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Compensatory Fee or Protectionist Tax: Oregon's Surcharge on Out-of-State Waste

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CASENOTE

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INTRODUCTION

Like the magician who makes a rabbit disappear from his hat, the average American places a sack of garbage on the curb, and with a poof and roar of an engine, the trash magically disappears. Unfortunately, the magic is but an illusion. Contrary to popular view, the trash must go somewhere. As landfills in many states reach maximum capacity, state and city officials wonder where their trash will go.[1]

Densely populated states often export their solid waste to other "host" states rather than construct more landfills within their own state.[2] New York's garbage exports have increased by 400 percent over the last five years. In 1991, New York closed 50 landfills without opening any new facilities.[3] Although states are generally loath to accept out-of-state waste, over 15 million tons of garbage are transported over state lines each year.[4] Recent United States Supreme Court decisions holding that commerce in garbage is subject to Commerce Clause protection have rendered states powerless to prevent importation of out-of-state garbage.[5]

A host state must provide regulation and environmental monitoring of all solid waste disposed of within its borders, irrespective

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1. W. Kovacs & A. Anderson, *States as Market Participants in Solid Waste Disposal Services--Fair Competition or the Destruction of the Private Sector?*, 18 Envtl. Law 779, 783 (1988).

2. 139 Cong. Rec. S2090-93 (Feb. 25, 1993) (statement of Sen. Coats).

3. *Id.*

4. A. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 Minn. L. Rev. 1219 (1992) (citing *Shipping Out the Trash*, 18 Envtl. Forum, Sept./Oct. 1991, at 28).

5. *E.g.*, City of Philadelphia v. New Jersey 437 U.S. 617 (1978). A bill which would allow states to ban importation of out of state garbage was passed by the Senate in 1992, but did not clear the House of Representatives. 139 Cong. Rec. S2090-01, S2096 (Feb. 25, 1993) (statement of Sen. Mathews). The bill has again been presented and is pending before the 103rd Congress. *Id.* Under the "market participant" exception to "dormant" Commerce Clause principles, states may be able to ban out-of-state waste from public landfills. *See* Ft. Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S.Ct. 2019, 2023 (1992). This article considers the constitutionality of surcharges placed on out-of-state waste deposited in private, rather than public landfills. Because the market participation theory does not apply to private landfills, the market participation theory will not be considered in this article.

of the source of the waste.[6] As an increasing proportion of landfill space within host states is taken up by out-of-state garbage, host states are attempting to establish compensatory mechanisms under which exporting states must pay their share of regulatory and environmental monitoring costs without running afoul of Commerce Clause principles.[7]

Solid waste disposal inherently generates regulatory costs.[8] Host states argue that outside states should pay for the environmental and regulatory costs associated with out-of-state waste deposited within a host state's borders.[9] If host states are forced to accept out-of-state garbage but are not allowed to collect fees for out-of-state garbage costs, host states will effectively be forced to pay regulatory costs created by another state's activities.

Host states often have large land resources and small populations.[10] Therefore, host states do not have the tax base to pay for garbage disposal costs they did not create.[11] The people who produce the waste should pay for costs associated with disposal of that waste. It is well settled that "interstate commerce may constitutionally be made to pay its way."[12] The real issue is how interstate commerce will be charged for its share of the costs associated with solid waste disposal.[13] States often prefer to pay for regulatory costs associated with in-state waste disposal through the state's general tax base.[14] Because producers of out-of-state waste generally do not contribute to a host state's tax base, however, some host states try to recover regulatory costs of out-of-state

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6. *See* Gilliam County v. Department of Environmental Quality, 837 P.2d 965, 973 (Or. Ct. App. 1992).

7. *Id.*

8. As used in the rest of this paper, regulatory costs will include costs for solid waste management, issuing new and renewal permits for solid waste disposal sites, environmental monitoring, ground water monitoring, and site closure and post-closure activities. These are the regulatory costs listed under Or. Rev. Stat. § 459.298 (1992).

9. Brief for Respondents at 9, Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon, 849 P.2d 500 (Or. 1993), *cert. granted*, 114 S.Ct. 38 (Sept. 28, 1993) (No. 93-70 & 93-108).

10. This fact is self-evident. Densely populated urban states do not have the same potential landfill space as do states with large areas of relatively unoccupied land.

11. Imagine if Wyoming, with less than 500,000 residents, was forced to pay the regulatory and environmental monitoring costs produced by the over 18 million residents of New York. 1990 U.S. Census.

12. Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

13. The petitioners in *Oregon Waste Systems*, even while trying to invalidate Oregon's surcharge, agree that Oregon is entitled to compensation for regulatory costs associated with out-of-state waste. Petitioners challenge the manner in which Oregon is attempting to gain this compensation. Brief for Petitioners at 18, *Oregon Waste Systems*, 849 P.2d 500.

14. *See Oregon Waste Systems*, 849 P.2d 500, 505; Government Suppliers Consolidating Services, Inc. v. Bayh, 975 F.2d 1267, 1271-72 (7th Cir. 1992).

waste through "compensatory surcharges" on out-of-state waste.[15] The constitutionality of Oregon's attempt to establish such a surcharge, currently pending before the United States Supreme Court in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, is the subject of this casenote.[16]

BACKGROUND OF *OREGON WASTE SYSTEMS*

The Oregon legislature established a $2.25 compensatory surcharge on every ton of out-of-state waste imported into the state.[17] Regulatory costs for in-state waste are to be paid through general taxes, and an 85 cent surcharge.[18]

Private landfill owners and exporters of out-of-state garbage challenged the constitutionality of Oregon's regulation, arguing that taxing resident landfill users through a different mechanism than non-resident landfill users is facially discriminatory and protectionist, raises a potential for state bias, and serves to isolate the state from the rest of the Union.[19] Such a statute, petitioners argue, violates the Commerce Clause of the United States Constitution.[20] Petitioners suggest that Oregon could impose a uniform surcharge on in-state and out-of-state waste and thereby achieve its statutory goal in a non-discriminatory fashion.[21]

Oregon justifies its compensatory surcharge on out-of-state garbage by noting that state residents already pay the regulatory costs associated with indigenous solid waste through their general state

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15. *See Oregon Waste Systems*, 849 P.2d 500, 505; *Government Suppliers Consolidating Services*, 975 F.2d at 1271-72.

