TARIFFS AND THE PROGRESSIVE FISCAL CONSTITUTION

LAWRENCE J. LIU[*] & ALEX ZHANG[**]

ABSTRACT

For more than a century, progressive taxation has constituted the American fiscal state. A resurgent and expanding tariff regime, however, threatens that commitment to progressive distribution. Given the ongoing popularity of tariffs, this Article examines how they might be designed and administered in a way that mitigates their regressive distributive impact. The Article thus develops and assesses proposals to (1) vary tariff burdens in accordance with the consumption of imported goods, (2) reduce income- or payroll-tax burdens on lower-income households, and (3) earmark tariff revenue for specified spending programs. Although none is perfect, we seek to articulate possibilities and highlight relevant considerations for policymakers seeking to make tariffs better cohere with our progressive fiscal constitution.

* Lawrence J. Liu is Associate Professor at Washington University in St. Louis School of Law.

** Alex Zhang is Associate Professor of Law at Emory University. Authors contributed equally to the Article. We thank Samuel Bagenstos, Jonathan Gould, Christine Kim, Matt Lawrence, Susan Morse, Adam Rosenzweig, and the audience at the *Washington University Law Review*'s Symposium on Taxing, Spending, and the Constitution for their insights and feedback, as well as the editors of the *Law Review* for their diligence.

TABLE OF CONTENTS

INTRODUCTION

Progressive taxation has constituted our fiscal state. Since the ratification of the Sixteenth Amendment, Congress has relied on the individual income tax as a main—and for the past eighty years, the most important—source of federal funding and mechanism of distributive justice. Unlike the consumption taxes on which Congress previously depended, such as excises and tariffs, the progressive income tax appealed to reformers of that era and successive governments as a more equitable means of raising revenue.[1] Since the New Deal, income-tax receipts have supported the dramatic expansion of federal power, along with the rise of an administrative state and welfare programs that have redefined American fiscal citizenship. Thus, the principle of ability to pay—and its statutory instantiation in the form of higher marginal rates based on the taxable unit's income[2]—is an entrenched feature of our polity, seemingly outside the realm of ordinary politics.

For much of that time, the growing revenue significance of the individual income tax was accompanied by the diminishing revenue significance of tariffs. Indeed, U.S. presidents' use of congressionally delegated authority to negotiate reductions in tariff rates is well-documented.[3] The recent resurgence of tariffs, however, threatens this constitutional-fiscal

1. *See* Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793 (2005).

2. Of course, the statutory structure of graduated income tax rates may overstate the actual tax burdens borne by those at the *very* top of the income distribution (e.g., the top 0.1 percent or 0.01 percent) due to well-documented tax-avoidance techniques. *See, e.g.*, Edward J. McCaffery, *The Death of the Income Tax (or, The Rise of America's Universal Wage Tax)*, 95 IND. L.J. 1233 (2020); *infra* notes 47–51 (discussing the distribution of tax burdens at the top).

3. *See generally* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 590–625 (2019); DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY (2017).

settlement. A self-congratulatory "tariff man,"[4] President Donald Trump has long touted the benefits of tariffs, including their potential to raise revenue and remedy the country's deficit in the trade of goods. In his campaign leading up to the 2024 presidential election, Trump expressed support for an "all-tariff" federal revenue system and for the repeal of the income tax.[5] So far, the President has tried to make good on that promise, imposing a raft of tariffs on allies and competitors alike.[6] By April 2025, federal tariff receipts had already reached a monthly high of $16.3 billion,[7] a record that has since continued to be broken.[8] Tariff receipts for the full 2025 calendar year totaled about $287 billion, up 192 percent versus 2024.[9] Should broad-based and retaliatory tariffs stay in place, they could soon rival the corporate income tax in their contribution to the federal fisc.[10]

Nor are tariffs simply a tool of the Trump administration. President Joe Biden kept in place most of the tariffs levied by the first Trump administration while further raising duties on various imports, actions that

4. *See* Anne O. Krueger, *Tariff Man Doubles Down*, PROJECT SYNDICATE (Mar. 24, 2025), https://www.project-syndicate.org/commentary/trump-tariff-agenda-means-trouble-for-american-and-global-economies-by-anne-o-krueger-2025-03 [https://perma.cc/DXE5-ZXX6].

5. *See* Lindsay Wise, Katy Stech Ferek & Alex Leary, *Trump Floats 'All-Tariff' Federal Revenue System in Return to Capitol Hill*, WALL ST. J. (June 13, 2024), https://www.wsj.com/politics/elections/trump-to-return-to-capitol-hill-for-first-time-since-jan-6-riot-f8b9b082 [https://perma.cc/2N3K-GFUT]; *Agenda47: President Trump's New Trade Plan to Protect American Workers*, DONALD J. TRUMP (Feb. 27, 2023), https://www.donaldjtrump.com/agenda47/agenda47-president-trumps-new-trade-plan-to-protect-american-workers [https://perma.cc/UR44-PEMV].

6. *See infra* Part II.

