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OREGON'S WASTED EFFORT: THE SUPREME COURT'S INABILITY TO ADAPT ITS COMPENSATORY TAX DOCTRINE TO SOLID WASTE REGULATIONS

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The myriad environmental and economic complexities associated with the regular disposal of our everyday garbage have led some commentators to call the complex solid waste disposal situation a modern-day "crisis."¹ Recent government reports estimate that a staggering 206.9 million tons of municipal solid waste ("MSW") were generated and disposed of in the United States in 1993.² Efforts to regulate and safely dispose of MSW are, of course, nothing new; however, as with other burgeoning environmental challenges, the onset of the twentieth century population explosions and increasing consumerism has presented health, environmental and fiscal difficulties of unexpected magnitude.

MSW landfills escaping the comprehensive solid waste regulatory authority of the Resource Conservation and Recovery Act ("RCRA")³ have been the source of all manner of pollution, ranging from "disease vectors, vermin, gaseous emissions, and liquid run-off"⁴ to the most serious and common threat of unregulated MSW landfills, that of leachate percolation and subsequent contamination of otherwise potable groundwater sources.⁵ The aggregate threat

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1. JUDD H. ALEXANDER, IN DEFENSE OF GARBAGE 7 (1993).

2. U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. EPA CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1994 UPDATE 5 (1994). The current MSW disposal total breaks down to an average of 1,650 pounds of MSW per person per year, or approximately 4.5 pounds per person per day. While the volume of MSW disposed annually is alone impressive, still more alarming is the fact that the 1993 total represents an increase of 32% over the 156.5 million tons disposed in the U.S. in 1988. See ALEXANDER, *supra* note 1, at 9 (citing U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. EPA CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE 79 (1991)).

3. 42 U.S.C. §§ 6901-6992(k) (1988).

4. ALEXANDER, *supra* note 1, at 157.

5. See JACQUELINE V. SWITZER, ENVIRONMENTAL POLITICS 105 (1994). Groundwater underneath MSW landfills often becomes contaminated by relatively small quantities of commonly disposed hazardous waste (e.g., nail polish, paint thinners, batteries) not screened prior to disposal. *Id.* Leachate is the fluid formed when water percolates through a landfill. *Id.*

In addition, MSW landfills become oxygen starved when they are compacted to reduce the overall volume. Reduced oxygen levels hamper the oxygen-driven biodegradation process, thereby retarding the already slow natural degradation of many modern wastes. See ALEXANDER, *supra* note 1, at 136-37. Slow degradation of MSW may not by itself present any immediate

of increasing MSW disposal rates and the attendant social fears, environmental degradations, and health hazards provided the impetus to enact expensive regulatory schemes like RCRA.

Although only a minuscule portion of land in the United States is covered by MSW landfills, several regions and states have been experiencing difficulties in siting MSW landfills.⁶ Landfills must meet topographical, geographical and climatic criteria established by RCRA⁷ and the more daunting regulations

environmental concerns or health hazards. However, the unsavory thought of garbage as a perpetual (compared to the human life span) neighbor does nothing to decrease the substantial political consequences of the "Not in My Backyard" ("NIMBY") factor. The NIMBY factor is generated when citizens react against the potentially adverse impacts of an environmental nuisance to be located near their neighborhood. Some argue that the NIMBY factor is the single highest hurdle to clear in finding an acceptable MSW landfill site. *See id.* at 22.

6. *See* ALEXANDER, *supra* note 1, at 8.

7. 42 U.S.C. § 6942(c) (listing the general guidelines for regulations that guide states in creating and updating solid waste plans). The provisions of § 6942(c) have made MSW landfill siting a more expensive proposition by requiring as part of the siting process the consideration of:

- (1) the varying regional, geologic, hydrogeologic, climatic, and other circumstances under which different solid waste practices are required in order to insure the reasonable protection of the quality of the ground and surface waters from leachate contamination, the reasonable protection of the quality of the surface waters from surface runoff contamination, and the reasonable protection of ambient air quality;
- (2) characteristics and conditions of collection, storage, processing, and disposal operating methods, techniques, and practices, and location of facilities where such operating methods, techniques, and practices are conducted, taking into account the nature of the material to be disposed;
- (3) methods for closing or upgrading open dumps for purposes of eliminating potential health hazards;
- (4) population density, distribution, and projected growth;
- (5) geographic, geologic, climatic, and hydrologic characteristics;
- (6) the type and location of transportation;
- (7) the profile of industries;
- (8) the constituents and generation rates of waste;
- (9) the political, economic, organizational, financial, and management problems affecting comprehensive solid waste management;
- (10) types of resource recovery facilities and resource conservation systems which are appropriate; and
- (11) available new and additional markets for recovered material and energy and energy resources recovered from solid waste as well as methods for conserving such materials and energy.

Id. The siting requirements are only a taste of RCRA's expensive comprehensive scheme which also requires careful management, cleanup and closure practices. RCRA mandates that states develop methods for achieving, among other objectives, a "reduc[ti]on in] the volume or quantity of material that ultimately becomes waste," *see id.* §§ 6941(a), 6942(b), consequently prompting states to enact significant disincentives to all generators of MSW, discussed *infra* text accompanying notes 9-10.

promulgated by EPA.⁸ As a result, fewer sites can now be considered acceptable. Moreover, the task of actually siting a MSW landfill has consequently become far more expensive, with more research, tests and reports required to determine a site's acceptability. Added expense also results from stringent operation, maintenance, cleanup, and closure requirements imposed by RCRA.⁹

States and localities have employed a creative variety of revenue-generating means¹⁰ to meet expensive regulatory requirements, environmentalist demands and the increasingly acute "Not in My Backyard" ("NIMBY") sentiments associated with landfill siting.¹¹ As part of an attempt to control MSW generation and to raise revenue, some states have imposed economic burdens on out-of-state MSW disposers.¹² Such burdens placed by states on interstate commerce are subject to the strictures of the "dormant," or "negative," Commerce Clause of the U.S. Constitution.¹³ Although the Commerce Clause is on its face an affirmative grant of power to Congress "to regulate Commerce with foreign Nations, and among the several States,"¹⁴ the Supreme Court has traditionally construed the clause as limiting states' ability to regulate interstate commerce when those regulations amount to economic protectionism and put interstate commerce at a competitive disadvantage.¹⁵

The Court treats MSW as an article of commerce clearly falling within the ambit of the "dormant" Commerce Clause.¹⁶ In its seminal case on the

8. 40 C.F.R. §§ 256.01-.65 (1994) (setting guidelines for state plans regarding siting, management, cleanup, and closure practices).

9. See 42 U.S.C. §§ 6941-6949(a).

10. See generally ALEXANDER, *supra* note 1, at 181-88 (discussing mandatory deposits and other packaging taxes); J.A. Butlin, *The Contribution of Economic Instruments to Solid Waste Management*, in *THE ECONOMICS OF ENVIRONMENTAL AND NATURAL RESOURCES POLICY* 144-51 (John A. Butlin ed., 1981) [hereinafter *ECONOMICS*] (discussing broad categories of economic instruments that serve to deter solid waste generation as well as raise money for funding solid waste programs); R. KERRY TURNER ET AL., *ENVIRONMENTAL ECONOMICS* 252-66 (1993).

11. See ALEXANDER, *supra* note 1, at 8, 21-22.

12. Information based upon author's experiences in the environmental consulting industry.

13. U.S. CONST. art. I, § 8, cl. 3; see LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2 (2d ed. 1988).

14. U.S. CONST. art. I, § 8, cl. 3.

15. See *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 535 (1949). See also *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 309 (1851); TRIBE, *supra* note 13, § 6-3; Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 *TAX LAW.* 37, 41-42 (1987); Philip M. Tatarowicz & Rebecca Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 *VAND. L. REV.* 879, 910 (1986).

16. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 (1978). Part of the importance of this decision's consideration of MSW as an article of commerce lies in the creation of an "open class" for other non-traditional entities—including natural resources—that could potentially be considered articles of commerce. See *Chemical Waste Mgmt., Inc. v. Hunt*, 112 S. Ct. 2009, 2013 n.3 (1992) (finding that hazardous waste falls within the ambit of the Commerce Clause); *Sporhase v.*

burdens on interstate commerce of MSW, *City of Philadelphia v. New Jersey*,¹⁷ the Court considered a New Jersey statute barring importation of all out-of-state MSW that did not meet the criteria of the Commissioner of the New Jersey Department of Environmental Protection.¹⁸ The Court easily found the statute unconstitutional on its face because it imposed the entire burden of conserving in-state MSW landfill space on out-of-state MSW generators, thereby discriminating against interstate commerce.¹⁹ Subsequent MSW interstate commerce restriction cases have, not surprisingly, turned on disincentives or regulations restricting interstate commerce more subtle than the statute struck in *City of Philadelphia*.²⁰ Nonetheless, the Court's decision in *City of Philadelphia* represents a crucial starting point from which to embark on an analysis of later Commerce Clause MSW cases, not only because the decision was the Court's first foray into modern interstate MSW disputes, but because the Court's treatment of the statute is largely representative of its later hostile review of impositions by states upon the interstate MSW flow.

This Note will focus on Commerce Clause jurisprudence as it relates to the imposition of a per-ton surcharge on imported MSW. Prior to the Court's decision in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,²¹ holding that such surcharges violate the Commerce Clause,²² surcharges on out-of-state MSW were becoming commonly used tools to generate revenue and restrict imported MSW.

Specifically, this Note will analyze the merits and repercussions of an argument by the State of Oregon in *Oregon Waste Systems* that such surcharges, despite their facially discriminatory impact, should have been held constitutional because they functioned as "compensatory taxes,"²³ designed to force out-of-state

Nebraska, 485 U.S. 941, 954-55 (1982) (finding that groundwater falls within the ambit of the Commerce Clause).

17. 437 U.S. 617.

18. *Id.* at 618.

19. *Id.* at 617.

20. See, e.g., *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S. Ct. 1345, 1348 (1994) (surcharge on out-of-state MSW); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2021 (1992) (ban on out-of-county MSW); *Hunt*, 112 S. Ct. at 2012 (surcharge on out-of-state MSW).

21. 114 S. Ct. 1345.

22. *Id.* at 1350.

23. Although the compensatory tax is only explicitly suggested in connection with a peripheral argument made by the state regarding the Privileges and Immunities Clause, the notion that the surcharge constitutes a compensatory tax pervades the state's entire Commerce Clause argument. See Respondents' Brief at 31, *Oregon Waste Systems*, 114 S. Ct. 1345 (No. 93-70) (No. 93-108). More importantly, for purposes of this analysis, the Court posits that "[r]espondents' principal defense of the higher surcharge on out-of-state MSW is that it is a 'compensatory tax' necessary to make shippers of such MSW pay their 'fair share' of the costs imposed on Oregon by the disposal of their MSW in the State." 114 S. Ct. at 1351.

MSW disposers to pay for their use of Oregon's MSW landfills.²⁴ Although the Court did not invalidate per se all possible formulations of MSW surcharges on out-of-state MSW, the uncompromising language of the Court's decision seems to translate into a grim future for those states wishing to implement and justify any such surcharges on out-of-state MSW.²⁵

This Note will argue that the Supreme Court should modify its compensatory tax test, particularly in the case of MSW regulation. The modification should enable states to account for the costs of environmental protection, MSW management, and health and safety risks posed by imported MSW by taxing out-of-state users of MSW landfills at a rate proportional to the costs imposed on the importing state. Otherwise, states will be severely hamstrung not only in their ability to force their neighbors who dump in their state to internalize the real costs of MSW disposal, but also in their ability to preserve environmental quality and recover both the economic and environmental costs of allowing out-of-state MSW disposers to dispose at artificially low prices.

First, this Note will chronicle the history of the compensatory tax doctrine and examine several cases that perhaps could have been decided under, or have influenced, that doctrine. The origin, purpose, evolution and current contours of the doctrine will be explored. This Note will then discuss several recent progeny of *City of Philadelphia*: Supreme Court decisions striking restrictions on interstate disposal of MSW and its problematic cousin, hazardous waste. Then, this Note will detail the confluence of the Court's prior compensatory tax doctrine with its modern MSW philosophies in *Oregon Waste Systems* and discuss why the Court rejected the compensatory tax defense in that case. Next, this Note will analyze and critique the application of the compensatory tax doctrine in *Oregon Waste Systems* in light of recent MSW cases and the purpose of the doctrine. Finally, this Note will offer suggestions for reformulating the compensatory tax doctrine, with an eye specifically toward its application to regulations of interstate commerce in MSW.

