

MONROE-LIVINGSTON SANITARY LANDFILL, INC.
v. TOWN OF CALEDONIA: STATE LANDFILL
REGULATION AND THE COMMERCE
CLAUSE

In recent years, the problem of waste disposal has reached national proportions.¹ In response to this growing problem, states, exercising their police power,² enacted legislation to lengthen the lifespan of landfill sites by restricting their use.³ Challenges under the com-

1. See Note, *The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision*, 11 RUT.-CAM. L.J. 31-34 (1979) [hereinafter cited as Note, *New Jersey's Options*]; Note, *Problems Associated with the Management of Solid Wastes: Is there a Solution in the Offing?*, 83 W. VA. L. REV. 131 (1980) [hereinafter cited as Note, *Waste Problems*]. The federal government has intervened with the Solid Waste Act. See 42 U.S.C. §§ 6901-6987 (1981).

2. The police power is an incident of state sovereignty. See *infra* note 75. Under the police power, the states legislate to protect the health, safety, and welfare of their citizens. See Note, *Waste Embargo Held a Violation of the Commerce Clause*, City of Philadelphia v. New Jersey, 11 CONN. L. REV. 292, 297-98 (1979) [hereinafter cited as Note, *Waste Embargo*]. For a discussion of the interrelationship of police power and the commerce clause, see Note, *Garbage, The Police Power, and the Commerce Clause*: City of Philadelphia v. New Jersey, 8 CAP. U.L. REV. 613 (1979) [hereinafter cited as Note, *Garbage and the Police Power*].

3. In 1978, ten states had legislation that banned out-of-state waste. See Comment, *State Embargo of Solid Waste: Impermissible Isolation or Rational Solution to a Pressing Problem?*, 82 DICK. L. REV. 325, 346-48 (1978) [hereinafter cited as Comment, *State Embargo*]. Today, only five of those state statutes remain. DEL. CODE ANN. tit. 16, § 1701 (Supp. 1980) (allows interstate refuse if permit is obtained); ILL. ANN. STAT. ch. 111 1/2, § 1021 (Smith-Hurd 1981) (allows interstate refuse if it is deposited at a site meeting statutory requirements); ME. REV. STAT. ANN. tit. 17, § 2253 (Supp. 1980) (allows interstate refuse if it is used as a raw material in production or if the refuse originates from property adjacent to Maine's state border); N.H. REV. STAT. ANN. § 147:30-f to :30-g (Supp. 1979) (allows interstate refuse if it is used as a raw material in production or if the out-of-state city producing the refuse is a member of the regional refuse disposal district or has an agreement with a state city to share facilities); N.J. STAT. ANN. § 13:11-10 (West Supp. 1981) (denies entry of interstate refuse until state's environmental commissioner promulgates the necessary regulations).

The other five statutes were repealed. Solid waste management acts have been enacted in their places. LA. REV. STAT. ANN. § 30:1124 (West Supp. 1981); MASS. GEN. LAWS ANN. ch. 21C, § 5 (West 1981); PA. STAT. ANN. tit. 35, § 6018 (Purdon

merce clause,⁴ brought by outsiders desiring access to restricted state landfills, questioned the validity of these state statutes.⁵ Under standard commerce clause analysis, the United States Supreme Court has subjected statutes that facially discriminate against interstate commerce to a balancing test,⁶ invalidating the statute if its discriminatory impact and the existence of adequate nondiscriminatory alternatives outweigh the resulting local benefits.⁷ In *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*,⁸ however, the New York Court of Appeals held that an ordinance facially prohibiting disposal within the town of any refuse generated elsewhere did not violate the commerce clause.⁹

1981); R.I. GEN. LAWS. § 23-19.1-7 to .1-9 (Supp. 1980); VT. STAT. ANN. tit. 10, § 6604 (Supp. 1981). The Pennsylvania statute is a prime example of these new acts. It authorizes the state's Department of Environmental Resources to administer a solid waste management plan. This plan includes the issuance of the required permits to persons desiring to deposit refuse or operate sanitary landfills in the state. PA. STAT. ANN. tit. 35, § 6018 (Purdon 1981).

In addition to state regulation, the national scope of the waste disposal problem has led to federal legislation. See Note, *Waste Problems*, *supra* note 1, at 138-40 (discussion on the federal Solid Waste Disposal Act). See 42 U.S.C. §§ 6901-6987 (1981).

4. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have power to regulate Commerce among the several states, and with the Indian tribes." *Id.* The commerce clause affords constitutional protection only to articles of interstate commerce. The issue is whether valueless refuse constitutes an article of commerce. Some refuse carries a value based on its potential for recycling or use as fuel. This renewable refuse is clearly a legitimate article of commerce. Non-renewable refuse has value imputed to it from the valuable service of its collection and disposal. Non-renewable refuse, therefore, is also a legitimate article of commerce. See *Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth.*, 68 N.J. 451, 468-69, 348 A.2d 505, 513-14 (1975); Comment, *State Embargo*, *supra* note 3, at 333-36.

5. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); Note, *Waste Embargo*, *supra* note 2.

6. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). In *Hughes*, the Court invalidated a state statute for its discrimination against the interstate commerce of natural minnows. The statute, "on its face," forbade the transportation of natural minnows out of the state for commercial purposes. Furthermore, the statute, in its "effect," prevented natural minnows from entering the interstate market. *Id.* at 336. See also Maltz, *The Burger Court, The Commerce Clause, and the Problem of Differential Treatment*, 54 IND. L.J. 165 (1979) (discussion of facial and direct discrimination).

