

THE CALIFORNIA GAS CHARGE AND BEYOND: TAXES AND FEES IN A CHANGING CLIMATE

[T]he power to tax is the power to destroy.¹

Chief Justice John Marshall

The power to tax is not the power to destroy while this Court sits.²

Justice Oliver Wendell Holmes

INTRODUCTION

Climate change is perhaps the most serious environmental problem facing the globe. The National Research Council (NRC) reports that “[g]reenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise.”³ Addressing the specific health impacts of these rising temperatures, the report states that, among other things, “[c]limate change has the potential to influence the frequency and transmission of infectious disease, alter heat- and cold-related mortality and morbidity, and influence air and water quality.”⁴ In a telling prediction of the broader effects of global warming, the NRC report concludes: “Global warming could well have serious adverse societal and ecological impacts by the end of this century”⁵ Climate change is the last environmental issue the United States should take lightly. Yet by all accounts that is exactly what the government has done. From its failure to ratify the Kyoto Protocol, to the woefully inadequate subsidies granted alternative energy, to its recent refusal to regulate greenhouse gases under the Clean Air Act, the government has constantly spurned any role in the prevention or mitigation of climate change.⁶ Perhaps, in addition to greater political will, the United

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The original language reads: “[T]he power to tax involves the power to destroy” *Id.* The language originated as a statement in Daniel Webster’s brief before the *McCulloch* Court. RESPECTFULLY QUOTED 337 (Suzy Platt ed., 1989). Chief Justice Marshall used the words without attribution in the Court’s opinion, and the language is now often ascribed to the Chief Justice in the slightly modified form quoted above. *Id.*

2. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

3. COMM. ON THE SCIENCE OF CLIMATE CHANGE, NAT’L ACADS., CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 1 (2001) [hereinafter CLIMATE CHANGE SCIENCE], available at <http://www.nap.edu/html/climatechange/index.html>.

4. *Id.* at 20.

5. *Id.* at 4.

6. *See* S. Res. 98, 105th Cong. (1997) (recommending against ratifying the United Nations Framework Convention on Climate Change, known as the Kyoto Protocol). In 2005, the congressional

States needs solutions that speak the same language as those causing the pollution and those charged with regulating the polluters. Perhaps the country needs economic solutions.

Carbon taxes have long been proposed as a means to reduce this country's dependence on fossil fuels. A carbon tax is a flat charge levied on the carbon content of fuels. This charge would be paid by producers, refiners, or directly by the consumer. The cost of fossil fuels would thereby increase according to the amount of carbon released by the fuel when combusted. The result of such a charge is two-fold. First, the charge would create an economic disincentive to consume fossil fuels, pushing consumer behavior towards conservation and non-carbon alternatives.⁷ Second, the revenues generated by such a tax would ideally be placed into a dedicated fund and used to finance research into alternative energy and efficiency measures.⁸ This simultaneous shift away from polluting activities combined with the investment in the development of alternatives is responsible for positive economic impact reported in some economic modeling studies.⁹

Despite the economic promise of carbon taxes, the idea of implementing such taxes on a large scale continues to be unpopular with many legislatures and the public at large.¹⁰ Indeed, distrust and dislike of taxation was a founding principle of the United States and continues to hold

Joint Committee on Taxation estimated the budget effects of energy tax subsidies, producing a table reflecting the estimates. The numbers from the table reveal that during the period between 2005 and 2015, tax incentives categorized as "Alternative Motor Vehicles and Fuels" total less than half the total of those categorized as "Domestic Fossil Fuel Security," reflecting the legislature's lack of commitment to fossil fuel alternatives. See J. Comm. on Taxation, Estimated Budget Effects of the Conference Agreement for Title XIII of H.R. 6, The "Energy Tax Incentives Act of 2005," JCX-59-05 1-4 (July 27, 2005), <http://www.senate.gov/~finance/sitepages/leg/072705leg59-05.pdf>. The Environmental Protection Agency (EPA) asserts it lacks authority to regulate with regard to climate change issues. See, e.g., *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1450-51 (2007) (noting the EPA's arguments why the Clean Air Act does not authorize it to issue regulations addressing climate change).

7. CAL. ENVTL. PROT. AGENCY, CLIMATE ACTION TEAM REPORT TO GOVERNOR SCHWARZENEGGER AND THE LEGISLATURE 82, 93 (2006), available at http://www.climatechange.ca.gov/climate_action_team/reports/2006-04-03_FINAL_CAT_REPORT.pdf [hereinafter CAT REPORT].

8. CAL. ENVTL. PROT. AGENCY, CLIMATE ACTION TEAM REPORT TO THE GOVERNOR AND LEGISLATURE, DRAFT 76 (2005), available at http://www.climatechange.ca.gov/climate_action_team/reports/2005-12-08_DRAFT_CAT_REPORT_TO_GOV+LEG.PDF.

9. See CAT REPORT, *supra* note 7, at 65, 84-85 (concluding that the expected net result of the suite of proposed climate-change-emission-reduction strategies will be positive).

10. See, e.g., Katie Kelley, *City Approves 'Carbon Tax' in Effort to Reduce Gas Emissions*, N.Y. TIMES, Nov. 18, 2006, at A13 (noting that Boulder, Colorado recently became the first and only government in the United States to implement a carbon tax). While Boulder's success is promising, much broader implementation will be required to have a measurable impact on greenhouse gas emissions and climate change.

a prominent place in the American ethos.¹¹ Furthermore, taxes are subject to a host of unique political protections that make new tax measures difficult to pass.¹² It is unsurprising, then, that policy-makers have not been more successful in using taxes to shape social policy.

Taxation is not the only cost-imposing instrument at a government's disposal, however. User fees have long been recognized as an alternative assessment that governments may levy under certain circumstances.¹³ User fees are issued to compensate the government for specific services or to offset the regulatory burden placed on society by certain conduct.¹⁴ While more limited in nature and use than taxes, such fees still offer governments the ability to discourage behavior and generate revenue while avoiding the negative stigma and heightened requirements associated with taxes.

It was only a matter of time, therefore, until user fees were proposed to address climate change. On April 3, 2006, the California Environmental Protection Agency released a report to Governor Schwarzenegger and the California Legislature highlighting a number of strategies the state might employ to reduce greenhouse-gas emissions.¹⁵ Among these strategies is a proposal to place a Public Goods Charge on transportation fuels.¹⁶ The charge would place a small fee on gasoline, in the neighborhood of 2.57 cents per gallon, to fund alternative-fuel and emissions-reduction programs.¹⁷

Opponents have already begun leveling attacks on the proposal. Among the more compelling arguments is that is that the gasoline charge is actually a tax in disguise.¹⁸ One creative headline in the Sacramento

11. See, e.g., Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 835 (2002) ("Among the deepest of American passions are a distrust of government and a concomitant anti-tax sentiment.").

12. In California, for example, state tax increases may be passed only upon the approval of two-thirds of both houses of the state legislature. CAL. CONST. art. XIII A, § 3.

13. See *Head Money Cases*, 112 U.S. 580, 595–96 (1884) (recognizing the federal government's authority to collect immigration fees as a "mere incident of the regulation of commerce").

14. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

15. CAT REPORT, *supra* note 7, at 39–84.

16. *Id.* at 81. California already has a public goods charge on electricity, the revenues of which are used to fund renewable-energy research. CAROLYN A. KUDUK & SCOTT J. ANDERS, ENERGY POLICY INITIATIVES CTR., FOLLOWING CALIFORNIA'S PUBLIC GOODS CHARGE: TRACKING CONTRIBUTIONS AND EXPENDITURES OF THE RENEWABLE ENERGY PROGRAM AND THE PIER PROGRAM 1 (2006), http://www.sandiego.edu/epic/publications/documents/060911_PGC_FINAL_000.pdf.

17. CAL. ENVTL. PROT. AGENCY, DRAFT CLIMATE ACTION TEAM REPORT TO GOVERNOR SCHWARZENEGGER AND THE LEGISLATURE 75–76 (2005), http://www.climatechange.ca.gov/climate_action_team/reports/2005-12-08_DRAFT_CAT_REPORT_TO_GOV+LEG.PDF [hereinafter DRAFT CAT REPORT]. Curiously, the \$2.57 per-gallon figure and the intended uses of the fee revenue, all included in the draft report, were omitted from the final version. CAT REPORT, *supra* note 7, at 81–82.

