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Ohio House Bill 869 and Similar Statutes:

An Analysis of Mandatory Deposits on Beverage Containers To Promote Recycling in Relation to Environmental Control

Introduction

Proposed House Bill 869 requires that all soft drink and beer containers carry a mandatory five-cent deposit in order to promote their recycling. This would necessarily cause a reduction in the litter discarded along Ohio's highways, parks, beaches, etc. To Ohio environmentalists, the Bill represents a major legislative response to the growing litter and solid waste problem. However, to industry it represents a major curtailment of their production growth and profits, specifically those industries whose production is concentrated solely or substantially in the area of non-returnable cans and bottles. If the Bill becomes effective it will be a major victory for environmentalists.

Similar legislation already has been enacted in Oregon. This legislation, called the "Bottle Bill," became effective on October 1, 1972 and is the prototype for not only Ohio's proposed Bill but also for many other states that have similar legislative proposals.

The significance of the Ohio and Oregon bills, along with other states' proposals, is that they represent an exercise by states of their police power in order to control their environment. Such control is achieved by compelling soft drink and beer industries to recycle the containers which they use in marketing their products. Since such legislation encompasses interstate commerce, a major clash emerges between the police power of the states and the Commerce Clause of the federal government. Also, since the legislation concentrates solely on soft drink and beer containers, the issues of equal protection and due process challenge the legislation's constitutionality.

This comment will analyze the constitutional issues involved and also provide some direction to the economic impact that such legislation will have on industry and the consumer.


Solid Waste Disposal and Beverage Containers: An Overview

Statistics show that out of the 3.5 billion tons of solid waste accumulated each year, approximately 30 billion bottles and 60 billion cans contribute to the mass.\(^4\) Also, in 1969, 43.8 billion containers for beer and soft drinks were manufactured, and it is estimated that by 1980, 100 billion of these containers will be produced and discarded every year.\(^5\) Regulatory response to the problem has concentrated on handling the used containers only after they have become a part of the accumulated mass of solid waste rather than controlling production. As of now there are a variety of regulatory processes dealing with disposing of solid waste.\(^6\) However, upon analysis it will be seen that each process is inherently or economically inefficient in attempting to control the disposal problem. The processes pertinent to the disposal of beverage containers are sanitary landfilling, incineration and salvaging.

The sanitary landfill or closed dump creates its own unique problems. For instance, despite the cover of earth over the landfill, fires can be generated underground which are caused by temperatures which reach 100 degrees within a few days after the solid waste is covered.\(^7\) Secondly, when the solid waste starts to degrade, it forms gases, some of which have an explosive character.\(^8\) The Bureau of Solid Waste Management considers 94 percent of all landfills and incinerators to be inadequate, with an estimated $4.2 billion needed to upgrade existing operations.\(^9\) And once land, especially in heavily populated areas, becomes scarce, solid waste will have to be hauled long distances, causing tremendous increases in the disposal costs.\(^10\) Accordingly, it appears that open dumping and sanitary landfilling are relatively inadequate methods of disposal.

Incineration only reduces solid waste by 75 percent, with the residue being dumped into the already inadequate landfills.\(^11\) More importantly, since bottles and cans do not decompose through incineration, it is a wholly inadequate solution to the problem of disposing of beverage containers. Salvaging bottles and cans from incinerators is ineffective since

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\(^4\) Hollister, To Reduce Litter, 8 Houston L. Rev. 687, 688 (1971); F. Grad, Environmental Law, Solid Wastes § 4.01(1) at 4-4 (1971).
\(^6\) Schmoyer, The Legal Framework of Solid Waste Disposal, 2 Environ. L. Rev. 312, 314 (1971); See also F. Grad, supra note 4, at 4-27.
\(^7\) Schmoyer, supra note 6, at 319.
\(^8\) Id. at 320.
\(^9\) Solid Waste Management, supra note 5, at 34.
\(^11\) Schmoyer, supra note 6, at 317.
the relative worth of these containers makes them economically unfeasible for collection and recycling after they have been mixed with other wastes.\footnote{Note, \textit{Solid Waste Pollution: Control of Container Packaging Through Taxation}, 1973 \textit{Urban L. Ann.} 387, 388. See also T. Bingham and P. Mulligan, \textit{The Beverage Container Problem—Analysis and Recommendations}, Contract No. 68-03-0038 (1972).}

The best solution in controlling solid waste is to recycle the mass at the earliest opportunity. This goal is adequately encompassed in the Ohio and Oregon bills. Their intended purpose is to reduce the number of littered beverage containers, to enhance collection of these containers, and to reduce the burden placed on solid waste collection.\footnote{T. Bingham and P. Mulligan, supra note 12.} Although some industrialists favor such legislation,\footnote{Ways, \textit{How to Think About the Environment}, \textit{Fortune}, Feb. 1970, Vol. 81, Part I, at 98, 118.} many advocate indirect methods such as strong anti-litter laws and public education.\footnote{F. Grad, \textit{supra} note 4, at 4-84.} Unfortunately, these answers are not adequate solutions to the problem because they just do not work.\footnote{Bingham and Mulligan, \textit{supra} note 12, at 79.}

Two Bills—A Comparison

The Ohio and Oregon bills will be compared in order to point out their distinctions and to show how states are attempting to effectuate mandatory deposits on beverage containers.

