

HIDDEN TAXATION AND THE RISE OF THE SHADOW FISCAL STATE

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Abstract

This Article uncovers a new and troubling development in U.S. fiscal governance: the use of executive-imposed tariffs as covert instruments of sovereign debt management and fiscal redistribution. Building on a provocative theory circulating among policymakers, it explores the possibility that President Trump's second-term tariff strategy aimed not merely at confronting foreign adversaries, but at reshaping external balances, stabilizing bond markets, and reducing reliance on foreign capital inflows. At the same time, the use of hidden, regressive tariffs helped to subsidize and sustain large-scale tax cuts for the ultra-wealthy, shifting the fiscal burden onto ordinary consumers without legislative transparency or consent.

Whether or not this theory fully captures the administration's intent, the constitutional and institutional dangers it reveals are profound. By repurposing tariffs to achieve fiscal objectives, the executive branch constructs a system of hidden, regressive taxation that bypasses Congress's exclusive authority under Article I of the U.S. Constitution. This practice severs the constitutional link between taxation and democratic accountability, replacing transparent lawmaking with opaque executive discretion. Tariffs, once instruments of trade policy, become de facto taxes imposed without public debate, statutory clarity, or procedural safeguards.

Beyond domestic concerns, this Article situates the phenomenon within the broader framework of international law. The unilateral imposition of tariffs for debt management purposes strains U.S. compliance with core World Trade Organization obligations, undermining the credibility of the rules-based trading system at a moment of deepening global economic fragmentation.

By tracing the emergence of a "shadow fiscal state" through the executive's tariff powers, this Article offers a new lens for understanding the erosion of constitutional governance and international economic norms. It concludes by proposing structural reforms, including a dual-track system for tariff actions

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modeled on administrative law procedures, to restore congressional control over fiscal policy and reinvigorate democratic transparency in taxation.

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INTRODUCTION

In recent years, the executive branch has turned to an unexpected tool of hidden taxation, transforming tariffs into mechanisms for raising revenue and potentially even managing federal debt.¹ No formal public debate has occurred. No

¹ Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/7BY7-AW3D>]; Reuven S. Avi-Yonah & Doron Narotzki, *The Tariffs Are Coming! The Tariffs Are Coming!*, 116 TAX NOTES INT'L 1577 (Oct. 13, 2025), <https://ssrn.com/abstract=5080792> [<https://perma.cc/VNC9-NPF7>]; Doron Narotzki, *Tariffs: Back to the Future*, 116 TAX NOTES INT'L 565 (Oct. 13, 2025), <https://ssrn.com/abstract=5007289> [<https://perma.cc/56XN-Z4HY>].

tax bill has passed Congress. Yet billions have been extracted from American consumers,² funding federal operations outside the constitutional framework designed to protect fiscal democracy.

In essence, this Article argues that we are witnessing the emergence of a shadow fiscal state, a parallel system of taxation constructed through executive actions rather than legislative consent.³ By using tariffs not to regulate trade, but to raise revenue and try to influence macroeconomic fundamentals, the executive branch has effectively rewritten core elements of the tax system while bypassing the democratic safeguards enshrined in both U.S. constitutional law and international economic agreements. This development signals not merely a policy shift but a profound constitutional rupture.

Against this backdrop, this Article examines a provocative theory circulating among policymakers: that President Trump's tariff strategy was designed not primarily to confront China or protect American industries but to stabilize U.S. sovereign debt.⁴ Whether or not the theory is correct, the structural risks it exposes

² Alex Durante, *Who Pays Tariffs? Americans Will Bear the Costs of the Next Trade War*, TAX FOUND. (Feb. 19, 2025), <https://taxfoundation.org/blog/who-pays-tariffs/> [<https://perma.cc/N4DJ-6UV5>].

³ See Benjamin Valdez, *Lutnick Says Administration Wants to Replace the IRS*, TAXNOTES (May 1, 2025), <https://www.taxnotes.com/featured-news/lutnick-says-administration-wants-replace-irs/2025/04/30/7s4cs> [<https://perma.cc/F7C5-VK3H>]; see also *Lutnick Touts Trump Goal of No Tax Under \$150,000 in Income*, TAXNOTES (Mar. 14, 2025), <https://www.taxnotes.com/tax-notes-federal/individual-income-taxation/lutnick-touts-trump-goal-no-tax-under-150000-income/2025/03/17/7rn7x> [<https://perma.cc/9RM9-E9QZ>]; Antonia Hitchens, *Donald Trump's Tariff Dealmaker-in-Chief*, NEW YORKER (July 21, 2025), <https://www.newyorker.com/magazine/2025/07/28/donald-trumps-tariff-dealmaker-in-chief> [<https://perma.cc/R3NP-XABD>].

⁴ See John Yahya Campbell, *This Isn't a Trade War. It's a Yield War—And You're Being Distracted*, LINKEDIN (Apr. 4, 2025), <https://www.linkedin.com/pulse/isnt-trade-war-its-yield-youre-being-distracted-john-campbell-rr0mf/> [<https://perma.cc/V9DD-5CE2>]; Ben ReinBerg, *The Yield War Behind this Trade War*, ALLIANCE FUND (Apr. 3, 2025), <https://benreinberg.substack.com/p/the-yield-war-behind-this-trade-war> [<https://perma.cc/5PNX-FQL7>]; Stephen Steinberger, (@StephenSteinberger), LinkedIn, (Apr. 2025), <https://www.linkedin.com/feed/update/urn:li:activity:7319742461101133826/> [<https://perma.cc/399C-V8EJ>]; Terence Zimwara, *Bitpanda CEO: Trump's Tariffs a 'Yield War,' Not Protectionism*, BITCOIN.COM NEWS (Apr. 5, 2025), <https://news.bitcoin.com/bitpanda-ceo-trumps-tariffs-a-yield-war-not-protectionism/> [<https://perma.cc/EH33-9JNT>].

to congressional authority, fiscal transparency, and global legal norms are real and urgent. What follows is a critical legal and institutional analysis of this emerging shadow fiscal architecture.

As articulated by Stephen Miran, Chair of the Council of Economic Advisers,⁵ recently nominated by President Trump to the Federal Reserve Board of Governors,⁶ the claim is that the true target of these tariffs is not a foreign adversary, but the domestic challenge of refinancing federal debt in an increasingly fragile fiscal environment. According to this theory (or at least the core of such theory, as it has different variants, and it has evolved as tariff announcements were introduced or suspended), Trump's trade measures are less about international bargaining and more about macroeconomic self-preservation.

The logic behind the theory is unconventional, yet internally coherent. It begins with the observation that interest payments on U.S. debt have reached unsustainable levels.⁷ To reduce the need for foreign capital, tariffs may be used

⁵ Board Members, *Stephen I. Miran*, BD. GOVERNORS FED. RESERVE SYS. (last updated Sep. 24, 2025), <https://www.federalreserve.gov/aboutthefed/bios/board/miran.htm> [https://perma.cc/4LEY-YPWY]; Gulam Jeelani, *Who is Stephen Miran, the US Economist Behind Trump Tariff Shockwaves?*, MINT (Apr. 10, 2025, at 02:15 PM IST), <https://www.livemint.com/news/us-news/meet-stephen-miran-the-us-economist-behind-donald-trumps-tariff-shockwaves-trade-war-11744249713142.html> [https://perma.cc/RGF7-VF6V].

⁶ A.J.S. Dhaliwal, Mehul Madia & Maxwell Earp-Thomas, *Trump to Nominate Stephen Miran to Federal Reserve Board of Governors*, JDSUPRA (Aug. 15, 2025), <https://www.jdsupra.com/legalnews/trump-to-nominate-stephen-miran-to-3939225/> [https://perma.cc/5U9N-249B].

⁷ Stephen Miran, *Mar-a-Lago Accord: A User's Guide to Restructuring the Global Trading System*, HUDSON BAY CAP. 35–38 (Nov. 2024), https://www.hudsonbaycapital.com/documents/FG/hudsonbay/research/638199_A_Users_Guide_to_Restructuring_the_Global_Trading_System.pdf [https://perma.cc/BNR6-ZVDU]; *The Consequences of Debt*, U.S. HOUSE COMM. ON BUDGET (Mar. 5, 2025), <https://budget.house.gov/press-release/the-consequences-of-debt> [https://perma.cc/2SG3-SZSZ]; William McBride, Erica York, Alex Durante, & Garrett Watson, *The Unsustainable US Debt Course and Impacts of Potential Tax Changes*, TAX FOUNDATION (Jan. 14, 2025), <https://taxfoundation.org/research/all/federal/us-debt-budget-taxes-spending-social-security-medicare/> [https://perma.cc/79Q6-MSVZ]; *Any Way You Look at It, Interest Costs on the National Debt Will Soon Be at an All-Time High*, PETER G. PETERSON FOUND., <https://www.pgpf.org/article/any-way-you-look-at-it-interest-costs-on-the-national-debt-will-soon-be-at-an-all-time-high/> [https://perma.cc/6W33-AAG5];

to suppress imports and shrink the trade deficit. A narrower trade deficit could, in theory, reduce capital outflows and help stabilize bond yields. This, in turn, might make it easier to implement what Stephen Miran and others have described as a “distressed exchange,” in which short-term, high-interest Treasury bonds are replaced with longer-term obligations at lower interest rates.⁸ Although such a move might be treated by rating agencies as a form of default, proponents argue that it could help avert a more serious fiscal rupture.⁹ Under this view, tariffs are not simply trade policy tools. They serve as a mechanism to delay or soften the impact of an impending debt crisis.¹⁰

This Article does not adopt or endorse that theory. Its assumptions are debatable, its predictions uncertain, and its broader credibility subject to serious questions. Nevertheless, the theory warrants close examination because of the institutional and legal issues it raises. If tariffs are in fact being used not to manage trade relationships, but to address domestic fiscal challenges,¹¹ this may signal a significant shift in how economic policy is being formulated and justified. It raises the possibility that the executive branch is employing trade authorities as a substitute for tax legislation, thereby bypassing Congress while imposing real economic burdens on the public.

What follows is a critical analysis of this theory. The Article begins by exploring the macroeconomic logic behind the argument and evaluating its internal consistency. It then turns to legal analysis, exploring how the reconfiguration of trade tools for fiscal purposes may violate international trade obligations and undermine constitutional principles of taxation. Finally, it introduces an additional concern: that tariffs, if deployed to advance fiscal objectives, may operate as a hidden and regressive tax system, imposed without transparency, oversight, or democratic consent.

Jagadeesh Gokhale & Kent Smetters, *When Does Federal Debt Reach Unsustainable Levels?*, PENN WHARTON U. PENN. (Oct. 6, 2023), <https://budgetmodel.wharton.upenn.edu/issues/2023/10/6/when-does-federal-debt-reach-unsustainable-levels> [https://perma.cc/N3WC-WJA5].

⁸ *Id.*; Mitu Gulati, *Could Trump Borrow a Page from Argentina’s Debt Swap Playbook?*, ECON. TIMES (Apr. 22, 2025, at 11:13), <https://economictimes.indiatimes.com/news/international/global-trends/could-trump-borrow-a-page-from-argentinass-debt-swap-playbook/articleshow/120542372.cms?from=mdr> [https://perma.cc/96TF-BMD7].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

I. MAKE AMERICA SOLVENT AGAIN

A growing number of voices, mostly online but also around President Trump's advisors, suggest that the rationale behind Trump's tariff policy may extend beyond conventional trade objectives. Contrary to the mainstream narrative, which is echoed by President Trump himself, that tariffs are primarily viewed as tools to correct trade imbalances or pressure foreign competitors,¹² the policy may instead reflect a broader strategy to manage the fiscal strain caused by rising U.S. debt servicing costs.¹³ According to this theory, and the *Mar-a-Lago Accord* (which is at the core of all variants of such theory), tariffs function not merely as instruments of protectionism, but as tools to reshape macroeconomic conditions in ways that facilitate debt stabilization.¹⁴

Professor Hans-Werner Sinn, who has at times been cited by proponents of this theory, has argued that persistent U.S. trade deficits, fueled by the dollar's reserve status, contribute to rising debt and financial vulnerability. Although he is critical of Trump's tariff policies, Sinn notes that some officials may view import restrictions as a means to reduce reliance on foreign capital and preserve fiscal space.¹⁵ He warns, however, that pursuing such strategies could trigger default

¹² Exec. Order No. 14257, 90 Fed. Reg. 15041 (Apr. 2, 2025). Ana Swanson, 'Totally Silly.' Trump's Focus on Trade Deficit Bewilders Economists, N.Y. TIMES (Apr. 9, 2025), <https://www.nytimes.com/2025/04/09/business/economy/trump-trade-deficit-tariffs-economist-doubts.html> [<https://perma.cc/V9NL-TXM6>]; Reuven S. Avi-Yonah & Doron Narotzki, The Tariffs Are Coming! The Tariffs Are Coming!, 116 TAX NOTES INT'L 1577 (Oct. 13, 2025), <https://ssrn.com/abstract=5080792> [<https://perma.cc/VNC9-NPF7>].

¹³ See John Yahya Campbell, *This Isn't a Trade War. It's a Yield War—And You're Being Distracted*, LINKEDIN (Apr. 4, 2025), <https://www.linkedin.com/pulse/isnt-trade-war-its-yield-youre-being-distracted-john-campbell-rr0mf/> [<https://perma.cc/V9DD-5CE2>]; Ben Reinberg, *The Yield War Behind this Trade War*, ALLIANCE FUND (Apr. 3, 2025), <https://benreinberg.substack.com/p/the-yield-war-behind-this-trade-war> [<https://perma.cc/5PNX-FQL7>]; Stephen Steinberger, (@StephenSteinberger), LinkedIn, (Apr. 2025), <https://www.linkedin.com/feed/update/urn:li:activity:7319742461101133826/> [<https://perma.cc/399C-V8EJ>]; Terence Zimwara, *Bitpanda CEO: Trump's Tariffs a 'Yield War,' Not Protectionism*, BITCOIN.COM NEWS (Apr. 5, 2025), <https://news.bitcoin.com/bitpanda-ceo-trumps-tariffs-a-yield-war-not-protectionism/> [<https://perma.cc/EH33-9JNT>].

¹⁴ Miran, *supra* note 7.

¹⁵ RESEARCH LOUNGE, *Prof. Dr. Hans Werner Sinn on International Trade Order, US Debt, US Dollar's Power & US Default*, (YouTube, Apr. 15, 2025), https://www.youtube.com/watch?v=1prF_0lKaM&ab_channel=ResearchLounge.

signals and broader economic instability.¹⁶ Stephen Miran extends this reasoning by discussing the possibility of what he and other commentators characterize as a “distressed exchange,” which involves strategically converting short-term, high-yield Treasury securities into longer-term instruments with lower interest rates.¹⁷ Miran, and other advocates of this approach, argue that, even if credit rating agencies were to classify it as a technical default, it could significantly reduce the government’s interest costs over time.¹⁸ The underlying rationale appears to be that, despite potential negative consequences, the fiscal benefits are substantial enough to justify the approach.

Interest payments now account for over ten percent of the federal budget and are projected to rise significantly as the federal government refinances maturing debt at higher interest rates.¹⁹ In this context, any mechanism that reduces the marginal cost of new debt issuance becomes politically and fiscally attractive. The logic behind this theory suggests that tariffs serve a dual function: they signal fiscal intent while simultaneously reshaping the demand for Treasuries through their effect on external balances.²⁰ From this perspective, trade policy becomes a tool of fiscal engineering that operates outside the traditional legislative process. Because tariff authority is largely delegated to the executive branch through broad statutory grants, the president can unilaterally adjust tariffs without congressional approval, effectively reshaping fiscal policy through trade measures alone.²¹

¹⁶ *Id.*

¹⁷ Miran, *supra* note 7.

¹⁸ Miran, *supra* note 7.

¹⁹ *What Is the National Debt Costing Us?*, PETER G. PETERSON FOUND., <https://www.pgpf.org/article/what-is-the-national-debt-costing-us/> (Feb. 3, 2025) [<https://perma.cc/X6BP-UT83>]; *Interest Expense and Average Interest Rates on the National Debt FY 2010—FYTD 2025*, U.S. TREASURY: FISCAL DATA, <https://fiscaldata.treasury.gov/interest-expense-avg-interest-rates/> (Sep. 30, 2025) [<https://perma.cc/B7B7-TRVN>].

²⁰ Miran, *supra* note 7.

²¹ Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. Cal. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/MZ2Y-YEJY>]; it should also be noted that this is not the first time economic threats were politicized to justify institutional action. See Karen Schnietz, *Democrats’ 1916 Tariff Commission: Responding to Dumping Fears and Illustrating the Consumer Costs of Protectionism*, 72 BUS. HIST. REV. 1, 2–5 (1998) (arguing that the 1916 Tariff Commission was created less out of Progressive ideals and more out of political fear of postwar foreign dumping and electoral vulnerability). President Trump’s behavior thus fits a historical pattern of using real or exaggerated economic threats to advance political objectives.

However, this theory rests on several contested economic assumptions. First, it presumes a reliable causal link between the trade deficit and Treasury yields. While the current account balance does affect the composition of capital flows, the empirical relationship between import levels and long-term interest rates remains ambiguous.²² Treasury yields are influenced by a complex array of factors, including inflation expectations, Federal Reserve policy, global risk sentiment, and fiscal credibility.²³ Tariffs may reduce imports,²⁴ but whether they reduce yields is far from certain, and even if they do, any reduction would likely come at a significant economic cost that is difficult to justify or sustain over time.²⁵

²² See Pierre-Olivier Gourinchas & Hélène Rey, *From World Banker to World Venture Capitalist: U.S. External Adjustment and the Exorbitant Privilege*, in G7 CURRENT ACCT. IMBALANCES: SUSTAINABILITY & ADJUSTMENT 11, 33–35 (Richard H. Clarida ed., 2007), <http://www.nber.org/books/clar06-2> [<https://perma.cc/BFC5-Z3VX>] (discussing how external adjustment occurs largely through valuation effects rather than trade surpluses or deficits); see also Francis E. Warnock & Veronica Cacadac Warnock, *International Capital Flows and U.S. Interest Rates*, in INT'L FIN. DISCUSSION PAPERS (Bd. Governors Fed. Rsrv. Sys. 2005), <https://www.federalreserve.gov/pubs/ifdp/2005/840/ifdp840.pdf> [<https://perma.cc/JV35-5YSV>] (finding that the relationship between foreign inflows and U.S. long-term interest rates is statistically significant and economically substantial, though the effects operate alongside other macroeconomic factors); Ben S. Bernanke, Vincent R. Reinhart & Brian P. Sack, *Monetary Policy Alternatives at the Zero Bound: An Empirical Assessment*, in FIN. & ECON. DISCUSSION SERIES (Bd. Governors Fed. Rsrv. Sys. 2004), <https://www.federalreserve.gov/pubs/feds/2004/200448/200448pap.pdf> [<https://perma.cc/FAN6-2FZE>].

²³ See Ben S. Bernanke, Vincent R. Reinhart, & Brian P. Sack, *Monetary Policy Alternatives at the Zero Bound: An Empirical Assessment*, in FIN. & ECON. DISCUSSION SERIES 7, 10 (Bd. Governors Fed. Rsrv. Sys. 2004), <https://www.federalreserve.gov/pubs/feds/2004/200448/200448pap.pdf> [<https://perma.cc/GQ2V-A6QG>] (noting that financial conditions and asset prices depend on a wide range of factors beyond the short-term policy rate, and that the effects of policy actions on yields remain uncertain); Francis E. Warnock & Veronica Cacadac Warnock, *International Capital Flows and U.S. Interest Rates*, in INT'L FIN. DISCUSSION PAPERS (Bd. Governors Fed. Rsrv. Sys. 2005), <https://www.federalreserve.gov/pubs/ifdp/2005/840/ifdp840.pdf> [<https://perma.cc/FAN6-2FZE>] (observing that foreign inflows affect long-term rates but that other unobserved factors also exert significant influence); *Federal Reserve Board's Semiannual Monetary Policy Report to the Congress Before the Comm. on Banking, Hous., & Urb. Affs.*, 109th Cong. (2005) (statement of Alan Greenspan, Chairman, Fed. Rsrv. Bd.), <https://www.federalreserve.gov/boarddocs/hh/2005/february/testimony.htm> [<https://perma.cc/G2RF-7R6H>]; Ben S. Bernanke, *Why Are Interest Rates So Low, Part 3*:

Second, the theory assumes that financial markets will interpret protectionist measures as a form of fiscal discipline.²⁶ But this is far from guaranteed. Markets could just as easily view tariffs as a source of inflationary pressure or geopolitical instability, particularly when they provoke retaliatory measures. Tariffs may send a signal, but the signal is subject to interpretation, and market reactions are notoriously difficult to predict.²⁷

Third, the inflationary effects of tariffs may offset their intended fiscal benefits.²⁸ By raising the price of imported goods, tariffs can contribute to cost-push inflation, which in turn can force the Federal Reserve to maintain higher interest rates (and can perhaps also explain President Trump's repeated attacks on

The Global Savings Glut, BROOKINGS INST. (Apr. 1, 2015), <https://www.brookings.edu/articles/why-are-interest-rates-so-low-part-3-the-global-savings-glut/> [https://perma.cc/VJ9J-GG9U].

