Are Tariffs Taxes?

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Introduction

This Article is about tariffs and the responsibility of Congress under the Taxing Power Clause of the Constitution. The clause provides that "Congress shall have the power to lay and collect Taxes, Duties, Imposts, and Excises."[1] This Article considers a question that is both constitutional and practical: What should Congress do about tariff law in order to fulfill the Constitution's separation-of-powers requirement that the legislature, not the executive, exercises the power of the purse?[2]

This question will have fresh relevance for the divided federal government produced by the election in November 2026. During 2025 and 2026, when Republicans controlled the Presidency, the House, and the Senate, members of the 119th Congress proposed various bills to revoke or amend presidential tariff authority or to reverse specific presidential tariff actions.[3] Some bills would have reversed presidential declarations of emergency. Others would have repealed specific statutory authorities. Others would have added mechanisms to require congressional assent to the imposition of new tariffs. As the bills' sponsors knew would happen in 2025 and 2026, none passed both houses of Congress, and thus none were presented to the President for signature or veto.

Democratic majorities in the House and the Senate in the 120th Congress change the picture. This situation will make the question of whether to treat tariffs as taxes extremely salient for the legislature. Democrats will not have the 60 votes needed to end Senate debate on most legislation—including the tariff-authority-limiting bills proposed in 2025-26—which could mean that Republican senators will be able to block congressional legislation on tariffs. But there is a

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[1] U.S. Const. art. I, § 8, cl. 1.

[2] This article engages with a growing body of recent literature about tariffs and the taxing power. See, e.g., Reuven Avi-Yonah & J.J. Wang, A Perfect Storm: Executive Orders and Tax Law, 45 Va. Tax Rev. 1 (2025); Reuven Avi-Yonah, Doron Narotski, and Tanir Shahar, From Relic to Relevance, the Resurgence of Tariffs, 77 U.C. Law J. 497 (2026); Conor Clarke & Ari Glogower, Tariffs and the Taxing Power: Historical Lessons for Major Questions and Nondelegation, 103 Wash. L. Rev. 1867 (2026); Jon Endean, Tariffs as Taxes: A Framework for Understanding Delegation of the Taxing Power, 63 San Diego L. Rev. (forthcoming 2026); Christine Kim, Troublesome Tariffs (draft 2026); Lawrence J. Liu & Alex Zhang, Tariffs and the Progressive Fiscal Constitution, 103 Wash. U. L. Rev. 1933 (2026); Chad Squitieri, The President's Authority to Impose Tariffs, 12 Harv. J. L. & Pub. Pol'y Per Curiam 1 (2024).

[3] See, e.g., End Trump's Tariff Act, S. 5390 (119th Cong., 2d Sess.) (terminating forced labor tariffs imposed under Section 301 in July 2026, repealing Section 122 balance-of-payments authority, repealing Section 338 authority, overriding reliquidation rules for duties imposed prior to enactment, and requiring refunds without documentation). This bill was proposed by Senator Schumer in September 2026.

way for Congress to maximize its control of tariff law and policy. This way is to bring tariffs into the admittedly imperfect tax legislative process of budget reconciliation.[4]

Both legislators and policy analysts across disciplines have avoided considering tariffs as taxes for over a century. Tariff law has been analyzed with regulatory and foreign affairs purposes, not revenue raising purposes, in mind.[5] Tax statutes and tariff statutes have parted ways in several respects. Tax statutes are ex ante, and provide detailed rules that Treasury carries out with relative precision. Tariff statutes are ex post, and provide general rules that the President later interprets to produce tariff policy. In contrast to tax statutes, tariff statutes are more general, more likely to delegate power directly to the President, and less likely to face stringent judicial review based on the Administrative Procedure Act or the major questions doctrine.[6]

Tariffs have been on a different track for presumptively good policy reasons. The President has advantages of speed and secrecy when conducting foreign affairs policy, and tariffs are important instruments in this effort, particularly given expanding interest in using economic tools rather than military force to accomplish international objectives. The usual free trade analysis disapproves of all trade restrictions but acknowledges that tariffs are the least bad option, largely because of their transparency.[7] If the President lacked tariff power, he might seek to accomplish the same goals with worse tools, like quotas, as past episodes illustrate.[8]

But the 120th Congress in 2027 will face a new question, since it has never before faced both (1) large new presidential tariffs and (2) a realistic political possibility of addressing them. Given the increasing size and importance of presidential tariffs, including their revenue-raising impact, should Congress take back more control of tariff law and policy? Our answer is yes. Consistent

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[4] Budget reconciliation has been roundly criticized for increasing the complexity and politicization of tax law and for setting forth procedures that are not in fact followed by Congress. The deep literature on the tax lawmaking process includes Ellen P. Aprill & Daniel J. Hemel, The Tax Legislative Process: A Byrd's Eye View, 81 J. L. & Contemp. Probs. 99 (2018); Michael J. Graetz, Paint-by-Numbers Lawmaking , 95 Colum. L. Rev. 609 (1995), Rebecca Kysar, Reconciling Congress to Tax Reform, 88 Notre Dame L. Rev. 2121 (2013), Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process As Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1 (1990); George K. Yin, Crafting Structural Tax Legislation in a Highly Polarized Congress, 81 J. L. & Contemp. Probs. 241 (2018). See also David Kamin et al., The Games they Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation, 103 Minn. L. Rev. 1439 (2019) (providing a catalog of problematic provisions enacted in the 2017 tax legislation).

[5] See, e.g., Kathleen Claussen & Timothy Meyer, The Foreign Commerce Power, 114 Calif. L. Rev. 407 (2026) (analyzing tariffs as part of trade law under the authority of the Foreign Commerce Clause); Jack Goldsmith, Major Questions Doctrine, Foreign Affairs, and the New Economic Statecraft, 139 Harv. L. Rev. 1961 (2026) (analyzing tariffs as an element of international industrial policy).

[6] Curtis A. Bradley & Jack L. Goldsmith, Foreign Affairs, Nondelegation, and the Major Questions Doctrine, 172 U. Pa. L. Rev. 1743 (2024); Timothy Meyer & Ganesh Sitaraman, The National Security Consequences of the Major Questions Doctrine, 122 Mich. L. Rev. 55 (2023).

[7] Alan O. Sykes, Comparative Advantage and the Normative Economics of International Trade Policy, 1 J. Int'l Econ. L. 49 (1998) (explaining conventional free-trade ideal of no tariffs or other trade barriers).

[8] See infra (describing President Carter's negotiation of voluntary export restrictions on televisions and cars imported from Japan).

with that, our proposal and recommendation in this Article is that Congress should include tariff law in the tax legislative process of budget reconciliation.

Because tariff law relates to revenue raising—even if that is not its primary objective—it *can* be considered as part of budget reconciliation.[9] The key question for Congress is whether it wants more power over—and responsibility for—tariff law. Congress's constitutional responsibility to exercise the taxing power should prompt it to seek and accept more responsibility for tariff law. That means budget reconciliation.

Congress exercises more power over legislation that falls under budget reconciliation. Budget reconciliation proceeds based on simple majorities of both the House and the Senate. It results in the passage of a bill that the President cannot ignore and will not automatically veto, because the bill draft begins with the President's own budget and typically includes many of his preferences. Collecting different provisions in a budget bill provides an opportunity for tradeoffs and negotiation that make presidential approval more likely.

One challenge for this approach is that tariff law, with its ex post design, is not a comfortable fit for the approach taken by the budget reconciliation process. Budget reconciliation operates by providing revenue estimates for different provisions over a future 10-year window. This predicts results based on detailed and specific ex ante tax statutes. But tariff law does not have to lose its ex post style in order to be allowed within the boundaries of budget reconciliation. True, the revenue estimates for a grant or a removal of, say, the presidential authority under Section 338 to impose tariffs of up to 50% (which have recently been used to increase leverage over Canada in USMCA negotiations) cannot predict the future and may be very inaccurate. But that does not disqualify the measure from budget reconciliation consideration.

Another objection to including tariff law in the tax law process will likely come from trade law and policy analysts. If tariff law is included in a process designed for income tax law, the analytic importance of trade law may be diminished. Here, it seems, the devil will be in the details. Modifications to tariff law can be achieved through budget reconciliation, and trade law scholars from a variety of perspectives have called for congressional change, including proposals for more disclosure or procedure[10] as well as proposals that would reverse presidential tariff actions or reduce substantive grants of authority. Whatever congressional change is appropriate for tariff law, it is more likely to happen under budget reconciliation.

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[9] The costs of NAFTA, for instance, were considered in budget reconciliation. See Allen Schick, The Federal Budget: Politics, Policy, Process 100 (1995). About a year later, congressional action on a GATT treaty was delayed to avoid a revenue offset requirement. See id. at 41.

[10] See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Presidential Control Over International Law, 131 Harv. L. Rev. 1201, 1292 (2018) (suggesting that "Congress…impose" ex post transparency "duties of centralized organization and publication "); Oona A. Hathaway, Presidential Power Over International Law: Restoring the Balance, 119 Yale L. J. 140 (2009) (proposing statutory administrative procedures for presidential international agreements).

Experience has shown that the current balance of powers tends to allocate quite a lot of tariff law discretion to the executive. Budget reconciliation is a way to gently shift some power back to Congress so that this balance can adjust incrementally. The process should draw support from the fact that the same two committees—House Ways and Means and Senate Finance—look after the budget reconciliation process and after trade law, including tariff statutes. The challenge will be to bring trade law analysis into the budget reconciliation process, for instance through a committee practice of asking trade experts as well as tax experts to evaluate tariff law proposals.

A final objection to including tariff law in the tax law process relates to the possibility that this move will entrench tariffs as revenue raisers. Tariffs are a bad tax,[11] and so it is best not to offer tariffs as revenue offsets in budget reconciliation that will help legislators fund other programs. Although we accept the arguments as to why tariffs are bad taxes, our response here is that there is a more important principle at stake. This principle is Congress's responsibility to carry out the constitutional requirement that the legislature must claim and use the power of the purse.

Judicial enforcement is one way of evaluating what Congress (rather than the executive branch) must do under the Taxing Power Clause.[12] But the judicial-enforcement boundaries of the Taxing Power Clause provide only extreme outer limits.[13] The constitutional constraint of nondelegation establishes only a minimum condition that a congressional delegation must articulate an "intelligible principle."[14] Another possible constitutional constraint, the requirement that revenue-raising bills originate in the House,[15] is likewise ineffective at limiting congressional delegation.[16]

Other judicial review doctrines sometimes can constrain the power of the executive branch in relation to Congress. These doctrines provide pathways (aside from nondelegation) for courts to enforce separation of powers values. They include statutory interpretation, the Administrative Procedure Act (APA) and the major questions doctrine (MQD). Each allows a court to hold

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[11] See, e.g., Kyle Pomerleau, Thomas Brosy, Robert McClelland, and John Wong, The Impact of Tariffs on the Cost of Capital in the U.S., AEI Economic Perspectives (Sept. 2026) (estimating that Liberation Day tariffs increased the "economy-wide cost of capital by as much as 2.7 percent"); see also Kimberly Clausing & Maurice Obstfeld, Tariffs as Fiscal Policy (forthcoming NTJ 2026) (criticizing tariffs as poor public finance instruments and claiming that "efficiency losses would approach one-third of revenues raised).

[12] See, e.g., James R. Hines & Kyle D. Logue, Delegating Tax, 114 Mich. L. Rev. 235, 268-69 (2015) (arguing that because the judicial nondelegation doctrine is weak, the Constitution does not significantly limit "authority Congress can delegate").

[13] See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1221 (1978) (questioning the idea of "equat[ing] the existence of a constitutional norm with the possibility of its enforcement against an offending official").

[14] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); See F.C.C. v. Consumers' Research, 606 U.S. 656, 672-76 (2025).

[15] See U.S. Const. art. 1 § 7.

[16] See Susan C. Morse, Shu-Yi Oei, and Diane Ring, The Origination Clause and the President's Tariffs, 103 Wash. U. L. Rev. 1897 (2026).

executive branch action unlawful because it falls outside the bounds of congressional legislation, and is therefore unauthorized.

However, none of statutory interpretation, the APA, or the MQD reliably constrains the power of the executive branch, especially the President, to impose tariffs under existing statutes. With respect to the APA, its requirements do not apply to power delegated directly to the President.[17] Such direct delegations are a feature of many tariff statutes. With respect to the MQD, a majority of the Supreme Court (for different reasons) takes the position that the major questions doctrine does not apply in tariff cases.[18]

Statutory interpretation has the most potential to constrain presidential tariff power in relation to Congress, but even statutory interpretation will have limited effect under current tariff statutes. In the 2026 case *Learning Resources v. Trump*, the Supreme Court held that the International Emergency Economic Powers Act (IEEPA) did not authorize certain presidential tariffs imposed in 2025, including a 10% universal tariff.[19] The court's reasoning centered on statutory interpretation and on the absence of an explicit power to tariff in the text of IEEPA. But courts are not likely to invalidate other presidential tariffs because of the *Learning Resources* precedent. Other statutes specifically authorize tariffs under broad standards that clearly allocate discretion to the President or to other executive branch actors.[20]

This Article proposes a change in congressional norms and practice, not a change to judicial review. It accepts as given judicial restraint and reluctance to supplant the judgment of Congress in tariff law. The Article's argument is constitutionally grounded in the Taxing Power Clause, but it relates to congressional responsibility, not judicial responsibility, to enforce that clause. The foundational assumption is that it falls to Congress to fulfill its constitutional assignment to exercise the power of the purse.

This Article offers and evaluates possible changes in legislative process, statutory drafting, and other congressional interventions. For example, Congress could incorporate tariff legislation into its ex ante tax legislative process, which centers on revenue estimates and budget reconciliation.[21] It could redraft tariff statutes to add tax-related prerequisites, procedures, or limits.[22] It could require tax-related disclosure, reporting, and analysis of the executive branch's use of tariff statutes.[23]

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[17] Franklin v Massachusetts, 505 U.S. 788 (1992).
[18] See, e.g., Learning Resources, Inc. v. Trump, 146 S. Ct. 628 (2026).
[19] Learning Resources, Inc. v. Trump, 146 S. Ct. 628 (2026).
[20] An example is the pending appeal in Oregon v. United States, in which the Federal Circuit appears likely to uphold the 10% tariff imposed under Section 122, even though the predicate of a trade deficit does not match the typically understood meaning of a balance-of-payments deficit, which is the predicate of the statute. *See infra*.
[21] Part IV.A
[22] Part IV.B
[23] Part IV.C

This Article proceeds as follows. In Part I, we provide historical background and definitions for tariffs and taxes. In Part II, we describe congressional practice in tariff law. In Part III, we explain how Congress exercises the taxing power in income tax law, and we note that it has largely omitted tariff law from its tax policy process and analysis. In Part IV, we consider what Congress should do, including possible changes to its legislative process, statutory drafting, and other, more informal modes of oversight.

I. What Are Tariffs and Taxes

A. A Brief History of Tariffs and Taxes in the United States

Many scholars have recounted the stories of U.S. tariff law,[24] on the one hand, and U.S. wage and income tax law,[25] on the other hand. A brief sketch of the two histories follows.

The Taxing Power Clause brings taxes and tariffs together with a clear text that emphatically assigns the power of the purse to the legislature. This aligns with Parliament's violent and successful wresting of taxing power away from the monarch in a 17th-century struggle that included the Ship Money case,[26] the English Civil War,[27] and the Glorious Revolution.[28] Legislative taxing power also follows Locke and Blackstone.[29] The first U.S. statute authorizing the Treasury Department, in contrast to other authorizing statutes, required the Secretary of the Treasury to report to Congress, not to the President.[30] There is very limited scholarly suggestion that taxing power arises outside Congress or that the President holds any general Article II power

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[24] See, e.g., Douglas A. Irwin, Clashing Over Commerce: A History of U.S. Trade Policy (2017) (analyzing U.S. trade policy from a historical perspective and focusing on legislative disagreement and negotiation); John H. Jackson, World Trade and the Law of GATT Parts II and III (1969) (assessing the legal force of presidential proclamations implementing GATT and the impact of GATT's tariff-reduction undertaking in Article I with U.S. domestic law); Kathleen Claussen & Timothy Meyer, The Foreign Commerce Power, 114 Calif. L. Rev. 407 (2026) (giving the history of presidential tariff policy in the U.S. from the Articles of Confederation to the present).

[25] See, e.g., W. Elliot Brownlee, Federal Taxation in America: A Short History (2d ed. 2004); Ajay Mehrohtra, _____; Graetz & O'Hear]

[26] In 1628, directly following Parliament's assertion of taxing power in the Petition of Right, King Charles I unilaterally imposed a "ship money" tax to fund navy expenditures. Endean 13-14 . The Court of the Exchequer upheld the king's action based on his national security judgment that the "honor and safety of the kingdom" were at stake, R. v. Hampden (1637) 3 State Tr. 825 (opinion of Crawley), and acknowledging the king's responsibility to determine what that safety required, Mark A. Graber, Ship Money: The Case that Time and Whittington Forgot, 35 Const. Commentary 47, 51 (2020) (explaining the judicial review theory of the case as "a conception of judicial power rooted in royal sovereignty").

[27] Parliament then outlawed the ship money tax. The resulting contest between Parliament and the king over taxing power is recognized as an important cause of the English Civil War, which Parliament won; the king was executed in 1649. See Endean, draft at 14-17.

[28] See Josh Chavetz, Congress's Constitution: Legislative Authority and the Separation of Powers 47-53 (2017) (describing continuing struggle over taxing and spending as between Parliament and monarchs in the 17th and 18th centuries).

