# TARIFFS AND THE TAXING POWER: HISTORICAL LESSONS FOR MAJOR QUESTIONS AND NONDELEGATION

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ABSTRACT

*American law is grappling with basic questions about the President's power to impose tariffs—questions concerning whether Congress can delegate this authority, and the degree to which it has. But the ongoing tariff controversy emerges against a backdrop of conflicting and shifting historical practice. Early Congresses drafted tariff statutes in painstaking detail, while some of the broadest delegations in the early Republic involved internal taxes. In the modern era, by contrast, Congress has delegated more expansive tariff powers to the President, while retaining closer control over internal taxes. How should we understand this seemingly conflicting history of practice, and its relevance for the debates over tax delegation today?*

*We begin by recounting the history of tariffs around the Founding, emphasizing the ways in which tariffs are historically and constitutionally distinct from other taxes. We then make three observations for the current debate over how nondelegation principles apply to tariffs. First, we provide an account of* <u>why</u> *the early history of tariff law diverges (or appears to diverge) from early tax delegations—namely, differences in tax design and administrative technology. It was easier for Congress to provide statutory specifications for taxes on discrete items (like import duties) than for tax bases that were novel and harder to measure (like the 1798 wealth tax). Second, we use the example of ad valorem duties to illustrate the delegation principles in early practice. Early Congresses delegated what they had to—but did not authorize the Executive Branch to decide the objects or levels of taxation. Third, we note that Congress maintained a firm grip over early tariffs even when these laws had express foreign policy implications and were explicitly discussed in foreign policy terms. These points offer a consistent understanding of the early taxing power—and suggest why broad presidential tariffs conflict with constitutional structure and practice.*

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## INTRODUCTION

Congress's authority to impose tariffs was arguably once the Constitution's most uncontroversial feature. Now, it is at once controversial and confusing. One of the most explosive legal issues of the second Trump Administration—generating ongoing controversy and litigation[1]—concerns President Trump's expansive use of tariffs to pursue a variety of domestic and international policy goals. On April 2, 2025—named "liberation day" by the President—a new executive order declared a national emergency over persistent U.S. trade deficits and directed the imposition of a ten-percent baseline ad valorem tariff on nearly all imports, with higher "reciprocal" tariffs on specific countries starting days later.[2] In the months since, President Trump repeatedly paused, resumed, expanded, contracted, and otherwise modified these and other tariffs.[3]

1. We developed this Article in the fall of 2025 alongside a Supreme Court amicus brief (also joined by Daniel Hemel and Jon Endean) in *Learning Resources, Inc. v. Trump* (No. 24-1287). *See* Brief for Tax Law Professors as *Amici Curiae* in Support of Petitioners, Learning Res., Inc. v. Trump & Trump v. V.O.S. Selections, Inc., 146 S. Ct. 628 (2026) (Nos. 24-1287 & 25-250), 2025 WL 3036526. Many of the arguments in that brief overlap with arguments we develop here. Relatively late in our editing process for this Article, the Supreme Court issued its February 20, 2026 opinion in the consolidated tariff case. *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026). We have not attempted to substantively revise this paper in light of the Court's opinion; we leave that project to future work. The wider debates over tariff delegations do not look likely to disappear anytime soon.

2. Exec. Order No. 14257, 90 Fed. Reg. 15041 (Apr. 2, 2025).

3. *See, e.g.*, Exec. Order No. 14266, 90 Fed. Reg. 15625 (Apr. 9, 2025) (modifying the reciprocal tariff rates "to reflect trading partner retaliation and alignment"); Exec. Order No. 14289, 90 Fed. Reg. 18907 (Apr. 29, 2025) (setting forth procedures for determining which tariffs apply to goods subject to multiple overlapping tariff orders); Exec. Order No. 14298, 90 Fed. Reg. 21831 (May 12, 2025) (modifying reciprocal tariff rates on China); Exec. Order No. 14316, 90 Fed. Reg. 30823 (July 7, 2025) (extending the modification of reciprocal tariff rates).

These actions have attracted legal challenges largely focused on questions of statutory interpretation. Many of the initial tariff actions of the second Trump Administration relied on the authority of the International Emergency Economic Powers Act (IEEPA), which empowers the President, after the declaration of a national emergency, to "regulate . . . importation . . . of . . . any property in which any foreign country . . . has any interest."[4] The primary challenges recently heard by the Supreme Court contested whether this IEEPA language really grants the President the broad tariff power he has claimed.[5]

But the controversy over the recent Trump tariffs also sounds in broader legal themes—including both the nondelegation and major questions doctrines. The Federal Circuit held in *V.O.S. Selections, Inc. v. Trump* that IEEPA did not authorize the challenged tariffs, reasoning that Congress has not delegated the broad authority to impose tariffs unless it did so "explicitly,"[6] and that Trump's "unheralded" and "transformative" tariffs also run "afoul of the major questions doctrine."[7] The claimants asked the Court to decide not only whether IEEPA authorized the challenged tariffs—but also whether such authorization would be an unconstitutional delegation of legislative authority to the President,[8] or would violate the major questions doctrine.[9] Both major questions and nondelegation—doctrines that are connected—were repeatedly raised at oral argument. In ruling on the Trump tariffs, therefore, the Supreme Court must grapple both with statutory questions and with background constitutional principles that inform statutory interpretation—questions that are broader than the proper construction of IEEPA and the scope of its famously ambiguous language.[10]

These questions about the tariff power also intersect with wider contemporary legal trends. We live in an age of increased scrutiny of broad delegations of the Article I legislative powers and related skepticism of

4. 50 U.S.C. § 1702(a)(1)(B).

5. *See* V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312 (Fed. Cir.), *cert. granted*, 146 S. Ct. 73 (2025), *aff'd sub nom.* Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026); Oregon v. Trump, 149 F.4th 1312 (Fed. Cir.), *cert. granted*, 146 S. Ct. 73 (2025), *aff'd sub nom.* Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026); Webber v. U.S. Dep't of Homeland Sec., 785 F. Supp. 3d 824 (D. Mont. 2025); Princess Awesome, LLC v. U.S. Customs & Border Prot., No. 25-00078 (Ct. Int'l Trade 2026).

6. *V.O.S. Selections*, 149 F.4th at 1332.

7. *Id.* at 1334–37; s*ee also id.* at 1336 ("The Executive's use of tariffs qualifies as a decision of vast economic and political significance, so the Government must 'point to clear congressional authorization' for its interpretation of IEEPA.").

8. Petition for a Writ of Certiorari at I, Trump v. V.O.S. Selections, Inc., 146 S. Ct. 628 (2026) (No. 25-250).

9. *Id.* at 6.

10. It is perhaps hard to imagine an economic authority that is broader and vaguer than the power to "regulate . . . any property." 50 U.S.C. § 1702(a)(1)(B).

Article II attempts to answer major questions.[11] And the power to impose tariffs is right there in Article I: "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises."[12]

Although the nondelegation and major questions doctrines are formally distinct, they operate as overlapping principles guiding the interpretation of statutes delegating Article I powers to the Executive, such as IEEPA's delegation of economic powers. Interpreting IEEPA to authorize only appropriately cabined discretion over tariffs avoids both delegation concerns and major questions concerns.[13] More generally, judges and commentators have noted the hydraulic relationship between the two doctrines, on account of their overlapping inquiries.[14] And the doctrines have been theorized in similar ways: Courts should not interpret ambiguous statutes to give agencies vast powers that raise constitutional risks.[15] For these reasons, this Article evaluates the question of how to properly interpret the scope of the tariff power delegated in IEEPA as having comparable implications for how both the nondelegation and major questions doctrines apply to tariffs and the taxing power.

Beyond these contemporary doctrinal trends, we also live in an age in which the Supreme Court increasingly turns to the history of practice

11. For a discussion of the interplay between the nondelegation and major questions doctrines, see Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 478 (2021).

12. U.S. CONST. art. I, § 8, cl. 1.

13. Moreover, important strands of nondelegation doctrine have long emphasized that the "majorness" of a policy decision—apart from and in addition to the degree of discretion that the policymaker exercises—should matter for the constitutional nondelegation inquiry. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"); *see also* The Benzene Case, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) (noting that he would hold the provision at issue to "violate the doctrine against uncanalized delegations of legislative power," in part "in light of the importance of the interests at stake").

