmitted balancing, nor did it mention that *Firemen* did not conclusively reject the balancing process, but rather deemed the weighing of incomparables "difficult."[100] The court underscored its misreading of *Firemen* by stating that gross disparity between the burden and benefit of a statute would be apparent "without going through the motions of a judicial weighing process."[101] Yet to establish *any* disparity, judicial evaluation of the legislative interest must take place, and a balancing must occur.

The *American Can* court supported its conclusion that only comparable benefits and burdens should be weighed by citing the "comparables" weighed in *Bibb v. Navajo Freight Lines, Inc.*,[102] *Southern Pacific Co. v. Arizona*,[103] and *Dean Milk Co. v. City of Madison*.[104] A reading of these cases indicates that although the Court balanced comparables in the process of evaluating least restrictive alternatives, it also balanced health and safety against economic burdens.[105] *American Can* thus used a comparison of less restrictive alternatives in previous cases to support its refusal to balance "non-comparables," and dismissed the consideration of less restrictive alternatives as a *legislative* judgment not subject to judicial review.[106]

Although *American Can* articulated an unwillingness to balance the benefits and burdens of the legislation, the court nevertheless transposed this balancing process to its evaluation of possible economic discrimination by the statute. After pointing out that the

98. 517 P.2d at 697.

99. *Id.* at 697-98.

100. *See* text accompanying note 86 *supra*.

101. 517 P.2d at 698.

102. 359 U.S. 520 (1959).

103. 325 U.S. 761 (1945).

104. 340 U.S. 349 (1951).

105. An evaluation of least restrictive alternatives is called for in the *Pike* test: "And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

106. 517 P.2d at 700. Independent of its decision not to balance, the court also considered whether the statute created an unconstitutional impediment on the free flow of interstate commerce. The court found a sua sponte distinction between the goods transported and the means of transportation, declaring that only regulations affecting the means of transportation had been invalidated.

bottle bill was not discriminatory per se because it had a negative impact on interstate commerce, the court said: "[I]t is appropriate to look to the nature of the economic burden upon interstate commerce and the legislative motivation in creating that burden. A gross disparity would tend to evidence police power coloration to an act of economic protectionism."[107] In determining that no legislative intent to discriminate existed,[108] the court described with apparent approval the precise legislative weighing process behind the bottle bill:

> Economic loss restricted to certain elements of the beverage industry must be viewed in relation to the broader loss to the general public of the state of Oregon which the legislature sought, by enactment of the bottle bill, to avoid. The availability of land and revenues for solid waste disposal, the cost of litter collection on our highways and in our public parks, the depletion of mineral and energy resources, the injuries to humans and animals caused by discarded pull tops, and the esthetic blight on our landscape, are all economic, safety and esthetic burdens of great consequence which must be borne by every member of the public. The legislature attached higher significance to the cost to the public than they did to the cost to the beverage industry and we have no cause to disturb that legislative determination.[109]

Despite a claimed unwillingness to balance "non-comparables," the court's agreement with such a legislative balancing process demonstrates a similar, if unadmitted process undertaken by the court under a deferential standard.

(b) Procter & Gamble v. City of Chicago

The Seventh Circuit case of *Procter & Gamble v. City of Chicago*[110] again demonstrates the courts' difficulty in balancing the benefit of an environmental statute against its burden on interstate commerce. The *Procter & Gamble* court actually adhered to the common interpretation of *Firemen,* declining to balance benefits and burdens while purporting to apply a variation of the *Pike* standard. In an analysis best described as confusing, the court stated that *Pike* called for a balancing process with regard to the effectiveness of the statute in achieving the legislative goal, yet the court failed to engage in an overall balancing of general benefits and burdens.

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107. *Id.* at 702.

108. The court based its ultimate finding that the bottle bill did not discriminate on the presence of a legitimate legislative intent and on the evenhanded effects of the bill on both in-state and foreign bottlers. The court reasoned that the bill's impact on bottlers was determined by proximity to Oregon markets (Portland, Oregon's largest city, is on the Washington border) and not state lines. *Id.* at 703.

