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The management and disposal of solid waste$^1$ has become a pressing national problem.$^2$ Adverse environmental effects are associated even with sanitary landfilling,$^3$ the most advanced disposal technique currently available. Concern with such effects has led to enactment of state and federal legislation designed to preserve environmental quality.$^4$

1. Federal statute defines solid waste as "garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . ." Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6903(27) (1976).


3. Sanitary landfilling is a method of disposing of refuse on land without creating nuisances or hazards to public health or safety, by utilizing the principles of engineering to confine the refuse to the smallest practical area, to reduce it to the smallest practical volume, and to cover it with a layer of earth at the conclusion of each day's operation or at such more frequent intervals as may be necessary. *American Society of Civil Engineering Division, Manuals of Engineering Practice* No. 39, *Sanitary Landfill 1* (1959). Sanitary landfilling is a vast improvement over open dumping, which may create groundwater pollution, produce noxious gases, harbor rodents, flies, or other disease vectors, and cause fires. Landfilling is also better than incineration which can cause severe air pollution. Although an improperly managed landfill also can cause water pollution and noxious gases, the principal drawback is that it uses land at a prodigious rate. See generally *H. Goddard, Managing Solid Wastes* 220-21 (1975) [hereinafter cited as *Goddard*]; *C. Mantell, Solid Wastes: Origin, Collection, Processing, and Disposal* (1975); *J. Pavoni, J. Heer & D. Hagerty, Handbook of Solid Waste Disposal* 171-72, 233-34 (1975) [hereinafter cited as *Handbook*]; Comment, *Solid Waste Disposal by Means of Sanitary Landfill*, 36 *Alb. L. Rev.* 632 (1972).

Because both state and federal governments regulate solid waste and other environmental hazards, conflicts between state and federal legislation could arise. Nevertheless, most state environmental legislation has withstood constitutional challenge. A notable exception is New Jersey's recent attempt to minimize the adverse environmental effects of solid waste disposal by prohibiting in-state disposal of out-of-state waste. In City of Philadelphia v. New Jersey, the Supreme Court of the United States ruled that this prohibition violates the commerce clause of the United States Constitution and is therefore invalid.

This Note examines the reasoning that led to the Court's decision, and concludes that although the statute violated the commerce clause, it was not for the reasons discussed in the opinion. The Note also considers a subsequent Supreme Court case, Hughes v. Oklahoma, in which the Court ruled that a Virginia statute that prohibited out-of-state transportation of certain hazardous waste materials was invalid under the commerce clause. The Note argues that the statute violated the commerce clause for different reasons than those discussed in the Hughes opinion.


6. Due regard for the proper allocation of roles between the state and national governments in solving common problems is rarely an obstacle to congressional action. The commerce clause, U.S. CONST. art. I, § 8, grants Congress plenary power to enact legislation to further the general welfare in areas involving interstate commerce. See Note, State Environmental Protection Legislation and the Commerce Clause, 87 HARV. L. REV. 1762, 1762 (1974).


8. See N.J. STAT. ANN. §§ 13:1-1 to -10 (West 1979). New Jersey has the misfortune of bordering two of the nation's most populous cities, New York and Philadelphia. Since land suitable for landfill is scarce in large metropolitan areas, New Jersey serves as the depository for much of its neighbors' refuse.


which the Court struck down as a violation of the commerce clause an Oklahoma statute ostensibly designed to protect the state’s wildlife.

The reasoning of City of Philadelphia and Hughes indicates that the Court may be moving to a three-tiered test of the validity of state statutes under the commerce clause. That test presumes the validity of state statutes that do not discriminate against interstate commerce—they are upheld unless the burden on commerce is excessive in relation to the local benefits derived from the statute. Statutes that discriminate in their effect are invalid unless the state can demonstrate that the statute promotes a legitimate state goal and that there are not adequate nondiscriminatory alternatives. Finally, a statute that on its face discriminates against interstate commerce would invoke a “strictest scrutiny” test.

I

ENVIRONMENTAL LAW AND THE COMMERCE CLAUSE

Because interstate rivalry after the Revolution threatened “the peace and safety of the Union,”12 the framers of the Constitution wrote the commerce clause to give the Federal Government the power to regulate interstate commerce.13 History has shown, however, that this power frequently conflicts with the states’ power to enact legislation bearing on the health, safety, and welfare of their citizens—the so-called police power.14

Philadelphia was the site of the dispute that gave rise to the seminal commerce clause decision concerning the constitutionality of state statutes regulating interstate commerce. In Cooley v. Board of Wardens,15 the Supreme Court first recognized that congressional power to regulate commerce does not preclude states from also exercising that

13. See, e.g., W. Rutledge, A Declaration of Legal Faith 25 (1947); Brown v. Maryland, 25 U.S. 266, 283, 12 Wheat. 419, 446 (1827). Recently, the Court wrote that “in order to succeed, the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations” among the colonies and later among the States under the Articles of Confederation.” Hughes v. Oklahoma, 99 S. Ct. 1727, 1731 (1979).
14. See generally L. Tribe, American Constitutional Law 319-412 (1978). The police power has been described as the state’s power “to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.” Barbier v. Connolly, 113 U.S. 27, 31 (1885). Quite recently the Court announced that environmental concerns are “legitimate local purposes similar to the States’ interests in protecting the health and safety of their citizens.” Hughes v. Oklahoma, 99 S. Ct. 1727, 1737 (1979).
15. 53 U.S. 318, 12 How. 298 (1851).
power. Under *Cooley*, the critical inquiry as to the validity of a state regulation was whether its subject matter was of national concern. If so, uniformity required congressional regulation. If the matter was of local concern, varying local regulations could be tolerated.

The next major advance in commerce clause doctrine was the non-discrimination principle announced in *Welton v. Missouri*. In striking down a statute requiring peddlers of out-of-state merchandise to secure a license and pay a tax, the Court held that because the transportation and exchange of commodities was of national importance and required uniform legislation, the commerce power of the Federal Government protects the commodity “even after it has entered the State, from any burdens imposed by reason of its foreign origin.” The Court’s somewhat strained interpretation of *Cooley* resulted in one of the few unchanging themes of later commerce clause decisions: since *Welton*, the Court has invalidated regulations and taxes that on their face discriminate against interstate commerce.

One exception to the nondiscrimination principle is the series of quarantine decisions in which the Court upheld legislation banning the importation of diseased cattle, germ-infested rags, or other noxious items. These decisions reasoned that such items are not articles of commerce, and thus are outside the purview of the commerce clause.

16. Prior to *Cooley*, Chief Justice Marshall read the clause as prohibiting all state regulation or taxation of interstate commerce. *See* Gibbons v. Ogden, 22 U.S. 1, 92, 9 Wheat. 1, 210-11 (1824) (dictum). Chief Justice Taney, however, viewed the clause as prohibiting nothing by its own force; he considered the states free to regulate commerce until stopped by congressional action. *See* The License Cases, 46 U.S. 590, 676-77, 5 How. 504, 578-79 (1847) (dictum). *See generally* F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937); Dowling, Interstate Commerce and State Power, 27 VA. L. REV. 1 (1940). In *Cooley* the Court compromised between these two earlier views.

17. 91 U.S. 275 (1875).

18. *Id.* at 282.


20. Asbell v. Kansas, 209 U.S. 251 (1907); Reid v. Colorado, 187 U.S. 137 (1902). In *Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465 (1888), the Court struck down an Iowa law forbidding common carriers from bringing intoxicating liquors into the state without a certificate. In dictum the Court stated that “States have power to provide by law suitable measures to prevent the introduction into the State of articles of trade, which . . . would bring in and spread disease.” *Id.* at 489.

21. *See, e.g.*, 125 U.S. at 489. In *Asbell*, the Court implied that diseased cattle were not articles of commerce. After approving “laws for the inspection of animals coming from other States with the purpose of excluding those which are diseased . . . ,” it stated: “[t]he State may not, however, . . . under the pretense of protecting the public health, employ inspection laws to exclude from its borders the products or merchandise of other States . . . .” 209 U.S. at 256. The Supreme Court rejected this interpretation of the quarantine cases in *City of Philadelphia v. New Jersey*, 437 U.S. at 621-23. See also text accompanying notes 31-80 *supra*. The roots of the quarantine decisions may be traced to dictum in *Gibbons v. Ogden* that states may enact legislation to govern their own citizens. 22 U.S. at 91, 9 Wheat. at 208. In reference to the inspection laws, the Court stated:

That inspection laws may have a remote and considerable influence on commerce,
For nondiscriminatory statutes, the Court has adopted several balancing tests. First adopted in *Parker v. Brown*, and later refined in *Southern Pacific Co. v. Arizona*, the early tests included consideration of "the nature and extent of the burden which the state regulation... imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable" the general rule permitting the free flow of interstate commerce. In subsequent cases, the Court often included additional factors such as whether reasonable nondiscriminatory alternatives are available, or whether the regulation is aimed at furthering public health and safety instead of maximizing the profits of local businesses.

The most recent declaration of a balancing standard, and the one adopted by the Supreme Court in *City of Philadelphia*, is set forth in *Pike v. Bruce Church, Inc.*

[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only in-

The Court's balancing of incommensurables such as public health and increased business costs, encountered in *City of Philadelphia*, usurps the legislative function more than in a case involving only economic factors. In some cases, the Court has been unwilling to undertake a balancing at all. In *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, R.I. & P.R.R.*, the Court rejected a balancing approach. "We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause." At least one court has prohibited the weighing of local interests if the burden on commerce is slight. In *Procter & Gamble Co. v. City of Chicago*, the court of appeals stated:

> [If] the burden on interstate commerce is slight, and the area of legislation is one that is properly of local concern, the means chosen to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing proof. If it is determined that this presumption should be applied, no further balancing need be undertaken.

The U.S. Supreme Court avoided this problem in *City of Philadelphia* when it declared the Waste Control Act *per se* invalid.
cidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities.  

Thus, before the Court will apply the balancing test, it must first find that the statute regulates evenhandedly. Courts have looked with particular favor upon evenhanded state statutes aimed at protecting or enhancing the environment. In Huron Portland Cement Co. v. City of Detroit, the Supreme Court considered the validity of a Detroit ordinance regulating the amount of smoke that could be emitted from vessels passing through the city. The Court upheld the ordinance, even though it effectively prohibited the use of certain types of boilers previously approved and licensed by the Federal Government. The law was valid because it effectuated a legitimate local interest and did not impose a burden materially affecting interstate commerce in an area where uniform regulation was necessary. The Court expressly noted that the ordinance was applicable to any person or business within the city. Absent discrimination or disruption of required national uniformity, the ordinance was constitutionally valid.