[29] Endean (draft at 18) (citing John Locke, Second Treatise on Government § 140 and 1 William Blackstone, Commentaries, *140).

[30] Chavetz, supra note __, at 58.

to tax.[31] The Supreme Court provided the main caveat in its *Learning Resources* decision, by reserving on the question of a possible wartime Article II power to tariff.[32]

Congress first exercised its taxing power by imposing tariffs. From 1789 to the 1930s, tariffs were the largest source of federal tax revenue.[33] They also, from the founding, had an acknowledged regulatory role relating to protection of developing industries.[34] These concepts of revenue and restriction dominated until the 1930s, and for many decades featured a lasting sectarian dispute between tariff-favoring Northern manufacturing interests and tariff-resisting Southern agricultural interests.[35]

Both tax law and trade law saw transformational change in the 1930s and 1940s, during the presidency of Franklin Roosevelt.[36] In tax law, the introduction of the payroll tax and the expansion of the income tax from class tax to mass tax produced new and more powerful fiscal engines for a greatly enlarged federal budget.[37] In trade law, the stage of reciprocity began, and tariffs decreased under the auspices of treaties negotiated under GATT and WTO supranational frameworks.[38] Tariffs lost their revenue importance as income and payroll tax gained theirs. As tax legislative process and tax policy analysis developed in the second half of the 20th century, these disciplines focused mostly on the income tax and typically excluded tariffs entirely.[39]

As tariff law exited public finance policy, it became part of the modern use of trade policy for purposes of broader national economic and security goals.[40] The U.S. pursued reduced tariffs, through GATT and WTO efforts, in part to support United States manufacturers' ability to pursue the vast export opportunities presented after World War II. On the other hand, the U.S. regularly imposed countervailing duties and antidumping duties in response to U.S. businesses' allegations that other countries were unfairly supporting their domestic industries or underpricing their

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[31] See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 254-55 (2001) (arguing that the President has residual power to the extent powers are not granted to Congress, but explaining that a residual foreign affairs power would not include the power to tax, since the eighteenth-century (post-English Civil War) monarch lacked "the powers of legislation and finance").
[32] LR at 241; see Aditya Bamzai, Sanctions and the Emergency Constitution, 172 U. Pa. L. Rev. 1817 (2024).
[33] Clarke/Glogower
[34] Hamilton Report on Manufactures
[35] Irwin N/S sectarian dispute
[36] Kim, Troublesome Tariffs
[37] Federal budget 9% of GDP in 1935, 23% in 2025. 1935: Budget $6.5, GDP $74B. 2025: Budget $7T, GDP $31T.
[38] John H. Jackson, The General Agreement on Tariffs and Trade in United States Domestic Law, 66 Mich. L. Rev. 249 (1967).
[39] See infra Part III.A.
[40] E.g. Kathleen Claussen & Timothy Meyer, The Foreign Commerce Power, 114 Calif. L. Rev. 407 (2026); Jack Goldsmith, Major Questions Doctrine, Foreign Affairs, and the New Economic Statecraft, 139 Harv. L. Rev. 1961 (2026). See also Edward Fishman, Chokepoints: American Power in the Age of Economic Warfare (2025) (describing the use of economic measures such as sanctions wielded against Russia, China, and Iran).

exports to the U.S.[41] Tariffs were part of a menu that sometimes included other interchangeable trade tools, such as quotas.[42]

Tariffs have been, since the 1940s, primarily a form of trade regulation and a tool of emergency government, and only secondarily a method of raising revenue. Income taxes have been, since the 1940s, primarily a method of raising revenue, and secondarily a form of regulation. As explained below in Parts I.B and I.C, this is reflected in the definitions of tariffs and taxes and in the theory, including the economic theory, underlying each tool.

B. Defining Tariffs

A tariff is a sum of money charged when a good is imported into the tariffing country.[43] It is often ad valorem, meaning that the tariff equals a percentage of the value of the good at the time of import.[44] A tariff might also equal a set charge per unit of good imposed, such as a fee charged per pound of sugar or barrel of oil imported.[45]

In trade law, tariffs are usually analyzed not as indirect taxes, but rather as regulatory trade restrictions, alongside quotas, embargos, and license fees. Trade law theory does not necessarily approve of trade restrictions. A leading view is that the first-best result would be a free trade regime, meaning the absence of all trade restrictions.[46] From an economic efficiency standpoint, free trade is a first-best outcome because it would generate the most overall welfare, as a result of different countries' different competitive advantages in producing different goods.

To illustrate the potential of tariffs to interfere with free trade, consider the tariffs imposed by Britain on the American colonies. During the eighteenth century, British tax revenue increased rapidly, by about eight times, and its mix shifted away from land and property taxes and toward excise taxes and import and export duties.[47] Some of these duties were import tariffs

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[41] See Lawrence J. Liu, Opening the Tariff Toolkit: The Demand for U.S. Administrative Trade Remedies, 101 N.Y.U. L. Rev. 520 (2026).
[42] See infra (re VERs)
[43] See, e.g., Chad Squitieri, The President's Authority to Impose Tariffs, 12 Harv. J. L. & Pub. Pol'y Per Curiam 1, 3 (2025) (defining a tariff as a "financial imposition" charged on importation).
[44] See, e.g., Learning Resources, Inc. v. Trump, 146 S. Ct. 628 (2026) (describing ad valorem tariffs imposed in 2025, such as the universal 10% tariff).
[45] See, e.g., Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 555 (1976) (describing "license fees" of $2 or $3 per barrel of oil).
[46] See, e.g., Alan O. Sykes, Comparative Advantage and the Normative Economics of International Trade Policy, 1 J. Int'l Econ. L. 49 (1998) (explaining the welfare gains that result from comparative advantage and world trade as a clear Kaldor-Hicks efficiency increase).
[47] See Max M. Edling, A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State 49-53 (2003) (noting the "growth of the extractive capacity of the eighteenth-century British state").

that raised prices on goods colonists had to buy from Great Britain.[48] Others were export tariffs that coupled with bans on exports to jurisdictions other than Britain.[49]

Tariffs are theoretically economically equivalent to quotas, meaning trade restrictions that limit the amount of imported goods. That is, under the standard small-open-economy assumption,[50] a quota and an economically equivalent tariff produce the same results for consumers and consumers. Both increase consumer prices for the affected good—a tariff directly, and a quota by restricting foreign supply. Both decrease foreign supply of the good—a quota directly, and a tariff because consumer demand decreases for a good whose price increased. Both increase domestic supply, in both cases because more domestic producers can make a profit at the increased price at which the good now trades.[51]

However, quotas and tariffs differ in that only tariffs produce government revenue. When a quota is imposed, the government does not collect the tariff-equivalent portion of the increase in price the quota produces. Instead, that amount, called "quota rent," is collected by foreign exporters. Quota rent is allocated among foreign exporters via allocation mechanisms that range from market-driven, such as private cartels, to precise regulation by the foreign, exporting jurisdiction.[52] That is, a quota and a small-open-economy tariff produce exactly the same results except that under a quota, consumers in effect transfer a portion of the higher prices they must pay to foreign exporters, while under a tariff, the increases in price that consumers must pay are transferred as revenue to the tariffing government.[53]

Tariffs generally occupy the place of least-bad solution in trade law theory. Because of their interference with free trade, tariffs, quotas, and other trade restrictions generally occupy the place

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[48] See Dickinson, Letter from Pennsylvania Farmer II (1768) (criticizing Stamp Act import duties designed not to regulate but to raise revenue from the colonies); See Edling, supra note 47, at 52-53 (arguing that the House of Commons enacted tax policies that burdened consumer interests that were underrepresented in the legislature).
[49] This forced colonial exporters to bear the burden of tariffs, which conforms to the "optimal tariff" theory that a tariffing jurisdiction with sufficient pricing power may force foreign exporters, rather than domestic consumers, to bear the economic burden of tariffs. See Sykes (book). See Thomas Jefferson, A Summary View of the Rights of British America [121-35] (1774) (noting "the duties they impose on our articles of export and import" and "[t]hat these acts prohibit us from carrying in quest of other purchasers the surplus of our tobaccoes remaining after the consumption of Great Britain is supplied: so that we must leave them with the British merchant for whatever he will please to allow us, to be by him reshipped to foreign markets, where he will reap the benefits of making sale of them for full value").
[50] Such an economy is a price-taking economy, open to trade and not large enough to affect the world price of goods.
[51] Alan O. Sykes, The Law and Economics of International Trade Agreements 152-55 (2023) (explaining tariff-quota equivalence).
[52] See Tom Campbell, Presidential Authority to Impose Tariffs, 83 La. L. Rev. 595, 603-04 (2023) (explaining that a quantitative restriction like a quota "offers the possibility of gain" to foreign exporters through price increases and that quotas therefore function like bargaining chips that non-U.S. countries may readily agree to).
[53] See Sykes at 153 (defining quota rent as theoretically equal to tariff revenue). For both the quota law and the tariff law, the illustration assumes open-economy facts, meaning that the country that imposes the tariffs is a price-taking country whose consumers pay the price determined by the global market for goods. The lower price of the imports reduces the market price that consumers will pay for both imported and home-manufactured goods in the home market. See id. (explaining small open economy and world price assumptions).

of second-best solutions in trade law theory. But tariffs are thought to be least bad because they are less complicated, more transparent, and more predictable.[54]

Sometimes presidents have more power to impose a quota as opposed to a tariff. This could be because of the text of a trade statute.[55] It could also be because the carrot of quota rent can persuade a foreign jurisdiction to voluntarily impose a quota, in an act that falls outside the power of Congress to limit or restrain.[56] For instance, President Carter used voluntary export restraint ("VER") quotas in the 1980s to limit various imports from a number of countries, including steel, electronics, and automobiles from Japan.[57] Because VERs offered windfall quota rent to foreign exporters, foreign governments preferred them to an equivalent tariff. Because VERs technically involved the foreign government's voluntary adoption of an export restriction, the President preferred them to trade lawmaking that might have required congressional approval.[58]

C. Defining Taxes

A very broad definition of taxes applies for purposes of the Taxing Power clause, though a somewhat narrower one is functionally used by Congress and tax analysts when considering tax law and policy. For purposes of the Taxing Power Clause, the Supreme Court has defined a tax as "an enforced contribution to provide for the support of government."[59] Criminal penalties are the main category of payments to government excluded from this broad definition.[60] A payment to government that also has a regulatory function still counts as a tax for purposes of the clause.[61] This is exemplified by the Supreme Court's decision that the Taxing Power Clause authorized Congress to offer taxpayers income tax credits for buying health insurance under the Affordable Care Act.[62]

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[54] See, e.g., Kevin C. Kennedy, The GATT-WTO System at Fifty, 16 Wisc. Int'l L. J. 421, 426-27 (1997) (explaining why GATT prohibits non-tariff barriers and endeavors to direct negotiation to tariff levels); Mavroidis or Jackson.
[55] See Learning Resources, Inc. v. Trump, 146 S. Ct. 628, 696-99 (2026) (Kavanaugh, J., dissenting) (comparing the President's acknowledged power to "block all imports or limit their quantity" to the "lesser power of imposing monetary exactions like tariffs") (citing Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 561-62 (1976)).
[56] See Campbell, supra note __,at 604-05 (explaining that quotas offer gain to foreign exporters and that it is more squarely within the president's diplomatic role to consider how to allocate these benefits than it is to impose a tariff).
[57] Jackson, Louis & Matsushita, Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules, 81 Mich. L. Rev. 267, 313-15 (1982); see also Boonekamp, Voluntary Export Restraints, Fin. & Dev'mt 1, 3-4 (Dec. 1987) (listing 32 VERs).
[58] See Jackson, Louis, & Matsushita, supra note __ at 348-49 (explaining that the "fast track" congressional approval process under the Trade Act of 1974 did not apply).
[59] United States v. La Franca, 282 U.S. 568, 572 (1931).
[60] Drexel Furniture, 259 U.S. at 38 (1922) (invalidating as beyond the authority of the Taxing Power Clause a tax equal to 10% of a company's net income on employers of children).
[61] Cf. Gibbons v. Ogden
[62] See NFIB v. Sebelius, 567 U.S. 519, 563-575 (2012) (focusing on the difference between taxes and penalties for unlawful action and acknowledging that the Taxing Power Clause authorizes Congress to require compulsory payments such as license fees). Sebelius illustrates that the breadth of the Taxing Power Clause translates to broad congressional authority. Following Learning Resources, some district court decisions advance the converse of this idea, and hold that certain fees imposed by Executive Order are unlawful because they are taxes unauthorized by

A tariff is clearly a tax for purposes of the Taxing Power Clause. Specifically, a tariff is an indirect tax. A tariff's incidence—the identity of the person who bears the economic burden of the tax—is deliberately separated from the obligation to pay the tax.[63] Economic theory[64] and empirical analysis[65] tell us that consumers usually bear the economic burden of tariffs, but consumers do not have the legal liability to pay them. Instead, the importer has the legal liability to pay tariffs[66] and manage any disputes or reliquidation and refund requests with the government.[67]

Tariffs are far from an ideal form of indirect consumption tax, such as a broad-based value-added tax imposed on all goods and services.[68] Tariffs are imposed only on goods and not on services. They are imposed only on foreign imported goods and not on domestically produced goods. They are imposed only on some foreign imported goods. They are imposed at different rates. And they are often applied at multiple points along a supply chain, causing a cascading effect that in effect increases the burden of the tax for businesses that are not vertically integrated.[69] Some economists estimate that the deadweight loss or excess burden of U.S. tariffs imposed in 2026 equals one-third of revenues raised.[70]

Tariffs also do not fit the idea of Pigouvian taxation, which provides tax policy's main mechanism for evaluating consumption taxes on a narrow base. Some Pigouvian taxes are known

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Congress. See, e.g., California v. Mullin, 1:25-cv-13829-LTS (D. Mass. June 8, 2026) (slip op. at 18-19) (holding that a $100,000 fee imposed by Executive Order as a charge for H1B work visas and collected by DHS is an unlawful tax), stay denied (1st Cir. July 24, 2026).

[63] See Pasquale Pistone et al., Fundamentals of Indirect Taxation 5-6 (4th ed. 2026) (noting that indirect taxation generally separates legal liability from economic burden).

[64] See Alan Sykes, The Law and Economics of International Trade Agreements18-20 (2023) (explaining why consumer prices increase by the amount of a tariff in the small open economy case).

[65] See, e.g., State of U.S. Tariffs: July 24, 2026, Budget Lab (July 24, 2026) (estimating consumer price impact of tariff policy), https://budgetlab.yale.edu/research/state-us-tariffs.

[66] See 19 U.S.C. §§ 1484(a), 1505(a); see also 19 C.F.R. § 141.1(b).

[67] See 19 U.S.C. § 1514(c)(2); 28 U.S.C. § 2631(a). It is possible, however, for a non-importer to challenge the lawfulness of a tariff, as happened in Learning Resources. Regarding tariff refunds generally, see Susan Morse and Diane Ring, Refunding the IEEPA Tariffs (draft 2026).

[68] France imposed the first value-added tax in 1954. Since then, VATs have spread rapidly. Every country in the OECD except for the United States imposes a VAT. The International Monetary Fund (IMF) has advanced the implementation of the VAT worldwide, often adding the condition of VAT imposition as a requirement before a nation can obtain IMF loans.Michael Keen, Jean-Paul Bodin, and Victoria P. Summers, The Modern VAT (2001).

[69] There are some measures, such as the "drawback" mechanism, in U.S. tariff law that aim to mitigate cascading, but these are not broadly effective. In contrast, VAT design takes great pains to avoid such a cascading effect. In its ideal form, the value-added tax also leverages the advantage of large institutions as third-party tax withholding agents while ensuring that items of consumption are taxed only once. For instance, when a good enters a country, the importer pays an amount equal to the VAT rate multiplied by the value of the import. When the importer sells it to the next step in a supply chain, say to a distributor, the distributor in effect pays an amount equal to the VAT rate multiplied by the incremental value in the distributor price over the import price. When the distributor sells to a consumer, the amount due equals the VAT rate multiplied by the incremental value in the retail price over the distributor price.

[70] See, e.g., Kimberly Clausing & Maurice Obstfeld, Tariffs as Fiscal Policy (forthcoming NTJ 2026) (criticizing tariffs as poor public finance instruments and claiming that "efficiency losses would approach one-third of revenues raised).

as sin taxes; they have been proposed or enacted on a broad range of goods such as "carbon, gasoline, fat, sugar, guns, cigarettes, alcohol, traffic, zoning, executive pay, and financial transactions."[71] The killing-two-birds-with-one-stone idea of Pigouvian taxes is to raise some revenue while discouraging an unwanted activity. Tariffs do not fit this mold.[72] Although tariffs push down the supply of imports of a certain good, that is not because the good more generally is unwanted. Rather, the idea typically is to encourage domestic, not foreign, production of a desirable good. The idea is not that we want less steel, but rather that we want less imported steel and more domestic steel.

Even though tariffs are taxes within the broad definition offered by the Taxing Power Clause, tariffs generally are not treated as taxes by tax law and policy analysis. Instead, tax law and policy functionally operates within a narrower ambit, for a subset of the laws that would be recognized as taxes under the Taxing Power Clause. Consider the OECD's definition of a tax as "a compulsory, unrequited payment to *general* government."[73] The addition of the idea of "general" support conveys the underlying mission of tax law and policy, which is public finance. Tax theory, unlike tariff theory, does not primarily aim to regulate behavior. It primarily aims to pay for "a civilized society"[74]—or, at least, for government.

