The Dormant Commerce Clause and the Massachusetts Landfill Moratorium: Are National Market Principles Adequately Served?

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I. INTRODUCTION

In December, 1995, the Commonwealth of Massachusetts announced a two-year moratorium on permit approvals for new landfills and the expansion of existing landfills.1 According to Trudy Coxe, Secretary of the Executive Office of Environmental Affairs, Massachusetts has determined that it does not have a need for more landfill capacity because its communities are more than adequately served by existing landfill capacity.2 The Commonwealth announced the moratorium in order to make this determination clear and to discourage project proponents from wasting their time by submitting futile permit applications.3 However, the moratorium is not an entirely philanthropic gesture for the benefit of project proponents and landfill operators. It is part of a comprehensive strategy for increasing recycling by making it harder for Massachusetts municipalities to rely on landfills as their primary means of waste disposal.4 Although the objectives of conserving land and encouraging recycling are clearly valid state purposes, the admitted rationale of the moratorium, lack of in-state

* Production Editor, 1996-1997, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
2 Id.
4 Id. at 5–6, 38–39.
demand, raises a serious possibility that the measure violates the dormant Commerce Clause of the United States Constitution. 5

In City of Philadelphia v. New Jersey, the United States Supreme Court established that garbage is an article of commerce and that states may not prohibit the importation of garbage. 6 Recent cases have established that flow-control ordinances that require local processing are analogous to export restrictions and natural resource hoarding and, like import embargoes, also violate the dormant Commerce Clause. 7 Recent cases also have established that states may not regulate waste disposal by imposing discriminatory taxes or fees on imported waste. 8 The Massachusetts permit moratorium is different from the regulations challenged in these cases because the moratorium does not regulate specific transactions by placing restrictions on individual shipments of waste. 9 Rather, the Massachusetts scheme regulates all landfill operators, those handling exclusively in-state waste and those handling out-of-state waste, through the imposition of a state-wide cap on landfill capacity and annual disposal tonnage. 10 Although the scheme is state-neutral with respect to individual transactions, it is not state-neutral with respect to the level of the state-wide cap. 11 The scheme will only consider the forecasted level of demand from Massachusetts waste generators when setting the level of the cap. 12

The United States Supreme Court has never decided whether a state-wide cap based on in-state demand is consistent with the dormant Commerce Clause. Three federal district courts have held that demonstration of in-state demand is not a permissible requirement for the issuance of a waste disposal permit. 13 The only circuit courts to consider state-wide caps, however, appear to be divided over the

5 U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 98 (1994) (noting understanding that Commerce Clause has negative aspect that denies states power).


9 See MASTER PLAN, supra note 3, at 38.

10 See id.

11 See generally id., ch. 3 (methodology for calculating need for capacity assumes no net imports and only considers in-state generators).

12 Id. at 29-30.

question of whether state-wide caps based exclusively on in-state demand discriminate against interstate commerce.\textsuperscript{14}

This Comment will review the dormant Commerce Clause jurisprudence in general, and the cases dealing with the regulation of natural resources in particular. Although the natural resources cases generally prohibit states from providing preferred access to their residents, the cases do not grant an absolute right of access to resources by out-of-state residents. Thus, there is some room for arguing that states may set some kind of state-wide caps on the exploitation of resources such as landfill capacity. The question is whether there are limits to the types of state-wide caps that may be imposed and, if so, the nature of those limits. This Comment will review a second line of dormant Commerce Clause cases, represented by \textit{Buck v. Kuykenda\textsuperscript{15}} and \textit{H. P. Hood \& Sons v. Du Mond,\textsuperscript{16}} which deal with regulations based on whether a market is adequately served, the stated rationale for the Massachusetts moratorium.\textsuperscript{17} These cases provide a basis for arguing that while some kind of state-wide cap may be permissible, a state-wide cap based on in-state demand should be subject to heightened scrutiny under some circumstances.\textsuperscript{18}

Section II discusses some of the details of the Massachusetts regulatory scheme for solid waste management and landfill permits. Section III reviews the dormant Commerce Clause jurisprudence in general, and the application of the dormant Commerce Clause to natural resources hoarding cases in particular. Section IV discusses states’ use of the “adequately served” criteria for regulating inter-state commerce. This section will review cases such as \textit{Buck} and \textit{Hood} which discuss the requirement of “demonstration of need” outside the context of waste disposal, as well as more recent case law involving permitting criteria and state-wide caps in the waste disposal arena. Section V applies the hoarding doctrine, “demonstration of need” case law, and dormant Commerce Clause policies to argue that state-wide caps based exclusively upon in-state demand should be considered virtually per se invalid. The analysis then evaluates the Massachus-

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\textsuperscript{14} See Environmental Technologies Council v. South Carolina, 98 F.3d 774, 787–88 (4th Cir. 1996); Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252, 1258 (4th Cir. 1995).

\textsuperscript{15} 267 U.S. 307 (1925).

\textsuperscript{16} 336 U.S. 525 (1949).

\textsuperscript{17} \textit{Master Plan}, supra note 3, at 4, 35.

\textsuperscript{18} See infra notes 185–217, 292–94 and accompanying text.
setts moratorium in light of the current case law, the analysis of state-wide caps, and the purposes of the dormant Commerce Clause.

II. MASSACHUSETTS SOLID WASTE MANAGEMENT

Massachusetts is committed to achieving a goal of recycling forty-six percent of all municipal solid waste by the year 2000. The Commonwealth views landfills as the least desirable waste management technology and intends to reduce landfill burial to four percent of total waste tonnage. Landfills create groundwater pollution and air pollution, as well as surface water problems. The Commonwealth views the "artificial cost advantage" enjoyed by landfill disposal as an impediment to the growth of recycling and as a threat to waste-to-energy facilities and recycling-related manufacturing and processing industries. Massachusetts has determined that it already has excess landfill capacity for its needs. "[P]ermitting more [municipal solid waste] landfill capacity can only come at the expense of reducing the share of the waste stream diverted to recycling and composting, or increasing waste imports. Both result in negative environmental and resource management impacts."

The Massachusetts landfill permitting regulations, prior to the announcement of the moratorium, included evaluation criteria which were based upon the "reasonably anticipated disposal capacity requirements and reduction/diversion goals of the Commonwealth and the geographic area(s) which the site will serve." Although the "geographic area(s)" language seems to leave room for the Commonwealth to consider the capacity requirements of out-of-state generators, the Department of Environmental Protection has interpreted this language to refer to geographic areas within the state. Thus, the criteria for review of permit applications, as defined by the regulations, require the Department to consider in-state need as a factor but, strictly speaking, do not require the proponent to demonstrate in-

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19 Master Plan, supra note 3, at 11.
20 See id. at 24.
21 Id. at 36.
22 Id. at 37.
23 Id.
24 Master Plan, supra note 3, at 37.
25 Id. (emphasis added).
27 See Master Plan, supra note 3, at 39 (referring to state-wide need).
state need.\textsuperscript{28} In interpreting the regulation, however, the Department has implemented a permit process in which each permit approval reduces the amount of total state-wide need available for subsequent permit applicants.\textsuperscript{29} The regulation, as implemented, therefore, amounts to a state-wide processing cap based exclusively upon in-state demand.\textsuperscript{30}

In 1994, the Commonwealth announced that it would not grant permits for additional municipal solid waste disposal capacity in the near term because there was substantial excess capacity.\textsuperscript{31} Nonetheless, public and private developers continued to present applications to build new landfills or expand existing landfills.\textsuperscript{32} The Commonwealth concluded that allowing the permitting process to remain open sent mixed signals to municipal planners that they could continue to rely upon landfills as a cheap disposal option.\textsuperscript{33} The Department of Environmental Protection announced a moratorium on most landfill permit applications in order to force local officials to reduce their communities' dependence on landfills.\textsuperscript{34}

The Massachusetts Solid Waste Master Plan: 1995 Update (hereinafter Master Plan) includes forecasts of Massachusetts solid waste disposal needs.\textsuperscript{35} These forecasts assume a growth in the percentage of waste composted and recycled from thirty-one percent in 1994 to a projected thirty-four percent in 1996 and to forty-six percent in 2000.\textsuperscript{36} Although a growth in recycling is described as an assumption,\textsuperscript{37} the Master Plan also recognizes that increased recycling is really a goal and that the Commonwealth probably cannot achieve this goal without a forced reduction in the available landfill capacity.\textsuperscript{38} A further assumption behind the forecasts is that the current net imports of

\textsuperscript{29} See Master Plan, supra note 3, at 39 ("Total state-wide need for disposal capacity is reduced by the number of tons of disposal allowed under the permit.") (emphasis added).
\textsuperscript{30} See id.
\textsuperscript{31} Id. at 38.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Master Plan, supra note 3, at 35, 38.
\textsuperscript{35} Id. at 29–33.
\textsuperscript{36} Id. at 3, 30.
\textsuperscript{37} Id. at 30.
\textsuperscript{38} See id. at 37. Furthermore, the Master Plan states that the reduction in capacity is also intended to assist Massachusetts recycling industries which would otherwise be threatened by competition from landfill operators. Id.
waste, amounting to 3.8% of the total waste stream, will decrease to zero.\textsuperscript{39} The \textit{Master Plan} does not indicate whether net imports will drop as a result of price increases in the remaining available capacity or as a result of a reduction in landfills accepting out-of-state waste. Nor does the \textit{Master Plan} discuss the possibility that some of the waste that is displaced from landfill disposal will end up being exported to other states rather than being recycled. The \textit{Master Plan} and the associated regulations establish a regulatory scheme which affects interstate commerce by reducing landfill capacity and by reducing net imports of waste to zero.\textsuperscript{40} These effects clearly implicate the dormant Commerce Clause.

III. THE DORMANT COMMERCE CLAUSE

A. General Dormant Commerce Clause Jurisprudence

The United States Supreme Court has interpreted the Commerce Clause of the United States Constitution\textsuperscript{41} as limiting the power of the states to discriminate against or burden interstate commerce.\textsuperscript{42} The Court sometimes describes the goals of the dormant Commerce Clause in terms of economic development: “every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation.”\textsuperscript{43} The Court also expresses these goals in terms of concerns that, without some form of restraint, the states will enact protectionist laws that will excite “jealousies and retaliatory measures.”\textsuperscript{44} The concern about retaliation is not merely another way of stating the economic development aspiration but embodies an additional concern for the integrity of the national political union.\textsuperscript{45}

The Court has fashioned general statements of principles from these goals:

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy,

\textsuperscript{39} \textit{MASTER PLAN}, supra note 3, at 3, 30.
\textsuperscript{40} See id.
\textsuperscript{41} U.S. CONST. art. I, § 8, cl. 3.
\textsuperscript{43} H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949).
\textsuperscript{44} See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994); Hood, 336 U.S. at 539 (“What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!”).
\textsuperscript{45} Donald H. Regan, \textit{The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause}, 84 MICH. L. REV. 1091, 1113 (1986).
including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. ... [O]ne state in its dealings with another may not place itself in a position of economic isolation.\textsuperscript{46}

The Court has articulated a vision of a national free trade zone in which there are no state lines for purposes of trade.\textsuperscript{47}

The Court’s dormant Commerce Clause jurisprudence seeks to strike a balance between these national market principles and an understanding of federalism in which the Commerce Clause was never intended to strip the states of the power to regulate local activity, even though it is incidentally related to interstate commerce.\textsuperscript{48} This balance is reflected in the Court’s two-tiered approach to analyzing challenged laws or actions.\textsuperscript{49} Where the state has been motivated by discriminatory purposes or the challenged action discriminates on its face or in its practical effect, the action is subject to a “virtually per se rule of invalidity.”\textsuperscript{50} The burden falls on the state to show that it is pursuing some legitimate purpose that cannot be achieved with a nondiscriminatory alternative.\textsuperscript{51} On the other hand, the so-called \textit{Pike} balancing test states that “[w]here a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”\textsuperscript{52}

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\textsuperscript{47} See \textit{Commonwealth Edison Co. v. Montana}, 453 U.S. 609, 618–19 (1981) (“[T]he borders between the States are essentially irrelevant. ... [I]n matters of foreign and interstate commerce there are no state lines.”) (quoting \textit{West v. Kansas Natural Gas Co.}, 221 U.S. 229, 255 (1911)).
\textsuperscript{51} \textit{Hughes v. Oklahoma}, 441 U.S. 322, 336 (1979). Although the “virtually per se” rule is almost always fatal, the Court may make an exception for quarantine laws that block interstate shipment of noxious articles. \textit{City of Philadelphia v. New Jersey}, 437 U.S. at 628. However, the courts will require more than a showing that the articles are undesirable; the very movement of the articles must represent a threat such that disposal as close to the point of generation as possible is required. \textit{See id.} at 628–29. A legitimate quarantine measure passes heightened dormant Commerce Clause scrutiny because there are no nondiscriminatory alternatives available for protecting the state’s interest. \textit{Maine v. Taylor}, 477 U.S. 131, 138, 151 (1986).
\textsuperscript{52} \textit{Pike v. Bruce Church, Inc.}, 397 U.S. 137, 142 (1970).
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The Court focuses on the distinction between the concepts of protectionist discrimination and incidental burden when it decides what level of scrutiny to apply to a state action. Generally, a statute discriminates against interstate commerce only when it confers a benefit upon in-state economic interests at the expense of out-of-state competitors, solely on the basis of their origin. For example, the mere fact that most of the burden of a tax is born by out-of-state interests is not necessarily considered discriminatory so long as the burden is not borne according to a distinction between in-state and out-of-state consumers.