²⁴ Kyle Pomerleau & Erica York, *Understanding the Effects of Tariffs*, AM. ENTER. INST. (Apr. 23, 2025), <https://www.aei.org/research-products/report/understanding-the-effects-of-tariffs/> [https://perma.cc/K9BR-UJXP].

²⁵ See *The Economic Effects of President Trump's Tariffs*, PENN WHARTON BUDGET MODEL (Apr. 10, 2025), <https://budgetmodel.wharton.upenn.edu/issues/2025/4/10/economic-effects-of-president-trumps-tariffs> [https://perma.cc/G994-7S7V]; *The Fiscal and Economic Effects of the Revised April 9 Tariffs*, BUDGET LAB (Apr. 10, 2015), <https://budgetlab.yale.edu/research/fiscal-and-economic-effects-revised-april-9-tariffs> [https://perma.cc/TUV3-U6VG]; Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [https://perma.cc/E47Y-CZJN].

²⁶ See Miran, *supra* note 7 (proposing that tariff revenues, combined with fiscal consolidation measures, can preserve U.S. fiscal credibility and strengthen the attractiveness of U.S. Treasuries).

²⁷ See Joe Rennison, Danielle Kaye, Ana Swanson, Tony Romm & River Akira Davis, *Tariffs News Highlights: Tariffs Send Wall Street Tumbling to Worst Day Since Pandemic*, N.Y. TIMES (May 24, 2025), <https://www.nytimes.com/live/2025/04/03/business/trump-tariffs> [https://perma.cc/2YP2-2Y63]; Joe Rennison, Colby Smith, Eshe Nelson, & Alexandra Stevenson, *Stocks Post Gains, but Bond Market Signals Investors Are Anxious*, N.Y. TIMES (Sept. 2, 2025), <https://www.nytimes.com/live/2025/04/11/business/trump-tariffs-stocks-china> [https://perma.cc/X434-UMJ9]; *Trump Tariffs: China Strikes Back As Stocks Slide After Worst Day Since 2020*, NBC NEWS (Apr. 4, 2025, 8:52 PM), <https://www.nbcnews.com/news/world/live-blog/trump-tariffs-live-updates-stocks-slide-worst-day-2020-world-leaders-rcna199623> [https://perma.cc/GS8M-LTEW].

²⁸ Tobias Burns, *Why Trump's Tariffs May Do Little to Pay for Tax Cuts*, THE HILL (Apr. 9, 2025, 6:00 AM), <https://thehill.com/business/5238587-why-trumps-tariffs-may-do-little-to-pay-for-tax-cuts/> [https://perma.cc/3WGH-NP6G].

the Federal Reserve Chair).²⁹ This economic vicious cycle could undermine the very debt management goals the policy seeks to achieve.³⁰

Despite these limitations, the theory has gained some traction for several reasons. First, it offers a politically expedient alternative to traditional fiscal reform. The executive branch can impose tariffs under existing statutes, avoiding the political costs of raising taxes or cutting spending.³¹ Second, it provides a narrative framework that imposes coherence (somewhat) on what has often appeared to be erratic and chaotic policymaking.³² By suggesting that there is a grand scheme or a sophisticated strategic plan underpinning President Trump's second-term tariff policy, the theory appeals to those seeking to rationalize or decode seemingly inconsistent decisions.³³ In this case, if tariffs can influence

²⁹ Natalie Sherman, *Why Trump Keeps Attacking the US Central Bank*, BBC NEWS (Apr. 25, 2025), <https://www.bbc.com/news/articles/cx20lyg4385o> [<https://perma.cc/U9Y9-3NMW>]; Rob Wile, *S&P 500 Tumble As Trump Ratchets Up His Attacks on Fed Chair Powell*, NBC NEWS (Apr. 21, 2025, 6:07 PM), <https://www.nbcnews.com/business/economy/trump-taunts-jerome-powell-waiting-long-cut-rates-rcna202123> [<https://perma.cc/5J7P-9WTV>]; Andrew Ackerman, *Presidents Have Long Criticized the Fed. It Usually Backfires.*, WASH. POST (Apr. 26, 2025), <https://www.washingtonpost.com/business/2025/04/26/trump-attacks-fed-powell-white-house/> [<https://perma.cc/G242-8E9B>]; Jason Furman, *The End of the Federal Reserve As We Know It?*, THE DISPATCH (Sep. 25, 2024), <https://thedispatch.com/article/the-end-of-the-federal-reserve-as-we-know-it/> [<https://perma.cc/GM6F-R7Q9>].

³⁰ Burns, *supra* note 28; see *When Does Federal Debt Reach Unsustainable Levels?*, PENN WHARTON BUDGET MODEL (Oct. 6, 2023), <https://budgetmodel.wharton.upenn.edu/issues/2023/10/6/when-does-federal-debt-reach-unsustainable-levels> [<https://perma.cc/5H9S-BXYW>] for a general analysis of the U.S. debt level.

³¹ Doron Narotzki & Tamir Shanan, *Trump's Economic Gamble: Tariffs, Tax Cuts, and the Twilight of the TCJA*, U. ST. THOMAS J. L. & PUB. POL'Y (forthcoming 2025).

³² Kalyeena Makortoff, *Trump's Erratic Tariffs Harder to Navigate Than Pandemic, Says UK Export Agency*, THE GUARDIAN (Apr. 21, 2025, 9:00 AM), <https://www.theguardian.com/business/2025/apr/21/trump-erratic-tariffs-harder-to-navigate-than-pandemic-says-uk-export-agency> [<https://perma.cc/2KE8-55U4>]; Stephen Castle, *Richard Branson Criticizes Trump's 'Erratic' Tariff Policies*, N.Y. TIMES (Apr. 23, 2025), <https://www.nytimes.com/2025/04/23/us/politics/richard-branson-trump-tariff-policies.html> [<https://perma.cc/FE27-F7FA>]; Narotzki & Shanan, *supra* note 31.

³³ A policy that the author of this Article referred to in another article as a gamble, see Narotzki & Shanan, *supra* note 31. Also, some have argued that President Trump's tariff policy reflects a sophisticated application of game theory, see Cristiano Carvalho, *Trump and Game Theory: Tariffs as a Geopolitical Strategy* (Mar. 15, 2025),

macroeconomic conditions, even indirectly, they become an attractive tool in a constrained policy environment.

This strategy also echoes the broader logic of the proposed “Mar-a-Lago Accord,” which envisions a restructured global trading and monetary order.³⁴ The *Mar-a-Lago Accord* calls for a deliberate devaluation of the dollar while preserving its reserve currency status, thereby reducing the trade deficit, stimulating domestic manufacturing, and rebalancing the international financial system. Tariffs, in this context, are seen as an instrument to accelerate that shift.³⁵

However, the economic and political risks of this theory are considerable. Critics argue that weaponizing tariffs for fiscal purposes could destabilize the

<https://ssrn.com/abstract=5180046> [<https://perma.cc/3XWF-MA5M>]; and to this I refer to another article, see Doron Narotzki, *Bluff Without Purpose: Rethinking Trump's Tariff Policy and the Misuse of Game Theory* (Apr. 17, 2025), <https://ssrn.com/abstract=5220905> [<https://perma.cc/X43V-Y77N>].

³⁴ Miran, *supra* note 7; Meet Stephen Miran, *The Harvard Hawk Behind Trump's Trade Blitz Eyeing a Mar-a-Lago Accord*, ECON. TIMES (Apr. 16, 2025, 10:01 PM IST), <https://economictimes.indiatimes.com/news/international/global-trends/meet-stephen-miran-the-harvard-hawk-behind-trumps-trade-blitz-eyeing-a-mar-a-lago-accord/articleshow/120352450.cms?from=mdr> [<https://perma.cc/93B7-DF8Q>]; Steven B. Kamin, *Council of Economic Advisors Chair Nominee Stephen Miran's Critique of the Global Monetary System-Part I*, AM. ENTER. INST. (Mar. 3, 2025), <https://www.aei.org/economics/council-of-economic-advisors-chair-nominee-stephen-mirans-critique-of-the-global-monetary-system-part-i/> [<https://perma.cc/6FYR-43GX>]; Steven B. Kamin, *CEA Chair Nominee Stephen Miran's Critique of the Global Monetary System-Part II*, AM. ENTER. INST. (Mar. 10, 2025), <https://www.aei.org/economics/cea-chair-nominee-stephen-mirans-critique-of-the-global-monetary-system-part-ii/> [<https://perma.cc/7T6L-G37S>].

³⁵ Miran, *supra* note 7; Meet Stephen Miran, *The Harvard Hawk Behind Trump's Trade Blitz Eyeing a Mar-a-Lago Accord*, ECON. TIMES (Apr. 16, 2025, 10:01 PM IST), <https://economictimes.indiatimes.com/news/international/global-trends/meet-stephen-miran-the-harvard-hawk-behind-trumps-trade-blitz-eyeing-a-mar-a-lago-accord/articleshow/120352450.cms?from=mdr> [<https://perma.cc/93B7-DF8Q>]; Steven B. Kamin, *Council of Economic Advisors Chair Nominee Stephen Miran's Critique of the Global Monetary System-Part I*, AM. ENTER. INST. (Mar. 3, 2025), <https://www.aei.org/economics/council-of-economic-advisors-chair-nominee-stephen-mirans-critique-of-the-global-monetary-system-part-i/> [<https://perma.cc/6FYR-43GX>]; Steven B. Kamin, *CEA Chair Nominee Stephen Miran's Critique of the Global Monetary System-Part II*, AM. ENTER. INST. (Mar. 10, 2025), <https://www.aei.org/economics/cea-chair-nominee-stephen-mirans-critique-of-the-global-monetary-system-part-ii/> [<https://perma.cc/7T6L-G37S>].

global financial system and undermine the credibility of U.S. debt.³⁶ Retaliation from trade partners, disruptions to global supply chains, and legal challenges in international forums could further complicate outcomes.³⁷ Moreover, the reliance on executive discretion to implement this strategy raises fundamental constitutional concerns, including the erosion of legislative control over taxation and spending.³⁸

In the following sections, this Article examines the legal implications of using tariffs for debt management, focusing on statutory authority, international trade obligations, and the constitutional boundaries of fiscal power.

II. TRADE TOOLS, FISCAL GOALS, AND THE LEGAL LIMITS OF EXECUTIVE POWER

This part examines the legal consequences of the theory referred to in Part II. Furthermore, this part focuses on the misalignment between the legal purpose of tariff statutes and their use as fiscal tools, and explores how such practice may violate trade law, constitutional principles, and norms of democratic accountability.

³⁶ Narotzki & Shanan, *supra* note 31; Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/4KMV-JC5R>]; Heather Stewart & Lauren Almeida, *Risks to Global Financial Stability Surging After Trump Tariffs, Warns IMF*, THE GUARDIAN (Apr. 22, 2025, at 10:15 AM), <https://www.theguardian.com/business/2025/apr/22/imf-warns-trump-tariffs-are-putting-global-financial-system-under-strain> [<https://perma.cc/S8V3-5LS7>]; Rafael Nam, *The Global Economy Will Be Hit Hard By Trump's Tariffs, IMF Warns*, NPR (Apr. 22, 2025, at 03:06 PM ET), <https://www.npr.org/2025/04/22/nx-s1-5372588/trump-tariffs-imf-trade-world-economy> [<https://perma.cc/TZB6-83JZ>]; *World Economic Outlook: A Critical Juncture Amid Policy Shifts*, INT'L MONETARY FUND (Apr. 22, 2025), <https://www.imf.org/en/Publications/WEO/Issues/2025/04/22/world-economic-outlook-april-2025> [<https://perma.cc/8AJP-TF47>].

³⁷ Narotzki & Shanan, *supra* note 31; Reuven S. Avi-Yonah, Doron Narotzki & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/4KMV-JC5R>]; Reuven S. Avi-Yonah & Doron Narotzki, *The Tariffs Are Coming! The Tariffs Are Coming!*, 116 TAX NOTES INT'L 1577 (Oct. 13, 2025), <https://ssrn.com/abstract=5080792> [<https://perma.cc/45E8-W46H>]; Doron Narotzki, *Tariffs: Back to the Future*, 116 TAX NOTES INT'L 565 (Oct. 13, 2025), <https://ssrn.com/abstract=5007289> [<https://perma.cc/WH2T-KU88>].

³⁸ Narotzki & Shanan, *supra* note 31.

A. *The Legal Purpose of Tariffs and Their Statutory Framework*

U.S. tariff legal authority is grounded in statutes that grant the executive branch some flexibility to respond to specific economic threats,³⁹ but this institutional design is layered atop a much older tradition of using tariffs as ad hoc fiscal tools, dating back to the colonial era. As William Hill documents, early American tariff policy emerged not from coherent national planning, but from a patchwork of colonial experiments driven by local revenue needs, political bargaining, and opportunistic trade restrictions, many of which lacked coordination or durable principles.⁴⁰

After the ratification of the Constitution and continuing until the early 1930s, tariffs, like other forms of taxation, were set directly by Congress.⁴¹ This changed following the enactment of the Smoot-Hawley Tariff Act of 1930,⁴² which imposed the second-highest tariffs in American history, targeting agricultural imports in an attempt to protect American farmers.⁴³ The Act, signed into law by President Hoover, triggered a global trade war that contributed to a 60 percent collapse in U.S. exports by 1933 and deepened the Great Depression.⁴⁴ In the

³⁹ Narotzki & Shanan, *supra* note 31; CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R48435, CONGRESSIONAL AND PRESIDENTIAL AUTHORITY TO IMPOSE IMPORT TARIFFS 1 AT 22 (2025), <https://www.congress.gov/crs-product/R48435> [<https://perma.cc/STC2-G5ZW>]; Adam Looney & Elena Patel, *Why Does the Executive Branch Have so Much Power Over Tariffs?*, BROOKINGS INST. (Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/> [<https://perma.cc/R9KQ-STTS>].

⁴⁰ William Hill, *The First Stages of the Tariff Policy of the United States*, 8 PUBL'NS. AM. ECON. ASS'N. 9 (Nov. 1893), <http://www.jstor.org/stable/2485625> [<https://perma.cc/3YDV-NDDU>].

⁴¹ Avi-Yonah, Narotzki, & Shanan, *supra* note 21, at 6.

⁴² *The Senate Passes the Smoot-Hawley Tariff*, S. HIST. OFF. (June 13, 1930), https://www.senate.gov/artandhistory/history/minute/Senate_Passes_Smoot_Hawley_Tariff.htm [<https://perma.cc/7TLW-7R4F>].

⁴³ Avi-Yonah, Narotzki, & Shanan, *supra* note 21, at 14–15; Judith A. McDonald, Anthony Patrick O'Brien & Colleen M. Callahan, *Trade Wars: Canada's Reaction to the Smoot-Hawley Tariff*, 57 J. ECON. HIST. 802, 806 (Dec.1997), <http://www.jstor.org/stable/2951161> [<https://perma.cc/J3L5-H28X>]; *Smoot-Hawley Tariff Act*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/economics/smoot-hawley-tariff-act/> [<https://perma.cc/VS6A-3XJ4>] (last visited Nov. 11, 2025).

⁴⁴ Avi-Yonah, Narotzki, & Shanan, *supra* note 21, at 16; Adam Looney & Elena Patel, *Why Does the Executive Branch Have so Much Power Over Tariffs?*, BROOKINGS INST.

aftermath, Congress moved away from directly setting tariff rates and began a decades-long process of transferring tariff authority to the executive branch.⁴⁵ This shift began with the Reciprocal Trade Agreements Act of 1934,⁴⁶ which authorized the President to negotiate bilateral agreements and make limited tariff adjustments without congressional action.⁴⁷

Thanks to several pieces of legislation enacted after 1934, the President today possesses several statutory authorities to impose tariffs without new congressional legislation.⁴⁸ Under Section 301 of the Trade Act of 1974, the President can levy tariffs in response to unfair trade practices by foreign nations.⁴⁹ Section 232 of the Trade Expansion Act of 1962 allows for tariffs to protect national security interests,⁵⁰ while Section 201 of the Trade Act of 1974 permits temporary safeguard measures in response to import surges that threaten domestic industries **following an injury determination by the International Trade Commission**.⁵¹ These provisions grant the executive branch significant discretion

(Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/> [<https://perma.cc/R9KQ-STTS>]; Greg Iacurci & Ana Teresa Sola, *What the Mother of all Trade Wars can Teach us About U.S. Tariffs, According to Economists*, CNBC (Feb. 5, 2025, at 11:34 AM), <https://www.cnbc.com/2025/02/05/how-smoot-hawley-tariff-sparked-the-mother-of-all-trade-wars.html> [<https://perma.cc/WXX9-AXC2>].

⁴⁵ Avi-Yonah, Narotzki, & Shanan, *supra* note 21, at 17; Adam Looney & Elena Patel, *Why Does the Executive Branch Have so Much Power Over Tariffs?*, BROOKINGS INST. (Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/> [<https://perma.cc/Q8BA-P6LW>].

⁴⁶ *New Deal Trade Policy: The Export-Import Bank & the Reciprocal Trade Agreement Act, 1934*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/export-import-bank> [<https://perma.cc/QKR8-EDA8>].

⁴⁷ Looney & Patel., *supra* note 45.

⁴⁸ Narotzki & Shanan, *supra* note 31; Christopher T. Zirpoli, Cong. Rsch. Serv., R48435, Congressional and Presidential Authority to Impose Import Tariffs (Apr. 23, 2025), <https://www.congress.gov/crs-product/R48435> [<https://perma.cc/X9TY-9A7N>]; Looney & Patel, *supra* note 45.

⁴⁹ Trade Act of 1974, Pub. L. No. 93-618, § 301(c)(1)(B), 88 Stat. 1978 (1975); Narotzki & Shanan, *supra* note 31; Zirpoli, *supra* note 48, at 15; Looney & Patel, *supra* note 45.

⁵⁰ Trade Act of 1974, Pub. L. No. 93-618, § 232, 88 Stat. 1978 (1975); Narotzki & Shanan, *supra* note 31; Zirpoli, *supra* note 48, at 12; Looney & Patel, *supra* note 45.

⁵¹ Trade Act of 1974, Pub. L. No. 93-618, § 201(a)-201(b)(B)(2), 88 Stat. 1978 (1975); Narotzki & Shanan, *supra* note 31; Zirpoli, *supra* note 48, at 12; Looney & Patel, *supra* note 45.

in trade policy.⁵² However, as highlighted by the Brookings Institution, such tariff actions are atypical because they are taxes implemented by executive regulation rather than through congressional legislation.⁵³ Unlike other executive regulations, tariffs often bypass standard administrative procedures and judicial reviews, resulting in minimal checks and balances.⁵⁴ This framework allows the President to enact tariffs without comprehensive economic analysis or substantial justification, leaving affected parties with limited avenues for recourse.⁵⁵

Nevertheless, each of the aforementioned statutory provisions is conditioned on specific factual findings tied to trade-related concerns. First, Section 301 of the Trade Act of 1974 requires a determination that a foreign country is engaging in unfair trade practices.⁵⁶ Second, Section 232 of the Trade Expansion Act of 1962 authorizes action only upon the finding that imports threaten national security.⁵⁷ And third, Section 201 of the Trade Act of 1974 permits safeguard measures when increased imports cause or threaten serious injury to domestic industries.⁵⁸

⁵² Looney & Patel, *supra* note 45; Narotzki & Shanan, *supra* note 31; Avi-Yonah, Narotzki, & Shanan, *supra* note 21, at 17.

⁵³ Looney & Patel, *supra* note 45; Scott Bomboy, How Congress Delegates its Tariff Powers to the President, NAT'L CONST. CTR.: BLOG (Apr. 2, 2025), <https://constitutioncenter.org/blog/how-congress-delegates-its-tariff-powers-to-the-president> [<https://perma.cc/44QN-CU9F>]; Zirpoli, *supra* note 48, at 1.

⁵⁴ Looney & Patel, *supra* note 45; Scott Bomboy, *How Congress Delegates its Tariff Powers to the President*, NAT'L CONST. CTR.: BLOG (Apr. 2, 2025), <https://constitutioncenter.org/blog/how-congress-delegates-its-tariff-powers-to-the-president> [<https://perma.cc/44QN-CU9F>]; Zirpoli, *supra* note 48, at 4.

⁵⁵ Looney & Patel, *supra* note 45; Scott Bomboy, *How Congress Delegates its Tariff Powers to the President*, NAT'L CONST. CTR.: BLOG (Apr. 2, 2025), <https://constitutioncenter.org/blog/how-congress-delegates-its-tariff-powers-to-the-president> [<https://perma.cc/44QN-CU9F>]; Zirpoli, *supra* note 48, at 24.

