

THE CONSTITUTIONALITY OF STATE ENVIRONMENTAL LAWS UNDER THE COMMERCE CLAUSE: *CITY OF PHILADELPHIA V. NEW JERSEY*

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I. INTRODUCTION

New Jersey is confronted with a state-wide solid waste disposal problem of major proportions. The state's sanitary landfill sites have a limited useful life expectancy. The foreseeable exhaustion of existing landfill sites has focused the concern of government officials on the need for a comprehensive state solid waste control policy.¹

In 1973, the New Jersey Legislature enacted controversial amendments to the state's Waste Control Act (WCA).² These amendments

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¹ STATE OF NEW JERSEY COUNTY AND MUNICIPAL GOVERNMENT STUDY COMMISSION, *SOLID WASTE: A COORDINATED APPROACH* (1972).

² 1973 N.J. Laws ch. 363 §§ 1-2, *amending* 13 N.J. STAT. ANN. §§ 11-1—8 (West 1973). In *City of Philadelphia v. New Jersey*, 97 S. Ct. 987 (1977), the constitutionality of the 1973 amendments was at issue. Those amendments are as follows:

Legislative findings.

The Legislature finds and determines that since the enactment of P.L. 1973, ch. 39 (C. 13:11—1 *et seq.*) 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 landfill sites are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside of 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.

Bringing solid or liquid waste originating or collected outside State into State; exceptions; regulations; penalty.

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and 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" P.L. 1973, ch. 39.

forbid the importation to New Jersey of any solid or liquid waste until the Commissioner of Environmental Protection determines that such action does not endanger the public health, safety, and welfare.³ Regulations promulgated by the Department of Environmental Protection (DEP) pursuant to the statute prohibit bringing into New Jersey municipal solid waste unless it is "to be separated or processed into usable secondary materials."⁴ The effect of the statute and regulations is to exclude all solid waste originating outside New Jersey from the state's landfill sites.

The Hackensack Meadowlands Development Commission (HMDC) is a governmental agency authorized by the state legislature to provide the northern portion of the state with adequate solid waste facilities.⁵ The projected useful life of the landfill facilities within the Hackensack Meadowlands District is of even shorter duration than the expected life of facilities located throughout the remainder of the state.⁶ Accordingly, the HMDC has also promulgated regulations which prohibit the disposal in the District of any solid waste which originates outside New Jersey.⁷ As a consequence, if the state were to repeal its prohibition on the importation of solid waste, the disposal of waste originating outside New Jersey would still be forbidden at landfill facilities within the District.

The constitutionality of the aforementioned statute and regulations has been challenged in two separate actions. In *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*,⁸ the HMDC and the DEP sought to enjoin the Authority from accepting at its landfill any waste which originated outside New Jersey. The Authority responded by alleging that the

³ 13 N.J. STAT. ANN. § 11-10 (West 1973). If New Jersey is to avoid converting land into sanitary landfills, existing landfills must satisfy the demand for waste disposal facilities until such time as either the baling or resource recovery plants to be constructed are ready to begin operation. Concerned that existing facilities would be unable to meet demand for the necessary length of time, the state has adopted measures designed to reduce the volume of waste arriving in New Jersey.

⁴ N.J.A.C. 7: 1-4.2 (1974).

⁵ Hackensack Meadowlands Reclamation and Development Act, 13 N.J. STAT. ANN. § 17-10 (West 1968).

⁶ Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 68 N.J. 451, 461, 348 A.2d 505, 510 (1975).

⁷ N.J.A.C. 19: 7-1.1 (g) and (h) (1973).

⁸ 127 N.J. Super. 160, 316 A.2d 711 (1974). The Municipal Sanitary Landfill Authority owned landfill operations within the Hackensack Meadowlands District. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 68 N.J. 451, 458 n.3, 348 A.2d 505, 508 n.3 (1974).

WCA and relevant regulations of both the DEP and the HMDC violated the commerce clause of the United States Constitution.⁹ Similarly, in *City of Philadelphia v. State*,¹⁰ Philadelphia, together with several owners of landfills in New Jersey, sought a declaration that the WCA and relevant DEP regulations violated the commerce clause. The trial courts invalidated each of the provisions which restricted the importation of solid waste into New Jersey.¹¹ The State Supreme Court combined the two cases on appeal.¹² In a unanimous decision, that court reversed and held that the challenged statute and regulations were a constitutionally permissible exercise of state power.¹³

The case was appealed to the United States Supreme Court.¹⁴ Before the Court heard oral argument, Congress enacted the Resource Conservation and Recovery Act of 1976.¹⁵ In a five-to-four *per curiam* opinion, the United States Supreme Court vacated the decision of the New Jersey Supreme Court and remanded the case "for reconsideration in the light of the Resource Conservation and Recovery Act of 1976."¹⁶ The Court reasoned that the Resource Conservation and Recovery Act may have preempted the challenged New Jersey statute, and noted that federal preemption of state statutes is primarily a matter of statutory interpretation.¹⁷ Therefore, "the views of the New Jersey Supreme Court on the question whether or to what extent the Resource Conservation and Recovery Act of 1976 pre-empts the New Jersey statute" were necessary.¹⁸

A dissenting opinion by Justice Powell found it "abundantly clear from the text of the statute and from its legislative history that Congress did not intend to pre-empt state laws such as the one at

⁹ U.S. CONST. art. I, § 8, stating in part: "The Congress shall have the power. . . . To regulate Commerce with foreign Nations, and among the several States. . . ."