Ohio's House Bill 869, if it is enacted, will become effective after December 31, 1973, and will encompass any soft drink, beer or malt beverage carried in a glass, metal, or plastic container.\footnote{H.B. 869, 110th Gen. Ass., Reg. Sess. §§ 913.241, 913.241(A), 913.242, 913.243, 4301.031, 4301.031(A), amending, Ohio Rev. Code §§ 913.99, 4301.99 (Supp. 1972).} Each of the enumerated containers will have a mandatory five-cent deposit placed upon it to be charged by the retailer and paid by the purchaser.\footnote{Id. §§ 913.241(A)(1), 4301.031(A)(1).} The refund value will be placed explicitly on each container,\footnote{Id. §§ 913.241(A)(2), 4301.031(A)(2).} and the traditional flip-top cap or pull tab will be eliminated.\footnote{Id.} This means that all containers covered within the purview of the statute will have to be opened with a can opener. Redemption centers can be established by any person so long as such center is approved by the Department of Agriculture,\footnote{Id. §§ 913.242.} and at the redemption center, any purchaser may procure a refund on his deposit.\footnote{Id. §§ 913.242.} The Department of Agriculture may, at any time after written notice to the person who established the center and those dealers who are affected by the center, withdraw approval of the center if it no longer
serves as a convenience to the consumer or does not comply with the orders set out by the Department.\textsuperscript{23} The Department shall conduct continuing surveys to determine the Bill’s economic impact,\textsuperscript{24} its practical effect upon recycling,\textsuperscript{25} and its effectiveness of reducing litter.\textsuperscript{26} An annual report shall be filed by the Department of Agriculture to the General Assembly\textsuperscript{27} stating its findings and recommendations for legislation.\textsuperscript{28}

Oregon’s Bottle Bill is more comprehensive than the Ohio Bill. Under the Oregon Bill, beverage containers have a refund value of not less than five cents\textsuperscript{29} as opposed to the mandatory five-cent deposit stated in the Ohio Bill. Although this provision is more flexible than Ohio’s, it will be seen that its impact on the Bill’s effectiveness will be miniscule. Furthermore, in Oregon, if a beverage container is certified it carries a deposit of not less than two cents,\textsuperscript{30} with all other beverage containers carrying a deposit of not less than five cents. A container is certified if it is reusable by more than one manufacturer in the ordinary course of business\textsuperscript{31} and if more than one manufacturer will accept the container for reuse.\textsuperscript{32} This provision promotes the use of reusable containers of uniform design.\textsuperscript{33} There is no such provision in the Ohio Bill, and although this provision will probably have little impact on non-returnables, it could have a major impact on returnables by consequently placing a burden on interstate commerce by forcing out-of-state manufacturers to change their product design.

Another major distinction between the two bills is that the Oregon Bill mandates that a dealer shall not refuse to accept from a customer any beverage containers that are covered within the Bill\textsuperscript{34} and, more importantly, that a distributor cannot refuse to accept from a dealer any containers covered.\textsuperscript{35} This latter provision is not included in the Ohio Bill. Its practical effect is that in Oregon all beverage containers, if brought back by the consumer, will ultimately be returned to the distributor who will then have the burden of recycling the containers for reuse. This is the exact end that the Bill is trying to effectuate. However, since under the Ohio Bill a distributor need not repurchase the used containers from the dealer,

\begin{itemize}
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. § 913.243(A).
\item \textsuperscript{25} Id. § 913.243(B).
\item \textsuperscript{26} Id. § 913.243(C).
\item \textsuperscript{27} Id. § 913.243.
\item \textsuperscript{28} Id. § 913.243(E).
\item \textsuperscript{29} ORE. REV. STAT. ch. 459.820(1) (1972).
\item \textsuperscript{30} Id. ch. 459.820(2).
\item \textsuperscript{31} Id. ch. 459.820(2) (a).
\item \textsuperscript{32} Id. ch. 459.810.
\item \textsuperscript{33} Id. ch. 459.860.
\item \textsuperscript{34} Id. ch. 459.830(1).
\item \textsuperscript{35} Id. ch. 459.830(2).
\end{itemize}
the burden of redistributing the used containers for reuse is placed upon the dealer with the intended purpose of the Bill being prostituted.

The last major feature that distinguishes the two bills is that under the Oregon Bill a dealer may refuse to accept a beverage container for refund if the container does not have a refund value placed upon it, or if the container can be taken to a properly established redemption center. This provision is pertinent in not only protecting the dealer from having to return deposits on containers which have not been subject to a deposit (for instance, bottles and cans purchased outside of the state), but more importantly, by affording the right to force consumers to return containers to a redemption center, he is alleviated from having to handle a large quantity of used containers which he may not be able to accept because of a lack of storage space. Clearly, this provision should be incorporated into the Ohio Bill for the protection of the dealer. It provides a tremendous benefit to the dealer with little extra burden to the consumer. Based on this information, an analysis can now be made of the economic and constitutional aspects of the Ohio and Oregon bills.

The Economic Impact of a Mandatory Deposit on Beverage Containers

A recent report completed in Oregon shows that a mandatory deposit on beverage containers causes substantial decline in the sale of non-returnable containers and an increase in the sale of returnables. This outcome is predictable because if consumers are going to have to return empty containers, they are going to buy those containers that sell for the lowest price which is usually the returnable bottle. Since statistics show that there is a major market for non-returnables, an analysis should be made of the economic implications associated with a reduction in non-returnable containers.