In American Can Co. v. Oregon Liquor Control Commission, the Oregon Court of Appeals upheld a statute designed to reduce litter by requiring a deposit on all soft drink and beer bottles and by banning the sale of those beverages in pull-top cans. The statute's effect on interstate commerce was significant: manufacturers made special cans for Oregon consumers, and bottle manufacturers claimed their sales would drop noticeably. As the court noted, however, legislation having adverse consequences for out-of-state businesses is not necessarily dis-

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29. Id. at 142. Although the outcome of cases applying the balancing tests has not always been predictable, some principles have emerged. For example, the Court has consistently struck down state regulations that restrict the access of out-of-state suppliers to local markets, Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); create actual or possible inconsistent standards between states, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); force out-of-state businesses to relocate within the state, Toomer v. Witsell, 334 U.S. 385 (1948); or preferentially allocate scarce natural resources previously available to out-of-state users, Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

30. The Pike test does not necessarily preclude the Court from applying the balancing test to non-evenhanded statutes. Implicit in City of Philadelphia, however, is that the balancing test is to be applied only to evenhanded statutes. After finding the New Jersey statute discriminatory, the Court invalidated it without applying the balancing test.


32. Id. at 443-48. The Court did not apply a balancing test to the Detroit ordinance.

33. 362 U.S. at 448.

In this instance, the statute did not give Oregon businesses a competitive advantage. The "cost of adjustment to the new exigencies of selling beverages in Oregon will be spread throughout the beverage industry . . . without regard to whether they are Oregon-based firms."

In *Procter & Gamble Co. v. City of Chicago*, the Seventh Circuit upheld a city ordinance banning the sale of high-phosphate detergents, even though the ban caused Procter and Gamble to lose nearly five million dollars in sales in the first five months after the ordinance took effect and required the company to alter interstate shipping routes. The court held that "[t]here is no discrimination in this case. The ordinance does not require that detergents be manufactured in Chicago or Illinois and does not benefit manufacturers who are located there." The court found the burden on interstate commerce to be slight and upheld the statute.

In each of these cases, the challenged statute or ordinance was evenhanded in its effect. Local businesses were not given a competitive advantage over out-of-state businesses. Environmental legislation, therefore, may successfully resist constitutional challenges precisely because it protects environmental values and not local business interests.

II
THE CASE

Finding the New Jersey environment threatened by the disposal of wastes, the New Jersey legislature enacted the Waste Control Act empowering the Commissioner of the State Department of Environmental Protection (DEP) to prohibit in-state disposal of solid wastes.

35. *Id.* at 640, 517 P.2d at 702.
36. *Id.* at 642, 517 P.2d at 703.
37. 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975).
38. *Id.* at 73.
39. *Id.* at 78.
40. *Id.* at 79.
41. The courts apparently have afforded greater deference to environmental statutes than to legislation promoting other police power goals. In *Procter & Gamble, American Can*, and *Huron Portland* the courts applied a more lenient “rational relation” test rather than a balancing test. *The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 60 n.31 (1978).*
42. Specifically, the legislature found that the volume of solid and liquid waste is rapidly increasing, that the treatment and disposal of these wastes poses a threat to the quality of the environment, that the quality of New Jersey's environment is being threatened by the treatment and disposal of wastes generated or collected outside of the State; and that this hazard can be reduced by the adoption of regulations governing this practice.

that originated or were collected outside New Jersey. The Commissioner promptly promulgated regulations prohibiting disposal of any out-of-state wastes within the Hackensack Meadowlands District. Shortly thereafter, the Hackensack Meadowlands Development Commission (HMDC), acting pursuant to the Hackensack Meadowlands Reclamation and Development Act, promulgated a similar set of regulations.

Finding that the disposal of out-of-state wastes “continues to pose an even greater threat to the quality of the environment” and diminishes the “available and appropriate land fill sites,” the legislature extended the Commissioner’s ban in 1974 to include the entire state. Because the Commissioner suspended the ban for renewable and recyclable wastes, the statute and regulations effectively prohibited im-

44. Id. § 13:11-4.
45. N.J. AD. CODE § 7:26-1.5 (1978). The Hackensack Meadowlands District is that part of the state where the shortage is most acute.
47. N.J. AD. CODE § 19:7-1-1(g), (h) (1978).
49. Effective as of February 1974, the Commissioner’s regulations provided:
(a) No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and his promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the “Waste Control Act”. 


New Jersey is not the only state faced with landfill shortages; it is a pervasive problem for many urban areas. At least ten states have responded by banning, under specified conditions, disposal of wastes collected in other states. See Johnston, State Embargo of Solid Waste: Impermissible Isolation or Rational Solution to a Pressing Problem? 82 DICK. L. REV. 325, 325-26 (1978) [hereinafter cited as Johnston]. On the basis of City of Philadelphia, the Tenth Circuit invalidated an Oklahoma statute that barred importation of out-of-state industrial wastes subject to a reciprocity agreement with the exporting state. Hardage v. Atkins, 582 F.2d 1264, 12 ERC 1043 (10th Cir. 1978).
portation only of those out-of-state wastes that would otherwise be deposited in New Jersey landfills.

Philadelphia, together with the City of Glen Cove and several New Jersey landfill operators, sought to enjoin enforcement of the statewide ban by asserting that it violated the commerce clause.50 In another suit,51 the DEP and HMDC sought to enjoin the Landfill Authority from accepting out-of-state wastes for disposal in violation of the 1973 statute. In both cases, the trial courts declared the ban unconstitutional because it discriminated against interstate commerce.

The New Jersey Supreme Court consolidated the cases on appeal and in a unanimous opinion reversed the trial courts.52 Although the court followed the reasoning of the quarantine cases53 and determined that “substances injurious to the public health [i.e., nonrecyclable garbage] are not ‘articles of commerce’ within the meaning of the constitutional phrase,”54 it also found that the transportation and disposal of valueless waste constituted interstate commerce.55 Nevertheless, the court found no “real or significant discrimination in favor of local collectors” since New Jersey collectors could not bring out-of-state refuse into New Jersey, and conversely, foreign collectors could dump in-state refuse in New Jersey.