16. 849 P.2d 500.

17. Or. Admin. R. 340-61-120(6) provides: "Each solid waste disposal site or regional solid waste disposal site that receives solid waste generated out-of-state shall submit tot he Department of Environmental Quality a per-ton surcharge of $2.25. This surcharge shall apply to each ton of out-of-state waste received at the disposal site[.]" *Oregon Waste Systems*, 849 P.2d at 503 (quoting Environmental Quality Commission, Or. Admin. R. 340-61-120(6)).

"The amount of the surcharge shall be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for . . . 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." Or. Rev. Stat. § 459.298.

18. Brief for Respondents at 9, *Oregon Waste Systems*, 849 P.2d 500.

19. Brief for Petitioners at 8-10.

20. *Id.*

21. *Id.* at 10.

taxes.[22] Because the surcharge fairly serves a compensatory function, Oregon argues that the surcharge is not discriminatory.[23]

The procedural route through which petitioners challenge Oregon's statute limits the degree to which the Court may review Oregon's statute.[24] This case arose on an original petition filed in the Oregon Court of Appeals, challenging the validity of the Environmental Quality Commission's rules governing disposal of solid waste.[25] The petition procedure allowed the court only to determine the facial validity of the rule, the authority of the agency to act, or compliance with applicable rulemaking procedures.[26] As the Oregon Supreme Court stated, "[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 inquiries."[27] In other words, the court did not ask whether Oregon's surcharge would more fairly equate costs paid by in-state and out-of-state waste producers if the surcharge was set at $2.00 or $3.00 rather than at the current rate of $2.25.[28]

While the appellate courts were essentially limited to a review of the statute on its face, the courts were free to delve below the surface in determining whether the mere existence of Oregon's statute is unfairly prejudicial to out-of-state waste.[29] The appellate courts were free to examine provisions of the statute and rules to determine whether, under any surcharge on out-of-state waste, the statute could be evenhanded.[30] While the appellate courts could not engage in a classic "as applied" analysis, because the courts had no facts before them, the courts were able to view the statute in a posture that presumed the statute could be applied in an evenhanded way.[31]

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22. Brief for Respondents at 9.

23. *Id.* Oregon claims the surcharge on out-of-state waste is fairly related equated to the cost of regulating out-of-state waste, and that Oregon residents and non-residents ultimately pay a similar regulatory cost for each ton of trash deposited in Oregon landfills. Brief for Respondents at 5-6, 23-24.

24. *Oregon Waste Systems*, 849 P.2d at 508-09.

25. *See id.* at 502-04.

26. Or. Rev. Stat. § 183.400. The court reviewing Oregon's statute may only declare the rule invalid if the rule "(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. § 183.400(4).

27. *Oregon Waste Systems*, 849 P.2d at 508-09.

28. *Id.*

29. *Id.* at 507-509.

30. *Id.*

31. *Id.*

Both the Oregon Court of Appeals and the Oregon Supreme Court found Oregon's statute to be a constitutional means of recovering regulatory costs for disposal of waste within Oregon's borders.[32] The Oregon Supreme Court concluded that Oregon's statute "and its implementing regulations constitutes a 'compensatory' fee for specific costs incurred by the state in the regulation of [out-of-state] waste."[33] Based on the surcharge's "express nexus to actual costs incurred," the court determined that Oregon's statute providing for the surcharge was neither discriminatory nor protectionist.[34]

The holding of the Oregon Supreme Court conflicts with an earlier decision by the Seventh Circuit Court.[35] The Seventh Circuit determined that different means of collecting regulatory costs for in-state and out-of-state waste is protectionist and violates the Commerce Clause.[36] The United States Supreme Court granted certiori in *Oregon Waste Systems*, argument was heard on January 18, and resolution of this conflict by the Court is expected this Spring.[37]

APPLICABLE METHODS OF ANALYSIS

The "dormant" Commerce Clause analysis has been described by the Supreme Court as a "quagmire" of judicial responses.[38] The many tests and seemingly contradictory case outcomes which comprise "dormant" Commerce Clause jurisprudence make for a legal enigma. It may well be that the result in *Oregon Waste Systems* will turn on whether the Court defines Oregon's surcharge as most similar to a compensatory fee, a compensatory tax, or a flat tax. The categorization of the surcharge will determine whether the Court uses a deferential level of scrutiny

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32. *Gilliam County*, 837 P.2d 965; *Oregon Waste Systems*, 849 P.2d 500.

33. *Oregon Waste Systems*, 849 P.2d at 508.

34. *Id.*

35. *Compare Government Suppliers Consolidating Services*, 975 F.2d 1267, with *Oregon Waste Systems*, 849 P.2d 500.

36. *Government Suppliers Consolidating Services*, 975 F.2d at 1284. Indiana's statute set a fee determined by the Solid Waste Management Board to "be set at an amount necessary to offset the costs incurred by the state or a county, a municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of the solid waste in Indiana." *Id.* at 1272, (quoting Ind. Code § 13-9.5-5-1 (b)).

37. 62 U.S.L.W. 3419 (U.S. Dec. 21, 1993) (Nos. 93-70 & 93-108), *cert. granted*, 114 S.Ct. 38 (Sept. 28, 1993).

38. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457-58 (1959). The "dormant" Commerce Clause relates to commerce issues where Congress has not spoken—regulation of "dormant" commerce clause issues is done entirely through the judiciary.

established in *Pike v. Bruce Church*,[39] or the strict scrutiny "per se rule of invalidity" developed in later cases.