¹⁰ Unreported 1974 opinion of the New Jersey Superior Court, Law Division.

¹¹ *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 127 N.J. Super. 160, 168-75, 316 A.2d 711, 715-19 (1974).

¹² *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 348 A.2d 505 (1975).

¹³ *Id.*

¹⁴ *City of Philadelphia v. New Jersey*, 97 S. Ct. at 988.

¹⁵ Resource Recovery and Conservation Act, 42 U.S.C.A. §§ 6901 *et seq.* (1976).

¹⁶ 97 S. Ct. at 988.

¹⁷ *Id.* The Court restricted its attention to the preemption of the state statute. Although the Court did not address the preemption of the state regulations, if Congress has in fact preempted control of solid waste disposal, both state regulations and statutes forbidding the importation of waste would be invalid. See text at note 25, *infra*.

¹⁸ 97 S. Ct. at 988.

issue here."¹⁹ The dissenting Justices would have decided the case on its merits.²⁰ The majority, however, disposed of the case without reaching the constitutional issues raised under the commerce clause.²¹

This article will discuss the constitutional issues which are presented by *City of Philadelphia*.²² If the New Jersey Supreme Court should decide that the Resource Conservation and Recovery Act does not preempt the state statute at issue, then the constitutional questions would again be before the United States Supreme Court for consideration. Even if the New Jersey court should decide that the state statute has been preempted, the facts of this case are a good basis for discussing the constitutional analysis which should be used to review state environmental laws under the commerce clause. The article will suggest that commerce clause analysis is currently unsettled in certain areas and will propose a standard which will result in a less searching judicial inquiry. Finally, the facts presented in *City of Philadelphia* will be relied upon to illustrate the proper application of the proposed standard.

II. JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF STATE LAWS UNDER THE COMMERCE CLAUSE

The commerce clause is an affirmative grant to Congress of the plenary power "to regulate commerce with foreign nations and among the states. . . ."²³ Equally important, however, is the fact that the commerce clause also acts as a limitation on state power.²⁴

¹⁹ *Id.* (Powell, J., dissenting).

²⁰ *Id.* at 989.

²¹ *Id.* at 988.

²² The preemption issue will not be analyzed in this article. See generally Hirsch, *Toward a New View of Federal Preemption*, 1972 ILL. L.F. 515; Note, *Preemption as a Preferential Ground: A New Cannon of Construction*, 12 STAN. L. REV. 208 (1959). Other issues presented by *City of Philadelphia* not specifically discussed in this article are whether "solid and liquid waste, or the process of collecting, treating and disposing of same, is a legitimate subject of interstate commerce," and whether "an appellate court, in reversing order granting motion for summary judgment, can constitutionally decide case on its merits without offering moving parties opportunities to be heard, prior to a final determination, on material issues of fact raised by their complaint." 45 U.S.L.W. 3040 (1976). The New Jersey Supreme Court assumed for purposes of its decision "that the service of transporting and disposing solid waste in the factual context here presented is in fact interstate commerce in the constitutional sense. . . ." 68 N.J. at 469-70, 348 A.2d at 514. A similar assumption is made for the purpose of this article.

²³ U.S. CONST. art. I, § 8.

²⁴ *Freeman v. Hewit*, 329 U.S. 249, 252 (1946). See Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762 (1974) [hereinafter cited as *State Environmental Protection*].

If Congress regulates a particular aspect of interstate commerce, any conflicting state regulation must yield to the superior federal enactment.²⁵ Even in the absence of conflict, if there is a congressional design to exclusively regulate a particular aspect of commerce,²⁶ or if that aspect of commerce by its very nature requires that any regulation be national in scope,²⁷ the commerce clause preempts state or local regulations of the subject area.

The more interesting and difficult constitutional problems arise when the state and federal governments possess concurrent power to regulate commerce. If Congress has not precluded state regulation of an area which is amenable to regulation on the state level, concurrent governmental authority exists.²⁸ The states may legislate with reference to legitimate matters of state concern as long as the national interest in free commercial intercourse is not unduly burdened. A state law which unduly burdens interstate commerce must yield to the national interest protected by the commerce clause.²⁹

The judiciary must determine if and when a state statute contravenes the commerce clause. Decisions of this sort require "a delicate adjustment of the conflicting state and federal claims."³⁰ The extent to which the national interest in the free flow of commerce prohibits state enactments affecting interstate commerce has received considerable attention from the United State Supreme Court. An analysis of the Court's decisions reveals the development and application of a review process focusing on three areas of concern. The Court requires: that the purpose advanced by the exercise of state power be legitimate, that the means for obtaining that purpose be reasonable, and that the interest promoted by the state enactment outweigh

²⁵ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-43 (1963); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209-10 (1824). Federal and state regulation will be deemed to conflict if "compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." 373 U.S. at 142-43. *But see Hirsch, Toward a New View of Federal Preemption*, 1972 ILL. L. F. 515, 526-28.

²⁶ "An explicit declaration of congressional design to displace state regulation" preempts any state or local regulation of a particular aspect of commerce. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

²⁷ *Id.* at 143; *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318-19 (1851). In *Wabash, St. Louis and Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886), for example, the Court held that the rates charged by railroads operating in interstate commerce are aspects of commerce which require that any regulation be national in scope.

²⁸ 373 U.S. at 143. See Note, *State Environmental Protection*, *supra* note 24, at 1772.