14. In *FCC v. Consumers' Research*, for example, Justice Kavanaugh noted that "many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law in related areas," highlighting (along with the end of *Chevron* deference) "the Court's application of the major questions canon of statutory interpretation." 606 U.S. 656, 705 (2025) (Kavanaugh, J., concurring); *see also* KRISTIN E. HICKMAN, RICHARD J. PIERCE, JR. & CHRISTOPHER J. WALKER, SUMMER 2025 UPDATE: FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 7 (4th ed. 2022 & Supp. 2025) (noting that "the more likely explanation" for the lack of interest in expanding the nondelegation doctrine "is that the Court has made other reforms to administrative law that address the majority's concerns about excessive congressional delegation," including "the rise of the new major questions doctrine").

15. *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 740–42 (2022) (Gorsuch, J., concurring) ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine. . . . The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does 'not inadvertently cross constitutional lines.'"); *see also The Benzene Case*, 448 U.S. at 646 (plurality opinion) ("A construction of the statute that avoids this kind of open-ended grant should certainly be favored.").

between the branches as evidence of the law's settled meaning. Presidential tariffs are of recent vintage (largely confined to the twentieth century), and the scale and scope of the second Trump Administration's tariffs represent a new high-water mark for the Article II tariff.

Yet the history of lawmaking through the taxing power appears to pose contradictions when it comes to delegation and the related major questions doctrine. On the one hand, early American tariff legislation—a type of what is often called "external" taxation—was usually highly detailed.[16] Some influential commentators have therefore pointed to these early laws, in combination with other evidence, to support an original understanding of a constitutional nondelegation requirement.[17] On the other hand, other influential commentators note that some of the broadest and earliest legislative delegations concerned "internal" taxation—perhaps most famously the Direct Tax of 1798, which required an extensive administrative apparatus that delegated significant discretion to the Executive Branch.[18]

Indeed, today's division of authority over tariffs and internal taxes appears to be the reverse of what existed in the first decades of congressional practice. Broad legislative delegations of tariff authority—while unknown in the first decades of legislative activity—are not exactly new. Congress has delegated some tariff authority to the President since 1890, and has done so more capaciously since 1934.[19] Indeed, two foundational Supreme Court cases upholding congressional delegations against constitutional challenge concerned tariff delegations.[20] Moreover, tariffs are regarded as an

16. *See infra* Section I.C; *see also* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 36 (1965) ("Congress for many years wrote every detail of the tariff laws.").

17. *See* Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1395 (2019) (arguing that "statements and actions from this era further suggest an understanding that not only was Congress the preferable body to take action, but that regulation by legislation was constitutionally required").

18. *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021) (providing detailed evidence of broad congressional delegation to the Executive Branch to administer and implement the Direct Tax of 1798).

19. *See* McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612 (authorizing the President to suspend the free entry of certain goods from countries imposing "duties or other exactions" deemed to be "reciprocally unequal and unreasonable" and to impose tariffs on these goods); Reciprocal Trade Agreements Act of 1934, ch. 474, 48 Stat. 943 (authorizing the President to enter into reciprocal trade agreements that reduce statutory tariff rates by up to fifty percent). For discussion of these acts and their significance in expanding congressional delegation of the tariff power, see also Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583 (2019); Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751 (1939).

20. Marshall Field & Co. v. Clark, 143 U.S. 649 (1892) (upholding the delegation of rate-setting authority to the President in Section 3 of the McKinley Tariff Act of 1890); J.W. Hampton, Jr., & Co.

important tool of foreign policy, raising the possibility that—even if the present statutory delegations are ambiguous—the President may lean on more than statutes for support, on the theory that he acts in Justice Jackson's famous "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[21] In the ongoing Supreme Court litigation over IEEPA, the government defends its broad reading on similar grounds, arguing that Congress has not delegated its Article I authorities, but merely supplemented foreign-affairs authorities that flow directly from Article II.[22]

By contrast, it is the *internal* taxes of today where Congress seems more concerned with "filling up the details," and retains authority over key features of tax design. For example, while the President and Treasury possess broad administrative authority to implement the Internal Revenue Code, the President may *not* set income tax rates.[23] For some critics of the modern administrative state, it is obvious that a proper understanding of the Constitution commands this result.[24] Still, delegations of the taxing power are regularly upheld. Last term, for example, the Court rejected a nondelegation challenge to the Federal Communications Commission's authority to determine fees that telecommunications carriers must pay—a kind of administrative tax—into a fund that subsidizes telecommunications access in underserved areas. The Court rejected the notion that delegations of the taxing power must clear a higher bar: "the delegation inquiry [is] just the same, and just the usual one."[25]

The twisting law and history of delegation, tariffs, and taxes may thus appear confusing and equivocal. Perhaps for this reason—among others—advocates on both sides of the current debate over the Trump tariffs have drawn differing conclusions from the historical record.

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v. United States, 276 U.S. 394 (1928) (establishing the "intelligible principle" standard for congressional delegations in upholding the President's authority to increase or decrease duty rates under the Tariff Act of 1922).

21. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

22. *See* Opening Brief for the Respondents at 12, Learning Res., Inc. v. Trump & Trump v. V.O.S. Selections, Inc., 146 S. Ct. 628 (2026) (Nos. 24-1287 & 25-250) ("For over a century, Congress has supplemented the President's constitutional power over foreign affairs and national security by delegating to him the authority to manage foreign trade in response to international conditions, including by imposing tariffs.").

23. *Compare* Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633 (2017), *with* James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235 (2015).

24. Philip Hamburger, for instance, has written that the traditional and proper understanding of nondelegation principles suggests that Treasury officials "could authorize the distribution of government largess, and could make regulations that instructed treasury officers, but he could not promulgate regulations altering tax rates." PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 4 (2014).

25. FCC v. Consumers' Rsch., 606 U.S. 656, 677 (2025).

Against this confusing backdrop, what, if anything, can the history teach us about the President's authority to impose tariffs, and Congress's ability to delegate that authority? As we have argued elsewhere, the history of congressional and executive practice can provide new perspectives on contemporary questions about the nature and limits of the taxing power.[26]

We turn to history to provide lessons for the debate over nondelegation and major questions as they apply to tariffs as well as the taxing power more generally. While our primary purpose here is not to comment on the litigation over the President's tariffs, we derive lessons that have relevance for the Court, and that suggest the broad reading of IEEPA advanced by the Trump Administration is out of step with both our constitutional structure and the early tradition of congressional control. Our lessons also have relevance for the ongoing academic debates over delegation, taxes, and tariffs.

In Part I, we provide an overview of the relevant early tariff history and an account of congressional practice regarding external taxes around the Founding. While much of this history has been explored elsewhere, we draw it together partly to emphasize an important and underappreciated theme: The legal history of external taxes is in many respects different from the history of the federal government's other fiscal powers. In the early republic, tariffs were, without question, the single most important federal revenue source. Indeed, a strong case can be made that the power to impose duties on foreign goods was *the* most important federal constitutional power. Among other things, the debate over the impost in the 1780s was arguably the primary motivation for the Constitutional Convention of 1787 and the centerpiece of plans for resolving the lingering Revolutionary War debts.

The text of the Constitution also treats internal and external taxation in subtly distinct ways. While both are included under the Constitution's Taxing Clause,[27] other clauses specifically deprive the states of authority

26. *See* Conor Clarke & Ari Glogower, *Apportioned Direct Taxes*, 79 TAX L. REV. (forthcoming 2026).

27. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises."). Notably, these terms overlap, and cover a variety of internal and external instruments. *See generally* Conor Clarke & Ari Glogower, Duties, Imposts, and Excises (Feb. 27, 2026) (unpublished manuscript) (on file with author). The constitutional terms "imposts" and "duties" overlap with (and are broader than) tariffs, with "duties" being perhaps the broadest term in the Clause. As a matter of historical usage, "the impost" referred to a uniform import duty on foreign goods. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 305 (Max Farrand ed., 1911) (Aug. 16, 1787) ("[*D*]*uties* are applicable to many objects to which the word *imposts* does not relate.") (statement of James Wilson); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 437–38 (1827) (Marshall, C.J.) ("An impost, or duty on imports, is a custom or a tax levied on articles brought into a country."). The term

over imports and emphasize that Congress retains oversight over related state lawmaking.[28] We reexamine the Constitution's relevant textual and structural commitments—an exploration that highlights the reasons to be additionally skeptical of tariff delegations compared to internal tax delegations—and sketch how the tariff authority was wielded after ratification.

In Part II, we offer three interpretive observations about this history that are relevant to the current legal and academic debates over nondelegation and major questions. First, we provide an account of *why* the early history of tariffs appears to diverge from early internal tax delegations. Here, we focus on the differences in tax design and administrative technology: It was easier for Congress to be specific about tariffs on discrete goods in the nineteenth century than for internal tax bases that were novel and harder to measure. Congress delegated what it had to—which, in the case of tariffs, was not much. Furthermore, these early delegations did not authorize the Executive Branch to decide the object or levels of taxation and thereby limited the Executive's discretion.