18. Larry McCarthy, *Gasoline Charge Quacks and Acts Like a Tax*, SACRAMENTO BUS. J., Jan.

Business Journal reads: “Gasoline charge quacks and acts like a tax.”¹⁹ Larry McCarthy, author of the article and president of the California Taxpayers’ Association in Sacramento, states that “by masquerading as a ‘charge,’ the proposal attempts to circumvent the requirement of a two-thirds majority for legislative approval.”²⁰ Jon Coupal, attorney and president of the Howard Jarvis Taxpayers Association (the largest taxpayer organization in California) agrees, stating:

[T]he real rub [of the gas charge] is that, by characterizing this tax as a “fee,” the promoters hope to bypass the constitutional requirement of a two-thirds vote of each house of the California Legislature. Because . . . “the power to tax is the power to destroy,” California voters have rightfully imposed a procedural hurdle on the state’s most draconian power.²¹

As these articles suggest, a legal challenge is sure to follow passage of the gasoline-charge proposal. Foremost among the claims will be that the charge is in fact an invalid tax. This Note argues that, properly crafted and understood, the California gasoline charge is not a tax and should survive a legal challenge.²²

Rather than limit itself strictly to the California proposal, however, this Note looks at the broader potential of gasoline fees as a tool of state or local governments and regulatory agencies. Part I provides an overview of taxes and the differing types of user fees. Part II then moves into an analysis of the criteria courts use to assess taxes and fees. It begins with an analysis of California case law, noting that under a recent decision, the gasoline charge would properly be considered a user fee in that state. This Note then looks at other jurisdictions’ analyses, arguing that while certain of the criteria applied by courts are appropriate in the context of gasoline charges, others misapply the tax-versus-fee distinction. The Note ultimately argues that whatever criteria a court may apply, gasoline charges are legally sound. Part III looks briefly at the potential for a gasoline charge at the federal level, laying out the executive branch’s independent authority to enact user fees.

27, 2006, at 59, available at <http://www.caltax.org/documents/2006/McCarthy-GasolineChargeQuacksActsLikeTax1-27-06.pdf>.

19. *Id.*

20. *Id.*

21. Jon Coupal, *Regulators Call It a ‘Charge’ to Avoid Tax Vote*, CALIFORNIA REPUBLIC.ORG, Feb. 14, 2006, <http://www.californiarepublic.org/archives/columns/Coupal/20060214CoupalCharge.html> (citations omitted).

22. Because many details of the charge—particularly the specific programs that would receive fee revenues—are not yet known, this Note necessarily discusses the charge generally and addresses how the charge could legally be implemented.

I. THE TAXONOMY OF TAXES AND FEES

Taxes and fees are economic instruments that allow governments to raise money to finance their activities. While similar in this one respect, the similarities end there. Both instruments occupy unique and important roles within the governmental structure. An understanding of the unique characteristics of each is crucial to understanding courts' varying decisions in this area.

A. *Taxes*

Taxes are the primary means by which most governments acquire their funds. Taxes raise revenue to finance general government services and functions; this revenue is placed into a general fund from which all branches of government may draw.²³ Taxes may be imposed arbitrarily, based solely on such factors as the income level of the taxpayer.²⁴ As the Supreme Court has noted, "Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income."²⁵ Because taxes are imposed arbitrarily and used generally, there is no assurance that tax dollars will benefit any given taxpayer.²⁶

Due to this non-correspondence between money spent and benefit received, taxes are subject to heightened passage requirements that are not imposed upon fees.²⁷ For example, the exclusive power to enact taxes rests with the legislative branch.²⁸ In the federal Constitution, the Origination Clause requires all tax measures to originate in the House of Representatives.²⁹ While the Senate may propose taxes, it may not act on

23. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

24. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340 (1974).

25. *Id.* (footnote omitted).

26. Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 384 (2004) ("[A]n important corollary of the uniformity principle is the legal irrelevancy of the taxpayer's assertion that he or she will receive no benefit from the service being funded by taxes.").

27. *See, e.g.*, CAL. CONST. art. XIII A, § 3 (requiring a two-thirds approval of both houses of the state legislature to pass new state tax increases); CAL. CONST. art. XIII A, § 4 (requiring a two-thirds vote of qualified electors to pass new local tax measures); MICH. CONST. art. IX, § 31 (prohibiting local governments "from levying any tax . . . without the approval of a majority of the qualified electors").

28. *See, e.g.*, U.S. CONST. art. 1, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives . . .").

29. *Id.*

such measures until after the House has acted.³⁰ Many states have similar constitutional provisions.³¹ In addition, some states require a greater legislative majority to pass a tax than to pass other measures.³² Some states require that a new tax or tax increase be approved by a direct vote of the electorate.³³ Taxes are subject to constitutional uniformity requirements that ensure that taxes are consistently assessed.³⁴

These requirements render taxes an ineffective tool for shaping social policy. Popular resistance to new taxes often prevents politically elected legislatures from acting on tax measures or from garnering enough support to overcome heightened passage requirements. This is especially true of carbon taxes, as the American populace carefully watches the price of gasoline and because the energy industry holds powerful influence in Congress.³⁵ User fees may avoid these problems for two reasons. First, fees may be independently enacted by non-legislative bodies, notably executive agencies.³⁶ Such agencies are not directly beholden to any particular constituency and may thereby avoid some of the political pressure brought to bear on legislatures. Second, fees enacted by legislatures are not subject to the heightened passage requirements of tax measures.³⁷ Importantly, while fees have their own set of fee-payer protections laid out in detail below, the heightened requirements of fees may be met by careful construction of the fee instrument itself.³⁸ To enact a user fee does not necessitate the greater political support that tax measures require. Furthermore, fees are not as politically taboo as are new tax measures. This discussion now addresses user fees and the characteristics that make them well-suited to achieving policy goals.

30. *Id.*

31. *E.g.*, ME. CONST. art. IV, pt. 3, § 9 (“[A]ll bills for raising a revenue shall originate in the House of Representatives, but the Senate may propose amendments as in other cases . . .”).

32. *E.g.*, CAL. CONST. art. XIII A, § 3.

33. *E.g.*, CAL. CONST. art. XIII A, § 4; MICH. CONST. art. IX, § 31.

34. *E.g.*, ME. CONST. art. IX, § 8; GA. CONST. art. VII, § I, ¶ III.

35. *See* Deepa Varadarajan, *Billboards and Big Utilities: Borrowing Land-Use Concepts To Regulate “Nonconforming” Sources Under the Clean Air Act*, 112 YALE L.J. 2553, 2554–55 (2003) (“A cynical observer might attribute (and, indeed, many have) the failure of [clean-energy] bills to the lobbying power of the energy industry and . . . lament[] the power of big money to influence environmental legislation . . .”).

36. *See* discussion *infra* Part III (noting the executive branch’s independent authority to issue fees).

37. *See, e.g.*, CAL. CONST. art. XIII A, § 3 (stating two-thirds passage requirement applies only to taxes); *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1358 (Cal. 1997) (holding that lead paint fees, as valid regulatory fees, were not subject to two-thirds vote requirement).

38. *See* discussion *infra* Part II.

B. User Fees

Although it is often useful to speak of a user fee as a singular assessment, user fees are better thought of as a general category encompassing several discrete types of charges. Because the different types of user fees serve differing policy goals, much analytical confusion may be avoided by a careful understanding of each.

1. Commodity Charges

One type of user fee is a commodity charge. Commodity charges are fees that are imposed to reimburse the government for specific goods or services provided to the paying individual.³⁹ Commodity charges are appropriate whenever the government acts in a business-like manner, selling products directly to consumers.⁴⁰ The term “rate” is usually applied to such a charge.⁴¹ Water-usage rates are a prime example, as are rates for electricity provided by public utilities.⁴²

In the federal government, commodity charges are imposed pursuant to the Independent Offices Appropriations Act (IOAA), popularly termed the User Charge Statute.⁴³ The statute provides:

- (b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—
 - (1) fair; and
 - (2) based on—
 - (A) the costs to the Government;
 - (B) the value of the service or thing to the recipient;
 - (C) public policy or interest served; and
 - (D) other relevant facts.⁴⁴

39. Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 343–44 (2002–03).

40. *Id.* at 343.

41. *Id.* at 344.

42. *Id.*

43. Independent Offices Appropriations Act, 31 U.S.C. § 9701 (2000) (formerly codified at 31 U.S.C. § 483(a)).

44. *Id.*

State and local governments impose user fees under similar statutes or pursuant to the state's general police power.⁴⁵ While the User Charge Statute is unique to the federal government, it provides a good model of the requirements of commodity charges in general.

