American Can: Judicial Response to Oregon's Nonreturnable Container Legislation

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Note

**AMERICAN CAN: JUDICIAL RESPONSE TO OREGON'S NONRETURNABLE CONTAINER LEGISLATION**

The state of Oregon recently enacted legislation that requires deposits on nonreturnable beverage containers and bans containers with disposable pop-tops. The beverage industry immediately challenged the statute's constitutionality on, inter alia, commerce clause, due process, and equal protection grounds. In American Can Co. v. Oregon Liquor Control Commission, the legislation was held constitutional. After discussing the mechanics of the bill, this Note examines the validity of the constitutional challenges, and concludes with an application of a commerce clause balancing test to the Oregon statute.

A bulwark of American marketing is disposable packaging—the plastic wrapping, the paper plate, the nonreturnable bottle. Millions of Americans are conditioned to “throw away” this solid waste, but it does not so easily disappear.\(^1\) Burgeoning solid waste disposal problems are evident everywhere. Of this daily avalanche of waste, nonreturnable beverage containers are a significant part:\(^2\) It is estimated that by 1976 we will use 60 billion bottles and cans for beer and soft drinks alone—double the 1966 level—of which nonreturnable containers are increasing to over 95 percent of the market share.\(^3\)

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1. Solid waste is ubiquitous in our parks and along our highways. In addition, Americans literally live on top of millions of tons of solid waste. An estimated 80% of the 200 million tons a year of municipal refuse is being discarded in open dumps—charitably labelled landfills—of which only 10 to 15% can be called environmentally sound. **Conservation Foundation Letter**, Apr. 1973, at 4.

2. See notes 62 and 105 infra.


<table>
<thead>
<tr>
<th>Type of Container</th>
<th>1958</th>
<th>1966</th>
<th>1976</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nonreturnable containers:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bottles:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Soft drink</td>
<td>192</td>
<td>1,980</td>
<td>13,500</td>
</tr>
<tr>
<td>Beer</td>
<td>1,239</td>
<td>5,031</td>
<td>8,600</td>
</tr>
<tr>
<td>Cans:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Soft drink</td>
<td>409</td>
<td>5,612</td>
<td>17,000</td>
</tr>
<tr>
<td>Beer</td>
<td>8,337</td>
<td>12,947</td>
<td>19,000</td>
</tr>
<tr>
<td>Nonreturnable total</td>
<td>10,177</td>
<td>25,570</td>
<td>58,100</td>
</tr>
<tr>
<td>Returnable containers:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Soft drink</td>
<td>1,240</td>
<td>1,922</td>
<td>1,200</td>
</tr>
<tr>
<td>Beer</td>
<td>388</td>
<td>577</td>
<td>460</td>
</tr>
</tbody>
</table>
This production of disposable containers not only adds to the load of solid waste but also consumes unnecessary amounts of virgin material and energy. In addition, these containers are the most evident component of litter and, as such, are a serious environmental problem.

This Note is concerned with the litigation surrounding the forceful, initial step taken by Oregon to meet the litter problem caused by nonreturnable beverage containers. Consistent with its progressive environmental policies, Oregon is the first state to enact a law requiring deposits on nonreturnable beverage containers and banning containers with disposable pop-tops. After taking a brief look at this Act (hereinafter referred to as the bottle bill), this Note will discuss the suit brought by the beverage industry seeking a judgment declaring the bottle bill unconstitutional. The bill was declared constitutional by the Oregon court of appeals in American Can Co. v. Oregon Liquor Control Commission. After presenting the history of this case, the Note will focus on the merits of the constitutional arguments against state regulation of beverage containers, in particular the commerce clause questions.

I

BACKGROUND

A. The Bottle Bill

Several methods of regulating nonreturnable beverage containers have been suggested. First, stores can be required to stock both returnable and nonreturnable containers for each product, thus staving off a complete take-over of the market by the nonreturnables which deal-

<table>
<thead>
<tr>
<th>Type of Container</th>
<th>1958</th>
<th>1966</th>
<th>1976</th>
</tr>
</thead>
<tbody>
<tr>
<td>Returnable total</td>
<td>1,628</td>
<td>2,499</td>
<td>1,660</td>
</tr>
<tr>
<td>TOTAL CONTAINERS</td>
<td>11,805</td>
<td>28,069</td>
<td>59,760</td>
</tr>
<tr>
<td>TOTAL FILLINGS</td>
<td>52,291</td>
<td>65,213</td>
<td>79,500</td>
</tr>
<tr>
<td>Ratio, containers to fillings</td>
<td>1:4.48</td>
<td>1:2.32</td>
<td>1:1.33</td>
</tr>
</tbody>
</table>


4. It is estimated that 244 trillion BTU's of energy would be saved annually if all consumers used returnable containers. 4 Env. Rptr.-Curr. Dev. 1813 (1974). While these savings would represent but a miniscule portion of the national energy budget, "... the most practical way to achieve energy savings is to use each of the many, many small economies that we find." Berry & Makino, Energy Thrift in Packaging and Marketing, 76 Technology Rev. 33, 40 (Feb. 74).

5. See note 62 infra.


8. 4 ERC 1584 (Ore. Cir. Ct., 1972). The appellate decision is reported in 517 P.2d 691, 6 ERC 1350 (Ore. App. 1973).
ers prefer.\(^9\) Second, a tax can be levied on nonreturnable containers: a low tax could provide a revenue fund for cleaning up litter, while a high tax would serve to destroy the market for nonreturnables.\(^{10}\) The third and most direct approach is a complete ban on the use of any container that cannot be reused.\(^{11}\) The fourth and most common suggestion is to require a deposit on all containers, thus discouraging use of nonreturnables and encouraging the return of all containers.\(^{12}\) The Oregon statute combines the last two approaches.

Passed in June 1971, the bottle bill did not become operative until October 1, 1972, in order to provide time for the changeover.\(^{13}\) Its purpose is to cause bottlers of beverages\(^14\) to package their product in multiple-use deposit bottles in order to reduce litter and solid waste and reduce the injuries to people and animals caused by discarded pop-tops.\(^{15}\)

The bottle bill bans the sale of pop-top cans by stating

\[
\text{[n]o person shall sell or offer for sale at retail in this state any metal beverage container so designed and constructed that a part of the container is detachable in opening the container without the aid of a can opener.}\(^{16}\)
\]

The bill requires that all beverage containers offered for sale have a refund value of not less than five cents.\(^{17}\) However, the bill reduces this minimum to two cents if the container is designed to be reused by more than one manufacturer and not only by the manufacturer of a specific brand name.\(^{18}\) Every beverage container must indicate by