109. *Id.* at 702-03.

110. 509 F.2d 69 (7th Cir.), *cert. denied,* 421 U.S. 978 (1975).

Procter & Gamble considered the validity of a Chicago ordinance intended to reduce eutrophication[111] of the Chicago River by banning the use of phospate laundry detergents. Plaintiffs, who lost $4.7 million in sales in the first five months of the ban,[112] raised significant technical questions whether phosphorous produced eutrophication and whether a reduction in the water's phosphorous content would reduce algae growth.[113] The court acknowledged the first two areas of possible balancing—a legitimate state purpose and a reasonable means to achieve that purpose[114]—yet appeared confused in applying the two facets of the balance. While most courts question whether environmental protection is a legitimate interest[115] and whether the legislation effectuates that interest, the *Procter & Gamble* court either ignored or assumed the fundamental question of legitimacy of environmental protection and instead evaluated whether reduced eutrophication was a legitimate interest. Ordinarily, a court would have analyzed eutrophication in terms of the legislation's effectiveness in protecting the environment. Instead, the *Pike* "effectiveness" element was accomplished through an evaluation of plaintiff's concerns about a phosphate ban's technical and chemical ability to achieve eutrophication reduction. The technical effectiveness has not been at issue in other environmental cases.[116]

In evaluating the legislative purpose, the court interpreted *Firemen* as holding that issues such as the benefits of algae removal were policy questions not for judicial evaluation.[117] Such an interpretation fails to recognize that the *Firemen* balancing language was directed at the general balancing concerns of whether a statute's benefits outweigh its burdens on interstate commerce, and not at a determination of a legitimate legislative purpose. The court noted the apparent split of authority between *Pike,* which called for a general benefit-burden balancing under a "clearly excessive" standard, and *Firemen,* which would eliminate this step.[118] The court resolved the conflict by declaring that the *Pike* "clearly excessive" balancing standard should be applied to whether the statutory

111. Eutrophication is the growth of nuisance algae.

112. 509 F.2d at 73.

113. *Id.* at 73-74.

114. *Id.* at 75 n.6.

115. *See, e.g.*, Huron Cement Co. v. Detroit, 362 U.S. 440 (1960); American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691 (Ct. App. 1973).

116. For example, an equivalent "technical" evaluation of the *American Can* bottle ban would consider whether a ban on one-way bottles would reduce the number of one-way bottles.

117. 509 F.2d at 75.

118. *Id.*

means (banning phosphate) were reasonably related to the legislative purpose, *i.e.*, did phosphate reduce algae. The court thus transformed the general balancing of a statute's burdens and benefits in *Pike* into an analysis of the technical effectiveness of the statute.[119]

Despite their espoused adherence to *Firemen*, the Seventh Circuit achieved the practical equivalent of *Pike* by evaluating the degree of burden imposed by the phosphate ban. After detailing the consequences of the ban,[120] the court further confused ordinary negative commerce clause analysis by reversing the "less restrictive alternatives" test. The court concluded that the burden on commerce was slight[121] because interstate commerce could reduce the impact of the phosphate ban through alternate marketing techniques.[122] Thus, by characterizing the burden on interstate commerce as slight because alternatives were available, and by finding a legitimate legislative goal, the court implicitly found that the statute met the "clearly excessive" test applied in a balancing of benefits and burdens.

(3) Summary

Decisions attempting to evaluate statutory benefits and burdens are not clear. *Pike* calls for a judicial balancing of a statute's benefits and burdens, *Firemen* engages in a balancing in the very act of forbidding balancing, and *Huron* and *Breard* dismiss the balancing process, despite articulating ways of evaluating benefits (*Breard*'s social welfare) or burdens (*Huron*'s uniformity). When applied to environmental legislation, the confusion of this authority is amplified by the variety of potential areas in which to engage the balancing process, as demonstrated in *American Can* and *Procter & Gamble. American Can* rejected a balancing of benefits and burdens, and then articulated a balancing process in its evaluation of the statute's discriminatory effect. *Procter & Gamble* injected an unprecedented evaluation of the statute's technical effectiveness and applied a balancing test to this new concern. *Procter & Gamble*

119. *Id.* The court paraphrased the standard as "clear and convincing proof." *Id.* at 76. *See* text accompanying note 78 *supra.*

120. The primary consequence was a refusal by regional distributors to stock both phosphate and nonphosphate formulas for the same detergent. 509 F.2d at 73.