²⁹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

³⁰ *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 553 (1949) (Black, J., dissenting), cited in majority opinion, *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976).

the national interest in a free interstate commerce.³¹

The first element involves an examination of the state law to ensure that it advances a purpose or objective which is a proper subject of state concern.³² The basis of the analysis was discussed by the Supreme Court in *South Carolina State Highway Department v. Barnwell Brothers, Inc.*³³

[I]t has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states. . . .³⁴

Barnwell rejected a constitutional challenge to a state statute which limited the width and weight of trucks traveling on the state's highways. The challenging party alleged that the statute imposed an unconstitutional burden on interstate commerce. In order to resolve this controversy, the Court first identified the purpose of the challenged statute as the "safety and conservation" of the state's highways.³⁵ The opinion states that "[f]ew subjects of state regulation are so peculiarly of local concern as is the use of state highways."³⁶ Thus, the state legislative power had been directed towards a legitimate purpose, and the first phase of the constitutional review process was satisfied.

The second phase of the review process requires a means analysis. In *Barnwell*, the Court referred to this aspect of the constitutional review as a determination of "whether the means of regulation chosen are reasonably adapted to the end sought."³⁷ The Court inquires whether it is reasonable to believe that a particular enactment will

³¹ See D. ENGBAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE 283-89 (1974); Note, *Use of the Commerce Clause to Invalidate Anti-Phosphate Legislation: Will It Wash? Soap and Detergent Association v. Chicago*, 45 COLO. L. REV. 487 (1974) [hereinafter cited as *Use of the Commerce Clause*].

³² *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190 (1938).

³³ 303 U.S. 177 (1938).

³⁴ *Id.* at 185.

³⁵ *Id.* at 187. In many instances, a statute may have more than one purpose. For example, in *Barnwell*, the safety and conservation of the state's highways was one purpose. An alternate purpose may have been bolstering the domestic trucking industry at the expense of foreign trucking companies. Thus, by identifying safety and highway conservation as the statutory purpose, the Court was actually identifying the primary statutory purpose. See text at notes 61-66, *infra*.

³⁶ 303 U.S. at 187.

³⁷ *Id.* at 190.

actually further the legitimate state purpose. A rational basis test is employed to determine the reasonableness of the means chosen by either the legislature or the executive agency.³⁸ The courts presume the constitutionality of the challenged provision,³⁹ and the challenger must demonstrate that the enactment at issue totally lacks a rational basis.⁴⁰

The state need not adopt the least restrictive means for furthering a legitimate state interest.⁴¹ As explained in *Barnwell*, a court should not

determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected.⁴²

Considerable discretion is accorded the state with reference to the formulation of state policy. Any means which is rationally related to a legitimate state purpose will survive the second phase of the constitutional review process.⁴³

The third phase of the constitutional review process consists of a balancing test.⁴⁴ The Supreme Court has described this element as "a determination of the relative weights of state and national interest"⁴⁵ The state interest promoted by the challenged law

³⁸ *Id.* at 191-92.

³⁹ *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959).

⁴⁰ 303 U.S. at 191-92.

⁴¹ *Id.* at 190-91; *ENGDAHL*, *supra* note 31, at 285-86. In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court invalidated the municipal ordinances at issue for discriminating against interstate commerce while "reasonable, nondiscriminatory alternatives" were available. *Id.* at 354. However, the Court did not say that the city was compelled to select the least restrictive means. In *Dean Milk*, the means chosen by the Legislature satisfied the rational basis means analysis, but was ruled unconstitutional in the balancing of interests test, the third phase of the Court's analysis. The decision reveals that the existence of an alternative and less burdensome means to accomplish the state objective is one factor to be taken into consideration in the application of the balancing test. As the Court stated, "Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them." *Id.* Due to the existence of a reasonable alternative means, the Court resolved its balancing in favor of the challenging party. See text at notes 50-53, *infra*. See also note 88, *infra*.

⁴² 303 U.S. at 190.

⁴³ *Id.*

⁴⁴ *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371-72 (1976); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783 (1945).

⁴⁵ *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 783 (1945). This balancing process is employed to review state laws which discriminate against interstate commerce as well as state laws which apply equally to intrastate and interstate commerce, but which unduly interfere with interstate commerce. Compare *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) with *Bibb v. Navajo Freight Lines*, 359

is weighed against the national interest in the free flow of commerce. If the state interest is greater, the challenged state provision will be sustained as a permissible exercise of state power; if the national interest is greater, the state provision will be struck down as a violation of the commerce clause.

Although the courts conduct a balancing test, they use a scale which does not always start from a position of complete equilibrium. The national interest is significantly strengthened in particular fact situations. For example, a disruption of commerce which results from the lack of uniformity among various states' laws produces a judicial bias in favor of the national interest. This principle is illustrated by *Bibb v. Navajo Freight Lines*.⁴⁶ At issue in *Bibb* was an Illinois statute which required that all trucks be equipped with a specified type of fender mudguard. At least one other state forbade the use of the type of mudguard required by Illinois.⁴⁷ In holding that the Illinois statute placed "an unconstitutional burden on interstate commerce," the Court did not simply balance the interests involved.⁴⁸ Rather, the Court required that the state show a "compelling interest" in order for the statute to be sustained.⁴⁹ Therefore, a lack of uniformity among states' laws which produces a serious obstruction to interstate commerce accords an appreciable advantage to the federal interest in the balancing process.

