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Seizing the Duty of Congress: The President's Unilateral Implementation of Tariffs is Unconstitutional

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Abstract

This paper examines the constitutional validity of President Donald J. Trump's 2025 imposition of tariffs under the International Emergency Economic Powers Act ("IEEPA"). It argues that the President's unilateral use of IEEPA to impose across-the-board tariffs represents an unprecedented and unconstitutional assumption of legislative authority, violating core separation of powers principles. The analysis exhaustively traces the historical and constitutional roots of the tariff power, emphasizing its placement in the Constitution as a revenue-raising tool vested exclusively in Article I. Drawing on historical practice, statutory interpretation, and key judicial precedents, the paper contends that while some delegation of duty power to the Executive is appropriate, Congress must first move, setting specific strictures for the President. The President's action fails to meet this standard, and courts should invalidate the tariffs under the nondelegation doctrine, the major questions doctrine, or on ultra vires grounds. The paper concludes that unless constrained, this use of emergency economic powers threatens to dismantle the structural safeguards of American constitutional governance.

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Table of Contents

Article

I. Introduction

"To me, the most beautiful word in the dictionary is tariff, and it's my favorite word."[2] During his second term, President Donald J. Trump unilaterally imposed a series of tariffs on imports to the United States.[3] He relied on power found in the International Emergency Economic Powers Act ("IEEPA").[4] This Act grants broad authority to the President, allowing him, in his sole discretion, to declare an "emergency" and then "investigate, regulate, or prohibit . . . any transactions in foreign exchange[,]" among other measures.[5] In doing so, the President unlawfully assumed the role of the Article I legislature. These tariffs are unconstitutional.

This paper does not seek to debate the merits, economically, politically, or otherwise, of tariff[6] policy. America's founders thought tariffs would sometimes be necessary, which is why the Constitution grants the federal government an enumerated power to levy duties. Many early presidents and legislators used duties to raise revenue or protect infant American industry. President Trump may be correct that the current moment calls for tariffs to protect American economic production; he may not. That is for economists and, more importantly, Congress to decide.

Instead, this paper evaluates who can exercise the tariff authority and within what strictures. It argues that presidential authority to set any tariffs on any goods, which is what President Trump claims, is unconstitutional. It proposes that Congress must first enact a detailed tariff regime, specifying the target goods and tariff rates, before it delegates authority to the President. And that delegated authority can only be the power to fire or release tariffs—it cannot be where to aim and how much to charge.

First, this paper analyzes IEEPA, the statute the President used here, including its pre-enactment history. IEEPA's powers activate upon a presidential declaration of a "national emergency." Once this happens, the statute affords the

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[2] Jenny Leonoard, *In Trump's Economic Plan, Tariff Is 'the Most Beautiful Word*, BLOOMBERG (Oct. 15, 2024, 4:32 PM), https://www.bloomberg.com/news/newsletters/2024-10-15/in-trump-s-economic-plan-tariff-is-the-most-beautiful-word.

[3] Josh Boak, *Trump announces sweeping new tariffs to promote US manufacturing, risking inflation and trade wars*, ASSOCIATED PRESS (Apr. 3, 2025, 7:30 AM), https://apnews.com/article/trump-tariffs-liberation-day-2a031b3c16120a5672a6ddd01da09933.

[4] *Id.*; International Emergency Economic Powers Act, 50 U.S.C. §§ 1707–1710 (1976).

[5] 50 U.S.C. § 1702(a)(1)(A)(i).

[6] This paper uses the term "tariff" and duty" interchangeably.

President vast authority over foreign trade. But IEEPA does not and cannot give Congress's exclusive revenue-raising authority to the Executive Branch.

Second, this article studies the history of the tariff power in the United States, tracing from the Boston Tea Party to now. The founders knew how serious this power was, especially when used for protectionist means, and accordingly required that duties *originate* in the Article I branch: Congress.

Third, this paper evaluates several major cases that reviewed congressional delegations of tariff power to the President. These cases stand for two propositions. First, Congress can delegate enforcement of duties to the president. Second, this delegation is sharply limited to fact-finding on whether to trigger or stop tariffs.

Finally, applying multiple legal theories—the nondelegation doctrine, the major questions doctrine, and *ultra vires*—this paper analyzes President Trump's current use of the tariff power. It finds, against history of the Constitution, tariff statutes, and case law, that the 2025 Tariffs are an egregious violation of the separation of powers. It proposes that courts should strike them down using the nondelegation doctrine or other alternative theories.

America is at a critical inflection point in constitutional history. Thankfully, there are clear answers, and courts can use longstanding precedent to correct this aberration in the separation of powers.

II. Background on IEEPA and how President Trump used it.

On April 2, 2025, President Trump issued an executive order implementing across-the-board tariffs on imports unto the United States.[7] He cited authority from IEEPA (1977) and the National Emergencies Act ("NEA") (1976), among other statutes.[8] He found that a lack of "reciprocity" in trade agreements, "disparate tariff rates," and trade partner "economic policies" resulted in "large and persistent annual U.S. goods trade deficits[.]"[9] According to him, this constituted "an unusual and extraordinary threat to the national security and economy of the United States."[10] The order implemented a tariff floor of "10 percent . . . ad valorem" that increased "for trading partners enumerated in Annex I to this order at the rates set forth in Annex I to this order."[11] Annex I listed all the "Reciprocal Tariff[s], Adjusted" with the percentage rate next to them.[12] All exceeded 10%—many

[7] Exec. Order No. 14,257, 90 Fed. Reg. 15,041 (2025) [hereinafter "2025 Tariffs"].
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.

significantly so.[13] On April 9, President Trump issued a 90-day "pause" on the tariffs but maintained a "universal 10% rate for all trade partners except China," which now has a tariff rate of 145%.[14]

Before this, no President ever used IEEPA to impose tariffs.[15]

a. IEEPA is a successor statute to the Trading with the Enemy Act.