121. The court reached this conclusion by initially recognizing the means-goods distinction drawn in *American Can*. The court concluded that the regulation of goods was an acceptable interference with the free flow of commerce. The validity of the means-goods distinction as an analytical tool was weakened, however, when the court separately evaluated the free flow of phosphate detergents. *See* note 106 *supra.*

122. *Id.* at 76-77. Other cases have evaluated alternatives to the state legislation, not alternatives to interstate commerce. This reversal of the least restrictive alternative test has been noted in Note, American Can: *Judicial Response to Oregon's Nonreturnable Container Legislation*, 4 ECOLOGY L.Q. 145, 158 (1974).

also reversed the least restrictive alternative test, applying it to interstate commerce instead of to the state legislation. Most importantly, *American Can* and *Procter & Gamble* demonstrate the need for clarity in negative commerce clause analysis of state environmental legislation.

III. THE TAX STANDARD

By comparison with benefit-burden analysis, the judicial standard for reviewing tax cases under the negative commerce clause is straightforward and easily applied. The courts are not concerned with weighing a statute's benefits and detriments; they simply evaluate if and to what extent a tax can be levied. The state's ability to tax interstate commerce is not in question. In the seminal case *Western Live Stock v. Bureau of Revenue*[123] the Supreme Court declared that interstate commerce could be required under the commerce clause to bear its "just share of state tax burden even though it increases the cost of doing the business."[124] The current commerce clause standard for judging state taxation was expressed recently in *Complete Auto Transit, Inc. v. Brady*.[125] The standard implicitly applied in *Complete Auto Transit* and generally applicable to tax cases requires a substantial nexus between the taxed activity and the state, fair apportionment of the tax, a fair relation between the amount of tax and the services provided by the state, and no discrimination against interstate commerce.[126] Similar concerns are reflected when courts evaluate tax imposed as a charge for the use of state-owned facilities. The Court in *Evansville-Vanderburg Airport v. Delta Airlines*,[127] an action challenging a charge for the use of airport facilities, required that the charge not be discriminatory, that it reflect "a fair if, imperfect, approximation of the use of facilities for whose benefit they are imposed,"[128] and that it not be excessive in relation to the costs incurred by the taxing authorities.[129]

In *Portland Pipe Line Corp. v. Environmental Improvement Commission*,[130] the tax standard was applied to a state environmental tax statute. The Maine legislation provided for a one-half cent

123. 303 U.S. 250 (1938).
124. *Id.* at 254.
125. 430 U.S. 274 (1977).
126. The Court mentioned these four factors three times with apparent approval. *Id.* at 277-78, 279, 287.
127. 405 U.S. 707 (1972).
128. *Id.* at 717.
129. *Id.* at 719.
130. 307 A.2d 1, *appeal dismissed*, 414 U.S. 1035 (1973).

per barrel license fee on petroleum transfers that required the use of shore terminals and ships over a minimum size. The tax provided the initial funding for a maximum four million dollar protection fund intended to finance clean-up operations and third party compensation in the event of an oil spill. Because the statute operated as a tax, benefit-burden analysis was unnecessary and the commerce clause challenge was resolved with relative simplicity.