I. ORIGIN, EVOLUTION, AND CURRENT CONTOURS OF THE COMPENSATORY TAX DOCTRINE

A. *Origin and Evolution*

The idea of a compensatory tax rescuing a facially discriminatory statute from constitutional infirmity seems to have its origin in the mid-nineteenth

24. 114 S. Ct. at 1351.

25. See *infra* notes 168-96 and accompanying text. While this Note focuses on the compensatory tax doctrine as applied to MSW surcharges, the Court's cramped and inconsistent compensatory tax jurisprudence could also affect interstate regulation of other nontraditional articles of commerce such as groundwater or hazardous waste. See *supra* note 16.

century Supreme Court case *Hinson v. Lott*.²⁶ In *Hinson*, Alabama had imposed a fifty-cents per gallon tax on sellers of "spirituous liquors" who brought their products into the state for sale.²⁷ However, Alabama also imposed a fifty-cent per gallon tax on "all whiskey and all brandy from fruits manufactured in [Alabama]."²⁸

The Court opined that the tax on out-of-state sellers, if standing alone, would have violated the Commerce Clause because the distinction about who was subject to the tax was drawn along state lines, thus impeding interstate commerce through impermissible discriminatory means.²⁹ However, the Court decided that because the state imposed an equivalent tax on in-state manufacturers of similar products, the tax on out-of-state sellers was "only the complementary provision necessary to make the tax equal on all liquors sold in the State."³⁰ Thus, the tax on out-of-state sellers "institute[d] no legislation which discriminate[d] against the products of sister States, but merely subject[ed] them to the same rate of taxation which similar articles pa[id] that are manufactured within the State"³¹ While the Court validated the facially discriminatory tax as "complementary,"³² the Court did so without analyzing how the doctrine might apply to other cases, and without regard to the fact that the two taxes fell on actors engaged in different commercial activities—selling versus manufacturing. Moreover, the Court in *Hinson* did not explain explicitly whether this new doctrine's purpose was strictly to compensate Alabama, by making out-of-state commercial activity pay its fair share of taxes, or also to level competition.³³

Some sixty years later, the Court began articulating its standards for determining which taxes are "complementary" in *General American Tank Car Corp. v. Day*.³⁴ In *Day*, Louisiana had imposed on nonresident corporations a tax of 2.5% of the assessed value of railroad rolling stock.³⁵ The tax was facially discriminatory because it applied only to nonresident corporations. However, the tax's effect was "complementary" because the Louisiana Constitution provided

26. 75 U.S. (8 Wall.) 148 (1868).

27. *Id.* at 148.

28. *Id.*

29. *Id.* at 150.

30. *Id.* at 153. Earlier cases such as *Hinson* referred to what is now thought of as a "compensatory tax" as a "complementary tax." Such taxes have also been reviewed at times as "compensating taxes."

31. *Id.*

32. *Id.*

33. The purpose of the tax could have been to level the playing field among commercial participants in similar industries, so that Alabama liquor manufacturers would not be put at a competitive disadvantage against out-of-state competitors. The fact that one tax was on sellers while the other was on manufacturers weakens, perhaps not substantially, the argument that the out-of-state tax's purpose was to even competition.

34. 270 U.S. 367 (1926).

35. *Id.* at 370.

that those subject to the tax were exempt from general local taxes,³⁶ and the 2.5% tax on railroad rolling stock was nearly identical (allegedly, a 0.04% difference) to the average rate of Louisiana local taxes.³⁷

In upholding the Louisiana tax, the Court announced several aspects that should be reviewed in determining whether a taxation scheme is a "complementary tax." First, the Court suggested that imposing a tax on nonresidents is not obnoxious to the Constitution if the tax, because of a similar local tax on residents only, is nondiscriminatory in both purpose and effect.³⁸ Second, "minute differences" between the potentially complementary taxes in question should not work to destroy the entire scheme, but a "fairness and reasonableness" standard should be used for comparing the tax's practical effects.³⁹ The Court upheld the tax on nonresidents after finding that the practical differences between the two taxes, although one was local and general and the other specific to nonresidents, were so small as to be "fair and reasonable."⁴⁰

Only a few years after *Day*, the Court reviewed what has come to be known as the prototype⁴¹ for compensatory taxes in *Henneford v. Silas Mason*.⁴² At issue in *Silas Mason* was a Washington two percent use tax on articles of trade purchased out-of-state but used in-state, thus rendering the tax facially discriminatory.⁴³ However, Washington's tax scheme also contained a two percent tax on almost every retail sale within the state.⁴⁴

Again, the Court found the facially discriminatory tax constitutional under the Commerce Clause not only because the taxes were identical in rate, but also because they burdened identical transactions: purchases.⁴⁵ The burden borne by out-of-state residents using their out-of-state purchases in Washington was balanced by an identical in-state burden: "retail sellers in Washington will be helped to compete upon terms of equality with retail sellers in other states who are exempt from a sales tax or any corresponding burden."⁴⁶ The Court thus evinced a competition-leveling purpose behind the doctrine to supplement the purpose of ensuring that revenue-generating burdens on interstate commerce remain fair relative to burdens imposed on intrastate commerce.⁴⁷

While the sales tax/use tax dichotomy in *Silas Mason* offers a prototype for what the Court now considers "substantially equivalent" events and

36. *Id.* (citing LA. CONST. of 1921, art. X, § 16).

37. *Id.* at 373.

38. *Id.* at 373-74.

39. *Id.* at 373.

40. *See id.* at 373-74.

41. *Oregon Waste Systems*, 114 S. Ct. at 1353.

42. 300 U.S. 577 (1937).

43. *Id.* at 579.

44. *Id.* at 579-80.

45. *Id.* at 581.

46. *Id.*

47. *See supra* note 33 and accompanying text.

compensatory taxes,⁴⁸ the Court has been ready and willing to depart from this prototype in cases both prior to and following *Silas Mason*.⁴⁹ Ironically, an oft-quoted portion of *Silas Mason* also left what would seem like substantial maneuvering room for subsequent flexibility-minded courts: "[t]here is no demand in . . . [the] Constitution that the state shall put its requirements in any one statute. It may distribute [taxes] as it sees fit, if the result, taken in its totality, is within the State's constitutional power."⁵⁰

B. *Contours of Today's Compensatory Tax Test*⁵¹

*Alaska v. Arctic Maid*⁵² was one of the few cases since *Silas Mason* in which the compensatory tax doctrine saved a facially discriminatory tax on interstate commerce. In *Arctic Maid*, the Court considered a 4% tax imposed by Alaska on the value of fish taken onto "freezer ships"—ships taking frozen Alaskan fish out-of-state.⁵³ Freezer ship operators complained that the tax discriminated against their interstate commercial interests because Alaskan canneries were not subject to the tax.⁵⁴ However, Alaska subjected local canneries to a six percent tax on the value of fish obtained for canning.⁵⁵ Alaskan fish processors paid an additional one percent tax over and above the six percent tax already paid by Alaskan canneries on the same fish.⁵⁶

In finding that the freezer ship tax was constitutionally fit, the Court deemed crucial the fact that "[t]he freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners"⁵⁷ Thus, the Court in *Arctic Maid*, as in *Silas Mason*, considered it paramount that those engaged in interstate commerce not be put at a competitive disadvantage against those engaged solely in intrastate commerce. Notably, the Court in *Arctic Maid* bypassed scrutiny of any "substantial equivalence" between the fish tax events

48. See *infra* note 189 and accompanying text.

49. See *supra* notes 26-40 and accompanying text; *infra* notes 52-61, 80-98, 109-17.

50. *Silas Mason*, 300 U.S. at 584 (quoting *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480 (1932)).

51. To facilitate later analysis, "today's" compensatory tax test is that posited in *Oregon Waste Systems*, 114 S. Ct. at 1352. The prongs of the compensatory tax test are still evolving, yet the test in *Oregon Waste Systems* relies on authority and tests similar to other recent formulations of the doctrine.

52. 366 U.S. 199 (1961).

53. *Id.* at 200.

54. *Id.* at 204.

55. *Id.*

56. *Id.*

57. *Id.*

when such an analysis would have been far from sure of producing a finding of "substantial equivalence."⁵⁸

Aside from its holding that entirely different commercial activities may be the subjects of compensatory taxes, the Court appeared to give some flexibility to the comparison of tax *burdens*. "If there is a difference between the taxes imposed . . . they are not so 'palpably disproportionate' as to run afoul of the Commerce Clause," the Court declared.⁵⁹ "No 'iron rule of equality' between taxes laid by a State on different types of business is necessary."⁶⁰ In current parlance, *Arctic Maid* requires that a tax on interstate commerce be shown roughly to approximate—but not exceed—the amount of the similar tax on intrastate commerce.⁶¹

Two relatively recent cases offer specific formulations for the second and third prongs currently needed to uphold a compensatory tax defense to a "dormant" Commerce Clause facial violation. First, according to *Oregon Waste Systems*, "the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent;' that is, they must be similar in substance to serve as mutually exclusive 'prox[ies]' for each other."⁶² In the case espousing the necessity of meeting this prong, *Armco v. Hardesty*,⁶³ West Virginia had imposed a gross receipts tax on out-of-state manufacturers engaged in wholesaling within the state.⁶⁴ Simultaneously, local manufacturers were subject to a significantly higher manufacturing tax rate than their out-of-state counterparts.⁶⁵ West Virginia argued that the purpose of the wholesaling tax was to compensate for the relatively higher manufacturing tax burden suffered by local manufacturers.⁶⁶ The Court, in rejecting West Virginia's argument, announced that:

58. This is another prong of today's compensatory tax test. See *infra* note 200 and accompanying text.

59. *Arctic Maid*, 366 U.S. at 205 (quoting *International Harvester Co. v. Evatt*, 329 U.S. 416, 422 (1951)).

60. *Id.* (quoting *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1948)).

61. *Oregon Waste Systems*, 114 S. Ct. at 1352. The *Arctic Maid* rule requiring only rough approximation was enunciated in a case in which the Court found the interstate commerce tax burden to be *less* than the burden on the complainants' intrastate competitors. See *Arctic Maid*, 366 U.S. at 204. However, most Commerce Clause cases are likely to be brought by interstate commerce participants suffering a *higher* tax burden than their intrastate competitors. Certainly, the Court needed less courage to make this proclamation and thus may have "meant" it less in this case than in the more common situation. Ironically, *Arctic Maid* was not nominally analyzed pursuant to the compensatory tax doctrine even though it is cited within *Oregon Waste Systems*' pronouncement of the elements of the compensatory tax test. *Oregon Waste Systems*, 114 S. Ct. at 1352.

62. *Oregon Waste Systems*, 114 S. Ct. at 1352 (quoting *Armco v. Hardesty*, 467 U.S. 638, 643 (1984)).

63. 467 U.S. 638 (1984).

64. *Id.* at 639.

65. *Id.* at 641.

66. *Id.* at 642.

[M]anufacturing and wholesaling are not 'substantially equivalent event[s]' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of state. Manufacturing frequently entails selling in the State, but we cannot say which portion of the manufacturing tax is attributable to manufacturing, and which portion to sales. The fact that the manufacturing tax is not reduced when a West Virginia manufacturer sells its goods out of state, and that it is reduced when part of the manufacturing takes place out of state, makes clear that the manufacturing tax is just that, and not in part a proxy for the gross receipts tax.⁶⁷

The Court thus signified its reluctance to compare different tax burdens imposed on different commercial activities, even if the taxes resulted in the same economic impact on both parties, as West Virginia claimed.⁶⁸ Since *Armco*, the "substantial equivalence" requirement has been a fixture in Commerce Clause compensatory tax analyses.

According to *Oregon Waste Systems*, to satisfy a compensatory tax defense, a state must also "[i]dentify . . . the [intrastate tax] burden for which the State is attempting to compensate."⁶⁹ In *Maryland v. Louisiana*,⁷⁰ the Court considered a Louisiana "first use tax" on outer continental shelf ("OCS") gas brought into Louisiana.⁷¹ In trying to justify the tax as compensatory for similar in-state tax burdens, Louisiana pointed to an identical tax imposed upon in-state producers of natural gas.⁷²

According to Louisiana, the OCS use tax was "designed to equalize competition between gas produced in Louisiana and subject to the state severance tax . . . and gas produced elsewhere not subject to the severance tax such as OCS gas."⁷³ The Court struck the tax despite the compensatory tax argument because Louisiana had no sovereign interest in compensation for resources extracted from the federally-owned OCS.⁷⁴ The Court implied that a state trying to justify a

67. *Id.* at 643 (citation omitted).