IEEPA is a successor bill to the Trading with the Enemy Act ("TWEA") and "sits at the center of the modern U.S. sanctions regime."[16] TWEA granted enormously broad powers to the President "to limit trading with, communicating with, or transporting enemies[.]"[17] During the Great Depression and the New Deal Era, Congress expanded TWEA, giving "the President the power to declare states of emergency in peacetime and assume expansive domestic economic powers."[18] President Roosevelt successfully asked Congress for more power over the domestic economy; this only expanded when America entered World War Two.[19] In 1950, President Truman was the first to declare a "national emergency, citing TWEA, to impose economic sanctions on North Korea and China."[20] Presidents expanded the use of this authority, reaching its apogee when, in response to an economic crisis, President Nixon declared an emergency to "place a 10% *ad valorem* supplemental duty on all dutiable goods entering the United States."[21]

In 1976, responding to a Committee report chronicling emergency power abuse, Congress passed a series of bills reforming TWEA.[22] One of these bills was IEEPA, which conferred "upon the President a new set of authorities for use in time

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[13] *Id*.
[14] Dan Mangan et al., *Trump doesn't rule out extending 90-day tariff pause: Live updates*, CNBC, https://www.cnbc.com/2025/04/10/china-trump-tariffs-live-updates.html (last updated Apr. 10, 2025, 3:34 PM); The White House, *Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment*, *Executive Orders*, THE WHITE HOUSE (Apr. 9, 2025),https://www.whitehouse.gov/presidential-actions/2025/04/modifying-reciprocal-tariff-rates-to-reflect-trading-partner-retaliation-and-alignment/.
[15] CHRISTOPHER A. CASEY, CONG. RES. SERV., IN11129, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT (IEEPA), THE NATIONAL EMERGENCIES ACT (NEA), AND TARIFFS: HISTORICAL BACKGROUND AND KEY ISSUES 1–3 (2025), https://www.congress.gov/crs-product/IN11129.
[16] CHRISTOPHER A. CASEY & JENNIFER K. ELSEA, CONG. RES. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 54 (2024), https://www.congress.gov/crs-product/R45618.
[17] *Id*. at 3.
[18] *Id*. at 4.
[19] *Id*. at 5.
[20] *Id*.
[21] *Id*. (citing Proclamation No. 4074, 36 Fed. Reg. 15,724 (Aug. 17, 1971)).
[22] *Id*. at 8.

of national emergency which are both more limited in scope than those of [TWEA] and subject to procedural limitations, including those of the National Emergency Act."[23] The House Committee Report was clear that given the "breadth of the authorities, and their availability at the President's discretion upon a declaration of a national emergency," any use should be "subject to various substantive restrictions."[24] And the "main one stems from a recognition that emergencies are by their nature rare and brief, and *are not to be equated with normal ongoing problems*."[25] Thus, this power should be used only for "a real emergency, and for no other purpose."[26]

b. To use IEEPA, the President must declare an emergency.

The President may use IEEPA "to deal with any unusual and extraordinary threat, which has its source . . . outside the United States, to the national security, foreign policy, or economy of the United States," but only "if the President declares a national emergency with respect to such threat."[27] The statute restricts use of its authorities "for any other purpose."[28] The Act does not define what a "national emergency" is.

Once the President has made such a declaration, a wide array of authorities open to him. He can "investigate, regulate, or prohibit" foreign exchange transactions, banking transfers, and imports or exports of currency or securities.[29] He can also

> regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property[.][30]

This power is broad—but has constitutional limits.

III. The constitutional history of Tariff Authority.

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[23] H.R. REP. NO. 95-459, at 2 (1977).
[24] *Id.* at 1011.
[25] CASEY, *supra* note 16.
[26] *Id*.
[27] 50 U.S.C. § 1701.
[28] *Id*. at § 1701(b).
[29] *Id*. at § 1702(a)(1).
[30] *Id*. at § 1702(a)(1)(B).

The founders were particularly concerned with the duty power and cabined it in the Article I branch.

a. Duties and their implementation were a core issue precipitating the American Revolution.

In 1773, the British Parliament passed the Tea Act to protect the financial interests of the East India Company.[31] While the Act relieved some tax burden on the sale of tea by the Company (and only the Company), it still required payment of a duty when the tea landed.[32] On December 16, 1773, a group of American colonists called the "Sons of Liberty" took to the Boston harbor.[33] They climbed aboard British ships and threw 340 chests of tea into the river.[34] Their pamphlets read:

> That worst of Plagues, the detested tea shipped for this port by the East India Company, is now arrived in the Harbor; the hour of destruction, or manly opposition to the machinations of Tyranny stares you in the Face[.][35]

This set off a chain of actions that led to the American Revolution. John Adams wrote, "This is the grandest, Event, which has ever yet happened Since, the Controversy, with Britain, opened!"[36] He later added, "This Destruction of the Tea is so bold, so daring, so firm, so intrepid, and so inflexible, and it must have so important Consequences and so lasting, that I cannot but consider it as an Epocha in History."[37] The term "Tea Party" has taken on special meaning in American lore, even becoming the label of a conservative political movement in 2009, which "extolled the virtues of free market principles."[38]

The situation in America today is different than what the colonists faced with the Tea Act. That was a colonizing power imposing duties on its subjects to protect a British, not American, company. But this story stands for two important points. First, objection to coercive use of the duty or tariff power was at the core of the American revolution. In the Declaration of Independence, Thomas Jefferson

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[31] History, *Tea Act,* HISTORY, https://www.history.com/articles/tea-act (last updated Feb. 27, 2025).
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Boston Tea Party History*, BOSTON TEA PARTY: A REVOLUTIONARY EXPERIENCE, https://www.bostonteapartyship.com (last visited Apr. 10, 2025).
[36] *Id*.
[37] *Id*.
[38] Michael Ray, *Tea Party Movement*, BRITANNICA, https://www.britannica.com/topic/Tea-Party-movement (last updated Mar. 14, 2025).

listed "Facts . . . submitted to a candid world" to prove that the King had established "absolute Tyranny over these States."[39] Among these were "cutting off our Trade with all parts of the world" and "imposing Taxes on us without or Consent."[40]

Second, the potential abuse of duties was something on the mind of the founders when they crafted the Constitution, though they did not rule duties out as an instrument altogether. Instead, the founders carefully apportioned the power to impose tariffs, like all revenue-raising powers, to Congress.

b. The plain text of the Constitution frames the power to collect duties alongside other revenue-raising tools.