7. *Hughes v. Oklahoma*, 441 U.S. at 336.

8. 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980). The issue in *Monroe* was whether a facially discriminatory ordinance that did not directly discriminate against interstate commerce was valid. *Id.* at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968.

9. *Id.* at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 969.

Monroe-Livingston Sanitary Landfill (Monroe) was the only privately owned and operated landfill in the Town of Caledonia.¹⁰ The landfill had derived all of its business from communities within the state and intended to continue doing so.¹¹ While Monroe was negotiating a contract to handle a nearby county's refuse, Caledonia enacted a sanitary landfill ordinance.¹² The ordinance prohibited the disposal of any refuse generated outside of Caledonia in the town landfill.¹³ Monroe unsuccessfully challenged the constitutionality of the ordinance.¹⁴ On appeal, the Appellate Division held that the ordinance facially restricted interstate movement of refuse.¹⁵ Nevertheless, the ordinance withstood constitutional scrutiny because its burden upon interstate commerce was negligible.¹⁶ Furthermore, the ordinance advanced the city's legitimate interest in protecting the health of its residents.¹⁷ The Court of Appeals of New York affirmed the Appellate Division's decision, finding that the ordinance did not burden interstate commerce.¹⁸ The court reasoned that since Monroe

10. *Id.*

11. *Id.* at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968. A sample of Monroe's customers included towns in Monroe, Livingston, and Genesee Counties, the City of Rochester, and businesses such as Rochester Gas and Electric Corporation. Brief for Appellant at 68.

12. 51 N.Y.2d at 682, 417 N.E.2d at 79, 435 N.Y.S.2d at 967. The Caledonia ordinance states that: "Refuse generated outside of the Town of Caledonia, New York, will not be accepted at facilities licensed by the Town of Caledonia unless authorized by the Town Board and consistent with the regional comprehensive plan as it relates to solid waste management." Caledonia, N.Y., Sanitary Landfill Ordinance § 7, subdiv. C (1976). A business could, however, apply for a special license authorizing the acceptance of out-of-town refuse. *Id.*

13. Caledonia, N.Y., Sanitary Landfill Ordinance § 7, subdiv. C (1976).

14. 51 N.Y.2d at 683, 417 N.E.2d at 79-80, 435 N.Y.S.2d at 967.

15. *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 72 A.D.2d 957, 958, 422 N.Y.S.2d 249, 251 (1979).

16. *Id.* at 958, 422 N.Y.S.2d at 251.

17. *Id.*

18. *Monroe-Livingston Sanitary Landfill, Inc.*, 51 N.Y.2d at 684-85, 417 N.E.2d at 80-81, 435 N.Y.S.2d at 968-69. The trial court also discussed whether the town ordinance was preempted by the state statute dealing with solid waste disposal. *Id.* at 683, 417 N.E.2d at 80, 435 N.Y.S.2d at 967-68. It held that the town ordinance was not preempted because the state statute did not evidence any intent to preempt. *Id.* at 683-84, 417 N.E.2d at 80, 435 N.Y.S.2d at 967-68. *See also* Note, *Waste Embargo*, *supra* note 2, at 308 & n.79 (refers to cases and materials that discuss the Supreme Court's recent reluctance to apply the doctrine of preemption to state statutes). The court failed to state whether the federal Solid Waste Disposal Act preempted the town ordinance. *See supra* note 3.

never refused out-of-state refuse, no evidence of discrimination existed.¹⁹ The court further denied the argument that intrastate out-of-town businesses, depositing refuse at sites outside of Caledonia, but still within the state, would indirectly displace interstate refuse.²⁰

The Supreme Court promulgated the current majority test for discerning the effect of state legislation upon interstate commerce in *Hunt v. Washington State Apple Advertising Commission*.²¹ In *Hunt*, a North Carolina statute required either the use of the applicable USDA grade or no grade at all on closed apple crates shipped for sale within the state.²² The statute, on its face, exhibited no discrimination against interstate commerce.²³ The Court found, however, that the statute effected discrimination in its operation.²⁴ The Court used a balancing test, which shifted to the statute's proponent the burden of demonstrating local benefits and the unavailability of adequate nondiscriminatory alternatives.²⁵

19. *Monroe-Livingston Sanitary Landfill, Inc.*, 51 N.Y.2d at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968.

20. *Id.* at 684-85, 417 N.E.2d at 80-81, 435 N.Y.S.2d at 968. Monroe argued that these intrastate businesses would dump elsewhere in New York, using landfill space otherwise available to interstate business. *Id.* The court overlooked a related argument—that intrastate out-of-town businesses engaged in interstate commerce would also be displaced. See *supra* note 10.

21. 432 U.S. 333 (1977).

22. *Id.* at 335.

23. *Id.* at 352. "Discrimination" against interstate commerce is commonly defined as state regulation that substantially affects interstate commerce with no similar effects on intrastate commerce. Note, *Solving New Jersey's Solid Waste Problem Constitutionally—or—Filling the Great Silences with Garbage*, 32 RUTGERS L. REV. 741, 746 n.33 (1979) [hereinafter cited as Note, *New Jersey's Problem*]. The text of the statute, "on its face," gave no indication of discrimination. See *supra* note 22 and accompanying text.

