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NOTES

Constitutional Law—Commerce Clause: Local Discrimination in Environmental Protection Regulation

Since the United States Supreme Court determined in *Cooley v. Board of Wardens*¹ that the Constitution's grant to Congress of the power to regulate commerce² did not necessarily exclude states from exercising the same power,³ state regulation of commerce has been subject to frequent and varying⁴ court scrutiny. In *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*⁵ the Supreme Court of New Jersey held that a New Jersey statute banning in-state disposal of out-of-state solid waste⁶ did not unconstitutionally infringe upon the congressional power to regulate commerce. It is doubtful, however, that federal courts would agree with this conclusion; and it is possible that this statute, although promulgated pursuant to the traditional police power vested in the states, is unconstitutional despite the federal courts' willingness to uphold state police power enactments undertaken in the field of environmental protection.⁷

1. 53 U.S. (12 How.) 298 (1851).

2. The commerce clause provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cl. 3.

3. 53 U.S. at 318-20. Drawing an analogy between the power of taxation and the power to regulate commerce, the Court observed that the existence of each respective power in the Congress could be compatible with the existence of a similar power in the states and that the states could legislate in the commerce area unless such action conflicted with congressional legislation or with a necessary uniformity in the regulation of any one subject matter within the field of commerce. *Id.*

4. The apparent inconsistency in Supreme Court adjudication of cases arising under the commerce clause can be ascribed to two factors: (1) the difficulty in determining the exact meaning and scope of a congressional act in the commerce field, as discussed by the Court in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and (2) the different tests that the Court has applied at any one time to state regulations challenged on commerce clause grounds. See text accompanying notes 24 & 28 *infra*.

5. 68 N.J. 451, 348 A.2d 505 (1975), *prob. juris. noted sub nom.* *City of Philadelphia v. New Jersey*, 96 S. Ct. 1504 (1976).

6. See note 8 *infra*.

7. The New Jersey Supreme Court cited several recent decisions in both federal and state forums that sustained environmental protection statutes against commerce clause attack. 68 N.J. at 476, 348 A.2d at 518. See note 40 *infra*.

New Jersey originally forbade disposal of out-of-state waste within the Hackensack Meadowlands District and later extended the ban to cover the entire state.⁸ The state agencies implementing the ban, the Hackensack Meadowlands Development Commission (HMDC) and the Department of Environmental Protection (DEP), brought suit to enjoin the Municipal Sanitary Landfill Authority (MSLA) from accepting for disposal in its landfill site within the Hackensack Meadowlands District any solid wastes originating or collected outside of New Jersey.⁹ Defendants¹⁰ challenged the constitutionality of the agencies' regulations and the authorizing statute on the grounds that the Waste Control Act and several of the HMDC regulations were arbitrary and unreasonable and that they violated both the commerce clause and the privileges and immunities clause; defendants further contended that the proce-

8. The Hackensack Meadowlands Reclamation and Development Act called for the orderly development of the Meadowlands and special provisions for solid waste disposal there. N.J. STAT. ANN. §§ 13:17-1 to -86 (West Supp. 1976). At the time the state sought development of the area, not merely its preservation, for the objective was "to reclaim, plan, develop and redevelop the Hackensack meadowlands." *Id.* § 13:17-1. The Legislature thereafter passed a Solid Waste Management Act designed to achieve safe and effective disposal of solid waste throughout New Jersey. N.J. STAT. ANN. §§ 13:1E-1 to -37 (West Supp. 1976). Ultimately, the Legislature, after finding that solid waste posed a grave threat to the quality of the state's environment, enacted the Waste Control Act, which in its final form empowered the commissioner of the State Department of Environmental Protection to regulate or ban disposal within New Jersey of out-of-state solid waste. N.J. STAT. ANN. §§ 13:1F-1 to -10 (West Supp. 1976). The section of the statute establishing the ban provides:

The Legislature finds and determines that . . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State . . . until the commissioner [of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has 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."

Id. §§ 13:1F-9, -10. Both the Department of Environmental Protection and the Hackensack Meadowlands Development Commission promulgated regulations towards this end. N.J. ADMIN. CODE 7:1-4.2 (1974); N.J. ADMIN. CODE 19:7-1.1 (1973).

9. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 127 N.J. Super. 160, 316 A.2d 711 (Ch. 1974).

