Florida Law Review

Volume 46 | Issue 3 Article 5

July 1994

Constitutional Law: Use of the Compensatory Tax Doctrine in Regulating Interstate Commerce

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CONSTITUTIONAL LAW: USE OF THE COMPENSATORY TAX DOCTRINE IN REGULATING INTERSTATE COMMERCE

Oregon Waste Systems v. Department of Environmental Quality, 114 S. Ct. 1345 (1994)

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Petitioners Oregon Waste Systems and Columbia Resource Co., disposers of solid waste, sought expedited review of a surcharge levied on out-of-state waste by respondent Oregon Department of Environmental Quality.[1] The surcharge in dispute imposed a $2.25 per ton fee on out-of-state waste, though the fee on in-state waste was only $0.85 per ton.[2] Petitioners brought suit in the Oregon Court of Appeals, challenging the Oregon surcharge imposed on out-of-state waste,[3] and alleging that it was invalid under the Commerce Clause[4] of the United States Constitution.[5]

The Oregon Court of Appeals upheld the surcharge, stating that it was a compensatory fee for costs incurred by the State,[6] and reasoning that the

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* This comment is dedicated to my parents, my brothers, and Matt, for their constant support.

1. Oregon Waste Sys. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1348-49 (1994). Oregon Waste Systems is owner and operator of a solid waste landfill in Gilliam County, Oregon, and accepts both in-state and out-of-state waste. *Id.* Columbia Resource Co. (CRC) maintains a contract with Clark County, Washington, in which CRC transports solid waste by barge from Clark County to a landfill in Morrow County, Oregon. *Id.*

2. *Id.* at 1348.

3. *Id.* at 1348-49. Petitioners challenged the administrative rule that established the surcharge, OR. ADMIN. R. 340-97-120(7) (1993), and its enabling statutes, OR. REV. STAT. §§ 459.297(1), .298 (1991). *Oregon Waste Sys.*, 114 S. Ct. at 1349. Section 459.297(1) provides that the Environmental Quality Commission shall determine the amount of the surcharge. *Id.* at 1348. Under § 459.298, the amount shall "be based upon 'the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for' " under the statutes. *Id.* (quoting § 459.298).

4. U.S. CONST. art. I, § 8, cl. 3. Under the Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

5. *Oregon Waste Sys.*, 114 S. Ct. at 1349. Petitioners also alleged that the Oregon surcharge was invalid under state law. *Id.*

6. Gilliam County v. Department of Envtl. Quality, 837 P.2d 965, 975 (Ct. App. 1992), *aff'd*, 849 P.2d 500 (Or. 1993), *rev'd sub nom.* Oregon Waste Sys. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994). The Oregon Court of Appeals distinguished between a "compensatory fee" and a "compensatory tax," stating that the latter is a general revenue measure "intended to equalize the tax burden between substantially similar interstate and intrastate transactions." *Id.* at 975 n.18. A compensatory fee, on the other hand, is a fee for specific costs incurred by the State in providing services to interstate commerce. *See id.* at 975-76. A compensatory fee is generally upheld if not discriminatory because it simply requires an interstate business to pay its fair share. *See id.* at 977. The test for a compensatory tax, on the other hand, is generally more stringent. *See Oregon Waste Sys.*, 114 S. Ct. at

Oregon legislature had shown a clear intent to make out-of-state waste generators pay nothing more than their fair share.[7] On appeal, the Oregon Supreme Court affirmed,[8] stating that the surcharge was not facially discriminatory because it was a compensatory fee.[9] The United States Su-

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1351. The compensatory tax doctrine allows courts to justify a facially discriminatory tax by requiring a legitimate local purpose that cannot be achieved through other nondiscriminatory means. *Id.* at 1352.

7. *Gilliam County*, 837 P.2d at 977. In addition, the Oregon Court of Appeals stated that the burden was on petitioners to show that the fees were excessive for their purpose, or that there was no sufficient nexus between the fee and the state-provided service. *Id.* at 975 (citing Clark v. Gray, Inc., 306 U.S. 583, 599 (1939); Interstate Transit, Inc. v. Lindsey, 283 U.S. 183, 190 (1931)). However, petitioners were unable to present evidence on this issue because the statute used to challenge the rule allowed only limited judicial review. *Id.* at 977; *infra* note 9. In the absence of this evidence, the court upheld the statutes as valid under the negative Commerce Clause. *Gilliam County*, 837 P.2d at 977.