The Maine court first addressed the issue whether a contribution to a provisional clean-up fund constituted a "fair share" of the state's tax burden that could be imposed on interstate commerce.[131] The *Portland Pipe* court differentiated between taxes imposed as general revenue device and those levied as part of a regulatory scheme,[132] but cited *Dean Milk Co. v. City of Madison*[133] for the proposition that the cost of preventing and remedying the harm caused by inherent dangers in interstate commerce was included in the "just share" of the tax burden that could be imposed as a regulation.[134] *Dean Milk* invalidated a discriminatory milk inspection ordinance that effectively banned out-of-state milk from the city of Madison. In examining reasonable alternatives to the discriminatory ordinance, the Supreme Court in *Dean Milk* indicated a permissible alternative would have been for out-of-state milk to be inspected locally and the cost of inspection imposed on those engaged in interstate commerce.[135] The *Portland Pipe* court concluded that the fund financed through the oil transfer tax was an analagous solution and that the just share of the cost of alleviating the potential hazard through the clean-up fund could be imposed on interstate commerce. In addition, the court noted that the Supreme Court had upheld similar charges for the costs of harbor administration[136] and quarantine inspection.[137]

In evaluating the actual amount of the tax, the Maine court applied two elements of the *Delta Airlines*[138] test to find that the fees were neither discriminatory nor excessive in relation to potential cost. The second part of the *Portland Pipe* test, however, differed significantly from the *Delta Airlines* test. *Delta Airlines,* which upheld use fees for publicly owned airport facilities, required that such charges reflect "a fair, if imperfect, approximation of *the use of*

131. *See* note 123 *supra* and accompanying text.
132. 307 A.2d at 37.
133. 340 U.S. 349 (1951).
134. 307 A.2d at 37.
135. 340 U.S. at 354-55.
136. Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935).
137. Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886).
138. *See* notes 127-28 *supra* and accompanying text.

facilities for whose benefit they are imposed."[139] *Portland Pipe* required that the charges represent a fair approximation of *"the conduct which gives rise to the danger* against which the Act seeks to guard."[140] The court thus considered the environment (the ocean and shoreline) to be a state facility and equated even the potential degradation of the environment with a use of that facility for which a reasonable fee could be charged. By inference, a reasonable fee could also be charged for actual environmental damage if the other facets of the *Delta Airlines* test were met. *Portland Pipe* thus considered the costs of guarding against and correcting environmental damage to be state expenditures for which commerce may be asked to bear its fair share.

IV. Environmental Impact as an Externality

The clarity of the *Portland Pipe* analysis, when compared with *American Can* and *Procter & Gamble,* results from Maine's reduction of the benefit-burden balancing between petroleum trade and an oil-free coast to a precise amount—a tax. The statute permits oil transfers to continue if they will pay a fair approximation of the costs related to their presence. A tax, in contrast to a prohibition, avoids an either/or situation in which the court must balance state benefits against commerce burdens, and in which either the commerce or the state interest must prevail, to the exclusion of the other. As *American Can* and *Procter & Gamble* reveal, this subjective assessment is made whether or not the court admits to a balancing process.[141] *Portland Pipe* demonstrates the conceptual reversal of the regulatory burden-benefit balancing process for negative commerce clause analysis in the tax cases. Whereas regulations are conceived of as "benefiting" the state and "burdening" commerce, thereby triggering judicial balancing, tax statutes are viewed as "unburdening" the state of "costs" and "unbenefiting" interstate commerce, which before the tax has not paid its "just share" of these costs.[142] The reciprocal nature of these characterizations is similar to that described in the area of discrimination.[143] The valid-

139. 405 U.S. at 717 (emphasis added).

140. 307 A.2d at 38 (emphasis added). The court found that the limitation of the tax to larger vessels fairly approximated the likely source of damage.

141. *See* notes 107-09 & 119-22 *supra* and accompanying text.

142. Language in *American Can* suggests the Oregon court intuitively reversed these concepts without acknowledgment. The Oregon legislature was persuaded that the economic benefit to the beverage industry brought with it "deleterious consequences to the environment and *additional costs to the public* . . . . [T]he attendant economic and aesthetic burden to the public outweighed the narrower economic benefit to the industry." 517 P.2d at 696 (emphasis added).