10. The MSLA is a joint venture wholly owned and operated by other named defendants. The City of Yonkers, New York, whose refuse was being deposited on the MSLA site within the Hackensack Meadowlands District, moved for and was granted leave to intervene as a party defendant. *Id.* at 163, 316 A.2d at 712.

dures adopted by the DEP in promulgating its rule violated due process.¹¹

Upholding only defendants' commerce clause claims,¹² the Superior Court of New Jersey found that "[a]lthough the State's objective in attempting to conserve a local natural resource for local needs is a proper police power purpose, that [objective] cannot be accomplished by discrimination based on the source of the refuse."¹³ Accordingly, the exclusion of out-of-state solid waste from deposit within the Hackensack Meadowlands District was declared unconstitutional.¹⁴ Subsequently the New Jersey Supreme Court granted certification in *Hackensack*¹⁵ and contemporaneously brought forward for argument and disposition¹⁶ a suit by the City of Philadelphia against New Jersey in which New Jersey's state-wide ban on out-of-state solid waste was declared unconstitutional as effecting an improper discrimination against interstate commerce.¹⁷

11. *Id.* at 163, 316 A.2d at 712. The privileges and immunities clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

12. The court found that the promulgation of the regulations was not arbitrary, nor did it contravene the enabling act under which the regulations were developed, the Hackensack Meadowlands Reclamation and Development Act. See note 8 *supra*. The failure to hold a hearing prior to adoption of the DEP rule was found not to have denied defendants due process, inasmuch as no hearing was required by statute or constitution. The court also determined that defendants did not vigorously advance their argument with respect to the privileges and immunities clause and that, regardless of this, there were serious infirmities in that position. 127 N.J. Super. at 167-69, 316 A.2d at 713-15.

13. *Id.* at 174, 316 A.2d at 718.

14. While discussing the validity of the state's action as an exercise of the police power, the court observed that the regulations then under attack did not prohibit disposal of out-of-state solid waste throughout New Jersey, but only banned its disposal within the Hackensack Meadowlands District. Questioning whether such a limited ban could be considered a measure undertaken to protect the public health of the state, the court added, in a footnote, that newly enacted sections 9 and 10 of the Solid Waste Act (quoted in note 8 *supra*) and the new DEP regulation promulgated thereunder might render its decision moot by establishing a state-wide ban against the importation of at least some forms of solid waste. *Id.* at 170 n.1, 316 A.2d at 716 n.1. The widening of the application of the ban, however, did not affect the grounds upon which the decision of the superior court rested, since the regulations were declared unconstitutional not as an improper or unnecessary exertion of the police power but for discriminating against New Jersey's sister states. Accordingly, the New Jersey Supreme Court, while noting the change the DEP regulation underwent, did not otherwise deal with the issue of the scope of the ban in its discussion of the statute's validity as an exercise under the police power. 68 N.J. at 457 n.2, 348 A.2d at 508 n.2.

15. *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 66 N.J. 337, 331 A.2d 37 (1974). During this time the judgment of the superior court had been stayed.

16. *City of Philadelphia v. State*, 67 N.J. 102, 335 A.2d 55 (1974).

17. *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 459, 348 A.2d 505, 509 (1975), *prob. juris. noted sub nom.* *City of Philadelphia v. New Jersey*, 96 S. Ct. 1504 (1976).

The New Jersey Supreme Court in *Hackensack* determined that the disputed solid waste did in fact constitute articles of commerce within the meaning of the commerce clause,¹⁸ and found that the statute was a valid exercise of the state's police power¹⁹ in an area that Congress had not preempted.²⁰ In disagreement with the lower courts, the supreme court ruled that the New Jersey Waste Act did not discriminate unconstitutionally against sister states.²¹ Declaring that the statute would be valid if the burden it imposed on interstate commerce did not outweigh its benefit to the state, the court found that the statute imposed only a "slight" burden on commerce²² and held that the statute's aim was "crucial to the welfare" of the state.²³ As a result of this balancing the court reversed the judgments of the lower courts and sustained the state's actions.