The existence of an alternative and less burdensome means for furthering the state objective also produces a judicial bias in favor of the national interest.⁵⁰ In *Dean Milk Co. v. Madison*, a city ordinance which prohibited the sale of all milk not pasteurized and bottled within a certain radius of the city was challenged.⁵¹ The Court invalidated the Madison ordinance for placing an impermissible burden on interstate commerce as the ordinance created a trade barrier excluding interstate commerce. The existence of "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests" was responsible for tipping the balance in favor of the federal interest.⁵² Ostensibly, the failure of the state to adopt an

U.S. 520 (1959) and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

⁴⁶ 359 U.S. 520 (1959).

⁴⁷ *Id.* at 523.

⁴⁸ *Id.* at 529.

⁴⁹ *Id.* at 529-30.

⁵⁰ *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

⁵¹ *Id.*

⁵² *Id.* at 354. A state or local enactment which discriminates against interstate commerce is not necessarily prohibited by the commerce clause. In *Dean Milk*, the Court inquired

adequate and less obstructive means for achieving a legitimate state purpose will significantly favor the national interest in the balancing process.⁵³

In summary, the constitutionality of state laws under the commerce clause depends upon three areas of concern. The court first assesses the legitimacy of the state's purpose. Second, the court examines the means chosen by the political authorities to determine whether that means reasonably furthers the legitimate state interest. Finally, the court balances the state's interest against the national interest in an unobstructed interstate commerce. Within the context of particular fact situations, however, the balancing process may involve a judicial bias in favor of the national interest.

III. APPLICATION OF THE STANDARD TO THE NEW JERSEY STATUTE

A. *The Legitimacy of the State Purpose*

As long as the state regulation of solid waste disposal has not been preempted by the federal government, the statute at issue in *City of Philadelphia* must be examined in accordance with the three areas of judicial concern. The first inquiry concerns the legitimacy of the state purpose.

The United States Supreme Court has established that states may enact laws for the purpose of protecting or promoting the health, safety, welfare, or morals of its citizens.⁵⁴ The exercise of state authority for these purposes is sometimes referred to as the states' police powers.⁵⁵ The question raised in *City of Philadelphia* is whether protection of the environment is within the state's police power.

The Supreme Court addressed the legitimacy of environmental

"whether the discrimination inherent in the Madison ordinance can be justified in view of the character of local interests and the available methods of protecting them." *Id.* Only after balancing the respective national and local interests did the Court conclude that the Madison city ordinance was unconstitutional. The balancing test revealed that the ordinance was "not essential for the protection of local health interests" and therefore did not justify "placing a discriminatory burden on interstate commerce." *Id.* at 356.

⁵³ Although it is appropriate to inquire as to the existence of alternative and less burdensome means as part of the balancing test, it is inappropriate to require a state to adopt the least restrictive means for furthering its purpose. *See* note 88, *infra*.

⁵⁴ *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 766 (1945); *Lochner v. New York*, 198 U.S. 45, 53 (1904) (discredited on other grounds).

⁵⁵ *Lochner v. New York*, 198 U.S. 45, 53 (1904) (discredited on other grounds). *See also* *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

protection as a state purpose in *Huron Portland Cement Co. v. Detroit*.⁵⁶ A city ordinance regulating smokestack emissions was challenged as a violation of the commerce clause. The Court noted the close nexus between the purpose of environmental protection and the traditional police power objectives of health and welfare. The majority found that "[T]he sole aim of the Detroit ordinance [was] the elimination of air pollution to protect the health and enhance the cleanliness of the local community."⁵⁷ The Court therefore concluded that city or state environmental regulation aimed at improving the quality of the air "clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."⁵⁸

Perhaps a more convincing declaration of the propriety of state efforts to protect the environment was announced in a case not involving the commerce clause. In *Georgia v. Tennessee Copper Co.*⁵⁹ the state of Georgia sought injunctive relief against a foreign industry which was polluting the air blowing into Georgia. Discussing the propriety of Georgia's concern for the protection of its environment, the Court stated that:

the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.⁶⁰

Thus, protection of the environment presents a legitimate state purpose.

A state may not discriminate against interstate commerce for the purpose of bolstering local industry. The Court has consistently struck down protective measures designed to burden interstate competition to the advantage of local business interests.⁶¹ Even if the statute challenged in *City of Philadelphia* promotes the protection of the environment as one purpose, a second purpose may be the insulation of domestic industry from foreign competition. The enactment may have both a legitimate and an illegitimate purpose.

⁵⁶ *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960).

⁵⁷ *Id.* at 445.

⁵⁸ *Id.* at 442.

⁵⁹ 206 U.S. 230 (1907).

⁶⁰ *Id.* at 237.

⁶¹ See *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The effect these dual purposes would have on the constitutionality of the challenged provisions must be examined.

Resolution of this issue is facilitated by a discussion of the Court's decision in *Buck v. Kuykendall*.⁶² The plaintiff desired to operate a common carrier for hire from Portland, Oregon to Seattle, Washington. The defendant argued that he acted pursuant to a state statute which authorized him to exclude "unnecessary competing carriers" from the highways to promote "the safety and convenience of the public"⁶³ The plaintiff, on the other hand, contended that the statute impermissibly prohibited competition in interstate commerce to the benefit of those carriers already operating within the state. Thus, the defendant argued that the statute advanced the legitimate purpose of safety, while the plaintiff argued that the statute instead advanced the impermissible purpose of restricting interstate commerce to the advantage of domestic economic interests.

