Does the Commerce Clause Value Public Goods?: West Lynn Creamery v. Healy

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[Government is 'to do for the people what needs to be done, but which they cannot, by individual effort, do at all, or do so well, for themselves.' Public goods satisfy this description for these are goods that will not be efficiently provided by a pure market mechanism.]

The Framers of the Constitution drafted the Commerce Clause during a period of economic rivalry among the states. These origins arguably led to the United States Supreme Court's interpretation that the Commerce Clause limits the states' power to regulate interstate commerce,

1. Paul A. Samuelson & William D. Nordhaus, Economics 312 (14th ed. 1992) (quoting in part Abraham Lincoln). "Public goods are ones whose benefits are indivisibly spread among the entire community, whether or not individuals desire to purchase the public good." Id. at 311.

2. U.S. Const. art. I, § 8, cl. 3. The Commerce Clause provides that "[t]he Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes ...." Id.

even when Congress has not spoken.\textsuperscript{4} State laws discriminating against out-of-state producers have been invalidated by the courts under the theory that the drafters of the Commerce Clause envisioned an economic union among the states.\textsuperscript{5} In short, this negative aspect of the Commerce Clause\textsuperscript{6} limits a state's power to adopt regulations that discriminate against interstate commerce.\textsuperscript{7} When states attempt to improve the efficiency of the market by internalizing the external costs of public goods, however, they may facially appear to be discriminating against out-of-state producers.\textsuperscript{8}

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\item \textsuperscript{4} Dennis v. Higgins, 498 U.S. 439, 447-48 (1991) (holding that state legislation that is protectionist or discriminatory violates the Commerce Clause principle of free trade); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 427 (1947) (describing the Clause's abridgement of state power, the Court states "[t]his has arisen from long-continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce . . . ."; Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 374 (1964); Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346, 351-52 (1939) (contending that the Commerce Clause "necessarily implies" that the states' power to regulate commerce is subordinated to the power expressly granted to Congress by the Commerce Clause); Steamship Co. v. Portwardens, 73 U.S. 31, 32-33 (1867) (holding that the commerce power had been granted to Congress so as to avoid the "interruption or embarrassment arising from the conflicting or hostile State regulations" of interstate commerce). Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 16 (1824) (stating that "[a] power in the States to do any thing, and every thing, in regard to commerce, till Congress shall undo it, would suppose a state of things, at least as bad as that which existed before the present constitution"). See Steven Breker-Cooper, The Commerce Clause: The Case for Judicial Non-Intervention, 69 OR. L. REV. 895, 899-901 (1990) (discussing the possibility that the Court has interpreted the Constitution as mandating an economic union among the states).
\item \textsuperscript{5} Polar Ice Cream, 375 U.S. at 374. The drafters of the Constitution enacted the Commerce Clause in response to economic rivalry among the states. Id.; Gibbons, 22 U.S. at 11-13 (contending that the state of trade and commerce had been a driving force in the adoption of the Constitution); see also Nowak, supra note 3, at 145-46 (describing the problems with interstate commerce that the Constitution was designed to resolve).
\item \textsuperscript{6} Amy M. Petragnani, Comment, The Dormant Commerce Clause: On Its Last Leg, 57 ALB. L. REV. 1215, 1215-16 (1994). The negative or dormant Commerce Clause prohibits states from regulating certain types of interstate commerce, even when Congress has not affirmatively regulated in that area. See Breker-Cooper, supra note 4, at 896. Experts argue that the negative Commerce Clause should not be utilized because only Congress should exercise the exclusive power granted to it under the Commerce Clause. Id.; Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 YALE L.J. 425, 427-28 (1982).
\item \textsuperscript{7} See Regan, supra note 3, at 1206 (arguing that the Supreme Court is properly utilizing the negative Commerce Clause to invalidate protectionist state legislation).
\item \textsuperscript{8} See infra text accompanying notes 252-306 (discussing the economic impact, which facially appeared to be similar to that of a tariff, of a tax and subsidy scheme designed, in part, to internalize the costs of the external benefits of undeveloped land occupied by dairy farmers).
\end{itemize}
The negative, or dormant, Commerce Clause\textsuperscript{9} generates tension between the text of the Constitution,\textsuperscript{10} notions of federalism,\textsuperscript{11} and the efficient maintenance of the economic union.\textsuperscript{12} In particular, the dormant Commerce Clause violates the constitutional principles of federalism and separation of powers.\textsuperscript{13} The Constitution clearly allows Congress to regulate interstate commerce and invalidate any inconsistent state regulation under the Supremacy Clause.\textsuperscript{14} The Court's encroachment of congressional power is evident in the rare cases in which Congress overrules the Supreme Court's dormant Commerce Clause jurisprudence,\textsuperscript{15} thus, as-

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  \item \textsuperscript{9} New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988) (stating that the "negative" aspect of the Commerce Clause directly limits States' power to protect their markets and discriminate against interstate commerce); Maine v. Taylor, 477 U.S. 131, 137 (1986) (discussing the Court's power under the dormant Commerce Clause); see Regan, supra note 3, at 1093 (finding that the dormant or negative Commerce Clause prohibits state protectionist legislation).
  \item \textsuperscript{10} See Martin H. Redish & Shane V. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, DUKE L.J. 569, 571 (1987) (arguing that there is no textual support in the Constitution for the negative Commerce Clause); c.f., Breker-Cooper, supra note 4, at 899-902 (discussing that the fact-finding process necessary for Commerce Clause determinations is vested in Congress by the Constitution, thus making it theoretically impossible for the Court to independently determine whether a burden on interstate commerce is impermissible).
  \item \textsuperscript{11} See Redish and Nugent, supra note 10, at 573-74 (contending that the negative Commerce Clause disrupts the Constitutional balance of power between the states and the federal government); see also Richard S. Myers, The Burger Court and the Commerce Clause: An Evaluation of the Role of State Sovereignty, 60 NOTRE DAME L. REV. 1056, 1057 (1985) (discussing the Burger Court's unsuccessful attempts at preserving the balance of power between the states and the national government under the Commerce Clause).
  \item \textsuperscript{12} See Patrick C. McGinley, Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra, 71 OR. L. REV. 409, 449, 454-56 (1992). McGinley argues that, rather than responding to commerce issues on a case-by-case basis, Congress may effectuate its will under the Commerce Clause through broad legislation of free trade causes of action. Id. But see Regan, supra note 3, at 1143-47 (praising motive review under the dormant Commerce Clause).
  \item \textsuperscript{13} See Petragnani, supra note 6, at 1215, 1243-44 (contending that the dormant Commerce Clause requires the Court to exercise legislative judgments, contrary to the separation of powers doctrine). Under the dormant Commerce Clause, the Supreme Court subjects state economic policy to review by the branch of the federal government subject to the least state influence. Id. at 1247. "The Court's usurpation of Congressional commerce power greatly limits the states' commercial power in the federal system. Id. at 1247-48.
  \item \textsuperscript{14} H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 542 (1949) (stating that Congress "could prohibit or curtail shipments of milk in interstate commerce" or authorize the states to do so); Wabash, St. Louis & Pa. Ry. v. Illinois, 118 U.S. 557, 577 (1886) (invalidating an Illinois statute banning discriminatory pricing by interstate carriers for the intrastate part of a train ride because the Commerce Clause demands that Congress should regulate the area); see Breker-Cooper, supra note 4, at 895, n.3 (stating that Congressional power under the Commerce Clause is not limited).
\end{itemize}
sersing their exclusive control of commerce under the Constitution.\textsuperscript{16}

While the Constitution affirmatively grants Congress power to regulate commerce,\textsuperscript{17} there is no clear limitation on state power in areas where Congress has not acted.\textsuperscript{18} The Supreme Court, however, infers such a limitation under the negative Commerce Clause.\textsuperscript{19}

Additionally, the Court has stated that the Tenth Amendment\textsuperscript{20} does not limit Congress' Commerce Clause power,\textsuperscript{21} or implicitly the Court's application of the negative Commerce Clause.\textsuperscript{22} An active judiciary in this area may invalidate state regulations, despite the fact that Congress may have approved of the state action\textsuperscript{23} or at the very least would have

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\item \textsuperscript{16} Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1988)) (overruling Leisy v. Hardin, 135 U.S. 100 (1890)).
\item \textsuperscript{17} U.S. CONST. art. I, § 8, cl. 3.
\item \textsuperscript{18} United States v. Darby, 312 U.S. 100, 115 (1941) (stating that Congress may regulate commerce so long as it does not violate a constitutional prohibition in the process).
\item \textsuperscript{19} Maine v. Taylor, 477 U.S. 131, 137-38 (1986) (contending that the Commerce Clause limits, but does not forbid, state commercial legislation); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 426 (1947) (finding that the Constitution does not expressly limit a state's power to tax within its borders); see Eule, \textit{supra} note 6, at 430 (arguing that the Commerce Clause was enacted, not as a prohibition against protectionism, but as a transfer of commerce power to Congress).
\item \textsuperscript{20} U.S. CONST. amend. X. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." \textit{Id}.
\item \textsuperscript{21} Maryland v. Wirtz, 392 U.S. 183, 196-97 (1968) (holding that Congress' commerce power is not limited merely because a state is involved); \textit{Darby}, 312 U.S. at 124 (holding that the Tenth Amendment "states but a truism that all is retained which has not been surrendered"); Lemke v. Farmers Grain Co., 258 U.S. 50, 59 (1921) (stating that Congress, as compared to the states, has superior power to regulate commerce among the states).
\item \textsuperscript{22} \textit{See Darby}, 312 U.S. at 124 (contending that the Tenth Amendment merely affirms the relationship between the national and state governments as represented in the Constitution prior to the adoption of the Tenth Amendment); \textit{see also} Jesse H. Choper, \textit{The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review}, 86 \textit{Yale L.J.} 1552, 1586 (1977). Professor Choper argues that "[c]ontinuing judicial oversight of alleged state encroachments on national power can also be justified on functional grounds. First, Congress has never established internal machinery for bringing to its attention the myriad of state and local rules that may arguably intrude on the national domain." \textit{Id}.
\item \textsuperscript{23} Congress passed the McCarran-Ferguson Act which authorized the states to regulate the sale of insurance policies. McCarran-Ferguson Act, 15 U.S.C. § 1011 (1988). \textit{Compare} United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 552-53 (1944) (holding that Congress constitutionally regulated the sale of insurance policies pursuant to its powers under the Commerce Clause) \textit{with} Paul v. Virginia, 75 U.S. 168 (1869) (holding
supported local economic experimentation for the benefit of future federal legislation.\textsuperscript{24}

Leaving state commercial legislation to the will of Congress, which is restrained by the people,\textsuperscript{25} could prevent the invalidation of beneficial state economic experimentation.\textsuperscript{26} Economic experimentation is needed to resolve a fundamental problem of the free market;\textsuperscript{27} namely, that it fails to internalize external costs.\textsuperscript{28} Similarly, when making production

that the states may regulate the issuance of insurance policies because they are not commerce, \textit{overruled by South-Eastern Underwriters Ass'n}, 322 U.S. at 533; \textit{see} Choper, \textit{supra} note 22, at 1587 n.194 (discussing the consequences of judicial error when the Court is utilizing legislative-like balancing).

\textsuperscript{24} \textit{See} Choper, \textit{supra} note 22, at 1587 n.194. A state’s power to fund its interests is paramount to the concept of federalism. \textit{See} United States \textit{v. Curtiss-Wright Export Corp.}, 299 U.S. 304, 316-18 (1936) (discussing the importance and the distribution of “sovereignty” among the state and national governments). Subsidies may damage an economic union, which the Supreme Court attempts to preserve under the Commerce Clause. \textit{See} Nowak, \textit{supra} note 3, at 146-47. This friction is analogous to the conflicts that countries have been trying to resolve in efforts to facilitate free trade. \textit{John H. Jackson et al., Legal Problems of International Economic Relations} 757-61 (1995) (discussing the international impact of subsidies).

\textsuperscript{25} Helvering \textit{v. Gerhardt}, 304 U.S. 405, 412 (1938) (stating that federal abuse of taxation power may be reliably prevented by the states’ representatives in Congress); \textit{The Federalist} No. 46, at 297 (James Madison) (Clinton Rossiter ed., 1961) James Madison believed that the federal government “will partake sufficiently of the spirit of [the states] to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.” \textit{Id.} Madison relied on equal state representation in the Senate as a Palladium to the portion of the sovereignty retained by the States, and an institution for preserving that residual sovereignty. \textit{The Federalist} No. 43, at 278-79 (James Madison) (Clinton Rossiter ed., 1961); \textit{see} Story, \textit{supra} note 3, at § 277.

\textsuperscript{26} \textit{See} Leonard Silk, \textit{Economics in Plain English} 39-41 (1986) (discussing E. F. Schumacher’s argument that proper changes in the economic system would benefit society). E. F. Schumacher contends that the axioms of economics, unlike those of the natural sciences and mathematics, can be created by the participants in the system. \textit{Id.} at 39. The axiom of economics is not a question of supply and demand, which is a given, but instead it is a question of, “[W]hat does it mean for something to be economical? . . . The goal of economic activity ought not to be to produce as much as possible, but to enable people to gain the most utility and comfort while using up the least amount of resources—especially irreplaceable resources . . . .” \textit{Id.} at 39-41.

\textsuperscript{27} \textit{See infra} note 273 and accompanying text (discussing the free market’s failure to internalize external costs and benefits, which leads to misallocations of resources).

\textsuperscript{28} J. Philip Wogaman, \textit{The Great Economic Debate: An Ethical Analysis} 93 (1977) (discussing capitalism’s failure to internalize external costs and benefits); Alasdair MacIntyre, \textit{Power Industry Morality, Symposium: A Report From The Edison Electric Institute} (1981) reprinted in \textit{Ethical Theory and Business} 233, 235 (Tom L. Beauchamp & Norman E. Bowie eds. 3d ed. 1988) (contending that the market “is of no help to us in those areas of life where we have to decide what our patterns of consumption are to be, how our preferences are to be ranked, [and] how our desires are to be ordered”); \textit{cf. Jacob Needleman, Money and the Meaning of Life} 25-28 (1991) (arguing that the free market generates too many goods that do not necessarily improve the quality of life, while neglecting many noneconomic goods that raise the true affluence of society).
decisions industry treats resources identically, irrespective of whether those resources are renewable, long term renewable, or nonrenewable. This indiscriminate treatment inevitably leads to the overconsumption of nonrenewable and long term renewable resources. For example, undeveloped land is a resource that may be reacquired only over the long run, and it produces external benefits for which its owner is not compensated. A state may address these market failures with subsidies that conform production to its true costs.

29. Albert N. Link, Link's International Dictionary of Business Economics, 171 (1993). The long run is the time it takes to change all factors of production. Id. The long run for a dairy farmer is the time it would take to change the level of all his inputs: land, dairy cows, equipment, and labor. See Samuelson and Nordhaus, supra note 1, at 112-13 (discussing the economic concept of the long run).

30. See Wogaman, supra note 28, at 142-43. Industry treats resources such as fossil fuels which “took nature billions of years to create” in the same manner as renewable resources, such as labor, when making production decisions. Id. at 142. Professor Samuelson alludes to the market’s inability to properly allocate nonrenewable resources and to internalize external costs and benefits:

Say the federal government wants to drill for oil off the California coast. A storm of complaints is heard. A defender of the program states, “What’s all the ruckus about? There’s valuable oil out there, and there is plenty of seawater to go around. This is very low-cost oil for the nation.” See Samuelson and Nordhaus, supra note 1, at 131. The complainants are voicing their concerns over the potential costs of an oil spill that may damage a long term renewable resource (the clean coast and the corresponding marine life).

31. See Wogaman, supra note 28, at 142 (discussing the problem of overconsumption of nonrenewable resources and resources that are only renewable over the long run). Not only may nonrenewable resources be depleted, but many of the earth’s resources will not allow for infinite growth. Id. at 139-43. John Stuart Mill argued the intuitive proposition that infinite growth is impossible in a finite world:

It must have always have been seen, more or less distinctly, by political economists, that the increase in wealth is not boundless: that at the end of what they term the progressive state lies the stationary state, that all progress in wealth is but a postponement of this, and that each step in advance is an approach to it . . .

Id. at 139 (quoting John Stuart Mill).

32. See supra note 29 and accompanying text (discussing the economic concept of the long run).

33. Noah M. Lemos, Intrinsic Value 120 (1994). The intrinsic value of an object is arguably constituted, in part, by social scientific facts, such as those deduced by economics. See id. Undeveloped land generates real benefits, some for which the owner of that property will not receive compensation. See id. at 194 (discussing the philosophical concept of value); see Samuelson and Nordhaus, supra note 1, at 131, 311-12 (discussing the economic concepts of external costs and benefits, and opportunity costs).

34. See Jackson, supra note 24, at 1169-71 (discussing the international use of agricultural subsidies to internalize the external benefits (national security and stable food prices) of farming); see also Mark P. Gergen, The Selfish State and the Market, 66 Tex. L. Rev. 1097, 1134-39 (1988) (discussing the economic effects of subsidies).
State expenditures favoring in-state producers also discriminate against out-of-state producers, but such expenditures are less likely than tariffs to damage competition because, while tariffs effectively restrict market access, subsidies encourage market participation. The lack of offense found in subsidies is reflected by the general rule that subsidizing an in-state industry does not violate the Commerce Clause. Traditionally, courts tolerate subsidies because subsidies often can produce beneficial social as well as economic consequences, and regulating them would be administratively difficult. The United States Supreme Court never

35. See Roger A. Arnold, Economics 776 (1989). If a foreign government subsidizes an industry, domestic producers, who must compete against the subsidized goods, are first to object to the resulting inequity. Id. The unfairness arises from a subsidized foreign producer increasing its domestic market share at the expense of nonsubsidized domestic producers. See id.; cf. Gergen, supra note 34, at 1135 (explaining this same inequity suffered by a foreign producer in a subsidized domestic market).

