

The Maine Rx Prescription Drug Plan and the Dormant Commerce Clause Doctrine: The Case of the Missing Link[age]

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I. INTRODUCTION

In the 2002 Term, the U.S. Supreme Court will hear the case of *Pharmaceutical Research and Manufacturers of America (PhRMA) v. Concannon*,¹ in which PhRMA, the plaintiff-appellant, will argue that the State of Maine's program to supply low-cost prescription drugs to its citizens (the Maine Rx Program) violates the dormant Commerce Clause doctrine. After the Program became law in 2000, PhRMA sought and obtained an injunction from a federal district court preventing the law from going into effect. Shortly thereafter, the First Circuit unanimously reversed the district court and lifted the injunction. In June 2002, the Supreme Court granted certiorari.²

This Article argues that the Maine Rx Program violates the dormant Commerce Clause doctrine³ because it links a facially nondiscriminatory tax with a subsidy in a

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¹ 249 F.3d 66 (1st Cir. 2001), *cert. granted*, 122 S. Ct. 2657 (U.S. June 28, 2002) (No. 01-188). Kevin Concannon is the Commissioner of the Maine Department of Human Services.

² *Id.*

³ The "dormant Commerce Clause doctrine" refers to the self-executing limitations on state power to regulate interstate commerce that the Supreme Court has inferred from Article I, § 8's grant of power over interstate and foreign commerce to Congress. The doctrine, though often criticized, dates from the Court's 1824 *Gibbons v. Ogden* decision. *Gibbons v. Ogden*, 22 U.S. 1 (1824). The modern dormant Commerce Clause doctrine does several things: it prohibits states from passing statutes that, either on their face or in purpose or effect, discriminate against interstate commerce or out-of-state commercial actors. *See, e.g.*, *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Statutes that do so are subject to a "per se" rule of invalidity, and will be sustained only on a showing by the state that the statute serves a legitimate local purpose and that the state has no less discriminatory alternatives. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves

way that, in combination, burdens out-of-state drug sellers. The Supreme Court has found similar programs to be invalid in past cases, most recently in the 1994 case *West Lynn Creamery, Inc. v. Healy*.⁴ My analysis contributes to the debate over the Program's constitutionality because the "suspect linkage" argument was not raised by PhRMA, was not addressed in *Concannon*, and has not been noticed in the extant commentary.⁵ Viewed from this perspective, it becomes clear that the Maine Rx Program is virtually indistinguishable from similar schemes that the Court has invalidated and that the Court should thus reverse the First Circuit's decision upholding the Program, laudable though its goals might be.

Part II describes the origins and operation of the Maine Rx Program. PhRMA's challenge and the First Circuit's decision are described in Part III. Part IV contains a summary of the Court's linkage decisions, concentrating on *West Lynn Creamery v. Healy*. Part IV also examines a recent article by Professors Dan Coenen and Walter Hellerstein⁶ that offers a deeper explanation of the Court's decisions in this area. Part V analyzes the Maine Rx Program in light of the cases and Coenen and Hellerstein's criteria for determining linkage, while Part VI considers defenses that Maine may offer.

a legitimate local purpose,⁷ and that this purpose could not be served as well by available nondiscriminatory means") (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336(1979)). Statutes that seek to regulate commerce extraterritorially, that is, activity that takes place outside the boundaries of a state, are similarly suspect under this per se rule. *See, e.g.*, *Brown-Forman Distillers v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). For those statutes that neither discriminate on their face, nor in their purpose or effect, the Court will ask whether the putative local benefits are clearly exceeded by the burdens on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The two-tiered structure of the dormant Commerce Clause doctrine and the variations within each tier are discussed in BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE (1999 & Supp. 2003); *see also* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.3 (2d ed. 2002).

Though it has a lengthy doctrinal pedigree, the dormant Commerce Clause doctrine has been subject to continuous criticism by scholars and judges who argue that the doctrine has little basis in the text of the Constitution or in the intent of its Framers. *See, e.g.*, *Tyler Pipe Indus., Inc. v. Wash. State Dep't Revenue*, 483 U.S. 232, 254 (1986) (Scalia, J., concurring in part and dissenting in part); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569. Others question whether the Court possesses the institutional competence to evaluate state economic policy. *See, e.g.*, Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395 (1986). For purposes of this essay, I take the dormant Commerce Clause doctrine as a given—a doctrinal fact of life that the Court is unlikely to repudiate. Space prohibits a full defense of the doctrine, though I have argued elsewhere that certain claims of the doctrine's critics are overstated. *See, e.g.*, Brannon P. Denning, *The Dormant Commerce Clause Doctrine and Constitutional Structure* (unpublished manuscript), available at <http://www.law.siu.edu/faculty/denning/biblio.htm> (arguing that critics who cite the Commerce Clause's lack of explicit exclusivity to undermine the textual basis of the dormant Commerce Clause doctrine have overlooked important evidence).

⁴ 512 U.S. 186 (1994).

⁵ *See* Conrad J. Barrington, Note and Comment, *Pharmaceutical Research and Manufacturers of America v. Concannon and Maine's Prescription Drug Rebate Statute: A Twenty-First Century Solution to the Medicaid Crisis*, 23 WHITTIER L. REV. 1127 (2002); Abigail B. Pancoast, Comment, *A Test Case for Reevaluation of the Dormant Commerce Clause: The Maine Rx Program*, 4 U. PA. J. CONST. L. 184 (2001); Whitney Magee Phelps, Comment, *Maine's Prescription Drug Plan: A Look into the Controversy*, 65 ALB. L. REV. 243 (2001). In the afore listed articles, none of the authors use the linkage analysis or note possible parallels between the Maine Program and the Massachusetts milk pricing order struck down in *West Lynn Creamery, Inc.* in their discussions of the Maine Rx Program and the dormant Commerce Clause doctrine.

⁶ Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 MICH. L. REV. 2167 (1997).

II. THE MAINE RX PROGRAM

In 2000, Maine Governor Angus King signed a bill that created the Maine Rx Program.⁷ The Program sought “to make prescription drugs more affordable for qualified Maine residents, thereby increasing the overall health of Maine residents, promoting healthy communities and protecting the public health and welfare.”⁸ The heart of the Program is a requirement that drug manufacturers and “labelers”⁹ selling drugs through state-supported programs that supply drugs to needy residents enter into “rebate agreements” whereby the drug sellers pay a certain percentage of in-state sales of prescription drugs each quarter back to the State, in essence taxing the sale of those drugs.¹⁰ The Commissioner of Maine’s Department of Human Services

⁷ ME. REV. STAT. ANN. tit.22, §§ 2681-2682 (West Supp. 2002).

⁸ *Id.* § 2681(1).

⁹ According to the statute, a “labeler” is “an entity or person that receives prescription drugs from a manufacturer or wholesaler and repackages those drugs for later retail sale and that has a labeler code from the federal Food and Drug Administration” *Id.* § 2681(2)(C).