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9. See Comment, State and Local Regulation of Nonreturnable Beverage Containers, 1972 Wis. L. Rev. 536, 537-38 [hereinafter cited as Comment, Regulation of Nonreturnables].
10. See id. at 540-41. Comment, Basic Constitutional Considerations in Regulating Non-returnables, 6 SUFFOLK L. REV. 83, 94-98 (1971) [hereinafter cited as Comment, Basic Constitutional Considerations]. However, this "low" tax to fund pick-up of the littered bottles could end up being equal to the high barrier tax, due to the great cost of collecting discarded beverage containers. For example, it is reported that it cost New York State about 30 cents to pick up each piece of bottle litter—about 7 times the bottle's value. Herzberg, Wanted: A Bottle That Disappears, N.Y. Times, Feb. 11, 1969, at 17, col. 1.
11. See Comment, Regulation of Nonreturnables, at 541-42.
12. See id. at 538-40. For drafts of suggested statutes see Schroth & Mugdan, Bottling Up the Throwaways: An Improved Bill and Some Thoughts For Future Drafters, 51 J. URBAN LAW 204, 247-53 (1973) [hereinafter cited as Schroth & Mugdan].
14. The bottle bill defines a beverage as "beer or other malt beverages and mineral waters, soda water and similar carbonated soft drinks in liquid form and intended for human consumption." ORE. REV. STAT. § 459.810(1) (1971).
15. 517 P.2d at 694, 6 ERC at 1351.
17. Id. § 459.820(1).
18. Id. § 459.820(2). The Oregon court of appeals interpreted this certifica-
embossing, stamp, or secure label, the refund value, except for glass beverage containers with the brand name permanently marked thereon and which necessarily have a refund value of not less than five cents. Dealers (i.e., retailers), and, in turn, distributors, cannot refuse to accept and pay for containers which satisfy the above requirements and are "of the kind, size, and brand" they sell.

The bill envisions organization of local redemption centers which will handle the return and storage of empty containers. On approval of the Oregon Liquor Control Commission any person, including a dealer or distributor, can establish such a center. The center is given a certificate which lists the type of beverage containers it must redeem and the local dealers it serves; the existence of such a center allows the listed dealers to refuse to accept empty containers of the type the center redeems. Redemption centers will not be profitable, and, practically, only dealers or distributors would be interested in establishing them for purposes of convenience. As of March 1974, there were no official redemption centers.

Violation of the bottle bill constitutes a misdemeanor; the bill also authorizes the State Department of Agriculture to suspend or revoke the license of a violator. Finally, the bill requires the legislative Fiscal Committee to submit a report on the economic impact, problems, effect, and costs of the bottle bill by January 1, 1975.

B. The Challenge in the Courts

An immediate and predictable response to the bill was open hostility on the part of the beverage industry which feared increased expenses and profit loss and desired a quick court test of such a potentially infectious statute. Suit was brought in the state circuit court requirement in Olympia Brewing Co. v. Oregon Liquor Control Commission, 516 P.2d 1321 (Ore. App. 1973).

19. Id. § 459.850(1), (2).
20. Id. § 459.830(1), (2).
21. A dealer is "every person [in Oregon] who engages in the sale of beverages in beverage containers to a consumer or means a redemption center certified under ORS 459.880." Id. § 459.810(5).
22. Id. § 459.880.
23. Id. § 459.840(2).
27. At the time of publishing this article Vermont is the only state to have passed similar legislation. 10 VT. STAT. ANN. tit. 36 §§ 1171-75 (1972). Many local jurisdictions presently have ordinances which regulate beverage containers. See, e.g., Bowie, Md. Ordinance 0-6-70 and 0-6-71; Howard County, Md., Howard County Council, Bill No. 7 (1971); Oberlin, Ohio, Ordinance 804 (1971); Loudoun County, Va., Ordinance of Loudoun County Board of Supervisors, May 17, 1971. In addition, dozens of state and hundreds of local jurisdictions are presently considering similar leg-
in Marion County against the State of Oregon and the responsible agencies to enjoin application of the bottle bill and to obtain a judgment declaring the bill unconstitutional. Plaintiffs were manufacturers of metal cans for beer and soft drinks, brewers in California and Arizona, out-of-state contract canners of soft drinks, and soft drink companies, all of whom do business in Oregon and have had a large percentage of business in one-way containers, and the Oregon Soft Drink Association. In addition, five glass container manufacturers intervened on the side of plaintiffs. The trial court held the bill valid in every respect and denied plaintiffs' requests. Plaintiffs appealed, retaining three of the leading constitutional lawyers in the United States. In a lucid opinion, the Court of Appeals of Oregon affirmed the lower court's approval of the legislation. Plaintiffs appealed to the Oregon supreme court, which denied their petition for review. A petition for a writ of certiorari in the United States Supreme Court is pending.

Aside from the various state constitutional challenges, plaintiffs challenged the bottle bill on three federal constitutional grounds. They invoked the equal protection and due process clauses of the fourteenth amendment, and the commerce clause of article I of the United States Constitution. In answering defendants injected an argument that the twenty-first amendment authorizes such legislation insofar as it relates to beer and malt liquor. This Note will discuss the four constitutional questions raised by plaintiffs and defendants and will closely examine the vastly more important commerce clause issue. Analysis of the commerce clause questions involved will present facts showing the need for, and the effectiveness of, the bottle bill and, in turn, illuminate the economic hardship of the beverage

islation. Opponents of the Oregon bill are concerned with the Oregon market, which represents less than one percent of the nation's consumers, because a constitutional victory would discourage other state and local jurisdictions from adopting such legislation. Steinhart, Oregon vs. the 'Right to Throw It All Away', THIS WORLD MAGAZINE, S.F. Examiner & Chronicle, Sept. 2, 1972, at 22, col. 2.

29. 517 P.2d at 694, 6 ERC at 1351.
30. 4 ERC at 1592.
32. 517 P.2d at 705, 6 ERC at 1350.
33. Letter from the Supreme Court of Oregon to plaintiffs, February 20, 1974.
35. 4 ERC at 1585.
36. See text accompanying notes 53-69 infra.
37. See text accompanying notes 70-169 infra.
38. Quoted at note 40 infra.
39. The trial court indicated that this defense was untenable. 4 ERC at 1585. Nonetheless defendants persisted in asserting the applicability of this unusual defense. Brief for Respondents at 16, 517 P.2d 691, 705, 6 ERC 1350 (1973).
industry and the possible problems of state action in the area of beverage container regulation. The Note will show that American Can is correctly decided and that bills such as the Oregon statute are not invalid under the commerce clause. However, it is suggested that some response is needed to prevent conflicts in such regulation among varying jurisdictions.

II
CONSTITUTIONAL ISSUES

A. The Twenty-First Amendment

The twenty-first amendment is general authority for the "right of a state to prohibit or regulate the importation of intoxicating liquor," conferring "more than normal state authority over public health, welfare, and morals" on such regulation. The historical matrix of the amendment does not indicate an attempt to vest unlimited jurisdiction in the states, but rather only to allow state control of local liquor consumption. This may vitiate Oregon's assertion that legislation designed to facilitate use of two-way beverage containers is protected by the twenty-first amendment. However, Oregon's reliance on this amendment is less surprising in light of the many Supreme Court decisions which have expanded state power under the twenty-first amendment to include many regulations not specifically limited to liquor consumption. In American Can, Oregon relied heavily on California v. LaRue, a recent Supreme Court decision upholding a state agency's prohibition of bottomless dancing on premises.

