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Edward A. Fitzgerald

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## THE WASTE WAR: OREGON WASTE SYSTEMS, INC. V. DEPARTMENT OF ENVIRONMENTAL QUALITY

*Edward A. Fitzgerald\**

The United States generates a great deal of solid<sup>1</sup> waste.<sup>2</sup> There is, however, a diminishing number of facilities available for the disposal of this waste.<sup>3</sup> The Environmental Protection Agency (EPA) has estimated that 80% of the existing solid waste landfills will be closed by the year 2009.<sup>4</sup> Chief Justice Rehnquist has acknowledged that “[g]enerating solid waste has never been a problem,” but “[f]inding environmentally safe disposal sites has.”<sup>5</sup>

Some localities have addressed the landfill shortage by transporting their municipal solid waste across state lines for disposal, a viable

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\* Edward A. Fitzgerald, J.D., Ph.D., Associate Professor of Political Science, Wright State University.

<sup>1</sup> Solid waste is defined as:

any garbage, refuse, sludge from a waste treatment plant, waste supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits . . . , or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 as amended.

42 U.S.C. § 6903(27) (1988).

<sup>2</sup> The EPA has estimated that:

over 11 billion tons of waste are generated every year from the following sources: At least 250 million tons are subtitle C hazardous wastes; 180 million tons are municipal wastes; 7 billion tons are industrial process wastes; and 4 billion tons are mining wastes, oil and gas wastes and other large volume wastes.

S. REP. NO. 301, 102d Cong., 2d Sess. 4 (1992).

<sup>3</sup> *Id.* at 5; OFFICE OF TECHNOLOGY ASSESSMENT, FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE? 1 (1989) [hereinafter OTA]; *see also* S. REP. NO. 11, 99th Cong., 1st Sess. 22-24 (1985).

<sup>4</sup> S. REP. NO. 11, *supra* note 3, at 22-24; OTA, *supra* note 3, at 1; *see also* S. REP. NO. 301, *supra* note 2, at 5.

<sup>5</sup> Oregon Waste Sys., Inc. v. Department of Env'tl. Quality, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1356

solution for various practical and economic reasons. In many cases, major cities are located near a state border, and the closest disposal facility may lie across the state line. In other cases, "temporary" shortages of disposal capacity in the generating state force dumpers to seek landfills in other states. Additionally, differences in landfill standards in out-of-state facilities can lead to lower disposal fees and offer an economic incentive to transport waste across state lines.<sup>6</sup> Finally, the trend toward larger, regional disposal capacity has increased the volume of both interstate and intrastate waste shipment.<sup>7</sup>

In 1992, approximately nineteen million tons of the two hundred million tons of municipal solid waste generated in the United States crossed state lines for disposal or incineration.<sup>8</sup> Sixteen states were net importers of waste, twelve states were net exporters, and only one state was not involved in interstate transfers of waste.<sup>9</sup> Four states exported more than one million tons; five states received more than one million tons.<sup>10</sup> New York, New Jersey, Missouri, and Washington accounted for over half of all municipal solid waste exports, while Pennsylvania, Illinois, Ohio, and Indiana accounted for over half of all municipal solid waste imports.<sup>11</sup>

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(1994) (Rehnquist, C.J., dissenting); *see also*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 367 (1992) (Rehnquist, C.J., dissenting).

<sup>6</sup> The National Governors Association (NGA) pointed out that:

from 1982-1989, landfill tipping fees have increased 149 percent nationally, with the greatest increase occurring in the last two years. The increases are most noticeable in areas with dwindling capacity, such as the Northeast. The National Solid Waste Association 1988 tipping fee survey found regional disposal costs of \$45.48 [per ton] in the Northeast, \$17.95 [per ton] in the Midwest, \$15.87 [per ton] in the South, and \$13.06 per ton in the West. . . . As tipping fees increase in areas with shrinking disposal capacity, lower fees found in other regions of the country (such as the Midwest) tend to attract out-of-state shipments.

NATIONAL GOVERNORS ASSOCIATION, CURBING WASTE IN A THROWAWAY WORLD: REPORT OF THE TASK FORCE ON SOLID WASTE MANAGEMENT 38-39 (1990) (citation omitted) [hereinafter CURBING WASTE].

<sup>7</sup> CONGRESSIONAL RESEARCH SERVICE, INTERSTATE SHIPMENT OF MUNICIPAL SOLID WASTE 7 (1993); *see* S. REP. NO. 52, 104th Cong., 1st Sess. 2 (1995).

<sup>8</sup> H.R. REP. NO. 720, 103d Cong., 2d Sess. 9 (1994).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* According to a 1993 report from the National Solid Waste Management Association: [i]nterstate shipment of waste grew by four million tons, an increase of more than 25 percent, between 1990 and 1992. Currently, about 15 million tons of municipal waste is exported; 47 States, the District of Columbia, the Canadian provinces of Ontario and British Columbia, and Mexico exported some portion of their municipal solid waste for disposal in the contiguous United States in 1992; 44 States import some municipal solid waste for disposal; 4 States (New York, New Jersey, Illinois, and Missouri) and the

There is an ongoing controversy over whether state and local governments have the authority to impose restrictions on the disposal of solid waste generated outside their jurisdiction.<sup>12</sup> Some states and local communities worry that imported municipal solid waste will frustrate their ability to handle their own municipal solid waste.<sup>13</sup> These states and local communities view imported solid waste as exhausting landfill capacity that was created at a great political expense.<sup>14</sup> Furthermore, many states do not wish to become dumping grounds for municipal solid waste imported from other states. These states feel that it is unfair for their citizens to bear the burden of managing out-of-state solid waste because other jurisdictions have been unwilling or unable to site new disposal facilities.<sup>15</sup> Other states and communities welcome imported solid waste, however, because it provides jobs, tax revenues, and other benefits.<sup>16</sup>

Some states have erected barriers to the importation of out-of-state waste, including "outright bans, differential fees, moratoria on facility construction, various planning and capacity assurance requirements or other mechanisms."<sup>17</sup> By 1992, thirty-seven states had enacted such laws, precipitating a "waste war."<sup>18</sup> These states "assert that they need import restrictions to protect the health and safety of their citizens, to conserve natural resources, to facilitate the management of their own waste, and to reduce the risks associated with waste disposal facilities."<sup>19</sup> Senator Max Baucus (D-Mont.) has stated that

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Canadian province of Ontario export more than one million tons of [municipal solid waste] for disposal; and an additional 13 States and the District of Columbia exported at least 100,000 tons of waste in 1992.

S. REP. NO. 52, *supra* note 7, at 2.

<sup>12</sup> See CURBING WASTE, *supra* note 6, at 39.

<sup>13</sup> The NGA noted that states that import municipal solid waste are watching their disposal capacity disappear, thus raising "questions about the ability of receiving states to meet the disposal needs of their own citizens." *Id.* The national decline in landfill availability magnifies the problem. *See id.*

<sup>14</sup> The location of landfills frequently generates political opposition. This phenomenon is known as the "Not in My Backyard Syndrome" (NIMBY). Orlando E. Delogu, "NIMBY" *Is a National Environmental Problem*, 35 S.D. L. REV. 198, 198 (1990); *see* Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 267-69 (1982).

<sup>15</sup> Bacow & Milkey, *supra* note 14, at 268.

<sup>16</sup> H.R. REP. NO. 720, *supra* note 8, at 9.

<sup>17</sup> S. REP. NO. 52, *supra* note 7, at 3; *see* Edward A. Fitzgerald, *The Waste War: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources and Chemical Waste Management, Inc. v. Hunt*, 13 STAN. ENVTL. L.J. 78, 79 (1994).

<sup>18</sup> S. REP. NO. 301, *supra* note 2, at 74; Fitzgerald, *supra* note 17, at 79.

<sup>19</sup> Fitzgerald, *supra* note 17, at 79.

the waste war "is being fought because communities are being forced to take more out-of-state trash than at any time in our history."<sup>20</sup>

The Supreme Court has not been sympathetic to the import states' concerns. Beginning in 1978, in *City of Philadelphia v. New Jersey*, the Court has invalidated state waste-import restrictions on the grounds that they impermissibly discriminate against interstate commerce.<sup>21</sup> In 1992, the Supreme Court in *Chemical Waste Management, Inc. v. Hunt*, determined that an Alabama law establishing an additional fee of \$72 per ton for the disposal of out-of-state hazardous waste violated the Commerce Clause.<sup>22</sup> In the same year, the Supreme Court held in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, that a Michigan law, which allowed counties to exclude out-of-county solid waste, also violated the Commerce Clause.<sup>23</sup> These cases demonstrate the Court's belief that the Commerce Clause guarantees a national economic marketplace in which waste, like any other good, can pass freely across state borders.<sup>24</sup>

The Supreme Court, however, fails to recognize that "a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as this."<sup>25</sup> The Court's interpretation of the Commerce Clause undermines the scheme of federalism embodied in the Constitution and exacerbates the shortage of available landfills by discouraging state and local governments from siting such facilities.

This Article analyzes the latest battle in the waste war, *Oregon Waste Systems, Inc. v. Department of Environmental Quality*.<sup>26</sup> In that case, the Supreme Court invalidated Oregon laws that imposed a \$2.25 per ton surcharge on the disposal of out-of-state solid waste, while charging an \$.85 per ton fee for the disposal of in-state solid waste.<sup>27</sup> This Article argues that the Supreme Court should have

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<sup>20</sup> *Senators See 'Civil War' Over Waste Imports; Coats Says He Will Offer Import Bank Bill Again*, 22 Env't Rep. (BNA), at 483 (June 21, 1991).

<sup>21</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

<sup>22</sup> *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 339 (1992); see *infra* notes 33-35 and accompanying text.

<sup>23</sup> *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 358 (1992).

<sup>24</sup> *Id.*; *Chemical Waste*, 504 U.S. at 338-42; *City of Philadelphia*, 437 U.S. at 622-29.

<sup>25</sup> *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1356 (1994) (Rehnquist, C.J., dissenting).

<sup>26</sup> *Id.* at 1345.

<sup>27</sup> *Id.* at 1348, 1355.

upheld the Oregon laws, employing the less rigorous test pronounced in *Pike v. Bruce Church, Inc.* (the *Pike* balancing test),<sup>28</sup> instead of the strict scrutiny test.<sup>29</sup> The Oregon laws were evenhanded statutes that did not discriminate against interstate commerce, but simply established a compensatory tax that was designed to recoup the costs paid by Oregon residents through the state income tax for solid waste disposal. The laws served legitimate state interests—providing for the safe disposal of municipal solid waste, advancing the health and safety of Oregon citizens, and protecting the environment. Ultimately, the benefits of the Oregon laws, providing for the equitable treatment of in-state and out-of-state residents regarding the costs for the safe disposal of solid wastes, outweighed the burden on interstate commerce, amounting to approximately \$.14 per week for the average out-of-state generator of solid waste.<sup>30</sup>

The first section of this Article discusses the dormant Commerce Clause and the tests the Supreme Court has developed to evaluate interstate commerce. Section II provides background facts of Oregon's legislative efforts to control its waste problem and outlines caselaw leading up to the decision in *Oregon Waste Systems*.<sup>31</sup> Section III critically analyzes the Supreme Court's decision in *Oregon Waste Systems* and suggests that the Court used the wrong test to strike down the law.<sup>32</sup> Finally, Section IV reviews recent efforts by Congress to resolve the waste war.

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<sup>28</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court stated that:

[w]here the 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.

*Id.* (citation omitted).

<sup>29</sup> See *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353-54 (1977).

<sup>30</sup> *Oregon Waste Systems*, 114 S. Ct. at 1355 n.2 (Rehnquist, C.J., dissenting). The Court stated:

[t]he \$2.25 per ton fee imposed on out-of-state waste exceeds the \$.85 per ton fee imposed on in-state waste by \$1.40. One ton equals 2,000 pounds. Assuming that the hypothetical nonresident generates 200 pounds of garbage per month (1/10 of a ton), the nonresident's garbage bill would increase by \$.14 per month.

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

<sup>31</sup> *Id.* at 1348-49.

<sup>32</sup> *Id.* at 1350-51.

## I. THE DORMANT COMMERCE CLAUSE

Article 1, Section 8 of the United States Constitution grants Congress the authority "to regulate Commerce with foreign Nations, and among the several States."<sup>33</sup> The Commerce Clause not only grants Congress the power to act, but also affects situations in which Congress has chosen not to act.<sup>34</sup> The Supreme Court has recognized that there is a dormant or negative Commerce Clause authority which limits the power of the states to erect barriers against interstate trade.<sup>35</sup>

There are four general views regarding the purposes of the Court's dormant Commerce Clause authority.<sup>36</sup> The first view posits that the Court, in order to promote free trade, may overturn state legislation which impedes economic efficiency.<sup>37</sup> The second view, focusing on inefficiency in the political process, holds that the Court reviews state law to ensure that interests unrepresented in the state legislative process are not discriminated against.<sup>38</sup> The third view, which combines elements of the two aforementioned positions, holds that the Court should review state legislation to ensure that the state law does not threaten the national political process and invite resentment and retaliation.<sup>39</sup> The fourth and most provocative view holds that the Court lacks any dormant Commerce Clause authority.<sup>40</sup>

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<sup>33</sup> U.S. CONST. art. I, § 8. The Supreme Court has held that the Commerce Clause gives Congress plenary authority which is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

<sup>34</sup> JOHN E. NOWAK, ET. AL., *CONSTITUTIONAL LAWS* § 8.1, at 260-61 (3d ed. 1986); *see also* *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 260 (1872); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298, 305 (1851); *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 244, 248 (1829).