No clear line separates the heightened scrutiny and *Pike* balancing tiers. "[F]acial discrimination by itself may be a fatal defect, regardless of the State’s purpose, because ‘the evil of protectionism can reside in legislative means as well as legislative ends.” However, even when a state has acted through a series of measures, each of which is individually constitutional, the Court may still examine the entire program to determine whether it discriminates in favor of local interests. The Court will look beyond the form of the measure when it decides what level of scrutiny to apply.

Protectionist purpose is sufficient to require heightened scrutiny. However, an explicit finding of protectionist purpose is not necessary for heightened scrutiny because “the evil of protectionism can reside in legislative means as well as legislative ends.” The Court will look beyond the “name, description or characterization” of a measure to the “practical impact of the law.” Even if a state’s ultimate aim is legitimate, “it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is

59 Id. (“Our Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce.”).  
60 See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984). Indeed, Regan has argued that almost all dormant Commerce Clause decisions can be explained solely by the presence or absence of protectionist purpose. Regan, supra note 45, at 1093.  
some reason, apart from their origin, to treat them differently." 63

The Court has occasionally discussed the difference between the two tiers as including a distinction between "direct" and "indirect" regulation or effect. 64 Professor Donald Regan, in his 1985 article, defined the "modern era of dormant commerce clause jurisprudence" in terms of the rejection of the "direct/indirect" distinction during the 1930's and 1940's. 65 Professor Regan cites Justice Stone's dissent in Di Santo v. Pennsylvania, 66 Professor Noel Dowling's 1940 Virginia Law Review article, 67 and Chief Justice Stone's opinion in Southern Pacific Co. v. Arizona68 as killing off the "direct/indirect" test.69

Justice Stone's Di Santo dissent criticized the "direct/indirect" test as "too mechanical, too uncertain in its application, and too remote from actualities, to be of value" and proposed that the Court consider "facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce" to decide whether the regulation "concerns interests peculiarly local and does not infringe the national interest."70 Professor Dowling noted that Justice Stone did not explain the nature of his proposed factors, that "local concern" and "infringement of national interest" are not mutually exclusive, and that the Court continued to use the "direct-indirect" test after Di Santo.71 Chief Justice Stone's opinion in Southern Pacific articulates a balancing approach, based on his Di Santo factors,72 but also sheds more light on what he considered to be "local concerns."73 Highway regulation,


64 See Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (generally striking down statutes that directly regulate or discriminate against interstate commerce).

65 Regan, supra note 45, at 1093-94.

66 273 U.S. 34, 43 (1927) (Stone, J., dissenting).


68 325 U.S. 761 (1945).

69 Regan, supra note 45, at 1094.


71 Dowling, supra note 67, at 7-8.

72 Southern Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945). Interestingly, Chief Justice Stone twice cites Buck v. Kuykendall, 267 U.S. 307, 315 (1925), for the proposition that states may not use their "police power" as an excuse for regulating interstate commerce. Southern Pac., 325 U.S. at 780-81. Buck was not, however, a balancing case and has been viewed as part of the "direct/indirect" line of cases. See infra notes 184-217 and accompanying text.

73 Southern Pac., 325 U.S. at 781.
which he considered to be local, was different from railroad regulation because highways are built, owned and maintained by the states. 74

The United States Supreme Court in *Pike v. Bruce Church, Inc.* questioned the meaning of the "direct/indirect" distinction and suggested that courts that use the terms "direct" and "indirect" are really involved in balancing. 75 Some time later, the Court's opinion in *Arkansas Electric Cooperative v. Arkansas Public Service Commission* suggested that the distinction between direct and indirect effects was at odds "with the general trend in [the] modern Commerce Clause jurisprudence." 76

Chief Justice Stone did not, however, succeed in eliminating the "direct/indirect" language from the dormant Commerce Clause jurisprudence. 77 In *Edgar v. MITE Corp.*, Justice White, writing a portion of the opinion which received only four votes, said that "[t]he Commerce Clause . . . permits only incidental regulation of interstate

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74 Id. at 783. But see George W. Bush & Sons v. Maloy, 267 U.S. 317, 324-25 (1925) (holding that *Buck v. Kuykendall* not limited to federally funded highways). Chief Justice Stone provided other examples of local regulations including "quarantine measures, game laws, and like local regulations of rivers, harbors, piers, and docks, with respect to which the state has exceptional scope for the exercise of its regulatory power." *Southern Pac.*, 325 U.S. at 783.

75 See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* opinion, while interpreting the distinction between "direct" and "indirect" effects as a form of balancing, uses the term "incidental" without explaining how that term differs from the term "indirect." See id.

76 Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 390 (1983) (rejecting retail/wholesale bright line which was based upon direct/indirect distinction). The Court has repudiated the use of distinctions between direct and indirect effects for purposes of non-dormant Commerce Clause jurisprudence. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Although the repudiation of the distinction in one context suggests the possibility that the distinction is not viable for dormant Commerce Clause analyses, the distinction is used for different purposes in the different contexts. In the non-dormant Commerce Clause context, the Court has used the distinction to create a narrow conception of interstate commerce for the purpose of limiting congressional power. See id. at 123-25 (rejecting use of "indirect" to define extent of federal power). In the dormant Commerce Clause context, the courts have used the term "direct" to refer to regulation that was the nearly exclusive domain of the federal government and has used the term "indirect" to refer to regulation that might be available to the states, if not pre-empted by federal legislation. See *Buck*, 267 U.S. at 316 (holding that regulation of competition to be "peculiarly within the province of the federal action"); *Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago*, 240 F.2d 930, 937 (7th Cir. 1957) (discussing "direct" and "indirect" regulation and using "indirect" and "incidental" interchangeably).

commerce by the States; direct regulation is prohibited.”78 Professor Regan, assuming that Justice White could hardly have meant to revive the “direct/indirect” test, argued that the direct/indirect portion of the opinion is really about extraterritorial legislation, which Regan considers to be a subject apart from the Commerce Clause.79 One year after the publication of Regan’s article, however, the Court, in Brown-Forman Distillers Corp. v. New York State Liquor Authority, held that New York’s alcoholic beverage pricing scheme directly regulated commerce because the effects of the scheme projected New York legislation into other states.80 Statutes with extraterritorial effects will be subject to heightened scrutiny under the “direct” rationale if they apply to, or control, commerce occurring wholly outside of the state or if the practical effect of the regulation is to control conduct beyond the boundaries of the state.81 The practical effect of the measure will be considered in light of other states’ regulatory schemes and the effect of other states adopting similar measures.82 Whether the “direct” criteria for heightened scrutiny has become limited to extraterritorial economic regulation is unclear;83 however, even those who question the utility of the “direct/indirect” distinction have admitted that it seems to retain a place in the current dormant Commerce Clause jurisprudence.84

When the Court finds that a statute is neither facially discriminatory, nor discriminatory in its purpose or effect, and its effect on commerce is indirect or incidental, it will apply the more flexible Pike balancing test.85 This test requires that the court consider the extent of the burden, the nature of the local purpose, and the availability of

78 Edgar, 457 U.S. at 640, 643 (statute was direct regulation because it prevented or interdicted interstate transactions).
79 Regan, supra note 45, at 1280–81.
80 476 U.S. at 584.
82 Id. at 336.
83 Cf. id. (factors discussed were the minimum propositions that could be stated from the Court’s cases concerning extraterritoriality); see also Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 396 (9th Cir.), cert. denied, 115 S. Ct. 2580 (1995) (stating that “direct” refers to regulations whose central purpose is to regulate commerce, usually to benefit local interests and that Buck v. Kuykendall, 267 U.S. 307 (1925), hinged on the primary purpose of regulating competition).
alternatives for achieving that purpose. 86 There do not appear to be many United States Supreme Court cases since Pike that have used the balancing test to invalidate a state statute. 87 Even the Pike decision seems to turn on the Court's suspicions of the state's motives, suggesting that the real problem is of an embargo or hoarding nature, and shedding some doubt on whether the Pike Court itself used the balancing test. 88 Even assuming that Pike balancing is a viable part of the Court's dormant Commerce Clause jurisprudence, the relative rarity of the Court's reliance on balancing to invalidate state action demonstrates that the selection of the appropriate level of scrutiny is the crucial issue in dormant Commerce Clause cases. 89

B. Hoarding Products and Natural Resources

The dormant Commerce Clause jurisprudence includes a general principle against hoarding of products: states may not "prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." 90 The dormant Commerce Clause also prohibits a state from providing its "own inhabitants a preferred right of access . . . to natural resources located within its borders." 91 City of Philadelphia v. New Jersey established the basis of dormant Commerce Clause waste cases, not merely by holding that "valueless" waste is an article of commerce, but also by analyzing landfill capacity as a natural resource. 92 The fact that the natural resource did not move in interstate com-

87 See generally Regan, supra note 45, § III.D (arguing that only Edgar v. MITE, 457 U.S. 624 (1982), even purports to use balancing and that it has little or no precedential value). Reliance upon Pike balancing is probably less unusual in the lower courts. See, e.g., Medigen, Inc. v. Public Serv. Comm'n, 985 F.2d 164, 166 (4th Cir. 1993); Northeast Sanitary Landfill, Inc. v. South Carolina Dep't of Health & Envtl. Control, 843 F. Supp. 100, 109 (D.S.C. 1992).
88 See Pike, 397 U.S. at 145 ("[T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere."); see also Regan, supra note 45, at 1215–20.
90 Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928); see also C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (may not hoard for benefit of local businesses).
merce was not relevant to the Court’s decision to apply long established anti-hoarding principles.\textsuperscript{93}

Several old cases established the basic prohibition against hoarding natural resources for local use. \textit{West v. Kansas Natural Gas Co.} held that a state may not use an embargo to conserve its resources for the exclusive use of its inhabitants.\textsuperscript{94} \textit{Pennsylvania v. West Virginia} applied \textit{West v. Kansas Natural Gas} to regulations that fell short of an embargo but provided preferred access to state residents.\textsuperscript{95} In \textit{Foster-Fountain Packing Co. v. Haydel}, Louisiana placed an embargo on raw shells or hulls and heads of shrimp because “they are required to be manufactured into fertilizer or used for an element in chicken feed.”\textsuperscript{96} The Court noted that states may not place an embargo on privately owned articles of commerce “on the ground that they are required to satisfy local demands or because they are needed by the people of the State.”\textsuperscript{97} In \textit{H. P. Hood & Sons v. Du Mond}, the State of New York denied an out-of-state milk distributor a license to open a milk collection depot, in part, because the expanded operation would reduce the supply of milk available to local markets.\textsuperscript{98} The United States Supreme Court applied \textit{Foster-Fountain Packing} and held that states are without the power to hoard articles of trade.\textsuperscript{99}

The anti-hoarding principle is not so broad as to preclude all state regulation over the exploitation of natural resources.\textsuperscript{100} The dormant Commerce Clause does not guarantee “residents of one State a right of access at ‘reasonable’ prices to resources located in another State.”\textsuperscript{101} The states retain the right to control the development and depletion of their own resources, so long as they do so in a nondiscriminatory manner.\textsuperscript{102} For example, the Court in \textit{City of Philadelphia v. New Jersey} assumed that New Jersey could “slow [] the flow of all waste

\textsuperscript{93} See id. at 628.
\textsuperscript{94} West v. Kansas Natural Gas Co., 221 U.S. 229, 250, 260 (1911).
\textsuperscript{95} Pennsylvania v. West Virginia, 262 U.S. 553, 597 (1923) (applying West v. Kansas Natural Gas Co., 221 U.S. 229 (1911)).
\textsuperscript{96} Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 8-9 (1928).
\textsuperscript{97} Id. at 10.
\textsuperscript{98} H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 526, 528-29 (1949).
\textsuperscript{99} Id. at 536 (quoting Foster-Fountain Packing, 278 U.S. at 10). The Hood decision also held that New York could not deny a permit on the grounds that the milk distribution market in upstate New York was already adequately served and that Hood’s new plant would result in destructive competition. See id. at 529-31. That aspect of the Hood decision is discussed infra Section IV.
\textsuperscript{101} Id.
\textsuperscript{102} See id.
into the State’s remaining landfills” as long as it did so without discriminating against imported waste on the basis of its origin.103 A state-wide cap is one way of slowing the flow of waste. Unfortunately, the dicta in City of Philadelphia v. New Jersey does not provide a clear answer to the question of what types of state-wide caps are consistent with the anti-hoarding principle.104

A traditional argument in favor of exempting states from the anti-hoarding principle involves the notion that states have a proprietary or ownership interest in wildlife or natural resources within their borders.105 For example, Geer v. Connecticut created an exemption from dormant Commerce Clause scrutiny for wild game.106 This exemption was based on the view that, as representatives of its citizens, states may attach conditions, such as forbidding interstate transportation of game, to the taking of commonly owned property.107 In Hughes v. Oklahoma, the United States Supreme Court rejected the “fiction of state ownership” and overturned Geer.108 The Court determined that the state’s interest in conservation was a legitimate local purpose similar to its health and safety interests, but that the scope of the conservation interest was narrower than the property interest under Geer because the state may no longer keep property within its jurisdiction for every purpose.109 New England Power Co. v. New Hampshire involved a challenge to a statute that allowed the New Hampshire Public Utilities Commission to prohibit the exportation of hydroelectricity based upon a determination of local need.110 The Court dis-

104 See id.
106 See id. at 530-31.
107 Id. at 530.
108 Hughes v. Oklahoma, 441 U.S. 322, 337 (1979). The Court stated that it had previously rejected the Geer analysis when other types of resources were involved. Id. at 329. It then went further to describe the Geer doctrine as “a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” Id. at 334 (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1948)).
109 Id. at 337.

