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Recent Developments: Commerce—City Ordinance Requiring a Deposit on All Soft Drink and Beer Containers Is Not an Unconstitutional Burden on Interstate Commerce. Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975)

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COMMERCE—CITY ORDINANCE REQUIRING A DEPOSIT ON ALL SOFT DRINK AND BEER CONTAINERS IS NOT AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE. *BOWIE INN, INC. V. CITY OF BOWIE*, 274 Md. 230, 335 A.2d 679 (1975).

In recent years, law regulating the sale of soft drink and beer containers have been enacted across the nation on both the state and local level. Regardless of the method of regulation, these laws purport to limit litter, preserve natural resources and generally improve the environment. In achieving this goal all such anti-litter laws burden the manufacturers, distributors and retailers in some manner. The basic question is whether the extent of this burden on commerce is so oppressive, discriminatory or unjustified that the legislative enactment will be invalidated as an undue hinderance on the flow of interstate commerce.[1] The Maryland Court of Appeals, when confronted with this issue in *Bowie Inn, Inc. v. City of Bowie*,[2] upheld a city ordinance which required a deposit on all retail sales of soft drink and beer containers.

The trial court, despite its finding that the ordinance would adversely affect the retailers' business, upheld the ordinance. The trial court determined that the ordinance was rationally related to solving litter problems in Bowie and that the alleged "severe" burdens were "highly speculative."[3] On appeal,[4] the petitioners—distributors, manufacturers and retailers—urged the court to apply the now traditional balancing test.[5] Basically, the balancing test weighs the benefits of the ordinance against the burdens it places on commerce.[6] The petitioners in *Bowie Inn* believed that the putative benefits were clearly outweighed by the burdens and, therefore, the ordinance should have been found unconstitutional.

Other courts that have considered challenges to environmental legislation have rejected the traditional application of the balancing test finding such a test inapplicable to issues regarding the environment.[7] Instead, these courts, as explained in *Bowie Inn*, have simply deferred to the legislative determination as long as the ordinance is within the legitimate exercise of the police power and is not discriminatory.[8] In the six to one decision with Judge O'Donnell dissenting, deference to

1. *See* American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 517 P.2d 691 (1973), upholding a statewide mandatory deposit statute.
2. 274 Md. 230, 335 A.2d 679 (1975).
3. *Id.* at 235, 335 A.2d at 682-83.
4. A writ of certiorari was granted by the Maryland Court of Appeals, by-passing a consideration by the Maryland Court of Special Appeals, pursuant to MD. ANN. CODE, Cts. & Jud. Proc. Art., § 12-201 *et seq.* (1974).
5. 274 Md. at 244-45, 335 A.2d at 687-88.
6. *See* note 29 *infra*.
7. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (municipal smoke abatement ordinance); American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 517 P.2d 691 (1973) (statewide mandatory deposit legislation).
8. 274 Md. at 244-46, 335 A.2d at 687-89.

the legislature was the course adopted by the court in *Bowie Inn*.[9] Although not applying the balancing test as urged by the petitioners, the court did say in dicta that "[a]ssuming that a 'weighing test' or 'balancing approach' is applicable to a case such as this, we have no hesitancy in concluding that the putative local benefits of the Bowie ordinance clearly outweigh any burden which the ordinance might impose on interstate commerce."[10]

The decision in *Bowie Inn* should not be interpreted as giving local governments the green light to enact, free from scrutiny, any type of deposit law. If the court in the future applied the balancing test dictum of *Bowie Inn*, then the validity of a local regulation will not only rely upon its burdensome impact when examined in isolation, but also upon the combined impact of all ordinances (some possibly in conflict) enacted by different subdivisions.[11] In other words, as different localities pass deposit laws with conflicting regulations, these non-conformities will increase the burden on commerce and could lead to the invalidation of future ordinances.