The court also reasoned that the purpose of the statute was to “give some measure of precarious protection to [the] natural environ-


53. See text accompanying notes 20-21 supra.

54. 68 N.J. at 467, 348 A.2d at 513. As early as 1847 in the License Cases, Justice Catron recognized in dictum that noxious items were not “articles of commerce” and thus were subject to the state police power. 46 U.S. 590, 5 How. 504 (1847).

The assumption is, that the police power was not touched by the constitution, but left to the States as the constitution found it. This is admitted . . . . If, from its nature, [an item] does not belong to commerce, or if its condition, from putrefaction or other cause, is such . . . . that it no longer belongs to commerce, or, in other words, is not a commercial article, then the State power may exclude its introduction . . . .

55. 68 N.J. at 467-69, 348 A.2d at 513-14. Although both Hackensack and the quarantine cases involved an embargo on items that were not “articles of commerce,” the court tested the New Jersey statute against the commerce clause because of its potential effects on the transportation and disposal of waste. Id. at 469-70, 348 A.2d at 514. In support of this distinction, the court cited language in United States v. Pennsylvania Refuse Removal Ass’n, 242 F. Supp. 794 (E.D. Pa. 1965), aff’d 357 F.2d 806 (3d Cir.), cert. denied, 384 U.S. 961 (1966).
ment,” rather than to “preserve and exploit a resource for selfish economic and commercial gain.” Finding protection of the environment to be a legitimate police power goal, and finding the effect upon trade and commerce to be relatively slight, the court had little trouble upholding the statute.

The City of Philadelphia appealed to the United States Supreme Court which, in a seven-to-two opinion by Justice Stewart, reversed the decision of the New Jersey Supreme Court. The Court sought to determine whether the statute was “basically a protectionist measure, or ... a law directed to legitimate local concerns” with only “incidental” effects upon interstate commerce. The Supreme Court held that because the Waste Control Act imposed the full burden of conserving the state’s remaining landfill space on out-of-state interests, it violated the principle of nondiscrimination both on its face and in its effect.

Using the standards set forth in South Carolina Highway Department v. Barnwell Bros., 303 U.S. 177 (1938), the New Jersey Supreme Court also found that the Waste Control Act was a permissible exercise of state legislative authority. Specifically, the court found that Congress had not preempted the solid waste disposal field, the statute and regulations were a valid exercise of the police power, the benefit to the state outweighed the burden on interstate commerce, and the means employed were suitable to the ends sought. The court deemed the Act a proper exercise of the police power since the legislature was “ministering to the needs of public health as well as endeavoring to preserve the environment.”

Although the court characterized as modest the increased costs that would have accrued to out-of-state waste disposers after the ban, they would have amounted to a $7.5 million yearly increase for the City of Yonkers and a $100 million incineration plant for the City of Philadelphia. Johnston, supra note 48, at 347 n.143. See also Reply Brief for Appellant at 6-7.


and thus violated the commerce clause of the United States Constitution.\textsuperscript{65}

Rejecting the New Jersey Supreme Court's dictum that valueless wastes are not articles of commerce, the Court found that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."\textsuperscript{66} The Court interpreted the quarantine cases as holding that a state could prohibit the transportation of particular articles across its borders if "the dangers inhering in their very movement" far outweighed their value in interstate commerce.\textsuperscript{67}

According to the majority, New Jersey made "no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible."\textsuperscript{68} The Court believed that the dangers arose at the disposal site where there is no basis on which to distinguish out-of-state from domestic waste.\textsuperscript{69} A legitimate quarantine law could not permit dumping one and ban dumping the other.\textsuperscript{70} Justice Rehnquist, writing for the dissent, believed that since the Court identified no evidence contradicting the New Jersey Supreme Court's finding that proper health and safety objectives motivated passage of the Waste Control Act, the Act should have been upheld.\textsuperscript{71} He found no basis on which to distinguish solid waste from germ-infected rags, diseased meat, and other noxious items.\textsuperscript{72}

I do not see why a state may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the state without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with

\textsuperscript{65} Id. at 629, 11 ERC at 1775.
\textsuperscript{66} Id. at 622, 11 ERC at 1772.
\textsuperscript{67} Id. at 622, 11 ERC at 1773. Later in the opinion the Court stated that the quarantine laws are not considered forbidden protectionist measures, even though they were directed against out-of-state commerce. [citations omitted]. But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.
\textsuperscript{68} Id. at 628-29, 11 ERC at 1775.
\textsuperscript{69} Id. at 629, 11 ERC at 1775.
\textsuperscript{70} Id. at 629, 11 ERC at 1775.
\textsuperscript{71} The Court in dictum stated that "it may be assumed as well that New Jersey may pursue those ends [i.e., protection of its environment] by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. Id. at 626, 11 ERC at 1774 (emphasis in original). This dictum, coupled with the "dangers in movement" language, presents intriguing questions concerning states' power to ban the dumping of nuclear waste within their borders. See Lucas, \textit{Nuclear Waste Management: A Challenge to Federalism}, 7 \textit{Ecology L.Q.} 917, 939 n.143 (1979).
\textsuperscript{72} Id. at 632, 11 ERC at 1777.
a view of having the validity of state laws turn on such pointless distinctions. 73

Not only is the distinction between hazardous movement and hazardous presence pointless, but the language of the quarantine decisions shows that the Court was never concerned solely with the dangers associated with the movement of an article. For example, in discussing the defendant's claimed right to ship quarantined material into other states, the Court in Reid v. Colorado 74 wrote: "But the defendant is not given by [the Constitution] the right to introduce into a state, against its will, live stock affected by a contagious, infectious or communicable disease, and whose presence in the State will or may be injurious to its domestic animals." 75