36. See Samuelson and Nordhaus, supra note 1, at 747. A tariff is a tax imposed on each unit of an imported product. Id.

37. See Gergen, supra note 34, at 1135. The argument is made that import tariffs and domestic subsidies both result in a lower appeal of the foreign product. Id. But, in effect, subsidies increase the competitive advantage of the party being subsidized, while tariffs reduce the competitive advantage of the producers who are subject to the tariff. Id. Economists also prefer subsidies to tariffs as a way of achieving social goals because subsidies do not raise the price of products. See Samuelson and Nordhaus, supra note 1, at 683. In addition, subsidies, like any expenditure, are more visible and therefore are more likely to generate debate. Id.


39. Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983) (dismissing petitioner's contention that generally available benefits should be actionable subsidies under the Tariff Act of 1930 because it would lead to the absurd result of declaring the construction of roads and bridges as actionable subsidies); see PPG Industries, Inc. v. United States, 928 F.2d 1568, 1570, 1574 (Ct. Cl. 1991) (stating that an actionable subsidy under the Tariff Act of 1930, does not, as a matter of law, include economic benefits conferred on a foreign industry by its government). There does not exist an internationally accepted definition of what distinguishes an unfair subsidy from a fair subsidy. Id. at 1574; see also Gergen, supra note 34, at 1136 (stating that the difference between subsidies and market interfering prohibitions, like tariffs, is only one of degree). But see Saul Levmore, Interstate Exploitation and Judicial Intervention, 69 Va. L. Rev. 563, 584 (1983) (discussing the reasons for the courts' preferential treatment of subsidies as compared to tariffs).

The failure of commerce clause [sic] objections to a state's expenditures in favor of its own citizens follows rather neatly from the realization that such payments are positive inducements that stimulate output rather than restrict it to monopoly levels . . . . Although [subsidies] might well cause overproduction as inefficient as a monopoly's underproduction, the legislating state itself pays for its action rather than profits from it, so that the legislature's judgment may be thought more reliable than parochial.

Id.
specifically has addressed the constitutionality of subsidies. In *West Lynn Creamery v. Healy* (Healy II), the Supreme Court addressed whether a facially nondiscriminatory tax coupled with a direct subsidy violated the Commerce Clause. In *Healy II*, the Court failed to resolve the issue of subsidies, but more importantly, the Court reaffirmed that the American economic union is a laissez-faire union.

In *West Lynn Creamery v. Healy* (Healy I), the West Lynn Creamery sought review of a nondiscriminatory Massachusetts dealer tax and domestic producer subsidy plan for the dairy industry. The Supreme Judicial Court of Massachusetts held that a subsidy to in-state dairy farmers funded by a tax levied on all dairy dealers selling milk in-state regardless of its origin only burdened interstate commerce incidentally. The proceeds from the tax benefitted solely in-state dairy farmers by way of

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But, Professor Gergen argues that subsidies always have a cost to those outside the provider state because they impose losses on the unsubsidized foreign industry and market. Gergen, supra note 34, at 1135-36. However, Professor Gergen states that a general rule against "subsidies would be difficult to administer because of the problems in distinguishing preferences in the allocation of public services from subsidies that improve the position of a state's citizens in the market." *Id.* at 1134.

40. *West Lynn Creamery v. Healy*, 114 S. Ct. 2205, 2214 n.15 (1994); see *Limbach*, 486 U.S. at 278 (stating that directly subsidizing domestic business does not violate the Commerce Clause absent a discriminatory tax); see also *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan J., concurring) (contending that a state may attract industry and residents by spending money to improve the business and social environment).

41. 114 S. Ct. 2205 (1994).

42. *Id.* at 2209. In particular, the pricing order required payment by all dairy dealers who sold their product in Massachusetts. *Id.* at 2210. The proceeds of the payments were then distributed to in-state dairy farmers only. *Id.*

43. *See id.* at 2214 n.15 (stating that the Court will not settle the constitutionality of subsidies in this case).

44. *See id.* at 2218 (discussing the virtues of a free market economy); see *Samuelson and Nordhaus*, supra note 1, at 740. A laissez-faire economy is driven by the marketplace with minimal government interference. *Id.*

45. 611 N.E.2d 239 (Mass. 1993).

46. *Id.* at 240-41.

47. *See id.* at 241 n.10. The tax, stemming from the state's pricing order, is calculated as one-third of the difference between the federal blend price of $12.00 and $15.00 (an amount fixed by the Massachusetts order), multiplied by the amount of the dealers Class I (fluid milk) sales in Massachusetts. *Id.* at 241 n.9, n.10.

48. *Id.* at 240 n.3 (defining dealer).

"A 'dealer' is defined as 'any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer.'”


49. *Healy I*, 611 N.E.2d at 245.
subsidy payments from the Massachusetts Dairy Equalization Fund. The purpose of the fund was not only to rescue the ailing Massachusetts dairy industry, but also to help preserve the vast tracts of scenic land that composed the dairy farms and drew tourists. Massachusetts’ pricing scheme was an innovative economic experiment designed to serve both environmental and protectionist goals.

West Lynn Creamery, a dairy dealer, alleged that the tax and subsidy plan violated the Commerce Clause because it protected only in-state dairy farmers. The Creamery asserted that the tax unconstitutionally discriminated against out-of-state dairy farmers because the fund payments, which were supported by the dealer tax, subsidized only in-state dairy farmers. Moreover, it argued that the discriminatory effect of the fund distribution scheme would result in reduced Massachusetts milk imports and increased domestic production. Refusing to accept any of the Creamery’s claims, the Supreme Judicial Court of Massachusetts up-

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50. Id. at 241. Massachusetts maintained its Dairy Equalization Fund separately from the state’s general fund. Id. The Dairy Equalization Fund was used solely to subsidize in-state, dairy farmers. Id.

51. Id. at 240 n.6. The state determined that the dairy crisis threatened “the economy of [the] entire state, the enviable lifestyle . . . , and the health of [the] consumers.” Id.

52. Healy II, 114 S. Ct. at 2209-10, 2221. The pricing scheme aimed to protect the Massachusetts’ dairy industry, to preserve the corresponding land, and to maintain a reliable in-state source of milk. Id. Aside from the protectionist purpose, the pricing scheme represented a method of incorporating the costs of the external benefits of dairy farming into the price of milk. See id. at 2221 (Rehnquist, C.J., dissenting). It appears that the Massachusetts legislature made the value judgment that the cost of the public good of undeveloped land should be incorporated into the price of milk. See id. (quoting appellee’s brief on the public benefits sustained by the dairy industry); cf. Kurt Klappholz, Value Judgments and Economics in The Philosophy of Economics 276, 284 (Daniel M. Hausman ed., 1984) (writing that policymakers usually have more than one goal to achieve with a particular policy). By compensating dairy farmers for their production of a public good, a state theoretically may produce the optimum level of that good. See Samuelson and Nordhaus, supra note 1, at 310-13 (discussing methods of internalizing the costs of external costs and benefits).

53. Healy I, 611 N.E.2d at 241; see Healy II, 114 S. Ct. at 2212-13 (finding that the Massachusetts pricing scheme violated the Commerce Clause because, in effect, it violated the principle of comparative advantage).

The economic law of comparative advantage holds that goods should be produced only by states that produce them at relatively low costs. See Samuelson and Nordhaus, supra note 1, at 29. Arguably, the pricing scheme did not violate the law of comparative advantage if the external benefits produced by the dairy industry are taken into account. See infra notes 287-99 and accompanying text (discussing the internalization of the external benefits of undeveloped land).

54. Healy I, 611 N.E.2d at 241; see infra notes 235-51 and accompanying text (arguing that out-of-state dairy farmers lost market share but did not pay the incidence of the Massachusetts dairy tax).

55. Healy I, 611 N.E.2d at 244.
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held the pricing order and subsidy, finding that its incidental burden on commerce was outweighed by the local benefits it provided. 56

The United States Supreme Court reversed Healy I. 57 The Court found the Massachusetts pricing order protectionist and violative of the Commerce Clause in its attempt to elevate milk prices and enhance the profitability of dairy farming in-state. 58 According to the Court, the pricing order produced the same anti-competitive result as a tariff 59 because the in-state subsidy more than offset the tax paid by in-state dairy farmers. 60

Justice Scalia, in a concurring opinion, criticized the majority’s reasoning as overly broad and threatening to the state’s traditional police power. 61 He opined that many environmentally-motivated state statutes would not survive judicial review if subjected to the Healy II majority’s

56. Id. at 245; see infra notes 291-96 and accompanying text (contending that not only did the Massachusetts subsidy compensate dairy farmers for the external benefits they produced, but also may have improved the efficiency of the in-state dairy market).

57. Healy II, 114 S. Ct. at 2218.

58. Id. at 2217-18; see infra notes 304-06 and accompanying text (analyzing the contention that self interested or protectionist motives may encourage legislation that improves the efficiency of the market).

59. Healy II, 114 S. Ct. at 2212; see infra notes 252-73 and accompanying text (discussing the tariff-like economic effects of the Massachusetts pricing scheme; absent the consideration of externalities); cf. Gergen, supra note 34, at 1135-36 (discussing the Court’s traditional tolerance of subsidies while cautioning that the difference between subsidies and tariffs is only one of degree).

60. See Healy II, 114 S. Ct. at 2212. Justice Stevens, writing for the majority, states that the pricing scheme creates a tariff-like barrier because out-of-state products bear the burden of the tax, while subsidized in-state dairy producers may charge supra-competitive prices. Id. In other words, Justice Stevens concluded that the tax was placed in effect only on out-of-state milk. Id.; see infra notes 252-73 and accompanying text (discussing the tariff-like effects of the Massachusetts pricing order and subsidy).

61. Healy II, 114 S. Ct. at 2219-20 (Scalia, J., concurring) (criticizing the majority’s reasoning for going well beyond reasoning used by the Court heretofore to find state statutes violative of the Commerce Clause).
reasoning. Nonetheless, Justice Scalia concurred in the opinion because of stare decisis.

In a dissenting opinion, Chief Justice Rehnquist suggested that the benefits of preserving undeveloped land may have justified the subsidy, and that Congress, not the Court, should decide whether this pricing plan violated the Commerce Clause. Chief Justice Rehnquist argued that the Court’s decision was inconsistent with both the principle of federalism and the doctrine of separation of powers.

This Note begins with an analysis of Supreme Court Commerce Clause jurisprudence. It then explores the potential effect of the Court’s reasoning in Healy II on future economic experimentation by the states. This Note proceeds with a discussion of the economic and historical concerns that the Court has relied on to define the reach of the Commerce Clause. Next, this Note analyzes the Supreme Court’s decision in Healy II, and its impact on state subsidies of in-state producers. This Note argues that the decision in Healy II may thwart beneficial economic experimentation by states. In particular, this Note suggests that the Court is poorly equipped to determine whether the internalization of an external cost, achieved only by protecting an industry from out-of-state competitors who are not compensated for the external benefits they produce, violates the Commerce Clause. This Note concludes that Congress is best able to provide guidelines for economic experimentation among the states because the legislative branch is more adequately equipped to determine reasonable economic policy.

62. Id. at 2219; see infra notes 197-98 (reviewing Justice Scalia’s concerns that, under the majority’s reasoning, even certain environmentally conscious packaging restrictions mandated by state law would be invalidated). Justice Scalia did not cite specific state statutes that he believed were threatened by what he perceived as the majority’s myopic focus on the national economic impact of the state regulations. See id. But the Clover Leaf case, where the Court upheld a state ban on plastic nonreturnable bottles, can serve as an example of the type of state action that Justice Scalia fears is endangered by the Healy II decision. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 (1981). The ban on plastic nonreturnable bottles may have been motivated by either environmental concerns or by local milk producers seeking protection. Id. at 458, 460. In Clover Leaf, the Court found that the state statute did burden interstate commerce but, only incidentally and, not in violation of the Commerce Clause. Id. at 472-74. Justice Scalia was concerned that legitimate environmental legislation may be invalidated under Healy II because of the disproportionate economic impact of such statutory schemes. Healy II, 114 S. Ct. at 2219.

63. Id. at 2220 (concurring in the opinion because, after 121 years of negative Commerce Clause jurisprudence, this “would not be a principled point at which to disembark from the negative-Commerce-Clause train”). Id.

64. Id. at 2221-23 (Rehnquist C.J., dissenting). The Chief Justice contends that Congress has not legislated a pure laissez-faire economy, therefore the Court should not impose one under the negative Commerce Clause. Id.

65. Id. at 2223.
I. PROTECTING THE ECONOMIC UNION AND DECREASING STATE SOVEREIGNTY UNDER THE DORMANT COMMERCE CLAUSE

Congress has express Constitutional authority to regulate interstate commerce.66 Under the Supremacy Clause, the courts must invalidate any inconsistent state statute or regulation.67 The courts' role in reviewing state legislation affecting interstate commerce has expanded, however, under the judicially created dormant Commerce Clause.68 This negative aspect of the Commerce Clause limits each state's power to adopt regulations that discriminate against interstate commerce, absent any Supremacy Clause invalidation grounds.69

A. The Rise and Fall of the Direct/Indirect Burden Test

The Court's judicial activism in interpreting the Commerce Clause stems from its determination that the clause "implicitly limit[s] state authority to interfere with business that transcend[s] state lines."70 The Court, however, has upheld the constitutionality of some state regulations

66. See U.S. Const. art. I, § 8, cl. 3 (granting Congress exclusive legislative power to regulate interstate commerce).

67. U.S. Const. art. VI, § 2. The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Id.; see also H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949) (acknowledging Congress' exclusive Commerce Clause power and discussing the Court's role under the Commerce Clause); Currin v. Wallace, 306 U.S. 1, 12-14 (1939) (finding that Congress regulates interstate commerce and any contrary state regulations must be invalidated by the Court). See Breker-Cooper, supra note 4, at 895 n.3 (noting Congressional authority to regulate interstate commerce is limitless).

68. See generally, Breker-Cooper, supra note 4, at 920-30 (discussing the evolution of Supreme Court dormant Commerce Clause jurisprudence).

69. See Baldwin v. G. A. F. Seeling, Inc., 294 U.S. 511, 514, 522-26 (1935) (invalidating state legislation that had been designed to limit competition between the states even when the federal government is not regulating the field); Bendix Autolite Corp. v. Midwesco Enter., 486 U.S. 888, 891 (1988) (finding that any benefits gained by discriminatory state legislation were insufficient to overcome the unconstitutional restraint on interstate commerce the statute imposed).

70. See generally, David P. Currie, THE CONSTITUTION IN THE SUPREME COURT 31 (1990) (discussing the expansive reach and the few limitations of the Commerce Clause); see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239 (1824) (ruling that states cannot exercise police power to "restrain a free intercourse among the states"); Cooley v. Board of Wardens, 53 U.S. 299 (1851) (deciding that when commercial matters are of national interest, a state may not individually regulate that field).

Specifically, the Court has found that intrastate sales of milk affect interstate commerce. See United States v. Wrightwood Dairy Co., 315 U.S. 110, 120 (1942). In Wrightwood Dairy Co., the Court concluded that "the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity." Id.
interfering with commerce that transcends state lines under the following two-tiered test.\footnote{See Nebbia v. New York, 291 U.S. 502, 538-39 (1934) (refusing to invalidate a regulation that was designed to protect the public health by maintaining a fresh and continuous supply of milk even though it burdened interstate commerce); Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 349, 353 (1939) (holding that nondiscriminatory state dairy regulations designed to protect in-state economic interests, and which only incidentally burdened interstate commerce, did not violate the Commerce Clause).} First, when a statute directly effects interstate commerce, the Court traditionally has struck it down\footnote{Brown-Forman Distillers v. New York Liquor Auth., 476 U.S. 573, 579 (1985) (stating that the Court generally invalidates discriminatory legislation that directly regulates interstate commerce). See, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978) (holding that New Jersey's ban on importing solid waste from outside the state violated the Commerce Clause); Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 34 (1974) (holding that Mississippi's failure to "honor and enforce contracts made for interstate or foreign commerce" violated the Commerce Clause); Shafer v. Farmers Grain Co., 268 U.S. 189, 203 (1925) (invalidating a North Dakota act requiring the comprehensive regulation and grading of wheat, because it was a direct regulation of interstate commerce).} and second, when the statute only indirectly affects interstate commerce and regulates even-handedly, the Court balances the statute's burden on interstate commerce against the local benefits of the statute.\footnote{Brown-Forman Distillers, 476 U.S. at 579. The Court recognized that an interstate business may be required to pay taxes as it travels through a state. New York, L. E. & W. R. R. v. Pennsylvania, 158 U.S. 431, 438-39 (1895). The Court stated that "[t]he interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance." Id. at 439.} Interstate commerce may be adversely affected by laws made pursuant to a state's Tenth Amendment\footnote{U.S. CONST. amend. X. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id. The Commerce Clause is not an absolute limit on a state's regulation of matters under its general police powers. See Maine v. Taylor, 477 U.S. 131, 138 (1986); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 36 (1980).} police power.\footnote{See Chesapeake & Ohio Ry. Co. v. Stapleton, 279 U.S. 587, 593-95 (1928) (discussing the extent to which a state may burden interstate commerce to eliminate child labor pursuant to their police power); Hennington v. Georgia, 163 U.S. 299, 308 (1896) (upholding a statute regulating the operation of trains on Sunday). Justice Harlan stated that an exercise of police power that "does not go beyond the necessities of the case" would be valid until displaced by congressional action. Id.} Under the negative Commerce Clause, the Court must often consider the legitimate interest of the state in protecting its citizens' health,\footnote{H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531-32 (1949) (acknowledging the states' broad power to protect their citizens' safety).} safety,\footnote{Nebbia v. New York, 291 U.S. 502, 524 (1934) (stating that "the power to promote the general welfare is inherent in government"); Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 493 (1887) (noting that a state may ban intrastate commerce of liquor "[f]or the purpose of protecting its people against the evils of intemperance"); see Baldwin} and welfare.\footnote{See Maine v. Taylor, 477 U.S. 131, 138-51 (1986) (upholding a state statute that banned out-of-state live baitfish that might introduce new parasites into Maine's fisheries).}
The Court's analysis of commercial barriers, however, does not always fit neatly under the two-tiered test. For example, in *Nebbia v. New York*, the Court upheld a New York statute establishing minimum milk prices under the theory that milk was a good affected with the public interest. More importantly, the Court refused to hold that the public control of prices or rates is per se unconstitutional. The dissent argued, however, that price fixing of goods affected with the public interest would subject the economy to needless regulation.