We then examine the case of the early ad valorem duties as an example of how the nature of the delegations depended on choices in tax design. This example illustrates what early Congresses had to delegate and why—namely, processes and judgments (such as valuation procedures) that could not be spelled out in advance by statute. At the same time, it underscores that these delegations were narrowly functional and did not authorize the Executive to make the underlying policy choices about whom to tax or at what rate.

Finally, we engage directly with the argument that because tariffs implicate foreign policy they flow in part from the President's Article II prerogatives. Early practice does not support this view. Early Congresses maintained a relatively firm grip over tariff design even though early tariffs had foreign policy implications and were explicitly discussed in foreign policy terms. Those tariffs were often designed (by Congress) both to raise revenue and to regulate foreign commerce.

Taken together, these points offer a consistent understanding of the tax and tariff power in the early Republic and explain why broad presidential powers to impose tariffs—as claimed by the Trump Administration in its interpretation of IEEPA—conflict with early historical practice.

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"tariffs" generally refers to a varied schedule of duties on imports. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, s.v. "tarif" (New York, S. Converse 1828) (defining the verb as "[t]o make a list of duties on goods"). For purposes of this Article, we use the term "tariffs" broadly to encompass what might also be termed customs, imposts, or imports duties.

28. *See infra* notes 56–57 and accompanying text.

## I. TARIFF HISTORY: AN OVERVIEW

To the modern ear, Congress's power to impose tariffs—and similar levies on imports, contained within the constitutional terms "duties" and "imposts"—can seem lost in the overall taxing power. But the power to tax imports was perhaps the single most important federal power for the new Republic. This was true before the Founding: The debate over a federal "impost"—and the failure to implement one under the Articles of Confederation—was one of the major controversies that bedeviled the Articles of Confederation and a proximate cause of the Constitutional Convention of 1787.

Because tariffs have a distinct history and raised distinct governance concerns, the text and structure of the Constitution treat them differently than other aspects of the taxing power. Most significantly, the Constitution deprives the states of concurrent authority over imports and provides Congress with oversight over related state lawmaking.[29]

Tariffs continued to have a unique role within the taxing power after ratification: They were by far the federal government's most important source of revenue from the Founding and until the rise of the modern income tax,[30] and it was uncontroversial in the early decades of the Republic that the American financial system would have this structure.[31]

Because tariffs were central to the taxing power during this period—and because, as explained below, early tariffs and taxes raised distinct design challenges[32]—Congress maintained significant control over their design and implementation. In his history of U.S. trade policy (which is, necessarily and substantially, also the history of U.S. tariff policy), Douglas Irwin observes that "Congress is at the center of the story because it is the principal venue in which trade policy is determined."[33] This was never more so than in the decades following the Constitution's ratification.

29. *See* U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports," and any consented-to imposts remain "subject to the Revision and Controul of the Congress."); *id.* cl. 3 (barring states from laying "any Duty of Tonnage").

30. MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867, at 242 (2014) (describing the importance of tariffs for early federal revenue); *see also* Clarke & Glogower, *supra* note 26 (describing more on the magnitude of tariffs relative to other sources of early revenue). During this era, Congress generally relied more heavily on internal taxes for revenue only during wartime declines in foreign trade.

31. *See* EDLING, *supra* note 30, at 243 ("[T]here were no serious proposals for radical transformation of the American fiscal system away from customs duties toward income and property taxes or even internal duties.").

32. *See infra* Section II.A.

33. DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY 2 (2017).

### *A. The Impost Debate*

The Articles of Confederation vested the pre-federal Congress with broad authority over foreign affairs and certain aspects of interstate commerce, but not an independent authority to levy taxes or tariffs. Instead, the Articles expressly preserved state fiscal authority. Article IX made explicit that "no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to,"[34] preserving state control over customs duties. Article VIII, meanwhile, required that "all other expenses that shall be incurred for the common defence or general welfare . . . shall be defrayed out of a common treasury, which shall be supplied by the several States," with each state's taxes "laid and levied by the authority and direction of the legislatures of the several States."[35] In practice, this structure meant that Congress could only request funds from the states and lacked any reliable stream of revenue—which created difficulty in funding federal activities or paying off the Revolutionary War debt.[36] Deprived of a tariff authority, Congress was forced to seek the states' permission to enact uniform imposts—an arrangement that proved unworkable.

Congressional proponents of a national taxing power sought on two primary occasions to authorize a federal impost under the Articles of Confederation. Congress[37] made its first major attempt in 1781, when it recommended that the states adopt a five percent ad valorem impost on imports. In its resolution of February 3, Congress declared the measure "indespensably [sic] necessary to the support of public credit and the prosecution of the War," and asked the states to "vest Congress with full power to collect and to appropriate the same to the discharge of the principal and interest of all debts already contracted or which may be contracted on the faith of the United States during the present war."[38] But the impost required unanimous approval of the states, and the refusal of Rhode Island—which feared that granting Congress independent taxing power would erode state sovereignty and burden its trade-dependent economy—

34. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

35. *Id.* art. VIII.

36. *See* IRWIN, *supra* note 33, at 54 ("Since Congress was not permitted to impose import duties, the national government could not raise revenue to fund its operations, finance the national debt, or pay for national defense.").

37. For simplicity, we use this blanket term to refer to all national legislative institutions, though the specific institution changes over time (from the First and Second Continental Congresses, to the Congress of the Confederation, to the post-1789 United States Congress).

38. 19 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 113 n.1 (Gaillard Hunt ed., 1912).

proved fatal.[39] Congress tried again in 1783, recommending to the states that it was "indispensably necessary to the restoration of public credit, and to the punctual and honorable discharge of the public debts, to invest the United States . . . with a power to levy . . . duties upon goods imported into the said states."[40] This time, New York vetoed the proposal—based on similar concerns that granting Congress unchecked taxing authority would endanger state sovereignty and shift fiscal control away from the state—thereby jeopardizing New York's ability to collect revenue from its port.[41] New York also rejected impost proposals in 1784 and 1785, and in 1786 it insisted that any New York import duties be collected by state officers—a move likewise aimed at maintaining state control.[42]

The inability of the states to adopt a national impost was a defining political issue of the 1780s. As Robin Einhorn has noted, when champions of a robust federal Constitution "attacked the 'imbecility' of the Articles of Confederation," the failure of the impost—and the ability of one holdout state to frustrate the urgent fiscal policy intentions of the rest—was a key part of what they had in mind.[43] This failure posed a basic threat to the national project, as duties on imports were understood to be the most important potential source of federal revenue.[44]

The contest over the impost also reflected the importance of imports—and their control—to individual state economies. And states worried that giving up such control to a federal authority might be damaging to their fiscal capacity. One month after Rhode Island's rejection of the 1781 impost, for instance, Virginia also withdrew its consent for the proposed federal impost with a statement, declaring that to permit "any power, other than the general assembly of this commonwealth, to levy duties or taxes upon the citizens of this state within the same, is injurious to its sovereignty,

39. For more detail on the 1781 impost debate and its failure, see ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 132 (2006) (summarizing debates over the impost of 1781); E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at 152–53 (1961) (describing key features of the failure of the impost of 1781).

40. 24 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789, at 257 (Gaillard Hunt ed., 1922).

41. *See* ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 28–29 (1993).

42. *See* ALEXANDER HAMILTON, INHABITANTS OF THE CITY OF NEW YORK TO THE LEGISLATURE OF NEW YORK STATE (Jan.–Mar., 1786), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 647, 647–52 (Harold C. Syrett ed., 1962) (describing history).

43. *See* EINHORN, *supra* note 39, at 119.

44. THE FEDERALIST NO. 12, at 93 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (identifying the impost as the most practicable federal revenue source); BRUTUS VII (Jan. 3, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 400 (Herbert J. Storing ed., 1981).

may prove destructive of the rights and liberty of the people, and . . . contravene[s] the spirit of the confederation."[45]

The impost controversy—and the inability of the states to coordinate on revenue and commercial matters—helped set the stage for the Constitutional Convention of 1787. In September of 1786, delegates from five states met in Annapolis, Maryland, at what became known as the Annapolis Convention.[46] Their mandate was to address the problems of interstate commerce under the Articles of Confederation, which left Congress too weak to regulate trade effectively. Because attendance was sparse, the delegates concluded that they could not take decisive action. Instead, in a report drafted largely by Alexander Hamilton, they recommended convening a broader assembly to address not only commercial disputes but the fundamental weaknesses of the Articles themselves.[47] That call led directly to the Philadelphia Convention of 1787, where the U.S. Constitution was drafted.[48]

### *B. Constitutional Text and Structure*

The impost debates of the early- and mid-1780s made it increasingly clear that the federal government needed the authority to raise revenue from imports. Thus, while the impost was important—and reflected deeply felt economic and regional interests of the states—the idea of giving Congress the authority to tax imports was perhaps the *least* controversial fiscal power to emerge from the Convention.[49] After a decade of controversy, the delegates understood that its time had come. The Committee of Detail's draft of the Taxing Clause was voted forward with no recorded controversy.[50]

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45. 11 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 171 (William Waller Hening ed., Richmond, Va., George Cochran 1823).