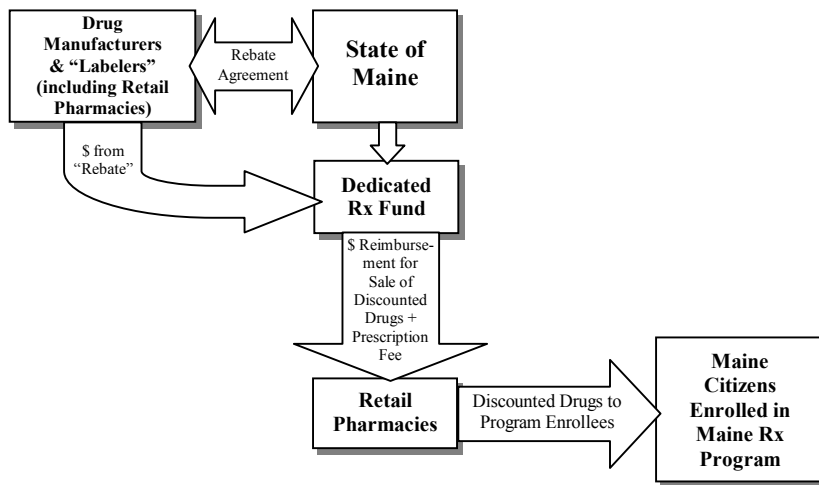
¹⁰ *Id.* § 2681(3). Though the statute terms the payment for supplying drugs through Maine’s Medicaid program a “rebate” to the state, and though the First Circuit stressed the “voluntary” nature of the rebate, *Concannon*, 249 F.3d at 82, I will refer to the rebate throughout this essay as a “tax” and will assume it to be such for purposes of the linkage analysis offered below. I do this for several reasons. First, the Supreme Court has made clear that it will not elevate form over substance in dormant Commerce Clause cases. *See, e.g.,* *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 575 (1997) (“To allow a State to avoid the strictures of the dormant Commerce Clause by the simple device of labeling its discriminatory tax a levy on real estate would destroy the barrier against protectionism that the Constitution provides.”); *W. Lynn Creamery, Inc., v. Healy*, 512 U.S. 186, 194 (1994) (noting that state “pricing order,” which imposed an “assessment” on all milk sold in the state was “effectively a tax which makes milk produced out of State more expensive”); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (criticizing the old rule whereby the Court had struck down statutes directly taxing interstate commerce, but upholding those seeking to tax only “the privilege of doing business”; the old rule “has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman”). Therefore, whatever label the state employs, the statute must be assessed according to its economic effects. *See id.* at 288-89. Judged according to these criteria, the Maine Program looks like a tax on the privilege of selling prescription drugs to the state’s Medicaid population. The avowed purpose of the Program is to raise revenue that will then be used to provide services to the State’s citizens. *See, e.g.,* BLACK’S LAW DICTIONARY 1469 (7th ed. 1999) (defining tax as “[a] monetary charge imposed by the government on persons, entities, or property to yield public revenue”). Further, attempting to insulate the tax from judicial scrutiny by reference to its “voluntary” nature seems to prove too much. After all, any tax is voluntary in the sense that the taxpayer is obligated to pay only to the extent the taxpayer chooses to engage in the taxed activity. Moreover, in this case, refusing to participate in the Program subjects the drug sellers to distinct penalties. *See infra* notes 15-16 and accompanying text. It would be absurd to allow a state to avoid judicial scrutiny of its taxes by allowing it to re-characterize them as “voluntary rebates” to the state triggered by engaging in a particular action. *Cf. Kathleen M. Sullivan, Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1429-430 (1989) (discussing “unconstitutional conditions as coercion” in the corporate privileges context). Maine recognized that the characterization of its “rebate” program as a tax was possible. In *Concannon*, Maine argued that the re-characterization met the relevant Supreme Court test for scrutinizing state taxes under the dormant Commerce Clause doctrine. *Concannon*, 249 F.3d at 84 n.11 (“On appeal, Maine argues in the alternative that the Act does not violate the dormant Commerce Clause because if the rebate provision is construed as a tax, it satisfies the requirements set forth in the *Complete Auto* line of cases dealing with taxation on interstate commerce.” (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977))). The First Circuit, however, refused to address the issue since Maine had not raised it in the lower court. *Concannon*, 249 F.3d at 84 n.11. It may be that the “suspect linkage” argument addressed below, *see infra* Parts IV-V, could be expanded to accommodate non-tax regulations that are linked to discriminatory subsidies, but I leave that for others to consider, for I am satisfied that, however denominated, Maine’s “rebate” is in fact a tax on the privilege of selling drugs to its Medicaid patients.

is instructed to obtain a “rebate” better than or equal to that offered by drug sellers to the federal government under Medicaid.¹¹

This de facto tax, in turn, is used to reimburse pharmacies, which, under the statute, agree to sell drugs covered under the rebate agreements to Maine citizens at a discount.¹² All “residents of the State who [have] obtained . . . a Maine Rx enrollment card” are eligible as “qualified resident[s]” for the Program.¹³ The pharmacies are reimbursed by the State for the discounted drugs sold under the Program.¹⁴ The reimbursements are to come from the “Maine Rx Dedicated Fund,” established by the Program, into which “revenue from manufacturers and labelers who pay rebates,” as well as any other appropriations, are placed.¹⁵ Figure 1, below, illustrates the structure of the Program.

Though “voluntary,” those drug sellers who choose not to participate in the Program face two penalties. First, the Program provides for the release of the names of non-participating manufacturers and sellers to the public.¹⁶ More importantly, the Program permits, to the extent permitted by federal law, the imposition of “prior authorization” requirements on non-participating manufacturers and sellers¹⁷—meaning non-participating manufacturers or labelers have to seek approval from the State before their drugs may be dispensed to Medicaid patients.

Figure 1. The Maine Rx Program



¹¹ *Id.* § 2681(4).

¹² *Id.* § 2681(5). Maine plans to phase the discount into effect. The “initial discounted price” is “a price that is less than or equal to the average wholesale price, minus 6%, plus the dispensing fee permitted under [Maine’s] Medicaid program” *Id.* § 2681(2)(B). The “secondary discounted price” required after October 1, 2001 is defined as “a price that is equal to or less than the initial discounted price minus the amount of any rebate paid by the State to the participating retail pharmacy.” *Id.* § 2681(2)(G).

¹³ *Id.* § 2681(2)(F).

¹⁴ *Id.* § 2681(6)(C)-(D) (requiring that participating pharmacies submit claims to the State, which is then obligated to reimburse the pharmacies “[o]n a weekly or biweekly basis”). In addition, a \$3 per prescription “professional fee” is also authorized for the initial transaction, with further professional fees to be set by the commissioner. *Id.* § 2681(6)(D). Utilization data collected from participating pharmacies will also be used to compute the rebates. *Id.* § 2681(6)(E).

¹⁵ *Id.* § 2681(9).

¹⁶ *Id.* § 2681(7).

¹⁷ *Id.*

III. PHRMA'S CHALLENGE

Soon after the Program's enactment, a federal district court granted PhRMA's request for a preliminary injunction. The judge found, *inter alia*, that the Program violated the dormant Commerce Clause doctrine. The State of Maine appealed, and the First Circuit reversed the district court.¹⁸ After finding that federal law did not preempt the Maine Rx Program,¹⁹ the court turned to the dormant Commerce Clause issue.

On appeal, PhRMA alleged that the Act violated the dormant Commerce Clause doctrine by regulating prices extraterritorially, and argued that the court should subject the Program to a strict scrutiny standard of review.²⁰ Specifically, PhRMA alleged that the practical effect of the Program was to regulate the price of prescription drugs outside the State of Maine by "regulat[ing] the transaction that occurs between the manufacturer and the wholesaler"²¹

The First Circuit disagreed with PhRMA's arguments. First, it distinguished the cases on which PhRMA relied.²²

Unlike . . . price affirmation and price control statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express purpose or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.²³

Moreover, the court noted, the Program neither "requires the rebate to be a certain amount dependent upon the price of prescription drugs in other states," nor "impose[s] direct controls on a transaction that occurs wholly out-of-state."²⁴

The court disputed PhRMA's contention that the Program effectively regulated out-of-state transactions between wholesalers and manufacturers. The Program, according to the court, was a "voluntary" one, providing for "negotiated rebate agreements" between the State and those selling drugs in-state.²⁵ It refused PhRMA's invitation to be suspicious of the State's motive in passing the Program, at

¹⁸ PhRMA v. Concannon, 249 F.3d 66, 83 (1st Cir. 2001), *cert. granted*, 122 S. Ct. 2657 (U.S. June 28, 2002) (No. 01-188).

¹⁹ *Id.* at 74-79. The court also found that PhRMA had standing to bring the lawsuit. *Id.* at 72-74. Should the Court decide that federal law preempts the Maine Rx Program, then it is unlikely to reach the dormant Commerce Clause question. *Cf.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.6 (2000) (striking down a Massachusetts law aimed at curbing trade with Burma on preemption grounds; declining to reach the question of whether a state law violated the dormant Foreign Commerce Clause doctrine). This article does not address the preemption argument.

²⁰ *Id.* at 81.

²¹ *Id.* at 82.

²² PhRMA relied heavily on three "extraterritorial" cases in which the Supreme Court struck down statutes that attempted to control in-state prices by tying them to the prices charged for sales of similar products in other states. *Id.* at 79-81 (citing *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (striking down a Connecticut statute requiring a beer seller to affirm that in-state prices are no greater than prices posted in adjacent states); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (striking down a similar New York price-affirmation statute); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (striking down a state law prohibiting in-state sales of milk purchased out-of-state for less than the minimum in-state price).

²³ *Concannon*, 249 F.3d at 81-82 (citation omitted).

²⁴ *Id.* at 82.

²⁵ *Id.*

least before the Program was operational.²⁶ While the court considered the effect on interstate commerce if other states passed similar legislation, it concluded that “[t]he most apparent effect would be a loss in profits for manufacturers. It does not appear . . . that statutes similar to the Maine Act . . . would result in manufacturers having inconsistent obligations to states or in creating a ‘price gridlock.’”²⁷ The court concluded, “Therefore[,] . . . there is no evidence that adverse effects on interstate commerce will occur”²⁸

Having found that the Program lacked the extraterritorial effects that would render it per se invalid, the court analyzed the Program under the more lenient *Pike* balancing test.²⁹ Accordingly, it considered whether the putative local benefit was clearly exceeded by the burden the Act placed on interstate commerce. As the court noted, “the only burden placed on interstate commerce by the Maine Act is its possible effects on the profits of individual manufacturers.”³⁰ On the other hand, the court considered the local benefits to be substantial: “The Maine Rx Program will potentially provide prescription drugs to Maine residents who could not otherwise afford them. The Maine Legislature has decided that without the Maine Rx Program, needy Maine citizens will continue to be deprived of necessary medical care because of rising drug costs.”³¹ The court found insufficient evidence that the burdens were clearly excessive in light of the potential public benefits and the Program survived the dormant Commerce Clause challenge.³² PhRMA subsequently petitioned the U.S. Supreme Court for a writ of certiorari, which the Court granted in June 2002.