1. The Decline of the Direct/Indirect Burden Test

The Supreme Court jettisoned the direct/indirect burden test in *Baldwin v. G. A. F. Seelig, Inc.*, when it invalidated a regulatory requirement that all milk purchased by in-state milk dealers be purchased at or above a set minimum price. The regulatory scheme insulated New York dairy farmers from out-of-state competitors, compelling the Court to strike down the statute as protectionist. In addition, the Court reasoned that distinctions between indirect and direct burdens on interstate commerce

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79. See *Nebbia*, 291 U.S. at 516-18, 538-39 (1934) (upholding a price floor on milk because milk is important to the public interest).


81. *Id.* at 516. An industry affected with a public interest is an enterprise that either the public itself may conduct, that the owner must obtain a public grant or franchise for, or that is a monopoly. *Id.* at 531. The Court upheld the *Nebbia* statute because it was made pursuant to the state's police powers. *Id.* The Court stated:

Milk is an essential item of the diet. It cannot long be stored. It is an excellent medium for the growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

*Id.* at 516-17.

82. *Id.* at 531-32 (finding that the regulation of prices, like the regulation of the manufacturing process, is not necessarily unconstitutional). An industry that maintains a strong public interest may constitutionally be subject to price regulations. *Id.*

83. *Id.* at 555 (McReynolds, J., dissenting) (contending that the price regulation of industries affected with the public interest would lead to numerous price regulations separating industry from market forces and ending "liberty under the Constitution").

84. 294 U.S. 511 (1935).

85. *Id.* at 519.

86. *Id.* at 522. The Court found that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Id.* at 523.
become irrelevant\footnote{Id. at 522-23; see also Wickard v. Filburn, 317 U.S. 111, 124 (1942). The Court found the indirect/direct burden test insufficient. Id. "Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production,' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'" Id.} when the barrier's purpose is to protect in-state markets from out-of-state producers.\footnote{Baldwin, 294 U.S. at 526.} The Court further reasoned that barriers designed to obviate the competitive advantages of out-of-state producers violated the Commerce Clause.\footnote{Id. at 527.}

Baldwin, the New York Commissioner of Agriculture and Markets, unsuccessfully had argued that the legitimate end of protecting the public health justified the regulatory scheme.\footnote{Id. at 522.} The Court reduced Baldwin's argument to absurdity,\footnote{Id. at 527.} stating that "[e]conomic welfare is always related to health, for there can be no health if men are starving."\footnote{Baldwin, 294 U.S. at 526.} Thus, the Court indicated that legislative protection of an industry will always indirectly benefit the health of its employees and their families.\footnote{Id. at 527.} An exception on health grounds would frustrate the purpose of the Commerce Clause.

2. Violating the Court's Legislative Will

The Court extended the reach of the negative Commerce Clause by balancing a state's legitimate interests in regulating against the burdens imposed on interstate commerce.\footnote{Id. at 522.} This, though, should be a legislative
function.\textsuperscript{95} \textit{Pike v. Bruce Church, Inc.},\textsuperscript{96} concerned an Arizona law that required all cantaloupes grown in-state to be labeled accordingly.\textsuperscript{97} The Arizona agricultural supervisor forbade an in-state cantaloupe grower from sending his cantaloupes to a California packaging facility to be packaged and labeled as California cantaloupes.\textsuperscript{98} Unless the farmer sent his cantaloupes to California, though, he would have had to build a $200,000 packaging facility in Arizona.\textsuperscript{99} The Court balanced the state's interest in labeling in-state cantaloupes against the plaintiff's burden of building a packaging facility.\textsuperscript{100} The Court invalidated the statute because the farmer's interest in not building a packaging facility was stronger than the state's interest in labeling cantaloupes.\textsuperscript{101} Underlying the \textit{Pike} test, is the judicial determination that it is constitutionally permissible for the Court to decide Commerce Clause cases by utilizing a legislative tool.\textsuperscript{102}

\textbf{B. Protecting and Preserving the Competitive Balance Between In-State and Out-of-State Entities}

Under the Commerce Clause, the Court will strike down state legislation designed to reduce the competitive advantages of out-of-state entities.\textsuperscript{103} For example, in \textit{Hunt v. Washington Apple Advertising Comm'n.},\textsuperscript{397 U.S. 137 (1970).}
The Commerce Clause the Court invalidated a facially neutral North Carolina statute requiring all apples sold or shipped into North Carolina in closed containers to be labeled with either the applicable federal grade or no grade at all. The Court found that the statute had a discriminatory impact on the Washington apple industry because "the [North Carolina] statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it earned for itself through its expensive inspection and grading system." The statute did not survive judicial scrutiny because it shielded the North Carolina apple industry from out-of-state competitors.

Similarly, states are not permitted to advantage in-state entities through taxes that only impact out-of-state competitors. A state, nonetheless, may tax an in-state transaction even if the products are destined for use outside of the state. For example, the Supreme Court upheld taxes on gross receipts from interstate transactions that occurred within the borders of the taxing state, provided the tax applied equally to all "wholly local transactions." The Court in International Harvester Co. v. Department of Treasury held that local transactions may be taxed so long as the taxable "event is separate and distinct from the transportation or intercourse which is interstate commerce." The underlying policy of insuring that local industry would not suffer a competitive disadvantage motivated the Court. The Court concluded that an in-state users tax as opposed to a gross receipts tax, would be constitutionally permissible.

The Court will, however, strike down a state statute that imposes a discriminatory tax on out-of-state industries. For example, exemptions from a twenty percent wholesale tax on liquor of certain alcoholic bever-

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104. Id.
105. Id. at 351.
106. Id.
109. Id. at 349 (holding that a state may tax certain activities of corporations that do business in-state but are incorporated out-of-state). It is constitutional for Indiana to tax interstate transactions that are consummated in Indiana where wholly local transactions are taxed in the same manner. Id.
111. Id. at 346. The Court will validate schemes that tax interstate commerce; so long as the scheme does not discriminate against interstate commerce. Id.
112. Id. at 349. A taxing scheme that exempted interstate commerce invariably would discriminate against intrastate commerce and vice versa. Id.
113. Id. at 348.
ages peculiar to Hawaii violated the Commerce Clause. The Court’s decision reversed the Hawaii Supreme Court’s holding that the liquor tax exemption did not violate the Commerce Clause because the incidence of the tax fell on in-state wholesalers of liquor and ultimately passed onto in-state consumers. The Supreme Court, in accordance with Hunt v. Washington Apple Advertising Commission, held that the exemption was constitutionally impermissible because it had the discriminatory purpose of encouraging domestic industry at the expense of interstate commerce.

C. State Police Power and the Interests of the State Resident

The creation of an economic union based on fair trade invariably will benefit consumers. In H. P. Hood & Sons, Inc. v. Dumond, the Court extolled the benefits of the Commerce Clause as a means of protecting the consumer from exploitation by regional producers. Similarly, the Court has permitted certain state barriers to interstate commerce when the state acted, pursuant to its police power, to protect consumers. For example, the Court allowed a state ban of colored oleomargarine designed to protect consumers from accidentally purchasing

115. Id.
116. Matter of Bacchus Imports, 656 P.2d 724, 734 (Haw. 1982). The court distinguished Maryland v. Louisiana, 451 U.S. 725 (1981) where Louisiana placed a tax on natural gas, brought into Louisiana even though much of the gas would be consumed by out-of-state consumers. Id. The Bacchus court noted that only in-state consumers paid the Hawaii liquor tax. Id.
118. Bacchus, 468 U.S. at 271.
119. See, e.g., H. P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525 (1949) (holding that New York may not ban additional facilities that acquire and ship milk interstate); Pennsylvania v. West Virginia 262 U.S. 553, 597-98 (1923) (invalidating as a serious burden on interstate commerce and consumers a statute requiring domestic natural gas demands be met before natural gas could be sold to another state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928) (invalidating a state statute banning the sale to out-of-state consumers of shrimp captured in Louisiana that had not had their heads and hulls removed). See ARNOLD, supra note 35, at 770-74 (discussing the economic benefits of free trade to consumers).
120. 336 U.S. 525 (1949).
121. Id. at 539. Protecting consumers from higher milk prices may not be of much concern to the federal government. See Richard A. Ippolito & Robert T. Masson, The Social Cost of Government Regulation of Milk, 21 J. L. & Econ. 33 (1978) (analyzing an econometric study that showed the cost of government price-support programs to consumers); see James K. Glassman, Sitting on Both Sides of the Fence on Farm Subsidies, WASH. Post, January 25, 1995, at F1, F4 (discussing the upcoming Congressional battle over farm subsidies).
122. See Plumley v. Massachusetts, 155 U.S. 461, 479 (1894) (upholding a statute banning colored oleomargarine in order to prevent consumers from being deceived into believing it was butter).
the deceptively-colored margarine instead of butter.\textsuperscript{123} Consumers therefore benefit from the Court’s prohibition against protectionism,\textsuperscript{124} as well as the Court’s respect for the States’ police powers which legitimately protect consumer health and safety.\textsuperscript{125}

1. Trade Barriers for the Public Good

Barriers to interstate trade generally are inefficient because they may divert production from low cost, out-of-state producers to high cost, in-state producers.\textsuperscript{126} Some barriers to interstate trade, however, are

\textsuperscript{123} Id. Arguably, the state was not trying to protect consumers, but rather the in-state dairy industry. \textit{See} \textit{Milton Friedman} \& \textit{Rose Friedman}, \textit{Free to Choose} 279-83 (1980). Producers have strong economic incentives to lobby for protectionist legislation for their individual products or services. \textit{Id.} at 280-83. Consumers’ interests in defeating protectionist legislation for an individual product or service is minimal. \textit{Id.} at 281-83. For example, protectionist legislation of the merchant marine cost consumers over $600 million in 1979. \textit{Id.} at 281. The legislation only costs individual consumers an extra three dollars per year, but a merchant marine’s job may be dependent on such legislation. \textit{Id.} The consumer had a $3 incentive to lobby against the legislation while the merchant marine’s financial incentive was much greater. \textit{Id.} Likewise, individual Massachusetts consumers probably were not outraged enough by imitation butter to lobby for a ban on colored oleomargarine. \textit{See id.} at 280-83 (discussing the economic incentives for lobbying).

\textsuperscript{124} \textit{See} \textit{Arnold}, \textit{supra} note 35, at 781-82. Consumers benefit when discriminatory taxes or other trade barriers which drive up the price of commodities are invalidated. \textit{Id.} Consumers lose more than domestic producers gain when the government prohibits imports. \textit{Id.} (discussing the economic gains of producers and losses of consumers when exports are prohibited). \textit{See, e.g.}, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 272 (1984) (holding that a discriminatory liquor tax, whose incidence arguably fell on in-state consumers, violated the Commerce Clause because the tax disproportionately affected the demand of in-state and out-of-state liquors); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 376-77 (1964) (holding that a Florida statute violated the Commerce Clause because it created a barrier that neutralized the advantages of out-of-state milk before it entered the consumer market).

\textsuperscript{125} \textit{See, e.g.}, Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 43 (1980) (finding that out-of-state goods that are particularly likely to threaten the health or safety of a state’s citizens may be kept out of a state); Reid v. Colorado, 187 U.S. 137, 152 (1902) (upholding a state ban on the importation of diseased livestock); Smith v. Alabama, 124 U.S. 465, 480 (1888) (upholding state review and licensing of interstate railway engineers); Cooley v. Board of Wardens, 53 U.S. 299 (1852) (validating a state law that required out-of-state ships to hire a local pilot to help navigate through local waters).

\textsuperscript{126} \textit{See Samuelson and Nordhaus}, \textit{supra} note 1, at 664. Tariffs are inefficient because they shift production contrary to the principal of comparative advantage. \textit{Id.; see Arnold}, \textit{supra} note 35, at 765. The principal of comparative advantage holds that states should produce goods in which they have a lower opportunity cost. \textit{Id.; see Friedman}, \textit{supra} note 123, at 36-37. Professor Friedman illustrates the principle of comparative advantage by comparing the production of a lawyer to a secretary. \textit{Id.} To further illustrate Professor Friedman’s example, assume that the attorney earns $75,000 a year and is twice as productive a secretary and five times as productive an attorney as her secretary who earns $25,000 a year. \textit{See id.} The law of comparative advantage would conclude that they both are better off performing their respective jobs. \textit{See id.} The lawyer should remain a lawyer because the opportunity cost of the legal work ($75,000) is higher than the benefits
designed to internalize the external costs that society is forced to bear.\textsuperscript{127} For example, in \textit{Bacchus}, a tax on wholesale liquor was designed to internalize the increased costs of "police and other governmental services" associated with the consumption of liquor.\textsuperscript{128} The tax was facially discriminatory against out-of-state liquor producers, however, and thus, violated the Commerce Clause.\textsuperscript{129}

A Minnesota ban on plastic nonreturnable milk containers did not violate the Commerce Clause because it was facially nondiscriminatory.\textsuperscript{130} The nondiscriminatory statute which did not apply to paper milk containers benefitted the in-state paper container manufacturers and burdened the out-of-state plastics industry.\textsuperscript{131} The burden, however, was not clearly excessive in comparison to the legitimate state interests in conserving natural resources and remedying its waste disposal problems.\textsuperscript{132}

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of her secretarial work ($2 \times 25,000 = 50,000$). See \textit{id}. Likewise, the opportunity cost for the secretary of the secretarial work ($25,000$) is higher than the benefits of his legal work ($75,000/5 = 15,000$). See \textit{id}; see also \textit{ARNOLD}, supra note 35, at 781 (discussing steel tariffs which saved numerous jobs paying $24,329 but cost domestic consumers an extra $85,272 for every job saved); see \textit{Regan}, supra note 3, at 1115 (stating that tariffs interfere with the efficient production of goods).

127. \textit{See Regan, supra} note 3, at 1115-16. Barriers to environmentally unfriendly packaging discourages the production of external costs (litter), possibly without decreasing the efficiency of the markets. \textit{Id}; see \textit{ARNOLD, supra} note 35, at 774 (contending that some trade barriers may successfully internalize the costs of the external benefits of national security).


129. \textit{Id}. The legislature provided the exemption for the local liquor to promote a fledgling industry. \textit{Id} at 270. The "infant-industry" argument states that young industries need temporary protection until they are mature enough to compete with established out-of-state industries. \textit{See ARNOLD, supra} note 35, at 774.

130. \textit{Minnesota v. Clover Leaf Creamery Co.}, 449 U.S. 456, 456-66 (1981). Respondents offered evidence that the Act would have negative environmental consequences. \textit{Id}. The Court reasoned that "[s]tates are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " \textit{Id} at 464 (citations omitted). Clover Leaf Creamery had been unable to meet this burden, despite providing substantial evidence that the ban on plastic nonreturnable bottles may have been worse for the environment than no ban at all. \textit{Id} at 463-64.

131. \textit{Id} at 458, 473. The respondents argued that the purpose of the Act was to reduce the interstate competition from plastic container producers, thereby aiding the in-state pulpwood industries which would benefit from both the ban and the subsequent increase in use of paper milk containers. \textit{Id}. The Court acknowledged that the in-state pulpwood industry would benefit from the legislation, but deemed the burden on interstate commerce not to be "clearly excessive" in comparison to the state's legitimate environmental interests. \textit{Id} at 473.