46. The convention was formally called the Meeting of Commissioners to Remedy Defects of the Federal Government. For a summary of the Annapolis Convention and its connection to the Philadelphia Convention of 1787, see BROWN, *supra* note 41, at 28–31.

47. *See Address of the Annapolis Convention, [Sept. 14, 1786]*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Hamilton/01-03-02-0556 [https://perma.cc/7JGA-P4W3].

48. BROWN, *supra* note 41, at 28.

49. *See* DALL W. FORSYTHE, TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION, 1781–1833, at 62 (1977) ("In striking contrast to the dispute over internal taxes, early tariff policy aroused no heated debate within the political elite, and no difficulties arose with collections. The issue of a national tariff had been widely discussed since 1781, and most Americans agreed that lack of such revenue authority was a crucial defect in the Articles of Confederation."); *see also* EINHORN, *supra* note 39, at 149 ("The U.S. Constitution was many things, but one of them was a device to ensure that the national government could levy the impost. . . . [T]he impost was not controversial."); BROWN, *supra* note 41, at 31 (noting the universal consensus and lack of controversy around the desirability of the impost).

50. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 143, 393–94, 456 (Max Farrand ed., 1911); *cf. id.* at 307–09 (Aug. 16, 1787).

The bigger question for the delegates was whether external sources of revenue would be *sufficient*—not whether they were necessary or desirable in the first place. Even Anti-Federalist opponents of the Constitution conceded the necessity of such external taxes, though they sought to reserve internal taxes for the states. Hamilton, in *Federalist No. 30*, acknowledged the force of that distinction but rejected it as "inconsistent with every idea of vigor or efficiency."[51] Limiting the federal government to commercial imposts, he argued, would "leave the General Government in a kind of tutelage to the State governments" and could never suffice for "the present and future exigencies of the Union."[52] The burden of existing public debt and the costs of essential federal establishments, he concluded, required a broader tax base than import duties alone. Still, the near-universal acceptance of imposts as a federal revenue source underscores the unusual strength of agreement on their desirability. This consensus—and the agreement to extend the federal taxing power to internal revenue sources as well—are reflected in the ratified text of Article I, Section 8: "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," subject to a uniformity requirement.[53]

But several other aspects of the text and structure are worth drawing out, because they emphasize the general principle that Congress would be in charge of revenue-raising, and also emphasize state concerns over the relationship between the new federal taxing power and their own economies. Revenue bills are required to originate in the House of Representatives, emphasizing that the power of the purse should be tied to a popularly accountable and geographically diverse body.[54] Congress is likewise forbidden from taxing exports and preferring the ports of one State over those of another,[55] underscoring the anxiety that the new federal powers might be used to privilege one state's economy at the expense of another.

Finally, the federal power to levy foreign duties and imposts emerged stronger than the rest of the taxing power, for it was the one component of that power that was expressly denied to the states. Article I, Section 10, Clause 2 provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws," and

51. THE FEDERALIST NO. 30, at 186 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
52. *Id.*
53. U.S. CONST. art. I, § 8, cl. 1.
54. *Id.* § 7, cl. 1. James Madison described the Origination Clause as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." THE FEDERALIST NO. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).
55. U.S. CONST. art. I, § 9, cls. 5–6.

further requires that any revenue from such imposts flow to the federal treasury and be "subject to the Revision and Controul of the Congress."[56] Clause 3 provides further that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage."[57] These additional provisions underscore both that tariffs were the most important federal taxing power and that they would be subject to congressional (and not more generically federal) oversight.

This constitutional structure emphasizes an important constitutional difference between internal and external taxation. In his famous *Federalist No. 32*, Hamilton seized on these provisions to underscore the concurrent nature of all the internal taxing powers—and thereby reassure the states. Because the Constitution both grants Congress authority over imposts and simultaneously denies that power to the states, Hamilton reasoned, the implication is that states otherwise retain "an independent and uncontrollable authority to raise their own revenues for the supply of their own wants."[58] With the *sole* exception of duties on imports and exports, Hamilton concluded, the states "retain that authority in the most absolute and unqualified sense," and any federal effort to restrict them further would be "a violent assumption of power, unwarranted by any article or clause of its Constitution."[59] The exclusion of states from the impost power thus reflected a rare instance of consensus: it was the one constitutional taxing measure that both Federalists and Anti-Federalists agreed belonged squarely in federal and—as the text repeatedly emphasizes—congressional hands.[60]

This distinction between internal and external taxes also raises an important structural question: Would the states have given up their concurrent power to impose tariffs if they thought Congress could freely delegate that power to the President? After all, tariffs were regarded as the most important revenue tool—and also, potentially, the most destructive to state economic interests. By the time of the Constitutional Convention, a general consensus recognized that the federal government needed this revenue authority—but the authorities of the Executive Branch were comparatively more controversial. Indeed, while the impost authority was arguably the least controversial federal power discussed at the convention,

56. U.S. CONST. art. I, § 10, cl. 2.
57. U.S. CONST. art. I, § 10, cl. 3.
58. THE FEDERALIST NO. 32, at 194 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
59. *Id.*
60. *See* BROWN, *supra* note 41, at 176 (describing Anti-Federalist plan whereby Congress would have "the sole and exclusive power of regulating trade, of imposing port duties" within the Confederation framework); *see also id.* at 203 (describing more detail on the Anti-Federalist desire for an expanded tariff power).

the new presidential power was perhaps the single *most* controversial structural feature of the Constitution.[61]

As we argued in our amicus brief,[62] we think the answer is likely that the states would not have given up their tariff authority if they thought policy decisions in this area were not going to be mediated through a representative congress. In addition to the textual commitments described above, we see ample evidence that the Founders would have expected the economic interests implicated by imports to be mediated through Congress. In *Federalist No. 10*, for example, Madison offered taxing and imports as core examples of policy issues that would provoke a strong factional response. "Shall domestic manufactures be encouraged, and in what degree," Madison asked rhetorically, "by restrictions on foreign manufactures?"[63] There is, he continued, "no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice" than the proper "apportionment of taxes."[64] For this reason, he continued, it was beneficial to have a Republic filter those interests "through the medium of a chosen body of citizens." Madison was hardly alone in thinking that divisive questions over imports would be settled by a representative and deliberative legislature—not by a single Executive.[65]

### C. Early Federal Tariff Legislation

Consistent with the expectations described above, Congress's new constitutional authority to tax imports was indeed the most important source

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61. The Founders' concerns with an overly broad executive power were numerous. *See, e.g.*, LUTHER MARTIN, GENUINE INFORMATION (Dec. 28, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 67 (Herbert J. Storing ed., 1981) (describing the nomination powers and the criticism that "the President as here constituted, was a KING, in every thing but the name"); George Mason, Draft Speech of June 4, 1787, *reprinted in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 113 (Max Farrand ed., 1911) ("If strong and extensive Powers are vested in the Executive, and that Executive consists only of one Person; the Government will of course degenerate (for I will call it degeneracy) into a Monarchy.").

62. Brief for Tax Law Professors as *Amici Curiae* in Support of Petitioners at 12, Learning Res., Inc. v. Trump & Trump v. V.O.S. Selections, Inc., 146 S. Ct. 628 (2026) (Nos. 24-1287 & 25-250).

63. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

64. *Id.*

65. During the Pennsylvania ratification debates, for example, James Wilson assured delegates that the new states should have confidence that Congress would not impose oppressive tariffs because all such laws would need to go through both the House and Senate. *See, e.g.*, 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453, 467 (Jonathan Elliot ed., 1901) (Dec. 4, 1787); *see also* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 THE PAPERS OF THOMAS JEFFERSON 438–44 (Julian P. Boyd ed., 1955) (noting that House members might "be very illy qualified to legislate for the Union [and] for foreign nations," but continuing that "this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves").

of public revenue in the early Republic.[66] Given the extensive debates of the 1780s, Congress's initial reliance on tariffs for revenue was largely uncontroversial, and was seen as inevitable.[67] Congress faced the immediate challenge of securing a stable revenue against the backdrop of the lingering war debt. As Madison explained in 1789 to his colleagues in the House of Representatives, "there are but two objects to which in this dilemma we can have recourse": "direct taxation" and "excises."[68] But Madison added that "direct taxation is not contemplated by any gentleman on this floor, nor are our constituents prepared for such a system of revenue," and noted that domestic excises on particular goods were politically toxic, as they "would give particular disgust in some states."[69] For Madison, that left only one viable path—the more politically acceptable and anticipated duties on imports. "[I]t is better to try what will be produced by a plan which is favoured by the public sentiment," he concluded, which "will give a support to our laws equal to the greatest energy of a strong execution."[70]

Madison introduced the first bill to impose duties on imports on April 8, 1789, just two days after a quorum had been achieved in Congress.[71] He urged Congress to act immediately—and adopt the five percent general impost that had been the primary focus of proposal and debate in the 1780s—and then work out a more specific schedule later, so as not to miss spring imports.[72] After some debate, Congress adopted the first federal tariff on July 4, 1789, levying duties on a wide range of imported goods.[73] This initial law imposing customs duties was the second enactment by Congress, preceded only by the law governing the time and manner of oaths of office.[74]

Related fiscal legislation occupied a large share of Congress's early work. Jennifer Mascott observes that "[s]ix of the 26 statutes enacted in that first session of the First Congress involved customs operations, and 37 of

66. *See* EINHORN, *supra* note 39, at 117 ("Before the Civil War, federal taxation was almost completely synonymous with the tariff.").

67. *See* FORSYTHE, *supra* note 49, at 68 (noting that the first American tariff "was not a public issue at all"). As Douglas Irwin notes, early objections from South Carolina in the Senate during this period—presaging the controversies over the tariff power and the nullification crisis to come—appear to have backfired and *increased* support for an initial tariff plan in the Senate. *See* IRWIN, *supra* note 33, at 76.

68. *Import Duties, [May 9] 1789*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-12-02-0090 [https://perma.cc/3ULH-PBXE] (original in *The Congressional Register*, I, 261–64; also reported fully in *N.Y. Daily Advertiser*, 12 May 1789).

69. *Id.*

70. *Id.*

71. IRWIN, *supra* note 33, at 73.

72. *Id.*

73. Act of July 4, 1789, ch. 2, 1 Stat. 24.

74. Mascott, *supra* note 17, at 1393; *see also* Act of June 1, 1789, ch. 1, 1 Stat. 23 (regulating "the Time and Manner of administering certain Oaths").

the 96 days of recorded legislative business in the session involved debate on customs laws."[75] Indeed, the First Congress devoted the majority of its legislative output to revenue measures, and the bills governing customs and tonnage duties were among the few statutes enacted by the summer of 1789.[76]

Congress subsequently revised the tariff schedule repeatedly in the succeeding sessions.[77] But the basic design structure of the tariffs did not change much in the decades that followed: tonnage duties based on total shipping imports, listed specific duties on discrete goods and commodities, and ad valorem duties for items that varied significantly in value or that could not be easily reduced to discrete units.[78]

### *D. The Executive Branch Tariffs*

When and how did the tariff authority shift to the Executive Branch? While the early legislation did reserve significant discretion to the Executive in implementing certain aspects of import duties,[79] the transition to broader presidential discretion over tariffs was much later: it unfolded gradually across the late-nineteenth and early-twentieth centuries. For most of the nineteenth century, Congress retained tight control over tariff schedules, drafting detailed lists of dutiable items and using tariff laws both to raise revenue and to pursue domestic economic objectives such as protection for infant industries and redistribution of wealth. But, by the late 1800s, many members of Congress grew concerned that legislative bargaining produced tariffs distorted by logrolling and special-interest capture.[80] The rise of industrial monopolies further weakened some traditional justifications for tariffs—the protection of fragile and nascent domestic industries—while the introduction of the income tax in the early twentieth century reduced the federal government's dependence on customs revenues.[81] These developments created space for a shift away from Congress's detailed enumeration of tariff rates and toward broader delegations of trade authority to the Executive.

The first significant delegation of tariff authority to the President appeared in the McKinley Tariff of 1890, which authorized the President to

75. Mascott, *supra* note 17, at 1393.
76. *Id.* at 1399.
77. FORSYTHE, *supra* note 49, at 67 (observing that "[t]he tariff schedule was revised by Congress twelve times between 1789 and the War of 1812").
78. *See, e.g.*, Act of May 2, 1792, ch. 27, 1 Stat. 259; Act of June 7, 1794, ch. 54, 1 Stat. 390.
79. *See infra* Section II.B.
80. Meyer & Sitaraman, *supra* note 19, at 599.
81. *Id.* at 596–97.

suspend exemptions if foreign nations imposed unfair tariffs on U.S. goods.[82] The Supreme Court upheld the provision in *Marshall Field & Co. v. Clark*, reasoning that the statute gave the President permissible discretion over the execution of the law rather than an unconstitutional power to legislate anew.[83] The 1890 tariff—along with later measures like the Fordney-McCumber Tariff of 1922, which included a flexible tariff mechanism[84]—signaled Congress's willingness to cede a greater degree of the technical and discretionary authority over tariff rates to the Executive Branch.[85] Again, the motives here were functional, and based on political-economy concerns: Delegating allowed members to insulate tariff-setting from interest group pressures and to portray rate adjustments as the product of technocratic rather than political judgment.[86] These steps in the late-nineteenth and early-twentieth centuries laid the groundwork for a more dramatic reallocation of statutory tariff authorities beginning in the 1930s.

An important shift came with the Reciprocal Trade Agreements Act of 1934, which authorized the President to negotiate bilateral trade agreements and reduce tariffs without further congressional action.[87] The 1934 Act reflected both increasing disillusionment with Congress's own tariff-making—especially the infamous Smoot-Hawley Tariff of 1930, which escalated protectionism at a time when global trade was already strained by the Great Depression[88]—and an emerging view that trade policy was appropriately part of the foreign affairs domain, as shared by the President and Congress.[89] The Supreme Court reinforced an expansive vision of presidential authority in foreign relations, while the Cold War brought a newfound urgency to the geopolitical consequences of trade negotiations.[90] Congress declined to reassert itself even as the President's authority expanded into multilateral trade institutions and increasingly broad agreements.[91] By the mid-twentieth century, this foreign affairs paradigm

82. Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567; *see* Meyer & Sitaraman, *supra* note 19, at 599.
83. Marshall Field & Co. v. Clark, 143 U.S. 649 (1892).
84. Tariff Act of 1922 (Fordney-McCumber Tariff), ch. 356, 42 Stat. 858.
85. Meyer & Sitaraman, *supra* note 19, at 595–96.
86. *Id.* at 598–99.
87. Reciprocal Trade Agreements Act of 1934, ch. 474, 48 Stat. 943.
88. Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.).
89. For a classic early cite, see United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936) (describing the President's constitutional authority over foreign affairs and the distribution of authority between the President and Congress). For a more recent one, see Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) ("The President does have a unique role in communicating with foreign governments . . . . But whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law.").
90. Meyer & Sitaraman, *supra* note 19, at 598–99.
91. *Id.* at 606.

left the President with dominant control over trade policy and marked the culmination of the long transition away from detailed congressional tariff control.

These trends set the stage for the current debate over the Trump tariffs. The tariff powers the Trump Administration has claimed under IEEPA trace back to delegations by Congress in the cases of wartime and national emergencies. In 1917, Congress enacted the Trading with the Enemy Act (TWEA)[92] soon after the country's entry into World War I. Section 5(b) of the TWEA granted the President additional powers "during the time of war" including to "investigate, regulate, or prohibit, any transactions in foreign exchange."[93] Congress subsequently expanded the TWEA in the 1930s to also apply "during any other period of national emergency declared by the President."[94] In 1976, Congress limited the scope of national emergencies that could be declared pursuant to the TWEA,[95] and then introduced a more limited scope of emergency powers under IEEPA the following year,[96] including the authority to "regulate" the "importation" of goods "if the President declares a national emergency with respect to" "any unusual and extraordinary threat."[97]

## II. LESSONS FOR THE AGE OF EXECUTIVE TARIFFS

Here, we focus on themes that can be drawn from the history and can contribute to—and add complexity to—the current debate over executive tariffs. First, we provide an account of why the early history of tariffs appears to diverge from early internal tax delegations. We focus on the differences in administrative technology and the design of the tax base. It was easier for Congress to be specific about tariffs on discrete goods in the late-eighteenth and early-nineteenth centuries than it was about tax bases that were novel and harder to measure—such as the federal internal wealth taxes imposed in 1798 and in the early nineteenth century.