68. *See id.* at 643-44. However, even sales taxes and use taxes do not burden exactly the same commercial activity: "The sales tax is imposed on the retail transaction, whereas the use tax is imposed on the use of property." Tatarowicz & Mims-Velarde, *supra* note 15, at 904. However, if the results of two different taxes are similar and more easily compared than the *Armco* taxes (i.e., a use tax and a sales tax, or a per pound of tax on fish freezer ships and a per pound tax on local fish canneries), the Court has been willing to compare taxes that are imposed on different commercial activities that it nevertheless views as substantially equivalent events.

69. 114 S. Ct. at 1352 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 758 (1981)).

70. 451 U.S. 725 (1981).

71. *Id.* at 728.

72. *See id.* at 731.

73. *Id.* at 732.

74. *Id.* at 759.

discriminatory burden on interstate commerce must “identif[y] the burden for which the State is trying to compensate.”⁷⁵ Although cited as an element separate from the substantially equivalent events requirement, analysis of the identification prong in fact returns the Court to the substantially equivalent events requirement:

The [severance tax on government-owned OCS and the first use tax] are not comparable in the same fashion as a use tax complements a sales tax. In that case [(use tax and sales tax)], a State is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State. No such equality exists in this instance.⁷⁶

Thus, the identification prong apparently has no discernable independent value as it is framed in *Oregon Waste Systems*; the requirement is automatically met as soon as a state convinces a court that the two taxes are substantially equivalent. Swallowing of the third prong by the second prong makes intuitive sense. A party able to show that the taxes target substantially equivalent events must have already successfully identified the events, as well as the parties and the burdens, being considered for substantial equivalence.⁷⁷

After the above analysis, the only two requirements left to uphold a compensatory tax are that the taxes imposed substantially equivalent events⁷⁸ and that the taxes levy roughly approximate burdens, provided that the interstate tax burden does not exceed the intrastate tax burden.⁷⁹ This somewhat clean formula is sullied, however, by several cases that exert influence in defining the contours of the compensatory tax test, despite the absence of any compensatory tax arguments made in them.

75. *Id.* at 758.

76. *Id.* at 759.

77. Admittedly, *Oregon Waste Systems* suggests that the identification requirement is a “threshold matter.” 114 S. Ct. at 1352. Although the Court acknowledged that it was only a threshold matter, its inclusion as a seemingly separate requirement only complicates the already blurred contours of the compensatory tax test. Mentioning only that the substantially equivalent events requirement needs to be satisfied would have been sufficient to cover the substance of the identification requirement and would have avoided any additional confusion or prong-adding. The remainder of this Note is clarified insofar as this discussion rejects the identification requirement, misleadingly introduced by the Court in *Oregon Waste Systems* as an independent prong of the compensatory tax test.

78. See *supra* notes 62-68 and accompanying text.

79. See *supra* notes 59-61 and accompanying text.

II. OTHER CASES INFLUENCING THE CONTOURS OF THE COMPENSATORY TAX TEST

Several cases in which a compensatory tax argument was not raised nevertheless remain particularly instructive as to which tax schemes the doctrine does and does not encompass, and perhaps should or should not encompass. This section will highlight several cases that present issues similar to those presented in compensatory tax cases (i.e., interstate commerce is restricted for reasons that are at least in part compensatory in nature), but for one reason or another did not consider the defense. Several issues particularly germane to an analysis of *Oregon Waste Systems* are explored in this section, and some of the more salient holdings of the cases will be analyzed for a comparison to the analysis offered in *Oregon Waste Systems*.

A. Can a Tax Functionally Equivalent to a Compensatory Tax Compensate for a State Burden Imposed Through General Taxes?

Three Supreme Court cases lend partial answers to the question posed by this subsection. In *Clark v. Paul Gray, Inc.*,⁸⁰ the Court considered a fifteen dollar California tax on cars brought into the state to be sold, while no similar levy was imposed upon cars being transported solely within the state for sale.⁸¹ The basis for the tax on out-of-state cars was that the drivers of such cars, often acting without compensation and only to obtain free transportation, created special dangers because of their supposed relative lack of concern for California drivers and roads, compared to California drivers.⁸² Moreover, the cars driven into the state were typically coupled, thus tending to skid more easily than "single" cars, and the coupled cars were driven in caravans which tended to increase traffic inconveniences and hazards.⁸³ All told, the caravans caused a disproportionate amount of wear and tear and hazards on California roads and drivers—a wear and tear that required added policing and state funds to mitigate.⁸⁴

California imposed the tax to compensate for the added costs of highway administration and policing the increased dangers posed by the coupled-car caravans.⁸⁵ However, California did not formally offer a "compensatory tax" argument. The Supreme Court found that the tax, though discriminatory against interstate commerce, had a basis "abundantly supported by the record," particularly because the California legislature had offered comprehensive details

80. 306 U.S. 583 (1939).

81. *Id.* at 585-86.

82. *Id.* at 591-92.

83. *Id.* at 592.

84. *See id.*

85. *See id.*

of the burdens imposed by such caravans.⁸⁶ The Court approved of the tax's avowed purpose of reimbursing California for the costs of added policing and repairing wear and tear of the roads.⁸⁷ In deciding that the tax reimbursed the state for those services, the Court deferred to legislative factfinding.⁸⁸

Notably, the caravan fee compensated for costs incurred by state agencies responsible for ensuring adequate policing and road maintenance. The funds used directly for operations of agencies were presumably raised largely through a general taxation scheme (e.g., income taxes). Nevertheless, the Supreme Court was willing to find that the tax was, implicitly at least, compensatory.⁸⁹ Thus, *Clark* suggests that a tax may be imposed on interstate commerce to compensate for a burden imposed on a state by that interstate commercial activity if the state's expended funds came from the state's general tax scheme.

In addition, the caravan fees obviously put the out-of-state haulers at a competitive disadvantage. The Court approved the tax without going through a formal compensatory tax analysis: the substantially equivalent events test was not addressed, perhaps simply because a compensatory tax argument was not nominally presented. Presumably, such an argument could have been presented to accompany the evidence about the police and maintenance costs associated with the caravans. Did this tax burdening interstate commerce survive because "compensatory tax" was not argued?

The car sellers also contested the reasonableness of the fee amount.⁹⁰ Both parties offered evidence that the tax compensated too little or too much for the costs incurred by the state,⁹¹ but the Court, in finding no egregious deviation from the true costs incurred, declared that:

The state is not required to compute with mathematical precision the cost to it of the services necessitated by the caravan traffic. If the fees charged do not appear to be manifestly disproportionate to the services rendered, we cannot say from our own knowledge or experience that they are excessive.⁹²

A somewhat similar taxation comparison arose in *Capitol Greyhound Lines v. Brice*.⁹³ In *Brice*, Maryland had imposed an excise tax on all common

86. *Id.*

87. *See id.* at 598-600.

88. *See id.* at 592, 594.

89. *See id.* at 599.

90. *See id.* at 598-99. The "reasonableness of the fee amount" is an issue in *Clark* corresponding, perhaps, to the rough approximation prong of the compensatory tax test in other cases.

91. *Id.*

92. *Id.* at 599 (citation omitted).

93. 339 U.S. 542 (1950).

carriers, both intrastate and interstate, traveling through Maryland.⁹⁴ Two bus lines challenged the tax as discriminatory against interstate commerce because it had no relation to quantity of road use and thus generally taxed interstate carriers more per mile of travel on Maryland roads than it did intrastate carriers.⁹⁵ Maryland *did not* attempt to identify a specific burden for which it was attempting to compensate, aside from farming out the privilege of using its roads.

The Supreme Court agreed with Maryland that taxes that impose a burden on both intrastate and interstate users of roads "are valid unless the amount is shown to be in excess of fair *compensation* for the privilege of using [Maryland] roads."⁹⁶ The Court chided the bus lines' failure to prove that the taxes were excessive in comparison to "fair compensation,"⁹⁷ even though neither party nor the Court explicitly attempted to approximate reasonably the actual cost of the privilege. The Court thus seemed to place the burden of proof for comparing the tax burdens on the out-of-state taxpayer.

Although the tax in *Brice* was not placed on articles of commerce and had no discernible impact on interstate competition, the Court repeatedly referred to the fact that the tax was a form of "compensation," without identifying the intrastate tax for which the tax on interstate commerce was being imposed.⁹⁸ If the compensation was for using the state's roads, then the Court must have been implying that the state was expending some resource on its roads for which it deserved compensation. Those resources must have been maintenance and policing costs, performed through the expenditure of general tax funds. The Court again implicitly accepted the idea that a specific tax on out-of-state participants in interstate commerce may compensate a state for expended resources originally generated through its general tax scheme. Again, the Court ignored the substantially equivalent events requirement, probably because the state did not make a compensatory tax argument and did not identify the intrastate tax for which the state sought compensation.

The Court reached a different conclusion in the more recent *American Trucking Associations, Inc. v. Scheiner*.⁹⁹ In *Scheiner*, the Court refused to compare the relative burden imposed by a Pennsylvania axle tax on all trucks to the general tax funds applied to state road maintenance.¹⁰⁰ The challenge to the tax was similar to that posed in *Brice*: the tax in question was discriminatory against interstate commerce because it had no relation to quantity of road use and thus generally taxed interstate carriers more per mile on Pennsylvania roads than

94. *Id.* at 543-44.

95. *See id.* at 545.

96. *Id.* (emphasis added).

97. *Id.*

98. *Id.* at 544-47.

99. 483 U.S. 266 (1987).

100. *Id.* at 288-89.

it did intrastate carriers.¹⁰¹ Pennsylvania conceded that there were no specific taxes for which the axle tax was attempting to compensate.¹⁰² However, if the language about "compensation" in *Brice* meant anything,¹⁰³ the tax sought only to compensate for expenses due to the added policing and other administrative costs associated with out-of-staters using Pennsylvania's roads.

Despite the fact that the tax at issue in *Scheiner* was a flat tax and, like that in *Brice*, not facially discriminatory against interstate commerce, the Court confessed its reluctance to "plunge . . . into the morass of weighing comparative tax burdens" by comparing taxes on dissimilar events.¹⁰⁴ The Court also struck the tax because the "tax discriminate[d] against out-of-state vehicles by subjecting them to a much higher charge per mile travelled in the state [and because the tax] d[id] not . . . approximate fairly the cost or value of the use of Pennsylvania's roads."¹⁰⁵

The Court's reluctance to compare different taxes, however, must have been a thinly veiled excuse for avoiding its real rationale.¹⁰⁶ Just how the Court concluded that the burden on out-of-state vehicles was much higher and that the tax "d[id] not . . . approximate fairly the cost or value of the use of Pennsylvania's roads" without first taking the "plunge" and "weighing comparative tax burdens" remains a mystery.¹⁰⁷ Obviously, the Court did compare and weigh the relative burdens imposed by the taxes; the Court was apparently grasping for other grounds on which to reject the tax. Still, the decision's recency compared to *Clark* and *Brice* adds some weight to the Court's reluctance.¹⁰⁸

101. *See id.* 483 U.S. at 275-76.

102. *Id.* at 287.

103. *See supra* note 98 and accompanying text.

104. *Id.* at 289-90 (quoting J. HELLERSTEIN, 1 STATE TAXATION: CORPORATE INCOME AND FRANCHISE TAXES ¶ 4.12[5] (1983)).

105. *Id.* at 290.

106. The Court's real rationale for its decision is subject to a debate largely beyond the scope of this Note. Perhaps the Court was reluctant to "plunge into the morass" but did anyway in its frenzy to find problems with the statute, or perhaps the Court wanted to leave itself an escape hatch for a time when balancing burdens became more complicated.

107. *Scheiner*, 483 U.S. at 289-90.