Surcharge Not Governed By Tax Cases

The constitutionality of Oregon's surcharge will depend in part upon whether the Court considers the surcharge to be a compensatory fee or a tax levied only upon out-of-state garbage.[40] The Court has recognized the validity of compensatory fees, and has distinguished these fees from discriminatory general revenue taxes which are not constitutionally permissible.[41]

The Oregon Court of Appeals, which found Oregon's surcharge constitutionally valid, further distinguished between a compensatory fee and a compensatory tax.[42] The court explained that a compensatory tax is a general revenue raising device "intended to equalize the tax burden between substantially similar interstate and intrastate transactions."[43] A tax on goods purchased out-of-state equivalent to the state's sales tax on goods purchased in-state is an example of a compensatory tax.[44] A compensatory fee, on the other hand, is levied by a state to allow the state to be reimbursed for the costs of a specific action.[45] The Oregon Supreme Court cited a string of United State Supreme Court cases in finding that

> "[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.(citation omitted). Such a law violates the Commerce Clause only where the amount of the fee is 'manifestly disproportionate to the services rendered.'"[46]

Oregon Waste Systems held that Oregon's surcharge most closely fits the definition of a compensatory fee.[47] Oregon's surcharge is designed to

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39. 397 U.S. 137 (1970).

40. *Gilliam County*, 837 P.2d at 975.

41. *See* Commonwealth Edison Company v. Montana, 453 U.S. 609, 622 n.12 (1981) (distinguishing between general revenue taxes and "user" taxes designed to compensate states for specific charges).

42. *Gilliam County*, 837 P.2d at 975 n.18.

43. *Id.*

44. *Id.*

45. *See Commonwealth Edison Company*, 453 U.S. at 622 n.12 (recognizing that considerations applicable to ordinary tax cases do not apply to compensatory taxes); *Gilliam County*, 837 P.2d at 975 n. 18.

46. *Oregon Waste Systems*, 849 P.2d at 508 (quoting Clark v. Paul Gray, Inc., 306 U.S. 583, 599 (1939).

47. 837 P.2d at 976; 849 P.2d at 508.

compensate the state for a specific event rather than to add to Oregon's general tax base. If the Court defines Oregon's surcharge as a compensatory fee and accepts *Clark v. Paul Gray* as controlling, the Court should find Oregon's surcharge to be constitutionally valid. Whether Oregon's surcharge is "manifestly disproportionate to the services rendered" is not before the Court.[48] Thus, under *Clark v. Paul Gray*, the only determination through which a compensatory fee may be struck down is not before the Court.

Oregon must also distinguish its surcharge from cases concerning flat taxes. The Supreme Court in *American Trucking Ass'n v. Scheiner* rejected Pennsylvania's attempt to impose a flat tax on out-of-state trucks of a specific weight.[49] Oregon's surcharge in *Oregon Waste Systems*, however, can be distinguished from the tax in *American Trucking Ass'n* on three grounds.

First, Pennsylvania attempted to justify the tax on grounds that out-of-state truckers should be charged for using Pennsylvania roads.[50] Pennsylvania reasoned that the charge should only be levied on out-of-state truckers because in-state truckers paid costs associated with in-state trucker use through yearly registration fees on Pennsylvania registered trucks.[51] Pennsylvania did not, however, show or attempt to show that the tax on out-of-state truckers related to the state's cost of maintaining the roads.[52] The tax was a flat tax on out-of-state truckers, unrelated to the amount an out-of-state trucker used Pennsylvania roads or cost the state through use of the roads.[53] Oregon's surcharge, on the other hand, is based on the amount of out-of-state trash dumped and the regulatory costs associated with the trash dumped.[54]

Second, Pennsylvania's truck tax was levied directly upon out-of-state truckers who competed against in-state truckers.[55] Oregon's surcharge, however, is placed upon out-of-state trash, not upon out-of-state trash haulers.[56] A hauler of out-of-state trash would have to pay a $2.25 surcharge on each ton of trash deposited, regardless of state residence. An in-state trash hauler has to pay an $0.85 surcharge on each ton of trash deposited, irrespective of state residence. In-state and out-of-

48. Or. Rev. Stat. § 183.400. The "proportionality to services rendered" has never before been reviewed by a fact-finding body. The constitutional analysis is whether the surcharge is valid, assuming it is fairly apportioned.

49. 483 U.S. 266 (1987).

50. *Id.* at 287.

51. *Id.* at 268-70.

52. *Id.* at 287, 290.

53. *Id.* at 290.

54. Or. Rev. Stat. § 459.298.

55. *American Trucking Ass'n*, 483 U.S. at 273.

56. Brief for Respondents at 9, *Oregon Waste Systems*, 849 P.2d 500.

state trash haulers have to pay the same fees for the same trash hauled. As a result, Oregon's statute does not necessarily give a competitive advantage to either in-state or out-of-state trash haulers.

Third, Pennsylvania's scheme was found to be protectionist because the tax threatened truckers with multiple taxation.[57] If other states followed Pennsylvania's lead, a trucker would have to pay taxes for each state the trucker entered, regardless of how often or for how many miles. The Court determined that such multiple taxation would impede the flow of interstate commerce, and invalidated Pennsylvania's flat tax.[58] Oregon's statute does not threaten the same multiple taxation.[59] Oregon's surcharge is placed upon a load of waste which will be permanently dumped in Oregon. The same trash is not dumped, then picked up and re-dumped in several states. Thus, Oregon's surcharge is distinct from the flat tax struck down by the Court in *American Trucking Ass'n*, and principles of apportionment in *American Trucking Ass'n* are not applicable to *Oregon Waste Systems*. Traditional tax cases can be further distinguished from the issue in *Oregon Waste Systems*, because the tax cases do not focus on issues of protectionism and economic isolation—the alleged harm of Oregon's surcharge.[60]

Case Precedent Allowing Compensatory Surcharges

The Court in *American Trucking Ass'n* did, however, indicate its reluctance to monitor an endless array of state surcharges.[61] The Court noted that "'[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax

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57. *American Trucking Ass'n*, 483 U.S. at 292.

58. *Id.*

59. Under Oregon's scheme, however, a small amount of multiple taxation may still occur. Non-residents working in Oregon will have to contribute to Oregon's general tax base, part of which will go to regulatory costs of in-state trash deposited in Oregon landfills. When these people deposit trash in Oregon landfills, they must pay for these regulatory costs again through a higher out-of-state surcharge. Brief for Petitioners at 26, *Oregon Waste Systems*, 849 P.2d 500. Nonetheless, this double taxation will probably not be impair Oregon's statute. These same people's taxes also partly fund Oregon's Game and Fish Department, and the non-residents must still pay higher fees to hunt and fish in Oregon.