Whether this particular exercise of the police power to achieve environmental protection would successfully withstand a challenge in the federal courts depends upon the "balancing test" applicable in a commerce clause review.²⁴ As the New Jersey court observed, the

18. *Id.* at 468-69, 348 A.2d at 514. The lower court in *Hackensack* had not explicitly stated that solid waste constituted an article of commerce within the commerce clause. See 127 N.J. Super. at 169-70, 316 A.2d at 716. The Supreme Court of New Jersey, however, relying on *United States v. Pennsylvania Refuse Removal Ass'n*, 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd*, 357 F.2d 806 (3d Cir. 1966), *cert. denied*, 384 U.S. 961 (1966), determined that the disposal of the solid waste, regardless of the conjectural value of the waste itself, constituted interstate commerce. 68 N.J. at 468-69, 348 A.2d at 514. The holding in *Pennsylvania Refuse* was particularly pertinent to the *Hackensack* situation since in the former case it was determined that "refuse transported from Pennsylvania to New Jersey and disposed of in the latter state . . . was plainly a proper subject of interstate commerce." 357 F.2d at 808.

19. 68 N.J. at 472, 348 A.2d at 516.

20. *Id.* at 471, 348 A.2d at 515.

21. *Id.* at 477, 348 A.2d at 518.

22. *Id.* at 475, 348 A.2d at 517-18.

23. *Id.* at 478, 348 A.2d at 519.

24. The balancing test juxtaposes the burden(s) on interstate commerce flowing from the challenged provision with the benefit(s) to the state derived therefrom. The most recent enunciation of the balancing test by the United States Supreme Court is to be found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in which the Court stated:

Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: 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 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 a lesser impact on interstate activities.

Id. at 142. Opposed to this somewhat hesitant espousal of the balancing test is another Court decision, *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. &*

commerce clause test applied to state actions has not been uniform.²⁵ This disparity is in part a result of *Cooley*,²⁶ the first United States Supreme Court decision to apply a commerce clause test, in which the Court restricted its holding to the facts and declined to articulate a general doctrine for future guidance.²⁷ Uncertainty is evident in many commerce clause cases,²⁸ particularly in those like *Hackensack* that deal with state environmental protection statutes.²⁹ Yet despite divergence in approach by federal and state courts on the issue of environmental regulation the cases uniformly hold that no state action can survive a commerce clause analysis if its effect on interstate commerce is heavily burdensome or if it discriminates against interstate commerce.³⁰

It is clear that the New Jersey court was correct in its decision that the area of solid waste disposal was not preempted by Congress,³¹ and

P.R.R., 393 U.S. 129 (1968). Upholding the validity of an Arkansas "full-crew" law that required a minimum train crew under certain conditions of railroad operations in the state, the Court strongly implied that such a test, if utilized at all, was to be applied only by another governmental body: "The question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our constitutional system, be fixed only by the people acting through their elected representatives." *Id.* at 138. The Court then noted its doubt as to whether in such a case any balancing test at all could be appropriate: "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." *Id.* at 140.

25. 68 N.J. at 473, 348 A.2d at 516.

26. See text accompanying notes 1-3 and note 3 *supra*.

27. See 53 U.S. (12 How.) at 320.

28. See *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975). In that case a federal appeals judge, after noting that "[c]lassifying the Supreme Court's commerce clause adjudications for the purpose of analytical application may seem to many an exercise in futility," attempted to devise his own categories in order to determine whether the statute there under challenge transgressed the federal plenary power under the commerce clause. *Id.* at 45.

29. The balancing test as applied in *Pike* and prior decisions is severely criticized in Note, *Use of the Commerce Clause to Invalidate Anti-Phosphate Legislation: Will It Wash?*, 45 U. COLO. L. REV. 487 (1974). This Note cites Professor David Engdahl as a recent commentator on the history of the commerce clause who urges abandonment of the balancing test in cases arising under the clause. The Note refers to Engdahl as taking "the position that if the . . . balancing test is reached, a court should make a presumption in favor of the validity of the legislation." *Id.* at 493. The *failure*, however, to apply such a test by two Oregon state courts reviewing the constitutionality of the Oregon Minimum Deposit Act, see text accompanying note 41 *infra*, was criticized in Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762 (1974). Tracing the history of the balancing test to its current form in *Pike*, the Note concludes: "Thus, it appears to be the duty of the courts to balance the harms and benefits of the state's environmental legislation." *Id.* at 1778.

30. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), discussed in note 24 *supra*.