A decrease in the sale of beverages in non-returnable containers causes a reduction in retail orders from suppliers which ultimately reduces the production of these items. This curtailment results in a reduction, by the manufacturer, of purchases for supplies and materials, and thus reduces employment. However, this employment reduction will be offset by a rise in employment in other industries caused by the increased sales of beverages in returnable containers. Manufacturers who produce, almost exclusively, non-returnable bottles and cans state that in order to transform their present systems into a returnable distribution system, additional costs would have to be incurred for larger warehouse space, double container

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36 Id. ch. 459.840(1).
37 Id. ch. 459.840(2).
38 E. Clausen, supra note 3, at 8.
39 Folk, Two Papers on the Effects of Mandatory Deposits on Beverage Containers, C.A.C. Doc. No. 73 at 2 (1972) [hereinafter cited as Folk].
handling in the plant, in-plant sanitizing of containers, safety inspection of used containers, less-than-capacity vehicular loading, increased time per stop to sort and load empties, fewer stops per route, more costly delivery equipment and more delivery employees. It should be noted further that out-of-state manufacturers will have greater transportation costs for delivering and collecting returnables, as compared with in-state manufacturers, causing them to accept either a lower profit margin or an increase in sales price. However, the manufacturer will be afforded some cost benefits by incurring tax write-offs due to corporate investments. And, once the complete shift to returnables has been procured, there will be a large savings due to the use of containers that are used only once. The manufacturer of non-returnable bottles and cans has the greatest economic burden since to survive in the market, a complete change in its product mix must be procured. In some cases such a transformation will be economically unfeasible and force the manufacturer out of business, but that burden is not forecasted for distributor and retailers.

The distributor will have increased employment due to additional salesmen and drivers, which offsets the reduction of employment in the manufacturing industry. Also, since delivery and pickup will be augmented by the larger percentage of returnables used, additional expense will be incurred for more trucks, etc. There would also be a capital loss from canning lines being rendered useless with a savings in overhead from not having to operate multiple lines.

Many retailers would prefer handling just one system, either returnable or non-returnable, but not both. For instance, in Oregon, after the Bottle Bill came into effect, the retailers announced that they would not carry national brands in non-returnables but would do so for returnables. Although mark-ups are usually higher for non-returnables the retailer is afforded the convenience of not having to deal with the container after it is purchased. In contrast, returnables require additional handling by the retailer after the containers are returned causing increased costs for storage and labor. However, the initial cost of purchasing the container will be less in an all-returnable system because of the trippage rate.

41 BINGHAM and MULLIGAN, supra note 13, at 60.
42 FOLK, supra note 39, at 12.
43 Brief for Appellant, supra note 40, at 30.
44 FOLK, supra note 39, at 73.
45 BINGHAM and MULLIGAN, supra note 13, at 60.
46 FOLK, supra note 39, at 7.
47 Id. at 10.
48 Id. at 7.
49 Id.
Under both the Ohio and Oregon bills, if consumers purchase a large quantity of containers and subsequently discard them without seeking a return on their deposit, the forfeited deposit will be a profit to the retailer, or as in the above bills, five cents on every container not returned. If the retailer market is competitive, the retailer may want to use the gain to reduce his selling price on the containers not yet sold. Hypothetically, if none of the containers were returned, the retailer could reduce his price by five cents, assuming that is the deposit rate, and thus offer the beverage at the price that was operable before the mandatory deposit became effective. Should most of the containers be returned, the retailer will incur the cost of redeeming and disposing of the containers which then will have to be added to his sales cost. As stated, under the Oregon Bill, the retailer can refuse to accept any containers that can be properly returned to redemption centers. This alleviates the cost of storage and handling on the part of the retailer and consequently causes the whole recycling process on the retail level to function more smoothly. The Ohio Bill should be amended to include such retailer protection. Another deficiency in the Ohio Bill that is pertinent to the retailer is his right to collect a refund from the distributor of every container returned. Such a provision is included in the Oregon Bill, and therein alleviates any burden that could be placed on the retailer if the distributor refused to accept the returned containers. Many retailers will not have adequate storage space to accept large quantities of containers and are financially unable to build larger storage space. Since one of the main purposes of a mandatory deposit is to recycle containers, a provision is needed in the Ohio Bill to force the recyclable containers back up the marketing chain. Without the above two amendments, the Ohio Bill is inherently deficient in bringing about the object that it intends to create.

Cost to the consumer should also be considered. Many consumers are presently paying two cents extra for soft drinks and one cent extra for beer in non-returnable containers. This convenience costs the consumer approximately $598.4 million. If a non-returnable bottle or can is not returned, as provided for under a mandatory deposit system, the consumer who refused the deposit will suffer the loss and either the retailer or other consumers will benefit by either increased profits or

50 Id. at 11.
51 Id.
52 Id.
53 Id.
54 ORE. REV. STAT. ch. 459.840(2) (1972).
56 BINGHAM and MULLIGAN, supra note 13, at 57.
reduced sales prices as stated above. But if a returnable bottle is discarded and not returned, all consumers are disadvantaged since the discarded container must be replaced by a new one. In both cases, if neither kind of container is returned, society must pay the cost to clean up those containers that are littered and then the cost of disposing of them along with other solid waste. This does not take into consideration the aesthetic cost involved which is incapable of being calculated.