143. *See* notes 66-74 *supra* and accompanying text.

ity of imposing such a tax on interstate commerce is clear.[144]

The difference between benefiting a state and unburdening it at first appears to be characterization rather than substance. Given that courts persist in employing this distinction, an obvious incentive is created for state legislatures to enact environmental legislation in the form of a tax to utilize the more permissive tax analysis rather than the uncertain benefit-burden analysis. But when viewed according to the economic concept of externalities, all state environmental legislation, whether tax or regulation, can be viewed as "unburdening" the state of costs imposed by interstate commerce.

In promulgating environmentally motivated tax or regulatory legislation, a legislature initially must make a value judgment that the environmental impact constitutes an actionable detriment. This judgment creates problems both in defining the problem and evaluating the degree of harm. A preliminary inquiry is required under present negative commerce clause analysis as to whether a state legislature is permitted to make this value judgment.[145] Characterizing environmental change as a detriment is a value judgment, although society's use of such value-laden terms as "pollution" and "degradation" often disguises that fact.[146] This initial value judgment is not free from controversy. Views asserting the primacy of environmental values have been criticized as leading to a rejection of rationality in conflict resolution.[147] In contrast, rational comparison and ranking of the environment has been said to transform "an inchoate sense of obligation towards natural objects . . . into an aspect of [homocentric] self-interest."[148] Religious and philosophical rationales for environmental protection[149] have been dismissed as "naive and elegaic celebration[s] of an irrelevant vision," and "[i]ntellectual hostility to urban life."[150]

Change to an interdependent ecology[151] is not harmful per se; harm will only exist after the change is deemed undesirable.[152] Regardless of this debate, it is significant for commerce clause pur-

144. *See* notes 123-24 *supra* and accompanying text.

145. This is reflected in the *Pike* test inquiry of "legitimate state interest." *See* text accompanying note 78 *supra*.

146. *See* notes 1-2 *supra* and accompanying text.

147. Tarlock, *supra* note 2, at 459.

148. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1332 (1974); *see* Tarlock, *supra* note 2, at 460.

149. These rationales are summarized in Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 427-39 (1975).

150. Tarlock, *supra* note 2, at 457-58.

151. This term is used to describe the naturally occurring factors and processes that support life. *See* Tarlock, *supra* note 2, at 462.

152. *Id.* at 462.

poses that environmental legislation is deemed a legitimate area of legislative concern. This need to justify the legislative purpose is the first factor expressed in the *Pike* test: is the legislature permitted to interpret environmental impact as a burden or cost? Courts considering the issue have all answered in the affirmative. The environment seems to have kept pace with aesthetics in its rise from a position clearly outside the "police power"[153] to its present status as an independently legitimate subject of legislation. It no longer is necessary to relate the environment to traditional areas of legislative interest—the "police power" concerns of health and safety.[154] A legislative decision that environmental impact is a detriment simply reflects the large scale shift of public attitude from resource exploitation to environmental conservation.[155] *Huron* explicitly held the environment to be a legitimate legislative area. Other courts have either assumed the point or echoed *Huron*.[156] Legislatures are thus free to determine that given environmental impact is a detriment.

The concept of externalities[157] demonstrates why interstate commerce should legitimately bear the effects of environmental legislation. Externalities, also termed social costs, have been defined as the use of resources without cost to the user, but at a cost to others.[158] According to free market economics,[159] consumers determine the proper allocation of resources by purchasing goods and services to the point at which the cost of an additional item will equal the value of an alternative purchase.[160] The price of an item should depend on both its relative desirability and its relative scarcity.[161] If the price of an item fails to include the costs perceived by

153. Police power is a conclusory term used to describe permissible areas of state legislation under the federal Constitution. *See* Garton, *Ecology and the Police Power*, 16 S.D. L. REV. 261, 263-67 (1971).

154. *Id. See also* Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149 (1954).

155. *See* notes 1-5 *supra* and accompanying text.

156. Huron Cement Co. v. Detroit, 362 U.S. 440, 442 (1960); American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691, 698 (Ct. App. 1973).

157. This Note does not attempt to give an exhaustive treatment of externality theory. Its aim is to provide sufficient background so that the general principles of the concept of externalities can be applied to negative commerce clause analysis of environmental legislation. For more complete treatment of externalities, see Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Johnson, *Meade, Bees, and Externalities*, 16 J.L. & ECON. 35 (1973); Smith, *Relative Prices, Technical Change, and Environmental Preservation*, 15 NAT. RESOURCES J. 283 (1975).

