North Dakota Law Review

Volume 51 | Number 2 Article 13

1974

Commerce - Constitutional Law - Validity of a Bottle Bill Encouraging the Use of Standard-Size Returnable Bottles

William L. Guy III

nity-enacted growth restrictions.[44] The traditional question of whether the legislatures and Congress might be better equipped to handle the problems of growth needs to be seriously considered. The right to travel may simply be too abstract to be effective in coping with all of the complexities of urban reality.[45]

CHARLES S. MILLER JR.

COMMERCE—CONSTITUTIONAL LAW—VALIDITY OF A "BOTTLE BILL" ENCOURAGING THE USE OF STANDARD-SIZED RETURNABLE BOTTLES.

On October 1, 1972,[1] Oregon became the first state[2] to regulate the use of non-returnable beverage containers.[3] The legislative purpose of the so-called "Bottle Bill" was two fold: 1) to force beverage packagers to use uniform, returnable, multiple-use bottles,

---

44. For example, the *Ramapo* type of approach, possibly unconstitutional under the analysis in Petaluma, may be a desirable method for dealing with the problems of growth and urban sprawl. Also, planning done on a regional or state level could minimize many of the adverse effects resulting from restrictions on growth and yet, allow them to be employed by communities within the planned area. However, under this decision, the constitutionality of growth limitations used within a regional context might be questionable. In probably the most interesting, if potentially not the most problem raising, paragraph of the decision, the court stated:

> In essence, the plaintiffs contend that the question of where a person should live is one within the exclusive realm of that individual's perogative, not within the decision making power of any governmental unit. Since Petaluma has assumed the power to make such decisions on the individual's behalf, it is contended that the city has violated the people's right to travel. Considering the facts of the case, we agree.

Id. at 581.

45. It has been suggested that the right to travel may be too abstract to deal effectively with the competing interests involving the use of durational residency requirements. *See generally* the dissenting opinions to Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618, 644 (1969). Any merit in this argument would seem to especially apply to the use of the right in the area of land use policy. The courts have traditionally, in this area, given deference to the legislatures because of the nature of the problems involved.

1. Ch. 745, § 12, [1971] Ore. Laws 2018.

2. The Vermont Bottle Bill, which became effective on September 1, 1973, is not as broad in scope as the Oregon legislation. The statute does not prohibit pull-top cans but does allow a three-cent, non-refundable handling charge on each returnable bottle. Com ment, *Beverage Container Legislation: A Policy and Constitutional Evaluation*, 52 TEXAS L. REV. 351, 354 (1974).

3. The Oregon statutes require that:

> (a) Beverage dealers must accept from consumers any beverage container "of the kind, size, and brand sold by the dealer" which indicates the statutory refund value required on all beverage containers sold in Oregon. ORE. REV. STAT. § 459.830(1) (1974).
>
> (b) Beverage distributors must then reimburse the dealer for the refund value of all such containers when they are transferred to the distributor. ORE. REV. STAT. § 459.830(2) (1974).
>
> (c) The statutory refund value is set at five cents per container. However, if a container is "certified" by the Oregon Liquor Control Commission as being suitable for universal use by all beverage packagers, the refund is reduced to two cents per container. ORE. REV. STAT. § 459.820 (1974).
>
> (d) Pull-top cans are prohibited. ORE. REV. STAT. § 459.850(3) (1974).

thereby, diminishing the state's problems with litter collection[4] and solid waste disposal[5] and, 2) to outlaw the "pull-top" which had been a source of injury to people and to animals.[6]

Within seven months of Governor Tom McCall's signing the legislation on July 2, 1971,[7] the bill's legislative opponents[8] filed an action for a declaratory judgement against several state agencies[9] in Marion County Circuit Court, seeking to invalidate the statute on state and federal constitutional grounds. The court rejected their challenge and held the statute to be valid. On appeal, the Court of Appeals of Oregon held that the statute was valid when tested by the Commerce Clause, the Due Process Clause and the Equal Protection Clause of the United States Constitution and by several sections of the Oregon Constitution.[10] The defendants' Twenty-first Amendment claim was rejected.[11] *American Can Company v. Oregon Liquor Control Commission,* 517 P.2d 691 (Or. App. 1974).