31. The preemption test as applied in the field of interstate commerce was set forth by the United States Supreme Court in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963):

The principle to be derived from our decisions is that federal regulation

in its finding that the New Jersey provisions were a valid exercise of the state's police power, especially in light of the extensive scope of that power as recognized by the Supreme Court.³² Nonetheless, the *Hackensack* court erred in upholding the validity of the state's solid waste ban; a comparison of *Hackensack* with cases in the environmental protection field reveals that the Waste Control Act, contrary to the New Jersey court's conclusions, discriminates against interstate commerce and significantly burdens the flow of that commerce without providing comparable benefit to the state. The commerce clause standards that environmental regulations must satisfy were articulated in *Huron Portland Cement Co. v. City of Detroit*,³³ the leading decision of the United States Supreme Court in which an environmental protection provision was juxtaposed with the federal interest of ensuring unimpeded interstate commerce. In upholding Detroit's Smoke Abatement Code as a valid exercise of the traditional police power³⁴ the Court in *Huron* set forth the controlling principle in cases of this nature: "Even-handed local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action . . . or unduly burdensome on . . . interstate commerce."³⁵ Under this broad statement of principle the New Jersey Waste Act might well be found, in a more neutral forum, to constitute an impermissible burden on interstate commerce.

Although the Detroit code in *Huron* resulted in a noticeable impact on at least some elements of interstate commerce,³⁶ it imposed its requirements in a manner that was "even-handed"; that is, the regulations were "applicable alike to 'any person, firm or corporation' within the city," as well as to those without.³⁷ By contrast the New Jersey

of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Id. at 142. The most recent congressional statement in this particular area, the Solid Waste Disposal Act, 42 U.S.C. §§ 3251-3259 (1970 & Supp. V 1975) declares that, despite the nationwide gravity of the solid waste problem, "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies" *Id.* § 3251(a)(6). This recognition of the primacy of the states in the field of solid waste disposal defeats any presumption of federal preemption. For a further discussion of this issue, see Note, 87 HARV. L. REV., *supra* note 29, at 1770-72 (1974).

32. See *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

33. 362 U.S. 440 (1960).

34. *Id.* at 442.

35. *Id.* at 443.

36. "Structural alterations [to the ships of appellant] would be required in order to insure compliance with the Code." *Id.* at 441.

37. *Id.* at 448.

provisions are aimed solely at out-of-state waste. The New Jersey court declared there had been no discrimination, at least in an economic sense, because out-of-state refuse collectors could continue to collect and dispose of solid waste within the state if the refuse originated within New Jersey.³⁸ This observation does not adequately dispose of the discrimination issue, however, especially since the court found that solid waste did constitute an article of commerce within the commerce clause.³⁹ To restrict the service of waste disposal to only those generating solid waste within New Jersey clearly discriminates against non-New Jersey interests since the service of refuse disposal constitutes commerce not only for the disposal agents but also for those whose solid waste is removed. Therefore it is clear that the New Jersey Waste Act's discriminatory impact distinguishes this statute from provisions upheld in *Huron* as well as provisions upheld in other cases utilized by the New Jersey court as supportive authority, thereby rendering the New Jersey laws voidable under the commerce clause standards applied by the Supreme Court in *Huron*.⁴⁰

38. 68 N.J. at 475, 348 A.2d at 517.

39. See text accompanying note 18 *supra*.

40. According to the *Huron* standards, only that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." 362 U.S. at 448 (emphasis added). In *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), cert. denied, 96 S. Ct. 1148 (1976), the *Huron* principle controlled the outcome with respect to the commerce clause attack maintained by appellant. *Id.* at 909. Another case cited by the *Hackensack* court as supportive of its decision, *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me.), appeal dismissed, 414 U.S. 1035 (1973), upheld a Maine provision against a commerce clause challenge because the court found that its impact, if any, on interstate commerce was non-discriminatory and even-handed, as required by *Huron*. *Id.* at 40. In that case the validity of a tax on the transfer of oil over water in Maine was sustained because it was levied on oil transferred intrastate as well as on oil traveling through interstate and foreign channels. In contrast the New Jersey Act not only discriminates against interstate commerce but bans rather than merely regulates the importation of material from other states into New Jersey, in essence prohibiting the flow of that element of interstate commerce. As to this issue see text accompanying notes 52-66 *infra*. *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir.), cert. denied, 421 U.S. 978 (1975), is also clearly distinguishable from *Hackensack*. In *Procter & Gamble* a modified balancing test was applied to demonstrate that a Chicago ordinance banning the sale of any detergent containing phosphates did not unconstitutionally burden the flow of interstate commerce and could therefore be readily upheld as a reasonable means of achieving a legitimate legislative aim. The Chicago ordinance differed from the New Jersey Waste Act since, designed to prevent the growth of nuisance algae in the Illinois Waterway, the ordinance applied a non-discriminatory ban against the entry into the city (and thus into the city's portion of the Waterway) of any phosphate detergent. To be fully analogous to the Chicago ordinance the New Jersey statute would have to ban the disposal of all solid waste in the imperiled areas. Since there were "no discriminatory aspects

