AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 7: The Republican Era – Separation of Powers/Nondelegation of Legislative Power

**Marshall Field & Co. v. Clark, 143 U.S. 649** (1892)

*The Tariff Act of 1890 imposed a variety of protectionist duties on goods imported into the United States. One section of the statute encouraged reciprocal trade agreements between the United States and other countries. In order to do so, it authorized the president to determine whether a country imposed “unequal and unreasonable” tariffs on certain American goods. In such cases, the president was empowered to suspend a provision allowing the free import of a set of goods.*

*The department store Marshall Field & Co. paid taxes on imported woolen and silk goods under the act, and sued that customs collector for the port of Chicago to recover those taxes. The department store argued that the tariff act was constitutionally defective and thus void in its entirety. Among the store’s objections was the claim that Congress had improperly delegated legislative power to the president in the reciprocal trade provision. The Court unanimously upheld the statute, though two justices dissented from the specific conclusion that this reciprocity provision was constitutionally valid.*

JUSTICE HARLAN delivered the opinion of the Court.

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The plaintiffs in error contend that this section, so far as it authorizes the President to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides, is unconstitutional as delegating to him both legislative and treatymaking powers, and, being an essential part of the system established by Congress, the entire act must be declared null and void. On behalf of the United States it is insisted that legislation of this character is sustained by an early decision of this Court and by the practice of the government for nearly a century, and that even if the third section were unconstitutional, the remaining parts of the act would stand.

The decision referred to is *The Brig Aurora* (1813). What was that case? The nonintercourse Act of March 1, 1809, forbidding the importation, after May 20, 1809, of goods, wares, or merchandise from any port or place in Great Britain or France, provided that

"The President of the United States be, and he hereby is, authorized, in case either France or Great Britain shall so revoke or modify her edicts as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation,"

after which the trade suspended by that act and the act laying an embargo could "be renewed with the nation so doing." . . .

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This certainly is a decision that it was competent for Congress to make the revival of an act depend upon the proclamation of the President showing the ascertainment by him of the fact that the edicts of certain nations had been so revoked or modified that they did not violate the neutral commerce of the United States. The same principle would apply in the case of the suspension of an act upon a contingency to be ascertained by the President and made known by his proclamation.

To what extent do precedents in legislation sustain the validity of the section under consideration, so far as it makes the suspension of certain provisions and the going into operation of other provisions of an act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation? If we find that Congress has frequently, from the organization of the government to the present time, conferred upon the President powers, with reference to trade and commerce, like those conferred by the third section of the Act of October 1, 1890, that fact is entitled to great weight in determining the question before us.

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By an Act approved March 3, 1817, prohibiting the importation into the United States, in any foreign vessel, from and after July 4 of that year, of plaster of Paris, the production of any country or its dependencies from which the vessels of the United States were not permitted to bring the same article, it was provided that the act should continue in force five years from January 31, 1817, provided

"that if any foreign nation or its dependencies which have now in force regulations on the subject of the trade in plaster of Paris prohibiting the exportation thereof to certain ports of the United States shall discontinue such regulations, the President of the United States is hereby authorized to declare that fact by his proclamation, and the restrictions imposed by this act shall, from the date of such proclamation, cease and be discontinued in relation to the nation, or its dependencies, discontinuing such regulations."

Proclamations in execution of this act were issued by President Monroe, relating to our trade with Nova Scotia and New Brunswick.

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By the 14th section of the Act of June 26, 1884, removing certain burdens on the American merchant marine and encouraging the American foreign carrying trade, certain tonnage duties were imposed upon vessels entering the United States from any foreign port or place in North America, Central America, the West India Islands, Bahama Islands, Bermuda Islands, Sandwich Islands, or Newfoundland, and the President was authorized to suspend the collection of so much of those duties, on vessels entering from certain ports, as might be in excess of the tonnage and lighthouse dues, or other equivalent tax or taxes, imposed on American vessels by the government of the foreign country in which such port was situated . . . . In execution of that act, Presidents Arthur and Cleveland issued proclamations suspending the collection of duties on goods arriving from certain designated ports. . . .