The "negative" Commerce Clause denotes the idea that the states may neither burden nor unjustifiably discriminate against the flow of interstate commerce. *Oregon Waste Sys.*, 114 S. Ct. at 1349. The Court has set out tests to determine whether a fee violates the principles of the Commerce Clause. *Id.* at 1350-51. If a fee on its face restricts commerce, then the fee is per se invalid unless the State can show a legitimate local concern that cannot be met with less discriminatory alternatives. *Id.* But, if a fee has only an incidental effect on interstate commerce, it is valid unless the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 1350 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

8. *Oregon Waste Sys.*, 114 S. Ct. at 1349; Gilliam County v. Department of Envtl. Quality, 849 P.2d 500, 509 (Or. 1993), *rev'd sub nom.* Oregon Waste Sys. v. Department of Envtl. Quality, 114 S. Ct. 1345 (1994).

9. *Gilliam County*, 849 P.2d at 508. The court also stated that the fee was levied for specific costs incurred by the State in regulation of out-of-state waste. *Id.* The court based its reasoning, in part, upon a Supreme Court decision in which the Court held that a fee placing a burden on interstate commerce could be justified by showing that it constitutes "reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce." *Id.* (quoting Ingles v. Morf, 300 U.S. 290, 294 (1936)).

There are two different lines of authority used in assessing the validity of taxes on interstate commerce. *See Gilliam County*, 837 P.2d at 975 & n.18 (discussing the difference between a compensatory fee and a compensatory tax). The first concerns the compensatory tax doctrine. This doctrine is merely a method of justifying a facially discriminatory tax that cannot meet legitimate local concerns through nondiscriminatory alternatives. *Oregon Waste Sys.*, 114 S. Ct. at 1352. Such a tax may be upheld if it meets a three-part test. First, the state must be able to identify the intrastate tax burden for which it is attempting to compensate. *Id.* Second, the state must show that the tax on interstate commerce fairly approximates the amount of tax on intrastate commerce. *Id.* Third, the events on which both taxes are imposed must be "substantially equivalent" such that they could serve as substitutes for one another. *Id.*

The second line of authority is the compensatory fee view, which allows fees to be imposed for costs incurred by the state in supervision and regulation of the activities of an entity engaged in interstate commerce. *Id.* Such fees are "*prima facie* reasonable." *Id.* They violate the Commerce Clause only when the fees are "manifestly disproportionate to the services rendered." *Id.* (citing *Clark*, 306 U.S. at 599).

In the instant case, the lower courts of appeal were unable to assess whether the surcharge was related to the costs incurred by the State of Oregon. *Gilliam County*, 837 P.2d at 977. Petitioners brought their challenge under OR. REV. STAT. § 183.400 (1991). *Gilliam County*, 837 P.2d at 977. Under § 183.400, the Oregon state courts were limited to a facial review of the statute. *Id.* The statute provides, in part, that "(3) Judicial review of a rule shall be limited to an examination of: (a) The rule under review; (b) The statutory provisions authorizing the rule; and (c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures. *Id.* (citing OR. REV. STAT. §

preme Court granted certiorari due to a conflict with a decision by the Seventh Circuit Court of Appeals.[10] The Court reversed and HELD, that a surcharge placing a higher fee on out-of-state waste than in-state waste was not a compensatory fee,[11] was facially discriminatory, and thus, invalid under the negative Commerce Clause.[12]

The Court has consistently held that a state may not tax a transaction crossing state lines more heavily than the same type of transaction occurring entirely within the state.[13] When a state imposes such a tax, it is facially discriminatory, and usually per se invalid under the negative Commerce Clause.[14] However, as the Court observed in *Maryland v. Louisiana*,[15] a facially discriminatory tax may be upheld if it is a compensatory tax.[16]

In *Maryland*, plaintiffs[17] sought a declaration that defendant Louisiana's "First-Use Tax" was unconstitutional under the negative Commerce Clause.[18] Defendant had imposed this tax in response to development of the Outer Continental Shelf (OCS).[19] The tax, levied on large reserves of oil and natural gas from the OCS, purported to compensate the people of Louisiana for the costs of protecting the State's resources and to equalize competition.[20] Though ninety-eight percent of the OCS gas processed in Louisiana was sold to out-of-state consumers,[21] defendant ar-

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183.400 (1991)). This statute effectively prohibited the lower courts in the instant case from deciding whether the surcharge was "manifestly disproportionate" to the services renders. *Id.*

10. *Oregon Waste Sys.*, 114 S. Ct. at 1349 & n.3 (citing Government Suppliers Consol. Servs. v. Bayh, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993)).