The above analysis is not a total picture of the impact a mandatory deposit has on industry, etc., since there is relatively little information on the subject due to the newness of the legislation in this area. Oregon is the only state that has a statewide statute such as this in operation; and, therefore, it is essential that the statistics compiled in that state be analyzed to see how the mandatory deposit system has actually affected industry. A report, as stated, was compiled on the effects of the Bill six months after it took effect. It was therein reported that prior to the enactment of the Bill, 51 percent of all soft drinks were sold in refillable bottles, eight percent in non-refillable bottles, and 41 percent in cans. Six months after the Bill was enacted, no disposable soft drink bottles were being sold and can sales decreased to less than one percent. Beer sold in cans, prior to the Bill's enactment, represented 35 percent of the market. Beer cans now represent less than one percent of the market. As was expected, manufacturers of non-returnable containers have been adversely affected. The glass container manufacturers, however, increased their market share, but they incurred extra costs because of having to change their production to returnables rather than non-returnables. It is estimated that out-of-state brewers have had increased shipping costs amounting to 38 percent, with an additional 28 cents per case to return them. Further, retailers have experienced some inconvenience in handling the large quantities of bottles being returned but increased pickups by the bottlers are expected to minimize this problem. As of March, 1973, it was estimated that 142 jobs have been created in the bottling industry to offset these losses.

The Oregon report substantiates the general trend expected from

57 See text accompanying notes 80 and 81 supra.
58 FOLK, supra note 39, at 15.
59 See note 38 supra.
60 E. CLAUSSEN, supra note 3, at 8.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id. at 12.
66 Id. at 13.
67 Id. at 14.
placing mandatory deposits on beverage containers. Since the effect of such a bill substantially removes non-returnables from the market, it could be asked why a statute banning non-returnables altogether has not been enacted since it would have more of a direct effect. However, one major advantage to a mandatory deposit bill is that it forces manufacturers and brewers, etc., to conform to a returnable system gradually rather than expecting them to accomplish an immediate transformation. This is beneficial to the industry and in essence a more equitable approach to the problem. Furthermore, once a returnable system is recognized by industry, it, along with environmentalists and agencies concerned with litter and solid waste eventually will work together to create solidarity in attempting to solve these environmental problems.68 Industry is already attempting to make such an effort.69

A Constitutional Analysis of Beverage Container Legislation

The first constitutional issue that must be resolved is whether or not a state has the police power, delegated to it by the tenth amendment of the Federal Constitution, to enact legislation that places a mandatory deposit on all beverage containers. To answer this, however, the term police power must first be defined. The purview of police power has been defined as the power of the state to enact any law that is related to the health, safety, morals or general welfare of the public so long as it is not arbitrary or unreasonable and bears a reasonable relationship to the object that it attempts to procure.70 Although this traditional definition affords some guidelines in measuring a state's power under the Constitution to enact legislation for its people, it fails to define the precise scope of the power.71 Consequently, an analysis must be made of the facts in each case to determine whether or not the power is properly exercisable.72 Accordingly, in order to properly analyze the beverage container legislation, a determination of the facts surrounding such legislation is required.

One of the main objects or purposes to be procured by beverage

68 FOLK, supra note 39, at 33.
70 State v. Cromwell, 72 N.D. 515, 9 N.W.2d 914, 919-920 (1947), noted in Hollister, To Reduce Litter, 8 HOUSTON L. REV. 687, 692, n. 21 (1971).
container legislation is to enhance recycling in order to reduce the litter which is scattered around our highways, parks, and beaches, etc.\textsuperscript{73} As will be seen, this not only develops a viable tool in controlling litter but also helps to alleviate the massive solid waste problem confronting us today. Such control has been necessitated by the fact that approximately 48 billion bottles and 46 billion cans are discarded each year.\textsuperscript{74} Also, in a recent survey conducted in Oregon it was estimated that, excluding plastics, 71 percent of all littered items were either cans or glass.\textsuperscript{75} These statistics substantiate the claim that beverage container legislation is paramount in controlling their use or abuse as the case may be.

Once it is established that a major problem exists in the use of beverage containers, is legislation which purports to solve this problem a reasonable object for state regulation since such legislation is based, at least in part, on aesthetic or environmental reasons? Although the prevailing view is that legislation must be based on something more than aesthetic reasons to be upheld as constitutional,\textsuperscript{76} there is a growing trend toward recognizing aesthetics as a valid exercise of a state's police power. For instance, one of the first cases recognizing aesthetics as a valid foundation for the exercise of state police power is \textit{People v. Stover}.\textsuperscript{77} There, a disgruntled resident of the city of Rye, New York, protested a local tax by placing a clothesline in his front yard and upon it placed soiled clothes, leaving them there undisturbed. When his protests appeared to be futile, he added additional clothesline accompanied by more soiled clothes until the city passed an ordinance prohibiting the maintenance of a clothesline in front or side yard that abutted a street, in order to alleviate the distraction to motorists. The court upheld the ordinance but based its decision on aesthetic principles rather than on the ostensible safety reasons of the statute.\textsuperscript{78}

Although litter per se is not necessarily as unsightly as soiled clothes, the tremendous quantity of litter discarded each year in our open spaces causes a very unsightly landscape,\textsuperscript{79} and certainly, such unsightliness falls under the language used in \textit{Stover}. In a subsequent case, \textit{Oregon City v. Hartke},\textsuperscript{80} the court was more categorical in its recognition of aesthetics

\textsuperscript{73} E. Clausen, \textit{supra} note 3, at 3.  
\textsuperscript{74} Hollister, \textit{To Reduce Litter}, \textit{8 Houston L. Rev.} 687, 688 (1971).  
\textsuperscript{76} Stoner McCray System v. Des Moines, \textit{247 Iowa} 313, 78 N.W.2d 843 (1956).  
\textsuperscript{77} Id. \textit{See also} Cromwell v. Ferrier, \textit{19 N.Y.2d} 263, 225 N.E.2d 749, 279 N.Y.S.2d (1967) (citing Stoner for the proposition that aesthetic enhancement is valid if it is regulated generally to the economic and cultural setting of the regulating community).  
\textsuperscript{78} Bingham and Mulligan, \textit{supra} note 13, at 81.  
per se as a valid exercise of a state's police power when by upholding a zoning ordinance it stated:

[t]here is a growing judicial recognition of the power of a city to impose zoning restrictions which can be justified solely upon the ground that they will tend to prevent or minimize discordant and unsightly surroundings. This change in attitude is a reflection of the refinement of our tastes and the growing appreciation of cultural values in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of general welfare the enhancement of the citizens' cultural life.81

The quoted language of Hartke is significant because the court gave recognition to the concept that unsightliness per se is a valid object of control by the state under general welfare. By analogy, the unsightliness intended to be alleviated by the beverage container legislation seems to fall within the categorical language of Hartke especially since the court gave recognition to the expansion of the police power for aesthetic reasons, i.e., the enhancement of citizens' cultural life. Clearly, such expansion encompasses the beverage container legislation since its purpose is almost identical to the legislation upheld in Hartke, i.e., the alleviation of unsightly surroundings.

It is pertinent to note that beverage container legislation has been upheld under the concept of police power, based on the fact that such legislation reduces the danger to travelers on highways within the state and also minimizes the property damage to residents owning property adjacent to the highways.82 Since such reasoning is non-aesthetic, beverage container legislation could be upheld as constitutional in those states that, as of yet, do not recognize aesthetics per se as a valid exercise of police power.

Although the safety reason used to uphold beverage container legislation is acceptable, in reality, it appears to be tenuous. Based on the growing recognition of more and more courts to uphold aesthetics per se as a valid exercise of police power, beverage container legislation should be upheld based on aesthetics per se since such legislation purports to alleviate litter and solid waste rather than reducing the physical danger to travelers on highways, etc. Such a decision would give recognition to the true purpose of the legislation and would lay the groundwork for further legislation dealing with the environment. With the modern trend of courts accepting aesthetics per se as a valid exercise of police power and since some court decisions have upheld beverage container legislation

81 Id. at 261. See also Leighty, Aesthetics as a Legal Basis for Environmental Control, 17 WAYNE L. REV. 1347, 1380 (1971).
on non-aesthetic grounds, it seems clear that the Oregon and Ohio bills are constitutional under the tenth amendment.

Once it is determined that the object attempting to be achieved by the Oregon and Ohio bills is valid under the tenth amendment, the next question that must be answered is whether or not that object bears a reasonable relationship to the public's health, safety, morals or general welfare. For if it does not, there is a denial of substantial due process under the fourteenth amendment.

The United States Supreme Court in *Nebbia v. New York* established the traditional test for substantive due process when it concluded that any state legislation would not be violative of the fifth and fourteenth amendments’ due process clauses unless it is unreasonable, arbitrary, or capricious and does not have a real and substantial relation to the object sought to be attained. Prior to the enactment of the Oregon Bill, it was estimated that 62 percent of all litter in Oregon was formed by beverage containers. A continual survey was taken to see the impact of the Bill on the reduction of beverage container litter and it was estimated that the amount of beverage containers in litter was reduced by 96 percent. Based on these facts alone, it is obvious that the Bill has a real and substantial relation to the object sought, i.e., a reduction in the litter of beverage containers. Notwithstanding this, the United States Supreme Court in *Williamson v. Lee Optical Co.*, declared that the Court will no longer sit as super-legislators when weighing the due process clause against the state's police power and, therefore, laws will not be struck down which regulate business merely because they are unwise, improvident, or out of harmony with a particular school of thought.

Although it cannot be disputed that the Bill has a major impact on industry, as was shown above, nevertheless, in *Northwestern Laundry v. Des Moines* a statute having a similar impact on industry was upheld. In that case the United States Supreme Court upheld a statute that prohibited the emission of dense smoke in certain portions of the city causing substantial capital expense to certain corporations affected by the statute. Although such a statute can be distinguished from the Bottle Bill in that the former deals with large quantities of smoke that could be substantially damaging to people's health, nevertheless, pertinent to the Bottle Bill is the court's statement that state regulations will not be held to be invalid

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84 Id. at 525. See also Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 449-450 (1951).
86 Id. at 7.
88 Id. at 488. See also Ferguson v. Skrupa, 372 U.S. 726 (1963).
on due process grounds even if it requires “the discontinuance of the use of the property or subjects the occupant to large expense in complying with the terms of the law or ordinance.” Based on this language it seems clear that the Bottle Bill's impact on industry does not destroy its constitutionality. Since the language used in Northwestern Laundry is broad in scope, it could be argued that the language, if taken literally, would mean that no impairment, however great, would invalidate the statute and therefore such language should be qualified or limited to the facts in the case. Such an argument has been encompassed, at least by implication, in Society of Plastics Industry v. City of New York, wherein the Supreme Court of New York County in New York held that a city tax, which taxed only plastic containers in order to promote their recycling, and to reduce the cost of waste disposal, was held to be violative of due process since the tax destroyed an industry to the benefit of its competitors without proof of any legitimate public interest being procured.