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.][41]

Plain text and historical context show that Article I, Section 8 of the Constitution is the key tool for Congress to raise revenue, even if Congress could also use it for protectionist aims. The text itself is clear: "provide for the common Defence and general Welfare of the United States."[42] Put more simply—these tools raise money to pay for national needs. This is distinct from the power to regulate Commerce, which was for regulatory matters.[43] But the cabining of Article I, Section 8 to *exclusively* raise revenue eroded "[b]y the time of the constitutional debates of 1789–90 . . . [because] Americans no longer claimed that a tax must be for the *sole* purpose of raising revenue."[44] Still, Americans "conceded that a tariff or excise that raised significant revenue still qualified as a tax [even if] the legislature imposed with the incidental purpose of protecting domestic producers[.]"[45]

One thing is consistently true about duties: they raise revenue, even if that may not be the primary motivation of the legislature (or President) executing them. That is tariffs' core function—to require payment from an individual seeking to

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[39] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[40] *Id*. (These are, for what it's worth, listed directly in order next to each other).
[41] U.S. CONST. art. I, § 8.
[42] *Id*.
[43] *See* Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"-and "Taxes" (Direct or Otherwise)*, 66 CASE W. RES. L. REV. 297, 318 (2015) ("Stated more positively, indirect taxes were those 'duties' imposed not principally for regulation but for the raising of revenue.").
[44] *Id*. at 307.
[45] *Id*. (citation omitted).

import goods to the United States, generally as a percentage of the value of the product. In his commentaries, Justice Joseph Story warned against reading the power to "lay and collect taxes, duties, imposts, and excises" as distinct from "the words 'to pay the debts and provide for the common defence and general welfare of the United States[.]"[46] He said that if splitting the two clauses as separate grants "be the true interpretation, then it is obvious that under the generality of the words . . . the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers[.]"[47]

c. The early Congress used tariffs to both raise revenue and protect infant industry.

This does not mean that the founders rejected duties altogether. One of the first laws passed by the Congress was the Tariff Act of 1789.[48] It was sponsored by James Madison, heralded by Alexander Hamilton, and signed into law by George Washington.[49] Madison initially proposed it to "raise revenue" and argued it should be a "temporary expedient, to remain in force only till a comprehensive system could be arranged."[50] Others, including Hamilton, disagreed, seeking to use it for protectionist ends.[51] President Washington ultimately "swung entirely over to Hamilton's views, and in messages to Congress urged the encouragement of domestic industries."[52] Washington wrote to Marquis de LaFayette that he recently ordered "homespun broadcloth of the Hartford[, Connecticut] fabric, to make a suit of clothes for myself."[53] He hoped it would soon be "unfashionable for a gentleman to appear in any other dress. Indeed, we have been too long subject to British prejudices."[54] And that did not just extend to clothing: "I use no porter or cheese in

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[46] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 640 (Thomas M. Cooley ed., 4th ed., Little, Brown, and Co. 1878).
[47] *Id*.
[48] Tyler Halloran, *A Brief History of Tariffs in the United States and the Dangers of their Use Today*, FORD. J. OF CORP. & FIN. L. (Mar. 17, 2019), https://news.law.fordham.edu/jcfl/2019/03/17/a-brief-history-of-tariffs-in-the-united-states-and-the-dangers-of-their-use-today/.
[49] William Hill, *Protection Purpose of the Tariff Act of 1789*, 2 J. OF POL. ECON. 54–76 (Dec. 1893).
[50] *Id*.
[51] *Id*. at 72.
[52] *Id*.
[53] *Id*.; Letter from George Washington, President of the U.S., to Marquis de LaFayette, (Jan. 29, 1789), (on file with National Archives).
[54] HILL, *supra* note 49.

my family, but such as is made in America: both those articles may now be purchased of an excellent quality."[55]

But one consistent theme throughout these debates was *Congress* deciding, in extraordinary detail, what and how much to levy duties for. For example, in Committee, Virginia Representative Theodorick Bland "stated that there were coal mines just opened in Virginia, capable of supplying the whole United states; and if some restraint was laid on the importation of coal, these mines might be worked to advantage."[56] Thomas Hartley, from Pennsylvania, worried about the effect of three cents and asked for one cent.[57] But, after deliberation, the Committee writing the legislation stuck with three cents.[58] The historical record is rife with details of minute policy debates over duty rates.

IV. Tariffs must originate in Congress.

Article I, Section 8[59] is an enumerated *congressional* power.[60] Unlike more general powers under the Commerce Clause,[61] Article I, Section 8 is quite specific as to what Congress may do: "lay and collect Taxes, Duties, Imposts and Excises[.]"[62] Congress even went a step further in the preceding section of the Constitution, requiring all such revenue raising methods to "originate in the House of Representatives[.]"[63] The framers thought this was critical, because the House, "unlike the Senate, would be directly elected by the people."[64] If the federal government is going to tax the people, it should be done by those most accountable to the people.

And it certainly should not be done by one man. As James Madison wrote in Federalist 47, "The accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[65] The founders did not want to enable an Executive who could run wild

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[55] Letter from George Washington to Marquis de LaFayette, *supra* note 53.
[56] HILL, *supra* note 49, at 68.
[57] *Id*.
[58] *Id*.
[59] U.S. CONST. art. I, § 8.
[60] *See* U.S. CONST. art. I, § 1 (the Vesting Clause).
[61] Though this author would like to note he thinks the founders never intended that power to be as general or broad as courts have interpreted it, that is a paper for another time.
[62] U.S. CONST. art. I, § 8.
[63] U.S. CONST. art. I, § 7.
[64] JAMES V. SATURNO, CONG. RES. SERV., RL31399, THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT (2011), https://www.congress.gov/crs-product/RL31399.
[65] THE FEDERALIST NO. 23 (James Madison).

with powers. They wanted a deliberative process, checked by a three-branch structure.

a. Congress did not even want this power to be in the hands of a unicameral legislature, much less one man.