132. \textit{Id} at 465-66.
2. Limiting the States Power with the Negative Commerce Clause

The Court has invalidated statutes, made pursuant to a state's police power, that facially discriminated against or unduly burdened interstate commerce. In City of Philadelphia v. New Jersey, the Court restricted environmental legislation by invalidating a New Jersey statute that prohibited the importation of most out-of-state waste. The Court articulated a two-tiered test to determine whether the provision violated the Commerce Clause. First, if the statute is facially discriminatory by protecting in-state entities at the expense of out-of-state entities, the statute is per se invalid. Second, if the statute is facially neutral, the Court will balance the statute's incidental burdens on interstate commerce against the local benefits it provides. In Philadelphia, the Court found the statute invalid under the first tier of the test, reasoning that blocking the flow of waste into the state was one of the clearest examples of economic protectionism. The Court struck down the statute because New Jersey discriminated against out-of-state waste that, apart from its origin, was no different than in-state waste.

Under the negative Commerce Clause, the Court has permitted a state to discriminate against interstate commerce only if there exists no less discriminatory means to reach the legitimate end. In Maine v. Taylor, the Court validated a facially discriminatory state statute that prohibited the importation of certain baitfish to protect in-state fish from out-of-state parasites.

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133. Southern Pacific Co. v. Arizona, 325 U.S. 761, 781 (1945) (invalidating a state regulation on the length of trains because it unduly burdened interstate commerce); Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75, 79 (1914). "The [Court's] decisions also show that a State cannot avoid the operation of [the Commerce Clause] by simply invoking the convenient apologetics of the police power." Id.; see infra notes 133-140 (discussing the Court's negative Commerce Clause rule, which limits a state's police power).


135. Id. at 628.

136. Id. at 624.

137. Id. But see Maine v. Taylor, 477 U.S. 131 (1986). In Taylor, the Court validated a facially discriminatory state statute that prohibited the importation of certain baitfish to protect in-state fish from out-of-state parasites. Id. at 151.

138. Philadelphia, 437 U.S. at 624 (citing with approval the dormant Commerce Clause balancing test in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)); see supra note 100 and accompanying text (discussing the Pike balancing test).

139. Philadelphia, 437 U.S. at 628-29. The Court found that the absolute ban on out-of-state waste was unconstitutional because New Jersey placed the burden of preserving its remaining landfill space solely on out-of-state interests. Id. at 629.

140. Id. at 627. If New Jersey had been able to find a health hazard unique to out-of-state waste, the ban may have been permissible as a quarantine law. Id. at 628.

141. Maine v. Taylor, 477 U.S. 131, 138 (1986). The ban on out-of-state baitfish was upheld because no method existed to test baitfish for parasites without killing them. Id. at 141-42.
the Court upheld a state ban on certain out-of-state fishing bait. The ban protected the in-state bait industry from out-of-state parasites. The Court concluded that such discriminatory regulations are constitutional if they, "serve[] a legitimate local purpose", and that this purpose could not be served as well by available nondiscriminatory means. The Court found that Maine demonstrated legitimate reasons for discriminating against out-of-state baitfish, apart from their origin.

3. State Recourse After an Erroneous Commerce Clause Ruling

Unfortunately the states have insignificant protection from erroneous Commerce Clause decisions made by the judiciary. The Court, in Garcia v. San Antonio Metropolitan Transit Authority, held that state authority under the Commerce Clause is better protected by state participation in the federal government than by judicial review. Presumably, the states' interests are procedurally protected in the federal government because they are represented in both houses of Congress. In fact, the Framers of the Constitution structured Congress to secure the states from the encroachment of federal power.

142. 477 U.S. at 131.
143. Id. at 151-52. The Maine statute banned the importation of all live baitfish. Id. at 132-33.
144. Id. at 140-41. The state argued that the delicate eco-system of Maine's lakes could be disturbed by the introduction of non-native parasites carried by live baitfish. Id. at 141.
145. Id. at 138. Even though live baitfish must be killed to inspect them for parasites, a statistical sampling method could be developed to certify shipments as parasite-free. Id. at 141-42. No scientifically accepted method of sampling, however, has been developed for live baitfish. Id.
146. Id. at 140-41. Despite evidence of protectionist motives, the Court found that the statute did not arbitrarily discriminate against interstate commerce. Id. at 149, 151.
147. See Redish and Nugent, supra note 10, at 589-90. The negative Commerce Clause represents a shift in power from Congress to the judiciary due to inactivity by Congress. Id. Professors Redish and Nugent, however, argue that the Framers intended state commercial regulations to be valid unless preempted by Congress. Id. The negative Commerce Clause thus upsets the constitutional balance of power between the States, Congress, and the Court. Id. at 603.
149. Id. at 554. Justice Blackmun, writing for the majority, concluded that the Framers decided to rely on the procedural "restraints on federal power over the States," rather than express limitations on federal power. Id. at 552.
150. See id. at 568-72 (Powell, J., dissenting) (discussing the states' "major role [in the Federal System] that cannot be pre-empted by the National Government").
151. Id. at 551 (discussing the Framer's intent to secure state power in the national government through representation in the legislature); see The Federalist No. 58, at 357 (James Madison) (Clinton Rossiter ed., 1961). Madison contended that the United States Senate is the legislative branch that functions as the representation of the states. Id.; see Choper, supra note 22, at 1561 (contending that state's rights are protected in the United States House of Representatives).
The Court's holding in *Garcia* indicates that a state's only protection against the Court under the dormant Commerce Clause is procedural.\(^\text{152}\) In particular, a state, through its elected representatives, can persuade Congress to legislate against a court's decision.\(^\text{153}\) The likelihood of Congressional intervention in judicial decision-making, however, is not high due to Congress' demanding workload.\(^\text{154}\)

\(^\text{152}\) See *Garcia*, 496 U.S. at 560 (Powell, J., dissenting) (maintaining that the majority's decision renders the Tenth Amendment meaningless and that States' sovereignty under the Commerce Clause may no longer be protected by the Court); James Hinshaw, *The Dormant Commerce Clause After Garcia: An Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511, 513 (1992). *Garcia* held that the Supreme Court will protect the states from Congress if political processes are not operating effectively. *Id.* at 513. In addition, the Court recognized that its continued balancing of state sovereignty interests under the negative Commerce Clause is an exception to its political process theory. *Id.* at 529; see also H. P. Hood & Sons, Inc. v. Dumond, 336 U.S. 525, 539 (1949) (stating that Congress has the power to overrule the Supreme Court's negative Commerce Clause jurisprudence). If a state's interest is not properly represented in Congress then an erroneous negative Commerce Clause decision may not be corrected by the legislature. See Hinshaw, *supra* at 529.

\(^\text{153}\) See *Leisy v. Hardin*, 135 U.S. 100, 123-24 (1890). In *Hardin*, the Court found that the states may seek commercial legislation from Congress. *Id.* Chief Justice Fuller, writing for the majority, stated:

> [T]he responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

*Id.* *But see* McGinley, *supra* note 12, at 454 n.170. Professor McGinley discusses the significance of shifting Commerce Clause power to the Supreme Court under the negative Commerce Clause.

While it is perfectly logical for Congress to preempt state laws that unduly burden commerce, any such legislative decision must inevitably implicate the political protection afforded states by the structure of the federal government—the voice of the states heard through their elected representatives and an executive chosen by a state-influenced electoral college. Under the extant dormant Commerce Clause approach, state and local interests have no chance to influence the Court in the political sense because the Court, rather than the Congress, decides whether to preempt a state law burdening free-trade interests.

*Id.*

\(^\text{154}\) See *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) (discussing the sluggishness of government, and the multitude of matters Congress handles). Justice Jackson discussed the dilemma that Courts face where states burden interstate commerce and Congress has not acted:

> It is a tempting escape from a difficult question to pass to Congress the responsibility for continued existence of local restraints and obstructions to national commerce. But these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters.

*Id.* Congress' busy schedule is equally likely to prevent Congress from overruling erroneous negative Commerce Clause decisions by the Supreme Court. See Redish and Nugent, *supra* note 10, at 590 (quoting Thomas Merrill). Professor Merrill states that Congress is far more likely not to act than to act. *Id.* The Supreme Court's interpretation of the dor-
II. West Lynn Creamery v. Healy: The Constitutional Limits of State Subsidies Under the Commerce Clause

In Healy II, the United States Supreme Court considered whether a tax on all milk sold in-state, that was used to subsidize in-state dairy farmers, violated the Commerce Clause. The Court held that although individually the tax and the subsidy may be legal, the combination of the two in the same pricing scheme was constitutionally impermissible. The Court's decision illustrates its willingness to sacrifice a state's sovereignty to preserve the Court's concept of an economic union.

West Lynn Creamery challenged the pricing scheme under the Commerce Clause. The Supreme Judicial Court of Massachusetts found that the pricing scheme did not violate the Commerce Clause because it was facially nondiscriminatory and only burdened interstate commerce incidentally. The United States Supreme Court reversed the Massachusetts Court in Healy II, and by doing so disallowed the dairy farmer subsidy, funded from a tax on milk dealers of all fluid milk sold in-state. The Court found that the burden of the tax fell on out-of-state milk because the amount of tax paid by in-state dairy farmers was

[Notes and citations are included in the text for reference.]
more than offset by the subsidy.\textsuperscript{164} The Supreme Court's opinion, however, places new limitations on a state's ability to economically regulate in-state industries.\textsuperscript{165}

\textbf{A. The Majority Opinion: Preserving the Economic Union}

In \textit{Healy II}, the Supreme Court held that even though a tax and a subsidy may not individually violate the Commerce Clause, a violation may occur when the two are used in conjunction.\textsuperscript{166} Like the tax in \textit{International Harvester v. Department of Treasury},\textsuperscript{167} the tax on a dairy dealer's in-state milk sales is nondiscriminatory and, as such, may be permissible under the Commerce Clause.\textsuperscript{168} In addition, a state ordinarily may subsidize an in-state producer from its general funds within the confines of the negative Commerce Clause.\textsuperscript{169} Justice Stevens, writing for the majority in \textit{Healy II}, likened a subsidy, funded from a tax that falls on out-of-state products, to a tariff.\textsuperscript{170}

In \textit{Healy II}, the Massachusetts Commissioner of the Department of Food and Agriculture concluded that the state must preserve its dairy industry by increasing the price of milk.\textsuperscript{171} Shortly after the commis-
tioner drew these conclusions, the state instituted the pricing scheme.\textsuperscript{172} The majority concluded that the overriding purpose of the pricing scheme was to protect the in-state dairy industry.\textsuperscript{173} As such, it violated the Court's prohibition against state protectionist legislation.\textsuperscript{174}

While the majority neither disputed nor accepted the respondents' assertion that because individually both the tax\textsuperscript{175} and subsidy are legal,\textsuperscript{176} the combination of the two is also legal.\textsuperscript{177} The Court reasoned that the combination of the two measures is more dangerous to interstate commerce than the independent effect of either provision.\textsuperscript{178} The Court utilized a process argument, reasoning that the state political process does not internalize the costs placed on out-of-state dairy farmers and is therefore an unreliable indicator of fair state economic legislation.\textsuperscript{179}

Next, the majority dismissed the respondents' argument that, because the tax was paid by milk dealers who did not compete against in-state dairy farmers, the pricing order did not discriminate against interstate commerce.\textsuperscript{180} The respondents' reasoning, if accepted, would permit a sales tax on only out-of-state milk, a premise which clearly would violate the Commerce Clause.\textsuperscript{181} The Court reasoned that the tax would effec-

difference between $15 (approximately the Massachusetts production price) and the federal blend price. \textit{Id.} The Commissioner chose this scheme because it generated approximately enough funds to maintain the state's current domestic dairy production. \textit{Id.}

\textsuperscript{172} Id.

\textsuperscript{173} Id. at 2213.

\textsuperscript{174} Id. Stating that the protection of in-state industry violates the Commerce Clause "because it, like a tariff, 'neutralize[s] advantages belonging to the place of origin.'" \textit{Id.} (citing Baldwin v. G. A. F. Seeling, Inc., 294 U.S. 511, 527 (1935)).

\textsuperscript{175} The Court has upheld state taxes that affect interstate commerce. \textit{See Wisconsin & Mich. Ry. Co. v. Powers, 191 U.S. 379 (1903)} (finding that interstate firms must bear some of the burdens of government by paying certain local taxes); \textit{Maine v. Grand Trunk Ry. Co., 142 U.S. 217 (1891)} (upholding a gross receipts tax on railroad companies calculated as a percentage of total receipts, divided by the total number of miles of tracks operated, multiplied by the total number of miles of in-state tracks).

\textsuperscript{176} \textit{Healy II, 114 S. Ct.} at 2214.

\textsuperscript{177} Id. The respondent contended that because it can constitutionally tax milk distributors and subsidies are constitutional, it may use the proceeds of the tax as it chooses. \textit{Id.}

\textsuperscript{178} Id. at 2215. Justice Stevens analogized the Massachusetts pricing scheme to an unconstitutional liquor tax which involved Hawaii's constitutional exercise of power to tax and to grant tax exemptions. \textit{Id.} (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)); \textit{see supra} notes 114-18 and accompanying text (discussing the \textit{Bacchus} liquor tax).

\textsuperscript{179} \textit{Healy II, 114 S. Ct.} at 2215 (stating that the political process is unlikely to protect out-of-state producers because in-state producers are appeased by the subsidy and consumers are unlikely to organize against higher milk prices).

\textsuperscript{180} Id. at 2216 (dismissing the respondent's argument because the tax and subsidy scheme placed a heavier burden on out-of-state milk, and thus the differential burden benefitted in-state producers over out-of-state producers).

\textsuperscript{181} Id. Justice Stevens concluded that the Massachusetts pricing scheme is no different under the Constitution than a discriminatory tax. \textit{Id.}
tively be paid by out-of-state products whether the tax was placed on dealers or producers.\textsuperscript{182}

The respondents next asserted that the pricing scheme did not violate the Commerce Clause because the tax burden was placed on both in-state milk dealers and in-state consumers.\textsuperscript{183} The majority dismissed the respondents' argument under the reasoning set forth in \textit{Bacchus}.\textsuperscript{184} In \textit{Bacchus}, the Supreme Court dismissed a tax paid by in-state consumers, that discriminated against out-of-state producers.\textsuperscript{185} In addition, the Court reasoned that out-of-state producers necessarily are hurt by any pricing scheme designed to divert market share to in-state producers.\textsuperscript{186}

The \textit{Healy II} majority dismissed the respondents' argument that the local benefits of preserving the ailing in-state dairy industry and the undeveloped tracts of farm land\textsuperscript{187} outweighed any incidental burden on interstate commerce.\textsuperscript{188} Moreover, the majority attacked the proposition that subsidizing an ailing industry should be distinguished from improving the competitive position of a healthy industry.\textsuperscript{189} The Court essentially found

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{182} \textit{Id.} The majority stated that a discriminatory tax may not escape Commerce Clause scrutiny because it is effectively placed on the out-of-state product instead of the out-of-state producer. \textit{Id.}
\item \textsuperscript{183} \textit{Id.}; see Woodruff v. Parham, 75 U.S. 123, 128 (1869) (arguing that the political process places a check on arbitrary commercial legislation where the legislature can harm disfavored interests only by harming in-state interests).
\item \textsuperscript{184} \textit{Woodruff} 75 U.S. at 128; see \textit{supra} notes 114-18 and accompanying text (discussing the Court's reasoning for invalidating a discriminatory state liquor tax).
\item \textsuperscript{185} \textit{Healy II}, 114 S. Ct. at 2216. A discriminatory tax does not survive a Commerce Clause challenge simply because in-state consumers pay also. \textit{Id.} (citing \textit{Bacchus Imports, Ltd.} v. Dias, 468 U.S. 263, 272 (1984)).
\item \textsuperscript{186} \textit{Id.} at 2217 (finding that any program designed to shift market share to in-state producers necessarily injures out-of-state competitors).
\item \textsuperscript{187} \textit{See id.} at 2217-18. The majority stated that it is not self-evident that the declining number of dairy farms will lead to less undeveloped land. \textit{Id.} at 2218. In support of this argument, the majority cites a Massachusetts research bulletin addressing the issue from 1951-1971. \textit{Id.} at 2217 n. 20. (citing J. Foster & W. MacConnell, Agricultural Land Use Change in Massachusetts 1951-1971, p. 5 (Research Bulletin No. 640, Jan. 1977)). The relevance of this report is questionable because the decline in Massachusetts producers' share of the market from the 1980's to the early 1990's led to the enactment of the pricing scheme. \textit{Id.} at 2209.
\item \textsuperscript{188} Dairy Study, 56 Fed. Reg. 22556 (1991). Massachusetts milk production decreased from 790 million pounds of milk in 1965 to 461 million pounds of milk in 1990. \textit{Id.} Nationally, milk production increased even though there were fewer dairy farms. \textit{Id.} This resulted from steadily increasing milk production per cow over the past two decades. \textit{Id.} at 22516.
\item \textsuperscript{189} \textit{Healy II}, 114 S. Ct. at 2217 (reasoning that "the rule against discrimination" is designed to subject all industry to interstate competition whether the industry is thriving or failing).
\end{enumerate}
\end{footnotesize}
a discriminatory purpose, regardless of whether the protected industry is thriving or failing.190

The Court dismissed the respondents' argument that the pricing scheme should have been permitted because it preserved undeveloped land. In support of its decision, the Court cited Philadelphia v. New Jersey.191 In Philadelphia, the Court ruled that an environmental goal may not be attained by discriminating against articles of commerce unless there is a legitimate reason for discriminating against those articles.192 Justice Stevens stated that an environmentally motivated commercial statute may not survive solely because of its virtuous goal.193

B. The Concurring Opinion: Drawing the Line on Subsidies

Justice Scalia characterized the majority's reasoning as overly broad,194 because, in his opinion, it would invalidate any law that "obstructs a national market."195 Justice Scalia cautioned that the Court's expansive rationale would invalidate many existing laws that further local interests but do not directly burden interstate commerce.196 In particular, Justice

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190. Id. The Court's holding is important because it is consistent with the principal of comparative advantage. See Samuelson and Nordhaus, supra note 1, at 663 (stating that relatively high-cost producers should not be producing that good). The reasoning also appears to prevent states from protecting infant industries that need protection to mature into competitive industries. See Arnold, supra note 35, at 774.