108. Although *Scheiner* must be taken seriously as a limitation upon the substantially equivalent events test in which the Court will hesitate to compare a general tax scheme to a specific tax, there is no inherent reason why the Court cannot do so, as it did in *Clark* and *Brice*. The Court may have learned that actually performing such comparisons is more complicated than its rather superficial comparisons in *Clark* and *Brice*. Surely honest and comprehensive attempts at such comparisons could become complex. However, courts manage to handle all manner of complex matters accompanied by a high degree of uncertainty with the help of expert witnesses. In *Scheiner*, the Court's reluctance may have stemmed in part from the fact that Pennsylvania did not try to break down how the funds from the general tax scheme were used for the services, if any, for which the axle tax revenues were to compensate. For example, Pennsylvania did not show how the tax was just making interstate commerce pay its fair share of its burden on Pennsylvania roads. *See id.* 483

B. *Is Resource Protection an Adequate Justification for Imposing Reasonable Restrictions on Interstate Commerce?*

Finally, still two other Supreme Court cases are relevant to the Court's eventual decision in *Oregon Waste Systems* because they appear to create "dormant" Commerce Clause exceptions for reasonable protection of natural resources. The structure of a Montana elk hunting license fee was the source of dispute before the Court in *Baldwin v. Fish & Game Commission*.¹⁰⁹ Montana had recently enacted legislation imposing higher elk hunting license fees on nonresidents than on its own residents.¹¹⁰ One major purpose of the fee structure was to compensate Montana for conservation expenditures charged only to Montana residents through general taxes.¹¹¹ The Court upheld the fee schedule even though the purpose of the higher fee was to compensate Montana for funds raised through the general tax scheme.¹¹²

Unique to the analysis in *Baldwin*, however, was the Court's delineation of the contours of the Privileges and Immunities Clause: "[i]t has not been suggested . . . that state citizenship or residency may never be used by a State to distinguish among persons."¹¹³ Furthermore, the Court added that "[i]t is important . . . that a state have power to preserve and regulate the exploitation of an important resource."¹¹⁴

Although the Court wielded this language in analyzing the Privileges and Immunities Clause,¹¹⁵ one can easily envision Montana putting forth a compensatory tax defense instead and the Court striking the fee schedule because the taxed events were not substantially equivalent. While differences exist between the purposes and functions of the two constitutional clauses, they clearly exert overlapping spheres of influence. To hold the same tax invalid under one

U.S. at 270-75.

109. 436 U.S. 371, 373 (1978).

110. *See id.* at 389-90. The higher fee on nonresidents also served to restrict the otherwise great number of would-be hunters, which in turn worked to maintain Montana's elk population at a sustainable level. *See id.*

111. The Court listed a litany of programs that the general tax scheme helped to fund that directly or indirectly benefited nonresident hunters, including: production and maintenance of big game populations, support for state parks, roads providing access to hunting areas, fire suppression to protect wildlife habitat, habitat benefits effected by Montana's Environmental Quality Council, enforcement of air and water quality standards, assistance by sheriff's departments to enforce game laws, state highway patrol officers who assist wildlife officers at game checking stations and forage support by resident ranchers. *Id.* at 389.

112. *See id.* at 389-90. The Court's comparison of Montana's general tax scheme with its license fee structure appears contradictory with its later holding in *Scheiner*, further weakening the precedential integrity of the Court's reluctance in *Scheiner* to perform the same kind of comparison.

113. *Id.* at 383.

114. *Id.* at 386 (citations omitted).

115. *See id.* at 383-86.

clause because it does not meet the substantially equivalent events requirement of the compensatory tax test, but valid under the other clause because “[it is] importan[t] . . . that a state have power to preserve and regulate the exploitation of an important resource”¹¹⁶ through means of a functionally compensatory tax, is surely to elevate form over substance.

Perhaps most importantly, the Court realized that the tax’s purpose was not only to compensate but also to regulate indirectly and thus to preserve a natural resource.¹¹⁷ In doing so, the Court implicitly validated the tax’s objective as a resource use disincentive to supplement any compensatory purpose or effect of the tax. The *Baldwin* decision may not have directly impacted interstate competition like a manufacturing or use tax would have, but the Court’s decision to allow Montana to protect its resources certainly had some tangential competitive impact on interstate commerce around Montana. The elk themselves may not have been bought or sold in interstate commerce, but out-of-state hunting outfitters and gun vendors probably suffered in comparison to their Montana counterparts. In addition, the advantage given to Montana residents over their counterparts in the taking of elk certainly has some of the characteristics of discrimination in interstate commerce. Yet, the Court did not allow these considerations to restrain it from validating Montana’s resource protectionist fee schedule.

Sporhase v. Nebraska involved the use of another state’s scarce natural resource—groundwater.¹¹⁸ The measure at issue in *Sporhase* was a resource protectionist regulation that was also intended to be compensatory through reciprocal agreements for groundwater use, rather than a tax. A Nebraska statute restricted the withdrawal of groundwater from any Nebraska well if the person extracting the groundwater intended to use it outside of Nebraska.¹¹⁹ To compensate for the extraction of Nebraska groundwater, the statute required the state of the permittee, as part of the condition for permitting, to grant reciprocal groundwater rights to Nebraska users.¹²⁰ Because the law placed restrictions on groundwater extractor permits, the case was not argued under the compensatory tax doctrine. The Court struck the provision primarily because Colorado, where appellants were planning to use the groundwater, had a statutory provision predating Nebraska’s that forbade the exportation of any of its groundwater.¹²¹

116. *Id.* at 386 (citations omitted).

117. *Id.* at 390. The Court took care to draw a distinction between resource and economic protectionism, suggesting that resource protectionism is more justifiable under the Commerce Clause than economic protectionism, which is forbidden. *Id.*

118. 458 U.S. 941 (1982).

119. *See id.*

120. *Id.* at 944.

121. *See id.* at 957-58.

Thus, Nebraska's reciprocity provision "act[ed] as an explicit barrier to the commerce between the two States."¹²²

Nevertheless, aside from the reciprocity problems faced when compared to the Colorado statute, the Court found some reasons to uphold the statute, perhaps establishing boundaries for subsequent natural resource protection/compensation cases. For instance, the Court noted that "[o]bviously, 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."¹²³ The Court thus indicated that even a restriction on interstate commerce to which the imposing state's citizens are not subject may be upheld if the imposing state's citizens are already similarly burdened. Applied to compensatory tax doctrine, this language in *Sporhase* suggests that a court could uphold a tax burden upon nonresidents if residents of the imposing state are already burdened with preserving the resource, even if the incidence of the taxes vary somewhat across state lines. Moreover, the Court in *Sporhase* sweepingly proclaimed that:

[A] State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism . . . and health and safety regulation.¹²⁴

Again, the Court suggested a favorable disposition toward an essentially discriminatory compensatory provision because a primary aim of the provision is health, safety and resource protection.

The restrictions reviewed in *Baldwin* and *Sporhase* contained a heavy proportion of compensatory intent mixed with resource protectionism. Both statutes were facially discriminatory and affected interstate commerce. The only reason that *both* statutes were not upheld was that one was not tailored narrowly enough to integrate effectively its neighbor's unreasonable restrictions.¹²⁵ Viewed from another perspective, perhaps the only reason both statutes had an opportunity to survive was because neither quite met the qualifications to be argued under the Court's narrow compensatory tax doctrine.

122. One might wonder why Nebraska's statute was struck while Colorado's statute arguably placed a far greater restriction on interstate commerce. Apparently, the answer is that Nebraska was the first state taken to task: "[Nebraska's] reciprocity agreement cannot, of course, be justified as a response to another state's unreasonable burden on commerce." *Id.* at 958 n.18.

123. *Id.* at 955-56.

124. *Id.* at 956 (citations omitted).

125. *Id.* at 958.

III. OTHER POSSIBLE LIMITATIONS ON *OREGON WASTE SYSTEMS*: RECENT STATUTES RESTRICTING INTERSTATE COMMERCE OF MSW STRUCK BY THE COURT

Two recent Supreme Court cases—*Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*¹²⁶ and *Chemical Waste Management, Inc. v. Hunt*¹²⁷—shed light on the Court's hostile approach to Commerce Clause restrictions in the context of MSW restrictions and thus provide some insight into the Court's later decision in *Oregon Waste Systems*. Moreover, these twin cases¹²⁸ offer insight into how the *Oregon Waste Systems* case differs from prior restrictions on interstate MSW commerce that have been struck by the Court—and what may be done to help states like Oregon justify their carefully planned reasonable burdens on interstate commerce.

At issue in *Fort Gratiot* was a Michigan solid waste statute that allowed counties to place an absolute ban on the importation of out-of-county solid waste.¹²⁹ Relying heavily on *City of Philadelphia*, the Court struck down the statute because such a ban by any county would have not only impeded intrastate-intercounty MSW disposal (which apparently was permissible) but also interstate commerce.¹³⁰ The statute was also "protectionist" for health and safety reasons but could not be rescued from constitutional condemnation.¹³¹ The Court easily found that Michigan's attempt to impose an absolute ban against non-local MSW violated the Commerce Clause.¹³²

In *Hunt*, Alabama had imposed a disposal surcharge on all *hazardous* waste generated outside the state.¹³³ The trial court rejected the state's compensatory tax argument, and that argument was not presented before the United States Supreme Court.¹³⁴ Alabama did *not* base its defense to the surcharge¹³⁵ on any specific accounting of the relative costs imposed on Alabama residents but instead couched their argument largely in protectionist terms—to

126. 112 S. Ct. 2019 (1992).

127. 112 S. Ct. 2009 (1992).

128. The two cases were issued together. *Id.*; *Fort Gratiot*, 112 S. Ct. 2019.

129. *Fort Gratiot*, 112 S. Ct. at 2021.

130. *Id.* at 2025-26.

131. *Id.* at 2027 ("There is . . . no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the State.").

132. *Id.* at 2028.

133. *Hunt*, 112 S. Ct. at 2011.

134. *Id.* at 2016 n.9.

135. The surcharge at issue in *Hunt* was \$72.00 per ton which, when added to a base fee of \$25.60 per ton for all hazardous wastes disposed in Alabama, created the disparity of charging a total of \$97.60 per ton to out-of-state disposers versus the \$25.60 base fee to in-state disposers. *Id.* at 2012.

protect the health and safety of Alabama citizens.¹³⁶ Alabama's argument in the United States Supreme Court did not differ significantly from the conclusions reached and given in the Alabama Supreme Court decision:

The Additional Fee serves these legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) *provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama*; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.¹³⁷

The Alabama Supreme Court, while not hearing argument expressly geared toward the compensatory tax issue, seemed to rule anyway that the fee was compensatory.¹³⁸ However, even if Alabama had expressly argued that the surcharge was a compensatory tax, the United States Supreme Court would have had little justification to uphold the surcharge because Alabama apparently did not present any information as to why the state reached a figure of \$72.00 per ton other than through arbitrary means. Thus, the surcharge doubtfully would have survived the rough approximation prong of the compensatory tax test. For this reason and others,¹³⁹ a compensatory tax argument certainly would have failed had Alabama brought it before the Court.

Hunt and *Fort Gratiot* combined to warn that the Court would not accept restrictions on interstate MSW commerce solely for health and safety reasons. The protectionist statutes reviewed in both cases, however, had arbitrary effects: an arbitrary absolute ban on disposal of interstate MSW in *Fort Gratiot*¹⁴⁰ and an arbitrarily inflated surcharge in *Hunt* when a small amount of state costs were at

136. *Id.* at 2014-16.

137. *Id.* at 2014 (quoting *Hunt v. Chemical Waste Management, Inc.*, 584 So. 2d 1367, 1389 (Ala. 1991)) (emphasis added).

138. *See id.*; *see also Hunt*, 584 So. 2d at 1388 (stating that the legislature in enacting the fee "was merely asking the states that are using Alabama as a dumping ground for their hazardous wastes to bear some of the costs for the increased risk they bring to the environment and the health and safety of the people of Alabama.").

139. Also, the single facility accepting hazardous waste in Alabama was private, and the facility basically paid for itself through private funds. *Hunt*, 112 S. Ct. at 2011. While there were some state costs associated with regulating the facility for which it could be argued that compensation was appropriate, those costs were relatively small because the cost of operation, liability, etc., remained with the private disposal facility. Thus, a compensatory tax argument could not have been argued other than on grounds of compensation for resource depreciation.

140. *See supra* notes 129-32 and accompanying text.

issue.¹⁴¹ The Court had yet to review a case in which a state, in trying to compensate for costs passed on to its own citizens through taxes, placed a restriction on interstate MSW movement that was not arbitrary.