Because of the similarity of the statute in the Plastics Industry case to the Bottle Bill, it could be argued that a case in point is present in deciding the case of substantive due process. But the Plastics Industry case can be distinguished on its facts since the court found that it cost no more nor no less to collect plastic containers than to collect paper, metal or glass containers. The court also concluded that the enforcement of the tax would cause a substitution of paper, glass, or metal containers for plastic ones and therefore the cost of waste disposal would increase rather than decrease. These facts are clearly distinguishable from the facts already enumerated concerning the impact and effect the Bottle Bill has on industry and the reduction of litter and solid waste disposal. Therefore it cannot be concluded that Plastics Industry should be precedent for the Bottle Bill legislation, and it would be more consistent to follow the ruling in Northwestern Laundry cited above. This is exactly what an Oregon State Circuit Court ruled when it upheld the Oregon Bottle Bill as not being violative of the due process clause.

Since the Bottle Bill has not been ruled upon by either the Supreme Court of Oregon or the United States Supreme Court, it cannot be stated with any degree of certainty whether or not the Bottle Bill is in violation of the tenth amendment or the Due Process Clause of the fourteenth amendment. However, the present case law seems to suggest that the Bottle Bill is constitutional on both grounds.

90 Id. at 491-492.
92 Id. at 383, 326 N.Y.S.2d at 805.
93 Id. at 378, 326 N.Y.S.2d at 800.
94 Id.
The police power and due process analysis does not end the constitutional dilemma facing the Bottle Bill. To be upheld as constitutional, it must be shown that the Bottle Bill also does not violate equal protection, interstate commerce, or preemption. Until that is established, the Bottle Bill's constitutionality exists on tenuous grounds. Therefore, an analysis of these issues is pertinent.

Briefly, there is already precedent for upholding the Bottle Bill as constitutional under the equal protection clause since the Supreme Court of Vermont, in Anchor Hocking Glass Corp. v. Barber, ruled that a state statute which prohibited the sale of beer and ale in non-returnable glass containers was not a denial of equal protection. The court held that a law is not invalid as violative of equal protection unless the inequality produced is unreasonable and arbitrary. The statute's purpose was to reduce the litter of such containers on the state's highways in order to minimize injury to travelers and the physical danger to real and personal property of adjacent landowners. The court believed that despite other items of litter on state highways, the legislature might have believed that because of their number and size and the likelihood of them being thrown away legislation should be enacted to control their use; and, therefore, the court felt that the discrimination was not invidious. The Oregon and Ohio bills are more encompassing than the Vermont statute and less discriminatory since they include soft drink containers which are equivalent in number and size to beer containers. Therefore, under the language of the Barber case there should not be a denial of equal protection.

The most important constitutional issue that challenges the constitutionality of the Oregon and Ohio bills is whether or not they violate the Commerce Clause. In Southern Pacific Co. v. Arizona the United States Supreme Court defined the boundaries in which the states may exercise their police power when it stated:

When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operations, and the consequent incentive to deal with them nationally is light, such regulation has been generally held to be within state authority.

But...the states have not been deemed to have authority to

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96 Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954). See also Police Department of The City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) which stated that in equal protection cases "[t]he crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."
97 Id. at 211, 105 A.2d at 275.
98 Id. at 213, 105 A.2d at 276.
99 Id. at 214, 105 A.2d at 277.
impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.\textsuperscript{102}

The Court then went on to recognize that most cases will fall between these two extremes, in which case, the actual effect upon interstate commerce must be weighed against the local interests of the state.\textsuperscript{103}

This balancing process was performed by the court in \textit{Dean Milk Co. v. City of Madison}.\textsuperscript{104} In that case a state statute was enacted which regulated the sale of milk by mandating that all milk be pasteurized in bottles at a pasteurizing plant within five miles of the center of the city. The court struck this statute down on the basis that it protected local industry by discriminating against interstate commerce, but the Court went on to qualify the discriminatory standards set out by stating that a discriminatory standard could be upheld if there is no other reasonable method of safeguarding the local interests of the state.\textsuperscript{105} This is an important distinction when weighing state interests against national interests since, in effect, the state's police power is expanded to effectuate a local interest where no other reasonable alternative is available notwithstanding its discriminatory effect on interstate commerce. Therefore, under the guidelines set by \textit{Southern Pacific} and \textit{Dean Milk}, a determination must be made as to whether or not the Oregon and Ohio bills violate the Commerce Clause.