IV. “SUSPECT LINKAGES”: THE MISSING ARGUMENT

For the purposes of this Article, I assume that the Court was correct, and that the Maine Rx Program does not present any obvious extraterritoriality problems.³³ Likewise, I assume that the Program could pass the lenient *Pike* balancing test. Is there then no problem under the dormant Commerce Clause doctrine? Not necessarily. This section argues that the Supreme Court should use the concept of “suspect linkages” to invalidate the Program. In brief, the Maine Rx Program seeks to impose a de facto tax on (mostly out-of-state) pharmaceutical companies and drug sellers to fund a drug subsidy for its residents. The Supreme Court has, in the past, invalidated similar schemes and could easily do so now through a straightforward application of current dormant Commerce Clause doctrine.

²⁶ *Id.* (“We note that the commissioner’s ‘best efforts’ [to negotiate rebates] may become coercive or otherwise inappropriate, but we cannot say so on this facial challenge. This may be an issue that needs to be revisited once the Act takes effect. On a facial challenge, however, the use of the commissioner’s ‘best efforts’ indicates that the Act is not ‘regulating’ prices, but merely ‘negotiating’ rebates.”).

²⁷ *Id.* at 82-83.

²⁸ *Id.* at 83.

²⁹ The court mentioned the facial discrimination and discriminatory effects tests, but noted that “PhRMA does not contend, nor did the district court find, that the Maine Act discriminates on its face or in its effects.” *Concannon*, 249 F.3d at 83.

³⁰ *Id.* at 84.

³¹ *Id.*

³² *Id.*

³³ Extraterritoriality needs to be better integrated into the dormant Commerce Clause doctrine, especially given its potential effects on the ability of states to regulate the Internet, for example. Such a reconceptualization is beyond the scope of this Article.

A. WHY LOOK FOR LURKING LINKAGES?

Before outlining the linkage argument, this section will explain why it matters that extraterritoriality arguments, like the one offered by PhRMA in the court below, should be abandoned in favor of the suspect linkage argument described in subsequent sections. The linkage argument is attractive for several reasons. As PhRMA conceded, the statute is neutral on its face,³⁴ and its discriminatory effects are difficult to predict, particularly when the statute had not gone into operation before PhRMA brought its challenge. For PhRMA to obtain some other form of strict judicial scrutiny, therefore, it had to base an argument on either extraterritoriality or suspect linkage. PhRMA's decision to argue extraterritoriality was not the best choice.

While the statute might have some effects outside the State of Maine or otherwise influence out-of-state parties' conduct, the statute does not clearly attempt to tie in-state conduct with conduct occurring outside the State or the country.³⁵ Significantly, in response to precisely those constitutional concerns, the original plan was amended to eliminate a provision that computed the discount price of Maine's drugs based upon drug prices in Canada.³⁶ Had that provision remained, the Program would have more closely resembled programs in which a state tried to tie in-state prices to the prices at which goods were sold out-of-state, and the case for extraterritoriality would have been stronger.³⁷ Its absence, however, severely undermined PhRMA's extraterritoriality argument.

Furthermore, extraterritoriality is an underdeveloped aspect of the dormant Commerce Clause doctrine.³⁸ Since the Program did not seem to closely track one of the paradigm extraterritoriality cases³⁹ and had not been implemented (thus depriving a court of evidence about the Program's operation), a court could understandably be reluctant to invalidate a state law on the dubious ground that it

³⁴ *Concannon*, 249 F.3d at 83.

³⁵ See generally ME. REV. STAT. ANN. tit.22, §§ 2681-2682 (West Supp. 2002). The Maine Program contains no attempt to tie the prices at which drugs are sold in the State to the prices of drugs sold by manufacturers or labelers elsewhere in the United States. *Id.* But see *Healy v. Beer Inst.*, 491 U.S. 324, 326 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575 (1986); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 518 (1935). In *Healy v. Beer Inst.*, the Court struck down a Connecticut statute that required out-of-state beer shippers to affirm that the prices at which beer was being sold in Connecticut was no higher than the prices at which their beer was sold in other states. 491 U.S. at 326. In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, the Court invalidated a similar New York statute requiring that sales from manufacturers to wholesalers be made at prices no higher than the lowest price at which those products were sold in other states. 476 U.S. at 575. Finally, in the older *Baldwin v. G.A.F. Seelig, Inc.* case, the Court struck down a New York law prohibiting the in-state sale of milk imported from other states if the seller had purchased the out-of-state milk for less than the prescribed minimum at which milk was sold in New York. 294 U.S. at 518.

³⁶ *Phelps*, *supra* note 5, at 249.

³⁷ See *Baldwin*, 294 U.S. at 511. The Program also did not attempt to protect in-state producers by forbidding the sale of goods purchased outside a state and imported if purchased at less than a state-specified minimum. See generally ME. REV. STAT. ANN. tit.22, §§ 2681-2682 (West Supp. 2002).

³⁸ Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789 (2001) ("The scope of the extraterritoriality principle is unclear.") (citation omitted); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1884 (1987) ("[W]e do not understand the extraterritoriality principle . . . nearly as well as we should.").

³⁹ See *supra* note 22 and accompanying text.

would produce unspecified (but malevolent) effects in other states. Extension of the extraterritoriality cases beyond their facts could call into question a number of state laws heretofore presumed valid. In the Internet Age and the age of multi-state businesses, what state laws do not have *some* extraterritorial effects? A decision invalidating the Maine Program on a portion of a doctrine that some individual justices regard as dubious, as well as one that might have unintentional consequences for traditional state regulatory authority, might be received with considerable skepticism by the present Supreme Court.⁴⁰

Disposing of the case on a “suspect linkage” analysis, by contrast, has several advantages. A substantial majority of the Court has recently endorsed the linkage theory.⁴¹ The theory, which calls for the linkage of taxing and spending programs in order to analyze their effect as a whole, provides the Court with an opportunity to apply the dormant Commerce Clause doctrine’s venerable antidiscrimination principle in a way that would preclude clever attempts by a state to avoid it. The Maine Rx Program, moreover, is closely analogous to a program the Court invalidated in *West Lynn Creamery* using a linkage analysis.⁴² Because of the similar factual situations, the Court could dispose of this case on linkage grounds without expanding its prior precedent and without breaking new theoretical ground. The same would not be true if the Court had to articulate a theory of extraterritoriality covering the Maine Program.

Finally, presuming that Congress does not act to authorize programs such as the Maine Rx Program,⁴³ invalidation under a linkage theory still leaves Maine free to go back to the drawing board and try something else—perhaps a tax increase, price controls, or even funding the subsidy out of general tax revenues. A decision invalidating the Program on a new and vaguely delimited extraterritoriality ground would leave Maine with less flexibility. If the State enacted outright price controls, would that possibly raise prices in neighboring states? Would those extraterritorial effects pass muster under any new test? Who knows? It might take further litigation to sort out remaining questions, leaving states frustrated and confused in the meantime as they grope toward a solution.

⁴⁰ Justice Scalia, though concurring in the Court’s judgment in *Healy v. Beer Inst.*, refused to endorse the extraterritoriality reasoning of the majority. The problem with that line of reasoning, he argued, “is that innumerable valid state laws affect pricing decisions in other States—even so rudimentary a law as a maximum price regulation.” 491 U.S. at 345 (Scalia, J., concurring). He found the principle “dubious and unnecessary to decide” the case. *Id.* Chief Justice Rehnquist, and Justices O’Connor and Stevens dissented, in part because they doubted that the Connecticut statute in fact regulated or controlled prices in other states. 491 U.S. at 347-48 (Rehnquist, C.J., dissenting). Interestingly, Justice Stevens wrote the majority opinion in *West Lynn Creamery, Inc.*, discussed below, for a majority that included both Justices Scalia and O’Connor. *W. Lynn Creamery, Inc., v. Healy*, 512 U.S. 186 (1986); *see infra* Part IV(B)(2). In *West Lynn Creamery*, Chief Justice Rehnquist dissented. 512 U.S. at 212-17.

⁴¹ *See infra* notes 62-91 and accompanying text.

⁴² *See infra* notes 62-95 and accompanying text.

⁴³ *But see* Greater Access to Affordable Pharmaceuticals Act of 2001, S. 812, 107th Cong. (2001). This law, in part, authorized the kind of program Maine enacted as an alternative to a comprehensive, federal prescription drug plan. *Id.* A House drug plan passed earlier without such a provision. *See* Greater Access to Affordable Pharmaceuticals Act of 2001, H.R. 1862, 107th Cong. (2001). The Senate and House bills are so dissimilar that no conference was planned.