11. *See id.* at 1352 n.6. For a description of the principle tenets of the negative Commerce Clause, see *supra* note 7.

12. *Id.* at 1355.

13. Armco Inc. v. Hardesty, 467 U.S. 638, 642 (1984).

14. *See* Chemical Waste Management v. Hunt, 112 S. Ct. 2009, 2014 (1992) (holding that an additional fee levied on out-of-state waste was facially discriminatory and invalid under the negative Commerce Clause); Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970) (holding that an Arizona act requiring all cantaloupes to be packaged in-state unconstitutionally burdened interstate commerce); *supra* note 7 (discussing the negative Commerce Clause).

15. 451 U.S. 725 (1981).

16. *Id.* at 754 (stating that "[p]rior case law has established that a state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way"). The Court required that the state identify the burden for which it was attempting to compensate and that it treat local and interstate commerce equally. *Id.* at 758-59; *see also supra* notes 6, 9 (explaining the compensatory tax doctrine).

17. Plaintiffs in the case were several states, the United States, and a number of pipeline companies. *Maryland*, 451 U.S. at 728.

18. *Id.* at 734. Plaintiffs also prayed for injunctive relief from paying the tax. *Id.*

19. *Id.* at 728, 731. The OCS is the land beneath the Gulf of Mexico, from which a large amount of natural gas and oil is pumped and refined in Louisiana prior to shipment to consumers in over 30 states. *Id.* at 728-29.

20. *Id.* at 732.

21. *Id.* at 729.

gued it was a compensatory tax because it approximated the severance tax that only in-state users had to pay.[22]

The Court, however, held that the tax was unconstitutional under the negative Commerce Clause because it discriminated in effect against interstate commerce,[23] and it could not be justified as a compensatory tax.[24] The *Maryland* Court reasoned that state exemptions and credits for Louisiana consumers largely protected them from the tax and left the burden on out-of-state consumers.[25]

Though the Court did not fully address the requirements of a compensatory tax in *Maryland*, it developed them more completely four years later in *Armco Inc. v. Hardesty*.[26] In *Armco*, appellant, an Ohio manufacturer and wholesaler of steel products,[27] challenged a West Virginia gross receipts tax[28] levied on wholesalers.[29] Because local manufacturers were exempt from the tax, Armco argued that it discriminated against interstate commerce.[30] The West Virginia Supreme Court of Appeals held that because in-state manufacturers were subjected to a much higher *manufacturing* tax than out-of-state manufacturers, the tax was not discriminatory.[31]

On review, however, the United States Supreme Court reversed,[32] holding that the tax unconstitutionally discriminated against interstate commerce.[33] The *Armco* Court adopted the *Maryland* Court's language, requiring the events on which the taxes were levied to be substantially equivalent.[34] The Court reasoned that because manufacturing and wholesaling were not "substantially equivalent events," the tax on in-state manufacturers did not compensate for the gross receipts tax levied on out-of-state wholesalers.[35] In dissent, Justice Rehnquist suggested that the

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22. *Id.* at 732, 758-59.

23. *Id.* at 760.

24. *Id.* at 758; *see also supra* notes 6-7, 9 (explaining the negative Commerce Clause and the compensatory tax doctrine).

25. *Maryland*, 451 U.S. at 757-58.

26. 467 U.S. 638 (1984).

27. *Id.* at 639.

28. W. VA. CODE § 11-13-2c (1983).

29. *Armco*, 467 U.S. at 640.

30. *Id.* at 640-41. Appellee State Tax Commissioner had found that, because appellant had not proven the tax discriminatory, it was valid. *Id.* at 641. The Circuit Court of Kanawha County reversed, holding that the insufficient nexus between the State and the sales would not support the levied tax. *Id.* The West Virginia Court of Appeals reversed the circuit court and maintained that appellant's local tax was fairly related to the services provided by the State. *Id.*

31. *Id.* at 641-42.

32. *Id.* at 646.

33. *Id.* at 642, 644.