No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting to engage in such business. Any such corporation . . . shall discontinue such business . . . whenever . . . the commission shall find that such electrical energy . . . is reasonably required for use within this state.

Id.
missed New Hampshire's argument that its ownership of the Connecticut River justified the regulation of its use.111 "Our cases consistently have held that the Commerce Clause of the Constitution precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom."112

The market participant exception to the dormant Commerce Clause provides another means for courts to exempt the states from the anti-hoarding principle.113 A state acting as a market participant, rather than as a regulator of private market participants, is largely immune from dormant Commerce Clause scrutiny.114

In spite of the fairly broad nature of the market participant exception,115 some question remains about whether the court will allow states to use the exception to justify hoarding of natural resources.116 In Reeves, Inc. v. Stake, the United States Supreme Court distinguished South Dakota's local preference policy in selling the output from a state-owned cement factory from the practices prohibited in the natural resources hoarding cases by noting that "[c]ement is not a natural resource."117 The Court went on to observe:

South Dakota has not sought to limit access to the State's limestone or other materials used to make cement. Nor has it restricted the ability of private firms or sister States to set up plants within its borders. Moreover, petitioner has not suggested that South Dakota possesses unique access to the materials needed to produce cement. Whatever limits might exist on a State's ability

111 New England Power Co., 455 U.S. at 338 n.6 (pre-eminent authority to regulate navigable waters resides with the federal government).
112 Id. at 338 (citations omitted). But see Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 956 (1982) (state's claim to public ownership of ground water may support a limited preference for its own citizens). The Court in Sporhase speculated that the measures which applied to interstate shipments of water may not have been stricter than limitations placed on intrastate transfers under a different provision. See id. The Court also indicated that there were legal expectations raised by the Court's equitable apportionment decrees and that the Court's previous decisions have "recognized the relevance of state boundaries in the allocation of scarce water resources." Id. To the extent that Sporhase can be read as ratifying hoarding, it is probably limited to claims over ground water. See Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 107 (1994).
114 See id. "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Id. at 810; see also Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980) (no constitutional plan to limit ability of states to operate freely in the market).
115 See Alexandria Scrap, 426 U.S. at 810.
116 See Reeves, 447 U.S. at 444.
117 Id. at 443.
to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here.\textsuperscript{118}

This passage suggests that the market participant exception is not absolute, at least where natural resources are concerned, and that there may be limits to the states' control over resources found within their borders.\textsuperscript{119} However, as dicta, this passage does not clearly establish the existence or bounds of those limits.\textsuperscript{120}

The hoarding cases impose limits on the power of the states to ration scarce natural resources.\textsuperscript{121} A common theme that emerges is that the dormant Commerce Clause prohibits states from "isolat[ing] themselves from a problem common to many by erecting a barrier against the movement of interstate trade."\textsuperscript{122} Although some of the Court's cases have discredited the notion of ownership and proprietary interest,\textsuperscript{123} there remains a tension between the national market goals of the dormant Commerce Clause and a continuing sense that the states must retain some power over the rate of exploitation of resources located within their jurisdiction.\textsuperscript{124} Thus, these cases do not provide a clear answer to the question of what types of state-wide caps on landfill capacity are permissible.

IV. LOCAL NEED AND THE DORMANT COMMERCE CLAUSE

A. Local Need as a Permit Requirement

The hoarding cases involve attempts by states to control the export of articles of commerce that are needed by in-state consum-

\textsuperscript{118} Id. at 444 (citations omitted).


\textsuperscript{120} See Reeves, 447 U.S. at 444. The *Master Plan* envisions the closure of all existing private landfills by the year 2000. *MASTER PLAN*, supra note 3, ch. 5 app. F. If Massachusetts refuses to grant permits to new private landfills, then Massachusetts could be effectively closed to out-of-state waste. See id. at 27 (projecting negligible private capacity in the year 2000). The question of the limits to the market participant exception imposed by the anti-hoarding principle, and the ability of states to use the market participant exception to overrule City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978), would become important.

\textsuperscript{121} See *City of Philadelphia v. New Jersey*, 437 U.S. at 628.

\textsuperscript{122} See id.


ers. A different line of dormant Commerce Clause cases deals with attempts by states to deny the licensing of new or expanded services because they are not needed by in-state consumers. Typically, a statute will permit or require a state agency to deny a certificate of convenience and necessity when a state agency determines that the market is adequately served. Massachusetts has presented this type of rationale, that the Commonwealth is adequately served by the existing landfill capacity, as one of the rationales for the Massachusetts landfill moratorium.

1. Early Development of the “Adequately Served” Case Law

State governments have used the concept of “public convenience and necessity” to regulate commercial activity for over 100 years. The term “convenience and necessity” refers to a variety of state interests that are protected through requirements relating to such issues as safety, financial responsibility, suitability of character, and market conditions. For purposes of this discussion, only a particular type of market condition is of interest: the requirement that there be a demonstration of need for the proposed service or that the market is not adequately served.

The states have long used “demonstration of need” as a permitting requirement in the area of local transportation. States may also require certification of interstate transportation providers and may “exclude unnecessary vehicles” on the basis of safety concerns such as congestion and wear and tear on the roads. However, a state may

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126 See, e.g., H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 528–29 (1949); Buck v. Kuykendall, 267 U.S. 307, 313 (1925). Hood involved both types of issues. The state was concerned that the export of milk from the new distribution facility would create milk shortages in Troy, N.Y. Hood, 336 U.S. at 529. The state was also concerned that the new facility would result in destructive competition between distributors. Id.
127 See, e.g., N.Y. Agric. & Mkts. Law § 258-c (McKinney 1972 and Supp. 1987) (“No license shall be denied . . . unless the commissioner finds . . . that the issuance of the license will tend to a destructive competition in a market already adequately served . . . .”), amended by 1987 N.Y. Laws ch. 540, § 9 (deleting “destructive competition” and “adequately served” basis for denial of permit).
128 MASTER PLAN, supra note 3, at 37.
130 See id. at 427.
131 See id. at 433–46.
not use adequacy of service as a permit condition for interstate transportation services without violating the dormant Commerce Clause. 133 In Buck v. Kuykendall, the State of Washington refused to grant a certificate of public convenience and necessity to an interstate bus operator on the grounds that the market the operator sought to enter was already adequately served. 134 The State argued that it could exclude unnecessary vehicles from its highways, even if those vehicles were involved in interstate commerce, in order to promote safety and economy. 135 Washington argued that the purpose of the statute, "to promote good service by excluding unnecessary competing carriers," was within its police powers. 136 Justice Brandeis, writing for an eight to one majority, rejected Washington's argument. 137 The state may regulate the manner of use of its highways "with a view to safety or to conservation of the highways," even if there is an indirect, but not unreasonable, burden on interstate commerce. 138 The state may not, however, prohibit competition in interstate commerce because the determination of "the existence of adequate facilities for conducting interstate commerce" is "peculiarly within the province of [the] federal [government]." 139 Demonstration of need as a certification requirement was more than merely an indirect burden on interstate commerce, and it was, therefore, unnecessary for the Court to inquire into whether the burden was "reasonable." 140

Eight years after Buck, Justice Brandeis, in Bradley v. Public Utilities Commission, wrote an opinion for a unanimous United States Supreme Court upholding the denial of a license to an interstate carrier. 141 The State of Ohio could deny a certificate of public conven-

133 Buck, 267 U.S. at 315–16; see also George W. Bush & Sons v. Maloy, 267 U.S. 317, 324–25 (1925) (Buck not limited to federally funded highways or to cases where denial is discretionary); Medigen, Inc. v. Public Serv. Comm'n, 985 F.2d 164, 167 (4th Cir. 1993) (may not deny market entry on ground that area already efficiently and adequately served); Atchison, Topeka & Santa Fe Ry. Co. v. City of Chicago, 240 F.2d 930, 940 (7th Cir. 1957) (consent of city to prosecution of a business not a valid requirement). But see Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 399–400 (9th Cir.) (barriers to entry justified by need to prevent "cream-skimming" which could result in discontinuance of service and improper disposal of waste), cert. denied, 115 S. Ct. 2580 (1995).
134 Buck, 267 U.S. at 313.
135 Id. at 315.
136 Id.
137 Id.
138 Id.
139 Buck, 267 U.S. at 316.
140 See id.
ienced and necessity where the proposed route of service was “so badly congested . . . that the addition of the applicant’s proposed service would create and maintain an excessive and undue hazard . . . .”142 The Court rejected the argument that an interstate carrier was “entitled to a certificate as of right” and that the denial of a certificate was a per se violation of the dormant Commerce Clause.143 However, the Court reaffirmed the holding in Buck that states may not use adequacy of existing transportation facilities as a criteria for denying a certificate.144 In Lloyd A. Fry Roofing Co. v. Wood, the United States Supreme Court upheld a certification statute that allowed the state to consider the adequacy of existing services as a factor in denying a permit, but did so only because the state had expressly disclaimed any right to refuse a permit on that basis.145 Although the Court allowed the states to require certificates for the purpose of identifying users of the state’s highways, it reaffirmed Buck v. Kuykendall and indicated that an attempt to enforce the “adequately served” provision would violate the dormant Commerce Clause.146

H. P. Hood & Sons v. Du Mond was the first United States Supreme Court case to apply Buck outside of the context of interstate transportation.147 In Hood, the State of New York denied an application for a license for expanded milk distribution facilities, in part, because the farmers in the area were already adequately served by existing facilities.148 New York was also concerned that unregulated competition would reduce the volume of milk received at existing plants and would increase the cost of handling milk in those plants.149 The Court recog-

142 Id. at 93–94.
143 Id. at 95. The states may require a certificate and may exclude interstate traffic for safety reasons. Id. at 96.
144 Id. at 95.
146 See id. at 161, 163. Justice Douglas, dissenting, argued that local regulation of the type present in the statute was invalid because it had been pre-empted by Congress when it gave the Interstate Commerce Commission authority to regulate interstate contract carriers. Id. at 166 (Douglas, J., dissenting). However, Justice Douglas also suggested that even as a preliminary matter, without consideration of pre-emption, the statute was invalid under Buck v. Kuykendall. See id. at 165 (Douglas, J., dissenting).
148 Id. at 529. The statute prohibited the grant of a license unless the commissioner is satisfied that the “issuance of the license will not tend to a destructive competition in a market already adequately served.” Id. at 527 n.3. The Commissioner found that “[t]here [was] no evidence that any producer [was] without a market for his milk. . . . The issuance of a license . . . would tend to a destructive competition in a market already adequately served.” Id. at 529.
149 Id. at 528–29.
nized the intimate connection between the production and distribution of milk and the public health and welfare.\footnote{150 Id. at 529.} It also recognized the "eccentric" nature of the milk industry and the need for and constitutional legitimacy of detailed, intricate, and comprehensive economic controls.\footnote{151 Id.} Nonetheless, the Court, citing 

\textit{Buck}, declared that: 

\textit{[T]he state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition. In \textit{Buck v. Kuykendall}, the Court struck down a state act because, in the language of Mr. Justice Brandeis, "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." The same argument here advanced, that limitation of competition would itself contribute to safety and conservation, and therefore indirectly serve an end permissible to the State, was there declared "not sound."}\footnote{152 Hood, 336 U.S. at 538 (citation omitted).} 

The Court did not distinguish between measures aimed at keeping milk in the state and keeping additional distribution capacity out of the state. Both types of measures represented efforts to directly regulate competition in an interstate market for the purpose of producing local benefits.\footnote{153 \textit{See id. at 530-31 (restrictions had the "avowed purpose and practical effect of curtailing the volume of interstate commerce"); see also Julian N. Eule, \textit{Laying the Dormant Commerce Clause to Rest}, 91 \textit{Yale L.J.} 425, 477 (1982) (Hood stands for the proposition that states may not use evenhanded regulation designed to achieve valid purpose if regulation attempts to limit interstate shipment of goods).} And both types of measures were treated as per se invalid.\footnote{154 \textit{See Hood}, 336 U.S. at 565 (Frankfurter, J., dissenting) (Court should have balanced competing interests rather than applying an absolute prohibition).} 

2. The Continued Viability of \textit{Buck v. Kuykendall} and \textit{H. P. Hood & Sons v. Du Mond} 

\textit{Buck} and \textit{Hood} preceded the development of the modern two-tiered approach to the dormant Commerce Clause.\footnote{155 \textit{See supra} notes 48–52 and accompanying text.} \textit{Buck} is a very old decision and \textit{Hood} was decided by a five to four majority. There is, therefore, a legitimate question whether these decisions remain good law.\footnote{156 \textit{See Eule, supra} note 153, at 479 (Hood can be criticized for ignoring "evenhanded" analysis, for ignoring "incidental" analysis, or for failing to employ "balancing" analysis).}
In 1978 the New York Court of Appeals upheld Section 258-c of New York’s Agriculture and Markets Law, the same statute that was at issue in *Hood.*\(^{157}\) New York denied Tuscan Farms, Inc., a New Jersey corporation, an extension of its milk dealers’ license into a new county because such an extension “would tend to a destructive competition for milk sales in a market already adequately served.”\(^{158}\) The court distinguished the denial of the permit from the situation in *Hood* by asserting that H. P. Hood was denied its permit in order to protect the economic interests of other milk distributors, while Tuscan Farms was denied its permit in order to protect consumers.\(^{159}\) In fact, the majority opinion in *Hood* specifically discussed New York’s regulation as an attempt to withhold milk from export in order to protect the supply of milk for local consumption.\(^{160}\) In spite of the New York Court of Appeals’ reading of *Hood,* the United States Supreme Court dismissed Tuscan’s appeal for want of a substantial federal question.\(^{161}\) The Court’s decision led Professor Eule to conclude that *Tuscan Dairy Farms* undermined *Hood*’s vitality and to talk of *Hood*’s demise.\(^{162}\)

*Tuscan Dairy Farms* has not been followed by the federal courts. In *Safeway Stores, Inc. v. Board of Agriculture,* the United States District Court for the District of Hawaii enjoined the state from denying a license to distribute milk where the state had denied the license on the grounds that “granting the license would tend to promote destructive or demoralizing competition in a market already adequately served.”\(^{163}\) The court cited the “adequately served” portion of the *Hood* decision for the proposition that the dormant Commerce Clause prohibits using regulations for the protection of local economic interests.\(^{164}\) Three years later, the United States District Court for the Eastern District of New York held that the application


\(^{158}\) Id. at 181.