A commodity charge, however, is not an appropriate vehicle for the enactment of gasoline charges. The Supreme Court has stated that under the federal User Charge Statute a "public agency performing . . . services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society."⁴⁶ Both the executive branch and courts have adopted a narrow test to determine whether particular commodity charges meet the requirements of the User Charge Statute.⁴⁷ In a circular interpreting the statute, the Office of Management and Budget (OMB) states that "[a] user charge . . . will be assessed against each *identifiable recipient* for special benefits derived from Federal activities beyond those received by the general public."⁴⁸ The circular goes on to state that "[n]o charge should be made for a service when the identification of the specific beneficiary is obscure, and the service can be considered primarily as benefiting broadly the general public."⁴⁹

In *Federal Power Commission v. New England Power Co.*, the Supreme Court adopted the OMB test, stating, "[w]e believe that is the proper construction of the [User Charge Statute]."⁵⁰ The Court then applied this test to annual assessments levied by the Federal Power Commission (Commission) on electric utilities to recoup costs not covered by license fees.⁵¹ In so doing, the Court found that "[t]he identifiable recipient of a unit of service from which he derives a special benefit . . . does not describe members of an industry which have neither asked for nor received the Commission's services during the year in question."⁵²

Thus, commodity charges are subject to two specific requirements

45. *E.g.*, WASH. REV. CODE § 35.92.010 (Supp. 2007) (authorizing local governments to charge water rates); *id.* § 35.92.050 (authorizing gas and electricity rates); *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1356 (Cal. 1997) (noting the California Government's authority to enact regulatory fees pursuant to the "general police power authority").

46. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340–41 (1974).

47. *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 350–51 (1974); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-25 (REVISED), MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS (1993), <http://www.whitehouse.gov/omb/circulars/a025/a025.html> [hereinafter OMB CIRCULAR].

48. OMB CIRCULAR, *supra* note 47 (emphasis added).

49. *Id.*

50. *New England Power Co.*, 415 U.S. at 350–51.

51. *Id.* at 346–47, 351.

52. *Id.* at 351 (internal quotation marks omitted).

under the User Charge Statute. First, they must be assessed against identifiable beneficiaries. Second, the individual paying the charge must benefit in a way not shared by the public at large. The second requirement is of particular importance for gasoline charges. While such charges would benefit automobile drivers in the sense that they would help provide alternative-fuel options and increase automobile efficiency, the real benefits of such measures would fall to the public as a whole in the form of air-pollution prevention. Such widely shared benefits would likely fail the second prong of the *New England Power* test. For this reason, gasoline charges should not be enacted as or considered commodity charges.

It is unfortunate, then, that California has chosen the term “Public Goods Charge” to describe its gasoline measure, as this moniker suggests a “commodity charge” is involved. As explained below, gasoline charges are more properly understood as “burden-offset charges” and should be analyzed accordingly. California’s mislabeling only muddies the already-turbid waters of the tax-versus-fee distinction, and it will likely add fuel to opponents’ argument that the gas charge is an invalid tax.⁵³

2. Regulatory Fees: In General

A second type of user fee is a regulatory fee. This Note argues that regulatory fees are conceptually distinct and should be analyzed separately from commodity charges. Regulatory fees are a subset of user fees that, as the name suggests, are imposed pursuant to regulatory authority.⁵⁴ As the First Circuit noted in *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, such fees may serve regulatory purposes in one of two ways.⁵⁵ They may do so directly by “deliberately discouraging particular conduct by making it more expensive.”⁵⁶ Or they may aid regulation indirectly by “raising money placed in a special fund to help defray the agency’s regulation-related expenses.”⁵⁷ They may take the form of, among other things, burden-offset charges or inspection, processing, and licensing fees.

53. California’s previous Public Goods Charge on electricity benefited consumers in a more individualized way, since energy-efficiency improvements directly reduce a consumer’s electricity costs in proportion to her expenditures. See KUDUK & ANDERS, *supra* note 16, at 1. Air pollution is widely dispersed, however, and affects all members of the public equally regardless of personal levels of gasoline consumption. For this reason, the two charges are distinct even if they operate in a similar fashion.

54. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

55. *Id.*

56. *Id.*

57. *Id.*

3. Regulatory Fees: Burden-Offset Charges⁵⁸

A further subset of regulatory fees, burden-offset charges, addresses the burdens imposed by individual actors on the whole of society.⁵⁹ In many situations, an actor's behavior creates a burden that is shared equally by many people. Climate change is a classic example, where the act of driving a car creates air pollution that is widely dispersed.⁶⁰ Economists term these situations "externalities," since the costs of the activity are borne externally by the public at large.⁶¹ While consumers pay for the gasoline they consume, they are not forced to pay for the costs of air pollution to the rest of society.⁶² Burden-offset charges are designed to simultaneously reduce the offensive activity and to help offset the costs to society—thereby internalizing the external costs.⁶³

One of the earliest examples of a charge that could be considered a burden-offset charge arose in 1884 in the *Head Money Cases*.⁶⁴ These cases concerned Congress's 1882 Act to Regulate Immigration, which levied a charge of fifty cents on "every passenger, not a citizen of the United States, who shall come by steam or sail vessel from a foreign port to any port within the United States."⁶⁵ The revenue was to be deposited into a dedicated account within the Treasury Department entitled the "immigrant fund" and used "to defray the expense of regulating immigration under [the Act to Regulate Immigration]."⁶⁶ Thus, the charge took an activity that would otherwise create a burden on society, immigration, and forced those engaged in the activity to help cover the cost of regulation. The *Head Money Cases* are discussed in more detail later in this Note.⁶⁷

58. Some commentators consider only inspection and processing fees to be "true" regulatory fees. *E.g.*, Spitzer, *supra* note 39, at 349–50. However, burden-offset charges properly fall within this category since they are used pursuant to a regulatory purpose and help to offset the costs of regulatory activities. Indeed, Black's Law Dictionary defines regulation as "[t]he act or process of controlling by rule or restriction." BLACK'S LAW DICTIONARY 1311 (8th ed. 2004). Burden-offset charges fit this definition in that they control, albeit economically, a given activity.

59. Spitzer, *supra* note 39, at 345.

60. See Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1022 (2006).

61. Spitzer, *supra* note 39, at 346. See generally Jonathan Macey, *The Limits of Legal Analysis: Using Externalities to Explain Legal Opinions in Structured Finance*, 84 TEX. L. REV. 75, 79–80 (2005) (discussing and defining various types of externalities).

62. See Engel, *supra* note 60, at 1022.

63. See Spitzer, *supra* note 39, at 346.

64. *Head Money Cases*, 112 U.S. 580 (1884).

65. *Id.* at 589–90.

66. *Id.* at 590.

67. See discussion *infra* Part II.

4. Regulatory Fees: Inspection, Processing, and License Fees

One other category of regulatory fee is inspection, processing, and license fees. Such fees are assessed to offset the costs of basic regulatory programs and activities.⁶⁸ As one commentator has put it, they are “charges to people who ask the government to pay them special attention, or whose activities give rise to special regulatory oversight.”⁶⁹ Examples of such charges include building permit fees,⁷⁰ driver’s license fees,⁷¹ and professional licensing fees.⁷² Though such charges are similar in many ways to burden-offset charges, they are more limited in nature as they typically apply only to explicitly licensed or permitted activities. For this reason, such fees would not encompass gasoline charges. Nevertheless, they are mentioned here because several important cases in this area dealing with licensing fees employ reasoning that applies equally well to other types of regulatory fees.

II. DISTINGUISHING TAXES AND FEES

As evident from the above discussion, taxes and fees—while they share basic traits—are quite distinct economic instruments.⁷³ Nevertheless, it is often difficult to squarely distinguish a tax from a fee since many assessments will have some characteristics of both. For this reason, courts have developed an array of tests to determine which of the two labels to apply. This Note now turns to a discussion of these tests and the specific factors they encompass.

A. *Federal Origins: The Head Money Factors*

In the *Head Money Cases*, the Supreme Court first recognized that user fees and taxes were independently viable and judicially distinguishable.⁷⁴ Analyzing the Act to Regulate Immigration’s fifty-cent-per-passenger charge, the Court stated that “the power exercised in this instance is not the

68. Spitzer, *supra* note 39, at 349–50.

69. *Id.* at 349.

70. *E.g.*, SEATTLE, WASH., CODE §§ 3.06.050, 22.504.010, 22.900D.010 (2007).

71. *E.g.*, WASH. REV. CODE § 46.20.120 (2001).

