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The Commerce Clause Quartet

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Leon D. Lazer

THE COMMERCE CLAUSE QUARTET*

Hon. Leon D. Lazer:

We are not done with Professor Schwartz. In another life, when I was a member of the Appellate Division, Second Department, I recall a case involving the Town of Oyster Bay in which there was an attack on some decision made by the Town Board of Oyster Bay.[1] The town decided to send garbage west and to pay the cost for transporting a large trailer full of garbage to landfills in Indiana, Ohio, and the mines in Pennsylvania. The plan was attacked as being a waste of public funds, and as I recall, issue was taken with the amount of money involved in shipping the garbage that way.

Subsequently, in a more recent life, when I was a member of the Temporary State Commission on Tax Reduction in Long Island, I looked at the numbers and budgetary problems relative to garbage disposal faced by towns in both Nassau and Suffolk Counties. When I was town attorney, a very long time ago in Huntington, the largest budgetary item was the highway department. Today, the largest budgetary item in most towns in Nassau and Suffolk, and I am sure in a lot of other places, is disposal of solid waste.

The Supreme Court has interjected a number of decisions this past Term which have affected the choices municipalities can make. It is most remarkable that, in many places, it is cheaper to send those trailer trucks to Indiana or anywhere in the midwest, than to burn the waste in the locality where an incinerator exists. Of course, this relates to the cost of the incinerator, the original cost of the bonds that have to be paid, as well as to their interest and maintenance. Therefore, since the private carters who collect

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1. Incorporated Village of Brookville v. Colby, 108 A.D.2d 724, 484 N.Y.S.2d 890 (2d Dep't 1985).

most of the garbage in Nassau and Suffolk must pay fees for dumping at the local landfills, they transport it to areas outside the locality which do not charge a fee. Those fees are called tipping fees and they are very important to the economy of running an incinerator. This is because these fees go to help pay for the bonds and the maintenance. To the extent the carters are able to transport their garbage elsewhere and dispose of it at a lower cost, the town loses out on the uncollected tipping fees.

In a number of cases this year, the Supreme Court has helped with some issues. The fear by those who were shipping the garbage west was that one of these days, other states would stop taking it. Thus, the question is raised; "if we do not have an incinerator, what are we going to do when no one will accept our trash?" The response is - let us spend 100 million or 200 million dollars and build an incinerator to avoid such a prospect.

Now, we will hear again from Professor Schwartz on some interstate commerce cases.

Professor Martin A. Schwartz:

INTRODUCTION

The last thing that Judge Lazer said saved me because I thought he was going to define my subject as garbage. Instead, he couched it in terms of the Commerce Clause. This leaves a little dignity to the subject.

Last Term, the United States Supreme Court rendered four decisions in which state or local laws which discriminated against out-of-state commerce were found to violate the Commerce Clause. The Court invalidated: a New York town's "flow control" ordinance requiring all solid waste to be processed at a designated transfer station before leaving the municipality, *C & A Carbone, Inc. v. Town of Clarkstown*;[2] an Oregon statute imposing higher surcharges on the disposal of solid waste from outside the state than within the state, *Oregon Waste Systems v. Department of*

2. 114 S. Ct. 1677 (1994).

Environmental Quality;[3] a Missouri use tax on goods purchased out-of-state, *Associated Industries of Missouri v. Lohman*;[4] and a Massachusetts "give back" scheme that, while imposing an equal assessment on milk sold by in and out-of-state dealers to Massachusetts retailers, distributed the proceeds solely to Massachusetts dairy farmers, *West Lynn Creamery, Inc. v. Healy*.[5] These decisions raise fundamental questions concerning the constitutional power of state and local government to devise polices for combating their environmental and fiscal problems.