IV. OREGON WASTE SYSTEMS AND THE COMPENSATORY TAX

In *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,¹⁴² the United States Supreme Court finally heard argument that a solid waste surcharge actually represented a compensatory tax designed to compensate for both the added tax burden associated with regulating and cleaning up MSW landfills and the increased health and safety risks of the citizens of the importing state.¹⁴³

A. Oregon's Surcharge on Out-of-State Waste

In addition to a base fee of \$0.85 per ton imposed on all MSW disposed in Oregon MSW landfills,¹⁴⁴ the Oregon Legislature in 1989 imposed a surcharge on "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site [within Oregon]."¹⁴⁵ The Legislature did not specify the amount of the surcharge but instead left that task to the Environmental Quality Commission ("EQC") with instructions that the surcharge "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 under [specific statutes]."¹⁴⁶

The EQC then followed its normal rulemaking procedures to set a fee consistent with the statutory directive.¹⁴⁷ The EQC held hearings on the surcharge in several cities, "receiv[ing] testimony and written comments from dozens of interested parties."¹⁴⁸ After calculating an initial surcharge, the EQC retained an independent economic consultant and revised their previous methodology as well

141. See *supra* notes 133-39 and accompanying text.

142. 114 S. Ct. 1345.

143. See Respondents' Brief, *Oregon Waste Systems*, 114 S. Ct. 1345 (No. 93-70) (No. 93-108).

144. See OR. REV. STAT. § 459A.110(1) (Supp. 1994) (authorizing fee on in-state waste); *id.* § 459A.110(8) (authorizing equal fee on out-of-state waste). See also *Oregon Waste Systems*, 114 S. Ct. at 1348 (describing \$0.85 base fee).

145. OR. REV. STAT. § 459.297(1) (1991).

146. *Id.* § 459.298. The statute also provided that the "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." *Id.*

147. See Respondents' Brief at 5-6, *Oregon Waste Systems*, 114 S. Ct. 1345 (No. 93-70) (No. 93-108).

148. *Id.* at 5.

as their fee in response to their consultant's comments.¹⁴⁹ Although no formal parties were identified, no formal record was created, no witnesses were sworn, and no cross-examination was allowed, the surcharge was created under the general guideline that the surcharge represent a "reasonable assessment of the cost to Oregon of accepting out-of-state waste . . . not . . . inflated to discourage importation of waste, nor deflated to encourage importation of waste."¹⁵⁰ At the completion of the rulemaking procedures, the EQC finally set the surcharge, which became effective January 1, 1991, at \$2.25 per ton.¹⁵¹

Thus, with the imposition of the surcharge, Oregon subjected out-of-state MSW to a much higher overall disposal charge (\$3.10 per ton) than in-state MSW (only \$0.85 per ton).¹⁵² The EQC divulged many of the specifics of its calculations, showing how the agency reached the \$2.25 figure.¹⁵³ Oregon later justified the surcharge with what was to be its primary legal argument for upholding the tax:

The differen[ce] . . . does not mean that the overall costs borne by Oregon citizens and waste generators for in-state waste disposal are lower than for disposal of out-of-state waste. Under Oregon's statutory scheme, in-state disposal costs are recovered partially through the \$.85 per ton disposal fee and also through general fund revenues Out-of-state waste producers pay a higher disposal fee because general revenues and fees generated from in-state waste would otherwise have to support the proportionate share of Oregon's program attributable to the costs of out-of-state waste disposal.¹⁵⁴

B. *The Oregon Court of Appeals Decision*

Soon after the EQC rulemaking, Oregon Waste Systems, Inc., along with Columbia Resource Company ("CRC") and Gilliam County, Oregon, filed a

149. *Id.* at 6.

150. *Id.*

151. OR. ADMIN. R. 340-97-120(7) (1990).

152. *Oregon Waste Systems*, 114 S. Ct. at 1348.

153. *Id.* at 1355 n.1 (Rehnquist, C.J., dissenting) (citing Petition for Certiorari at 4, *Oregon Waste Systems*, 114 S. Ct. 1345 (No. 93-70) (No. 93-108)). The identified costs composing the surcharge included: \$0.72 per ton for increased environmental liability, \$0.66 per ton for reimbursements to the state for tax credits and other public subsidies, \$0.58 per ton for statewide activities for reducing environmental risks and improving solid waste management, \$0.20 per ton for lost disposal capacity, \$0.05 per ton for solid waste reduction activities related to the review and certification of waste reduction and recycling plans, \$0.03 per ton for supporting the public infrastructure, and \$0.01 per ton for nuisance impacts from transportation. *Id.*

154. Respondents' Brief at 9, *Oregon Waste Systems*, 114 S. Ct. 1345 (No. 93-70) (No. 93-108) (citations omitted).

complaint against the EQC in the Oregon Court of Appeals.¹⁵⁵ Notably, the initial filing in the Court of Appeals meant that, while appellate review would be expedited, factfinding was bypassed; the methods used by EQC to arrive at the \$2.25 figure could not be evaluated in the court.¹⁵⁶ The petitioners challenged both the surcharge and its enabling statutes under the Commerce Clause of the United States Constitution.¹⁵⁷

The court found that the challenger of a potential Commerce Clause violation "has the burden to show that the fee is excessive for the purpose for which it is collected"¹⁵⁸ and that petitioners had not met that burden.¹⁵⁹ Thus, the court upheld the surcharge because it "exact[ed] a compensatory fee for the distinct burden that the state incurs to regulate and facilitate disposal of out-of-state waste."¹⁶⁰ In fact, the court deferred to the judgment of the legislature, which in the court's estimation had made "abundantly clear that it intend[ed] only to make 'out of state generators pay their 'fair share' of the costs' and no more."¹⁶¹

C. The Oregon Supreme Court Decision

The Oregon Supreme Court affirmed the Oregon Court of Appeals' ruling in *Gilliam County v. Department of Environmental Quality*.¹⁶² Despite noting the resemblance between the Oregon surcharge and the surcharge at issue in *Hunt*, the Oregon Supreme Court found that the surcharge constituted a compensatory fee.¹⁶³ In upholding the surcharge, the court noted that "[b]ecause of [its] express nexus to actual costs incurred [by state and local governments] . . . [t]here is a discernible basis for the surcharge apart from [its out-of-state] origin."¹⁶⁴

155. *Gilliam County v. Department of Env'tl. Quality*, 837 P.2d 965, 968 (Or. Ct. App. 1992), *aff'd*, 849 P.2d 500 (Or. 1993), *rev'd*, 114 S. Ct. 1345 (1994). Oregon Waste Systems operated a MSW landfill in Gilliam County that accepted solid waste, from both in-state and out-of-state sources, for disposal. *Id.* CRC had a twenty year contract with Clark County, Washington, under which CRC transported MSW via barge to Morrow County, Oregon. *Id.*

156. *Id.* at 977.

157. *Id.* at 968, 974.

158. *Id.* at 975 (citing *Clark*, 306 U.S. at 599).

159. *See id.* at 977.

160. *Id.* at 976. Although on appeal the surcharge was argued under "compensatory tax" doctrine, the Oregon Court of Appeals thought the surcharge a "compensatory fee." *Id.* The court suggested that a compensatory tax "is a general revenue measure that is intended to equalize the tax burden between substantially similar interstate and intrastate transactions" but ironically did not offer a definition for a "compensatory fee." *Id.* at 975 & n.18. As the Oregon and United States Supreme Courts understood the surcharge to fall within a class of potentially compensatory taxes, the distinction made by the Oregon Court of Appeals seems to be minimal, and maybe only nominal.

161. *Id.* at 977 (quoting *Hunt*, 112 S. Ct. at 2016 n.9).

162. 849 P.2d 500, 508 (Or. 1993), *rev'd*, 114 S. Ct. 1345 (1994).

163. *Id.*

164. *Id.*

Moreover, the surcharge was “demonstrably justified by a valid factor unrelated to economic protectionism.”¹⁶⁵ Thus, the Oregon Supreme Court found that no parties were put at a competitive disadvantage in contravention of the Commerce Clause but instead that Oregon’s objectives and results were only to recover the costs imposed by out-of-state MSW and to protect its natural resources.¹⁶⁶ Finally, the court noted generally 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.”¹⁶⁷ The surcharge, however, was to receive quite different treatment on review.

D. *The United States Supreme Court Decision*

1. *The Majority Opinion*

After granting certiorari because of a conflict between the Oregon Supreme Court decision and a Seventh Circuit decision,¹⁶⁸ the United States Supreme Court reversed the Oregon Supreme Court’s decision and found that the surcharge violated the Commerce Clause.¹⁶⁹ Justice Thomas, writing for the majority, found the surcharge to be discriminatory and invalid under the Commerce Clause because it divided economic burdens associated with MSW along state lines without ample justification.¹⁷⁰ Furthermore, the majority found the tax could not be saved from constitutional infirmity by the compensatory tax doctrine for a variety of reasons.¹⁷¹

After restating the Commerce Clause’s “negative” aspect prohibiting states from unjustifiably discriminating against or burdening the interstate flow of articles of commerce, the majority constructed a framework for its rejection of the surcharge by alluding to the possibility of the Balkanization of the states if such surcharges were held to be constitutional and other states were to follow Oregon’s example.¹⁷² The majority easily found that the surcharge was *per se* invalid because of its “obvious” discriminatory effect upon interstate commerce.¹⁷³ In structuring its fee system in the way that it did, Oregon “tax[ed] a transaction .

165. *Id.* (quoting *Hunt*, 112 S. Ct. at 2015).

166. *Id.* Notably, because Oregon laws restrict the scope of judicial review of administrative rules in expedited proceedings, the Oregon Supreme Court did not decide the factual question of whether the surcharge on out-of-state MSW was disproportionate to the costs incurred by in-state MSW disposers. *Id.* at 508-09.

167. *Id.* at 508.

168. *See Oregon Waste Systems*, 114 S. Ct. at 1349 (citing *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1284 (1992)).

169. *Id.* at 1355.

170. *Id.*

171. *Id.* at 1351-53.

172. *Id.* at 1349.

173. *Id.* at 1350.

. . more heavily when it crosse[d] state lines than when it occur[ed] entirely within the State."¹⁷⁴ The majority asserted that the extent of the difference between the fees imposed on in-state and out-of-state MSW was irrelevant—*any* difference would be considered discriminatory.¹⁷⁵ The majority stated:

We find respondents' narrow focus on Oregon's compensatory aim to be foreclosed by our precedents. As we reiterated in *Chemical Waste*, the purpose of, or justification for, a law has no bearing on whether it is facially *discriminatory*. Consequently, even if the surcharge merely recoups the costs of disposing of out-of-state waste in Oregon, the fact remains that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce.¹⁷⁶

Thus, the majority implied that compensation for local and state government expenses cannot be a defense to a finding of a regulation's discriminatory character; as a threshold matter, a regulation will be facially discriminatory and thus subject to strict scrutiny despite any underlying compensatory rationale.¹⁷⁷ However, the majority found that the same regulation could be rescued from constitutional infirmity if its purpose was "compensatory,"¹⁷⁸ and it satisfied the various prongs for a compensatory tax outlined in the Court's previous compensatory tax cases.¹⁷⁹

The respondents' primary defense was that the surcharge constituted a "compensatory tax" necessary to make shippers of such waste pay their 'fair share' of the costs imposed on Oregon by the disposal of their [MSW] in the State."¹⁸⁰ After noting the door left open in *Hunt* that could allow a surcharge like Oregon's to escape constitutional infirmity, the majority found that "[a]lthough it is often no mean feat to determine whether a challenged tax is a compensatory tax, we have little difficulty concluding that the Oregon surcharge is not such a tax."¹⁸¹

The majority offered as its initial definition of a compensatory tax the same definition offered in *Maryland v. Louisiana*: "a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and

174. *Id.* (citations omitted).

175. *Id.* at 1350 & n.4.

176. *Id.* at 1350 (citations omitted) (emphasis added).

177. *See id.*

178. *Id.* at 1352.

179. *See supra* notes 51-79 and accompanying text.

180. *Oregon Waste Systems*, 114 S. Ct. at 1351.