While some of these precedents are stronger than others, in their application to the case before us, they all show that, in the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments in the interest of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations. If the decision in the case of The Brig Aurora had never been rendered, the practical construction of the Constitution, as given by so many acts of Congress and embracing almost the entire period of our national existence, should not be overruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land. . . .

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That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The Act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not in any real sense invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the Act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States which the President deemed -- that is, which he found to be -- reciprocally unequal and unreasonable. Congress itself prescribed in advance the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words "he may deem," in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that county, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself, as it left the hands of Congress, that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea, and hides from particular countries should be suspended in a given contingency, and that in case of such suspension, certain duties should be imposed.

"The true distinction," as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners of Clinton County* (OH 1852). In *Moers v. City of Reading* (PA 1853), the language of the court was: “Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.” . . . The proper distinction, the court said [in *Locke’s Appeal* (PA 1873)], was this:

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

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*Affirmed*.

JUSTICE LAMAR, with whom CHIEF JUSTICE FULLER joined, concurring.

. . . . We think that this particular provision is repugnant to the first section of the first article of the Constitution of the United States, which provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." That no part of this legislative power can be delegated by Congress to any other department of the government, executive or judicial, is an axiom in constitutional law, and is universally recognized as a principle essential to the integrity and maintenance of the system of government ordained by the Constitution. The legislative power must remain in the organ where it is lodged by that instrument. We think that the section in question does delegate legislative power to the executive department, and also commits to that department matters belonging to the treatymaking power, in violation of paragraph two of the second section of Article II of the Constitution. . . .

We do not think that legislation of this character is sustained by any decision of this Court or by precedents in congressional legislation numerous enough to be properly considered as the practice of the government. One of the instances referred to as legislation analogous to this section is that embodied in the acts of Congress of 1809 and 1810, known as the "Non-Intercourse Acts," pronounced by this Court to be valid in the case of *The Brig Aurora*. . . .

These enactments, in our opinion, transferred no legislative power to the President. The legislation was purely contingent. It provided for an ascertainment by the President of an event in the future -- an event defined in the act and directed to be evidenced by his proclamation. It also prescribed the consequences which were to follow upon that proclamation. Such proclamation was wholly in the nature of an executive act, a prescribed mode of ascertainment, which involved no exercise by the President of what belonged to the lawmaking power. The supreme will of Congress would have been enforced whether the event provided for had or had not happened, either in the continuance of the restrictions of the one hand, or, on and other, in their suspension.

But the purpose and effect of the section now under consideration are radically different. It does not, as was provided in the statutes of 1809 and 1810, entrust the President with the ascertainment of a fact therein defined upon which the law is to go into operation. It goes further than that, and deputes to the President the power to suspend another section in the same act whenever "he may deem" the action of any foreign nation producing and exporting the articles named in that section to be "reciprocally unequal and unreasonable," and it further deputes to him the power to continue that suspension, and to impose revenue duties on the articles named, "for such time as he may deem just." This certainly extends to the executive the exercise of those discretionary powers which the Constitution has vested in the lawmaking department. It unquestionably vests in the President the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides, or any of such articles, and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced reciprocally unequal and unreasonable in its operation upon the products of this country.

These features of this section are in our opinion in palpable violation of the Constitution of the United States, and serve to distinguish it from the legislative precedents which are relied upon to sustain it as the practice of the government. None of these legislative precedents save the one above referred to has as yet undergone review by this Court or been sustained by its decision. And if there be any congressional legislation which may be construed as delegating to the President the power to suspend any law exempting any importations from duty, or to reimpose revenue duties on them, upon his own judgment as to what constitutes in the policy of other countries a fair and reasonable reciprocity, such legislative precedents cannot avail as authority against a clear and undoubted principle of the Constitution. We say "revenue policy" because the phrase "agricultural or other products of the United States" is comprehensive, and embraces our manufacturing and mining as well as agricultural products, all of which interests are thus entrusted to the discretion of the President, in the adjustment of trade relations with other countries, upon a basis of reciprocity.

While, however, we cannot agree to the proposition that this particular section is valid and constitutional, we do not regard it as such an essential part of the tariff act as to invalidate all its other provisions, and we therefore concur in the judgment of this Court affirming the judgments of the court below in the several cases.