40. U.S. CONST. amend. XXI. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.
41. See, e.g., Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939).
42. California v. LaRue, 409 U.S. 109, 114 (1972).
43. See Note, The Twenty-First Amendment versus The Interstate Commerce Clause, 55 YALE L.J. 815, 816 (1946).
44. Id. at 816.
45. The Supreme Court has held the following state regulations to be exempt from traditional constitutional limitations of equal protection, due process, and the commerce clause under the aegis of the twenty-first amendment: prohibition of importation of certain non-registered brands of liquor (Mahoney v. Triner Corp., 304 U.S. 401 (1938)); prohibition of sale of any beer made in a state which discriminates against local beer (Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939)); and special taxes on beer imported from out of state (State Bd. of Equalization of California v. Young's Market Co., 299 U.S. 59 (1936)). The Court has made it clear that "nothing in the twenty-first amendment . . . requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance." Joseph H. Seagram & Sons v. Hotstetter, 384 U.S. 35, 47 (1966).
licensed to sell liquor by the drink.\textsuperscript{47} Admitting that some of the prescribed performances were forms of expression protected by the first amendment, the Court held that regulation of such expression did not violate the federal constitution due to the state's broad authority to control intoxicating liquor under the twenty-first amendment.\textsuperscript{48} In light of the preferred position of first amendment rights,\textsuperscript{49} Oregon's assertion that the twenty-first amendment would protect the bottle bill, insofar as it relates to beer and malt liquor containers, seems plausible. Nonetheless, it is surprising that Oregon would invest so much in a constitutional sanction admittedly not applicable to non-alcoholic beverages. Since over one-fourth of all containers littered are soft-drink containers,\textsuperscript{50} upholding the bottle bill solely under the twenty-first amendment would seriously undermine the broad purpose of the bill. It also would likely cause its invalidation, due to the difficulty of severing its resultant unconstitutional part.\textsuperscript{51} In declining to uphold the bottle bill on the basis of the twenty-first amendment, both the trial court and the court of appeals undoubtedly sensed that the twenty-first amendment defense was of dubious merit.\textsuperscript{52} An analysis of state police power weighed against the due process, equal protection, and commerce clauses is more relevant in discussion of the merits of the bottle bill.

\textbf{B. Due Process and Equal Protection}

Arguing from the due process clause, plaintiffs charged that the bottle bill places an "unreasonable and catastrophic financial burden" on them and will not lessen litter and will actually exacerbate solid

\textsuperscript{47} Id. at 114-19.
\textsuperscript{48} Id. A recent casenote on \textit{LaRue} asserts that the decision is significant not for the twenty-first amendment aspect but for its characterization of some of the performances as outside the scope of the first amendment. Note, \textit{California v. LaRue: The Supreme Court's View of Wine, Women and the First Amendment}, 68 Nw. U. L. Rev. 130, 134 (1973). But see Note, \textit{California v. LaRue} (U.S. 1972), 19 Vill. L. Rev. 177, 178 (1973). However, the majority opinion in \textit{LaRue} does not make clear to what extent it based its holding on first amendment grounds. 409 U.S. at 118.
\textsuperscript{50} EPA, \textit{OREGON'S BOTTLE BILL: THE FIRST SIX MONTHS}, at 4 (1973) [hereinafter cited as EPA: \textit{THE BOTTLE BILL}].
\textsuperscript{51} Oregon law provides that an unconstitutional part of any statute shall be severable unless the remaining parts (1) are dependent on the unconstitutional part; (2) would not have been enacted without the unconstitutional part; or (3) could not be executed in accordance with the legislative intent. Ore. Rev. Stat. § 174.040(2), (3) (1971). The bottle bill is not drafted so that a court could easily construe a legislative intent to sever any unconstitutional part.
\textsuperscript{52} 4 ERC at 1586; 517 P.2d at 705, 6 ERC at 1359. The only other state court to hear a case on the constitutionality of similar legislation held that the twenty-first
waste disposal problems. This argument, however, bears limited relevance to modern due process criteria. Over the last several decades the Supreme Court has deferred to legislative judgment on the wisdom of legislation, even though the law might exact a needless, wasteful requirement. Considering this background, it is probable that no claim of a due process denial of substantive economic rights would now be sustained by the Supreme Court. Thus, the due process argument is not a serious constitutional issue, and the court of appeals quite rightly gave it short shrift.

The equal protection argument is somewhat more viable. Plaintiffs asserted that the bottle bill denied them equal protection in creating an arbitrary and unreasonable classification, without objective criteria, which invidiously discriminated against them. They claimed, amendment protects a statute prohibiting the sale of beer in nonreturnable containers. Note, however, that this legislation controlled only beer and malt liquor containers. Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 218, 105 A.2d 271, 279 (1954).

53. 4 ERC at 1586. Intervenors contended that although "beverage containers represent only a small fraction of the solid waste, the expert testimony indicates that because of their high intrinsic value their presence was important to the economic viability of the whole recovery system." Brief For Northwestern Glass Co., et al. as Intervenors-Appellants at 13, 517 P.2d 691, 6 ERC 1350 (1973). See also Comment, Regulation of Nonreturnables, supra note 9, at 571-73. See notes 138-63 infra and accompanying text. The bottle bill is entitled to a presumption of validity when challenged under the due process clause, and thus the burden is on plaintiff to prove these allegations. See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959).

54. In the past, during much of our country's early economic development and westward expansion, substantive due process insulated business from state regulation: The Supreme Court would carefully examine the effectiveness of state business regulations and invalidate those which unduly burdened business. See, e.g., Lochner v. New York, 198 U.S. 45 (1905). However, the Court dramatically changed its position. In Nebbia v. New York, the Court articulated the modern view that "... the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that ... it may not be annulled unless palpably in excess of legislative power." 291 U.S. 502, 537-38 (1933).


58. 517 P.2d at 703-04, 6 ERC at 1358.

59. 4 ERC at 1587. Plaintiffs also argued that the bottle bill deprives them of a fundamental right to engage in interstate commerce—analagous to the right to engage in interstate travel—in order to subject the bill to the strict judicial scrutiny used where fundamental rights or suspect criteria are involved. State legislation is subject to this stricter scrutiny when suspect criteria such as race or wealth (McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) ) are used in the legislation, or when the legislation penalizes fundamental rights such as voting (Williams v. Rhodes, 393 U.S. 385 (1968) ) or the right to engage in interstate travel (Shapiro v. Thompson, 394 U.S. 618 (1969) ). Where state legislation involves fundamental rights or suspect criteria, it violates equal protection absent a showing by the state of a compelling state interest. Shapiro v. Thompson, 394 U.S. at 634. However, this strict test is not ap-
in part, that one-way beverage containers and pop-tops were but a small aspect of the litter and solid waste problem and therefore the prohibition does not reasonably relate to any solution.\textsuperscript{60} To be invalid under equal protection this bill must be without any reasonable basis, and therefore purely arbitrary.\textsuperscript{61} The bottle bill, however, is directed at discrete environmental problems: beverage containers make up the bulk of litter,\textsuperscript{62} and the resulting cans, broken bottles, and small, sharp pop-tops present possible dangers. Despite these distinguishable aspects and the ready adoptability of a two-way system,\textsuperscript{63} plaintiffs nonetheless claimed that beverage containers were indistinguishable from unregulated containers such as pickle or mayonnaise jars and thus the bottle bill impermissibly discriminated among items within the classification which equally contribute to solid waste problems.\textsuperscript{64} However, under the proper test, the bottle bill need not be drawn with mathematical nicety and may result in some measure of applicable where neither the rights involved are fundamental nor the classification suspect. An assertion that the right to engage in interstate commerce is a fundamental right for purposes of this constitutional test has no basis in any of the cases. While the right to travel is classified as a fundamental right, the cases involving travel are concerned with the right of persons, not containers, to interstate travel. See, e.g., Edwards v. California, 314 U.S. 160, 177 (1941). While recent commentators have noted that the Court has been de-emphasizing the liberty-property dichotomy of this dual approach, most of the new technique has not been elaborated and its signs remain dicta. Gunther, \textit{Foreward: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection}, 86 \textit{Harv. L. Rev.} 1 (1972).  