181. *Id.*

'substantially similar' tax on intrastate commerce does not offend the negative Commerce Clause."¹⁸² Because the respondents presented to the Court the first serious compensatory tax defense in some time, the majority elaborated upon its definition of the compensatory tax doctrine by setting out the specific prongs of the test. Specifically, the majority, reworking and combining the features of past compensatory tax cases,¹⁸³ articulated that:

A state must, as a threshold matter, "identif[y] . . . the [intrastate tax] burden for which the state is attempting to compensate." *Maryland* Once that burden has been identified, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. See, e.g., *Alaska v. Arctic Maid*. . . . Finally, the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent"; that is, they must be sufficiently similar in substance to serve as mutually exclusive "prox[ies]" for each other. *Armco*.¹⁸⁴

Respondents' compensatory tax argument failed first because the "[r]espondents' fail[ed] to identify a specific charge on intrastate commerce equal to or exceeding the surcharge."¹⁸⁵ The majority found unpersuasive respondents' argument that its general taxation pays as much for costs associated with in-state MSW landfills as does the out-of-state surcharge.¹⁸⁶ Intimating that funds raised through general taxation could never have a compensatory tax counterpart, the majority sweepingly found that "[g]eneral] tax payments are received for the general purposes of the [government], and are, upon proper receipt, lost in the general revenues."¹⁸⁷

The majority also found that the surcharge could not withstand scrutiny under the compensatory tax test because the surcharge was not substantially equivalent to taxes imposed on Oregonians.¹⁸⁸ As its primary example of taxes on "substantially equivalent" events, the majority pointed to the "prototypical example" of taxes on "the sale and use of articles of trade."¹⁸⁹ Admitting its "reluctance to recognize new categories of compensatory taxes," the majority

182. *Id.* at 1352 (quoting *Maryland*, 451 U.S. at 758-59).

183. Of course, not all of the cases from which the compensatory tax test was derived were initially argued as "compensatory tax" cases. See, e.g., *Arctic Maid*, 366 U.S. 199).

184. *Oregon Waste Systems*, 114 S. Ct. at 1352 (citations omitted). Note that this is the test described earlier. See *supra* notes 51-79 and accompanying text.

185. *Oregon Waste Systems*, 114 S. Ct. at 1352.

186. *Id.* at 1353.

187. *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 128 (1968) (Harlan, J., dissenting)).

188. See *id.*

189. *Id.* (citing *Silas Mason*, 300 U.S. at 579).

easily found that MSW disposal and income earning were not substantially equivalent events.¹⁹⁰

The majority was reluctant to explain why it would not recognize new categories of compensatory taxes or why it was appropriate in this case to require that the taxes be imposed on substantially equivalent events. Instead, the majority's only rationale for rejecting the respondents' general taxation argument, beyond citing amalgamated and largely unrelated bits of precedent, was that:

[P]ermitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation "would allow a state to tax intrastate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds."¹⁹¹

Because the majority found the first two prongs not satisfied,¹⁹² it had no apparent need to address the third prong of its enunciated compensatory tax test: whether the identifiable tax on interstate commerce was a rough approximation of the tax on interstate commerce.¹⁹³ Instead, the majority moved on to address and reject both of respondents' two final arguments that did not rely on the compensatory tax formulation¹⁹⁴ and remanded the case back to the Oregon Supreme Court.¹⁹⁵

Notably, the respondents did not argue before the Court that out-of-state MSW presented a unique health or safety concern not found in Oregon or that the

190. *Id.*

191. *Id.* at n.8 (quoting *Bayh*, 975 F.2d at 1284).

192. The finding that the respondents could not identify the compensating intrastate tax burden was unnecessary and logically subsumed by the Court's finding that the taxes at issue in this case did not tax substantially equivalent events. See *supra* notes 75-77 and accompanying text.

193. See *Oregon Waste Systems*, 114 S. Ct. at 1353.

194. *Id.* at 1353-54. The Court rejected an independent assertion that the surcharge was constitutionally valid as a cost-spreading measure. *Id.* The Court also disagreed with Oregon's suggestion that the surcharge's purpose as resource protection instead of economic protectionism should save it from constitutional infirmity. *Id.* at 1354.

While agreeing that the surcharge could possibly be construed as resource protectionism, the majority recalled *City of Philadelphia* in rejecting the argument: "[A]ssuming that landfill space is a 'natural resource,' 'a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its own borders.'" *Id.* at 1354 (quoting *City of Philadelphia*, 437 U.S. at 627). Any apparent exception to the *City of Philadelphia* rule granted in *Sporhase* was unique only because the resource at issue in *Sporhase* was water which, "unlike other natural resources, is essential for human survival." *Id.* (quoting *Sporhase*, 458 U.S. at 952). Implicitly, the majority found that hazards associated with MSW did not pose dangers as serious as that of a potential water shortage.

195. *Oregon Waste Systems*, 114 S. Ct. at 1355.

disposal of out-of-state MSW imposed a higher cost on Oregonians than the disposal of in-state MSW.¹⁹⁶

2. Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist, joined by Justice Blackmun, filed a vigorous dissent that disagreed with most of the majority's reasoning.¹⁹⁷ Citing the serious problems generally posed by increasing MSW disposal rates and the cost to state and local governments to control MSW problems,¹⁹⁸ Rehnquist found Oregon's surcharge to be a responsible reaction to its specific problems and a permissible restriction on interstate commerce.¹⁹⁹ In objecting to what he called "t[ying] the hands of the States,"²⁰⁰ Rehnquist charged that the majority "stubbornly refuse[d] to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in [this] case[]."²⁰¹

Rehnquist cited the careful and specific breakdown of costs made by the EQC to arrive at its total of \$2.25²⁰² as justification for its surcharge.²⁰³ Rehnquist also acknowledged the expected added costs to individual out-of-state disposers calculated by respondents in an attempt to dampen the apparent impact of the surcharge, repeating the respondents' cost calculation of approximately \$0.14 per month to a hypothetical nonresident who disposes of all of her MSW in Oregon.²⁰⁴

196. *Id.* at 1351. A successful argument premised on the notion that imported MSW presented a unique health or safety hazard not found in Oregon would have enabled the statute to bypass further scrutiny pursuant to *Maine v. Taylor*, 477 U.S. 131, 148-52 (1986). Of course, the respondents could not prove anything uniquely hazardous about out-of-state MSW.

Interestingly, Chief Justice Rehnquist, in his dissent, cites *Maine* not because MSW poses a unique risk but simply because it poses *some* risk to Oregonians' health and safety. *Oregon Waste Systems*, 114 S. Ct. at 1357 (Rehnquist, C.J., dissenting) (citing *Maine*, 477 U.S. at 151). Rehnquist found that the surcharge did "not 'needlessly obstruct[] interstate trade or attempt[] to place [Oregon] in a position of economic isolation;'" instead, he found the surcharge a useful tool within its "broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Id.* at 1357 (Rehnquist, C.J., dissenting) (citing *Maine*, 477 U.S. at 151).

197. *Oregon Waste Systems*, 114 S. Ct. at 1355-59 (Rehnquist, C.J., dissenting).

198. *See id.* at 1355-56 (Rehnquist, C.J., dissenting).

199. *See id.* at 1358-59 (Rehnquist, C.J., dissenting).

200. *Id.* at 1355 (Rehnquist, C.J., dissenting).

201. *Id.* at 1356 (Rehnquist, C.J., dissenting).

202. *See supra* note 153 and accompanying text.

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

204. *Id.* at n.2 (Rehnquist, C.J., dissenting). Given the Court's previous finding of a "residuum of power" to regulate interstate commerce left to the states in the absence of any contradictory congressional authority, Rehnquist wondered how an additional \$0.14 per week exceeded that residuum. *Id.* at 1359 (Rehnquist, C.J., dissenting).

While Rehnquist found weight in the careful tailoring of the surcharge by the EQC and the limited burden on out-of-state MSW generators, his legal analysis centered primarily on what he perceived to be the majority's "nonchalant conclusion" in finding the surcharge a failure under compensatory tax doctrine.²⁰⁵ When addressing the respondents' compensatory tax argument, Rehnquist found that the majority's focus on differential fees was "myopic" because of its refusal to compare the indirect payment, including the solid waste program's regulatory fees as well as the general taxation scheme, to the specific surcharge.²⁰⁶ Rehnquist exposed what he viewed as the majority's hypocrisy by comparing its holding to *Baldwin*,²⁰⁷ asserting that if Oregon "owned . . . a park or recreational facility [instead of landfill space], it would be allowed to charge differential fees for in-state and out-of-state users of the resource."²⁰⁸ Rehnquist found that the \$2.25 per ton fee on nonresidents represented a "fair approximation" of the privilege to use Oregon's MSW landfills.²⁰⁹

Rehnquist also attacked the majority's application of the substantially equivalent events prong of its compensatory tax test.²¹⁰ Ignoring the "events" portion of the prong, and arguably twisting the prong's application to a comparison of the tax *burdens* instead of the taxed *events*, Rehnquist found the \$0.14 per week difference small enough to find the two taxes substantially equivalent.²¹¹

In addition, Rehnquist drew a critical analogy between the groundwater restriction at issue in *Sporhase*²¹² and the surcharge at issue in *Oregon Waste Systems*.²¹³ When the health and safety of a citizenry are at issue, Rehnquist observed that "[t]he 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.'"²¹⁴ According to Rehnquist, the Court has long distinguished between resource and economic protectionism and has viewed the "control over the collection and disposal of solid waste [as] a legitimate, nonarbitrary exercise of police powers to protect health and safety."²¹⁵

Further dissecting the majority's failure to distinguish between the merits of economic and resource protectionism, Rehnquist observed that Oregon MSW

205. *Id.* at 1356 (Rehnquist, C.J., dissenting).

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

207. 436 U.S. 371. *See supra* notes 109-17 and accompanying text.

208. *Oregon Waste Systems*, 114 S. Ct. at 1358 (Rehnquist, C.J., dissenting).

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

210. *See id.* (Rehnquist, C.J., dissenting).

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

212. *Sporhase*, 458 U.S. 941. *See supra* notes 118-24 and accompanying text.

213. *Oregon Waste Systems*, 114 S. Ct. at 1356 (Rehnquist, C.J., dissenting) (citing *Sporhase*, 458 U.S. 941).

214. *Id.* (Rehnquist, C.J., dissenting) (quoting *Sporhase*, 458 U.S. at 957).

215. *Id.* at 1356-57 (Rehnquist, C.J., dissenting).

generators did not compete with out-of-state MSW producers to sell MSW and that the surcharge thus did not offer in-state MSW generators a competitive advantage over their out-of-state counterparts by the surcharge²¹⁶—the primary evil prevented by the “negative” Commerce Clause.²¹⁷ Instead, Rehnquist found, the Court’s decision would tangibly disadvantage Oregon businesses because they, in contrast to their out-of-state counterparts, would have to pay the indirect “nondisposal” costs of operating and maintaining a safe MSW landfill system in Oregon.²¹⁸

In an attempt to avoid Balkanization of the states through striking down discriminatory surcharges, the Supreme Court had instead forced states into a difficult position, according to Rehnquist. The Chief Justice envisioned two divergent fates for states after the Court’s decision: “become a dumper and ship as much waste as possible to a less populated State, or become a dumpee, and stoically accept waste from more densely populated States.”²¹⁹ Less-densely populated states such as Oregon, Rehnquist imagined, would be compelled to become dumping grounds given the majority’s Commerce Clause jurisprudence.²²⁰ Ultimately, Rehnquist concluded, the Court’s decision hamstrung states in their attempts to meet “the environmental, health, safety, and political challenges posed by the problem of solid waste disposal in modern society.”²²¹

V. ANALYSIS OF *OREGON WASTE SYSTEMS* IN LIGHT OF PRIOR COMPENSATORY TAX AND MSW-COMMERCE CLAUSE PRECEDENT

The Supreme Court in *Oregon Waste Systems* offered a mechanical, and at times misleading, application of the compensatory tax test. The test had been developed in cases in which traditional articles of commerce—manufactured, bought and sold by competitors on the market—were the subject of restrictions. Because the doctrine evolved in a different context, the test demanded adaptation before being applied to restrictions on non-traditional articles of commerce like

216. *Id.* at 1357 (Rehnquist, C.J., dissenting).

217. See *TRIBE*, *supra* note 13, §§ 6-2, 6-3; *DuMond*, 366 U.S. at 529.

218. *Oregon Waste Systems*, 114 S. Ct. at 1357 (Rehnquist, C.J., dissenting). Without the surcharge, Rehnquist surmises, both Oregonians and non-Oregonians would have to pay MSW disposal fees, but only Oregonians would have to pay “nondisposal” fees that finance “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.” *Id.* (Rehnquist, C.J., dissenting). Rehnquist’s list did not even account for environmental problems such as extra air pollution, noise and nuisances resulting from the significant increase in trucks hauling out-of-state waste. Nor does Rehnquist’s list include difficult-to-calculate externalities, such as medical expenses, work time lost, aesthetic harm, reduced land area for landfill siting or other use, and reduced property values. For a discussion of externalities in general, see also *TURNER ET AL.*, *supra* note 10, at 25-26.

219. *Oregon Waste Systems*, 114 S. Ct. at 1357 (Rehnquist, C.J., dissenting).

220. *Id.* at 1359 (Rehnquist, C.J., dissenting).

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

MSW that attempted to compensate for depreciated value and loss of resources, and potentially increased health and safety risks.

As noted earlier, the Court's insistence upon the state's identification of an intrastate tax burden for which it was attempting to compensate was a hollow hurdle placed by the Court in the path of the state.²²² Even worse than the redundancy of this prong compared to the substantially equivalent events prong is that its addition needlessly taunts the state for not having a specific tax burden for which it is trying to compensate, thus making it appear that the state cannot even meet this "threshold matter."²²³

A far more serious and substantive defect in the Court's opinion is the majority's application of the substantially equivalent events prong, which is misapplied and unfortunately unaccompanied by any meaningful rationale.²²⁴ The Court undermined the argument that the surcharge compensated for expenditures derived from Oregon's general tax scheme by opining that whether the tax is compensatory is too difficult to determine because general taxes are "lost in the general revenues" prior to their use for specific programs like solid waste management.²²⁵ The Court apparently wanted to see an administrative nightmare—specific taxes maintained in separate accounts after collection, and then spent only on the state program for which they were designated—before it would find that two taxes were identifiable and based upon substantially equivalent events. This reluctance is subject to the earlier criticism that it generally flies in the face of the Court's past willingness to engage in comparisons of specific and general taxes.²²⁶

The Court then initiated its substantially equivalent events prong review in earnest by offering the prototype of sales and use taxes that was the subject of *Silas Mason*, instead of offering a clear definition of what substantially equivalent events are or should be.²²⁷ Rather than providing a meaningful rationale as to why it did not consider the general taxation scheme and the MSW surcharge in *Oregon Waste Systems* to be substantially equivalent events, the majority weakly asserted that the Court had had a "recent reluctance" to recognize new categories, that the *Silas Mason* tax pairing was the only compensatory tax upheld "in recent memory" and that the Court would not "plunge . . . into the morass of weighing comparative tax burdens."²²⁸

Despite the Court's disappointing analysis as to why the taxes were not substantially equivalent events, it is certainly possible to arrive at the Court's conclusion based upon their application of the test. However, the Court

222. See *supra* notes 74-77 and accompanying text.

223. *Oregon Waste Systems*, 114 S. Ct. at 1352.

224. *Id.* at 1353.

225. *Id.* (quoting *Flast*, 392 U.S. at 128 (Harlan, J., dissenting)).

226. See *supra* notes 80-98, 108 and accompanying text.

227. *Oregon Waste Systems*, 114 S. Ct. at 1353 (citing *Silas Mason*, 300 U.S. at 579).

228. *Id.* (quoting *HELLERSTEIN*, *supra* note 104, at 150).

apparently did not remember the rationale underlying the substantially equivalent events requirement. In *Silas Mason*, the taxes were found to burden substantially equivalent events, i.e., purchases.²²⁹ The two taxes taken together thus eliminated any competitive disadvantage to those commercial participants engaged in interstate commerce.²³⁰ In contrast, the *Armco* manufacturing and wholesaling taxes were not found to burden substantially equivalent events because they burdened substantially different actors in the chain of handlers of articles of trade.²³¹ Thus, the question about whether the Court's application of the substantially equivalent events test was even warranted *should* boil down to whether the surcharge would have competitively disadvantaged the petitioners.²³²

As a preliminary matter, it is useful to note that demand for garbage disposal services, especially when small fluctuations in costs are involved, enjoys a relatively inelastic demand.²³³ Thus, the costs that business disposers and haulers would be forced to pay by the surcharge would be relatively easy to pass on to their customers. Out-of-state customers of business disposers that dispose of MSW in Oregon participate at the same economic level as the at-large taxpayers in Oregon who largely fund the solid waste programs through "nondisposal" taxes. If the *Oregon Waste Systems* petitioners could pass the surcharge costs on to their customers, the businesses would not suffer any competitive disadvantage under any analysis. Moreover, if all of the costs of the surcharge were passed on to the individual customers, then those customers would presumably be paying exactly their fair share relative to Oregon taxpayers who pay "nondisposal" taxes to support Oregon's solid waste program.

Even assuming that the costs of the surcharge could not be passed on to individual customers, the petitioners would still not have been put at a competitive disadvantage. Business petitioners were concerned about the surcharge because they supposed that it meant that they would have to pay more to dispose of their out-of-state customers' MSW, which in turn would drive up their total costs, and thus they would be put at a competitive disadvantage.

A careful analysis shows that petitioners' fear that they would have been disadvantaged compared to their competitors who disposed of a relatively higher proportion of Oregon MSW in Oregon was nearly groundless. Here, petitioners'

229. See *supra* notes 42-47 and accompanying text.

230. See *supra* notes 46-47 and accompanying text.

231. See *supra* notes 63-68 and accompanying text.

232. Some commentators have pointed out that "[m]ore recently . . . the Court has not focused on identifying competitors. Instead . . . the Court indicated that taxes must be levied on 'substantially equivalent events' for them to be considered complementary." Tatarowicz & Mims-Velarde, *supra* note 15, at 910. The same commentators note that because of the test's evolving standards, it is "unclear" just how the Court now decides whether two taxes are "complementary." See *id.* at 911.

233. See Butlin, *supra* note 10, at 148. However, Rehnquist's focus on the size of the charge passed onto customers is as "myopic" as the majority's arguments that he attacks. See *supra* note 206 and accompanying text.

business competitors would have been subject to the same burdens by the surcharge as would petitioners. The surcharge was based upon the state of residency of the waste generator. As a result, the expense of disposing petitioners' individual customers' MSW would not vary with whether petitioners or their competitors disposed of the MSW. However, the business disposer who initially disposed of a relatively higher proportion of Oregon-generated MSW ("Company A") could have conceivably captured an additional part of the out-of-state MSW disposal market because they could have passed some of their lower total costs of disposing Oregon MSW on to new out-of-state customers more easily than could their out-of-state MSW-intensive counterpart ("Company B"), which must charge higher average fees to all its customers to operate at a profit.

Nonetheless, the possibility of Company A being able to capture some of Company B's out-of-state market due to lower overall operational costs suffers from two problems. First, business disposers located in Oregon would presumably be like Company A because they are the businesses with a higher proportion of Oregon customers. For Company A to add out-of-state customers, Company A would have to establish new routes out-of-state, an expensive proposition. Though such expenses might act as a deterrent to Company A from taking Company B's clients, the following scenario is far more likely to act as a disincentive.

If Company A accepted out-of-state customers that would by definition have MSW that was more expensive to dispose, the added expense associated with handling those customers' MSW would raise the total costs that would need to be passed on to all of Company A's original customers and would have the effect of increasing Company A's marginal costs. This increase in costs would lead some of Company A's Oregon customers to switch to any company with lower costs. Again, companies of choice would be those with proportionally more Oregon customers ("Company A-1"). Thus, it would be risky for Company A to take on Company B's out-of-state customers, lest Company A-1 steal Company A's customers after Company A's marginal costs increase. Such a built-in disincentive mechanism would likely force Company A to refrain from trying to capture a significant number of Company B's customers.

Moreover, Company B, if close enough to be potentially in competition with Company A, would, of course, be "eligible" to capture some of the Oregon MSW market and thereby reduce their marginal costs and thus the costs they pass on to their individual customers. Although initially attracting customers would be difficult for Company B because of the higher total costs which would need to be passed on to new customers, claiming Oregon customers would likely not have been difficult if Company B had initially lost some of their customers to Company A. Company A would then have marginal costs more closely aligned with Company B's marginal costs. In a worst case scenario for petitioners, an equilibrium would be established between Company A and Company B so that each would have a similar proportion of in-state and out-of-state customers.

However, for the reasons suggested above, garnering more out-of-state customers might not be initially profitable for Company A.

For all of these reasons, the negative competitive impact of the surcharge is likely to be slight, if any, on companies involved in the disposal of MSW. As a result, the competition-preserving policy behind the substantially equivalent events prong is lacking.²³⁴ the requirement that the taxes meet this prong may have no rationale behind it other than to ease the *Court's* burden of comparing taxes. Conveniently, but apparently overlooked by the majority, the Oregon Department of Environmental Quality had already performed a detailed tax comparison pursuant to its recommendation for the surcharge.²³⁵

Gilliam County's concerns were presumably that its disposal rates would go up as out-of-state waste became more expensive to dispose. However, from a judicial perspective, the county's concerns as a participant in the competitive business market must be considered secondary to its role as a local government serving the entire range of its citizens' needs. In an analysis of Oregon's solid waste program funds, three tax sources contributed: Oregon MSW disposal companies, out-of-state MSW disposal companies, and Oregon general taxpayers—not out-of-state taxpayers. Because neither out-of-state taxpayers nor out-of-state MSW disposal companies using Oregon landfill space paid the true costs for Oregon to implement its full program, Oregon should hold those out-of-state entities accountable for the externalities that they impose. The surcharge forces out-of-state beneficiaries of Oregon's resources and program expenditures, whether they are the disposal companies or their customers, to internalize the costs associated with MSW disposal.²³⁶

The Court's sole non-posturing rationale regarding the substantially equivalent events prong rests in its observation that "the very fact that in-state

234. See *supra* notes 46-47, 57-58, 166 and accompanying text.

235. See *supra* note 153 and accompanying text.

236. It be could contended that if those disposers of out-of-state waste are forced to pay for externalities, then the out-of-state MSW surcharge would leave those companies that dispose of Oregon MSW still disposing of the MSW at less than economically efficient costs. This may be so, but all state programs cannot realistically be operated by raising funds directly from those businesses that impose externalities on the state; instead, the administrative reality is that states need to raise some of their revenue from the general tax scheme to help pay for externalities such as running the state's solid waste program. A state should be able to choose which businesses will pay what proportion of those externalities *as long as their choice does not put one business at a significant competitive disadvantage or spread the burden unreasonably*. Simply because a decision was made along state lines should not end the inquiry; instead, a surcharge on those out-of-state MSW disposers is a fair first step. In the pre-surcharge structure, the "nondisposal" tax impacts Oregonians only, and the disposal base fees on both sides of the state line combine to pay for the externalities of both states' disposal habits. The burden in such a situation is clearly discriminatory along state lines, against *Oregonians*. In the post-surcharge structure, presumably both states are paying for the externalities that they impose: Oregon through nondisposal taxes and disposal fees, and other states through disposal base fees and surcharges. The difference in the structures arise because Oregon cannot force out-of-staters to pay externalities through general taxes.

shippers of out-of-state waste, such as Oregon Waste Systems, are charged the out-of-state surcharge even though they pay Oregon income taxes refutes respondents' argument that the respective taxable events are substantially equivalent.²³⁷ This observation, although somewhat appealing superficially, actually amounts to little: petitioners were engaged directly in the business of disposing MSW in Oregon and therefore were a direct source of the harm. Funds expended to ameliorate the harm need to be compensated. Petitioners' payment of income taxes only covered a small portion of that for which Oregon was seeking compensation: the total costs of disposing out-of-state MSW in Oregon. The income tax that petitioners paid was hardly "compensatory" given the externalities imposed by out-of-state MSW disposal.

The Court treated the possible resource protectionist aim in *Oregon Waste Systems* as an issue separate from the "compensatory tax" claim.²³⁸ However, the *Baldwin*²³⁹ and *Sporhase*²⁴⁰ decisions counsel differently, deeming the taking of natural resources a compensable action.²⁴¹ Because natural resources cannot be valued adequately by the market²⁴² and because their sustainable preservation is crucial to the state's vitality and not to any one business or industry, such resources are justifiably protected through a reasonable restriction against out-of-state users who, in aggregate, could ultimately pose a serious threat to that resource.

The natural resource at stake in *Oregon Waste Systems*—adequate landfill space, clean groundwater and clean air—all demand compensation from those who would cause environmental externalities, even though their market value is not easily discernible. The intrastate taxes imposed to maintain the quality of the natural resources do not always have a correlative substantially equivalent event to tax. Instead, the funds for their preservation must often come from the revenue pool created through a general tax scheme. This consideration renders a strict substantially equivalent events test inappropriate for cases in which resource protection involves reasonable restrictions on interstate commerce.