<sup>35</sup> *See Wyoming v. Oklahoma*, 502 U.S. 437, 554 (1992); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370-72 (1976); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534-35 (1949).

<sup>36</sup> David Pomper, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1313, 1314, 1315-17 n.29 (1989).

<sup>37</sup> *Id.* at 1314; *H.P. Hood & Sons*, 336 U.S. at 537-39. *But see* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 45-46 (1983).

<sup>38</sup> Pomper, *supra* note 36, at 1314; *see also* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 205-06 (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 83-84 (1980); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 439 (1982); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1209-10 (1986); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 132 (1979).

<sup>39</sup> Pomper, *supra* note 36, at 1316-17; *see also* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 567-70 (1983).

<sup>40</sup> Pomper, *supra* note 36, at 1314 n.29; Martin H. Redish & Shane V. Nugent, *The Dormant*

In analyzing whether state legislation violates dormant Commerce Clause authority, the Supreme Court has adopted "a two-tiered approach."<sup>41</sup> The Court distinguishes between state statutes that discriminate against interstate commerce on their face or in their effect, and state statutes that regulate evenhandedly with only indirect effects on interstate commerce.<sup>42</sup> If the Court finds that a state statute regulates in an evenhanded manner to realize a legitimate local purpose, the Court will employ the balancing test of *Pike v. Bruce Church, Inc.*<sup>43</sup> Under the *Pike* balancing test, the Court will uphold the statute "unless the burden imposed on such [interstate] commerce is clearly excessive in relation to the putative local benefits."<sup>44</sup>

If the Court finds that a state statute discriminates either explicitly or effectively against interstate commerce, the statute is assumed to be invalid and is subject to the strict scrutiny test of *Hunt v. Washington Apple Advertising Commission*.<sup>45</sup> The state must demonstrate "the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives [are] adequate to preserve the local interests at stake."<sup>46</sup> If a state statute is a form of economic protec-

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*Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 617 n.28 (1987); see also Thomas K. Anson & P.M. Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 91-97 (1980) (advocating this approach in the natural resource context).

Justice Scalia has stated that the Court's dormant Commerce Clause decisions "made no sense." *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., dissenting). Justice Scalia noted that the "uncertainty in application has been attributable in no small part to the lack of any clear theoretical underpinnings for judicial 'enforcement' of the Commerce Clause." *Id.* (Scalia, J., dissenting).

<sup>41</sup> *Brown-Forman Distillers v. New York Liquor Auth.*, 476 U.S. 573, 578 (1986).

<sup>42</sup> *Id.* at 579. The Court stated that it had:

adopted what amounts to a two-tiered approach. . . . When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

*Id.* at 578-79 (citations omitted).

<sup>43</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see *Brown-Forman*, 476 U.S. at 578.

<sup>44</sup> *Pike*, 397 U.S. at 142.

<sup>45</sup> See 432 U.S. 333, 353 (1977).

<sup>46</sup> *Id.*



tionism, the Court has erected a “virtually *per se* rule of invalidity” under *City of Philadelphia v. New Jersey*.<sup>47</sup>

The invocation and application of these tests proved crucial to the United States Supreme Court’s dormant Commerce Clause analysis in the *Oregon Waste Systems, Inc. v. Department of Environmental Quality* decision.<sup>48</sup> Finding discrimination against interstate commerce, the United States Supreme Court strictly scrutinized and invalidated the Oregon laws.<sup>49</sup> The Supreme Court invoked the wrong test, however, failing to recognize that the Oregon laws were even-handed statutes that furthered a legitimate state purpose. The Supreme Court should have utilized the *Pike* balancing test and found that the benefits of the Oregon laws exceeded any burdens imposed on interstate commerce.<sup>50</sup>

## II. BACKGROUND

In 1989, Oregon enacted comprehensive waste-reduction legislation.<sup>51</sup> The Oregon legislature declared that “[t]here is a shortage of appropriate sites for landfills in Oregon” and that “[i]t is in the best interests of the people of Oregon to extend the useful life of existing solid waste disposal sites by . . . requiring solid waste to undergo volume reduction through recycling and reuse measures before disposal in landfills.”<sup>52</sup>

The legislation directed the Oregon Environmental Quality Commission (EQC) to establish by rule a surcharge based on the costs to the state and its political subdivisions of disposing of out-of-state solid waste.<sup>53</sup> In December 1990, the EQC established a surcharge of \$2.25

<sup>47</sup> 437 U.S. 617, 624 (1977).

<sup>48</sup> See *Oregon Waste Sys., Inc. v. Department of Envntl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1354 (1994).

<sup>49</sup> See *id.* at 1355 (Rehnquist, C.J., dissenting).

<sup>50</sup> See *supra* notes 43–44 and accompanying text.

<sup>51</sup> OR. REV. STAT. § 459.297 (1992) provides:

1) Beginning on January 1, 1991, every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site shall pay a surcharge as established by the Environmental Quality Commission under ORS 459.298. The surcharge shall be in addition to any other fee charged for disposal of solid waste at the site.

2) The surcharge collected under this section shall be deposited in the State Treasury to the credit of an account of the Department of Environmental Quality. Such moneys are continuously appropriated to the department to meet the costs of the department in administering the solid waste program. . . .

<sup>52</sup> OR. REV. STAT. §§ 459.015(1)(c)–(d) (1992), amended by 1991 Or. Laws, ch. 385, § 7; see *Gilliam County v. Department of Envntl. Quality*, 837 P.2d 965, 973 (Or. Ct. App. 1992).

<sup>53</sup> OR. REV. STAT. § 459.298 (1992) provides:

per ton on foreign waste. The EQC was also directed to establish a fee for the disposal of in-state waste which was not cost driven, but was a revenue device for the support of environmental protection programs, solid waste planning, and recycling. The fee on in-state waste was statutorily limited to \$.50 per ton, but the statute was amended in 1991 to raise the in-state fee to \$.85 per ton.<sup>54</sup>

Oregon Waste Systems (OWS) owned and operated a regional solid waste disposal facility, the Columbia Ridge Recycling Center and Landfill located southwest of Arlington in Gilliam County. OWS disposed of solid waste generated both inside and outside of Oregon. The business provided direct and indirect benefits to Gilliam County by employing its citizens and paying local fees and taxes. The Columbia Resource Company (CRC) had a twenty-year contract with Clark County, Washington, under which it disposed of the county's solid waste. The CRC utilized the Finley Buttes Landfill in Morrow County, Oregon as its disposal site.<sup>55</sup> OWS, CRC, and Gilliam County brought suit challenging the Oregon laws, alleging, *inter alia*, that the different fees violated the Commerce Clause.<sup>56</sup>

The Oregon Court of Appeals upheld the statutes, recognizing that Oregon was charging "a compensatory fee" for special costs incurred by the state and its political subdivisions regarding solid waste disposal.<sup>57</sup> The extra costs borne by Oregon included costs associated with solid waste management, permit issuance, environmental monitoring, groundwater monitoring, and site closure.<sup>58</sup> The court noted that the law was simply designed to make "out-of-state generators

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[s]ubject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions, the [EQC] shall establish by rule the amount of the surcharge to be collected under ORS § 459.297. The amount of the surcharge shall be based on the costs to the state of Oregon and political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for under the provisions of ORS. . . . These costs may include but need not be limited to costs incurred for: (1) Solid waste management; (2) Issuing new and renewal permits for solid waste disposal sites; (3) Environmental monitoring; (4) Ground water monitoring; and (5) Site closure and post-closure activities.

<sup>54</sup> *Id.* § 459.294(5) (current version at OR. REV. STAT. § 459A.110(5) (1992)).

<sup>55</sup> *Gilliam County*, 837 P.2d at 968.

<sup>56</sup> *Id.* The plaintiffs in *Gilliam County* raised several procedural arguments. They asserted that OR. REV. STAT. § 459.298 required the agency to follow an unconstitutional process. *Id.* at 970. Alternatively, the plaintiffs argued that if the procedures were permissible, then the rules promulgated under them were invalid because the agency did not follow the procedures. If the rules were made through a valid procedure, they were still invalid because they discriminated against interstate commerce. *Id.*

<sup>57</sup> *Id.* at 975.

<sup>58</sup> *Id.*

pay their fair share of the costs and no more.”<sup>59</sup> Furthermore, the court held that facial review of the legislation and regulations did not show that the fees were either excessive or unrelated to the state-provided services.<sup>60</sup>

The Oregon Supreme Court also found that the different fees did not violate the Commerce Clause.<sup>61</sup> The court held that the Commerce Clause prohibits discrimination against out-of-state goods unless there are reasons for the discrimination other than their origin.<sup>62</sup> In this case, the surcharge on out-of-state solid waste acted as a compensatory fee for the services rendered by the state and local governments.<sup>63</sup> In finding the laws valid, however, the court asserted that state judicial review laws prevented the court from determining if the fees were excessive in the context of that suit.<sup>64</sup>

The Oregon Supreme Court’s decision contradicted two previous federal court holdings that invalidated Indiana<sup>65</sup> and Georgia<sup>66</sup> statutes imposing higher costs for the disposal of out-of-state waste. In 1991, Indiana enacted statutes discouraging solid waste imports by imposing backhaul limitations, registration and sticker requirements, surety bond posting, and higher tipping fees for the disposal of out-of-state waste.<sup>67</sup> Indiana asserted that the higher tipping fees “merely offset[] what would otherwise be a subsidy for interstate commerce”

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<sup>59</sup> *Id.* at 977 (citing *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 346 n.9 (1992)).

<sup>60</sup> *Gilliam County*, 837 P.2d at 977.

<sup>61</sup> *Gilliam County v. Department of Env'tl. Quality*, 849 P.2d 500, 508 (Or. 1993).

<sup>62</sup> *Id.* at 507.

<sup>63</sup> *Id.* at 508.

<sup>64</sup> *Id.* at 508–09; OR. REV. STAT. § 183.400 (1991) provides in part:

1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court. . . .

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.

4) The court shall declare the rule invalid only if it finds that the rule; a) Violates constitutional provisions; b) Exceeds the statutory authority of the agency; or c) Was adopted without compliance with applicable rulemaking procedures.

<sup>65</sup> *Government Suppliers Consolidating Serv. v. Bayh*, 975 F.2d 1267, 1268 (7th Cir. 1992).

<sup>66</sup> *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725, 736 (M.D. Ga. 1992).

<sup>67</sup> *See Bayh*, 975 F.2d at 1270–72.

and "require[] out-of-state haulers to shoulder their fair share of in-state administrative costs."<sup>68</sup> Once the costs generated by the disposal of out-of-state waste were determined, "the state was constitutionally permitted to level the playing field."<sup>69</sup>

In *Government Suppliers Consolidating Service v. Bayh*, the United States District Court for the Southern District of Indiana, utilizing the *Pike* balancing test, upheld the Indiana statutes for the most part, striking down only the surety bond requirement.<sup>70</sup> On appeal, the United States Court of Appeals for the Seventh Circuit found the laws discriminatory and subjected them to strict judicial scrutiny. The Seventh Circuit determined that the higher tipping fees for out-of-state waste allowed the "state to tax interstate commerce more heavily than in-state commerce any time the entities involved in interstate commerce happened to use facilities supported by general tax funds."<sup>71</sup> This ran contrary to the caselaw which requires equality in the treatment of in-state and out-of-state concerns. There was no equality because the "Indiana statutes imposed a tax on haulers of waste which cross state lines, while sparing haulers of waste who remain entirely within the state."<sup>72</sup> Even more, the Indiana statutes provided for additional fees to offset the costs incurred by "a county, municipality or township that can be attributed to the importation of the solid waste into Indiana."<sup>73</sup> In striking down the laws, the Seventh Circuit noted that "a state may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."<sup>74</sup>

Likewise, the United States District Court for the Middle District of Georgia struck down state disposal laws as violative of the Commerce Clause.<sup>75</sup> In 1990, Georgia enacted the Georgia Comprehensive

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<sup>68</sup> *Id.* at 1283.

<sup>69</sup> *Id.*

<sup>70</sup> See *Government Suppliers Consolidating Serv. v. Bayh*, 734 F. Supp. 853, 866-67 (S.D. Ind. 1990). On appeal, the United States Court of Appeals for the Seventh Circuit noted that the district court determined that the surety bond provision was "an unnecessary burden on interstate commerce." *Bayh*, 975 F.2d at 1274.

<sup>71</sup> *Bayh*, 975 F.2d at 1284.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing IND. CODE § 13-9.5-5-1(b) (1991)).

<sup>74</sup> *Bayh*, 975 F.2d at 1284-85.

<sup>75</sup> *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725, 736 (M.D. Ga. 1992).