I. RESTRICTIONS ON STATE AUTONOMY UNDER THE COMMERCE CLAUSE

Before proceeding to last Term's Commerce Clause quartet, some background is in order. The Commerce Clause, as written, grants power to Congress to "regulate Commerce . . . among the several states. . . ."[6] As construed by the United States Supreme Court, however, the Commerce Clause also operates as a limitation on the power of the states to regulate out-of-state commerce. "This negative (or "dormant") aspect of the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic measures by burdening out-of-state competitors."[7]

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3. 114 S. Ct. 1345 (1994).

4. 114 S. Ct. 1815 (1994).

5. 114 S. Ct. 2205 (1994).

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

7. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988). In *New Energy*, the Court held that an Ohio statute discriminated against interstate commerce since other states were not treated the same unless they offered a similar tax credit for ethanol production. The Court was not convinced that Ohio was encouraging the use of ethanol for health reasons. Rather, the Court determined that the statute was related to economic protectionism. *Accord* West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2211 (1994); Associated Indus. v. Lohman, 114 S. Ct. 1815, 1820 (1994); Oregon Waste Sys. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1350 (1994); Philadelphia v. New Jersey, 437 U.S. 617 (1978). Congress, however, can sanction state rules that would otherwise violate the dormant Commerce Clause. Quill Corp. v. North Dakota,

Because the Commerce Clause seeks to foster national economic unity, state or municipal "[d]iscrimination against interstate commerce in favor of local business is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[8] The state must demonstrate that the discrimination is justified by a legitimate factor unrelated to economic protectionism,[9] and that no less discriminatory alternatives are available.[10] "By contrast, non-discriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"[11]

Unlike claims of racial and gender discrimination under the Equal Protection Clause, which require a determination of

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112 S. Ct. 1904, 1916 (1992). *See also* H.P. Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949).

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. . . .

Id.

8. *C & A Carbone*, 114 S. Ct. at 1683.

9. *See* Chemical Waste Management v. Hunt, 112 S. Ct. 2009, 2015 (1992) (finding that the state failed to show that the discrimination was justified by concerns unrelated to economic protectionism); Wyoming v. Oklahoma, 502 U.S. 437, 457-58 (1992) (holding that Oklahoma failed to justify that the Act's discrimination against out-of-state coal was unrelated to the States' economic interests).

10. *See New Energy*, 486 U.S. at 278. "[A] State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that can not be adequately served by reasonable nondiscriminatory alternatives." *Id.* For a rare instance in which a state was able to satisfy these stringent standards, see Maine v. Taylor, 477 U.S. 131 (1986), holding a Maine statute valid even though it was discriminatory, since there was a legitimate local purpose of protecting the ecology and there was a lack of nondiscriminatory alternatives.

11. *Oregon Waste Systems*, 114 S. Ct. at 1350 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

governmental intent,[12] a state or local law can be found to discriminate against out-of-state commerce for Commerce Clause purposes regardless of the legislative purpose, motive, or intent.[13] It is enough that the law draws a discriminatory line that disadvantages out-of-state commerce or, if facially neutral, is discriminatory in its practical operation and effect.[14] Further, the Supreme Court has not been receptive to arguments that a state or local law that discriminates against out-of-state commerce should be saved because the law *also* discriminates against certain in-state groups.[15]

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12. *See, e.g.*, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial [or gender group], it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."); Washington v. Davis, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

13. *See Associated Indus.*, 114 S. Ct. at 1824 (stating that the "court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce"); *see also* Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) (stating that the "ultimate legislative purpose need not be resolved, because its resolution would not be relevant to the constitutional issue..."). For constitutional claims, there is normally no meaningful distinction between legislative purpose, motive, and intent.

14. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). In *Hunt*, a North Carolina statute required all closed containers of apples sold or shipped into the state to bear the applicable federal grade or be identified by no grade. Although facially neutral, the statute had a predictable direct effect of substantially discriminating against interstate commerce. *Id.* at 352.

15. *See C & A Carbone*, 114 S. Ct. at 1682 ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2025 (1992) ("[Merely because] the Michigan statute allows individual counties to accept solid waste from out of state does not qualify it as discriminatory character."); Dean Milk Co. v. Madison, 340 U.S. 349, 354 n.4 (1951) ("It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.").