72. *E.g.*, *id.* §§ 18.106.125 (1999), 18.140.050 (2005).

73. *See generally* Jason Burge, Note, *Rethinking Fees and Taxes in Light of the New York City Health Care Security Act*, 61 N.Y.U. ANN. SURV. AM. L. 679, 696–715 (2005–06) (providing an excellent discussion of the distinction between taxes and fees in New York, on which this note draws for its basic form and organization).

74. *Head Money Cases*, 112 U.S. 580, 594–96 (1884).

taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce.”⁷⁵ The Court went on to apply a two-prong test to support its conclusion that the charge at issue was a regulatory fee, not a tax.⁷⁶ First the Court looked to the regulatory purpose of the statute.⁷⁷ It noted that:

The title of the act, “An Act to regulate immigration,” is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources.⁷⁸

The Court found dispositive that Congress enacted the charge specifically to regulate immigration, not to raise revenue for general government purposes.⁷⁹

The Court then considered whether the revenue was ultimately used to pursue those regulatory purposes.⁸⁰ To this end, the existence of the immigrant fund was of key importance. All proceeds from the charge were placed into the fund and could be used to pursue the Act’s regulatory aims.⁸¹ The Court noted that “[t]he money thus raised, though paid into the Treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government.”⁸² The *Head Money Cases* thus establish the following general analytical scheme: where money generated by a charge is simply paid into the general fund to be used at the government’s will, the charge is a tax; and where money is designated for a specific regulatory purpose and used only for that purpose, the charge should be upheld as a valid fee.⁸³

75. *Id.* at 595.

76. *Id.* at 594–95.

77. *Id.* at 595.

78. *Id.*

79. *Id.* at 595–96.

80. *Id.* at 596.

81. *Id.*

82. *Id.*

83. *Id.*

B. The California Approach: Head Money Revisited

The Supreme Court of California's decision in *Sinclair Paint Co. v. State Board of Equalization* would likely govern the question of whether a gasoline charge is a tax or a user fee in California.⁸⁴ In that case, the court asked whether fees imposed pursuant to the state's Childhood Lead Poisoning and Prevention Act of 1991 (the Act)⁸⁵ were taxes subject to California's heightened passage requirements.⁸⁶ The Act provided necessary medical attention to children identified as being at risk of lead poisoning.⁸⁷ This care was funded entirely through fees "assessed on manufacturers or other persons contributing to environmental lead contamination."⁸⁸ The amount of the fee was determined based upon the manufacturers' relative responsibility for environmental lead contamination.⁸⁹ If a manufacturer could show it did not contribute to environmental lead contamination, it was exempt from paying the fee.⁹⁰

Employing a simple two-prong test very similar to that originally laid out in the *Head Money Cases*, California's high court upheld the charges as valid burden-offset fees imposed under the police power.⁹¹ The court first asked if "the Legislature imposed the fees to mitigate the actual or anticipated adverse effects of the fee payers' operations."⁹² Essentially, the court sought to determine whether the fees served a regulatory function or were aimed solely at raising general revenue. The court found that by requiring manufacturers to pay for their burden on society, the fee served a valid regulatory goal.⁹³ It stated that the fee "is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations."⁹⁴ The court further noted that the fees regulated lead-paint manufacturers "by deterring further manufacture, distribution, or sale of dangerous products, and by stimulating research and development efforts to produce safer or alternative products."⁹⁵ Describing this charge as a "mitigating effects" fee, the court's decision thus acknowledged the validity of

84. *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1351 (Cal. 1997).

85. CAL. HEALTH & SAFETY CODE §§ 105275–310 (2007).

86. CAL. CONST. art. XIII A, § 3 (requiring the approval of two thirds of the state legislature to pass new state tax increases); *Sinclair Paint Co.*, 937 P.2d at 1351.

87. *Sinclair Paint Co.*, 937 P.2d at 1351.

88. *Id.* (citing CAL. HEALTH & SAFETY CODE §§ 105305, 105310).

89. *Id.* at 1352 (citing CAL. HEALTH & SAFETY CODE § 105310(b)).

90. *Id.* (citing CAL. HEALTH & SAFETY CODE § 1053109d)).

91. *Id.* at 1351.

92. *Id.*

93. *Id.* at 1356.

94. *Id.*

95. *Id.*

burden-offset fees as a subset of regulatory fees.⁹⁶

Applying the second prong, the court noted “the amount of the fees must bear a reasonable relationship to th[e] adverse effects [produced by the activity].”⁹⁷ Where such a reasonable relationship exists, the charge may be considered a valid component of the regulatory system.⁹⁸ Here, the court noted that the fee in question “require[d] manufacturers and other persons whose products have exposed children to lead contamination to bear a *fair share* of the cost of mitigating the adverse health effects their products created in the community.”⁹⁹ The court did not spend much time on this point, however, since the paint manufacturer never denied that such a reasonable relationship existed.¹⁰⁰

Under the court’s test in *Sinclair Paint Co.*, California’s gasoline charge proposal would likely be considered a valid burden-offset fee or, as the court put it, a “mitigating effects” fee. The gasoline-fee revenues would be used to directly mitigate the adverse effects of gasoline consumption on society. The fee would do so by funding programs for alternative fuel, energy efficiency, and climate change mitigation research.¹⁰¹ The fee would serve as a deterrent to gasoline consumption by increasing the cost of gasoline to the consumer, thereby reducing the quantity consumed. Both the additional money available for research and the increased cost of gasoline would stimulate “research and development efforts to produce safer or alternative products.”¹⁰² Under the California court’s pronouncement in *Sinclair Paint Co.*, these characteristics demonstrate that the gasoline fee is a proper incident to the regulation of greenhouse gases.

Furthermore, the fee’s amount would bear a rational relationship to the adverse effects generated by the activity. Given the potentially disastrous effects predicted to result from climate change,¹⁰³ a 2.57 cent-per-gallon charge seems far from excessive. Presumably, the programs would be funded entirely through fee revenue, while none of the revenue would be placed into the general fund. Assuming these conditions are met, there is nothing to prevent the gasoline charge from being upheld as a valid regulatory fee. For these reasons, the attacks of opponents calling the fee a tax in disguise are legally unfounded.

96. *Id.*

97. *Id.* at 1351.

98. *Id.* at 1356.

99. *Id.* (emphasis added).

100. *Id.* at 1355.

101. See DRAFT CAT REPORT, *supra* note 17, at 76.

102. *Sinclair Paint Co.*, 937 P.2d at 1356.

103. See generally CLIMATE CHANGE SCIENCE, *supra* note 3, at 20 (describing some of the adverse impacts scientists anticipate will result from climate change).

C. The Tax-Versus-Fee Distinction in Other Jurisdictions

Looking beyond California, there is great potential for gasoline charges to be successfully implemented in other states and at the federal level. Unfortunately, the tax-versus-fee discussion in many jurisdictions has devolved into a confusing array of interpretations that threaten to suffocate the simple practicality of *Head Money*, as modern courts have supplemented the *Head Money* criteria with a number of other factors.¹⁰⁴ While some of these factors have proven useful in certain contexts, others seem generally puzzling, while still others confuse completely the nature of taxes and fees and the underlying policies of each. Moreover, there appears to be little rhyme or reason in courts' application of the factors. Particularly troublesome is the lack of a developed distinction between the varying types of user fees, as courts often present the binary choice of tax or fee. Consequently, by applying the same requirements to all types of user fees, some courts have struck down certain types of user fees, notably burden-offset charges.

This Note argues that a different analysis is justified if the fee is a burden-offset charge as opposed to a commodity charge, and that burden-offset charges are ultimately valid. To this end, the discussion below of taxes and fees makes continual reference to the type of fee that may be involved, and how this distinction should vary a court's analysis. The intent of the discussion that follows is not to validate any one jurisdiction's approach to analyzing taxes and fees. Rather, it is to examine the entirety of factors that courts have employed to varying degrees of analytical precision. Using this discussion as a guide, the proponents of gas charges in any given jurisdiction will be better equipped to craft arguments—taking into account that jurisdiction's prior jurisprudence in this area—that (1) courts have misapplied certain factors to user fees, and (2) when viewed through the proper lens, gas charges measure up to the legal standards properly laid out for such fees.

1. Regulatory Purpose

First and foremost, regulatory fees must serve a regulatory purpose. First laid out in the *Head Money Cases*, the regulatory-purpose requirement has been employed in many decisions, including in the First Circuit's *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto*

104. See, e.g., *Bolt v. City of Lansing*, 587 N.W.2d 264, 269–72 (Mich. 1998) (considering such factors as voluntariness, proportionality, and efficacy of regulation).