Solid Waste Management Act (GCSWMA),<sup>76</sup> which placed restrictions on the disposal of out-of-state solid waste that were not imposed on in-state waste. First, out-of-state waste handlers were required to “develop and implement a waste analysis plan capable of identifying representative samples of all waste received by the facility.”<sup>77</sup> Second, all out-of-state waste transported within Georgia had to be accompanied by a manifest.<sup>78</sup> Third, out-of-state waste handlers were required to pay a fee of \$10 for every ton of out-of-state waste that they received for disposal.<sup>79</sup> Fourth, all generators, collectors, processors, transporters, and disposers of out-of-state waste were subject to random inspections.<sup>80</sup> Finally, handling permits for out-of-state waste were only effective for ten years.<sup>81</sup> In 1992, two privately owned landfills seeking to dispose of out-of-state waste challenged the laws as undue burdens on interstate commerce, because the landfills were forced to comply with a set of administrative requirements that were not required for the handling of in-state waste.<sup>82</sup> Following the *Chemical Waste Management, Inc. v. Hunt*<sup>83</sup> and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*<sup>84</sup> framework, the United States District Court for the Middle District of Georgia found the GCSWMA facially discriminatory against out-of-state waste and employed strict scrutiny to invalidate the laws.<sup>85</sup>

The Oregon Supreme Court's decision in *Oregon Waste Systems, Inc. v. Department of Environmental Equality*, running counter to the federal court cases in Georgia and Indiana, set the stage for United States Supreme Court review of the Oregon case.<sup>86</sup> In *Oregon Waste Systems*, the United States Supreme Court overturned the Oregon Supreme Court and invalidated the Oregon laws on Commerce Clause grounds.<sup>87</sup> Finding the different fees for in-state and

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<sup>76</sup> GA. CODE ANN. § 12-8-20, et. seq. (1992).

<sup>77</sup> *Id.* § 12-8-27(a)(3).

<sup>78</sup> *Id.* § 12-8-27(b).

<sup>79</sup> *Id.* § 12-8-27(c).

<sup>80</sup> *Id.* § 12-8-27(d).

<sup>81</sup> *Southern States Landfill, Inc. v. Georgia Dep't of Natural Resources*, 801 F. Supp. 725, 729-30 (M.D. Ga. 1992).

<sup>82</sup> *See id.* at 727-28.

<sup>83</sup> 504 U.S. 334, 338-42 (1992).

<sup>84</sup> 504 U.S. 353, 359-61 (1992).

<sup>85</sup> *See Southern States*, 801 F. Supp. at 730-32.

<sup>86</sup> *See Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1355 (1994) (Rehnquist, C.J., dissenting).

<sup>87</sup> *Id.* (Rehnquist, C.J., dissenting).

out-of-state waste facially discriminatory, the United States Supreme Court subjected the Oregon laws to strict scrutiny.<sup>88</sup> The Court rejected the Oregon court's findings that the surcharge on out-of-state waste was a nondiscriminatory, compensatory tax designed to make up for the costs paid by Oregon residents through their state income tax. The Court found that there was no in-state charge comparable to the out-of-state surcharge. Even if the state income tax was the in-state analogue, the surcharge still did not meet the requirements of a compensatory tax because it was not being levied on a substantially equivalent event.<sup>89</sup> The Court also rejected Oregon's arguments that the surcharge allowed Oregon to spread the costs of solid waste disposal to all Oregon citizens and helped reserve Oregon landfills for in-state residents by discouraging solid waste import.<sup>90</sup> The Court noted that, although these were legitimate state purposes, they could be met by nondiscriminatory means.<sup>91</sup>

### III. ANALYSIS

The United States Supreme Court, in *Oregon Waste Systems*, wrongly invoked the analytical framework of *Chemical Waste Management, Inc. v. Hunt*<sup>92</sup> to review the Oregon solid waste disposal laws.<sup>93</sup> In *Chemical Waste Management*, the Court examined a 1990 Alabama law that charged two fees for the disposal of hazardous waste in Alabama. A base fee of \$25.60 per ton was imposed on all hazardous waste disposed of in Alabama, regardless of origin.<sup>94</sup> An additional fee of \$72 per ton was levied on all hazardous waste generated outside of Alabama and disposed of in Alabama.<sup>95</sup> The law also capped the amount of hazardous waste that could be deposited at a commercial facility in a one-year period.<sup>96</sup>

The United States Supreme Court held that since the Alabama law facially discriminated against interstate commerce, regardless of the purported local purposes and the absence of nondiscriminatory alter-

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<sup>88</sup> *Id.* at 1350-51.

<sup>89</sup> *Id.* at 1352.

<sup>90</sup> *Id.* at 1353-54.

<sup>91</sup> See *Oregon Waste Systems*, 114 S. Ct. at 1354-55.

<sup>92</sup> 504 U.S. 334, 338-42 (1992).

<sup>93</sup> *Oregon Waste Systems*, 114 S. Ct. at 1350-51.

<sup>94</sup> *Chemical Waste Management*, 504 U.S. at 338 (citing ALA. CODE § 22-30B-2(a) (1975 & Supp. 1994)).

<sup>95</sup> *Id.* at 338-39 (citing ALA. CODE § 22-30B-2(b)).

<sup>96</sup> *Id.* at 338 (citing ALA. CODE § 22-30B-2.3).

natives, the law would be subjected to strict judicial scrutiny. Alabama could not isolate itself from a national problem by erecting a barrier to interstate commerce.<sup>97</sup>

The Court determined that Alabama's concerns for the health and safety of Alabama citizens, the protection of the environment, and the conservation of natural resources did not vary with the origin of the waste.<sup>98</sup> The Court characterized the additional fee on out-of-state hazardous waste as a form of economic protectionism which saddled out-of-state generators with the burden of reducing the flow of hazardous waste into Alabama.<sup>99</sup> Since Alabama allowed the generation and disposal of hazardous waste within state borders and the importation of hazardous waste if the fee was paid, the Alabama law was not analogous to a quarantine law that would prevent the traffic of noxious articles whatever their point of origin.<sup>100</sup> The Court also found that nondiscriminatory alternatives were available, such as "a generally applicable per-ton additional fee on all hazardous waste disposed of within Alabama, or a per-mile tax on all vehicles transporting hazardous waste across Alabama roads, or an even-handed cap on the total tonnage landfilled at [the disposal facility]."<sup>101</sup> The Court specifically did not address the issues "that the additional fee makes out-of-state generators pay their 'fair share' of the costs of Alabama waste disposal facilities, however, or that the additional fee is justified as a 'compensatory tax.'"<sup>102</sup>

The United States Supreme Court should not have utilized the *Chemical Waste Management* framework to review the Oregon laws in *Oregon Waste Systems*. Rather, the Court should have employed the *Pike* balancing test because the Oregon laws were evenhanded regulations that served a legitimate state goal of having in-state and out-of-state residents pay the same aggregate amounts for the safe disposal of solid waste. Other federal circuit courts, specifically the United States Court of Appeals for the Ninth Circuit in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*<sup>103</sup> and the United States Court of Appeals for the Eleventh Circuit in *Diamond Waste*,

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<sup>97</sup> *Id.* at 338-42.

<sup>98</sup> *Id.* at 342-47.

<sup>99</sup> *Chemical Waste Management*, 504 U.S. at 342-47.

<sup>100</sup> *Id.* at 346-47.

<sup>101</sup> *Id.* at 344 (emphasis in original deleted) (citations omitted).

<sup>102</sup> *Id.* at 346 n.9. The Court stated that, "[w]e pretermitted this issue, for it was not the basis for the decision below and has not been briefed or argued by the parties here." *Id.*

<sup>103</sup> 820 F.2d 1482, 1484 (9th Cir. 1987).

*Inc. v. Monroe County, Georgia*,<sup>104</sup> utilized the *Pike* balancing test to evaluate local bans on solid waste imports.<sup>105</sup> Furthermore, the benefits of the Oregon laws clearly outweighed any burdens on interstate commerce. The Oregon laws provided for the safe disposal of solid waste and only cost the typical out-of-state generator \$.14 per week.

### A. *Evenhandedness*

Before employing the *Pike* balancing test, courts must determine whether a state law regulates in an evenhanded manner. The Oregon laws satisfied this criterion as nondiscriminatory, compensatory taxes. The Supreme Court has upheld compensatory taxes levied on out-of-state concerns to compensate for charges imposed on in-state businesses.<sup>106</sup> Indeed, compensatory taxes are designed to provide equality of treatment between in-state and out-of-state businesses.<sup>107</sup> In early cases,<sup>108</sup> the Court examined the purposes and effects of compensatory taxes to ensure that the taxes were nondiscriminatory.<sup>109</sup> The Court compared burdens placed on out-of-state concerns to those

<sup>104</sup> 939 F.2d 941, 944-45 (11th Cir. 1991).

<sup>105</sup> See *Omni Group Farms, Inc. v. County of Cayuga*, 766 F. Supp. 69, 75-76 (N.D.N.Y. 1991). For a contrary view, see *BFI Medical Waste Sys. v. Whatcom County*, 983 F.2d 911, 913 (9th Cir. 1992); *BFI Medical Waste Sys., Inc. v. Whatcom County*, 756 F. Supp. 480, 483-86 (W.D. Wash. 1991), *aff'd*, 983 F.2d 911 (9th Cir. 1992); and *Shayne Bros., Inc. v. Prince George's County, Md.*, 556 F. Supp. 182, 184-87 (D. Md. 1983).

<sup>106</sup> *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1352 (1994).

<sup>107</sup> *Maryland v. Louisiana*, 451 U.S. 725, 758-59 (1981); *Boston Stock Exch. v. State Tax Comm'r*, 429 U.S. 318, 331-32 (1977); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 583-84 (1937); see generally Walter Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAW. 405 (1986).

<sup>108</sup> Commentators have noted that "[s]ome of the older Supreme Court decisions appear to go further afield in search of compensating taxes than more recent decisions. Older decisions considered different types of taxes on unrelated activities to be complementary." Philip M. Tatarowicz and Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 909 (1986).

<sup>109</sup> The United States Supreme Court noted that, in reviewing Commerce Clause challenges to state taxes, its goal has been to "establish a consistent and rational method of inquiry" focusing on "the practical effect of a challenged tax." *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980).

Similarly, the Pennsylvania Supreme Court stated that:

the focus is always upon the effect or economic consequences of the state tax upon interstate commerce. . . . The delicate balance between the conflicting state's interests . . . and those of interstate commerce . . . requires careful analysis of 'the unique characteristics of the statute at issue and the particular circumstances in each case.' . . . Moreover, in challenging the constitutionality of a state's taxing legislation under



imposed on in-state businesses through the state tax scheme to ensure that in-state businesses were not granted any advantage over out-of-state concerns.<sup>110</sup>

In 1868, in *Hinson v. Lott*, the Supreme Court reviewed an Alabama law that imposed a gallon tax on the sale of liquor produced out-of-state and imported into Alabama, but placed no similar fee on liquor produced in-state.<sup>111</sup> The Court found the tax nondiscriminatory because local distillers were subject to a comparable tax.<sup>112</sup> The Court did not dwell on the point that the taxes fell on different businesses—retailers for out-of-state liquor and distillers for in-state liquor. Indeed, the Court found that the gallon tax was a “complementary provision necessary to make the tax equal on all liquors sold in the State.”<sup>113</sup> The tax did not discriminate against out-of-state products, but “merely subject[ed] them to the same rate of taxation” as articles manufactured in-state.<sup>114</sup> The tax was therefore not “an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State[.]”<sup>115</sup>

Likewise, in 1926, in *General American Tank Car Corp. v. Day*, the Supreme Court examined a Louisiana tax imposed on nonresident corporations’ rolling stock operated in the state.<sup>116</sup> The tax was de-

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the Commerce Clause, the burden is on the challenger to overcome the presumption of validity given to all such legislation.

*American Trucking Ass'ns v. Scheiner*, 509 A.2d 838, 848–49 (Pa. 1986), *rev'd*, 483 U.S. 266 (1987) (citations omitted).

One commentator noted that, “a bright line test is not easily discernible from the number of decisions where the Court inquired whether the alleged compensating tax did properly serve as a balm of Gilead to heal an otherwise discriminatorily ill tax.” PHILIP HARTMAN, *FEDERAL LIMITS ON STATE AND LOCAL TAXATION*, § 2:19, at 23 (Supp. 1985); *see also* Tatarowicz and Mims-Velarde, *supra* note 108, at 909–17.

<sup>110</sup> *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932). The Court noted that: “[t]here is no demand in [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State’s constitutional power.” *Id.*

The Court stated that:

[a] state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State’s tax scheme. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.

*Maryland v. Louisiana*, 451 U.S. at 756 (citation omitted).

<sup>111</sup> *Hinson v. Lott*, 75 U.S. (8 Wall.) 148, 148–49 (1868).

<sup>112</sup> *Id.* at 152–53.

<sup>113</sup> *Id.* at 153.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *General Am. Tank Car Corp. v. Day*, 270 U.S. 367, 370 (1926).

signed to compensate for local property taxes paid by residents.<sup>117</sup> The Court found that the tax “discloses no purpose to discriminate against nonresident taxpayers.”<sup>118</sup> The tax was “not invalid merely because the equality in its operation as compared with local taxation has not been attained with mathematical exactness.”<sup>119</sup> The Court focused on “the fairness and reasonableness of its purposes and practical operation, rather than [on] minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary.”<sup>120</sup> The Court upheld the tax because the amount paid by out-of-state businesses was approximately the same as that paid by in-state businesses.<sup>121</sup>

The Supreme Court reached a similar result in two other cases involving state laws taxing out-of-state concerns, upholding the laws because their effect was not unfair. In *Interstate Busses Corp. v. Blodgett*, the Court upheld Connecticut’s \$.01 per mile highway tax imposed on interstate carriers, although no similar tax was imposed on intrastate carriers.<sup>122</sup> Local carriers, however, were subject to a 3% gross receipt tax and income taxes for which interstate carriers were not responsible.<sup>123</sup> Even though in-state and out-of-state carriers were treated differently, the Supreme Court found no discrimination because the mileage fee on out-of-state residents did not exceed the in-state gross receipt tax and income tax.<sup>124</sup> The Court noted that, “[t]o gain the relief for which it prays, appellant is under the necessity of showing that in actual practice the tax of which it complains falls with disproportionate economic weight on it.”<sup>125</sup>

Similarly, in *Gregg Dyeing Co. v. Query*, the United States Supreme Court upheld a South Carolina tax on gas imported into the state and

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 373.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *General Am. Tank Car*, 270 U.S. at 374–75.