24. 432 U.S. at 350-52. Washington apple growers marketed their product under their state's grading system, a more rigid system than the USDA applies. The North Carolina requirement increased the Washington growers' business expenses and cut the competitive advantage attributable to their popular apples. The statute did not affect similar North Carolina growers. *Id.* at 336-37, 351. Thus, the statute caused direct discrimination against interstate commerce. *Id.*

25. *Id.* at 353. "When discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id.*

The *Hunt* balancing test must be reviewed in light of an earlier test presented in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be up-

The "per se" rule, a novel shortcut used to avoid the *Hunt* test,

held unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 142. A "burden on interstate commerce" is defined as excessive state regulation that affects intrastate and interstate commerce indiscriminately. Note, *New Jersey's Problem*, *supra* note 23. The *Pike* test, unlike the *Hunt* test, cannot be used to review a discriminatory statute.

The development of the *Pike* test began in *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945). In *Southern Pacific*, the Supreme Court held that the safety effect of a state law prohibiting the operation of trains with over 14 passengers or 70 cars was so "slight or problematical as not to outweigh the burden on interstate commerce." *Id.* at 775. See also G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 285-86 (10th ed. 1980); Comment, *Use of the Commerce Clause to Invalidate Anti-Phosphate Legislation: Will It Wash?*, 45 U. COLO. L. REV. 487, 492, 493 n.50 (1974) [hereinafter cited as Comment, *Will It Wash?*]. The Supreme Court again utilized a balancing approach in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). In *Bibb*, the utilization of the *Southern Pacific* test invalidated a state safety statute requiring trucks and trailers on the state's highways to use special mudflaps. *Id.* at 522, 530.

In *Pike*, the balancing test achieved its present form. The *Pike* Court invalidated a state statute requiring all locally grown cantaloupes to be crated before shipment. 397 U.S. at 145-46.

The *Pike* test survived an attack in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978). In *Raymond Motor*, the Court held that, regardless of precedent prior to *Southern Pacific* and *Bibb*, the state statute prohibiting double-trailers over 55 feet long posed a substantial burden on interstate commerce. *Id.* at 442-48. For further analysis of the development of the *Pike* test, see Maltz, *The Burger Court, The Regulation of Interstate Transportation, and the Concept of Local Concern: The Jurisprudence of Categories*, 46 TENN. L. REV. 406 (1979); Comment, *State Embargo*, *supra* note 3, at 336-45. But see *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (a state may exercise the right to favor its own citizens by requiring out-of-state residents to present stricter proof of original state title of junk automobiles delivered for destruction).

Some commentators have urged that the *Pike* balancing test be abandoned or altered. D. ENGBAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE 290-94 (1974). For further discussion of the *Pike* test, see Comment, *Will It Wash?*, *supra*, at 489-94. The rationale for this dissatisfaction lies in its balancing of the burdens upon commerce against the effectiveness of the means for reaching the legitimate end. *Id.* at 290. Improper balancing may lead to usurpation of the state legislative role in policymaking. *Id.* See, e.g., *Brotherhood of Locomotive Fireman & Engineman v. Chicago, R.I. & P.R.R.*, 393 U.S. 129, 136 (1968) (reversed district court, which had engaged in the prohibited "legislative" role of determining that "full-crew" laws did not substantially affect safety in train operations). See generally Comment, *Will It Wash?*, *supra*, at 489-94.

The precursors to the *Hunt* test deviated from the *Pike* rationale in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935). In *Baldwin*, the Supreme Court, hinting at a balancing test, held that the "relation between [a state statute prohibiting the sale of

arose in *City of Philadelphia v. New Jersey*.²⁶ In *Philadelphia*, the New Jersey Waste Control Act prohibited any person from bringing refuse into the state if it originated elsewhere.²⁷ Private landfill owners in New Jersey, and their municipal patrons in other states, challenged the constitutionality of the state statute on commerce clause

interstate milk and the objective of protecting public health] was too remote and indirect to justify the obstructions to interstate commerce." *Id.* at 524. A preliminary balancing test arose in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). In *Dean Milk*, the Supreme Court held that a city ordinance, prohibiting the sale of milk bottled more than five miles from the center of the city, discriminated against interstate commerce. *Id.* at 350, 356. Under the *Dean Milk* analysis, a discriminatory effect of an ordinance could be justified in terms of the local interests and the available methods to effectuate them. *Id.* at 354. See *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (invalidated a state statute denying the sale of milk by out-of-state producers whose own states failed to sign reciprocity agreements).

In *Hunt*, the Court matured the test of *Dean Milk*. There, the proponents failed to justify the statute's direct discrimination, due to the artless disclosure of an illegitimate motive and the existence of available alternatives. 432 U.S. at 352-54.

26. 437 U.S. 617 (1978).

27. *Id.* at 618-19. The New Jersey Waste Control Act, enacted the 1973, read as follows:

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 [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State. Any person violating this provision shall be subject to the penalty and enforcement provisions of the "Waste Control Act."

N.J. STAT. ANN. § 13:7-10 (West Supp. 1981). The statute was repealed in 1981. 1981 N.J. Laws, ch. 78, § 1. Regulations, promulgated by the commissioner, became effective February 1, 1974.

a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

1. Garbage to be fed to swine in the State of New Jersey;
2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste;
3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that no less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and
4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department of such treatment, processing or recovery, other than by disposal on or in the lands of this State.