⁵⁶ Danielle M. Trachtenberg, Cong. Rsch. Serv., IF11346, Section 301 of the Trade Act of 1974, (2024), <https://www.congress.gov/crs-product/IF11346> [<https://perma.cc/7EY6-PWAZ>]; Scott Lincicome, Inu Manak, & Alfredo Carrillo Obregon, *Unfair Trade or Unfair Protection? The Evolution and Abuse of Section 301*, Cato Inst. (June 14, 2022), <https://www.cato.org/policy-analysis/unfair-trade-or-unfair-protection-evolution-abuse-section-301> [<https://perma.cc/7URC-XD4C>].

⁵⁷ Rachel F. Fefer, Cong. Rsch. Serv., IF10667, Section 232 of the Trade Expansion Act of 1962, (2022), <https://www.congress.gov/crs-product/IF10667> [<https://perma.cc/5YNA-8AA6>].

⁵⁸ Liana Wong, Cong. Rsch. Serv., IF10786, Safeguards: Section 201 of the Trade Act of 1974, (2021), <https://www.congress.gov/crs-product/IF10786> [<https://perma.cc/K3UG-9M4Q>].

Critically, none of these provisions contemplates macro-fiscal justifications such as debt management, capital flow stabilization, or interest cost containment.

If tariffs are being imposed not to correct foreign trade behavior or defend national security, but to facilitate a domestic debt strategy, this raises substantial legal questions. Such use arguably exceeds the scope of delegated authority. Courts have generally been deferential to executive findings under these statutes,⁵⁹ but such deference has limits, especially where the executive's stated purpose diverges from the statutory rationale.⁶⁰

Additionally, this disconnect may not only violate domestic law. It also risks contravening U.S. obligations under international trade agreements, as discussed in the next subsection.

B. International Trade Law Violations

If the theory Part II describes, that U.S. tariffs were imposed to manage debt rather than to fix the United States' trade distortions or protect national security, proves correct, then the United States may be in breach of multiple obligations under international trade law.⁶¹ The World Trade Organization (WTO) system is built on foundational principles such as non-discrimination, transparency, and good faith in the application of trade measures,⁶² and it is responsible for upholding

⁵⁹ Doron Narotzki & Tamir Shanan, *Trump's Economic Gamble: Tariffs, Tax Cuts, and the Twilight of the TCJA*, U. ST. THOMAS J. L. & PUB. POL'Y (forthcoming 2025); Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026).

⁶⁰ See, e.g., Elizabeth Goitein, *How the President Is Misusing Emergency Powers to Impose Worldwide Tariffs*, BRENNAN CTR. FOR JUST. (May 13, 2025), <https://www.brennancenter.org/our-work/research-reports/how-president-misusing-emergency-powers-impose-worldwide-tariffs> [<https://perma.cc/57CJ-396G>].

⁶¹ See, e.g., Martin McElwee, Lorand Bartels, & Cara Carr, *Trump's Tariffs: WTO Consultations Requested by China, Canada and the European Union*, FRESHFIELDS: RISK & COMPLIANCE BLOGS (Apr. 9, 2025), <https://riskandcompliance.freshfields.com/post/102k86k/trumps-tariffs-wto-consultations-requested-by-china-canada-and-the-european-un> [<https://perma.cc/AC4D-V2PL>].

⁶² *Principles of the Trading System*, WORLD TRADE ORG.: UNDERSTANDING THE WTO: BASICS, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [<https://perma.cc/2QDV-ZJ8U>]; Bernard M. Hoekman & Petros C. Mavroidis, *World Trade Organization: Law, Economics, and Politics* (2d ed., 2015).

the integrity of this rule-based, international trade framework.⁶³ Tariffs applied for purposes unrelated to trade or national security potentially violate these commitments.

1. Most-Favored-Nation and National Treatment Principles

Under the General Agreement on Tariffs and Trade (GATT) Article I,⁶⁴ WTO members must grant most-favored-nation (MFN) treatment, meaning that any favorable treatment afforded to one country's goods must be extended to all WTO members.⁶⁵ Similarly, GATT Article III requires that imported products receive treatment "no less favorable" than that afforded to domestic-like products.⁶⁶

If tariffs are imposed selectively or for non-trade reasons, such as reducing capital flows or manipulating macroeconomic conditions, they are not grounded in the purpose of protecting domestic producers or addressing specific foreign trade practices. This increases the risk that they will be deemed discriminatory or arbitrary under WTO law.⁶⁷ Even if tariffs are applied uniformly across products or countries, the underlying rationale matters. WTO jurisprudence, including the Chile—Taxes on Alcoholic Beverages case, has recognized that measures cloaked in neutrality may still violate Article III if their structure or design disadvantages imports.⁶⁸

2. Violation of the Proportionality Principle

WTO law recognizes a limited number of exceptions to the MFN and national

⁶³ Aoife McCormick, *Two Steps Forward, Three Steps Back: GATT Article III:4 and Proposals for Reform*, LOND. SCH. ECON. L. REV. (Apr. 4, 2022), <https://blog.lselawreview.com/2022/04/04/two-steps-forward-three-steps-back-gatt-article-iii4-and-proposals-for-reform/> [<https://perma.cc/JKY3-KKL6>]; Elijah Asdourian & David Wessel, *What Are Tariffs, and Why Are They Rising?*, BROOKINGS INST. (Feb. 11, 2025), <https://www.brookings.edu/articles/what-are-tariffs-and-why-are-they-rising/> [<https://perma.cc/2EKE-TL28>]; Hoekman, *supra* note 62.

⁶⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁶⁵ *GATS Training Module: Chapter 1*, WORLD TRADE ORG.: TRADE TOPICS, https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm [<https://perma.cc/94VH-XT7Q>].

⁶⁶ Peter M. Gerhart & Michael S. Baron, *Articles: Understanding National Treatment: The Participatory Vision of the WTO*, 14 IND. INT'L & COMP. L. REV. 505, 513 (2004).

⁶⁷ Hoekman, *supra* note 62.

⁶⁸ Appellate Body Report, *Chile—Taxes on Alcoholic Beverages*, WTO Docs. WT/DS87/AB/R, WT/DS110/AB/R (adopted Jan. 12, 2000).

treatment rules, including those found in GATT Article XX, which allows for measures necessary to protect public morals, human health, or national security.⁶⁹ However, these exceptions require that the measure be proportional and necessary, and they demand that a country does not apply the measure in a manner constituting a disguised restriction on trade (*i.e.* “weighing and balancing”).⁷⁰

Using tariffs to manage national debt does not fall within any of these categories. It also fails the proportionality test: a broad and economically disruptive trade restriction is not a narrowly tailored means of reducing interest payments.⁷¹ The use of tariffs to pursue fiscal goals could therefore be interpreted as a disguised restriction on international commerce, undermining the legitimacy of the U.S. position in future WTO dispute proceedings.

3. *Erosion of Credibility and Institutional Integrity*

Beyond legal violation, there is a reputational cost to Trump’s tariff regime.⁷² The United States, which has been one of the critical forces behind the current international trade framework,⁷³ has historically positioned itself as a champion of rules-based international trade.⁷⁴ If the U.S. deployed tariffs to stabilize debt markets, other countries may reasonably conclude that the U.S. is acting in bad

⁶⁹ WTO Rules and Environmental Policies: GATT Exceptions, WORLD TRADE ORG.: TRADE TOPICS,

https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm
[<https://perma.cc/3A2Q-FHTX>].

⁷⁰ *WTO Analytical Index: GATT 1994 – Article XX*, WORLD TRADE ORG. (June 2025), https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf
[<https://perma.cc/4DAX-SHB7>].

⁷¹ Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EUR. J. INT’L L. 985 (2006); Peter Van den Bossche, *Looking for Proportionality in WTO Law*, 35 LEGAL ISSUES ECON. INTEGRATION 283, at 285, 290–91 (2008); Donald H. Regan, *The Meaning of “Necessary” in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 WORLD TRADE REV. 347, 350–51 (2007); *see, e.g.*, Timothy Meyer, *The Political Economy of WTO Exceptions*, 99 WASH. U. L. REV. 1299 (2022).

⁷² *See, e.g.*, Michael Clark, *Trump Forfeits U.S. Global Leadership at Americans’ Expense and to China’s Gain*, CTR. FOR AM. PROGRESS (Apr. 17, 2025).

⁷³ *See, e.g.*, *The History of the Multilateral Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/history_e.htm [<https://perma.cc/2FH3-RHH3>]

(last visited Aug. 18, 2025).

⁷⁴ *Trade for Peace: Pathways to Sustainable Trade and Peace*, WORLD TRADE ORG. (2024), https://www.wto.org/english/thewto_e/acc_e/tradeforpeace_e.htm
[<https://perma.cc/BB6W-6RSZ>].

faith by invoking trade tools for reasons that have nothing to do with international economic relations. This international perception could undermine U.S. efforts to challenge protectionism abroad, and it could erode nations' confidence in the WTO framework itself.⁷⁵

This reputational damage is not hypothetical.⁷⁶ In recent years, parties have already challenged U.S. tariffs under Sections 232 and 301 before WTO panels and appellate proceedings.⁷⁷ For example, in *United States—Steel and Aluminum Products*, the WTO ruled that the U.S. could not justify its tariffs on national security grounds.⁷⁸ It follows, then, that expanding tariff use for national debt management would push these boundaries even further, making future WTO challenges more likely and less defensible.

C. *The Constitutional Structure of Taxation and the Erosion of Legislative Authority*

If President Trump's tariff policy is, in fact, being used to manage the national debt for purposes unrelated to trade enforcement or national security, the practice raises serious constitutional concerns. It reflects the use of tariffs as a semi-hidden fiscal strategy tied to a highly speculative and questionable effort to improve the United States' ability to refinance its Treasury debt and to subsidize tax breaks for

⁷⁵ See, e.g., Joe Sommerlad, *JPMorgan CEO Jamie Dimon Warns US Could Lose Credibility over Trump Trade War*, THE INDEPENDENT (Apr. 16, 2025, at 07:17 PM EDT), <https://www.the-independent.com/news/world/americas/us-politics/jamie-dimon-trump-trade-war-tariffs-b2734238.html> [<https://perma.cc/LN3T-NWYX>].

⁷⁶ Sommerlad, *supra* note 75; Michael Clark, *Trump Forfeits U.S. Global Leadership at Americans' Expense and to China's Gain*, CTR. FOR AM. PROGRESS (Apr. 17, 2025), <https://www.americanprogress.org/article/trump-forfeits-u-s-global-leadership-at-americans-expense-and-to-chinas-gain/> [<https://perma.cc/AAC7-LMFV>]; David Silverberg, Opinion, *'The damage has been done:' Trump's Tariff Tantrums Have Evaporated Trust in America*, TORO. STAR: BUS. (June 16, 2025, 03:50 PM), https://www.thestar.com/business/opinion/the-damage-has-been-done-trumps-tariff-tantrums-have-evaporated-trust-in-america/article_0dc66dfa-88f9-40ec-b3cd-61ed8e8f1896.html [<https://perma.cc/SX9V-D3QU>]; Steve Hanke & Matt Sekerke, *Trump's tariffs are not 'common sense' – and they're putting America's credibility and 'exorbitant privilege' at risk*, FORTUNE: COMMENTARY (Apr. 4, 2025, at 12:52 PM EDT), <https://fortune.com/2025/04/04/trump-tariffs-misconceptions-common-sense/> [<https://perma.cc/4LMG-DW6D>].

⁷⁷ Christopher A. Casey et. al., Cong. Rsch. Serv., R45529, *Trump Administration Tariff Actions: Frequently Asked Questions* (2020).

⁷⁸ Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/R (adopted Dec. 9, 2022).

the wealthy through the extension of the Tax Cuts and Jobs Act (TCJA).⁷⁹

The power to tax and spend is expressly vested in Congress under Article I, Section 8 of the U.S. Constitution.⁸⁰ This authority lies at the heart of democratic accountability, and it ensures that revenue decisions reflect legislative deliberation and political consent.⁸¹ Using tariffs as a substitute for tax policy circumvents this framework and shifts, in an unconstitutional manner, meaningful control over fiscal outcomes to the executive branch.

1. Delegated Authority and Its Limits

Congress has delegated limited authority to the President to impose tariffs in specific contexts, including national security (Section 232 of the Trade Expansion Act of 1962), unfair trade practices (Section 301 of the Trade Act of 1974), and temporary safeguards (Section 201 of the Trade Act of 1974).⁸² However, these

⁷⁹ For an analysis of the complicated economic implications of extending the TCJA, see *Extending Provisions of the Tax Cuts and Jobs Act*, TAX POL'Y CTR. (Apr. 11, 2025), <https://taxpolicycenter.org/tax-model-analysis/extending-provisions-tax-cuts-and-jobs-act> [<https://perma.cc/9Y2R-FLGC>].

⁸⁰ U.S. CONST. art. I, § 8; John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 254 (1967); Adam Looney & Elena Patel, *Why Does the Executive Branch Have So Much Power Over Tariffs?*, BROOKINGS INST. (Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/> [<https://perma.cc/T2ML-C9V3>].

⁸¹ Cf. Cong. Rsch. Serv., *Overview of Spending Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C1-2-1/ALDE_00013356/ [<https://perma.cc/KTV9-K9YF>]. (last visited Apr. 27, 2025).

⁸² Christopher A. Casey, Cong. Rsch. Serv., IF11030, *U.S. Tariff Policy: Overview* (2025); Christopher T. Zirpoli, Cong. Rsch. Serv., R48435, *Congressional and Presidential Authority to Impose Import Tariffs* (2025); Jackson, *supra* note 80, at 245; Looney & Patel, *supra* note 80; Scott Bomboy, *How Congress Delegates Its Tariff Powers to the President*, Nat'l Const. Ctr.: Const. Daily Blog (Apr. 2, 2025), <https://constitutioncenter.org/blog/how-congress-delegates-its-tariff-powers-to-the-president> [<https://perma.cc/44QN-CU9F>]; Zachary B. Wolf, *Congress Gave Presidents Power Over Tariffs. They Could Always Take it Back*, CNN (Apr. 8, 2025, at 05:38 PM EDT), <https://www.cnn.com/2025/04/08/politics/tariffs-trump-power-constitution-congress/index.html> [<https://perma.cc/2LSK-JUR6>]; Marc Levinson, *Congress Loved Tariffs Long Before President 'Tariff Man' Trump*, Bloomberg: Weekend Essay (Apr. 25, 2025, at 02:00 AM MST), <https://www.bloomberg.com/news/articles/2025-04-25/will-congress-temper-trump-s-tariffs-history-isn-t-encouraging?embedded-checkout=true> [<https://perma.cc/39A8-CNRP>]; also, some scholars noted that Section 338 of the Tariff

delegations are not open-ended.⁸³ They are tied to statutory findings that serve as preconditions to the President's exercise of tariff power.⁸⁴

Courts have historically granted the executive branch considerable discretion in interpreting tariff provisions, particularly under doctrines of judicial deference.⁸⁵ However, that deference is not absolute. In the landmark case *Youngstown Sheet & Tube Co. v. Sawyer*,⁸⁶ the Supreme Court made clear that executive action must be grounded in a valid legislative grant of authority. Justice Jackson's influential concurrence in *Youngstown* articulated a tripartite framework for evaluating presidential power: the President's authority is at its strongest when acting with congressional authorization; operates in a "zone of twilight" when congressional intent is uncertain; and is at its weakest when acting against the expressed or implied will of Congress.⁸⁷ In this last category, when the President acts without statutory support or in a manner inconsistent with the purposes underlying the delegation, such action exceeds constitutional bounds and demands the strictest judicial scrutiny.

Applying that framework here, the use of tariffs as a tool for managing the national debt, rather than for regulating trade or addressing national security concerns, would likely fall into Jackson's third category, where presidential authority is at its weakest. In this posture, executive action demands heightened judicial scrutiny because it risks exceeding the constitutional bounds of delegated power.

Act of 1930 remains available to the president and he could theoretically have used them to impose retaliatory tariffs during Trump's first administration. See John K. Veroneau & Catherine H. Gibson, *Presidential Tariff Authority*, 111 Am. J. Int'l L. 957, 967–69 (2017).

⁸³ See, e.g., Constitutional Law. *Legislative Powers: Delegation of Powers. Validity of Flexible Tariff*, 44 HARV. L. REV. 1140, 1140 (1931).

⁸⁴ Veroneau & Gibson, *supra* note 82, at 967–69; for a broader analysis of the evolution of delegated trade authority and the expansion of executive power in U.S. trade lawmaking, see Kathleen Claussen, *Trading Spaces: The Changing Role of the Executive in U.S. Trade Lawmaking*, 24 IND. J. GLOB. LEGAL STUD. 345, 347 (2017); Constitutional Law. *Legislative Powers: Delegation of Powers. Validity of Flexible Tariff*, *supra* note 83.

⁸⁵ See, e.g., *Field v. Clark*, 143 U.S. 649 (1892), where the Supreme Court upheld Congress's delegation of power to the President to impose retaliatory tariffs. This decision set a precedent for broad executive discretion over trade policy, despite separation-of-powers concerns. The Supreme Court further explained that the President was not making a new law but only determining whether certain conditions existed that triggered a tariff schedule already defined by Congress. This legal reasoning aligns with the standard set in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and discussed next.

⁸⁶ *Youngstown*, 343 U.S. at 579.

⁸⁷ *Id.* at 637.

Also, as other legal scholars have emphasized, presidential participation in administrative processes governed by statute does not shield executive action from judicial review. Courts must carefully evaluate whether the President's role respects statutory limits and procedural safeguards.⁸⁸ When executive action distorts statutory purpose or expands delegated authority beyond its intended scope, judicial intervention becomes constitutionally imperative.⁸⁹ None of the statutory provisions empowering the President to impose tariffs, including Section 232, Section 301, or Section 201, authorizes the use of tariffs as a mechanism for fiscal policy experimentation. Reinterpreting trade statutes designed to address targeted trade-related harms into instruments for general debt management stretches delegation beyond its intended scope and undermines the structural separation of powers that *Youngstown* seeks to protect. Such a reinterpretation would not merely reflect an aggressive use of executive discretion but an *ultra vires* act that distorts the legislative purpose underlying the delegation of power itself.

2. A Quiet Rewriting of the Tax System

Perhaps more troubling is the functional impact of such a strategy. If, in fact, we are witness to the executive branch introducing tariffs not just as trade policy, but as a de facto fiscal tool for raising revenue and managing national debt obligations (and engaging in an all-out global trade war), this is truly a troubling event we have yet to see in American history. Under U.S. law, tariff proceeds (like other import duties) flow into the general treasury, effectively making them a form of taxation.⁹⁰ By unilaterally imposing or increasing tariffs, a President can

⁸⁸ See Charles B. Hochman, *Judicial Review of Administrative Processes in Which the President Participates*, 74 HARV. L. REV. 684, 712 (1961); see also Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 24, 51, 54–56 (1982).

⁸⁹ Bruff, *supra* note 88, at 55.

⁹⁰ Bailey Schulz, *Trump Puts Tariffs on Imports from Canada, Mexico, China. Where Does the Tariff Money Go?*, USA TODAY (Mar. 5, 2025, at 10:03 AM ET), <https://www.usatoday.com/story/money/2025/03/05/where-does-tariff-money-go/81375235007/> [<https://perma.cc/647M-EENZd>]. Though it should be noted that from a legal terminology, tariff is of course a form of tax. In *Dooley v. United States*, 183 U.S. 151, 156–57 (1901), the Court stated: “Now, there can be no doubt whatever that, if the legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally imposed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think

generate billions in additional revenue without direct congressional approval. For example, by 2025 Trump's tariffs are projected to raise approximately \$172 billion (0.57 percent of GDP) in that year alone, "making the tariffs the largest tax hike since 1993."⁹¹ This revenue, collected at U.S. ports of entry and ultimately passed on to consumers as numerous studies have shown,⁹² contributes to funding government operations and servicing debt much like legislated taxes.⁹³ In effect, the executive branch has discovered that it can unilaterally tap a significant source of public income through its trade authorities, achieving what one might call a *backdoor tax increase* on the populace.

What makes this maneuver a "quiet rewriting" of the tax system is its subtlety. Tariffs are often publicly framed as measures against foreign competitors or to

the same result must follow, if the duty be laid by Congress in the interest and for the benefit of Porto Rico. The truth is, that, in imposing the duty as a temporary expedient, with a proviso that it may be abolished by the legislative assembly of Porto Rico at its will, Congress thereby shows that it is undertaking to legislate for the island for the time being and only until the local government is put into operation." Hence, the Court treated the duties as a form of taxation, using the terms interchangeably and analyzing them as functionally equivalent for constitutional purposes.