The present case arose from the enactment by the Bowie City Council of an ordinance which requires a five cent deposit on all soft drink and beer containers, either bottles (including non-returnables) or cans sold at the retail level.[12] The petitioners sought a declaratory judgment as to the ordinance's constitutionality, as well as an injunction against its enforcement.[13]

In affirming the lower court decision, the Maryland Court of Appeals refused to accept any of the petitioners' allegations that the ordinance was constitutionally infirm.[14] Of the six constitutional areas of attack, only the allegation that the ordinance was violative of the Commerce Clause will receive extended treatment in this note.

First, the court rejected a due process challenge based upon a violation of the Fourteenth Amendment. In examining the ordinance in view of the test for constitutionality under the Due Process Clause, the court found "a clear relation between the mandatory deposit requirement and the object of reducing litter in Bowie."[15] Judge Eldridge,

9. *Id.*
10. *Id.* at 246, 335 A.2d at 689.
11. Bibb v. Navajo Freight Lines Inc., 359 U.S. 520 (1959). In this case an allegedly valid safety measure requiring a particular mud flap for trucks was found to constitute an undue burden on interstate commerce because of the conflicting mud flap requirements existing in neighboring states. *See* note 69 *infra* and accompanying text.
12. Bowie, Md. Ordinances 0-4-71. This ordinance replaced a broader 1970 ordinance that simply prohibited the sale of carbonated beverages in non-returnable bottles. Additionally, the new ordinance provides that anyone convicted of violating it shall be guilty of a misdemeanor and subject to a one hundred dollar fine and/or thirty days in jail.
13. 274 Md. at 232, 335 A.2d at 681.
14. *Id.* at 233, 335 A.2d at 681-82. This case was a consolidation of two suits, one brought by bottlers and distributors and the other brought by local retailers.
15. *Id.* at 237, 335 A.2d at 684. Petitioners relied in part on Kokales v. City of Ann Arbor, Docket No. 7753 (Washtenaw Co., Mich. Cir. Ct., 1974), where a similar deposit law was struck down. The court noted that there existed virtually no relationship between the health, safety and welfare of the community and the regulation, partly because the

speaking for the majority, stated that legislative exercise of the police power is valid as long as it is not arbitrary, oppressive or unreasonable, and when valid, the wisdom of a law is not in question.[16] Additionally, the court noted that special deference must be given to a legislative enactment of a safety or environmental nature when the method has not been given an opportunity to "prove its worth."[17]

Second, the court declined to accept the petitioners' contention that the definition of "soft drink" was unconstitutionally vague.[18] The court did note, however, that some minimal difficulty might prospectively be faced in determining whether specific products are "soft drinks," but concluded that this possible minor confusion did not violate the Due Process Clause.[19]

Third, petitioners claimed a denial of equal protection,[20] reasoning that to regulate only soft drink and beer containers, instead of all beverage containers, constituted an unreasonable classification.[21] The court refused to accept this proposition, observing that classifications need only rest upon some valid basis that has a substantial relation to the purpose of the ordinance.[22] The court then acknowledged the necessary deference to legislative judgment,[23] noting recent cases which have interpreted similar statutes. In each of these cases, the

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ordinance was only local and not statewide. The dissent of Judge O'Donnell in Bowie Inn v. City of Bowie, 274 Md. at 240, 335 A.2d at 690, resting on the due process argument, contended first that the evidence at the trial was not adequate to establish a real and substantial relationship and second that the majority opinion neglected the established state due process requirements by accepting "any consideration" as sufficient, instead of requiring "real and substantial relations" between the means and the end. *Id.* at 261, 335 A.2d at 696.