The Origination Clause, rather than the Taxing Power Clause, comes closer to articulating the payments for general government support that are relevant functionally for tax law and policy. The Origination Clause, which requires that bills "for raising Revenue" begin in the House,[75] is weak as a constitutional constraint. Nevertheless, Origination Clause precedent describes the idea that sufficiently specific regulatory statutes are not revenue-raising taxes imposed to support general government.[76] For instance, even though the Supreme Court held that the Taxing Power Clause authorized the Affordable Care Act, the D.C. Circuit contemporaneously held that the Origination Clause did not apply to the statute, because it was a more specific regulatory statute whose purpose was to incentivize taxpayers to obtain health care coverage.[77] The Supreme Court similarly has held that government charges to establish a national currency,[78] pay for railroad

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[71] See, e.g., Victor Fleischer, Curb Your Enthusiasm for Pigouvian Taxes, 68 Vand. L. Rev. 1673 (2015).
[72] Avi-Yonah
[73] OECD, cited in Keen/Slemrod (emphasis added)
[74] Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 271 U.S. 655, __ (1927) (Holmes, J., dissenting).
[75] U.S. Const. Art. I, § 7, cl. 1.
[76] That is, even though the Origination Clause is not a strong constitutional constraint, it has generated precedent that illustrates the functional boundaries of tax law and policy. See Susan C. Morse, Shu-Yi Oei, and Diane M. Ring, The Origination Clause and the President's Tariffs, 103 Wash. U. L. Rev. 1897 (2026).
[77] See Sissel v. U.S. Dep't Health & Human Servs., 799 F.3d 1035, 1044-49 (D.C. Cir. 2015) (holding that the ACA did not violate the Origination Clause even if it should be treated as originating in the Senate due to the "gut-and-replace" amendment of a shell bill introduced in the House). Then-Judge Brett Kavanaugh dissented. He argued that the enrolled bill rule, which respects congressional procedure, would have provided a better ground for decision and that the House shell bill then subjected to a gut-and-replace amendment by the Senate to produce the Affordable Care Act should be treated as originating in the House for purposes of the Origination Clause. See id. at 1044-49 (Kavanaugh, J., dissenting).
[78] See Twin City Bank v. Nebeker, 167 U.S. 196, 202-03 (1897).

construction,[79] and support a crime victims' fund[80] were for specific purposes, not general purposes, and thus did not "rais[e] Revenue."

The idea that taxes are about revenue-raising and not regulation aligns with the commitment of the founders of the U.S. income tax to broad-basd income taxation. Henry Simons, an "intellectual architect of the income tax,"[81] sought to avoid the "selective economic regulation" unavoidable with tariffs, both to pursue progressivity and to promote a free market.[82] Stanley Surrey insisted that the revenue-raising mission of tax should predominate and called on tax analysts generally to resist the use of the tax code for other purposes.[83] Surrey's legacy includes the annual congressional practice of itemizing the federal budget cost of hundreds of tax expenditure items, which, roughly, mean to regulate rather than to raise revenue.[84] The problem of the proper ideal income tax baseline against which to measure tax expenditure departures is, perhaps, insoluble.[85] But the idea that the indispensable and irreducible goal of tax is to raise revenue remains a widely held and foundational idea for tax law analysis.

Public finance economics also accepts the premise that revenue is the sine qua non of tax. In contrast to trade economists, public finance economists start with the goal of raising revenue for the government and ask what taxes would accomplish that goal most efficiently. Often this goal is stated through a budget constraint—that is, the assumption that the chosen tax must raise a certain amount of revenue.[86] Optimal tax economic theory operates within a closed system, aims at a budget constraint, acknowledges that persons within the taxing jurisdiction will bear the tax, and seeks to minimize the deadweight loss or economic efficiency cost produced by the tax.[87]

II. Tariffs, Taxes, and Separation of Powers

As discussed in this Part II, tariff law and tax law manages separation of powers concerns differently. Tax and tariff statutes have different statutory styles, executive branch delegations, and standards for judicial review. For the income tax law—which has been the core concern of tax law and policy for a century--Congress exercises the taxing power with a specific set of

[79] See Millard v. Roberts, 202 U.S. 429, 435-37 (1906).
[80] See Munoz-Flores v. United States, 495 U.S. 385, 397-400 (1990).
[81] Daniel Shaviro, The Forgotten Henry Simons, 41 Fla. St. U. L. Rev. 1, 3 (2013)
[82] Shaviro 24
[83] Surrey/McDaniel
[84] Re tax expenditures
[85] Boris J. Bittker, Accounting for Federal "Tax Subsidies" in the National Budget, 22 Nat'l Tax J. 244 (1969).
[86] See, e.g., Daniel Hemel & David Weisbach, The Behavioral Elasticity of Tax Revenue, 13 J. Leg. Analysis, 381 (2021) (proposing a metric for choosing among different tax policies with the understanding that some amount of tax revenue would need to be raised).
[87] See, e.g., Louis Kaplow, The Theory of Taxation and Public Economics (2008). Optimal tax theory is entirely separate from the theory of optimal tariffs, which posits that a large tariffing jurisdiction with a monopsony, or in other words the market power to set prices, might be able to impose a tariff the burden of which would fall entirely on foreign importers.

mostly ex ante legislative tools designed to raise revenue (although they may also have regulatory effects).

In contrast, Congress has approached tariff law as trade law for the last century. Tariff statutes primarily aim to regulate, rather than to raise revenue; and feature general instructions to the executive branch, and often directly the President, to regulate ex post, for instance by changing tariff rates and base. Tariff delegations are directed to several places within the executive branch, coordinated by the managerial U.S. Trade Representative role, and subject to more deferential judicial review, including because of patchy application of the Administrative Procedure Act and the major questions doctrine.

A. Statutory Style

Since at least the 1930s, tariff statutes have contained more general directions and tax statutes have been more specific.[88] As many scholars have observed, legal provisions often fall along a continuum between standards and rules, where rules answer more questions ex ante and standards leave more questions open for later, ex post decisionmakers to answer.[89] Modern tariff statutes are more like standards, while modern tax statutes are more like rules.

Many other scholars have discussed the excruciating detail of modern income tax law, so we will mention it only briefly here. []

Tariff statutes used to resemble modern income tax law in their detail. From the founding through the 1930s, Congress faced a fundamental regional tension, between Northern manufacturing interests that preferred higher tariffs and Southern agricultural interests that preferred lower tariffs.[90] Members of Congress struggled for power over tariff law and produced highly negotiated and minutely detailed statutes, for instance specifying specific tariff rates for different types of sugar or different types of tea.[91]

Near the start of the twentieth century, some tariff statute provisions began to include broad delegation to the President,[92] and tariff statutes shifted to produce their modern structure. They include measures designed to cabin delegation ex post, for instance by providing a prerequisite before tariff authority can be exercised, a process through which the authority must be exercised by certain delegates within the executive branch, and/or limits on the level and duration of the tariff as well as on the duration of the authority, effected for instance through sunset provisions.

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[88] See Conor Clarke & Ari Glogower, Tariffs and the Taxing Power: Historical Lessons for Major Questions and Nondelegation, 103 Wash. L. Rev. 1867-68, 1887 (2026) (noting the specificity of early external taxation statutes authorizing tariffs and the general language of early internal taxes, such as direct taxes subject to apportionment).

[89] Kaplow, Schauer, Sullivan

[90] Irwin 7-8

[91] See Jennifer Mascott, Early Customs Laws and Delegation, 87 Geo. Wash. L. Rev. 1388, 1401 (2018) (giving examples of tariff statute detail).

[92] See Claussen & Meyer, Foreign Commerce Power (as they trace this including before the McKinley tariff); see also Clarke & Glogower, supra note __at 1883 (noting concerns that "logrolling and special-interest capture" produced "distorted" legislated tariff schedules).

The Supreme Court has confirmed the constitutional ability of Congress, despite the nondelegation doctrine, to use broad and general language in tariff statutes.[93]

The "reciprocity movement" of the 1880s and 1890s pushed additional delegation of tariff power to the President. It advanced the argument that some tariff policy moves would be win-win deals, desirable for all factions. For instance, it would not hurt U.S. business interests to offer low tariffs on "tropical goods" that lacked competing domestic producers, especially if trading countries, for instance in Latin America, would in exchange reduce their tariffs on U.S. manufactured and agricultural goods.[94] One result was that the McKinley Tariff of 1890.[95] This statute not only increased tariffs on dutiable imports by about four percentage points,[96] but also contained a "sea change" delegation to the President.[97] The statute allowed the President to rescind statutory tariff exemptions on goods with relatively little domestic production, including coffee and sugar, if he found that certain countries imposed "unequal and unreasonable" duties on exports received from the U.S.[98] He acted through the State Department and struck at least ten deals.[99]

In *Field v. Clark*,[100] the Supreme Court upheld the McKinley tariff statute against a challenge from U.S. merchants, who claimed that it was unconstitutional for Congress to give the President

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[93] Some Justices have advocated a revival of the nondelegation doctrine, in particular arguing in favor of stricter nondelegation limits for tax. Justice Neil Gorsuch, joined by Justice Samuel Alito and Justice Clarence Thomas, so wrote in his dissent from the Court's F.C.C. v. Consumers' Research decision. FCC v. Consumers' Res. (Gorsuch, J., dissenting). But, curiously, Justice Clarence Thomas goes in the opposite direction when it comes to tariffs. In his Learning Resources dissent, Justice Thomas argues that the power to tariff may be delegated even if the power to tax cannot be, because of the status of a tariff as an "external" tax that relates to foreign affairs and national security. Justice Clarence Thomas advanced a due process analysis of tariffs in his Learning Resources dissent. He See Learning Res. at 682 (Thomas, J., dissenting) (arguing that the historic insistence on legislative approval for taxes does not extend to external revenue with the same force because importation is not a core private right) (citing Nelson, 107 Colum. L. Rev., at 580). [This distinction does not hold up to scrutiny. The income tax is internal, but not all income tax provisions burden core private rights. Transactions predicated on government regulatory regimes, such as the sale of an FCC broadcast license, provide one example. Others include the taxation of punitive damages (compare Gore (due process constrains imposition of punitive damages), treasure trove (note Crown's right to treasure), and emotional distress (Murphy). Perhaps one could argue that the Thomas external revenue argument connects to optimal tariffs, and that the argument suggests that these do not present a due process issue because they produce no deprivation of private property within the tariffing country, and that the Founders failed to carve optimal tariffs out of Article I under the assumption that any tariff the United States might impose could not be optimal, because at the founding the United States lacked the economy power to set prices. But even if this is plausible, Article I does not treat optimal tariffs or external revenue differently.]

[94] Irwin 303

[95] Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567.

[96] See Irwin, supra note __, at 263-69 (giving history of adoption of the McKinley tariff).

[97] See Oona A. Hathaway, Treaties' End: The Past, Present, and Future of International Lawmaking in the United States, 117 Yale L.J. 1236, 1294-95 (2008) (noting the lack of any required congressional approval as a "sea change in lawmaking authority").

[98] Field v. Clark, 143 U.S. 649, 681 (U.S. 1892).

[99] Hathaway/Hathaway &Eichensehr. Ten executive agreements were reached under this delegated power in the McKinley tariff. For instance, in negotiations with Brazil, the United States conditioned continuing duty-free treatment of coffee and other goods on Brazil's elimination of duties on U.S. goods such as wheat, pork, and farm equipment. See Irwin, supra note __, at 303-05.

[100] 143 U.S. 649 (U.S. 1892).

"legislative" authority to rescind exemptions in response to "unequal and unreasonable" duties. The merchants aimed to persuade the Court to invalidate the statute as a whole under the theory that the delegation violated constitutional separation-of-powers requirements.[101] The Supreme Court acknowledged the existence of a constitutional non-delegation doctrine that limited legislative power that could be delegated to the executive branch,[102] but held the statute constitutional. The Court's decision highlighted tariffs' foreign affairs. A key precedent was *The Aurora*,[103] which held constitutional an 1809 delegation to the President to reverse an embargo on trade with Britain and France.[104] It was and always had been constitutional, concluded the Court, for Congress to "invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations."[105]

Thirty years later, and less than a decade before the only two Supreme Court decisions to invalidate statutes on nondelegation grounds,[106] the Court upheld another broad tariff statute delegation, in *J.W. Hampton*. This case established the "intelligible principle" standard that still frames nondelegation analysis today.[107] The statute at issue authorized certain tariff increases for "differences in costs of production in the United States and the principal competing country."[108] Especially given the flexibility of considerations that could inform a decision about disproportionate costs of production,[109] the delegation was broad. But the *J.W. Hampton* Court concluded that the statute made "perfectly clear and perfectly intelligible" what Congress "intended:" to set duty rates to as to "enable domestic producers to compete on terms of equality for foreign producers in the markets of the United States."[110] In contrast to *Field*, the *J.W. Hampton* opinion focused less on foreign affairs and more on regulation, and on intervening cases that had upheld delegations to nascent administrative agencies.[111] The Interstate Commerce

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[101] Field v. Clark, 143 U.S. 649, 681 (U.S. 1892).
[102] See Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379 (2017) (giving history of nondelegation cases); see also Jason Iuliano & Keith E. Whittington, The Nondelegation Doctrine: Alive and Well, 93 Notre Dame L. Rev. 619 (2018); Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231 (1994).
[103] The Aurora, 7 Cranch 382 (1813) ([holding lawful the statute based on the predicate that the President found Britain or France changed their "edicts" and thereby "cease[d] to violate the neutral commerce of the United States"]).
[104] Non-Intercourse Act of March 1, 1809, c. 24, §§ 4, 11. Other examples included a 1794 act authorizing the President to impose an embargo, an 1815 act authorizing the President to revoke a discriminating duty if he was satisfied that a foreign nation had abolished countervailing duties, and an 1884 act authorizing the President to suspend the collection of tonnage duties on vessels from any North American port that exceeded similar duties reciprocally imposed on American vessels. 683-89. The dissent pointed out that none of these had been reviewed by the Supreme Court. 700
[105] 691
[106] See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp., 295 U.S. 495 (1935).
[107] FCC v Consumers Research
[108] Tariff Act of 1922, title 3, section 315.
[109] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 403 (1928) (noting that considerations could include wages, material costs, differences in wholesale prices, government subsidies, and "any other advantages or disadvantages in competition").
[110] 404 (noting that the Tariff Commission—the independent agency created by Congress in 1916 had found that the tariff on barium dioxide did not equalize costs of production with respect to Germany).
[111] Whittington/Iuliano

Commission provided the key example, as the Court analogized the setting of tariffs to the setting of rates for railroads and other interstate carriers.[112] The unanimous decision concluded that the delegation to the President to "obtai[n] needed data" (which might change over time)[113] and act accordingly was constitutional because it gave an "intelligible principle."[114]

The trend of delegated executive tariff power continued in the landmark Reciprocal Trade Agreements Act of 1934 (RTAA), passed by a Democratic Congress during Franklin Roosevelt's first term.[115] It gave the President three years of authority, subject only to a notice-and-comment requirement, to enter into executive agreements that reduced import duties by up to 50 percent. In one version of the story of the passage of the RTAA, it resulted from wise legislators giving up the tariff power to save themselves from the risk of industry capture.[116] In another version of the story, it was motivated by the goal of promoting U.S. exports held by Western as well as Southern agrarian interests, whose business would benefit from more exports and less retaliation from other nations against high-tariff U.S. policies.[117] Under this latter theory, interest groups continued to motivate U.S. tariff policy, but through the executive branch rather than Congress.

Other statutory authorizations to negotiate tariff reductions followed, and supported the development of the multinational General Agreement on Tariffs and Trade in 1947, the establishment of the World Trade Organization in 1995,[118] and the initiation of bilateral and

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[112] 407-09

[113] 404-05

[114] 409. See also United States v. George S. Bush & Co., 310 U.S. 371 (1941) (reversing lower court decision and concluding that the President could apply an unrepresentative exchange rate to translate costs of production and support the imposition of a tariff on canned clams from Japan).

[115] Irwin 429-432

[116] See I.M. Destler, American Trade Politics 14-17 (4th ed. 2005) (explaining Secretary of State Cordell Hull's argument that delegation to the President would reduce interest group influence in trade policy).

[117] See Jide O. Nzelibe, The Illusion of the Free-Trade Constitution, 19 N.Y.U. J. Legis. & Pub. Pol'y 1, 10-11 (2016)fi (arguing that certain interest groups endorsed the reciprocity movement for traditional reasons for favoring lower tariffs).

[118] For the statutory exceptions listed above, there exist parallel exceptions in the international agreements that relate to tariffs and trade. The Article I keystone of the General Agreement on Tariffs and Trade requires all signatories to offer "most favored nation" status to each other, meaning that each nation will offer the lowest tariff rate negotiated with any member to every other member. If this MFN clause applied strictly and absolutely, any presidential tariff imposition would automatically violate GATT. But GATT also provides for exceptions, including for free trade areas (as provided in the NAFTA and the USMCA) and for other reasons of overriding national interest, for instance for national security and for unfair trade.

U.S. imposition of tariffs may be authorized by a U.S. statute but not by the related GATT exception, at least as interpreted by the GATT's enforcing body, the World Trade Organization. In the area of national security, for instance, the U.S. interpretation of discretion is broad[118] while the WTO interpretation is narrow.[118] But even when U.S. actions violate GATT, the U.S. in recent years has been able to avoid international sanctions by maneuvering within procedural rules at the WTO. The mechanism, known as "appealing into the void," involves disabling an appellate body at the WTO by refusing to appoint a U.S. representative to that body as the charter requires. When appeal is not possible, WTO rules suspend the effect of any initial sanctioning decision, so that even if another country successfully protested U.S. tariff imposition at the WTO, any sanction would be ineffective.