An early Supreme Court case upheld a state statute that regulated standards for certain containers in which horticulture products were marketed.\textsuperscript{106} Out-of-state manufacturers of such containers challenged the statute stating that the statute excludes them from the in-state market since their plants were unequipped to manufacture containers under the standards set by the statute.\textsuperscript{107} However, the Court ruled that the statute did not unduly burden interstate commerce since the statute applied uniformly to all containers regardless of their origin, and the out-of-state manufacturers were not precluded from shipping their containers into the state but were only restricted as to their use of their product while in intrastate commerce.\textsuperscript{108} The statute in the \textit{White} case is similar to the Ohio and Oregon bills in that there is uniform application among all the affected industry whether it be interstate or intrastate as the analysis of the two bills indicates. The \textit{White} case, however, looked to whether

\textsuperscript{102} Id. at 767.
\textsuperscript{103} Id. at 768-769. See Stern, \textit{supra} note 84, at 452.
\textsuperscript{104} Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).
\textsuperscript{105} Id. at 354.
\textsuperscript{106} Pacific States Box \& Basket Co. v. White, 296 U.S. 176 (1935).
\textsuperscript{107} Id. at 183.
\textsuperscript{108} Id. at 184.
or not the state statute affected interstate commerce before it crossed state lines. Since such a test is not viable today because of the pervasiveness given to the Commerce Clause by the Court, to uphold the Ohio and Oregon bills merely on *White* would be tenuous.

A case giving more strength to the constitutionality of the Ohio and Oregon bills under the Commerce Clause is *Huron Portland Cement Co. v. City of Detroit*. In that case, the court upheld a state statute which enforced a smoke ordinance on all vessels, including those in interstate commerce, in order to abate pollution. The court held that even-handed regulations by a state are valid unless they unduly burden interstate commerce and, consequently, determined that there was no such burden. Therefore, under *Huron Cement* a state statute does not violate the Commerce Clause if its regulation is even-handed and not duly burdensome on interstate commerce. As was previously shown, the Ohio and Oregon bills are constitutionally sound in that they apply uniformly to all industry, whether interstate or intrastate. However, what is unduly burdensome on interstate commerce is a nebulous standard relying on the factual situations in each case for its determination.

It must be conceded that the Ohio and Oregon bills will have an impact on industry, especially can manufacturers, as stated above. But recent decisions dealing with state statutes that prohibit the sale of phosphate-based detergents within state borders have held that there is no undue burden on interstate commerce, especially when the only burden alleged is increased cost to interstate businessmen. The increased cost to interstate commerce was weighed against the state's desire to preserve its waters. For instance, recognizing the imminent problem of water pollution and based on the conclusive facts that phosphates add tremendously to entrophication, the court in *Soap and Detergent Association v. Clark* stated that the increased cost to interstate businessmen is a "normal business response to new legislation to preserve and protect the nation's waters." Taking this into consideration, with the growing accumulation of solid waste and the national concern over the problem, it is logically

110 *Id.* at 443-444.
111 *Id.* at 448.
115 See Note, *supra* note 5; see *Hollister, supra* note 4, at 687.
consistent to conclude that the increased cost to interstate manufacturers under the Ohio and Oregon bills is also merely a normal business response to the outcries of a need for a viable control over the solid waste and litter problems.

In all fairness it should be noted that although increased costs to interstate commerce were equally placed on intrastate businessmen, nevertheless, interstate industry is discriminated against in that its transportation costs to reship its returnable bottles will be greater than intrastate industry, therefore placing a higher retail price on their product. It must be remembered that the Ohio and Oregon bills will cause non-returnables to be eliminated from the market; and, therefore, the practical application of the statute itself causes an obvious price discrimination against interstate industry. But notwithstanding that fact, a state's need to control its solid waste problem far outweighs the right for interstate industry to deal freely in interstate commerce. State interest to control litter and solid waste by use of Bottle Bill legislation falls under the exception stated in Dean Milk because the only efficacious method for controlling solid waste is to control production of those items that end up in the solid waste mass. As previously stated, present methods of solid waste control are below adequate standards and are incapable of handling our present solid waste problem. And although the Ohio and Oregon bills do not totally eliminate litter and solid waste, statistics show that such legislation does aid substantially in the curtailment of such problems. Therefore, industries' right to sell their products within a state without the added burden placed upon them by a mandatory deposit system is clearly outweighed by the need to limit litter and solid waste.

In the only court decision to date that has ruled on the Oregon Bill or any other similar bill, the trial court distinguished the instrumentalities of interstate commerce, i.e., trucks, trains, etc., from commerce itself. The court stated that unreasonable burdens on interstate commerce are usually only recognized when a state attempts to regulate the very instrumentalities of interstate commerce or when it attempts to pass legislation which seeks to give intrastate industry an economic advantage. The court concluded that neither element was present and upheld the Bill's constitutionality. However, whether or not these distinctions will be recognized by the Oregon Supreme Court cannot be determined. But despite this fact, it does seem clear that case law is present to uphold the Oregon Bill along with the Ohio Bill under the Commerce Clause.