The Court found that the statute's "primary purpose [was] not regulation with a view to safety or to conservation of the highways, but the prohibition of competition."⁶⁴ Anti-competitive restriction of interstate commerce constitutes an illegitimate state purpose. The statute was therefore ruled repugnant to the commerce clause.⁶⁵

Buck v. Kuykendall demonstrates that while a given statute may arguably promote more than one legislative purpose, the identification of the primary purpose is essential in constitutional adjudication under the commerce clause.⁶⁶ Therefore, in *City of Philadelphia*, a determination of the primary purpose of the challenged statute is necessary.

The New Jersey Supreme Court found the primary purpose to be the protection of the environment.⁶⁷ The evidence supports that

⁶² *Buck v. Kuykendall*, 267 U.S. 307 (1925).

⁶³ *Id.* at 314-15.

⁶⁴ *Id.*

⁶⁵ *Id.* at 316.

⁶⁶ Compare *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949), with *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939). Both cases involved state regulation which burdened the interstate shipment of milk. The Court determined that the primary purpose of the statute at issue in *Milk Control Bd.* was "to reach a domestic situation in the interest of the welfare of the producers and consumers of milk in Pennsylvania." 306 U.S. at 352-53. Therefore, the statute was found constitutional. In *H.P. Hood & Sons* the Court determined that the primary purpose of the New York law was "the promotion of the state's own economic advantages by curtailment of interstate commerce . . ." and the law was held to be unconstitutional. 336 U.S. at 532.

⁶⁷ *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 68 N. J. 451, 464-65, 348 A.2d 505, 511-12 (1975).

conclusion. Restricting the importation of solid waste reduces the volume of waste buried at New Jersey's sanitary landfill sites. The reduced volume of waste produces a corresponding increase in the expected life of existing landfill facilities.⁶⁸ New Jersey contends that the prolongation of the life of existing landfills would, at least temporarily, eliminate the need for developing additional landfill sites thereby conserving presently undeveloped land.⁶⁹

Arguably the real purpose of the challenged restriction on the importation of solid waste may be the promotion of local business interests at the expense of foreign businesses. However, in the fact situation presented, the New Jersey statute does not advance that impermissible purpose. Local business interests would not benefit from the exclusion of waste. To the contrary, private landfill owners in New Jersey, such as the petitioner Municipal Sanitary Landfill Authority, and domestic disposal companies which haul waste to New Jersey landfill sites from surrounding states, would suffer reduced business.

Considering all the relevant facts, the New Jersey Supreme Court correctly concluded that the primary purpose of the challenged statute is the protection of the environment. As environmental protection is a legitimate state purpose, the state enactment at issue satisfies the first phase of the constitutional review process.

B. Analysis of the Means

The second area of judicial concern is whether the means chosen by the state is rationally related to a legitimate state purpose.⁷⁰ Unless the challenging party demonstrates that the means totally lacks a rational basis, the means analysis will not defeat the law's constitutionality.⁷¹

The New Jersey Supreme Court concluded that the restriction on the importation of solid waste constituted a reasonable means of furthering the legitimate state purpose of environmental protection. The court determined that it was not irrational for the state to find that the disputed statute would help to preserve currently

⁶⁸ *Id.* at 461, 348 A.2d at 510.

⁶⁹ *Id.* at 465, 348 A.2d at 512.

⁷⁰ *South Carolina State Highway Dep't v. Barnwell Bros.*, 330 U.S. 177, 190 (1938).

⁷¹ *Id.* at 191-92. The means test does not present a serious obstacle to a finding of constitutionality. This phase of the analysis merely ensures that a state law bears some logical relation to the purpose which the legislature has intended.

undeveloped land.⁷² Accordingly, the state supreme court reversed⁷³ the decision of the superior court which had held the challenged enactment unconstitutional for employing a means which impermissibly discriminated against interstate commerce.⁷⁴

In arriving at its decision, the superior court apparently applied a balancing test under the guise of a means analysis. The court weighed the burden which the importation restrictions placed on interstate commerce and found it to be excessive.⁷⁵ The means employed by the state was therefore ruled constitutionally impermissible.⁷⁶ The court improperly considered the burden placed on commerce as part of its means analysis. The only issue to be considered in the second phase of the review process is whether the state has chosen a means rationally related to the legitimate state purpose.⁷⁷ Any consequential burden placed on commerce is irrelevant to the resolution of this issue. The disruption of commerce constitutes an element of the balancing test which comprises the third area for judicial concern.⁷⁸ Thus, the decision of the superior court that the means selected by the state is constitutionally impermissible was erroneous.

The New Jersey Supreme Court correctly concluded that the restrictions on the importation of waste originating outside New Jersey bore a rational relation to the legitimate state purpose of environmental protection. Therefore, the challenged statute survived the second phase of the constitutional review.

C. *The Balancing of Interests*

The third and final area for judicial concern consists of a balancing test.⁷⁹ If the state has adopted a reasonable means for furthering a legitimate interest, the interest promoted by the statute and the

⁷² 68 N.J. at 475, 348 A.2d at 517.

⁷³ *Id.* at 478, 348 A.2d at 519.

⁷⁴ Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 127 N.J. Super. 160, 175, 316 A.2d 711, 719 (1974).