60. Containers regulated by the bottle bill represent only about 1.4\% of urban solid waste. \textit{Brief for Intervenors-Appellants} at 13.  

61. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Under this test, even the most dubious legislative classifications have been upheld. For example, the Supreme Court upheld a New York City traffic ordinance which allowed trucks to carry advertising of the owner's products, but not other advertising, on the basis that the local authority might have concluded that "those who advertised their own wares on their trucks do not present the same traffic problem in view of the nature and extent of the advertising they use." Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).  


63. Prior to the effective date of the bottle bill approximately 51\% of carbonated beverages were sold in refillable bottles. EPA, \textit{The Bottle Bill, supra} note 50 at 12. Returnable and nonreturnable bottles are made on the same forming machines. \textit{Brief for Intervenors-Appellants} at 12.  

64. \textit{4 ERC at 1588}.  

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Moreover, it is not constitutionally significant that the bottle bill singles out beverage containers from the larger classification of containers or packaging. A state may take one step at a time in addressing a problem, and "it is no requirement of equal protection that all evils of the same genus be eradicated or none at all." Since the classification of containers regulated by the bottle beverage containers is not "wholly irrelevant to the achievement of the State's objective" of regulating litter and a state may permissably regulate just one aspect of a problem, the bottle bill meets equal protection criteria. Plaintiffs cannot present facts to overcome the presumed validity of the bill, and the court of appeals was correct in holding that their right of equal protection has not been abridged.

C. The Commerce Clause

Where Congress has not preempted a field, states may regulate commerce within certain limitations. As with due process and equal protection, the state act is presumed to be constitutional. However, this presumption is more vulnerable to attack, for the Supreme Court, in determining the validity of a commerce clause challenge, tends to judge the effectiveness and reasonableness of a statute in light of the national interest in unobstructed commerce. Thus, plaintiffs' most substantial challenge is under the commerce clause. The commerce clauses must operate in the context of the reserved powers given to the states by the tenth amendment. A commerce clause analysis entails a delicate balance between valid state regulatory action and the need for a free flowing national commerce, and, thus, Supreme Court decisions applying the commerce clause do not always fall into a consistent pattern. However, in general, the Supreme Court has upheld state regulation of commerce pursuant to the police power where it (1) neither discriminates against interstate commerce (2) nor disrupts its required uniformity. The following discussion will

68. Id.
69. 517 P.2d at 704-05, 6 ERC at 1359.
70. There is no claim of preemption here. See note 80 infra.
72. Supra note 36.
73. Id.
76. U.S. CONST. art. X.
first consider the preliminary issue of whether the bill is concerned with a proper area for state regulation. It will then discuss plaintiffs' contentions that the bill (1) discriminates against interstate commerce by giving local business a substantial advantage over out-of-state business, (2) or, failing discriminatory effect, disrupts interstate commerce to an extent not merited by its questionable benefits and overly burdensome methods.78 Lastly, the discussion will focus on the potential constitutional problem of conflicting state laws regulating beverage containers.

1. The Bottle Bill and State Regulation

The exercise of police power embraces the right of a community to a beautiful environment.79 The parties in American Can admitted that control of litter and solid waste disposal is a proper exercise of police power, and that there was no question of federal preemption in the area.80 In fact, Congress has declared that the primary responsibility for enhancement of environmental quality rests with state and local governments;81 and in particular, in the Federal Solid Waste Disposal Act of 1965, it stated that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies."82 Congressional declarations that states shall carry primary legislative responsibility in an area of state federal overlap carry great weight. For example, in Huron Portland Cement Co. v. City of Detroit, the Court relied on the Federal Air Pollution Control Act's avowal of state air quality responsibility to validate a local smoke abatement code despite existence of federal inspection

78. Brief for Intervenors-Appellants at 15-16.
79. State police power has been variously defined. It is an expansive concept, and "extends beyond health, morals, and safety and comprehends the duty to protect the well-being and tranquility of a community." Kovacs v. Cooper, 336 U.S. 77, 83 (1949). Police power embraces a wide range of state legislation protecting the social welfare of the community, as opposed to its economic welfare, and clearly extends to environmental protection: "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states . . . may act . . . concurrently with the federal government." Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960). See also Askew v. American Waterways Operators, Inc., 411 U.S. 325, 343 (1973) (sea-to-shore pollution).
80. Reply brief for Intervenors-Appellants at 15. For a discussion of the preemption issue in this context see Comment, Basic Constitutional Considerations, supra note 10, at 90-91.
82. 42 U.S.C. § 3251(a)(6) (1970). Congress has provided for federal action through financial and technical assistance. Id.
standards. The analogy to the solid waste control area is obvious. However, while Congressional recognition of the existent state authority does give support to the bottle bill against constitutional attack, Congress has not specifically authorized legislation such as the bottle bill. Thus an analysis of the bill's effect on interstate commerce is necessary.

2. **Discrimination Against Interstate Commerce**

Plaintiffs claimed that the bottle bill violated the commerce clause by erecting barriers which favor intrastate commerce over interstate commerce. The leading case on such discrimination against interstate commerce is *Dean Milk Co. v. City of Madison*, in which the court invalidated a local ordinance forbidding the sale of any milk not pasteurized within five miles of the center of Madison. The ordinance advanced the locale's commercial interest at the expense of out-of-state competitors. The court found that the law invited economic isolationism, and a "multiplication of preferential trade areas destructive of the very purpose of the commerce clause."

a. **The effect on interstate commerce**

In applying the discrimination test to a regulatory statute the issue is not the stated purpose of a statute, but rather its effect. The bottle bill does affect some distant businesses more than local ones. Prior to the bottle bill, out-of-state shippers used a greater percentage of one-way containers than did local manufacturers. Indeed, it was

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85. 4 ERC at 1588.
87. *Id.* at 354.
88. *Id.* at 356. The court in *H.P. Hood v. Dumond*, 336 U.S. 525 (1949) aptly stated the doctrine:
   This court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting the right to impose even burdensome regulations in the interests of local health and safety.
336 U.S. at 535.
89. The inquiry, of course, is into the effect, not the purpose of the legislation. To look only at the purpose would render the commerce clause meaningless and leave restraints on state regulation subject only to the due process clause. *Dean Milk Co. v. City of Madison*, 340 U.S. at 354.
90. The Oregon Attorney General did admit that "[m]any Oregon concerns will indeed be given a competitive advantage over outside firms who have inadequate distribution facilities to handle re-cycled bottles." 517 P.2d at 701, n.6, 6 ERC at 1356.
the development of one way containers that enabled distant businesses to compete with local businesses. The bottle bill causes some handling costs which increase with the distance from the market and may eliminate this line of business. Industry also claims that the reduction from a five cent to two cent return fee for standardized containers will permit Oregon producers to pirate containers from distant manufacturers for less than their cost of production—"in effect . . . [making] distant shippers . . . sell bottles to Oregon firms at below cost." The postulated result is balkanization of the beverage industry and a return to the regional markets which existed prior to the one-way systems.