B. THE SUSPECT LINKAGE CASES

Hornbook law holds that nondiscriminatory taxes generally do not violate the dormant Commerce Clause doctrine.⁴⁴ State subsidies to in-state residents also generally do not pose constitutional problems.⁴⁵ Nevertheless, the Court has struck down schemes in which taxes and subsidies were *linked* in a manner that effectively taxed out-of-state parties while conferring benefits funded by that tax on in-state residents. This section describes the Court's cases in this area in which state tax and subsidy programs have been held to violate the dormant Commerce Clause, though the constituent parts of those schemes may have passed muster but for their linkage. It also summarizes the criteria that Professors Dan Coenen and Walter Hellerstein have formulated to determine whether a suspect linkage between a state tax and a spending program is present.⁴⁶ Part V details the similarity between previously invalidated schemes and the Maine Program, and it uses Coenen and Hellerstein's criteria to analyze the Maine Program.

1. *Bacchus Imports & New Energy Company*

Two cases decided by the Court in the 1980s laid the foundation for the 1994 *West Lynn Creamery* case, the facts of which furnish a close analogy to those of *Concannon*. In the first case, *Bacchus Imports, Ltd. v. Dias*,⁴⁷ the Court struck down an exemption from Hawaii's Liquor Tax for a locally-produced alcoholic beverage, known as *okolehao*, and pineapple wine.⁴⁸ The Court began with a "cardinal rule of Commerce Clause jurisprudence . . . that '[n]o State . . . may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"⁴⁹ It then rejected Hawaii's claims that (1) there was no competition among the local liquor and other liquors that were denied a similar

⁴⁴ See, e.g., BITTKER, *supra* note 3, at § 8.10 (discussing the Supreme Court's abandonment of its flat prohibition on state taxation of interstate commerce in favor of a regime that permitted interstate commerce to be taxed, but not discriminated against, by states); CHERMERINSKY, *supra* note 3, at § 5.4.1 ("Discriminatory taxes are virtually never allowed, while nondiscriminatory taxes are much more likely to be permitted."); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-16 (3d ed. 2000) (discussing the emergence of the dormant Commerce Clause as the dominant one in the Court's scrutiny of state taxes on interstate commerce).

⁴⁵ See, e.g., *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the dormant Commerce Clause]"); BITTKER, *supra* note 3, § 6.06[G] (noting the arguments in favor of subsidies' constitutionality); Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 *YALE L.J.* 965, 977 (1998) (noting the long-standing view that such subsidies are not constitutionally problematic); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 *CORNELL L. REV.* 789, 839-46 (1996); *but see* *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 589 (1997) ("We have never squarely confronted the constitutionality of subsidies . . . and we need not address these questions today." (internal quotation marks omitted) (citations omitted)); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 *HARV. L. REV.* 377 (1996) (arguing that the dormant Commerce Clause doctrine should be applied to such incentives, as well as some subsidies).

⁴⁶ Coenen & Hellerstein, *supra* note 6.

⁴⁷ 468 U.S. 263 (1984).

⁴⁸ *Bacchus Imports*, 468 U.S. at 265.

⁴⁹ *Id.* at 268.

exemption⁵⁰ and (2) that there was no intent to discriminate, but merely an intent to “promote a local industry.”⁵¹

While the Court did not dispute “that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry,” it noted that the Commerce Clause and its anti-discrimination principle “stand[] as a limitation on the means by which a State can constitutionally seek to achieve that goal.”⁵² Were the Court to accept Hawaii’s proffered justification that it sought merely to promote a local industry, the Court “would have little occasion ever to find a statute unconstitutionally discriminatory.”⁵³

In the second case, *New Energy Company of Ind. v. Limbach*,⁵⁴ the Court struck down an Ohio tax credit for each gallon of Ohio ethanol sold that offset the state’s motor vehicle fuel sales tax.⁵⁵ Ohio first began subsidizing the use of ethanol in 1981 by offering a credit against the fuel sales tax, but in 1984 it restricted the tax credit to Ohio-produced ethanol or ethanol produced in states providing reciprocal tax treatment to Ohio ethanol.⁵⁶

The discriminatory credit was challenged by an Indiana ethanol producer who claimed that it was protectionist and violated the dormant Commerce Clause doctrine.⁵⁷ The Court, in an opinion written by Justice Scalia, agreed: “The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination.”⁵⁸ While acknowledging that the Indiana producer was the beneficiary of an Indiana cash subsidy—one not available to out-of-state ethanol producers—Scalia wrote:

[t]o believe the Indiana scheme is valid . . . is not to believe that the Ohio scheme must be valid as well. The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State’s regulation of interstate commerce*.⁵⁹

Direct subsidies of in-state industries like Indiana’s, he continued, “do[] not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.”⁶⁰

A few principles can be distilled from the holdings in *New Energy Company* and *Bacchus Imports*. State subsidies to domestic industries are, in and of themselves,

⁵⁰ *Id.* at 269. The Court found that “[t]he State’s position that there is no competition is belied by its purported justification in the first place,” for example, the need to support local industries by encouraging consumption of the product. *Id.*

⁵¹ *Id.* at 273.

⁵² *Id.* at 271.

⁵³ *Id.* at 273. The State also argued that the Twenty-First Amendment permitted the discriminatory tax, a position that the Court rejected. *Id.* at 274-77. Three justices dissented, arguing that the State was correct on the Twenty-First Amendment issue. *Id.* at 278-87. For an argument that the dissenters were correct and that the majority was wrong on this issue, see Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-First Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297 (2002).

⁵⁴ 486 U.S. 269 (1988).

⁵⁵ *Id.* at 271.

⁵⁶ *Id.* at 272.

⁵⁷ *Id.* at 272-73.

⁵⁸ *Id.* at 274.

⁵⁹ *Id.* at 278.

⁶⁰ *Id.*

not ordinarily a problem under the dormant Commerce Clause doctrine. The Court does not, however, consider a tax exemption or tax credit to be the equivalent of a cash subsidy. Therefore, if a nondiscriminatory tax is levied on interstate and intrastate commerce alike, but out-of-state interests are denied the benefits of tax credits or exemptions offered to in-state producers of a particular good, the “virtually per se rule” of invalidity will operate against those discriminatory taxes. Further, for purposes of analysis under the dormant Commerce Clause doctrine, it does not matter that a state’s alleged intent behind the discriminatory exemption or credit is not to discriminate against interstate commerce, but merely to support a “struggling” local industry, just as the Court has previously held that merely labeling a state law an exercise of its “police power” will not immunize it from scrutiny under the dormant Commerce Clause doctrine.⁶¹

2. *West Lynn Creamery*

*West Lynn Creamery, Inc. v. Healy*⁶² posed a different fact situation for the Court. Massachusetts had imposed an assessment on all milk sold by dealers (two-thirds of which was produced outside the state) to Massachusetts retailers.⁶³ The revenue from the assessment was collected in a separate fund and later distributed to Massachusetts dairy farmers.⁶⁴ At first glance, the subsidy scheme seemed not to pose a problem because it involved a nondiscriminatory tax and a cash subsidy. The Court nevertheless struck it down.

Justice Stevens’s decision began by comparing the price support program with the paradigmatic violation of the dormant Commerce Clause doctrine—the tariff. “A tariff . . . simultaneously raises revenue and benefits local producers by burdening their out-of-state competitors,” Stevens wrote.⁶⁵ Since tariffs are clearly unconstitutional, he continued, “the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means.”⁶⁶ These cases featured laws that sought to “neutraliz[e] the advantage possessed by lower cost out-of-state producers,” and he concluded that Massachusetts’s law was similar to other schemes the Court had invalidated.⁶⁷ “Its avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States,” he noted.⁶⁸ Despite the fact that the assessment applied to milk produced in and out of Massachusetts, “its effect on Massachusetts producers is entirely . . . offset by the subsidy provided exclusively to Massachusetts dairy

⁶¹ See, e.g., *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) (adopting the view that a discriminatory “ordinance is valid simply because it professes to be a health measure . . . would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods”); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949) (“This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.”).

⁶² 512 U.S. 186 (1994).

⁶³ *W. Lynn Creamery, Inc.*, 512 U.S. at 188.

⁶⁴ *Id.*

⁶⁵ *Id.* at 193.

⁶⁶ *Id.*

⁶⁷ *Id.* at 194.