And never mind simply a wild Executive, the founders also worried about a mad *legislature* run amuck. While commenters frequently refer to three branches of government as "coequal," this is not entirely true. The Article I branch is the greatest among equals. It can enact any law it wants, even over the veto of the President.[66] It can impeach and remove members of the other branches, including the President, Vice President, or Supreme Court justices.[67] Only it can declare war.[68] Only it can raise revenue.[69] And, with big enough supermajorities, it can do all of these things itself, no matter what the other branches say.[70]

This posed a threat—that even an elected body made up of many people could wield such power made the founders nervous. James Madison wrote in Federalist 62 that "is a misfortune incident to republican government . . . may forget their obligations to their constituents, and prove unfaithful to their important."[71] Given this potential for abuse, bicameralism "doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient."[72] He believed this "precaution" was so obvious, and "so well understood . . . that it would be more than superfluous to enlarge on it."[73]

He wrote that the "necessity of a senate is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions."[74] He warned that it is impossible to assume that, a legislature left to itself, will not "escape a variety of important errors in the exercise of their legislative trust."[75] Ultimately, this bicameral system "increases the security

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[66] U.S. CONST. art. I, § 7. Cl. 2.
[67] U.S. CONST. art. II, § 4.
[68] U.S. CONST. art. I, § 8, Cl. 11.
[69] U.S. CONST. art. I, § 8, Cl. 1.
[70] U.S. CONST. art. V.
[71] THE FEDERALIST NO. 62 (James Madison).
[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *Id*.

for . . . fidelity to the object of government, which is the happiness of the people[.]"[76] A single-body legislature was not enough of a check on tyranny.

b. The President has some discretionary power over tariffs, but only as a fact finder.

If a unicameral legislature could not be trusted to exercise power properly, how can one man? The idea that the will of the President could, without any material guidance from Congress, levy taxes or duties, would baffle the founders. That said, some of the earliest laws in our nation's history *did* give the President limited authority over tariffs. This trend continued for centuries, and a series of Supreme Court decisions and statutes have upheld these laws as lawful delegations. But *none* of these bills (and decisions interpreting them) remotely resemble the power President Trump claims under IEEPA.

First, many of the *earliest* statutes simply allowed the president to *lift*, not impose, duties. Second, all of them merely asked the President to *find facts* in order to trigger (or release) some congressionally created duty scheme. Third, all of them contained specific enumerations of what goods to be tariffed and at what amounts. None simply gave the Article I, Section 8 authority to the President whenever he perceives an "emergency" and implements, at his sole discretion, whatever duties he pleases. Below is a survey of the most important case and statutory history setting the contours of this power.

i. *Marshall Field v. Clark*.

The case that chronicles much of the statutory history of tariff delegations—and which Trump Administration may (wrongly) feel supports its position—is *Marshall Field v. Clark*.[77] There, the Court reviewed a challenge to the Tariff Act of October 1, 1890.[78] The first allegation was that the bill did not originate in the House, which, as we saw above, all revenue-raising bills must do.[79] Disposing of that after an analysis of the bill's signing process, the Court moved onto what is most relevant here: a provision of the statute giving the President the power to trigger duties on imports to "secure reciprocal trade with countries."[80]

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[76] *Id*.
[77] Marshall Field & Co. v. Clark,143 U.S. 649, 662–65 (1892).
[78] *Id*.
[79] *Id*. at 680.
[80] *Id*.

> **whenever and so often as the president shall be satisfied that the government of any country producing and exporting** sugars, molasses, coffee, tea, and hides, raw and uncured
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> . . .
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> which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States **he may deem to be reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty, to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction** of such sugar, molasses, coffee, tea, and hides, the production of such country, **for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid** . . . as follows[.][81]

So far, proponents of the President may be nodding along. Reciprocal tariffs? Check. The President's ability to trigger them? Check. Broad discretion on his part to do so whenever he determines? Check. But there's a sharp limit here. Pay close attention to the detail "as follows . . ."

> 'All sugars not above number thirteen Dutch standard in color shall pay duty on their polariscopic tests as follows namely:
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> 'All sugars not above number thirteen Dutch standard in color, all tank bottoms, sirups of cane juice or of beet juice, melada, concentrated melada
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> . . .
>
> 'Molasses testing above fifty-six degrees, four cents per gallon.
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> . . .
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> 'On coffee, three cents per pound.
>
> 'On tea, ten cents per pound.
>
> 'Hides, raw or uncured, whether dry, salted, or pickled, Angora goat-skins, raw, without the wool . . . one and one-half cents per pound.'[82]

Look at the details contained in these sections—and this is just a short excerpt. Congress specifies *exactly* which goods and what the tariff should be, down to the

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[81] *Id.* at 680 (emphasis added).
[82] *Id*. at 681 (citing Tariff of 1890, ch. 1244, 26 Stat. 567, 612).

cents per unit. This is *Congress* doing *its* job in exercising Article I, Section 8 authority. It is not leaving that discretion to the president, nor could it. Congress simply loads the gun, fires, and gives the President discretion of when to release the trigger. It does not give him the discretion of what to shoot at or what caliber bullet to use.

The *Clark* Court then ticks through its own history evaluating the president's power to impose duties.[83] It starts with *The Aurora*, which is a case that dealt with something similar to tariffs—the ability of the President to lift a congressionally-imposed trade limitation and embargo on France or Great Britain.[84] President Madison used that power, and *The Aurora* "certainly is a decision that it was competent for congress to make the revival of an act depend upon the proclamation of the president[.]"[85] It recounted another bill "authorized the president, when congress was not in session, and for a prescribed period, 'whenever, in his opinion, the public safety shall so require, to lay an embargo" on ships and vessels.[86] This bill only dealt with embargoes, not trade or commerce, for emergency situations when Congress was not at home.[87] And its duration was time-limited to when Congress returned.[88]

Two statutes, signed by President Adams, gave the President the power to "remit and discontinue the prohibitions and restraints hereby enacted" upon a finding that foreign governments had ceased acts of aggression and hostilities against the United States.[89] President Jefferson signed two acts in 1806 that imposed import restrictions—again naming the specific products and their value—but allowed the President "to suspend the operation of aforesaid act, if in his judgment the public interest should require it: provided, that such suspension shall not extend beyond the second Monday in December next."[90] The *Clark* Court then catalogued acts from 1815 (signed by Madison), 1817, 1824, 1854, 1866, 1890, and so on—all statutes that, according to the Court, gave the President the ability to *lift*