191. Healy II, 114 S. Ct. at 2217 n.20; see supra notes 139-40 and accompanying text (discussing Philadelphia v. New Jersey).

192. Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978). The Court found that the means New Jersey utilized were constitutionally impermissible regardless of the end desired. Id.

[It does not matter whether the ultimate aim of [the New Jersey regulation] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment . . . . But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from the origin, to treat them differently.

Id.

193. Healy II, 114 S. Ct. at 2217 n.20 (Justice Stevens reached this conclusion due to the Philadelphia decision).

194. Id. at 2218 (Scalia, J., concurring). Justice Scalia interpreted the Court's reasoning as an amalgamation of all the expansive negative Commerce Clause opinions. Id. at 2219. This resulted in a principle that invalidates any state statute or regulation that encourages production contrary to the law of comparative advantage as applied to the United States. Id.; see Samuelson and Nordhaus, supra note 1, at 663-64 (discussing the principle of comparative advantage).

195. Healy II, 114 S. Ct. at 2219 (contending that some laws that interfere with the national market do not violate the Commerce Clause).

196. Id. (contending that the Massachusetts pricing scheme is no different than states' attempts to attract industry through subsidies).
Scalia referred to statutes that favor in-state industry incidentally to advance the statute's environmental objective.197 Essentially, he doubted the wisdom of invalidating state laws that objectively serve both protectionist and environmental goals.198

Justice Scalia implied that he would enforce the "negative Commerce Clause against state laws that either facially discriminate against interstate commerce or that are indistinguishable from laws previously held unconstitutional by the Court.199 Under the second situation, Justice Scalia concluded that the Massachusetts pricing scheme was analogous to a discriminatory tax exemption, which the Court invalidated as repugnant to the Commerce Clause in Bacchus.200 Therefore, despite his concerns, Justice Scalia concurred in the opinion because of the principle of stare decisis.201

In an effort to shape the Court's expansive reasoning, Justice Scalia advocated a bright line between constitutionally permissible and impermissible subsidies.202 He argued that a state should be able to subsidize an industry "so long as it does so from nondiscriminatory taxes that go

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197. Id. Justice Scalia believes that the Court's reasoning endangers some state laws requiring the use of certain recyclable packaging materials that are contrary to industry practice. Id. Such laws "favor[ ] local non-exporting producers, who do not have to establish an additional, separate packaging operation for in-state sales." Id.; see supra notes 130-32 and accompanying text (discussing the validation of a state law banning nonrecyclable plastic milk containers in Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981)).

198. See Healy II, 114 S. Ct. at 2219 (Scalia, J., concurring) (stating that a law similar to the Clover Leaf Creamery ban on nonrecyclable plastic milk bottles "would be unconstitutional without regard to whether disruption of the 'national market' is the real purpose of the restriction, and without the need to 'balance' the importance of the state interests thereby pursued").

199. Id. at 2220; see Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259-60 (1987) (Scalia, J., concurring in part, dissenting in part) (citing the Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1852); and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 15-16, 225-28, 230-33 (1824) (Johnson, J., concurring in judgment)). Justice Scalia is critical of the Court's dormant Commerce Clause jurisprudence, contending that the Court's application of the negative Commerce Clause "[has,] not to put too fine a point on the matter, made no sense." Tyler Pipe, 483 U.S. at 260.


201. Healy II, 114 S. Ct. at 2220 (concurring on the basis of stare decisis because the Court adopted the negative Commerce Clause 121 years ago in Reading R.R. Co. v. Pennsylvania (Case of the State Freight Tax), 82 U.S. 232 (1873)). Id. Justice Scalia concurred despite, his concerns that there is no textual support for the negative Commerce Clause in the Constitution. Id. See New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988) (finding that the Commerce Clause not only grants Congress the authority to regulate commerce, but also places a limit on the states' power to discriminate against interstate commerce).

202. Healy II, 114 S. Ct. at 2220-21 (Scalia, J., concurring). Justice Scalia drew the bright line between subsidies funded from taxes placed in a separate fund and subsidies funded by taxes placed in the general fund. Id. Justice Scalia drew the line here because
into the state’s general revenue fund." This bright line limit of the negative Commerce Clause had not been based on the assumption that a consciously funded state subsidy is less likely to be used solely for protectionist purposes.204

C. The Dissenting Opinion: Economic Experimentation

In dissent, Chief Justice Rehnquist contended that the tax and subsidy plan was designed, in part, to preserve a supply of fresh local milk.205 The Chief Justice argued that the Massachusetts pricing scheme should have been upheld for the same reasons a Pennsylvania statute which required a minimum price to be paid to in-state dairy farmers,206 was upheld in Milk Control Board v. Eisenberg Farm Product.207 The price floor affected the price out-of-state milk purchasers paid to Pennsylvania dairy dealers.208 The Court held that the Pennsylvania statute only burdened interstate commerce incidentally.209 Accordingly, Chief Justice Rehnquist concluded that the Massachusetts pricing scheme placed a similar incidental burden on interstate commerce and, like the Pennsylvania price floor, did not discriminate with respect to in-state milk dealers.210

In addition, Chief Justice Rehnquist justified the pricing scheme based on its environmental objective of preserving undeveloped tracts of land in

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the Massachusetts pricing scheme was analogous to the discriminatory taxes held invalid under the Commerce Clause in Bacchus. Id.

203. Id. at 2221.

204. Id. The Chief Justice stated that interest group participation in the political process should not be utilized under negative Commerce Clause analysis, even though protectionist legislation would not be as likely to pass. Id. This is so because the voters would more likely perceive the opportunity costs of subsidies being paid from the state’s general fund. Id.

205. Id. (Rehnquist, C.J., dissenting) (stating that Massachusetts provided the subsidy, in part, to preserve the local supply of milk pursuant to its police powers).

206. Milk Control Bd. v. Eisenberg Farm Prod., 306 U.S. 346, 352 (1939). The Court upheld a price floor for milk; finding that it benefitted both dairy consumers and producers. Id.

207. Id.

208. Id. at 352.

209. Id.

210. Healy II, 114 S. Ct. at 2222 (finding that Massachusetts dairy tax scheme, like the Eisenberg price floor, was nondiscriminatory because it applied to all milk sold in-state, regardless of where it had been produced).
Massachusetts.\textsuperscript{211} Without assistance from the state government, these external benefits would disappear, thereby harming the entire state.\textsuperscript{212}

The dissent concluded that it was a legislative decision whether the Massachusetts tax and subsidy plan violated the Commerce Clause.\textsuperscript{213} Chief Justice Rehnquist insisted that economic experimentation should not be thwarted by the courts, but only, if at all, by Congress.\textsuperscript{214} In his opinion a policy of laissez-faire economics\textsuperscript{215} is not in the Constitution, and if it is to be implemented it must be implemented by Congress, not the courts.\textsuperscript{216} The Chief Justice asserted that economic experimentation is a value of federalism that the judicially imposed negative Commerce Clause threatens.\textsuperscript{217}

\textsuperscript{211} Id. at 2221. Chief Justice Rehnquist maintained that preserving undeveloped land via a subsidy did not violate the Commerce Clause because "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." \textit{Id.} (quoting Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984).

\textsuperscript{212} Id. Chief Justice Rehnquist argued that not only will Massachusetts risk losing in-state dairy farmers, but that the state also will lose "the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education." \textit{Id.} (quoting the Massachusetts Special Commission).

\textsuperscript{213} Id. at 2223 (contending that economic policy decisions should be left with the elected representatives of the people as required by the principles of federalism).

\textsuperscript{214} Id. Chief Justice Rehnquist cited Justice Brandeis in support of his contention that economic policy should be determined by Congress, and if Congress chooses not to legislate then the Constitution requires that the power rest with the states. \textit{Id.}

\textquotesingle\textquotesingle{}To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.\textquotesingle\textquotesingle{} \textit{Id.} (quoting New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)).

\textsuperscript{215} See \textsc{Samuelson} and \textsc{Nordhaus}, supra note 1, at 35. In a laissez-faire system, the government interferes with the economy only when absolutely necessary. \textit{Id.} In such an economy the market place is relied on to reach efficient outcomes. \textit{Id.}; see \textsc{Regan}, supra note 3, at 1096-97 (warning that a failure to understand the difference between laissez-faire economics and free trade could result in the invalidation of nonprotectionist state legislation under the negative Commerce Clause).

\textsuperscript{216} \textit{Healy II}, 114 S. Ct. at 2223. Chief Justice Rehnquist argued that a policy of laissez-faire economics under the principles of federalism must be made by Congress. \textit{Id.}; see \textsc{Alexander Hamilton and the Founding of the Nation} 285, 360 (Richard B. Morris ed. 1957) (discussing Alexander Hamilton's arguments for government support of industry instead of a laissez-faire approach).

\textsuperscript{217} \textit{Healy II}, 114 S. Ct. at 2223. Chief Justice Rehnquist argued that under federalist principles, the states should be able to regulate their economies unless Congress provides otherwise. \textit{Id.}; see \textit{infra} note 222 and accompanying text (discussing the beneficial information produced by states engaging in economic experimentation).
III. WHERE TO DRAW THE LINE ON TAXES AND SUBSIDIES

*Healy II* is an important case in the evolution of the American economy. Under traditional economic analysis, which does not necessarily account for external costs and benefits, the Massachusetts pricing scheme suffers from the economic inefficiencies of a tariff. If the external benefits of undeveloped land are factored into the equation, however, the pricing scheme looks less like a tariff and more like a solution. States that are willing to risk economic experimentation provide beneficial information for Congress. Such experimentation enables Congress to determine whether the state program should be implemented federally or legislated against. Unfortunately, the Court's decision in *Healy II* thwarts economic experimentation at the state level.

There is no textual support in the Constitution for Court action based on the negative implications of the Commerce Clause. In fact, there

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218. In this Note, I equate traditional economics to classical economics. *See Arnold, supra* note 35, at 220 (stating that classical economists advocated an economic policy of laissez-faire, because they believed that the market mechanism can be relied on to reach efficient outcomes); *see* Steven Kelman, *Regulation and Paternalism*, PUBLIC POLICY 29 (1981) *reprinted in Ethical Theory and Business*, 151, 156 (Tom L. Beauchamp & Norman E. Bowie eds., 3d ed. 1988) (contending that "introductory economics textbooks tend to obscure the issue of externalities, because they imply that most actions lack external effects").

219. *See generally Samuelson and Nordhaus, supra* note 1, at 311-12 (discussing the differences between public and private goods). Externalities are external costs or benefits that the market does not account for when reaching equilibrium. *Id.*

220. *See infra* notes 252-73 and accompanying text (discussing the similar economic effects of a tariff and the Massachusetts pricing scheme). Classical economic theory holds that the market is self regulating and thus reaches efficient outcomes on its own. *See Samuelson and Nordhaus, supra* note 1, at 376. A market that involves external costs and benefits will not reach an efficient outcome on its own. *See Arnold, supra* note 35, at 723-24 (analyzing government interference in the market designed to adjust production to its socially optimal level). The Massachusetts commissioner purported that the pricing scheme produced local benefits outweighing the burden it placed on interstate commerce. *See Healy II*, 114 S. Ct. at 2217. In economic terms the commissioner is claiming that the Massachusetts pricing scheme produced a more efficient market by internalizing the costs of external benefits. *Id.; see Arnold, supra* note 35, at 723-24 (discussing the use of taxes and subsidies to help the market achieve a more efficient outcome).

221. *See infra* notes 287-306 and accompanying text (exploring the possibility of reaching the socially optimal level of undeveloped dairy land under the Massachusetts pricing scheme).

222. *See Redish and Nugent, supra* note 10, at 598 (extolling the benefits of state economic experimentation). Professors Redish and Nugent contend that the text of the Constitution provides for the benefits of state economic experimentation, while retaining for Congress the power to preempt state commercial regulations that unduly burden interstate commerce. *Id.*

223. U.S. CONST. art. I, § 8, cl. 3. The Constitution grants all of the power to regulate commerce to Congress. *Id.; see infra* note 10 (discussing the tension between the Constitution and the negative Commerce Clause).
are compelling reasons to leave the Commerce Clause power with Congress — where the Constitution placed it.\textsuperscript{224} Congress is adept at gathering information, while the courts generally are limited to the information presented by both parties.\textsuperscript{225} \textit{Healy II}\textsuperscript{226} clearly demonstrates that such policy-making decisions should rest with Congress.\textsuperscript{227} The lengthy and subjective analysis of the Massachusetts' pricing scheme calls into question the appropriateness of a court deciding such commercial issues.\textsuperscript{228} \textit{Healy II}'s analytical structure highlights why economists rarely agree on economic policy decisions that are crucial to a society's quality of life.\textsuperscript{229}

\textsuperscript{224} See supra notes 147-54 and accompanying text (discussing the inadequate procedural protections states receive from judicial negative Commerce Clause decisions with which Congress may disagree); see supra note 12 (contending that an economic policy issued by Congress would be more efficient than having the Court invalidate particular state statutes and regulations under the negative Commerce Clause); see supra note 13 (arguing that commercial policy should be determined by Congress because it, unlike the Court, is restrained by the will of the people); see infra notes 225-29 and accompanying text (discussing Congress' superior ability to gather relevant information necessary to make economic policy judgments).

\textsuperscript{225} The Federalist No. 56, 346-47 (James Madison) (Clinton Rossiter ed., 1961) (stating that commercial regulation requires significant information and that the legislature is designed to gather such information); see infra note 227 (arguing that economic policymaking requires the gathering of information and that Congress, not the Court, is best suited for this purpose).

\textsuperscript{226} West Lynn Creamery v. Healy, 114 S. Ct. 2205 (1994).

\textsuperscript{227} Id. at 2217. Justice Stevens, writing for the majority stated that if the Court were to accept that local benefits justified the Massachusetts pricing scheme, "we would make a virtue of the vice that the [Commerce Clause] condemns." Id.; see George J. Stigler, \textit{The Economist as Preacher and Other Essays}, 4 (1982) (stating that there is hardly anything in economics except for policy); see Gunnar Myrdal, \textit{The Political Element in the Development of Economic Thought} (1954), \textit{reprinted in The Philosophy of Economics} 250, 254 (Daniel M. Hausman ed., 1984) (contending that economists frequently mask the value judgments that form the basis of their economic views). "In texts where economic policy is discussed in practical terms adapted to concrete problems, we usually find that the elements of specific political doctrines are introduced as simple assertions, without the paraphernalia of proof which the writers concerned undoubtedly feel they could easily supply if required." Id. at 254-55. See generally Woganan, supra note 28, at 155-66. (maintaining that economics is not a hard science that may be applied mechanically, rather, economics must be based on certain value judgments); see Breker-Cooper, supra note 4, at 899-902 (discussing that the Constitution vests the fact finding process necessary for Commerce Clause determinations with Congress).

\textsuperscript{228} See Myrdal, supra note 227, at 257-58. The author stated that the first premise of economics is the meaning of value. Id. He added that this determination may only be made in the realm of politics and philosophy. Id.