The appealing into the void tactic helps explain why sanctions have not applied to U.S. income tax benefits for exports enacted in 2017 and 2025. It also may help explain why so few countries have protested U.S. tariff

regional trade agreements. The negotiation of tariff reductions through multilateral negotiations has often occurred under fast-track, or trade promotion authority, which delegates some broad authority but less than that under the RTAA. Under fast-track, Congress typically gives broad discretion to the President to negotiate and Congress also agrees to consider negotiated trade agreement promptly, without invoking the Senate filibuster rule and without offering amendments.[119]

When tariff statutes delegate broad discretion to increase tariffs, they often use the structure of prerequisite, process, and limit to constrain future action.[120] This stands in stark contrast to modern norms of statutory drafting in tax, which try to say everything up front, in detailed, ex ante, rule format. In contrast to the congressional approval required by fast track, provisions that allow the President or executive branch to increase tariffs generally do not require approval from Congress to take effect. Instead, they proceed under statutory exceptions that give significant discretion to the President or to other parts of the executive branch.[121]

Important delegations to increase tariffs include Section 232, which contains a national security exception; and Section 301, which contains an unfair trade exception. Each illustrates tariff statutes' practice of including a prerequisite—a factual standard that must be met before a tariff may be imposed. Section 232 allows tariffs if an "article is being imported into the United States in such quantities or under such circumstances as to threaten or impair the national security."[122] It has been used to impose tariffs on oil and steel, in addition to other recent examples. Section 301 allows tariffs if a foreign country's practice "is unjustifiable and burdens or restricts United States commerce."[123] It has been used to impose tariffs on China in relation to intellectual property misuse and on 60 economies in relation to forced labor regulation, among many recent examples.

These predicates for the exercise of tariffing authority are poster-child ex post standards. They rest on mushy predicate language such as "unequal and unreasonable costs," "circumstances as to threaten or impair the national security," "burdens or restricts United States commerce," or even on no predicate language, as in the case of the RTAA. The ex post standard

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impositions at the WTO. More recently, even if U.S. actions violate GATT, the WTO process is incapable of sanctioning them. Instead of international law constraining the tariff law actions of the executive branch, that task has fallen to the U.S. courts.

[119] Irwin 674

[120] See Kathleen Claussen, Trade's Security Exceptionalism, 72 Stan. L. Rev. 1097 (2020).

[121] A number of other statutes also allow presidential or executive branch tariff increases. See 19 U.S.C. §§ 2251-2255 (providing Section 201 authority to protect domestic industry from import surges); 19 U.S.C. § 2132 (providing Section 122 authority to impose a tariff of up to 15% for up to 150 days to address a balance-of-payments deficit); 19 U.S.C. § 1328 (providing Section 338 authority to impose tariffs of up to 50% if the President finds an action "burdens or discriminates" against U.S., commerce. See Zirpoli, Congressional and Presidential Authority to Impose Import Tariffs, CONG. RES. SERV. (March 19, 2026)

[122] 19 U.S.C. § 1832(b)(3)(A).

[123] 19 U.S.C. § 2411(a)(1)(B)

design transfers authority to determine the content of the law to later decisionmakers—the executive branch and the courts, not Congress. As discussed below, the courts have limited tools to limit executive branch actions, especially if the delegation is to the President, and so the executive branch has been the arbiter of whether factual predicates are met.

Process—which identifies the specific actor within the executive branch to take action, and what action they must or may take--is another common design feature of tariff statutes. Section 232 requires a Department of Commerce report to identify the imports that threaten or impair national security. After that, the President has the responsibility to impose tariffs to address the concern. Section 301 requires the U.S. Trade Representative to both provide a report on the burdensome or restrictive trade practice and to impose the tariffs that result. Other provisions run the process exclusively through the President. These include IEEPA, used to impose the tariffs held unlawful in *Learning Resources*; section 122, used to impose a universal 10% tariff following the *Learning Resources* decision; and Section 338, used to impose tariffs on various Canadian goods in an effort to increase United States leverage during the negotiation of the U.S.-Mexico-Canada trade treaty in 2026.

Limits—including maximum rate changes and maximum durations—are another common design feature of tariff statutes. The RTAA, for instance, authorized President Roosevelt to reduce tariffs by up to 50%. Another example is Section 122, the balance-of-payments statute used by President Trump to impose a 10% universal tariff after the Supreme Court decided *Learning Resources*. Section 122 illustrates two kinds of limits for the power to impose a tariff: a cap and a maximum time period. Under Section 122, the President has the authority to impose a tariff of up to a cap of 15% for a maximum duration of 150 days, to address a balance-of-payments deficit.

Sunset provisions have supplied another common tariff-statute limit.[124] The RTAA is the classic example—its authority lasted for only three years, then was renewed over the next few decades over what has been called the [RTAA era]. Fast track authority, too, is often limited by sunset provisions.

B. Executive Branch Players

When Congress delegates taxing power, its statutes name different elements within the executive branch to receive that power. Tax statutes take a streamlined approach, and delegate nearly everything to the Treasury Department. Tariff statutes name a cast of different delegates, including the President directly, and coordinate these delegates' action through the office of the U.S. Trade Representative.

[124] Some suggest expanded use, e.g. Anderson (2018), Goitein (2020), Goldsmith (2015)

1. Tax delegations

The income tax code gives the Treasury Secretary the power to make "all needful rules and regulations for the enforcement of this title."[125] Specific income tax provisions also specifically delegate regulatory authority to the Treasury. In turn, the practice of the Treasury Department (and its subagency, the Internal Revenue Service) is to carefully follow detailed congressional statutes. In a typical rulemaking project, Treasury uses notice-and-comment procedure, starting with proposed regulations and a notice of proposed rulemaking, followed by notice-and-comment, followed by the promulgation of final regulations.[126] The explanations that accompany tax regulations narrate Treasury's careful consideration of the statutes.

A more detailed picture of Treasury rulemaking emerges from a case study of recent regulations promulgated under IRC Section 199A in after the 2017 tax act. It shows how faithful Treasury tax regulation drafters are to the statute. It also demonstrates the influence of interest groups, whose meetings with Treasury influence the first proposed regulation draft, before the official notice-and-comment period. But the interest groups, like the Treasury, must work within the detailed text of the statute.[127]

The attachment of Treasury to statutory language is so strong that even when it is clear that the statute has made a mistake, the longtime historic practice has been to request a technical corrections statute from Congress.[128]

A caveat is that Treasury sometimes stretches statutory language when its rule or guidance favors taxpayers. In general, no one suffers a specific injury as a result of an administrative giveaway to specific taxpayers, since the affected taxpayers are helped, not hurt, and no one else experiences a specific consequence. As a result, there is a general lack of standing to challenge pro-taxpayer guidance. But given the success of taxpayers who challenge restrictive guidance for failing to faithfully execute the statute's text, this state of affairs for pro-taxpayer guidance seems not to undermine the general point that Treasury sticks to the statutory text.

As Andrew Larson and William Foster have shown, the tax law rarely directly delegates authority to the President or executive branch to make executive determinations that change tax law outcomes. Rare examples of executive determination are clustered in certain specific subject areas, including disaster declarations and trade and foreign relations.[129] For instance, when the

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[125] I.R.C. § 7805.
[126] Kristin E. Hickman, Administering the Tax System We Have, 63 Duke L. J. 1717, 1739 (2014) (explaining Treasury's rulemaking approach).
[127] Shu-Yi Oei & Leigh Osofsky, Legislation and Comment: The Making of the § 199A Regulations, 69 Emory L. J. 209 (2019).
[128] Leigh Osofsky, Agency Legislative Fixes, 105 Iowa L. Rev. 2107 (2020); Mollie Wagoner, Technically Important: The Essential Role of Technical Corrections and How Congress Can Revive Them, 106 Minn. L. Rev. 2543 (2022).
[129] See, e.g., Andrew L. Larson & William E. Foster, Presidential Tax Discretion, 73 Alabama L. Rev. __. 294-300 (listing, with respect to disaster declaration authority, consequences in several locations in the code including the allowance of deductible personal casualty losses under Section 163). See also id. (noting that tax consequences such

President lists a government or an organization as a terrorist organization, certain tax benefits, including foreign tax credits as provided by Section 901(j), are withdrawn.[130] The Treasury Department lists penalized governments quarterly,[131] but little revenue loss results from these provisions.[132]

The President theoretically can control indirectly both general and specific regulatory authority at Treasury, for instance through his power to hire and fire Treasury officials and employees.[133] But as a practical matter the President exercises little of the authority.[134] Indeed, Treasury does not always exercise authority delegated to it by statute delegations; instead, it often leaves specific delegations unused and instead requests legislative change to fix a perceived problem.[135] As Daniel Hemel has shown, Treasury sometimes requests a legislative fix to a problem that was created by a Treasury regulation or other guidance, instead of changing the regulation itself through an executive branch process.[136] Possible reasons include a preference for sharing the blame for the tax increase with Congress and/or a preference for reserving the revenue pay-for for a statute so that Congress can claim that benefit in the PAYGO process.

2. Tariff delegations

As described above in Part II.A, statutes delegate broad tariff power to the executive branch, including to the President. Why is executive branch discretion considered important in tariff law? There are at least two possible rationales: expertise and foreign affairs. Expertise does not necessarily distinguish tariff law from income tax law in terms of the advisability of delegation to the executive branch—but foreign affairs does.

The advantage of expertise over legislative negotiation provides one historic rationale for delegating the making of tariff law to the executive branch. This view holds that during the twentieth century, the President and the executive branch successfully pursued the theoretical

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as preferential tax treatment for combat pay lie within the control of the President through his ability to designate combat zones).

[130] See I.R.C. § 901(j) (disallowing foreign tax credit for taxes imposed by a foreign government not recognized or designated as providing support for terrorism). See also Ashley Deeks & Andrew Hayashi, Tax Law as Foreign Policy, 170 U. Pa. L. Rev. 275 310-12 (2022) (explaining Section 901(j) sanction, adding that income from a controlled foreign corporation in a designated country is deemed to be currently included in a U.S. shareholder's income, and noting that similar sanctions apply for taxpayers listed as cooperating in a foreign country's unsanctioned boycott under I.R.C. § 999).

[131] Treasury quarterly announcement re: unsanctioned boycott countries under Section 999 and terrorist-supporting countries under Section 901(j).

[132] Annual revenue loss from these provisions is on the order of [$10-20 million], which is less than one-thousandth of one percent of annual federal tax revenue. See Deeks & Hayashi, supra note __, at 312.

[133] Supreme Court cases have continued to confirm this authority. See, e.g. . See also Hemel, supra note __, at ___ (describing the structure of Treasury Department appointments controlled by the President).

[134] Recent examples such as interfering with IRS enforcement notwithstanding.

[135] See Hemel, supra note __, at 667-69 (recounting presidential requests to change the inventory lower-of-cost-or-market accounting method via legislation, rather than changing it via regulation).

[136] See Hemel, supra note __, at 658-65 (recounting proposed legislative fixes for capital gain treatment for investment fund carried interest, a situation caused by an I.R.S. Revenue Procedure; and for the low taxation of multinational "stateless income," a situation caused by the so-called "check-the-box" Treasury Regulations).

ideal of lower tariffs and more free trade thanks to increased delegation.[137] An identical argument can be and has been made on behalf of the income tax law—that the President and the executive branch would better pursue the theoretical ideal of a broad-based income tax that sought to raise revenue efficiently and fairly while minimizing tax expenditure distortions and distractions.[138]

The foreign affairs rationale, though, is different. Trade policy has also long been recognized as a useful tool for the President as he conducts foreign affairs and national security policy. Delegation is important because speed and secrecy may enable an effective response to an international emergency or crisis.[139] If we want some element of the government to be able to respond quickly to a terrorist threat or a run on U.S. gold reserves, the executive branch is it.

The dilemma is classic: How to build in exceptions to ensure that the executive can respond to emergency or crisis, without sacrificing the overall constitutional structure and the power of the legislature within it.[140] Congress could choose to revoke tariff authority altogether in order to maintain its power of the purse, and might, for instance if the executive abused the power and there were no other way to constrain it.[141] But such a revocation would risk that the executive would still claim the ability to impose trade restrictions—certainly quotas, but maybe tariffs, too--in emergencies or crises, but without any acknowledgment of congressional power to legislate or related judicial power to enforce.[142]

Trade policy has also long been recognized as a useful tool for the President as he conducts foreign affairs and national security policy. Tariffs have been used to support armed conflicts.[143] More general economy-protection tariffs have also been presented as emergency measures. President Nixon used an emergency-powers tariff to force other nations off the gold standard.[144] President Ford[145] and President Trump[146] used national-security-exception tariffs to protect the U.S. oil and steel industries, respectively. Until *Learning Resources*, appellate courts upheld every presidential tariff imposed under the authority of an emergency or national security power.

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[137] Trade law article re expertise not foreign affairs
[138] Hines/Logue
[139] The ideas of "crisis" and "emergency" are distinguishable, but often not distinguished. See, e.g., J.S. Maloy, Beyond Crisis and Emergency: Climate Change as a Political Epic, 38 Ethics & International Affairs 107, 110 (2024) (distinguishing "crisis," "emergency," and "epic" based on their temporal qualities and noting that political theory has not focused on the distinctions).
[140] See, e.g., Sanford Levinson & Jack M. Balkin, Constitutional Dictatorship: Its Dangers and Its Design, 94 Minn. L. Rev. 1789, 1804-05 (2010) (defining "constitutional dictatorship" as allowing "certain individuals or institutions the right to make binding rules…unhindered by timely legal checks to their authority").
[141] See supra re ship money/English civil war
[142] John Ferejohn & Pasquale Pasquino, The Law of the Exception: A Typology of Emergency Powers, 2 Int'l J. Con. Law 210, 212, 218 (2004) (recognizing the problem of "difficult-to-control" executive power and noting the Roman practice of establishing a dictator for a limited period of six months).
[143] Bamzai
[144] Nixon order; Yoshida
[145] Algonquin
[146] Am Institute of Steel

The President's power to impose an emergency quota supports the argument that the President should have the power to impose an emergency tariff. As explained above, tariffs and quotas have an economic equivalence, in that either a tariff or a quota can yield the same impact on producers and consumers. President often have the power to impose quotas under statutes, and even where they do not, their authority to conduct diplomatic relations with other nations gives them the ability to negotiate quotas voluntarily imposed by other countries. President Carter demonstrated this power when he persuaded Japan to impose voluntary export restrictions on televisions and cars in the 1980s. If Presidents lacked the ability to tariff, one result might be more quotas—and there seems to be agreement that tariffs are better than quotas, largely because of their transparency. The consensus is strong enough that GATT bans quotas.

Many early tariff statutes, including the RTAA, delegated authority directly to the President. Initially, the President subdelegated to the State Department his statutory authority to negotiate both bilateral agreements and multilateral, tariff-reducing treaties like the General Agreement on Tariffs and Trade.[147] Later, the job of negotiating trade treaties and monitoring their requirements expanded beyond the capacity of the State Department, not only because of the volume of work, but also because of its content. The Commerce Department, for instance, came to have responsibility for administering trade remedies, including anti-dumping and countervailing duty matters, which make up the large majority of tariff investigations.[148] The Treasury Department housed the enforcement function of Customs and Border Protection.

Over the years, the coordination of different agency functions and the center of trade policy became a separate function, but it still aligned closely with President. In 1962 Congress authorized a special representative for trade,[149] which became the U.S. Trade Representative (USTR) in 1974,[150] located in the Executive Office of the President. USTR responsibilities expanded over the decades to create what Kathleen Claussen has termed a "trade super-agency" that engages in "managerial trade administration."[151] Trade law is said to have a "boundary" issue—in other words, the USTR sees trade law everywhere.[152] Environmental or food safety regulations raise non-tariff barrier issues. Trade treaties often raise issues related to energy production, labor, technology, and many other fields. The USTR's role includes advising many substantive agencies about the trade implications of proposed rules and regulations.

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[147] This delegation of authority typically included the authority for the president to negotiate and effect changes in tariffs. (In contrast, the president often lacked the authority to negotiate and effect changes in non-tariff trade barriers.) See Timothy Meyer and Ganesh Sitamaran, Trade and the Separation of Powers, 107 Calif. L. Rev. 583, 643-44 (2019). In the decades after World War II, under the umbrella of the, the U.S. participated in successive rounds of multiyear, multilateral trade negotiations. This time period saw sharp decreases in tariff revenue collections. Jackson, others on executive activity in GATT rounds

[148] Kathleen Claussen, Trade Administration, 107 Va. L. Rev. 845 (2021).

[149] Trade Expansion Act of 1962

[150] Trade Act of 1974

[151] Kathleen Claussen, Trade Administration, 107 Va. L. Rev. 845, 869 (2021).

[152] Meyer & Sitamaran

In addition to the coordinating function of USTR, specific trade statutes that delegate tariff-increasing power to the executive branch do not uniformly give that power directly to the President. Rather, they establish various roles for different agencies. [Zirpoli]

C. Judicial review

While it is Congress's choice to delegate taxing power and the executive branch's job to exercise that power, it is in part the judiciary's job to police that exercise of power. The premise of this Article is that it is not only the judiciary's job to defend the congressional Taxing Power; that is up to Congress, too. But key tools of judicial review—statutory interpretation, the Administrative Procedure Act, and the major questions doctrine--are part of the framework for consideration of congressional action.[153] Statutory interpretation is available for both tax and tariff law. But the Administrative Procedure Act and the major questions doctrine, while clearly applicable in tax law, are often inapplicable in tariff law, as explained below.