16. 274 Md. at 235, 335 A.2d at 683; *see* Maryland Bd. of Pharmacy v. Sav-A-Lot Inc., 270 Md. 103, 106, 311 A.2d 242, 244 (1973); Salisbury Beauty School v. State Bd. of Cosmetologists, 268 Md. 32, 300 A.2d 367 (1973).
17. 274 Md. at 237-38, 335 A.2d at 684; *see* American Fed'n of Labor v. American Sash and Door Co., 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring); *cf.* Fuller v. County Comm'r of Baltimore County, 214 Md. 168, 133 A.2d 397 (1957).
18. 274 Md. at 239-40, 335 A.2d at 684-85. The court found that the forty-five word definition was not vague since it did not fail "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954).
19. 274 Md. at 240, 335 A.2d at 685; *see* Giant of Md. Inc. v. State's Attorney, 267 Md. 501, 514-15, 298 A.2d 427, 434-35, *appeal dismissed*, 412 U.S. 915 (1973).
20. U.S. CONST. amend. XIV, § 1.
21. 274 Md. at 240, 335 A.2d at 686.
22. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911), where the Court enunciated the requirement that for a statute to succumb to an equal protection attack, it must be "without any reasonable basis and therefore purely arbitrary." *See generally* Matter of Trader, 272 Md. 364, 325 A.2d 398 (1974).
23. 274 Md. at 240-43, 335 A.2d at 686-87. The court also noted that the legislature need not attack so massive a problem as litter in one grand sweep. Instead, different areas of the problem can be treated by specific legislation. 274 Md. at 241, 335 A.2d at 686; Williamson v. Lee Optical Co., 348 U.S. 483, 489, *reh. denied*, 349 U.S. 925 (1955). *See* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1085 (1969).

classification was found to be reasonable in light of the magnitude and propensity with which such containers are littered.[24]

Fourth, the petitioners challenged the existence of the City of Bowie's power to enact such an ordinance.[25] This was dismissed by noting that all municipalities have been given the power to regulate garbage.[26]

Fifth, the petitioners alleged that the Maryland General Assembly, in its supervisory role, had preempted the regulation of containers for alcoholic beverages.[27] This was dismissed by noting that the state interest in regulating such containers concerns itself with neither environmental waste control nor deposits required on sales at the retail level.[28]

It was the petitioners' challenge that the ordinance violated the Commerce Clause that deserves the most detailed and cautious examination. Several tests purporting to determine whether a local regulation creates an unconstitutional burden on interstate commerce have been developed over the years.[29] Examples of these include the

24. 274 Md. at 241-43, 335 A.2d 686-87. For other cases dealing with deposit laws *see* American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 517 P.2d 691 (1973); Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954); Kokales v. City of Ann Arbor, Docket No. 7753, (Washtenaw Co., Mich. Cir. Ct., 1974). *See also* E. CLAUSSEN, OREGON'S BOTTLE BILL: THE FIRST SIX MONTHS (U.S. Environmental Protection Agency Pub. SW-109, 1973). For cases applying the equal protection test in Maryland, *see* Maryland Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973); Baltimore v. Charles Center Parking, Inc., 259 Md. 595, 271 A.2d 144 (1970).
25. 274 Md. at 244, 335 A.2d at 689.
26. MD. ANN. CODE art. 23A, § 2(14) (Supp. 1974). *See* City of Gaithersburg v. Montgomery County, 271 Md. 505, 318 A.2d 509 (1974). Law of May 21, 1973, ch. 451, § 1, [1973] Laws of Md. 921, repealed MD. ANN. CODE art. 23A, § 4, because the exemption of some municipal corporations from MD. ANN. CODE art. 23A, § 2, violated the Maryland Constitution, Art. XI-E, § 1.
27. MD. ANN. CODE art. 2B, § 185 & 186 (Supp. 1968).
28. 274 Md. at 248-49, 335 A.2d at 690.
29. Perhaps the first test was that in which Chief Justice Marshall examined the purpose of an ordinance in light of an inherently exclusive national power over interstate commerce. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824) (dictum). Chief Justice Taney applied a simpler test which held that all power to regulate interstate commerce was concurrent, as long as Congress had remained dormant. License Cases, 46 U.S. (5 How.) 504, 579 (1847). Justice Curtis, in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), combined Marshall's and Taney's approaches, establishing the test as first requiring an examination of the subject matter and second requiring a determination of whether that subject matter required a uniform national rule, which would make it exclusively a national concern immune from local regulation. If local regulation was deemed wiser, then local governments were given concurrent jurisdiction as long as Congress had not preempted. Later decisions rested upon judicial determinations of whether the local regulation had a direct or indirect effect on interstate commerce. Smith v. Alabama, 124 U.S. 465 (1888). This approach was attacked as being too mechanical by Justice Stone's dissent in DiSanto v. Pennsylvania, 273 U.S. 34 (1927). Stone eventually asserted and applied a non-mechanical balancing test that weighed the local benefits against the burdens on interstate commerce. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). The balancing test was later refined and intensified in scope in Bibb v. Navajo Freight Lines Inc., 359 U.S. 520 (1959). The balancing test has not always been found applicable and a partial return to mechanical tests occurred in both Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), and Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R., 393 U.S.