\textsuperscript{229} See Silk, supra note 26, at 25-48 (arguing that economists disagree frequently because their theories are biased by their own political and social values). For example, economist Joan Robinson considered the market economy to be unstable, and "subject to the problems of income inequality, manipulation of demand, and extreme business concentration." Arnold, supra note 35, at 568. Professor George Akerlof argued that it is advantageous to pay labor more than the market dictates because worker productivity will rise. Id. at 348. Professor Murray Rothbard contends that the government should not interfere
Fortunately, the Framers of the Constitution empowered Congress, not the courts to determine economic policy.\footnote{230}

\textbf{A. The Economics of the Massachusetts Pricing Scheme}

The majority in \textit{Healy II} noted that the Court "[has] never squarely confronted the constitutionality of subsidies, and we need not do so now."\footnote{231} The general rule, though, is that subsidizing an in-state industry does not violate the Constitution.\footnote{232} Additionally, the Court has held that both a discriminatory tax credit\footnote{233} and a discriminatory tax are constitutionally invalid.\footnote{234}

The Court concluded that the tax predominately fell on out-of-state products and thus, impermissibly burdened interstate commerce.\footnote{235} This determination is crucial because the Court is more likely to uphold a regulation that adversely affects major in-state interests; while the legislature is more likely to address a legitimate in-state interest.\footnote{236} The incidence of a tax on a dealer may be partially or fully shifted backwards to the produ-

\begin{itemize}
  \item \textit{New Energy Co. of Ind. v. Limbach}, 486 U.S. 269, 278 (1988) (reasoning that direct subsidization of an in-state industry generally does not violate the Commerce Clause but discriminatory taxation of out-of-state manufacturers does).
  \item \textit{Id.} at 271-80 (finding invalid an Ohio statute that allowed for a discriminatory tax credit).
  \item See \textit{Bacchus Imports Ltd. v. Dias}, 468 U.S. 263, 276 (1984) (finding that Hawaii's alcohol tax was protectionist and therefore discriminatory and unconstitutional).
  \item \textit{Healy II}, 114 S. Ct. at 2212 (finding that the Massachusetts dairy tax was effectively imposed only on out-of-state milk).
  \item \textit{See Minnesota v. Clover Leaf Creamery Co.}, 449 U.S. 456, 473 n.17 (1981) (arguing that "[t]he existence of a major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse") (citing \textit{South Carolina State Highway Dept. v. Barnwell Bros., Inc.}, 303 U.S. 177, 187 (1938)); \textit{International Harvester Co. v. Depart-
cers or forward to the consumers.\textsuperscript{237} In fact, whether a tax was collected from milk consumers or from milk dealers, the impact of the tax theoretically would not change.\textsuperscript{238} With the exception of controlled economic experiments, however, it is very difficult to measure the effects of taxes as they pass through the economy.\textsuperscript{239} Congress is better equipped than the Courts, though, to determine the incidence of a tax.\textsuperscript{240}

A cursory examination of the factors that determine where the incidence of a tax lies suggests that the incidence of the Massachusetts dairy tax fell predominately on consumers.\textsuperscript{241} The incidence of a tax is deter-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{237} See \textsc{Samuelson and Nordhaus, supra} note 1, at 333 (discussing the incidence of taxes). In analyzing a tax, one must first ask who ultimately pays the tax. \textit{See generally Richard A. Posner, Economic Analysis of Law,} 606 (3rd ed. 1986). Judge Posner has stated that:

\begin{quote}
[I]t is irrelevant from an economic standpoint whether a tax is 'on' interstate commerce or where the nominal subject of the tax is physically located. The economic issues are how much of the tax is ultimately borne by nonresidents and whether the effect of the tax is to increase, without justification based on higher costs of governmental services, the prices of imported compared to domestic goods.
\end{quote}

\textit{Id.}\textsuperscript{238} See \textsc{Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics} 319 (1989). The incidence of a tax is contingent solely on the shape and elasticities of the supply and demand curves and not where the tax is collected. \textit{Id.} A tax will fall on consumers and producers in different proportions, depending on the relative elasticities of supply and demand. \textsc{Samuelson and Nordhaus, supra} note 1, at 75. If demand is relatively inelastic compared to supply, then the tax burden falls heavily on consumers. \textit{Id.} A tax, however, will fall predominately on producers, if supply is relatively more inelastic then demand. \textit{Id.}\textsuperscript{239} See \textsc{Samuelson and Nordhaus, supra} note 1, at 333 (discussing the economic concept of tax incidence). For example, a tax placed on gas stations, calculated as a percentage of total gasoline sales, will not be paid solely by the gas station, it may be partially passed to consumers. \textit{Id.} Part of the incidence of the tax may be placed on truck-drivers. \textit{See id.} The truck-drivers in turn may push part of the incidence of the tax on to their employers. \textit{See id.} The employers then may place part of the incidence back on the consumers of the products which were shipped by the truck driver of the gasoline. \textit{See id.}\textsuperscript{240} See Redish and Nugent, \textit{supra} note 10, at 594 (stating that Congress has both superior access to information, and the ability to distribute problems to agencies who may then hold hearings and debate the issues); \textit{see also} Thomas K. Anson & P.M. Schenckkan, Federalism, the Dormant Commerce Clause, and State-Owned Resources 59 Tex. L. Rev. 71, 84 (1980) (contending that "Congress has the superior institutional capability to gather relevant economic information, and Congress operates on the political basis considered most appropriate for resolving normative questions").

\textsuperscript{241} \textit{See infra} notes 242-51 and accompanying text (analyzing the incidence of the Massachusetts dairy tax).
\end{enumerate}
\end{footnotesize}
minded by the price elasticities of supply and demand. An inelastic supply and an inelastic demand results in the burden of the tax falling mainly on consumers. Milk, for instance, is likely to have a fairly inelastic demand because it has no close substitutes. Additionally, because milk is a relatively minor expense in terms of a person's overall

242. See Samuelson and Nordhaus, supra note 1, at 71-72. Price elasticity of supply measures the percentage change in the quantity supplied divided by the percentage change in price. Id. The main determinant of supply elasticity is the extent to which production may be increased. Id. For example, Monet paintings have a perfectly inelastic supply. See id. No matter how high the market price of Monet paintings rises, their supply will remain unchanged. See id.

243. See id. at 744 (discussing the determinants of the economic concept of elasticity of demand). Samuelson defined price elasticity of demand as, “[a] measure of the extent to which quantity demanded responds to a price change.” Id. The elasticity of demand is determined by the following factors: the importance of the commodity in consumers’ budgets, whether the item is a necessity or luxury, whether consumers may substitute other items in his budget for the one in question, and whether a consumer may increase or lower their demand for the product quickly. Id. at 70-71. Insulin for example illustrates Samuelson and Nordhaus’s discussion of the economic concept of elasticity of demand because insulin probably has a perfectly inelastic demand curve. See Id. Consumers of insulin may not: (1) substitute other drugs for insulin; (2) devise a budget without purchasing insulin; (3) lower or raise their personal demand for the drug; and (4) insulin is very important to its consumers. See id. Demand for gum is an illustrative example of high demand elasticity because consumers may: (1) substitute other types of candy for gum; (2) easily remove gum from their budget; (3) decide to consume more or less depending on the price of gum; and (4) terminate their consumption of gum because it is not a necessity. See id.; Pindyck and Rubinfeld, supra note 238, at 319-22 (analyzing the economic impact of a tax or subsidy on consumers, producers and the product’s market price).

244. See Pindyck and Rubinfeld, supra note 238, at 319-23 (discussing the relative burdens placed on consumers and producers when a particular product is taxed). Consumers predominately bear the burden of a tax if consumer demand is relatively inelastic compared to supply. Id. In the present case, if one applies Pindyck and Rubenfield’s reasoning to the Massachusetts pricing scheme, consumers will pay for most of the tax because milk consumers generally are unwilling to proportionately reduce their intake of milk as prices rise. See id. The Massachusetts milk supply is very elastic because producers of milk will respond quickly to changes in the market price by substantially reducing or increasing the amount sold to Massachusetts suppliers. See id.; Baumer, supra note 163, at 206 (providing that the demand for milk is relatively inelastic). All other things being equal, this occurs because suppliers of Massachusetts milk typically would sell their milk to other states if the incidence of the tax fell on them. See Pindyck and Rubinfeld, supra note 238, at 319-23.

245. See Arnold, supra note 35, at 464-65 (discussing the economic concept of demand elasticity). For example, to further illustrate Arnold’s theory, assume a consumer regularly purchases insulin and aspirin. See id. Next assume, the prices of both products rise dramatically and the consumer must decide whether to continue purchasing the products. See id. Acetaminophen and ibuprofen easily may be substituted for aspirin. See id. Insulin, however, has no close substitutes. The consumer can be expected to consume less aspirin as she shifts her consumption to other pain relievers. See id. Her consumption of insulin, however, is unlikely to decline because she cannot substitute other drugs for insulin. See id. (discussing the role substitute goods play in determining the price elasticity of demand for a product).
budget, its demand typically will be less elastic. In fact, because of these factors, demand for fluid milk is relatively inelastic.

In addition, the price elasticity of milk supply in Massachusetts, in theory is very elastic. The market has a highly elastic supply curve because all producers have the option of selling their milk in other states. They would not, therefore, choose to provide milk in Massachusetts for a lower price than they can receive by selling it outside the state. Due to the relatively inelastic price demand and elastic supply for fluid milk, the incidence of the tax more than likely fell on Massachusetts consumers and a lesser degree on dairy dealers.

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246. See id. at 465-66. Consumers are less likely to change their consumption of an inexpensive item, as opposed to an expensive item, in the face of price increases. Id. Arnold's reasoning may be demonstrated by watching consumer demand decrease less in response to a 5% increase in the price of paper clips than to a 5% increase in the price of housing. See id. (discussing the economic concept of price elasticity of demand).

247. Arthur A. Burns, The Decline of Competition 275 (1936). Cooperative pricing allows higher prices for fluid milk, which has a relatively inelastic demand, while allowing for a lower price on surplus milk, which is used for cheese, ice cream, evaporated milk, etc. and has a more elastic demand. Id.; see also Dairy Study, 58 Fed. Reg. 22514, 22520 (1991). The Commodity Credit Corporation of the United States Department of Agriculture assumed in studies of federal dairy programs that demand elasticity remained unchanged at -0.15 for the 1991/92 - 1996/97 period. Id. Therefore, if the price of milk increased by 100%, demand would drop only by 15%. See id.; see also Baumer, supra note 163, at 206 (finding that because the demand for fluid milk is relatively inelastic, increases in price lead to increased revenues). Part of the tax still falls on the dairy dealers because consumer demand is not perfectly inelastic. See supra note 244 and accompanying text. The part of the tax that fell on the West Lynn Creamery provided a financial incentive for their challenge of the pricing scheme. See id.

248. See infra notes 249-50 and accompanying text (discussing the price elasticity of supply for milk); see also Samuelson and Nordhaus, supra note 1, at 70-71 (stating that the more substitutes available for a good the more elastic the supply). By analogy, a change in the price of milk in Massachusetts would cause a larger change in the quantity of milk supplied by producers because producers may shift the supply of milk to in-state or out-of-state dairy dealers. See id.

249. See Pindyck and Rubinfeld, supra note 238, at 362 (stating that in a market with numerous purchasers, an individual buyer will face a highly elastic supply curve). The Massachusetts dairy market, one of 48 in the continental United States, competes for the supply of milk with many other markets. See id.

250. See Pindyck and Rubinfeld, supra note 238, at 322. All things being equal, a producer whose supply curve is perfectly elastic will not supply the good if he must pay any tax. Id. This analysis does not factor in elements such as transportation costs and the limited shelf-life of milk. See Link, supra note 29, at 42. "When examining the effect of an independent variable [such as a tax placed on milk suppliers], it is assumed that all other factors that can affect the dependent variable are unchanged, so that the partial effect of a change in the dependent variable under study can be measured." Id.

251. See Pindyck and Rubinfeld, supra note 238, at 319-26 (discussing the economic incidence of a tax). See Dairy Study, 56 Fed. Reg. 22514, 22520 (1991). The Commodity Credit corporation of the USDA assumed in its economic analysis model of federal dairy programs that a "large change in price would not affect the quantity of milk consumed by much." Id. Thus, indicating milk's inelastic demand and elastic supply. See Samuelson
B. The Pricing Scheme is Similar to a Tariff

The majority in Healy II maintained that the Massachusetts pricing order was analogous to a tariff. The Court stated that, because tariffs are so patently unconstitutional, states will only attempt to achieve their benefits through other schemes. While the Framers of the Constitution granted the Supreme Court authority to invalidate tariffs, the Court did not invalidate the Massachusetts pricing scheme under the Tariffs Clause.

Economically, a tariff generates a loss exceeding the revenues gained by the government and the profits gained by in-state producers. In addition, a tariff generally will raise the price and the domestic production of a good, while it usually lowers the amount imported and con-

AND NORDHAUS, supra note 1, at 70 (stating that demand is inelastic where the “[p]ercentage change in quantity demanded [is] less than [the] percentage change in price”).


253. Id. at 2211. The Court contends that a price floor such as the one held invalid in Baldwin v. G. A. F. Seeling, Inc., 294 U.S. 511 (1935), was an attempt by New York to achieve the tariff-like benefit of protecting in-state industry. Id.

254. See infra note 255 (quoting the Tariff’s clause of the Constitution).

255. U.S. CONST. art. I, § 10, cl. 2. The Tariff’s clause of the Constitution states that:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any state on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of Congress.

256. See SAMUELSON AND NORDHAUS, supra note 1, at 681 (explaining the economic costs of a tariff). A tariff generates a deadweight loss to consumers, an economy composed of higher domestic prices, inefficiency in production, and lost consumer surplus from the raised price. Id. Consumer surplus is “[t]he difference between the amount that a consumer would be willing to pay for a commodity and the amount actually paid.” Id. at 733. For example, the consumer who is willing to buy a television for $400 must pay $380 for the television due to a tariff, despite the fact that the non-tariff market price for televisions is $340. See id. at 681. The loss of consumer surplus, for this consumer due to the tariff, equals ($380 - $340) $40. See id. Greater inefficiency results when a tariff protects domestic producers because they can economically operate less efficient facilities that, under normal market conditions, would operate at a loss. Cf. id. at 681-82. A tariff also results in a transfer of wealth to the collecting government. Id.


If the federal government could cause the bones of the elderly to break when they fell, that would be denounced as the height of idiotic tyranny. But, as long as federal policy consists instead of a quota that imposes the equivalent of a 170% tariff on dairy imports, thereby insuring that many Americans will have calcium deficiencies and weak bones, that is okay.

Id. Milk quotas have the same economic effect as a tariff, in that they increase prices to the consumer. See JACKSON, supra note 24, at 42-43 (comparing the economic effects of
A tariff is less likely to lower the amount of milk consumed, however, because milk's demand is relatively inelastic. Thus, the Court stated that "[l]ike an ordinary tariff, the tax is . . . effectively imposed only on out-of-state products." The Healy II majority did not invalidate the pricing scheme under the Tariff Clause because the scheme did not lay "duties or imposts" on the imported milk. Instead, Massachusetts consumers predominately paid the costs of the tariff-like pricing scheme. The Court could not find that a pricing scheme paid mainly by in-state interests was a duty or impost on imported milk.

While the Court did not find a duty or impost, the Massachusetts pricing scheme produced the same economic effects of a tariff: (1) an increase in the price of the good; (2) a decrease in out-of-state production; and (3) an increase in in-state production. The milk tax increased the price of out-of-state milk relative to the in-state milk sold at a subsidized price. The scheme added eight cents to the price of a gallon of milk, thereby allowing less efficient in-state dairy farms to stay in business.

The funds collected by the domestic government under a tariff, however, flow to foreign firms as increased profits. See supra note 1, at 680 (analyzing the economic effects of a tariff). Compare supra note 3 and accompanying text (discussing the economic rivalry which inspired the Commerce Clause) with Silx, supra note 26, at 135-36. Following protectionist legislation by the United States, exports from the United States fell drastically due to retaliatory trade barriers. Id.; see U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY, 291-92 (Robert M. Stern ed., 1987) reprinted in LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS, 38 (John H. Jackson et. al., eds., 1995) (claiming that the signing of the Smoot-Hawley Tariff act by Herbert Hoover was the "most disastrous single mistake any U.S. president has made in international relations" and that it was responsible for the severity of the Great Depression).

See supra note 251 and accompanying text (stating that an increase in price will not cause a proportionate drop in the consumption of milk). See supra note 25 and accompanying text (concluding that in-state interests primarily paid the Massachusetts dairy tax). See supra note 35, at 777-79 (discussing the economic effects of a tariff). See infra notes 252-63 and accompanying text (comparing the economic effects of a tariff to the economic effects of the Massachusetts pricing scheme).
majority found that the purpose and effect of the pricing scheme was to divert market share from out-of-state dairy farmers to in-state dairy farmers. The subsidy to in-state dairy farmers would increase in-state production. The tax decreased the quantity of out-of-state milk consumed in Massachusetts. The subsidy of in-state producers also would reduce the price that out-of-state producers could command. Therefore, the Massachusetts plan, without accounting for externalities, suffers from the same economic inefficiencies as a tariff. In short, this similarity between the Massachusetts plan and a tariff is the crux of the case, because markets do not naturally account for external costs and benefits.

also FRIEDMAN, supra note 123, at 280-83. Protectionism generally results in large financial benefits to a few producers and small financial losses to many consumers. Id. The losses to consumers generally exceed the total benefits to producers. Id. Protectionist legislation often is driven by large special interest groups, because consumers have too small of a financial risk to justify fighting the legislation. Id.


269. See Healy II, 114 S. Ct. at 2212-13; SAMUELSON AND NORDHAUS, supra note 1, at 332-33 (stating that a tax placed on a product will reduce the consumption of that product).

270. See ARNOLD, supra note 35, at 776 (stating that government subsidization of industry reduces the market price of their goods). But see Healy II, 114 S. Ct. at 2212-13 (1994). The Federal government mandates a minimum price for milk. Id. This price floor may have obscured the rise in the market price of milk in response to the Massachusetts pricing scheme. Id.

271. See infra notes 288-99 and accompanying text (discussing the ability of subsidies and taxes to internalize the costs of the external benefits of producing milk).

272. See supra notes 252-70 and accompanying text (comparing the economic effects of a tariff and the Massachusetts pricing scheme); ARNOLD, supra note 35, at 723-24 (stating that taxes and subsidies can result in the socially optimal output, despite, the fact that it may result in higher prices and lower production of the product). Reaching the socially optimal output often may be achieved only if the government imposes taxes or subsidies to internalize the external costs or benefits of the product. Id.