If subjected to the exhaustive commerce clause analysis set forth in *American Can Co. v. Oregon Liquor Control Commission*⁴¹ the New Jersey act would be unconstitutional under criteria other than a test of discriminatory intent. In *American Can* the Oregon court determined that the increased costs arising from the state provision under attack were borne by all affected industries without regard to state lines.⁴² In obvious contrast to the Oregon approach, the New Jersey Supreme Court ignored the extent of consequential economic discrimination against non-New Jersey groups who benefit from the transfer of waste to New Jersey.⁴³ Although economic discrimination is a relatively remote effect of the New Jersey statute, it could result in invalidation of the New Jersey Waste Control Act were a court to explore in detail the economic burdens and benefits flowing from the act and apply to its economic findings the balancing test required in a full commerce clause review.

The *Hackensack* decision is also vulnerable to close review because it fails properly to refute objections that the act intentionally discriminates against other states—objections that are based primarily on what may be termed the “natural resources cases”⁴⁴ cited by the lower court in *Hackensack*. At issue in those cases was the validity of provisions regulating natural gas or petroleum that had the effect of retaining the resource within the producing states. The regulations were

associated with this purpose [the elimination of nuisance algae] that might invalidate it,” the *Procter & Gamble* court found that the purpose and the Chicago ordinance promoting it were not unconstitutional. 509 F.2d at 80. Confronted with the discriminatory aspects of the New Jersey act—which protects only New Jersey’s interests, by banning only non-New Jersey solid waste—it is questionable whether the *Procter & Gamble* court would arrive at the same conclusion.

41. 15 Or. App. 618, 517 P.2d 691 (1973). This decision upheld the constitutionality of the Oregon Minimum Deposit Act, OR. REV. STAT. §§ 45.810-890 (1975), which requires that all beverage containers sold in Oregon be accepted for reuse by distributors and bottlers, and which enacted a ban on pull-top cans.

42. 15 Or. App. at 642, 517 P.2d at 703. See Note, 87 HARV. L. REV., *supra* note 29, at 1783, which further analyzes the economic burdens borne by the State of Oregon, its citizens, and the various facets of the industry as a result of the act and concludes, *inter alia*, that the deposit imposes no real handicap on the industry and that the larger portion of the economic burden is internalized and thus borne ultimately by the consumers of the beverages under regulation.

43. The New Jersey statute would lead to an immediate increase in solid waste disposal costs for the litigant cities in *Hackensack*. 68 N.J. at 476, 348 A.2d at 518. It is obvious that such a burden, however “small” or “modest” the *Hackensack* court characterized it, would not be borne by any New Jersey interests associated with either the generation or disposal of solid waste in the state.

44. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). See text accompanying note 13 *supra*.

invariably defended, as in *West v. Kansas Natural Gas Co.*,⁴⁵ as "exercise[s] of the police power to conserve the natural resources of the state,"⁴⁶ but the Supreme Court in *West* ruled such resource conservation was really designed only to serve "the business welfare" of the producing state, and if adopted by each state would unconstitutionally "halt . . . commerce at state lines."⁴⁷ The New Jersey Supreme Court found this reasoning inapplicable to the New Jersey Waste Act because of the distinction it discovered between the basic state purposes of the *West* regulations on the one hand and those of the New Jersey act on the other: the distinction between an effort "to preserve and exploit a [natural] resource for selfish economic and commercial gain" and an attempt "to protect the health of its citizens and give some measure of precarious protection to its natural environment."⁴⁸