⁹¹ Erica York & Alex Durante, *Trump Tariffs: The Economic Impact of the Trump Trade War*, TAX FOUND. (Oct. 31, 2025), <https://taxfoundation.org/research/all/federal/trump-tariffs-trade-war/> [https://perma.cc/2M5G-XMJS].

⁹² Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026); Alex Durante, *Who Pays Tariffs? Americans Will Bear the Costs of the Next Trade War*, TAX FOUND. (Feb. 19, 2025), <https://taxfoundation.org/blog/who-pays-tariffs/>; Schulz, *supra* note 90; Tom Zizka, *Where does tariff money go?*, FOX 26 HOU. (Apr. 8, 2025, at 05:39 PM CDT), <https://www.fox26houston.com/news/where-does-tariff-money-go> [https://perma.cc/B4G7-LNWY]; Benn Steil & Elisabeth Harding, *Where Will Trump's Tariff Revenues Go? His First Term Provides a Big Clue.*, COUNCIL ON FOREIGN RELS. (Feb. 3, 2025, 03:45 PM EST), <https://www.cfr.org/blog/where-will-trumps-tariff-revenues-go-his-first-term-provides-big-clue>.

⁹³ Bailey Schulz, *Trump Puts Tariffs on Imports from Canada, Mexico, China. Where Does the Tariff Money Go?*, USA TODAY (Mar. 5, 2025, at 10:03 AM ET), <https://www.usatoday.com/story/money/2025/03/05/where-does-tariff-money-go/81375235007/> [https://perma.cc/647M-EENZd]; Tom Zizka, *Where Does Tariff Money Go*, FOX 26 HOU. (Apr. 8, 2025, at 05:39 PM CDT), <https://www.fox26houston.com/news/where-does-tariff-money-go> [https://perma.cc/B4G7-LNWY].

protect domestic industry, rather than as tax policy.⁹⁴ Yet economically, tariffs operate much like a federal consumption tax on imported goods, with costs largely passed on to American consumers through higher prices. Consumers and businesses bear these additional expenses, which contribute to government revenue.⁹⁵ Unlike changes to income or payroll taxes, however, these de facto tax increases occur quietly, without the scrutiny or debate that typically accompanies tax legislation. Under the executive's tariff authority, there is usually no explicit tax bill or open budget debate; the President's proclamation or executive action suffices to raise the duty.⁹⁶ This lack of overt process means the public may not immediately recognize that they are effectively bearing the burden of a new tax. The result is a covert shift in fiscal policy: the administration can raise revenue and address deficits by exploiting import duties, all while bypassing the constitutional safeguards and legislative processes that normally govern taxation.

Historically, tariffs were a primary source of U.S. federal revenue (especially in the 19th century), but since the early 20th century, the nation has deliberately shifted toward income and other taxes for reasons of equity and economic efficiency.⁹⁷ President Trump's tariff policy reverses that long-term trend in a

⁹⁴ See, for example, *Fact Sheet: President Donald J. Trump Ensures National Security and Economic Resilience Through Section 232 Actions on Processed Critical Minerals and Derivative Products*, THE WHITE HOUSE (Apr. 15, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-ensures-national-security-and-economic-resilience-through-section-232-actions-on-processed-critical-minerals-and-derivative-products/> [https://perma.cc/3FA5-VTK3]; *Fact Sheet: President Donald J. Trump Declares National Emergency to Increase Our Competitive Edge, Protect Our Sovereignty, and Strengthen Our National and Economic Security*, THE WHITE HOUSE (Apr. 2, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security/> [https://perma.cc/8LSR-6PWJ]; Ryan Ermey, 'We Have to Protect This Country': Here's What Trump Hopes To Accomplish with Tariffs, CNBC (Apr. 2, 2025, at 05:29 PM EDT), <https://www.cnbc.com/2025/04/02/trump-tariffs-what-he-hopes-to-accomplish.html> [https://perma.cc/29DV-GLK5].

⁹⁵ Avi-Yonah, Narotzki, & Shanan, *supra* note 92. Alex Durante, *Who Pays Tariffs? Americans Will Bear the Costs of the Next Trade War*, TAX FOUND. (Feb. 19, 2025), <https://taxfoundation.org/blog/who-pays-tariffs/> [https://perma.cc/T4NA-AK8D].

⁹⁶ Looney & Patel, *supra* note 45.

⁹⁷ Avi-Yonah, Narotzki, & Shanan, *supra* note 92; Doron Narotzki, *Tariffs: Back to the Future*, 116 TAX NOTES INT'L 565, (Oct. 13, 2025), <https://ssrn.com/abstract=5007289> [https://perma.cc/WH2T-KU88]; Doron Narotzki, Tamir Shanan & Julianne Jones,

subtle, yet very meaningful, way. By invoking statutes originally designed to regulate foreign commerce for national security purposes and resolve trade disputes, President Trump uses tariffs as a significant revenue-generating mechanism for the U.S. Treasury.⁹⁸ In fact, the tariff increase under President Trump is so large that it was noted to be larger than the tax revenue increase from the Affordable Care Act's tax measures.⁹⁹ In other words, a trade measure implemented by unilateral executive action had a larger fiscal impact than major tax laws passed by Congress.¹⁰⁰ This fact alone highlights how profoundly the executive's tariff tool can influence the nation's revenue stream, all without changing a single provision of the Internal Revenue Code, or following any administrative law thresholds.¹⁰¹ Moreover, when such funds are implicitly used to manage debt (for example, and as the theory referred to in Part II argues, to help cover interest payments or reduce the need for borrowing), the President is stepping into what is traditionally a congressional role of balancing the budget through taxation or debt decisions. The result is clear but troubling: the tax system

Taxation and the Founding Fathers, 186 TAX NOTES FED. 1413 (Feb. 24, 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5198677 [<https://perma.cc/N7Y2-89XN>].

⁹⁸ While suggesting his tariff policy will lead to an income tax reduction, see, for example, Richard Ruben, *Trump Floats Improbable Income-Tax Tied to Tariffs*, WALL ST. J. (Apr. 28, 2025 05:49 PM ET), <https://www.wsj.com/politics/policy/tariffs-income-taxes-revenue-8b647e6b> [<https://perma.cc/VEF3-P7HW>]; David Goldman & Matt Egan, *Trump Says He'll Eliminate Income Taxes. There's a Problem with That*, CNN (Apr. 28 2025, at 01:19 PM EDT), <https://www.cnn.com/2025/04/28/business/taxes-trump-tariffs/index.html> [<https://perma.cc/XZG9-NQ8A>].

⁹⁹ Dylan Matthews, *Trump and Harris Could Raise Taxes Without Asking Congress. Congress Should Stop Them*, VOX (Sep. 30, 2024, at 04:00 AM MST), <https://www.vox.com/policy/374102/trump-harris-tariffs-congress> [<https://perma.cc/XXK7-QV5A>]; Manuela Tobias, *Do Trump Tariffs Cost More Than the Affordable Care Act*, POLITIFACT (Oct. 12, 2018), <https://www.politifact.com/factchecks/2018/oct/12/national-taxpayers-union/trump-tariffs-cost-more-health-care-taxes/> [<https://perma.cc/9K9U-WQKC>]; Erica York & Alex Durante, *Trump Tariffs: Tracking The Economic Impact of the Trump Trade War*, TAX FOUND. (Oct. 31, 2025), <https://taxfoundation.org/research/all/federal/trump-tariffs-trade-war/> [<https://perma.cc/D5MC-735Z>].

¹⁰⁰ Chris Isidore, *Trump Aide Says Tariffs Will Raise \$6 Trillion, Which Would be Largest Tax Hike in US History*, CNN (March 31, 2025, at 01:38 PM EDT), <https://www.cnn.com/2025/03/31/economy/tariffs-largest-tax-hike> [<https://perma.cc/Q6MY-FN72>].

¹⁰¹ Looney & Patel, *supra* note 45.

is being quietly rewritten in practice, and policy that should be made through transparent legislative tax reforms is instead happening through the opaque mechanism of import duties.

The executive branch typically defends this practice by citing statutory delegations and invoking economic or national security justifications for tariff measures.¹⁰² Formally, the legal authority for recent tariff actions derives from statutes mentioned previously, as the Trade Expansion Act of 1962 and the Trade Act of 1974, under which Congress conditionally delegated power to the President.¹⁰³ However, when these delegated powers are stretched to authorize broad, sweeping tariffs that pursue objectives far removed from those originally contemplated by Congress, the distinction between trade regulation and tax policy becomes increasingly blurred and worrisome.¹⁰⁴ The operative mechanism is the use of tariffs as de facto taxes. In practice, the President identifies a triggering condition, often expansively construed, such as a perceived threat to “national

¹⁰² See, for example, *Fact Sheet: President Donald J. Trump Ensures National Security and Economic Resilience Through Section 232 Actions on Processed Critical Minerals and Derivative Products*, THE WHITE HOUSE (Apr. 15, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-ensures-national-security-and-economic-resilience-through-section-232-actions-on-processed-critical-minerals-and-derivative-products/> [https://perma.cc/Z7NP-YPEG]; *Fact Sheet: President Donald J. Trump Declares National Emergency to Increase Our Competitive Edge, Protect Our Sovereignty, and Strengthen Our National and Economic Security*, THE WHITE HOUSE (Apr. 2, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security/> [https://perma.cc/C3SJ-Q6TM].

¹⁰³ Looney & Patel, *supra* note 45.

¹⁰⁴ Dan Mangan, *Dozen States Sue Trump in Bid to Block New Tariffs*, CNBC (Apr. 25, 2025, at 08:25 AM EDT) <https://www.cnbc.com/2025/04/23/states-sue-trump-in-bid-to-block-new-tariffs.html> [https://perma.cc/8D4D-5Y7W]; Ramishah Maruf, *Twelve States Sue the Trump Administration over 'Tax Hikes' Through Tariffs*, CNN (Apr. 23, 2025, at 07:51 AM EDT), <https://www.cnn.com/2025/04/23/business/twelve-states-sue-trump-tariffs/index.html> [https://perma.cc/L7C3-L38N]; Larry Neumeister, *Twelve States File Suit Against Trump Administration Tariff Policy*, PBS NEWS (Apr. 23, 2025, at 05:48 PM EDT), <https://www.pbs.org/newshour/politics/twelve-states-file-suit-against-trump-administration-tariff-policy> [https://perma.cc/A52D-MRKT]; Jasmine Baehr, *Twelve States Sue Trump Over Tariffs Claiming They're 'Illegal' and Harmful to US Economy*, FOX NEWS (Apr. 23, 2025, at 09:20 EDT), <https://www.foxnews.com/politics/twelve-states-sue-trump-over-tariffs-claiming-theyre-illegal-harmful-us-economy> [https://perma.cc/Z2CD-GW6B].

security” or the existence of “unfair” foreign trade practices. Then, he unilaterally imposes tariffs that generate substantial revenue. This approach effectively enables the executive branch to levy taxes on imports (and by extension on consumers), provided that it can assert a plausible statutory justification.

Overall, this tariff policy to raise revenue in order to pay for tax cuts (which are mostly benefiting a small percentage of taxpayers)¹⁰⁵ or manipulate recent economic norms,¹⁰⁶ alters the structure of the tax system without the procedures that normally complement such change. There is no legislative debate, no committee review, no opportunity for amendments or public input. Instead, a regressive, consumption-based burden is imposed on the American public through opaque and unaccountable means, which this Article argues amounts to a quiet rewriting of the federal fiscal order.

Nonetheless, and this is another important reason to reevaluate and reconsider President Trump’s use of tariffs and his executive authority regarding it, over time, this shift in the prevailing tariff policy of the executive branch risks normalizing a mode of governance in which politically sensitive fiscal decisions are outsourced to the executive branch and trade officials who implement these changes without congressional oversight. This concern is not new. Writing in 1896, economist A. P. Winston cautioned that the protective tariff system, particularly after the enactment of the Tariff of 1824, had already begun to subvert the constitutional

¹⁰⁵ By absolute numbers, the ultra-wealthy taxpayers would benefit significantly more than the low- and middle-income taxpayers. See Margot Crandall-Hollick & Joseph Rosenberg, *Unpacking the TCJA: Who Benefits and Who Loses from Extending Major Provisions*, TAX POL’Y CTR. (Dec. 19, 2024), <https://taxpolicycenter.org/taxvox/unpacking-tcja-who-benefits-and-who-loses-extending-major-provisions> [<https://perma.cc/AY9S-L4NL>]; *Extending Provisions of the Tax cuts and Jobs Act*, TAX POL’Y CTR., (Mar. 27, 2025), <https://taxpolicycenter.org/tax-model-analysis/extending-provisions-tax-cuts-and-jobs-act> [<https://perma.cc/6CYS-ZKV3>]; Greg Iacurci, ‘Reverse Robin Hood Scam’ or Windfall for Middle Class? Lawmakers Debate Trump Tax Plan Extensions, CNBC (Mar. 3, 2025, at 10:12 AM EST), <https://www.cnbc.com/2025/03/03/who-benefits-from-trump-tax-cuts-and-jobs-act-extension.html> [<https://perma.cc/Z3BW-CKTD>]; Catherine Lucey, *Trump Floats New Income Tax Cut in Bid to Ease Tariffs Bite*, BLOOMBERG: POL. (Apr. 27, 2025, at 3:32 PM MST), <https://www.bloomberg.com/news/articles/2025-04-27/trump-floats-new-income-tax-cut-in-bid-to-ease-bite-of-tariffs> [<https://perma.cc/96LK-N8XR>].

¹⁰⁶ *A User’s Guide to Restructuring the Global Trading System*, HUDSON BAY CAP., (Nov. 2024), https://www.hudsonbaycapital.com/documents/FG/hudsonbay/research/638199_A_Users_Guide_to_Restructuring_the_Global_Trading_System.pdf [<https://perma.cc/26QC-BGLD>].

framework by transforming revenue measures into instruments of regional favoritism and political manipulation.¹⁰⁷ Although tariffs were authorized under the Constitution, Winston emphasized that their legitimacy depended on shared expectations of moderation and equity. In his view, the framers of the U.S. Constitution did not intend for tariff policy to become a tool of industrial enrichment at the expense of other sectors and regions. The move toward aggressive, protectionist duties marked what he called a “novel system,” incompatible with the constitutional order as understood at the time of ratification.¹⁰⁸ His critique stresses a recurring danger: that tariff authority, if unchecked, invites not only economic distortion, but also a quiet displacement of the legislative role in fiscal governance.¹⁰⁹

3. *Delegation and the Displacement of Legislative Tax Authority*

¹⁰⁷ A. P. Winston, *The Tariff and the Constitution*, 5 J. POL. ECON. 40 (1896), <http://www.jstor.org/stable/1817508> [<https://perma.cc/Z5XP-9F4Z>]. It should be noted though that in 1894, Congress enacted the Wilson-Gorman Tariff Act, which not only reduced tariff rates but also introduced a permanent federal income tax. The following year, in *Pollock v. Farmers' Loan & Trust Co.*, the Supreme Court invalidated the income tax provision, holding in a narrow 5-4 decision that it constituted a direct tax not apportioned among the states as required by Article I, Section 9 of the Constitution. The ruling effectively halted federal income taxation until the ratification of the Sixteenth Amendment in 1913. In the wake of *Pollock*, Congress turned back to tariffs as the primary revenue source, raising duties to historically high levels after 1896, see Scott Bomboy, *A Brief History of the Constitution and Tariffs*, NAT'L CONST. CTR. (Feb. 7, 2025), <https://constitutioncenter.org/blog/a-brief-history-of-the-constitution-and-tariffs> [<https://perma.cc/JQ9N-8YXB>].

¹⁰⁸ Winston, *supra* note 107.

¹⁰⁹ A similar critique appears in modern scholarship reexamining the original North-South compromises embedded in the Constitution. Baack, McGuire, and Van Cott argue that Southern delegates at the Constitutional Convention accepted a simple-majority rule for commercial regulation in exchange for a ban on export taxes and a temporary guarantee of slave importation. However, they contend that this agreement was a strategic miscalculation. Due to the economic principle of tariff symmetry, import duties acted as de facto export taxes, disproportionately burdening the South's export-dependent economy. The authors show that this early constitutional bargain not only undermined Southern economic interests but also enabled a long-term erosion of fiscal balance and sectional equity through unchecked federal tariff power. See Ben Baack, Robert A. McGuire, & T. Norman Van Cott, *Constitutional Agreement During the Drafting of the Constitution: A New Interpretation*, 38 J. LEGAL STUD. 533 (2009), <https://www.jstor.org/stable/10.1086/597327> [<https://perma.cc/9JFE-PAQX>].

The Constitution assigns the power to “lay and collect Taxes, Duties, Imposts, and Excises” to Congress.¹¹⁰ It further requires that all bills for raising revenue originate in the House of Representatives, the chamber most directly accountable to the people.¹¹¹ These provisions reflect a fundamental principle of democratic governance dating back to the American Revolution: taxation without representation is unjust.¹¹² Yet, the modern proliferation of executive tariff authority has, in practice, displaced this principle.¹¹³ Through decades of delegation, Congress has handed over a considerable measure of its taxing power to the President, thereby allowing the executive branch to make key decisions about who and what gets taxed without going through the ordinary legislative process.¹¹⁴ This phenomenon represents a significant shift in the institutional balance of taxation authority, one that unfolded gradually and largely outside the public’s view. The following brief historical overview explains how this transformation occurred.

Generally, starting in the 20th century, Congress began delegating tariff-setting powers to the President as part of trade legislation.¹¹⁵ A notable early example was the Reciprocal Trade Agreements Act of 1934, which authorized the executive to negotiate mutual tariff reductions enacted, that Congress passed under

¹¹⁰ U.S. Const. art. I, § 8, cl. 1.

¹¹¹ U.S. Const. art. I, § 7.

¹¹² Doron Narotzki, Tamir Shanan, & Julianne Jones, *Taxation and the Founding Fathers*, 186 TAX NOTES FED. 1413 (Oct. 25, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5198677 [<https://perma.cc/MYH4-E7VX>].

¹¹³ Larry Neumeister, *Twelve States File Suit Against Trump Administration Tariff Policy*, PBS NEWS: POLITICS (Apr. 23, 2025, at 05:48 PM EST), <https://www.pbs.org/newshour/politics/twelve-states-file-suit-against-trump-administration-tariff-policy> [<https://perma.cc/N36N-8VBQ>]; Dan Mangan, *States Sue Trump in Bid to Block New Tariffs*, CNBC (Apr. 25, 2025, at 08:25 AM EDT), <https://www.cnbc.com/2025/04/23/states-sue-trump-in-bid-to-block-new-tariffs.html> [<https://perma.cc/4J3M-YG9B>].

¹¹⁴ CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R48435, CONGRESSIONAL AND PRESIDENTIAL AUTHORITY TO IMPOSE IMPORT TARIFFS 1 (2025), <https://www.congress.gov/crs-product/R48435> [<https://perma.cc/3F6J-YVAH>]; Adam Looney & Elena Patel, *Why Does the Executive Branch Have So Much Power over Tariffs?*, BROOKINGS INST. (Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/> [<https://perma.cc/H3VM-9FPV>].

¹¹⁵ CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW (2025), <https://www.congress.gov/crs-product/IF11030> [<https://perma.cc/BP46-SQ9N>].

President Franklin D. Roosevelt.¹¹⁶ While Congress intended that delegation to lower tariffs (a necessary response to the protectionist excesses of the Smoot-Hawley Tariff Act), it set a precedent for executive involvement in tax-like decisions. Over time, additional statutes expanded presidential latitude: the Trade Expansion Act of 1962 (Section 232) authorizes tariffs for national security reasons, and the Trade Act of 1974 provides two additional tools: Section 301 for responding to unfair trade practices and Section 201 for temporary safeguard measures in response to surges in imports that cause or threaten serious injury to domestic American industries.¹¹⁷ Each of these laws effectively transferred some of Congress's Article I taxing power to the executive, albeit for limited and specific purposes. It is unlikely, however, that Congress anticipated these economic instruments would one day be employed to fundamentally shift the domestic tax burden, restructure the global economic framework, or serve as a mechanism for sovereign debt management. Over time, with Congress's tacit acquiescence, successive presidents from both parties have accumulated a remarkable degree of discretion in setting tariffs.¹¹⁸

The result of all this is highly problematic and troubling. The Trump administration's aggressive use of dormant tariff authorities exposes just how far this delegation has gone. President Trump himself even declared that he does not need Congress's approval to impose a tariff program,¹¹⁹ and this assertion was

¹¹⁶ *New Deal Trade Policy: The Export-Import Bank & The Reciprocal Trade Agreement Act, 1934*, U.S. DEP'T STATE: OFF. HISTORIAN, <https://history.state.gov/milestones/1921-1936/export-import-bank> [<https://perma.cc/DKU9-WN2S>].