As the dissent in City of Philadelphia seemed to ignore, it was not the intent of the Court in the quarantine cases to attach a per se rule of validity to the quarantine statutes without regard to their economic effects. For instance, in Hannibal & St. Joseph Railroad v. Husen, 76 the Supreme Court invalidated a Missouri cattle quarantine law that did not differentiate between diseased and undiseased livestock. The state had gone beyond that which was "absolutely necessary" for self protection. 77 In Minnesota v. Barber, 78 the Court struck down a statute that imposed severe inspection requirements for meat because the practical effect of the law was to exclude out-of-state meat producers from in-state markets. 79 The Court in Reid recognized that a ban on the importation of diseased cattle might economically harm parties transporting cattle across state lines, and that a court should consider those effects in determining the validity of the statute. 80

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73. Id. at 632-33, 11 ERC at 1777.
74. 187 U.S. 137 (1902).
75. Id. at 151 (emphasis in original). The "dangers in movement" argument may not be as pointless as it first appears. Cattle quarantine statutes are directed at epidemics occurring outside the state, and thus further the desirable goal of confining the epidemic to a limited geographical area. Although directed only at out-of-state cattle, the statutes' discriminatory nature may be offset by state public health laws requiring diseased cattle to be destroyed on site. Thus, regardless of origin, diseased cattle may not be transported. This argument, however, does not fully explain the validity of statutes banning the importation of noxious materials that normally would not be the product of extraterritorial epidemics. Price v. Illinois, 238 U.S. 446 (1915); Savage v. Jones, 225 U.S. 501 (1912).
76. 95 U.S. 465 (1877).
77. Id. at 472-73.
78. 136 U.S. 313 (1890).
79. Id. at 322-23.
80. 187 U.S. at 152.
The economic effects of New Jersey's Waste Control Act would have been far greater than those of a quarantine statute. Unlike the continuous generation of municipal waste, the generation of diseased meat or cattle is unintentional and intermittent. Meat producers have no ongoing need to dispose of diseased cattle. Since the producer of the diseased item could not have sold it anywhere, the only increased cost arising from the quarantine statute would be the potentially higher cost of in-state disposal of the diseased product. This occasional cost would be a negligible burden on interstate commerce.  

III

DISCRIMINATION AND PROTECTIONISM

Despite the Court's unsound basis for distinguishing the quarantine cases from City of Philadelphia, its holding that the New Jersey legislation unconstitutionally discriminated against interstate commerce was correct: disposal of waste is an interstate commercial activity, and the statute discriminated on its face and in its effect against out-of-state disposers.

The New Jersey statute would have led to the very result that the commerce clause was designed to prohibit. Although disposal of waste in New Jersey landfills is economically attractive to both residents and nonresidents, the ban limited the benefits of inexpensive disposal to residents. "On its face, [the ban] imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." Furthermore, the statute would have given resident waste disposers a competitive advantage over their nonresident counterparts since the ban would have increased the latter's disposal costs.

The New Jersey Supreme Court's attempt to distinguish legislation that discriminates against out-of-state businesses from that which protects the state's environment is unpersuasive. None of the authorities cited by the court give even tenuous support to the constitutional signif-
icance of this distinction.\textsuperscript{84} The leading case dealing with the commerce clause and environmental legislation, \textit{Huron Portland Cement Co. v. City of Detroit},\textsuperscript{85} involved an evenhanded ordinance.\textsuperscript{86} In that case, the Court upheld a city ordinance limiting the permissible smokestack emissions because it applied to all polluters.\textsuperscript{87} Furthermore, \textit{American Can Co. v. Oregon Liquor Control Commission}\textsuperscript{88} emphasized that environmental legislation must be nondiscriminatory.\textsuperscript{89}

Yet, \textit{City of Philadelphia} suggests that discrimination on the face of a statute may not always be fatal: such discrimination might be permissible if there is some reason, apart from origin, to treat out-of-state articles differently from in-state articles.\textsuperscript{90} In a subsequent opinion, \textit{Hughes v. Oklahoma},\textsuperscript{91} the Court suggested that “[a]t a minimum, such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.”\textsuperscript{92}

In that case, an Oklahoma statute prohibited any person from transporting natural minnows for sale outside of Oklahoma.\textsuperscript{93} Hughes, a commercial minnow dealer, was arrested for transporting a shipment of minnows from Oklahoma to Nebraska. The Court held that the Oklahoma statute discriminated on its face against interstate commerce.\textsuperscript{94}

By requiring examination of local purposes and nondiscriminatory alternatives, \textit{Hughes} suggests that non-evenhanded statutes may be analyzed under the standards set forth in \textit{Dean Milk v. City of Madison}\textsuperscript{95} and \textit{Hunt v. Washington Apple Advertising Commission},\textsuperscript{96} both of which considered statutes that discriminated in their “practical effect.”\textsuperscript{97}

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\textsuperscript{85} 362 U.S. 440 (1960).
\textsuperscript{86} See text accompanying notes 31-41 supra.
\textsuperscript{87} 362 U.S. at 448.
\textsuperscript{88} 15 Or. App. 618, 517 P.2d 691 (1973).
\textsuperscript{89} \textit{Id}. at 642, 517 P.2d at 703.
\textsuperscript{90} 437 U.S. at 627, 11 ERC at 1774. The Court, however, did not say what reason would suffice.
\textsuperscript{91} 99 S. Ct. 1727 (1979).
\textsuperscript{92} \textit{Id}. at 1737.
\textsuperscript{93} \textit{OKLA. STAT.} tit. 29, § 4-115(B) (Supp. 1978). That section provides: “No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state.” \textit{Id}.
\textsuperscript{94} 99 S. Ct. at 1737.
\textsuperscript{95} 340 U.S. 333 (1977).
\textsuperscript{97} The Court in \textit{Dean Milk} stated that the “regulation . . . in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. . . . In thus erecting an economic barrier protecting a major local industry against competition from
Before *Hughes*, the Court had never intimated that *Dean Milk* and *Hunt* were applicable to facially discriminatory statutes.