There nevertheless exists a greater degree of similarity between the two types of state action than the New Jersey court chose to recognize. The original and primary goal of the New Jersey provisions was development, not mere conservation, of the disposal areas.⁴⁹ Admittedly the promotion of the wise and productive development of land is a legitimate aim of the police power, but however important and worthwhile the commercial and industrial development of the Hackensack Meadowlands and other landfill sites may be to New Jersey, the promotion of this activity does not constitute health or environmental preservation and cannot successfully be defended as a measure undertaken to achieve either goal.⁵⁰ Rather it might be appropriate at this juncture for courts to recognize that in an area as heavily populated as the Northeast Corridor landfill sites and open land of any sort are as valuable a natural resource and economic commodity as gas or oil continue to be. Discriminatory measures designed to prevent utilization of this resource by other states, typified by the New Jersey Waste Act, may therefore be subject to the limiting doctrine set forth in *West*.⁵¹

45. 221 U.S. 229 (1911).

46. *Id.* at 249.

47. *Id.* at 255.

48. 68 N.J. at 477, 348 A.2d at 518.

49. See note 8 *supra*.

50. As the New Jersey Supreme Court observed in *Hackensack*, "garbage and refuse do provide a great threat to the public health." 68 N.J. at 472, 348 A.2d at 516 (citing *Shaw v. Township of Byram*, 86 N.J. Super. 598, 602, 207 A.2d 570, 572, *cert. denied*, 45 N.J. 35, 210 A.2d 780 (1965)). The *Shaw* decision, however, concerned the open dumping of garbage, which presumably involved a far greater degree of risk to the public health than does sanitary landfill (which is by definition a less hazardous operation), the mode of solid waste disposal adopted in the Hackensack Meadowlands District and other areas in the state.

51. A more recent Supreme Court decision has held that state fixing of natural gas

Finally, the fact that New Jersey chose the extreme recourse of a ban to achieve its purpose subjects the Waste Control Act to a high degree of judicial scrutiny and, accordingly, a high risk of invalidation.⁵² Not all outright bans of a given material in commerce are unconstitutional;⁵³ however, such prohibitions are inevitably reviewed with great assiduity to ensure that they do not "interfere with transportation into or through the State, *beyond what is absolutely necessary for its self-protection*. . . . The Police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise" ⁵⁴ The constitutionality of a total ban must be conditioned on its

wellhead prices is permissible within the commerce clause as a legitimate effort to conserve valuable natural resources. *Cities Serv. Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950). The measure was upheld because Oklahoma was "justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources." *Id.* at 187. The Court noted, however, that there were limits to the ways in which a state might respond to such a concern, limits that might be of some pertinence to *Hackensack*. "The only requirements consistently recognized have been that the regulation *not discriminate or place an embargo* on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." *Id.* at 186-87 (emphasis added). Such limitations apparently led to the invalidation of a Texas statute that forbade the exportation of well water to other states without specific legislative approval. *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966). In that case the court noted critically that contrary to the avowed purpose of the statute it did not "operate to conserve water resources of the State of Texas except in the sense that it [did] so for her own benefit to the detriment of her sister States as in the case of *West v. Kansas Natural Gas Co.*" *Id.* at 839-40. The Texas statute, like the New Jersey act, prohibited only out-of-state interests from utilizing the protected natural resource (well water and landfill sites, respectively) while "indulging in the substantial discrimination" of allowing the prohibited activity to be carried on by those within the state. *Id.* at 840. In placing a discriminatory embargo on interstate transportation of the unique natural and environmental resource of water the Texas statute was thus clearly unconstitutional under *West*; it is likely that the New Jersey Waste Control Act, by enacting a ban on out-of-state use of a like resource, is similarly invalid.

52. See, e.g., *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1 (Me.), *appeal dismissed*, 414 U.S. 1035 (1973). The court upheld the validity of the Maine provision taxing oil transference because, in part, the statute did not prohibit that aspect of interstate commerce but instead merely undertook to regulate it so as to alleviate the effects of the peril of oil spills. *Id.* at 37.