Rico.¹⁰⁵ In that case, the court considered whether a three percent periodic fee imposed on a private cellular provider was a tax or a fee.¹⁰⁶ The fee, imposed by the Puerto Rico Public Service Commission, required San Juan Cellular to pay three percent of its gross revenue into a fund used to defray the costs of specific Commission activities including specialized investigations, legally mandated equipment acquisition, and the hiring of professional and expert services.¹⁰⁷

The First Circuit began by examining the differing purposes of taxes and fees, noting that “[t]he classic ‘tax’ is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and [is] spent for the benefit of the entire community.”¹⁰⁸ In contrast, “[t]he classic ‘regulatory fee’ is imposed by an agency upon those subject to its regulation. . . . [to] serve regulatory purposes”¹⁰⁹ The court held that the assessment’s intention to offset the Commission’s regulation-related expenses, together with other aspects of the charge, “place[d] the 3% charge close to the ‘fee’ end of the spectrum.”¹¹⁰ In other words, the fee served a valid regulatory purpose.

While seemingly simple in form, applying this factor is not always so straightforward. Many states have likewise demanded that fees serve regulatory purposes, but at times have done so in a confusing manner. The Washington Supreme Court, in determining the validity of residential housing fees, has asked “whether the primary purpose of [a charge] is to accomplish desired public benefits which cost money, or whether the primary purpose is to regulate.”¹¹¹ The Washington court noted that “[i]f the fees are merely tools in the regulation of [an activity], they are not taxes. If, on the other hand, the primary purpose of the fees is to raise money, the fees are not regulatory, but fiscal, and they are taxes.”¹¹² This

105. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n of P.R.*, 967 F.2d 683, 685–86 (1st Cir. 1992).

106. *Id.* at 684–85.

107. *Id.* at 684, 686.

108. *Id.* at 685.

109. *Id.* (citation omitted).

110. *Id.* at 686.

111. *Hillis Homes, Inc. v. Snohomish County*, 650 P.2d 193, 195 (Wash. 1982) (quoting *Haugen v. Gleason*, 359 P.2d 108, 111 (Or. 1961)). In *Hillis Homes*, a county resolution imposed “extended use fees” on residential land subdivisions and housing proposals in order to offset the “increased demand on solid waste disposal facilities, parks, roads, and sheriff’s services” that such projects create. *Id.* at 194. The court invalidated the ordinance as an unauthorized tax. *Id.* at 194–95. That the fees financed what would otherwise be considered general government services explains the court’s decision, though the court’s language regarding the regulatory-purpose requirement is perhaps unhelpfully broad.

112. *Id.* at 195.

money-raising-versus-tool-of-regulation notion is a common formulation of the regulatory-purpose factor.¹¹³

Unfortunately, this formulation causes some confusion among courts that have attempted to apply it. This confusion arises for two reasons. First, all charges generate revenue whether the charge is a tax or a fee.¹¹⁴ To say that a charge is a tax for the sole reason that it aims to raise revenue is therefore incomplete.¹¹⁵ Rather, courts need to look to the purposes behind the need to raise money. As already noted, taxes raise money for the general provision of government services, usually services that are unrelated to the taxed activity.¹¹⁶ Fees, on the other hand, raise money only for specific regulatory programs that are related to the assessed activity.¹¹⁷ Thus, both instruments may properly be intended to raise money. However, only where the desire to raise revenue is general in nature—i.e., the revenue is intended for purposes unrelated to the discouraged activity—should the regulatory-purpose test deem the charge a tax.¹¹⁸ Indeed, the California Supreme Court has noted:

From the viewpoint of general police power authority, we see no reason why statutes or ordinances calling on polluters or producers of contaminating products to help in mitigation or cleanup efforts should be deemed less ‘regulatory’ in nature than the initial permit or licensing programs that allowed them to operate.¹¹⁹

Also problematic is the aforementioned notion that charges may not be used to “accomplish desired public benefits which cost money.”¹²⁰ Quite to the contrary, regulation always aims to provide benefits to the public as a whole, whether the regulation takes the form of an economic instrument or otherwise. Driver’s license fees, for example, ensure that the nation’s roadways are driven by competent drivers. Building inspection fees ensure safe buildings not only for individual residents, but also for visitors and adjoining property owners. Accomplishing these benefits will always cost

113. *See, e.g., Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (“[A] user fee must serve a regulatory purpose rather than a revenue-raising purpose.”).

114. Spitzer, *supra* note 39, at 352.

115. *See Reynolds, supra* note 26, at 412–13.

116. *See supra* text accompanying notes 23–27.

117. *See Head Money Cases*, 112 U.S. 580, 595 (1884).

118. *See, e.g., Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1355 (Cal. 1997) (“[T]he term ‘special taxes’ . . . does not embrace fees charged in connection with regulatory activities . . . not levied for unrelated revenue purposes.” (internal quotation marks and citation omitted)).

119. *Id.* at 1356.

120. *Hillis Homes, Inc. v. Snohomish County*, 650 P.2d 193, 195 (Wash. 1982) (quoting *Haugen v. Gleason*, 359 P.2d 108, 111 (Or. 1961)).

money and will be at least partially funded through user fees. Thus, the distinction drawn between regulatory purposes and revenue-raising purposes proves ultimately unhelpful. Rather, courts must draw the distinction between specific regulatory programs and general provision of government services. Where the former is sought, a fee is appropriate; where the latter is the goal, a tax must be the instrument.

Gasoline charges serve the requisite regulatory purpose. They aim to reduce the country's emissions of greenhouse gases, a valid goal of regulation given climate change's potential to wreak irreparable havoc on the global climate.¹²¹ Ideally, such a fee's revenues would not fund general government services, nor would they offset the cost of programs currently drawing on the general fund. Rather, gasoline fees could be narrowly tailored to reduce our consumption of fossil fuels, to support research and development of alternative technologies, and to make the adoption of such technologies feasible and cost-effective.¹²² While not of the traditional command-and-control regulatory ilk, these are valid regulatory purposes nevertheless.

2. Ultimate Use of Revenue

After a court determines a fee's purpose, it will often look to "the [fee] revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation."¹²³ The Supreme Court of Washington stated in *Covell v. City of Seattle* that courts must ask "whether the money collected must be allocated only to the authorized regulatory purpose."¹²⁴ As the Massachusetts Supreme Judicial Court noted, "That revenue obtained from a particular charge is not used exclusively to meet expenses incurred in providing the service but is destined instead for a broader range of services or for a general fund, while not decisive, is of weight in indicating that the

121. See Clean Air Act § 302(h), 42 U.S.C. § 7602(h) (2000) (stating that the Act's regulatory provisions cover air pollutants that cause "effects on . . . weather, visibility, and climate").

122. See DRAFT CAT REPORT, *supra* note 17, at 76 ("[A gasoline] charge could be used to encourage fuel diversity in the transportation sector and [to] provide funds to create incentives for reductions in climate change emissions from a range of transportation sources.").

123. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

124. *Covell v. City of Seattle*, 905 P.2d 324, 327 (Wash. 1995). *Covell* dealt with a residential street utility charge that could be imposed by municipalities "for the use or availability of the streets" to subsidize the creation of a street utility. *Id.* at 325. The charge was set at two dollars per month for single-family residences and at \$1.35 per month for housing units in multi-family residences. *Id.* at 326. The fee revenues were legislatively earmarked "for transportation purposes only." *Id.* at 331. Primarily because the court did not consider the fee to serve a regulatory purpose, however, the court invalidated the fee as a tax. *Id.*

charge is a tax.”¹²⁵ On the other hand, placing the money into a dedicated fund to be used only for a specified purpose indicates the charge is a bona fide user fee.¹²⁶

A gas charge can easily meet this requirement. A properly crafted gasoline charge would channel funds directly into the designated programs, without money escaping into the general fund. It is, of course, imperative that policymakers do not look to gasoline charges as an additional source of revenue, skimming money off the top to support unrelated government programs. This has been a problem with regulatory fees in the past, notably California’s previous Public Goods Charge on electricity.¹²⁷ Even where the majority of funds served a fee’s regulatory purposes, the wider distribution of any portion of revenue would almost certainly prove fatal to the charge before a reviewing court.¹²⁸ A government body enacting a gasoline charge must therefore resist the urge to finance other government activities from the charge’s revenues. This might convert the charge into an invalid tax and foreclose the opportunity to generate any revenue at all. However, as long as the revenue is placed into a designated fund and left there, the charge should be safe from judicial scrutiny.