⁷⁵ In the view of the superior court, any state law which has a greater effect on interstate commerce than on intrastate commerce would place an impermissible burden on interstate commerce. Therefore, the court concluded that the state law at issue was unconstitutional. See *id.* at 174-75, 316 A.2d at 718-19.

⁷⁶ 127 N.J. Super. at 174-75, 316 A.2d at 718-19.

⁷⁷ See ENGDAHL, note 31 *supra*, at 285-86.

⁷⁸ *Use of the Commerce Clause*, note 31 *supra*, at 490-91; ENGDAHL, note 31 *supra*, at 286-88.

⁷⁹ *Id.*

federal interest in a free interstate commerce are balanced against one another.⁸⁰ The courts must identify the more important interest in a particular case.⁸¹ If the courts identify the national interest as the more important interest, the statute unconstitutionally infringes on Congress' authority to regulate commerce.

In *City of Philadelphia*, the legitimate state interest is the protection of the environment, or, more specifically, the preservation of undeveloped land.⁸² In order to determine the constitutionality of the challenged statute, the courts must balance the state interest in preserving undeveloped land against the national interest in a free interstate commerce. As stated previously, however, the scales do not always start from a position of complete equilibrium.

The United States Supreme Court has cited the need for uniformity among states' laws as an important consideration which tends to tip the balance in favor of the national interest.⁸³ At least in cases concerning the states' promotion of environmental interests, however, the mere potential of conflicting state legislation will not strengthen the national interest. In *Huron Portland Cement Co. v. Detroit*, the Court determined that challengers must demonstrate the actual existence of conflicting legislation in order to strengthen the national interest in the balancing process.⁸⁴

Demonstrating the actual existence of other states' laws which conflict with those of New Jersey would help tip the balance in favor of the national interest.⁸⁵ For example, in *Bibb v. Navajo Freight*

⁸⁰ *Id.*

⁸¹ *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976).

⁸² 68 N.J. at 464-65, 348 A.2d at 511-12.

⁸³ See *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

⁸⁴ 362 U.S. 440, 448 (1960).

⁸⁵ Although an analysis concerned with the uniformity of states' laws, such as that conducted by the United States Supreme Court in *Bibb* is similar to the analysis used in determining questions of preemption, there is an important difference. A preemption analysis asks whether a state statute conflicts with existing federal law or policy, or whether the subject matter is one amenable to regulation solely on the national level. See text at notes 23-29, *supra*. The analysis associated with the uniformity question, on the other hand, asks whether a state statute conflicts with the laws of other states so as to impermissibly burden interstate commerce.

This distinction is apparent in *Bibb*. The Court found that Illinois was not preempted from enacting highway safety regulations. To the contrary, the Court "recognized the peculiarly local nature of this subject of safety, and . . . upheld state statutes applicable alike to interstate and intrastate commerce. . . ." 359 U.S. at 523. Although there was no preemption problem, the Illinois statute conflicted with the laws of other states so as to impermissibly burden interstate commerce. Applying the balancing test, the Court concluded that "the heavy burden which the Illinois mudguard law places on the interstate movement of trucks and trailers seems to us to pass the permissible limits even for safety regulations." *Id.* at 530.

Lines, the disruption of commerce resulted from contradictory regulations among the states.⁸⁶ A truck could not possibly have been equipped to satisfy the conflicting laws of both Illinois and Arkansas.⁸⁷ Clearly in *City of Philadelphia* no actual conflict with other states' laws exists. Although hypothetical state statutes requiring that all waste must be exported to New Jersey would create a conflict, the absurdity of such laws is readily apparent.

Another factor which favors the federal interest in the balancing process is the availability of reasonable and less burdensome alternatives for promoting the state interest.⁸⁸ If the challenging party in *City of Philadelphia* proves the existence of a reasonable and less burdensome alternative means for furthering the state's purpose in preserving undeveloped land, the federal interest in the free flow of commerce would be strengthened. The question becomes what criteria should be used to judge whether a proposed means in fact constitutes a reasonable alternative. The case law suggests that the proposed alternative should provide the same benefits as the challenged means, should not significantly increase the burden on the state, and should significantly lessen the burden on interstate commerce.⁸⁹ The challenger in *Hackensack Meadowlands* failed to establish the existence of a reasonable and less burdensome alternative means. Consequently, the New Jersey Supreme Court concluded that the chosen method was "apparently the best available."⁹⁰

Having failed to identify the presence of either of the factors which strongly favor the national interest, reviewing state legislation under the commerce clause involves a simple balancing of the

⁸⁶ 359 U.S. 520 (1959).

⁸⁷ *Id.* at 527.

⁸⁸ *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 372-73 (1976); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354-56 (1951).

Although it is inappropriate for a court to examine alternative means as part of the means analysis, *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 190-91 (1938), the existence of reasonable alternatives is relevant to the balancing test by assisting in the determination of whether the burden placed on interstate commerce "can be justified in view of the character of the local interests and the available methods of protecting them." *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). The Court has stated that a state may not: "plainly discriminate against interstate commerce . . . even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable, nondiscriminatory alternatives adequate to conserve legitimate local interests, are available." *Id.*

⁸⁹ *Id.*

⁹⁰ 68 N.J. at 475, 348 A.2d at 517.

respective state and federal interests.⁹¹ Application of the balancing test raises serious problems, however. Implicit in the concept of balancing is the determination that one interest is greater, or more important, than another. To decide questions of relative value or importance, the courts must engage in a quantitative analysis. If the courts are to conduct any sort of meaningful comparison, the interests being compared must be amenable to some common scale of measurement. Once the value of the respective interests are measured on some common scale, the courts can make a quantitative judgment that one interest is of greater value than another.