When it came to raising revenue, early Congresses delegated what they had to. In the case of tariffs, this was not much. We demonstrate, however, how even early Congresses *did* delegate processes and determinations that could not be specified in advance by statute, such as valuation procedures

92. Trading with the Enemy Act of 1917, ch. 106, §§ 1–19, 40 Stat. 411, 411–26.
93. *Id.* § 5(b)(1).
94. Emergency Banking Relief Act, ch. 1, § 2, 48 Stat. 1, 1 (1933).
95. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).
96. International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1625, 1626 (1977).
97. 50 U.S.C. §§ 1701(a), 1702(a)(1)(B).

for ad valorem duties. In these cases, however, these delegations were cabined by the nature of the tax base.

Finally, we argue that Congress maintained this firm grip over tariffs even though early tariffs had foreign policy implications and were explicitly discussed in foreign policy terms. The Founding generation understood that tariffs could raise revenue and regulate foreign commerce.

Taken together, these points explain some of the seeming contradictions and inconsistencies in the early practice of tax and tariff delegations. Our account also explains why the expansive reading of IEEPA to sanction the level of tariff discretion the Trump Administration now claims would be inconsistent with this historical practice and the structural safeguards with which this practice conformed.

### *A. The Divergence of Tax and Tariff Delegations*

As noted above, the historical record may at first appear to offer conflicting evidence on the scope of congressional delegations of the taxing power. On the one hand, Congress enacted detailed customs laws from the Founding well into the twentieth century. Jennifer Mascott emphasizes that the early tariff and tonnage acts were drafted with "highly detailed" specificity that left little discretion to officers in the field.[98] As explained below, it is a mistake to think those early custom laws were *completely* devoid of delegated discretion—or could be.[99] But these laws are nevertheless read as suggesting a practice of limited congressional tariff delegations.[100]

On the other hand, in other cases early Congresses enacted tax laws accompanied by vast new statutory administrative systems to implement the taxes—such as the Direct Tax of 1798—and correspondingly broad grants of discretion to these new executive officers when structuring and administering the taxes.[101] Why the difference?

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98. Mascott, *supra* note 17, at 1394–1403. Mascott offers additional evidence suggesting limited early delegations of the tariff power. Congress enacted many of these basic measures even before creating the Treasury Department—in Mascott's view, reflecting a judgment that revenue laws were too important to be left initially to Article II officials. *Id.* at 1394–95. Furthermore, after Hamilton became Secretary of the Treasury, Congress treated his reports on customs matters as proposals for legislative action, and Hamilton himself sought statutory clarification when ambiguities arose. *Id.* at 1395–96, 1400. Finally, Mascott notes that the relevant legislative debates show members tailoring customs provisions to protect the distinct economic interests of their constituents—a process that, she argues, could occur through representative lawmaking rather than centralized administrative action. *Id.* at 1402–03, 1406–07.

99. *See infra* Section II.B.

100. *See generally* Mascott, *supra* note 17.

101. *See* Parrillo, *supra* note 18; *see also infra* note 105 and accompanying text.

We believe this inconsistency is best explained by the fundamentally different design features of tariffs and internal taxes, and the different balance of statutory prescriptions and administrative discretion that is needed to impose different revenue instruments. Consider the basic determinations that are necessary to calculate a tax liability: the specification of a taxable base (such as "income" in the federal income tax), the measurement of the taxable base (for example, how much "income" does the taxpayer have), and then the application of a rate schedule to this base.[102] Each of these variables must be determined by either Congress through statutory design or by the Executive Branch through regulation and administration.

The different forms of taxes Congress imposed placed different amounts of pressure on these variables. For example, in the case of specific duties—which imposed a tax per item on specified imported goods—specification of the taxable base and the calculation of the amount of tax due was relatively simple. For this reason, the early customs statutes appeared to leave little discretion to the Executive Branch: All the statute had to do was provide a list of all the taxable import goods and their applicable custom rates.[103] In other words, these statutes seemed detailed and complex, but only with respect to determinations which Congress did not need to delegate to the Executive Branch. Indeed, this was seen as one of the great virtues of import duties: They were easy to collect precisely *because* they required little discretion.[104]

The internal taxes, in contrast, often required much greater delegation of administrative discretion, simply due to the design of these instruments, and the nature of the factors that could not be specified in the statute. In this case, Congress could not designate by statute the attributable amount of the taxable base for each taxpayer, but could merely provide general principles for how the Executive Branch could make these determinations through regulation and administration. For example, in the case of the 1798 Direct Tax, Congress established a vast administrative apparatus with broad

102. *See, e.g.*, I.R.C. § 1(a)–(d) (the method for calculating income tax liabilities by applying a rate schedule to a base of "taxable income"). Additional variables not addressed here, such as credits against tax, may also factor into the calculation of tax liabilities.

103. *See, e.g.*, Act of July 4, 1789, ch. 2, 1 Stat. 24 (an act "for laying a Duty on Goods, Wares, and Merchandises imported into the United States") (the detailed list of specific duties and applicable rates in the first tariff legislation, the Tariff of 1789).

104. EINHORN, *supra* note 39, at 117–18 (noting that the "federal government relied on the tariff" in part because "it was easier to collect than other taxes"); *see also id.* at 133 (noting that the impost "could be levied and collected with a minimum of administrative capacity"); FORSYTHE, *supra* note 49, at 66 ("The customs service was also an impressive model of administrative efficiency.").

discretion to determine taxpayers' property values and to assess and collect the tax.[105]

This broad delegation was necessary because of the nature of the taxes Congress sought to impose. To apportion a direct tax among the states by population as the Constitution required,[106] Congress had to first specify a total amount to be raised from the tax, as well as the quota to be raised from each state.[107] That is, in this case the typical method of calculating tax liabilities was reversed, and instead started with the amount of tax to be raised and had to work backwards to determine the taxable base and applicable rates, which could not all be anticipated *ex ante* in the statutes. In this case, Congress had no choice but to leave crucial input variables in the tax calculation unspecified, and to delegate broad administrative discretion to the Executive Branch to make these determinations.

This same problem arose with the early income taxes, attempted by Congress in 1861 and 1894,[108] and with the modern income tax imposed in 1913 after the ratification of the Sixteenth Amendment.[109] All of these laws sought to tax a base defined as a comprehensive measure of a taxpayer's total income, as an indicator of an even more abstract taxable base of a taxpayer's economic capacity.[110] For this reason, these laws provided for certain components of the income tax base (such as income from professions, dividends, interest, etc.) as well as catch-all language to include

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105. *See* Act of July 9, 1798, ch. 70, 1 Stat. 580 (an act "to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States") (establishing the administrative apparatus that would be necessary to administer the Direct Tax of 1798).

106. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4. For discussion of the apportionment requirement, see Clarke & Glogower, *supra* note 26.

107. *See, e.g.*, Act of July 14, 1798, ch. 75, 1 Stat. 597 (an act "to lay and collect a direct tax within the United States.") (the statutory design of the Direct Tax of 1798, which provided for a total direct tax to be raised of $2 million as well as each state's quota). If Congress did not begin by specifying a "sum certain" of the amount of tax to be raised in the statute, it could not ensure that the direct tax would be constitutionally apportioned among the states by population. *See id.*

108. *See* Act of Aug. 5, 1861, ch. 45, §§ 49–52, 12 Stat. 292, 309–11 (an act "to provide increased Revenue from Imports, to pay Interest on the Public Debt, and for other Purposes") (laying the 1861 Income Tax); Act of Aug. 27, 1894, ch. 349, §§ 27–31, 28 Stat. 509, 553–56 (an act "[t]o reduce taxation, to provide revenue for the Government, and for other purposes") (laying the 1894 Income Tax). The 1861 Income Tax was subsequently upheld by the Supreme Court in *Springer v. United States*, 102 U.S. 586 (1881), while the 1894 Income Tax was infamously struck down by the Court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *vacated on reh'g*, 158 U.S. 601 (1895).

109. U.S. CONST. amend. XVI (providing that Congress "shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States"); Act of Oct. 3, 1913, ch. 16, 38 Stat. 114 (an act "[t]o reduce tariff duties and to provide revenue for the Government, and for other purposes") (laying the 1913 Income Tax).

110. *See* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 (2013).

an undefined residual of income from whatever source.[111] These statutes all necessarily delegated significant authority to the Executive Branch to define and measure the components of the income tax base.[112] Congress could not specify *ex ante* all the variables and measurement determinations for calculating the taxes due on a broad and abstract measure such as income, as it could in the case of the tariff schedules.

