Two Words Cannot Bear Such Weight: *Learning Resources v. Trump* and the Recovery of Tariff Power

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The First Congress passed two laws before all others. The first prescribed the oath of office.[1] The second laid tariffs.[2] The sequence is suggestive. The authority to tax imports is the first of all the powers of Congress listed in the Constitution, and for good reason; the Revolution was fought on the principle that taxes may be imposed only by the representatives of the people. Indeed, revenue bills must originate in the House, the body nearest to the people who will be paying them.[3] For more than two centuries after that first tariff bill, Presidents of every party and stripe, no matter the urgency or emergency, followed the letter and spirit of these provisions. If they wanted tariffs, they put a request before Congress or acted under statutes in which Congress granted the power in plain words, with clear rates, under time limits, and through a prescribed process.

In 2025, President Trump broke from that consistent practice. Invoking the International Emergency Economic Powers Act (IEEPA), a statute that does not mention tariffs (or any other tax powers) and

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[1] Act of June 1, 1789, ch. 1, 1 Stat. 23 (1789) (oaths).

[2] Act of July 4, 1789, ch. 2, 1 Stat. 24 (1789) (tariffs).

[3] U.S. Const. art. I, § 7, cl. 1; art. I, § 8, cl. 1. *Id.* art. I.

had never been used to justify them, he issued an emergency proclamation and executive order imposing tariffs ranging from 10 percent to 50 percent, on virtually every country in the world—friend or foe, countries with and without trade surpluses with the United States. Almost immediately, he began announcing changes in his new tariffs—increasing some, lowering others, canceling some, and exempting some without notice and often with no explanation. IEEPA, passed in 1977, is plainly and simply an economic sanctions statute, to be used only in instances of "unusual and extraordinary" threats to national security or other national interests, such as when Iran seized American hostages or Russia invaded Ukraine. Unlike the handful of statutes that authorize executive imposition of tariffs in particular situations, IEEPA makes no mention of tariffs; but the government defended the actions in court as an exercise of the statutory power to "regulate . . . importation." Two words, the Chief Justice observed, "separated by 16 others."[4]

On February 20, 2026, the Supreme Court held that those two words "cannot bear such weight."[5] In a 6–3 decision, the Court ruled that IEEPA does not authorize the President to impose tariffs. Chief Justice John Roberts wrote for the Court. Much of his opinion was joined by five Justices, though Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson declined to join parts of the opinion discussing the Major Questions Doctrine, calling this analysis "unnecessary." Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh dissented.

Fundamental to the decision was the distinction between the power to tax and the power to regulate. Although the taxing power is frequently used not just to raise revenue but also to achieve regulatory purposes, the two powers are found in separate clauses of the Constitution and are subject to different procedural safeguards, designed to ensure that the legislative branch retains complete control over the power of the purse. There can be no doubt that tariffs are taxes. Article I, Section 8, Clause 1 speaks of "imposts" and "duties" (which are synonyms for "tariffs") in the same breath as other taxes, while it gives the power to "regulate" commerce in a separate provision. And while President Trump often speaks of tariffs as if

[4] Learning Res., Inc. v. Trump, 607 U.S. 229, 240 (2026).

[5] *Id.*

they were paid by foreigners, tariffs are actually imposed on and paid by U.S. firms when they import goods from abroad. As an economic matter, the incidence of these taxes falls overwhelmingly on the American importers and their American customers.

The Court's decision is the most consequential separation-of-powers ruling in a generation. It returned the taxing power to the branch the Constitution assigns it. And it rebuffed the claim that a presidential declaration of emergency unlocks powers Congress never granted—in the face of extraordinary rhetorical pressure from the President himself.

Yet the decision left open a great deal. The Court said nothing about remedies, leaving the lower courts with the task of sorting out refunds on some 50 million customs entries. It offered no guidance on the limits of "regulate . . . importation" outside the context of tariff power. And it fractured over the major questions doctrine, producing six opinions with no consensus for the doctrine's application. Within hours of the ruling, the President imposed a replacement tariff under a different statute, launching a second round of litigation that continues as we write. This article recounts how we got here and what the Court decided, as well as the work that remains for the judiciary, the Executive, and, most of all, Congress.

I. From Sanctions Statute to Tariff Machine

Congress enacted IEEPA in 1977 to *narrow* presidential emergency power, not expand it. The law was a response to its forerunner, the 1917 Trading with the Enemy Act (TWEA), which over 60 years had grown from a wartime necessity into a catch-all for peacetime economic control. A post-Watergate Congress, uneasy with such open-ended executive power, had already moved to put some discipline on the matter with the Trade Act of 1974 and the National Emergencies Act of 1976. IEEPA followed in short order.[6]

Under the new statute, a President can declare a national emergency only to deal with an "unusual and extraordinary threat" originating substantially abroad.[7] This enables the President to "investigate, block during the pendency of an investigation, regulate,

[6] Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976); International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977); *see* H.R. Rep. No. 95-459, at 2, 8–9 (1977).

[7] 50 U.S.C. § 1701(a).

direct and compel, nullify, void, prevent or prohibit" a long list of transactions involving foreign property, including "importation or exportation."[8] For half a century, Presidents from both sides of the aisle have used IEEPA to sanction cartels and kleptocrats, freeze assets, and embargo foes. Yet prior to 2025, none had ever thought to use it to increase taxes of any kind.

President Trump took that unprecedented step in the weeks after his second inauguration. In February 2025, citing the flow of fentanyl and other drugs across the borders, he declared national emergencies and imposed IEEPA tariffs of 25 percent on most Canadian and Mexican imports and 10 percent on most Chinese imports.[9] On April 2, citing "large and persistent" trade deficits, he imposed the so-called "reciprocal" tariffs: a baseline duty of at least 10 percent on all imports from all trading partners, with dozens of countries assigned higher rates, displacing trade agreements that had been enacted by Congress.[10]

The result was more like a moving picture than any tariff schedule one might expect. The China rate first jumped from 10 percent to 20 percent and, in two days' time under the reciprocal rules, climbed from 34 percent to 84 percent to 125 percent, for an effective 145 percent.[11] Goods moved into and out of the tariff system by executive order: beef, coffee, tea, spices, and fertilizer were covered in the initial order and exempted when they proved politically inexpedient; other products and other countries moved in and out of favor without explanation or for reasons unrelated to the existence of "large and persistent trade deficits," which were the ostensible rationale for the action. An example is the 50 percent tariff on goods from Brazil in retaliation for that country's criminal prosecution of its former president, a friend of President Trump. The *de minimis* exemption for low-value shipments went away by decree. The Court later catalogued this "dizzying array of modifications" as evidence of the

[8] *Id*. § 1702(a)(1)(B).

[9] Exec. Order No. 14,193, 90 Fed. Reg. 9,113, 9,114 (Feb. 1, 2025); Exec. Order No. 14,194, 90 Fed. Reg. 9,117, 9,118 (Feb. 1, 2025); Exec. Order No. 14,195, 90 Fed. Reg. 9,121, 9,122 (Feb. 1, 2025).

[10] Exec. Order No. 14,257, 90 Fed. Reg. 15,041, 15,041, 15,045 (Apr. 2, 2025).

[11] Exec. Order No. 14,228, 90 Fed. Reg. 11,463, 11,463 (Mar. 3, 2025); Exec. Order No. 14,259, 90 Fed. Reg. 15,509, 15,509 (Apr. 8, 2025); Exec. Order No. 14,266, 90 Fed. Reg. 15,625, 15,626 (Apr. 9, 2025).

sweeping and unconstrained nature of the asserted power: the ability to change the amount, product, and duration of a tariff at will.[12]

There was no disputing the economic stakes; the government boasted of them. Its briefs projected that the tariffs would cut the national deficit by $4 trillion and touted international agreements, reached under tariff pressure, said to be worth $15 trillion.[13] The President's lawyers told the Court that the question of whether America was to be "a rich nation" or a "poor" one rested on the outcome of the case.[14] They meant this as a reason to uphold the tariffs, but some on the Court took it as a confession that the tariffs had little to do with the extraordinary foreign affairs emergencies that IEEPA was passed to combat.

II. Three Courts, One Answer

Two sets of plaintiffs challenged the tariffs, in separate courts, both advancing the same argument: IEEPA lacks authority for such measures.

The *Learning Resources* plaintiffs, two family-owned businesses that import educational toys, sued in the District Court for the District of Columbia. That court denied the government's motion to transfer the case to the Court of International Trade (CIT), held that IEEPA confers no tariff power, and preliminarily enjoined the tariffs that were applied to the plaintiffs.[15]

The *V.O.S. Selections* plaintiffs, five small businesses joined by 12 states, sued in the CIT, which has exclusive jurisdiction over any lawsuit "that arises out of any law of the United States providing for . . . tariffs" or their "administration and enforcement."[16] That court entertained briefing and argument and granted summary judgment against the government on the ground that the President's order

[12] *Learning Res., Inc.*, 607 U.S. at 237–38, 243–44.

[13] *Id*. at 246 (citing Opening Brief for the Respondents in No. 24-1287 and the Petitioners in No. 25-250 at 3, 11, Learning Res., Inc. v. Trump, 607 U.S. 229 (2026) (Nos. 24-1287 & 25-250)).

[14] *Id*. (citing Opening Brief for the Respondents in No. 24-1287 and the Petitioners in No. 25-250 at 2, Learning Res., Inc. v. Trump, 607 U.S. 229 (2026) (Nos. 24-1287 & 25-250)).

[15] Learning Res., Inc. v. Trump, 784 F. Supp. 3d 209, 223 (D.D.C. 2025).

[16] 28 U.S.C. §§ 1581(i)(1)(B), (D).

exceeded his authority under IEEPA.[17] The Federal Circuit, sitting *en banc*, affirmed in relevant part, holding that the power to "regulate . . . importation" did not authorize tariffs "unbounded in scope, amount, and duration."[18] Four judges, concurring, would have gone further and held that IEEPA authorizes no tariffs whatsoever. Four judges dissented.

President Trump denounced the *en banc* ruling and warned of ruin for the country if it stood. The government quickly sought certiorari and expedited review; the *Learning Resources* plaintiffs separately sought certiorari before judgment. The Court granted both on September 9, 2025, consolidated the cases, and heard argument on November 5.[19] Judging from the prediction markets, most observers went into the argument expecting the government to lose and left it with that expectation strengthened. Few expected the decision to take so long. Every week the tariffs were in place, American importers were paying billions of dollars that, presumably, would have to be returned. The decision came down on February 20, 2026.

III. The Decision

A. The Jurisdictional Housekeeping

There is irony with the caption of this case: it is styled after plaintiffs whose suit the Court unanimously vacated. The Court took jurisdiction only in the case arising from the CIT and the Federal Circuit, *V.O.S. Selections*, but for technical reasons, the cases retained the name from the dismissed suit, *Learning Resources*. Jurisdiction mattered because the relevant statute vests exclusive jurisdiction over any case that "arises out of" tariff law in the CIT.[20] The *Learning Resources* plaintiffs argued that because the challenged tariffs were predicated on IEEPA, which is not a tariff law, the case belonged in ordinary district court. The CIT and Federal Circuit, affirmed by the

[17] V.O.S. Selections, Inc. v. Trump, 772 F. Supp. 3d 1350, 1365, 1383 (Ct. Int'l Trade 2025).

[18] V.O.S. Selections, Inc. v. Trump, 149 F.4th 1312, 1338 (Fed. Cir. 2025) (en banc) (per curiam).

[19] Trump v. V.O.S. Selections, Inc., 146 S. Ct. 73 (2025); Transcript of Oral Argument at 1, Learning Res., Inc. v. Trump, 607 U.S. 229 (2026) (Nos. 24-1287 & 25-250).

[20] *Learning Res., Inc.*, 607 U.S. at 239, 240 n.1; 28 U.S.C. § 1581(i)(1)(B); 19 U.S.C. §§ 2483, 3004(c)(1)(C).

Supreme Court, reasoned that executive changes to tariffs are incorporated in the Harmonized Tariff Schedule, which has the status of tariff law. Sensibly, the Supreme Court granted certiorari in both cases, ensuring that, whichever way it ruled on the tricky jurisdictional question, it would have jurisdiction to reach the merits.

One other practical point bears mention: the result of the jurisdictional ruling is that all future tariff cases, including refund actions, will be channeled through a single specialized court, the CIT. These cases therefore do not present the possibility of conflicting decisions among multiple district courts—the problem that gave rise to the issue of nationwide injunctions, resolved in *Trump v. CASA, Inc*.[21]

B. The Essential Holding: "Regulate" Does Not Mean "Tax"

The central question—whether IEEPA delegated authority to the President to impose tariffs—gained a solid six-Justice majority, all of whom joined that part of Chief Justice Roberts's opinion for the Court. The opinion opens where the Framers did: Article I, Section 8 grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises," and the tariff is "very clear[ly] . . . a branch of the taxing power."[22] Madison saw the purse as the House's way of curbing "all the overgrown prerogatives of the other branches"; Hamilton predicted the government would rely on tariffs for revenue.[23] After a revolution fought over taxation without representation, the Framers gave Congress "alone . . . access to the pockets of the people" and vested no part of the taxing power in the Executive.[24] The government did not contest that the President has no inherent peacetime authority to levy tariffs. President Trump's claim of power was based entirely on the IEEPA statute.

The statute gives the executive branch extensive powers to respond to specific "unusual and extraordinary threats" to national security arising from hostile foreign action, such as the 1980 Iranian hostage seizure or Russia's invasion of Ukraine. The ordinary meaning of the words cannot be stretched to cover longstanding conditions, such

[21] 606 U.S. 831 (2025).

[22] U.S. Const. art. I, § 8, cl. 1; *Learning Res., Inc.*, 607 U.S. at 240–41; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 201 (1824).

[23] The Federalist No. 58 (James Madison), The Federalist No. 12 (Alexander Hamilton).

[24] The Federalist No. 48 (James Madison); Nicol v. Ames, 173 U.S. 509, 515 (1899).

as the balance of trade deficit—which has complex domestic as well as international causes and has lasted half a century. The Executive Order itself repeatedly describes U.S. trade deficits as "persistent," which made it difficult to maintain they are "unusual" and "extraordinary." Furthermore, IEEPA does not give the President the power to tax Americans, no matter what the emergency. Section 1702(a)(1)(B) lists nine verbs: investigate, block, regulate, direct, compel, nullify, void, prevent, prohibit. None of them refers to an "import surcharge"—the terms Congress uses whenever it delegates tariff authority.[25] In its briefs, the government could not point to a single instance in the U.S. Code where "regulate" has been construed to mean tax. The government conceded that the Securities and Exchange Commission's power to "regulate the trading of . . . securities" would not let the Commission tax securities trades.[26] The Court declined to accept that Congress hid "a delegation of its birth-right power to tax within the quotidian power to 'regulate'" in IEEPA when it had never used the term in that way in any other statute.[27]

The statute's text and structure support one another. As Chief Justice John Marshall observed some two centuries ago, the right to levy taxes is "entirely distinct" from the power to regulate commerce.[28] When Congress wants both, it says so expressly. The government's interpretation would also render IEEPA partly unconstitutional: the statute authorizes the President to "regulate . . . importation or exportation" in the same breath, and the Constitution flatly forbids taxing exports.[29] This shows Congress was equipping the President to cut off commerce with foreign threats, not to put American importers' money in the Treasury, as a tariff does. The distinction between trade embargoes and tariffs goes back to the 18th-century law of nations, well known to our Framers. Under the law of nations, when nations went to war it immediately became illegal for their citizens to trade with the enemy, and this prohibition could be enforced by the Executive without additional legislation. War did not give rise to tariffs, or to an executive power to impose tariffs. It is

[25] *See, e.g.*, 19 U.S.C. §§ 1338(d), 2132(a), 2253(a)(3)(A), 2411(c)(1)(B).

[26] *Learning Res., Inc.*, 607 U.S. at 249 (quoting 15 U.S.C. § 78i(h)(1)).

[27] *Id.* at 249–50.

[28] *Gibbons*, 22 U.S. at 201.

[29] U.S. Const. art. I, § 9, cl. 5.

natural that IEEPA, which is a successor statute to the Trading with the Enemy Act, would retain this distinction. The Court found the government's claim that a tariff is a "lesser" tool between compulsion and prohibition to be without merit; the two powers have different origins and different effects.[30]

History puts the final word on it. In IEEPA's half century, no President found a tariff power in the Act, even as Presidents invoked the statute continuously for other purposes and imposed tariffs on tires and washing machines under other statutes.[31] In recent years, across presidential administrations of both parties, the Court has been rightly skeptical of attempts by the Executive to seize upon vague language in old statutes as a delegation of power never heretofore recognized.

The government's best case was *United States v. Yoshida International*, a 1975 decision from the Court of Customs and Patent Appeals that retroactively blessed President Richard Nixon's temporary 10 percent surcharge under TWEA.[32] But examined closely, *Yoshida* backfires on the government for two reasons. First, Congress had responded to Nixon's tariff surcharges by enacting a specific law, Section 122 of the Trade Act of 1974, prescribing what the President "shall" do to address "large and serious United States balance of payments deficits": namely, to impose emergency surcharges limited in amount (15 percent) and duration (150 days), giving Congress time to act.[33] The *Yoshida* court took pains to stress that it was not sanctioning "any future surcharge of a different nature" or "the exercise of an unlimited power."[34] The Court explained that future cases would be "govern[ed]" by Section 122, with which Presidents "must, of course, comply."[35] If *Yoshida* is good law, it condemns rather than sustains President Trump's unconstrained, indefinite tariffs, which lack any of the limits respected by President Nixon or embodied in Section 122.

Second, in a lengthy report, Congress examined the uses of TWEA by Presidents from Franklin Roosevelt to Nixon, including the 1971

[30] *Learning Res., Inc.*, 607 U.S. at 251–52.

[31] *Id.* at 244–45 n.3.

[32] *Id.* at 252–53; United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975).

[33] Trade Act of 1974, § 122, 19 U.S.C. § 2132(a).

[34] *Yoshida*, 526 F.2d at 577, 583.

[35] *Id.* at 582 n.33.

tariff surcharge belatedly upheld in *Yoshida*. The report concluded that the statute had been treated as "essentially an unlimited grant of authority," which in this post-Watergate period was unacceptable.[36] In response to these findings, Congress repealed TWEA except in case of declared war and replaced it with IEEPA, which it described as providing new "authorities for use in time of national emergency which are both more limited in scope than those of [TWEA] and subject to various procedural limitations."[37] Those limits included restricting IEEPA to "unusual and extraordinary"[38] threats to national security and imposing a congressional veto on all proclamations of emergency. Against this backdrop, the government's attempt to interpret IEEPA as incorporating an unlimited version of the very assertion of power Congress had attempted to repeal was wholly unconvincing.

It is worth noting a certain restraint on the part of the Court in its *Learning Resources* opinion. The Court made clear it would not "set forth the metes and bounds" of the power to "regulate . . . importation."[39] It decided one question: the power granted to the President via IEEPA does not embrace tariffs. Whether it embraces quotas, licensing schemes, or other border measures was a question left for another day.

C. Broader Questions of Separation of Powers

The Court's statutory analysis, which garnered six Justices' votes without any separate opinions, was sufficient to decide the case. But in view of the obvious separation-of-powers concerns, a plurality of the Court went further. Its doctrinal tool was what has come to be known as the "Major Questions Doctrine." Readers of this *Review* will know the formula: where the Executive puts forward an uncertain statutory claim to a power of great "economic and political significance," the Court insists on unambiguous authorization from Congress.[40] In this instance the plurality saw the doctrine at work

[36] H.R. Rep. No. 95-459, at 7.

[37] *Id.* at 2.

[38] 50 U.S.C. § 1701(a).

[39] *Learning Res., Inc.*, 607 U.S. at 250–51.

[40] West Virginia v. EPA, 597 U.S. 697, 721–24 (2022); Biden v. Nebraska, 600 U.S. 477, 504–06 (2023).

with "particular force" given that the delegation in question goes to the very heart of the congressional power of the purse, or what Madison termed "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[41] Lurking in the background was the nondelegation doctrine, which had been vigorously argued by the parties and discussed at oral argument. But the Court's interpretation of IEEPA in light of the Major Questions Doctrine made it unnecessary for the Court to wade back into those troubled waters.

Over the past decade or more, the Court has transformed the principle of separation of powers from an executive-friendly dormouse into a potent suite of doctrines designed to ensure that the executive branch is confined to powers vested by the Constitution or genuinely delegated by Congress in terms sufficient to define the metes and bounds of executive authority. To appreciate the change, it is necessary to take a step back and look to the separation-of-powers doctrines as they emerged from the New Deal Court.

The key case, dating from the Korean War era, was *Youngstown Sheet & Tube Co. v. Sawyer*.[42] The taxpayer plaintiffs in *V.O.S. Selections* invoked this case in the first paragraph of their brief. The 6–3 decision in *Youngstown*, from a Court whose Justices had all been appointed by Presidents Franklin Roosevelt or Harry Truman, blocked President Truman's executive order temporarily seizing the nation's steel mills to keep them open at the height of the Korean War. The Court held that the order was unconstitutional—not because a clause of the Constitution forbade it, but because neither a clause in the Constitution nor any statute authorized it. In other words, actions by the executive branch that are *ultra vires* (without authorization) are just as unconstitutional as those that violate a specific prohibition. Unfortunately, the Court's fractured opinions (five opinions for the six Justices in the majority, plus one for the three in dissent) generated much confusion about how to tell when a presidential act was *ultra vires*—confusion that the Court multiplied and confounded over the ensuing decades.

[41] *Learning Res., Inc.*, 607 U.S. at 242–43 (quoting The Federalist No. 58 (James Madison)); The Federalist No. 58 (James Madison).

[42] 343 U.S. 579 (1952).

Justice Robert Jackson's elegant concurrence has been the most influential. He divided cases involving challenges to executive power into three categories. Category One comprises actions where Congress has authorized the executive action. Category Three comprises actions where Congress has disapproved of the executive action. Category Two, the most important, comprises actions where Congress has neither approved nor disapproved. The first and third categories offer little difficulty; in most cases, the President wins Category One and loses Category Three. But what about Category Two? Justice Jackson's concurrence describes Category Two cases as falling in a "zone of twilight" where the answer "is likely to depend on the imperatives of events and contemporary imponderables."[43] That description is decidedly unhelpful. How can courts evaluate "the imperatives of events" without second-guessing the policy judgments involved? If the "contemporary imponderables" are imponderable, how can courts ponder them? Indeed, Jackson's Category Two is worse than unhelpful. It comments that "congressional inertia, indifference, or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility."[44] That suggests congressional inaction may empower the President to act unilaterally, thus effectively contradicting the premise that unauthorized exertions of power are unconstitutional.[45]

This tension in Jackson's description of Category Two might not matter if most cases fell into Categories One or Three. But alas, almost every modern contested case falls into Category Two. Occasionally, Presidents rest their case on constitutionally vested power, but not often. Typically, Presidents rely primarily on broad or ambiguous language in one of the thousands of statutes passed by Congress over the centuries. The entire ballgame lies in how to read those statutes.

For roughly 40 years, during which the power of the executive branch grew and grew, the Court embraced the idea that if a statute is ambiguous, the courts should defer to the interpretation given by the executive, if that interpretation is reasonable. This idea was called "*Chevron* deference," after the case in which it first was

[43] *Id.* at 637 (Jackson, J., concurring).

[44] *Id.*

[45] One of this Article's coauthors criticizes the Jackson concurrence at length in his book, Michael W. McConnell, The President Who Would Not Be King: Executive Power Under the Constitution 277–85 (Bridget Flanner-McCoy & Alena Chekanov eds., 2020).

formally announced.[46] Thus Category Two cases went in favor of the executive branch. If a statute was clear enough that a contrary interpretation would be unreasonable, it logically fell in Categories One or Three. All cases involving not-unreasonable invocations of broad or ambiguous statutory language were resolved by deferring to the executive, which is to say to support assertions of executive power. Had *Chevron* applied in the tariff case, it might well have come out the other way.

Fortunately, in 2024, the Court overruled *Chevron* in a case called *Loper Bright Enterprises v. Raimondo*.[47] But that is not all. In the intervening years, the Court had developed an opposite rule of construction, applicable at least in cases of great importance. Called the Major Questions Doctrine, it holds that in matters of great significance, the executive branch should not be able to claim novel powers without a solid—maybe even an explicit—basis in statutory language. Originally, the Major Questions Doctrine was simply an exception to *Chevron*, but now, after *Chevron*'s demise, it applies to statutory interpretation more generally. In effect, *Loper Bright* flipped the script for Category Two cases. Category Two cases, by definition, do not provide the degree of clarity or explicitness that the Major Questions Doctrine demands. It follows that Category Two cases—the most numerous and important of the three categories—now tend to go against the executive, at least with respect to novel claims of statutory power.

As the Chief Justice noted, the Major Questions Doctrine applied with particular force in the tariff case because President Trump's tariffs amounted to hundreds of billions of dollars in new taxes, seriously disrupted trade relations with our trading partners, replaced stable and consistent tariff schedules with rapidly changing and unpredictable rates, and upended the system for setting tariffs that had prevailed since the 1974 Trade Act. No question before the Court in recent times has been more "major." The executive's assertion of tariff power under IEEPA was novel. And even if one credited the government's argument that the term "regulate" in IEEPA could be read to encompass imposition of tariffs, it would be difficult to claim that such a reading is clear, explicit, or unambiguous. It is

[46] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[47] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

not insignificant that the judges of the specialized court with expertise in the field of trade law roundly rejected the administration's interpretation.

Unfortunately, the Major Questions analysis, which seems to these authors straightforward, divided the Court. The three more liberal Justices—Kagan, Sotomayor, and Jackson—maintained that it was "unnecessary" for the Court to invoke the Major Questions Doctrine because the case was sufficiently clear based on what Justice Kagan called "straight-up statutory construction."[48] Fair enough. That may well be so—though Justice Neil Gorsuch persuasively argued that this "straight-up" construction implicitly relied on premises hard to distinguish from Major Questions. But an unstated reason why these Justices may not have been willing to join this portion of the Chief's opinion is because the doctrine had been invoked previously to invalidate a number of Biden administration initiatives—such as student loan forgiveness, the nearly universal COVID-19 vaccine mandate, the housing eviction moratorium, and the interpretation of the Clean Air Act to become a tool against global warming—from which these Justices dissented.

Justices Gorsuch and Amy Coney Barrett, both appointed by President Trump, strongly support the Major Questions Doctrine and strongly supported its application in the tariff case. But the two Justices differ with respect to the proper ground on which the Doctrine rests. Justice Barrett regards it as an instrument for discerning likely congressional intent. In her opinion, it is highly unlikely that Congress would give blank checks to the executive to determine major issues of government policy.[49] Justice Gorsuch regards it as an instrument for preventing violations of the nondelegation doctrine.[50] The Major Questions Doctrine makes it more difficult for Congress to delegate vast swaths of regulatory power to the executive without clear limits and guidelines. The two Justices took the occasion of the tariff cases to debate which of these two understandings is superior. But the differences between them had no practical significance for the tariff case; both versions pointed in the same direction.

[48] *Learning Res., Inc.*, 607 U.S. at 304–06, 310 (Kagan, J., concurring in part and concurring in the judgment).

[49] *Id.* at 300–04 (Barrett, J., concurring); *see* Biden, 600 U.S. at 507–22 (Barrett, J., concurring).

[50] *Learning Res., Inc.*, 607 U.S. at 268–69 (Gorsuch, J., concurring).

That leaves the dissenters: Justices Kavanaugh and Alito were more impressed with the government's statutory position that the power to regulate can include the power to tax for regulatory purposes.[51] However, the view that the Major Questions Doctrine should not be applied to questions of foreign affairs drove their dissent. In that realm, they argue, it is both typical and desirable for Congress to delegate power with a generous hand, and it is not possible to anticipate with clarity exactly what foreign affairs powers the exigencies of world affairs may demand.

That position raises two interrelated problems. First, a vast array of domestic policy matters have foreign policy implications. Climate change was the subject of the Paris Accords—yet the dissenting Justices had no difficulty applying the Major Questions Doctrine when the Obama and Biden administrations attempted to sideline Congress by interpreting the Clean Air Act broadly to include climate change powers. Other examples abound. Immigration affects foreign affairs; capital punishment affects foreign affairs; college entrance policy affects foreign affairs. It is highly unlikely that the dissenting Justices truly believe that anything that touches foreign affairs is governed by the old *Chevron* deference rather than by a more skeptical Major Questions Doctrine.

Second, it is far from clear that tariffs should fall within such an exception even if it exists. The Founders were well aware of the foreign affairs implications of tariffs, but they located the tariff power squarely in Congress's wheelhouse. Tariffs are taxes paid by Americans. Few things were more central to the Framers' vision than the principle that taxes on Americans must be authorized by the votes of representatives elected by Americans.

Justice Thomas dissented on different grounds. He was the only one of the nine to address the nondelegation doctrine. In his dissent, he adopted a view of nondelegation that had never been advanced in the Court before (largely based on the academic work of one of the authors of this article).[52] In a nutshell, this view maintains that Congress may delegate powers not of a purely legislative or judicial nature back to the executive without need for an intelligible principle. The problem for Justice Thomas's use of this theory, however,

[51] *Id*. at 338–46, 372–85 (Kavanaugh, J., dissenting).

[52] McConnell, *supra* note 45, at 328–35.

is that the imposition of taxes on Americans, including tariffs (which were the most common form of taxes in the early years), was a quintessentially legislative power. It falls outside Madison's proposal for delegation of powers not legislative or judicial in nature. The hard question is whether Congress may delegate any taxing power *at all*, as Justice Gorsuch argued in *Consumers' Research*, not whether it can do so free of the intelligible principle constraint.[53] It seems obvious that if the intelligible principle constraint applies, IEEPA cannot satisfy it. IEEPA does not even mention tariffs; it therefore sets neither a ceiling nor a floor. If the government's argument is right, then the President has an unlimited authority to impose whatever tariffs he wishes, so long as he issues an emergency declaration (which itself, the government argued, was judicially unreviewable). Applying Justice Thomas's usual nondelegation scruples, that is beyond the pale.

IV. The Judgment Vindicated

We have no compunction in making full disclosure: the authors of this article are partisans when it comes to the outcome of this case. One of us served as counsel to the *V.O.S. Selections* plaintiffs; both of us helped write a brief of *amici curiae*, joined by scholars and former public officials across the political spectrum, urging the courts to hold the tariffs unlawful. But the judgment is not predicated on our word alone. The case for it is found in three propositions the Court has, for the most part, embraced and a fourth it has prudently left in reserve.

The first is textual, and it is not close. Congress knows how to delegate tariff power. It has done so many times, always with the words "duty" or "tariff," and always with caps, time frames, and a process. IEEPA contains none of that vocabulary or those limits. To find in "regulate . . . importation" a power to tax every import on earth at any rate forever is to conscript a sanctions statute for a service Congress never intended. The government's inability to identify even one other statute where "regulate" means "tax" should have ended the case, and for six Justices it largely did.

The second argument is structural. The Framers were most careful with the taxing power, lodging it in the House under the Origination Clause precisely because its abuse by a distant executive once

[53] FCC v. Consumers' Rsch., 606 U.S. 656, 723–24 (2025) (Gorsuch, J., dissenting).

spurred a revolution. A reading of IEEPA that lets a President tax by proclamation, checked only by his own emergency findings (which the government insisted no court could review) and revocable only over his veto, turns the constitutional design on its head. It gives the Executive the legislature's "most complete and effectual weapon." *Youngstown* teaches that an emergency is the classic pretext for this exact migration of power, and the tariff program of 2025, with its shifting rates and improvised exemptions, was a live demonstration of unilateral fiscal policy, not a response to an emergency.

We made the third point to our friends who backed these tariffs as a matter of policy: the shoe will be on the other foot at some point. This is a presidential power, not a Trump one. On the government's theory, a future President who deems climate change an extraordinary foreign threat can put an indefinite and unreviewable tariff on gasoline cars or whatever he pleases. The Solicitor General was forthright enough to concede at argument that a victory would open the same door for every successor. As Justice Gorsuch asked in so many words, what President is going to give up that power? Conservatives who cheered the tariffs should be grateful the Court declined to build a throne.

Equal credit is due for what the Court chose not to do. It refrained from constitutionalizing trade policy or second-guessing a tariff laid down under a proper delegation of power. It did not wade into the nondelegation doctrine even though the case was argued in its shadow, nor did it define the limits of IEEPA's "regulate" power, leaving the statute's traditional artillery of embargoes and quotas where they were. In the best tradition of separation-of-powers rulings, the decision is narrow: if the Executive wants to get at the purse, he must prove Congress put it there. But the fractured nature of the rationale has its costs. With no majority to apply or disavow the Major Questions Doctrine, and with the Kagan and Barrett concurrences putting its foundations in question, lower courts have a result to follow in *Learning Resources* but plenty of methodology to debate when the next extravagant claim of delegated power comes their way.

V. Loose Ends: The Refund Morass

In its ruling, the Court made clear that the tariffs were unlawful from the start, yet it was silent on how to remedy the problem. That silence has left in its wake what is arguably the most formidable customs-remedy issue this country has seen, and one could say the situation has been treated with less than the deference it warranted.

The numbers are staggering. By the government's own accounting, importers paid IEEPA duties on more than 53 million entries; as of early March 2026, roughly 20 million remained unliquidated.[54] Two weeks after the decision, the Court of International Trade directed the government to pay refunds,[55] and Customs and Border Protection (CBP) promptly responded that its Automated Commercial Environment system could not process refunds at that scale without new machinery.[56]

As a result, entitlement is now determined on an entry-by-entry basis. Unliquidated entries are in the best position. Those already liquidated but within the protest period must be challenged in time. Once finally liquidated, they are all but inaccessible save for litigation or an act of Congress. It was a busy spring for trade counsel filing protective protests and CIT actions to hold their ground, while the CIT put CBP on notice to show how it intends to get a refund system in place.[57]

The administration's posture has ranged from grudging to obstructive. The incentives are perverse in that each month of delay amounts to an interest-free loan of taxes that should never have been exacted. There is no need to complicate the equities here. The duties were levied without statutory authority, and the Constitution does not allow "keeping the change" when exactions are unlawful. Congress could resolve the mess in a paragraph, directing automatic refunds with interest across all entry postures, and it should. Whether it will is a different question, since the Treasury's windfall runs to hundreds of billions of dollars, and found money has few enemies in Washington.

[54] Decl. of Brandon Lord ¶¶ 12, 21, Atmus Filtration, Inc. v. United States, No. 26-01259 (Ct. Int'l Trade Mar. 6, 2026), ECF No. 31.

[55] Order at 2–3, Atmus Filtration, Inc. v. United States, No. 26-01259 (Ct. Int'l Trade Mar. 4, 2026), ECF No. 21.

[56] Decl. of Brandon Lord ¶¶ 17–29, Atmus Filtration, Inc. v. United States, No. 26-01259 (Ct. Int'l Trade Mar. 6, 2026), ECF No. 31. The court paused immediate implementation on March 6 while CBP developed a mechanism.

[57] CBP launched CAPE refund functionality in April, and the CIT issued Administrative Order 26-01 on July 13. U.S. Customs & Border Prot., Consolidated Administration and Processing of Entries (July 10, 2026). U.S. Ct. Int'l Trade, Administrative Order No. 26-01, *In re Procedures for New IEEPA Tariff Cases* (July 13, 2026).

VI. The Sequel: Tariff Whack-a-Mole

Justice Kavanaugh predicted that the President could reimpose most of the tariffs under other statutes, and the President seems to have treated the prediction as an instruction manual. Within hours of the decision he ordered IEEPA tariff collection terminated and, by separate proclamation, imposed a "temporary" 10 percent global tariff under Section 122 of the Trade Act of 1974, effective February 24, with public musings about raising it to the statutory ceiling.[58] A separate order continued the suspension of *de minimis* treatment for low-value imports.

Section 122 is a stark contrast with IEEPA. It has the tariff vocabulary the Court said was absent from IEEPA, expressly permitting a "temporary import surcharge . . . in the form of duties." But the duty authority is only to address "large and serious" balance-of-payments deficits, only up to 15 percent, and only for 150 days unless Congress affirmatively extends it.[59] With no action from Congress, the new tariff ran its course on July 24, 2026. Litigation followed at once: a coalition of states and importers challenged the proclamation. On May 7, a divided Court of International Trade held that the administration had not shown the kind of balance-of-payments deficit that Section 122 requires. The court limited relief to the State of Washington and the importer plaintiffs before it. The Federal Circuit then stayed the injunctions pending appeal, allowing collection to continue.[60]

The administration did not wait for Section 122 to expire. On July 15, after a Section 301 investigation, findings, public comment, and hearings, Trump directed a 25 percent tariff on Brazilian imports (with some exceptions) effective July 22. Five days later, he invoked Section 338 of the Tariff Act of 1930, apparently for the first time in nearly a century, to impose 50 percent additional duties on roughly $20 billion of specified Canadian goods. Three proclamations targeted alleged discrimination involving motor vehicles,

[58] Proclamation No. 11012, 91 Fed. Reg. 9,339, 9,339, 9,341–42 (Feb. 20, 2026); Executive Order No. 14,389, 91 Fed. Reg. 9,437 (Feb. 20, 2026).

[59] 19 U.S.C. § 2132(a).

[60] Oregon v. United States, Nos. 26-01472 & 26-01606, slip op. at 46–52 (Ct. Int'l Trade May 7, 2026), *stay granted sub nom.* Oregon ex rel. Beshear v. Trump, Nos. 2026-1804, 2026-1805, 2026 U.S. App. LEXIS 17200, at *15 (Fed. Cir. June 11, 2026) (per curiam).

alcoholic beverages, and dairy products; those duties were set to take effect August 19. The administration has also continued to expand and modify sectoral tariffs under Sections 232 and 301.

Some observers point to the commotion as evidence the Court's decision was for naught; the old tariffs are gone but new ones have taken their place. That criticism misunderstands the victory. The question in *Learning Resources* was never whether America would have tariffs, but who decides and under what constraints. The post-decision world answers that question correctly. The President may still pursue tariffs, but he must do so under statutes in which Congress clearly delegated the power, subject to rate caps, time limits, mandated findings, and judicial review in the statutory conditions. A 10 percent surcharge with a 150-day fuse that can be challenged in court is constitutional government. A 145 percent duty based on an unreviewable emergency and two words is not. It may be a game of whack-a-mole at times, but it is the product of a President abiding by the law, not putting himself above it.

VII. Congress's Move

The Court policed the boundary, but in the end only Congress can hold it. The decision gives rise to three reforms that ought to win over even those on the other side of the aisle who know they may have cause to distrust a President in time.

To begin with, the holding should be put into code. An amendment to IEEPA should make clear that the statute does not allow for duties, taxes, or any other form of revenue. That way the Court's construction is not at the mercy of its interpretation and there is no room for a future administration to relitigate the matter.

Then there is the matter of the emergency architecture. The National Emergencies Act was predicated on a legislative veto that *INS v. Chadha*[61] put an end to. Now a supermajority is needed to terminate an emergency, which explains why some have endured for decades. Something like the ARTICLE ONE Act would turn things on their head: an emergency declaration would run its course unless Congress gives it the nod. The plurality was right to note as a fact of the last 50 years that "[e]mergency powers tend to kindle emergencies." Congress should act on it.

[61] 462 U.S. 919 (1983).

As for the refunds, it is an abdication of responsibility for the courts and CBP to have to make up a remedy each month for 53 million entries. Congress has the power to require that money—taken without authority—is returned with interest, by a process importers can use without having to go to court or administrative law judges.

Beyond these points lies the harder question the case exposed but did not answer: how much tariff power should Congress delegate at all? Sections 122, 232, and 301 survived this litigation because they are real delegations with real limits. But Section 232's national-security rationale has stretched to cover steel, autos, and much else, and this Court has never revisited *Algonquin* in the modern era. One can expect the nondelegation issues that were in the air during *Learning Resources* to come back around, especially in light of Justice Thomas's lone dissent from the other side of the argument. Congress could let the reckoning come or get ahead of it by taking back the discretion it has granted, one statute at a time. The Framers put the purse in Congress's hands on the assumption that it would want it. Whether that holds up remains to be seen.

Conclusion

In the Founders' view, taxation was a focal point of self-government, a matter of no exaction without the consent of the people's representatives. Some 237 years on, an administration put forward the notion that a sanctions statute had in effect ceded that primordial power to a single individual by virtue of its authority to "regulate . . . importation." The Supreme Court read the two words, weighed them against the constitutional order they were said to displace, and returned the only verdict the text, structure, and history allow: those words cannot bear such weight.

One might recall this case for the refunds it has triggered or the tariffs it put an end to. But there is more to it than that. At a time when executive overreach is asserted with some force, six Justices from across the party line have stood firm against the incumbent's ire to make clear that emergencies are no excuse to rewrite Article I. The Framers left the purse strings with Congress and so they remain. Now Congress must show if it is still fit for the task.