⁶⁸ *Id.*

farmers [T]he tax is thus effectively imposed only on out-of-state products.”⁶⁹ Stevens noted the similarity between the Massachusetts scheme and Hawaii’s liquor tax exemption that was struck down in *Bacchus Imports*. “[I]f a discriminatory tax rebate,” like that in *Bacchus*, “is unconstitutional, Massachusetts’s pricing order is surely invalid” because Massachusetts not only rebated the amount of tax paid, but also distributed revenue from the assessments on milk produced elsewhere to in-state producers.⁷⁰

The State put forward a number of defenses, which Stevens dismissed in turn. Of particular importance is his treatment of Massachusetts’s claim that since each component of the price support program, standing alone, would be valid, the combination cannot be unconstitutional.⁷¹ Starting from the premises that nondiscriminatory taxes and direct subsidies are permissible, but that “[o]ur Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce,”⁷² Stevens wrote that the State “erred in assuming that the constitutionality of the pricing order follows logically from the constitutionality of its component parts.”⁷³

[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State’s political processes can no longer be relied upon to prevent legislative abuse, because of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.⁷⁴

Moreover, Stevens refused to “divorce the premium payments from the use to which the payments are put. It is the entire program . . . that simultaneously burdens interstate commerce and discriminates in favor of local producers.”⁷⁵ The choice of means, he concluded, “cannot guarantee the constitutionality of the program as a whole.”⁷⁶

To the argument that the milk dealers who paid the assessment and the farmers who collected the subsidy were not in competition, and thus there could be no discrimination, Stevens responded that it is the *burden* discrimination places “on any part of the stream of commerce—from wholesaler to retailer to consumer” that matters.⁷⁷ “[A] burden placed at any point,” he wrote, “will result in a disadvantage to the out-of-state producer.”⁷⁸ Similarly, Stevens was not impressed with the argument that because Massachusetts consumers would bear the cost of the program by paying more for milk, regardless of where it was produced, its effects would be largely felt in-state. “This argument, if accepted, would undermine almost every discriminatory tax case,” he noted.⁷⁹ Regardless of who bears the incidence of the tax, if it is discriminatory, then it is unconstitutional.⁸⁰ Finally, the Court, as it did in

⁶⁹ *Id.*

⁷⁰ *Id.* at 197.

⁷¹ *Id.* at 198.

⁷² *Id.* at 201.

⁷³ *Id.* at 199.

⁷⁴ *Id.* at 200.

⁷⁵ *Id.* at 201.

⁷⁶ *Id.*

⁷⁷ *Id.* at 202.

⁷⁸ *Id.*

⁷⁹ *Id.* at 203.

⁸⁰ *Id.* Stevens also noted that the Massachusetts consumers are part of an integrated interstate market. “[T]he purpose and effect of the pricing order are to divert market share to Massachusetts

Bacchus, rejected the plea for a “struggling industry” exception to the dormant Commerce Clause doctrine.⁸¹

Justice Stevens wrote for a five-member majority; while Justices Scalia and Thomas joined the Court in its judgment, they declined to sign on to Stevens’s opinion. Scalia wrote a concurring opinion that took issue with the potential expanse of the majority’s reasoning, especially insofar as it seemed to reserve the question of the constitutionality of outright subsidies. “It seems to me,” Scalia wrote, “that a state subsidy would *clearly* be invalid under any formulation of the Court’s guiding principle” that the Commerce Clause prohibits states to act to give local industries an artificial advantage over goods produced in other states at a lower cost.⁸² The potential of such a theory to invalidate “many garden-variety state laws heretofore permissible” was unacceptable to Scalia, who thought that there was an alternate basis for deciding the case.⁸³

Though no fan of the dormant Commerce Clause doctrine,⁸⁴ Scalia nevertheless felt obliged to “honor[] the holdings of our past decisions” while not “extend[ing] the rationale that produced those decisions any further.”⁸⁵ Summarizing the Court’s prior decisions, he sketched the two ends of the spectrum of state regulation of commerce. At one end lay discriminatory taxes, which he acknowledged were unconstitutional, as was a discriminatory exemption or credit against a facially neutral tax.⁸⁶ At the other end, however, “a state subsidy from general revenues,” he stated, “is so far removed from what we have hitherto held to be unconstitutional, that prohibiting it must be regarded as an extension of our negative-Commerce-Clause jurisprudence and therefore, to me, unacceptable.”⁸⁷ The question was where “a nondiscriminatory tax upon the industry, the revenues from which were placed in a segregated fund, which fund is disbursed as ‘rebates’ or ‘subsidies’ to in-state members of the industry,” fell on the spectrum.⁸⁸ Was it closer to the straight subsidy, or to the discriminatory credit or exemption from the neutral tax?

Though pronouncing it a “close” question, Scalia declined “to disembark from the negative-Commerce-Clause train.”⁸⁹ He “would allow a State to subsidize its domestic industry so long as it does so from nondiscriminatory taxes that go into the

dairy farmers. This diversion necessarily injures the dairy farmers in neighboring states.” *Id.* Of course, the same might be said for cash subsidies, which the Court assumed were not problematic under the dormant Commerce Clause doctrine. *See id.* at 199 (“A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business.”).

⁸¹ *Id.* at 205 (“If we were to accept these arguments, we would make a virtue of the vice that the rule against discrimination condemns. Preservation of local industry by protecting it from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.”).

⁸² *Id.* at 208 (Scalia, J., concurring).

⁸³ *Id.* at 209 (Scalia, J., concurring).

⁸⁴ *Id.* at 209-10; *see also* *Tyler Pipe Indus., Inc. v. Wash. State Dep’t Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part) (expressing doubt about the strength of negative-Commerce-Clause doctrine).

⁸⁵ *W. Lynn Creamery, Inc.*, 512 U.S. at 210 (Scalia, J., concurring).

⁸⁶ *Id.* at 210-11 (Scalia, J., concurring) (“It is long settled that [a discriminatory tax on interstate commerce] is unconstitutional under the negative Commerce Clause [E]xemption from or ‘credit’ against a ‘neutral’ tax is no different in principle from the first, and has likewise been held invalid.” (citation omitted)).

⁸⁷ *Id.* at 211 (Scalia, J., concurring).

⁸⁸ *Id.* at 210 (Scalia, J., concurring).

⁸⁹ *Id.* at 211 (Scalia, J., concurring).

State's general revenue fund."⁹⁰ While nodding toward the literature suggesting an economic rationale for the distinction between taxes and subsidies, he claimed not to rely on that thinking. "I draw the line where I do," he wrote, "because it is a clear, rational line at the limits of our extant negative-Commerce-Clause jurisprudence."⁹¹

West Lynn Creamery, though relying heavily on *Bacchus Imports* and *New Energy Company*, represents an expansion of both cases, though the expansion is hardly surprising and imminently justifiable in the result it reached. *Bacchus Imports* and *New Energy Company* simply applied the nondiscrimination principle to the award and denial of tax exemptions or tax credits that favored in-state producers over out-of-state producers, while acknowledging that a difference existed between tax credits or exemptions on the one hand, and cash subsidies that were available only to a state's resident on the other. *West Lynn Creamery*—in part relying on the unarticulated premise that the Constitution bars clever and indirect violations of its terms as well as direct and inartful ones—stands for the proposition that the whole of a program could be invalid where the sum of its parts might not be if the program exists or operates to discriminate against interstate commerce. The Court was careful not to take the labels or characterizations assigned by the State at face value. It instead looked to the operation and likely effects of the program. After doing so, even two of the Court's ardent dormant Commerce Clause doctrine critics could not locate a principled point of distinction between the Massachusetts price support program and the Court's prior cases. As Professor Tribe notes in his treatise, *West Lynn Creamery* "at once confirmed the breadth of [the Court's] prohibition on discriminatory taxation and expanded that prohibition considerably. The states may still serve as laboratories for democracy, but their fiscal experiments are subject to rigorous judicial scrutiny, designed to smoke out measures that discriminate."⁹²

Though it seems to reach the right result, *West Lynn Creamery* is, in many ways, an unsatisfactory opinion. As Justice Scalia pointed out in his concurring opinion, Justice Stevens's efficiency rationale for the dormant Commerce Clause doctrine seems to call into question scores of programs that had heretofore remained unquestioned.⁹³ In addition, as the dissenters pointed out, the recipients of Massachusetts's subsidies (in-state milk producers) were not necessarily those on whom the assessment was made (milk dealers).⁹⁴ Scalia's opinion, however, is equally unsatisfactory. Upholding Massachusetts's price support program as long as the assessment was laundered in the State's general revenue fund before distribution

⁹⁰ *Id.* (Scalia, J., concurring).

⁹¹ *Id.* at 212 (Scalia, J., concurring).

⁹² TRIBE, *supra* note 44, at 1113.

⁹³ *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring). To take but one example, suppose a state heavily subsidized roads and education in a bid to lure industry from a state with lower labor costs. If a business moved from one state to the other in order to take advantage of that infrastructure, would the subsidizing state be accused of "neutralizing the advantage possessed by lower cost, out-of-state producers?" See Coenen, *supra* note 45, at 1003.

⁹⁴ *W. Lynn Creamery, Inc.*, 512 U.S. at 214 (Rehnquist, C.J., dissenting) (noting that "the Court strikes down this method of state subsidization because the nondiscriminatory tax levied against all milk *dealers* is coupled with a subsidy to milk *producers*"); Coenen, *supra* note 45, at 1016 ("The Chief Justice . . . suggested that the critical criterion in assessing the constitutionality of state subsidy programs should be whether they direct payments on a discriminatory basis to the same persons whose tax payments create the subsidy fund." (citation omitted)); Coenen & Hellerstein, *supra* note 6, at 2175 (noting the criticism and the majority's failure to respond to it).

as a subsidy, as opposed to placing it in a segregated fund, would seem the very definition of elevating form over substance.⁹⁵

Scalia's distinction may be "clear," but clarity comes at the cost of arbitrariness and maybe even rationality. Dissatisfaction with the Court's reasoning in *West Lynn Creamery* led two scholars to look at that decision and others in which the Court struck down linked taxing and spending programs to try to extrapolate an analytical framework for future use. The next section summarizes their conclusions, while Part V uses their analysis to evaluate the Maine Rx Program.