Plaintiffs' major and most viable argument lay in claiming that the Commerce Clause abrogated the state's police power,[12] which had been retained for the states by the Tenth Amendment to the

---

4. Prior to implementation of the Bottle Bill, can and bottle litter constituted approximately 25 per cent of the total roadside trash in Oregon. Litter studies by the Oregon State Highway Division and Oregon Environmental Council, indicate that beverage container litter along the state's highways has decreased by 50 to 90 per cent since October 1, 1972. The overall decrease includes a fourfold increase (from 1.6 to 6.4 per cent of total roadside trash) in the volume of returnable bottles collected from Oregon ditches. Comment, *supra* note 2, at 355-57.

5. Disposable beverage containers comprise approximately 1.3 per cent of total solid waste generated in the United States. If the average number of roundtrips per returnable bottle continues to decline (from 40 roundtrips prior to World War II to 15 roundtrips in the 1970's with less than 4 roundtrips in some metropolitan areas) the reduction in solid waste resulting from the increased use of returnable bottles will become negligible. *Id.* at 357-58.

6. American Can Co. v. Oregon Liquor Control Comm'n., 517 P.2d 691, 694 (Ore. Ct. App. 1973).

7. Ch. 745, [1971] Ore. Laws 2019.

8. Plaintiffs were American Can Co., Continental Can Co., National Can Corp., Reynolds Metals Co., Anheuser-Busch, Inc.; Theo. Hamm Co., Miller Brewing Co., National Brewing Co., Jos. Schlitz Brewing Co., Oregon Soft Drink Ass'n, Inc.; Claser Beverages, a division of Alpac Corp., Noel Canning Corp., Pacific Coca Cola Bottling Co., and Shasta Beverages Division, Consolidated Foods Corp. Intervenor-appellants were Northwestern Glass Co., a division of Indian Head, Inc.; Owens-Illinois, Inc.; Anchor Hocking Corp.; Glass Containers Corp.; and Borckway Glass Co., Inc. 4 ENV. L. REV. 419, 420 n.8 (1974).

9. Defendants were Oregon Liquor Control Commission, State Department of Agriculture, Eric G. Gration, Gordon Hadson, Thomas F. Young, John E. Martin, and Irvin Mann, Jr. *Id.*

10. The court rejected as inapplicable the following provisions of the Oregon constitution:
a) Article 1, section 10, ". . . Every man shall have remedy by due course of law for injury done him in his person, property or reputation."
b) Article 1, section 18, "private property shall not be taken for public use . . . without just compensation."
c) Article 1, section 20, "[n]o law shall be passed granting to any citizen or class of citizens, privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."
517 P.2d at 705.

11. The Twenty-first Amendment prohibits the transportation of liquor into any state in violation of its laws. The court noted that the purpose of the Amendment was to provide the states with local determination of their prohibition status, not with the regulation of alcoholic beverage containers. *Id.*

12. *Id.* at 696.

United States Constitution.[13] However, the court pointed out that the purpose of the Commerce Clause was to facilitate free trade among the states and that many valid exercises of the police power do affect, in some way, interstate commerce without contravening the Commerce Clause.[14]

The application of the Commerce Clause was found to bar state police action only when:

> (1) federal action has pre-empted the regulation of the activity;
>
> (2) the state action impedes the free physical flow of commerce from one state to another; or
>
> (3) protectionist state action, even though under the guise of police power, discriminates against interstate commerce.[15]

A claim of federal pre-emption was not asserted, apparently due to the clear Congressional mandate in the Federal Solid Waste Disposal Act[16] that the individual states and municipalities are responsible for solution of the solid waste disposal problem.[17] The only federal action which is authorized by the Act is financial and technical assistance to the state and local governments.

Plaintiff's did claim that "Oregon's 'Bottle Bill' would not merely 'impede substantially the free flow of commerce'[18] but in many cases totally destroy and eliminate it. . . . "[19] However, the court pointed out that the "free flow of commerce" concept refers to the actions of common carriers, not to the goods being transported.[20] Specifically, only when regulation "materially restrict[s] the free flow of commerce across state lines, or interfere[s] with it in matters with respect to which uniformity of regulation is of predominant national concern" will the state action be void.[21]

In response, plaintiffs sought to show that one-way bottles and cans were more than an aggregation of small containers. Non-returnable containers were asserted to be "an interstate system of distribution for a national industry."[22] Even if that premise had been allowed, the Oregon court found that the system was subject to regulation or prohibition by the state's police power.[23]

