

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

With Foreign Nations.—There are certain dicta urging or suggesting that Congress' power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the nation's unlimited power over foreign relations, the former was conferred upon the National Government primarily in order to protect freedom of commerce from state interference. The four dissenting Justices in the *Lottery Case* endorsed this view in the following words: "[T]he power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other."⁷⁰³

Twelve years later, Chief Justice White, speaking for the Court, expressed the same view: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers, and therefore the cases cited, and many more which might be cited announcing the principles which they uphold, have obviously no relation to the question in hand."⁷⁰⁴

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it."⁷⁰⁵ And nearly fifty years later, Justice Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."⁷⁰⁶ Today it is firmly

⁷⁰³ *Lottery Case* (*Champion v. Ames*), 188 U.S. 321, 373 (1903).

⁷⁰⁴ *Brolan v. United States*, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in *Japan Line v. County of Los Angeles*, 441 U.S. 434, 448–51 (1979), a "dormant" commerce clause case involving state taxation with an impact on foreign commerce. In context, the distinction seems unexceptionable, but the language extends beyond context.

⁷⁰⁵ *License Cases*, 46 U.S. (5 How.) 504, 578 (1847).

⁷⁰⁶ *Pittsburg & Southern Coal Co. v. Bates*, 156 U.S. 577, 587 (1895).