Whatever the merit of these claims, the above effects are not discriminatory in the commerce clause sense. The increased costs of shipping containers for reuse reflects the natural disadvantage of distance and may affect some Oregon firms more adversely than out-of-state firms. The bottle bill does not advance the commercial interest of any identifiable local industry; several Oregon businesses opposed the bill and were among the plaintiffs. And where a proposed bill "is . . . subjected to those political restraints . . . normally exerted on legislation [adversely affecting] some interests within the state," the Supreme Court is prone to view the legislation as an even-handed balancing of conflicting interests. Indeed, some Oregon businesses are suffering; some plants are shutting down, and the Oregon brewers' market share declined from 35 percent in May 1972 to 32.3 percent in May 1973. On this foundation of fact and law, it

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92. The economies of nonreturnable containers gave out-of-state manufacturers the ability to compete with local industry and thus were a major impetus for the expansion to a national market. Id.

93. Because of the need both to use heavier and bulkier returnable containers and to retrieve returnable containers for reuse, costs are greater for more distant shippers. Id. at 13-14.

94. 517 P.2d at 703, 6 ERC at 1350. Local industry would have to pay more for new bottles than certified bottles with a deposit of two cents. Reply Brief for Intervenors-Appellants at 13-14.

95. Brief for Intervenors-Appellants at 20.


98. Emerald Canning Corp. of Eugene, Oregon will be put out of business, and the bill will force a shutdown of a plant of the Continental Can Co. in Portland. Brief of Amici Curiae NRDC and People's Lobby against Nonreturnables at 8. Both industry and labor attempted to defeat or amend the bill, and industry offered an alternate bill putting a one-fourth of a cent tax on each nonreturnable container. Leslow, supra note 62, at 198.

99. Oregon Liquor Control Comm'n, Statement of Bar Sales in Oregon by Breweries (May 1972); Id. (May 1973).
is clear that the bill neither operates nor is designed to operate as a protectionist measure and the Oregon court of appeals correctly rejected the charge of discrimination.\(^{100}\)

\(b.\) **The possibility of less burdensome alternatives**

The Court in *Dean Milk* based its decision in large part on the availability of less burdensome and adequate alternatives means of insuring wholesome milk.\(^{101}\) Plaintiffs in *American Can* implied that such less burdensome alternatives exist.\(^{102}\) Looking for theory to support the assertion that Oregon must use a less burdensome alternative, they urged that the state, or those citizens who are doing the littering, must bear the cost of cleaning up the resulting mess\(^{103}\) because the commerce clause “commands that the state pay for benefits to be conferred only upon its citizens.”\(^{104}\) This assertion simply ignores the fact that states may require those who create the burdens to pay the costs. The litter and waste caused by nonreturnable containers is not an inherent problem but a result of industry's marketing techniques.\(^{105}\)

The alternatives plaintiffs would apply are makeweight at best. They suggested litter laws and extensive educational programs ("people cause litter, not products")\(^{106}\) but education and law enforcement would not have a significant impact on the problems, and would serve best to complement the bottle bill.\(^{107}\) Plaintiffs placed particular em-

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100. 517 P.2d at 703, 6 ERC at 1357.
103. *Id.* at 13-15.
104. Reply Brief for Intervenor-Appellants at 21. Plaintiffs rely on the following theory, articulated in *Southern Pacific Co. v. Arizona*:
   In applying this rule the Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected . . .
105. It is well established in tax cases that interstate commerce must pay its own way. *See, e.g., Western Live Stock v. Bureau of Internal Revenue*, 303 U.S. 250, 254 (1938). The costs of picking up and disposing of solid wastes can be immense. It has been estimated that $1.5 billion per year is spent to dispose of metal, glass, and plastic containers. *N.Y. Times*, Sept. 9, 1971, § 1, at 45, col. 1. Plaintiffs noted that improved machinery for cleaning up roadsides is being developed (517 P.2d at 699-700, 6 ERC at 1355). But this ignores the fact that the state may choose not to have the citizenry at large pay to clean up litter but instead cut off the cause—i.e., industry and dealers must change their marketing, and consumers must bear the inconvenience of paying deposits and returning containers.
106. Brief for Intervenor-Appellants at 15. Plaintiffs did not suggest a tax on nonreturnable containers as a possible alternative. See note 10 supra and accompanying text.
107. For example, *Keep America Beautiful* and other organizations have had nominal results with such educational programs. *National Industrial Pollution Control Council, Glass Containers* 13 (1971). Anti-litter laws may largely fail for
phasis on implementation of resource recovery systems which will separate reusable elements from solid waste. 108 But this ignores the main purpose of the bottle bill—reduction of litter. Fully integrated resource recovery systems—which, in any regard, are only in the developmental state 109—will deal only with the effect of litter through solid waste pickup and recycling. Even if plaintiffs' suggestions are reasonable alternatives to the bottle bill, the fact is of limited relevance. An examination of the context in which the consideration of reasonable alternatives is pertinent shows its inapplicability in American Can. 110 The Court's use of the reasonable alternative test in Dean Milk indicated that a state cannot erect discriminatory economic barriers "if reasonably nondiscriminative alternatives, adequate to conserve legitimate local interests, are available"; thus, the existence of reasonable alternatives in Dean Milk seemed to underscore that the real design of the statute was not a valid police power objective but promotion of a local economic interest at the expense of interstate commerce. Implementation of plaintiffs' alternatives posited in American Can, however, would upset a proper legislative determination of who should bear the cost of a clean environment. Indeed, when reviewing the health and welfare laws, the Court has applied the reasonable alternative test in reverse, looking to see if out-of-state commerce has other channels for introducing its goods into the state. 112 Here, plaintiffs may still sell their products in Oregon, only now by different rules.