34. *Id.* at 642-43 (quoting *Maryland*, 451 U.S. at 759). The purpose of this requirement was to "assure uniform treatment of goods and materials to be consumed in the State." *Maryland*, 451 U.S. at 759.

35. *Armco*, 467 U.S. at 643. The Court based its assessment of the tax upon an "internal con-

Court's reasoning was purely speculative.[36] He argued that the Court should compare the taxes according to the amounts each produced, and not base its decision upon the facial purpose of each.[37]

The Court most recently had an opportunity to address the substantially equivalent events requirement[38] for a compensatory tax in *Chemical Waste Management v. Hunt*.[39] Here, petitioner Chemical Waste Management, owner and operator of one of the nation's oldest hazardous waste land disposal facilities at Emelle, Alabama,[40] sued respondent Governor Hunt for assessing an additional $72 per-ton fee[41] on out-of-state waste at Emelle.[42] Although respondent argued that the fee served legitimate local purposes,[43] the Court stated that there were less discriminatory alterna-

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sistency" test. *Id.* at 644. Under this test, a tax is internally consistent, and therefore valid, if it does not impermissibly interfere with free trade when applied by every jurisdiction. *Id.* The Court hypothesized that a similar tax, imposed by another state, on manufacturers would cause out-of-staters to pay a manufacturing tax *and* a wholesale tax, while in-staters would pay only the manufacturing tax. *Id.* Because of this result, the Court noted, the tax would not have internal consistency and would therefore be unconstitutional. *See id.* For a criticism of the internal consistency test, see Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 232, 254 (1987) (Scalia, J., concurring in part and dissenting in part). In his opinion, Justice Scalia criticized the internal consistency test, observing that it had no basis in the Constitution and was not mandated by past Court decisions. *Id.* at 254 (Scalia, J., concurring in part and dissenting in part). He also noted that the only cases observing the internal consistency test since its origin were cases involving apportionment of the net income of business that more than one State desired to tax. *Id.* at 256 (Scalia, J., concurring in part and dissenting in part). According to Justice Scalia, any unapportioned flat tax on multistate activities would fail the test. *Id.* at 254 (Scalia, J., concurring in part and dissenting in part).

36. *Id.* at 646, 648 (Rehnquist, J., dissenting).

37. *Id.* at 647 (Rehnquist, J., dissenting). Justice Rehnquist stated that the Court should not concern itself with the mere possibility that other states may levy taxes that would effect a "double taxation" on interstate commerce. *See id.* at 648 (Rehnquist, J., dissenting). Congress, on occasion, has actively addressed similar concerns. An example is the Anti-Head Tax Act (AHTA), 49 App. U.S.C. § 1513 (1988 & Supp. V 1993), which Congress passed in response to the Court's decision in Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707 (1972). Northwest Airlines v. County of Kent, Mich., 114 S. Ct. 855, 861 (1994). In *Evansville-Vanderburgh*, the Court held that Indiana's fee of $1 per commercial airline passenger was valid because it did not discriminate against interstate commerce, it was a fair approximation of use of facilities, and it was not excessive in relation to the costs incurred. *Evansville-Vanderburgh*, 405 U.S. at 717. Because Congress was concerned that the Court's approval of Indiana's head tax on passengers boarding flights would lead to other states' adoption of similar taxes, Congress enacted the AHTA, which prohibits such taxes on air transportation. *Northwest Airlines*, 114 S. Ct. at 861. This action by Congress lends support to the belief of many that Congress will regulate interstate commerce when given the opportunity (i.e., when the Court defers). *See id.*

38. *Armco*, 467 U.S. at 642-43.

39. 112 S. Ct. 2009 (1992).

40. *Id.* at 2011.

41. In this Comment, the term "fee" refers to the actual revenue measure adopted by the State, unless otherwise stated. "Tax" refers to the doctrine used to justify a facially discriminatory fee on out-of-state waste. *See supra* note 9.