<sup>122</sup> *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 250 (1928).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 250–51. The Court stated that:

[a]ppellant plainly does not establish discrimination by showing merely that the two statutes are different in form or adopt a different measure or method of assessment, or that it is subject to three kinds of taxes while interstate carriers are subject only to two or to one. We cannot say from a mere inspection of the statutes that the mileage tax is a substantially greater burden on appellant’s interstate business than is its correlative, the gross receipts tax, on comparable interstate businesses.

*Id.* at 251.

<sup>125</sup> *Id.*

stored for future use.<sup>126</sup> The Court found the tax compensated for an excise tax on the sale and use of gas produced within the state.<sup>127</sup> The Court stated the rule that, “[w]e regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the State.”<sup>128</sup>

The Supreme Court applied the same framework based on disproportionate effects in *Henneford v. Silas Mason Co.*, where it upheld a Washington use tax on personal property that had not been subject to the Washington sales tax or any other state’s sales or use tax of equal or greater amount.<sup>129</sup> The purpose of the tax was “that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden.”<sup>130</sup> The use tax was comparable to the sales tax on the purchase of similar goods in Washington.<sup>131</sup> In validating the tax scheme, the Court remarked that, “[w]hen the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates.”<sup>132</sup>

In 1961, in *Alaska v. Arctic Maid*, the Supreme Court reviewed an Alaska tax imposed on freezer ships.<sup>133</sup> The tax was 4% of the value of salmon caught or obtained for freezing in Alaska’s territorial sea and sold out of state, primarily to canneries in Washington.<sup>134</sup> Alaska imposed no similar fee on salmon caught, frozen, and sent to Alaskan canneries, but Alaskan canneries paid a tax of 6% on the value of salmon for canning.<sup>135</sup> Comparing the tax on the freezer ships with the tax on the Alaskan canneries, the Court found no discrimination because “no matter how the tax on ‘freezer ships’ is computed, it did not exceed the six-percent tax on the local canners.”<sup>136</sup> Even if there was a difference between the taxes, it was “not so ‘palpably disproportion-

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<sup>126</sup> *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 482 (1932).

<sup>127</sup> *Id.* at 481. The Court stated that: “[d]iscrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries.” *Id.*

<sup>128</sup> *Id.* at 476.

<sup>129</sup> *Henneford v. Silas Mason Co.*, 300 U.S. 577, 588 (1937).

<sup>130</sup> *Id.* at 581.

<sup>131</sup> *See id.* at 584.

<sup>132</sup> *Id.*

<sup>133</sup> *Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 204.

<sup>136</sup> *Id.*

ate' . . . as to run afoul of the Commerce Clause."<sup>137</sup> The Court pointed out that "[n]o 'iron rule of equality' between taxes laid by a State on different types of business is necessary."<sup>138</sup>

In 1981, the Supreme Court began to revise the compensatory tax doctrine in *Maryland v. Louisiana*, imposing a stricter test based on the specific interests taxed.<sup>139</sup> Louisiana enacted a first-use tax on natural gas imported into the state and not previously subjected to state severance or production taxes.<sup>140</sup> The first-use tax was designed to equalize the price of imported natural gas, which came from the federal outer continental shelf (OCS), with the price of natural gas produced in Louisiana, which was subject to a state severance tax.<sup>141</sup> The Court determined that even though Louisiana was seeking equality, the various exemptions and credits provided under the first-use tax precluded the burden of the tax from falling on in-state users.<sup>142</sup> The Court rejected Louisiana's assertion that the first-use tax was a valid compensatory tax.<sup>143</sup> Attempting to identify the in-state burden that the tax was designed to compensate, Louisiana claimed that the first-use tax equalled the state severance tax.<sup>144</sup> The Court found that Louisiana had no interest in OCS natural gas, however.<sup>145</sup> Thus, unlike the valid use and sales taxes in *Henneford v. Silas Mason Co.*,<sup>146</sup> the two Louisiana taxes were not comparable, because they were not levied on a "substantially equivalent event."<sup>147</sup>

The Supreme Court's new "substantially equivalent event" requirement for compensatory taxes departed from the disproportionate effects test used in prior cases.<sup>148</sup> In fact, the new standard would likely have invalidated statutes that previously had been acceptable.<sup>149</sup> Compensatory taxes were designed to equalize in-state and

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<sup>137</sup> *Id.* at 205.

<sup>138</sup> *Alaska v. Arctic Maid*, 366 U.S. at 205.

<sup>139</sup> *Maryland v. Louisiana*, 451 U.S. 725, 725-26 (1981).

<sup>140</sup> *Id.* at 731.

<sup>141</sup> *See id.*

<sup>142</sup> *Id.* at 753-60.

<sup>143</sup> *Id.* at 758.

<sup>144</sup> *Maryland v. Louisiana*, 451 U.S. at 758-59.

<sup>145</sup> *Id.* at 759.

<sup>146</sup> 300 U.S. 577, 588 (1937).

<sup>147</sup> *Maryland v. Louisiana*, 451 U.S. at 759.

<sup>148</sup> Several commentators noted that, "[u]nfortunately, the 'substantially equivalent events' test sheds very little light on the problem of identifying compensatory taxes." Tatarowicz and Mims-Velarde, *supra* note 108, at 911.

<sup>149</sup> *See Alaska v. Arctic Maid*, 366 U.S. 199, 204-05 (1981) (taxes on freezer ships headed out of state to compensate in-state taxes on canneries); *Interstate Busses Corp. v. Blodgett*, 276

out-of-state burdens, and Louisiana's first-use tax accomplished this end.<sup>150</sup> Nevertheless, the Court was correct to invalidate Louisiana's first-use tax because the credits and exemptions precluded equality of treatment and favored in-state interests. The Court could have arrived at the same conclusion, however, by employing the previously used purposes and effects approach.<sup>151</sup>

In 1984, in *Armco, Inc. v. Hardesty*, the Supreme Court reviewed a West Virginia statute that levied a gross receipt tax of .27% on property manufactured out-of-state and imported for sale.<sup>152</sup> Local manufacturers, whether based in-state or out-of-state, were exempt from the wholesale tax because they paid a manufacturing tax of .88%.<sup>153</sup> The Court determined that the taxing scheme discriminated against interstate commerce, even though in-state manufacturers paid more taxes than out-of-state wholesalers.<sup>154</sup> The wholesale tax could not be considered a compensatory tax because manufacturing and wholesaling were not substantially equivalent events.<sup>155</sup>

The *Armco* Court imposed a further requirement that the state's taxes must be internally consistent.<sup>156</sup> If such taxes were enacted in

U.S. 245, 251-52 (1928) (highway tax on interstate carriers to compensate for in-state gross receipt and income tax).

<sup>150</sup> One commentator stated that:

one can argue that the First Use Tax is not discriminatory within the meaning of the Commerce Clause. . . . [W]hen the tax is viewed in light of the severance tax imposed on gas extracted within Louisiana, one can contend that the practical effect of the levy is to create equality between the tax burdens borne by gas flowing into Louisiana, whether extracted in Louisiana or offshore. Establishing such equality, after all, was the principal goal of the framers of the First Use Tax. . . .

Walter Hellerstein, *State Taxation in the Federal System: Perspectives on Louisiana's First Use Tax on Natural Gas*, 55 TUL. L. REV. 601, 622 (1981).

<sup>151</sup> See David F. Shores, *State Taxation of Gross Receipts and the Negative Commerce Clause*, 54 MO. L. REV. 555, 572-73 (1989); see also Robert G. Lathrop, *Armco—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause*, 63 TAXES 551, 557 (1985); see also *supra* note 109 and accompanying text.

<sup>152</sup> *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 644.

<sup>155</sup> *Id.* at 643. Several commentators noted that:

the Court's enunciation of a test based solely on comparison of events is misleading. The Court in these two cases [*Armco* and *Maryland v. Louisiana*] appears to have focused not only on the equivalence of events, but also on other factors relating to the operation and interaction of the two taxes. Thus, it is unclear just how the Court now decides whether two taxes are complementary.

Tatarowicz and Mims-Velarde, *supra* note 108, at 911. Another commentator stated that, "[a]lthough manufacturing and wholesaling are different events, this observation sheds no light on the practical economic effect of the taxes." Shores, *supra* note 151, at 571.

<sup>156</sup> *Armco*, 467 U.S. at 644.

every jurisdiction, there would be no interference with interstate commerce.<sup>157</sup> The Court pointed out that if another state imposed a manufacturing tax, the out-of-state business would pay both the home state's manufacturing tax and the West Virginia wholesale tax, while businesses in West Virginia would pay only the manufacturing tax.<sup>158</sup> The Court did not require proof on this point, noting that:

[a]ny other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of [forty-nine] other states, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated.<sup>159</sup>

The *Armco* Court should have utilized the purposes and effects test<sup>160</sup> and upheld the West Virginia tax.<sup>161</sup> The purpose of the West Virginia tax was to avoid subjecting in-state manufacturers to double taxation. The effect of the West Virginia tax should have been "measured in dollars and cents, not legal abstractions."<sup>162</sup> In-state manufacturers paid a tax of .88%, while out-of-state wholesalers paid a tax of only .27%.<sup>163</sup> Although in-state manufacturers paid a tax three times higher than out-of-state wholesalers, the tax was nondiscriminatory.<sup>164</sup> The Court should have relied on *Alaska v. Arctic Maid*, which avoided rigid rules of equality regarding taxes on different types of businesses, and upheld the West Virginia tax because there was no favor-

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<sup>157</sup> *Id.* In *Container Corp. of America v. Franchise Tax Board*, the Court noted that the Due Process Clause and the Commerce Clause require fairness on the part of the states when determining the tax base of interstate companies subject to state taxation. See *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). The Court declared that, "[t]he first, and . . . obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business'[s] income being taxed." *Id.*; see also Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH. L. REV. 138, 139–40 (1988); Milton G. Rowland, *In Support of Armco, Inc. v. Hardesty and Internal Consistency: A Plea for Bright-Line Rules in the Area of State Taxation of Interstate Commerce*, 22 GONZ. L. REV. 365, 372 (1986/87).

<sup>158</sup> *Armco*, 467 U.S. at 644.

<sup>159</sup> *Id.* at 644–45.

<sup>160</sup> See *supra* note 109 and accompanying text.

<sup>161</sup> The West Virginia Supreme Court upheld the statute, finding that it did not violate the Commerce Clause. *Armco, Inc. v. Hardesty*, 303 S.E.2d 706 (W. Va. 1983); see also C. James Judson & Susan G. Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat From Economic Reality In Analysis of State Taxes*, 87 W. VA. L. REV. 723, 723 (1985).

<sup>162</sup> *Armco*, 467 U.S. at 647 (Rehnquist, J., dissenting) (quoting *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963)).

<sup>163</sup> Shores, *supra* note 151, at 570.

<sup>164</sup> *Id.* at 571.

itism of in-state manufacturers.<sup>165</sup> Furthermore, the Court should not have invoked internal consistency, a factor applicable to net income determinations, but not relevant to Commerce Clause violations.<sup>166</sup> In dissent, Justice Rehnquist noted that, “[w]here a State’s taxes are linked exactly to the activities taxed, it should be unnecessary to examine a hypothetical taxing scheme to see if interstate commerce would be unduly burdened.”<sup>167</sup>

The next step in the evolution of the compensatory tax doctrine occurred in 1987, in *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, which involved a Washington business and occupation tax imposed on wholesaling and manufacturing.<sup>168</sup> The wholesale tax was measured by the gross receipt of sales, while the manufacturing tax was based on the value of the manufactured product.<sup>169</sup> Washington provided a “multiple activities exception” under which local manufacturers were exempt from the manufacturing tax to the extent that their output was subject to the wholesale tax.<sup>170</sup> As a result, local manufacturers paid the wholesale tax on local sales and the manufacturing tax on out-of-state sales, while out-of-state sellers paid the wholesale tax on goods sold in Washington.<sup>171</sup> The manufacturing and wholesale taxes were an identical .44%.<sup>172</sup>

The Supreme Court in *Tyler Pipe* found the Washington tax discriminatory because the “multiple activities exception” provided that the manufacturing tax was assessed only on goods produced in Wash-

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<sup>165</sup> See *Armco*, 303 S.E.2d at 717. The West Virginia Supreme Court determined that “our situation is more analogous to *Alaska v. Arctic Maid* . . .” and concluded that “we do not believe that under *Alaska v. Arctic Maid*, a showing of discrimination has been made between these two different taxes as they relate to interstate commerce.” *Id.*; see also Lathrop, *supra* note 151, at 559.

<sup>166</sup> See Judson & Duffy, *supra* note 161, at 739–40. Commentators, criticizing the invocation of internal consistency, termed this “an apparent ‘belt and suspenders’ line of reasoning.” *Id.* at 739. They asserted that:

discrimination does not depend on whatever tax system another state or local jurisdiction might establish; it depends upon the effect of the taxing scheme of the jurisdiction which is under taxpayer attack. Discrimination cannot be established by reference to what others do but instead must be established by reference to the actions of the taxing authority which are under challenge.