158. Meyers, *supra* note 149, at 446.

159. H. SEDGWICK, THE PRINCIPLES OF POLITICAL ECONOMY 406 (1st ed. 1883), *cited in* Johnson, *supra* note 157, at 35.

160. Johnson, *supra* note 157, at 36.

161. Meyers, *supra* note 149, at 448.

others as imposed on them by objectionable side-effects of producing the item,[162] the market inaccurately undervalues the item in relation to alternative purchases that have all their costs reflected in their price. For example, purchasers pay less than the full price for a can of beer, because the dollar cost of production and the selling price do not include the eventual cost of disposal of the empty containers.

When damage to a resource is not reflected in the price of the item that causes that damage, the market fails to ration the resource to reflect its scarcity.[163] If anything, the use of a resource without cost to the user (the resource being, for example, a landfill, an unlittered roadside, clean water, or clean beaches) encourages use of that resource by cheapening the product's ultimate market price. If the use of landfills or the creation of roadside litter carries no price and thus creates no cost for a beverage bottler, what bottler would self-impose the dollar expense, competitive disadvantage, and inconvenience of returnable bottles?

Externality theory states that in a perfect system efficient allocation of resources results if all those objecting to an externality pay the resource user to alter his conduct.[164] The competing value judgments between the environment and cheaper products can be resolved in the market place. Those desiring a clean roadside can pay a bottler the extra cost of marketing the beverage in returnable bottles.

At least two imperfections in the system, however, prevent this theory from working in practice. First, the transaction costs of contacting and assembling the litter objectors to collect a large number of small payments may be prohibitive, leaving insufficient funds to pay the bottler.[165] Second, the dollar "votes" against an externality like litter will not reflect the total number of people and the total dollar amount each theoretically would pay to eliminate beverage container litter because of the "free rider" problem. Each individual has an incentive not to pay the full value for him to be free of bottle litter because he will receive the full benefit of a litter-free environ-

162. One commentator has noted:

> If factors of production are thought of as rights [and not only physical entities], it becomes easier to understand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.) is also a factor of production . . . . The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right . . . .

Coase, *supra* note 157, at 44.

163. This analysis is found in Meyers, *supra* note 149, at 448.

164. Coase, *supra* note 157, at 2-6; Meyers, *supra* note 149, at 448.

165. Coase, *supra* note 157, at 10; Meyers, *supra* note 149, at 448-49.

ment whether he pays or not.[166]

For various reasons, among them the transaction costs and the "free rider" problem, a free market economy does not operate and objectionable externalities are not appropriately reduced or eliminated through free market operations.[167] Governmental interference through legislation is the traditional solution to such economic problems as externalities.[168] For example, the coastal protection fund in *Portland Pipe* represents a governmental attempt to place a price on the use of an externality because the market failed to price the resource use. The appropriate cost[169] imposed by interstate commerce on the state is internalized when it is properly reflected in the ultimate market price of the goods.

A prohibition of an interstate commerce item such as disposable containers, in contrast to a tax, appears superficially to be a proscriptive value judgment qualitatively different than the internalization of an externality through a tax. This is a misconception reflected in judicial evaluation. Regulatory prohibitions receive the complicated benefit-burden analysis while taxes face a far simpler and less subjective review. The difference between a tax and a regulation, however, is one of degree rather than kind. Once a legitimate legislative decision is made to internalize an environmental externality, two alternatives are present; imposition of a tax calculated at the cost to the state of the environmental impact, or elimination of the impact entirely through a prohibition. Either alternative will force the market price of the product to reflect the former externality of environmental impact, a tax by directly adding the environmental cost to the price, and a prohibition by inducing the expense of changed production and distribution methods (included in the final market price) that will avoid the environmental impact. Technically, the tax can be based on the payment required to force the "polluters" voluntarily to eliminate the detriment. This method might be called "removing the economic incentive to pollute."[170] For practical purposes, however, the cost to the state will be calculated on the dollar cost of rectifying the environmental damage.