1. Statutory interpretation

In tax law, using statutory interpretation as a tool for constraining executive branch action is a familiar story. Indeed, it is the main story over decades of tax case law precedent. When tax scholars write about judicial review, they generally assume that the question is, how do courts interpret tax statutes? The questions open for debate and analysis keep their focus on the statutory details and relate to modes of analysis—textual or purposivist—for analyzing that object.[154]

Tax analysts also ask whether the approach to statutory interpretation and deference for tax should differ from the approach in other subject areas. For decades, tax had an exceptional approach to statutory interpretation and deference. Throughout most of the *Chevron* era, when courts often deferred to agencies' statutory interpretation, tax cases followed the less-deference *National Muffler* precedent.[155] This test gave more power to courts to substitute their statutory interpretation for that produced by the executive branch.

The *National Muffler* test instructed a court to "see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose." The case named various factors relevant to the inquiry, including the age of the regulation, its correspondence with reliable information about congressional intent, reliance, consistency of interpretation, and congressional attention to the regulation when re-enacting a statute. This test, from a 1979 Supreme Court

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[153] The constitutional nondelegation doctrine is discussed above as an outer boundary on congressional power. Part II.A.

[154] [E.g. Jonathan Choi, The Substantive Canons of Tax Law, 72 Stan. L. Rev. 194 (2020); Jonathan Choi, Beyond Purposivism in Tax Law, 107 Iowa L. Rev. 1439 (2022); Deborah Geier, Interpreting Tax Legislation: The Role of Purpose, 2 Fla. Tax Rev. 492 (1995); Lawrence Zelenak, Thinking About Nonliteral Interpretations of the Internal Revenue Code, 64 N.C. L. Rev. 623 (1986), William D. Popkin, Law-Making Responsibility and Statutory Interpretation, 68 Ind. L. J. 865 (1993); John F. Coverdale, Text as Limit: A Plea for a Decent Respect for the Tax Code, 71 Tul. L. Rev. 1501 (1997)]

[155] National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979).

opinion, is of its time in the sense that it uses "purposive" language as well as "textual" language. Courts today tend more strongly toward a textual approach. But *National Muffler* is clear—clearer than *Chevron* deference—that it is courts' job to interpret statutes.

National Muffler stands in contrast to *Maple Leaf Fish*,[156] a key precedent for deference to executive branch tariff statute interpretations, discussed below. *Maple Leaf Fish* suggests "a limited role" for "reviewing courts."[157] *National Muffler* charges courts to interpret statutes and compare them to regulations. To the extent *National Muffler* contemplates deference to regulations, it does so not out of respect for the executive branch, but rather, for the most part, out of respect for Congress, for instance on the theory that Congress has implicitly approved the regulation by assuming it as background when enacting tax statutes.

A reason to emphasize *National Muffler* in tax statutory interpretation is that it aligns with (though it is not identical to) the Supreme Court's 2024 instruction in *Loper Bright* for courts to substitute their independent judgment for the judgment of agencies when it comes to statutory interpretation. There was a relatively brief period of 13 years when *Chevron* deference applied to tax cases.[158] But with the ending of that period of deference—which in any case might not have been as deferential as *Maple Leaf Fish*—tax law is back to courts having considerable statutory interpretation powers. Review of agencies' statutory interpretations under *Loper Bright* may not be identical to *National Muffler*,[159] but it is likely not far off,[160] and it differs from deferential review of tariff law interpretations.

In tariff law, statutory interpretation became the focus of the Supreme Court in the tariff cases that it heard after holding for the government in the nondelegation case *J.W. Hampton* in 1928. For instance, in 1940, it decided *United States v. George S. Bush & Co.*, a case involving a tariff imposed on canned clams imported from Japan, under a statute that authorized additional duties to equalize costs of production. The statute had a specific provision that authorized the Tariff Commission to consider these costs by evaluating "the weighted average of invoice prices for a representative period." The commission cherrypicked the exchange rate to use to convert Japanese invoice prices, choosing one that would indicate higher Japanese costs of production and that only covered one of the two years in the data set. The Court of Customs and Patent Appeals had held the exchange rate selection unlawful, but the Supreme Court reversed.[161]

In case after tariff case in the decades following *Bush*, both the Supreme Court and the federal appellate courts held that tariffs imposed by the President or by agencies within the executive branch were lawful. In most cases, their decisions turned on the interpretation of

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[156] 762 F.2d 86 (1985).
[157] [Consider factfinding vs. lawmaking as possible distinction? But Maple Leaf Fish seems to go beyond the facts found.]
[158] That is, after *Mayo* and before *Loper Bright*. See Mayo Found. v. United States, 562 U.S. 44 (2011); Hickman article on this period.
[159] See Amandeep Grewal, Tax Regulations After Loper Bright, 2024 Mich. State L. Rev. 1083.
[160] See Blaine G. Saito, Tax Regulations in a Loper Bright Light, 28 Fla. Tax Rev. 530 (2025).
[161] George S. Bush 310 U.S. 271 (1940).

statutory language. The cases considered the permission granted to the executive branch under various provisions in tariff statutes, including prequisites, process, or limits.[162]

For example, the Federal Circuit in *United States v. Yoshida International, Inc.*[163] held that prerequisite language in the Trading With the Enemies Act—which, like IEEPA, provided that the President could "regulate" "importation" in an "emergency"--authorized a universal 10% tariff, imposed for four months in order to encourage other countries to abandon the gold standard and avert a balance-of-payments problem. In 1976, a unanimous Supreme Court examined statutory trigger language in *Federal Energy Administration v. Algonquin SNG, Inc*[164]. The Court held that statutory language of section 232, which allows the President to "adjust" "imports" following the Treasury Secretary's finding of a national security threat, authorized the President to impose a license fee on oil that functioned as a tariff.[165]

Courts have also been deferential to the executive branch where process is concerned, while sticking to the idea that the authority to tariff flows to the President from Congress, rather than from Article II.[166] A leading case is *Maple Leaf Fish Co. v. United States*, decided in 1985.[167] There, the Federal Circuit examined the factfinding of the International Trade Commission under the "escape clause" provisions of Section 201. The investigation requires public hearings, the consideration of certain factors, and a report to the President regarding competition resulting from increased import quantities.[168] The question in the case was whether an ITC report, which authorized tariffs on mushrooms, could apply to frozen mushrooms even though the frozen-mushroom business was barely considered by the ITC investigation. The court deferred to the ITC's and the President's assertion that frozen mushrooms were covered, explaining that trade matters "involving the President and foreign affairs" involve a "very limited role of reviewing courts."[169]

Transpacific Steel LLC v. United States provides a more recent example of deference, in that case with respect to a limit. There, the Commerce Department provided a report authorizing the President to impose a national security exception tariff on steel under Section 232. A related statutory section requires the President to [take action] within [90 days]. The President claimed

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[162] See supra II.B.1.
[163] 526 F.2d 560 (C.C.P.A 1975).
[164] 426 U.S. 548 (1976)
[165] The Algonquin Court also held that section 232 did not violate the nondelegation doctrine.
[166] See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Presidential Control Over International Law, 131 Harv. L. Rev. 1201, 1259 (2018) (arguing that except for "narrow exception[s]" such as claims settlement, the power to recognize other nations and the Commander in Chief power, congressional authorization is required for presidential action in international law).
[167] 762 F.2d 86 (1985).
[168] 19 U.S.C. § 2251
[169] The Maple Leaf court suggested that its analysis went beyond the deference that would be due to an agency, even under the contemporaneous Chevron doctrine. It is not clear that this would hold up under current law given HMTX, which treats USTR as an agency subject to the APA and therefore presumably subject to mere Chevron deference and now Loper Bright. On the other hand, *Maple Leaf* could be confined to sitautions in which an agency's factfinding is reviewed.

that he satisfied the 90-day requirement by making a plan to negotiate with other countries using threatened high steel tariffs as leverage, and that therefore tariff rates that changed significantly after the 90-day period were authorized. The Federal Circuit agreed with the President.

Scholars explain that although tariff authority flows from Congress to the President, the foreign affairs context of tariff law has prompted courts, like the *Maple Leaf Fish* court, to lean in favor of the President when considering the meaning of the delegation under the statute and, therefore, the lawfulness of presidential tariff actions. Sometimes the idea of foreign affairs deference to the President also has extended to foreign-affairs deference to the actions of agencies, like the ITC in *Maple Leaf Fish.* As some scholars have written, the deference appears even if a delegation happens through a statute; it informs courts' statutory interpretation choices.[170]

Scholars also disagree over whether strong deference to executive branch actions should continue to exist for tariff cases, as a matter of statutory interpretation. Scholars who argue for greater deference emphasize that the President is not, and should not be, subject to the major questions doctrine.[171] They also defend the practice of more deferential ordinary statutory interpretation in foreign affairs, for instance based on the logic of Justice Jackson's famous *Youngstown Steel* opinion.[172] Some emphasize the importance of such deference particularly when national security is at stake.[173]

Other scholars advocate less deference, at least in some circumstances. Some point out that foreign relations exceptionalism had a bright moment in the 1930s, but has faded over time.[174] They emphasize that not only the Taxing Power Clause, but also the Foreign Commerce Clause, allocates responsibility for trade law to Congress.[175] Others advance the view that courts should amend their statutory interpretation practice and shift power and responsibility away from the President and back toward Congress. And they argue that if the objective of trade policy is economic welfare, there is particularly strong reason to limit executive branch authority.[176]

The Court's 2026 *Learning Resources* decision follows the practice of statutory interpretation in tariff and trade law, even though its result does not defer to the President. The Court's opinion, authored by Chief Justice John Roberts, analyzed whether IEEPA's authorization to "regulate" "importation" allowed the President to impose tariffs, and concluded that IEEPA does not

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[170] Bradley/Goldsmith 2018.
[171] Goldsmith 2024
[172] Curtis A. Bradley & Martin S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 Mich. L. Rev. 545 (2004).
[173] C. Alexander Evans, Trade, Tariffs, Sanctions, and Security: A Framework for Judicial Review, 37 Stan. L. & Pol'y Rev. 40 (2026).
[174] Ganesh Sitamaran & Ingrid Wuerth, The Normalization of Foreign Relations Law, 128 Harv. L. Rev. 1897 (2015).
[175] Kathleen Claussen & Timothy Meyer, The Foreign Commerce Power, 114 Cal. L. Rev. 407 (2026).
[176] Kathleen Claussen & Timothy Meyer, Economic Security and the Separation of Powers, 172 U. Pa. L. Rev. 1955 (2024).

authorize tariffs. Three Justices—Roberts, Justice Neil Gorsuch, and Justice Amy Coney Barrett—also wrote that the major questions doctrine supported the conclusion that IEEPA did not authorize tariffs. But because Gorsuch and Barrett each joined the Court's opinion in full, it is not clear that their conclusion requires the application of the MQD—and Barrett, in any case, considers the MQD as part of textualist statutory interpretation.

Before *Learning Resources*, the appellate cases interpreting tariff statutes had universally concluded that tariffs imposed by the executive branch were lawful, and had often referred to the foreign-affairs context to explain why they lean in favor of a statutory interpretation that gives deference to the President. In *Learning Resources, Inc. v. Trump*,[177] only Justice Kavanaugh's dissent (joined by Justices Alito and Thomas) exemplified this foreign-affairs based deference view.

Another recent case, *Oregon v. United States*,[178] shows the limited potential of statutory interpretation following *Learning Resources*. *Oregon* involves the second attempt under the Trump administration to impose a 10% universal tariff, which became effective promptly following the *Learning Resources* decision. The case presents the question of whether courts will accept the President's view that the statutory prerequisite of a balance-of-payments deficit is satisfied if a trade deficit exists. Although the Court of International Trade held the President's view unlawful, the Federal Circuit quickly stayed that decision and signaled likely deference to the President's interpretation of the statute.[179] Neither court invoked *Loper Bright v. Raimondo*, the 2024 Supreme Court case, decided under the Administrative Procedure Act, that requires courts to substitute their "independent judgment" for that of administrative agencies.[180]

2. Administrative Procedure Act

The APA provides another avenue of attack for a plaintiff challenging the authority of an executive branch action. The statutory requirements of the APA provide procedures that agencies must follow, such as the notice-and-comment requirements for rulemaking.[181] Judicial interpretations of this requirement under a line of cases starting with *State Farm* have come to impose, for instance, the requirement that an agency provide a "reasoned explanation" for its rulemaking.[182] In addition, when executive branch action constitutes "final agency action," the APA's review provisions apply. In 2024, the Supreme Court held in *Loper Bright* that this APA

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[177] Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).
[178] In Oregon v. United States, 2026 WL 1257668.the Court of International Trade interpreted the statutory trigger or prerequisite of a "balance of payments" deficit differently than the President, and held unlawful the Section 122 universal 10% tariff imposed after the release of the Learning Resources decision. The Federal Circuit, however, stayed the injunction imposed by the lower court.

[179] Fed circuit stays Oregon decision
[180] Loper Bright independent judgment (last page of majority opinion)
[181] 5 U.S.C. § 553.
[182] State Farm

provision required judges to apply their own independent judgment of a statute's meaning, rather than accepting an agency's interpretation.[183]

It has been clear since 2011 that the APA applies squarely to Treasury and the IRS as to any other agency.[184] As a result, the application of *State Farm* reasoned explanation requirements and *Loper Bright* independent judicial statutory interpretation[185] impose significant possible constraints on agency action in tax law, Examples of tax cases applying *State Farm* are: [Altera,]. Examples of tax cases applying *Loper Bright* are: [conservation easement, 2017 international provisions].

In tariff law, things are different. The key reason is that, unlike tax statutes, tariff statutes do not uniformly designate authority to an administrative agency subject to the APA. Tariff statute delegates vary widely, from the President, to the USTR, to other administrative agencies like the Commerce Department.[186]

The APA does not apply to delegations directly to the President. This is clear from *Franklin v. Massachusetts*.[187] The facts of *Franklin* involved a report provided to the President by the Census Bureau, part of the Commerce Department, that apportioned military federal employees to their "home of record."[188] After receiving the report, President, per the applicable statute, created a statement showing the number of individuals and the resulting number of representatives allocated to each state.[189]

In *Franklin*, the Supreme Court noted "[t]hat the final act is that of the President," so that there was no "final agency action" to review.[190] It explained that the APA neither explicitly excludes nor explicitly includes the President in its definition of "agency"[191] and held that "[o]ut

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[183] 392 (citing and quoting APA Section 706, which directs courts to "interpret constitutional and statutory provisions").
[184] Mayo Found. v. United States, 562 U.S. 44 (2011).
[185] The main holding of Loper Bright is that "[c]ourts must exercise their independent judgment" regarding the meaning of a statute. 412. The case also explains that a statute might "delegat[e] discretionary authority to an agency," in which case the task of statutory interpretation is to determine the bounds of that delegation. 395, 403. See, e.g., Adrian Vermeule, The Old Regime and the Loper Bright "Revolution", 2024 S. Ct. Rev. 235 (2025). Tax scholars have mostly concluded that the catchall, broad delegation in the Internal Revenue Code that covers most tax rulemaking in guidance is not a specific delegation entitled to more deference. See, e.g., Amandeep S. Grewal, Tax Regulations After Loper Bright, 2024 Mich. St. L. Rev. 1083, 1114-16 (arguing that not only § 7805, but also a regulatory grant specifying that the Secretary "shall" issue regulations to further the "purpose" of a section is general, not specific, regulatory authority) (citing Rowan Cos. V. United States, 452 U.S. 247, 253 (1981)); David Weisbach, An APA for Tax, 2025 Mich. St. L. Rev. 1165,1183-84 (questioning whether the deference standard makes nan important difference, but preferring "broad deference to the Treasury" to the Loper Bright rule "[b]ecause I believe that Treasury and IRS officials are vastly better at interpreting the Tax Code than generalist judges.").
[186] See supra Part II.B.1.
[187] 505 U.S. 788 (1992).
[188] 795-96
[189] 798 (citing and quoting 2 U.S.C. §2a(a)).
[190] 798-99
[191] 800

of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."[192]

Plaintiffs can use the APA to challenge tariff actions delegated to executive branch functions other than the President—including actions delegated to the USTR. In *HMTX Industries LLC v. United States*,[193] the Federal Circuit considered certain process requirements and upheld Section 301 unfair trade tariffs imposed against China imposed during the first Trump presidency. These tariffs were modified repeatedly after their initial imposition, but the court held that broad statutory language in Section 307 supported the U.S. Trade Representative's power to make those modifications. Because the USTR was the executive branch actor, the notice-and-comment procedural requirements of the Administrative Procedure Act also applied, and the Federal Circuit found sufficient the USTR's revised explanation of the changes, after the CIT remanded the action without vacating it.

In contrast, the APA is generally not used to challenge tariff actions delegated to the President. For example, in *Transpacific Steel L.L.C. v. U.S.*,[194] the Federal Circuit considered certain duration requirements related to national security tariffs imposed by the President under Section 232 after a Department of Commerce finding of a national security risk. The court considered whether tariffs had to be imposed within statutory time limits, or whether those time limits only required the President to decide upon a plan, rather than taking a specific action. It decided that the time limits only required the President to decide upon a plan.[195] The plaintiffs did not make an APA challenge.

Learning Resources exemplifies the tariff-case approach when a tariff action occurs under a statute that directly authorizes the President to impose a tariff and thus does not implicate the APA. In this structure, *Learning Resources* is like *Transpacific* and unlike *HMTX*. That is, the plaintiffs in *Learning Resources* could, and did, make arguments under the nondelegation doctrine, the major questions doctrine, and statutory interpretation. The APA did not apply, and the plaintiffs did not raise it. Instead, the plaintiffs had to win one of the three arguments in order to win the case, while the government had to win all three. The Court's opinion simply decided the statutory interpretation question and left it at that. In contrast, the principal dissent, authored by Justice Kavanaugh, argued that the government should defeat each of the plaintiffs' three claims.