"Cooley Test,"[30] where the subject matter to be regulated by the statute is examined and categorized as requiring either local or uniform national control. If uniform national control is required, then the local statute will be struck down.[31] For a brief period of time the Supreme Court applied the "direct-indirect test," allowing local regulations which only indirectly affect interstate commerce to stand.[32] These and various other tests have been utilized to prevent a state from inflicting burdens on those outside its borders who have no political redress against the imposing state,[33] as well as to preserve the free flow of interstate commerce.[34]

Before applying any of the tests to a given statute, courts generally examine certain factors which, if applicable, could invalidate the statute without further scrutiny. First, the court must find the local statute to be a valid exercise of the state police power.[35] State courts have unanimously upheld deposit laws as benefiting the health and safety of the locality.[36] Second, one locality cannot discriminate against another, either patently[37] or disguised as an exercise of the police power.[38] Those challenging deposit laws often allege discrimination based upon the increased costs to out-of-state bottlers and distributors.[39] This claim is rejected by noting that the increased costs resulting merely from distance, not from state borderlines, affects both in-state and out-of-state distributors identically.[40] Any preemption of

129 (1968). This led the Supreme Court to note recently in a general statement that any of these tests can still be applied to determine if the local regulation constitutes an unconstitutional burden. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

In addition to the varying application of the tests, the criteria to be examined in applying each test has also varied. For instance, each court must determine whether or not potential burdens on interstate commerce can be examined. Although most courts have allowed potential burdens to be examined, Southern Pacific Co. v. Arizona, 325 U.S. at 775, some have limited the examination to only actually existing burdens. Huron Portland Cement Co. v. City of Detroit, 362 U.S. at 448.

30. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).
31. *Id.*
32. DiSanto v. Pennsylvania, 273 U.S. 34 (1927).
33. *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); *See also* Dean Milk v. City of Madison, 340 U.S. 349 (1951), which raises the additional question of whether alternative, less burdensome methods of regulation should be considered. Possible alternatives include statewide litter control acts, voluntary programs of litter control, and various clean-up programs which most jurisdictions now have. The dissent of Judge O'Donnell in *Bowie Inn* also suggested similar alternatives that might reduce litter without so great an impact on the petitioners. 274 Md. at 259-60, 335 A.2d at 695-96.
34. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).
35. Breard v. City of Alexandria, 341 U.S. 622, 640-41 (1951).
36. American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 632, 517 P.2d 691, 698 (1973); Anchor Hocking Glass Corp. v. Barber, 118 Vt. 206, 105 A.2d 271 (1954); Kokales v. City of Ann Arbor, Docket No. 7753 (Washtenaw Co., Mich. Cir. Ct., 1974).
37. Welton v. Missouri, 91 U.S. 275 (1876).
38. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).
39. American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 641, 517 P.2d 691, 702 (1973).
40. *Id.* at 642-43, 517 P.2d at 703; Bowie Inn v. City of Bowie, 274 Md. at 245, 335 A.2d at 688. *See* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1777 (1974).