The ultimate issue, therefore, requires defining when a regula-

166. Meyers, *supra* note 149, at 448-50.

167. Meyers lists perfect competition and correct supply, demand, and price information in addition to no externalities as other essential elements to free market economy. The presence of these prerequisites may be questioned, as can the initial assumption of free market economies that man will always act to maximize his own welfare. *See* Meyers, *supra* note 149, at 448.

168. *Id.* at 452.

169. Appropriate cost is defined by the legislature, or perhaps even common consensus.

170. *See* Meyers, *supra* note 149, at 449.

tory prohibition rather than a tax based on state costs is the justifiable method of internalizing the externality of environmental impact caused by interstate commerce. One such instance arises when the cost of rectifying the impact may be prohibitive. For example, a 1971 New York State estimate placed the cost of bottle litter clean-up at 30 cents per bottle.[171] In such cases a prohibition of the impact would serve the value expressed in the *Pike* standard of being the least restrictive method[172] of internalizing the externality. A ban on one-way bottles would result in a far smaller price increase than the thirty cents per bottle tax permissible under present tax analysis. The beverage would arrive at the market place at a cheaper price and with less burden on interstate commerce. A second situation in which a prohibition is justifiable exists when the damage done by the environmental impact is irreversible. An irreversible impact cannot be successfully rectified by state measures, no matter what their costs. An example would be strip mining that is so extensive that the land could never be successfully reclaimed for its former use as a human recreation area and habitat for wildlife. Conceptually, an irreversible impact serves to extend the externalities of a given environmental impact over time, thus increasing the cost of the impact. In the strip mining example, the impact is not only on the existing population, which suffers the loss of recreational use of the mountains, but on succeeding generations who are foreclosed from the same recreation by the environmental impact.[173] These future externalities of an irreversible environmental impact will be difficult to quantify, but will increase when extended over time.[174] A prohibition in such a situation is the only effective implementation of the legislative value judgment that the environmental impact is a detriment. If interstate commerce is incapable of paying its just share of the state costs of environmental impact, it is reasonable to prohibit interstate commerce from imposing these costs. Thus a

171. Note, *supra* note 122, at 145, 147 n.10.

172. *See* text accompanying note 78 *supra*.

173. For an explanation of the economic impact of irreversibilities, see Smith, note 157 *supra*, at 291-93.

174. The argument exists that the replacement of benefit-burden analysis by tax analysis in environmental negative commerce clause cases because of externality theory is equally applicable to other state legislative areas such as health and safety. A court may thus object to applying tax analysis to environmental cases for fear that this more deferential review would be required in all state regulatory cases to achieve a perceived analytical consistency based on treating all "regulatory" cases alike. As indicated in the text between notes 140 and 141 *supra*, the difference between a tax and a regulatory prohibition is one of degree, not quality. Environmental impact, however, can also be distinguished from health (except in extreme cases) and safety because the former has a far greater *irreversible* impact and hence greater externalities for succeeding generations.

prohibition represents the same legislative intent as a tax—internalization of a previous external cost into the market price of an item. Although some commerce clause cases indicate otherwise, a prohibition of an environmental impact will simply increase the cost of marketing an item in interstate commerce in the same way that a tax would[175]—by justifiably internalizing an externality.

When both environmental taxes and prohibitions are viewed as an attempt to internalize an externality cost, the tax cases provide the most appropriate standard of review for constitutionality under the commerce clause. Identical concerns are protected without engaging in a subjective balancing of benefits and burdens more properly left to state legislatures.

V. CONCLUSION

The tax standards of *Complete Auto Transit* and *Delta Airlines* can be successfully applied to state regulatory environmental legislation. First, the statute must not discriminate against interstate commerce. As discussed above, the label "discrimination" is more of a conclusion than a starting point. At least with respect to articles that have actual or potential adverse externalities far in excess of their commercial value, such as the garbage in *City of Philadelphia,* states permitting these articles to enter the flow of interstate commerce are guilty of as much discrimination and protectionism as those states erecting barriers against such items. Under current analysis, however, even one branch of the doctrine of quasi-sovereignty suggests that legislation must result in equal treatment of intrastate and interstate activity.