42. *Chemical Waste Management*, 112 S. Ct. at 2011-12. Petitioner sought both declaratory relief and injunctive relief from paying the fee. *Id.*

43. *Id.* at 2014. Respondent's asserted purposes were, in part, protection of the health and safety

tives to achieve these purposes.[44] Though the Court did not specifically address the compensatory tax issue,[45] it left open the possibility that a heavier surcharge on out-of-state waste may be justified if based on the costs of disposing the waste from other states.[46]

The Court, nevertheless, stated that the $72 additional fee on out-of-state waste facially discriminated against interstate commerce.[47] As a result, respondent bore the burden of proving that there was a legitimate reason unrelated to economic protectionism for treating out-of-state waste differently.[48] Respondent was unable to demonstrate that out-of-state hazardous waste posed a greater threat than in-state waste[49] and, accordingly, the Court held the additional fee invalid under the negative Commerce Clause.[50]

Chief Justice Rehnquist, dissenting, addressed the compensatory tax notion, stating that Alabama citizens already carried the tax burden through general state revenues.[51] He reasoned that it was unfair to require Alabamans to pay twice, once through state taxation, and again through this specific disposal fee.[52] In doing so, Chief Justice Rehnquist made an argument similar to his *Armco* dissent, in which he noted that the Court should not be overly concerned with differential fees, but should measure equality in "dollars and cents, not legal abstractions."[53]

In the instant case the Court continued its stance, stating that the compensatory tax doctrine was simply a way to justify a facially discriminatory tax as achieving a legitimate local purpose which could not be achieved through nondiscriminatory alternatives.[54] The instant Court set out standards from its past decisions in a three-part test to determine whether a tax

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of its citizens, conservation of the environment, protection of the state's natural resources, and compensation for the costs incurred by dumping out-of-state waste. *Id.*

44. *Id.* at 2015. Some alternatives included a per-ton fee on all hazardous waste and a cap on the total amount of waste disposed of at Emelle. *Id.*

45. *Id.* at 2016 n.9. The Court in *Chemical Waste Management* noted that respondent had presented the compensatory tax argument at the trial court level, where that court found that the facts did not support the substantially equivalent event requirement imposed on in-state waste. *Id.* The Court did not resurrect this issue. *Id.* As the Court observed in *Maine v. Taylor,* strict scrutiny of discriminatory fees is the "responsibility of district courts," as the appellate courts do not decide factual questions *de novo.* Maine v. Taylor, 477 U.S. 131, 144-45 (1986).

46. *Chemical Waste Management,* 112 S. Ct. at 2016 n.9; *accord Oregon Waste Sys.,* 114 S. Ct. at 1351.

47. *Chemical Waste Management,* 112 S. Ct. at 2015.

48. *Id.*

49. *Id.*

50. *See id.*

51. *Id.* at 2018 (Rehnquist, C.J., dissenting).

52. *Id.* (Rehnquist, C.J., dissenting).

53. *See Armco,* 467 U.S. at 647 (Rehnquist, J., dissenting) (quoting Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 70 (1963)).

54. *Oregon Waste Sys.,* 114 S. Ct. at 1352.

on interstate commerce is compensatory.[55] First, a state must be able to identify the intrastate tax burden for which it is attempting to compensate.[56] Second, the state must show that the tax on interstate commerce fairly approximates the amount of tax on intrastate commerce.[57] Third, the events on which both taxes are imposed must be substantially equivalent such that they could serve as substitutes for one another.[58]

According to the instant Court, the State failed to meet even the first part of the test because it did not identify an intrastate tax burden for which it was attempting to compensate.[59] In addition, the Court stated that respondent's attempt to equate the out-of-state surcharge with the State's general taxation was inadequate because the events on which the two taxes were levied were not substantially equivalent.[60] According to the instant Court, the only taxes recently upheld under the compensatory doctrine were use taxes upon products purchased out-of-state.[61] Because the compensatory tax doctrine is limited to taxes placed on substantially equivalent events, identification of a fee on interstate commerce with general tax statutes on intrastate commerce would not suffice.[62]

The confusion in the instant Court's reasoning was over the distinction between compensatory taxes and compensatory fees. In the instant case, the Court applied the compensatory tax test, stating that it was appropriate when a private entity provided the service for which the tax was attempting to compensate.[63] Although the Oregon Court of Appeals labeled the surcharge a compensatory fee and imposed a more lenient test,[64] the instant Court stated that the lower court interpreted past caselaw incorrectly by relying on user fee cases.[65] According to the Court, user fees applied

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55. *Id.*

56. *Id.* (citing *Maryland*, 451 U.S. at 758).

57. *Id.* (citing Alaska v. Arctic Maid, 366 U.S. 199, 204-05 (1961)).

58. *Id.* (citing *Armco*, 467 U.S. at 643).

59. *Id.* at 1352-53. The Court noted that the closest identifiable tax was the $0.85 per-ton surcharge on in-state waste. *Id.* at 1352. But, because this was only one-third of the amount of the interstate tax, it was not compensatory. *Id.*

60. *Id.* at 1353. The Court, under the substantially equivalent requirement, demanded taxes on substantially equivalent events. *Id.* In addition, the Court stated that the purpose of a surcharge is irrelevant to the question of facial discrimination. *Id.* at 1350.

61. *Id.* at 1353. Use taxes are those collectible by a seller when the buyer is domiciled in another state. BLACK'S LAW DICTIONARY 1543 (6th ed. 1990).

62. *Oregon Waste Sys.*, 114 S. Ct. at 1353. According to Chief Justice Rehnquist, this is an example of formalism in the Court's approach. *See id.* at 1356 (Rehnquist, C.J., dissenting); *cf. Armco*, 467 U.S. at 648 (Rehnquist, J., dissenting) (suggesting that the Court is using unnecessary formalism).

63. *Oregon Waste Sys.*, 114 S. Ct. at 1352 & n.6.

64. *Gilliam County*, 837 P.2d at 975. Under the Oregon Court of Appeals' test for compensatory fees, the challenger has the burden of showing that the amount of the fee exceeds the purpose for which it is collected or that there is no sufficient nexus between the fee and the extent of use of the state-provided services. *Id.*

65. *Oregon Waste Sys.*, 114 S. Ct. at 1352 n.6. Under the user fee cases, a fee is valid if its

only to charges by the State for use of state-owned facilities.[66] Thus, the user fees were inapplicable to the surcharge in the instant case because private entities owned the Oregon landfills.[67]

In the instant case, Chief Justice Rehnquist once again responded to the Court's "myopic focus" on equating interstate and intrastate fees.[68] He criticized the Court's indifference to the fact that in-state users already supported Oregon's comprehensive regulatory scheme through income taxes and other fees.[69] He also observed that the Court had previously opened up the possibility that a fee on out-of-state waste might be valid if based upon the costs of disposing out-of-state waste.[70] The instant Court, however, addressed this concern by requiring a compensatory tax that does not make interstate commerce pay more than its fair share.[71]

The instant case is the first in which the Court has applied the stringent compensatory tax test to find a heavier surcharge on out-of-state waste invalid.[72] Because the Oregon courts were precluded from determining whether the out-of-state surcharge was "disproportionate" to the services offered by the State,[73] the Court applied the three-part test to invalidate the surcharge.[74] This shift in focus to compensatory taxes has virtually eliminated the availability of the compensatory fee test in solid waste disposal cases.

Many questions arise as a result of the Court's shift in focus. First, is the instant Court correct in assessing the surcharge as a compensatory tax

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amount is a fair approximation of the use of the facilities and does not discriminate against interstate commerce. *See, e.g.*, Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707, 716-17 (1972).

66. *Oregon Waste Sys.*, 114 S. Ct. at 1352 n.6.

67. *Id.* In his dissent, Chief Justice Rehnquist noted that if the State had owned the Oregon landfills, thus "acting as a market participant, rather than as a market regulator," the negative Commerce Clause would place no limits on the State's activities. *Id.* at 1358 (Rehnquist, C.J., dissenting) (quoting South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 93 (1984)). In this instance, according to Chief Justice Rehnquist, the user fee cases would have applied to determine whether the surcharge discriminated against interstate commerce. *Id.* at 1358 (Rehnquist, C.J., dissenting).

68. *Id.* at 1356 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist previously suggested other options available to the states. *See Chemical Waste Management*, 112 S. Ct. at 2019 (Rehnquist, C.J., dissenting). In *Chemical Waste Management*, he asserted the states could provide "subsidies or other tax breaks to domestic industries" or perhaps open its own facilities for in-state consumers, thus utilizing the market participant doctrine. *Id.* (Rehnquist, C.J., dissenting).

69. *Oregon Waste Sys.*, 114 S. Ct. at 1356 (Rehnquist, C.J., dissenting).

70. *Id.* at 1355 (Rehnquist, C.J., dissenting) (citing *Chemical Waste Management*, 112 S. Ct. at 2016 n.9).

71. *Id.* at 1351.