---

13. "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the People." U.S. CONST. amend. X.
14. 517 P.2d at 696.
15. *Id.* at 697.
16. 42 U.S.C. § 3251-3259 (1970).
17. *Id.* § 3251(a)(6).
18. Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).
19. 517 P.2d at 700.
20. *Id.*
21. Southern Pacific Co. v. Arizona, 325 U.S. 761, 770 (1945).
22. 517 P.2d at 701.
23. In 1951 the Supreme Court upheld a municipal ban on door-to-door solicitation, a distribution system utilized by the magazine industry. The fact that the other means of

Plaintiffs also contended that the "Bottle Bill" was "protectionist" legislation which discriminated against interests outside the state of Oregon.[24] While the court agreed that protectionist legislation was invalid *per se*,[25] it pointed out that "legislation which has negative economic consequences for non-state business is not necessarily discriminatory against interstate commerce."[26] Moreover, the statute in question did not ban the out-of-state beverage industry; it simply caused a redistribution of the market shares among the various interests concerned.[27]

Similarly rejected was plaintiff's contention that the reduced refund value[28] assigned to standard-sized, returnable bottles[29] resulted in a discriminatory hardship for out-of-state interests.[30] For the present, these out-of-state interests who were a long distance from Oregon markets would suffer from disportionate transportation costs in their recycling operation. However, if the standard-sized bottle came into wide use nationally, or even regionally, the bottlers would merely reuse those bottles which were redeemd locally.[31] If the bottlers responded to this legislative incentive, then the bulk of the economic hardship would vanish.

Plaintiffs' second major contention asserts that the statute violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[32] The court pointed out that the doctrine of substantive due process,[33]

---

distribution left open by the ordinance were not as profitable was irrelevant to the Court. Breard v. Alexandria, 341 U.S. 622, 637-38 (1951).

24. 517 P.2d at 701.

25. *Id.* The Court noted that the United States Supreme Court has found the following to be protectionist legislation: "milk quota preferences for in-state milk, Baldwin v. G.A.F. Seeling, 294 U.S. 511 (1935); Polar Co. v. Andrews, 375 U.S. 361 (1964), preferential inspection laws which inhibit non-state distributors, Minnesota v. Barber, 136 U.S. 313 (1890); Dean Milk Co. v. Madison, 340 U.S. 349 (1951);" and, "a requirement that Arizona canalopes be packed in Arizona, Pike v. Brice Church, Inc., 397 U.S. 137 (1970)." *Id.* at 701 and 702.

26. *Id.* at 702.

27. Because the keystone to the economics of returnable bottles is transportation cost, the economic advantage or disadvantage is a function of distance not a function of state lines. Those out-of-state beverage interests located just across the state line, primarily in the state of Washington, but near the major metropolitan markets in Oregon would have a far superior market position when compared with Oregon businesses located far from their markets within the state. The court pointed specifically to an Oregon cannery and to the state's only brewery, both of which expected to suffer losses far more serious thon those of their out-of-state competitors. *Id.* at 703; *See generally* United States v. SCRAP, 412 U.S. 669 (1973).

28. A refund value of two-cents was assigned to "certified" bottles. Bottles not approved by the Commission for universal use carried not less than a five-cent refund value. ORE. REV. STAT. § 459.820 (1974).

29. ORE. REV. STAT. § 459.860(2)(b) (1974) provides that a bottle will be so "certified" if more than one beverage packager agrees to reuse it and pay any refund value. A recent case has determined that the second packager is not required to actually reuse the bottle to maintain its certification. The second packager need only stand ready to fulfill its agreement with the first packager and the Oregon Liquor Control Commission. Olympia Brewing Co. v. Oregon Liquor Control Comm'n, 516 P.2d 1321, 1322 (Ore. Ct. App. 1973).

30. 517 P.2d at 703.

31. *Id.*

32. *Id.* at 703-04.

33. Substantive due process is one of the primary Constitutional restraints on the police power. The leading cast, Lochner v. New York, 198 U.S. 45 (1905), advanced the view

which first appeared in 1897[34] and was abandoned in 1937,[35] has been consistently rejected for nearly 40 years.[36]

In their equal protection claim, plaintiffs assert that the right to engage in interstate commerce is in the same category as "freedom from discrimination based upon race, religion, or sex and the right to travel."[37] If this premise were true, the court would be required to apply the "strict scrutiny" test instead of the "reasonableness" (or minimum rationality) test to the alleged discrimination.[38] However, the court found that rather than being a fundamental personal right, the Commerce Clause is an "allocation of power between the levels of government in the federal system."[39] Since the outlawing of pull-tops and the use of standard-sized, returnable bottles are not arbitrary classifications but are, instead, reasonable legislative solutions to the problems of solid waste disposal, injury, and litter, plaintiffs' equal protection contention was rejected.[40]

Even if the "Bottle Bill" becomes a national policy[41] the unit cost of beverages to the consumer will increase due to greater transportation, handling, and storage costs.[42] Such a cost might well be legislatively justified on a national basis if balanced against the long-term problem of unnecessarily depleting non-renewal resources.[43] However, if for litter purposes, North Dakota adopted a "Bottle Bill"[44] without the participation of its neighboring states, particularly Minnesota, it would probably result in the cessation of non-draft bev-

---

that the judiciary could objectively determine the reasonableness of the legislation. In essence the court was substituting its judgment for that of the legislature.