\(^{159}\) Id. at 187–88.

\(^{160}\) See H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 531 (1949); see also Eule, supra note 153, at 478 (*Tuscan Dairy Farms* fails effectively to distinguish *Hood*).


\(^{162}\) See Eule, supra note 153, at 479, 481.


\(^{164}\) Id. at 785. Although the court’s opinion stresses its findings that the statute, as enforced, displayed discriminatory purpose and effect, the court also noted that there were good reasons to invalidate the statute as inherently unconstitutional. *Id.* at 784–86. The court decided not to invalidate the statute out of considerations of comity. *Id.* at 786.
of Section 258, the *Hood/Tuscan Dairy Farms* statute that denied a milk distributor entry into a market that was already adequately served, violated the dormant Commerce Clause.\(^{165}\) Without mentioning *Tuscan Farms*, and relying heavily on *Hood* and *Safeway Stores*, the court said that:

> These cases make clear that even if the Court accepts [the commissioner's] contention that excluding Farmland from the market is necessary to keep existing producers in business and ensure a plentiful supply of milk for New York consumers, denying the out-of-state dealer access into the market on that basis is in direct conflict with the principles of the commerce clause.\(^{166}\)

Fifteen Supreme Court majority opinions have cited *Hood* in the fifteen years since Professor Eule's announcement of *Hood*'s demise.\(^{167}\) None of those opinions are critical of *Hood*'s reasoning and none of them attempt to narrow *Hood*'s applicability to its facts.\(^{168}\) Some element of *Hood*, therefore, remains good law.

In contrast to *Hood*, only four Supreme Court majority opinions have cited *Buck v. Kuykendall* over the past eighteen years.\(^{169}\)

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\(^{166}\) *Id.*


in large part to the pre-emption effects of the Motor Carrier Act of 1935, more than sixty years have passed since the Supreme Court has relied upon *Buck* to invalidate a state action. Two recent United States Court of Appeals decisions have discussed *Buck* in the context of convenience and necessity requirements in waste collection and transportation regulations. In *Medigen, Inc. v. Public Service Commission*, the Fourth Circuit appeared to characterize the *Buck* decision as relying on the distinction between “direct” and “indirect” regulations, a distinction which the Fourth Circuit questioned. The court avoided articulating what it felt to be an appropriate criteria for heightened scrutiny by relying upon the *Pike* balancing test to invalidate the denial of a permit.

In *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, the United States Court of Appeals for the Ninth Circuit rejected Kleenwell's argument that *Buck* establishes a per se rule against states requiring a certificate of necessity from any party engaged in interstate commerce. The court also rejected Kleenwell's arguments based on distinctions between “direct” and “indirect” regulation and upheld the statute under the *Pike* test. The court found

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173 *Medigen*, 985 F.2d at 166.

174 See id. at 166–67 (demonstration of need requirement did not serve legitimate state purpose in light of other regulatory provisions that regulate prices and require transporters to offer services to all).

175 *Kleenwell*, 48 F.3d at 396. The court cited three cases, TV Pix, Inc. v. Taylor, 396 U.S. 556 (1970) (per curiam), Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276 (1961), and C.A. Bradley v. Public Utils. Comm'n, 289 U.S. 92 (1933), which it said “undermined” the “assertion that *Buck* establishes a per se rule against regulations like the one before us.” *Kleenwell*, 48 F.3d at 396. Two of these cases rejected a per se rule against certification requirements. See TV Pix, Inc. v. Taylor, 304 F. Supp. 459, 462–63 (D. Nev.) (“[E]ach case should be viewed on its own facts . . . .”), aff'd per curiam, 396 U.S. 556 (1968); Bradley, 289 U.S. at 95–96 (rejecting claim that carrier is “entitled to a certificate as of right”). None of the cases, however, undermine *Buck*’s prohibition with regard to adequacy of service as a certification requirement. See Eli Lilly, 366 U.S. at 277 (state only required applicant to file copy of charter together with limited amount of information about operations); *Bradley*, 289 U.S. at 95–96 (state may not regulate for the purpose of preventing undesirable competition); TV Pix, 304 F. Supp. at 463 (state sought only to regulate quality of and rates charged for service).

176 *Kleenwell*, 48 F.3d at 396–98, 400–01. The court indicated that its holding was limited to “the general structure and purpose of the regulatory scheme and [did] not consider whether the specifics of its operation would withstand constitutional scrutiny.” Id. at 399.
that the purpose of the statute, "ensuring the safe disposal of solid waste in rural areas," was a legitimate state concern,\textsuperscript{177} and that the burden of the regulatory scheme was "incidental" and "insignificant."\textsuperscript{178} Neither Medigen nor Kleenwell convincingly confirms the continued viability of Buck v. Kuykendall because neither case relied upon Buck for its holding.\textsuperscript{179} Neither case, however, suggests that Buck is no longer viable. Medigen shies away from expressing any judgment about Buck itself.\textsuperscript{180} Kleenwell appears to reaffirm the continued viability of Buck, and to merely take issue with the plaintiff's claim of a per se right to a permit and the plaintiff's "expansive" interpretation of "direct regulation."\textsuperscript{181}

The United States Supreme Court has not overruled or limited Buck or Hood to their facts. There might be some argument that Buck is \textit{sui generis}—that interstate transportation is different because it is an instrumentality of interstate commerce.\textsuperscript{182} Hood, however, did not suggest that Buck initially was limited to transportation or that Buck's application to milk processing was an expansion of Buck's holding.\textsuperscript{183} There is even less reason to view Hood as limited to the milk industry.

\textsuperscript{177} Id. at 398.
\textsuperscript{178} Id. at 399–400. The court did not discuss the availability of less burdensome alternatives as part of its balancing process but instead emphasized the fact that the regulations were not discriminatory on their face or in their effect. See id. at 400 (benefits outweighed burdens because provision burdened in-state and out-of-state companies in the same way and treated interstate and intrastate carriers identically). This reasoning is not typical of dormant Commerce Clause cases. Discrimination is generally discussed as grounds for heightened scrutiny, and is not usually part of \textit{Pike} balancing. See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (need not resort to \textit{Pike} test if measure discriminates).
\textsuperscript{179} See Kleenwell, 48 F.3d at 398, Medigen, Inc. v. Public Servo Comm'n, 985 F.2d 164, 166–67 (4th Cir. 1993).
\textsuperscript{180} Medigen, 985 F.2d at 166.
\textsuperscript{181} See Kleenwell, 48 F.3d at 396, 397 & n.7 (Buck and progeny hinge on fact that primary purpose of regulation was to inhibit undesirable competition).
\textsuperscript{183} See H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 538 (1949). Buck has been cited by modern United States Supreme Court cases outside of the context of interstate transportation. See C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 394 (1994) (practical effect of flow control on interstate commerce is analogous to law found invalid in Buck v. Kuykendall); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980) ("Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition."); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.").
3. The Modern Meaning of *Buck v. Kuykendall* and *H. P. Hood & Sons v. Du Mond*

The initial inquiry in a modern analysis is to determine which level of scrutiny the *Buck* and *Hood* Courts applied.\(^{184}\) Neither the *Buck* nor *Hood* opinions contain any language that can be interpreted as balancing.\(^{185}\) The thrust of the *Buck* decision is that the prohibition of interstate competition is not a valid purpose because it is "within the province of federal action."\(^{186}\) The absence of a valid purpose made it unnecessary for the Court to perform a balancing analysis.\(^{187}\) The dissent in *Hood* criticized the majority for conducting "an exercise in absolutes" rather than balancing competing interests.\(^{188}\) Both *Buck* and *Hood* must, therefore, be examples of the application of heightened scrutiny.

The next inquiry in a modern analysis is whether *Buck* and *Hood* applied heightened scrutiny because they involved facially discriminatory measures or measures which discriminated in purpose or effect.\(^{189}\) *Buck* made its modern reemergence in *City of Philadelphia v. New Jersey* where the Court stated the virtually per se prohibition against "simple economic protectionism."\(^{190}\) *Buck* did not, however, involve simple economic protectionism, in the sense of favoring an in-state interest over an out-of-state interest, because the permit applicant in *Buck* was an in-state business.\(^{191}\)

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\(^{185}\) See Regan, supra note 45, at 1266–67 (discussing passages in *Hood* which might conceivably be construed to imply balancing but, he argues, do not).

\(^{186}\) See *Buck v. Kuykendall*, 267 U.S. 307, 315–16 (1925). The *Buck* opinion makes use of the term "indirect burden," makes a distinction between "burden" and "obstruction," and fails to inquire into the reasonableness of the burden. *Id.* This suggests that *Buck* cannot be understood as a *Pike* balancing decision. *But see* *Pike v. Bruce Church*, Inc., 397 U.S. 137, 142 (1970) (asserting that previous balancing decisions have spoken in terms of "direct" and "indirect" effects but not discussing *Buck* specifically).

\(^{187}\) See *Buck*, 267 U.S. at 315–16 (avoiding inquiry into reasonableness of burdens because they were "of a different character").


\(^{191}\) See *Buck*, 267 U.S. at 313. Although the Court described the statute as prohibiting use by some persons, "while permitting it to others for the same purpose and in the same manner," the Court's opinion does not suggest that its holding is based on a finding of discriminatory purpose or effect. *See id.* at 315–16. The fact that the permit applicant in *Buck* was a resident of Washington makes any suggestion of discrimination against out-of-state firms in favor of in-state competitors somewhat implausible. *See id.* at 313.
The analysis of the role of discrimination is more difficult in *Hood* than in *Buck* because *Hood* involved New York's attempt to regulate two different types of competition: 1) competition between New York consumers and Massachusetts consumers; and 2) competition among milk distributors serving New York dairy farmers. The attempt to hoard milk for the benefit of New York consumers fits the classic pattern of discrimination. *Hood* cannot, however, be read as merely an anti-hoarding decision because the Court devoted so much effort to discussion of New York's "adequately served" rationale for the regulation of distributors. It is possible that the Court's analysis of the regulation of distributors was based upon an underlying sense that New York was discriminating against Hood because it was an out-of-state firm. The *Hood* dissent, however, points out that the "adequately served" criteria is facially neutral and that there was no factual finding of discriminatory purpose. Both *Buck* and *Hood*, therefore, must be seen as applying heightened scrutiny for some reason other than a finding of discrimination.

The "direct/indirect" distinction is the only rationale within the current jurisprudence, other than discrimination, for applying heightened scrutiny. The language in both *Buck* and *Hood* is consistent

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193 See *Regan*, *supra* note 45, at 1094–95 (defining protectionism in terms of purpose to improve competitive position of local actors vis-a-vis foreign competitors through traditional instruments such as tariffs, quotas or embargoes).

194 See *Hood*, 336 U.S. at 537–40. Even Professor Regan concedes that *Hood* "could just possibly" be read as condemning measures taken with neutral anti-competitive purposes which, nonetheless, operate to disadvantage an out-of-state competitor. See *Regan*, *supra* note 45, at 1263.

195 See *Regan*, *supra* note 45, at 1264–65.

196 *Hood*, 336 U.S. at 549 (Black, J., dissenting).