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[192] 800-01. See Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 6 n. 30 (1993) (noting that Justices' opinions in Franklin further questioned whether the President could be subject to a judicial injunction outside the requirement to perform a "ministerial" duty).
[193] 156 F.4th 1236 (Fed. Cir. 2025).
[194] 4 F.4th 1307 (Fed. Cir. 2021).
[195] For a proposal for improvement in the judicial review of national security-based tariffs, see Cory Alexander Evans, Trade, Tariffs, Sanctions, and Security: A Framework for Judicial Review, 37 Stan. L. & Pol'y Rev. 43 (2026).

3. Major questions doctrine

A challenge to the executive branch application of a tax or tariff statute might also raise the major questions doctrine, which is said to require a clear statement of congressional intent when a statute delegates to the executive power in an area of great importance, economic or otherwise. Some, prominently Justice Amy Coney Barrett, consider the MQD part of statutory interpretation. Others, prominently Justice Neil Gorsuch, consider it a separate constraint.

For purposes of the comparison of judicial review of tax and tariff statutes, the key point is that the Supreme Court has applied the MQD to a tax statute, but not to a tariff statute. The tax example is *King v. Burwell*.[196] There, the Court considered whether an Affordable Care Act provision that that allowed tax credits for health insurance purchased on an exchange "established by the State" meant that tax credits were available for health insurance purchased on federal as well as state exchanges. It concluded (consistent with Treasury's interpretation) that the tax credits were available for federal-exchange insurance.

The relevant tariff case is *Learning Resources*. In that case, the nine Justices split 3-3-3 on the MQD question. Three Justices (Roberts, Gorsuch, and Barrett) would have applied the MQD. Three Justices (Kagan, Sotomayor, and Jackson) thought the MQD did not apply, consistent with a general skepticism of the doctrine. Importantly, three Justices who typically support analysis through an MQD lens (Kavanaugh, Alito, and Thomas) nevertheless concluded that the MQD should not apply to evaluate an executive action in the tariff space, because that area of policy is too close to foreign affairs.

III. How Congress Exercises Revenue Oversight

As detailed above, the Constitution places the primary power for revenue oversight in the hands of Congress under the taxing powers provisions. These constitutional parameters set the minimum engagement by Congress over revenue raising. The decision in 1789 to make revenue raising a key feature of the nation's governing document reflected the new country's strongly held belief that the heart of revenue raising power should lie not with the executive, but with the branch of government closer to the people, the legislature.[197] But in reality, these core powers of the Origination Clause and Taxing Clause in Article 1 serve two further functions. By raising the subject to a constitutional level, the provisions set an expectation about the seriousness of revenue raising *and* they provide Congress with the structural space in which to meaningfully pursue such serious oversight.

What these core powers do not provide are detailed rules about how to meaningfully exercise that oversight, nor does the Constitution provide a direct mechanism by which to enforce Congress's duty to take revenue raising seriously. Instead, congressional practice signals the legislature's close attention to these oversight duties, particularly in taxation, and especially

[196] 576 U.S. 473 (2015).
[197]

income taxation. However, congressional revenue oversight has not, in the past 90 years, encompassed tariffs in that remit. This Part provides a closer look at what congressional revenue oversight has included and sets the stage to consider in Part IV what Congress should do to provide similar, constitutionally anticipated, revenue oversight to modern tariffs that have taken on a new revenue raising function not seen in almost a century.

A. Congressional Practices Signal Serious Attention to Oversight Duties

The legislative and executive branches of the federal government often have strained against each other for control of revenue and spending law. From the founding through the Civil War, the House Ways and Means Committee and the Senate Finance Committee each oversaw revenue and spending. In the 1860s, the spending or appropriations functions were split away from these committees, but both Ways and Means and Senate Finance kept their revenue functions only.

As described more in Part III.B, presidential budgeting began with the Budget and Accounting Act of 1921, which established the Bureau of the Budget, predecessor to today's executive branch Office of Management and Budget or OMB. Since then, the President has exercised the first-mover, agenda-setting ability to propose a budget that Congress considers. In 1974, the Congressional Budget Act clawed back some power to the legislature through the process that Congress passes a budget resolution that authorizes deficit levels and rough categorizations of spending.[198]

There are two moments of congressional approval in the budget process: the passage of the concurrent budget resolution, and the passage of the bill that meets the terms of the budget resolution. Importantly, the filibuster and cloture rule of Senate procedure—which requires a 60-vote majority to pass most legislation—does not apply to either. Instead, both the initial approval of the budget resolution and the later approval of the enacted law require only simple majorities of each chamber.[199]

Because the budget reconciliation resolution is supposed to specify the permitted deficit, this process also necessarily requires revenue estimates, provided by the congressional Joint Committee on Taxation and the Congressional Budget Office. Various efforts have been made to curtail deficit spending through the congressional budgeting process, including the "PAYGO" requirement enacted in 1990 that every proposed expenditure or tax cut had to be offset by equivalent revenue within a 10-year budget window. For a time, Congress took PAYGO very seriously. But more recently, Congress has dodged PAYGO, for instance by authorizing big deficits.

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[198] Note some recent departures from process

[199] Because of this lower threshold for congressional approval, legislators have an incentive to insert measures unrelated to taxing and spending into budget bills; the boundaries of this practice are policed by the Senate parliamentarian, under the Byrd rule, through a process known as the Byrd bath. Ellen P. Aprill & Daniel J. Hemel, The Tax Legislative Process: A Byrd's Eye View, 81 Law & Contemp. Probs. 90 (2018).

At the heart of revenue oversight is the capacity to draw upon data, revenue estimates, testimony, and the consideration of alternatives in the context of revenue raising legislation. Work along these lines has included participation by the House Ways and Means Committess, the Senate Finance Committee, Treasury, and the Joint Committee on Taxation ("JCT").[200] After a brief review of the overall Congressional oversight process for income taxation, this Part then details the information gathering, the economic and revenue analysis, and hearings that together form the backbone of the congressional consideration of tax legislation.

Once Congress decides to undertake significant tax legislation, the process begins with a public hearing held by the House Committee on Ways and Means.[201] In the context of reviewing congressional oversight of revenue raising, it is worth observing that this committee was established in 1789[202] and is "one of the oldest and most eminent of the House Committees….exercis[ing] jurisdiction over legislation concerns taxes, tariffs, revenue sharing, foreign trade policy, welfare and health insurance, the level of the public debt, and the social security system."[203] Following public hearings, the congressional process continues with executive sessions of the Ways and Means Committee which, though not open to the public, include Treasury representatives, the committee's staff, and the staff of the Joint Committee on Internal Revenue Taxation who present their respective views on the proposal, and importantly "respond to questions and supply data and analyses."[204] The Joint Committee, whose official title changed in 1976 to become simply the Joint Committee on Taxation,[205] was established in 1926.[206] The decisions of the Ways and Means Committee would then be transformed into proposed statutory language by the House Legislative Counsil, "assisted by the staffs of the Treasury and the Joint Committee on Internal Revenue Taxation" and the Joint Committee staff would prepare the report "describing the bill and outlining the reasons for the Ways and Means Committee's action."[207]

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[200] See, e.g., Ronald A. Pearlman, The Tax Legislative Process: 1972–1992, 57 TAX NOTES 939 (1992); Bernard M. (Bob) Shapiro, The Last 50 Years: The Evolving Role of the Joint Committee Staff in the Tax Legislative Process 2–6 (Feb. 2016) (unpublished draft), https://capitolhistory.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Shapiro.pdf [https://perma.cc/T84F-3WNW].

[201] Michael J. Graetz, Reflections on the Tax Legislative Process: Prelude to Reform, 58 Va. L. Rev. 1389, 1396 (1972). See generally, Stanley S. Surrey & Paul R. McDaniel, The Tax Expenditure Concept: Current Developments and Emerging Issues, 20 B.C. L. Rev. 225, 300-19 (1979) (detailing the legislative process for several different tax legislations min the 1970s).

[202] See, e.g., Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 1 (updated January 10, 2023), https://crsreports.congress.gov.

[203] Graetz, supra note___ at 1396 n. 26.

[204] Graetz, supra note __ at 1396.

[205] Section 1907(a)(1) of the Tax Reform Act of 1976 (Pub. L. No. 94-455)

[206] Joint Committee on Taxation, History, https://www.jct.gov/about-us/history/. See also, Bernard M. Shapiro, "The Last 50 Years: The Evolving Role of the Joint Committee Staff in the Tax Legislative Process", Draft prepared by the Former Chief of Staff of the Joint Committee, for the United States Capitol Historical Society's program on "The History and Role of the Joint Committee: the Joint Committee and the Tax Legislative Process" (February 2016).

[207] Graetz, supra note __ at 1396-97.

After debate and approval by the House, a similar process was undertaken in the Senate. As with the House, the parallel Senate Finance Committee process included public hearings (often with additional witnesses as the entire House process may have increased awareness of the issues under debate with the Senate hearing offered the last opportunity for public views to be aired).[208] Assuming any bill passed by the Senate differed from the House, the revised bill returned to the House for acceptance of such changes or, as would be more likely, a conference with the Senate to "reconcile the differences."[209] Following agreement at this level, a conference report explaining the changes and the resulting legislation would be prepared and presented to the House and the Senate for their respective approval, which if granted would result in the bill being sent to the President.

The deliberation and drafting at both the House and Senate take place against the backdrop of data and estimates prepared for Congress, along with expert recommendations regarding economic impacts, administrability and equity. The Treasury has been source of this guidance (despite its dual role in representing the perspective of the executive branch).[210] Revenue estimations, which take centerstage in contemporary income tax debates, can be seen as early as 1861, and reflected existing practice regarding congressional reporting on public revenues and expenditures and "plans for improving and increasing the revenue."[211] The Report to Congress from the Secretary of the Treasury (July 4, 1861) identified the pressing need for revenue due to the war, and concluded that not less than $80 million should be secured through taxation, and an additional $240 million secured through loans. After reviewing various revenue raising options, the Report proposes that indeed $80 million should be raised through taxation.[212] Though the Report did not detail an income tax option, in the subsequent debate leading up to the Revenue Act of 1861 signed by President Lincoln on August 5, 1861, the prospect of an income tax was raised and discussed in both the House and the Senate, and ultimately was included in the tax legislation.[213] That said, the data and estimation techniques employed today were not then available to those advising Congress. The December 1861 year-end report from the Secretary of the Treasury on Finances, observed that the "Secretary is acquainted with no statistics which afford the means of a satisfactory estimate of the amount likely to be realized from the income tax," but did go on to suggest the tax with some revisions might generate $10 million dollars, and

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[208] Graetz, supra note __ at 1397.
[209] Graetz, supra note __ at 1397.
[210] Graetz, supra note __ at 1399.
[211] Report of the Secretary of the Treasury on the State of Finances, S. Exec. Doc. No. 2, 37th Cong., 2d Sess. at 1(July 4,1861), https://fraser.stlouisfed.org/files/docs/publications/treasar/AR_TREASURY_1861_2.pdf.
[212] Report of the Secretary of the Treasury on the State of Finances, S. Exec. Doc. No. 2, 37th Cong., 2d Sess. at 6 (July 4, 1861), https://fraser.stlouisfed.org/files/docs/publications/treasar/AR_TREASURY_1861_2.pdf.
[213] Sheldon D. Pollack, "The First National Income Tax, 1861-1872," at, 7-12, Presentation to the Policy History Conference (June 8, 2012), https://udel.edu/~pollack/Downloaded%20SDP%20articles,%20etc/papers/First%20National%20Income%20Tax,%201861-1872%20for%202012%20Policy%20History%20conference.pdf.

also questioned the wisdom of the new income tax given its exemption limit of $800/year and the administrative cost of developing a mechanism to collect it.[214]

Moving ahead to the modern income tax, we see revenue estimates being reported in 1925 as part of the discussion of the Revenue Bill of 1926. The December 2025 Report from the Committee on Ways and Means noted that in spring 2025 Congress determined that the "Revenue Act of 1924 was producing more revenue than was necessary to carry on the function of the Government."[215] The Report continued on to provide the estimated surpluses for fiscal years 1925, 1926, and 1927.[216] To pursue timely legislative reform that would address the excess revenue, Congress approved the Ways and Means Committee hiring staff in 2025 to provide expert services to the Committee in aid of drafting proposed legislation. Additionally, the Committee was directed to "gather such information, through Government agents or otherwise, as to them may seem fit in the preparation of a bill or bills for the revision of the Revenue Act of 1924 and internal revenue laws…"[217] The Committee held public hearings which "lasted about two weeks" and at which a "large number of witnesses appeared" with none turned away.[218] The Report details the careful attention that the Committee gave to the requests and proposals from witnesses and others. Perhaps just as importantly, the Report captures the overall vision of the Committee's work on behalf of Congress in collecting revenue:

> Every reduction of taxes asked and every proposed amendment received the careful consideration of the committee. It was manifestly impossible to make all the reductions asked; but the committee, having first determined the total amount of reduction in revenues which could properly be made, proceeded to apportion the benefits of such reduction not only among the taxpayers whose need of relief seemed greatest, and where it appeared it could be made with the least disadvantage to the Government; but, as far as possible, to so distribute them as to bring the maximum good to all of our people.[219]

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[214] Report of the Secretary of the Treasury on the State of Finances for the Year Ending June 30, 1861, S. Exec. Doc. No. 2, 37th Cong., 2d Sess. at 15 (Dec. 2, 1861), https://www.govinfo.gov/content/pkg/SERIALSET-01121_00_00-002-0002-0000/pdf/SERIALSET-01121_00_00-002-0002-0000.pdf.

[215] Report from the Committee on Ways and Means, Revenue Bill of 1926, Report No. 1, 69th Cong., 1st Sess. at 1 (Dec. 7, 1925), https://www.govinfo.gov/content/pkg/SERIALSET-08531_00_00-002-0001-0000/pdf/SERIALSET-08531_00_00-002-0001-0000.pdf.

[216] Report from the Committee on Ways and Means, Revenue Bill of 1926, Report No. 1, 69th Cong., 1st Sess. at 1 (Dec. 7, 1925), https://www.govinfo.gov/content/pkg/SERIALSET-08531_00_00-002-0001-0000/pdf/SERIALSET-08531_00_00-002-0001-0000.pdf.

[217] Report from the Committee on Ways and Means, Revenue Bill of 1926, Report No. 1, 69th Cong., 1st Sess. at 2 (Dec. 7, 1925), https://www.govinfo.gov/content/pkg/SERIALSET-08531_00_00-002-0001-0000/pdf/SERIALSET-08531_00_00-002-0001-0000.pdf.

[218] Report from the Committee on Ways and Means, Revenue Bill of 1926, Report No. 1, 69th Cong., 1st Sess. at 2 (Dec. 7, 1925), https://www.govinfo.gov/content/pkg/SERIALSET-08531_00_00-002-0001-0000/pdf/SERIALSET-08531_00_00-002-0001-0000.pdf.

[219] Report from the Committee on Ways and Means, Revenue Bill of 1926, Report No. 1, 69th Cong., 1st Sess. at 2 (Dec. 7, 1925), https://www.govinfo.gov/content/pkg/SERIALSET-08531_00_00-002-0001-0000/pdf/SERIALSET-08531_00_00-002-0001-0000.pdf.

At the same time that Congress examined current and estimated revenue projections in drafting the Revenue Act of 1926, it incorporated a new provision in the proposed bill that "provides for the establishment of a commission to be known as the joint commission on taxation and to be composed of 15 members 5 members shall be Members of the Senate, to be appointed by the President of the Senate; 5 members shall be Members of the House or Members elect of the House of Representatives, to be appointed by the Speaker of the House of Representatives; 5 members shall be selected from the general public, to be appointed by the President."[220] The bill also defined the scope of the Joint Commission's duties, which indirectly again reflected Congress' broader understanding of *its* own role in revenue raising and thus the nature of the assistance it sought from the new commission: "It shall be the duty of the commission to investigate and report upon the operation, effects, and administration of the Federal system of income and other internal-revenue taxes and upon any proposals or measures which in the judgment of the commission may be employed to simplify or improve the operation or administration of such systems of taxes and to make and report upon such other investigations in respect of such system of taxes as the commission may deem necessary."[221]

The Report from the Senate Committee on Finance regarding the 1926 tax legislation paralleled the House Ways and Means Committee Report, citing Secretary of Treasury revenue estimates, and including various tables such as one comparing the taxation of married taxpayers at different income levels under the Tax Act of 1913, the Tax Act of 1916, and proposed 1926 revenue act.[222] Speaking to the proposed Joint Commission on Taxation, the Senate Report offered its own amendments, including both a name change (to the Joint Committee on Taxation) and a charge to not just gather information "to assist [Congress] in the framing of future revenue legislation" but also to "be in direct contact with the Bureau of Internal Revenue for the purpose of a closer insight into the problems of [tax] administration [as well as securing additional information that might aid in drafting revenue legislation]."[223]

The resulting Joint Committee, which published its own first report in 1927,[224] evolved in the intervening decades to play a strong advising role, and by the early 1970s (and just preceding another major reform in congressional oversight of tax legislation) maintained a staff of 23 including tax lawyers, economists, revenue estimators and an accountant.[225] Although 1974 marked a moment in which some now familiar steps in the congressional process for revenue

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[220] Report from the Committee on Ways and Means, Revenue Bill of 1926, Report No. 1, 69th Cong., 1st Sess. at 23 (Dec. 7, 1925), https://www.govinfo.gov/content/pkg/SERIALSET-08531_00_00-002-0001-0000/pdf/SERIALSET-08531_00_00-002-0001-0000.pdf.
[221] Report from the Committee on Ways and Means, Revenue Bill of 1926, Report No. 1, 69th Cong., 1st Sess. at 23 (Dec. 7, 1925), https://www.govinfo.gov/content/pkg/SERIALSET-08531_00_00-002-0001-0000/pdf/SERIALSET-08531_00_00-002-0001-0000.pdf.
[222] Report from the Committee on Finance, Internal Revenue Bill of 1926, Report No. 52, 69th Cong. 1st Sess. at 1, 3, 4 (Jan. 16, 1926), https://www.finance.senate.gov/wp-content/uploads/media/doc/SRpt69-52.pdf.
[223] Report from the Committee on Finance, Internal Revenue Bill of 1926, Report No. 52, 69th Cong. 1st Sess. at 14 (Jan. 16, 1926), https://www.finance.senate.gov/wp-content/uploads/media/doc/SRpt69-52.pdf.
[224] See, e.g., Joint Committee on Taxation, History, https://www.jct.gov/about-us/history/.
[225] Graetz, supra note __ at 1409.

