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Dormant Commerce Clause, Tariffs, Subsidies

**Abstract:**

The dormant Commerce Clause of the United States Constitution, as currently construed by the Supreme Court, permits states to “promote” instate businesses but not to “protect” those businesses from out-of-state competition. This Article examines the tenuous distinction between promoting and protecting local industry in the context of state tariffs and state subsidies. A state tariff—a tax imposed solely on goods imported from another state—is the “paradigmatic example” of a protectionist state law that violates the dormant Commerce Clause. Meanwhile, a state subsidy to domestic producers of a good, when funded out of general revenues, is treated as virtually per se constitutional because it “merely assists local business.” This Article looks to international economics and constitutional history in an attempt to justify the differing treatment of tariffs and subsidies. The analysis suggests that the differing treatment can be justified, although not because subsidies merely promote local business. The analysis also provides a framework for determining whether a state law is more like a valid subsidy or an invalid tariff, and thus aids in understanding a number of recent Supreme Court cases that address the validity of state taxing schemes that favor local businesses.