53. State power to regulate traffic in intoxicating liquor represents one well-recognized exception to the federal plenary powers under the commerce clause. See *National R.R. Passenger Corp. v. Miller*, 358 F. Supp. 1321 (D. Kan.), *aff'd*, 414 U.S. 948 (1973). Additional areas in which pervasive state regulation is permitted are discussed in Note, 87 HARV. L. REV., *supra* note 29, at 1784. Because of the deference accorded to the states, discriminatory regulations in the commerce of firearms or firecrackers, for example, are not likely to be reversed. *But see Bowman v. Chicago & N. Ry.*, 125 U.S. 465 (1888), in which the Court held unconstitutional an Iowa law banning the importation (as opposed to the mere sale) of intoxicating liquor.

54. *Railroad Co. v. Husen*, 95 U.S. 465, 472-74 (1877), *quoted in Bowman v. Chicago & N. Ry.*, 125 U.S. 465, 491-92 (emphasis added).

being found nondiscriminatory.⁵⁵ Unless shown to be essential to the protection of public health the discriminatory aspects of New Jersey's waste control measures expose the provisions to constitutional attack as impermissible prohibitions on articles within interstate commerce.⁵⁶

It appears that the New Jersey court's decision in *Hackensack* failed to resolve the commerce clause difficulties raised by the statute. The act apparently does not encroach upon an area preempted by the federal government,⁵⁷ but it is doubtful that the New Jersey program provides the type of solution for the solid waste disposal problem that Congress envisaged. Consequently, the act might be regarded with disfavor in a federal forum because it fails to coincide with the general direction of federal policy.⁵⁸ In addition, were the balancing test to be applied by a federal court similar to the one applied in *American*

55. See, e.g., *Robertson v. California*, 328 U.S. 440 (1946). This case upheld the constitutionality of California provisions excluding insurance brokers and agents from doing business within California if they did not satisfy reserve requirements set forth by the state. The Court declared in the determinative part of its opinion: "Exclusion there is, but it is exclusion of what the State has the power to keep out, until Congress speaks otherwise." *Id.* at 459. It sustained the validity of the reserve requirements, finding that they "cannot be held, either on the face of the statute or by any showing that has been made, to be . . . designed or effective either to discriminate against foreign or interstate insurers or to forbid or exclude their activities . . ." *Id.*

56. Compare *Hackensack with Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd per curiam*, 440 F.2d 1319 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971), which upheld the constitutionality of a New York statute banning the importation and sale of certain wild animal products in New York. Although the New Jersey Waste Act is, like the *Palladio* provision, an exercise of the police power undertaken in an area not preempted by Congress, the New Jersey statute is not so neutral and evenhanded in its prohibition. The New York ban was not established to protect or in any way facilitate the state's control of animals native to or otherwise within New York, nor was New York attempting to provide some shield to producers of such products within the state. The New York ban did not distinguish among the animals themselves or the products obtained from them by state or national origin; the New Jersey statute, on the other hand, makes that distinction and does so in order to facilitate the state's disposal of its solid waste and to promote other state interests. Although these interests may be as worthy of protection as those New York sought to promote, the discrimination between New Jersey and non-New Jersey articles is not duplicated in the New York statute. Accordingly, subjected to commerce clause scrutiny, the New Jersey ban, thus distinguishable, may not meet with the same success as the New York statute reviewed in *Palladio*.

57. See note 31 and text accompanying note 20 *supra*.

58. The Secretary of Health, Education and Welfare was empowered by the Solid Waste Disposal Act to "encourage the enactment of improved and, so far as practicable, uniform State and local laws governing solid-waste disposal." 42 U.S.C. § 3254 (1970). Although at least one state, Maine, has adopted a statute similar in purpose and effect to the New Jersey Solid Waste Control Act, ME. REV. STAT. tit. 17, § 2253 (1976), New Jersey's neighboring states of Pennsylvania, New York and Delaware have not. Thus, the New Jersey statute, though not intrusive on a federally preempted field, obstructs the uniformity Congress desires to achieve in that area.

*Can*⁵⁹ the Waste Act and its attendant regulations could be held to have engendered an impermissible economic impact on the flow of interstate commerce. In a case such as *Hackensack* it is possible that the balancing test can properly be applied only by a federal court, for in the presence of outright discrimination occurring at the state boundaries the ability of the state courts to apply the test in a proficient and neutral manner may be limited.