Second, the tax must reflect a "fair, if imperfect, approximation of the use of facilities for whose benefits they are imposed."[176]

175. *Southern Pacific v. Arizona* emphasized the "confusion" that a maximum train length statute would impose on interstate commerce. Justice Black, author of the *Firemen* opinion, however, maintained explicitly in his *Southern Pacific* dissent that the burden created was nothing more than an additional cost. 325 U.S. at 793 (Black, J., dissenting). Several challenges to state environmental legislation not involving extensive commerce clause analysis have supported the contention that a regulatory prohibition only imposes increased costs on interstate commerce. Soap & Detergent Ass'n v. Clark, 330 F. Supp. 1218, 1221 (S.D. Fla. 1971) (costs of phosphate removal from sewerage greater than costs of phosphate ban); Soap & Detergent Ass'n v. Offut, 3 ENVIR. REP. CAS. (BNA) 1117 (D. Ind. 1971) (only impact of phosphate ban on manufacturer was increased cost); Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954) (one-way bottle ban upheld; profit margins not constitutionally protected). The theory that the taxing standard of "just share of costs" and the concept of externalities should be considered in determining whether a regulation constituted an excessive burden on interstate commerce was advanced in Note, *State Environmental Protection Legislation and the Commerce Clause,* 87 HARV. L. REV. 1762, 1782-83 (1974).

176. Evansville-Vanderburg Airport v. Delta Airlines, 405 U.S. 707, 717 (1972). The levy

Portland Pipe held that the environment, and danger to the environment, constituted "state facilities" for purposes of this test. This analogy is conceptually valid since the environment now requires maintenance and repair similar to more traditional facilities.[177] This portion of the standard protects the same concerns evidenced in *Procter & Gamble* that the statutory means effectuate the legislative purpose.[178] The statute must reasonably apply to those areas of commerce causing the unwanted environmental impact.

Third, *Complete Auto Transit* requires that the tax be related to services provided by the state,[179] reflecting the *Delta Airlines* requirement that the fees not be "excessive" in relation to costs incurred.[180] As suggested earlier, the standard of state costs could be dollar costs to the state of rectifying the environmental impact. A tax grossly in excess of actual or projected state costs would be invalid as a means of rectifying the environmental impact, as would prohibitions that could be replaced by a less restrictive tax.[181] Irreparable environmental damage or excessive cost in rectifying the damage would justify a prohibition as the only effective means of internalizing the externality, and hence the imposing on interstate commerce of its "just share" of the costs imposed by its presence.

Characterizing environmental impact as a cost is a legislative value judgment that reflects society's present attitude towards the environment. Once this judgment is made, the negative commerce clause tax standards would sufficiently supervise state internalization of the external cost of environmental impact in the market place, whether internalization is through a tax or a prohibition. The tax standards would also avoid the undesirable judicial impingement on a legislature's initial value judgment inherent in benefit-burden analysis. Finally, use of the tax standards would accurately reflect the present view that the externalities of environmental impact are a cost to the state and that interstate commerce may be required to pay its fair share.

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in *Complete Auto Transit* was a sales tax for general revenue purposes, rather than the use of specific facilities. For general revenue purposes, the Court approved the standard requiring a nexus between the taxed activity and the state, and a fair apportionment of the tax to the intra-state activities. *See* note 126 *supra*.

177. A distinction can be drawn in that the environment required no capital expenditure. But the fact that environmental impact has been perceived as a cost gives the environment the character of a capital asset.

178. *See* notes 114-16 *supra* and accompanying text.

179. *See* notes 125-26 *supra* and accompanying text.

180. *See* notes 127-29 *supra* and accompanying text.

181. *Delta Airlines* placed the burden of proof of excessive fees on the plaintiff. 405 U.S. at 719.