After the 1936 presidential election, in which President Roosevelt's social legislation apparently received an overwhelming mandate, the Supreme Court abandoned its substantive due process position. In its place the Court adopted the view expressed by Justice Holmes in his Lochner dissent. The Holmes test is that of the "reasonable legislator." In its present form the test has evolved into a subjective one, in which the Court determines if "a rational legislator could have regarded the statute as a reasonable method of furthering public health, safety, morals or welfare." Since this test is so easily fulfilled, the effect has been the abandonment of substantive due process as a constitutional consideration. B. SCHWARTZ, CONSTITUTIONAL LAW 165-68 (1972).

34. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

35. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

36. Brotherhood of Firemen v. Chicago, Rock Is. & Pac. R.R. Co., 393 U.S. 129 (1968).

37. 517 P.2d at 704.

38. *Id.*

39. *Id.*

40. *Id.*

41. Legislation prohibiting the use of non-returnable beverage containers, S. 2062, 93d Cong., 2d Sess. (1974) was introduced in the United States Senate on June 25, 1973. Although a hearing was held on May 6, 1974, the bill remains in the Commerce Committee.

42. *See generally* Comment, *supra* note 2.

43. At the present time the annual consumption of nonrenewable resources by the beverage packaging industry for single use containers includes 318 million tons of glass for non-returnable bottles and 2.5 million tons of steel and 332,500 tons of aluminum for cans. The hidden resource depletion in the use of non-returnable containers is that of energy. A forty per cent saving could be achieved by the use of returnable containers in an industry whose current annual requirements would provide electricity for a year in Washington, D.C., San Francisco, Boston, and Pittsburgh. *Id.* at 358-59.

44. In 1973 a bill that required a five-cent refundable deposit on all beverage containers sold in the state was indefinitely postponed by the Industry Business and Labor Committee of the North Dakota House of Representatives. All beverage containers collected by retailers would be redeemed by the distributors who would recycle them.

The bill differed from the Oregon legislation in that (a) there was no ban on pull-

erage sales in the state. This state alone does not provide beverage interests with an adequate population base to economically make the necessary alterations to their systems of packaging and distribution. If non-draft beverages were not sold in the state, many North Dakotans, particularly the approximately 50 per cent who live within 135 miles of major shopping centers in western Minnesota,[45] would simply make their beverage purchases out-of-state. The result would be citizen inconvenience, loss of tax revenue, and a failure to keep non-returnable containers out of North Dakota.

WILLIAM L. GUY III

FEDERAL JURISDICTION—AMOUNT IN CONTROVERSY—EACH MEMBER OF THE CLASS IN A CLASS ACTION MUST INDEPENDENTLY SATISFY THE REQUISITE JURISDICTIONAL AMOUNT.

This was a diversity action brought as a class action, under Rule 23(b)(3) of the Federal Rules of Civil Procedure,[1] by four lakeside property owners, representing all lakefront landowners and lessees in the towns of Orwell, Shoreham, and Bridport, Vermont. Plaintiffs claimed impairment of property rights resulting from al-

---

tops, (b) there was no requirement that the container be reusable—only recyclable, and (c) a uniform refund value was assigned without regard to any scheme of container standardization.

The bill probably would have been effective in helping to solve the problems of littering and solid waste disposal. The high refund value would be an incentive to bounty hunters who would help keep the ditches and parks clean. However, in not banning disposable containers, recycling with its attendant waste of energy would still be required. Since pull-top cans were not prohibited, injuries to humans and animals resulting from their use would not have been abated. Finally, the distributors would have received a windfall profit as a result of deposits that were not redeemed. H. 1477, 43d Legislative Assembly of North Dakota (1973).

45. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973 10, table 8 (94th ed.).

1. FED. R. CIV. P. 23(b).
Rule 23(b) reads:

> (b) Class Actions Maintainable.
> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent of varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class or,
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: