

Reflections on the Legality of Trump's Tariffs from an International Investment Law Perspective

Associate professor Paulo DE BRITO¹

Abstract

After a federal appeals court decided the International Emergency Economic Powers Act invoked by Trump could not legally justify the imposition of tariffs, the case is now in the hands of the Supreme Court of the United States. In U.S. constitutional history, taxes have traditionally belonged to Congress for consideration. In this paper I will address the legal arguments which are at stake and some possible implications for the current trade war. The study asks whether the unilateral imposition of tariffs under an expansive interpretation of emergency powers may trigger State responsibility under applicable bilateral investment treaties and customary international law standards, including fair and equitable treatment, indirect expropriation, and non-discrimination obligations. Using doctrinal analysis and selected case law, the paper argues that while States retain regulatory autonomy in matters of economic security, the systemic expansion of executive tariff authority risks blurring the boundary between legitimate regulatory action and Treaty-inconsistent economic coercion. The implications extend beyond U.S. constitutional law, potentially affecting the current trade war and the stability of the global investment regime.

Keywords: tariffs, national security exception, fair and equitable treatment, indirect expropriation, trade war, executive powers.

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1. Introduction

Since his return to power in January 2025, Donald Trump has consistently pursued the dismantling of the multilateralism and globalism that shaped international relations and trade after the Second World War and, particularly, after the fall of the Berlin Wall, continuing the orientation of his first term. In their place, he advocates a return to traditional bilateralism, rejecting David Ricardo's theory of free trade and reviving the economic nationalism and protectionism associated with Friedrich List².

¹ Paulo De Brito - Universidade Lusófona, Centro Universitário do Porto, p4299@ulusofona.pt, ORCID: 0000-0001-6105-1184

² The goal was to protect the rising industries in the most unfavoured nations. See Won-Ho Kim, "US Tariff Policy and a Transformation of Global Trade Architecture," *Asia and the Global Economy* 5, no. 2 (December 2025): 100120, doi: 10.1016/j.aglobe.2025.100120; and Giuseppe Spatafora. *The Foreign Policy-First President? US External Action under Trump 2.0 – in Data*. EUISS Commentary. Paris: European Union Institute for Security Studies, February 2026. <https://doi.org/10.2815/9507102>.

The process, however, has not been calm, giving rise to advances and setbacks, with frequent conflicts that have led to controversial judicial decisions³ where multiple legal and constitutional arguments have been wielded for and against the presidential power to set customs duties, within the context of the separation of powers of the United States Constitution. The controversy continues with a pronounced political war aspect and inevitable repercussions in the markets, in response to the volatility of confidence induced by each new measure announced. In this paper, I will abstract from the political and economic dimensions involved in the new customs vision of the US presidency, within the anti-globalist context of the respective project, and focus on the strict legal-constitutional analysis of the division of tax powers between the President and the US Congress, in light of the United States Constitution.

Hence, the correct legal consideration of customs tariffs in the USA cannot ignore two elementary assumptions: the tax nature of any customs tariff and the importance of the fight against this type of tax in the very process that led to the independence of the United States of America.

Customs tariffs are taxes. A tax is legally defined as a coercive, definitive, unilateral payment, without the character of a sanction, demanded by the State, with a view to achieving public goals. The tax is coercive because the requirement for its payment is independent of the will of the payers. The payment is coercively imposed on them, even against their will. It is definitive because, unlike a forced public loan, what is paid as a legally due tax is never returned to the taxpayer, remaining definitively alienated in favour of the active subject of the tax legal relationship. It is unilateral because its payment does not give rise to any direct counter-performance that is the reciprocal counterpart of the respective payment. The lack of a punitive character is introduced into the concept of tax to distinguish it from those payments (fines and penalties) that correspond to punishments for the practice of illicit acts.