the field by Congress is a third defect that would invalidate a local ordinance affecting interstate commerce.[41] On the other hand, intent manifested by Congress that a particular subject should be controlled locally increases the presumption in favor of the local regulation's validity.[42] The indication by Congress that some environmental areas should be the subject of local rather than national control has therefore added strength to the existing presumption of validity that deposit laws possess.[43]

Once it has found the local regulation to be a non-discriminatory exercise of the police power in an area of commerce that is free from congressional restrictions, the Supreme Court has often gone one step further and applied the balancing test.[44] In utilizing this test, the court weighs the putative benefits of the local ordinance against the burdens it imposes on the free flow of interstate commerce, upholding the statute if the benefits outweigh the burdens.[45] Courts, however, have refused to apply this increasingly popular balancing test to local regulations dealing with the environment.[46]

The validity of the ordinance in *Bowie Inn*, as has been the case with other local environmental regulations, was not upheld by application of the balancing test. However, the possibility that the balancing test might be applied in the future makes it important to determine both the reason for and the effect of the non-application of the balancing

41. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

42. Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). *See also* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), where the Court upheld a congressional declaration that regulation of insurance is a local matter.

43. Bowie Inn v. City of Bowie, 274 Md. at 245, 335 A.2d at 688. The Maryland Court of Appeals relied heavily on Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), where the Supreme Court noted that Congress had indicated that air pollution was a problem properly controlled by local governments. This same rationale was applied in American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 633-34, 517 P.2d 691, 699 (1973), where the court noted that:

> Congress has directed that the states take primary responsibility for action in this field. By enacting the Federal Solid Waste Disposal Act, 42 USC § 3251 *et seq.* (*sic.*) (1970), Congress specifically recognized that the proliferation of new packages for consumer products has severely taxed our disposal resources and blighted our landscapes. It disclaimed federal preemption and assigned to local government the task of coping with the problem with limited federal fiscal assistance.

See also Environmental Quality Improvement Act, 42 U.S.C. §§ 4371 *et seq.* (1970); Federal Water Pollution Act, 33 U.S.C. §§ 1151 *et seq.* (1970). *But see* more recently 33 U.S.C. §§ 1251-1376 (Supp. II, 1972).

44. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), where the Court stated that a statute incidentally affecting commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. *But see* Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R., 393 U.S. 129 (1968).

45. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526 (1959), where the Court noted that increased costs alone are not a sufficient burden on interstate commerce to invalidate a local safety ordinance.

46. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 517 P.2d 691 (1973). *Contra*, Procter and Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1975).

test. The simple question is: why would courts examining local environmental statutes not apply the balancing test? A first reaction would be that such a test is simply inappropriate. Can any benefit to the environment ever be measured against an economic burden to interstate commerce? Few courts have expressly mentioned the difficulty of balancing intangibles, but it seems to represent one strong reason for not applying the balancing test.[47]

A second reason for non-application of the balancing test is that some courts have limited its scope to transportation[48] cases, such as those involving the length of trains[49] or the required safety equipment on trucks.[50] Although the test was developed in transportation cases, its scope has not been limited solely to them.[51] It is only reasonable to assume that valid balances between benefits and burdens can be made in areas other than those concerning the safety of interstate transportation.

The possibility that the court could become a "super legislature" is a third explanation for not utilizing the balancing test.[52] However, the restraint that the courts have exercised in overruling acts of legislatures, coupled with the presumption of constitutionality afforded safety statutes, should eliminate any separation of powers problems.[53] Since courts can examine regulations to determine whether there exists enough of a "real and substantial relationship" to withstand a due process challenge, why must they then stop and defer to the legislature without considering the burdens on interstate commerce?