The Supreme Court's nondiscrimination principles are fully applicable to state and local taxes. In fact, the Court has gone so far as to say that "[o]nce a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."[16] Strong medicine indeed!

Lest the reader be too quick to conclude that the speaker has strayed far from his usual focus upon the enforcement of individual rights under 42 U.S.C. § 1983,[17] it should be remembered that the Supreme Court resolved in 1991 that dormant Commerce Clause claims may be asserted under section 1983.[18] This means that prevailing claimants may be able to recover their attorneys' fees under the civil rights fee statute, 42 U.S.C. § 1988.[19]

II. CURRENT SUPREME COURT COMMERCE CLAUSE TRENDS

The Court's decisions in *C & A Carbone* and *Oregon Waste Systems* continue the line of Supreme Court decisions striking

16. Chemical Waste Management v. Hunt, 112 S. Ct. 2009, 2014 (1992).

17. 42 U.S.C. § 1983 (1988). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

18. Dennis v. Higgins 498 U.S. 439, 440 (1991) (holding that claims for violations of the Commerce Clause could be brought under § 1983).

19. 42 U.S.C.A. § 1988 (b) (West Supp. 1994). Section 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Id.

down state and local waste disposal laws that discriminate against interstate commerce.[20] The saga started with the 1978 decision in *Philadelphia v. New Jersey*,[21] that a New Jersey statute that prohibited the importation of waste which originated out-of-state violated the dormant Commerce Clause. The Court found that waste was an article of commerce and that, by allowing only waste originating in-state to be disposed of in state landfills, the statute discriminated against out-of-state commerce.[22] Further, New Jersey did not have a legitimate health interest which justified its distinction between in and out-of-state waste.[23] Although New Jersey could impose a total ban on the disposal of waste in its landfills, it could not discriminate between in and out-of-state waste. "Put[ting] a gloss on Justice Cardozo's memorable summation," in *Baldwin v. G.A.F. Seelig*,[24] Professor Tribe concluded that *Philadelphia v. New Jersey* stands for the

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20. *Oregon Waste Sys.*, 114 S. Ct. at 1355-56 (Rehnquist, J., dissenting) ("[T]he Court further cranks the dormant Commerce Clause ratchet against the States by striking down such cost-based fees, and by so doing ties the hands of the States . . . ."). It should be noted that the Chief Justice Rehnquist also dissented in *C & A Carbone*.

21. 437 U.S. 617 (1978).

22. *Id.* at 626-27.

23. *Id.* at 629. The Supreme Court in *Philadelphia v. New Jersey* distinguished the quarantine laws which have been upheld by the Supreme Court in Shell v. Kansas, 209 U.S. 251 (1907), on the ground that those laws ban the shipment of noxious articles, like diseased livestock, into the state. While quarantine laws burden out-of-state commerce, they do "not discriminate against interstate commerce as such, but simply prevent[ ] traffic in noxious articles, whatever their origin." 437 U.S. at 629. Since New Jersey allowed the in-state disposal of waste, it could not claim

> that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point . . . there is no basis to distinguish out-of-state waste from domestic waste.

Id.

24. 294 U.S. 511, 523-24 (1935). In *Baldwin*, New York's attempt to discourage the purchase of out-of-state milk was held to be discriminatory, since its purpose was to protect New York's dairy industry.

proposition that "'the peoples of the several states must sink or swim together,' even in their collective garbage."[25]

The Court followed *Philadelphia v. New Jersey* in two cases decided in 1992. In *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*,[26] the Court invalidated a Michigan statute that prohibited landfill operators from accepting solid waste originating outside the county in which the facilities operated.[27] The statutory policy clearly discriminated against out-of-state commerce.[28] The fact that the policy also discriminated against waste originating in other Michigan counties was of no moment.[29] A state policy that discriminates against out-of-state commerce will not be saved from constitutional doom because the state chooses to disadvantage certain in-state groups as well.[30] And, while Michigan could even-handedly "limit the amount of waste that landfill operators may accept each year[,]" there was "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."[31]