72. *Id.*; *see also supra* note 9 (describing the three-part test which is applied to compensatory taxes).

73. *Oregon Waste Sys.*, 114 S. Ct. at 1349 (relying on *Gilliam County*, 849 P.2d at 508-09).

74. *Id.* at 1352.

rather than a compensatory fee, as the lower court had?[75] Second, is it really necessary to differentiate between State-owned facilities and private entities when the State is enacting the surcharge as part of a comprehensive regulatory program?[76] Finally, has the Court overreached in its analysis under the Commerce Clause, requiring Congress to step in and develop a uniform plan for solid waste management?

First, the instant Court breaks with past decisions by expanding the compensatory tax doctrine to surcharges on out-of-state waste. The Court has never evaluated such a fee as a compensatory tax.[77] In fact, the line of cases on which the instant Court relies involves severance, manufacturing, and wholesale taxes.[78] Based on its line of precedent,[79] the Court should have evaluated the surcharge under the compensatory fee theory, which upholds a fee for costs incurred by the State in regulation as long as it is not manifestly disproportionate to the services offered by the State to interstate commerce.[80] By applying this analysis, the Court would not

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75. *Gilliam County*, 849 P.2d at 508.

76. *Oregon Waste Sys.*, 114 S. Ct. at 1355 (Rehnquist, C.J., dissenting).

77. Although the Court in *Chemical Waste Management* noted the trial court's evaluation of the $72 fee under the compensatory tax test, *see supra* note 45, the fee in question was an additional fee on out-of-state waste with no counterpart for in-state waste. *Chemical Waste Management*, 112 S. Ct. at 2012. In the instant case, however, there is an in-state surcharge in addition to the out-of-state surcharge. *Oregon Waste Sys.*, 114 S. Ct. at 1350. Therefore, the Court of Appeals of Oregon was correct in stating that the proper focus was on whether the out-of-state surcharge was disproportionate to the services provided by the State. *See Gilliam County*, 837 P.2d at 977. In addition, the Court in *Chemical Waste Management* left open the possibility that a differential fee may be valid if it were based on the costs of disposing out-of-state waste. *Chemical Waste Management*, 112 S. Ct. at 2016 n.9.

78. *See* Tyler Pipe Indus. v. Department of Revenue, 483 U.S. 232, 235 (1987) (holding that a tax applied equally to extraction, manufacturing, wholesale sales, and retail sales was unconstitutional because it discriminated against Washington manufacturers who engaged in interstate commerce); *Armco*, 467 U.S. at 638, 643 (holding a wholesale tax on interstate commerce unconstitutional because the intrastate tax was not based on a substantially equivalent event); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618, 636 (1981) (holding a coal severance tax constitutional because it "is computed at the same rate regardless of the final destination"). Though the First-Use Tax in *Maryland* appears most similar to the surcharge in the instant case, it can be distinguished. *See Maryland*, 451 U.S. at 731. In *Maryland*, the State levied the First-Use Tax to reimburse citizens and the State for removal and protection of its resources, which the Court found to be a valid state interest. *Id.* at 732, 759. But, the First-Use Tax is similar to a severance tax, which imposes a charge on *removing* commerce from a State. The surcharge in the instant case can be distinguished, because it is levied on commerce coming *into* the state. *See Oregon Waste Sys.*, 114 S. Ct. at 1348. In addition, the use of facilities in the State is more analogous to "user fees" (i.e., approximating the cost of the use of a facility, such as an airport), *see Evansville-Vanderburgh*, 405 U.S. at 717, than "use fees" (i.e., levied on first taxable use of a resource within the State, *see Maryland*, 451 U.S. at 731).

79. *See Commonwealth Edison*, 453 U.S. at 622 n.12; Clark v. Paul Gray, Inc., 306 U.S. 583, 599 (1930); Great N. Ry. v. Washington, 300 U.S. 154, 160 (1937).

80. *Clark*, 306 U.S. at 599; *see also supra* note 9 (discussing compensatory fees). Although the Court in *Evansville-Vanderburgh* explicitly stated that the charge was valid in the case of State-provided facilities, *Evansville-Vanderburgh*, 405 U.S. at 717, the Court should expand this concept to cases in which the State is regulating private entities as part of an environmental regulatory scheme.

have expanded the compensatory tax test so far to dispose of most fees in solid waste cases.