3. The Bottle Bill Does Not Pose an Undue Burden on Interstate Commerce

A state regulation may also violate the commerce clause when it operates to disrupt the required uniformity of interstate commerce. 113 Thus as stated in Southern Pacific Co. v. Arizona, where

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108. Brief for Intervenor-Appellants at 32.
109. CONSERVATION FOUNDATION LETTER, at 6 (Apr. 1973). We now have the technology for separation and recovery of many items from solid waste, "but the use of this knowledge has been limited by the simple economic fact that throwing away all solid waste material has been cheaper than recovering even the more valuable elements of it. As we recognize the need to conserve our resources and as low cost dumping sites disappear, more sophisticated reclamation processes will gain support." Cannon, Can We Recycle Cans? 74 TECHNOLOGY REV. 40, 44 (May 1972).
111. 340 U.S. at 354.
113. The Supreme Court has articulated the test in various ways. Where state
state legislation interferes with a matter which requires uniformity of regulation or substantially impedes the free flow of interstate commerce, the Supreme Court will scrutinize the statute to determine if the burden imposed is clearly excessive in relation to any putative local benefits. A main point of contention between plaintiffs and the state was whether this classic and more stringent constitutional test should be applied to the bottle bill. The Court has indicated that it will indulge in such a balancing test only where the questioned state legislation either discriminates against interstate commerce or disrupts its uniformity. Thus, in many cases the court has shown deference to state legislation and declined to use a balancing test. The Oregon court implied that the balancing test should not be used in American Can because neither effect appeared. While the Oregon court may have overemphasized the fact that the bottle bill does not regulate an instrumentality of commerce, the Supreme Court does have a marked inclination to uphold legislation which, though disrupting commerce, protects the social welfare of the community. As a general

114. Southern Pacific Co., v. Arizona, 325 U.S. at 767. However, the Supreme Court has shown great deference to nondiscriminatory police regulations which have some palpable benefit. The Court specifically indicated in Bibb, one of the few cases holding a nondiscriminatory statute invalid under the commerce clause, that "if there are alternative ways of solving a problem we do not sit to determine which of them is best suited to achieve a valid state objective. Policy decisions are for the state legislature absent federal entry into the field." 359 U.S. at 524.

325 U.S. at 770-71.

115. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960). The Supreme Court in Pike v. Bruce Church, Inc., one of the most recent commerce clause decisions, admitted that the Court only on occasion would "candidly undertake a balancing approach" in resolving commerce clause issues. 397 U.S. 137, 142 (1970).


117. 517 P.2d at 700-01, 6 ERC at 1355-56.

118. When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of the community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of [a state].
rule, where state legislation is a bona fide health, safety, or welfare measure, the Court will be cautious about applying the classic balancing test. The reason for the Court's hesitation is apparent: Where the statute involved is social legislation, and the burdens complained of are economic, it would be a nice bit of legerdemain to achieve a balance between economic loss and intangibles that are protected under the state's police power.\textsuperscript{119}

In order to show that the Court will apply a balancing test to a challenge to legislation not directly affecting the flow of interstate commerce, plaintiffs relied heavily on \textit{Pike v. Bruce Church, Inc.}\textsuperscript{120} In \textit{Pike}, an Arizona law required that all cantaloupe shipped out of Arizona be packaged in state approved containers; as a result, plaintiff, who generally had his cantaloupe packaged nearby in California, faced a substantial economic loss.\textsuperscript{121} However, application of \textit{Pike} to the bottle bill is inappropriate. The Court in \textit{Pike} found that the design of the statute which they invalidated was to enhance the Arizona growers' reputation by requiring plaintiff to undergo great expense in using Arizona labelling for his superior produce.\textsuperscript{122} Such a law is a classic example of economic protectionism and is virtually invalid per se.\textsuperscript{123} The Court noted that \textit{Pike} was a discrimination case, and premised their application of the balancing test on the statute's improper exercise of police power.\textsuperscript{124} In contrast, the bottle bill is based on the very essence of police power.\textsuperscript{125} Since the bottle bill is a valid exercise of police power, is nondiscriminatory,\textsuperscript{126} and does not disrupt the required uniformity of interstate commerce,\textsuperscript{127} it should stand without the necessity of judicial scrutiny.

\textbf{Breard v. City of Alexandria, 341 U.S. 622, 640 (1951).} See also cases cited in note 116 \textit{supra.}

\textbf{119.} The Court has explicitly articulated the difficulty of balancing noncomparables in a recent case: "It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highways." \textit{Brotherhood of Locomotive F. & E. v. Chicago, R.I. & P. R.R. Co., 393 U.S. 129, 140 (1968).} The blight caused by nonreturnable beverage containers seems no easier to balance against financial loss. In fact, the Court summarily refused to apply a balancing test to a commerce clause challenge to a Detroit ordinance aimed at air pollution in \textit{Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960).}


\textbf{121.} \textit{Id.} at 138.

\textbf{122.} \textit{Id.} at 145-46.

\textbf{123.} \textit{Id.} at 145.

\textbf{124.} It was not a proper exercise of police power in that it did not protect consumers and its "purpose and design are simply to protect and enhance the reputation of the growers within the state." \textit{Id.} at 143.

\textbf{125.} See note 79 \textit{supra.}

\textbf{126.} See text accompanying notes 85-100 \textit{supra.}

\textbf{127.} See text accompanying notes 164-171 \textit{infra.}
4. Applying the Balancing Test to the Bottle Bill

Although the Oregon court rightly avoided a balancing test, it is revealing to apply the balancing test developed in *Southern Pacific* and *Pike.\(^{128}\) The balancing test label does not mean the Court will engage in *de novo* review of legislation and invalidate it whenever the Court feels the burdens of the legislation seem to outweigh the benefits.\(^{129}\) State regulation is cloaked with a strong presumption of legality;\(^{130}\) as the Court has indicated, more than an adverse economic impact on commerce is required to invalidate state legislation which has demonstrable benefits.\(^{131}\) Under this approach, the Court has validated an economically burdensome law upon a mere finding of some tendency to promote a valid state interest.\(^{132}\) The Court will invalidate state legislation on commerce clause grounds only where the putative state benefit is grossly disproportionate to the burden on the flow of interstate commerce or where the legislation utterly fails to promote valid state interests.\(^{133}\) Where a burden on commerce does exist, the crucial inquiry becomes whether the bottle bill as a police power meas-

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128. Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local interest is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

129. This is clear from a careful reading of the cases relied upon by plaintiffs. In *Bibb v. Navajo Freight Lines, Inc.*, the Court found that the contoured mudguard had no advantages over the standard mudguard and it created new hazards. 359 U.S. 520, 525 (1959). Similarly, in *Southern Pacific Co. v. Arizona*, the Court found that the increased train length "had no reasonable relation to safety." 325 U.S. at 776.


131. The Court will not engage in scrutiny unless other than economic costs are involved. In *Bibb*, the Court noted that if they "had here only a question of whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burdened interstate commerce, we would have to sustain the law . . . ." 359 U.S. at 526. *See also* Brotherhood of Locomotive F. & E. v. Chicago, R.I. & P. R.R. Co., 393 U.S. 129, 139-40 (1968). In *Brotherhood of Locomotive F. & E.* the Court noted that the additional factor in *Bibb* was " . . . that the contour mudguard requirement flatly conflicted with laws, enforced in at least one other State, that trucks must be equipped with straight mudguards" and that they had invalidated the Illinois legislation on that carefully limited basis. *Id.* at 140 n.13.