In *Chemical Waste Management v. Hunt*,[32] the Court invalidated an Alabama statute which imposed higher fees upon hazardous waste generated outside the state than waste originating in state.[33] The fee was payable by the waste disposal operator. The statute facially discriminated against hazardous waste generated outside of Alabama, and under *Philadelphia v. New Jersey*, was found to violate the dormant Commerce Clause. Significantly, the Court found that the state had a number of non-discriminatory alternatives to alleviate its concerns about the volume of waste entering the state, "not the least of which are a generally applicable per-ton additional fee on *all* hazardous waste disposed of within

25. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § § 6, 8, at 426 (2d ed. 1988) (quoting Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935)).

26. 112 S. Ct. 2019 (1992).

27. *Id.* at 2027.

28. *Id.*

29. *Id.* at 2025-26.

30. *Id.*

31. *Id.* at 2027.

32. 112 S. Ct. 2009 (1992).

33. *Id.* at 2016-17.

Alabama, . . . or a per-mile tax on *all* vehicles transporting hazardous waste across Alabama roads, . . . or an even-handed cap on the total tonnage landfilled. . . ."[34] To the extent Alabama seeks to further environmental, health, and safety concerns, it can "regulate more closely the transportation and disposal of *all* hazardous waste within its borders."[35] In addition, as Chief Justice Rehnquist suggested in his dissenting opinion, "Alabama may, under the market participation doctrine, open its own facility catering only to Alabama customers."[36] There are, then, a number of non-discriminatory methods that state and local government may employ to solve their waste disposal problems.

III. FLOW CONTROL REGULATIONS

Although the Court's decisions identified a number of non-discriminatory waste disposal options available to state and local government, the decisions in *C & A Carbone* and *Oregon Waste Systems* involved state and local policies which also discriminated against interstate commerce. *C & A Carbone* concerned a "flow control" ordinance adopted by the Town of Clarkstown, New York, which required "all solid waste to be processed at a

34. *Id.* at 2015.

35. *Id.* at 2016.

36. *Id.* at 2019 (Rehnquist, C.J., dissenting). *See* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1983) (holding that the Commerce Clause was not violated since the state was acting as a market participant expending its own funds for construction contracts); Reeves v. State, 447 U.S. 429 (1980) (permitting a state owned cement plant to give a preference to the sale of cement it produced solely to its residents as the state was acting as a market participant and not as a market regulator); Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) (allowing a state bounty scheme to encourage the removal of automobile hulks from Maryland streets and junkyards). The cited cases support the conclusion that a state that participates in the market, rather than regulates it, is exempt from dormant Commerce Clause scrutiny. *See, e.g.*, Swin Resource Sys. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989) (holding that the county which operated a landfill was exempt from dormant Commerce Clause claims and was allowed to give preference to county residents), *cert. denied*, 493 U.S. 1077 (1990); *see also Oregon Waste Sys.*, 114 S. Ct. at 1354 n.9 (leaving open application of the market participation doctrine to interstate commerce regulation).

designated transfer station before leaving the municipality."[37] To backtrack, in 1989, the town entered into a consent decree pursuant to which it agreed to close its landfill and build a new solid waste transfer station.[38] "The station would receive bulk solid waste and separate recyclable from nonrecyclable items. Recyclable waste would be baled for shipment to a recycling facility; nonrecyclable waste, to a suitable landfill or incinerator."[39]

A private contractor agreed to build the transfer facility and operate it for five years, after which it would be sold to the town for one dollar.[40] In order to finance the project, the town guaranteed the contractor "a minimum waste flow of 120,000 tons per year, for which the contractor could charge the hauler a so-called tipping fee of $81 per ton."[41] The town agreed to make up any "tipping fee deficit."[42] In an attempt to meet the 120,000 ton guarantee, a town ordinance provided that any trash in Clarkstown must be delivered to the town's transfer facility for processing; it prohibited the shipment of trash outside of Clarkstown unless it was first processed at the Clarkstown transfer facility.[43] "Over 20 states have enacted statutes authorizing local governments to adopt flow control laws."[44]