*Id.* at 739–40.

<sup>167</sup> *Armco, Inc. v. Hardesty*, 467 U.S. 638, 648 (1984) (Rehnquist, J., dissenting).

<sup>168</sup> See *Tyler Pipe Indus., Inc. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 232–33 (1987).

<sup>169</sup> *Id.* at 235.

<sup>170</sup> *Id.* at 235 n.5.

<sup>171</sup> *Id.* at 235.

<sup>172</sup> See *id.* at 237.

ington and sold out of state.<sup>173</sup> The exemption from the manufacturing tax for local manufacturers who paid the wholesale tax was similar to the West Virginia tax that the Court found unconstitutional in *Armco, Inc. v. Hardesty*.<sup>174</sup>

The Court also determined that payment of the manufacturing tax on out-of-state sales did not compensate for the wholesale tax paid on in-state sales because there was no identification of the burdens for which the state was seeking compensation.<sup>175</sup> Manufacturing and wholesaling were not substantially equivalent events.<sup>176</sup> The Court held that the Washington tax scheme provided a tax break to local manufacturers who sold in state, but placed interstate commerce at a disadvantage.<sup>177</sup> Furthermore, the Court decided that the Washington tax was not internally consistent.<sup>178</sup> The Washington tax scheme posed the possibility of double taxation to an out-of-state business selling in Washington that was required to pay a manufacturing tax to its home state. The only way to cure these defects was to ensure the deductibility of any manufacturing or wholesale tax paid to any state.<sup>179</sup>

The Court should have upheld the Washington tax under the purposes and effects test.<sup>180</sup> The tax was designed to avoid double taxation of in-state businesses. In-state businesses were relieved from paying the manufacturing tax to the extent that they paid the wholesale tax, which all businesses paid equally. In-state businesses only paid the manufacturing tax on exported goods, while out-of-state businesses were free from paying any manufacturing tax.<sup>181</sup> Further-

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<sup>173</sup> *Tyler Pipe*, 483 U.S. at 248; see also Jeffrey Kilduff, *The "Internal Consistency" Test is Alive and Well: Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 41 *TAX LAW* 587, 587 (1987).

<sup>174</sup> See *Tyler Pipe*, 483 U.S. at 239-42.

<sup>175</sup> See *id.* at 244 n.12.

<sup>176</sup> *Id.* at 244.

<sup>177</sup> *Id.* at 248, 253.

<sup>178</sup> See *supra* notes 156-57 and accompanying text.

<sup>179</sup> *Tyler Pipe*, 483 U.S. at 245-47. One commentator explained that, "[c]ontrary to the Court's assertion, until *Tyler Pipe*, a reduction in the use tax for a sales tax paid to another state was not viewed as constitutionally mandated." Shores, *supra* note 151, at 583-86.

<sup>180</sup> See *National Can Corp. v. State Dep't of Revenue*, 732 P.2d 134, 134-35 (Wash. 1986). The Washington Supreme Court found that the statute did not violate the Commerce Clause. See *id.*; see also *supra* note 109 and accompanying text.

<sup>181</sup> See *Tyler Pipe*, 483 U.S. at 243. One commentator observed that:

[i]f the Court had applied the discrimination doctrine (as it traditionally has done) to require substantial equality of treatment for interstate and intrastate transactions under the tax laws of a given state looked at in isolation, the Court would have held



more, the internal consistency requirement,<sup>182</sup> which was “nowhere to be found in the Constitution,”<sup>183</sup> should not have been invoked.<sup>184</sup> State taxes should be judged on their own merits, not “on the basis of assumptions as to what other States *might* do.”<sup>185</sup> Such assumptions would deny state legislatures the freedom to design their own taxing schemes.<sup>186</sup>

The last significant compensatory tax case, decided in 1987, *American Trucking Associations v. Scheiner*, involved Pennsylvania statutes that imposed lump-sum annual taxes on the operation of trucks on Pennsylvania highways.<sup>187</sup> One statute required that an identification marker be affixed to every truck over a specified weight at an annual charge of \$25 from 1980 to 1982.<sup>188</sup> The statute exempted trucks registered in Pennsylvania by making the marker fee part of the general registration fee which was increased by \$25 when the marker fee was established.<sup>189</sup> In 1982, the marker fee was reduced to \$5 when Pennsylvania enacted a second statute which imposed an annual axle fee of \$36 per axle on all trucks over a specified weight using state highways.<sup>190</sup> The second statute also reduced Pennsylvania registration fees for classes of vehicles weighing more than 26,000 pounds by the same amount.<sup>191</sup>

The Supreme Court held that the Pennsylvania statutes were discriminatory and not internally consistent.<sup>192</sup> Since out-of-state trucks did not use Pennsylvania roads to the same extent as in-state trucks, out-of-state trucks were paying five times more per mile than in-state

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the Washington statute nondiscriminatory. Interstate and intrastate transactions were treated evenhandedly under the Washington tax scheme.

Shores, *supra* note 151, at 596–97.

<sup>182</sup> See *supra* notes 156–57 and accompanying text.

<sup>183</sup> *Tyler Pipe*, 483 U.S. at 254 (Scalia, J., dissenting).

<sup>184</sup> In dissent, Justice Scalia noted that when a “tax is assessed not on unitary income but on discrete events such as sale, manufacture, and delivery, which can occur in a single State or in different States, that apportionment principle is not applicable; there is simply no unitary figure or event to apportion.” *Id.* at 256 (Scalia, J., dissenting).

<sup>185</sup> *Id.* at 259 (Scalia, J., dissenting) (emphasis in original).

<sup>186</sup> See *id.* at 258–59 (Scalia, J., dissenting).

<sup>187</sup> *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 269 (1987).

<sup>188</sup> *Id.* at 273–74.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 274.

<sup>191</sup> *Id.*

<sup>192</sup> *American Trucking*, 483 U.S. at 286–87. The Pennsylvania Supreme Court had held that the statutes did not violate the Commerce Clause. *American Trucking Ass'ns v. Scheiner*, 509 A.2d 838, 849–55 (Pa. 1986), *rev'd* 483 U.S. 266 (1987); see *supra* notes 156–57 and accompanying text.

trucks.<sup>193</sup> Furthermore, if other states retaliated by imposing flat taxes, the taxes would disrupt interstate commerce.<sup>194</sup>

Justice Scalia, joined by Chief Justice Rehnquist, in dissent, voiced opposition to internal consistency tests, asserting that the fees should be upheld because the fees were applied equally to both in-state and out-of-state trucks.<sup>195</sup> Addressing an issue ignored by the majority, the dissent argued that the reduction in the Pennsylvania registration fee caused by the payment of the axle fee did not violate the Commerce Clause because both fees were independent and nondiscriminatory.<sup>196</sup>

Likewise, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Powell, in dissent, refused to view internal consistency as the constitutional yardstick by which to measure state taxes under the Commerce Clause.<sup>197</sup> Justice O'Connor asserted that internal consistency should be applied only to state taxes that were facially discriminatory.<sup>198</sup> Justice O'Connor noted that "creating an 'internal consistency' rule of general application [was] an entirely novel enterprise that the Court undertakes for the first time in this case."<sup>199</sup> Justice O'Connor concluded that there was "no reason why such a rule is necessary or desirable."<sup>200</sup>

This review of caselaw suggests that the Supreme Court has taken a detour by imposing the substantially equivalent events and internal consistency standards on compensatory state taxes.<sup>201</sup> The Court should return to the purposes and effects test to determine the validity of compensatory taxes. The purpose of the state taxing statute and its effect in relation to the state's entire taxing scheme should be determinative. The Court should ensure that in-state residents are not benefitted at the expense of out-of-state concerns. This does not mean, however, that in-state residents should subsidize out-of-state concerns. Furthermore, the Court should abandon its internal consis-

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<sup>193</sup> *American Trucking*, 483 U.S. at 276.

<sup>194</sup> *Id.* at 284-87.

<sup>195</sup> *Id.* at 304 (Scalia, J., dissenting).

<sup>196</sup> *Id.* at 304-06 (Scalia, J., dissenting).

<sup>197</sup> *Id.* at 303. (O'Connor, J., dissenting).

<sup>198</sup> *American Trucking*, 483 U.S. at 303 (O'Connor, J., dissenting).

<sup>199</sup> *Id.* (O'Connor, J., dissenting).

<sup>200</sup> *Id.* (O'Connor, J., dissenting).

<sup>201</sup> One commentator noted that, "the phrase 'substantially equivalent events' used by *Armco* as the touchstone for determining the complementary nature of two or more taxes appears to be something of an accordion term that can be expanded or contracted as the Court thinks the situation warrants." HARTMAN, *supra* note 109, at 30.

tency standard, which rests on legal abstractions and fails to examine actual state tax burdens.<sup>202</sup>

Utilizing the purposes and effects conceptual framework, the *Oregon Waste Systems, Inc. v. Department of Environmental Quality* Court should have found that the Oregon law provided for an even-handed treatment of in-state and out-of-state residents. The Oregon surcharge was designed to have out-of-state residents pay the same amount as in-state residents for the safe disposal of municipal solid wastes.<sup>203</sup> The Oregon surcharge also guaranteed that in-state residents were not subsidizing the loss of a resource which the state helped to create.<sup>204</sup>

Some evidentiary questions, such as disproportionality of the surcharge, were addressed neither by the Oregon courts because of the procedural posture of the case,<sup>205</sup> nor by the United States Supreme Court because of its finding of facial discrimination.<sup>206</sup> The courts should have addressed whether the components of the out-of-state surcharge were actually costs paid for by in-state residents through general revenues generated by the state income tax.<sup>207</sup> If such costs

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<sup>202</sup> One commentator noted that:

[t]he 'internal consistency' approach is not appropriate for a gross receipts tax case and, in fact, relate[s] only to the formulary element of the apportioned net income tax. This confusing and somewhat baffling approach will open the flood gates to all manner of challenges under the Commerce Clause through mere speculation that some other state might enact a tax structure which would result in impermissible discrimination.

Lathrop, *supra* note 151, at 557.

<sup>203</sup> See *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1358-59 (1994) (Rehnquist, C.J., dissenting).

<sup>204</sup> *Id.* at 1355, 1358-59 (Rehnquist, C.J., dissenting).

<sup>205</sup> The case was originally brought in the Oregon Court of Appeals as a challenge to the EQC's rules governing the disposal of solid waste. The court only could declare the rule invalid if it "(a) violates constitutional provisions; (b) exceeds the statutory authority of the agency; or (c) was adopted without compliance with applicable rulemaking procedures." OR. REV. STAT. § 183.40(4). The Oregon Supreme Court noted that:

[o]ur scope of review under ORS § 183.400 precludes us from deciding whether the surcharge is impermissible as 'disproportionate' to the services rendered or to the costs incurred by the State of Oregon in connection with permitting waste disposal sites to accept solid waste generated out of state, because those are factual inquires. As this court noted . . . 'judicial review under ORS § 183.400 is limited to the face of the rule and the law pertinent to it. Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to other forums.' Similarly, petitioners' claim of disproportionality may not be addressed in this proceeding under ORS § 183.400.

*Gilliam County v. Department of Env'tl. Quality*, 849 P.2d 500, 508-09 (Or. 1993) (citation omitted).

<sup>206</sup> *Oregon Waste Systems*, 114 S. Ct. at 1350.

<sup>207</sup> The surcharge imposed by Oregon was comprised of the following identified costs:

were incurred, Oregon was entitled to the recovery of these costs through the surcharge on out-of-state waste.

### B. *Legitimate State Interests*

The second threshold question before applying the *Pike* balancing test is whether a statute advances a legitimate state interest.<sup>208</sup> Under the Tenth Amendment, states retain their police powers to act for the health, safety, and welfare of their citizens and for the protection of the environment.<sup>209</sup> In *Georgia v. Tennessee Copper Co.*, Justice Holmes found that a state in its sovereign capacity “has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”<sup>210</sup> Similarly, in *Minnesota v. Clover Leaf*

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(1) Statewide activities for reducing environmental risk and improving solid waste management—\$.58 per ton. According to the Oregon Department of Environmental Quality (DEQ), \$.42 of this equaled the amount of general fund revenues allocated to solid waste programs, including \$.10 for domestic waste reduction activity, \$.08 for administering regulatory programs, and \$.08 for statewide solid waste management planning. The remaining \$.16 was allocable to the portion of the \$.50 fee previously assessed on domestic waste, monies similarly dedicated to waste reduction and recycling, groundwater monitoring, and planning activities by and grants to local government units for disposal and recycling.

(2) Reimbursements to the state for tax credits and other public subsidies—\$.66 per ton.

(3) Solid waste reduction activities related to the review and certification of waste reduction and recycling plans—\$.05 per ton. This charge apparently included the cost of reviewing waste reduction and recycling plans of sending jurisdictions.

(4) Increased environmental liability—\$.72 per ton. Although the DEQ estimated the likelihood of petitioners' responsibility for \$50 million worth of unfunded environmental liability at one tenth of one per cent, the EQC calculated this charge assuming a 100% probability of a \$90 million cleanup.

(5) Lost disposal capacity—\$.20 per ton. This component included environmental studies and political deliberations associated with siting new landfills.

(6) Publicly supported infrastructure—\$.03 per ton. Among the costs comprising this category were highway maintenance, additional rail crossings, and increased traffic patrolling.

(7) Nuisance impacts from transportation—\$.01 per ton. The DEQ conceded that the use of traffic accident statistics gleaned from records were the proxy for measuring loss of quiet enjoyment.