3. Particularized Benefit for the Payer

Some courts have required that a fee provide a particularized benefit to the fee payer. This is an even more problematic factor. In *Bolt v. City of Lansing*, the Supreme Court of Michigan considered whether a user charge provided a particularized benefit in the context of a charge on storm water run-off generated by parcels of land.¹²⁹ The fee was assessed in order to implement a combined sewer overflow control program, which sought to reduce the discharge of untreated wastewater which had previously occurred during periods of heavy precipitation.¹³⁰ The Michigan court noted that “[a] proper fee must reflect the bestowal of a corresponding benefit on the person paying the charge, which benefit is not generally

125. *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1106 (Mass. 1984) (internal quotation marks omitted).

126. *E.g.*, *San Juan Cellular*, 967 F.2d at 686.

127. *See KUDUK & ANDERS*, *supra* note 16, at 5 (noting that a significant portion of the charge’s revenue was “transferred for use in the general fund” as a “loan” and has never been paid back).

128. *See, e.g.*, *Emerson Coll.*, 462 N.E.2d at 1106.

129. *Bolt v. City of Lansing*, 587 N.W.2d 264, 266–67, 271 (Mich. 1998). “The charge [was] imposed on each parcel of real property located in the city using a formula that attempts to roughly estimate each parcel’s storm water runoff.” *Id.* at 267.

130. *Id.* at 266.

shared by other members of society.”¹³¹ The court concluded that the storm water charge would benefit the public at large and would not provide any specific service to the affected property owners.¹³² Thus, the court held: “[T]he lack of correspondence between the charges and the benefit conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public.”¹³³

Admittedly, gasoline charges provide little in the way of a particularized benefit to the fee payer. One tenuous argument for a particularized benefit is that research into alternative fuels and automobile efficiency will ultimately lower the transportation costs for present-day gasoline consumers. However, the group of future consumers who will enjoy this benefit is likely to be both over- and under-inclusive of present-day drivers. Furthermore, the creation of incentives for alternative fuels will benefit only those consumers who use such fuels and not the consumers of standard gasoline on which the fee is levied. On the whole, then, gasoline charges probably would not survive in a court that adheres strictly to the particularized-benefit test.

The particularized-benefit test, however, is a poor way to evaluate a regulatory fee, especially considering the policies behind such fees. Particularized benefits arise primarily in the context of commodity charges, where it is important that the costs borne by the consumer are tied directly to the purchased service or product.¹³⁴ Regulatory fees, on the other hand, serve broader societal goals and must necessarily be broader in scope. Indeed, societal benefits are often the very purpose of regulation.

Many courts have held that user fees may, as burden-offset charges, validly benefit society as a whole. In *Teter v. Clark County*, for example, the Supreme Court of Washington considered a county storm water charge similar to the charge at issue in *Bolt*.¹³⁵ Unlike *Bolt*, the Washington court asserted that regulatory fees may provide benefits to the public at large.¹³⁶

131. *Id.* at 271 (citing *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340–342 (1974)).

132. *Id.*

133. *Id.* Indeed, the dissenting lower court opinion noted that “the ‘fee’ is not structured to simply defray the costs of a ‘regulatory’ activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens.” *Bolt v. City of Lansing*, 561 N.W.2d 423, 429 (Mich. Ct. App. 1997) (Markman, J., dissenting). The dissent in the lower court went on to say that “[t]he extent of any particularized benefit to property owners is considerably outweighed by the general benefit to the citizenry of Lansing as a whole in the form of enhanced environmental quality.” *Id.* at 430.

134. See Spitzer, *supra* note 39, at 343–44.

135. *Teter v. Clark County*, 704 P.2d 1171, 1174–75 (Wash. 1985).

136. *Id.* at 1177.

The Washington court began by noting that “[t]he police power is broad enough to encompass all laws tending to promote the ‘health, peace, morals, education, good order and welfare of the people [T]he only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state.’”¹³⁷ This led the court to conclude that, pursuant to this broad police power, “the charge is properly characterized as a charge imposed to implement a health or safety law and is valid, even though appellants do not receive any *specific* ‘service.’”¹³⁸ Indeed, the same court in *Covell v. City of Seattle* affirmed:

The . . . inquiry is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. Where such a relationship exists, then the charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer.¹³⁹

The Supreme Court of Missouri reached a similar conclusion in its consideration of solid waste disposal fees in *Craig v. City of Macon*.¹⁴⁰ In *Craig*, certain fee payers did not utilize the solid waste services funded by the fee’s revenue and therefore derived no particular benefit from the fee.¹⁴¹ Nevertheless, the court found that the fee was proper because it served valid regulatory purposes, even if such purposes benefited society as a whole.¹⁴² Like *Teter*, the court based its conclusion on the comprehensive police power from which burden-offset charges are derived:

Generally, the function of the police power has been held to promote the health, welfare, and, safety of the people by regulating all threats either to the comfort, safety, and welfare of the populace or harmful to the public interest. More specifically, the preservation of the public health is

137. *Id.* (quoting *Markham Adver. Co. v. State*, 439 P.2d 248, 258 (Wash. 1968)).

138. *Id.*

139. *Covell v. City of Seattle*, 905 P.2d 324, 327 (Wash. 1995) (citations omitted).

140. *Craig v. City of Macon*, 543 S.W.2d 772, 773 (Mo. 1976).

141. *Id.*

142. *Id.* at 774.

In the case before us, the charge was only incidental to the regulatory scheme. The payments went only to pay the cost of the waste collection and disposal. The ordinances authorized only those charges necessary to pay the expenses of the service None of the money subsidized the operation of the city or went into general revenue. Rather, the payments were collected for a specific purpose, to pay the cost of the service.

Id.

recognized as a goal of the highest priority, and the accumulation of garbage is a serious threat to the public health.¹⁴³

The court reasoned that “[t]he legislative intent and the purpose of the city’s ordinances are not primarily to remove waste from the community for the convenience of residents, but rather to protect the public health by regulating the collection and disposal of garbage.”¹⁴⁴

In *City of Hobbs v. Chesport, Ltd.*, the Supreme Court of New Mexico similarly upheld a solid waste disposal fee where the services funded by the fee were not utilized by some fee payers.¹⁴⁵ The court held that a due process violation did not exist because “the measure involved here is a police measure involving the health of all members of the community,” and the “sum to be collected . . . is to defray the expenses of . . . garbage collection and disposal.”¹⁴⁶ The general benefit was an acceptable incident of regulatory authority, and the charge was properly a regulatory fee.¹⁴⁷

Thus, gasoline charges are best understood as burden-offset charges that validly benefit the public as a whole. As the above discussion illustrates, governments may enact such fees pursuant to general police powers and other broad grants of regulatory authority. Thus far, not all courts have accepted the validity of such charges. One task in defending gasoline charges may be to convince courts of the inappropriateness of the particularized-benefit test as applied to charges other than commodity fees. Courts have yet to identify a compelling reason why government agents, pursuant to delegated regulatory authority or the police power, may impose indirect financial burdens on actors—as virtually any regulation imposes costs on those subject to its authority—but may not impose those costs directly as a tool of regulation. The Supreme Court, for one, has expressly allowed such action.¹⁴⁸ Thus, the fact that a gasoline charge provides a broad-based benefit should not prove fatal when properly analyzed as a burden-offset charge enacted pursuant to valid regulatory goals.

4. Who Institutes the Charge?

Courts sometimes look to the identity of the assessing body in

143. *Id.* at 774 (citations omitted).

144. *Id.*

145. *City of Hobbs v. Chesport, Ltd.*, 417 P.2d 210, 212, 214 (N.M. 1966).

146. *Id.* at 214 (quotations omitted).