The Court, in an opinion by Justice Kennedy, found that the ordinance discriminated against interstate commerce because it deprived out-of-state processing companies "of access to a local market."[45] The article of commerce at issue was best characterized

37. *C & A Carbone*, 114 S. Ct. at 1680.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1690 (O'Connor, J., concurring).
45. *Id.* at 1681. Justice O'Connor, concurring in the judgment, found that the ordinance did not discriminate against interstate commerce but rather, gave "a waste processing monopoly to the transfer station." *Id.* at 1691 (O'Connor, J., concurring). Nevertheless, she found that the ordinance violated the dormant Commerce Clause because it imposed an "excessive" burden on interstate commerce. *Id.* at 1691 (O'Connor, J., concurring). Justice Souter filed a dissenting opinion in which Chief Justice Rehnquist and Justice Blackmun joined. *Id.* at 1692 (Souter, J., dissenting).

as the service of processing and disposing of solid waste.[46] In finding the ordinance unconstitutional, the Court relied upon a consistent line of Supreme Court decisions finding state laws that required in-state processing to violate the dormant Commerce Clause.[47] These laws generate business for in-state processors while squelching out-of-state processors out of the local market. The Clarkstown ordinance "hoards" solid waste for the local processor.[48] Although the Clarkstown ordinance differed from the laws at issue in the Court's prior processing cases in that it favored "a single local proprietor[,] this just [made] the protectionist effect of the ordinance more acute."[49]

As in its other Commerce Clause waste disposal decisions, the Court pointed out that the town had a number of non-discriminatory alternatives to advance its interests. Health and environmental concerns could be furthered with uniform non-discriminatory safety regulations applicable to the Clarkstown facility and competitors alike.[50] As to the town's fiscal concerns, the Court flatly declared that "revenue generation is not a local interest that can justify discrimination against interstate commerce."[51] Further, the town could finance its new facility through general tax revenues or municipal bonds.[52]

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46. *Id.* at 1682.

47. *Id.* at 1682-83. *See* South-Central Timber Dev. Inc. v. Wunnicke, 467 U.S. 82 (1984) (in-state processing of timber); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (in state packaging of cantaloupes); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (in-state removal of shrimp heads and hulls); Minnesota v. Barber, 136 U.S. 313 (1890) (in-state inspection of meat).

48. *C & A Carbone*, 114 S. Ct. at 1683.

49. *Id.*

50. *Id.*

51. *Id.* at 1684.

52. *Id.* "But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give the project an advantage over rival businesses from out of State." *Id.*

IV. FEE STRUCTURING AND COMPENSATORY TAXATION POLICIES

The issue in *Oregon Waste Systems v. Department of Environmental Quality*[53] was very similar to that in *Chemical Waste Management v. Hunt.*[54] Like the Alabama statute invalidated in *Chemical Waste Management*, Oregon levied higher fees on landfill operators for solid waste generated out-of-state than in state. While an eighty-five cent per ton fee was imposed for in-state waste, a $2.25 per ton surcharge was imposed for waste from other states.[55] The Court, in an opinion written by Justice Thomas, found that this fee structure discriminated against interstate commerce in violation of the dormant Commerce Clause.[56]

In *Chemical Waste Management*, the Supreme Court left open the possibility that discriminatory waste disposal charges might be justified on the grounds of higher costs to a state from the disposal of out-of-state waste.[57] Oregon did not argue that the disposal of waste from other states imposes higher costs on Oregon than the disposed of in-state waste.[58] Nor did Oregon argue that out-of-state waste created a greater danger to health or safety.[59] Nevertheless Oregon argued that the surcharge imposed on out-of-state waste was a valid compensatory tax.[60] The classic compensatory tax is a state's use tax imposed on goods purchased out-of-state and used or stored in-state that compensates or equalizes a substantially equivalent sales tax imposed upon goods purchased in-state.[61] The idea is that while the use tax, in isolation,

53. 114 S. Ct. 1345 (1994).