C. A THEORY OF SUSPECT LINKAGES

After surveying the cases decided by the Supreme Court, Professors Dan Coenen and Walter Hellerstein distilled the principles that seemed to drive the Court's decisions covering linked taxing and spending schemes.⁹⁶ Their article identified five factors on which the so-called "linkage" cases hinged, and extracted the three "key principles" which courts should apply when hearing similar cases.⁹⁷ Coenen and Hellerstein labeled their five factors: (1) internalization, (2) simultaneity, (3) scope, (4) correlation and (5) policy responsiveness.⁹⁸ The factors and the principles are summarized below.

If the state legislature has "structured [a] payment as a method of directly reducing the obligation to pay [a] single, particular tax against which the credit or exemption operates," then, according to Coenen and Hellerstein, *internalization* is present.⁹⁹ Internalization can be present in a strong or a weak form. "Strong internalization," for example, is found in "the case of the tax credit or exemption [that is] enacted along with and exactly offsetting the underlying tax in such a way as to disfavor all and only members of a constitutionally protected group."¹⁰⁰ If, on the other hand, the offsetting exemption or credit operates against *another* tax, then "weak internalization" is present.¹⁰¹ No internalization is present "when the state does not purport to grant tax relief at all, but instead makes outright payments," other than true tax rebates.¹⁰²

Simultaneity simply means that the tax and spending measures were passed together as a package.¹⁰³ "[S]imultaneity," the authors wrote, "is strongly suggestive of a legislative purpose to have the spending program offset the tax in a manner functionally akin to the sort of credit or exemption that gives rise to

⁹⁵ Coenen & Hellerstein, *supra* note 6, at 2174 ("Following Justice Scalia's logic, Massachusetts could have imposed the same taxes in the same amounts on the same milk dealers, and paid the same subsidies in the same amounts to the same milk producers, if only the state had run the tax payments into, and the subsidies back out of, the state's general fund." (citation omitted)); Note, *Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 HARV. L. REV. 1537, 1554 (1997) (asking why "[a]n otherwise unconstitutional tax becomes constitutional if the tax revenue simply makes a momentary pit stop in the general treasury").

⁹⁶ Coenen & Hellerstein, *supra* note 6.

⁹⁷ *Id.* at 2195.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2197-198.

¹⁰⁰ *Id.* at 2196.

¹⁰¹ *Id.* at 2198. Their example is a credit against state property taxes equal to the amount of state income taxes paid. *Id.* at 2197-198.

¹⁰² *Id.* at 2198.

¹⁰³ *Id.*

internalization.”¹⁰⁴ Moreover, “simultaneity may well distort the political processes in a way that raises particular risks of factional overreaching.”¹⁰⁵

The *scope* of the taxing and spending measures “concerns the relationship between the class of taxpayers, the class of payment beneficiaries, and the class of persons protected by the operative constitutional rule.”¹⁰⁶ If an “exemption or credit afforded by the state covers *all*, but *only*, those state residents subject to the tax,” Coenen and Hellerstein would term such a payment “universal.”¹⁰⁷

Similar to the previous three factors, *correlation* concerns the level of “connectedness” between the taxing and spending programs. The authors’ definition, however, differs from the previous three factors because it embraces several different ways in which taxing and spending programs can be connected or linked. Correlation, thus, can occur with respect to the duration (i.e., whether the spending lasts as long as the tax), computation (i.e., whether both “bear a significant mathematical relationship”¹⁰⁸ when computed) and source (whether the state “sets aside some or all of the proceeds of the challenged tax itself to fund its payment program”).¹⁰⁹ “[W]hen two of the three forms of correlation . . . are present,” the authors “believe that such correlation almost always marks the case”¹¹⁰

Finally, Coenen and Hellerstein suggest that judges ought to inquire “whether the challenged state program raises distinctive concerns in light of the policies that drive the particular tax discrimination doctrine at issue” (such as the dormant Commerce Clause doctrine or the Privileges and Immunities Clause of Article IV).¹¹¹ They refer to this as *policy responsiveness*.

Using the five “objective” factors, Coenen and Hellerstein then proposed three tests for tax and subsidy programs that would gauge the extent to which the factors described above are present in those programs. The presence of a number of those factors, in turn, is strongly suggestive of an unconstitutional linkage that should result in a program’s invalidation by a court.

- *The Virtually Per Se Rule*—When a program is structured so that the state internalizes an exemption to a particular tax, a “virtually per se rule” establishes a linkage.¹¹²
- *Twin Indicia Rule of Thumb*—If internalization is not present, the authors urge the application of a rule of thumb for establishing linkage that would presume its presence “when two of . . . three ‘objective’ linkage factors other than internalization—that is, simultaneity, correlation, and scope—are present in a strong sense.”¹¹³

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2199.

¹⁰⁷ *Id.* Coenen and Hellerstein note that spending can be under-universal and over-universal in the sense that some payments will not cover all state citizens and others will cover persons who are not state citizens. *Id.* at 2199-200.

¹⁰⁸ Coenen and Hellerstein’s example is a tax and a spending program, both of which “are computed as a stated percentage of gross receipts.” *Id.* at 2200.

¹⁰⁹ *Id.* at 2200-201.

¹¹⁰ *Id.* at 2201.

¹¹¹ *Id.*

¹¹² *Id.* at 2195.

¹¹³ *Id.* at 2196.

- *Five-Factor Analysis*—“In all other cases . . . courts should consider all five linking factors in deciding whether to treat the taxing measure and the spending measure as parts of an inseparable whole.”¹¹⁴

V. ANALYZING THE MAINE RX PROGRAM

This section analyzes the Maine Rx Program in light of the criteria and tests that Professors Coenen and Hellerstein developed in their article. Before turning to Coenen and Hellerstein’s fine-grained analysis, however, it is worth noting the striking similarity between the Maine Rx Program and Massachusetts’s dairy price support scheme.

A. FACTUAL SIMILARITIES BETWEEN *WEST LYNN CREAMERY* AND THE MAINE RX PROGRAM

West Lynn Creamery involved a facially even-handed tax on the sale of milk regardless of where the milk was produced. The revenue from this tax was placed in a segregated fund from which subsidies to *in-state* milk producers were drawn.¹¹⁵ Despite the complaints from the dissent that the taxpayers and the subsidy recipients were different groups, the majority concluded that the tax and subsidy were linked in a way that discriminated against interstate commerce.¹¹⁶ Justice Scalia, in his concurrence, stated that he would have upheld the program if the subsidy had come from general revenue, rather than from a segregated fund.¹¹⁷

The Maine Rx Program taxes drug manufacturers and “labelers”¹¹⁸ selling drugs to the State’s Medicaid patients. The revenue from that tax goes into a segregated fund, from which subsidies to “participating retail pharmac[ies]”¹¹⁹ selling discounted prescription drugs to Program enrollees are drawn. Those pharmacies also receive an initial \$3 per prescription “professional fee” for filling prescriptions.¹²⁰ Somewhat obscured by the statute’s definitions, however, is the fact that the participating retail pharmacies to which the money from the Maine Rx Program goes would also be “labelers” who would be obligated to pay the tax on the sale of drugs to fund the subsidy. *Not* included in that definition are out-of-state drug manufacturers that are also taxed, but which receive no subsidy for the sale of discounted drugs as the in-state pharmacies would. Accordingly, the problem raised by Chief Justice Rehnquist in *West Lynn Creamery*—that those taxed and the subsidy recipients were not necessarily the same groups—is not present in the Maine Rx Program. The same retail pharmacies responsible for paying the tax will have that tax offset by the amounts they receive to dispense the discounted drugs to Program enrollees. When the prescription fee for filling Program prescriptions, also funded by the segregated fund, is taken into account, those in-state pharmacies may even be reimbursed in excess of the amount they were taxed.

¹¹⁴ *Id.*

¹¹⁵ *W. Lynn Creamery, Inc.*, 512 U.S. at 190-91.

¹¹⁶ *Id.* at 194-95.

¹¹⁷ *Id.* at 211 (Scalia, J., concurring).

¹¹⁸ The statute defines “labelers” as anyone “that receives prescription drugs from a manufacturer or wholesaler and repackages those drugs for later retail sale.” 22 ME. REV. STAT. ANN. tit. 22, § 2681(2)(C) (West Supp. 2002). The term would clearly include retail pharmacies.

¹¹⁹ *Id.* § 2681(5).

¹²⁰ *Id.* § 2681(6)(D).