An example of the proper application of the balancing test is found in *Pike v. Bruce Church, Inc.*⁹² In order to protect the reputation of its farmers, Arizona law required that all cantaloupes grown in the state be packed in accordance with certain standards. The state interest furthered by the statute was the commercial interest of the farmers. The national concern was the commercial interest in a free interstate commerce. Since both the state and national interests were commercial, they were amenable to a common scale of measurement, namely, dollars. The Court therefore had a basis for comparing the relative value of the respective interests. The result of the balancing test was the conclusion that the national interest represented by the party challenging the statute outweighed the legitimate state interest.⁹³ Accordingly, the state statute was ruled unconstitutional as a violation of the commerce clause.

Problems arise, however, when the state's interest cannot be measured in terms of dollars. For example, a challenger alleges that a state statute which furthers the safety of citizens unconstitutionally burdens interstate commerce. In order to determine the constitutionality of the statute, a court must balance the state's interest in safety against the national interest in a free interstate commerce. The state's interest in safety cannot be measured in terms of dollars, nor may the national interest in a free interstate commerce be measured in terms of safety. Consequently, the courts lack any sort of standard by which to conduct a quantitative analysis. The balancing test, in such instances, becomes random picking and choosing between very different concerns.

⁹¹ See *Use of the Commerce Clause*, note 31 *supra*, at 490-91; ENGBAHL, note 31 *supra*, at 286-88.

⁹² 397 U.S. 137 (1970).

⁹³ *Id.* at 145-46.

IV. A NEW STANDARD PROPOSED

The Supreme Court recognized the difficulties created by the balancing of commercial and noncommercial interests in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific Railroad*.⁹⁴ A state statute purporting the legitimate state interest in safety established a minimum number of employees which could be employed on a train crew. A group of railroads alleged that the statute was an impermissible state interference with interstate commerce. The Court upheld the statute, and, in the process, refused to apply a balancing test as an element of the standard of review.⁹⁵ The majority recognized its inability to conduct any sort of meaningful quantitative analysis with interests as different as safety and commerce. The opinion was critical of the district court for attempting to balance "financial losses . . . against the loss of lives and limbs of workers and people using the highways."⁹⁶ The Supreme Court concluded that choosing between a noncommercial interest such as safety and the national interest in commerce was essentially a matter of "public policy" to be resolved "by the people acting through their elected representatives."⁹⁷ Thus, the *Brotherhood* opinion lends support to the contention that the approach to reviewing state laws under the commerce clause should be altered to take into account the difficulties which are created by the balancing of commercial and noncommercial interests.

The premise that the *Brotherhood* reasoning should be applied to review the constitutionality of state environmental laws has received some judicial support. *American Can Co. v. Oregon Liquor Control Commission*⁹⁸ involved a state court challenge to an Oregon statute which required that carbonated beverages and beer be sold in returnable bottles. In rejecting the allegation that the statute violated the commerce clause, the court refused to apply a balancing test. The Oregon court concluded that *Brotherhood* established "the inappropriateness of a weighing process in cases of non-comparable benefit and injury. . . ."⁹⁹ In reference to the subjective nature of balancing interests such as environmental protection and

⁹⁴ 393 U.S. 129 (1968).

⁹⁵ *Id.* at 143-44.

⁹⁶ *Id.* at 140.

⁹⁷ *Id.* at 138.

⁹⁸ 15 Or. App. 618, 517 P.2d 691 (1973), *appeal denied*, 15 Or. App. 618, 517 P.2d 691 (1974).

⁹⁹ 15 Or. App. at 630-31, 517 P.2d at 697.

commerce, the court observed that the "process becomes political and is constitutionally assigned to the legislative branch as the determiner of policy."¹⁰⁰ Limiting the scope of its review to a purpose and a means analysis, the court concluded that the statute was a constitutionally valid exercise of state power.¹⁰¹

*Soap and Detergent Association v. Clark*¹⁰² presents another example of the application of the *Brotherhood* reasoning to review the constitutionality of an environmental law. The county ordinance at issue in *Clark* forbade the sale or use of phosphate detergents and established certain labeling requirements. The Association alleged that the ordinance placed an unreasonable burden on interstate commerce. Relying on *Brotherhood*, the federal district court stated that "the judicial power cannot be invoked to invalidate the judgment of the County's citizens speaking through their elected representatives as to the price society should pay to promote health and safety in their community."¹⁰³ Consequently, the county ordinance was found constitutionally permissible.¹⁰⁴

The reasoning employed by the courts in *American Can Co. v. Oregon*¹⁰⁵ and *Soap and Detergent Association v. Clark*¹⁰⁶ suggests the proper approach to reviewing the constitutionality of state environmental legislation under the commerce clause. The state interest in environmental protection and the national interest in commerce are not amenable to a common scale of measurement. Consequently, the courts lack any meaningful standards by which to conduct a quantitative analysis. The balancing test is reduced to a subjective value judgment.

¹⁰⁰ *Id.* at 631, 517 P.2d at 698.

¹⁰¹ *Id.* at 644, 517 P.2d at 703.

¹⁰² 330 F. Supp. 1218 (S.D. Fla. 1971).

¹⁰³ *Id.* at 1222.