A fourth reason for non-application of the balancing test arises when Congress has expressed its desire to have local instead of national regulation.[54] Such congressional expression eliminates the need to balance. The Supreme Court prefers to base its decisions on a finding of congressional mandate for two reasons. On one hand, it enables the Court to insulate itself from allegations of usurpation of legislative authority. On the other hand, a decision based on the finding of a congressional mandate allows Congress to reverse through subsequent

47. Palladio, Inc. v. Diamond, 321 F. Supp. 630 (S.D.N.Y. 1970). For an excellent discussion of balancing intangibles, *see* American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 631-32, 517 P.2d 691, 697-98 (1973). *Cf.* Procter and Gamble Co. v. City of Chicago, 509 F.2d 69, 75 (7th Cir. 1975); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762, 1779 (1974).

48. American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 631, 517 P.2d 691, 698 (1973); 87 HARV. L. REV. at 1778; Note, *State and Local Regulation of Non-Returnable Beverage Containers*, 1972 WIS. L. REV. 536, 549.

49. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

50. Bibb v. Navajo Freight Lines, Inc., 350 U.S. 520 (1959).

51. *Cf.* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Procter and Gamble Co. v. City of Detroit, 509 F.2d 69 (7th Cir. 1975).

52. South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).

53. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

54. *See* note 43 *supra*. The Oregon court relied heavily upon the congressional mandate in American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 633, 517 P.2d 691, 699 (1973).

enactments any misinterpretations the Court may have made as to congressional intent.[55] This fourth rationale has been given added impetus in deposit law cases as a result of legislation encouraging local control of environmental matters.[56]

Finally, a question often arises as to whether both potential and existing burdens should be balanced.[57] Courts may be hesitant to apply the balancing test because clear precedent is lacking as to whether both types of burdens are to be considered. The judiciary can avoid the need to determine which burdens to balance by deferring to legislative judgment.[58]

The Maryland Court of Appeals found that the Bowie ordinance did not constitute an unconstitutional burden on interstate commerce. While the court did not rely upon the balancing test for its holding, it did apply the test in an *arguendo* manner. In this dictum application of the test, the court considered only existing and not potential burdens on interstate commerce.[59] The majority found the balance to be clearly in favor of the Bowie ordinance, but the opinion contained little discussion of exactly what factors were weighed. The retailers claimed that their loss of business to non-restricted retailers in neighboring jurisdictions, combined with the increased handling and storage costs, as well as the unavailability of certain products in returnable containers, constituted an undue burden.[60] The distributors and bottlers claimed that the increased transportation costs, the strong consumer preference for non-returnable containers, and the tailoring of a unique distribution scheme for a market as small as Bowie all placed unconstitutional burdens on interstate commerce.[61]

The court answered these allegations briefly, explaining that the Bowie ordinance did not prohibit any soft drink or beverage container

55. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946), where the Court upheld a seemingly burdensome state insurance law because Congress had determined that insurance should be controlled locally.

56. American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 633-34, 517 P.2d 691, 699 (1973). *See* note 43 *supra*.

57. *Compare* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), where the Court balanced potential future burdens that could constitute an undue burden on interstate commerce, *with* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), where the Court only considered those burdens on interstate commerce that were actually existing.

58. *See* Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Southern Pacific Co. v. Arizona, 325 U.S. 761, 775 (1945). *Cf.* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960).

59. 274 Md. at 246-47, 335 A.2d at 689.

60. *Id.* at 244-46, 335 A.2d at 688-89. *See* Brief for Appellant at 44-46, Bowie Inn v. City of Bowie, 274 Md. 230, 335 A.2d 679. For a detailed discussion of the burdens which deposit laws impose on commerce, *see* American Can Co. v. Oregon Liquor Control Comm'n, 15 Ore. App. 618, 634-40, 517 P.2d 691, 698-701 (1973). A "benefit versus burdens" analysis of deposit laws can be found in McCaull, *Back to Glass*, 16 ENVIRONMENT 6 (1974); Note, *State and Local Regulations of Non-Returnable Beverage Containers*, 1972 WIS. L. REV. 536.