The Court's conclusion that Oregon failed to meet the substantially equivalent events prong precluded a meaningful assessment of whether the surcharge was a rough approximation of the proportion of the tax burden imposed through Oregon's general tax scheme that funded the state's solid waste programs. Not reaching this prong was an unfortunate byproduct of the Court's problematic analysis of the substantially equivalent events prong. This result is unfortunate because Oregon performed a far more comprehensive task in roughly

237. *Oregon Waste Systems*, 114 S. Ct. at 1353.

238. *See id.* at 1353-54.

239. 436 U.S. 371.

240. 458 U.S. 941.

241. *See supra* notes 109-25 and accompanying text.

242. *See* TURNER, *supra* note 10, at 26, 74.

approximating the tax burden than did its arbitrarily-acting predecessors in *Hunt*²⁴³ and *Fort Gratiot*,²⁴⁴ and even in some cases where compensatory taxes were upheld, as in *Clark*,²⁴⁵ *Brice*,²⁴⁶ and *Arctic Maid*.²⁴⁷ Still, the Court in *Oregon Waste Systems* relied on *Hunt* even though, in *Hunt*, Alabama did not attempt to apportion their costs in a reasonable manner. The Court presumably found the surcharge easier to damn under its mechanical application of the substantially equivalent events prong than under Oregon's careful attempt to meet the strictures of the rough approximation prong.

By not addressing whether the taxes were roughly approximate, the Court was able to skirt confronting the list of externalities imposed on Oregon by out-of-state MSW disposal. Petitioner CRC complained that "[c]ost' components such as 'loss of quiet enjoyment,' reimbursement for tax credits, lost disposal capacity, and a risk premium for unfunded environmental liability are not collected through domestic tipping fees."²⁴⁸ Although petitioners were technically correct in their assertions, the costs they listed still represented actual costs to Oregon, regardless of whether the expenditures to pay for those costs were collected through domestic tipping fees. Moreover, both respondents²⁴⁹ and Chief Justice Rehnquist²⁵⁰ could, and did, recognize the other large and more easily quantifiable costs presented by out-of-state MSW.

The Court's reliance upon *Hunt* in *Oregon Waste Systems* also had one other distasteful aspect: in *Hunt*, the only facility that received waste was private, for which the state could not justifiably seek "compensation."²⁵¹ In *Oregon Waste Systems*, the state was supporting the landfills and the solid waste program and thus could have been compensated for direct fiscal expenditures, not just for natural resource depreciation.

VI. SUGGESTIONS FOR REFORMING THE COMPENSATORY TAX DOCTRINE IN MSW RESTRICTION CASES

After *Oregon Waste Systems*, states presumably cannot impose surcharges on out-of-state MSW in addition to the base fees imposed on all MSW. Even if a state could bear the administrative hassle of setting aside tax revenue received through its general tax scheme and accounting for the precise sums spent on all

243. *Hunt*, 112 S. Ct. at 2016.

244. *Fort Gratiot*, 112 S. Ct. at 2021.

245. *Clark*, 306 U.S. at 599.

246. *Brice*, 339 U.S. at 545.

247. *Arctic Maid*, 366 U.S. at 204.

248. Reply Brief of Petitioners Columbia Resource Company, L.P., at 7, *Oregon Waste Systems*, 114 S. Ct. 1345 (No. 93-70) (No. 93-108).

249. See *supra* notes 153-54 and accompanying text.

250. See *supra* notes 203-04 and accompanying text.

251. See *supra* note 139.

of its solid waste programs, that state presumably could still not impose a surcharge on out-of-state MSW because it would probably fail the substantially equivalent events prong of the compensatory tax test.²⁵² However, because the compensatory tax test applied by the Court still appears to be in flux,²⁵³ the Court could take notice, perhaps, of the wisdom of adapting or reformulating the doctrine to suit the different contexts within which the doctrine is applied. Because some noted Commerce Clause scholars have already suggested ideas for more clearly delineating the compensatory tax doctrine in general,²⁵⁴ this Note will only offer suggestions in the context of interstate commerce restrictions on non-traditional articles of commerce, particularly MSW, in which, either directly or indirectly, part of the restrictions' goals is also protection of a natural resource.

Perhaps most importantly, the substantially equivalent events prong should be modified to be more in line with the policies underlying natural resource preservation in *Baldwin*.²⁵⁵ The prong should be adapted to reflect more judicial willingness to compare general tax schemes to specific taxes, as in *Baldwin*, *Clark*, and *Brice*, instead of rigidly holding that specific taxes can never be compensatory for revenues raised through a general tax scheme.

If the Court does not return to some form of its willingness to compare specific tax burdens with general tax burdens, state taxpayers cannot seek a reasonable partial reimbursement for payment of general taxes that are used to support a resource which is also used by non-residents. The consequences of such a system, one apparently mandated by *Oregon Waste Systems*, is to encourage residents of some states to abuse the natural resources of other states and then escape paying any just compensation. The transformation of the Court's original use of the substantially equivalent events prong, once used to ensure a level playing field among competitive businesses and now used to ensure simpler compensatory tax analyses, will continue to hamstring those states attempting to fund their natural resource protection programs without breaking the backs of their own citizens. Simplicity alone, however, is not enough to justify a lack of analysis,²⁵⁶ particularly where the presence of the policy reasons behind the application of a test are questionable, as they are here. Costs imposed by interstate commerce on depletable natural resources are undoubtedly difficult to compute and, in turn, to compensate. Nevertheless, the Court must plunge forward anyway, or their reluctance will prevent states from taking significant measures to protect the sustainability of natural resources and to seek compensation for their use. The Court indicated its willingness in *Baldwin* to discriminate, at least incidentally, against interstate commerce when doing so would effectuate legitimate protection of a state's natural resource. No adaptation

252. See *supra* notes 188-90 and accompanying text.

253. See *supra* note 181 and accompanying text.

254. See, e.g., Hellerstein, *supra* note 15, at 457-63.

255. *Baldwin*, 436 U.S. at 383, 386.

256. See *supra* note 108.

of the test would mean that compensatory taxes could never be permitted to compensate for environmental programs that are partly funded through general tax schemes, the arrangement under which most state environmental programs are operated. A loosening of the substantially equivalent events prong in cases involving resource protection, then, would be an appropriate adaptation of the test.²⁵⁷

In rethinking a new substantially equivalent events test for resource protection cases, the Court should consider allowing the expenditure of funds raised through a state's general taxation scheme to be compensated reasonably by a tax on nonresidents who use the resource, *if* the tax does not have the effect of putting interstate commerce at a discernible disadvantage.²⁵⁸ If the specific tax is meant to compensate for the expenditure of general tax funds and does not place the party or industry subject to the specific surcharge at a competitive disadvantage, then the main policy concerns behind application of the substantially equivalent events prong can be avoided, and the question of rough approximation should be addressed.²⁵⁹

Of course, the compensatory tax should still roughly approximate the burden on intrastate commerce. Because the state imposing a facially discriminatory tax is burdening interstate commerce, that state should have the burden of showing that the tax imposed not only roughly approximates the intrastate tax burden but also that the purpose of the tax is compensatory rather than discriminatory.²⁶⁰ Although proof of "rough approximation" may be a heavy burden, the imposing state should be allowed an opportunity to meet the burden because it is in the best position to account for all of the costs (direct and indirect, economic and environmental) incurred as a result of interstate commerce. Businesses, subject to the compensatory tax, that impose externalities are certainly not in as good a position to dispute the costs of the externalities that they impose but should have the opportunity to rebut any "proved" costs.

257. Ideas about exactly how the substantially equivalent events prong should be reformulated or treated in future nonarbitrary, non-competition effecting compensatory tax cases are too numerous to flesh out in detail. On one extreme, perhaps the prong should be discarded. On the other extreme, perhaps the prong should be just as strictly applied as it is now, with a single exception carved out for the comparison of general tax schemes with surcharges on out-of-state natural resource users.

258. See *supra* notes 46-47, 57-58, 166 and accompanying text.

259. The superfluous identification "prong" of the *Oregon Waste Systems*' compensatory tax test should be discarded. See *supra* notes 74-77 and accompanying text.

260. But see *supra* note 158 and accompanying text. Usually, as espoused in the Oregon Court of Appeals decision, the challenger of a potential constitutional violation has the burden of proving a violation. *Gilliam County*, 837 P.2d at 976. For compensatory tax cases, the same could hold true for the whole case, *except* for the rough approximation prong. Once a statute has been deemed facially discriminatory, the state presumably has more information to show that the scheme, taken as a whole, is not discriminatory but is instead a rough approximation of intrastate tax burdens.

In allowing a state to prove its burden of comparing taxes, the Court should give substantial weight to state legislative or administrative factfinding endeavors, as in *Clark*.²⁶¹ Precision should not be required, though, or an imposing state would rarely, if ever, meet its burden. Moreover, courts would otherwise become mired in minutiae and endlessly-debated discrepancies and would feel obligated to expend time to ensure exact compensation. Such an approximate accounting would not depart from earlier doctrine but would be in accord with the *Arctic Maid* rough approximation test.²⁶² This prong appears satisfactory in its present form, although it may be subject to inconsistent interpretations.

The earliest formulation of the doctrine, found in *Day*,²⁶³ postulated that a compensatory tax should save an otherwise discriminatory tax from constitutional infirmity if the tax is nondiscriminatory in purpose and effect, applying a fairness and reasonableness standard.²⁶⁴ The rigidity that has since been introduced to add discipline to compensatory tax analyses has ultimately resulted in the Court's inability to adapt the test to meet the evolving, often intermeshing, worlds of varied tax mechanisms, environmental science and the administrative state. Instead, the flexibility enunciated in, and objectives underlying, the *Day* decision seem forgotten in today's compensatory tax jurisprudence. Such flexibility is now needed to adapt the test to new contexts, instead of rote application of a stale form of the test.

Only in the latter half of this century has the economics community begun valuing environmental resources and impacts that were previously not valued or undervalued due to their inability to be traded in the marketplace.²⁶⁵ Just because the compensatory tax doctrine evolved primarily before methods were developed to value these resources and environmental externalities does not mean that natural resources and externalities should not now be included in modern-day analyses of areas in which states have the right to seek compensation. In *Baldwin*,²⁶⁶ the underlying principle was that natural resource damage may be too great if a state cannot fairly regulate its resources against interstate commerce and that environmental protectionism, when the burden is fairly apportioned, should not be subject to the same per se rule of invalidity that is applied to economic protectionism.²⁶⁷ The same ideas should remain at the forefront when considering easing the rigid compensatory tax test for natural resource protection.

261. See *supra* notes 86-88 and accompanying text.

262. See *supra* note 61 and accompanying text.

263. 270 U.S. 367.

264. See *supra* notes 38-39 and accompanying text.

265. See John McInerney, *Natural Resource Economics: The Basic Analytical Principles*, in *ECONOMICS*, *supra* note 10, at 32.

266. *Baldwin*, 436 U.S. 371.

267. See *supra* note 117.

Finally, the same principles that guided *Maine v. Taylor*²⁶⁸ must be cautiously extended to other contexts. Unique dangers like those posed in *Maine* should not be the only basis for placing some fair burden upon interstate commerce. Some leeway must be allowed for states to argue, here via the compensatory tax test, that qualities other than uniqueness—such as dramatically increased volume of waste, rate of degradation, or unequal tax burdens supporting a resource—are compensable in the natural resources context. The Court should recognize that expanding the compensatory tax test could encourage economically efficient use of natural resources by nonresidents and spur environmental vitality in states that impose restrictions. “[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State . . . to sit idly by and wait until potentially irreversible environmental damage has occurred”²⁶⁹ Furthermore:

[T]he commerce clause . . . does not elevate free trade above all other values. As long as a state does not . . . 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.²⁷⁰

Surely, given this ideal, when free trade is not discernably affected and the tax on interstate commerce reflects reasonable compensation for the expenditure of intrastate taxes, a state tax burdening interstate commerce should not offend the Commerce Clause when it shifts environmental externalities upon those who use the resource. Nominally calling the tax “compensatory” is not a good enough reason to change the analysis.

268. 477 U.S. 131; *see supra* note 196 and accompanying text.

269. *Maine* 477 U.S. at 148 (quoting *United States v. Taylor*, 585 F. Supp. 393, 397 (Me. 1984)).

270. *Id.* at 151 (citations omitted).