The tax is intended, as mentioned, for the realisation of public purposes. The usual public purpose is to obtain revenue for the realisation of public expenses. These are the so-called tributary taxes. There are others, however, which, without prejudice to also constituting State revenue, have other purposes that are not immediately aimed at obtaining revenue. These are extra-fiscal taxes. It is in this last category that customs tariffs fall. They constitute taxes on foreign trade, traditionally endowed with a dual function: a revenue-raising function (they are intended to generate revenue for the Treasury); and a regulatory and protectionist function (they also aim to favour domestic

³ Namely, *V.O.S. Selections, Inc. v. Trump*, in which the US Court of International Trade (CIT) granted summary judgment to the plaintiffs, stating that the International Emergency Economic Powers Act (IEEPA) does not permit the President to impose generalised tariffs under the excuse of an economic emergency. The ruling emphasised the IEEPA aims at restrictive financial measures, but does not allow for indirect taxation on trade. Thus, the President had exceeded the power conferred by the IEEPA, and the Court reaffirmed the imposition of tariffs is, in essence, a tax matter subject to the principle of ‘no taxation without representation’. In *Learning Resources, Inc. v. Trump*, Judge Rudolph Contreras ruled illegal the tariffs imposed by Trump on the plaintiffs, but decided to stay his order so that the parties may seek to appeal. On September 9, 2025, the SCOTUS accepted to review both cases. Also, on this subject, e.g. William A. Galston, ‘Are President Trump’s tariffs legal?’ *Brookings*, September 12, 2025, https://www.brookings.edu/articles/are-president-trumps-tariffs-legal/?utm_source=chatgpt.com. Library of Congress, Congressional Research Service, “Court Decisions Regarding Tariffs Imposed under the International Emergency Economic Powers Act (IEEPA),” *Congress.gov*, October 10, 2025, <https://www.congress.gov/crs-product/LSB11332>.

production against foreign competition). In legal terms, they are classified as indirect taxes, collected at the border, and are distinguished from other taxes only by their object and purpose⁴.

They are, in the first instance, instruments of economic policy or industrial protection, but their fiscal nature persists⁵. They consist of coercive, definitive, and unilateral obligations imposed on taxpayers, even against their will and without giving rise to any consideration. They are taxes and, consequently, levies subject to the same constitutional principles that govern domestic taxation. Among these the principle of ‘no taxation without representation’ stands out in modern States, inherited primarily from the English Magna Carta of 1215. If the tax is imposed on the people, then it must be consented to by the people’s representatives, elected to their parliamentary bodies. The creation of taxes is an act of sovereignty whose exercise must be subject to the will of those represented⁶.

Indeed, the violation of this principle by British sovereignty in the Sugar Act (1764)⁷, the Townshend Acts (1767)⁸, and the Tea Act (1773)⁹, among others, was one of the main motivations for the colonial disputes with the British Parliament that would lead to the American Revolution and the independence of the USA. And it was its reaffirmation, with the limits analysed below, that the US Constitution enshrined.

Methodologically, this article is grounded in a classical doctrinal analysis structured on two interconnected normative planes: United States constitutional law and international investment law. It employs systematic and teleological interpretation of the relevant constitutional provisions (Articles I and II of the U.S. Constitution), read in conjunction with the pertinent federal statutes (notably the Trade Expansion Act, the Trade Act of 1974, and the International Emergency Economic Powers Act) and the case law of the Supreme Court concerning the delegation of taxing authority and the non-delegation doctrine. Building upon this domestic framework, the study extends its inquiry through a doctrinal and case law examination of applicable bilateral investment Treaty standards and customary international law — particularly fair and equitable treatment, indirect expropriation, and non-discrimination — drawing on selected case law to assess whether an expansive use of executive tariff powers may engage State responsibility. The overall approach is therefore normative-analytical and systemically

⁴ Article I, section 8, clause 1 of the US Constitution, uses the wording “Taxes, Duties, Imposts and Excises” to name different tax instruments. Legal scholars and case law sustain the word ‘Duties’ includes, indeed, customs tariffs.

⁵ Cf. José Joaquim Teixeira Ribeiro, *Lições de Finanças Públicas*, 2nd ed., Coimbra Editora, 1984, pp. 211.

⁶ The Enlightenment, in its search for a new foundation for the principle of equality among men, based on the individual and not on the traditional conception (abandoned by the triumph of nominalist philosophical currents), built upon the concept of man’s creation in the image and likeness of God, introduced the idea of a ‘social contract’. In this contract, taxation was conceived as a manifestation of the pact between rulers and the ruled. John Locke, for example, in his *Second Treatise of Government* (1690), stated that the power to levy taxes depends on the consent of the people; without this consent, any collection would constitute an abuse of power. This principle crossed the Atlantic and, adopted by the republicanism of the 18th century, became the mainstay of political legitimacy in the New World.

⁷ Cf. National Humanities Center, *Colonists Respond to the Sugar Act & Currency Act, 1764*, <https://americainclass.org/sources/makingrevolution/crisis/text2/sugaractresponse1764.pdf>

⁸ Cf. National Humanities Center, *Colonists Respond to the Townshend Acts, 1767–1770*, <https://americainclass.org/sources/makingrevolution/crisis/text4/townshendactsresponse1767.pdf>

⁹ Cf. National Humanities Center, *Colonists Respond to the Tea Act & the Boston Tea Party, 1773*, <https://americainclass.org/sources/makingrevolution/crisis/text6/teaactresponse.pdf>.

comparative, aimed at conceptually delineating the boundary between legitimate regulatory autonomy in matters of economic security and Treaty-inconsistent economic coercion.

2. The Principle of Tax Legality in the US Constitution

As mentioned, even before the founding of the American State, taxation was understood, in the New World as in the old, as an act of sovereignty subject to the principle of ‘no taxation without representation’, a principle soon converted into a constitutional guarantee in the Constitution of 1787, which in its Art. I, Sec. 8, Cl. 1, reserved to Congress the exclusive competence to ‘lay and collect Taxes, Duties, Imposts and Excises’, referring to the President only the function of executing the tax laws (and laws in general) approved, under the terms of Art. II, Sec. 3: ‘He shall take Care that the Laws be faithfully executed.’ Specifically, the United States Constitution (1787) embodied and institutionalized the legal content of the principle ‘no taxation without representation’ in several legal provisions that express the consecration of the same principle that in continental European law is affirmed as the principle of tax legality and which goes back to the idea of reserving the competence to create taxes to the legislative power (*nullum tributum sine lege*). American scholars usually refer to this principle, more broadly, as ‘the power of the purse’: the control of public resources and revenues is a prerogative of the representative body¹⁰. Thus, Article I, Section 7, Clause 1 stipulates that ‘All Bills for raising Revenue shall originate in the House of Representatives; the Senate may propose or concur with Amendments as on other Bills’. In turn, Article I, Section 8, Clause 1, already mentioned, complements this: ‘Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, pay the Debts, and provide for the Common Defence and General Welfare of the United States.’ These norms reaffirm the absolute reservation of legislative competence of Congress in tax matters. Only the latter holds the original legislative power. No other sovereign body of the USA can create taxes or tariffs without a prior law approved by Congress, whose House of Representatives is directly elected by the people, translating the constitutional design of the federal system the principle that fiscal power derives entirely and exclusively from the consent of the people. The attribution of this power exclusively to Congress expresses the core of the democratic-fiscal principle. As James Madison emphasized in the Federalist Papers (no. 58): ‘This power over the purse may, in fact, be regarded as the most complete and effective weapon with which any constitution can arm the immediate representatives of the people.’¹¹ Taxation is not merely a financial instrument or a commercial and economic policy tool; it also asserts itself, and above all, as the greatest symbol of popular sovereignty. The fiscal authority of the State is only legitimate insofar as it reflects the political representation of the nation. In this context, the President’s taxing power, however broad his executive authority may be, does not encompass the original competence to create or modify taxes. He can only act within the

¹⁰ Cf. History, Art & Archives, *U.S. House of Representatives*, ‘Power of the Purse’, <https://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/> (October 18, 2025).

¹¹ ‘The Federalist No 58, [20 February 1788],’ Founders Online, National Archives, <https://founders.archives.gov/documents/Hamilton/01-04-02-0207>. [Original source: The Papers of Alexander Hamilton, vol. 4, January 1787–May 1788, ed. Harold C. Syrett. New York: Columbia University Press, 1962, pp. 533–539.].

limits of the laws that Congress approves. What is incumbent upon him is the execution of these laws. Thus, when the President issues a proclamation or an executive order setting tariffs, he does so by expressing a legislative delegation. He does not exercise a power of his own, but a merely derived faculty to execute a mandate conferred upon him by Congress through law and which, necessarily, must remain within the respective limits. The reality of international relations and the noted extra-fiscal nature of customs tariffs have, however, imposed the practical need to reconcile the original and exclusive legislative competence of Congress with the imperative executive flexibility demanded by the constant variations in international trade and global geostrategic balances. Even more so after the USA became the world's largest economic and military power, with US tariffs assuming, alongside their traditional revenue-raising and protectionist functions, a new fundamental function as a political-diplomatic tool, which can be used as an instrument of negotiation or commercial retaliation.¹² The same tax that finances the State and protects industry and domestic economic activity can also be used by the USA as a foreign policy weapon, the conduct of which falls, in the first instance, to the President. The legislator was therefore forced to delegate broad powers to the President to adjust tariffs, invoke national security exceptions, or adopt economic emergency measures. Historically, Congress has authorized the Executive Branch to adjust tariffs based on varying circumstances and situations on several occasions, most notably the following Acts: Trade Expansion Act of 1962, on national security¹³, the Trade Act of 1974¹⁴, on unfair trade practices and the International Emergency Economic Powers Act – IEEPA (1977), on economic emergencies¹⁵.

But even these authorizations are conditional in nature: the President is always obliged to justify the measures and act within the limits defined by law.

Now, it is in this ambiguity that the source of the permanent tension between the legislative and executive branches lies, in the domain of the exercise of tariff powers enshrined in the United States Constitution. Under the pretext of pursuing the defence of national security, the Executive is tempted to invade the domain of tax powers reserved for Congress. The latter, in turn – especially when the President does not control the majority in the Senate and/or the House of Representatives – tends to zealously defend the legal reserve that it possesses. The conflict is only frequently overcome by the mediating intervention of the courts.

3. The Division of Tariff Powers Between Congress and the President of the USA. The Supreme Court of the United States (SCOTUS) Case Law

Despite currently mobilising political forces both for and against Donald Trump's claim of his presidential right to impose tariffs, the problem of reconciling the powers of Congress with the powers of the President in the field of customs duties is not, in fact, new in American constitutional history. Since the 19th century, each expansion

¹² We can include Trump's trade policies within this latter role.

¹³ 'Trade Expansion Act of 1962', <https://www.govinfo.gov/content/pkg/STATUTE-76/pdf/STATUTE-76-Pg872.pdf>, and also 'Trade Expansion Act of 1962: President's Message', <https://www.govinfo.gov/content/pkg/CPRT-87HPRT81081O/pdf/CPRT-87HPRT81081O.pdf>.

¹⁴ 'Trade Act of 1974', <https://www.govinfo.gov/content/pkg/COMPS-10384/pdf/COMPS-10384.pdf>.

¹⁵ "International Emergency Economic Powers Act", <https://www.govinfo.gov/content/pkg/COMPS-1079/pdf/COMPS-1079.pdf>.

of presidential power in economic matters has generated debate about the limits of legislative delegation and respect for the non-delegation doctrine¹⁶.

The issue is defined precisely by the need to determine to what extent, and within what limits, the delegated powers exercised by the President respect the principle of tax legality and the democratic corollary that all taxation requires representation.

The need to establish such a delimitation presided over the very first decisions of the SCOTUS, with the Supreme Court tending to impose a restrictive view of presidential powers and to reaffirm the principle of legality, fearing that an overly broad perspective of the powers involved in the delegation could turn the President into a *de facto* legislator, thereby violating the principle of separation of powers and the essential core of the representative principle.

In *McCulloch v. Maryland* (17 U.S. 316, 1819), Chief Justice John Marshall warned: ‘That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied¹⁷.’ Marshall summarised the logic of the American Fundamental Law: the power to tax is essential, but it must be balanced and subordinated to the principle of legality¹⁸.

However, it was in the case of *Field v. Clark* (143 U.S. 649, 1892)¹⁹ that the courts were first called upon to decide directly and immediately on the controversy of the delegation of powers to the President in customs matters. Congress had passed a law authorising the president to suspend tariff exemptions on products from countries that discriminated against American goods (the so-called reciprocity provision). The plaintiffs argued that such a law violated the separation of powers by allowing the Executive to assume legislative powers. The SCOTUS then decided that suspending tariff exemptions, according to the conditions stipulated by Congress, did not constitute a transfer of legislative competence because the Executive was acting only with a view to applying the law according to the parameters previously set.

Reaffirming the principle of legality, the reservation of law, and the separation of powers, the Supreme Court clearly distinguished between delegating legislative power and authorising the execution of a law, declaring that only the first involved a true disrespect for the Constitution. ‘The true distinction,’ as Judge Ranney, speaking for the Supreme Court of Ohio, has said, ‘is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring authority or discretion as, to its execution, to be exercised under and in pursuance of the law. The

¹⁶ For a contemporary critical revisiting of the principle of non-delegation doctrine, see Kevin J. Fandl, ‘National Security Tariffs: A Threat to Effective Trade Policy’, *University of Pennsylvania Journal of Business Law*, volume 23:2 (1921), pp. 340–389, where the author reveals himself to be markedly opposed to the generic delegation of tax powers to the President. Available at <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1637&context=jbl>

¹⁷ Cf. Library of Congress, *McCulloch v. Maryland* (17 U.S. 316, 1819), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep017/usrep017316/usrep017316.pdf>.

¹⁸ On this subject, cf. Herman M. Knoeller, ‘The Power to Tax: Foundations and Limits’, *Marquette Law Review*, volume 125 (April 1938), pp. 125–134, <https://scholarship.law.marquette.edu/mulr/vol22/iss3/2>.

¹⁹ Cf. Library of Congress, *Field v. Clark* (143 U.S. 649, 1892), <https://tile.loc.gov/storage-services/service/ll/usrep/usrep143/usrep143649/usrep143649.pdf>.

first cannot be done; to the latter no valid objection can be made.²⁰ This decision constitutes a precedent for legislative delegation in tariff matters. It is its doctrine that established the basis for the modern balance between Congress and the President in the fields of sharing tariff powers. From it, it became clear that the President has the power to shape and adjust tariffs, provided, however, that the law previously establishes the terms and limits of his action.

Throughout the 20th century – even in decisions not directly related to tariff powers – the SCOTUS, based on considerations and principles equally valid for the tax and customs fields, successively detailed and developed the general criterion for validating the terms of distribution of legislative and executive powers between Congress and the President, progressively establishing the corresponding spheres of action.

Thus, following the financial and economic crisis of 1929, based on the non-delegation doctrine, and developing and implementing the respective parameters, the SCOTUS, especially in the cases *Panama Refining Co. v. Ryan* (1935)²¹ and *A.L.A. Schechter Poultry Corp. v. United States* (1935)²², declared excessively vague delegations invalid, decreeing that any delegation to the Executive must be accompanied by ‘intelligible standards’, by clear criteria that limit presidential discretion.

The truth is that, without essentially departing from the permanent principles thus defined, over time, SCOTUS became more permissive, accepting most delegations, provided they were accompanied by some legal criteria of concrete determination.

In practice, Congress began to pass broad laws, such as the aforementioned Trade Expansion Act (1962), the Trade Act (1974), and the IEEPA (1977), which authorise the President to act for reasons of national security or economic emergency and which transformed him into a central actor in tariff policy, always assuming, however, that he acts not by his own original right, but in a derivative manner, by delegation of powers from Congress.

4. The Current Situation

As is well known, the debate has re-emerged with full force in recent years, especially with the tariff measures of President Donald J. Trump, after his return to the presidency in 2025.

In his first term, there were several cases in which the limits of the legislative delegation of Congress were questioned again, within the framework of presidential tariffs imposed under the Trade Expansion Act (sec. 232) and the IEEPA.

The case of the *American Institute for International Steel v. United States* (CIT, 2019)²³ acquired particular relevance, in which companies in the sector challenged tariffs on steel and aluminium.

The United States Court of International Trade (CIT) recognised that section 232

²⁰ Cf. Library of Congress, *Field v. Clark* (143 U.S. 649, 1892), cit., pp. 693–694.

²¹ Cf. Library of Congress, *Panama Refining Co. v. Ryan* (1935), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep293/usrep293388/usrep293388.pdf>.

²² Cf. Library of Congress, *A.L.A. Schechter Poultry Corp. v. United States* (1935), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep295/usrep295495/usrep295495.pdf>.

²³ Cf. *American Institute for Int’l Steel, Inc. v. United States*, No. 18–00152 (Ct. Int’l Trade 2019), <https://law.justia.com/cases/federal/appellate-courts/cit/18-00152/18-00152-2019-03-25.html>.

of the Trade Expansion Act granted very broad powers to the President, but understood, nevertheless, that such delegation did not violate the Constitution, relying on the precedent of *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976),²⁴ which found not surmountable.

The court noted, however, with some discomfort, that ‘to be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as an action in excess of the President’s section 232 authority (...). One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President’s statutory authority, and the scope of review would preclude the uncovering of such a truth. Nevertheless, such concerns are beyond this court’s power to address, given the Supreme Court’s decision in *Algonquin*. 426 U.S. at 558–60.’²⁵

Judge Katzmman went even further and, although conforming to the decision, by virtue of the *Algonquin* precedent, he did not fail to point out: ‘In the end, I conclude that, as my colleagues hold, we are bound by *Algonquin*, and thus I am constrained to join the judgment entered today denying the plaintiffs’ motion and granting the defendants’ motion. I respectfully suggest, however, that the fullness of time can inform understanding that may not have been available more than forty years ago. We deal now with real recent actions, not hypothetical ones. Certainly, those actions might provide an empirical basis to revisit assumptions. If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?’²⁶

In February 2020, the United States Court of Appeals for the Federal Circuit upheld the decision²⁷, and in June, the SCOTUS denied the appeal, maintaining the former²⁸.

Starting in 2025, with President Donald Trump’s second term, the courts are once again being called upon to reassess the limits of presidential tariff powers.

We have already highlighted the cases *V.O.S. Selections, Inc. v. Trump* (Federal Circuit, 2025), and *Learning Resources, Inc. v. Trump*, in which the judiciary reversed the President’s orders, proclaiming the traditional doctrine that the imposition of tariffs implies an act of tax sovereignty, therefore subject to the principle of representation.

However, these are provisional decisions of lower courts, pending appeals that were accepted for joint review by the SCOTUS in September 2025. It will be the first time in decades that the Supreme Court will again discuss the constitutional nature of presidential tariff power.

In any case, the recent case law trend – although the final meaning of its decision cannot be anticipated – indicates that the SCOTUS may revisit the delegation of tariff

²⁴ Cf. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 550 (1976), <https://supreme.justia.com/cases/federal/us/426/548/#tab-opinion-1951803>.

²⁵ Cf. *American Institute for Int’l Steel, Inc. v. United States*, No. 18–00152 (Ct. Int’l Trade 2019), cit. p. 14.

²⁶ Cf. *American Institute for Int’l Steel, Inc. v. United States*, No. 18–00152 (Ct. Int’l Trade 2019), cit. p. 28.

²⁷ United States Court of Appeals for the Federal Circuit – *Appeal from the United States Court of International Trade in No. 1:18-cv-00152-CRK-JCG-GSK*, Judge Claire R. Kelly, Judge Gary S. Katzmman, Judge Jennifer ChoeGroves, <https://www.cafc.uscourts.gov/opinions-orders/19-1727.opinion.2-28-20201542185.pdf>.

²⁸ Cf. Supreme Court of the United States – *American Institute for International Steel, Inc., et al., Petitioners v. United States, et al.*, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-1177.html>.

powers in light of the so-called major questions doctrine²⁹, developed in administrative regulation cases, such as *West Virginia v. EPA* (2022)³⁰, and which argues, returning, in some way, to the philosophy underlying the cases *Panama Refining Co. v. Ryan* (1935) and *A.L.A. Schechter Poultry Corp. v. United States* (1935), that issues of great economic or political relevance require clear and unequivocal legislative authorisation, and that the Executive is prohibited from inferring implicit powers from vague texts. Applied to tariff matters, this doctrine would imply that the President could not impose tariffs of great impact without express authorisation from Congress, being, in any case, obliged to adequately justify the verification of the assumptions of the exercise of his delegated power, and the mere generic invocation of ‘national emergency’ or ‘economic security’ would not suffice for this purpose.

If followed, this line of interpretation would bring American law closer to the original spirit of no taxation without representation: the greater the fiscal or economic impact of a measure, the more explicit the legislative consent authorising it must be³¹.

5. Conclusion

Despite the heated debate that Trump’s tariffs generated after his return to the White House, the problem of legitimacy and presidential competence to enact such measures is not new. Historical and recent case law reveal a continuous line of tension between executive effectiveness and democratic legitimacy. The American judiciary has always recognised the need for the President to act quickly in trade policy and foreign security matters, but has never abandoned the principle that the power to tax is the primary expression of popular sovereignty. Even when validating broad tax delegations, the SCOTUS has never failed to emphasise that the ultimate foundation of taxation is the consent of those represented, not political expediency. It is a principle inscribed in the very DNA of American independence³².

The current evolution, doctrinally marked by the revaluation of the major questions doctrine and by a return to classic constitutional rigidity, re-establishing the original balance between Congress and the President, does not, however, make it foreseeable that the debate will end, especially since the conservative majority in the SCOTUS will likely tend to follow, or at least not strongly oppose, the polemical and

²⁹ On this subject, see Daniel E. Walters, ‘The Major Questions Doctrine at the Boundaries of Interpretive Law’, *Iowa Law Review*, volume 109 (2024), pp. 465-540, <https://scholarship.law.tamu.edu/facscholar/1979>; Louis J. Capozzi III, « In Defense of the Major Questions Doctrine », *Notre Dame Law Review*, volume 100, Issue 2 (2025), pp. 509-582, <https://scholarship.law.nd.edu/ndlr/vol100/iss2/2>; Samuel Buckberry Joyce, ‘Testing the Major Questions Doctrine’, *Stanford Environmental Law Journal*, Vol. 43:1, (2024), pp. 50–94, <https://law.stanford.edu/wp-content/uploads/2024/02/FINAL-Joyce-Article.pdf>. In a dissenting opinion, denying the relevance of the major questions doctrine, the lower court’s decision in the case *Learning Resources, Inc. v. Trump* was criticized, arguing the IEEPA ‘empowers the President to regulate importation through a traditional and familiar means: tariffs’, cf. Chad Squitieri, ‘The President’s Authority to Impose Tariffs’, *Harvard Journal of Law & Public Policy: Per Curiam*, No. 12, (Summer 2025), pp. 1–12, <https://scholarship.law.edu/cgi/viewcontent.cgi?article=2192&context=scholar>

³⁰ Supreme Court of the United States, *West Virginia et al. v. Environmental Protection Agency et al.*, https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf

³¹ Marek Martyniszyn, “Competition Law and Policy in Crisis and the Rise of the Expansive State,” *Journal of Antitrust Enforcement* (2025): 1–40, jnaf020, <https://doi.org/10.1093/jaenfo/jnaf020>.

³² Reuven S. Avi-Yonah and Yoseph M. Edrey, “Constitutional Review of Federal Tax Legislation,” *University of Illinois Law Review* 2023, no. 1 (2023): 3–52.

polarising style of the current President of the USA.

From a legal-functional point of view, tariffs are a powerful instrument for using taxation to conduct foreign policy and safeguard the geostrategic interests of the USA. Therefore, the constitutional debate on tariffs is not limited to the technical-legal dimension. It also comprises an essential political dimension: it is a matter of defining to what extent national security and interests impose or may justify exceptions to the principle of tax legality and to the idea of ‘no taxation without representation’.

The prevailing answer will depend on the independence of the courts at each moment. However, even if the SCOTUS ruled against Trump, the latter would resort to another legal framework to justify his tariff policy. The trade war is here to stay.

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