273. See SAMUELSON AND NORDHAUS, supra note 1, at 310-15 (exploring the markets' inability to account for external costs and benefits without government assistance); ARNOLD, supra note 35, at 723-24 (discussing the government's role in internalizing external costs and benefits); PINDYCK AND RUBINFELD, supra note 238, at 641. For example, a program to clean up 2,000 acres of land for recreational use is worth $200,000 to a town of 10,000 citizens. Id. It would cost a private firm $50,000 to provide the program. Id. If the firm could collect at least $5 from each resident then the market would provide the program. Id. Every resident of the town would enjoy the benefits of the program whether or not they contributed to the program. Id. In this situation, the market encourages people to act as free riders. Id. Government action probably would be needed to effectuate this socially desirable program. Id.
C. The Court Invalidated the Pricing Scheme because of its Economic Impact and the Perceived Motive of the Legislature

The Court invalidated the pricing scheme for two reasons: its economic impact\(^{274}\) and its protectionist purpose.\(^{275}\) One commentator has argued that by invalidating such legislation the Court primarily has prevented the states from "engaging in purposeful economic protectionism."\(^{276}\) Many cases, however, suggest that the Court is invalidating only state laws that principally burden out-of-state producers, because they are unable to participate in the political process leading to the enactment of burdensome statutes or regulations.\(^{277}\)

Donald Regan has established a two-part definition to measure whether state statutes are protectionist: If they were designed to "improve[ ] the competitive position of local (in-state) economic actors" and if "the statute (or whatever) is analogous in form to the traditional instruments of protectionism," including the tariff then they are protectionist.\(^{278}\) The Healy II majority found that not only did the statute improve

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\(^{274}\) *Healy II*, 114 S. Ct. at 2212-13. Out-of-state dairy producers lose business under the Massachusetts scheme, while in-state producers gain market share. *Id.* at 2213. This disparate impact led the Court to dismantle the tax and subsidy scheme. *Id.* at 2212-13.

\(^{275}\) *Id.* at 2213 (implying that a desire to protect the Massachusetts domestic dairy industry motivated the Massachusetts pricing scheme). The Court held that the protectionist effect of the pricing scheme rendered it unconstitutional. *Id.*

\(^{276}\) See Regan, *supra* note 3, at 1092-93 (contending that the Court is invalidating state statutes that are motivated by protectionist goals). *But see* Friedman, *supra* note 123, at 37. Foreign Subsidies may hurt domestic (U.S.) producers, but this is just one of the risks of doing business. *Id.* For taking this risk, producers are adequately compensated by the possibility of supracompetitive prices. *Id.* Professor Friedman contends that the "free enterprise system" offers both risks and benefits, and that it is fair for an industry to endure the injury produced by subsidized foreign products because it is off-set by the possible corresponding benefits of high profits. *Id.*

\(^{277}\) *South Carolina State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 184-85 n.2 (1938). The Court stated that:

> [s]tate regulations affecting interstate commerce, whose purpose or effect is to gain from those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. *Id.* (citing Hall v. DeCuir, 95 U.S. 485, 497-98 (1877)). *Compare* Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 13 (1928); Western Union Telegraph Co. v. Pendleton, 162 U.S. 650, 659 (1896); Bowman v. Chicago & N. W. R. Co., 125 U.S. 465, 498 (1888); and Wabash, St. L. & P. R. Co. v. Illinois, 118 U.S. 557, 575-78 (1886), with Baldwin v. Seelig, 294 U.S. 511, 524 (1934); *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 41-42 (1908); and *Geer v. Connecticut*, 161 U.S. 519, 531-32 (1895). *See* Western Union Telegraph Co. v. Kansas, 216 U.S. 1, 27 (1910).

\(^{278}\) See Regan, *supra* note 3, at 1094-95 (concluding that where a state statute has a protectionist effect without a corresponding motive, the Court should not invalidate it); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 95 (1987) (Scalia J., concurring)
the competitive position of in-state dairy farmers, but the Court also anal-
ogized it to a tariff.  

The first element of the Regan test fails to distinguish the milk subsidy from the vast number of subsidies that states routinely enact. For example, the motivation for state funding of roads in rural Massachusetts may have been to improve the competitive position of dairy farmers by helping them transport their milk. Holding such indirect subsidies invalid under the Commerce Clause, would paralyze state governments.

The second element of the Regan test is supported by Justice Stevens’ majority opinion, rejecting the Massachusetts pricing scheme. Clearly, though, some subsidies do not produce the same anti-competitive results as tariffs. The majority, applying traditional economic analysis, reasoned that the tax (which decreased the competitive advantage of out-of-state producers) and the subsidy (which increased the competitive advantage of in-state producers) created a tariff-like trade barrier. But, the

(arguing that if Regan’s theory is not correct as to how the Supreme Court is deciding cases, then it should be).

279. *Healy II*, 114 S. Ct. at 2212-13 (noting that like a tariff, the Massachusetts scheme neutralizes the advantages held by the place of origin).

280. See Regan, *supra* note 3, at 1094-95. The first element of the Regan test is whether a statute designed solely to improve the competitive position of an in-state industry. *Id.* Theoretically, this would include state expenditures for improving the infrastructure in-state industry utilized. *See id.; infra* note 282 (stating that general subsidies, such as infrastructure maintenance, do not constitute unfair trade).


282. *See id.* If states are unable to bestow general subsidies such as building and maintaining roads, the states would be impotent with respect to providing basic support to industry. *Id.; see* THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). James Madison stated that “[t]he powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” *Id.*

283. *See supra* notes 170, 279 and accompanying text (writing for the majority, Justice Stevens held the protectionist motivated pricing scheme invalid under the Commerce Clause; this holding was consistent with professor Regan’s Commerce Clause theory).

284. *See infra* notes 287-99 and accompanying text (discussing internalizing the costs of external benefits of undeveloped land via the Massachusetts subsidization of in-state dairy farmers).

285. *See supra* note 170 and accompanying text (discussing the majority’s conclusion that the Massachusetts pricing scheme produced an unconstitutional tariff-like barrier); SAMUELSON AND NORDHAUS, *supra* note 1, at 663. Professor Samuelson opines that the principle of comparative advantage holds that goods should be produced in areas where they may be produced most efficiently. *Id.* He states:

*The principle of comparative advantage* holds that each country will specialize in the production and export of those goods that it can produce at relatively low cost (in which it is relatively more efficient than other countries); conversely, each
traditional economic analysis, used by the majority, fails to account for external costs and benefits.\textsuperscript{286}

\section*{D. Using Taxes and Subsidies to Internalize the Costs of Environmental Externalities}

Massachusetts' special commission contended that the dairy pricing scheme helped preserve vast tracts of undeveloped land which produced benefits for both Massachusetts as a whole and the state's tourism industry.\textsuperscript{287} The undeveloped dairy land generated positive externalities.\textsuperscript{288} The dairy farmers, however, were not compensated by the free market for the positive external benefits that their land produced.\textsuperscript{289} The failure

\begin{itemize}
  \item country will import those goods which it produces at relatively high cost (in which it is relatively less efficient than other countries).
  \end{itemize}

\textit{Id.} (emphasis in original).

286. See supra notes 218-20 (discussing classical economic theory and its failure to account for externalities).


288. See \textit{ARNOLD}, supra note 35, at 719 (introducing the economic concept of positive externalities). A positive externality is created by a group or individual action that creates a benefit for others, while the benefit's producer is not adequately compensated. \textit{Id.; see LEMOS, supra note 33, at 97-99} (discussing the philosophical argument in support of the proposition that "beautiful tracts of wilderness" are intrinsically good). Positive emotional responses to nature also provide evidence of nature's value. \textit{Id.} at 181, 191. For example, when an individual experiences a positive emotional response to the majesty of a cornfield, but does not compensate the field's owner for the pleasure she derives from the sight, an externality has occurred. See \textit{id.} (discussing the philosophical concept of value); \textit{ARNOLD, supra} note 35, at 719 (explaining externalities in simple terms).

289. See \textit{ARNOLD, supra} note 35, at 719-20 (discussing positive externalities). Professor Arnold states that "[a]n externality is \textit{internalized} if the person(s) or group that generated the externality incorporate into their own private or internal cost-benefit calculations the external benefits . . . or the external costs . . . that third parties bear." \textit{Id.} at 720 (emphasis in original). The free market quickly develops a tourism industry centered around the environment. \textit{JOSEPH J. SENECA & MICHAEL K. TAUSSIG, ENVIRONMENTAL ECONOMICS} 184 (1974). The free market, however, fails to preserve the environmental attractions which led to the land's development in the first place. See \textit{id.} at 184-85. For example, assume that several builders own 5 plots of land that surround a secluded but well-known fishing lake. The people who visit the lake derive benefits from the wilderness and the fishing. Cf. \textit{PINDYCK AND RUBINFELD, supra} note 238, at 635-36 (discussing the problem of overconsumption with respect to "common property resources" such as the fish in a lake that no one owns). Each developer knows that the resort value of the land is greater if the wilderness and undeveloped land is preserved.

Economically the example may be reflected by the following profit schedule that may be collectively reached for: 1 resort = 100, for 2 resorts = 175, for 3 resorts = 200, for 4 resorts = 190, and 5 resorts = 170. If a builder decides not to develop the land two things will happen: first she will not recognize any of the profits that likely will come from development; and, second, the other developers will reap higher profits because of the external benefits of her undeveloped land. See \textit{SENECA AND TAUSSIG, supra}, at 184-85. Assuming that there are impediments that prevent bargaining, all the parties likely will develop their
of the market to adequately compensate dairy farmers for maintaining undeveloped land led to a lower amount of undeveloped land than is socially optimal. Because a subsidy can internalize an external cost, subsidizing dairy farmers' maintenance of undeveloped land has the potential to produce the socially optimal level of the resource.

Ideally, all land owners, including dairy farmers, would be compensated for the external benefits that their land produces. One way to adequately compensate individuals for the external benefits generated by their land would be to lower the property taxes on undeveloped land.

In an area such as the Northeastern United States, where property values

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See R. H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 15-19 (1960) (discussing the transaction costs involved in making a deal with respect to negative external costs). "[I]f one assumes rationality, no transaction costs, and no legal impediments to bargaining, all malallocations of resources would be fully cured in the market by bargains." Guido Calabresi, Transaction Costs, Resource Allocation, and Liability Rules - A Comment, 11 J. Law & Econ. 67, 68 (1968) (emphasis in original). This example illustrates why the optimal level of development frequently is not reached where numerous land owners occupy stretches of land with exceptional environmental and tourist value. See Robert Cooter, The Cost of Coase, 11 J. of Legal Studies 1, 24-27 (1982) (discussing the inefficient results that arise from noncooperative outcomes); see also Arnold, supra note 35, at 721 (discussing the role of property rights in eliminating externalities).

See Friedman, supra note 123, at 204. Discussing the failure of the market to produce the optimal level of undeveloped land. Id. at 204-05. Professor Friedman warns that government attempts at solving market failures often fail to achieve a satisfactory solution, thereby replacing market failures with government failures. Id.; see Arnold, supra note 35, at 719 (displaying graphically how the market does not produce the optimal level of goods that generate external benefits); see also Richard A. Epstein, Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase, 36 J. Law & Econ. 553, 558-61 (1993) (discussing the social problem of positive externalities and the problem of bargaining obstacles that often prevent socially optimal outcomes).

Karl E. Case, Economics and Tax Policy 121 (1986) (noting that carefully designed taxes and subsidies could internalize external effects). A lower tax rate for undeveloped land may also help internalize the external costs of undeveloped land. Arnold W. Reitze, Jr., Environmental Planning: Law of Land & Resources One-71 (1974). Such programs, however, are considered failures because they allow speculators to hold onto land cheaply, until they believe it is profitable to build. Id.

See Arnold, supra note 35, at 723. The author notes that an externality can be internalized by a subsidy or a tax. Id. The subsidy raises the production of a good by internalizing the external benefits of that good while the tax lowers the production of a good to internalize its external costs. Id.; see supra note 291 and accompanying text (discussing the internalization of external effects).

See supra notes 288-92 and accompanying text (discussing the resulting inefficiency if the economic position of producers of external costs or benefits is not properly adjusted); Arnold, supra note 35, at 719 (graphically displaying the larger optimal output of a good that produces positive externalities).

See supra note 291 and accompanying text (discussing the limitations on altering the economic position of producers of external benefits through favorable tax treatment).
are often high,\textsuperscript{295} however, this may not be enough.\textsuperscript{296} An area with high property values is precisely the type of region in which undeveloped land would be in short supply, and the external benefits the land produced theoretically would attain a high market price.\textsuperscript{297} Preservation of the undeveloped land associated with dairy farms could be achieved by compensating dairy farmers through a subsidy derived from a milk tax. The tax would be paid by the in-state consumers who receive the greatest benefit from the undeveloped lands.\textsuperscript{298} Theoretically, if the subsidy payments equalled the market price for the external benefits, an outcome more efficient than the free market would be attained.\textsuperscript{299}

Additionally, under a Kantian analysis the Court’s invalidation of the Massachusetts pricing scheme may be flawed.\textsuperscript{300} Kant’s categorical imperative states that an act is morally correct if it may be willed as a uni-


\textsuperscript{296} See supra note 291 (contending that lower tax rates on undeveloped land may only encourage speculators to hold the land until its market value has peaked). For example, a state may not require a dairy farmer to pay property taxes on a farm that he operates at a $20,000 a year profit. If the price of his land rises to $500,000 and the interest rate is 10%, it would make economical sense for him to sell the land and live off the annual $50,000 interest payment. See Healy II, 114 S. Ct. at 2221 (Rehnquist, C.J., dissenting). As the dairy business became less profitable and the price of land rose, dairy farmers in Massachusetts began selling their land to developers. Id.

\textsuperscript{297} See JAMES C. HITE ET. AL., THE ECONOMICS OF ENVIRONMENTAL QUALITY, 17-18, 23-24 (1972) (discussing the market analysis of the supply of environmental goods such as the cost of a one-day vacation in Jamaica). The positive externalities of undeveloped land are most valuable where the supply is low and the demand is high. Id. at 17-24 (applying the laws of supply and demand to the environment and environmental goods). For example, New York City’s Central Park theoretically generates high external benefits because the supply of undeveloped land in New York is low and the demand for such land is presumably high. See id.; see also infra note 299 and accompanying text (discussing the benefits of undeveloped land in urban environments). Therefore, a higher subsidy should be issued for undeveloped land held in areas of high demand and low supply. See generally SAMUELSON AND NORDHAUS, supra note 1, at 48-60 (discussing the effects supply and demand have on a good’s market price).

\textsuperscript{298} See supra notes 287-92 and accompanying text (discussing the potential under the Massachusetts pricing scheme of compensating dairy farmers for their production of external benefits).

\textsuperscript{299} A TASK FORCE REPORT SPONSORED BY THE ROCKEFELLER BROTHER’S FUND, THE USE OF LAND: A CITIZEN’S POLICY GUIDE TO URBAN GROWTH 135-38 (William K. Reilly ed. 1973) (arguing that selective placement or retention of undeveloped land would lead to “higher economic and environmental values” of land); see ARNOLD, supra note 35, at 719 (discussing and displaying the markets' inability to produce the socially optimal level of goods that produce positive externalities); id. at 723 (explaining the use of taxes and subsidies as one method of reaching the socially optimal level of production).

\textsuperscript{300} See infra note 301 and accompanying text (contending that the Massachusetts pricing scheme passes Kant’s categorical imperative because the scheme may help to reach the socially optimal level of production, and thus, may be willed as a universal law).
If every state taxed the consumption of farms and farm products, in relation to the positive external benefits that in-state farms generate, the result would be a nationwide internalization of the costs of farm land. In addition, the taxes paid by out-of-state interests, if any, would be demonstrably incidental. Under a Kantian analysis therefore, the Massachusetts pricing scheme may be willed as a universal law and should not be invalidated by the Court as being inconsistent with an economic union.

To promote environmental preservation, state governments should be permitted to enact fiscal policies that benefit the environment despite incidentally burdening interstate commerce. Even if the Court correctly

301. Immanuel Kant, *Foundations of the Metaphysics of Morals*, reprinted in *Ethics: Selections from Classical and Contemporary Writers* 183, 199, 204 (Oliver A. Johnson ed. 6th ed., 1989). “There is . . . only one categorical imperative. It is: Act only according to that maxim by which you can at the same time will that it should become a universal law.” *Id.* at 199. For example, cheating on exams may not be willed as a universal law, because, if everybody cheated on exams then exams would no longer serve their intended function. *See id.* at 199-200 (discussing the philosophical theorem of the categorical imperative). On the other hand, a law stating that one should not kill without justification may be willed as a universal law. *See id.* at 199. In addition, one should not borrow money knowing they will be unable to repay because to will this as a universal law would render promises of repayment meaningless. *See id.* at 199-200. Tom L. Beauchamp, *Ethical Theory and Its Application to Business*, *Ethical Theory and Business* 1, 38 (Tom L. Beauchamp & Norman E. Bowie eds., 3d. ed. 1988). Stating that the theft of trade secrets violates the categorical imperative. *Id.* Willing the theft of trade secrets as a universal law would render useless the intellectual property rights that provide the incentive for progress. *See id.*

302. *See HITE, supra* note 297, at 70-72 (discussing the rising demand for finite environmental resources and the markets' inability to allocate and preserve them efficiently); *see also* Friedman, *supra* note 123, at 206-08 (recommending the utilization of market mechanisms instead of arbitrary government regulations to help to maintain control over the environment).

303. *See* International Harvester Co. v. Department of Treasury, 322 U.S. 340, 344-46 (1944). Arguably, the taxes paid by out-of-state dairy producers would be just as incidental as the gross receipts tax in *International Harvester.* *See id.*

304. *See* Kant, *supra* note 301, at 199 (stating the categorical imperative). Compare *supra* notes 287-303 (discussing the Massachusetts pricing scheme's potential to internalize costs of the external benefits of undeveloped land); Arnold, *supra* note 35, at 723 (stating that taxes and subsidies may be utilized to generate the socially optimal output of a good that produces externalities) with *supra* notes 252-277 (discussing the majority's assertion that the Massachusetts pricing scheme produced a tariff-like barrier). Tariffs, however, may not be willed as a universal law. *See supra* note 258 (discussing the disastrous economic consequences that followed the implementation of drastically higher tariffs in the United States prior to the Great Depression).