In fairness, the Maine Rx Program is not intended to allow Maine drug manufacturers to compete with lower-cost drug manufacturers located out-of-state. Thus, Justice Stevens's "de facto tariff" argument seems inapposite in this case. There is little reason, however, to think that this difference would serve to distinguish *West Lynn Creamery*. Despite the fact that Stevens's opinion offered an efficiency justification for its decision—the milk price support program enabled Massachusetts to vitiate the advantage that lower cost producers from other states possessed—he later stated that *where* the discrimination occurred in the "stream of commerce" was not relevant.¹²¹ It was enough that it occurred. Similarly, Maine is seeking to provide a broad benefit to its residents (and its pharmacists) through a subsidy. This subsidy is funded by what amounts to a discriminatory tax on out-of-state drug manufacturers that will not be eligible for subsidies available to in-state labelers/pharmacies. The Court has rejected similar arguments that, if there is no competition between the in-state recipients of the subsidy and the out-of-state payers of the "rebate," for instance, no discrimination exists.¹²²

Moreover, nothing in the Court's opinion suggests that the de facto tariff argument is the *only* case in which the dormant Commerce Clause doctrine operates. It merely offered the tariff as the "paradigmatic example of a law discriminating against interstate commerce"¹²³ One could characterize the problem as one of externalities—the State forcing out-of-state interests to bear the costs of a benefit legislated for the State's citizens—or a breakdown in the political process.¹²⁴ One could even argue that prescription drug prices are a "national problem" that calls for a national, as opposed to local, solution.¹²⁵

B. APPLYING COENEN AND HELLERSTEIN'S FIVE-FACTOR ANALYSIS

Even if the factual similarities between the program in *West Lynn Creamery* and the Maine Rx Program are not beyond doubt, Coenen and Hellerstein's factors help clinch the case for unconstitutionality. Coenen and Hellerstein's analysis of linkage is undoubtedly an improvement on the *West Lynn Creamery* decision, which has the hallmarks of what Professor Cass Sunstein calls an "incompletely theorized" line of reasoning.¹²⁶ The majority opinion provided little in the way of a useful guide for

¹²¹ *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 202 (1994).

¹²² *See supra* notes 50-51 and accompanying text.

¹²³ *W. Lynn Creamery, Inc.*, 512 U.S. at 193; *see also* *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 571 (1997) (acknowledging, as a justification of the dormant Commerce Clause doctrine, "the central importance of federal control over interstate and foreign commerce" and the Founders' desire to eliminate "invidious and partial restraints" (internal quotation marks omitted)).

¹²⁴ Language from Stevens's opinion suggests that the majority saw this as a problem as well.

[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy. So, in this case, one would ordinarily have expected at least three groups to lobby against the order premium, which, as a tax, raises the price (and hence lowers demand) for milk: dairy farmers, milk dealers, and consumers. But because the tax was coupled with a subsidy, one of the most powerful of these groups, Massachusetts dairy farmers, instead of exerting their influence against the tax, were in fact its primary supporters.

W. Lynn Creamery, Inc., 512 U.S. at 200-01.

¹²⁵ *See* *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851); *see also infra* notes 137-140 and accompanying text for a discussion of the "policy responsiveness" aspect of Coenen and Hellerstein's suspect linkage analysis in the context of the Maine Rx Program.

¹²⁶ *See* CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

application to future cases, other than to say that its dormant Commerce Clause jurisprudence has “eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.”¹²⁷ Moreover, Justices Scalia and Thomas do little more to explain the majority’s decision, instead relying on analogies to earlier cases, such as *Bacchus Imports*, and signaling that they would approve the very same program as long as the subsidy is funded from general revenues.¹²⁸ As shown in this section, the Maine Rx Program has several characteristics that Coenen and Hellerstein have identified as strongly suggestive of unconstitutional linkage.

1. Internalization

As Coenen and Hellerstein define “internalization,”¹²⁹ the Program is probably not internalized because there is no exemption or credit that directly offsets the tax. On the other hand, since the subsidy payments to the pharmacies are coupled with the \$3 prescription fee to which pharmacies are entitled,¹³⁰ the payments may constitute a true “tax rebate” that Coenen and Hellerstein would include in their definition of internalization.¹³¹

2. Simultaneity

Simultaneity, an important factor in *West Lynn Creamery*, is clearly present in this case.¹³² Both the tax and the subsidy components of the Maine Rx Program were passed at the same time, with the former going into the segregated fund from which the latter is drawn. Because the two were part of the same package, we might infer from that a legislative intent to allow the pharmacies to have their rebate liability offset by the subsidy. This factor, as it did in *West Lynn Creamery*,¹³³ however, ought to raise questions about whether the legislature bought-off possible domestic opposition, leaving unpopular out-of-state drug manufacturers to bear the full costs of the Program, and to recoup those costs, if at all, by raising prices in

¹²⁷ *W. Lynn Creamery, Inc.*, 512 U.S. at 201.

¹²⁸ See *supra* text accompanying note 93.

¹²⁹ See Coenen & Hellerstein, *supra* note 6, at 2197-198; see also note 102 and accompanying text.

¹³⁰ See *supra* note 14 and accompanying text.

¹³¹ See *supra* note 105 and accompanying text.

¹³² *W. Lynn Creamery, Inc.*, 512 U.S. at 201.

Respondent’s argument [that if separate parts of the program are constitutional, the program as a whole is too,] would require us to analyze separately two parts of an integrated regulation, but we cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or the distributions from the fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers.

Id.; see also *id.* at 200 (noting that the subsidy to in-state interests could buy-off domestic opposition to the facially neutral tax, thus distorting the political processes that might otherwise operate to defeat the tax); Coenen & Hellerstein, *supra* note 6, at 2198 (“[S]imultaneity may well distort political processes in a way that raises particular risks of factional overreaching. The majority in *West Lynn Creamery, Inc.* focused on this point, and we believe that it was on solid ground in doing so.” (citations omitted)); *id.* at 2216 (“Insofar as *West Lynn Creamery, Inc.* is our guide, it emphasizes one linkage factor we have identified above: simultaneity. The Court relied on the political dynamics of the enactment of the taxing and spending measures as the glue that held them together for constitutional purposes.” (citations omitted)); *id.* at 2217 (“Perhaps the principal practical teaching of *West Lynn Creamery, Inc.*—although it is one that is implicit rather than explicit—lies in the notion that simultaneity is a central factor in subsidy cases.”).

¹³³ See *supra* note 74 and accompanying text.

other jurisdictions that lack similar plans. That drug manufacturers were seen as primarily responsible for the cost of prescription drugs, and that they would be brought in line “or else,” is strongly suggested by another part of the Program that outlawed “drug profiteering,”¹³⁴ and a provision threatening the imposition of price controls if prices did not come down by 2003.¹³⁵

3. Scope

The Maine Program appears to be nearly universal in scope. Pharmacies qualify for the subsidy by offering discounted drugs to Program participants and are reimbursed by the State. By reimbursing the pharmacies who, as “labelers” under the Program, are also obliged to pay a tax on drug sales to the State’s Medicaid population, but not the drug manufacturers, the subsidy appears to be restricted to Maine’s citizens, and the Program itself would cover most Maine citizens otherwise adversely affected by the tax. In operation, then, the apparently neutral tax is, in reality, discriminatory since in-state pharmacies and residents receive a benefit not available to those out-of-state.

4. Correlation

In Coenen and Hellerstein’s schema, spending and taxing programs can be connected, or “correlated,” in any of three ways; the presence of two, they think, presents strong evidence of linkage.¹³⁶ The tax and subsidy in the Maine Program seems to be connected in at least two ways. First, “source” connection is present—the tax goes into a separate fund that pays for the prescription drug subsidy that compensates the participating pharmacies. Second, one may assume that the programs are connected as to “duration” as well. Though the statute establishing the Maine Rx fund makes reference to legislative appropriations, the taxes on drug sales to Medicaid patients clearly constitute the primary source of funding. Were the tax repealed, it seems difficult to imagine that the drug subsidy would continue for very long.

5. Policy Responsiveness

Though Coenen and Hellerstein admit that policy responsiveness is less objective than determining whether, say, the taxing and spending programs were passed at the same time,¹³⁷ they nevertheless are correct in making it part of any inquiry into linkage. Many of the concerns underlying the dormant Commerce Clause doctrine are implicated by the Maine Rx Program. First, the *Cooley* rule establishes that national problems require national solutions.¹³⁸ One might say that, since drug prices are a problem nationwide, the solution should come from Congress, rather than from the various states whose piecemeal reforms could lead to even higher prices in states without such plans. Second, the anti-discrimination principle holds that states ought not to secure advantages for their citizens or their

¹³⁴ See ME. REV. STAT. ANN. tit.22, § 2697 (West Supp. 2002). This provision was also struck down by the district court, but was not part of the appeal to the First Circuit.

¹³⁵ See *id.* § 2693 (permitting the establishment of maximum retail prices for prescription drugs after 2003).

¹³⁶ See *supra* notes 111-113 and accompanying text.

¹³⁷ See Coenen & Hellerstein, *supra* note 6, at 2218-19.