54. 112 S. Ct. 2009 (1992).

55. *Oregon Waste Sys.*, 114 S. Ct. at 1348.

56. *Id.* at 1355. Chief Justice Rehnquist filed a dissenting opinion in which Justice Blackmun joined.

57. 112 S. Ct. at 2016 n.9.

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

59. *Id. See Chemical Waste Management*, 112 S. Ct. at 2015 ("[T]here is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. . . .").

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

61. *See* Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

discriminates against out-of-state commerce, substantial equality may result when it is considered together with the sales tax.[62] This is not only the classic example, but the only tax upheld by the Supreme Court "in recent memory under the compensatory tax doctrine."[63]

The Court had little trouble concluding that the $2.25 per ton surcharge on out-of-state waste was not a compensatory tax. It could not compensate for the substantially smaller eighty-five cent per ton surcharge on in-state waste. Nor could it be said to compensate for the state's income tax imposed upon in-state earned income. Even if it were possible to quantify the general tax burden attributable to in-state waste, the compensatory tax argument failed "because the in-state and out-of-state levies are not imposed on substantially equivalent events."[64] Taxes on earning income and taxes imposed on disposing of waste at Oregon landfills are simply "entirely different" taxes.[65]

The compensatory tax doctrine was also at issue in *Associated Industries v. Lohman*.[66] In that case, the Court, in an opinion by Justice Thomas, unanimously ruled that Missouri's use tax discriminated against interstate commerce in violation of the dormant Commerce Clause in those municipalities where the use tax exceeded the sales tax.[67]

We will simplify Missouri's sales and use taxation scheme somewhat to illustrate the issue. Missouri imposed a 4% sales tax upon goods purchased within the state and a 4% use tax on goods

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62. As Justice Cardozo explained in Henneford v. Silas Mason Co., 300 U.S. at 584, under a compensatory tax "the stranger from afar is subject to no greater burden as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Id.* at 584.

63. *Oregon Waste Sys.*, 114 S. Ct. at 1353. The Court has been reluctant "to recognize new categories of compensatory taxes. . . ." *Id.*

64. *Oregon Waste Sys.*, 114 S. Ct. at 1353.

65. *Id.* (quoting Washington v. United States, 460 U.S. 536, 546 n.11 (1983)). *See* Armco v. Hardesty, 467 U.S. 638 (1984) (ruling that manufacturing and wholesaling are not substantially equivalent events).

66. 114 S. Ct. 1815 (1994).

67. *Id.* at 1821. All of the other Justices joined in Justice Thomas' opinion except Justice Blackmun, who concurred in the judgment.

purchased outside the state and used or stored within the state. No problem, yet. Missouri, however, also imposed an "additional" 1.5% use tax that was not paired with any state sales tax. State law authorizes municipalities to impose local sales taxes. "Over 1,000 localities have used that authority to enact sales taxes ranging from 0.5% to 3.5%, while at least one county has no local sales tax at all."[68] In some municipalities the "additional" 1.5% use tax exceeded the local sales tax. This is what caused the discrimination against out-of-state commerce.

Although Missouri argued that its "additional" use tax was constitutional because it compensated for the local sales tax, in fact, whether the use tax was equal or lower than the sales tax was "a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce."[69]

The Court rejected Missouri's argument that it should evaluate the equivalency of the use and sales taxes on an overall statewide basis. This argument improperly assumed that discrimination against interstate commerce in some parts of a state could be offset by preferential treatment for interstate trade in other parts. Such an approach violates the principle that for a tax to be compensatory, the consumer must be free to make decisions free of the intra versus inter state tax consequences of a transaction.[70]

The fact that the discrimination against interstate commerce was the direct result of municipal action, rather than state action, did not call for a different remedy. Although a state may delegate its taxing authority to local government, "it may not grant its political subdivisions a power to discriminate against interstate commerce that [the] State lacked in the first instance."[71]

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68. *Id.* at 1819.