60. *See* Analysis of Oregon's Statute *infra*. As a result, the *Complete Auto Transit Test*, Complete Auto Transit v. Brady, 430 U.S. 274 (1977), and other tax tests will probably not be used in analyzing the constitutionality of Oregon's statute. *Ft. Gratiot Sanitary Landfill, Chemical Waste Management, Government Suppliers Consolidating Services*, and *Oregon Waste Systems*, all failed to analyze the surcharge in question with the *Complete Auto Transit* or other traditional tax tests.

61. 483 U.S. at 289.

burdens.'"[62] The Court's reluctance to compare disparate tax systems is clear—especially when an easy non-disparate tax system exists.[63]

A long line of United States Supreme Court precedence shows that the Court has been willing to support compensatory state surcharges—that interstate commerce must pay its fair share of a state's costs attributable to the interstate commerce.[64] When a state wished to inspect the quality of food coming into the state for health purposes, the Court actually **suggested** that states "charge the actual and reasonable cost of such inspection to the importing producers and processors."[65] If the Court agrees that Oregon's surcharge is levied for the legitimate purpose of gaining compensation for regulatory costs, these cases indicate the Court should allow Oregon's surcharge.

In *Interstate Transit, Inc. v. Lindsey*, the Court indicated that a state could be reimbursed by non-resident highway users for the fair costs of constructing and maintaining the highway.[66] The Court wrote that states "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 the traffic thereon."[67] While the particular tax in *Interstate Transit* was struck down, language from the Court indicates that states are permitted to have **residents** pay highway construction and regulation costs through general taxes and have **non-residents** pay their share of these costs through a separate surcharge.[68] Under *Interstate Transit* Oregon should also be able to have in-state waste

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62. *Id.* (quoting J. Hellerstein, 1 State Taxation: Corporate Income and Franchise Taxes § 4.12[5], at 150 (1983)).

63. Although the principle holding of *American Trucking Ass'n* does not apply to *Oregon Waste Systems*, language from *American Trucking Ass'n* can be used to show the Court's reluctance to compare disparate tax systems.

64. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981); Maryland v. Louisiana, 451 U.S. 725 (1981). Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972); Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Great Northern Railway Co. v. Washington, 300 U.S. 154 (1937); Ingles v. Morf, 300 U.S. 290 (1937); Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931). The Court has stated:

> The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution. A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is prima facie reasonable.

Great Northern Railway Co. v. Washington, 300 U.S. at 160 (1937).

65. Dean Milk Co. v. Madison, 340 U.S. 349, 354-55 (1951).

66. 283 U.S. at 185.

67. *Id.*

68. *Id.* at 186.

haulers pay for regulatory costs through general taxes while haulers of out-of-state waste pay the costs through a surcharge. *Interstate Transit* is supported by *Ingles v. Morf* which said a fee burdening interstate commerce may be justified by showing that it is "reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce."[69] Thus, while the Court may be reluctant to encourage compensatory state surcharges, it seems to have already opened the door to these surcharges through previous decisions.

Protectionist Considerations: Appropriate Scrutiny

The level of scrutiny with which the Court chooses to review Oregon's statute will be critical to the outcome of *Oregon Waste Systems*. In previous "dormant" Commerce Clause cases, the Court has used the *Pike* balancing test as a tool for determining the proper level of scrutiny upon statutory review. The *Pike* test states:

> Where 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.[70]

The threshold consideration under a *Pike* analysis is whether a statute is evenhanded; lack of evenhandedness raises the specter of protectionism.[71] The Court, however, has not made clear whether the question of

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69. 300 U.S. at 294.

70. Philadelphia v. New Jersey, 437 U.S. at 624 (quoting *Pike*, 397 U.S. at 142).

71. Whether Oregon's statute is evenhanded will be the most crucial element of the Pike test. The elements of local purpose, burden on interstate commerce, and availability of an alternative with less impact will not be crucial in the outcome of *Oregon Waste Systems*. Petitioners have already conceded that Oregon has a legitimate public interest in regulating outside trash and protecting its environment. Brief for Petitioners at 18, *Oregon Waste Systems*, 849 P.2d 500. The Court also found that New Jersey, Alabama, and Michigan's statutes served legitimate public interests, and the Court found each of those statutes unconstitutional because they were protectionist. Philadelphia v. New Jersey, 437 U.S. at 626-27, *Chemical Waste Management*, 112 S.Ct. at 2013, *Ft. Gratiot Sanitary Landfill*, 112 S.Ct. at 2024.

The burden Oregon's statute places upon interstate commerce is not really significant. The burden placed upon interstate commerce is only significant if it is an unfair burden-which goes to the question of evenhandedness. Oregon has no duty to subsidize

evenhandedness applies to a statute on its face, or in its effect.[72] A statute which appears biased on its face may turn out to be evenhanded in its effect. Statutes are most likely to be considered protectionist when they have a disciminatory effect.[73] Because protectionism is the main focus of a "dormant" Commerce Clause analysis, it is more useful to consider if a statute is evenhanded in effect than if it is evenhanded on its face.[74]

Protectionism is the common thread which binds all "dormant" Commerce Clause cases.[75] State laws cannot serve a protectionist purpose.[76] States cannot pass laws in an attempt to hoard natural resources or to gain an economic advantage over another state, state laws cannot "isolate the State from the national economy."[77] When a state law does have a protectionist effect, the Court reviews the statute with strict scrutiny and "a virtually per se rule of invalidity . . . ."[78] In order for the state law to stand under the "strict scrutiny" test, states must "'justify [their statute] both in terms of the local benefits flowing from the statute

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regulatory costs for out-of-state trash, so if Oregon's statute fairly charges all trash (in-state and out-of-state) for regulatory costs, it does not matter that these reasonable costs are a burden. Finally, if the current scheme already equally charges all waste depositors, converting to a uniform surcharge would not decrease the burden on interstate commerce. If Oregon were to convert to a uniform surcharge and still maintain its regulatory goals, the surcharge would have to be at least the current out-of-state level of $2.25. The burden on interstate commerce would not change. In fact, to absorb the costs of converting to a uniform system Oregon might raise a uniform surcharge above the current surcharge level on out-of-state trash. If so, petitioner's proposed alternative would actually increase the burden on interstate commerce.

72. Usually, a statute which is not even-handed on its face is also not even-handed in effect, thus the court has not yet had to distinguish between facial or effectual evenhandedness. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S 349 (1951); Philadelphia v. New Jersey, 437 U.S. 617; *Chemical Waste Management*, 112 S.Ct. 2009; *Ft. Gratiot Sanitary Landfill*, 112 S.Ct. 2019.

73. Philadelphia v. New Jersey, 437 U.S. at 624-25.

74. Whether the surcharge is evenhanded "in effect" refers to the effect of recovering costs for in-state waste through a separate mechanism than out-of-state waste. Of course, whether Oregon's statute is evenhanded in effect will also depend upon whether the amount of the surcharge is fairly determined. The fairness of the amount of the surcharge chosen by Oregon has yet to be judicially reviewed. *See supra* n. 23-30 and accompanying text. Thus the current question is, whether under any amount of surcharge on out-of-state waste, could the different means of recovering regulatory costs for in-state and out-of-state waste be evenhanded in effect?

75. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S 349; Philadelphia v. New Jersey, 437 U.S. 617; Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977); Maine v. Taylor, 477 U.S. 131 (1988); *Chemical Waste Management*, 112 S.Ct. 2009; *Ft. Gratiot Sanitary Landfill*, 112 S.Ct. 2019.

76. Philadelphia v. New Jersey, 437 U.S. at 626-27.

77. *Id.* at 627.

78. *Id.* at 624.

and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'"[79]

Whether Oregon's surcharge is protectionist, may well depend upon whether the surcharge is evenhanded in the manner of its application.[80] If the Court determines the effect of Oregon's statute to be evenhanded, the statute should not be considered protectionist, and the Court will probably apply the *Pike* balancing test.[81] Under this deferential analysis, Oregon's statute should stand—Oregon's statute has a legitimate local interest that does not impose any greater burden on interstate than in-state commerce.[82] If the statute is discriminatory in effect as well as on its face, then it will be analyzed under the strict scrutiny test.[83] Because Oregon's legitimate purpose could be achieved through the alternative means of a uniform surcharge, Oregon's statute will not withstand a strict scrutiny analysis.[84]

Regulations on Interstate Travel of Solid Waste—Supreme Court Precedents

The Court has found protectionism and has applied a strict scrutiny review to all previous state statutes attempting to inhibit the flow of waste across state lines.[85] The progenitor of jurisprudence governing interstate travel of solid waste is *City of Philadelphia v. New Jersey*.[86] The Court in *Philadelphia v. New Jersey* determined that in absence of Congressional legislation, states cannot ban importation of out-of-state garbage to privately owned landfills.[87] The Court determined that solid waste was commerce, and absent Congressional legislation, a state's regulation of waste is subject to scrutiny under the "dormant" Commerce Clause.[88] Because New Jersey's law was protectionist, the

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79. *Chemical Waste Management*, 112 S.Ct. at 2014 (quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. at 353).

80. In determining the constitutionality of a statute under the "dormant" Commerce Clause, the Court stated, "[t]he crucial inquiry . . . must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon commerce that are only incidental." Philadelphia v. New Jersey, 437 U.S. at 624.

81. *Id.*

82. *See supra* note .

83. Philadelphia v. New Jersey, 437 U.S. at 624-25.

84. *See infra* note .

85. *See* Philadelphia v. New Jersey, 437 U.S. at 626-627; *Ft. Gratiot Sanitary Landfill*, 112 S.Ct. at 2024; *Chemical Waste Management*, 112 S.Ct. at 2015.

86. 437 U.S. 617.

87. *Id.* at 620-22.

88. *Id.* at 622.

Court reviewed New Jersey's law with strict scrutiny.[89] New Jersey's statute was protectionist because it was not evenhanded, it sought to ban waste simply on the basis of its origin.[90] The Court wrote, "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[91] While New Jersey has an interest in protecting its land resources, a state cannot hoard its natural resources to the exclusion of other states.[92]

The Court recently echoed this statement in striking down Alabama's surcharge on out-of-state waste in *Chemical Waste Management*.[93] The Court struck down Alabama's $72.00 per ton additional fee on waste generated outside Alabama because the Court found "the additional fee to be 'an obvious effort to saddle those outside the State'."[94] The additional fee in *Chemical Waste Management*, however, did not purport to be a compensatory fee which would reimburse the state for regulatory costs associated with out-of-state waste.[95] Still, the Supreme Court's decision in *Chemical Waste Management* leaves no question that states may not arbitrarily impose unequal fees on out-of-state garbage.[96]

Oregon distinguishes itself form *Chemical Waste Management* by arguing that Oregon's fees are fairly related to state regulatory and environmental monitoring costs.[97] The Court in *Chemical Waste Management* explicitly left open the question of whether surcharges designed to be compensatory fees are constitutional.[98]

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89. *See id.* at 626-27. Although the Court did not articulate the current strict scrutiny test as a state needing to justify its law "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives" the Court did review New Jersey's law with strict scrutiny.

90. *Id.* at 627.

91. *Id.*

92. *See id.*

93. 112 S.Ct. at 2014-15.

94. *Id.* at 2016 (quoting Philadelphia v. New Jersey, 437 U.S. at 629).