The *Hackensack* court described in detail the "crisis proportions" that the solid waste problem had reached in New Jersey⁶⁰ and it is undeniable that New Jersey does have the right to undertake appropriate measures to deal with this pressing environmental concern. However, even if the Waste Control Act did not raise troublesome constitutional questions New Jersey would eventually have to adopt alternative methods of solving the state's waste disposal problem, for it is apparent that the New Jersey Waste Act only alleviates the situation on a temporary basis. As the New Jersey Supreme Court stated, the ban on in-state disposal of solid waste originating outside the state would lengthen the lifespan of existing New Jersey landfill sites by a mere eight percent.⁶¹ Therefore, although the statute was enacted to prevent "further virgin wetlands or other undeveloped lands from being devoted to landfill purposes,"⁶² it seems that the prohibition would at best only delay for a short time the conversion of such areas into landfill sites. The statute's long-term benefit to the state is miniscule—and compared to the discriminatory burden cast on the flow of interstate commerce and the resulting negative repercussions to out-of-state interests it is doubtful that the statute could survive any thorough application of the balancing test in a federal forum.

Hackensack accentuates the need for a federal uniform approach to the problem,⁶³ but it is unlikely that Congress will act toward this

59. See text accompanying notes 41-43 *supra*.

60. 68 N.J. at 460-65, 348 A.2d at 509-12.

61. *Id.* at 461, 348 A.2d at 510. The court further found that as of January 1, 1974, sanitary landfills within the Hackensack Meadowlands would be usable for only one year longer than expected if the ban were enacted. Prior to the enactment of the ban it was estimated that all land presently committed to landfill operations would be exhausted by 1982; extending the usefulness of those sites by eight percent would not appreciably lengthen the period during which they could be used for disposal. *Id.* at 462 n.7, 348 A.2d at 510 n.7. New Jersey's solid waste could be disposed of in its neighboring states, but it is conceivable that, inspired or irked by New Jersey's Waste Act, those states might pass reciprocal measures, foreclosing New Jersey from employing that avenue.

62. *Id.* at 465, 348 A.2d at 512.

63. See Note, *Control of Redeemable Solid Waste: A Proposed National Bill*, 5 SUFFOLK L. REV. 962 (1971).

end.⁶⁴ However, the New Jersey Solid Waste Act and the *Hackensack* decision upholding it may impel the federal courts toward the enunciation of a new statement on this statute and others that represent a challenge to the plenary federal commerce powers and toward the invalidation of any environmental protection provision that erects a discriminatory barrier against other states. The only other alternative may be a beginning of the "ecological Balkanization" of this country similar to "the intolerable experience of the economic Balkanization of America that existed in the colonial period and under the Articles of Confederation"⁶⁵—the situation the commerce clause was designed to eliminate.

IRA STEVEN LEFTON

Constitutional Law—Conditions of Confinement for Administratively Segregated Prisoners

It is common for prisoners subjected to segregation or solitary confinement to lose many privileges and rights accorded the general inmate population. The federal courts in recent years have often defined and protected constitutional rights of inmates placed in segrega-

64. A bill to amend the Solid Waste Disposal Act of 1965 was introduced in the House of Representatives in 1975 and was designed to oblige each state to adopt a statewide waste management and resource recovery program implementing, among other objectives: "(10) interstate co-operation in waste management and resource recovery, and (11) consistency of waste management and resource recovery with Federal, state, and local air and water pollution control, noise control, land use, and other environmental policies and regulations." H.R. 5487, 94th Cong., 1st Sess. pt. I, § 251 (1975). As hearings on the bill reveal, however, even these proposed amendments would not have resulted in an increased federal role in the area preempting the states from taking action on their own. Such state action would still be permitted and therefore could continue to result in provisions that, like the New Jersey Waste Act, make no effective contribution to the national effort to deal with the solid waste situation. Thus in response to a query as to the desirability of areawide, rather than state-by-state approaches, the bill's sponsor, Rep. Paul G. Rogers, declared, "Well, I think this is commendable, and I think this should be encouraged. Areawide planning would be encouraged under section 255(b) of my bill, unless the state decides—as Connecticut has—to establish and operate a statewide plan." *Hearings on H.R. 5487 Before the Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 101 (1975).*

65. *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 628, 517 P.2d 691, 696 (1973).