147. *Id.*

148. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559, 570 (1976) (upholding fees on oil imports pursuant to general grant of regulatory authority in Trade Expansion Act); *see discussion infra* Part III.

determining whether a charge is a tax or a user fee. In *Valero Terrestrial Corp. v. Caffrey*, the Fourth Circuit Court of Appeals was asked to determine whether a solid waste disposal assessment charge was a tax or a user fee.¹⁴⁹ The law at issue imposed a charge of \$3.50 per ton for the disposal of solid waste at any solid-waste disposal facility in West Virginia.¹⁵⁰ The court first considered “what entity imposes the charge,” noting that “the charge was imposed by the West Virginia legislature and not any administrative agency.”¹⁵¹ This, the court reasoned, “indicate[s] that the charge imposed . . . is a ‘tax.’”¹⁵² In *San Juan Cellular*, the First Circuit likewise gave import to the identity of the assessing body, noting in upholding the charge as a user fee that “[a] regulatory agency assesses the fee.”¹⁵³

Discussion of these courts’ analyses of this factor need go no further, as the factor itself is fatally flawed. The identity of the assessing body should play no role in determining whether a charge is a tax or a fee. A major purpose of judicial review in this area is to ensure that executive agencies do not impose taxes. For this reason, the fact that an executive agency administers the charge should not serve as evidence that the charge is a fee, as this would defeat the purpose of the courts’ review. A legislature, on the other hand, may enact either taxes or fees so long as they meet the requirements imposed on each. The simple fact that a charge is enacted by a legislature does nothing to determine the nature of the charge. Just as courts will not defer to a legislature’s label of a charge as a tax or a fee,¹⁵⁴ courts should not consider the body that implements the charge as being in any way determinative.

5. Proportionality of Charge to Benefit Received or Detriment Caused

Some courts have held that any assessment not proportional to a benefit received or a detriment caused is in fact a tax. The Michigan Supreme Court noted in *Bolt v. City of Lansing* that “user fees must be proportionate to the necessary costs of the service.”¹⁵⁵ The court went on to say that “[t]he revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over

149. *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 132–33 (4th Cir. 2000).

150. *Id.* at 132–33.

151. *Id.* at 134.

152. *Id.* (citation omitted).

153. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n of P.R.*, 967 F.2d 683, 686 (1st Cir. 1992).

154. *Burge*, *supra* note 73, at 697.

155. *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (citing *Bray v. Dep’t of State*, 341 N.W.2d 92, 97 (Mich. 1983); *Merrelli v. St. Clair Shores*, 96 N.W.2d 144, 148–49 (Mich. 1959)).

the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax.”¹⁵⁶ Many commentators would disagree with the court’s analysis.¹⁵⁷ A fee that is set too high is simply that—a fee that is set too high.¹⁵⁸ Unless the additional proceeds are placed in the general fund or used to finance general government operations, the fee is still a regulatory tool and should be treated as such. Disproportion may justify the court-ordered lowering of a fee, but would not alone justify invalidating the fee as a tax in disguise.

Regardless, a carefully crafted gasoline charge would pass the proportionality requirement. There is no set cost to greenhouse gas reductions; rather, such reductions are cumulative. The more money that is funneled into research and development programs and the more money that is spent to subsidize alternatives, the greater the emissions reductions that will be achieved. Thus, proportionality could be achieved almost by default. The sole challenge will be to set the fee where it will generate a reasonable level of income, and ensure that such income is channeled directly to the sponsored programs. So long as the programs themselves are reasonable and the funding is direct, the fee cannot be said to be disproportionate.

6. Voluntariness

Some courts have stated that only a tax may be compulsory, whereas fees must be voluntary. As the Supreme Judicial Court of Massachusetts has stated, fees “are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.”¹⁵⁹ In *Bolt v. City of Lansing*, the Michigan Supreme Court cited the voluntary nature of fees as critical to its invalidation of the storm water service charge.¹⁶⁰ The court noted that “[o]ne of the distinguishing factors of a tax is that it is compulsory by law, whereas payments of user fees are only compulsory for those who use the service, have the ability to choose

156. *Id.* at 270. One important factor in the court’s reasoning was that the charge “replace[d] the portion of the program . . . previously funded by the general fund revenues from property and income taxes.” *Id.* at 272. This acknowledgement reflects a general concern among courts that legislatures, agencies, and municipalities will escape tax restrictions by instituting new user fees to finance programs that would otherwise require general funds. *See id.* at 273 (“To conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as ‘services’ and enacting a myriad of ‘fees’ for those services.”).

157. *See, e.g.,* Spitzer, *supra* note 39, at 348 (“[T]he fact that a particular user charge exceeds the user’s fair share does not automatically convert that charge into a tax.”).

158. *Id.*

159. *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984) (citing *Vanceburg v. Fed. Energy Regulatory Comm’n*, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977)).

160. *Bolt*, 587 N.W.2d at 272.

how much of the service to use, and whether to use it at all.”¹⁶¹ The court quoted *Ripperger v. Grand Rapids*, noting, “Water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity No one can be compelled to take water unless he chooses.”¹⁶² The *Bolt* court noted that “[t]he property owner has no choice whether to use the [storm-water] service and is unable to control the extent to which the service is used.”¹⁶³

While this reasoning no doubt applies in the context of commodity charges, it is not at all clear that the same standard should govern burden-offset charges. The court’s analysis fails to explain why a few individuals may create a burden society must involuntarily bear, yet those same individuals may not be subject to an involuntary fee. With burden-offset charges, the actor’s choice—i.e., the fee’s voluntariness—lies in the actor’s decision whether to create the burden in the first place. Once the choice is made and the burden imposed, there is no sound reason that actors should not be required to assist in meeting the costs of the burden they have produced.

Regardless, voluntariness is not likely to be a serious issue in the case of gasoline charges. Purchasing a commodity like gasoline is as voluntary a behavior as behavior can be. A consumer that wishes to avoid the fee simply uses less gasoline, either by driving less or by driving a more fuel-efficient car. While it is true that the Supreme Court of Michigan in *Bolt v. City of Lansing* rejected this argument in the real property context, the court’s reasoning would not extend to gasoline charges.¹⁶⁴ The court stated:

The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on property.¹⁶⁵

Relinquishing a right of ownership to real property is quite a different matter from reducing one’s consumption of gasoline. Consuming less gasoline involves giving up no pre-existing property interest, nor does it impose as great a hardship on an individual as would refraining from land development. Thus, courts considering gasoline charges would likely find

161. *Id.* (internal quotation marks omitted).

162. *Id.* at 269 (quoting *Ripperger v. City of Grand Rapids*, 62 N.W.2d 585, 586 (Mich. 1954)).

163. *Id.* at 272.

164. *Id.*

165. *Id.*

such a fee voluntary due to the public's ready ability to restrict its consumption of gasoline.

D. Conclusion: Policy as a Guide

As is evident from the foregoing discussion, the differing policy rationales behind taxes and fees may help guide courts' analyses of the two assessments. Courts should keep these underlying policies in mind when determining which factors to apply to what charges. These policies are perhaps best carried out by returning to the two basic factors first enunciated in the *Head Money Cases*; specifically, that a regulatory fee serve a regulatory purpose and that its revenue ultimately be used solely in pursuit of that purpose.¹⁶⁶ Courts might supplement these basic factors cautiously—and only when relevant to the charge at hand—in order to avoid logical fallacies like those discussed above. Under the two *Head Money* factors, there is little doubt that gasoline charges would squarely pass legal muster as valid regulatory fees.

III. FEDERAL GAS CHARGES: THE EXECUTIVE BRANCH'S INDEPENDENT AUTHORITY TO ENACT REGULATORY FEES

Having considered the factors that generally must be met for a gasoline charge to be valid, this Note now returns to the federal level to ponder the potential for the executive branch to independently enact a gasoline user fee. Since the *Head Money Cases* were decided in 1884, Congress's ability to enact fees and expressly delegate fee-making authority to the executive has been well established.¹⁶⁷ The executive branch's ability to independently issue fees under a general grant of regulatory authority, however, is somewhat less clear.¹⁶⁸ If the executive possessed such authority, federal agencies like the EPA arguably could enact a gasoline fee pursuant to a preexisting grant of authority, such as that found in the Clean Air Act.¹⁶⁹ As noted earlier, this would avoid many of the political realities

166. *Head Money Cases*, 112 U.S. 580, 594–96 (1884).

167. *See id.* at 595–96 (upholding Congress's issuance of an immigration fee as incident to the regulation of interstate commerce); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407–08 (1928) (allowing Congress to delegate the fixing of rates to the Interstate Commerce Commission).

168. *Proposals to Control the Manufacture, Use, and Disposal of Ozone-Depleting Substances: Hearing on S. 201, S. 333, S. 491, S. 503, and S. 676 Before the Subcomm. on Envtl. Prot. of the S. Comm. on Env't and Public Works*, 101st Cong. 255 (1989) (statement of the General Accounting Office) (discussing the EPA's authority to place a regulatory fee on ozone pursuant to § 157(b) of the Clean Air Act, 42 U.S.C. § 7457).