¹³⁸ *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

industries at the expense of outsiders¹³⁹ who are unable to adequately represent their interests in the political process.¹⁴⁰ Third, and clearly related to the anti-discrimination principle, states ought not act to benefit their citizens in ways that possibly burden *other* states' residents by imposing on them the costs of that state's policy.¹⁴¹

In addition to the close resemblance that the Maine Rx Program bears to the facts in *West Lynn Creamery*—down to the segregated fund from which the funds for the subsidy are drawn—most of Coenen and Hellerstein's indicia of linkage are also present. At the very least, under either the five-factor analysis or the twin-indicia rule of thumb, there is an illegitimate linkage between the tax and the subsidy.¹⁴² The strong presence of at least two of their objective factors—simultaneity and correlation, and likely scope as well—certainly would establish linkage under the twin indicia rule of thumb.¹⁴³

VI. CAN MAINE DEFEND ITS PROGRAM?

A. AVAILABILITY OF LESS DISCRIMINATORY ALTERNATIVES

Coenen and Hellerstein stress that the tests for linkage drawn from the factors they identify should not be mechanically applied.¹⁴⁴ Even in applying the “virtually per se” rule of invalidity in dormant Commerce Clause doctrine cases, the Supreme Court has allowed states to present evidence that there is no alternative to the state's discrimination.¹⁴⁵ The Court even upheld at least one starkly discriminatory statute on that ground.¹⁴⁶ Could Maine, in this case, present compelling evidence to rebut the presumption that there is linkage and that the Program should be upheld? Considering the range of options that Maine had to fund the subsidy, the Court should be somewhat suspicious of its motive in linking the subsidy with the “rebate” program.

Alternatively, Maine could have raised individual income tax rates, especially in the upper income brackets, and redistribute that money to pharmacies offering discounted drugs. It could have offered its citizens a tax credit against amounts

¹³⁹ *Camps Newfound/Owatonna*, 520 U.S. at 571 (noting that the power to regulate commerce was given to Congress “[b]ecause each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents” and that its adoption “had immediately effected a curtailment of state power” even in the absence of congressional action).

¹⁴⁰ *W. Lynn Creamery, Inc.*, 512 U.S. at 200 (“[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.”).

¹⁴¹ *See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986) (“While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess.”).

¹⁴² *See supra* notes 116-117 and accompanying text.

¹⁴³ *See supra* note 116 and accompanying text.

¹⁴⁴ Coenen & Hellerstein, *supra* note 6, at 2195.

¹⁴⁵ *See Maine v. Taylor*, 477 U.S. 131, 138 (1986) (“[O]nce a state law is shown to discriminate against interstate commerce either on its face or in practical effect, the burden falls on the State to demonstrate both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.”).

¹⁴⁶ *Taylor*, 477 U.S. at 151-52 (upholding Maine statute prohibiting importation of live baitfish from out-of-state).

spent on prescription drugs, in effect subsidizing their purchase. It could have raised excise or “sin taxes” on items like tobacco products, beer and liquor. It even could have increased corporate taxes or other fees to create additional revenue for the plan. The fact that it chose to require drug manufacturers to enter into “voluntary” rebate agreements to fund the Program suggests the classic protectionist move of imposing costs on out-of-state economic actors and residents to benefit its own citizens or economic interests.

B. MAINE IS NOT A “MARKET PARTICIPANT”

Though the First Circuit rejected the argument,¹⁴⁷ Maine could claim that it was simply acting as a participant in the prescription drug market and choosing to negotiate terms as would private parties.¹⁴⁸ The First Circuit properly noted, however, that Maine was not *purchasing* prescription drugs for its own account, nor was it spending state money to build prescription drug plants that would sell only to in-state residents. Individuals would still purchase their own drugs at a price regulated by the State.¹⁴⁹ Taxing and spending in this manner resembles the sort of “primeval governmental activity” that Justice Scalia remarked upon in his *New Energy Company* opinion that rejected a similar appeal to the market participant exception by the State of Ohio.¹⁵⁰ Simply put, Maine is seeking to indirectly regulate the price of prescription drugs sold in-state. It is not “participating” in that market. Moreover, even if Maine could fairly be described as participating in the prescription drug market for its *Medicaid* patients, the requirement that all drug sellers participating in those programs rebate money to subsidize the purchase of *other* drugs sold to *other* customers is the classic “downstream” regulation of another market, which a plurality of the Court has disapproved.¹⁵¹ Given the

¹⁴⁷ *PhRMA v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *cert. granted*, 122 S. Ct. 2657 (U.S. June 28, 2002) (No. 01-188).

¹⁴⁸ The market-participant exception to the dormant Commerce Clause doctrine permits states to discriminate against interstate commerce if the state is merely acting as an ordinary participant in a particular market, as opposed to a governmental regulator. *See Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *see generally* BITTKER, *supra* note 3, at §§ 7.01-7.07; CHEMERINSKY, *supra* note 3, at § 5.3.7.2; TRIBE, *supra* note 44, at § 6-11; Dan T. Coenen, *Untangling the Market-Participant Exception to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

¹⁴⁹ *Concannon*, 249 F.3d at 80.

¹⁵⁰ In *New Energy Co. of Ind. v. Limbach*, Ohio argued that its discriminatory tax exemption was constitutional because it was acting to participate in the market for alternative fuels by subsidizing its in-state production. 486 U.S. 269, 277 (1988). Justice Scalia responded:

The market-participation doctrine has no application here. The Ohio action ultimately at issue is neither its purchase or its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity. To be sure, the tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market We think it clear that Ohio’s assessment and computation of its fuel sales tax, regardless of whether it produces a subsidy, cannot plausibly be analogized to the activity of a private purchaser.

Id. at 277-78.

¹⁵¹ In *S. Cent. Timber Dev., Inc. v. Wunnicke*, the Court struck down an Alaska regulation that conditioned the sale of state-owned timber on the local processing of that timber prior to export from the State. 467 U.S. 82, 98 (1984). In a plurality opinion, Justice White refused to apply the market-participant doctrine to the timber sale. *Id.* He found that Alaska was not participating in the timber processing market; it was participating in the timber sale market. *Id.* Justice White wrote:

weaknesses of its market-participant defense, and the panoply of alternatives to its discriminatory tax and subsidy program, the outcome seems clear: the Maine Rx Program should be struck down.

VII. CONCLUSION

Drug manufacturers are only slightly more popular than members of Congress or corporate executives these days. Given the high cost of healthcare generally, and of prescription drugs in particular, it is natural that governments are looking for a way to both reduce their own healthcare costs and to advance the health and welfare of those citizens who are either uninsured or underinsured. The Maine Rx Program clearly aims toward these goals. However, since the early nineteenth century, the Court has consistently held that while states may seek the best for their citizens, they may not do so by imposing costs that citizens of other states are forced to bear, or by otherwise discriminating against or burdening interstate commerce.¹⁵² While this is not a principle confined exclusively to the dormant Commerce Clause,¹⁵³ it has found its most eloquent expression there, whether in *Cooley's* prescription of national solutions for national problems,¹⁵⁴ in Justice Cardozo's blunt admonition that the Constitution and the Commerce Clause were premised on the notion that the

[t]he limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. Unless the "market" is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.

Id. at 97-98.

¹⁵² See *supra* note 3.

¹⁵³ As noted in *McCulloch v. Maryland*:

When [states] tax the chartered institutions of the States, they tax their constituents But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves.

17 U.S. 316, 435 (1819); see also *U.S. Term Limits v. Thornton*, 514 U.S. 779, 822 (1995).

Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and national character that the Framers envisioned and sought to ensure. . . . Such a patchwork would also sever the direct link that the Framers found so critical between the National Government and the people of the United States.

Id.; see also CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 42 (1969) (arguing that "the very structure of the relation between the national representatives and his constituency, there arises a compelling inference of some national constitutional protection" against certain "state infringement[s]"); Denning, *supra* note 3 (arguing that the dormant Commerce Clause can be located in a similar structural relationship).

¹⁵⁴ *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851) (stating "[w]hatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of a nature as to require exclusive regulation by Congress").

states would “sink or swim” together,¹⁵⁵ or in Justice Jackson’s paean to the open economy.¹⁵⁶

Ostensibly neutral taxes, the effects of which are offset by credits or exemptions available only to local industries or local citizens, are clearly unconstitutional. The Court has further held that funding subsidies, which have not been questioned in the past, with the proceeds of ostensibly neutral taxes in a way that only outsiders feel the pinch, is also unconstitutional. The Maine Rx Program bears more than a passing resemblance to those measures that the Court has previously struck down as violative of the venerable nondiscrimination principle. Moreover, when analyzed under Coenen and Hellerstein’s criteria for determining when a suspect linkage between a tax and subsidy exists, the invalidity comes into sharper focus. Maine has no plausible defense to offer and, as such, the Program should be struck down on the ground that it violates the dormant Commerce Clause doctrine. By deciding this case based on a suspect linkage analysis, the Court could render the correct decision and avoid the problems associated with the impermissible extraterritorial effects argument offered in the lower court.

¹⁵⁵ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). “The Constitution was framed under the dominion of a political philosophy less parochial in range. It 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.*

¹⁵⁶ *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34, 537-38, 539 (1949).

The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished . . . [O]ur economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, [and] has as its corollary that the states are not separable economic units . . . Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 533-34.