*Dean Milk* involved a municipal ordinance that discriminated against interstate commerce by forbidding the sale of milk not pasteurized within five miles of the city. The Court held that despite the city's "unquestioned power to protect the health and safety of its people," the ordinance was unconstitutional because "reasonable nondiscriminatory alternatives" were available. 98

In *Hunt*, a North Carolina statute required all apples shipped into the state either to display a USDA grade or have no other classification. 99 Thus, Washington's grading system, usable in all other states, was prohibited in North Carolina. The Washington apple industry sued to overturn the statute. If forced to use a different grading system only for North Carolina, the industry could abandon its more stringent grading system on which its reputation depended; it could obliterate the preprinted labels on containers intended for North Carolina, giving its product a damaged appearance, or it could specially pack and ship apples for North Carolina. Each alternative involved additional expense. 100 The Court found that the effect of the statute "not only burden[ed] interstate sales of Washington apples, but also discriminat[ed] against them." 101 The state failed "to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." 102 As a result, the statute was in violation of the commerce clause. Thus, the New Jersey Waste Control Act could have been upheld under *Hunt* only if the statute had furthered a legitimate state goal and there had been no reasonable nondiscriminatory alternatives available.

The Waste Control Act set forth the New Jersey Legislature's finding that the Act was necessary to lessen the threat to the environment caused by treatment and disposal of out-of-state wastes. 103 More specifically, the New Jersey Supreme Court found the legislative purpose was not only "to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also

8. 340 U.S. at 354. See also 432 U.S. at 350, and see text accompanying notes 99-102 infra.

98. 340 U.S. at 354. The Court held that there could be no "objection to the avowed purpose of this enactment . . . [I]t appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities." Id. at 353. Thus, before the Court would consider whether reasonable alternatives existed, it would consider whether the legislation furthered a legitimate objective.

99. 432 U.S. at 337.

100. Id. at 338.

101. Id. at 350.

102. Id. at 353.

to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy.”

The United States Supreme Court, however, saw the statute as an attempt to retain for state residents scarce natural resources rather than to protect the health and safety of New Jersey citizens by improving their environment. Viewed this way, the Waste Control Act certainly would be invalid under the first branch of the Hunt test.

Yet, the Court has recognized protection of the environment as a legitimate police power goal. Here, both the New Jersey Legislature and the New Jersey Supreme Court identified protection of the environment as the statute’s purpose. Arguably, at least, the statute passed the first branch of the Hunt test—furthering a legitimate state goal.

The cases cited by the majority as examples of statutes enacted for impermissible purposes are distinguishable from City of Philadelphia because they involved no conceivable legitimate police power objective. For example, in Baldwin v. G.A.F. Seelig, the Court struck down a New York law that prohibited the resale of out-of-state milk at a price lower than the statutory minimum so that New York farmers could earn a “living income.” Unlike the statute in Baldwin, the expressed environmental aims of the Waste Control Act were not to be effected by direct economic discrimination. The natural resource cases, 

104. 68 N.J. at 473, 348 A.2d at 516. The appellants, on the other hand, asserted that the state’s only purpose was “to suppress competition and stabilize the cost of solid waste disposal for New Jersey residents . . . .” 437 U.S. at 626, 11 ERC at 1774. This purpose is the type of economic discrimination that the commerce clause was designed to avoid and that the Court has consistently invalidated.

105. “On its face, it imposes on out-of-state commercial interests the full burden of conserving the State’s remaining landfill space.” 437 U.S. at 628, 11 ERC at 1775.

106. Long before Dean Milk and Hunt, the Court struck down statutes that prohibited exports of natural resources. See, e.g., Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (invalidating an embargo on exports of natural gas); West v. Kansas Natural Gas Co., 221 U.S. 229 (1910) (invalidating a natural gas embargo enacted to conserve the gas). The state interest in conserving its resources, however, has been held sufficient to justify nondiscriminatory laws. See, Cities Service Co. v. Peerless, 340 U.S. 179 (1950) (upholding price regulations intended to conserve resources).

107. See Hughes v. Oklahoma, 99 S. Ct. 1727, 1737 (1979) (“We consider the States’ interests in conservation and protection of wild animals as legitimate local purposes similar to the States’ interests in protecting the health and safety of their citizens.”); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (“The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city’s inhabitants. Legislation designed to free from pollution the very air that people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the public power.”). In fact, the Court in City of Philadelphia recognized that protection of the environment is a legitimate police power goal. “[W]e assume New Jersey has every right to protect its residents’ pocketbooks as well as their environment.” 437 U.S. at 626.

108. 437 U.S. at 627, 11 ERC at 1774-75.


110. Id. at 523.
Pennsylvania v. West Virginia\textsuperscript{111} and West v. Kansas Natural Gas Co.,\textsuperscript{112} are also distinguishable from City of Philadelphia. At issue in those cases were regulations to retain petroleum or natural gas within the producing states. Those cases prohibit a state from giving “its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders.”\textsuperscript{113} The Court’s characterization of both petroleum and land solely as “natural resources” ignores the fact that the petroleum regulations, unlike the Waste Control Act, bore no relation to the health and welfare of the states’ citizens.