95. *Id.*

96. *Id.*

97. Brief for Respondents at 22-23, *Oregon Waste Systems*, 849 P.2d 500.

98. 112 S.Ct. at 2016 n.9. The Court writes, "The State presents no argument here . . . that the additional fee makes out-of-state generators pay their 'fair share' of the costs of Alabama waste disposal facilities, or that the additional fee is justified as a 'compensatory tax.' . . . We pretermit this issue, for it was not the basis for the decision below and has not been briefed or argued by the parties here." *Id.*

ANALYSIS OF OREGON'S STATUTE

One of the first considerations in analyzing Oregon's statute is whether the statute is discriminatory. In *Philadelphia v. New Jersey*, New Jersey's law was protectionist and discriminatory because it sought to protect New Jersey landfills at the expense of interstate commerce; it barred out-of-state waste strictly on the basis of its origin.[99] Like New Jersey, Oregon is treating waste differently solely on the basis of the waste's origin.[100] Unlike New Jersey, however, it is not clear that Oregon is "discriminating against articles of commerce" by treating the waste differently.

While Oregon does treat trash differently based on the trash's origin, Oregon may still argue that the surcharge does not necessarily discriminate upon the basis of origin.[101] The surcharge does not impose an additional charge on out-of-state trash.[102] Rather, the surcharge places a charge on out-of-state trash that was already indirectly paid through general taxes on in-state trash.[103] Oregon has a strong argument that its statute is not discriminatory as long as Oregon can show that it does not disproportionately charge out-of-state trash. In fact, Oregon might assert that the out-of-state surcharge prevents discrimination by preventing out-of-state waste producers from taking a free ride on the backs of in-state tax payers.

Oregon may continue to argue that their surcharge does not discriminate against out-of-state trash haulers because the surcharge is placed upon out-of-state trash, not upon out-of-state trash haulers. Both in-state and out-of-state trash haulers have to pay the same fees for the same trash hauled.[104] Oregon's statute does not give a competitive advantage to either in-state or out-of-state trash haulers. Still, out-of-state garbage is usually hauled by out-of-state companies, so the practical effect of a compensatory fee like Oregon's or Indiana's is to have out-of-state trash haulers pay a surcharge that in-state trash haulers generally do not pay.

Oregon's statute can also be viewed as facially discriminatory because Oregon's statute collects regulatory costs for in-state and out-of-state waste through different mechanisms.[105] A statute's facial discrimi-

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99. Philadelphia v. New Jersey, 437 U.S. at 627-28.
100. Or. Rev. Stat. § 459.298.
101. Brief for Respondents at 4-6, *Oregon Waste Systems*, 849 P.2d 500.
102. *Oregon Waste Systems*, 849 P.2d at 508.
103. *Id.*
104. Or. Rev. Stat. § 459.298.
105. *Chemical Waste Management*, 112 S.Ct. at 2014 n.5. The Court found Alabama's statute

nation, however, may not alone be enough to compel the strict scrutiny test. The Court has recently said the strict scrutiny test is appropriate when "the additional fee discriminates both on its face and in practical effect."[106] In *Oregon Waste Systems*, what appears on the surface to be facial discrimination may effectively be an acceptable means to achieve even-handed regulation. To give a fair constitutional analysis to Oregon's statute, one must go below the surface, to see if protectionism resides in the roots of Oregon's statute.

The primary focus of cases using the strict scrutiny test has been on concerns of protectionism.[107] The law in *Philadelphia v. New Jersey* was protectionist because it placed a complete ban out-of-state waste.[108] The law in *Chemical Waste Management* was protectionist because it sought to exclude out-of-state waste by placing a fee on out-of-state waste not borne by in-state waste.[109] The means of levying a compensatory surcharge used in *Oregon Waste Systems*, however, do not seek to unfairly tax or bar trash coming into a host state.[110] If a statute is not protectionist, it may not make sense to apply the strict scrutiny test, even if the statute is facially discriminatory.[111] Oregon argues that because the surcharge on out-of-state trash is fairly calculated to recover regulatory costs associated with the trash, that the statute is not protectionist.[112] Because the statute is not protectionist, Oregon argues that the strict scrutiny test should not be used.[113]

Oregon rejects petitioners claim that the strict scrutiny test should be used to force Oregon to justify its statute "in terms of . . . nondiscrimi-

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to be facially discriminatory. The Court's discussion on facial discrimination occurred before the Court discussed the reasonableness of Alabama's statute, implying that a surcharge placed only on out-of-state waste is facially discriminatory irrespective of its fairness.

106. *Id.* (emphasis added).

107. *See* Philadelphia v. New Jersey, 437 U.S. 617; Maine v. Taylor 477 U.S. 131; *Ft. Gratiot Sanitary Landfill*, 112 S.Ct. 2019; *Chemical Waste Management*, 112 S.Ct. 2009.

108. Philadelphia v. New Jersey, 437 U.S. at 627-28.

109. 112 S.Ct. at 2014-15. The Court adopted the Trial Court's finding that "under the facts of this case that the only basis for the additional fee is the origin of the waste." *Id.* at 2015. The facts of Gilliam are different, in that Oregon has supplied a compensatory basis for the surcharge, which distinguishes *Oregon Waste Systems* from *Chemical Waste Management*, and may warrant a different outcome.

110. Oregon's surcharge does not attempt to bar or excessively charge trash coming into the state. It purportedly charges out-of-state trash depositors fair regulatory costs associated with the trash deposited. Furthermore, Oregon does not differentiate between in-state and out-of-state trash in determining what regulatory costs are associated with each ton of trash.

111. Philadelphia v. New Jersey, 437 U.S. 617, said "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626 (emphasis added). The Court did not say that discriminatory means necessarily imply protectionism. Discriminatory means of achieving a legitimate purpose do not necessarily equal "protectionist means."

112. Brief for Respondents at 26-27, *Oregon Waste Systems*, 849 P.2d 500.

113. *Id.*

natory alternatives adequate to preserve the local interests at stake."[114] Oregon argues that its current scheme already fairly apportions regulatory costs, and that it should not be forced to adopt an alternative means of equalizing regulatory costs if its current means has no protectionist effect.[115] Oregon argues that it would be unfair for the Court to force Oregon to alter its current tax system.[116]

The Court, however, may view Oregon's statute as having a protectionist effect on large producers of out-of-state trash. Under Oregon's statute, haulers of in-state trash do not pay the out-of-state trash surcharge on each load of trash they dump in Oregon landfills. The regulatory costs for in-state trash are paid through the general tax revenue. The regulatory costs for in-state trash are spread throughout Oregon's population irrespective of the amount of individual trash produced. In contrast, haulers of out-of-state trash pay regulatory costs each time they dump a load of trash. These costs will most likely be passed on to out-of-state trash producers in proportion to the level of trash they produce.