¹¹⁷ CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R48435, CONGRESSIONAL AND PRESIDENTIAL AUTHORITY TO IMPOSE IMPORT TARIFFS 1 (2025), <https://www.congress.gov/crs-product/R48435> [<https://perma.cc/CF8Z-MKRG>]; Adam Looney & Elena Patel, *Why Does the Executive Branch Have So Much Power over Tariffs?*, BROOKINGS INST. (Jan. 15, 2025), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/> [<https://perma.cc/H3VM-9FPV>].

¹¹⁸ CASEY, *supra* note 115; Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. Cal. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>]; Doron Narotzki, *Tariffs: Back to the Future*, 116 TAX NOTES INT'L 565 (Oct. 13, 2025), <https://ssrn.com/abstract=5007289> [<https://perma.cc/Y9YP-8JKT>]; Doron Narotzki, *Scrapping Tariffs, Spurring Growth*, 184 TAX NOTES FED. 2289 (Sep. 16, 2024), <https://ssrn.com/abstract=5007283> [<https://perma.cc/H8DL-ULNT>].

¹¹⁹ Max Zahn, *Trump Doubles Down on Plan to Impose Massive Tariffs if Reelected*, ABC NEWS (Sep. 25, 2024, at 12:55 PM), <https://abcnews.go.com/Business/could-trump->

grounded in the broad language of existing statutes.

In reality, and a short while after beginning his second term, President Trump significantly expanded the use of executive authority to reshape U.S. trade policy. Invoking the International Emergency Economic Powers Act (IEEPA), enacted in 1977,¹²⁰ President Trump declared a national emergency, citing trade deficits and unfair foreign practices as threats to national security.¹²¹ This declaration facilitated the implementation of a sweeping 10-percent tariff on virtually all imports into the United States, effective April 5, 2025.¹²² Subsequently, on April 9, 2025, President Trump imposed higher “reciprocal” tariffs on countries with significant trade imbalances or non-tariff barriers, including a new 125-percent reciprocal tariff on China layered on top of the existing 20-percent “fentanyl” tariff, raising the combined rate to at least 145-percent, and in some cases higher, depending on product classification and surcharges.¹²³ According to many, President Trump’s tariff policy is economically equivalent to one of the largest tax

impose-tariffs-without-approval-congress/story?id=113955335 [https://perma.cc/4V72-4YS5].

¹²⁰ CHRISTOPHER A. CASEY & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618 THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE (2024), <https://www.congress.gov/crs-product/R45618> [https://perma.cc/C7R2-CPDQ].

¹²¹ Fact Sheet: President Donald J. Trump Declares National Emergency to Increase Our Competitive Edge, Protect Our Sovereignty, and Strengthen Our National and Economic Security, THE WHITE HOUSE, (Apr. 2, 2025), <https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security/> [https://perma.cc/EN9S-V32U]; CHRISTOPHER A. CASEY, CONG. RSCH. SERV. IN11129, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT (IEEPA), THE NATIONAL EMERGENCIES ACT (NEA) AND TARIFFS: HISTORICAL BACKGROUND AND KEY ISSUES, (Apr. 7, 2025), <https://www.congress.gov/crs-product/IN11129> [https://perma.cc/7G4S-W32S]; Madeleine Ngo, *What to Know About the Emergency Law Trump Used to Impose Tariffs*, N.Y. TIMES (Aug. 29, 2025), <https://www.nytimes.com/2025/02/02/us/politics/trump-tariffs-ieepa.html> [https://perma.cc/DFD7-9Y34].

¹²² THE WHITE HOUSE, *supra* note 121, at ¶ 4.

¹²³ THE WHITE HOUSE, *supra* note 121, at ¶ 5; Peter Tabor, Joel E. Roberson, Micah J. Burbanks-Ivey, Molly B. O’Casey, Sophie Jin, Ronald A. Oleynik, Robert A. Friedman, Andrew K. McCallister, Francisco J. Sanchez, & Antonia I. Tzinova, *President Trump Announces Preliminary Trade Agreements with U.K., China for Tariff Reductions*, HOLLAND & KNIGHT ALERT (May 20, 2025), <https://www.hklaw.com/en/insights/publications/2025/05/president-trump-announces-preliminary-trade-agreements-with-uk-china> [https://perma.cc/U7H3-7FYZ].

increases in recent history.¹²⁴ It should be noted, however, that regarding the tariff measures on China, President Trump signed an executive order that continued the suspension of heightened tariffs through November 10, 2025.¹²⁵ More importantly, while all this was happening, Congress had no input over these decisions.

This course of dealing marked a substantial departure from traditional trade policy, as the executive branch unilaterally enacted broad-based tariffs without direct congressional approval. While IEEPA grants the President authority to regulate international economic transactions during national emergencies, President Trump's use of the IEEPA to impose comprehensive tariffs on a global scale raises constitutional questions regarding the separation of powers and Congress's exclusive authority over taxation and trade under Article I of the U.S. Constitution. The administration's actions have prompted legal challenges, and they have intensified debates over the appropriate limits of executive power in economic policymaking.¹²⁶

After the United States Supreme Court invalidated the legislative-veto device in *INS v. Chadha*,¹²⁷ Congress could no longer control delegated executive decisions by one- or two-House disapproval; rather, Congress could only override executive decisions made under previously-delegated authority through bicameralism and presentment.¹²⁸ Because of these restrictions, the IEEPA offers

¹²⁴ Steve Liesman, *Trump's Tariffs Are Equivalent to One of the Largest Tax Increases in Decades*, CNBC (May 16, 2019, at 11:17 AM EDT), <https://www.cnbc.com/2019/05/16/trumps-tariffs-are-equivalent-to-one-of-the-largest-tax-increases-in-decades.html> [https://perma.cc/4BHC-S5Z2].

¹²⁵ *Fact Sheet: President Donald J. Trump Continues the Suspension of the Heightened Tariffs on China*, THE WHITE HOUSE (Aug. 11, 2025), <https://www.whitehouse.gov/fact-sheets/2025/08/fact-sheet-president-donald-j-trump-continues-the-suspension-of-the-heightened-tariffs-on-china/> [https://perma.cc/GE93-ZUA5] (noting that the 10-percent reciprocal tariff remained in place).

¹²⁶ Jasmine Baehr, *Twelve States Sue Trump over Tariffs, Claiming They're 'Illegal' and Harmful to U.S. Economy*, FOX NEWS (Apr. 23, 2025, at 9:20 PM EDT), <https://www.foxnews.com/politics/twelve-states-sue-trump-over-tariffs-claiming-theyre-illegal-harmful-us-economy> [https://perma.cc/G9AK-NMDK].

¹²⁷ *INS v. Chadha*, 462 U.S. 919 (1983).

¹²⁸ U.S. Const. art. I, § 7, cls. 2–3; *INS v. Chadha*, 462 U.S. 919, 946–59 (1983); *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998); see generally *The Legislative Veto: Is It Legislation?*, 38 WASH. & LEE L. REV. 172 (1981), <https://scholarlycommons.law.wlu.edu/wlulr/vol38/iss1/13> [https://perma.cc/HA8Q-C8MP]; see also RICHARD R. CAMBOSOS, CONGRESSIONAL OVERSIGHT AND THE LEGISLATIVE VETO, 4 OGC ADVISER 9 (1980), <https://www.gao.gov/products/113400> [https://perma.cc/T39F-VMKN].

the President a wide berth to act first and face minimal oversight later.¹²⁹ The result is that under the current legal framework, a President can cite a nebulous “emergency” and unilaterally impose what are in effect taxes,¹³⁰ completely bypassing the tax-writing committees in Congress.

Some in Congress have proposed reasserting their authority. One such proposal has been the “No Taxation Without Representation Act,” which would require congressional approval before any presidential tariff hike takes effect.¹³¹ Such efforts reflect a realization that Congress’s constitutional power to levy taxes has been quietly, but dramatically, undermined.¹³² In essence, we are witnessing a power shift: the executive branch effectively legislates new taxes in the form of tariffs, thereby re-writing the balance of power envisaged by the Framers.¹³³ This development raises fundamental questions about whether the center of gravity in tax policy has shifted from Congress to the executive, a shift that, if true, would have far-reaching constitutional implications.

¹²⁹ See, e.g., William Yeatman, *The Case for Congressional Regulatory Review*, CATO INST., (Feb. 18, 2025), <https://www.cato.org/policy-analysis/case-congressional-regulatory-review> [<https://perma.cc/X4LH-RXHM>] (arguing that Congress should develop new legal tools to reassert oversight over executive regulatory action).

¹³⁰ See, e.g., *Brown v. Maryland*, 25 U.S. 419, 437–40 (1827) (“An impost, or duty on imports is a custom or a tax levied on articles brought into a country. . . . A duty on imports is a tax on the article which is paid by the consumer.”); *Pac. Ins. v. Soule*, 74 U.S. 433, 445 (1868) (“Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than ‘taxes.’ It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of ‘imposts.’”); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 296 (1976) (“the Court significantly characterized an impost or duty as ‘a custom or a tax levied on articles brought into a country’”); *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998) (Holding that the Harbor Maintenance Tax on exports “imposes a tax, not a user fee.”).

¹³¹ H.R. 1295, 117th Cong. (2021).

¹³² Dylan Matthews, *Trump and Harris Could Raise Taxes Without Asking Congress. Congress Should Stop Them*, VOX (Sep. 30, 2024, at 04:00 AM MST), <https://www.vox.com/policy/374102/trump-harris-tariffs-congress> [<https://perma.cc/R42Q-QHAY>] (“it’s the traditional role of legislatures in all democratic countries, and putting this power instead in the president’s hands cuts the people’s representatives out of the process of determining how they are taxed—a concept that goes back to before the American Revolution.”).

¹³³ Doron Narotzki, Tamir Shanan, & Julianne Jones, *Taxation and the Founding Fathers*, 186 TAX NOTES FED. 1413 (Feb. 24, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5198677 [<https://perma.cc/PSY6-4ALB>].

4. Testing the Boundaries of Presidential Tariff Power

In 2025, a series of developments put the question of whether Congress may delegate tariff authority to the executive before the federal courts. On August 29, 2025, the U.S. Court of Appeals for the Federal Circuit decided *V.O.S. Selections, Inc. v. Trump*,¹³⁴ affirming the Court of International Trade and invalidating five executive orders that imposed broad tariffs under the IEEPA. Although the court cabined the legal question presented, the ruling had wide consequences that heightened uncertainty and volatility across domestic and global markets. In *V.O.S. Selections, Inc. v. Trump*, the Federal Circuit held that the IEEPA's "regulate" power does not authorize the President to impose tariffs of unlimited duration on nearly all goods from nearly every country.¹³⁵

The challenged executive orders in *V.O.S. Selections, Inc. v. Trump*, arose from national emergencies President Trump declared at the beginning of his second term and included threats at the southern border that involved illicit drugs (Proclamation 10886)¹³⁶ and extensions to trade imbalances with Canada, Mexico, and China with Executive Orders 14193,¹³⁷ 14194,¹³⁸ and 14195.¹³⁹ These executive orders imposed 25-percent tariffs on goods from Canada and Mexico and 10-percent tariffs on Chinese goods, and they were labeled as "Trafficking Tariffs." Shortly after President Trump issued these three orders, he issued Executive Order 14257,¹⁴⁰ which established a 10-percent baseline tariff on imports from most U.S. trading partners, with additional reciprocal rates up to 50 percent for countries with trade imbalances. Executive Order 14266¹⁴¹ made minor adjustments.

These measures, projected to generate between \$2.3 trillion and \$3.3 trillion in revenue over a decade, departed from congressional authority and established

¹³⁴ *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812 & 2025-1813, slip op. (Fed. Cir. Aug. 29, 2025).

¹³⁵ *Id.*

¹³⁶ Proclamation No. 10886, 90 Fed. Reg. 8327 (Jan. 29, 2025) ("America's sovereignty is under attack. . . . This invasion has caused widespread chaos and suffering in our country over the last 4 years. . . . This assault on the American people and the integrity of America's sovereign borders represents a grave threat to our Nation.").

¹³⁷ Exec. Order No. 14193, 90 Fed. Reg. 9113 (Feb. 7, 2025).

¹³⁸ Exec. Order No. 14194, 90 Fed. Reg. 9117 (Feb. 7, 2025).

¹³⁹ Exec. Order No. 14195, 90 Fed. Reg. 9121 (Feb. 7, 2025).

¹⁴⁰ Exec. Order No. 14257, 90 Fed. Reg. 15041 (Apr. 7, 2025).

¹⁴¹ Exec. Order No. 14266, 90 Fed. Reg. 15625 (Apr. 15, 2025).

tariff schedules under the Harmonized Tariff Schedule of the United States.¹⁴²

The Federal Circuit's per curiam opinion in *V.O.S. Selections, Inc. v. Trump* echoes the concerns this paper expresses by meticulously explaining the administration's overreach through a layered statutory analysis. The Federal Circuit Court chose to adopt a cautious approach and limited the scope of its review and decision when it came to interpreting the IEEPA's text. It did so narrowly as stated: "We are not addressing whether the President's actions should have been taken as a matter of policy. Nor are we deciding whether IEEPA authorizes any tariffs at all. Rather, the only issue we resolve on appeal is whether the Trafficking Tariffs and Reciprocal Tariffs imposed by the Challenged Executive Orders are authorized by [the] IEEPA. We conclude they are not."¹⁴³ The court's holding emphasized that the authority to "regulate . . . importation" under § 1702(a)(1)(B)¹⁴⁴ does not encompass the imposition of tariffs or duties or any similar term for that matter, especially those that are unbounded in scope, duration, and economic impact. The courts further stated that the IEEPA does not include a residual clause that allows the President any "powers beyond those which are explicitly listed."¹⁴⁵

The majority opinion's narrow approach tried to keep its analysis to the statutory language, noting that the IEEPA states specific presidential powers, such as to investigate, block, direct, compel, nullify, void, prevent, or prohibit transactions, and the opinion omits any reference to tariffs, duties, taxes, or similar monetary exactions.¹⁴⁶ Invoking the canon that the expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*),¹⁴⁷ the majority held that the IEEPA confers no tariff authority on the President.¹⁴⁸ Overall, the court

¹⁴² *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812 & 2025-1813, slip op. at 36 (Fed. Cir. Aug. 29, 2025).

¹⁴³ *Id.* at 26.

¹⁴⁴ 50 U.S.C.A. § 1702(a)(1)(B) (West, current through P.L. 119-36).

¹⁴⁵ *V.O.S. Selections*, slip op. at 19.

¹⁴⁶ *Id.*

¹⁴⁷ VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (Mar. 30, 2023), <https://www.congress.gov/crs-product/R45153> [<https://perma.cc/KNV8-HV3M>].

¹⁴⁸ *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812 & 2025-1813, slip op. at 19, 27 (Fed. Cir. Aug. 29, 2025) ("IEEPA provides that, after declaring a national emergency pursuant to the NEA, the President may 'investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any . . . importation or exportation of . . . any property in which any foreign country or a national

stated that the statute's listed verbs regulate and interdict transactions and property flows in foreign commerce, and this reasoning echoes common law restrictions on trading with enemies¹⁴⁹ rather than conferring a revenue-raising power such as tariffs or taxes.¹⁵⁰ To emphasize this textual limit, the court contrasted the IEEPA with other trade statutes in which Congress had explicitly delegated tariff authority.¹⁵¹ For example, Section 232 of the Trade Expansion Act of 1962 permits the President to broadly "adjust the imports" if they threaten national security,¹⁵² a phrase the Supreme Court in *Federal Energy Administration v. Algonquin SNG, Inc.*¹⁵³ interpreted to include license fees.¹⁵⁴ Even then, there are still certain procedural safeguards like investigations and consultations.¹⁵⁵ Similarly, Sections 201 and 301 of the Trade Act of 1974¹⁵⁶ authorize "duties" or "increases in . . .

thereof has any interest.' 50 U.S.C. § 1702(a)(1)(B). Notably, IEEPA does not use the words 'tariffs' or 'duties,' nor any similar terms like 'customs,' 'taxes,' or 'imposts.' IEEPA also does not have a residual clause granting the President powers beyond those which are explicitly listed. . . . Notably, when drafting IEEPA, Congress did not use the term 'tariff' or any of its synonyms, like 'duty' or 'tax.' There are numerous statutes that do delegate to the President the power to impose tariffs; in each of these statutes that we have identified, Congress has used clear and precise terms to delegate tariff power, reciting the term 'duties' or one of its synonyms. In contrast, none of these statutes uses the broad term 'regulate' without also separately and explicitly granting the President the authority to impose tariffs. The absence of any such tariff language in IEEPA contrasts with statutes where Congress has affirmatively granted such power and included clear limits on that power. . . . Further. . . . in each statute delegating tariff power to the President, Congress has provided specific substantive limitations and procedural guidelines to be followed in imposing any such tariffs. It seems unlikely that Congress intended, in enacting IEEPA, to depart from its past practice and grant the President unlimited authority to impose tariffs. The statute neither mentions tariffs (or any of its synonyms) nor has procedural safeguards that contain clear limits on the President's power to impose tariffs.").

¹⁴⁹ *Id.* at 33, n.14 ("Instead, the other verbs implicate the common law doctrine that trade with enemy nations or hostile actors is illegal.").

¹⁵⁰ *Id.* at 19. ("Regulate' must be read in the context of these other verbs, none of which involve monetary actions or suggest the power to tax or impose tariffs.").

¹⁵¹ *Id.* at 6.

¹⁵² Trade Expansion Act of 1962 § 232, 19 U.S.C.A. § 1862 (West, current through P.L. 119-36).

¹⁵³ *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 557 (1976).

¹⁵⁴ *Id.* at 551–52, 561.

¹⁵⁵ 19 U.S.C.A. § 1862 (b)(1)–(2), (c)(1)–(2) (West, current through P.L. 119-36); 15 C.F.R. § 705.7 (Current through November 10, 2025, 90 FR 50744).

¹⁵⁶ Trade Act of 1974 §§ 201, 301, 19 U.S.C. §§ 2251, 2411 (West, current through P.L. 119-36).

duty” with built-in constraints such as a USTR investigation,¹⁵⁷ consultation with the foreign country regarding its trading practices with the United States,¹⁵⁸ or publication of factual findings and proposed actions prior to imposing the tariffs.¹⁵⁹ The IEEPA, by contrast, lacks such explicit terms or protections, indicating no congressional intent to grant the President sweeping tariff powers.¹⁶⁰

The court explained, very clearly, that tariffs are taxes under Article I, Section 8, Clause 1,¹⁶¹ but are not equivalent to “regulation”, per *National Federation of Independent Business v. Sebelius*.¹⁶² The court, surely expecting an appeal to its decision, also provided historical context to further highlight what it views as the President’s overreach. The court traced tariff authority back to the Framers, where Congress has long set detailed schedules under its Article I powers to lay duties and regulate commerce.¹⁶³ The court also looked back and analyzed the IEEPA’s predecessor, the Trading with the Enemy Act (TWEA),¹⁶⁴ which contained similar “investigate, regulate . . . importation” language.¹⁶⁵ However, the court distinguished the 1975 decision in *United States v. Yoshida International, Inc.*,¹⁶⁶ which upheld a temporary 10-percent surcharge under TWEA as narrow in scope (limited to concessional articles), duration (temporary), and rate (capped by congressional standards).¹⁶⁷ When Congress enacted the IEEPA in 1977 to “revise and delimit” TWEA’s peacetime powers, it did not ratify or expand tariff authority.¹⁶⁸ Instead, historical uses of the IEEPA have focused on targeted

¹⁵⁷ 19 U.S.C.A. § 2412 (West, current through P.L. 119-36).

¹⁵⁸ 19 U.S.C.A. § 2413 (West, current through P.L. 119-36).

¹⁵⁹ 19 U.S.C.A. § 2414 (West, current through P.L. 119-36); V.O.S. Selections, Inc. v. Trump, Nos. 2025-1812 & 2025-1813, slip op. at 20–21 (Fed. Cir. Aug. 29, 2025).

¹⁶⁰ V.O.S. Selections, Inc., slip op. at 21.

¹⁶¹ U.S. CONST. art. I, § 8, cl. 1.

¹⁶² Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 572 (2012).

¹⁶³ V.O.S. Selections, Inc., slip op. at 4.

¹⁶⁴ Trading with the Enemy Act, 50 U.S.C.A. §§ 4301–4341 (West, current through P.L. 119-36); V.O.S. Selections, Inc., slip op. at 5–7.

¹⁶⁵ 50 U.S.C.A. § 4305 (b)(1)(B) (West, current through P.L. 119-36); V.O.S. Selections, Inc., slip op. at 15.

¹⁶⁶ United States v. Yoshida Int’l, Inc., 526 F.2d 560 (C.C.P.A. 1975).

¹⁶⁷ V.O.S. Selections, Inc. v. Trump, No. 2025-1812 & 2025-1813, slip op. at 17, 40 (Fed. Cir. Aug. 29, 2025) (quoting United States v. Yoshida Int’l, Inc., 526 F.2d 560, 577–78 (C.C.P.A. 1975)).