61. 274 Md. at 244, 335 A.2d at 688. Substantial evidence was presented challenging the effectiveness of such anti-litter laws, but this evidence was primarily aimed at the due process issue. *But see* McCaull, *Back to Glass*, 16 ENVIRONMENT 6, 8 (1974).

from being sold, but merely required that a deposit be charged and refunded on all such containers sold at the retail level in Bowie.[62] The court further labeled most of the alleged burdens as merely "speculative."[63] Against these burdens the court simply balanced the putative benefits of a "substantially cleaner environment"[64] and, although the court referred to the balancing test, it is important to note that it did not base its decision on it. Instead, the court relied on the test in *Huron Portland Cement Co. v. City of Detroit*,[65] which held as valid any "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity."[66]

The impact of *Bowie Inn* cannot yet be measured.[67] By its decision, the Maryland Court of Appeals has certainly given a boost to the legislative efforts of environmentalists. However, since the court did not reject the balancing test, but merely chose not to apply it in its holding, environmentalists could discover that an initial victory does not guarantee that the battle has been won. While the court has apparently given local groups the opportunity to protect environmental interests through the passage of deposit laws, it has left the door open for subsequent attacks on such laws. In future cases, the court may choose to rely on the balancing test,[68] particularly if several localities have enacted conflicting deposit laws. This possible conflict is best illustrated by *Bibb v. Navajo Freight Lines, Inc.*,[69] in which the United States Supreme Court struck down a safety statute requiring a particular type of mud flap on trucks because of existing incompatible mud flap requirements in other jurisdictions. The Court found that the burdens, which occurred solely because of the competing requirements, placed an unconstitutional burden on interstate commerce. The *Bibb* reasoning can be applied by analogy to local deposit ordinances. If such ordinances are enacted containing conflicting methods of regulation, such as banning different types of containers, then the burden placed upon the bottlers, manufacturers and retailers could increase. These increased burdens caused by the conflicting requirements could, in turn, lead to the invalidation of the deposit laws by application of the balancing test.

The federal government, through the Environmental Protection Agency, has proposed a system of regulation for the sale of soft drink

62. 274 Md. at 246, 335 A.2d at 688.
63. *Id.*
64. *Id.*
65. 362 U.S. 440 (1960).
66. 362 U.S. at 448. This seems akin to the examination utilized in pre-balancing test cases, such as South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938).
67. It is noteworthy that this decision represents the first local deposit law to successfully withstand appellate scrutiny. *See* Kokales v. City of Ann Arbor, Docket No. 7753 (Washtenaw Co., Mich. Cir. Ct., 1974).
68. The balancing test has been applied to environmental statutes. *See* Procter and Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1975).
69. 359 U.S. 520 (1959).

and beer containers on federal installations which is similar to the Bowie Ordinance.[70] Additionally, a few Maryland counties have enacted varying deposit laws,[71] and there are proposals pending on both the state and local level.[72] Before enacting any deposit law, the locality should consider the advantages of adopting a Bowie-type ordinance. First, the Bowie ordinance has already passed an exhaustive court challenge. Second, the legislative intent of benefiting the environment would be furthered by complementary regulations. Finally, complementary ordinances could reduce the burdens on commerce. For example, by applying economic principles, it can be argued that uniform deposit laws would reduce the competitive disadvantage to which Bowie retailers may be subjected by putting a greater number of retailers under similar regulations. Additionally, the burden on manufacturers and distributors could be reduced as a result of the increased size of the regulated market.

The Maryland Court of Appeals has given local environmentally concerned governments an opportunity to develop their own deposit laws and to prove the effectiveness of such legislation. However, without cooperative planning between local governments, aimed at establishing a uniform complementary method of regulation, future deposit laws may be held to be an unconstitutional burden on the flow of interstate commerce.

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70. *See* 40 Fed. Reg. 52967 (1973).
71. *See* Montgomery County, Md., Bill 66-74, Nov. 18, 1975 (mandatory deposit bill to take effect Jan. 1, 1978); Howard County, Md., Bill 7, July 2, 1971.
72. Approximately thirty-five bills have been introduced calling for statewide regulation of bottles and litter. None have been successful.