Nevertheless, even if the Court had recognized the environmental purposes of the Waste Control Act, the Act would have failed the second part of the Hunt test because reasonable nondiscriminatory alternatives were available: \textsuperscript{114} the state could have lessened the effects of dumping or reduced the amount of waste. For instance, technological methods are available to mollify the adverse environmental effects of waste dumping.\textsuperscript{115} Although technological solutions may increase the cost of operating landfills, New Jersey could generate additional revenues through a nondiscriminatory waste tax.\textsuperscript{116} A nondiscriminatory tax would increase the price of and lower the demand for dumping in New Jersey landfills, thus slowing the influx of waste, paying for the new technology, and forcing out-of-state businesses to pay for their

\textsuperscript{111} 262 U.S. 553 (1923).
\textsuperscript{112} 221 U.S. 229 (1911).
\textsuperscript{113} 437 U.S. at 627, 11 ERC at 1774.
\textsuperscript{114} The dissent apparently assumed that there were no nondiscriminatory alternatives. “The health and safety hazards associated with landfills present appellees with a currently unsolvable dilemma.” \textit{Id.} at 630, 11 ERC at 1776 (Rehnquist, J., dissenting). If this factual assumption is correct, \textit{City of Philadelphia} might well survive a Hunt analysis.
\textsuperscript{115} See generally \textsc{Handbook}, supra note 3, at 183-90; \textsc{Reindl}, \textit{Managing Gas and Leachate Production on Landfills}, 20 \textsc{Solid Wastes Management} 30 (July 1977) [hereinafter cited as \textsc{Reindl}]; \textsc{Sorg & Bendixen}, \textit{Sanitary Landfill} in \textsc{Solid Wastes: Origin, Collection, Processing, and Disposal} 71 (C. Mantell ed. 1975) [hereinafter cited as \textsc{Sorg & Bendixen}].

The natural production of methane at waste disposal sites can be managed by controlled burning, \textsc{Handbook}, supra note 3, at 184, or by pumping air into the landfill. \textit{Id.} at 187; \textsc{Reindl}, supra, at 64. Leachate production can be controlled by careful site selection, \textsc{Sorg & Bendixen}, supra, at 79, by bailing or shredding the refuse, \textsc{Reindl}, supra, at 31, or by placing an impermeable membrane between the landfill and the water table. \textsc{Goddard}, supra note 3, at 221; \textsc{Handbook}, supra note 3, at 190; \textsc{Sorg & Bendixen}, supra, at 80. Finally, the useful life of a landfill can be extended by compacting the waste material before disposal. \textsc{Handbook}, supra note 3, at 183.

\textsuperscript{116} A waste tax will be upheld if (1) the activity taxed is sufficiently connected to the statute to justify a tax; (2) the tax is fairly related to the benefits provided to the taxpayer; (3) the tax is nondiscriminatory; and (4) the tax is fairly apportioned. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 287 (1977). Given the Court’s tolerance for environmentally based legislation, a carefully drawn and fair waste tax would be upheld. Ironically, the waste tax option was unavailable to New Jersey in 1974; prior to \textit{Complete Auto}, the Court had ruled that state taxes directed at the “privilege of doing business” imposed upon the multi-state business were \textit{per se} unconstitutional. \textit{See}, e.g., Spector Motor Service, Inc. v. O’Connor, 340 U.S. 602 (1951); Helson & Randolph v. Kentucky, 279 U.S. 245 (1929).
share of the environmental costs of dumping. The goals of the Waste Control Act could be effected without forcing the entire cost on out-of-state entities.

A footnote in *City of Philadelphia* suggests another, although less satisfactory, means for New Jersey to cope with its problem: state subsidies to in-state landfill operators.\(^\text{117}\) The subsidies would be paid to landfill operators only for the in-state waste that they accepted. If the subsidies were high enough, it would be to the operators' advantage to forgo present profits from out-of-state waste, and instead leave the dumpsites open for future subsidized, in-state waste.

In an earlier case, *Hughes v. Alexandria Scrap Corp.*,\(^\text{118}\) the Court upheld a Maryland program that enabled in-state scrap processors to receive a subsidy more easily than out-of-state processors. In rejecting the contention that the subsidy program should be evaluated under the *Pike* balancing test,\(^\text{119}\) the Court conceded that the statute discouraged suppliers from taking junked automobiles out of the state for processing.\(^\text{120}\) The Court concluded, however, that

Maryland entered the market for the purpose, agreed by all to be commendable as well as legitimate, of protecting the State's environment. As a means of furthering this purpose, it elected the payment of state funds—in the form of bounties—to encourage the removal of automobile hulks from Maryland streets and junkyards. . . . But no trade barrier of the type forbidden by the Commerce Clause . . . impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State.\(^\text{121}\)

The analogy to *Alexandria Scrap* is not entirely satisfactory, however. That case involved a state-created market; without the subsidy, the junked autos would not have been brought to the scrap yards. *City of Philadelphia* involved the opposite situation; the demand for landfill exceeded the supply. Because the subsidy would disrupt existing markets, the Court could well examine the scheme more closely.

In addition, New Jersey may find the nondiscriminatory tax more attractive than the subsidy. The subsidy would place the costs of keeping waste out of the state of New Jersey, whereas a tax would not only reduce demand for New Jersey landfills, but would also force out-of-state businesses to bear a fair proportion of the environmental costs of dumping.