This basic difference between forms of taxation helps to reconcile Mascott and Parrillo's different accounts of delegation in the early Republic: They are evaluating different types of taxes which do not require the same types of delegation.[113] This distinction also helps to explain the profoundly different roles of delegation with respect to the tariffs and the internal taxes, and particularly as the latter evolved to tax broader measures of economic capacity. As a result, it is entirely understandable why Congress might be understood to restrict delegations to the Executive Branch in setting and designing tariffs, even as Congress has given the Executive broader discretion to fill in the gaps that are inevitable with an income tax.

Put simply, the scope of the delegated discretion depended on the type of tax being designed. In this respect, we think both Parrillo and Mascott have important insights to offer: Congress has delegated substantial authority over taxation since the Founding era, but only when necessary to fill specific gaps in the calculation of tax liabilities, and only when the discretion is limited based on the nature of the tax instrument.

This distinction also has implications for how we might understand the role of the major questions doctrine in these two contexts. Taxes can have profound economic consequences both for individual taxpayers and the country. Even in the context of internal taxes, however, Congress never gave the Executive Branch the kind of discretion that could fundamentally reshape these taxes and their economic effects—but instead empowered the Executive Branch to fill in the details of the broad contours prescribed. If, however, Congress were to delegate broad discretionary authority to the Executive Branch to independently determine both the categories of items

111. For example, the Income Tax of 1861 provided for a tax on "the annual income of every person residing in the United States, whether such income is derived from any kind of property, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever . . . ." Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309.

112. *See, e.g.*, *id.* § 50 (providing for executive-branch officers to administer the Income Tax of 1861).

113. That is, these two differing views illustrate how not all delegations of taxing authority are comparable, and not all types of statutory detail are comparable. Rather, the nature of and extent of the delegations depends on the characteristics of the underlying taxes.

subject to tariffs as well as the rates, then this discretion could create a new kind of major questions problem that never arose with the previous practice of imposing either internal taxes or congressional tariffs.

## *B. The Gaps in Early Tariff Legislation*

For the reasons described above, it would be a mistake to think that early laws governing the duties on imports could always (and did) fill in *every* jot and tittle. This Section evaluates the design of the ad valorem duties—that is, duties raised according to value, rather than according to a unit measurement of the imported good, such as quantity or weight. The case of the ad valorem duties illustrates how delegations of the taxing power depended on the design of the tax instrument, even in the early tariff legislation.

The ad valorem customs duties necessarily required greater executive discretion to determine the applicable values. In this case, the goods did not have to simply be listed in the statute but also valued by someone. Furthermore, Congress could not always specify *ex ante* in the statute what the values would be for each imported good, beyond prescribing certain conventions or methods that would be used in making these valuations. It is not surprising that Congress did delegate greater discretion to the Executive Branch to determine the value of goods and therefore the applicable taxes.

Early U.S. laws followed this structure. Consider, for example, the very first U.S. law imposing duties on imports.[114] This 1789 law imposed some duties based on quantity ("molasses, per gallon, two and a half cents"[115]) and some duties based on weight ("coffee, per pound, two and a half cents"[116]). But it also contained a large number of items to be charged according to a schedule of ad valorem rates: for example, "all looking-glasses, window and other glass (except black quart bottles) . . . [t]en per centum ad valorem."[117] Indeed, ad valorem duties were the default mechanism in this early law: For all goods not specifically described, Congress imposed a rate of "five per centum on the value thereof at the time and place of importation."[118]

These ad valorem duties were important revenue instruments. In a 1795 report, Treasury Secretary Alexander Hamilton reported that, under the laws of the time, "not much short of one-third of the whole amount of the duties

114. Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24. (an act "for laying a Duty on Goods, Wares, and Merchandises imported into the United States").

115. *Id.* at 25.

116. *Id.*

117. *Id.* at 26.

118. *Id.*

is derived from articles rated ad valorem."[119] In later years, ad valorem duties continued to produce a large percentage of federal revenue.[120]

These laws also left substantial discretion to those charged with administering and collecting the tax. Early statutes typically required valuation at the actual cost of the goods (i.e., the cost to the merchant importing the goods to the United States), but in many cases no reliable documentation of that cost was available. In those circumstances, customs officials were empowered to convene adjudicatory proceedings to establish a value, and both collectors and appraisers exercised broad authority to challenge importers' invoices, order physical inspections, and adjust declared values.[121] In this way, the design of the early ad valorem tariffs more closely resembled that of the first federal wealth tax, with a substantial delegation of administrative discretion to the Executive Branch necessitated by the design of the tax.[122]

This discretion, combined with reliance on invoices, made ad valorem duties vulnerable to fraud and produced inequalities—leading to both concern and resignation at the inevitability of administrative discretion. One Treasury report noted that "[i]t is, undoubtedly, a just and great objection to this method of ascertaining ad valorem duties that it produces very considerable inequalities in the operation of those duties upon different importers," and that "no scheme of human policy has yet been devised for the collection of ad valorem duties which does not, in some degree, involve the difficulty of unequal valuations."[123] Elsewhere, Secretary Hamilton noted that, in other nations, efforts to guard against evasion and inequality—which "infallibly happen" under an ad valorem system—"led to contract more and more the number of articles rated *ad valorem*, and of course to extend the number of those rated specifically . . . ."[124]

119. ALEXANDER HAMILTON, IMPROVEMENT OF THE REVENUE (Feb. 2, 1795), *reprinted in* 1 AMERICAN STATE PAPERS, CLASS III: FINANCE 348, 348 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1832).

120. *See, e.g.*, ALBERT GALLATIN, STATE OF THE FINANCES (Dec. 8, 1809), *reprinted in* 2 AMERICAN STATE PAPERS, CLASS III: FINANCE 373, 375 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1832).

121. *See, e.g.*, Act of July 31, 1789, ch. 5, § 16, 1 Stat. 29, 41 (delegating discretion to officers in appraising and valuing goods that were missing their "invoice of their cost" or that were damaged in transit); *see also* Act of Mar. 3, 1817, ch. 51, 3 Stat. 369 (an act "supplementary to 'An act to regulate the duties on imports and tonnage'") (providing that ad valorem duties would be established based on the net cost of the article at the place whence imported plus a standardized addition of twenty percent on all merchandise imported from places beyond the Cape of Good Hope, and of ten percent on articles imported from all other places).

122. *See supra* notes 106–07 and accompanying text.

123. NATHAN SANFORD, REMISSION OF DUTIES (Jan. 4, 1819), *reprinted in* 3 AMERICAN STATE PAPERS, CLASS III: FINANCE 836, 837 (Walter Lowrie & Matthew St. Clair Clarke eds., 1834).

124. HAMILTON, *supra* note 119, at 348.

This example in the early history shows the dual nature of early tariff delegations. On the one hand, it would be a mistake to see early lawmaking in this area as free of delegation or discretion. No realistic legal framework on an important and substantively rich issue could be completely free of discretion—and tariffs were not. On the other hand, the nature of the delegations tells us something about how Congress understood and transferred its authority. Early tariff statutes delegated only what could not practicably be specified *ex ante*—questions of administration, valuation, and execution—while reserving to Congress the core policy judgments about the objects of taxation and the levels at which they would be imposed.

### *C. Tariffs and Foreign Policy*

Tariffs are also distinct within the taxing power—and distinctly challenging—because they also serve as instruments of foreign policy, and therefore occupy a shared domain of constitutional authority. As Bayless Manning famously put it, trade regulation is an "intermestic" affair—something simultaneously domestic and international in character.[125] This dual character is reflected in the standard account of American trade history, which typically describes tariffs as directed toward the goals of raising revenue, protecting domestic industries, and expanding foreign trade.[126] Yet the standard account also identifies a tilt over time: Tariffs started out as a revenue tool, but have more recently transformed into a foreign policy tool.[127] As mentioned above, this matters because of the President's constitutional prerogatives over foreign affairs. Proponents of a broad executive tariff power claim that, because tariffs have become a tool of foreign policy, they now implicate the President's core Article II authorities.[128]

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125. Bayless Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFFS. 306, 309 (1977).

126. IRWIN, *supra* note 33, at 2 ("US trade policy has been directed toward achieving three principal objectives: raising revenue for the government by levying duties on imports, restricting imports to protect domestic producers from foreign competition, and concluding reciprocity agreements to reduce trade barriers and expand exports.").

127. Meyer & Sitaraman, *supra* note 19, at 592–93 ("Over the course of the nineteenth century, trade law and policy were virtually coextensive with the tariff. The justification for tariffs shifted over time, but the central purposes of tariffs were all tied to domestic economics: revenue, internal improvements, protection of industry, encouragement of infant industry, and safeguarding labor.").