197 See id. at 528–29.

with this rationale.\textsuperscript{199} Yet, some explanation of the sense in which these decisions involved “direct” regulation is necessary in order to avoid Justice Stone’s criticism that the “direct/indirect” distinction is too results oriented.\textsuperscript{200} The Court’s opinion in \textit{C & A Carbone v. Town of Clarkstown} can be read as suggesting one possible interpretation of \textit{Buck} as a “directly regulates” decision: that even the evenhanded regulation of competition in interstate commerce is not a permissible state purpose.\textsuperscript{201} \textit{Hood}, however, suggests that not all regulation of competition is prohibited.\textsuperscript{202} The facts of \textit{Buck} and \textit{Hood} support a

\textsuperscript{199} See Medigen, Inc. v. Public Serv. Comm’n, 985 F.2d 164, 166 (4th Cir. 1993) (characterizing George W. Bush & Sons v. Maloy, 267 U.S. 317 (1925), Buck v. Kuykendall, 267 U.S. 307 (1925), and C.A. Bradley v. Public Utils Comm’n, 289 U.S. 92 (1933), as holding that “direct” regulations are per se unconstitutional). \textit{Buck} talks of “indirect” burdens and concludes that the “statute is a regulation, not of the use of its own highways, but of interstate commerce.” \textit{Buck}, 267 U.S. at 315–16. The \textit{Hood} opinion generally avoids the words “direct” and “indirect” and speaks in terms of prohibitions on measures which seek economic advantage. See generally \textit{Hood}, 336 U.S. at 530–37 (speaking in terms of aiding and protecting and promoting economic advantage). \textit{Hood’s} discussion of \textit{Buck}, however, arguably goes beyond protectionism. See \textit{id}. at 538 (stating that limitation of competition is prohibited even if it achieves permissible ends such as safety and conservation); see also \textit{id}. at 564 (Frankfurter, J., dissenting) (interpreting majority opinion as per se prohibition on regulation of competition).


\textsuperscript{201} See \textit{C & A Carbone, Inc. v. Town of Clarkstown}, 511 U.S. 383, 394 (1994) (measure which does not explicitly regulate interstate commerce may not do so in effect in order to prohibit competition); Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 396 (9th Cir.), cert. denied, 115 S. Ct. 2580 (1995) (term “direct” refers to regulation whose central purpose is to regulate commerce); Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1388 (8th Cir. 1993) (flow control ordinance was “not regulation with a view to safety or to conservation... but the prohibition of competition”); see also \textit{Panhandle E. Pipe Line Co. v. Michigan Pub. Serv. Comm’n}, 341 U.S. 329, 340 (1951) (Frankfurter, J., dissenting) (\textit{Buck} stands for the proposition that states may not exclude products or services on the basis of adequacy of service). Justice Frankfurter’s interpretation of \textit{Buck} in his dissent in \textit{Panhandle} stands in apparent contradiction to his opinion in \textit{Hood}. His \textit{Panhandle} dissent starts with the claim that the controversy is not over the instrumentalities of interstate but over the regulation of competition. See \textit{Panhandle}, 341 U.S. at 337 (Frankfurter, J., dissenting). He proceeds to argue that states may not determine what competition they will or will not allow from without, \textit{id}. at 339, and then cites the invalidation of regulation based upon convenience and necessity in \textit{Buck} as decisive, \textit{id}. at 340. Thus, in Justice Frankfurter’s view, denial of market entry to a foreign purchaser should be subject to balancing, \textit{Hood}, 336 U.S. at 564, but denial of market entry to a foreign supplier is per se invalid, see \textit{Panhandle}, 341 U.S. at 340 (Frankfurter, J., dissenting).

\textsuperscript{202} \textit{Hood}, 336 U.S. at 530 (approving of regulation of prices so long as effect on interstate commerce is incidental) (citing Milk Control Board v. Eisenberg Farm Prods., 306 U.S. 346, 350 (1939)).
more narrowly drawn formulation of what is prohibited: adequacy of service may not be used as a criteria for barring market entry when the purchasers in that market are not entirely local.\textsuperscript{203}

This "adequacy of service to out-of-state purchasers" formulation of "direct" regulation is consistent with the representation reinforcement theory of the dormant Commerce Clause.\textsuperscript{204} According to representation theorists, a state can be expected to reach a politically acceptable allocation of burdens and benefits among its own residents but is not obligated to weigh the interests of out-of-state residents.\textsuperscript{205} When a state makes a judgment about whether out-of-state purchasers are adequately served, there is no political process available to protect those purchasers.\textsuperscript{206} In \textit{Buck}, Washington and Oregon came to opposite conclusions about whether the interstate market for passenger transportation was adequately served.\textsuperscript{207} It is possible that the two states merely disagreed in their assessment of the likelihood of "destructive competition," and the resulting burdens on passengers of either state.\textsuperscript{208} It seems, however, just as likely that the two states shared an understanding that one state's interests would benefit and one state's interests would suffer from additional competition.\textsuperscript{209} Where the regulated activity serves interstate purchasers, therefore, attempts to use the "adequately served" criteria should receive heightened scrutiny.\textsuperscript{210} Where the market serves a purely local clientele, there is less danger that a state will use the "adequately served"

\textsuperscript{203} See \textit{Hood}, 336 U.S. at 526 (out-of-state distributor was purchaser of milk); Buck v. Kuykendall, 267 U.S. 307, 313 (1925) (out-of-state passengers were purchasers of transportation services).

\textsuperscript{204} See, \textit{e.g.}, South Carolina Hwy. Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938) ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation.").

\textsuperscript{205} See \textit{id.}; Eule, \textit{supra} note 153, at 443 (process-oriented protection of representational government is the only justification for displacing state regulation).

\textsuperscript{206} See \textit{Barnwell}, 303 U.S. at 185 n.2.

\textsuperscript{207} \textit{Buck}, 267 U.S. at 313.

\textsuperscript{208} See \textit{id.} at 316 (issuance of certificate by Oregon deemed equivalent of legislative declaration that public convenience and necessity required additional service).

\textsuperscript{209} Cf. \textit{Barnwell Bros.}, 330 U.S. at 185 n.2. Under the \textit{Barnwell} analysis, the interests of Oregon riders in \textit{Buck} were not represented by the Washington political process. \textit{See id.}

\textsuperscript{210} \textit{Cf.} \textit{Barnwell Bros.}, 330 U.S. at 185 n.2. Under the \textit{Barnwell} analysis, the interests of Oregon riders in \textit{Buck} were not represented by the Washington political process. \textit{See id.}
criterion as a subterfuge to burden out-of-state customers, and the *Pike* balancing test should be employed.\(^{211}\)

The "adequacy of service to out-of-state purchasers" formulation is also consistent with some of the case law which deals with regulations based upon adequacy of service. In *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson* and *Medigen, Inc. v. Public Service Commission*, the markets being served, generators of hazardous waste, were located entirely within the licensing state and the statutes were otherwise facially neutral.\(^{212}\) Therefore, the regulations did not "directly" regulate interstate commerce and the courts properly used *Pike* balancing.\(^{213}\) In *Safeway Stores v. Board of Agriculture* and *Farmland Dairies v. Commissioner of N.Y. Department of Agriculture and Markets*, the markets being served, as defined by the location of the purchasers, was entirely local.\(^{214}\) Both opinions contain dicta to the effect that denying market access to out-of-state

\(^{211}\) Cf. *Barnwell*, 330 U.S. at 185 n.2 (local clientele protected by political process in regulating state). This is where *Hood* does not fit comfortably within the modern jurisprudence. The market that was already adequately served in *Hood* was a purely intrastate market because it was comprised of milk producers in up-state New York. *See* H. P. *Hood & Sons v. Du Mond*, 336 U.S. 525, 526 & n.1 (1949). Therefore, the adequately served criteria was not facially discriminatory and, according to modern jurisprudence, the Court should have used a balancing approach. This would have entailed examining the admittedly legitimate state purpose of controlling destructive competition in the milk industry in light of the regulatory alternatives available to the state. However, the Court performed no such inquiry and probably did invalidate the provision on a per se basis. The Court's opinion does not discuss the hoarding and adequately served issues separately enough to determine whether it would have conducted some kind of balancing inquiry in the absence of hoarding.


\(^{213}\) *See* *Kleenwell*, 48 F.3d at 396–97, 399 (rejecting "direct" regulation approach and applying *Pike*); *Medigen*, 985 F.2d at 166 (applying *Pike* without expressing an opinion about whether regulation was discriminatory). The *Kleenwell* court said that the waste hauler's claim was limited to the argument that the certification requirement was invalid per se under *Buck*. *See* 48 F.3d at 399. The difference in outcome between *Medigen* and *Kleenwell* results from the different levels of deference the courts accorded the states in evaluating less burdensome alternatives under the *Pike* test. *See* *Kleenwell*, 48 F.3d at 399–400 (mentioning regulatory provisions including common carrier obligation, safety practices, service territories, and rate regulation, but failing to discuss why they were insufficient to achieve universal service without additional entry barriers); *Medigen*, 985 F.2d at 167 (finding that other regulatory tools helped insure that universal service is provided and "ruinous" effects of competition were entirely speculative). There is also some reason to believe that the *Kleenwell* decision is outcome oriented. The hauler initiated interstate operations, only after it was denied a certificate for intrastate operations, as a way of circumventing the regulatory scheme. *See* *Kleenwell*, 48 F.3d at 399.

suppliers on the basis of adequacy of service is inherently unconstitutional. While this dicta may well be consistent with Hood, it states a more severe restriction on state power than is implied by the narrower purchaser-oriented formulation. According to the purchaser-oriented formulation, heightened scrutiny would not have been appropriate in either case, in the absence of a finding of discrimination. The dicta in these cases suggests, however, that both courts were prepared to apply a “directly regulates” rationale and would have been even more receptive to an argument in favor of heightened scrutiny where the market involved out-of-state purchasers.

B. Local Need and the Regulation of Waste

The United States Supreme Court has never decided whether, and under what circumstances, a state may require a demonstration of in-state need as a condition for approval of a waste processing permit. Neither has the Court decided the closely related issue of whether a state may rely exclusively on in-state need to set state-wide capacity or processing limitations. There are, however, recent lower court decisions that address both of these types of measures, and that are, therefore, directly relevant to the Massachusetts regulatory scheme.

1. Conditioning Permits on Demonstration of Local Need

South Carolina and Georgia have passed waste management statutes that require that waste handling operators demonstrate in-state need as a condition for the approval of a permit for new or expanded operations. The federal courts have held that these requirements

215 See Farmland, 650 F. Supp. at 944; Safeway, 590 F. Supp. at 784–86.
216 See Farmland, 650 F. Supp. at 944; Safeway, 590 F. Supp. at 784–86.
217 See Farmland, 650 F. Supp. at 944; Safeway, 590 F. Supp. at 784–86.
No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until a demonstration of need is approved by the department . . . In determining if there is a need for new or expanded solid waste disposal sites, the department shall not consider solid waste generated in jurisdictions not subject to the provisions of a county or regional solid waste management plan pursuant to this chapter.
In considering a demonstration of need from an applicant to construct a new facility prior to adoption and approval of state and county or regional solid waste plans . . . the department may only consider the amount of waste generated within this State . . . In considering a demonstration of need from an applicant to construct an expansion to an existing permitted facility prior to adoption and approval of state and county or
violate the dormant Commerce Clause; however, these courts have disagreed on whether to apply heightened scrutiny or *Pike* balancing.\(^{219}\)

**Hazardous Waste Treatment Council v. South Carolina ("HWTC")** involved the appeal of a temporary injunction issued against South Carolina's enforcement of a number of waste regulations, including its local need requirement.\(^{220}\) The United States Court of Appeals for the Fourth Circuit remanded the injunction of the "local need" permit requirement, not because of any doubts about the plaintiff's likelihood of success, but because the district court had failed to balance the hardships to the parties.\(^{221}\) Although the Fourth Circuit disclaimed any intention of deciding the constitutionality of the provisions, the court suggested that the local need provision would be subject to heightened scrutiny because it "appears to be an attempt to block South Carolina from the nationwide problem" and "appears not to regulate evenhandedly."\(^{222}\)

On remand, the United States District Court for the District of South Carolina granted the plaintiff's motion for summary judgment and invalidated the local need requirement as facially discriminatory.\(^{223}\) The demonstration of need requirement was an "obvious effort to hoard the economic resources of [the] state and to isolate [the] state from interstate commerce."\(^{224}\) Once again, South Carolina appealed the district court's ruling, arguing that the "demonstration of need" requirement was neutral because, once imposed, it applied equally to regional solid waste plans . . . the department may only consider the amount of waste generated within this State.

*Id.* GA. CODE ANN. § 12–8-24(b)(1) (Michie 1992 & Supp. 1995) provides:

No permit for a biomedical waste thermal treatment technology facility shall be issued by the director unless the applicant for such facility demonstrates to the director that a need exists for the facility for waste generated in Georgia by showing that there is not presently in existence within the state sufficient disposal facilities for biomedical waste being generated or expected to be generated within the state.

*Id.*


\(^{221}\) See *id.* at 788.

\(^{222}\) *Id.* at 791 n.14.


\(^{224}\) *Id.* at 1037.
in-state and out-of-state shipments.\textsuperscript{225} The United States Court of Appeals for the Fourth Circuit rejected this argument, reasoning that the demonstration of need requirement discriminated in effect by making expanded capacity available only where in-state needs dictate.\textsuperscript{226}

In \textit{Northeast Sanitary Landfill, Inc. v. South Carolina Department of Health and Environmental Control}, a landfill operator challenged the state’s refusal to grant authorization for the importation of out-of-state waste.\textsuperscript{227} The South Carolina Solid Waste Policy and Management Act of 1991 ("1991 Act")\textsuperscript{228} and the Nonhazardous Solid Waste Management Planning Regulations ("Regulation 61–100")\textsuperscript{229} together conditioned approval of landfill construction and expansion permits on a showing of in-state need.