In addition, the instant Court's use of the compensatory tax cases as precedent has burdened the State, requiring it to justify its imposition of a higher surcharge on out-of-state waste.[81] Because the test for compensatory taxes is stringent, states' fees examined under it are rarely held valid.[82] By rejecting the Oregon appellate courts' assessment of the surcharge as a compensatory fee,[83] the instant Court effectively has transferred the burden from the challenger[84] to the state itself.

Second, although the instant Court distinguished between state-owned facilities and private entities,[85] the Court paid little attention to the fact that the out-of-state surcharge is part of a comprehensive regulatory program to manage solid waste disposal.[86] Theoretically, if the State were imposing the surcharge as a market participant, rather than a market regulator, it would not be harnessed by the restraints of the negative Commerce Clause.[87] Though the State is not a market participant in the disposal of solid waste, the Court again is being too formalistic in invalidating the surcharge based on its facially discriminatory nature.[88] If the Court looked behind the fee to its purpose, it might find that it fairly compensates for the services the State offers to interstate commerce. Using this compensatory fee view, the Court would be forced to focus on the disproportionate aspect of the surcharge rather than expanding the compensatory tax doctrine to invalidate the surcharge.[89]

Finally, the Court, by extensively expanding the test for compensatory taxes,[90] has complicated the states' attempts to deal with solid waste management through their own schemes. As a result, states that have developed comprehensive regulatory schemes will now be required to

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81. *Oregon Waste Sys.*, 114 S. Ct. at 1351.

82. *Id.*; *see also Chemical Waste Management*, 112 S. Ct. at 2014 (stating that states are usually forbidden from imposing burdensome taxes).

83. *Oregon Waste Sys.*, 114 S. Ct. at 1352 n.6.

84. Under the court of appeals' compensatory fee test, the challenger has the burden of showing that the amount of the fee exceeds the purpose for which it is collected, or showing that there is no sufficient nexus between the fee and the extent of use of the state-provided service. *Gilliam County*, 837 P.2d at 975.

85. *Oregon Waste Sys.*, 114 S. Ct. at 1352 n.6.

86. *Id.* at 1355-56 (Rehnquist, C.J., dissenting).

87. *Id.* at 1358 (Rehnquist, C.J., dissenting) (citing South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 93 (1984)).

88. *See Armco*, 467 U.S. at 648 (Rehnquist, J., dissenting).

89. Although OR. REV. STAT. § 183.400 prohibited the court from addressing the "disproportionate" argument of petitioners, *supra* note 9, the issue could have been considered "on review of an order in a contested case." *Gilliam County*, 837 P.2d at 977.

90. *See Oregon Waste Sys.*, 114 S. Ct. at 1355 (Rehnquist, C.J., dissenting); *supra* notes 77-80 and accompanying text.

apply equal fees to in-state and out-of-state waste in order to avoid facial discrimination against interstate commerce. Because the events on which fees are levied must be substantially equivalent,[91] states will be forced to require in-state users to pay double taxes or they will have to remove long-standing tax structures, thus damaging the autonomy of the states in developing their own tax schemes.

If there is a general trend in the Court toward facially equalizing the tax burden on intrastate and interstate commerce, Congress may be best equipped to address the problem. While the Court evaluates taxes on a case-by-case and state-by-state basis, Congress could develop a uniform plan to equalize the tax burden on the states and consumers. In this event, Congress could better research the inner workings of each state's tax scheme, and develop a plan to provide for the most equitable disposal of solid waste.

The instant Court's application of the compensatory tax doctrine has thrown the burden from the challenger of a surcharge onto the State to justify a heavier tax on interstate commerce. This effect will substantially increase the states' difficulty in sustaining out-of-state fees on solid waste disposal. Because the instant Court has required facially equivalent surcharges on intrastate and interstate commerce,[92] the states must place a heavier burden on intrastate commerce or revamp existing tax structures, thus impairing the states' autonomy. The Court seems to have overlooked that, because the Commerce Clause gave Congress, not the judiciary, the power to regulate interstate commerce,[93] Congress should assume the role of developing uniform state regulation of solid waste.

91. *See Oregon Waste Sys.*, 114 S. Ct. at 1357 (Rehnquist, C.J., dissenting).
92. *See id.* at 1355.
93. U.S. CONST. art. I, § 8, cl. 3.