(i.e. tax) legislation were enacted with passage of the Congressional Budget Act of 1974,[226] revenue estimates had, as noted above grounded Congressional decision-making in tax legislation in 1925, and report, and constituted an important part of the legislative process by the 1940s. It was during war period (WWII) that the Joint Committee's work, which previously included a strong focus on oversight of the IRS (a had been advocated by the Senate in 1926), began to provide "nonpartisan technical support in the legislative process in drafting and enacting legislation to generate needed revenues."[227] However, even through the early 1970s, revenue estimates have been characterized by a former Chief of Staff of the Joint Committee on Taxation, as "more or less an afterthought, considered at policy decisions were made."[228] He reports that in 1972, there were "three revenue estimators and one revenue analyst" on staff and that they "did not have access to a computer model and their data sources were very limited" though Treasury estimators "had been using a computerized individual tax model since the 1960s."[229]

The Congressional Budget Act of 1974[230] (CBA) notably reshaped the landscape for revenue raising with several important changes. First, it provided for the adoption by Congress of a concurrent resolution on the budget[231] so that Congress can make overall fiscal determinations for the year and set guidelines for budget-related measures.[232] Though not binding, such resolutions establish a policy basis and foundation, and their creation contrasts with prior practice where budget measures were often considered individually by Congress and were evaluated without any coordination or overall assessment.[233] Second, the CBA established additional bodies to work in the general revenue oversight space: the House and Senate Budget Committees,[234] and the Congressional Budget Office.[235] The latter is tasked with providing an "independent source for budgetary information, particularly estimates concerning the cost of proposed legislation."[236] Third, a budget resolution must include "budget aggregates and

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[226] Congressional Budget Act, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 2 U.S.C. §§ 601-688).
[227] Bernard M. Shapiro, "The Last 50 Years: The Evolving Role of the Joint Committee Staff in the Tax Legislative Process", Draft prepared by the Former Chief of Staff of the Joint Committee, for the United States Capitol Historical Society's program on "The History and Role of the Joint Committee: the Joint Committee and the Tax Legislative Process" at 2 (February 2016); see also Joint Committee on Taxation, History, https://www.jct.gov/about-us/history/.
[228] Ronald A. Pearlman, The Tax Legislative Process: 1972-1992, 57 Tax Notes 939 (Nov. 12, 1992).
[229] Ronald A. Pearlman, The Tax Legislative Process: 1972-1992, 57 Tax Notes 939 (Nov. 12, 1992).
[230] Congressional Budget Act of 1974, Titles I-IX of the Congressional Budget and Impoundment Control Act, P.L. 93-344 (1974), codified in 2 U.S.C. §§601-688.
[231] 2 U.S.C. § 632(a).
[232] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 4, 15 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.
[233] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 4, 15 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.
[234] Sections 101-102, Congressional Budget Act of 1974, Titles I-IX of the Congressional Budget and Impoundment Control Act, P.L. 93-344 (1974), codified in 2 U.S.C. §§601-688.
[235] Sections 201-203, Congressional Budget Act of 1974, Titles I-IX of the Congressional Budget and Impoundment Control Act, P.L. 93-344 (1974), codified in 2 U.S.C. §§601-688.
[236] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 4 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.

spending levels for each functional category of the budget" (total revenues and how that is to be changed through legislation), total new budget outlays; surplus/deficit; and public debt.[237] Particularly interesting, given the focus of this article's inquiry, the CBA requires that a report accompany the budget resolution and that is include the following:

- a comparison of total new budget authority, total outlays, total revenues, and the surplus or deficit for each fiscal year set forth in the budget resolution with the amounts requested in the budget submitted by the President;
- the estimated levels of total new budget authority and total outlays, divided between discretionary and mandatory amounts, for each major functional category;
- the economic assumptions that underlie the matters set forth in the budget resolution and any alternative assumptions and objectives the Budget Committee considered;
- information, data, and comparisons indicating the manner in which, and the basis on which, the Budget Committee determined each of the matters set forth in the resolution;
- the estimated levels of tax expenditures by major items and functional categories for the President's budget and in the budget resolution; and
- the committee spending allocations (commonly referred to as Section 302(a) allocations after the applicable section of the CBA).[238]

Scoring (the process of developing estimates of budgetary impacts of various measures related to revenues, deficits and spending) forms an important part of the modern revenue oversight process. The CBA specifies that the House and Senate Budget Committees are tasked with scoring legislative proposals to serve as the basis of decision making in Congress[239] and then enforcing Congress' budgetary rules.[240] CBO assists these congressional committees by providing baseline budget projections (i.e., estimates of federal spending and revenue collection

[237] Sections 301-310, Congressional Budget Act of 1974, Titles I-IX of the Congressional Budget and Impoundment Control Act, P.L. 93-344 (1974), codified in 2 U.S.C. §§601-688.
[238] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 16 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.
[239] Sections 312, Congressional Budget Act of 1974, Titles I-IX of the Congressional Budget and Impoundment Control Act, P.L. 93-344 (1974); see also Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 19 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240; Congressional Budget Office, "CBO Explains Budgetary Scorekeeping Guidelines, (Jan. 2021), https://www.cbo.gov/system/files/2021-01/56507-Scorekeeping.pdf.
[240] Congressional Budget Office, "CBO Explains Budgetary Scorekeeping Guidelines, (Jan. 2021), https://www.cbo.gov/system/files/2021-01/56507-Scorekeeping.pdf.

under existing law)[241] and cost estimates.[242] The Joint Committee on Taxation also contributes to this process and supports the committees by providing estimates of revenue legislation.[243]

This snapshot of the congressional budget process highlights important ways in which Congress has sought to strengthen its ability to assess and evaluate the budget and related revenue raising, and the various options available to the legislature. The congressional quest for information and budget estimates is not new, but the capacity to provide such data on a range of questions has dramatically increased along with the staffs dedicated to this function. It is not that the budget process overcomes the politics—but it frames the politics.

B. President as First Mover with Congress Controlling Budget and Revenue Reconciliation

In locating the ongoing base of revenue raising power in the federal government, it is important to note the role that the President often plays as a "first mover" in legislative process despite the specific constitutional powers granted Congress in this area. Writing in the 1970s, and looking at the prior decades of tax reform, Professor Michael Graetz (who held various roles in Treasury starting the in the late 1960s), observed that typically "tax legislation is enacted as a response to recommendations of the President."[244] In part this reflects the statutory (as opposed to constitutional) role established by the Budget and Accounting Act of 1921 for the President in the budget process.[245] The President is required to "transmit to Congress…the Budget, which shall set forth …*his Budget message, summary data and text, and supporting detail*." (emphasis in the original).[246] These details are to include estimates of expenditures and receipts both under current law and under revenue proposals contained in the Budget.[247] Given that agencies do not directly submit budget requests to Congress, this executive role offers the President the opportunity to provide a consolidated picture of federal agency activities and spending and

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[241] See, e.g., Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 19 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.
[242] Congressional Budget Office, "CBO Explains Budgetary Scorekeeping Guidelines, (Jan. 2021), https://www.cbo.gov/system/files/2021-01/56507-Scorekeeping.pdf; Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 19 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.
[243] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 20 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.
[244] Michael J. Graetz, Reflections on the Tax Legislative Process: Prelude to Reform, 58 Va. L. Rev. 1389, 1395 (1972). See generally, Stanley S. Surrey & Paul R. McDaniel, The Tax Expenditure Concept: Current Developments and Emerging Issues, 20 B.C. L. Rev. 225, 300-19 (1979) (detailing the legislative process for several different tax legislations min the 1970s).
[245] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 13 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240. Section 201, Budget and Accounting Act of 1921, Pub. L. NO. 67-13, 42 Stat. 20 (codified as amended in scattered provisions of 31 U.S.C.), https://www.gao.gov/assets/D03855.pdf.
[246] Section 201, Budget and Accounting Act of 1921, Pub. L. NO. 67-13, 42 Stat. 20 (codified as amended in scattered provisions of 31 U.S.C.), https://www.gao.gov/assets/D03855.pdf.
[247] Section 201, Budget and Accounting Act of 1921, Pub. L. NO. 67-13, 42 Stat. 20 (codified as amended in scattered provisions of 31 U.S.C.), https://www.gao.gov/assets/D03855.pdf.

related revenue raising recommendations.[248] The 1921 Act also created the Bureau of the Budget to aid the President in preparing these estimates and materials,[249] and today that bureau assisting in these and other functions is the Office of Management and Budget (OMB).[250] And in cases where the executive branch initiates (in the form of suggesting) new tax legislation, "the Secretary of the Treasury is generally the first witness to appear, followed by other Administration spokesmen and then by witnesses from the general public."[251] But despite an important budget role for the executive, the actual power to originate a revenue raising bill remains with the House, and the power to levy taxes, duties, imposts and excises remains with Congress.[252]

C. Tariffs and Congressional Revenue Oversight

Over the past 90 years, two important trends have marked Congress' engagement with revenue raising. The first is the dramatically increased infrastructure surrounding Congress' role regarding revenue raising. This growth is reflected in the evolving technical expectations for what support and guidance is provided Congress (due to a mix of technical advances and resource prioritization within government) and in the array of actors engaged in the process, ranging from the Committee on Taxation (1926) to the House and Senate Finance Committees (1974) and then CBO (1974). This technical and operational infrastructure is supported by various process changes implemented over time, and while it is beyond the scope of this article to detail the full history and function of the budgetary process, the introduction of the budget resolution in the CBA marks a major step**.**

The second trend, as detailed above in the introduction and Part I, is the increasing role of income and payroll taxes as key sources of federal revenue, as compared to tariffs. Given this reality, it is not surprising that despite the significant and increasing efforts directed at revenue estimates and related calculations generally, key tariffs provisions in place today were not themselves envisioned as revenue raising. For example, IEEPA[253] the tariff statute enacted in 1977 and which formed the legal authority for the presidentially imposed tariffs invalidated by the Supreme Court in *Learning Resources*, was estimated by the CBO in 1977 to have "no budget impact."[254]

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[248] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 13-14 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240.
[249] Section 207, Budget and Accounting Act of 1921, Pub. L. NO. 67-13, 42 Stat. 20 (codified as amended in scattered provisions of 31 U.S.C.), https://www.gao.gov/assets/D03855.pdf.
[250] Congressional Research Service, "Introduction to the Federal Budget Process," R46240 at 14 (updated January 10, 2023), https://www.congress.gov/crs-product/R46240; Reorganization Plan No. 2 of 1970, Section 102(a) (July 1, 1970), https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg2085.pdf#page=1.
[251] Graetz, supra note __ at 1396.
[252] U.S. Const. art. I, §§ 7-8.
[253] 50 U.S.C. §§1701 et seq, P.L. 95-223.
[254] See H.R. Rep. No. 95-459, 95th Cong. 1st Sess. at 19(June 23, 1977) ("Report of the Committee on International Relations [Including Cost Estimate of the Congressional Budget Office] on H.R. 7738"), https://www.justsecurity.org/wp-content/uploads/2024/04/IEEPA-House-Committee-on-International-Relations-report_1977-copy_clean.pdf.

Similarly, the tariffs announced by the President on February 20, 2026 after release of the *Learning Resources* decision were based on authority granted under Section 122 of the Trade Act of 1974, 19 U.S.C. § 2132.[255] Broadly speaking, the imposed tariffs amounted to an additional 10% tax broadly applied, with some product and some country exceptions. Those tariffs were challenged and held unlawful by the Court of International Trade in May 2026,[256] a decision stayed by the Federal Circuit[257] pending appeal. The tariffs then expired pursuant to the statutorily imposed 150-day limitation (unrelated to the ongoing litigation).

Revenue estimates do not appear to have been prepared for Section 122 when under consideration by Congress in 1974. Notably, the Senate Finance Committee Report on the Act stated "circumstances can change rapidly and the Committee deems it necessary that the President have authority to impose surcharges and other import restrictions for balance of payments reasons even though under present circumstances such authority is not likely to be utilized." Thus, also although the overall Act and the specific powers granted in Section 122 were very much the product of economic analysis regarding the global economy, balance of payments, unfair trade practices and negotiated tariff reductions, there is no indication that Section 122 was considered as part of a revenue raising provision and no indication of CBO, House, or Senate revenue estimates or comparable analyses. The power was squarely located in the trade tool category.

Finally, on July 23, 2026, replacement tariffs were imposed[258] by the administration under the statutory authority of Section 301(b) of the Trade Act of 1974.[259] Section 301(b) authorizes tariffs in response to denial of U.S. rights under a trade agreement, or practice or policy of a foreign country is unjustifiable and burdens US commerce.[260] Exercise of executive tariff powers under Section 301 requires an investigation and a finding by the U.S. Trade Representative of such conduct prior to imposition of the tariff (in contrast to tariffs under Section 122). The imposed Section 301 tariffs, like the IEEPA and the Section 122 tariffs that preceded were sweeping and here imposed on 60 jurisdictions, primarily in response to their "failure…to

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[255] Imposing a Temporary Import Surcharge to Address Fundamental International Payment Problems, Proclamation No. 11,012, 91 Fed. Reg. 9339 (Feb. 25, 2026).
[256] State of Oregon v. United States, Slip Op. 26-47 (Ct. Int'l trade May 7, 2026).
[257] State of Oregon v. Trump, Nos. 2026-1804, 2026-1805, slip. Op. (Fed. Cir. June 11, 2026) (nonprecedential order), https://storage.courtlistener.com/recap/gov.uscourts.cafc.24360/gov.uscourts.cafc.24360.61.0_1.pdf.
[258] Office of the United States Trade Representative, "Notice of action," Docket Nos. USTR-2026-0265, USTR 2026-266 (July 23, 2026), https://ustr.gov/sites/default/files/files/Press/Releases/2026/FLIP%20301%20Investigation%20Final%20Action%20FRN%207-23-26%20FINAL.pdf.
[259] See, e.g., Congressional Research Service, In Focus: Section 301 of the Trade Act of 1974 (Updated November 2, 2026), https://www.congress.gov/crs-product/IF11346.
[260] Trade Act of 1974, Publ. L. N0. 93-618, § 301, 88 Stat. 1978, 2041-42 (1975); see also, Congressional Research Service, "Section 301 of the Trade Act of 1974: Origin, Evolution, and Use" at 1-2 (Updated December 14, 2020), https://www.everycrsreport.com/files/2020-12-14_R46604_8eaf97947c64727bd0ba4f11b14fec1dbdc43239.pdf.

impose and effectively enforce a prohibition on the importation of good productive with force labor."[261] The tariff rates were imposed at levels of 10% and 12.5%.[262]

These presidential tariffs were accounted for to some extent in revenue estimates. For instance, revenue from the IEEPA tariffs, however, were included in CBO's baseline budget projections in February 2026.[263] Congress may have relied on these estimates even after *Learning* Resources held those tariffs unlawful.[264] Later, the CBO has issued updates to reflect tariff changes, such as the imposition of tariffs under Section 122 and Section 301, as described above.[265] There is some information flowing and Congress may decide to consider tariffs when it legislates—but this is different from the more structured process of budget reconciliation, with its patterns of information gathering and disclosure.

The revenue estimate discussions in the 1974 Senate Finance Committee Report reflected the understanding that the expected tariffs reductions to be negotiated under the 1974 Act would reduce revenue in the future years when such negotiations would be completed.[266] The Committee anticipated that "an honest, vigorous enforcement of United States statues dealing with unfair competitive practices will result in the imposition of antidumping duties and countervailing duties to a greater extent than has been the case in the past when these statutes were not vigorously enforced," but that observation does not encompass the Section 301 tariffs which were separate and not considered as either anti-dumping duties or countervailing duties.[267]

The Section 301 tariff powers granted the President do come with a range of limitations in terms of substance and process (some of which were added after the initial 1974 legislation).[268] As referenced above, those included the identification of the kind of qualifying foreign nation

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[261] Office of the United States Trade Representative, "Fact Sheet: USTR Section 301 Action in Response to the Failure of 60 Economies to Ban Imports Produced with Forced Labor," (July 2026), https://ustr.gov/about/policy-offices/press-office/fact-sheets/2026/july/fact-sheet-ustr-section-301-action-response-failure-60-economies-ban-imports-produced-forced-labor.

[262] Office of the United States Trade Representative, "Fact Sheet: USTR Section 301 Action in Response to the Failure of 60 Economies to Ban Imports Produced with Forced Labor," (July 2026), https://ustr.gov/about/policy-offices/press-office/fact-sheets/2026/july/fact-sheet-ustr-section-301-action-response-failure-60-economies-ban-imports-produced-forced-labor.