The United States District Court for the District of South Carolina questioned whether the state had the statutory authority to prohibit importation of waste from outside a county or region.\textsuperscript{230} Without ruling on that issue, the court held that the state’s implementation of the Act and the Regulation violated the dormant Commerce Clause.\textsuperscript{231} The court found that the state’s application of the 1991 Act and Regulation 61–100 discriminated against out-of-region waste; however, the court applied the \textit{Pike} balancing test instead of heightened scrutiny.\textsuperscript{232}

\begin{itemize}
\item \textsuperscript{225} See Environmental Technologies Council v. South Carolina, 98 F.3d 774, 788 (4th Cir. 1996).
\item \textsuperscript{226} See id.
\item \textsuperscript{229} S.C. CODE REGS. 61–100 (Supp. 1995) provides:
\begin{enumerate}
\item \textbf{I. PURPOSE AND SCOPE:}
\begin{enumerate}
\item Because sites suitable for the proper management of solid wastes are limited, applicants for permits to establish or expand solid waste management facilities shall demonstrate to the Department the need for such new or expanded facilities . . . .
\item (C) No permit to construct a new solid waste management facility or to expand an existing solid waste management facility may be issued until the demonstration of need is approved by the Department . . . .
\end{enumerate}
\item \textbf{III. DEMONSTRATION OF NEED REQUIREMENTS:}
\begin{enumerate}
\item (C) For purposes of demonstrating need, waste generated outside the county or regional planning area shall not be included unless the Department approves an alternate planning area . . . .
\end{enumerate}
\end{enumerate}
\item \textsuperscript{230} Id. at 107 n.15.
\item \textsuperscript{231} Id. at 109.
\item \textsuperscript{232} The court compared two \textit{Pike} balancing cases, Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987) and Diamond Waste, Inc. v. Monroe County, 939 F.2d
The court declined to reach the question of whether the local need provision was "facially unconstitutional" because the court was able to dispose of the case based on the provision’s application to the plaintiff’s particular circumstances. The court did, however, hint at the possibility that the "need requirement" might have been difficult to defend had the case been decided on the basis of the statute as written. In an earlier portion of the opinion, the court went out of its way to discuss HWTC, in which the Fourth Circuit criticized the hazardous waste version of Regulation 61–100 as "an attempt to block South Carolina from the nationwide problem." The Northeast Sanitary Landfill court also suggested that the state’s purpose "to protect state resources by restricting the flow of waste into South Carolina" was illegitimate.

In Environmental Waste Reductions, Inc. v. Reheis, the United States District Court for the Northern District of Georgia held that a statute requiring permit applicants for biomedical waste thermal treatment facilities to demonstrate "Georgia need" violated the Commerce Clause. The statute required the applicant to show "that there is not presently in existence within the state sufficient disposal facilities for biomedical waste being generated or expected to be generated within the state." The court concluded that the statute would fail both the heightened scrutiny and Pike balancing tests.

The statute received heightened scrutiny because it discriminated on its face, in its purpose, and in its effect. The court reviewed the history of the statute and found that although the stated purpose of the statute was to limit the volume of waste handled in-state, the statute did not limit or reduce the volume of waste generated in-state, and its passage was motivated by a desire "to restrict the
influx of biomedical waste from other states." The statute discriminated on its face and in its effect because it blocked disposal of out-of-state waste "for no reason other than that Georgia's biomedical waste generators have no need for the disposal capacity sought." The statute also favored existing Georgia facilities to the detriment of any entity that proposed to construct capacity to handle out-of-state waste and favored existing commercial facilities to the detriment of consumers who would pay the higher prices resulting from a restricted supply. The "Georgia need" provision was an impermissible "attempt to isolate Georgia from a problem common to the several states." The court, having decided to apply heightened scrutiny, determined that Georgia had shown neither a legitimate local purpose nor the absence of reasonable nondiscriminatory alternatives, and that the statute, therefore, was unconstitutional.

Consistent with the court's heightened scrutiny analysis, the court started out its discussion of balancing by finding that the "Georgia need" provision did not further the stated purpose of limiting or reducing the volume of waste handled in Georgia. But the court then went further and found that even this stated goal would not benefit Georgia "in any legally permissible way." The state had not demonstrated that there would be fewer accidents or an improvement to the environment. On the other side of the balancing equation, the burden on interstate commerce was not incidental because the proposed plant was close to the Alabama border and the plaintiff had attempted unsuccessfully to obtain additional capacity at other incinerators. The court concluded that these burdens were "clearly excessive in relation to the putative local benefits."

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242 Id. at 1558.
243 Id. at 1559 (noting that out-of-state generators would not be able to justify expansion of capacity but in-state generators would).
244 Environmental Waste Reductions, 887 F. Supp. at 1559. Professor Regan has suggested that the dormant Commerce Clause only protects competitors from discrimination. See Regan, supra note 45, at 1096. In his view, disposal facilities are not in competition with consumers and, therefore, a state's decision to favor disposal facilities over consumers is not protectionism prohibited by the dormant Commerce Clause. See id.
246 Id. at 1559-60, 1572. The state admitted that it had not considered nondiscriminatory alternatives. Id. at 1559.
247 Id. at 1561.
248 Id.
249 Id.
251 Id. at 1563.
2. State-Wide Processing Caps

The United States Court of Appeals for the Fourth Circuit has heard two cases involving South Carolina's regulation of hazardous and non-hazardous waste. These cases examined two statutes that imposed similar state-wide processing caps based upon in-state demand. Although the final outcome of one of the cases is, as of this writing, still uncertain, the courts appear to have arrived at different conclusions concerning the legal effect of basing processing caps upon in-state demand. The Chambers Medical Technologies, Inc. v. Bryant court appeared to suggest that a state could use whatever method it wished to calculate a processing cap, so long as the cap applied to all waste processors. The HWTC/Environmental Technologies Council court appeared to conclude that state-wide caps that


During a twelve-month period, the commissioner may allow land disposal by burial in excess of the limitation upon certification of the department that:

(A) disposal by land burial from a particular site in South Carolina is necessary to protect the health and safety of the people of this State; or

(B) at least one hundred ten thousand tons of hazardous waste disposed of by land burial in this State during the twelve-month period was generated in South Carolina.


(A) Beginning November 1, 1990, and annually thereafter, the department shall estimate and publish the amount of infectious waste it expects to be generated within this State during the succeeding calendar year. No permitted commercial infectious waste incinerator facility may burn more than one-twelfth of the annual estimate of infectious waste during any one month of the year to which the estimate applies. However, at no time may the limit on the amount of infectious waste burned in a month be less than fifteen hundred tons.

(B) The limitation on the tonnage of infectious waste does not apply to infectious waste treated by hospitals or generator facilities if the waste is generated in this State and is incinerated on a nonprofit basis.

(C) For purposes of this section, a permitted commercial infectious waste incinerator facility means a site where infectious waste is incinerated regardless of the number of incinerator units or the ownership of the units.

Id.

254 Chambers, 52 F.3d at 1260 (1995) (remanding to district court for factual findings of whether purpose or practical effects of exemptions are discriminatory).

255 Compare Environmental Technologies Council v. South Carolina, 98 F.3d 774, 787–88 (1996) (cap was not facially neutral but rather discriminatory) with Chambers, 52 F.3d at 1258, 1260 n.11 (cap was not facially discriminatory but may have been discriminatory in its practical effect).

256 See Chambers, 52 F.3d at 1258 (method by which cap is established does not burden out-of-state waste unequally).
are based upon in-state demand are facially discriminatory and are, therefore, subject to heightened scrutiny.257

Hazardous Waste Treatment Council v. South Carolina involved a challenge to several elements of South Carolina’s hazardous waste management program including a fluctuating state-wide cap on the annual volume of waste that can be buried.258 Judge Murnaghan, writing for the United States Court of Appeals for the Fourth Circuit, affirmed the lower court’s temporary restraining order enjoining enforcement of the fluctuating cap.259 After reviewing the challenged provisions, the court said that “[t]he challenged aspects . . . may almost certainly prove to violate the Commerce Clause.”260 The orders and statutes were subject to heightened scrutiny, not Pike balancing, because they were facially discriminatory.261 On remand, the district court granted the plaintiff’s motion for summary judgment and invalidated all of the enjoined measures, including the state-wide cap.262

In Chambers Medical Technologies, Inc. v. Bryant, an incinerator operator challenged a statute that capped the monthly volume that could be treated at a permitted incinerator facility.263 The statutory cap used a formula based on an estimate of the volume of in-state generated waste.264 The incinerator operator argued that the statute should receive “heightened Commerce Clause analysis”265 because 1) in-state generators are unaffected by the law; 2) the practical effect of the cap is discriminatory; and 3) statements made during legislative committee hearings indicate discriminatory purpose.266 Although the court was unable to determine which level of scrutiny to apply, it held that the statute would not pass the heightened scrutiny test but would survive the Pike balancing test.267

The court initially concluded that the cap did not discriminate on its face or in its practical effect.268 “The method by which the level of

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257 See Environmental Technologies Council, 98 F.3d at 787-88 (cap not so neutral as state would have court believe).
259 Id. at 787 & n.9.
260 Id. at 792.
261 See id. at 791.
263 Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252, 1255 (4th Cir. 1995).
265 Chambers, 52 F.3d at 1257.
266 Id. at 1258-59.
267 Id. at 1262.
268 Id. at 1258.
the fluctuating treatment cap imposed by South Carolina is established does not place increased burdens on waste based on its origin.\textsuperscript{269} The fluctuating cap is no more burdensome to out-of-state generators than to in-state-generators and is no more burdensome than a flat cap.\textsuperscript{270} The court concluded that language in \textit{HWTC} that appeared to prohibit references to state of origin\textsuperscript{271} was not dispositive of whether the reference to in-state demand renders a fluctuating cap violative of the dormant Commerce Clause.\textsuperscript{272} The court also examined the motives behind the statute, although it made no independent analysis of discriminatory purpose and referred exclusively to the trial court’s findings of fact.\textsuperscript{273} The court considered the district court’s findings ambiguous with respect to legislative purpose and remanded the question of purpose for further findings.\textsuperscript{274}

Having disposed of all grounds for heightened scrutiny, the court revisited the issue of whether the statute discriminated in its practical effect.\textsuperscript{275} The Chambers facility was the only commercial incinerator in the state and was also the only facility treating out-of-state waste.\textsuperscript{276} The statutory exemption for non-profit facilities burning in-state waste meant, in practical terms, that the cap applied only to the Chambers facility and only to out-of-state waste.\textsuperscript{277} The court concluded that if these facts were true, and it had no reason to doubt them, that the statute “would appear to be discriminatory in its practical effect.”\textsuperscript{278}

\begin{footnotes}
\item[269] Id.
\item[270] Chambers, 52 F.3d at 1258.
\item[271] Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 792 (4th Cir. 1991) (state may preserve capacity by limiting total disposal without reference to whether in-state or out-of-state waste is involved).
\item[272] Chambers, 52 F.3d at 1258 n.9. The court said that the \textit{HWTC} decision was unclear about which provisions were invalidated and noted that the plaintiff in \textit{HWTC} had not challenged the method by which the cap was established. \textit{Id.} Finally, the court noted that language in \textit{HWTC} concerning references to out-of-state waste referred to provisions of the Act that gave preference to in-state waste disposal. \textit{Id.}
\item[273] Id. at 1259-60. The court quoted the following language from the district court opinion: “South Carolina, like other states, has attempted to deal with the influx of out-of-state waste with legislation which discourages out-of-state waste.” \textit{Id.} (citing Chambers Medical Technologies, Inc. v. Jarrett, 841 F. Supp. 1402, 1405-07 (D.S.C. 1994), aff’d in part and remanded in part by Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252, 1255 (4th Cir. 1995)).
\item[274] Chambers, 52 F.3d at 1260. The district court’s findings were ambiguous because they could be interpreted as finding either that the purpose or the effect of the statute was to discourage out-of-state waste. \textit{Id.} The Fourth Circuit also questioned whether the finding related to a discriminatory purpose because such a finding would have triggered heightened scrutiny but the district court had not applied heightened scrutiny. \textit{Id.}
\item[275] Id. at 1260 n.11.
\item[276] See \textit{id.}
\item[277] Id.
\item[278] Id.
\end{footnotes}
The court declined to so hold because the state had not been given an opportunity to demonstrate a valid purpose and the absence of non-discriminatory alternatives. Later in its opinion, however, the court granted the validity of the purposes advanced by the state and then concluded that there are nondiscriminatory alternatives that could adequately address the state's concerns. Thus, while the court remanded the case, in part for a determination of legitimate purpose and nondiscriminatory alternatives, the court also made its own determination of those matters and concluded that the cap could not be upheld if the cap was discriminatory in its purpose, on its face, or in its practical effect.

Following the Chambers decision, South Carolina continued its appeal of the district court's decision in HWTC (now Environmental Technologies Council v. South Carolina) and argued that the state-wide cap and demonstration of need requirements were neutral and should be upheld. South Carolina argued that the statutory language of the cap, phrased in strictly numerical terms, and omitting any reference to the source of waste, was "an evenhanded neutral limit." The court agreed that a state could set an evenhanded cap on capacity. South Carolina's cap was not, however, evenhanded and neutral because it could be lifted if necessary to protect South Carolina's citizens or if the statutory limit of waste buried was generated in South Carolina.