Out-of-state industries which produce a large amount of trash could argue that allowing parallel in-state industries to defer costs of their waste disposal throughout Oregon's general population is discriminatory and protectionist. Oregon's statue effectively allows in-state industries which produce high levels of trash to operate at a lower cost than parallel out-of-state industries.[117] Regardless of the intent of Oregon's statute, a small degree of economic protectionism is one of the statute's effects.

If the Court does determine Oregon's statute to be protectionist, Oregon must "justify it both in terms of the [legitimate] local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[118] Given

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114. *Id.* at 28.

115. *Id.*

116. *Id.* at 35. Oregon can argue that as long as its system of recovering regulatory costs is fairly related to the costs incurred, Oregon, not out of state waste producers, should dictate Oregon's policy decisions.

117. This argument for protectionism is enhanced by the fact that Oregon admits that one of the purposes of its current scheme of collecting regulatory costs is to allow Oregon to spread the cost of trash disposal throughout its general population. *Id.* at 37. Oregon may have many legitimate reasons for wanting to do this, but if spreading the costs out has the illegitimate effect of economic protectionism, the statute probably be reviewed with, and fold under, strict scrutiny. Oregon claims spreading regulatory costs out among its population is a legitimate purpose of its current statute which cannot be achieved by the suggested alternative of a uniform surcharge. *Id.* It is doubtful that the Court will agree that allowing regulatory costs to be generally divided within Oregon borders, but not outside of its borders, is a legitimate purpose of Oregon's statute.

118. *Chemical Waste Management*, 112 S.Ct. at 2014 (quoting Hunt v. Washington Apple

environmental concerns and diminishing landfill space, Oregon should be able to justify its statute in terms of "local benefits flowing from the statute." Still, an available alternative to Oregon's legitimate purpose is readily available. Oregon could levy a uniform surcharge on in-state and out-of-state trash alike.

Only in rare instances has the Court allowed states to maintain protectionist laws.[119] If a law is considered protectionist the Court is willing to force states to incur an expense in seeking non-protectionist alternatives.[120]

LOWER COURT CASES DEALING WITH THE SPECIFIC ISSUE

The Seventh Circuit in *Government Suppliers Consolidating Services* found Indiana's statute, imposing surcharges similar to those mandated by Oregon's statute, to be unconstitutional.[121] The court determined that different treatment of out-of-state garbage constitutes facial discrimination.[122] The court then asked if the surcharge could be "'demonstrably justified by a valid factor unrelated to economic protectionism.'"[123] Because the court found that the surcharge was discriminatory, the court did not have to consider alternative methods of achieving the statute's purpose. The court determined Indiana's statute to be unconstitutional without providing a deep analysis of how the statute might be protectionist. The court simply stated, "the Indiana statute imposes a tax on haulers of waste who cross the state line, while sparing haulers of waste who remain entirely within the state."[124] Rather than considering whether the statute fairly charged in-state and out-of-state residents for their share of regulatory costs, the court continued, "'Equal treatment for in-state and out-of-state taxpayers similarly situated' has been a condition precedent for a valid tax. There is no such equality here: the Indiana statute imposes a tax on haulers of waste who cross the state line, while sparing haulers of waste who remain entirely within the state."[125] The court's analysis can be criticized on several grounds. First, the court did not address the idea that rather than being spared, haulers of in-state waste

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Advertising Comm'n, 432 U.S. at 353).

119. *See* Maine v. Taylor, 477 U.S. 131.

120. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (prohibiting state from eliminating confusion concerning apple grades through the easy and inexpensive method of requiring USDA grades on all apples).

121. 975 F.2d at 1272.

122. *Id.* at 1284-85.

123. *Id.* at 1285 (quoting *Ft. Gratiot Sanitary Landfill*, 112 S.Ct. at 2023-24).

124. *Id.* at 1284.

125. *Id.*

might actually pay their share of regulatory costs through a different mechanism. Second, the court did not draw a distinction between a compensatory fee and a compensatory tax; the court relied upon cases dealing with compensatory taxes.[126] Finally, the court's opinion did not address whether the statute was ultimately protectionist; whether the statute did commit the evil sought to be protected by the dormant Commerce Clause.

The Oregon Supreme Court in *Oregon Waste Systems* provided a much deeper analysis on the issue of protectionism.[127] The court in *Oregon Waste Systems*, looked below the surface of Oregon's statute before determining if the statute was facially discriminatory.[128] The court stated, "Because of the express nexus to actual costs incurred, we conclude that the surcharge authorized by [Oregon's statute] does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state."[129]

In determining that Oregon's statute was not protectionist the court relied upon a string of Supreme Court cases allowing states to issue compensatory fees "for costs incurred by a state in supervising and regulating the activities of an entity engaged in interstate commerce . . . ."[130] Because the court determined Oregon's surcharge to be non-protectionist, the court found the surcharge to be constitutional, and found no need for Oregon to seek an alternative method of gaining

126. *Id.*

127. *See Oregon Waste Systems*, 849 P.2d at 508.

128. *Id.*

129. *Id.* The Oregon Supreme Court indicated that although Oregon's statute was not protectionist, it still must be "demonstrably justified by a valid factor unrelated to economic protectionism." *Oregon Waste Systems*, 849 P.2d at 508. Previously, this demonstrably justified test has been used in conjunction with the strict scrutiny test. The Oregon Supreme Court cites *Chemical Waste Management* as its source for the demonstrably justified test. *Chemical Waste Management* cites *Ft. Gratiot Sanitary Landfill* which cites *New Energy Company of Indiana* which cites Maine v. Taylor as its source for the test. Each of the Court decisions citing the test have focused their attention on concerns of protectionism and have used the demonstrably justified test in conjunction with the strict scrutiny test. *Fort Gratiot Sanitary Landfill*, 112 S.Ct. at 2024; *Chemical Waste Management*, 112 S.Ct. at 2013; New Energy Company of Indiana v. Limbach, 486 U.S. 269, 278 (1988); Maine v. Taylor, 477 U.S. at 138, 151.