¹⁶⁸ *Id.* at 18.

sanctions like asset freezes¹⁶⁹ or transaction blocks,¹⁷⁰ not global tariffs.¹⁷¹ The court further rejected ratification as a basis to expand *Yoshida*. The majority cautioned that Congress cannot be presumed to adopt only the government-favored slice of a prior decision.¹⁷² Judge Cunningham’s “Additional Views,”¹⁷³ citing *Jama v. ICE*,¹⁷⁴ explained that ratification applies only when Congress reenacts the provision without change and when there is a broad, settled judicial consensus. Neither condition was present in this case.¹⁷⁵

The major questions doctrine provided the majority decision’s analytical capstone,¹⁷⁶ as the court deemed, correctly, that these tariffs are a matter of vast economic and political significance.¹⁷⁷ By the government’s own account, these tariffs would raise \$2.3–\$3.3 trillion and reach a goods-import sector equal to about 14% of the U.S. economy.¹⁷⁸ Because the government has “never previously claimed powers of this magnitude”¹⁷⁹ under the IEEPA, the majority treated this as a major question and required “clear congressional authorization” to find in favor of the administration.¹⁸⁰

Overall, without a “clear congressional authorization,” the court refused to infer such power from ambiguous text, particularly given the administration’s unprecedented expansion of the IEEPA from an emergency response tool into a

¹⁶⁹ *Id.* at 36.

¹⁷⁰ *Id.* at 32, 35–36.

¹⁷¹ In fact, the IEEPA never used for imposing tariffs, *see* CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB11281, LEGAL AUTHORITY FOR THE PRESIDENT TO IMPOSE TARIFFS UNDER THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT 1 (2025), <https://www.congress.gov/crs-product/R48435> [<https://perma.cc/CF8Z-MKRG>].

¹⁷² V.O.S. Selections, Inc., slip op. at 39, 41–42 (Fed. Cir. Aug. 29, 2025).

¹⁷³ *Id.* at 48 (Fed. Cir. Aug. 29, 2025) (“we write separately to state our view that IEEPA does not authorize the President to impose any tariffs.”).

¹⁷⁴ *Jama v. Immigr. & Customs Enf’t*, 543 U.S. 335, 349 (2005).

¹⁷⁵ V.O.S. Selections, Inc., slip op. at 53–54 (Fed. Cir. Aug. 29, 2025).

¹⁷⁶ *Id.* at 33.

¹⁷⁷ *West Virginia v. Env’tl Prot. Agency*, 597 U.S. 697, 716 (2022); *Id.* at 34; Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://doi.org/10.2139/ssrn.5172266> [<https://perma.cc/5KBP-6L7Y>]; Domenico Imparato, Reuven S. Avi-Yonah, & Doron Narotzki, *No Trade Wars Without Taxation—Who’s to Blame, and What Comes Next?*, 29 FLA. TAX REV. (forthcoming 2026), <https://doi.org/10.2139/ssrn.5414555> [<https://perma.cc/LZH3-T8DT>].

¹⁷⁸ V.O.S. Selections, Inc., slip op. at 36 (Fed. Cir. Aug. 29, 2025).

¹⁷⁹ *Id.* at 35; *Biden v. Nebraska*, 600 U.S. 477, 501–03 (2023).

¹⁸⁰ V.O.S. Selections, Inc., slip op. at 34 (Fed. Cir. Aug. 29, 2025).

general fiscal instrument. This transformation, the court stated, encroaches on Congress's domain,¹⁸¹ risking an unconstitutional delegation if the court were to expansively read the word "regulate."

Additional views by Circuit Judge Cunningham, joined by Judges Lourie, Reyna, and Stark, reinforced this contention by arguing that equating "regulate" with taxation would render other IEEPA provisions superfluous and would violate anti-surplusage canons, citing *TRW Inc. v. Andrews*¹⁸² and *Duncan v. Walker*.¹⁸³ These views emphasize unconstitutional delegation,¹⁸⁴ warning that a broad reading could violate non-delegation principles by lacking an "intelligible principle," referencing *FCC v. Consumers' Research*.¹⁸⁵ The views stated that even if the government's reading were plausible, "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to" impose "'fees' or 'taxes,'"¹⁸⁶ citing *Skinner v. Mid-Am. Pipeline Co.*¹⁸⁷

The dissenting opinion, led by Judge Taranto and joined by Chief Judge Moore and Judges Prost and Chen, countered that the IEEPA's broad language permits tariffs without requirements for temporariness,¹⁸⁸ caps,¹⁸⁹ or narrow scope.¹⁹⁰ The dissent rejected the majority's non-textual limits, and argued that "regulate . . . importation" include duties as a form of control.¹⁹¹ It distinguished *Yoshida* as confirming authority without artificial boundaries and asserting no major questions issue, as broad delegations are standard in foreign affairs matters,¹⁹² citing a long list of decades old cases, such as *United States v. Curtiss-Wright Export Corp.*¹⁹³ and *Zemel v. Rusk*.¹⁹⁴ The dissent rejected the non-delegation challenge, not

¹⁸¹ *Id.* at 12, 36, 57 (Fed. Cir. Aug. 29, 2025) ("The Government's interpretation of IEEPA would be a functionally limitless delegation of Congressional taxation authority" and "tariffs are a core Congressional power. The 'basic and consequential tradeoffs' that are inherent in the President's decision to impose the Trafficking and Reciprocal Tariffs 'are ones that Congress would likely have intended for itself'").

¹⁸² *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

¹⁸³ *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

¹⁸⁴ *V.O.S. Selections, Inc.*, slip op. at 56 (Fed. Cir. Aug. 29, 2025).

¹⁸⁵ *Fed. Comm'n v. Consumers' Rsch.*, 606 U.S. 656, 673 (2025).

¹⁸⁶ *V.O.S. Selections, Inc.*, slip op. at 51.

¹⁸⁷ *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 224 (1989).

¹⁸⁸ *V.O.S. Selections, Inc.*, slip op. at 100 (Taranto, J., dissenting).

¹⁸⁹ *Id.* at 101.

¹⁹⁰ *Id.* at 64, 89.

¹⁹¹ *Id.* at 64, 91, 95.

¹⁹² *Id.* at 96, 115–16.

¹⁹³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁹⁴ *Zemel v. Rusk*, 381 U.S. 1 (1965).

because of procedural formalities,¹⁹⁵ but because the IEEPA contains substantive limits, a qualifying “unusual and extraordinary threat,” and a requirement that presidential action “deal with” that threat.¹⁹⁶ Furthermore, the dissent stated that broad delegations in foreign-affairs emergencies are permissible, consistent with *Dames & Moore v. Regan*.¹⁹⁷ The dissent asserted that the Trafficking Tariffs “deal with” threats through leverage, even if indirect,¹⁹⁸ and emergencies that average over nine years, per Congressional Research Service reports.¹⁹⁹ The dissenting approach privileges the text of the executive orders over statutory context and public justifications, and discounts how unprecedented the asserted tariff power is in practice. In other words, the dissent’s method narrows textualism to the four corners of the executive orders, giving little weight to statutory purpose, historical practice, and the administration’s own daily statements about the reasons and goals behind its tariff policy. That lens minimizes the major questions concern and treats leverage as sufficient “to deal with” the threat.

The dissent, I argue, misconceives the IEEPA by characterizing tariffs as an ordinary sanction while disregarding the statute’s language, historical usage, and institutional practice, while also ignoring the broader context of this specific financial tool (as both this article and the majority decision discusses). It asserts that there is “no persuasive basis” to think Congress meant to deny tariff use under the IEEPA,²⁰⁰ yet the fact is that no President had ever used IEEPA to impose tariffs at all, let alone broad duties on the U.S.’s allies.²⁰¹ The dissent does not grapple with the IEEPA’s established use for targeted sanctions on property and transactions rather than revenue measures, and it supplies no limiting principle beyond an emergency declaration. Accepting the government’s assertion that the declaration alone justifies these tariffs and that the tariffs were adopted solely to address that emergency, contradicts the statute’s design and the baseline rule that tariff authority requires clear congressional authorization.

In short, the Framers created a system that viewed tariff power as legislative and thus granted it to Congress.²⁰² Reading the IEEPA to provide this authority by

¹⁹⁵ V.O.S. Selections, Inc., slip op. at 119 (Taranto, J., dissenting).

¹⁹⁶ *Id.* at 119, 123.

¹⁹⁷ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

¹⁹⁸ V.O.S. Selections, Inc., slip op. at 126 (Taranto, J., dissenting).

¹⁹⁹ *Id.* at 100.

²⁰⁰ *Id.* at 92.

²⁰¹ CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., R48435, CONGRESSIONAL AND PRESIDENTIAL AUTHORITY TO IMPOSE IMPORT TARIFFS 1 AT 22 (2025), <https://www.congress.gov/crs-product/R48435> [<https://perma.cc/STC2-G5ZW>].

²⁰² U.S. CONST. art. I, § 8, cl. 1, 3; *id.*

implication, in effect, converts a sanctions law into a tax code in the hands of the executive.²⁰³ This issue cannot and should not be ignored. However, this is what the dissenting opinion supports, whether knowingly or unknowingly, perhaps out of a sense of judicial deference to the executive power. Granting the executive unlimited taxation power with no text, no history, and no limits, is not delegation, but rather abdication.

Nonetheless, I argue that the majority decision, while correct and thorough in its statutory focus, is too cabined. It does not address whether the IEEPA could authorize narrower tariffs, nor does it explore fiscal pretexts, regressive effects, or WTO violations.²⁰⁴ It leaves those determinations for future challenges or academic scholarship. The court vacated the Court of International Trade's (CIT's) universal permanent injunction and remanded for the CIT to reassess remedies under the four *eBay*²⁰⁵ factors and the Supreme Court's guidance in *Trump v. CASA*,²⁰⁶ while affirming the CIT's jurisdiction under 28 U.S.C. § 1581(i)(1)(B).²⁰⁷

The administration has almost immediately publicly stated its intent to appeal to the Supreme Court. The current Court, with its emphasis on executive deference in foreign affairs and national security, may expand IEEPA's scope, framing the tariffs as a necessary response to economic threats. This would align with precedents like *Trump v. Hawaii*,²⁰⁸ where the Supreme Court upheld broad presidential authority despite the executive's underlying motives. If it does so, the Supreme Court would likely have to ignore the administration's repeated admissions that tariffs are primarily revenue tools, not survival imperatives. For instance, the Tax Foundation estimates that Trump's 2025 tariffs will raise \$172 billion, equivalent to 0.57 percent of GDP, making them the largest tax increase since 1993.²⁰⁹ CBS reports a 242-percent increase in tariff revenue collected since

²⁰³ Doron Narotzki, *Taxation Without Representation: How Trump's Tariff Policy Undermines Democracy and International Legal Norms*, VERFASSUNGSBLOG (Aug. 4, 2025), <https://verfassungsblog.de/us-tariffs-taxation/> [<https://perma.cc/3VEU-X8J5>].

²⁰⁴ *Id.*

²⁰⁵ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

²⁰⁶ *Trump v. CASA, Inc.*, 606 U.S. 831 (2025).

²⁰⁷ 28 U.S.C. § 1581(i)(1)(B) (West, current through P.L. 119-36).

²⁰⁸ *Trump v. Hawaii*, 585 U.S. 667 (2018).

²⁰⁹ Erica York & Alex Durante, *Trump Tariffs: The Economic Impact of the Trump Trade War*, TAX FOUND. (Oct. 31, 2025), <https://taxfoundation.org/research/all/federal/trump-tariffs-trade-war/> [<https://perma.cc/D5MC-735Z>].

the universal 10-percent tariff took effect in July 2024.²¹⁰ The Yale Budget Lab projects \$2.7 trillion in revenue over the next decade.²¹¹ President Trump himself has stated that tariffs will increase the amount of taxes raised,²¹² boosting investment and encouraging domestic purchases.²¹³ Even in his January 20, 2025, inauguration speech, President Trump announced plans to create an “External Revenue Service” to collect tariffs and duties,²¹⁴ effectively proposing to replace or supplant the IRS with a tariff-focused agency. President Trump and his Administration also falsely claimed that foreign countries pay the tariffs. Yet, economists treat tariffs as taxes on imports collected in the United States, and the empirical literature shows the burden falls largely on U.S. buyers.²¹⁵ Multiple

²¹⁰ Megan Cerullo, *With New Tariffs in Effect, Economists See Profit Dips and Price Hikes Up Ahead*, CBS NEWS (Aug. 7, 2025, at 08:21 PM EDT), <https://www.cbsnews.com/news/trump-tariffs-consumer-price-hikes-business-profits-dip/> [<https://perma.cc/AZ6M-9XX2>].

²¹¹ *State of U.S. Tariffs: August 1, 2025*, BUDGET LAB YALE (Aug. 1, 2025), <https://budgetlab.yale.edu/research/state-us-tariffs-august-1-2025> [<https://perma.cc/DQB2-6CJH>].

²¹² See, e.g., Donald J. Trump, *Address Before a Joint Session of the Congress*, AM. PRESIDENCY PROJECT (Mar. 4, 2025), <https://www.presidency.ucsb.edu/node/376572> [<https://perma.cc/NM9V-NH7L>]; Donald J. Trump, *Remarks Announcing Additional United States Tariff Actions on Foreign Imports*, AM. PRESIDENCY PROJECT (Apr. 2, 2025), <https://www.presidency.ucsb.edu/node/377648> [<https://perma.cc/6AXZ-M9UF>]; *Read the Full Transcript of Donald Trump's '100 Days' Interview With TIME*, TIME (Apr. 25, 2025, at 03:01 AM MT), <https://time.com/7280114/donald-trump-2025-interview-transcript/> [<https://perma.cc/76QX-6CMH>]; Donald J. Trump, *Truth Social Posts of April 27, 2025*, AM. PRESIDENCY PROJECT (Apr. 27, 2025), <https://www.presidency.ucsb.edu/node/377561> [<https://perma.cc/28GR-MDLV>]; Donald J. Trump (@realDonaldTrump), X (Nov. 29, 2018, at 05:32 AM), <https://x.com/realdonaldtrump/status/1068120444279103488> [<https://perma.cc/TPC8-BYYH>].

²¹³ Jemma Crew & Jennifer Clarke, *What Trump Has Done—and Why it Matters*, BBC NEWS (Apr. 3, 2025), <https://www.bbc.com/news/articles/c0qnd2x1nn3o> [<https://perma.cc/LS5K-PY3F>].

²¹⁴ Donald J. Trump, *The Inaugural Address*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/remarks/2025/01/the-inaugural-address/> [<https://perma.cc/PEQ8-QQF5>].

²¹⁵ Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://doi.org/10.2139/ssrn.5172266> [<https://perma.cc/5KBP-6L7Y>]; Domenico Imperato, Reuven S. Avi-Yonah, & Doron Narotzki, *No Trade Wars Without Taxation -*

studies find a long-term, near-complete pass-through of tariff rates into U.S. import prices and measurable increases in domestic prices, with clear household-level costs.²¹⁶ Because tariffs function as broad consumption taxes, they are regressive and reduce after-tax incomes proportionally more for low- and middle-income households.²¹⁷ The claim that foreign countries pay the tariffs is simply inaccurate and contradicted by economists who confirm such costs fall on American consumers.²¹⁸ In short, a tariff is a hidden, non-transparent tax borne at home that is being sold to the public with a false narrative.²¹⁹

Immediately after the Federal Circuit's ruling, President Trump pivoted to national security rhetoric, posting that upholding the decision would "literally destroy the United States of America" and insisting "ALL TARIFFS ARE STILL IN EFFECT."²²⁰ He called the court "[h]ighly [p]artisan" and warned that removing tariffs would end U.S. survival, abruptly shifting from revenue boasts to existential threats.²²¹ To this, Erica York, Vice President of Federal Taxation at the Tax Foundation, a right-wing D.C.-based thinktank, had a straightforward response, posting on her online social media account: "Stopping the illegal taxation Americans' purchases of goods produced in other countries would 'literally destroy the United States of America. Lol.'"²²² Yet, the Supreme Court may reverse the Federal Circuit's ruling. If it does so, it would have to act as if these crystal-clear, revenue-focused statements never occurred, and it would need to blindly defer to the executive on national security grounds, refusing to probe

Who's to Blame, and What Comes Next?, 29 FLA. TAX REV. (forthcoming 2026), <https://doi.org/10.2139/ssrn.5414555> [<https://perma.cc/LZH3-T8DT>]; Reuven S. Avi-Yonah & Doron Narotzki, *The Tariffs Are Coming! The Tariffs Are Coming!*, 116 TAX NOTES INT'L 1577 (Oct. 13, 2025), <https://ssrn.com/abstract=5080792> [<https://perma.cc/45E8-W46H>]; Doron Narotzki, *Tariffs: Back to the Future*, 116 TAX NOTES INT'L 565 (Oct. 13, 2025), <https://ssrn.com/abstract=5007289> [<https://perma.cc/Y9YP-8JKT>].

²¹⁶ Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://doi.org/10.2139/ssrn.5172266> [<https://perma.cc/5KBP-6L7Y>].

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Ben Berkowitz, *Trump Warns Tariff Ruling Could "Literally Destroy the United States,"* AXIOS: ECONOMY (Aug. 29, 2025), <https://www.axios.com/2025/08/29/trump-tariff-ruling> [<https://perma.cc/HRH4-3MHU>].

²²¹ *Id.*

²²² Erica York (@ericadyork), X (Aug. 29, 2025, at 03:13 PM), <https://x.com/ericadyork/status/1961552879917129985> [<https://perma.cc/TB9X-57DD>].

presidential motives even when they are pretextual. However, such a ruling would be incorrect.

The administration's emphasis on revenue generation reveals the tariff's true fiscal purpose, which is not a genuine security imperative. Allowing the tariffs to stand would normalize the shadow fiscal state, entrenching regressive taxation without consent and further eroding congressional control over the purse, leaving behind one of the most known and foundational principles and values of our nation: "No Taxation Without Representation."²²³

On November 5, 2025, the Supreme Court heard a consolidated oral argument in *Learning Resources, Inc. v. Trump*²²⁴ and *Trump v. V.O.S. Selections, Inc.*, which together presented the question of whether the IEEPA authorizes the President to impose sweeping "Liberation Day" and "reciprocal" tariffs on ordinary imports.²²⁵ The argument confirmed that the cases are not simply about trade policy, but about the constitutional allocation of taxing and tariff authority and the limits of congressional delegation to the executive branch.

The federal government framed the case as an emergency-powers dispute. The Solicitor General argued that IEEPA's instruction that the President may "regulate importation" during a foreign-origin national emergency is textually broad enough to include tariff schedules as one among many tools for controlling the terms on which goods may enter the United States.²²⁶ In that account, tariffs are just a modality of regulation, comparable to licensing, blocking, or conditioning transactions, and courts should defer to the President's judgment about how best to address external threats to economic stability and national security.²²⁷ The

²²³ *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812 & 2025-1813, slip op. at 12–13 (Fed. Cir. Aug. 29, 2025); Doron Narotzki, *Taxation Without Representation: How Trump's Tariff Policy Undermines Democracy and International Legal Norms*, VERFASSUNGSBLOG (Aug. 4, 2025), <https://verfassungsblog.de/us-tariffs-taxation/> [<https://perma.cc/3VEU-X8J5>]; Doron Narotzki, Tamir Shanan, & Julianne Jones, *Taxation and the Founding Fathers*, 186 TAX NOTES FED. 1413 (Feb. 24, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5198677 [<https://perma.cc/PSY6-4ALB>].

²²⁴ *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209 (D.D.C. 2025), *cert. granted before judgment*, No. 24-1287 (Sep. 9, 2025).

²²⁵ Transcript of Oral Argument at 1–2, 4–6, *Learning Res., Inc. v. Trump* (No. 24-1287) and *Trump v. V.O.S. Selections, Inc.* (No. 25-250), (Nov. 5, 2025).

²²⁶ Transcript of Oral Argument at 5, *Learning Res., Inc. v. Trump* (No. 24-1287) (Nov. 5, 2025) [hereinafter *Tr.*] (Gen. Sauer arguing that "[t]he phrase 'regulate importation' plainly embraces tariffs").