N.J. ADMIN. CODE tit. 7, § 1-4.2 (Supp. 1977).

grounds.²⁸ To fulfill the *Hunt* requirements, the state presented evidence of health-related objectives.²⁹ These objectives, however, merely hid efforts to isolate the state landfill resources from out-of-state residents.³⁰ To forge an alternative to the *Hunt* test, the Court stated that economic protectionism³¹ can exist either in a statute's means or in its objectives.³² Finding economic protectionism in the attempted means,³³ the *Philadelphia* Court held that the statute was

28. 437 U.S. at 619. The New Jersey operators had waste disposal agreements with the out-of-state cities. The statute immediately affected the operators' businesses and the cities' waste removal service. In response, they sued the State of New Jersey and its Department of Environmental Protection. *Id.*

29. *Id.* at 625-26. The determination of legitimacy regressed into a "yelling contest" with the plaintiff shouting "economic end" and the defendant screaming "health." *Id.*

30. *See id.* at 626.

31. Economic protectionism results when a state uses its police powers to isolate its residents from adverse competition with other states' residents. *See, e.g.,* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 537-39 (1949); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1938). Under the Articles of Confederation, economic exclusionary actions led to counteractions threatening fragmentation of the nation. *See* THE FEDERALIST 26-30 (J. Hamilton ed. 1869). The constitutional authors sought to reduce this destructive effect of economic protectionism on the flow of interstate commerce. *See, e.g.,* H.P. Hood & Sons, Inc., 336 U.S. at 533-35; Baldwin, 294 U.S. at 521-23. *But see* Note, *Garbage and the Police Power*, *supra* note 2, at 623-28 (the commerce clause does not guarantee that one state may use another as a landfill, because such action would be counterproductive and met with retaliatory dumping).

32. 437 U.S. at 626. *See* Dean Milk Co. v. Madison, 340 U.S. at 354 (discriminatory means prohibited the sale of non-local milk in order to regulate the sanitary standard of milk sold).

The *Philadelphia* Court cited a line of cases challenging protectionism statutes whose legitimate goals failed to deter the Court's finding of discriminatory means. 437 U.S. at 427. *See, e.g.,* Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) (a discriminatory statute sought to maintain an adequate supply of milk by creating price floors against undercutting interstate competition); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (a discriminatory statute sought to increase the quantity of industrial jobs in the state by preventing the shipment out of state of unshelled shrimp for packaging). These cases demonstrate that an economic motive may be as legitimate as a police power motive, so long as it is not effectuated by discriminatory means. 437 U.S. at 626-27. *But see* Note, *Garbage and the Police Power*, *supra* note 2, at 623-25 (criticizes the *Philadelphia* Court's failure to consider the alleged legitimate local interest).

33. 437 U.S. at 627. The only reason for using this discriminatory means rested in preserving the state landfills for residential use only. *Id.* at 626-27, 629. Nonresident refuse does not constitute a greater health hazard than resident refuse. *Id.* at 629. If the problem lies in the increasing volume of refuse deposited in New Jersey's limited landfill space, then a more direct and nondiscriminatory approach would be to limit

invalid per se under the commerce clause.³⁴

*Dutchess Sanitation Service, Inc. v. Town of Plattekill*³⁵ presented a

the quantity of refuse that could be deposited by everyone, regardless of residential status. *Id.* at 626-27.

34. See 437 U.S. at 624, 627-28. The *Hunt* test requires balancing when prima facie discrimination is found. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 353. The Supreme Court, however, in applying a per se rule of invalidity, sidesteps this part of the analysis. See *City of Philadelphia v. New Jersey*, 437 U.S. at 624. See also *infra* note 68 and accompanying text (discussion of the *Monroe* Court's failure to apply correctly the *Hunt* test). The Supreme Court has frequently heard commerce clause challenges against economic protectionism statutes. These cases have consistently tipped toward invalidity, virtually forming a per se rule of invalidity. See *City of Philadelphia*, 437 U.S. at 624. See also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (declared a state statute that requires the packaging of cantaloupe in the state before interstate shipment to be virtually invalid per se); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (invalidated a state statute that avowedly denied construction of an additional milk plant by an interstate business because the plant would create destructive competition in an adequately served local market); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (invalidated a state statute prohibiting, in effect, the sale of interstate milk at less than intrastate prices); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (invalidated a state statute preventing the packing of unshelled shrimp out of the state because of the local demand for shell products).

The Court has not promulgated this rule indiscriminately. The rule only applies when statutes effectuate simple economic protectionism. *City of Philadelphia v. New Jersey*, 437 U.S. at 624. "Simple economic protectionism" exists when legitimate state interests do not support the statute or there is patent discrimination against interstate commerce. *Id.* When the statute does not effectuate "simple economic protectionism," the *Hunt* balancing test is used. See *Hunt*, 432 U.S. at 353.

Some commentators criticize the use of the "artificial" per se rule of invalidity. They present alternative reasons for holding the statutes invalid. *Dister & Schlesinger, State Waste Embargoes Violate the Commerce Clause: City of Philadelphia v. New Jersey*, 8 *ECOLOGY* L.Q. 371, 377-83, 389, 391 (1979). Other commentators consider the absence of the balancing step to be an anomaly in commerce clause analysis. Note, *Garbage and the Police Power*, *supra* note 2, at 626-27, 629.