169. *See infra* text accompanying notes 200, 201.

that make carbon taxes so difficult to enact.¹⁷⁰

In at least one case, the Supreme Court has upheld regulatory fees independently issued by the executive branch pursuant to a general delegation of authority.¹⁷¹ In *Federal Energy Administration v. Algonquin SNG, Inc.*, the Court allowed executive imposition of license fees under the Trade Expansion Act of 1962.¹⁷² The Act applied to articles “being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security” and authorized the President to “take such action, and for such time, as he deem[ed] necessary to adjust the imports of [the] article and its derivatives.”¹⁷³ In 1959, President Eisenhower imposed a system of quotas to decrease imports of crude oil relative to domestic production under an earlier version of the Trade Expansion Act.¹⁷⁴ President Nixon, recognizing that the quotas were not having their desired effect, amended the program in 1973 to establish “a gradually increasing schedule of license fees for importers.”¹⁷⁵ In 1975, the Secretary of the Treasury determined that neither of the programs was fulfilling their objectives and that oil imports were threatening to impair national security.¹⁷⁶ In response, President Ford immediately raised the license fees to their maximum scheduled levels and imposed a supplemental fee on all imported oil.¹⁷⁷ Two lawsuits were subsequently filed challenging the 1975 fees as beyond the President’s statutory and constitutional authority.¹⁷⁸

The *Algonquin* Court began by stating that the Act presented a constitutionally valid delegation of legislative power.¹⁷⁹ The Court noted that “[i]f Congress shall lay down by legislative act an intelligible principle to which the [President] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”¹⁸⁰ The statute passed this test for three reasons. First, it established conditions that must be met prior to Presidential action.¹⁸¹ Second, it limited the President in deciding what form of action to take, and, third, it listed certain factors to be considered by

170. *See supra* Part I.A.

171. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–59 (1976).

172. *Id.* at 559 (citing Trade Expansion Act of 1962 § 232(b), 19 U.S.C. § 1862(b) (1970)).

173. Trade Expansion Act of 1962 § 232(b).

174. *Algonquin*, 426 U.S. at 552.

175. *Id.* at 553.

176. *Id.* at 554.

177. *Id.* at 555.

178. *Id.* at 556.

179. *Id.* at 558.

180. *Id.* at 559 (quoting *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)).

181. *Id.*

the President in exercising his regulatory authority.¹⁸²

The Court then applied traditional techniques of statutory construction to determine that the Act included monetary instruments among its regulatory tools.¹⁸³ The Court first noted it found “no support in the language of the statute for respondents’ contention that the authorization to the President to ‘adjust’ imports should be read to encompass only quantitative methods—*i.e.*, quotas—as opposed to monetary methods—*i.e.*, license fees—of effecting such adjustments.”¹⁸⁴ Moreover, the Court found affirmative evidence in the legislative history that Congress intended to confer on the President the full array of regulatory tools.¹⁸⁵ Importantly, then, the Court treated the question of whether regulatory fees could be imposed under a broad grant of authority in the same fashion as any other question of statutory interpretation—*i.e.*, by asking whether such fees were fairly within the scope of Congress’s intent expressed in the plain language and legislative history of the statute. The Court held that “a license fee as much as a quota has its initial and direct impact on imports, albeit on their price as opposed to their quantity.”¹⁸⁶ For this reason, the Court in *Algonquin* was quite willing to infer that Congress impliedly delegated fee-making authority in the Trade Expansion Act’s general grant of power.¹⁸⁷

This doctrine of implied fee-making authority was illustrated in *Independent Gasoline Marketers Council v. Duncan*, a later case addressing the same statutory provision.¹⁸⁸ By 1979, oil was again being imported into the United States in quantities that threatened to impair national security.¹⁸⁹ In response, President Carter enacted the Petroleum Import Adjustment Program (PIAP), which imposed a license fee on imported crude oil and gasoline.¹⁹⁰ Unlike the fee at issue in *Algonquin*, however, PIAP required domestic gasoline refiners to reimburse importers through an entitlement program.¹⁹¹ Because the costs of the fee could be disbursed through the chain of distribution, consumers of both domestic and imported gasoline were impacted equally.¹⁹² PIAP therefore acted as a “conservation fee,”

182. *Id.*

183. *Id.* at 561–71.

184. *Id.* at 561.

185. *Id.* at 562 (“Turning from § 232’s language to its legislative history, again there is much to suggest that the President’s authority extends to the imposition of monetary exactions—*i.e.*, license fees and duties.”).

186. *Id.* at 571.

187. *Id.* at 570–71.

188. *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 616 (D.D.C. 1980).

189. *Id.*

190. *Id.* (citing Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 3, 1980)).

191. *Id.*

192. *Id.*

reducing gasoline consumption in the United States without altering the ratio of domestic production to imports.¹⁹³ The court held that such a fee exceeded the President's authority under the Trade Expansion Act, which authorized the regulation of domestic goods only if incidental to the regulation of imports.¹⁹⁴ The regulation of domestic oil under PIAP was "not incidental to regulation of imported oil. Rather, it [was] a primary purpose of the program."¹⁹⁵

The fatal flaw in *Duncan*, therefore, was not the statute's failure to contemplate fees *per se*. Indeed, *Algonquin* establishes that agencies may enact fees under broader grants of regulatory authority, including under the specific provision at issue in *Duncan*.¹⁹⁶ Rather, the specific fee structure of PIAP exceeded the scope of allowable regulation because it applied to both imported and domestic oil.¹⁹⁷ PIAP did not fulfill the regulatory aims of the statute "[b]ecause of the displacement of the initial import fee onto both domestic and imported oil, [such that] the PIAP could not act as a disincentive to reduce imports."¹⁹⁸ Thus, the executive branch exceeded its delegated authority in crafting the fee, but was acting reasonably when it chose a fee in the first place. Taken as a whole, these cases establish that an executive agency may impose fees pursuant to a broad grant of regulatory authority, so long as such fees are fairly within the overall scope of regulation contemplated by Congress.

A gasoline charge might therefore be enacted by the EPA pursuant to section 211 of the Clean Air Act.¹⁹⁹ That section, entitled "Regulation of fuels," grants the EPA the broad authority to:

[B]y regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle . . . if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare.²⁰⁰

After the sweeping language of the Court's recent pronouncement in *Massachusetts v. EPA*, it is likely the EPA will soon determine greenhouse

193. *Id.* at 616–17.

194. *Id.* at 618.

195. *Id.*

196. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 570–71 (1976).

197. *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 617 (D.D.C. 1980).

198. *Id.* at 617.

199. *See* 42 U.S.C. § 7545 (2000) (establishing administrative authority to regulate fuels).

200. *Id.* § 7545(c)(1).

gases endanger the public health.²⁰¹ Thus, like the Trade Expansion Act, the grant of regulatory authority in the Clean Air Act should be found to confer fee-making authority in addition to non-monetary regulatory power.

CONCLUSION

Given the above discussion, California's proposed charge on gasoline is a proper application of the California legislature's regulatory authority. Hopefully, other states, municipalities, and the EPA will soon follow California's lead and offer up their own proposals for gasoline charges to combat rising greenhouse gas emissions. In order for this to be possible, however, courts need to simplify their approach to distinguishing taxes and fees, keeping in mind the differing policy goals and protections afforded by each. Ideally, courts should return to the practical two-part test laid out in the *Head Money Cases*, incorporating other factors only when particularly relevant to the charge at issue. Importantly for gasoline taxes, courts must remember that there is a fundamental difference between commodity charges and burden-offset charges, and acknowledge that the latter are a valid exercise of regulatory authority. Among other things, this will require courts to dispense with the notion that all fees must produce a particularized benefit to the fee payer. The lawyer's role in challenges to gasoline charge proposals will be to convince a reviewing court that gasoline charges meet the traditional criteria of fees, particularly burden-offset charges. In addition, lawyers must strive to prevent the mischaracterizations of taxes and fees discussed in this article that not only confuse the tax-versus-fee distinction, but ultimately undermine the public good by invalidating necessary regulations. Whether or not one believes that the power to tax is the power to destroy,²⁰² the power to impose user fees might just prove itself to be a power to help slow the oncoming destructive force of climate change.

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201. See *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1446–47, 1455 (2007) (“The harms associated with climate change are serious and well recognized.”). That case, recently decided by the Court, questioned whether greenhouse gases may “reasonably be anticipated to endanger the public health or welfare.” *Id.* at 1446 (citing the Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000)).

202. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819); see *supra* text accompanying note 1.

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