²²⁷ *Id.* at 10 (Gen. Sauer arguing these are "regulatory tariffs," not "revenue-raising tariffs"); *id.* at 60–62 (discussing deference to presidential findings of emergency).

government also invoked historical practice under predecessor statutes and emphasized the traditional judicial reluctance to second-guess presidential assessments of emergencies or the chosen means of response.²²⁸

The challengers, a coalition of importers and states, argued for a very different theory. They insisted that tariffs are taxes in substance, raising money from domestic importers that flows into the Treasury, and that this moves the case squarely into Article I territory.²²⁹ In their view, because the Constitution vests the power to lay “Taxes, Duties, Imposts, and Excises” in Congress and requires revenue bills to originate in the House of Representatives, any claim that the President can unilaterally set general tariff rates demands a clear statement from Congress.²³⁰ IEEPA, they argued, has never functioned as a revenue statute. For decades it has been used to freeze assets, block particular transactions, and impose targeted sanctions, not to create broad-based duties on lawful trade.²³¹ Treating IEEPA as an open-ended tariff authority would allow the executive to displace Congress in precisely the domain the Constitution treats as legislative at its core.²³²

The Justices’ questions concentrated on text, structure, and history rather than economic theory. Several members of the Court focused on the mismatch between IEEPA’s licensing vocabulary and the government’s asserted power to raise revenue. Justice Barrett challenged the Solicitor General to identify the specific statutory words that authorize setting general tariff rates, pressing the difference between measures that block or condition transactions and measures that function to collect money for the Treasury.²³³ Justice Sotomayor emphasized that when Congress intends to delegate tariff authority, it typically uses explicit language referring to “duties,” “tariffs,” or “increases in duty” in trade statutes such as Section 232 of the Trade Expansion Act and Sections 201 and 301 of the Trade

²²⁸ *Id.* at 23–24 (discussing President Nixon’s use of TWEA); *id.* at 48–49 (discussing nondelegation in foreign affairs).

²²⁹ *Id.* at 97 (Mr. Katyal arguing: “Tariffs are taxes. They take dollars from Americans’ pockets . . . [o]ur founders gave that taxing power to Congress alone.”).

²³⁰ *Id.*; *see also id.* at 135–40 (discussing the constitutional context of “regulate” vs. taxing power).

²³¹ *Id.* at 98 (Mr. Katyal stating: “IEEPA is a sanction statute. . . . never once to include tariffs.”).

²³² *Id.* at 98–101 (arguing that finding tariff authority in IEEPA is a “one-way ratchet” that displaces Congress).

²³³ *Id.* at 25 (Justice Barrett asking: “Can you point to any other place in the Code . . . where that phrase together, ‘regulate importation,’ has been used to confer tariff-imposing authority?”); *id.* at 46–47 (distinguishing between license conditions and revenue-raising tariffs).

Act of 1974, rather than the licensing verbs that appear in IEEPA.²³⁴ Justice Gorsuch questioned whether the catchall phrase “by means of licenses or otherwise” can reasonably be read to smuggle in a power to design comprehensive tariff schedules absent a clear statement from Congress, particularly when that reading would shift core taxing decisions away from the legislature.²³⁵

History and precedent played a central role as well. Chief Justice Roberts questioned the applicability of *Dames & Moore*²³⁶ to the dispute,²³⁷ while Justice Kavanaugh asked how much guidance can be drawn from *FEA v. Algonquin SNG, Inc.*²³⁸ and from President Nixon’s temporary import surcharge.²³⁹ Justice Kavanaugh further inquired whether the absence of any across-the-board tariffs under IEEPA since its enactment in 1977 should be understood as evidence that neither Congress nor the executive regarded it as a tariff statute.²⁴⁰ Justice Jackson emphasized that Congress adopted IEEPA in part to narrow and regularize the broad peacetime authorities that the Trading with the Enemy Act had conferred, which complicates the idea that IEEPA silently contains a sweeping power to impose revenue-generating duties.²⁴¹ Those lines of questioning cast doubt on the government’s suggestion that the statute’s general reference to “regulat[ing] importation” can bear the weight of a nationwide tariff program.

Underlying these exchanges were two constitutional themes that run throughout this Article. First, the major questions doctrine loomed over the discussion. Several Justices asked why the government’s reading of IEEPA, which would authorize tariffs projected to raise trillions of dollars and affect a substantial share of United States goods imports, does not require a clear congressional

²³⁴ *Id.* at 15–16 (Justice Sotomayor questioning why Congress did not use “tax” or “duty”); *id.* at 54 (referencing “regulate” and “tax” in other statutes); *id.* at 99–101 (Mr. Katyal listing specific trade statutes).

²³⁵ *Id.* at 117–18, 139 (Justice Gorsuch asking if “by means of licenses or otherwise” can be read to include tariffs, noting the “major questions thumb”).

²³⁶ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

²³⁷ *Supra* note 228, at 10–11 (Chief Justice Roberts distinguishing *Dames & Moore* as a “narrow decision” that “certainly did not concern tariffs”).

²³⁸ *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976).

²³⁹ *Supra* note 228, at 23 (Justice Kavanaugh asking about the “Nixon example and precedent”); *id.* at 142–44 (Justice Kavanaugh discussing *Algonquin* and the “adjust imports” language).

²⁴⁰ *Id.* at 76–78 (Justice Kavanaugh asking about Congress’s understanding in 1977 vis-à-vis the Nixon precedent).

²⁴¹ *Id.* at 18 (Justice Jackson stating IEEPA “was designed and intended to limit presidential authority”); *id.* at 151–52 (discussing the severing of wartime roots).

statement.²⁴² If tariffs are, in economic substance, taxes, then allowing the President to impose them based on a general grant to “regulate importation” appears to place a matter of vast economic and political significance outside the ordinary safeguards of Article I. Second, the Justices returned repeatedly to the problem of delegation and abdication. Justice Gorsuch put the issue most starkly when he asked what, if anything, would prevent Congress from simply handing “all responsibility” for foreign commerce or even for decisions about war to the President if the Court accepts the government’s theory of IEEPA.²⁴³ That question exposed the broader stakes: whether there are constitutional limits on how far Congress may shift core fiscal and trade decisions to the executive under the guise of emergency management.

The argument also highlighted the functional difference between traditional IEEPA sanctions and the tariff regime at issue. Historically, IEEPA actions have targeted specific wrongdoers, sectors, or financial flows: freezing the assets of designated actors, prohibiting particular categories of transactions, or restricting commerce with identified countries or entities.²⁴⁴ The tariffs before the Court are far broader and more general. They apply to lawful imports from most trading partners, without tailoring to any discrete threat, and their primary effect is to raise revenue at the border.²⁴⁵ Several Justices pressed the Solicitor General on why that structure does not confirm the challengers’ characterization of the program as a revenue device, and why the Court should treat such measures as ordinary “regulation” rather than as taxation.²⁴⁶

Finally, the Court devoted substantial attention to remedies and practical consequences. The Justices asked what would follow if IEEPA is held not to authorize tariff schedules, including whether duties already collected must be refunded, how to manage reliance interests of firms that have structured their supply chains around the challenged regime, and what tools remain available to

²⁴² *Id.* at 34 (Chief Justice Roberts discussing major questions); *id.* at 112 (Mr. Katyal noting the tariffs will “raise \$4 trillion”).

²⁴³ *Id.* at 65 (Justice Gorsuch asking: “[W]hat would prohibit Congress from just abdicating all responsibility to regulate foreign commerce, for that matter, declare war, to the President?”).

²⁴⁴ *Id.* at 185 (Mr. Gutman arguing IEEPA sanctions are imposed “directly on the wrong doers”).

²⁴⁵ *Id.* at 183–84 (Mr. Gutman distinguishing sanctions from tariffs on lawful goods).

²⁴⁶ *Id.* at 168–69 (Justice Kagan asking why revenue-raisers are in a different category).

the executive for emergency trade measures.²⁴⁷ Those questions returned the focus to Congress. If the Court concludes that IEEPA does not clearly delegate tariff authority, then the decision whether to authorize such programs in the future must come from Congress through ordinary legislation, not from unilateral executive decrees grounded in an emergency statute enacted for a narrower purpose.

Taken together, the oral argument suggests that a number of Justices are skeptical of treating IEEPA as an implied tax statute and are attuned to the separation-of-powers concerns that this Article identifies, and the overall line of questioning emphasized that the legality of President Trump's tariff policy cannot be assessed solely as a matter of trade policy. It must be understood as a test of whether the executive may construct a system of tariff-based taxation under an emergency sanctions law, without a clear decision by Congress to transfer that aspect of Article I authority to the President.

Checks and balances are central to the Constitution and the system's structural design. The Framers built both to restrain unilateral power and to require institutional consent. That design has been strained. If the Supreme Court does not leave the Federal Circuit's decision in place, Congress is the only actor that can stop further erosion, restore stability, and impose accountability.

Congress must act to reclaim its role, perhaps through legislation requiring approval for major tariff actions or imposing procedural safeguards akin to the Administrative Procedure Act.²⁴⁸ Without an immediate reform, the decision risks becoming a fleeting victory, leaving taxpayers vulnerable to executive-driven fiscal policy. As this article warns, solvency achieved through constitutional shortcuts is no solvency at all. It threatens the foundations of democratic governance and our mutual future.

5. *Implications for Democratic Accountability*

The design of the Constitution assumes that the power to tax will be politically visible, openly debated, and constrained by electoral accountability. Fiscal burdens are meant to emerge from transparent legislative processes, ensuring that the public can link government action to its costs and hold decision-makers responsible. When tariffs are used to achieve fiscal outcomes without raising taxes through legislation, this vital connection is obscured. The public bears real economic

²⁴⁷ *Id.* at 123–24 (Justice Alito asking about the refund process); *id.* at 153 (Justice Barrett asking: “tell me how the reimbursement process would work. Would it be a complete mess?”).

²⁴⁸ Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (West, current through P.L. 119-36).

burdens, often without understanding their source or the mechanisms by which they have been imposed.

By allowing the executive branch to shift the tax burden through trade policy, the government evades the political consequences traditionally associated with revenue decisions. Although this maneuver may be expedient in the short term, it sets a dangerous constitutional precedent. Fiscal instruments, once removed from the legislative sphere, become harder to challenge, harder to repeal, and harder to scrutinize.

This concern implicates more than process. As Professor Herbert Wechsler explains in his seminal work, based on a lecture given at Harvard Law School in 1959, and titled “*Toward Neutral Principles of Constitutional Law*,” constitutional adjudication and interpretation must rest on neutral principles.²⁴⁹ These principles must be general, consistent, and not shaped by ideological or political preference. When revenue is raised through executive discretion rather than legislative debate, the justification for such authority must be based on defensible and transparent legal reasoning. Otherwise, there is no principled limit to how far the executive might stretch delegated powers. Wechsler warns that legitimacy falters when decisions are driven by desired outcomes rather than anchored in law.²⁵⁰ As Kent Greenawalt later discussed,²⁵¹ Wechsler’s idea of neutrality was not a call for mechanical jurisprudence or a denial that judges must weigh competing values. Rather, it was a minimal, but essential, standard. Judges must articulate reasons

²⁴⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For context and background, it is worth noting that Herbert Wechsler delivered this lecture at Harvard in 1959 amid ongoing controversy surrounding the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), just four years earlier. The famous ruling that declared racial segregation in public schools unconstitutional and overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896). While widely hailed as a civil rights breakthrough, the Court’s decision in *Brown* provoked fierce resistance in the South through organized efforts of “Massive Resistance” and drew criticism from within the legal profession. Among the skeptics was Judge Learned Hand, who warned that the Court was abandoning judicial restraint and likened it to “a third legislative chamber.” See Blake Boehne, *Neutral Principles of Constitutional Law and the Dobbs Case: An Appraisal*, ST. ANDREWS. L. REV. (July 17, 2022), <https://www.standrewslawreview.com/post/neutral-principles-of-constitutional-law-and-the-dobbs-case-an-appraisal> [<https://perma.cc/QKH7-LE4K>]; Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 505 (1997).

²⁵⁰ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

²⁵¹ Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 991 (1978).

that they would accept in other similar cases, reasons that can be generalized without contradiction or selective application. Neutral principles, in this view, do not eliminate moral or political judgment, but they constrain it within a framework of legal discipline.²⁵² Wechsler does not insist that every constitutional answer is predetermined or that all questions admit a single correct answer. What he urges is for courts to explain their choices through principled reasoning that could, in theory, command respect, even from those who disagree with the result.²⁵³

This Article argues that the executive use of tariff powers for raising revenue and potentially even managing the national federal deficit and the global trading system, without legislative enactment or meaningful deliberation, fails that test. It does not rest on reasons that can be neutrally applied to other contexts of fiscal policymaking, nor does it reflect a coherent account of delegated power under Article I of the U.S. Constitution. Instead, it relies on opportunistic readings of statutory authority that obscure the constitutional allocation of taxing power. If neutrality is the standard by which courts must justify even legitimate civil rights decisions, then it must also apply to the exercise of fiscal power through trade statutes. Otherwise, the principle of reasoned justification loses its constraining force and becomes a selectively enforced aspiration.

As Professor Jon Michaels has explained, the separation of powers is not a fixed constitutional arrangement but a framework that evolves in response to changes in institutional governance.²⁵⁴ In the twentieth century, the administrative state developed its own internal system of checks, relying on tensions between agency heads, career civil servants, and public stakeholders to maintain legitimacy and accountability.²⁵⁵ In more recent years, however, those internal constraints have weakened. The rise of privatization, executive centralization, and procedural shortcuts has diminished the rivalrous dynamics that once preserved balance within administrative governance.²⁵⁶ The use of tariff powers as a fiscal tool continues and exacerbates this pattern. It concentrates decision-making authority in the executive branch, one that is now more than ever before impacted by private individuals and personal agendas and goals, bypasses both legislative approval and administrative safeguards, and removes meaningful public engagement. This is not just a statutory overreach. It reflects a deeper structural shift toward a post-administrative model of governance in which the functional separation of powers

²⁵² See *id.* at 998.

²⁵³ See *id.* at 985, 999–1000.

²⁵⁴ See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 535 (2015).

²⁵⁵ See *id.* at 534, 547–48.

²⁵⁶ See *id.* at 574.

is quietly collapsing, and the traditional architecture of democratic accountability is no longer capable of restraining unilateral fiscal action.

This concern is not limited to tariff policy alone. In the context of international agreements, Professor Oona Hathaway has documented how the gradual transfer of core Article I powers from Congress to the executive branch has produced a structural imbalance that undermines democratic accountability.²⁵⁷ Hathaway shows that Congress's incremental delegation of its treaty-making powers has allowed the President to create binding international obligations without meaningful legislative oversight.²⁵⁸ A parallel dynamic is evident here: the President, empowered by decades of statutory delegation, is able to impose substantial fiscal burdens through tariffs without congressional enactment or public deliberation. In both contexts, the erosion of legislative control displaces the constitutional mechanisms designed to align government power with the consent of the governed.

Some scholars have argued that the President possesses a narrow "protective power" to defend the federal government's operations absent express legislative authorization.²⁵⁹ However, this protective authority is limited to preserving the functioning of government institutions and cannot extend to imposing covert taxation on the public. The power to raise revenue through taxation, including functionally equivalent instruments like tariff-based levies, is expressly vested in Congress under Article I of the U.S. Constitution. Delegations allowing the executive branch to adjust tariffs must therefore be construed narrowly to prevent the collapse of the separation between legislative taxation and executive enforcement. Executive repurposing of tariffs for fiscal objectives exceeds the bounds of protective power and risks transforming administrative discretion into unilateral fiscal policymaking.

Ultimately, when the executive branch can impose major financial obligations, whether through hidden taxation or binding international commitments, without direct legislative approval, it hollows out one of the core safeguards of American constitutional democracy: the requirement that those who tax, or bind the nation, must be politically accountable to those who bear the consequences. Left unchecked, this dynamic threatens to normalize a shadow fiscal state in which revenue extraction and policy commitments operate outside the channels of representative government.

²⁵⁷ Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L. J. 140, 230 (2009).

²⁵⁸ *Id.* at 181.

²⁵⁹ See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61 (1993).

III. THE TAX DIMENSION: TARIFFS AS HIDDEN, UNACCOUNTABLE REVENUE

If the theory advanced in Part II is accurate, and President Trump used tariffs not to regulate trade but to help manage the federal debt burden, then the fiscal implications extend well beyond trade law or constitutional delegation. Instead, they implicate the core structure of tax policy. Tariffs, in this scenario, function as a form of shadow taxation: they raise revenue, impose economic burdens on domestic consumers, and do so without legislative enactment, public transparency, or the procedural safeguards normally associated with federal tax law.

A. Tariffs as Functional Consumption Taxes

In short, tariffs are imposed on imported goods, but their economic impacts fall overwhelmingly on domestic consumers.²⁶⁰ Multiple studies, including those by the National Bureau of Economic Research and the Federal Reserve, have confirmed that the vast majority of costs from the Trump-era tariffs were passed on to U.S. households in the form of higher prices.²⁶¹

This reality makes tariffs economically indistinguishable from a consumption tax, akin to a retail sales tax or a value-added tax (VAT).²⁶² However, unlike a VAT, which is broad-based, transparent, and often accompanied by input credits to prevent cascading taxation, tariffs are more often narrow, arbitrary, and

²⁶⁰ Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>]; *Brown v. Maryland* 25 U.S. 419, 440 (1827) (“A duty on imports is a tax on the article which is paid by the consumer.”).

²⁶¹ Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>]; see U.S. INT’L TRADE COMM’N, ECONOMIC IMPACT OF SECTION 232 AND 301 TARIFFS ON U.S. INDUSTRIES 144–45 (2023).

²⁶² See, for example, U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-566, *VALUE-ADDED TAXES: LESSONS LEARNED OTHER COUNTRIES ON COMPLIANCE RISKS, ADMINISTRATIVE COSTS, COMPLIANCE BURDEN, AND TRANSITION* 2, 7 (Apr. 4, 2008), <https://www.gao.gov/products/gao-08-566> [<https://www.gao.gov/products/gao-08-566>], for a general analysis of the VAT and comparison between other countries; also, for further analysis and considerations regarding VAT, see *Tax Reform and Consumption-Based Tax Systems: Hearing Before the H. Comm. on Ways & Means*, 112th Cong. (2011) (statement of Dr. Robert J. Carroll, Ernst & Young LLP), <https://waysandmeans.house.gov/2011/07/26/hearing-on-tax-reform-and-consumption-based-tax-systems/> [<https://perma.cc/39B3-MAE4>].

regressive.²⁶³ Sooner or later, the tariffs apply only to selected goods and sectors with no regard for tax neutrality, horizontal equity, or efficiency.²⁶⁴ From a tax-design perspective, the deployment of tariffs as a revenue tool fails every major criterion of sound tax policy.²⁶⁵ It produces loss, distorts consumer behavior, creates windfalls for favored producers, and avoids legislative scrutiny.²⁶⁶

The introduction of a federal consumption tax is not inherently objectionable; in fact, I strongly support a federal VAT.²⁶⁷ A properly structured federal VAT, or a broad-based 10-percent tariff applied transparently across a wide range of goods could offer economic merit and provide a more sustainable source of revenue the

²⁶³ Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), available at <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>]; Doron Narotzki, Tamir Shanan & Reuven S. Avi-Yonah, *The U.S. Tax Paradox*, 14 Tex. A&M L. Rev. (forthcoming 2026).

²⁶⁴ See, e.g., Auzinea Bacon, *Smartphones and Computers Are Now Exempt from Trump's Latest Tariffs*, CNN (Apr. 12, 2025, at 02:19 PM EDT), <https://www.cnn.com/2025/04/12/tech/trump-electronics-china-tariffs/index.html> [<https://perma.cc/6SP5-Y7SY>]; see also, Helen Davidson, *Trump Warns Exemptions on Smartphones, Electronics Will Be Short-lived, Promises Future Tariffs*, THE GUARDIAN, (Apr. 13, 2025, at 08:21 PM EDT) <https://www.theguardian.com/us-news/2025/apr/14/trump-warns-exemptions-on-smartphones-electronics-will-be-short-lived-promises-future-tariffs-president-china> [<https://perma.cc/2B62-4DZ4>]; see also, Wyatte Grantham-Philips, *Confusion Reigns After Trump Exempts Electronics from New Tariff Regime. Here's What We Know*, ASSOCIATED PRESS NEWS, (Apr. 14, 2025, at 03:04 PM MST) <https://apnews.com/article/trump-tariffs-electronic-tech-exemption-12a8c11485c810a61cbd6e1c63ae8801> [<https://perma.cc/U6DJ-7WG7>]; see also, Madeline Halpert, *Trump Exempts Smartphones and Computers from New Tariffs*, BBC NEWS, (Apr. 12, 2025) <https://www.bbc.com/news/articles/c20xn626y81o> [<https://perma.cc/8TZM-PS6Y>].

²⁶⁵ See Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>];

²⁶⁶ See Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>]; see also, Adam Looney & Elena Patel, *Why Does the Executive Branch Have So Much Power Over Tariffs?*, BROOKINGS, (Jan. 15, 2002), <https://www.brookings.edu/articles/why-does-the-executive-branch-have-so-much-power-over-tariffs/> [<https://perma.cc/YD96-5CJG>].

²⁶⁷ See Doron Narotzki, Tamir Shanan, & Reuven S. Avi-Yonah, *The U.S. Tax Paradox*, 14 Tex. A&M L. Rev. (forthcoming 2026); Doron Narotzki, *From Deficits to Equity: Designing a Fair Federal Consumption Tax*, 189 Tax Notes Fed. 31 (2025).