35. 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980). In the interim between *Philadelphia* and *Dutchess*, the Court rearticulated the *Pike* and *Hunt* tests in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

[W]e must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The burden to show discrimination rests on the party challenging the validity of the statute, but "[w]hen discrimination against commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."

Id. at 336 (invalidated a state statute prohibiting the transportation of natural min-

similar commerce clause analysis problem. Here, however, the New York court avoided the Supreme Court rule of invalidity per se.³⁶ In *Dutchess*, a town ordinance³⁷ prohibited everyone except town residents and business owners from depositing refuse that originated outside the town.³⁸ The plaintiff was a town landfill business, dealing in interstate refuse with out-of-state customers.³⁹ The court, noting that purely local activities may substantially affect interstate commerce,⁴⁰ applied the "ripple effect" test, focusing upon the "imposi-

nous out of the state for commercial purposes). *Hughes* required that a statute, discriminating against interstate commerce solely on its face, must withstand the scrutiny of the *Hunt* test. *Id.* at 337. See *Dister & Schlesinger*, *supra* note 34, at 384, 390.

36. See 51 N.Y.2d at 677, 417 N.E.2d at 78, 435 N.Y.S.2d at 965-66 (used the *Hunt* balancing test). Apparently, the court did not find "simple economic protectionism" in *Dutchess*. Because legitimate local interests support the ordinance, there is no patent discrimination against interstate commerce. 51 N.Y.2d at 677, 417 N.E.2d at 78, 435 N.Y.S.2d at 966. See *supra* note 33. The factual situations in *Philadelphia* and *Dutchess* are too similar, however, to support such opposing views of the per se rule. Another reason for the court to use the balancing test might have been the fear of being overruled by the Supreme Court. "Simple economic protectionism" is more apparent in a state statute than in a town ordinance. Upon review, therefore, the Court could have found a misapplication of that standard. A more likely reason is that the *Dutchess* Court wanted to form a precedent in which stark economic protectionism was not required for a holding of invalidity. Instead, the *Dutchess* Court wanted to ensure that future refuse disposal ordinances, exhibiting no "simple economic protectionism" would not be presumed valid, but would be subjected to scrutiny under the balancing test. 51 N.Y.2d at 677, 417 N.E.2d at 78, 435 N.Y.S.2d at 966. *Cf. infra* note 46.

37. See 51 N.Y.2d at 676 n.2, 417 N.E.2d at 77 n.2, 435 N.Y.S.2d at 965 n.2.

38. *Id.* at 672, 417 N.E.2d at 75, 435 N.Y.S.2d at 963. The ordinance "forbids anyone other than those who reside or conduct an established business in the town from depositing within its boundaries any 'garbage, rubbish or other articles originating elsewhere than in the Town.'" *Id.* The plaintiff could deposit its own trash in the town, but it could not allow its customers to do likewise. *Id.*

39. *Id.* at 672-73, 417 N.E.2d at 75-76, 435 N.Y.S.2d at 963.

40. 51 N.Y.2d at 675-76, 417 N.E.2d at 77, 435 N.Y.S.2d at 964-65. See also *Fry v. United States*, 421 U.S. 542, 547 (1975) (wage increases of employees of entirely intrastate operations substantially affected interstate commerce); *United States v. Women's Sportswear Mfrs. Ass'n*, 335 U.S. 460, 464 (1949) (a local trade association's practice of fixing prices for services performed entirely intrastate substantially affected interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 125-27 (1942) (wheat, home-grown for consumption on the farm, substantially affected interstate commerce). In *Woman's Sportswear*, Justice Jackson clarified the issue, indicating that the "source . . . or . . . the application of the restraint may be intrastate . . . but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." 353 U.S. at 464. *Cf. United States v. Rock*

tion of cumulative burdens."⁴¹ Under this test, the court considers the extent to which the ordinance at issue, and hypothetically similar ordinances, would affect interstate commerce.⁴² Here, the court found that but for the purely local ordinance, or a similar ordinance elsewhere, landfill operators such as Dutchess could receive waste from out-of-state as well as out-of-town.⁴³ Applying the *Hunt* balancing test, the New York court found that the ordinance substantially affected interstate commerce, and that adequate nondiscriminatory means were available to meet the legitimate end.⁴⁴ The court therefore held the ordinance invalid as discriminatory against interstate commerce.⁴⁵ Furthermore, a minority of the judges viewed the ordi-

Royal Coop., Inc., 307 U.S. 533, 569 (1939) (intrastate activities do not escape commerce clause analysis merely because they are intrastate).

41. See, e.g., *Monroe-Livingston Sanitary Landfill, Inc.*, 51 N.Y.2d at 684-87, 417 N.E.2d at 80-82, 435 N.Y.S.2d at 968-70; *Dutchess Sanitation Serv., Inc.*, 51 N.Y.2d at 675-76, 417 N.E.2d at 77, 435 N.Y.S.2d at 964-65 (dicta); *Fry v. United States*, 421 U.S. 542, 547 (1975); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

42. See, e.g., *Monroe-Livingston Sanitary Landfill, Inc.*, 51 N.Y.2d at 684-87, 417 N.E.2d at 80-82, 435 N.Y.S.2d at 968-70 (majority and dissenting opinions); *Dutchess Sanitation Serv., Inc.*, 51 N.Y.2d at 675-76, 417 N.E.2d at 77, 435 N.Y.S.2d at 964-65 (dicta); *Fry v. United States*, 421 U.S. 542, 547-48 (1975) (the cumulative burden of wage increases for entirely local employees would force the wages of interstate employees to rise and impair federal efforts to stabilize wages); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (where the cumulative burden of homegrown wheat would have a detrimental effect on federal efforts to stabilize the price and supply of wheat); Brief for Appellant, *supra* note 11, at 65-69. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 236-37 (1978).