Purposely, this comment has dealt with the topic of solid waste as

119 Id. at 1591.
being merely a state problem per se, but such is not the case. Due to its complexity and pervasiveness throughout the country, the federal government has enacted legislation recognizing it as a major social problem that is national in scope. For instance, in 1965 Congress enacted the Solid Waste Disposal Act\(^\text{120}\) for the purpose of promoting solid waste management and resource recovery systems on the state level.\(^\text{121}\) Although the Act provided for financial and technical assistance to states concerning their solid waste problems, the Act concluded that, though national in scope, the problems of solid waste disposal "should continue to be primarily the function of the State..."\(^\text{122}\) However, in 1970 the Act was amended by the Resource Recovery Act to further the development and control of the solid waste problem. The question that must be answered, and one that will challenge the constitutionality of statutes that place mandatory deposits on beverage containers, is whether or not the 1970 Act preempts any state regulations in the area of solid waste control.\(^\text{123}\)

In determining the preemption issue, the courts first determine whether or not the federal and state regulations conflict to such a degree as to impair the federal regulation.\(^\text{124}\) If no such conflict exists, the state regulation will be upheld unless the subject matter being regulated is of national interest and demands uniform regulation.\(^\text{125}\) This is substantiated by the language used by the court in *Huron Cement Co. v. Detroit*\(^\text{126}\) wherein the court concluded:

In determining whether state regulation has been preempted by federal action, "the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. In other words, such intent is not to be implied unless the Act of Congress fairly interpreted is in actual conflict with the law of the State."\(^\text{127}\)

To reiterate, the Resource Recovery Act of 1970 attempts to promote solid waste management and to facilitate resource recovery systems to control solid waste. It could be argued that the Ohio and Oregon bills therefore conflict with the federal legislation and are thereby preempted. But the Act defines solid waste as follows: "The term 'solid waste' means garbage, refuse, and other discarded solid materials..."\(^\text{128}\) The words


\(^{121}\) *Id.* at § 3251(b).

\(^{122}\) *Id.* at § 3251(a) (6).

\(^{123}\) See Schmoyer, *supra* note 6, at 312.


\(^{125}\) *Id.*


\(^{127}\) *Id.* at 443.

“other discarded materials” imply that the Act is limited only to products, etc., after they have been discarded. If this is so, the Ohio and Oregon bills could be distinguished in that they attempt only to alleviate the increase in solid waste and do not attempt to control it directly; and, a fortiori, the state and federal regulations do not conflict. However, Section 205(9) (2) of the Resource Recovery Act provides:

(9) The Secretary shall carry out an investigation and study to determine—

(2) changes in current product characteristics and the production and packaging practices which would reduce the amount of solid waste;

The language in that Section appears to encompass the field being regulated by the Oregon Bill and the Ohio Bill if enacted. But it is important to note that Section 205(9) only authorizes the Secretary to carry out an investigation with reports of such investigation being reported to the President. There is no explicit language in the Act authorizing or mandating that legislation be enacted in that area. And in Florida Lime & Avocado Growers, Inc. v. Paul, the court cautioned that:

Federal regulation 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 the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

Under the above language, it is at least plausible to conclude that the federal legislation does not dictate that the states may not regulate in the area of controlling production. At least until Congress decides that it is essential that it enact specific legislation to preempt the field in this area, it is safe to say that state legislation is valid, since it does not conflict with any specific federal legislation now in force. Also, such legislation facilitates rather than burdens the solid waste problem dealt with in the Resource Recovery Act. And although the Resource Recovery Act defines the solid waste problem as national in scope, it nevertheless specifically states that solid waste should be the primary responsibility of the state, implying that the federal regulation be merely supervisory.

129 Id.
131 Id. at 142.
CONCLUSION

It should be realized that environmental problems are technologically, economically, and constitutionally complex, with no panacea readily available to abate them. We must cut through the rhetoric of many industrial and environmental leaders and begin a concerted effort among government, industry and people. This is what the House Bill 869 and the Oregon Bottle Bill represent. This legislation combined with all the other similarly proposed legislation is the first major effort by government to take a hard look at the environmental problems of litter and solid waste and to realize that what must be made is an economic sacrifice to preserve the quality of our environment. Our gross national product will be reduced because such legislation necessarily transforms the non-returnable beverage container industry into a returnable one, thereby causing a reduction in production. But as was stated, controlling litter and solid waste before it is created seems to be the only viable solution that is currently available to abate these problem areas. Industry will suffer; this is an inevitable consequence, but this is the sacrifice that it must make in order to help preserve the already dwindling quality of our environment. Because of the substantial impact that environmental problems have on our lifestyle, industry must begin to recognize its social responsibility in helping preserve our environment, especially since it is a major contributor to the problem. Industry can no longer expect society en masse to carry its burden; it must now make a sacrifice.

Since industry owes a duty to its stockholders to maximize profits, it must be the government who supplies the impetus needed to force industry to respond to our ever-expanding environmental problems. This has been cogently summarized as follows:

The overwhelming need is to arrange an overdue marriage between economics and ecology; to bring the corporate system to realize that the earth is not a vast storehouse of natural wealth to be drawn upon freely for our material well-being but is also our abode, the place we live and bring up our children and seek psychic sustenance.133

The people will also have to make a sacrifice to enhance the quality of our environment. At least as to the beverage container problem, consumers must now shed their laziness if a returnable system is implemented. A consumer conscientiousness can and will be developed, not only as to the beverage containers and the solid waste problem, but also to all other facets of our environment. However, this conscientiousness will have to be molded by government and slowly nurtured. Mass education through advertisements is not the answer, but governmental regulation which offers no better alternative is.

Ohio Bill 869 is one of many steps needed to be taken in order to keep this country beautiful. A concerted effort by government, industry, and the people is more than just an idealistic hypothesis, it is a precept that must be effectuated in order to preserve our environment.

GARY R. MYERS