¹⁰⁴ *Id.* at 1223. The district court did not completely dispense with a balancing test. Rather, it stated that the *Brotherhood* standard required that "the scales be strongly tipped in favor of the legislative pronouncement." *Id.* at 1222. Theoretically, the court may be allowing for a demonstration on the part of the challenging party of a compelling interest as justification for upholding a legislative pronouncement. However, the Supreme Court has not applied a compelling interest test to a party alleging the unconstitutionality of a legislative pronouncement. As a practical matter, there does not appear to be any meaningful difference between the standard of review discussed in *Soap and Detergent Association v. Clark*, 330 F. Supp. 1218 (S.D. Fla. 1971), and that discussed in the text. *But see* *Proctor & Gamble Co. v. Chicago*, 509 F.2d 69 (1975), *cert. denied*, 421 U.S. 978 (1975).

¹⁰⁵ 15 Or. App. 618, 517 P.2d 691 (1973), *appeal denied*, 15 Or. App. 618, 517 P.2d 691 (1974).

¹⁰⁶ 330 F. Supp. 1218 (S.D. Fla. 1971).

This analysis does not require that the courts abdicate their role of adjudicating the constitutionality of state laws under the commerce clause. However, the constitutional review should be altered to reflect the uniqueness of the judicial role in commerce clause cases reviewing certain state laws. While the balancing test, subject to its shortcomings, may be a necessary component of constitutional adjudication in some areas of the law, it is not necessary to the resolution of all state commerce clause cases. Congress, not the judiciary, is the final authority for determining the appropriate scope of state regulation.¹⁰⁷ Moreover, the Congress is better equipped than the courts to balance two interests not amenable to a common scale of measurement.¹⁰⁸ Unlike the judiciary, Congress does not have to narrow its deliberations to a particular fact situation. Rather, Congress may consider all the relevant facts and then issue whatever policy judgment appears most reasonable.¹⁰⁹ Thus, it is inappropriate and unnecessary for the courts to embark upon a standardless balancing of very different interests.

Courts should continue to inquire whether a state has chosen a legitimate state purpose and a reasonable means for furthering that purpose. Also, if the state interest is commercial in nature, the courts should continue to apply a balancing test. Similarly, if the state interest is not commercial in nature, and either the disruption of commerce results from a lack of uniformity among the laws of various states, or there exists a reasonable and less burdensome alternative means, the courts should continue to apply a balancing test and ordinarily find in favor of the strengthened federal interest. However, if the state interest is not commercial and the factors which favor the federal interest in the balancing process are not present, the balancing test becomes unnecessary. Foregoing the balancing test would permit the courts to decide the constitutionality of state laws without having to make subjective policy judgments. If, as a policy matter, Congress should believe that a state law sustained by the courts imposed an excessive burden on interstate commerce, Congress would retain the final authority to preempt the offensive state provision.¹¹⁰

¹⁰⁷ See *Use of the Commerce Clause*, note 31 *supra*, at 493.

¹⁰⁸ In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court stated that "the lack of judicially discoverable and manageable standards for resolving . . ." a dispute is one indication that the dispute may best be resolved by the political branches of government.

¹⁰⁹ *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939).

¹¹⁰ See *Use of the Commerce Clause*, note 31 *supra*, at 493.

The subjective nature of balancing interests such as environmental protection and commerce is evident in *Hackensack Meadowlands*. The New Jersey Supreme Court balanced the respective interests and concluded that the state interest was the greater of the two.¹¹¹ On the other hand, the superior court, confronted with precisely the same fact situation, conducted a balancing test under the guise of a means analysis and concluded that the national interest was the greater.¹¹²

In light of the United States Supreme Court's decision in *Brotherhood*, the better approach to reviewing the constitutionality of the state statute at issue in *City of Philadelphia* and state environmental laws in general would be to dispense with the balancing test altogether. By applying the *Brotherhood* reasoning, the subjective policy judgments rendered by the New Jersey courts could be avoided. Therefore, without applying the balancing test, the state law should be sustained as a constitutionally permissible exercise of state power.

V. CONCLUSION

If the New Jersey Supreme Court rules that the Waste Control Act¹¹³ has not been preempted by the Resource Recovery and Conservation Act,¹¹⁴ the constitutional issues presented by *City of Philadelphia* may again be before the United States Supreme Court. *City of Philadelphia* would present the Court with the opportunity to state explicitly that the *Brotherhood* reasoning is to be applied in reviewing the constitutionality of state environmental laws under the commerce clause. A holding to this effect by the Court could have a significant influence on the future of state environmental regulation. The subjective balancing test permits the courts to exercise a judicial veto of any environmental regulation which affects commerce. Uncertainty pervades the constitutional adjudication. Consequently, states are unable to determine the scope of their own authority to enact environmental laws. The *Brotherhood* reasoning substitutes principled analysis for subjective

¹¹¹ *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 348 A.2d 505 (1975).

¹¹² *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 127 N.J. Super. 160, 316 A.2d 711 (1974).

¹¹³ See note 1, *supra*.

¹¹⁴ Resource Recovery and Conservation Act, 42 U.S.C.A. § 6901 *et seq.* (1976).

determinations. Free from unwarranted and unpredictable judicial interference, the states would have greater latitude in formulating policies designed to preserve and protect a state's legitimate interest in its environment. Accordingly, adoption of the *Brotherhood* analysis for reviewing the constitutionality of state environmental laws may prove to be a catalyst for increased state activity directed towards the protection of the environment.