The test does not require that similar activity actually exist in other municipalities. The courts consider only "the cumulative burden that would result if similar regulations were adopted elsewhere." *Dutchess Sanitation Serv., Inc.*, 51 N.Y.2d at 676, 417 N.E.2d at 77, 435 N.Y.S.2d at 965. See *Monroe-Livingston Sanitary Landfill, Inc.*, 51 N.Y.2d at 686-87, 417 N.E.2d at 82, 435 N.Y.S.2d at 969-70; *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). In *Wickard*, the excess homegrown wheat of only one farmer was at issue. The trivial effect of this wheat on interstate commerce was sufficient to produce a "ripple effect," thus activating the commerce clause. *Id. Contra*, Brief for Respondent at 59-60, (burdens of similar town ordinances would be mere speculation).

43. 51 N.Y.2d at 676, 417 N.E.2d at 77, 435 N.Y.S.2d at 965.

44. 51 N.Y.2d at 677, 417 N.E.2d at 78, 435 N.Y.S.2d at 965-66. The court, without debate, accepted health as the only legitimate goal. The court found that this goal would be achieved more efficiently by the alternatives—inspection and evenhanded regulation of refuse disposal. No reason exists focusing the discriminatory ordinance except isolating, by economic means, the town residents from out-of-town demand for the use of their landfills. *Id.*

45. *Id.*

nance as facially discriminatory.⁴⁶

Although *Monroe* presented a factual situation virtually identical to *Philadelphia* and *Dutchess*, the *Monroe* court held contrary to those cases.⁴⁷ Although the ordinance in *Monroe* excluded all refuse generated outside of Caledonia,⁴⁸ the majority denied that the ordinance was intended to exclude interstate refuse.⁴⁹

Under the *Philadelphia* and the *Dutchess* minority view, the *Monroe* majority⁵⁰ erred in not finding that the ordinance facially discriminated against interstate commerce. In *Philadelphia*, the Supreme Court held a similar statute, prohibiting all waste originating or collected outside the state, to be facially discriminatory.⁵¹ Additionally, in *Dutchess*, a minority found the ordinance, prohibiting deposits by anyone other than town residents and business operators, to be facially discriminatory.⁵² Likewise, the *Monroe* ordinance prohibited out-of-town refuse, a category that includes refuse originating out-of-state.⁵³ Therefore, the ordinance effectively prevented

46. 51 N.Y.2d at 678 n.3, 417 N.E.2d at 78 n.3, 435 N.Y.S.2d at 966 n.3. The three judges were Fuchsberg, Jones, and Meyer. *Id.* Judge Fuchsberg authored the unanimous opinion in *Dutchess*. 51 N.Y.2d at 672, 417 N.E.2d at 75, 435 N.Y.S.2d at 963. In *Monroe*, however, the court split. Judges Cooke, Jasen, and Gabrielli concurred with Judge Wachtler in his majority opinion validating the ordinance, and Judge Jones and Meyer joined with Judge Fuchsberg in his dissenting opinion. 51 N.Y.2d at 690-91, 417 N.E.2d at 84, 435 N.Y.S.2d at 972.

47. 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980).

48. *Id.* at 682-83, 417 N.E.2d at 79, 435 N.Y.S.2d at 967.

49. *Id.* at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968. The facts suggest that the ordinance was merely the town's response to prevent entry of refuse from a nearby county. *Id.* at 688, 417 N.E.2d at 82, 435 N.Y.S.2d at 970 (Fuchsberg, J., dissenting); Brief for Appellant, *supra* note 11, at 73-74.

50. The *Monroe* dissent viewed the ordinance as facially discriminatory. 51 N.Y.2d at 685, 691, 417 N.E.2d at 81, 84, 435 N.Y.S.2d at 969, 972 (Fuchsberg, J., dissenting). See *infra* note 60 and accompanying text.

51. 437 U.S. at 618, 627-28.

52. 51 N.Y.2d at 678 n.3, 417 N.E.2d at 78 n.3, 435 N.Y.S.2d at 966 n.3. See *supra* note 46.

53. 51 N.Y.2d at 685, 417 N.E.2d at 81, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 72 A.D.2d 957, 958, 422 N.Y.S.2d 249, 251 (1979) (the lower court admitted that the ordinance "theoretically" restricts interstate commerce). Cf. *Dutchess Sanitation Serv., Inc.*, 51 N.Y.2d at 678 n.3, 417 N.E.2d at 78 n.3, 435 N.Y.S.2d at 966 n.3 (three of the seven judges held an ordinance virtually identical to that in *Monroe* to be facially discriminatory).

Monroe from contracting with out-of-state firms.⁵⁴ It also denied use of the town's landfill to outlying businesses that affect or engage in interstate commerce.⁵⁵ The *Monroe* majority erred, therefore, in failing to consider this facial discrimination.