At any rate, it is clear that the Oregon Supreme Court has never intended to apply strict scrutiny to Oregon's statute--it presumed Oregon's statute to be "prima facie reasonable" and never considered alternatives of achieving the statute's objective. *Oregon Waste Systems*, 849 P.2d at 508. The Oregon Supreme Court properly stayed focused on the main issue of protectionism. *Id.* at 508. The demonstrably justified test may have simply been a means to get below the surface of what initially appears to be a facially discriminatory statute.

130. *Oregon Waste Systems*, 849 P.3d at 508.

compensation for regulatory costs associated with out-of-state solid waste.[131]

PUBLIC POLICY CONCERNS—EFFICACY OF UNIFORM SURCHARGE

Oregon has argued that because its current system of collecting regulatory costs is non-discriminatory, Oregon should not be forced to seek an alternative way of having no discriminatory effect.[132] However, public policy concerns indicate that more than being an alternative way of having no discriminatory effect, a uniform surcharge may be a better way of having no discriminatory effect.[133] Whether discriminatory or not, Oregon's statute does provide for different treatment of in-state and out-of-state waste.[134] In *Fort. Gratiot Sanitary Landfill*, the Court asked if the state could "identif[y] any reason apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county . . ." [135] Thus, Oregon may have to provide a good reason why its statutory method of gaining revenues to cover regulatory costs is as good as a uniform surcharge on in-state and out-of-state waste alike.

A uniform surcharge would do away with different methodological treatment and the potential for discrimination. While Oregon's surcharge may not currently have a discriminatory effect, a disparate system of collection leaves a potential for future discriminatory effects. The Supreme Court has recognized that states have an incentive to shift the burden of their costs to non-residents.[136] The Court may not trust states to fairly set surcharges on interstate commerce. The Court must balance a state's autonomy and right to regulate its own system against outside states' right to be free from regulation that can easily become protectionist.

A uniform surcharge might also better serve environmental objectives. Because the regulatory costs for in-state trash is usually paid for through the general tax base, producers of in-state trash do not directly feel or see costs associated with waste disposal. However, the surcharge on out-of-state waste will, in all likelihood, be passed on to

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131. *Id.* at 509.

132. *See* Brief for Respondents at 28, *Oregon Waste Systems*, 849 P.2d 500.

133. With a uniform surcharge regulatory costs for in-state trash would be paid through the same per-ton fee levied on out-of-state trash; in-state and out-of-state trash would be charged equally and through the same mechanism.

134. Or. Rev. Stat. § 459.298.

135. 112 S.Ct. at 2024.

136. Nippert v. City of Richmond, 327 U.S. 416, 434-435 (1946).

producers of out-of-state waste. Producers of out-of-state waste will have an economic incentive to reduce their waste production. This incentive does not exist for producers of in-state waste.[137]

Forcing Oregon to adopt a uniform surcharge to pay for regulatory costs of waste disposal may also reduce potential litigation. Courts would not have to be called upon continually to determine if a certain surcharge, or adjustment to a surcharge, is fairly applied. Affirming the Oregon Supreme Court's decision in *Oregon Waste Systems* opens the door for states to place a surcharge on non-residents for any service paid through a state's general taxes. A state could place a surcharge on every person entering a state to compensate the state for expenses of highway patrol and police protection. When non-residents drive into a state, the state could force the nonresident to pay a fair share of regulatory costs associated with the pollution from the nonresident's car. The possible surcharges are limitless, and courts would be called upon to adjudicate the fairness of each surcharge. A uniform surcharge on residents and nonresidents alike does not threaten to place this heavier burden upon the courts.

The potential burden on courts is magnified by the difficulty in evaluating the fairness of cost recovery schemes such as used in Oregon's statute. A determination of fairness could require review of vast amounts of economic analysis, and must consider a seemingly endless array of factors. The fairness of a uniform surcharge, on the other hand, requires little review.

CONCLUSION

On the surface, *Oregon Waste Systems* appears to be a simple case. Because Oregon treats in-state and out-of-state waste differently, petitioners argue that the statute must be unconstitutional. A fair review of the effect of the Oregon statute, however, suggests that the question is not so easily answered. The purpose of the "dormant" Commerce Clause is to prevent state protectionism to insure that the States of the Union to act as a cohesive body where no state unfairly takes economic advantage of resources within its borders.

To prevent protectionism, each state must open its resources to all states. Similarly, no state may shift its economic responsibilities onto

137. Striking down Oregon's statute, however, may ultimately have negative environmental effects. Oregon's surcharge on out-of-state trash, and equivalent tax funding for in-state trash, is largely designed to meet environmental goals. Brief for Respondents at 13, *Oregon Waste Systems*, 849 P.2d 500. No assurance exists that future Oregon legislatures will be as environmentally conscious in adopting an alternative mechanism of recovering regulatory costs.

the shoulders of another state. Oregon cannot force neighboring states to pay part of Oregon's share of solid waste regulatory costs. Analogously, Oregon cannot be forced to subsidize waste disposal for other states. The principal inquiry in *Oregon Waste Systems* is whether its chosen mechanism for achieving this equality allows Oregon to take economic advantage of outside states. Does the current mechanism through which Oregon collects its regulatory costs foster protectionism or does it fairly allocate costs between those who dump in-state and out-of-state waste in Oregon landfills?

(Editor's Note: After this casenote went to press, the Supreme Court issued its opinion holding that the Oregon surcharge on out-of-state waste is facially invalid under the dormant commerce clause. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345 (1994). The Supreme Court was persuaded by the argument--see text of the casenote accompanying notes 116-20--that protectionism was lurking in the different mechanisms used to recover the environmental costs of in-state and out-of-state waste, and expressed concern that to allow this disparate tax treatment might lead to other forms of impermissible state protectionism. 114 S. Ct. at 1346, 1354.)

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