Thus, New Jersey had available adequate alternatives to protect its

\(^\text{117}\) The Court expressed "no opinion about . . . New Jersey's power to spend state funds solely on behalf of state residents and businesses . . . ." 437 U.S. at 627 n.6, 11 ERC at 1775 n.6.
\(^\text{118}\) 426 U.S. 794 (1976).
\(^\text{119}\) See notes 28-30 *supra* and accompanying text.
\(^\text{120}\) 426 U.S. at 803.
\(^\text{121}\) *Id.* at 809-10.
interests. Even if the Waste Control Act had not failed the first branch of the Hunt test, the Court would have struck down the statute under the second branch.

Although both City of Philadelphia and Hughes considered statutes that were discriminatory on their face, the holdings are different. In City of Philadelphia, the Court held the statute unconstitutional outright, while in Hughes, the Court evaluated the statute under a “strictest scrutiny” standard.122 Under the latter standard, the Court applied the Hunt test, putting the burden on the state to demonstrate resulting legitimate local benefits and a lack of reasonable alternatives. This change in the standard for examining facially discriminatory statutes may signal a move to a three-tiered system of scrutiny. Properly applied, this system could avoid the need for the anomalous reasoning in City of Philadelphia which distinguished that case from the quarantine cases.

Under this approach a court would first apply the Pike balancing test. Evenhanded statutes would be presumed valid unless “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”123 Thus, one would expect most evenhanded statutes to be upheld.

Examples of statutes previously upheld under this test include those challenged in Huron Portland,124 Procter & Gamble,125 and American Can.126 In each case, the statute was evenhanded—it applied equally to out-of-state and local business, giving the latter no competitive advantage. In each the burden on interstate commerce was great. For example, in Procter & Gamble,127 the plaintiff lost five million dollars in sales in the first five months after the ordinance banning high-phosphate detergents took effect. In American Can,128 the anti-litter statute forced can manufacturers to manufacture special cans for the Oregon market; bottle sales dropped because the statute permitted only returnable bottles. Nevertheless, the burden on commerce was not “clearly excessive” when compared to the local benefits—in each case, a cleaner environment.

The next two tiers of scrutiny would be invoked whenever the challenged statute is discriminatory. As Hughes noted, “[t]he burden to show discrimination rests on the party challenging the validity of the

122. The Court also stated that “facial discrimination by itself may be a fatal defect . . . .” 99 S. Ct. at 1737 (emphasis added). See text accompanying notes 91-92 supra.
123. 397 U.S. at 142.
127. See text accompanying notes 37-40 supra.
128. See text accompanying notes 34-36 supra.
statute.” Once such discrimination is demonstrated, however, the state must bear the burden of justification, “both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”

The second tier of scrutiny would be applied whenever the regulation is discriminatory only in its effect. Both Dean Milk and Hunt involved statutes struck down under this test. In Dean Milk, the ordinance requiring milk to be pasteurized within five miles of the city was struck down because reasonable alternatives were available. In Hunt, North Carolina’s statute requiring out-of-state apple producers to change their grading system failed because the state could not demonstrate either sufficient local benefits or a lack of adequate alternatives. Most environmental legislation, by contrast, should be able to pass the first test because environmental regulations are designed to produce local benefits. So long as nondiscriminatory alternatives are unavailable, the regulation should pass muster.

The third tier of scrutiny would be limited to facially discriminatory statutes. Although the test is ostensibly the same as that used for regulations that discriminate in their effect, language in Hughes suggests that the test will be applied more strictly to facially discriminatory regulations. For example, the opinion notes that facial discrimination “may be a fatal defect,” and that “[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives,” indicating that only rarely would such a statute be upheld. The challenged statute in City of Philadelphia would fail under this analysis. Even if the statute advances a legitimate local purpose, the availability of adequate alternatives would defeat the statute. Statutes that would survive this analysis include those upheld in the quarantine cases. The local benefits of the quarantine are great: diseased cattle could cause widespread sickness in humans or perhaps infect healthy stock. Furthermore, states have no real alternative to completely excluding diseased stock. Of course, an overly broad statute, as that in Minnesota v. Barber would be struck down under the strictest scrutiny standard.

129. 99 S. Ct. at 1736.
131. See text accompanying note 98 supra.
132. See text accompanying notes 99-102 supra.
133. 99 S. Ct. at 1737.
134. Id.
135. See notes 114-21 supra and accompanying text.
136. 136 U.S. 313 (1890). In Barber, Minnesota had imposed severe meat inspection requirements whose practical effect was to exclude out-of-state meat producers. See text accompanying notes 78-79 supra.
The adoption of a three-tiered system of scrutiny would not signify a major change in existing commerce clause doctrine. The first two tiers are clearly derived from the standards announced in *Hunt* and *Pike*. The creation of a third tier would require only formal adoption of a “strictest scrutiny” standard for facially discriminatory statutes in place of the *per se* rule of invalidity used in *City of Philadelphia*. The advantage is doctrinal clarity; using a strictest scrutiny test, the Court can avoid artificial distinctions such as “dangers in movement” in order to reconcile conflicting prior cases.

**CONCLUSION**

Although the Supreme Court decided *City of Philadelphia* correctly, its reasoning was incorrect. The Court’s use of a *per se* rule of invalidity led it to distinguish the quarantine cases with a “dangers in movement” argument that is both artificial and without support in prior case law.

Language in *Hughes* indicates the Court is moving to a three-tiered system of analysis in which facially discriminatory statutes are examined under the strictest scrutiny. The new standard is not a large change in commerce clause doctrine. The first two tiers, applicable to evenhanded statutes and those discriminatory in effect, have been set out in prior case law. This analysis, however, would eliminate the need for the artificial reasoning set forth in *City of Philadelphia*. 