Brief of Petitioner Columbia Resource Company, L.P. at 6-7, *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345 (1994) (Nos. 93-70 and 93-108); see also *Oregon Waste Systems*, 114 S. Ct. at 1355 n.1 (Rehnquist, C.J., dissenting).

<sup>208</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>209</sup> See U.S. CONST. amend. X. The Tenth Amendment states: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

<sup>210</sup> *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

*Creamery Co.*, Justice Brennan recognized “the substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems.”<sup>211</sup> Furthermore, the Supreme Court has confirmed that the Commerce Clause did not “cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.”<sup>212</sup> The Commerce Clause may restrain, but does not preclude, a state’s authority to protect the environment.<sup>213</sup>

Solid waste collection, handling, transport, storage, and disposal pose serious environmental, health, and safety concerns that states must address.<sup>214</sup> Landfills produce leachate, a noxious and highly polluted liquid that frequently pollutes ground and surface waters.<sup>215</sup> The decomposition of solid waste at landfills produces methane, which poses a risk of explosions.<sup>216</sup> Rodents and scavenger birds attracted to landfills pose additional health hazards.<sup>217</sup> Furthermore, landfills preclude the possibility of preserving the site for conservation, adversely affect aesthetics and ecological balance, and limit future development of the property.<sup>218</sup>

Congress has explicitly recognized the potential dangers to public health from the land disposal of solid waste.<sup>219</sup> The Resource Conservation and Recovery Act (RCRA) states that the “disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the

<sup>211</sup> *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981).

<sup>212</sup> *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443–44 (1960) (quoting *Sherlock v. Alling*, 93 U.S. 99, 103 (1876)).

<sup>213</sup> The Court in *Maine v. Taylor* stated that:

the Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to ‘place itself in a position of economic isolation,’ . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

*Maine v. Taylor*, 477 U.S. 131, 151 (1986).

<sup>214</sup> See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629–30 (1978) (Rehnquist, J., dissenting).

<sup>215</sup> *Id.* at 630 (Rehnquist, J., dissenting).

<sup>216</sup> *Id.* (Rehnquist, J., dissenting).

<sup>217</sup> *Id.* (Rehnquist, J., dissenting).

<sup>218</sup> *Municipal Sanitary Landfill Auth. v. Hackensack Meadowlands Dev. Comm’n*, 293 A.2d 426, 428 (N.J. Super. Ct. App. Div. 1972).

<sup>219</sup> *City of Philadelphia*, 437 U.S. at 629–30 n.1 (Rehnquist, J., dissenting).

environment.”<sup>220</sup> RCRA also recognized that “open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land.”<sup>221</sup>

Oregon attempted to address the problems associated with the disposal of municipal solid waste with statutes that were part of a comprehensive plan to protect the environment. Oregon simply sought to make out-of-state producers pay the same amount as in-state residents for the disposal of municipal solid waste.<sup>222</sup> This plan constituted a legitimate exercise of Oregon’s police power to protect the health and safety of Oregon citizens and to preserve the environment.

The Supreme Court has recognized that a statute that imposes a compensatory fee is “not a burden upon, or regulation of, interstate commerce in violation of the Commerce Clause.”<sup>223</sup> On the contrary, “a law imposing a compensatory fee for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce is *prima facie* reasonable.”<sup>224</sup> Such a law only will be overturned if the fee is “manifestly disproportionate to the services rendered.”<sup>225</sup>

In *Interstate Transit, Inc. v. Lindsey*, for instance, the Supreme Court reviewed a Tennessee statute that imposed a tax on companies operating interstate motorbuses on state highways.<sup>226</sup> The Court noted that the state “may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating traffic

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<sup>220</sup> 42 U.S.C. § 6901(b)(2) (1988).

<sup>221</sup> *Id.* § 6901(b)(4).

<sup>222</sup> *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1356 (1994) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted in dissent that, “[t]he Court’s myopic focus on ‘differential fees’ ignores the fact that in-state producers of solid waste support the Oregon regulatory program through state income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste.” *Id.* (Rehnquist, C.J., dissenting).

<sup>223</sup> *Great N. Ry. v. Washington*, 300 U.S. 154, 160 (1937).

<sup>224</sup> *Gilliam County v. Department of Env'tl. Quality*, 849 P.2d 500, 508 (Or. 1993).

<sup>225</sup> *Id.* (quoting *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)); see also *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 720 (1972) (upholding fees which were not excessive in relation to the costs incurred and which represented a fair approximation of the use of facilities); *Ingles v. Morf*, 300 U.S. 290, 294 (1936) (holding that a fee which was designed as “reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce” did not violate the Commerce Clause).

<sup>226</sup> *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 185 (1931).

thereon.”<sup>227</sup> Such a tax must be “levied only as compensation for use of the highways or to defray the expense of regulating motor traffic.”<sup>228</sup> The tax would be “sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.”<sup>229</sup>

In *Clark v. Paul Gray, Inc.*, the Court upheld a caravanning fee imposed on each automobile traveling on state highways destined for sale either within or without California.<sup>230</sup> The fee was designed “to reimburse the State for expenses incurred in administering police regulations” regarding this activity and as “compensation for the privilege of using the public highway.”<sup>231</sup> However, the law exempted cars moved exclusively within one of two zones that were roughly defined as the northern and southern halves of California.<sup>232</sup> The Court found that the distinction between intrazone and interzone traffic was permissible because California incurred costs regarding the management of interzone traffic which were already being paid by intrazone traffic.<sup>233</sup> Furthermore, the fee was not “manifestly disproportionate to the services rendered.”<sup>234</sup>

In *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, however, the Supreme Court disregarded the compensatory fee cases, stating that they only applied to “charge[s] imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.”<sup>235</sup> The Court held that because the landfills in question were privately owned, “the out-of-state surcharge is plainly not a user fee.”<sup>236</sup> Even if the surcharge could be viewed as a user fee, it still could not be sustained because it discriminated against interstate commerce.<sup>237</sup>

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 186.

<sup>229</sup> *Id.* The Court, however, invalidated the tax because it was not “predicated upon the use made, or to be made, of the highways of the state.” *Id.* at 190. The tax was “proportioned solely to the earning capacity of the vehicle.” *Id.* As such, there was “no sufficient relation between the measure employed and the extent or manner of use to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses.” *Id.*

<sup>230</sup> *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 598 (1939).

<sup>231</sup> *Id.* at 586.

<sup>232</sup> *Id.* at 586–87.

<sup>233</sup> *Id.* at 595–98.

<sup>234</sup> *Id.* at 599.

<sup>235</sup> *Oregon Waste Sys., Inc. v. Department of Envntl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1352 n.6 (1994) (quoting *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

The *Oregon Waste Systems* Court failed to recognize the nature of solid waste disposal. Landfills and incinerators come into existence through governmental action and are regulated by the state even after they are closed. The Oregon laws were not designed to regulate conduct or impose taxes to support the government; they were based on and applied to providing a narrow range of state services that were directly connected to the activity on which the fee was imposed.<sup>238</sup> Furthermore, Oregon's \$2.25 per ton fee was a "fair approximation" of the privilege to use its landfills.<sup>239</sup> Chief Justice Rehnquist, in dissent, correctly noted that precedents only required "substantial equivalency" between the fees charged on in-state and out-of-state waste.<sup>240</sup>

### C. Benefits and Costs

Since the Oregon laws were evenhanded and advanced a legitimate local interest, the *Oregon Waste Systems* Court should have utilized the *Pike* balancing test, which requires that putative local benefits exceed any burdens imposed on interstate commerce.<sup>241</sup>

Oregon comprehensively regulates the disposal of solid waste within the state.<sup>242</sup> For example, a state permit is required to operate a solid waste disposal site.<sup>243</sup> The site must be operated in accordance with the governing laws and regulations and terms specified in the permit.<sup>244</sup> The types of materials that may be disposed of at such a facility are limited by Oregon law.<sup>245</sup> When disposal operations are

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<sup>238</sup> Gilliam County v. Department of Env'tl. Quality, 837 P.2d 955, 975-76 n.19 (1992).

<sup>239</sup> *Oregon Waste Systems*, 114 S. Ct. at 1358 (Rehnquist, C.J., dissenting) (quoting *Commonwealth Edison v. Montana*, 453 U.S. at 621).

<sup>240</sup> *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist cited *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, in which the Court stated:

[a]t least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.

*Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972).

<sup>241</sup> See *supra* note 28.

<sup>242</sup> Chief Justice Rehnquist noted in dissent that Oregon should be applauded for "responsibly attempt[ing] to address its solid waste disposal problem through the enactment of a comprehensive regulatory scheme for the management, disposal, reduction, and recycling of solid waste." *Oregon Waste Systems*, 114 S. Ct. at 1355 (Rehnquist, C.J., dissenting).

<sup>243</sup> OR. REV. STAT. § 459.205 (1992).

<sup>244</sup> *Id.* § 459.376 (1992).

<sup>245</sup> *Id.* § 459.247 (1992).



completed at a site, the owner must close the site and maintain it in accordance with specified standards.<sup>246</sup> These statutory provisions are supplemented by extensive regulations.<sup>247</sup> Oregon charges a number of different fees in connection with the regulation of solid waste disposal, including a permit application fee<sup>248</sup> and annual fees for implementing program compliance,<sup>249</sup> for recycling,<sup>250</sup> and for the removal of hazardous substances at solid waste disposal sites.<sup>251</sup> Furthermore, the county in which a disposal site is located may also impose a fee.<sup>252</sup>

In 1989, Oregon enacted two laws, to become effective in 1991, which provided that every person who disposes of solid waste generated out-of-state must pay a surcharge to help meet the cost to the state of administering the solid waste program.<sup>253</sup> The Oregon Environmental Quality Commission (EQC) set the surcharge for out-of-state waste at \$2.25 per ton.<sup>254</sup> The Oregon legislature established a surcharge on the disposal of in-state solid waste at \$.85 per ton.<sup>255</sup> Oregon asserted that the difference in fees compensated the state for the costs of solid waste disposal paid by in-state residents through their state income tax.

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<sup>246</sup> *Id.* §§ 459.268, 459.270 (1992).

<sup>247</sup> OR. ADMIN. R. 340-93-97 (1993).

<sup>248</sup> This fee "shall be based on the anticipated cost of filing and investigating the application, of issuing or denying the requested permit and of an inspection program to determine compliance or noncompliance with the permit." OR. REV. STAT. § 459.235(2) (1992). The fee ranges from \$100 to \$10,000 for solid waste disposal. *Id.*

<sup>249</sup> The fee is "based on the amount of solid waste received at the disposal site in the previous calendar year," OR. REV. STAT. § 459.235(3), and is fixed at \$.21 per ton for landfills. OR. ADMIN. R. 340-97-120(4).

<sup>250</sup> This fee is set at \$.09 per ton. OR. ADMIN. R. 340-97-120(4).

<sup>251</sup> The fee, OR. REV. STAT. § 459.236 (1992), is set at \$.13 per ton. OR. ADMIN. R. 340-97-120(5)(d).

<sup>252</sup> The amount of this fee is negotiated between the county and the site operator; in the absence of an agreement, the statute provides for a formula based on the number of tons of waste disposed of at the site. OR. REV. STAT. § 459.310 (1992).

<sup>253</sup> OR. REV. STAT. § 459.297.

<sup>254</sup> OR. ADMIN. R. 340-97-120(7). The EQC initially adopted a fee of \$2.75 per ton, but that regulation was disapproved by the state Emergency Board. OR. REV. STAT. § 459.298 (requiring Emergency Board approval during the interim between sessions of the rule promulgated by the EQC).

<sup>255</sup> OR. REV. STAT. §§ 459A.110(5), 459A.115. Concerned that courts would invalidate the surcharge on out-of-state waste and leave only in-state solid waste subject to the additional levy, the Oregon legislature in 1991 amended the statute to subject out-of-state waste to the same \$.85 per ton charge as in-state waste. OR. REV. STAT. § 459.110(6). This fee was added to the \$2.25 per ton fee, which was left in place. If the \$2.25 per ton fee was upheld by courts, the \$.85 per ton fee would again be limited to Oregon waste. 1991 Or. Laws, ch. 385, §§ 91-92; Brief

Oregon determined that since the benefits of safe solid waste disposal accrued to all Oregon citizens, costs should be spread among all citizens through the state income tax and the surcharge on the deposit of solid waste generated within the state.<sup>256</sup> Oregon assured that adequate landfill capacity would be available and promulgated regulations for the safe disposal of solid waste. Oregon could not tax out-of-state residents to fund its solid waste disposal program. Oregon did not prohibit the importation of solid waste, but simply attempted to charge out-of-state residents the same amount as in-state residents for disposal of solid waste. Consequently, Oregon residents would not be subsidizing the depletion of a state-created resource.<sup>257</sup>

The Supreme Court has recognized that states can impose reasonable restrictions on out-of-state residents' use of publicly created resources.<sup>258</sup> In 1982, the Court in *Sporhase v. Nebraska*, reviewed a Nebraska law designed to reserve the state's groundwater for Nebraska citizens in times of shortage by requiring that any withdrawal be reasonable, consistent with the state's conservation policy, and not detrimental to public policy.<sup>259</sup> The Court recognized that the Nebraska law treated in-state and out-of-state residents differently.<sup>260</sup> Nevertheless, since both intrastate and interstate transfers of groundwater were highly regulated, the Court found no discrimination against interstate commerce.<sup>261</sup> Consequently, the Court utilized

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of Respondent Oregon Waste Systems, Inc. at 27-28, *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345 (1994) (Nos. 93-70 and 93-108).