305. *See* South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 190-91 (1938). Justice Stone commented that “[F]airly debatable questions as to . . . reasonableness, wisdom and propriety are not for the determination of courts, but for the [state] legislative body . . . .” *Id.* at 191. Michael P. Healy, *The Preemption of State Hazardous and Solid Waste Regulations: The Dormant Commerce Clause Awakens Once More*, reprinted in *Environmental Law Anthology* II 859, 894-96 (Allison P. Zabriskie, Thad-
decided that the Massachusetts pricing scheme was protectionist, by invalidating it the Court forbade an area of economic experimentation that would allow both economic growth and the protection of public goods.306

E. The Court Likely Will Continue to Invalidate Protectionist State Subsidies that Produce Tariff-Like Economic Affects

Because of its adversity to protectionist legislation, the Court is unlikely to embrace plans similar to the Massachusetts pricing scheme.307 Unfortunately, the organized producers of environmental goods are more likely to influence beneficial environmental legislation than are the unor-
ganized and dispersed beneficiaries. Even if the Massachusetts dairy farmers were concerned only with gaining a competitive advantage and not concerned about the environment, an objective analysis of the legislation would be no different. The Court, however, allowed some room for the environmentally conscious legislator to maneuver.

The Healy II Court did not address whether the tax and subsidy program would have been legal if the tax first had been placed in the state general fund. Some scholars argue that if a subsidy is paid from the state treasury, the courts should be deferential to the legislature, which is more likely to consider the burdens and benefits of the subsidy. But,

308. See Healy II, 114 S. Ct. at 2215. In Healy II, the majority suggested that the political process leading to the enactment of the Massachusetts pricing scheme was distorted, because the most powerful in-state group opposed to a dairy tax was silenced by a corresponding subsidy. Id. The majority suggested that despite the fact that two independent regulations, the tax and subsidy, may each be legal under the Commerce Clause, their combined effect may produce consequences not associated with the individual parts. Id. at 2214-15. However, the burden of the pricing scheme falls predominately on in-state consumers and dairy dealers with a substantial in-state presence who may adequately represent any out-of-state opposition to the pricing scheme. See id. at 2221 (Rehnquist, C.J., dissenting). The dissent argued that the participation of special interest groups in the political process has no relevance under dormant Commerce Clause analysis. Id. at 2219-20 (Scalia, J., concurring). Justice Scalia stated that the Chief Justice's distinction between subsidies that violate and that do not violate the negative Commerce Clause are not based on an inquiry into the role of special interest groups in the political process. Id. at 221; see Friedman, supra note 123, at 32-33, 88, 191, 193-94, 229, 279-86, 289 (discussing the incentives for special interest groups to influence the political system, and exploring the general public's inability to protect its diverse interests more actively); Choper, supra note 22, at 1584-85 (contending that special interest groups have a far greater influence in state legislation than in federal legislation). This is exemplified by laws that discriminate against outsiders for the benefit of local private or governmental interests. Id.

309. See supra note 308 (discussing the impact special interest groups have on state and local legislation); see also supra notes 300-04 and accompanying text (discussing a philosophical analysis of the Massachusetts pricing scheme in which the scheme would remain the same regardless of which special interest group encouraged its passage).

310. See infra notes 311-41. (discussing the means not foreclosed by the Court to achieve the desired ends of the Massachusetts pricing scheme). The states may reach the desired ends of the pricing scheme by subsidizing the dairy farmers from the state's general fund. Id.


312. See Levmore, supra note 39, at 585 (contending that the state legislature applies a more thorough cost-benefit analysis to a subsidy or preference that is taken from the state's general fund, because the government rather than a private entity is paying); see Gergen, supra note 34, at 1135-36 (noting that state legislatures ignore the external costs of subsidies borne outside the state, by out-of-state producers who face a decline in price and market share attributed to the subsidies); cf. Healy II, 114 S. Ct. at 2221 (Scalia, J., concurring) (inferring that Levmore's reasoning should not be a basis for determining the Constitutionality of subsidies).
under the second element of the Regan test, the subsidy still would violate the Commerce Clause because it generates the effects of a tariff.\textsuperscript{313}

States receive the majority of their revenue from sales taxes.\textsuperscript{314} Sales taxes and use taxes\textsuperscript{315} subject out-of-state producers to additional costs.\textsuperscript{316} It is impractical and probably impossible for a state tax system to not impact out-of-state producers.\textsuperscript{317} If the general funds subsidize in-state producers, it is likely that out-of-state interests would provide some of the funds.\textsuperscript{318}

A pure subsidy, with no corresponding tax on the item produced,\textsuperscript{319} would pass the Regan test because the out-of-state producers would not suffer any direct barriers to competition.\textsuperscript{320} Instead, the subsidy would result in the accurate allocation of the in-state producer's comparative advantage if the subsidy internalized an external cost.\textsuperscript{321} Thus, the Court

\begin{footnotesize}
313. See supra note 278, and accompanying text (stating the two elements of the Regan test). A subsidy, whether it is paid directly by private entities or the government, would still produce the same tariff-like effects condemned by the Healy II majority. See supra notes 283-86 and accompanying text (discussing the economic effects of the Massachusetts pricing scheme with respect to the second element of the Regan test).

314. See SAMUELSON AND NORDHAUS, supra note 1, at 332-33. States receive most of their revenue through general sales taxes and taxes placed on gasoline, alcohol, and tobacco. Id.

315. All States Tax Guide (P-H) ¶ 250. All states except Alaska, Delaware, Montana, New Hampshire, and Oregon impose general state sales and use taxes. Id.

316. See PINDYCK AND RUBINFELD, supra note 238, at 320-22 (discussing the economic factors that determine what percentage of a sales tax is ultimately paid by producers). Sales taxes imposed on goods produced out-of-state result in out-of-state producers paying a portion of the tax. Id. For a more detailed discussion of the economic analysis used to determine the incidence of a tax relating to the Massachusetts dairy scheme, see supra notes 234-51 and accompanying text.

317. See PINDYCK AND RUBINFELD, supra note 238, at 323. For example, states tax gasoline to effectuate a use tax of state highways and impose costs on out-of-state producers that must ship their products in-state. See supra notes 312-13 (discussing the effect of state sales taxes on out-of-state producers).

318. See supra notes 313-17, and accompanying text (discussing out-of-state sources of in-state revenue). Because states' sales taxes and use taxes are ultimately paid, in part, by out-of-state producers, the states' general fund include taxes paid by out-of-state producers. Id.

319. See Levmore, supra note 39, at 592-98 (discussing the Court's treatment of taxes affecting interstate commerce). See Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 427 (1947). The Supreme Court contended "[f]rom the Commerce Clause itself, there comes, also, an abridgment of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce." Id.

320. See supra note 278 and accompanying text (stating the two elements of the Regan test). See Regan, supra note 3, at 1193-95. Professor Regan contends that the negative Commerce Clause permits state spending on industry. Id.

321. See SAMUELSON AND NORDHAUS, supra note 1, at 663. Comparative advantage provides that states will specialize in the production of goods that it can produce at a
should not, under the negative Commerce Clause, invalidate pure subsidies created by state legislators.\textsuperscript{322}

Finally, whether direct subsidies without corresponding taxes on out-of-state producers violates the Commerce Clause is a policy question best left to the wisdom of the states' legislative bodies,\textsuperscript{323} because subsidies may be in the realm of economic experimentation,\textsuperscript{324} which is consistent with the principles of federalism.\textsuperscript{325} In addition, subsidies may be helpful in producing the optimal level of environmental benefits.\textsuperscript{326} A direct sub-

relatively low cost. \textit{Id.} When producers are compensated for their production of external benefits, their production will adjust according to their true comparative advantage. \textit{See id.} (discussing the concept of comparative advantage); \textit{see also} ARNOLD, supra note 35, at 720-23 (discussing the internalization of external costs resulting in a socially optimal output).

322. \textit{See} Regan, supra note 3, at 1193-97. Regan contends that some state spending programs should not be invalidated under the negative Commerce Clause because they: (1) do not obtrusively interfere with the market economy; (2) are not overly hostile toward other states; (3) are costly to the state and are not "likely to damage the economy seriously in the aggregate, if at all"; (4) often are beneficial to the nation and would be undertaken by a state only if the benefits fall predominately on that state; and (5) are not likely to result in the destructive retaliations associated with tariffs. \textit{Id.} at 1194-95.

323. \textit{See} Anson and Schenkkan, supra note 240, at 99 (concluding that "federalism demands a respect for state decisions of political economy that the Court never has accorded in traditional dormant commerce clause cases, a respect that the Court is institutionally ill suited to reconcile with national economic concerns"); \textit{cf.} Redish and Nugent, supra note 10, at 593. The states would prefer congressional to judicial oversight of interstate commerce because Congress is less likely to act. \textit{Id.; see supra} notes 152-54 (discussing the minimal likelihood of congressional action because Congress is preoccupied with other matters).

324. \textit{See} Levmore, supra note 39, at 586 (stating that Congress may regard non-explorative state action as appropriate experimentation, consistent with the federal structure of government); \textit{see also} Alasdair MacIntyre, \textit{The Privatization of Good: An Inaugural Lecture}, 52 THE REVIEW OF POLITICS 344, 352-53, reprinted in \textit{JUSTICE: ALTERNATIVE POLITICAL PERSPECTIVES} 239, 245-46 (James P. Sterba 2nd ed., 1992). A common conception of what is good for society is needed to reach the socially optimal allocation of resources. \textit{Id.} For example, too many resources are spent extending human life into a mindless existence, while the young and the unborn are economically deprived. \textit{Id.}

Critics of capitalism assert, however, that it is loaded in favor of such 'private' goods as autos, soap, deodorants, watches, refrigerators, clothing, etc., and against 'public goods,' such as public television, public beaches, concert halls, museums, symphony orchestras, ballets, parks, hospitals, medical services, public schools, or decent homes for the aged. \textit{See} SILK, supra note 26, at 83.

325. Levmore, supra note 39, at 586. Professor Levmore contends that subsidies from a general fund are within the realm of economic experimentation consistent with the principles of federalism. \textit{Id.}

326. \textit{See} Robert C. Ellickson, \textit{Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls} 40 U. CHI. L. REV. 681, 729-30 (1973) reprinted in \textit{A PROPERTY ANTHOLOGY} 384, 391 (Richard H. Chused ed., 1993). The way to internalize an external benefit of property is achieved best through a system of rewards. \textit{Id.; see also} ARNOLD, supra note 35, at 723-24 (illustrating how subsidies may be used to internalize
Subsidy paid to the Massachusetts dairy farmers would increase the milk production of in-state dairy farmers, and would reduce the Massachusetts market share of out-of-state milk producers. The beneficiaries of a subsidy designed to sustain in-state dairy farmers, as opposed to the Massachusetts pricing scheme, are not the out-of-state dairy farmers, but rather, the dairy consumers who benefit from not paying the incidence of the Healy II tax. Therefore, the effect of a direct subsidy with no corresponding tax is no more or less protectionist than the Massachusetts pricing scheme.

Justice Scalia would validate all subsidies which were issued from a state's general fund. The Court's previous rulings regarding tax credits and tax exemptions supports Justice Scalia's test. Under this bright line test, Massachusetts could have placed the funds from the milk dealer tax into the state's general fund and then issued a subsidy to in-

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327. See Pindyck and Rubinfeld, supra note 238, at 322-23 (stating that the quantity of a product will increase if the production is subsidized). The author does recognize that subsidies risk overproduction and surpluses, however, farmers properly compensated for the external benefits they produce would displace farmers producing in areas where there is a surplus of undeveloped land. See Arnold, supra note 35 at 63 (stating that subsidies increase production); see also id. at 723-24 (cautioning against the dangers of misjudging the level of subsidization necessary to internalize the costs of an external benefit); see supra note 297 (providing that under an efficient scheme of subsidies, areas where the supply of undeveloped land is low and the demand is high, a larger subsidy should be issued).

328. See Gergen, supra note 34, at 1135-36 (stating that subsidies of in-state producers decreases the market share of out-of-state producers).

329. See Pindyck and Rubinfeld, supra note 238, at 323 (explaining the economic effects of a subsidy). "[T]he benefit of a subsidy accrues mostly to consumers if [the price elasticity of demand over the price elasticity of supply] is small . . . ." Id. Therefore, if price elasticity of demand for milk is low, while the price elasticity of supply is high the benefit of a subsidy would flow primarily to consumers. See id. However, much of the subsidy may result in a deadweight loss because it is being issued to dairy farmers who may not be efficient enough to compete in the free market. See id.

330. See supra notes 314-18, 324-30 (discussing the similar protectionist effects of subsidies paid to in-state dairy farmers from the state's general fund, and subsidies paid from segregated funds).


332. See supra notes 107-18, and accompanying text (discussing the Court's invalidation of discriminatory taxes that burden interstate commerce, and their validation of nondiscriminatory taxes affecting interstate firms).

333. See Healy II, 114 S. Ct. at 2211-12 (Scalia J., concurring). Justice Scalia argues that the Constitution permits a state to subsidize its domestic industry from nondiscriminatory taxes placed in the state's general fund. See id. Furthermore, Justice Scalia believes that the effect of subsidizing from a segregated fund, would be to subsidize an industry with discriminatory taxes, once the transaction was integrated. Id.
state dairy farmers. Economically, this is a distinction without a difference. The resulting economic effects that compelled the majority to liken the pricing scheme to a tariff would still occur. Politically, however, the electorate would be more likely to perceive the opportunity cost of the subsidy and subject the subsidy to a higher level of scrutiny. This approach would allow states to burden out-of-state producers with the costs of subsidizing in-state interests.

The out-of-state dairy farmers arguably would not be unfairly affected by any subsidy to in-state dairy farmers with or without a corresponding tax. The state will be unable to foist the burden of the in-state tax on the out-of-state dairy farmers, because the out-of-state dairy farmers can sell their milk in numerous other markets. The out-of-state producers only appear to be hurt when they are not similarly compensated for the external benefits they produce.

IV. CONCLUSION

The power to regulate commerce should rest with the governmental bodies best suited for the job. External costs and benefits are very diff-

334. See supra notes 202-04, 333 (discussing Justice Scalia's bright line subsidy test).
335. See supra notes 232-74 and accompanying text. The economic affects of the Massachusetts pricing scheme would not change if the proceeds from the dairy tax first were placed in a general fund as opposed to a segregated fund. Id.
336. See supra notes 264-73 and accompanying text (discussing the economic effects that lead the majority to conclude that the Massachusetts pricing scheme was a tariff-like barrier).
337. See SAMUELSON AND NORDHAUS, supra note 1, at 743 (defining the economic concept of opportunity costs). An opportunity cost is defined as “[t]he value of the next best use (or opportunity) for an economic good, or the value of the sacrificed alternative.” Id.
338. See Levmore, supra note 39, at 585 (contending that a legislature is less likely to spend money from the state’s general fund because they can more adequately perceive the opportunity costs of the program).
339. See supra notes 335-36 and accompanying text (stating that the economic effects of a subsidy on an industry are identical where funded by a nondiscriminatory tax taken from a segregated fund or a general fund).
340. See supra notes 287-99 and accompanying text (analyzing the use of the Massachusetts pricing scheme as a means of achieving the socially optimal use of dairy farms). Subsidies that internalize the costs of external benefits represent fair trade because such a result is identical to the outcome had there been no externalities. See ARNOLD, supra note 35, at 719-20 (discussing the disparity between the socially optimal output and the market output caused by external benefits).
341. See supra notes 248-51 and accompanying text (stating that both in-state dairy farmers and dealers paid the dairy tax because the out-of-state dairy farmers had the option of selling their milk in numerous markets).
342. See supra notes 340-41 (explaining that subsidies that do not internalize the costs related to external benefits may result in a disparity between the socially optimal output and the market output).
cult to measure because the market does not establish their value as it
does for private goods. Thus, value judgments must be made before ac-
tions may be taken to internalize these costs and benefits. These judg-
ments are most appropriately made and implemented by the legislature.
Economic experimentation, utilizing tax and subsidy schemes similar to
that in *Healy II*, may help to solve various market failures. Subsidies and
taxes, however, are often used with protectionist motives and may serve
to obstruct the economic union. Nonetheless, the benefits of economic
experimentation demand that the Court not invalidate state legislation,
attempting to correct market failures as it did in *Healy II*.

The Court's negative Commerce Clause jurisprudence represents an
approval of a laissez-faire economy. The Framers of the Constitution
may have believed in this economic ideology. Policy decisions, however,
are meant to be determined by the people, not by the Court's determina-
tion that the Framers would have approved of a particular policy.

Congress needs to address whether pricing schemes designed to inter-
nalize external costs and motivated, in part, by protectionist goals violate
the Commerce Clause. Economic experimentation is both risky and ben-
eficial. Congress is unlikely to risk economic experimentation on the na-
tion unless there is evidence of beneficial results from the states. If
experimentation is prohibited at the state level then it may impede the
economic evolution of the United States.

George P. Patterson