The *Monroe* majority also erred by not finding that the ordinance, as applied, discriminated against interstate commerce. The *Monroe* majority determined that the plaintiff did not actually engage in interstate commerce.⁵⁶ It based this assertion upon the plaintiff's admission that it had never contracted for out-of-state refuse and that it did not anticipate such business.⁵⁷ The majority, using only this admission, distinguished *Philadelphia* and *Dutchess*,⁵⁸ because both prior cases contained evidence of ongoing interstate business.⁵⁹ Thus, in *Philadelphia* and in *Dutchess*, discrimination was actual and apparent.⁶⁰

The *Monroe* majority astutely noted that no out-of-state carting firms⁶¹ were denied access to Caledonia's landfills by the ordinance.⁶² The court dismissed, however, the indirect effect caused by the refusal of access to intrastate businesses.⁶³ These companies either en-

54. See 51 N.Y.2d at 686, 417 N.E.2d at 82, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).

55. *Id.*

56. 51 N.Y.2d at 684, 685, 417 N.E.2d at 80, 81, 435 N.Y.S.2d at 968, 969.

57. *Id.* at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968.

58. *Id.* at 684, 685, 417 N.E.2d at 80, 81, 435 N.Y.S.2d at 968, 969.

59. *Id.* at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968. The majority looked for ongoing interstate activity at the time the ordinance was enacted. *Id.* The time of enactment cannot be the sole time used for determining whether actual interstate activity is occurring. See *supra* notes 54-55 and accompanying text. If an out-of-state business offer were made to plaintiff, only the resulting actual discrimination would cause the ordinance to become fallible. See 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980).

The other distinguishing factor is that a state statute was involved in *Philadelphia*, while a town ordinance was involved in *Monroe*. This difference is minimal, however, because *Dutchess* also involved a town ordinance. See *supra* note 38.

60. 51 N.Y.2d at 677, 417 N.E.2d at 78, 80, 435 N.Y.S.2d at 966, 968.

61. "Carting firms" are businesses that transport refuse. RANDOM HOUSE COLLEGE DICTIONARY 207 (rev. 1975).

62. 51 N.Y.2d at 684-85, 417 N.E.2d at 80-81, 435 N.Y.S.2d at 968-69.

63. *Id.* at 684-85, 417 N.E.2d at 80-81, 435 N.Y.S.2d at 968-69. The majority says that few such ordinances enacted in the development of a community would be valid under such a view. *Id.* The example given is a zoning ordinance that lowers the number of houses constructed in a certain sector of the community. The dissent suggests that this example does not support the majority's argument. The fewer number

gaged in interstate commerce or competed with interstate businesses for other landfill space.⁶⁴ By rejecting any claim of indirect effect, the court ignored compelling precedents, which established that purely local activities may substantially deter interstate commerce by a "ripple effect."⁶⁵ Undoubtedly, the denial of access to these intrastate businesses, and other similarly situated businesses, would have a substantial effect on interstate commerce.⁶⁶

Because it failed to find that the ordinance facially and directly discriminated against interstate commerce, the *Monroe* majority never reached the final step in the analysis—the *Hunt* balancing test.⁶⁷ When an ordinance discriminates against interstate commerce,⁶⁸ its proponents must show, under *Hunt*, the unavailability of adequate nondiscriminatory alternatives and that the local benefits

of houses constructed would lessen the amount of building materials moving through interstate commerce to the community. The lessening of the demand, however, would be equal across the board and would not discriminate against interstate commerce. *Id.* at 685-86 & n.1, 417 N.E.2d at 81 & n.1, 435 N.Y.S.2d at 968-69 & n.1 (Fuchsberg, J., dissenting).

The *Monroe* court distinguished the dicta in *Dutchess*. See *infra* note 40. Apparently, judging from the numerous references in his dissent in *Monroe* to his dicta in *Dutchess*, Judge Fuchsberg prepared the opinion in *Dutchess* to support his dissent in *Monroe*. See 41 N.Y.2d at 685-91, 417 N.E.2d at 81-84, 435 N.Y.S.2d at 969-72 (Fuchsberg, J., dissenting); *Dutchess Sanitation Service, Inc.*, 51 N.Y.2d at 673-78, 417 N.E.2d at 76-78, 435 N.Y.S.2d at 963-66.

64. 51 N.Y.2d at 686, 417 N.E.2d at 81-82, 435 N.Y.S.2d at 969. See *supra* note 10.

65. See *supra* notes 40-42 and accompanying text.

66. See *Monroe-Livingston Sanitary Landfill, Inc.*, 51 N.Y.2d at 686-87, 417 N.E.2d at 81-82, 435 N.Y.S.2d at 969-70 (Fuchsberg, J., dissenting).

67. See *supra* note 25.

68. Neither the *Dutchess* nor *Monroe* courts dealt with an issue raised by the *Dutchess* lower court—whether the commerce clause prohibited a local town ordinance that evenhandedly burdened both intrastate out-of-town businesses and out-of-state businesses to the advantage of the town. *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 73 A.D.2d 300, 302, 426 N.Y.S.2d 176, 178 (1980). See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Justice Rehnquist addressed this issue in his dissent in *Hughes*. In *Hughes*, the state statute prohibited the transportation of natural minnows out of the state for commercial purposes. Justice Rehnquist found that the statute did not discriminate against interstate commerce. He held that it was an evenhanded ban on all persons, residents or not, with only incidental burdens on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. at 344-46 (Rehnquist, J., dissenting). See Note, *Hughes v. Oklahoma and Baldwin v. Fish and Game Commission: The Commerce Clause and State Control of Natural Resources*, 66 VA. L. REV. 1145, 1151-52 (1980) (short discussion of Rehnquist's dissent). *Contra*, *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951). The *Dean* Court invalidated an ordinance prohibiting the city sale of milk bottled more than five miles from the center of the city. The

outweigh the discrimination.⁶⁹ In *Monroe*, adequate nondiscriminatory alternatives existed, such as limitation on the amount, type, or state of refuse accepted.⁷⁰ Moreover, evidence did not support the alleged local benefit—the preservation of the water supply from contamination.⁷¹ Thus, the majority erred in not finding the ordinance discriminatory either facially or as applied.