[263] CBO, The Budget and Economic Outlook: 2026 to 2036, available at https://www.cbo.gov/publication/62105#_idTextAnchor153, Ch. 5, Box 1.

[264] Committee for a Responsible Federal Budget

[265] CBO's Updated Budgetary Projections of Tariffs as of July 31, 2026 (8/20/26), https://www.cbo.gov/publication/62704.

[266] "Trade Reform Act of 1974, Report of the Committee on Finance, United States Senate Together with Additional Views on H.R. 10710, Senate Report No. 93-1298, 93rd Cong. 2nd Sess. at 237 (November 26, 1974), https://www.finance.senate.gov/wp-content/uploads/media/doc/trade10.pdf.

[267] "Trade Reform Act of 1974, Report of the Committee on Finance, United States Senate Together with Additional Views on H.R. 10710, Senate Report No. 93-1298, 93rd Cong. 2nd Sess. at 31-35 (November 26, 1974), https://www.finance.senate.gov/wp-content/uploads/media/doc/trade10.pdf.

[268] See, e.g., Trade Act of 1988.

misconduct, an investigation (including foreign government consultation and other public participation) and determination by the U.S. Trade Representative that the Section 301 threshold has been met, and mandatory four year review by the U.S. Trade Representative. What is absent is an explicit cap on the tariff rate imposed (in contrast to Section 122), though the statute expects a connection between the U.S. commerce harm and the retaliatory action imposed by the President.[269] Section 301 does not impose a requirement that Congress approve the individual tariff imposed by the President, no does it call for congressional or CBO revenue estimates of the proposed tariff or any overall cap on customs revenue collected. As with IEEPA and Section 122, the courts do remain as constraint on Presidential overreach in enacting tariffs that exceed statutory authority, or fail to comply with statutory prerequisites.

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Several important observations emerge from this review of Congress's exercise of its revenue oversight role. From the outset, Congress sought data, revenue estimates, legislative options, expert analysis, and public comment, all in an effort to determine how much revenue the federal government would exact and how it would do so. The formation of the Joint Committee itself was explained by reference to the need to gather such information and the corresponding need for experts to do so. Additionally, Congress adapted its information gathering process for revenue legislation over time, reflecting both the increased role of the income tax (for example in World War II),[270] *and* the increased capacity to develop more sophisticated revenue predictions,[271] estimates and models over the years (for example, the Congressional Budget Act of 1974). Even in the present, there are regular debates regarding the most appropriate way in which to conduct revenue estimates.[272] Finally, despite the centrality of information and analysis, the revenue raising process and its oversight can be quite political in nature. But the fact that the process can be political in no way undermines the conclusion that Congress is attentive. We understand that revenue raising is political, and accordingly the Constitution made the choice that the elected branch closest to the people should be the one to bear this important responsibility.

Collectively, this history demonstrates that Congress knows how to, and does, take its constitutional revenue raising role seriously and that embracing this responsibility can result in different kinds of process, involving different actors, and even incorporating different statutory design features. To the extent tariffs now play a stronger revenue raising role than they have in

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[269] Section 301(a)(3), 19 U.S. C. § 2411(a)(3).
[270] Bernard M. Shapiro, "The Last 50 Years: The Evolving Role of the Joint Committee Staff in the Tax Legislative Process", Draft prepared by the Former Chief of Staff of the Joint Committee, for the United States Capitol Historical Society's program on "The History and Role of the Joint Committee: the Joint Committee and the Tax Legislative Process" at 2 (February 2016); see also Joint Committee on Taxation, History, https://www.jct.gov/about-us/history/.
[271] See generally Michael J. Graetz, Reflections on the Tax Legislative Process: Prelude to Reform, 58 Va. L. Rev. 1389, 1415-1422 (1972) (reviewing the revenue estimating challenges experienced in the 1960s and earlier 1970s).
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decades, it is incumbent upon Congress to recognize this shift and to ensure that it maintains adequate oversight of the tariff side of federal revenue raising. What that oversight should or could look like, and when it would be warranted are questions addressed next in Part IV.

IV. What Congress Should Do

In this last Part of the Article, we return to the question posed at the start: What should Congress do about tariff law in order to fulfill the Constitution's separation-of-powers requirement that the legislature, not the executive, exercises the power of the purse?

A. Budget Reconciliation and Reversing Presidential Tariffs

The question of what Congress should do squarely presents itself in 2027. Congress faces large tariff costs imposed by a President, and both the House and the Senate will be held by the party opposing the White House. There is an opportunity to reverse the President's specific tariffs, or repeal or restrict his general authority to impose them. Congress can and should act on opportunity by acting through the budget reconciliation process, both because it will maximize the chance of success and, relatedly, because it is the method that enables Congress to carry out its constitutional responsibility to use and protect the power of the purse.

INS v. Chadha, the 1983 Supreme Court holding that the Constitution prohibits legislative vetos,[273] limits congressional ability to reverse executive branch action. Before *Chadha*, Congress claimed the power to enact statutes that reserved the later right to reverse presidential decisions without presentment, meaning without the requirement for either presidential signature or for legislative override of a presidential veto. For instance, statutes provided that committee action or, House, Senate, or joint resolution—without presentment--might reverse a presidential decision or stop a presidential decision from taking effect unless a resolution approved them.[274] Under *Chadha*, both types of provisions--congressional override and congressional permission—are unconstitutional.[275] Instead, Congress must follow the constitutional requirements of passage and presentment.

This means in turn that under typical legislative rules, reversing a presidential tariff requires passage by a majority of the House, approval by 60 Senators, and presidential approval.[276] If the President vetoes the legislation, a two-thirds vote in the House and the Senate is required to

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[273] 462 U.S. 919, 944 (1983) (holding unconstitutional a statutory provision allowing a one-house resolution to override an executive branch decision that extreme hardship justified the suspension of a deportation).
[274] See, e.g., Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking after I.N.S. v. Chadha, 18 N.Y.U. J. Int'l L. Pol. 1196-1210 (cataloguing legislative veto provisions in trade statutes starting with a1958 law and arguing that "Chadha's extraordinary sweep necessitated a major legislative overhaul of the trade statutes"); see also congressionalworkingon this Romero-Fernandez 11th cir
[275] See Curtis A. Bradley, Reassessing the Legislative Veto: the Statutory President, Foreign Affairs, and Congressional Workarounds, 13 J. Leg. Analysis 440, 449 (2021) (explaining that legislative process requirements should apply to the congressional creation of "new legal effects" whether through override or through permission).
[276] Article on cloture filibuster rule

override the veto.[277] As many scholars have observed, this can make it functionally impossible for Congress to reverse a presidential action.[278]

In the tax context, the legislative procedure picture is different, because of the rules that govern the consideration of budget legislation. As explained above, budget reconciliation legislation requires the approval of a simple majority of the House and the Senate. One might think that if the important bottleneck is the presidential veto, the reduction in the number of required Senate votes might not increase, as a practical matter, congressional ability to reverse a presidential tariff action.

But the budget reconciliation process, in some circumstances, could increase the ability of Congress to reverse a presidential tariff action. The process involves the trading of many different provisions off against each other. If the President prefers to secure the passage of some provisions in a budget reconciliation bill, he might accept the loss of a tariff power in exchange. Budget reconciliation, in other words, sets up the conditions for a negotiated outcome.

Another feature of budget reconciliation is known as "PAYGO," the [1991] statute requiring tax increase (or spending decrease) offsets for spending increases or tax decreases. Originally, PAYGO aimed for revenue neutrality. In recent iterations, budget resolutions have set a maximum deficit increase, and PAYGO operates against this. Congress may prefer not to include a reversal of presidential tariff increases in PAYGO because it will count as a revenue decrease and reduce the ability of legislators to achieve passage of their preferred tax cut or spending provisions.

To illustrate the interaction of tariff reversal and the budget reconciliation process, consider three possible tariff reversal actions that Congress might take with respect to tariffs imposed by President Trump. The first involves the possible repeal of Section 338, the 1938 statute used in fall 2026—for the first time in history—to impose punitive 50% tariffs on a limited set of Canadian imports in an effort to increase leverage in USCMA negotiations. The second involves the possible prospective reversal of the universal 10%/12.5% forced-labor tariffs imposed in July 2026 under Section 301, the unfair trade exception. The third involves the possible retroactive reversal of the universal 10% tariff imposed in February 2026 under Section 122, the balance-of-payments exception.

[277] Art I §7
[278] See e.g. Pildes

The table below sets forth some relevant considerations in each case.

	Revenue cost (where higher cost reduces congressional interest)	Likelihood of presidential agreement	Other comments	Overall assessment
Repeal § 338	Likely minimal	More probable than others; Section 301 power would remain	Could provide cover for reset in US-Canada negotiations;	Good candidate for repeal
Reverse § 122 balance-of-payments tariff retroactively	Material, @ $50 billion/year	Possible; reversal of already-collected tariffs raises deficit but does not change current Presidential negotiating power	Logistically messy to refund final-and-liquidated, as in IEEPA tariff cases. Would resolve *Oregon* litigation.	Possible candidate for reversal. On retroactivity: *Carlsen* provides some authority for one year back, could also enact as a spending measure, and perhaps no standing to challenge.
Reverse § 301 forced-labor tariffs prospectively	Significant, @ $100 billion annually	Unlikely; would require President to give up a powerful international negotiation tool and a signature domestic policy	Other avenues of congressional attack could include involvement in litigation; note APA applies since USTR is executive branch actor	Unlikely candidate for reversal; perhaps, if coupled with other negotiated items in budget bill.

B. Tax Provisions in Tariff Statutes

Tax provisions could also be inserted into the structure of tariff statutes using statutory amendment. Recall that tariff statutes often feature guardrails in the form of prerequisites (such as the "burdens or restricts" commerce requirement of Section 301), processes (such as the Department of Commerce report under Section 232), and limits (such as the outer bound of a 15% tariff for 6 months under Section 122). Congress could pursue its responsibility for revenue-raising oversight by including tax guardrails in tariff statutes. This idea would apply prospectively, for actions taken by the President, the U.S. Trade Representative, or other actors after the statutory amendment.

With respect to prerequisite guardrails, a key question is the amount of discretion Congress prefers to delegate to (presumably) the Treasury to constrain presidential tariff authority on tax grounds. On one hand, due to the President's appointment power, the President can exert considerable control over Treasury decisions.[279] On the other hand, Congress can design a statute to give more or less discretion to the Treasury (and thus to the President) to obtain a desired result. A prerequisite that asked for Treasury to confirm that there would not be a "significant" tax effect, for instance on the traditional tax metrics of distributive, efficiency, or administrability, gives Treasury and thus the President significant discretion. A prerequisite that asks for Treasury to confirm that a presidential tariff action would be revenue-neutral would narrow the discretion inherent in the delegation.

Another question with respect to process requirements is the judicial review regime that Congress prefers. If Congress prefers more stringent, APA-based judicial review, including the imposition of *Loper Bright* and the requirement that an agency explain its decisions under *State Farm* and related precedents, Congress could consider requiring the Treasury Department to concurrently approve the imposition of a tariff or requiring another agency with final approval to consider the Treasury Department's findings. This would follow the model of Section 301, which gives the USTR the responsibility to both make an initial report and take a final agency action by deciding on tariffs to be imposed. More stringent APA review applies to USTR tariff-imposition decisions under Section 301.[280]

In contrast, if Congress prefers a process requirement that does not trigger more stringent APA review, it could insert a Treasury review requirement into the process, but maintain the President as the decisionmaker that imposes the tariff. This approach avoids a final agency action that is a tariff-imposing action exposed to APA review. It follows the model of Section 232, the national security exception, which gives the Department of Commerce the responsibility to make an initial report, and gives the President the responsibility to impose tariffs after receiving the

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[279] See, e.g., Trump v. Slaughter, 606 U.S. __ (2026). [Perhaps consider: how does this case law apply to the International Tariff Commission.]

[280] See HMTX Industries LLC v. United States, 156 F.4th 1236, 1255-59 (Fed. Cir. 2025), cert. denied, (holding USTR compliance with notice-and-comment provisions of 5 U.S.C. § 553 adequate after remand without vacatur of Section 301 actions directed against China based on findings of forced transfer of intellectual property).

report. Because the final decision regarding the imposition of the tariff results from the President's action, not the Department of Commerce action, more stringent APA review does not apply to the imposition of Section 232 tariffs.[281]

With respect to limit requirements, as other scholars have suggested, the more revenue a tariff statute raises, the greater is the congressional concern with the power of the purse or the constitutional responsibility of congress to retain control over the Taxing Power.[282] This has prompted suggestions of revenue cutoffs or limits. To make this idea concrete, consider the approximate relationship between GDP of $30 trillion, a federal budget of about $6 trillion and the estimated maximum tariff revenue of about $600 billion annually.

If maximum tariff revenue is about 2 percent of GDP, then this upper limit may provide some context for an upper-bound breaker or guardrail. Consider for instance the possibility of limiting presidential tariff authority to an aggregate of 0.25 percent of GDP. This would equal $75 billion annually under the above assumptions, which is less than the $100-$200 billion in annual collections estimated from the 10% universal tariffs imposed (under various authorities) in 2026.

Various different consequences might follow from reaching a maximum-tariff-revenue breaker limit. They range from the informational—that the executive branch must provide various reports or consultation opportunities once certain benchmarks have been triggered--to more direct control, such as reliquidating tariffs once annual liquidations exceed a maximum or freezing or otherwise changing tariffs in a subsequent years based on prior year tariffs reaching a certain level. Another, more intermediate, option is "report-and-wait"—the idea that after proposing a sufficiently large tariff increase, the executive branch must wait for the duration of a review period, during which the President might be required to consult with congressional tax committees, before the tariff could go into effect.[283]

C. Monitoring

As other scholars have observed, Congress often lacks basic information about discretionary executive branch action with respect to foreign affairs,[284] including with respect to trade matters.[285] A recommended solution is monitoring, by imposing "consultation, reporting, and

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[281] See generally Franklin v. Massachusetts, 505 U.S. 788 (1992). See, e.g., Transpacific Steel LLC v. United States, 4 F. 4th 1306 (Fed. Cir. 2021), cert. denied (in case holding lawful presidential tariff rate adjustments outside time periods stated in statute and reversing Court of International Trade, Administrative Procedure Act not raised).
[282] Reuven S. Avi-Yonah, Doron Narotski, and Tanir Shahar, From Relic to Relevance, the Resurgence of Tariffs, 77 U.C. Law J. 497 (2026).
[283] Bradley (2021) at 460 (describing "report-and-wait" provisions under a statute authorizing nuclear cooperation agreements).
[284] See, e.g., Koh (1988) at 1326-29 (recommending expanded congressional access to classified information and the establishment of deliberative congressional norms such as counter reports to executive branch emergency declarations).
[285] See Curtis A. Bradley & Jack L. Goldsmith, Presidential Control Over International Law, 131 Harv. L. Rev. 1201, 1216-17 (2018) (recounting executive agreement practice under the Obama administration, including the secret negotiation of a trade agreement without a clear statutory basis).

publication obligations" on the executive branch.[286] Even scholars who hesitate to recommend narrower delegation or more stringent judicial review favor greater ex post transparency and disclosure of executive action in foreign affairs, including to support the efficacy of congressional ex post checks on presidential action.[287]

Just as with the monitoring of foreign affairs, information is a key prerequisite for Congress to carry out its constitutional responsibility to oversee the exercise of the Taxing Power. When it comes to tariff information, one advantage for Congress is the Congressional Research Service, whose reports on tariff law are the go-to resource in the area. Another advantage for a congressional monitoring project is that the same two committees—House Ways and Means and Senate Finance—have responsibility for tariff law and income tax law. Congress can also maximize the transparency and usefulness of tariff disclosure requirements by connecting them to the budget reconciliation process.

Consultation, reporting, and monitoring measures for the interaction between tariffs and tax policy could be located in Senate Finance, House Ways and Means, and/or JCT. They could be required by law, or simply adopted as committee norms and projects. The existing process[288] provides an interesting model of interaction. For instance, the information cycle established by budget reconciliation provides a framework for disclosure requirements. For instance, Congress could request (or require) the President to submit along with his budget proposals a report regarding tariff collections and contemplated adjustments. The report could include tax-oriented information designed to facilitate the analysis of the distribution, efficiency, and administrative costs and benefits of tariff law.[289]

Such measures can be required by statute, but they also can be produced without any statutory foundation. Committees have the power to require hearings, and each house of Congress has the power to issue subpoenas. Meanwhile, background possibilities (or threats) of reduced appropriations or impeachment or simply reduced cooperation between subject-matter committees and corresponding agencies tend to induce the executive branch to comply.

Conclusion

In 2027, Congress will face the question of whether to challenge—in a way that could plausibly become law—the President's tariffs. In order to fulfill its constitutional responsibilities related to revenue raising, Congress should take more responsibility for tariff law and policy. But

[286] Bradley (2021) at 464
[287] See Bradley & Goldsmith (2018) at 1286-87 (casting doubt on various accountability proposals but supporting ex post transparency).
[288] See supra Part III.
[289] This raises the question of whether the executive branch information regarding tariffs could and should be placed outside the bounds of PAYGO and the budget reconciliation process.

it should not abandon the ex post style of tariff laws, which gives the President appropriate authority to use this tool to help manage emergencies, crises, and foreign affairs. Instead, it should consider reversing some specific tariff actions and adding general tax-related guardrails into tariff statutes. It should require additional monitoring, information, and congressional committee consultation. And it should use the budget reconciliation process of tax legislation to help accomplish all of this.