<sup>256</sup> *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1353 (1994). The Court rejected this argument stating that, "to give controlling effect to respondent's characterization of Oregon's tax scheme as seemingly benign cost-spreading would require us to overlook the fact that the scheme necessarily incorporates a protectionist objective as well." *Id.* at 1354.

<sup>257</sup> *Id.* at 1357-58 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted in dissent that: Congress also has recognized taxes as an effective method of discouraging consumption of natural resources in other contexts . . . (tax on ozone-depleting chemicals) . . . (gas guzzler excise tax) . . . Nothing should change the analysis when the natural resource—landfill space—was created or regulated by the State in the first place.

*Id.* (Rehnquist, C.J., dissenting) (citations omitted).

<sup>258</sup> *Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982).

<sup>259</sup> *Id.* at 944. The Court in *Oregon Waste Systems* narrowly interpreted its previous *Sporhase* decision, stating:

that holding was premised on several different factors tied to the simple fact of life that, 'water, unlike other natural resources, is essential for human survival.' *Sporhase* therefor provides no support for respondents' position that the States may erect a financial barrier to the flow of waste from other states into Oregon landfills.

*Oregon Waste Systems*, 114 S. Ct. at 1354 (citation omitted).

<sup>260</sup> *Sporhase*, 458 U.S. at 955.

<sup>261</sup> *Id.* at 955-56. The Court stated that:

the *Pike* balancing test to evaluate the nondiscriminatory aspects of the Nebraska law.<sup>262</sup>

The Court found that it was reasonable for Nebraska to conserve its natural resources for use by its own citizens during times of shortage for several reasons.<sup>263</sup> First, Nebraska had the right to regulate groundwater transfers to protect the health of its citizens.<sup>264</sup> Second, Nebraska had a reasonable expectation that under certain conditions it could restrict the groundwater within its borders.<sup>265</sup> Third, although Nebraska's assertion of limited public ownership did not preclude Commerce Clause scrutiny, it might support a limited preference for Nebraska's residents.<sup>266</sup> Finally, given Nebraska's conservation efforts, the continued existence of groundwater was not just happenstance. The groundwater had the "indicia of a good publicly produced and owned in which the state may favor its own citizens."<sup>267</sup>

The Oregon laws at issue in *Oregon Waste Systems, Inc. v. Department of Environmental Quality* were comparable in many respects to the Nebraska law.<sup>268</sup> First, similar to the purposes of the Nebraska law, the Oregon laws were designed to protect the health and safety of Oregon's citizens and the environment by dealing with Oregon's

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a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation.

*Id.*

<sup>262</sup> *Id.* at 954–57. The Nebraska law also provided that groundwater could not be exported to any state which lacked a reciprocity agreement with Nebraska. The Court, applying the strict scrutiny test to this provision, determined that the reciprocity violated the Commerce Clause because it erected a barrier to interstate commerce and was not narrowly tailored to meet the goals of conservation. *Id.* at 957–58.

<sup>263</sup> *Id.* at 956.

<sup>264</sup> *Id.*

<sup>265</sup> *Sporhase*, 458 U.S. at 956.

<sup>266</sup> *Id.* at 955–57.

<sup>267</sup> *Id.* at 957.

<sup>268</sup> *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1356 (1994) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted in dissent that "in *Sporhase v. Nebraska* . . . a State may enact a comprehensive regulatory system to address an environmental problem or a threat to natural resources within the confines of the Commerce Clause." *Id.* (Rehnquist, C.J., dissenting) (citation omitted). Analogizing Nebraska's restrictions on groundwater to Oregon's concerns with a "clean and safe environment," Chief Justice Rehnquist stated that, "where a State imposes restrictions on the ability of its own citizens to dispose of solid waste in an effort to promote a 'clean and safe environment,' it is not discriminating against interstate commerce by preventing the uncontrolled transfer of out-of-state solid waste into the State." *Id.* (Rehnquist, C.J., dissenting).

solid waste disposal problem.<sup>269</sup> Second, the Oregon laws and the Nebraska law were both enacted by lawmakers who legitimately expected that they possessed authority over the area regulated. RCRA recognizes that "the collection and disposal of solid waste should continue to be primarily the function of State, regional, and local agencies."<sup>270</sup> RCRA requires the EPA to establish guidelines for the development of state or regional solid waste management plans, authorizes the funding of such plans, and encourages states to develop such plans to manage their own solid waste.<sup>271</sup> The states are given broad discretion to fashion plans that comply with EPA guidelines.<sup>272</sup> RCRA implies that states should have some control over the importation of solid waste.<sup>273</sup> Otherwise, a state's solid waste plan could be frustrated by an increase in the amount of imported waste.

Another issue in common in the Oregon and Nebraska cases is that, like groundwater transfers, solid waste disposal is a highly regulated industry performing a traditional governmental function.<sup>274</sup> Oregon's rigorous oversight of this private industry was analogous to Nebraska's limited property interest in its groundwater. Finally, landfills are not natural resources which appear by happenstance, but are

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<sup>269</sup> *Id.* at 1357 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist determined, in dissent, that, "[t]he availability of environmentally sound landfill space and the proper disposal of solid waste strike me as justifiable 'safety or health' rationales for the fee." *Id.* (Rehnquist, C.J., dissenting).

<sup>270</sup> 42 U.S.C. § 6901(a)(4).

<sup>271</sup> 42 U.S.C. §§ 6941-49 (1988); see also Keith E. Johnston, Comment, *State Embargo of Solid Waste: Impermissible Isolation or Rational Solution to a Pressing Problem?*, 82 DICK. L. REV. 325, 329-33 (1978).

<sup>272</sup> H.R. REP. NO. 1491, 94th Cong., 2d Sess. pt. 1, at 33-35 (1976).

<sup>273</sup> See Allen J. Danzig, *The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision*, 11 RUT.-CAM. L.J. 31, 34-36 (1979).

The New Jersey Supreme Court stated that:

Congress itself has recognized the need for the development of comprehensive state plans for solid waste disposal and implicitly this requires the planned management of waste flow. Congress has there expressed a strong policy preference for resource recovery. Resource recovery cannot be accomplished if waste streams are not directed. The court order here recognizes local responsibilities . . . that clearly require integrated planning.

Glassboro v. Gloucester County Bd. of Chosen Freeholders, 485 A.2d 299, 303 (N.J. 1984) (citation omitted).

<sup>274</sup> Courts have recognized that the "[c]ontrol of local sanitation, including garbage collection and disposal, . . . is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment." *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981); see also *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 318-19 (1905); *Gardner v. Michigan*, 199 U.S. 325, 331 (1905); *State ex rel. Mook v. City of Cincinnati*, 163 N.E. 583, 583 (Ohio 1929), *cert. denied*, 280 U.S.

engineered facilities which require liners, leachate collectors, and operating systems.<sup>275</sup> The existence of adequate and safe solid waste disposal facilities was the result of the state's efforts.<sup>276</sup> The landfill facilities in Oregon, like the groundwater in Nebraska, were goods publicly produced to which the state could grant preference to its own citizens.<sup>277</sup> If Oregon allowed out-of-state solid waste disposal at a cost less than in-state disposal, Oregon citizens would be subsidizing the exhaustion of Oregon's own publicly created resource.<sup>278</sup>

The Oregon laws did not pose undue burdens on other states.<sup>279</sup> The financial burden imposed on out-of-state waste generators was a mere \$14 per week.<sup>280</sup> This was a small price to pay for dumping trash in a neighboring state's backyard, especially in light of the shortage of landfill capacity.<sup>281</sup>

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578 (1929); Martin E. Gold, *Solid Waste Management and the Constitution's Commerce Clause*, 25 URB. 21 (1993).

<sup>275</sup> Stanley E. Cox, *Burying Misconceptions About Trash and Commerce: Why It Is Time to Dump Philadelphia v. New Jersey*, 20 CAP. U. L. REV. 813, 820 (1991); see also Swin Resource Sys., Inc. v. Lycoming County, Pa., 883 F.2d 245, 254 (3d Cir. 1989).

<sup>276</sup> Oregon Waste Sys., Inc. v. Department of Env'tl. Quality, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1356 (1994) (Rehnquist, C.J., dissenting) (citation omitted). Chief Justice Rehnquist noted in dissent that:

[t]he availability of safe landfill disposal sites in Oregon did not occur by chance. Through its regulatory scheme, the State of Oregon inspects landfill sites, monitors waste streams, promotes recycling, and imposes an \$0.85 per ton disposal fee on in-state waste, all in an effort to curb the threat that its residents will harm the environment and create health and safety problems through excessive and unmonitored solid waste disposal.

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

<sup>277</sup> See *id.* (Rehnquist, C.J., dissenting) (citation omitted).

<sup>278</sup> *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted in dissent that:

[d]epletion of a clean and safe environment will follow if Oregon must accept out-of-state waste at its landfills without a sharing of the disposal costs. The Commerce Clause does not require a State to abide this outcome where the 'natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage.'

*Id.* (Rehnquist, C.J., dissenting) (citation omitted).

<sup>279</sup> There was a risk of some multiple taxation under the Oregon scheme. Out-of-state residents who worked in Oregon were charged twice for the disposal of their municipal solid waste. They paid first through the Oregon income tax and second through the higher out-of-state surcharge. However, this double taxation should not impair the Oregon program because out-of-state residents who pay the Oregon income tax also partly fund the Oregon Game and Fish Department, while still paying higher fees to hunt and fish in Oregon. Steve Yarbrough, Casenote, *Compensatory Fee or Protectionist Tax: Oregon's Surcharge on Out-of-State Waste*, 34 NAT. RESOURCES J. 497, 504 n.59 (1994).

<sup>280</sup> Oregon Waste Sys., Inc. v. Department of Env'tl. Quality, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1355 n.2 (1994) (Rehnquist, C.J., dissenting).

<sup>281</sup> The NGA noted:

The burden that the Oregon laws did impose on exporting states was that these states would have to assume greater responsibility for the disposal of their solid waste. If Oregon could create the landfill capacity, so could other states. Geography imposes only limited constraints on the siting of landfills, which can be located in any state.<sup>282</sup> The landfill shortage stems from the fact that some states, mostly due to political pressures, have failed to meet their municipal obligations to site such facilities. These states should not be able to transfer their burden to states like Oregon that have a rational and timely program to deal with solid waste disposal. In his dissent in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, Chief Justice Rehnquist stressed, "I see nothing in the Commerce Clause that compels less densely populated States to serve as the low-cost dumping grounds for their neighbors, suffering the attendant risks that solid waste landfills present."<sup>283</sup>

The Supreme Court in *Pike v. Bruce Church, Inc.*, held that where a legitimate local purpose exists, the question of placing a burden on interstate commerce was a matter of degree.<sup>284</sup> The Court stated that, "the extent of the burden 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."<sup>285</sup> In *Oregon Waste Systems*, the imposition of the surcharge on the disposal of out-of-state waste was the least restrictive alternative for Oregon to achieve its goals. The uniform fee urged by the petitioners in *Oregon Waste Systems* would not have allowed Oregon to structure its tax system to spread the costs incurred for the safe disposal of solid waste to its citizens, who were the direct beneficiaries of a clean environment.<sup>286</sup> Furthermore, a uniform fee would act as a subsidy

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the lack of capacity due to landfill closing is exacerbated by the difficulty of listing new disposal facilities. Since 1980 fewer than 2,000 landfills have been sited in the U.S. While this might seem large, it translates into one in twenty local governments siting a landfill during the past decade.

CURBING WASTE, *supra* note 6, at 40.

<sup>282</sup> See Cox, *supra* note 275, at 820-23; Jonathan Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement As a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567, 571-73 (1991).

<sup>283</sup> *Oregon Waste Systems*, 114 S. Ct. at 1358 (Rehnquist, C.J., dissenting); *accord* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 371 (1992) (Rehnquist, C.J., dissenting).

<sup>284</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

<sup>285</sup> *Id.*

<sup>286</sup> Reply Brief of Petitioner Columbia Resource Company, L.P. at 111-13, *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345 (1994) (Nos. 93-70 and 93-108).

from in-state residents to out-of-state disposers who did not pay for the costs of safe solid waste disposal through the state income tax.

#### IV. CONGRESSIONAL REACTION

Given the Court's hostility to state efforts to manage solid waste disposal, Congress has been forced into the controversy regarding the interstate transport of municipal solid waste. Congress can immunize state actions that would otherwise violate the Commerce Clause.<sup>287</sup> In 1992, the Senate Committee on Environment and Public Works reported a bill amending the Resource Conservation and Recovery Act, including granting state governors the power to restrict the disposal of out-of-state waste.<sup>288</sup> This bill was not considered by the full Senate. The Senate did, however, pass a bill entitled the Interstate Transportation of Municipal Solid Waste Act of 1992, which allowed state governors to prohibit or limit the importation of out-of-state municipal solid waste upon the request of the local government.<sup>289</sup> The House of Representatives, however, did not enact comparable legislation, and the bill died.<sup>290</sup>

Similar efforts commenced in 1993.<sup>291</sup> President Clinton expressed his support for a bill that would allow states to control the importation of solid waste.<sup>292</sup> In the 103d Congress, nine bills were introduced into the House of Representatives that either prohibited the importation of solid waste or authorized additional fees for the disposal of out-of-state solid waste.<sup>293</sup> In the second session of the 103d Congress, the House Energy and Commerce Committee issued a report on the State and Local Government Interstate Waste Control Act of 1994 (the House bill),<sup>294</sup> which was designed to reverse the Court's *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Re-*

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<sup>287</sup> *Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 174-75 (1985).