69. *Id.* at 1821.

70. *Id.* at 1823 (citing Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332 (1977)).

71. *Associated Indus.*, 114 S. Ct. at 1824. The Court remanded the question of the appropriate remedy to the state court. *Id* at 1825 (citing McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990)). *See* Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) (stating that while

V. TAX ASSESSMENT - GIVE BACK PROVISIONS

Another aspect of a discriminatory state tax policy was at issue in *West Lynn Creamery v. Healy*.[72] That case dealt with a Massachusetts tax assessment imposed upon milk dealers, both in-state and out-of-state, who sell milk to Massachusetts retailers. In fact, most of the milk sold to Massachusetts retailers was produced out-of-state. Massachusetts then distributed all of the proceeds from this assessment to Massachusetts dairy farmers. In an opinion by Justice Stevens, the Court ruled that this "give back" provision discriminated against interstate commerce in violation of the dormant Commerce Clause.[73]

The Court found that the "avowed purpose" and effect of the Massachusetts scheme was to enable higher cost Massachusetts dairy farmers to compete with the lower cost out-of-state farmers.[74] Massachusetts argued that the Court should analyze the taxation and rebate aspects separately.[75] It then urged that the tax assessment was constitutional because it was imposed equally on in and out-of-state dealers, and that the disbursements to in-state farmers was valid because states may constitutionally grant subsidies to local business interests.[76] Clever, but not constitutional.

The Court refused to analyze the two components separately. Assuming that each component standing alone was non-discriminatory and thus constitutional, it did not follow that the same could be said for the entire scheme. It is true that "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local

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the state must make available a meaningful remedy, it retains flexibility in responding to the finding that it has levied an unconstitutional discriminatory tax).

72. 114 S. Ct. 2205 (1994).

73. *Id.* at 2212. Justice Scalia filed a separate concurring opinion in which Justice Thomas joined. *Id.* at 2218 (Scalia, J., concurring). Chief Justice Rehnquist dissented in an opinion in which Justice Blackmun joined. *Id.* at 2221. (Rehnquist, C.J., dissenting).

74. *Id.* at 2212.

75. *Id.* at 2214.

76. *Id.* at 2214-15.

business."[77] The subsidy in *West Lynn Creamery*, however, was funded principally from the sale of milk produced in other states.[78] Thus, the state assisted local farmers by burdening interstate commerce. This it may not do.[79]

Massachusetts' other arguments were also meritless. To the assertion that the milk dealers who pay the tax are not competitors of the Massachusetts farmers who receive the subsidies, the Court responded that 150 years of Supreme Court precedent holds that "the imposition of a differential burden on any part of the stream of commerce -- from wholesaler to retailer to consumer -- is invalid, because a burden placed at any point will result in a disadvantage to the out-of-state producer."[80] Nor could the taxation scheme be justified on the basis of Massachusetts' interest in saving its financially distressed dairy industry from "collapse." Acceptance of such an argument would effectively abrogate the principle of nondiscrimination. "Preservation of local industry by protecting it from the rigors of interstate commerce is the hallmark of economic protectionism that the Commerce Clause prohibits."[81]

CONCLUSION

Although state and local government enjoy great latitude in devising mechanisms for solving their environmental and fiscal problems, the Commerce Clause quartet makes clear that they may not employ policies that discriminate against interstate commerce, no matter how noble their purpose. As these four decisions

77. *Id.*

78. *Id.* at 2214.

79. The Court explained that, because the tax was coupled with a subsidy, one of the most powerful groups that would ordinarily be expected to lobby against the tax, Massachusetts dairy farmers, "were in fact its primary supporters." *Id.* at 2215.

80. *Id.* at 2216. It could not be said that the tax scheme burdened only Massachusetts consumers and milk dealers; it clearly impacted out-of-state producers. *Id.* at 2216-17.

81. *Id.* at 2217.

demonstrate, the Supreme Court vigorously enforces the principle of nondiscrimination.