279 Chambers, 52 F.3d at 1260 n.11. The state had, in fact, been given the opportunity to demonstrate valid purpose and absence of alternatives. The plaintiff Chambers had directly challenged the constitutionality of the fluctuating cap at trial and the state presented arguments that the cap was evenhanded. Chambers Medical Technologies, Inc. v. Jarrett, 841 F. Supp. 1402, 1412 (D.S.C. 1994), aff’d in part and remanded in part by Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252 (4th Cir. 1995). The state was clearly on notice that it would have to show a legitimate state purpose and the absence of nondiscriminatory alternatives if the court disagreed with it and found the measure to be discriminatory. Even if the state had not been given the opportunity to argue purpose and alternatives, the determination of purpose and alternatives is a separate inquiry from the determination of discrimination.

280 Chambers, 52 F.3d at 1261.

281 See id.

282 Environmental Technologies Council v. South Carolina, 98 F.3d 774, 782 (4th Cir. 1996). South Carolina, apparently relying upon Chambers, 52 F.3d at 1258 n.9, initially argued that the HWTC opinion had excluded the state-wide cap from the list of provisions enjoined. Judge Murnaghan "clarified" his previous opinion in HWTC by indicating that the cap "is included as one of the items that violates the Commerce Clause." Environmental Technologies Council, 98 F.3d at 787 n.20.

283 See Environmental Technologies Council, 98 F.3d at 787.

284 Id. (citing Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 345 (1992)).

285 Environmental Technologies Council, 98 F.3d at 787 (citing S.C. CODE ANN. § 44-56-60(a)(3)).
These exceptions rendered the cap facially discriminatory because the exceptions were not granted to out-of-state interests, and, like the demonstration of need requirement, made expanded capacity available when needed by in-state, but not out-of-state interests.

The Chambers and Environmental Technologies Council courts have made similar statements with respect to the viability of facially neutral caps. These decisions have, however, arrived at different definitions of what constitutes a facially neutral cap. For the Chambers court, a cap is facially neutral if, regardless of its derivation, it applies equally to all shipments of waste, regardless of their origin. For the Environmental Technologies Council court, a cap is facially neutral only if it applies equally to all shipments of waste and it makes expanded capacity available to in-state and out-of-state interests on an equal basis.

V. Analysis

The Massachusetts landfill moratorium is similar, both in purpose and in implementation, to the demonstration of local need requirements and the processing caps discussed in HWTC, Environmental Waste Reductions, Inc. v. Reheis, Northeast Sanitary Landfill, Inc. v. South Carolina Department of Health and Environmental Control, and Chambers Medical Technologies, Inc. v. Bryant. This section will argue that state-wide waste processing caps based on in-state demand should be subject to heightened scrutiny. This conclusion will then be used as part of an argument that the Massachusetts regulatory scheme violates the dormant Commerce Clause.

A. Constitutionality of State-Wide Processing Caps

State-wide waste processing caps based on in-state demand should be subject to heightened scrutiny for the following reasons: 1) they are inconsistent with Buck v. Kuykendall and its progeny; 2) they are...
logically indistinguishable from the requirement that a permit applicant demonstrate local need; 3) they are inconsistent with basic policies of the dormant Commerce Clause; and 4) the Chambers decision, which holds that state-wide caps are not discriminatory, is unpersuasive. The fact that these caps are often implemented in order to achieve health and safety objectives does not save them from heightened scrutiny.\textsuperscript{291}

1. \textit{Buck v. Kuykendall} and State-Wide Caps

The market for landfill and waste incineration services is an interstate market in the sense that the activity being regulated serves customers in multiple states.\textsuperscript{292} The interstate nature of this market is clearly distinguishable from the intrastate nature of the market in the waste transportation cases, where the regulated activity—collection and transportation within the state—serviced customers in a single state.\textsuperscript{293} The residence of the service provider is irrelevant for purposes of the \textit{Buck} analysis to the question of whether the market is interstate or intrastate.\textsuperscript{294}

State-wide caps that are derived from projected levels of in-state demand are directly analogous to regulations that are based upon an assessment of adequacy of service. These caps reflect the regulating state’s unilateral judgment that a higher level of capacity will not serve the interests of the state’s residents because the level of the cap is sufficient to accommodate the disposal needs of the state’s residents. State-wide caps based exclusively upon in-state demand thus fall within the “directly regulates” interpretation of \textit{Buck} and should be subject to heightened scrutiny.

2. Permit Requirements

The United States District Courts have invalidated three “demonstration of in-state need” statutes, either holding or suggesting that they are facially discriminatory and are subject to heightened scruti-


\textsuperscript{292} Cf. Buck v. Kuykendall, 267 U.S. 307, 313 (1925) (market consisted of consumers in two states).


\textsuperscript{294} Compare Buck, 267 U.S. at 313 (interstate market served by an in-state business) with Medigen, 986 F.2d at 165 (intradstate market served by an out-of-state business).
tiny. The demonstration of need requirement is discriminatory even though the requirement does not block the transport of any particular quantity of out-of-state waste or prevent any particular waste processor from devoting its capacity to out-of-state waste. The demonstration of need requirement governs the process by which states authorize the creation of new capacity, not the process by which operators allocate capacity to specific generators. Similarly, state-wide caps are concerned with the process by which states create new capacity. The question, then, is whether a state-wide cap based upon in-state demand differs significantly from a demonstration of need requirement. If not, then the demonstration of need cases would also require that state-wide caps be subject to heightened scrutiny.

Under extreme circumstances, a demonstration of need requirement and a state-wide cap are equivalent. For example, if there is no in-state generation of a particular type of waste, then a permit applicant cannot demonstrate any in-state demand for disposal of that type of waste. Both the demonstration of need requirement and the state-wide cap will prevent an applicant from creating any waste handling capacity for use by out-of-state generators. The state will not allow the processing of any out-of-state waste. Under these circumstances, a demonstration of need requirement is an embargo and is strictly forbidden.

A demonstration of need requirement and a state-wide cap will produce equivalent results under less extreme circumstances. If the current level of permitted capacity is equal to the current level of in-state generation, and all in-state generators have contracts which


297 See id.


300 See City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (finding the state had frozen the flow of commerce).
are sufficient to handle their anticipated needs, then under either a state-wide cap or a demonstration of need requirement, the state will allow new capacity to be created to handle new in-state demand but not new out-of-state demand. This result demonstrates that, by design, state-wide caps will treat in-state and out-of-state waste differently for no reason other than their origin.301

Both the demonstration of need requirement and the state-wide cap control the creation of new capacity in a way that discriminates against out-of-state waste.302 State-wide caps based exclusively upon in-state demand are, thus, facially discriminatory according to the demonstration of need cases.303

3. Dormant Commerce Clause Policy

In City of Philadelphia v. New Jersey, the Court held that an embargo of waste is impermissible because it represents an "attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."304 From the point of view of this policy, is there really any difference between an embargo and a state-wide cap?

A state-wide cap based on an accurate measurement of in-state demand makes it possible for a state to handle a volume of waste equal to that which it produces. The state will not necessarily be free-loading at the expense of other states. Similarly, an embargo against the importation of waste would not necessarily result in a state handling less than its fair share. There was, however, no hint in City of Philadelphia v. New Jersey that the Court viewed New Jersey as a free-

301 See id. at 626–27. A state-wide cap would be slightly more flexible than a demonstration of need requirement because a cap would always allow new capacity to be created in response to the decommissioning of existing capacity, whereas the demonstration of need requirement might not. For example, if the decommissioned capacity had been devoted to out-of-state generators, then the loss of capacity would not result in unsatisfied in-state demand, and the permit applicant would not be able to satisfy the demonstration of need requirement. In any event, the cap's slightly greater degree of flexibility does not change the fact that in-state generators would have preferred access to new capacity through more lenient permitting requirements. See Environmental Technologies Council, 901 F. Supp. at 1035 ("[B]arring consideration of out-of-state market needs and customers in determining whether a facility may be built or expanded ... is ... a form of protectionism ... ").


loader. New Jersey's embargo violated the "anti-isolation" principle because the embargo precluded the possibility that New Jersey would handle more than its fair share. A state-wide cap, no less than an embargo, prevents the state from accepting more than its fair share. The fact that such a cap will allow one ton to enter the state for every ton that leaves does not make it more consistent with the "anti-isolation" principle.

4. The Chambers Medical Technologies, Inc. v. Bryant Decision

The United States Court of Appeals for the Fourth Circuit in Chambers Medical Technologies, Inc. v. Bryant held that South Carolina's state-wide cap based on in-state demand was not facially discriminatory and that it satisfied the Pike balancing test. The court's opinion goes to great lengths to avoid invalidating the cap. The opinion's analysis of purpose is strained and its reading of the HWTC opinion seems less than straightforward. According to Buck v. Kuykendall, and the cases dealing with the "adequately served" requirement, the court should have found the cap to be invalid virtually per se because the market being served was not local.

The Chambers court managed to read ambiguity into the HWTC district court's findings by suggesting that the relationship between the effect of "discouraging out-of-state waste" and the state's "attempt to deal with the influx of out-of-state waste" did not show discriminatory purpose. The court's opinion said the statement could be "interpreted as an observation that the legislation enacted has had

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305 The Court focused on the concept of "isolation," and did not suggest that New Jersey was trying to take unfair advantage of its neighbors. See id.
306 See id. at 629.

Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Id.
307 See id.
308 See id.
309 Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252, 1257–58 (4th Cir. 1995).
310 See id. at 1258 n.9.
311 See supra notes 184–217 and accompanying text.
312 See Chambers, 52 F.3d at 1260.
the effect of discouraging out-of-state waste, an interpretation that potentially hurts, rather than helps South Carolina’s case.” This explanation is apparently an unsuccessful attempt to paraphrase South Carolina’s argument that “the State passed a law which has the constitutionally valid effect of discouraging out-of-state as well as in-state waste by enacting an even-handed cap.” The court also adopted South Carolina’s suggestion that the district court’s failure to apply heightened scrutiny indicates that the district court did not find a discriminatory purpose. The district court, however, did not discuss the allegation that the purpose of the fluctuating cap was discriminatory. The district court concluded that the absence of facial discrimination was sufficient to avoid heightened scrutiny, a view that would explain how the court could have found discriminatory purpose without applying heightened scrutiny. The district court’s “logic,” therefore, undermines the Fourth Circuit’s strained reading of the findings.

The Chambers court’s interpretation of HWTC is also strained. The court quoted language from HWTC to the effect that the state may limit total disposal “without reference to whether in-state or out-of-state waste is actually involved.” The court then concluded that the “without reference to” language was not dispositive of the constitutionality of the cap for three reasons. First, the Fourth Circuit said it was unclear which of the challenged provisions had been enjoined by the HWTC district court. The fact that the HWTC Circuit Court specifically identified the provision by citing Section 44–56–60(a)(3)(B), the section containing the exception for in-state demand, did not stop

313 Id.
314 See Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342 (1992) (noting that statute plainly discouraged full operation of importing facility); cf. Chambers, 52 F.3d at 1260 n.11 (noting that application of cap to only processor handling out-of-state waste would be discriminatory in practical effect).
315 See Appellee’s Supplemental Cross Brief at 8, Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252 (4th Cir. 1995) (Nos. 94–1400, 94–1414).
316 See Chambers, 52 F.3d at 1260; Appellee’s Supplemental Cross Brief at 8, Chambers (Nos. 94–1400, 94–1414) (arguing that either lower court was totally inconsistent or the finding was not a finding of fact but merely a passing reference).
318 See id.
319 Chambers, 52 F.3d at 1258 n.9 (quoting Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 792 (4th Cir. 1991)).
320 Id. at 1258.
321 Id.
the Chambers court from finding ambiguity. It is not clear how the Chambers court could have read this list as not including the method by which the cap was computed. Moreover, on remand, the HWTC (Environmental Technologies Council v. South Carolina) district court invalidated the cap, an unlikely result if it had not been challenged. Third, the Chambers court said that the context of the "without reference to" language related to provisions of the statute that gave preference to in-state waste disposal, rather than to the fluctuating cap. It is true that the paragraph containing the "without reference to" language does not specifically mention the fluctuating cap. The fluctuating cap, however, can easily be seen as a measure that gives preference to in-state waste because the cap makes additional capacity available only when there is additional in-state demand.

Finally, the court avoided heightened scrutiny by holding that the fluctuating cap was facially neutral and not discriminatory in effect. According to the court, the state is free to set a cap at whatever level the state likes, so long as the authorized capacity is made available on a non-discriminatory basis. The idea that the state can set a cap at whatever level it likes appears to come from two places. The first source for this idea appears to be the Chambers lower court citation to Chemical Waste Management, Inc. v. Hunt, for the proposition that states may apply an even-handed cap. What Chemical Waste Management really said was that:

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322 See id.
323 Id. at 1259 n.9.
326 Chambers, 52 F.3d at 1258.
328 Chambers, 52 F.3d at 1258.
329 Id.
ultimately, the State's concern focuses on the volume of the waste entering the Emelle facility. Less discriminatory alternatives, however, are available to alleviate this concern, not the least of which are a generally applicable per-ton additional fee on all hazardous waste disposed of within Alabama, or a per-mile tax on all vehicles transporting hazardous waste across Alabama roads, or an evenhanded cap on the total tonnage landfilled at Emelle. This passage supports the certification of a maximum capacity at a particular facility but says absolutely nothing about state-wide caps at either fixed or fluctuating levels. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources and City of Philadelphia v. New Jersey contain statements apparently approving of neutral caps; however, neither case actually involved the constitutionality of a state-wide cap.

