

BROTHERS IN LAW

No Executive Taxation Without Clear Legislative Authorization

By [Akhil and Vikram Amar](#)

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(Jimmy Woo via Unsplash)

Brothers in Law is a recurring series by brothers Akhil and Vikram Amar, with special emphasis on measuring what the Supreme Court says against what the Constitution itself says. For more content from Akhil and Vikram, please see Akhil's free weekly podcast, "[America's Constitution](#)," Vikram's regular columns on [Justia](#), and Akhil's new book, [Born Equal: Remaking America's Constitution, 1840-1920](#).

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Our recurring “Brothers in Law” column, launched in July, was on pause for several weeks while Akhil was on a national book tour to promote his recently released tome, [Born Equal](#), and Vik was busy working on some briefs and law review articles. We shall soon return to our initial posts on [United States v. Skrmetti](#) to explore how this landmark case, decided in June, should have been analyzed had the justices properly understood the Constitution’s grand idea of birth equality – the theme of Akhil’s new book. But before adding the final chapter to our discussion of this seminal ruling from last term, we aim today to offer a few quick but important thoughts about the biggest cases being considered thus far in the current term, [Learning Resources, Inc. v. Trump](#) and [Trump v. V.O.S. Selections](#), which were argued on Wednesday.

Vik (along with a former member of Congress, Mickey Edwards) filed a “friend of the court” brief in this litigation, providing a structural explanation of why conferrals of broad policymaking power to the president (as distinguished from other actors) pose distinctive constitutional problems on account of the president’s veto pen, and thus why the court should construe statutes allegedly conferring such powers to him narrowly. Readers should certainly [take a look](#), and it appears at least some of the justices already did; Justices Neil Gorsuch and Amy Coney Barrett in particular asked many questions at oral argument focused on the “retrieval problem” and the “one-way-ratchet,” conceptual terms that Vik’s amicus brief, based on his prior academic scholarship, introduced and explored, but that no other briefs in the case mentioned.

Akhil also has a few things to get off his chest. What follows is one useful way (and a way that the briefs in the case don’t fully capture) to think about the big issues at stake – a self-consciously originalist narrative that locates the current tariff litigation against the backdrop of landmark events over the course of multiple continents and multiple centuries.

For over 400 years, taxation has raised unique and grave concerns in the Anglo-American constitutional tradition. In the 1620s and 1630s, the Stuart monarch Charles I tried to stretch parliamentary enactments beyond their clear terms and to

impose various taxes and levies that had not been clearly intended by Parliament. In so doing, Charles precipitated what is known as the [Ship Money](#) crisis on the heels of Parliament's famous [Petition of Right](#), asserting that taxes generally required clear parliamentary authorization. The controversy ultimately spiraled out and provoked the long and bloody English Civil War. In that conflict, Parliament eventually imposed a death sentence on Charles, who was beheaded in 1649.

A basic tenet of English constitutionalism emerging from the aftermath of the English Civil War of the 1640s and the Glorious Revolution of the 1680s is that all revenue measures must plainly originate in the House of Commons – a large assembly elected at frequent intervals.

American patriots in the 1760s and 1770s took these principles to heart and fought the Revolutionary War in defense of the famous motto, "[No taxation without representation](#)." American Patriots conceded that Parliament could *regulate* imperial trade for all sorts of purposes, but NOT *for the purpose of raising* revenue: This was the key distinction made famous by John Dickinson's "[Letters from a Farmer in Pennsylvania](#)" in the late 1760s (for more on this, please see Akhil's [The Words That Made Us: America's Constitutional Conversation, 1760-1840](#), especially at pages 64-68). Revenue could be raised intentionally, Americans insisted, only by large representative assemblies elected at regular intervals by those who would be taxed. Parliament could not tax America for revenue purposes precisely because Parliament was not elected and frequently re-elected by Americans. [The Declaration of Independence](#) assailed both British King George III and his British Parliament for "imposing taxes on us [Americans] without our Consent" – without, that is, consent as registered in "our own legislatures."

The Revolutionary War (long and bloody like the English Civil War) ensued, precipitated in no small part by this crucial issue of the taxing power – the issue of who could tax, how, and why. As Chief Justice John Marshall (who had served in that war under George Washington) would put the point in one of his landmark opinions for the Supreme Court, [Gibbons v. Ogden](#), "The right to regulate commerce, even by the imposition of duties, was not

controverted, but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed” (emphasis added.)

The American Constitution, drafted at Philadelphia by Dickinson and other leading patriots, codified these basic precepts. Constitutionally, revenue measures must originate in the House of Representatives – a rule that mirrored and built on the British constitutional precept that all revenue measures had to originate in the House of Commons. Like the House of Commons, the House of Representatives was designed as a numerous body subject to frequent re-election – on this side of the Atlantic, every two years. And taxation and representation were expressly linked in a famous provision prescribing House apportionment (the so-called three-fifths clause).