United States needs as it faces a growing national deficit.²⁶⁸ However, such a significant shift in the fiscal system should occur through the democratic and constitutional process—through open legislative debate, congressional enactment, and public accountability, rather than through unilateral executive action that circumvents the structural safeguards of representative government.

To be very clear, this process is not a mere technical formality. It is a constitutional obligation that lies at the heart of representative democracy. Decisions about taxation must reflect collective consent through legislation, not executive action, because the authority to tax is inseparable from the principle of public legitimacy.²⁶⁹

B. *The Regressive and Hidden Nature of Tariff-Based Taxation*

The executive's use of tariffs as a significant revenue source, thereby bypassing the ordinary constitutional tax process, compounds the democratic concerns discussed above and echoes one of the foundational grievances of the American Revolution: that taxation without representation is an affront to legitimate governance. By converting trade measures into covert fiscal instruments, the executive branch imposes new economic burdens without engaging the public mechanisms of debate, deliberation, and consent that are essential to democratic legitimacy.²⁷⁰

The burdens of this shadow tax fall disproportionately on lower- and middle-income households, who spend a larger share of their income on imported goods such as clothing, electronics, appliances, and fuel. Because tariffs are embedded in consumer prices, they also lack transparency.²⁷¹ Unlike income taxes or payroll taxes, which appear on a pay stub or tax return, the cost of tariffs is hidden. Consumers feel the pain of rising prices, but they are rarely able to attribute it to executive-imposed trade measures.²⁷² The result is a fiscal policy whose true

²⁶⁸ *Id.*

²⁶⁹ Doron Narotzki, Tamir Shanan, & Julianne Jones, *Taxation and the Founding Fathers*, 186 TAX NOTES FED. 1413 (Feb. 24, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5198677 [<https://perma.cc/PSY6-4ALB>].

²⁷⁰ *See id.*

²⁷¹ *See* Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>].

²⁷² David Autor, Anne Beck, David Dorn, & Gordon H. Hanson, *Help for the Heartland? The Employment and Electoral Effects of the Trump Tariffs in the United*

nature is concealed and whose economic impacts are difficult for voters to trace back to their political origin.

This invisibility undermines the public's ability to evaluate or resist tariff-driven revenue measures. It erodes the feedback loop between taxpayers and their representatives, weakening the accountability mechanisms that fiscal democracy requires.²⁷³ A taxation system that is hidden from view, regressive in structure, and insulated from legislative and public scrutiny severs the link between government action and democratic control.

Moreover, the displacement of congressional oversight in favor of unilateral executive action not only undermines legal transparency but also degrades the functional responsiveness of the constitutional system.²⁷⁴ Just as the hidden negotiation of binding international agreements threatens to marginalize Congress in lawmaking, the hidden imposition of regressive taxation through tariffs threatens to marginalize Congress in fiscal policymaking. In both cases, the constitutional requirement that the people's representatives control the creation of binding obligations is quietly circumvented.

Overall, a regressive tax imposed without legislative consent and disguised as trade enforcement represents a profound departure from the constitutional and normative foundations of American tax policy. It signals the emergence of a parallel fiscal system, one that is opaque, regressive, and insulated from political accountability. As a result, the tariffs pose lasting risks to the health of American democracy.

C. Case Study: The Vietnam Tariff Deal as Political Theater and Hidden Taxation

States, NBER WORKING PAPER SERIES (Aug. 15, 2024), https://economics.mit.edu/sites/default/files/2024-08/Help_for_the_Heartland_20240815.pdf [<https://perma.cc/K5QK-R34Y>]; Young Gui Kim, 2024 U.S. Presidential Election: The Effects of Trump's Tariff Policy, HARV. & KIEP RSCH. PAPER, WORLD ECON. BRIEF No. 24-13 (May 17, 2024), <https://ssrn.com/abstract=4863903> [<https://perma.cc/AQ5K-Q5X8>].

²⁷³ See e.g., David Autor, Anne Beck, David Dorn, & Gordon H. Hanson, *Help for the Heartland? The Employment and Electoral Effects of the Trump Tariffs in the United States*, HARV. & NBER WORKING PAPER SERIES (Aug. 15, 2024), https://economics.mit.edu/sites/default/files/2024-08/Help_for_the_Heartland_20240815.pdf [<https://perma.cc/K5QK-R34Y>] (finding that import tariffs have little positive impact and if anything may have been mildly negative).

²⁷⁴ Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009).

In 2024, the United States recorded a substantial trade imbalance with Vietnam.²⁷⁵ According to the Office of the United States Trade Representative, the total U.S. goods trade with Vietnam reached \$155.1 billion.²⁷⁶ U.S. exports to Vietnam amounted to \$13.1 billion, reflecting a 32.9-percent increase from 2023.²⁷⁷ In contrast, imports from Vietnam totaled \$136.6 billion, up 19.3 percent from the prior year.²⁷⁸ This produced a goods trade deficit of \$123.5 billion, marking an 18.1-percent increase over 2023.²⁷⁹ Vietnam became one of the leading sources of the U.S. trade deficit.²⁸⁰

Pursuant to the Office of the United States Trade Representative, the United States and Vietnam have maintained an ongoing bilateral dialogue on trade and investment, structured partially through a 2007 Trade and Investment Framework Agreement that facilitated engagement on specific commercial disputes,²⁸¹ oversight of Vietnam's compliance with its WTO accession obligations, and coordination on broader regional and multilateral economic matters.²⁸² However, on "Liberation Day,"²⁸³ those considerations became irrelevant, and as a result, the United States and Vietnam entered negotiations over a new tariff framework.

On July 2, 2025, President Trump announced that the United States and Vietnam (officially known as "the Socialist Republic of Vietnam") had reached a

²⁷⁵ Jenna Ross, *Trade Tug of War: America's Largest Trade Deficits*, VISUAL CAPITALIST (Mar. 7, 2025), <https://www.visualcapitalist.com/sp/trade-tug-of-war-americas-largest-trade-deficits/> [<https://perma.cc/J9M9-HZW8>].

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Jenna Ross, *Trade Tug of War: America's Largest Trade Deficits*, VISUAL CAPITALIST (Mar. 7, 2025), <https://www.visualcapitalist.com/sp/trade-tug-of-war-americas-largest-trade-deficits/> [<https://perma.cc/J9M9-HZW8>].

²⁸¹ Office of the U.S. Trade Representative, *United States–Vietnam Trade and Investment Framework Agreement* (June 21, 2007), https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file81_12935.pdf [<https://perma.cc/K5QJ-WHGJ>].

²⁸² *Vietnam Trade Summary*, OFF. U.S. TRADE REP., <https://ustr.gov/countries-regions/southeast-asia-pacific/vietnam> [<https://perma.cc/A8PL-K8GG>] (last visited July 9, 2025).

²⁸³ Barath Harithas, Kyle Meng, Evan Brown, & Catharine Mouradian, *Liberation Day: The Tariffs Explained*, CTR. FOR STRATEGIC & INT'L STUD. (Apr. 3, 2025), <https://www.csis.org/analysis/liberation-day-tariffs-explained> [<https://perma.cc/S68H-6E6Y>].

new trade agreement.²⁸⁴ Although the full terms of the deal remain unclear and the signed agreement has not yet been made public, President Trump stated that U.S. exports to Vietnam will receive tariff-free access, while Vietnamese exports to the United States will be subject to a 20 percent tariff.²⁸⁵ Additionally, goods transshipped through Vietnam to the United States will face a 40 percent tariff.²⁸⁶

This statement, however, seems to contradict the administration's stated tariff policy earlier in the year. On February 17, 2025, President Trump announced on a social media post that the U.S. tariff policy would be strictly reciprocal as "whatever Countries charge the United States of America, we will charge them—No more, no less!"²⁸⁷ President Trump then argued for the principles of fairness, simplicity, and symmetry in trade enforcement.²⁸⁸ Yet, the structure of the Vietnam deal deviates sharply from that purported rationale.

In the absence of the full text of the trade agreement, this analysis focuses on the public statements made by President Trump and Secretary of Commerce Howard Lutnick, as they provide the primary insight into the deal's intended structure and rationale.²⁸⁹

It should be noted, at least for context and background, that when President

²⁸⁴ Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 2, 2025, at 07:25 AM), <https://truthsocial.com/@realDonaldTrump/posts/114784098546698642> [<https://perma.cc/5WXZ-AFCM>]; Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 2, 2025, at 07:44 AM), <https://truthsocial.com/@realDonaldTrump/posts/114784170652465525> [<https://perma.cc/559E-X238>]; Duane Morris LLP, *Vietnam Becomes the Third Country to Enter into a Trade Deal with the United States: Understanding the Opportunities and Challenges Created by the Three Trade Deals* (July 3, 2025), https://www.duanemorris.com/alerts/vietnam_becomes_third_country_enter_trade_deal_united_states_understanding_opportunities_0725.html [<https://perma.cc/5XXY-UF9Y>]; Nga Pham & Danielle Kurtzleben, *Trump Announces Trade Deal with Vietnam*, NPR (July 2, 2025, at 12:47 PM ET), <https://www.npr.org/2025/07/02/nx-s1-5422252/trump-trade-deal-vietnam-tariff> [<https://perma.cc/8HRM-7PQ6>].

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ Donald J. Trump (@realDonaldTrump), X (Feb. 17, 2025, at 12:35 PM), <https://x.com/realDonaldTrump/status/1891572283161944433?lang=en> [<https://perma.cc/J8U6-BM3C>].

²⁸⁸ *Id.*

²⁸⁹ See Antonia Hitchens, *Donald Trump's Tariff Dealmaker-in-Chief*, NEW YORKER (July 21, 2025), <https://www.newyorker.com/magazine/2025/07/28/donald-trumps-tariff-dealmaker-in-chief> [<https://perma.cc/R3NP-XABD>] ("How Howard Lutnick, the Secretary of Commerce, plans to transform government into a money-making enterprise.").

Trump took office for the second time in January 2025, the average U.S. tariff applied to MFN trading partners, including Vietnam, was approximately 3.3 percent on a simple average basis.²⁹⁰ Therefore, the newly-announced rates represent a marked escalation from that baseline, signaling a significant shift in U.S. tariff policy, not only in applied rates, but also in the abandonment of prior commitments to reciprocity.

The President, of course, characterized the agreement as a “great deal” for the United States, and said on social media:

The Terms are that Vietnam will pay the United States a 20 [percent] Tariff on any and all goods sent into our Territory. . . . In return, Vietnam will do something that they have never done before, give the United States of America TOTAL ACCESS to their Markets for Trade. In other words, they will “OPEN THEIR MARKET TO THE UNITED STATES,” meaning that, we will be able to sell our product into Vietnam at ZERO Tariff.²⁹¹

Shortly after, Secretary of Commerce, Howard Lutnick, shared the President’s statement and added that “[o]ur trade deal with Vietnam is a massive win for America’s businesses [sic] and farmers! For the FIRST TIME EVER, Vietnam will open its markets to the United States. They will pay 20% to sell their products here, and 40% on transshipping. . . . This is HUGE for our farmers.”²⁹²

Therefore, to summarize the details of the trade deal as we know it now:

1. U.S. exports to Vietnam will face no tariff.
2. Vietnamese exports to the U.S. will face a 20-percent tariff.
3. Goods transshipped through Vietnam from other countries to the U.S. will face a 40-percent tariff.

Therefore, while the administration markets the Vietnamese tariffs as a win

²⁹⁰ Colin Grabow, *Trump’s Vietnam Agreement Bodes Poorly for Future Trade Deals*, CATO INST. (July 7, 2025, at 12:01 PM), <https://www.cato.org/blog/trumps-vietnam-agreement-bodes-poorly-future-trade-deals> [<https://perma.cc/7SVP-JR9W>]; *Tariff Profile: United States, WORLD TRADE ORG.*, https://www.wto.org/english/res_e/statis_e/daily_update_e/tariff_profiles/US_E.pdf [<https://perma.cc/44BN-UTML>] (last visited July 9, 2025).

²⁹¹ Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (July 2, 2025, at 07:44 AM), <https://truthsocial.com/@realDonaldTrump/posts/114784170652465525> [<https://perma.cc/T5UB-JGBL>] (Caps in original).

²⁹² Howard Lutnick (@howardlutnick), X (July 2, 2025, at 09:59 AM), <https://x.com/howardlutnick/status/1940455257017909375> [<https://perma.cc/E9Q3-G6ZJ>].

for American businesses, the practical effect of this deal is a significant increase in the cost of imported goods. Vietnam plays a central role in the U.S. supply chain of goods.²⁹³ A 20-percent to 40-percent tariff on these imports is functionally a consumption tax²⁹⁴ the executive branch imposed unilaterally. Although political statements have suggested that Vietnam or other countries will bear the cost of these tariffs,²⁹⁵ such claims are either misleading or based on a fundamental misunderstanding of how tariffs operate.²⁹⁶ In practice, U.S. importers are responsible for paying the tariffs at the border, and they typically pass (at the very least, partially) those costs on to consumers through higher prices.²⁹⁷ The economic burden falls most heavily on lower- and middle-income households, highlighting the regressive and opaque nature of the broader tariff regime examined in this Article.

In the end, the only clear beneficiary of this arrangement is the federal government, which gains a new source of revenue without passing a tax bill or engaging in any legislative process. Ultimately, consumers will face higher prices, businesses will encounter additional uncertainty, and the broader economy will

²⁹³ Jenna Ross, *Trade Tug of War: America's Largest Trade Deficits*, VISUAL CAPITALIST (Mar. 7, 2025), <https://www.visualcapitalist.com/sp/trade-tug-of-war-americas-largest-trade-deficits/> [<https://perma.cc/J9M9-HZW8>]; *Vietnam Trade Summary*, OFF. U.S. TRADE REP., <https://ustr.gov/countries-regions/southeast-asia-pacific/vietnam> [<https://perma.cc/A8PL-K8GG>] (last visited July 9, 2025).

²⁹⁴ See, e.g., Reuven S. Avi-Yonah, Doron Narotzki, & Tamir Shanan, *From Relic to Relevance, The Resurgence of Tariffs*, 77 U. CAL. L.J. (forthcoming 2026), <https://ssrn.com/abstract=5172266> [<https://perma.cc/5KBP-6L7Y>]; Reuven S. Avi-Yonah & Doron Narotzki, *The Tariffs Are Coming! The Tariffs Are Coming!* 116 TAX NOTES INT'L 1577, (Oct. 13, 2025), <https://ssrn.com/abstract=5080792> [<https://perma.cc/45E8-W46H>]; Doron Narotzki, *Tariffs: Back to the Future*, 116 TAX NOTES INT'L 565, 565 at 565, <https://ssrn.com/abstract=5007289> [<https://perma.cc/Y9YP-8JKT>].

²⁹⁵ Trump, *supra* note 291; Lutnick, *supra* note 292.

²⁹⁶ See, e.g., Avi-Yonah, Narotzki, & Shanan *supra* note 294.

²⁹⁷ Maqbool Dada, Tinglong Dai, Yunxiang Sun, & Mariana Socal, *Tariffs as a Hidden Tax: Price Pass-Through in Multi-Stage Supply Chains* (July 25, 2025), <https://ssrn.com/abstract=5237643> [<https://perma.cc/54AC-3JZW>]; Alberto Cavallo, Gita Gopinath, Brent Neiman, & Gaoyan Tang, *Tariff Passthrough at the Border and at the Store: Evidence from US Trade Policy* (Oct. 17, 2019), <https://ssrn.com/abstract=3470793> [<https://perma.cc/Z7PN-U4Z6>]; Omar Barbiero & Hillary Stein, *The Impact of Tariffs on Inflation* (Feb. 6, 2025), <https://ssrn.com/abstract=5127709> [<https://perma.cc/5NNZ-4MEE>]; Colin Grabow, *Trump's Vietnam Agreement Bodes Poorly for Future Trade Deals*, CATO INST. (July 7, 2025), <https://www.cato.org/blog/trumps-vietnam-agreement-bodes-poorly-future-trade-deals> [<https://perma.cc/7SVP-JR9W>].

absorb the downstream effects. In marked contrast, the executive branch will secure a steady stream of funds, collected at the border and largely hidden from public scrutiny, while it markets the dollars as money collected from foreign governments. This outcome reflects the core concern of this Article: the use of trade measures to impose covert taxation outside the constitutional framework.

IV. CONCLUSION

Even if the Part II theory is only partly correct in its assertion that President Trump's tariff policy serves not as a trade strategy but as a fiscal maneuver to manage federal debt, to restructure the U.S. federal tax framework, and to disrupt the global trade system, then the constitutional implications are profound. The executive branch would have constructed a *shadow fiscal state*, a parallel system of taxation operating outside the framework of the tax code, without congressional enactment and without the checks and balances of democratic accountability.

Tariffs used to curb capital outflows, influence bond yields, or raise revenue are no longer functioning as instruments of trade policy. They operate instead as covert forms of taxation. Yet, unlike conventional taxes, the executive imposes them without legislative debate, without public scrutiny, and without the constitutional safeguards that anchor fiscal legitimacy. The administration crafts the tariffs through executive discretion, embedding them invisibly in consumer prices and shielding them from meaningful oversight. Oversight is not a procedural luxury; it is the core principle of any functioning democracy and the embodiment of the foundational idea that there can be no taxation without representation. When revenue is extracted without legislative consent, the fundamental relationship between the government and the governed begins to erode.

This practice circumvents the constitutional structure that vests taxing authority in Congress. It fractures the essential connection between public burdens and public consent, replacing legislative deliberation with executive discretion. It also distorts the proper role of trade policy within the constitutional framework, turning what should be regulatory instruments into disguised mechanisms of domestic fiscal management. By shifting the power to impose public financial burdens outside of democratic channels, this strategy risks normalizing a form of taxation that is regressive, opaque, and insulated from political accountability.

Moreover, this strategy carries not only U.S. constitutional risks, but also international legal consequences. The use of sweeping tariffs detached from authentic trade aims has strained the rules-based global trading system. It violates core obligations under the WTO framework, which prohibits arbitrary and protectionist measures disguised as national security or fiscal necessity. By

exploiting legal loopholes and stretching exceptions beyond recognition, the United States undermines both its own credibility and the integrity of international economic law.

This Article does not claim that the theory is conclusively established. Legitimate questions remain regarding its strategic coherence, causal assumptions about macroeconomic effects, and ultimate sustainability. Nevertheless, even in its early stages, the use of tariffs as a functional substitute for congressional taxation warrants serious constitutional concern. The executive's use of tariffs in this way reflects a deeper institutional pathology: the erosion of congressional will to safeguard its core Article I powers and the broader weakening of the separation of powers that supports fiscal democracy.

In addition, the fact that President Trump's senior advisors, as well as policy documents such as the *Mar-a-Lago Accord*, explicitly addressed strategies that mirror the concerns raised by this theory stresses that these risks are not entirely speculative. Rather, they were contemplated at the highest levels of government, and this reality makes the constitutional stakes too significant to ignore.

In a functioning constitutional system, the decision to raise revenue must proceed through open, accountable lawmaking that is informed by public debate and constrained by institutional checks. The emergence of an alternative revenue system built on executive-imposed tariffs represents not merely a procedural irregularity, but a profound constitutional rupture. Whether temporary or systemic, whether calculated or improvised, it signals a dangerous reallocation of fiscal authority. Solvency maintained by constitutional shortcuts is not fiscal health. It is the erosion of democratic legitimacy, and it demands urgent scrutiny.

Restoring fiscal democracy will require structural reform. Just as Professor Oona Hathaway has proposed a dual-track system to rebalance congressional oversight over international lawmaking,²⁹⁸ a similar framework is needed for tariff-based fiscal actions. Minor tariff adjustments designed to address genuine trade concerns could continue under an administrative track, subject to transparency, public notice, and meaningful comment procedures. However, major tariff measures, particularly those that materially impact federal revenue or macroeconomic conditions, should require expedited congressional approval. An Administrative Procedure Act for Executive Tariff Actions would help restore the constitutional balance and ensure that the power to tax remains anchored in representative institutions. Without such reforms, the shadow fiscal state risks becoming a permanent feature of American governance. Concretely, limited

²⁹⁸ Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009), <https://ssrn.com/abstract=1471550>.

executive actions should proceed only when the responsible agency issues written findings, uses notice and comment under the Administrative Procedure Act, and includes automatic sunsets. By contrast, any tariff program expected to raise at least 0.1 percent of Gross Domestic Product (GDP) or to last more than 24 months should receive expedited congressional approval, with House-first origination to honor the Origination Clause. Courts should apply a clear rule of decision: if an action is narrow, time-limited, and fits the text of the IEEPA or comparable sanctions statutes focused on transactions, it is presumptively lawful; if an action is sweeping, indefinite, and revenue-dominant without clear tariff authority in the statutory text, it requires unmistakable authorization from Congress, and otherwise is unlawful.