The second possible source for this idea comes from a footnote in the Fourth Circuit opinion in HWTC. The HWTC court cited the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 104(c)(9) as authorizing states to refuse to sign interstate agreements. This section of CERCLA sets out conditions a state must meet in order for the federal government to provide remedial action in that state. These conditions do not, however, authorize the states to regulate interstate commerce in a way that would otherwise be unconstitutional. The HWTC court finally concluded that CERCLA Section 104(c)(9) does not authorize a state to limit its actual in-state capacity to in-state waste. Thus, the Chambers courts have misapplied Chemical Waste Management, HWTC, and possibly CERCLA and have provided no appropriate precedents.
in support of, or policy justifications in favor of, facially neutral state-wide caps.

There are good reasons to be suspicious of apparently neutral state-wide caps. First, state-wide caps are essentially import quotas because the maximum amount of waste that can be imported into the state is equal to the state-regulated capacity. Therefore, state-wide caps allow the states to circumvent the constitutional prohibition against setting import quotas. Second, state-wide caps, to the extent that they result in a reduction of imports, are essentially attempts to isolate the states from the economic problems of the nation. By setting the cap equal to the level of waste generated in-state, the state can determine, by legislative fiat, that it will have no net imports. There is little practical difference between this type of cap and permitting states to isolate themselves by prohibiting imports. Third, while the level of the cap will inevitably change from time to time to accommodate changes in local demand, it is unrealistic to expect that a state which has imposed a cap will increase that cap in order to accommodate a neighboring state. The process by which changes will be made to a neutral cap will, due to political pressures, be equivalent to a fluctuating cap defined in terms of in-state demand.

Even assuming that neutral caps are constitutional, the Chambers court did not really explain how that assumption leads to its conclusion that in-state need-based caps are facially neutral. When a waste generator in a fluctuating cap state needs to find additional disposal capacity, it can look to neighboring states or it can try to convince its own state to allocate more capacity to an existing or new operator.

340 The fact that the theoretical limit on imports may often, but not always, be very large is not relevant to the issue of whether it is a quota or whether quotas are constitutional. See City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (attempt to erect a barrier is crucial issue).

341 See id.

342 See id.

343 See id.

344 See South Carolina Hwy. Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938).

345 See id.

346 Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252, 1258 (4th Cir. 1995) (asserting that burdens on in-state and out-of-state are the same without discussing difference in effect on capacity resulting from increase in in-state, but not out-of-state, demand).

that it can ensure that it gains access to the newly available capacity, for example through contractual arrangements entered into with the permit applicant. On the other hand, if an out-of-state generator needs additional capacity, it will not have the option of getting more capacity allocated in the cap state.\textsuperscript{348} Fluctuating caps, therefore, provide in-state interests with preferential access to a natural resource in violation of the anti-hoarding principle.\textsuperscript{349}

The Chambers holding that the fluctuating cap should not be subject to heightened scrutiny is not supported by the Buck \textit{v. Kuykendall} line of cases.\textsuperscript{350} The reasoning of the case is unpersuasive and the opinion itself is internally inconsistent. The Chambers opinion should be viewed as inconsistent with both the older case law dealing with the “adequately served” regulations in general\textsuperscript{351} and the newer case law dealing with “demonstration of need” in waste cases in particular.\textsuperscript{352}

\textbf{B. Application to the Massachusetts Permit Moratorium}

The analysis of the Massachusetts scheme starts with the selection of the standard of scrutiny: heightened scrutiny or \textit{Pike} balancing. There are three reasons the Massachusetts scheme should receive heightened scrutiny: 1) the process for granting permits closely resembles the “demonstration of need” provisions declared invalid in the South Carolina and Georgia cases;\textsuperscript{353} 2) the moratorium is equivalent to a state-wide cap based upon in-state demand;\textsuperscript{354} and 3) there is a strong argument that provisions of the Master Plan demonstrate discriminatory purpose or effect.\textsuperscript{355}

The Massachusetts regulatory scheme includes a “demonstration of need” requirement which is similar to the “demonstration of need”

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{348} See id.
\item \textsuperscript{349} See City of Philadelphia \textit{v. New Jersey}, 437 U.S. at 628.
\item \textsuperscript{350} See supra notes 184–217 and accompanying text.
\item \textsuperscript{354} See supra Section V.A.
\item \textsuperscript{355} See Chambers Medical Technologies, Inc. \textit{v. Bryant}, 52 F.3d 1252, 1260 n.11 (4th Cir. 1995) (considering possibility that exception for in-state generators renders scheme discriminatory).
\end{enumerate}
\end{footnotesize}
requirements in Georgia\textsuperscript{356} and South Carolina.\textsuperscript{357} Massachusetts makes a factual determination of the level of in-state need and allocates permits until that need is satisfied.\textsuperscript{358} Once the deemed level of need is allocated, it is unlikely that the state will grant approval to an operator who wants to develop more capacity to serve an out-of-state generator.\textsuperscript{359} This process closely resembles the “demonstration of need” requirements that were struck down in South Carolina and Georgia.\textsuperscript{360} Those cases strongly suggest that the Massachusetts permitting process is virtually per se invalid.\textsuperscript{361}

According to the Massachusetts Solid Waste Master Plan, the landfill moratorium represents little more than an attempt to clarify the Commonwealth’s previous position: the Commonwealth is not receptive to new landfill projects because the market is adequately, or more than adequately, served by existing capacity.\textsuperscript{362} The regulatory scheme, of which the moratorium is a part, is in essence, a state-wide processing cap that is designed to decrease over time.\textsuperscript{363} The Massachusetts processing cap is similar to the South Carolina caps in the sense that only Massachusetts demand is considered in setting the level of the cap\textsuperscript{364} and the moratorium will not apply to certain actions that probably apply only to Massachusetts generators.\textsuperscript{365}

According to Buck’s treatment of the adequately served requirement, the only way to avoid heightened scrutiny would be to argue that the market is not an interstate market.\textsuperscript{366} As was the case with South Carolina, the market that Massachusetts is attempting to regul-

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\item \textsuperscript{356}GA. CODE ANN. § 12-8-24(b)(1) (Michie 1992 & Supp. 1995).
\item \textsuperscript{358}See MASTER PLAN, supra note 3, at 39-40.
\item \textsuperscript{359}See MASS. REGS. CODE tit. 310, § 19.038(2)(a) (1995).
\item \textsuperscript{362}See MASTER PLAN, supra note 3, at 38.
\item \textsuperscript{363}See id. at 27.
\item \textsuperscript{364}See id. at 30 (Table 3-1 item 1).
\item \textsuperscript{365}See id. at 36 (exception for imminent threat to public health, safety, or environment presumably does not apply to threats outside of the state).
\item \textsuperscript{366}See Buck v. Kuykendall, 267 U.S. 307, 313 (1925) (market consisted of consumers in two states).
\end{itemize}
late is an interstate market because it serves both in-state and out-of-state generators.\textsuperscript{367} Massachusetts might argue that the market is not an interstate market because Congress has required the states to plan for disposal capacity which is sufficient to provide for the states’ own needs; however, the courts have rejected this argument.\textsuperscript{368} A major difference between the Massachusetts and South Carolina regulatory schemes is that Massachusetts does not attempt to explicitly reserve capacity for in-state generators.\textsuperscript{369} The reasoning in \textit{Hazardous Waste Treatment Council v. South Carolina} and the argument in Section V.A of this Comment, however, do not depend on the presence of other discriminatory measures.\textsuperscript{370} A state-wide cap based exclusively upon in-state demand, even absent other discriminatory measures, should still be virtually per se invalid.

The scheme also suffers from a discriminatory purpose. There are three legitimate purposes that are achieved by the scheme: reducing an undesirable land use; creating incentives for generators to reduce their dependence on landfill disposal and increase their use of recycling; and creating an economic environment in which recycling industries can grow and develop new technology.\textsuperscript{371} The scheme is also intended to ensure that Massachusetts does not become a significant net importer of solid waste.\textsuperscript{372} The \textit{Master Plan} states this as an assumption, rather than as an objective; however, no other outcome is mathematically possible and thus, control of imports should be viewed as one of the scheme’s design goals.\textsuperscript{373} The fact that the \textit{Master Plan} is designed to limit imports is also revealed by a comment in the

\begin{itemize}
\item \textsuperscript{367} See \textit{Master Plan}, supra note 3, at 3 (net imports in 1994 amounted to 3.8\% of total solid waste disposal).
\item \textsuperscript{369} It is unclear whether the selection criteria for competing proposals for new capacity effectively reserves capacity for in-state generators through the requirement that the project promote the integrated solid waste management objectives. See \textit{Master Plan}, supra note 3, at 40. One of the assumptions of the Solid Waste Management Plan is that Massachusetts will be a zero net importer of solid waste. \textit{Id.} at 30. Presumably, a project that could compromise that assumption by importing large amounts of waste would not be considered to promote the solid waste management objectives.
\item \textsuperscript{370} See \textit{Environmental Technologies Council v. South Carolina}, 98 F.3d 774, 787–88 (4th Cir. 1996) (rejecting fluctuating cap without reference to other provisions).
\item \textsuperscript{371} See \textit{Master Plan}, supra note 3, at 36–38.
\item \textsuperscript{372} See \textit{id.} at 37.
\item \textsuperscript{373} See \textit{id.} at 30.
\end{itemize}
Master Plan which notes that one of the undesirable consequences of permitting additional landfill capacity would be increased waste imports.\textsuperscript{374} Thus, a purpose, not an assumption, of the scheme is to limit imports by enforcing a form of reciprocity in which the Commonwealth will only allow imports from other states if other states accept an equal amount of waste from the Commonwealth.\textsuperscript{375}

There are other indications of discriminatory purpose. The Master Plan contains a theoretical exception to the moratorium which allows the state-wide cap to be exceeded if there is a showing of exceptional hardship within a project proponent’s service area.\textsuperscript{376} This exception does not appear to be available to applicants seeking to serve out-of-state generators. With regard to criteria for site assignment, the Master Plan describes a site selection process which would give priority to proposed facilities which make a “contribution to state-wide or regional integrated solid waste management goals.”\textsuperscript{377} This strongly suggests that an applicant who is seeking to serve an out-of-state generator is not likely to fare well in the selection process. These provisions, the Master Plan’s attitude toward imports, and the fact that the scheme is guaranteed to prevent substantial net imports, should be sufficient to demonstrate discriminatory purpose.

In order to uphold the scheme under heightened scrutiny, the Commonwealth must be able to show that there are no non-discriminatory alternatives that serve legitimate state purposes.\textsuperscript{378} In this case, there appear to be several nondiscriminatory alternatives. The current scheme is predicated in large part on the theory that a forced reduction in supply will directly result in a reduction in landfill use and will indirectly result in increased prices, which in turn will result in greater incentives for municipalities to adopt recycling programs.\textsuperscript{379} The increase in recycling will, in turn, result in an improved economic environment for recycling industries.\textsuperscript{380} The most obvious alternative available is a nondiscriminatory tax on landfill use. A tax would discourage both in-state and out-of-state generators from using Massa-

\textsuperscript{374} See id. at 37.
\textsuperscript{375} See Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 791 (4th Cir. 1991) (citing Dean Milk Co. v. Madison, 340 U.S. 349 (1951), for the proposition that reciprocity provisions are unconstitutional even where public health justification is asserted).
\textsuperscript{376} See Master Plan, supra note 3, at 44.
\textsuperscript{377} See id. at 45.
\textsuperscript{379} See Master Plan, supra note 3, at 37.
\textsuperscript{380} See id.
chusetts landfills, and would encourage municipalities to adopt recycling. Another alternative would be to mandate recycling programs on municipalities. This approach would decrease the in-state demand but might also cause a decrease in unregulated landfill prices, resulting in an increase in imports. This effect could be prevented by combining the mandatory recycling approach with the tax approach. The presence of nondiscriminatory alternatives requires that the Massachusetts landfill regulatory scheme be invalidated.\textsuperscript{381}

VI. Conclusion

The \textit{Buck v. Kuykendall} line of cases establishes a strong presumption against regulation of interstate markets based on adequacy of service, where the regulating state refuses to consider out-of-state needs. The Massachusetts landfill moratorium is just such a measure. It appears to be facially neutral because it applies to all landfills, regardless of whether they handle in-state or out-of-state waste. However, the refusal to accommodate out-of-state demand in the computation of market need makes the regulatory scheme facially discriminatory. Because there are nondiscriminatory alternatives that will serve Massachusetts’s legitimate purposes, the landfill moratorium violates the dormant Commerce Clause of the United States Constitution. Massachusetts may regulate solid waste in order to achieve its goals; however, it may not do so by creating a local market and isolating itself from the national economy.

The Massachusetts solid waste regulatory scheme is a well-intentioned attempt at solving a pressing environmental problem. It is possible that the most effective approaches for solid waste management will require that the states be free to regulate solid waste disposal as a local market. This possibility makes the judicial invalidation of the Massachusetts moratorium an unattractive prospect. The courts should not, however, shy away from upholding the principles behind the dormant Commerce Clause by allowing the states to “go it alone” and isolate themselves from each other. “It is easy to mock or minimize the significance of ‘free trade among the states’ . . . . It is true of this principle, as of others, that the principle is not to be reduced to the appeal of the particular instance in which it is invoked.”\textsuperscript{382}

\textsuperscript{381} See Chambers Medical Technologies, Inc. v. Bryant, 52 F.3d 1252, 1261 (4th Cir. 1995) (suggesting that measure would fail heightened scrutiny because nondiscriminatory measures were available).