128. *See, e.g.*, Petition for a Writ of Certiorari at 6, Trump v. V.O.S. Selections, Inc., 146 S. Ct. 628 (2026) (No. 25-250) (arguing that "Congress has long supplemented the President's Article II foreign-affairs powers by delegating capacious authority to impose tariffs that, in the President's judgment, will advance national security, foster economic prosperity, or facilitate negotiations with foreign counterparts.").

We offer something of a corrective to this standard account. Tariffs were always understood—before the Founding and immediately after—as tools with foreign policy implications. The claim that presidential control over tariff policy rests solely on the idea that tariffs "became" matters of foreign policy in the twentieth century therefore oversimplifies the issue. The constitutional balance of authority at the Founding necessarily incorporated an understanding that tariff policy was deeply enmeshed with foreign relations.

American public policy debates have always viewed tariffs as something more than a revenue tool—even as, in early America, tariffs were also the most important revenue tool. The crucial debates over tariffs in the 1780s, for instance, were also debates about foreign policy. In 1783, the British imposed stiff duties on America for a mix of foreign policy reasons, including strengthening British maritime control, protecting domestic British manufacturing, and retaliating against the United States.[129] This measure had a crippling effect on the American economy; James Madison complained in a 1785 letter that British retaliatory duties had "robbed us of our trade with the West Indies" and left national trade in a "deplorable Condition."[130]

In 1784, Congress initiated an effort to open American trade and sent John Adams to negotiate with the British.[131] His reports underscored the limits of American diplomacy without credible economic leverage via tariffs—thereby highlighting how tariff policy and foreign policy were already linked.[132] In a notable letter to John Jay, Adams wrote that "nothing but Retaliation, reciprocal Prohibitions, and Imposts and putting ourselves in a Posture of defense will have any Effect."[133]

Debates in the *Federalist Papers* and associated literature likewise demonstrate an early understanding that tariffs would serve foreign policy goals. In *Federalist No. 10*—the most famous of them all—Madison poses "restrictions on foreign manufactures" as his go-to example of the kind of important policy question that different factional interests would want to answer differently.[134] Even Alexander Hamilton—one of the more ardent

129. *See* IRWIN, *supra* note 33, at 49.

130. Letter from James Madison to Richard Henry Lee (July 7, 1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON: 10 MARCH 1784–28 MARCH 1786, at 314, 314–16 (Robert A. Rutland & William M.E. Rachal eds., 1973).

131. IRWIN, *supra* note 33, at 51.

132. *Id.* at 52–53 ("Recognizing the futility of his mission, Adams fired dispatch after dispatch to Congress explaining that the threat of retaliation was the only way to persuade Britain to reach a commercial agreement.").

133. Letter from John Adams to John Jay (Aug. 30, 1785), *reprinted in* 17 THE ADAMS PAPERS: APRIL–NOVEMBER 1785, at 374, 374–78 (Gregg L. Lint et al. eds., 2014).

134. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

proponents of free trade principles among the Founders—acknowledges the foreign policy uses of tariffs at several points in the *Federalist Papers* and elsewhere. In a 1782 essay, Hamilton noted that giving Congress power over foreign trade was as "necessary for the purposes of commerce"—that is, the promotion of American trade interests—"as of revenue."[135] In *Federalist No. 11*, he gives one of the clearest early statements that tariffs (and commercial regulations more broadly) were not simply instruments of domestic finance but also tools of foreign policy, noting that "[b]y prohibitory regulations, extending, at the same time, throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets."[136] Similarly in *Federalist No. 35*, Hamilton describes the many ways in which tariffs shape behavior in a fashion that is relevant for foreign policy—among them, the fact that "they tend to render other classes of the community tributary, in an improper degree, to the manufacturing classes, to whom they give a premature monopoly of the markets" and that they can "force industry out of its more natural channels into others."[137]

The varied policy uses of tariffs were also apparent in the early laws and debates over U.S. law after ratification. In this context, Hamilton wanted to avoid conflict with Britain and ensure a steady revenue, while Jefferson, Madison, and others saw trade policy as something that could be wielded against the British.[138] The debates made clear that disagreements over the level of duties were always connected to broader questions about how the country should position itself in the international order.[139] The first tariff turned out to be only "moderately protectionist" in this regard, but the debates over it emphasized many of these same foreign policy themes and leave no doubt that the foreign policy implications of tariffs were on the minds of the Founding generation.[140] The Tonnage Act—the 1789 law that imposed duties based on the carrying capacity of ships entering U.S. ports—had foreign policy front and center. Madison called for discriminating against nations that did not adopt favorable terms with the United States,[141] arguing that he was "well satisfied that there are good and substantial reasons" for "discriminating between nations in commercial alliance with

135. ALEXANDER HAMILTON, THE CONTINENTALIST NO. V (Apr. 18, 1782), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON 75, 75–82 (Harold C. Syrett ed., 1962).

136. THE FEDERALIST NO. 11, at 88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

137. THE FEDERALIST NO. 35, at 212 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

138. Douglas A. Irwin, *Revenue or Reciprocity? Founding Feuds over Early U.S. Trade Policy*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S, at 89, 89–90 (Douglas A. Irwin & Richard Sylla eds., 2011) (Nat'l Bureau of Econ. Rsch., Working Paper No. 11738, 2010).

139. *Id.*

140. *See, e.g.*, EINHORN, *supra* note 39, at 149–54 (summarizing debates).

141. EDLING, *supra* note 30, at 71.

the United States, and those with whom no treaties exist."[142] Madison argued further that "[i]f America were to leave her ports perfectly free, and make no discrimination between vessels owned by her citizens and those owned by foreigners, while other nations make this discrimination, it is obvious that such policy would go to exclude American shipping altogether from foreign ports, and she would be materially affected in one of her most important interests."[143] While Congress did not adopt the full scope of Madison's proposal, it accepted some discrimination expressly designed to advance foreign policy, such as considerably lower duties on American-owned and built vessels than others.[144]

The foreign-policy uses of tariffs were also explicitly apparent in other early laws, many of which discriminated against specific foreign imports or in favor of U.S.-owned ships.[145] And tariffs enacted in the following decades—such as the Tariff of 1824, which substantially raised duties and laid the groundwork for the nullification crisis—similarly lacked a strong revenue purpose and were instead motivated by other policy goals.[146]

Taken together, the evidence shows that tariffs were never a purely domestic revenue instrument; they were viewed as a central part of the nation's foreign policy toolkit from (and indeed well before) the Founding. Recognizing this history complicates the standard account and suggests that constitutional debates over tariff authority must grapple with their original role as levers of international strategy as well as sources of federal revenue.

## CONCLUSION

This Article's account of the tax and tariff power in the early Republic explains the seeming contradictions in the historical record and the roles of Congress and the Executive Branch. The history demonstrates that Congress has never exercised absolute control, nor has the President ever enjoyed unbounded discretion. Instead, the nature of tax and tariff delegations

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142. JAMES MADISON, TONNAGE DUTIES (Apr. 21, 1789), *reprinted in* 12 THE PAPERS OF JAMES MADISON: 2 MARCH 1789–20 JANUARY 1790, at 127 (Charles F. Hobson & Robert A. Rutland eds., 1979).

143. Madison's statement is reprinted in CONG. GLOBE, 28th Cong., 1st Sess. 643 (1844).

144. Act of July 20, 1789, ch. 3, 1 Stat. 27 (an act "imposing Duties on Tonnage"); *see* EDLING, *supra* note 30, at 72; FORSYTHE, *supra* note 49, at 64–65.

145. *See, e.g.*, Act of July 1, 1812, ch. 112, 2 Stat. 768 (an act "for imposing additional duties upon all goods, wares, and merchandise imported from any foreign port or place, and for other purposes") (increasing duty rates amid the war and imposing even higher rates on imports from foreign vessels); *see also* Mascott, *supra* note 17, at 1401–02 (summarizing these foreign policy details).

146. FORSYTHE, *supra* note 49, at 76–77 (noting that "[s]ince the Treasury had shown a surplus for the two previous years, no pretense was made that the increases were required to raise revenues," and that protection of domestic industry was "the only possible justification for the tariff increase").

depended on the details of tax design and administrative technology, as well as on politics, economics, and institutional capacity. That history underscores a hard lesson for today's debates: Claims of clear and formalistic constitutional boundaries are themselves ahistorical, and the modern controversies over tariff delegations reprise struggles that have been contested since the Founding. This account also shows how the broad tariff powers claimed by the Trump Administration in its interpretation of IEEPA exceed the bounds of these zones of contestation and negotiation.