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[83] Marshall Field & Co. v. Clark,143 U.S. 649, 682 (1892).
[84] *Id*. (citing Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 382–83 (1813)).
[85] *Id*.
[86] *Id*. at 683–84.
[87] Of course, it was far more difficult to summon Congress back to Washington in 1794 than it is now, given technological advancements in travel. *See* Act of June 4, 1794, ch. 41, 1 Stat. 372 ("President authorized to lay embargoes" with power "to carry the same into effect"); *cf*. H.R. JOURNAL, 3rd Cong., 1st Sess., at 201–18 (1794) H.J. 201–18 (Congress simultaneously was enacting duties on specific goods, not delegating trade and commerce powers to the President, even temporarily).
[88]Ch. 41, 1 Stat. 372 (the act shall be in force until fifteen days after the next session of Congress, "and no longer.").
[89] Marshall Field & Co. v. Clark,143 U.S. 649, 684–85 (1892).
[90] *Id* at 685 (citing Act of Dec. 19, 1806, ch. 1, 2 Stat.411).

specific tariffs and duties that Congress implemented if he deemed it appropriate.[91] Tracing this history, the Court felt confident that the power present in *Clark* was "not an entirely new feature in the legislation of congress, but has the sanction of many precedents in legislation."[92] It admits that "some of these precedents are stronger than others" but that the legislature can "in the interest of their people [invest] he president with large discretion in matters arising out of the *execution* of statutes relating to trade and commerce with other nations."[93]

Clark expressly recognizes the nondelegation principle: "[that] congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[94] But here, *Clark* found Congress had not invested "the president with the power of legislation."[95] Why? Because "Congress itself prescribed, in advance, the duties to be levied, collected, and paid" on *specific*, enumerated goods by designated countries.[96] While the President could "examine the commercial regulations of other countries . . . and form a judgment as to whether they were reciprocally equal and reasonable[,]" his discretion was limited to whether to fire the gun.[97] "He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related *only to the enforcement of the policy established by congress*."[98] Thus, all the President was doing was ascertaining "the existence of a particular fact" and not exercising "the function of making laws."[99] Instead, "[l]egislative power was exercised when congress declared that the suspension should take effect upon a named contingency."[100]

So while *Clark* blessed a congressional delegation, its reasoning strictly limited what the Legislature could give away. Put simply: Congress must specifically create and craft its exercise of legislative power. For tariffs, it must, at least, state the good and the level of tariff, hopefully with the country of origin. It can then give the President the ability to fire the gun or release the trigger. But it

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[91] *Id*. at 685–89.
[92] *Id*. at 690.
[93] *Id*. at 691 (emphasis added).
[94] *Id*. at 692.
[95] Marshall Field & Co. v. Clark,143 U.S. 649, 692 (1892).
[96] *Id*. at 692–93.
[97] *Id*. at 693.
[98] *Id*.
[99] *Id*. ("The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.") (quoting Railroad Co. v. Comm'rs, 1 Ohio St. 88 (1852)).
[100] *Id*.

cannot give the President the ability to do what only it can: pass legislation imposing the tariff in the first place.

ii. *Curtiss-Wright Export Corporation*.

The next is *United States v. Curtiss-Wright Export Corporation*.[101] In response to an armed conflict in Bolivia, Congress passed a Joint Resolution stating that "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries[,]" and he makes a proclamation saying that, then it will become "unlawful to sell . . any arms or munitions of war" to those countries.[102] Shortly after enactment of the Joint Resolution, President Franklin D. Roosevelt issued a proclamation with the necessary finding, banning arms.[103] On appeal of a criminal case, the court considered whether this delegation of authority was a constitutional violation, ultimately declining to strike it down.

Proponents of President Trump's tariffs may find comfort in *Curtiss-Wright* famously quoting John Marshall: "The president is the sole organ of the nation in its external relations, and its sole representatives with foreign nations."[104] But this comfort is misplaced—*Curtiss-Wright* evaluates and follows the pattern of the other cases and statutes: the legislature crafted a specific, detailed sanctions regime, and then gave the President the ability to fire or not.[105] Even if that is not convincing, the challenged statute concerned neither a tariff power nor did it raise revenue, but an *embargo* power over *weapon sales* to countries "engaged in armed conflict[,]" which is something far different—and more like a war power.[106]

This is, again, the President firing an embargo cannon after Congress loaded it and pointed it at the appropriate target. He can make a factual determination, set enforcement parameters, and decide when to stop. But he cannot invent, out of thin air, legislative policy.

iii. *Yoshida International*.

Yoshida is a Court of Customs and Patent Appeals (a predecessor to the Federal Circuit) case reviewing President Richard Nixon's use of TWEA.[107] In

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[101] United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936).
[102] *Id*. at 312.
[103] *Id*.
[104] *Curtis*, 299 U.S. 304, 319–20 (1936).
[105] *Id*. at 312.
[106] *Id*. at 312.
[107] United States v. Yoshida Intern., Inc., 63 C.C.P.A. 15, 17 (1975).

1971, facing a "prolonged decline in the international monetary reserves of the United states, and our trade and international position [being] seriously threatened" and citing security concerns, President Nixon implemented 10% ad valorem tariffs on "dutiable articles."[108] The court found TWEA's delegation to be "broad indeed[,]" including the power to "regulate . . . the importation of 'any' property in which 'any' foreign country or national thereof has 'any' interest[.]"[109] This language tracks closely with IEEPA.

The court concluded that Congress "authorized the president, during an emergency . . . to 'regulate importation,' by imposing an import duty surcharge or by other means appropriate and reasonably related[.]"[110] Noting fears the President could use this statute to violate nondelegation, the Court held that "presidential actions must be judged in light of what the President actually did, not in light of what he could have done."[111] The court upheld President Nixon's use of the tariff power, finding that his proclamation, rather than ignoring congressional will, "specifically provided" that if the tariff rate would exceed the "total duty or charge payable [from] the Tariff Schedules of the United States," then that rate would apply.[112] And also, the duties were "limited to articles which had been the subject of prior tariff concessions and, thus, to less than all United States imports."[113]

Analyzing the nondelegation challenge, the court applied the "intelligible principle" test and found that the limitations in TWEA of "time of war" or "national emergencies" was a limiting principle enough.[114] While taking a narrow view of the nondelegation doctrine, the court makes an important point: "[t]he declaration of a national emergency *is not a talisman enabling the President to rewrite the tariff schedules*[.]"[115] The President did not seek nor would receive judicial blessing of "a wholesale delegation of legislative power. . . . We do not here sanction the exercise of an unlimited power, which . . . would be to strike a blow to our Constitution."[116]

V. The nondelegation and major questions doctrines are available here.

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[108] *Id.* (quoting Proclamation No. 4074, 36 Fed. Reg. 15,724 (Aug. 17, 1971)).
[109] *Id*. at 23.
[110] *Id*. at 28.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*. at 33–35.
[115] *Id*. at 35 (emphasis added).
[116] *Id*.

A party seeking to challenge tariffs may proceed under the nondelegation doctrine or the major questions doctrine. An overview of both follows.

a. The nondelegation doctrine and its current, unclear status.

The nondelegation doctrine finds its genesis in the Vesting Clause of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States[.]"[117] This means Congress cannot, within reason, give its constitutionally-reserved powers away to other branches of government.[118] The doctrine is currently "dormant," though recent overtures by the Court suggest its possible return.[119]

Below, this paper argues the Court could stop short of a full reinvigoration of nondelegation doctrine to strike down these tariffs, though it should certainly consider doing so. This is important, because the Supreme Court has in recent years turned down multiple opportunities to speak on the topic.[120] The Court is currently considering *Consumer's Research*, which is fully briefed and argued, where the Court could reinvigorate the non-delegation doctrine.[121] But based on oral arguments and the posture of the case, commentators feel this is unlikely.[122]

The last Supreme Court case to use the nondelegation doctrine was *Schechter Poultry* in 1935. The Court's nondelegation test, which is still good law, asks whether Congress has laid "down by legislative act an intelligible principle to which the person or body authorized to [exercise that delegated authority] is directed to confirm," and, if so, "such legislative action is not a forbidden delegation of legislative power."[123] As *Mistretta* affirmed in 1989, the intelligible principle test is "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[124] That same Court quotes *Panama Refining* (also from 1935), which said that the "Constitution has never been regarded as denying to the

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[117] U.S. CONST. art. I, § 1.
[118] *See* Gary Lawson, *Discretion as Delegation: the "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005).
[119] Dale B. Thompson, *The Second Coming of* Schecter Poultry*, or Should We Leave It Buried?*, 55 TEX. TECH L. REV. 157, 158 (2022).
[120] Gundy v. United States, 583 U.S. 831 (2017).
[121] FCC v. Consumers' Rsch., 145 S. Ct. 587 (2024)
[122] Amy Howe, *Justices appear likely to uphold FCC telecom access subsidy*, SCOTUSBLOG (Mar. 27, 2025, 11:24 AM), https://www.scotusblog.com/2025/03/justices-appear-likely-to-uphold-fcc-telecom-access-subsidy/
[123] Mistretta v. United States, 488 U.S. 361, 655 (1989) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)).
[124] *Id*.

Congress the necessary resources of flexibility and practicality, which will enable it to perform its function."[125]

In *Mistretta*, the Court approved a broad delegation of authority to the United States Sentencing Commission. It found Congress provided an intelligible principle by "charg[ing] the Commission with three goals" and specifying "four purposes . . . the Commission must pursue in carrying out its mandate[.]"[126] Additionally, "Congress prescribed the specific tool . . . for the Commission to use in regulating sentencing."[127] And Congress gave the Commission specific factors, prohibitions, guidance, and more.[128]

The most recent, major opportunity—pre-*Consumers' Research*—for the Court to tangle with nondelegation came in *Gundy v. United States*.[129] In a dissent, joined by two other justices,[130] Justice Gorsuch wrote at length on what the non-delegation doctrine *should* be, and why the Court should have reinvigorated it in *Gundy*.[131] He notes the framers knew it would undermine our entire "system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals."[132] And, of course, "Article I's detailed processes for new laws were also designed to promote deliberation . . . . [T]he framers went to great lengths to make lawmaking difficult."[133] This is because as James Madison said, "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates."[134]

b. The major questions doctrine is available as a "nondelegation circuit breaker."

In *West Virginia*, the Court defined the major questions doctrine and held that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[135] Even if a delegation has a "colorable textual basis[,]" courts should use "common sense" to interpret "the

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[125] *Id*. (quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935)).
[126] *Id*. at 656.
[127] *Id*.
[128] *Id*.
[129] Gundy v. United States, 588 U.S. 128 (2019).
[130] Justice Alito indicated he may be open to joining on nondelegation in the future. *Id.* at 149 (Alito, J., concurring).
[131] *Id*. at 152–153 (Gorsuch, J., dissenting).
[132] *Id*.
[133] *Id*. at 154.
[134] *Id*. at 156 (citation omitted).
[135] West Virginia v. EPA, 597 U.S. 697, 716 (2022) (citation and quotations omitted)

manner in which Congress" would have delegated "such power[,]" making it "very unlikely that Congress had actually done so."[136] This is because "[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices."[137] The Court adds that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there . . . . To convince us otherwise, something more than a merely plausible textual basis is required."[138] As discussed below, the tariff power is certainly a question of "vast economic and political significance," and thus Congress must speak clearly to give it away (if it can even do such a thing).

As this author argues elsewhere, the status of the major questions doctrine, particularly after *Loper Bright Enterprises*, is in some doubt.[139] While the doctrine may have been a threshold question before affording *Chevron* deference, that is no longer necessary: *Loper Bright* overturned *Chevron* and mandated that courts must in the first instance find the "single, best meaning" of a statute.[140] Lower courts have been struggling with the major questions doctrine since the Court's decision in *West Virginia*, particularly "whether the doctrine is one interpretative tool among many or a -clear statement rule[.]"[141] But even in the wake of this uncertainty, when the Court is forced to confront a constitutional, nondelegation issue, then the major questions doctrine sits there available for easy use. As this author wrote, "break glass in case of constitutional avoidance."[142] And here is certainly a use case for the doctrine.

VI. President Trump's tariffs are unlawful and violate the Constitution.

We now turn to the issue of the moment: whether, given all the constitutional, statutory, and case history, President Trump's tariffs are unlawful. They are and, if given the opportunity, courts should strike them down. Litigants have multiple theories available: 1) an as-applied constitutional violation of the nondelegation doctrine; 2) an as-applied violation of the major questions doctrine; 3) finding the tariffs are *ultra vires*; and 4) finding IEEPA facially violates the

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[136] *Id*. at 722–23.
[137] *Id*. at 723 (cleaned up).
[138] *Id*. at 723 (cleaned up).
[139] Eric Bolinder, *Litigating Loper Bright: Interpretive Challenges and Solutions for the Post-Chevron Era*, 128 W.V. L. REV. (forthcoming Nov. 2025) (manuscript at 36), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5205437.
[140] *Id*. at 3 (quoting Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024)).
[141] *Id*. at 36 (quoting Mayfield v. U.S. Dep't of Labor, 117 F.4th 611, 616 (5th Cir. 2024)).
[142] *Id*.

nondelegation doctrine. This paper analyzes them in the order of strongest to weakest.

a. President Trump's tariffs are an as-applied violation of the nondelegation doctrine.

The use of IEEPA here is unlike anything in American history. All prior tariff power, dating back to the founding, found its origination, detail, and execution mechanisms in a congressionally-enacted statute. Recall the vigorous debate in Congress over one cents or three cents for a bushel a coal. That was just one example—of *many*—emblematic of the seriousness and exactitude of Congress's approach to tariffs. Consider also the statute from *Marshall Field v. Clark*, which specified the product, value, and duty amount. That statute, like the many before it,[143] simply pressed the trigger on tariffs, then turned control over the President to be a *fact finder* and executor. Basically, here is an algorithm setting the tariff, and if the other country stops behaving badly, the President can turn it on or off—no further congressional action necessary. None of the statutes gave the President the ability to set tariffs on the items he wished, at the rates he decided, for an indefinite amount of time, only subject to his whim.

Contrast that to the 2025 Tariffs. Using incredibly broad language and declaring a "national emergency," the President has taken upon himself the full vestments of the legislature. He decided what countries to tariff. He created and executed his own calculation of what tariffs to assess—what goods, and at what rates. He executed the tariffs for an indefinite period. He then changed the entire tariff policy, seemingly by the minute at times. This is core legislative authority, as we see above, and needs to come from the Article I body first. They deliberate, weigh policy, consider constituent needs, and then vote.

Consider that Madison was concerned about giving this power to a *unicameral*, *elected* legislature. How much more would the founders recoil at the idea that Article I, Section 8 could simply be given away to the President, with the slimmest of safeguards and threshold findings? Even the generous ruling of *Yoshida*—if it is still good and applicable law—would not bless the action here. There, the court was clear that "[t]he declaration of a national emergency *is not a talisman enabling the President to rewrite the tariff schedules*," and the President does "not seek here, nor would [he] receive, judicial approval of a wholesale delegation of legislative power. . . . We do not here sanction the exercise of an unlimited power[.]" But that is precisely what President Trump is doing here. The ability to set whatever tariffs at whatever rates against whatever countries for

whatever period of time is rewriting the tariff schedules—an exercise of unlimited power.

Using nondelegation, rather than any of the below alternatives, is preferable for two reasons.

i. This is a good vehicle to reinvigorate the nondelegation doctrine.

First, this is a good vehicle for the Court, using Justice Gorsuch's dissent in *Gundy*, to rehabilitate the nondelegation doctrine. Not only would it be able to set the standards for the doctrine, but it would also be able to set the outer limits of when delegations to the President deal with authority that may inhere in Article II.

For example, one section of *Gundy* may seem to prove fatal to this argument—but a deeper read shows this is not the case. Justice Gorsuch writes that "Congress may assign the executive and judicial branches certain non-legislative responsibilities . . . Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch."[144] He specifically notes *The Aurora* as "an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II."[145] Put plainly, in *The Aurora*, Congress imposed an embargo until the President factually determined that either of those countries had ceased "to violate the neutral commerce of the United States."[146] *The Aurora* thus held that "[t]he legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect."[147] While this seems potentially fatal to a challenge to President Trump's use of IEEPA—after all, it implicates the President's foreign policy powers—it is not. What happened here is nothing like *The Aurora*.

Yes, tariffs necessarily relate to foreign policy and, yes, Congress can delegate some of that authority away—but there is a clear limit. This paper cites case after case above defining and enforcing that limit. And keep in mind, too, that the tariff power is specific, enumerated power to the Article I branch—revenue raising is not something Congress can simply gift away to the Executive. Consider the reaction if Congress did something similar with another Article I, Section 8 power, taxation, granting the President the ability to change the income tax as he wishes in response to "economic emergency." Because President Trump's use of IEEPA identically resembles the congressional power solely vested in Article I,

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[144] *Id.* at 159.
[145] *Id*.
[146] *Id*. at 383.
[147] *Id*. at 387.

Section 8, it is unlawful. There is no intelligible principle to be found here. If Congress truly wishes him to have the power he now claims, it may simply codify his tariff schedules and give him, with the appropriate standards, the ability to find facts enabling or lifting the tariffs.

ii. Using nondelegation will prevent future abuse.

Second, striking the 2025 Tariffs down under nondelegation will necessarily prevent future abuse of the IEEPA authority. By setting a strict line and defining, precisely, how the IEEPA authority must be used— and how and to what extent Congress can delegate away tariff authority, the Court will prevent any future manipulation of creative emergency declarations or broad congressional enactments. And to do so, it does not need to overturn past tariff precedents. It could simply point to *Clark*'s reasoned explanation of why that bill was *not* a nondelegation violation and apply those standards here. This also gives the court an out if it does not want to use this vehicle as a wholesale refreshment of the nondelegation doctrine, instead allowing it to focus on the tariff power specifically. Congressional delegation of tariffs must specify: the product to be tariffed, at what rate, and, preferably, from what country of origin. The President may fact find on whether they can be turned on or off and enforce the law. That's it. If the statute lacks any of these things, it violates the nondelegation doctrine.

b. President Trump's tariffs violate the major questions doctrine.

The Court could apply major questions and avoid the sticky work of having to affirm the contours of a nondelegation test for tariff power. The use of across-the-board tariffs that are having a global impact on the economy are surely a decision of "vast economic and political significance." Even if IEEPA provides a "colorable textual basis," the Court here could use "common sense" to determine that it is "very unlikely" that Congress would have simply given Article I, Section 8 away to the president.

The separation of powers concerns here are of dire importance. This "ambiguous" and broad text should make the court "reluctant to read" into IEEPA such tremendous presidential powers. Many of the same arguments I make above would apply here too, though the Court would not need to make specific findings about violations of the nondelegation doctrine.