<sup>288</sup> S. REP. No. 301, *supra* note 2, at 1, 72.

<sup>289</sup> S. 2877, 102d Cong., 2d Sess. (1992); *Senate Passes Bill to Allow Governors to Restrict Interstate Transport of Garbage*, 23 Env't Rep. (BNA) No. 14, at 1099 (July 31, 1992).

<sup>290</sup> *RCRA Bill Dies As Congress Nears Adjournment; Senator Says House 'Puts Politics Over Policy'*, 23 Env't Rep. (BNA) No. 24, at 1540 (Oct. 9, 1992).

<sup>291</sup> *First Two Days of 103rd Congress See Introduction of No Environmental Bills*, 23 Env't Rep. (BNA) No. 38, at 2352 (Jan. 15, 1993).

<sup>292</sup> *See Coats, Wyder Join Forces On Bills to Allow State Bans of Waste Imports*, 23 Env't Rep. (BNA) No. 45, at 2873 (Mar. 5, 1993).

<sup>293</sup> H.R. REP. NO. 720, *supra* note 8, at 11.

<sup>294</sup> H.R. 4779, 103d Cong., 2d Sess. (1994).

*sources* decision.<sup>295</sup> The House bill, which granted state and local governments some control over the importation of municipal solid waste, passed overwhelmingly by a vote of 368 to 55.<sup>296</sup>

The House bill granted local governments primary authority to control the importation of solid waste.<sup>297</sup> Landfills and incinerators needed permission from local governments to import out-of-state solid waste. Upon the request of local government, a state governor could limit the importation of out-of-state solid waste to the landfill or incinerator in the local jurisdiction to 1993 levels, with some exceptions.<sup>298</sup> Furthermore, if a state imported more than 750,000 tons of municipal solid waste in 1993, the state could reduce, by defined percentages, the amount of municipal solid waste imported from exporting states.<sup>299</sup>

The House bill specifically addressed the problem presented in *Oregon Waste Systems, Inc. v. Department of Environmental Quality* by allowing states to impose a surcharge for the disposal of some out-of-state solid waste.<sup>300</sup> The surcharge was based on the state's costs, but could not exceed \$2 per ton. The state was required to show that 1) the costs were incurred; 2) without the surcharge the state's residents would be subsidizing the disposal of out-of-state solid waste; and 3) the costs were compensatory, not discriminatory.<sup>301</sup> Furthermore, the fee had to be invested in the state's solid waste program.<sup>302</sup>

The Senate Committee on Environment and Public Works took a different approach. The Committee issued a report on the Interstate Transportation of Municipal Solid Waste Act of 1994,<sup>303</sup> which granted more authority to state governors.<sup>304</sup> If requested by local government, a governor could ban out-of-state municipal waste at landfills

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<sup>295</sup> H.R. REP. NO. 720, *supra* note 8, at 10; see *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 367-68 (1992).

<sup>296</sup> 140 CONG. REC. H9938-39 (daily ed. Sept. 28, 1994); *House Passes Interstate Transport Bill After Reaching Compromise Among Factions*, 25 Env't Rep. (BNA) No. 22, at 1118-19 (Sept. 30, 1994).

<sup>297</sup> H.R. REP. NO. 720, *supra* note 8, at 12.

<sup>298</sup> *Id.* at 17.

<sup>299</sup> *Id.* at 14-18.

<sup>300</sup> *Id.* at 19.

<sup>301</sup> *Id.*

<sup>302</sup> H.R. REP. NO. 720, *supra* note 8, at 19.

<sup>303</sup> S. 2345, 103d Cong., 2d Sess. (1994).

<sup>304</sup> S. REP. NO. 322, 103d Cong., 2d Sess. 4-6 (1994).



and facilities that did not receive such waste in 1993.<sup>305</sup> Under the bill, a governor could thus unilaterally freeze municipal solid waste imports to landfills and facilities at 1993 levels.<sup>306</sup> Furthermore, a governor could decrease the flow of out-of-state municipal solid waste received from any state exporting more than certain aggregate amounts of solid waste in designated years. A governor could also decrease the flow of out-of-state solid waste imported from any particular state if the imports from that state exceeded statutorily defined limits.<sup>307</sup> The Senate passed the bill by a voice vote on September 30, 1994.<sup>308</sup>

In the closing days of the 103d Congress in 1994, the House of Representatives worked out a compromise measure sponsored by Representative Al Swift (D-Wa.). Under the compromise, landfills and incinerators were barred from accepting out-of-state solid waste beginning January 1, 1995, unless the local government took affirmative action to accept such waste.<sup>309</sup> At the local government's request, the state governor could restrict the importation of out-of-state solid waste to 1993 levels. The House compromise included the Senate's provisions granting gubernatorial control regarding export and import limitations on solid waste, as well as the cost-recovery surcharge provisions.<sup>310</sup> On October 7, 1994, the House approved the compromise bill.<sup>311</sup> However, on October 8, 1994, the Senate rejected the compromise measure.<sup>312</sup>

Reconsideration of interstate waste restrictions began in the 104th Congress. On April 5, 1995, the Senate Environment and Public Works Committee issued a favorable report on the Interstate Transportation of Municipal Solid Waste Act of 1995,<sup>313</sup> which amends the Solid Waste Disposal Act (SWDA).<sup>314</sup> This bill grants state governors unilateral power to restrict the importation of municipal solid waste to 1993 levels and to ban future imports to facilities that did not receive such waste in 1993 at the request of the affected local commu-

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<sup>305</sup> *Id.* at 4.

<sup>306</sup> *Id.* at 4-5.

<sup>307</sup> *Id.* at 6-12.

<sup>308</sup> *Senate Passes Interstate Waste Bill; Prospects for Final Approval Uncertain*, 25 *Env't Rep.* (BNA) No. 23, at 1148 (Oct. 7, 1994).

<sup>309</sup> 140 CONG. REC. H11401 (daily ed. Oct. 7, 1994).

<sup>310</sup> 140 CONG. REC. H11403 (daily ed. Oct. 7, 1994).

<sup>311</sup> 140 CONG. REC. H11398-407 (daily ed. Oct. 7, 1994).

<sup>312</sup> *Final Efforts on Interstate Transport, Municipal Floor-Control Measure Fall Short*, 25 *Env't Rep.* (BNA) No. 24, at 1174-75 (Oct. 14, 1994).

<sup>313</sup> S. 534, 104th Cong., 1st Sess. (1995); see generally S. REP. NO. 52, *supra* note 7.

<sup>314</sup> 42 U.S.C. §§ 6901-22k.

nity.<sup>315</sup> The bill includes an import provision to ensure that no single state is forced to accept excessive amounts of municipal solid waste from any particular state,<sup>316</sup> and an export provision that reduces the amount of solid waste exported from any particular state.<sup>317</sup> Furthermore, the bill allows the states that charged additional fees for the disposal of out-of-state solid waste before April 3, 1994, to impose a fee of no more than \$1 per ton as long as the fee is utilized to fund solid waste management programs administered by such states.<sup>318</sup>

Although the import restrictions considered by the 103d and 104th Congresses are a step in the right direction, they do not go far enough. Under the SWDA,<sup>319</sup> states are authorized to develop comprehensive solid waste management plans. Congress should amend the SWDA to allow states, as part of their solid waste management plans, to ban the disposal of out-of-state solid waste, or at least allow states to charge a greater fee for its disposal.<sup>320</sup> Congress followed a similar

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<sup>315</sup> S. REP. NO. 52, *supra* note 7, at 13.

<sup>316</sup> See *id.* at 10. Section 4011(a)(3)(A) allows a governor to unilaterally restrict out-of-state solid waste from any one state in excess of the following levels: in 1996, more than 1.4 million tons or 90% of the 1993 levels of such waste exported to such state, whichever is greater; in 1997, 1.3 million tons or 90% of the 1996 levels of such waste exported to such state, whichever is greater; in 1998, 1.2 million tons or 90% of the 1997 levels of such waste exported to such state, whichever is greater; in 1999, 1.1 million tons, or 90% of the 1998 levels of such waste exported to such state, whichever is greater; in 2000, 1 million tons; in 2001, 800,000 tons; and in 2002, and each year thereafter, 600,000 tons. *Id.*

<sup>317</sup> See S. REP. NO. 52, *supra* note 7, at 10. Section 4011(a)(3)(A) allows a governor to ban out-of-state municipal solid waste from any state exporting more than 3.5 million tons of municipal solid waste in 1996; 3 million tons in 1997 and 1998; 2.5 million tons in 1999 and 2000; 1.5 million tons in 2001 and 2002; and 1 million tons of solid waste in 2003 and every year thereafter. *Id.*

<sup>318</sup> See S. REP. NO. 52, *supra* note 7, at 16–17. Section 4011(d) provides grandfather authority for the imposition of cost recovery surcharges. The imposition of the surcharge is conditioned upon the state's ability to demonstrate that a differential cost arises from the processing of disposal of out-of-state waste, that such costs would otherwise have to be paid by the state, and that the surcharge is compensatory and not discriminatory. A state may not assess a surcharge if the cost that this surcharge is intended to cover is otherwise recovered by another surcharge or tax assessed against solid waste. The state bears the burden of proof that the fee satisfies the above conditions. *Id.*

<sup>319</sup> 42 U.S.C. §§ 6941–49a.

<sup>320</sup> The NGA recommended that:

Congress should waive Commerce Clause restrictions and allow states to establish—without prior approval—special fees on imported solid waste. The fees should be high enough that the waste exporter pays as much to export the waste as to dispose of it in-state, not including transportation expenses. If such a system fails to resolve interstate waste disputes, the federal government should examine other long-term options, including the use of arbitration, special fines on egregious waste exporters, and limits on the amount of waste states can ship beyond their borders.

CURBING WASTE, *supra* note 6, at 35.

path before in a related area in the Low-Level Radioactive Waste Policy Amendments Act of 1985,<sup>321</sup> a law validated, in part, by the Supreme Court in *New York v. United States*.<sup>322</sup> Congress similarly should employ this state-control approach to allow states to counter their waste problems.

## V. CONCLUSION

The Supreme Court in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, like other battles in the waste war, utilized the dormant Commerce Clause to “tie the hands of the States in addressing the vexing national problem of solid waste disposal.”<sup>323</sup> The Court’s decision will encourage out-of-state generators to “produce solid waste with reckless abandon and avoid paying concomitant state taxes to develop new landfills and clean up retired landfill sites.”<sup>324</sup> The Court’s decision also imposed a burden on Oregon citizens because “[t]hey alone will have to pay the ‘nondisposal’ fees associated with solid waste: landfill siting, landfill clean-up, insurance to cover environmental accidents, and transportation improvement costs associated with out-of-state waste being shipped into the State.”<sup>325</sup> The Court thus presented states with a Hobson’s choice: “become a dumper and ship as much waste as possible [in]to a less populated State,

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<sup>321</sup> The Low-Level Radioactive Waste Policy Amendments Act of 1985 requires the states, either individually or through regional compacts, to manage the disposal of low level radioactive waste generated within their borders. The Act provides three incentives to encourage state compliance. First, states with disposal sites can impose a surcharge on the waste received from other states. The Secretary of Energy receives a percentage of the surcharge, which is dispensed to the states after they achieve certain milestones in the development of their own radioactive waste disposal sites. Second, states with disposal sites can increase the cost of access to their sites, and eventually deny any access to the states not complying with the federal deadlines. Third, the states, failing to deal with the disposal of their internally generated low level radioactive wastes according to the federal guidelines, are required, upon request of the owners of the waste, to take title to and possession of the waste, or become liable for damages incurred by the generators resulting from the states’ failure to take title. Pub. L. No. 99-240, 99 Stat. 1842, 42 U.S.C. § 2021 (1988).

<sup>322</sup> In 1992, the Supreme Court, in *New York v. United States*, found that the monetary and access incentives were legitimate exercises of congressional Commerce Clause and Taxing and Spending Clause authority. *New York v. United States*, 505 U.S. 144, 169-73 (1992). The Court, however, invalidated the take-title provisions, holding that they either exceeded Commerce Clause authority or intruded upon state sovereignty. *Id.* at 171-73.

<sup>323</sup> See *Oregon Waste Sys., Inc. v. Department of Env’tl. Quality*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1345, 1355-56 (1994) (Rehnquist, C.J., dissenting).

<sup>324</sup> See *id.* at 1357 (Rehnquist, C.J., dissenting).

<sup>325</sup> *Id.* (Rehnquist, C.J., dissenting).

or become a dumpee, and stoically accept waste from more densely populated States.”<sup>326</sup>

Congress must act in concert to settle the waste war. Congress should allow the states to ban out-of-state solid waste or charge a higher fee for its disposal. Otherwise, the states will “undoubtedly continue to search for a way to limit their risk from sites in operation.”<sup>327</sup> These efforts will generate additional litigation which will “work to the principal advantage only of those states that refuse to contribute to a solution.”<sup>328</sup> Ultimately, states must be allowed to legislate freely in the area of waste disposal and to develop palatable solutions to the shortage of available landfill.

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<sup>326</sup> *Id.* (Rehnquist, C.J., dissenting).

<sup>327</sup> *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 351 (1992) (Rehnquist, C.J., dissenting).

<sup>328</sup> *Id.* (Rehnquist, C.J., dissenting).