Given that America’s Congress has broad taxation power and also broad power to regulate various matters including interstate and international commerce, Congress may indeed combine these powers in its legislation. Thus, Congress may regulate for revenue purposes and also raise revenue for regulatory purposes.

But the Trump tariff cases raise entirely different questions than whether Congress can regulate and tax broadly and interchangeably: May the executive, *without clear congressional authorization*, twist a statute (the [International Emergency Economic Powers Act](#)) that nowhere uses the magic words tax or revenue, into a gigantic revenue measure? May the executive in effect rewrite the entire tax code for an indefinite period in the absence of any clear legislative authorization?

And make no mistake, the Trump tariffs are in fact intentional revenue-raising measures borne by American consumers. Even as the solicitor general at oral argument suggested that the revenue the tariffs raised was incidental to their regulatory purpose, the [brief](#) for the United States highlights the hundreds of billions of dollars the tariffs bring into America’s coffers, and laments the budget woes that will result if the tariff revenue stream is interrupted. Even after the oral argument, President

Trump **reportedly** boasted about the high volume of revenue his tariffs was generating. And many economists weighed in at the court via friend-of-the-court briefs also explaining how tariffs operate similarly to other domestic taxes.

Even if Congress had explicitly invited the president to write his own tax code, such a blank check might well violate basic nondelegation principles – “delegation run riot” in the famous language of this court in the landmark **Schechter Poultry** case of 1935, which struck down a New Deal program impermissibly concentrating government power in the executive branch by giving executive officials virtually unbridled power to set wages and prices and favor some private businesses over others.

The **Panama Refining** case of 1935 was decided on similar grounds. And the date of these two landmark cases is hardly coincidental. As Vik’s amicus brief points out, the court in that year was rightly concerned to prevent an American slide into executive authoritarianism and presidential dictatorship akin to the rise in Europe of Mussolini, Hitler, Stalin, and Franco.

But the Roberts court today need not reach the constitutional nondelegation question. The Roberts court should simply narrowly – and fairly – construe Congress’ language so as not to allow the executive to rewrite the tax code at will. Should Congress choose to do this in the future, with its eyes open, then the court might need to revisit the matter. But if the Roberts court wrongly reads the current statute to empower presidential dictatorship authority over the tax code, it will be hard for Congress to claw back its constitutional role and power. As Vik’s amicus brief explains, any attempted repeal or president-limiting modification of IEEPA will likely have to surmount a presidential veto. And the fact that presidents wear two hats – they exercise power conferred by Congress but also have a large say in Congress’ future attempts to retrieve that power – animates much of the Constitution’s concern that power ought not to be delegated in a way that can’t be overseen or reclaimed by the body that delegated it. (This is what Gorsuch and Barrett were drawing on when they posed questions about the “retrieval problem” and “one-way ratchet” of power accretion to the president.)

Just as congressional statutes regulating states are construed narrowly to protect against federalism incursions, so too statutes conferring substantial power to presidents should be read narrowly to protect against separation of powers violations. (We might also draw here from private law; just as insurance policies are often construed to protect insured persons and consumer contracts are often construed to protect consumers, so here congressional statutes should be construed to protect the public against presidential dictatorship.)

The plain words of IEEPA strongly support this result. They authorize “regulation” of both “importation” and “exportation.” But exports cannot constitutionally be regulated for revenue purposes; as Article I section 9, clause 5 makes clear, “No Tax or Duty shall be laid on Articles exported from any State.” It is a wild textual stretch to say that the word “regulate” means “regulate for revenue purposes” for imports but means the exact opposite for exports.

It should also go without saying that the Supreme Court’s jurisprudence must not be partisan. In the 2012 Obamacare case, [National Federation of Independent Business v. Sebelius](#), four Republican-appointed justices awkwardly argued that a landmark law enacted overwhelmingly by Democrats could not be justified as a tax law even though the statute referred to cognates and variants of the word “tax” – “tax,” “taxpayer,” “taxable,” “taxation,” etc. – a whopping 34 times, as noted by Akhil in [The Constitution Today](#). Happily for the court and for our country, these four justices were in dissent. And it would be particularly awkward today for the Roberts court to be perceived as having narrowly construed executive-empowering language under President Joe Biden, as in the landmark student loan case of [Biden v. Nebraska](#), while doing the exact opposite when confronting this president.

Coming back to the biggest issue in this case, reading a bland law that nowhere uses the words revenue or taxes to empower President Trump – or any other president – to rewrite the tax code unilaterally risks creating a dictatorship broadly reminiscent of England’s Charles I in the early 1600s and continental Europe’s authoritarians in the early 1900s. The wise words of Justice

Robert Jackson in the 1952 [Youngstown](#) case (words that Akhil highlighted in early October on his podcast and that oral advocate Neal Katyal featured prominently in his closing remarks on Wednesday) ring true in the case at hand: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”

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Cases: [Learning Resources, Inc. v. Trump \(Tariffs\)](#), [Trump v. V.O.S. Selections](#)

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