The drawback here is that it leaves the door open for a more creative use of the power, or more specified and invented emergency declarations, to take another run at inputting global tariffs. It would also allow Congress to "speak clearly" and pass a law giving the President this authority, which would be unconstitutional. A strict application of a nondelegation standard, like this paper develops above, does

not pose the same risk. That said, the Court could use broad language and, even if in dicta, predict what future uses of the power would also violate the doctrine.

c. President Trump's tariffs violate the statutory language.

The Court could also avoid the constitutional issue altogether and simply rule that the President acted *ultra vires*. There are two arguments here. First, this is not a true declaration of a national emergency. Second, IEEPA does not grant the power for tariffs.

i. This is not a true declaration of a national emergency.

While the statute does not define the statutory term "national emergency," the court could employ the canons and conclude that emergency means, well, emergency. This would require a factual analysis of the President's allegations, the state of the economy, the length of the emergency, and more. In this case, it may be obvious on its face that there is no worldwide emergency. President Trump "paused" the tariffs, while keeping a 10% threshold in place that his Treasury Secretary said would only be removed by "some kind of extraordinary deal."[148] This indicates permanent policy change, not true emergency. But such a ruling would put many other long-running emergency declarations at risk, something the Supreme Court may hesitate to do.

During Trump's first term, the Court cited policy pretext when it struck down a citizenship question on the census.[149] It held that an agency decision was unlawfully pretextual—"We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process."[150] So too here—the court would have a bevy of statements, from both President Trump and his advisors, that it could hold to be pretextual and indicative that this is not a true emergency.

Courts should resist this urge too. As Justice Thomas wrote the Census case, "the Court has opened a Pandora's box of pretext-based challenges in administrative law."[151] Here, dealing with a presidential proclamation, ruling on pretext could open a similar Pandora's box. IEEPA gives the President wide latitude and discretion. He may have many reasons for why he declared a national emergency, but the real test is whether it's truly a national emergency, not what pretext may also exist. To do this sort of analysis would require courts to peer into

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[148]CNBC Television, *Hassett: It would take an 'extraordinary deal' for Trump to drop rates below 10%*, YOUTUBE (Apr. 10, 2025), https://www.youtube.com/watch?v=a1Q-YQJrRMU
[149]Trump v. New York, 592 U.S. 125 (2020).
[150] *Id*. at 785.
[151] *Id*. at 798 (Thomas, J., concurring in part).

the President's mind, attempting to divine his true motivation. While it may be obvious in a case like this, such a ruling could open all sorts of issues for similar cases in the future that review presidential decisionmaking.

ii. IEEPA does not grant the power to impose tariffs.

Dean Campbell has cogently argued that "IEEPA has never been used to impose a tariff . . . The claim that the IEEPA gives the president authority to impose tariffs is based on a faulty syllogism that, since the powers the IEEPA gives the president are broad, tariff authority is likely included."[152] He concludes this from the fact that IEEPA does not "refer to tariffs" and instead calls for "quantitative restrictions."[153] While this argument could win the day—especially if the Court will engage the canon of constitutional avoidance—this paper's concern is that the language in IEEPA is so intentionally broad[154] that the court may struggle to textually read out the power to levy duties. The Court may also hesitate to imperil all other existing emergency declarations, which may happen if it sets down narrow markers to define emergencies.

d. The court could find IEEPA facially unconstitutional.

The Court is unlikely to do this. But if it wanted to seek a maximalist application of the nondelegation doctrine, it could hold that the broad grant in IEEPA is simply unconstitutional. If Congress wants the President to exercise some emergency authority, it must at least define what an emergency is, set limits on the authority, and provide checks on when and how long the President can use it.

This is the most unlikely choice for the Court for two reasons. First, it will be reluctant to strike down Congress's grant of emergency authority for the President to use in times of true crisis or war time. And second, it will likely, as Justice Gorsuch noted in *Gundy*, find that there are times where the President's foreign policy powers—acting outside of an Article I, Section 8-type authority—crossover with Congress's delegation here.

VII. Conclusion

This paper has tried to strike a neutral tone throughout, engaging with the constitutional issues, while not commenting on the substantive merits of tariffs. But the constitutional issues here are grave. If neither the courts nor Congress steps into stop this, the President will have assumed the Constitution's revenue-raising

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[152] Tom Campbel, *Presidential Authority to Impose Tariffs*, 83 LA. L. REV. 606 (2023).
[153] *Id*.
[154] 50 U.S.C.S. § 1702(a)(1)(A) (Giving the president the power to "regulate" "any transaction" by "any person" by "means or instructions, licenses, or otherwise.")

authority wholly unto himself. He will be able to turn trade on and off to America and impose significant indirect taxes on American citizens as he sees fit. This portends the end of separation of powers and Congress as an independent Article I body.

The founders intended our separation of powers system to protect against the whims of a king. The stability created by our tripartite government is one of the many things that has made America the envy of the world. Predictable policymaking and an even-handed rule of law made the United States an economic center of nations. Both American citizens and citizens of the World can trust that America will not simply turn on a dime on the whims of one man. Instead, it takes collaborative effort of a representative Republic. Madison warned mightily against this sort of reactionary behavior—and he felt confident that our bicameral legislature, checked by the veto power of the President, was the best way to avoid it.

President Trump's use of IEEPA to implement worldwide tariffs is unlawful. Chiefly, it violates core separation of powers principles. *Centuries* of case law set out a standard of what is a proper delegation of tariff authority. These cases call for specificity from Congress and, most importantly, require that *Congress* be the first mover in setting up the tariff system. What we are faced with today is something entirely different. The President is the first mover, legislative drafter, and enforcer of the tariffs. Congress barely plays any part at all, unless it chooses to. And if it does not, the courts must step in and stop this.

In George Washington's letter to Lafayette—the original "buy American" campaign—he concludes with an observation of what is happening in Europe. Washington writes,

> While you are quarreling among yourselves in Europe—while one King is running mad . . . I think you need not doubt, My Dear Marquis we shall continue in tranquility here—And that population will be progressive so long as there shall continue to be so many easy means for obtaining a subsistence[.][155]

America should continue in tranquility with reasoned economic policymaking. If Congress, acting as the legislative body, believes along with President Trump that protectionist tariffs are the right policy, then it should debate, develop, and specify them in the legislative process. Unlike the Europe of 1789, we do not have a king.

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[155] Letter from George Washington to Marquis de LaFayette, *supra* note 53.