133. For a rare example of the Court striking down a state statute of real possible benefit because of its disproportionate burden on interstate commerce see *Seaboard Airline R.R. v. Blackwell*, 244 U.S. 310 (1917) (state law requiring trains to stop at crossings).
ure "is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interference." In *Southern Pacific* the Supreme Court found that evidence introduced indicated that the safety regulations involved were counterproductive since they actually increased the safety hazard. Conversely, the Court will uphold a burdensome state regulation where it promotes a valid state objective. In *Huron Portland Cement Co. v. City of Detroit*, the Court ignored the burdens of a smoke abatement law requiring equipment on ships even though the law would affect ships which only occasionally stopped at Detroit in their interstate travels. The parallel between *Huron*—which relied on the Federal Air Pollution Control Act as manifesting national policy for local initiative in fighting air pollution—and the present case is striking. Indeed, unlike the Detroit ordinance, the bottle bill will not spill over the borders but will only affect that separable quantum of commerce which is sent to the Oregon market. Even so, it is necessary in this balancing analysis framework to look at the plaintiffs' contention that the bottle bill's burden on interstate commerce is great and, secondly, their contention that the putative benefits of the bill are small.

Plaintiffs introduced a substantial amount of uncontradicted evidence to demonstrate the extent of the bill's economic impact. This evidence showed that exclusion of returnable containers from the Oregon market would cause nonreturnable glass beverage manufacturers to lose millions of dollars annually, and would virtually eliminate the Oregon market for can manufacturers. Also, as noted above, the bill adds costs for distant manufacturers, and makes multifunctional returnable bottles available to local bottlers at a bargain cost of two cents. In addition, it was estimated that the bill would reduce the


135. 325 U.S. at 776-79.


138. 517 P.2d at 695; 6 ERC at 1352.

139. It was estimated that, for example, Northwestern Glass Company will lose over $2.5 million in annual sales, and that Owens-Illinois will lose in excess of $4 million. Brief for Intervenor-Appellants at 6-9. Representatives of metal containers companies testified that beer and soft drink containers represented a substantial portion of their business (100% in one case), and that the ban on pop-tops would hurt business. Also, plaintiffs fear that proliferation of this type of bill would further exacerbate the situation. 517 P.2d at 695, 6 ERC at 1352. Returnable cans would be feasible, yet probably not practical. Retailers do not want to go to the trouble of handling both bottles and cans, for the cans are more difficult to handle and store. In addition, bottles may be returned to the market after washing while cans must be remelted and go through the entire recycling process. Wall St. J., Dec. 15, 1972, at 13, col. 2.

140. See notes 94-95 *supra* and accompanying text. New refillable bottles cost
overall carbonated soft drink market in Oregon by as much as ten percent—although during the first six months of the bill's operation soft drinks remained stable and beer sales increased. In sum, the bill may make it more difficult for nationwide marketing enterprises to retain their hegemony over the market. However, it is the can and bottle beverage business, both in-state and out which suffers, and it is exactly the antisocial aspect of their products that Oregon has chosen to regulate.

The burden on interstate commerce in this balancing framework must be compared to the extent to which the bottle bill advances its objectives. Although containers regulated by the bill represent only 1.4 percent of Oregon's urban solid waste, to say the bill has a slight effect on solid waste problems ignores the bill's real impact. The bottle bill does not purport to be a substitute for a fully integrated solid waste reclamation system. Such a system is at the experimental stage and, while the bottle bill may have real relevance in development of an integrated solid waste disposal program, its real design is to rid the state of unsightly and dangerous litter. Contrary to plaintiffs' evidence, the bill has had initial success in reducing litter up to five times the deposit values, which results in cost cutting for local brewers.

EPA: THE BOTTLE BILL, supra note 50, at 12.

141. Brief for Intervenor-Appellants at 12.

142. During the first six months of operation of the bill, sales of soft drinks in the Oregon market neither decreased nor increased. Beer sales in the fourth quarter of 1972 were up over the fourth quarter of 1971. EPA: THE BOTTLE BILL, supra note 50 at 9.

143. See notes 91-95 supra and accompanying text.

144. Plaintiffs objected to the bill partially on the basis that it not only would impede the flow of commerce, but would totally eliminate commerce in inherently harmless products, i.e., beverage containers. 517 P.2d 700; 6 ERC at 1355. However, this does not compel a finding of unconstitutionality. Precedent exists for allowing states to completely stop the flow of commerce in specific goods. See, e.g., Reid v. Colorado, 187 U.S. 137 (1902) (excluding diseased cattle from the state); Smith v. St. Louis & S.W. Ry., 181 U.S. 248 (1901) (prohibition of importation of mules and horses from a diseased area for 163 days); Palladio, Inc. v. Diamond, 321 F. Supp. 630 (S.D.N.C. 1970), aff'd per curiam, 440 F.2d 1319 (2d Cir. 1971), cert. denied, 404 U.S. 983 (1971) (prohibiting importation of certain products of endangered species). It is especially significant in this last case that the legislation had at best an indirect effect on the local environment and this somewhat officious interest was upheld. See Note, Recent Cases (Palladio, Inc. v. Diamond), 85 HARV. L. REV. 852 (1972).

145. Plaintiffs urged that since only 1.4% of solid waste containers consist of regulated containers, and that the containers themselves do not pose solid waste problems since they "lend necessary stability to sanitary land fills," the bottle bill has no effect on solid waste disposal. Brief for Intervenor-Appellants at 30.


147. Id. at 4.

148. 517 P.2d at 694, 6 ERC at 1351.

149. Unchallenged testimony by plaintiffs' expert, a behavioral psychologist, showed "that monetary inducement of the mandatory refund will not deter the littering
from highways and parks. The United States Environmental Protection Agency reports that, while prior to the effective date of the legislation beverage containers made up an estimated 60 percent of roadside litter,\(^\text{150}\) this portion decreased by at least 49 percent between the winter of 1971-72 and the winter of 1972-73.\(^\text{151}\) In addition, the high proportion of roadside litter consisting of beverage cans should drop to nearly zero.\(^\text{152}\) Thirdly, plaintiffs argued that beverage containers are the least vexatious of all the components of solid waste, and lend necessary stability to sanitary land fills, the solid waste disposal system in Oregon.\(^\text{153}\) However, it is apparent not only that much of this stable solid waste gets waylaid as litter, but also that many cities are running out of landfill areas in which to dump solid waste.\(^\text{154}\) Moreover, local governments do not choose to use landfills, but are compelled to do so by consumer preferences and marketing practices of companies that create disposable solid waste. In sum, the bottle bill is a proper police regulation which significantly advances its valid objectives, and the economic burdens which it places on industry are constitutionally permissible.

5. Resolving the Potential of Conflicting State Laws

In Cooley v. Board of Wardens, the Supreme Court declared that state regulation of areas in need of national uniformity violates the commerce clause.\(^\text{155}\) This doctrine was applied in Bibb v. Navajo Freight Lines, Inc. in which the Court invalidated an Illinois requirement for special mudguards on trucks passing through the state that placed a severe and direct burden on interstate commerce.\(^\text{156}\)

behavior," and evidence concerning a similar law in British Columbia substantiates this hypothesis. Brief for Intervenor-Appellants at 13. Yet, Oregon could compliment the bottle bill with enforcement of existing litter laws (ORE. REV. STAT. §§ 164.805, 449.107 (1971)), as well as through educational programs. A confluence of all factors could have a noticeable impact on public attitudes towards littering.