The *Monroe* decision may allow ordinances to discriminate against interstate commerce, so long as they do not do so directly. Fortunately, this state court decision should only have a limited effect on the future of waste disposal legislation in light of the Supreme Court's decision in *Philadelphia*.⁷² Should *Monroe*, or a similar case,⁷³ come before the Supreme Court,⁷⁴ however, it might be up-

Court considered it immaterial that the statute burdened intrastate commerce outside the five-mile radius as well as interstate commerce).

69. *Monroe-Livingston Sanitary Landfill Inc.*, 51 N.Y.2d at 688, 417 N.E.2d at 83, 435 N.Y.S.2d at 977 (Fuchsberg, J., dissenting); *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979).

70. See, e.g., *Dutchess Sanitation Serv. Inc.*, 51 N.Y.2d at 677, 417 N.E.2d at 78, 435 N.Y.S.2d at 965-66. In addition, the town could have authorized its officials or the State Department of Environmental Protection to administer the ordinance and to inspect the refuse of depositors for compliance with the ordinance. *Id.* See *supra* note 2.

The majority did not consider either of these alternatives. *Monroe-Livingston Sanitary Landfill Inc.*, 51 N.Y.2d at 689, 417 N.E.2d at 83, 435 N.Y.S.2d at 971 (Fuchsberg, J., dissenting). The balancing element of the *Hughes* test only applies when discrimination is found. *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979). The majority failed to find discrimination. See *Monroe-Livingston Sanitary Landfill Inc.*, 51 N.Y.2d at 684-85, 417 N.E.2d at 80-81, 435 N.Y.S.2d at 968-69.

71. *Monroe-Livingston Sanitary Landfill Inc.*, 51 N.Y.2d at 689-90, 417 N.E.2d at 83-84, 435 N.Y.S.2d at 971-72 (Fuchsberg, J., dissenting). Note that after the finding of discrimination, the burden swings to the defendant town to prove the efficacy of the ordinance. See *Hughes v. Oklahoma*, 441 U.S. 332, 336 (1979). The two authors of the reports and documents showing danger to the water supply were impeached by their lack of expertise and absence of actual in-the-field observation. Additionally, no evidence was presented that showed the finding of pollution in any area well. *Monroe-Livingston Sanitary Landfill Inc.*, 51 N.Y.2d at 689, 417 N.E.2d at 83, 435 N.Y.S.2d at 971 (Fuchsberg, J., dissenting).

72. See *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). State court decisions are not binding on federal courts or sister states. In addition, *Monroe* may be distinguished because of its uncommon factual situation and lack of direct discrimination. See *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980).

73. See *supra* note 3. In addition to the five state statutes, innumerable ordinances, like the Caledonia ordinance, exist. In order for municipalities to judge the validity of the various legislation, a final decision on the *Monroe* holding is needed.

74. *Monroe* has not been appealed to the Supreme Court of the United States.

held in order to promote state sovereignty.⁷⁵ Furthermore, the Supreme Court that heard *Philadelphia* has changed due to retirement. Should the opportunity occur, the present Court ought to limit *Monroe* to its factual setting, ensuring under *Philadelphia* and *Hunt* that future waste disposal legislation does not discriminate against interstate commerce.

Kathryn J. Wysack

Instead, plaintiff filed an application with the Town of Caledonia (*see supra* note 13) for a license to accept refuse from out of town. Caledonia denied the license, and plaintiff filed for a review of the denial pursuant to Article 78 of the New York Civil Practice and Rules. Letter from Robert G. Harvey, counsel for Monroe, to Kathryn J. Wysack (Sept. 4, 1981) (discussing status of *Monroe*). If the plaintiff had appealed to the Supreme Court, it would have risked dismissal for lack of injury. No actual discrimination against interstate commerce had been found by the lower courts. In following the procedural remedies of the ordinance and of New York law, however, Monroe has established injury. It has been denied a license to accept refuse from out of town. Monroe may appeal directly to the Supreme Court, or it may proceed through the federal courts.

75. Note, *Waste Embargo, supra* note 2, at 309. "State sovereignty" denotes the powers reserved by the states in the tenth amendment. Within it, states may perform essential governmental functions. Note, *New Jersey's Problem, supra* note 23 at 759-62. State sovereignty may provide the doctrine under which *Monroe* or a similar case is upheld by the Supreme Court. Note, *Waste Embargo, supra* note 2, at 309.

Other exceptions to the reach of the commerce clause are the ownership exception and the proprietary exclusion. For a discussion of these exceptions and cases suggesting how a town waste disposal ordinance might bypass commerce clause analysis, see Note, *New Jersey's Problem, supra* note 23, at 748-58; 13 GA. L. REV. 1086 (1979). See also D. ENGDahl, *supra* note 25.