\(^\text{150. EPA: THE BOTTLE BILL, supra note 50, at 4.}\)
\(^\text{151. Id. at 13-14.}\)
\(^\text{152. Cans made up 73.1% of beverage container litter prior to passage of the bill. Id. at 4. Use of beverage cans had declined to nearly zero by the beginning of 1973. Id. at 8.}\)
\(^\text{153. Brief for Intervenor-Appellants, at 30.}\)
\(^\text{154. More and more, "cities are left to dispose of waste they did not create on land they no longer have." S.F. Chronicle, June 10, 1973 at 10, col. 2. See note 1 supra.}\)
\(^\text{156. 339 U.S. at 529. The Illinois requirement prevented interlining, which is the interchange of trailers between an originating carrier and another serving a different area, thus providing a "speedy through-service for the shipper." Id. at 527-28.}\)
Court found that the regulation was not a matter lending itself to diversity of treatment and that the need for national uniformity overrode the very questionable benefits of the special mudguards. Because the Illinois law was in conflict with other state law, Bibb is one of the few cases where a nondiscriminatory police power regulation was held to have placed an unconstitutional burden on interstate commerce. A court would have grounds for invalidation of the bottle bill if it is in conflict with other state statutes and that conflict places a substantial burden on interstate commerce. Those handful of state and local regulations now in effect throughout the country are substantially similar to the bill and, at the moment, there is no web of conflicting state and local regulations which might be grounds for invalidating the bottle bill. However, as opponents of the bill anxiously point out, if Oregon may constitutionally enact such legislation, so may other states. Indeed, an attorney for the amici curiae has indicated that the Oregon legislation is the crucial test for the hundreds of local jurisdictions and dozens of states considering similar enactments. However, a mere potential conflict is not grounds for invalidation of the bill. In Huron, which presented a parallel problem, the Court stated:

[While the appellant argues that other local governments might impose different requirements as to air pollution, . . . the record contains nothing to suggest the existence of any such competing or conflicting local regulations . . . . We conclude that no impermissible burden on commerce has been shown.]

When read in conjunction, Huron and Bibb imply that states may pass legislation on a first-in-time-first-in-right basis for the potential of conflicting state laws is no bar to a statute, while actual conflicting state law may indicate a violation of the commerce clause.

The amici curiae brief asserts that even if lack of uniformity existed the legislation would not violate the commerce clause. This

157. The Court struck down the Illinois requirement on the very narrow ground that it did conflict with other state law, and the economic burden of the statute was not determinative. Id. at 526. See note 141 supra.
158. 359 U.S. at 529.
159. Opponents of the bill assert that duplication of similar legislation will exacerbate the constitutional wrong. Brief for Intervenor-Appellants at 43.
160. Id.
161. Steinhart, Oregon vs. the 'Right to Throw It All Away,' This World Magazine, S.F. Examiner & Chronicle, Sept. 2, 1972, at 22, col. 2.
162. 362 U.S. at 448.
163. Cf. General Motors Corp. v. Washington, 377 U.S. 436, 448-49 (1964). However, note that merely because a state police measure is burdensome and does conflict with other state law does not automatically dictate the conclusion that it violates the commerce clause, for the benefit may be so compelling that the innovative but late-coming state statute need not give way. Bibb v. Navajo Freight Lines, Inc., 359 U.S. at 530.
164. Brief for Amici Curiae at 27.
optimistic statement is subject to some doubt, for a mosaic of conflicting state and local regulations might place severe and unnecessary burdens on commerce. For example, the Olympia Brewing Company of Tumwater, Washington must stop production lines to insert special Oregon labels required by the bottle bill, and the earmarked beer must be stored and shipped separately.\footnote{165} Certainly at some point a constitutional limit on such juggling would be reached. It is probable that more and more jurisdictions will pass legislation governing nonreturnable containers. In this situation, an impetus to national uniformity would not only insure constitutionality of the bill but also economy in operation. This impetus could come from state or federal authorities. States could avoid constitutional issues by drafting statutes very similar to Oregon's or by agreeing on another uniform structure for statutes governing nonreturnables. Alternatively, and perhaps more realistically, Congressional action could insure national uniformity. This could be either in the form of a federal statute prohibiting the introduction of nonreturnable beverage containers into interstate commerce, or, alternatively, administrative action in the form of federal guidelines and funding which formulate a cohesive national policy under the aegis of existing federal acts.\footnote{166} Senators Hatfield, Case, Hughes, Kennedy, and Packwood have introduced a senate bill which prohibits the introduction of nonreturnable beverage containers into interstate commerce.\footnote{167} While no action has been taken on the bill,\footnote{168} Oregon's experience should prove valuable for Congress in a determination of the feasibility of such legislation. Since the commerce clause does mandate national uniformity in the face of a web of conflicting state laws and, in view of the fact that dozens of state and local jurisdictions are considering legislation such as the bottle bill,\footnote{169} cognizant state and federal authorities must come forth with a solution.

\footnote{165} Wall St. J., Dec. 15, 1972, at 13, col. 3.\footnote{166} Present federal law provides for state responsibility over environmental issues while at the same time expressly providing for federal funding, technical assistance, and leadership. Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371 (2), (3) (1970); Solid Waste Disposal Act of 1965, 42 U.S.C. § 3251(a)(6) (1970).\footnote{167} S. 2062, 93d Cong., 1st Sess. (1973).\footnote{168} A hearing has been promised this spring in the Senate Subcomm. on the Environment, Commerce Comm. Telephone interview with Tom Imeson, Legislative Aid to Sen. Hatfield, Mar. 21, 1974.\footnote{169} Steinhart, \textit{Oregon vs. the 'Right to Throw It All Away,'} \textit{THIS WORLD MAGAZINE}, S.F. Examiner & Chronicle, Sept. 2, 1972, at 22, col. 2. Note the lobbyists have opposed a national ban as well. Opponents of a national bill principally rely on an industry finance dstudy by the Midwest Research Institute which predicts an economic disaster if a national ban is imposed, including elimination of 164,000 well paying jobs and a reduction of the gross national product by more than $10 billion. While this extensive and complex study has undoubtedly hindered legislation, its conclusions are suspect. Other studies show more than offsetting positive effects. Schroth & Mudgan \textit{supra} note 12, at 233-36. \textit{See} Folk, Employment Effects of the Mandatory De-
CONCLUSION

Oregon is attempting to mitigate the problems of solid waste and litter by regulating their source. If Oregon's experience with the bottle bill is a happy one, doubtless many of the states considering similar legislation will follow suit. This Note has shown that, as in American Can, courts should find little constitutional trouble with such statutes. The major outstanding problem arises from the possibility of a web of conflicting state laws on container regulation. This may be resolved informally by a process of modeling new statutes on ones already in existence. Otherwise, if conflicts begin to arise, the answer must lie in Congress passing a national law on regulation of nonreturnable containers.

Charles M. Moos

posit Regulation, Illinois Institute for Environmental Quality Document No. 72-1 (1972); Folk, Employment Effects of a Ban on Nonreturnable Beverage Containers in Minnesota, Minnesota Pollution Control Agency Document No. 617 (1973), noted in Schroth & Mudgan, supra note 12, at 234 n.28.