7. Anthony DeBarros, *U.S. Collected a Record $16.3 Billion in Customs Duties in April*, WALL ST. J. (May 12, 2025), https://www.wsj.com/livecoverage/stock-market-today-tariffs-trade-war-05-12-2025/card/u-s-collected-a-record-16-3-billion-in-customs-duties-in-april-xgzJO1QrMJMzGev81FAH [https://perma.cc/TGZ5-9L2Q].

8. Tobias Burns, *Customs Duties Hit New Record in August on Tariff Revenues*, THE HILL (Sept. 11, 2025), https://thehill.com/business/5499132-customs-duties-hit-new-record-in-august-on-tariff-revenues [https://perma.cc/GY98-X3L2].

9. Marina Azzimonti, Jacob Titcomb & John O'Trakoun, *How Much Revenue Has Been Raised by Tariffs So Far?*, FED. RSRV. BANK RICH. (Jan. 13, 2026), https://www.richmondfed.org/research/national_economy/macro_minute/2026/how_much_revenue_raised_by_tariffs_so_far [https://perma.cc/44SH-K38U]. In late February 2026, a splintered Supreme Court struck down tariffs levied pursuant to the International Emergency Economic Powers Act (IEEPA). Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026). Following the Supreme Court's opinion, the Court of International Trade ordered nationwide tariff refunds. Amended Order, Atmus Filtration, Inc. v. United States (No. 26-01259), 2026 WL 679285 (Ct. Int'l Trade Mar. 5, 2026). But the Trump administration has already employed alternative statutory authorities in seeking to reimpose tariffs like those promulgated under IEEPA. Thus, even if refunds diminish IEEPA-tariff receipts for the 2025 calendar year, future revenue streams from the tariff regime appear durable. *See* Lawrence J. Liu, *No More IEEPA Tariffs? The Legal Bases of an Alternative Regime*, 110 MINN. L. REV. HEADNOTES 89 (2026) (cataloguing the authorities that could underlie a non-IEEPA tariff regime and highlighting considerations that will affect their future use).

10. *See* DONALD J. MARPLES & BRENDAN MCDERMOTT, CONG. RSCH. SERV., R48313, OVERVIEW OF THE FEDERAL TAX SYSTEM IN 2024, at 2 (2024); *supra* note 9 and accompanying text (noting record tariff receipts in 2025).

led one prominent observer to also label Biden a "tariff man."[11] Like presidential efforts to reduce tariffs, executive-driven moves to restrict imports rest on delegated powers that increasingly sound in economic security.[12]

The continuing use of tariffs is thus all but assured. Indeed, even after the Supreme Court invalidated the bulk of tariffs imposed in 2025 by the President, the administration quickly pivoted to alternative statutory authorities to ensure the continuation of its expanded tariff regime.[13] But tariffs' political popularity has not translated into the academic discourse. Scholars and commentators have instead criticized the tariff regime for its distortion, distributive effects, ineffectiveness, and questionable use of certain legal authorities.[14] In particular, tariffs are regressive: They are consumption taxes on imported goods and disproportionately burden lower-income households.[15]

---

11. William Alan Reinsch, *The Return of Tariff Man—But Not the One You Were Expecting*, CSIS (May 20, 2024), https://www.csis.org/analysis/return-tariff-man-not-one-you-were-expecting [https://perma.cc/4F44-Q36N]; *see also* David E. Bond, Matt Solomon & Ian Saccomanno, *United States Finalizes Section 301 Tariff Increases on Imports from China*, WHITE & CASE (Sept. 17, 2024), https://www.whitecase.com/insight-alert/united-states-finalizes-section-301-tariff-increases-imports-china [https://perma.cc/ZVC8-7XUB].

12. *See* Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1115–25 (2020); Kathleen Claussen & Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. PA. L. REV. 1955 (2024).

13. *See* Tony Romm & Ana Swanson, *The Trade Statutes Trump Will Use to Keep Imposing Tariffs*, N.Y. TIMES (Feb. 20, 2026), https://www.nytimes.com/2026/02/20/us/politics/trump-other-options-tariffs.html [https://perma.cc/4XFN-NCSP] (describing the legal authorities cited by the President in his press conference shortly after the Supreme Court's decision); Liu, *supra* note 9.

14. *E.g.*, *Learning Res.*, 146 S. Ct. at 637 (holding that IEEPA does not authorize tariffs); KIMBERLY A. CLAUSING & MARY E. LOVELY, PETERSON INST. FOR INT'L ECON., POLICY BRIEF NO. 24-1, WHY TRUMP'S TARIFF PROPOSALS WOULD HARM WORKING AMERICANS (2024), https://www.piie.com/sites/default/files/2024-05/pb24-1.pdf [https://perma.cc/SLH7-GFG3]; Adam S. Hersh & Josh Bivens, *Tariffs—Everything You Need to Know but Were Afraid to Ask*, ECON. POL'Y INST. (Mar. 28, 2025), https://www.epi.org/publication/tariffs-everything-you-need-to-know-but-were-afraid-to-ask/ [https://perma.cc/V68G-5VBV]; *see* Reuven S. Avi-Yonah, Doron Narotzki & Tamir Shanan, *From Relic to Relevance, the Resurgence of Tariffs*, 77 U.C. L.J. 497 (2026); Jennifer Hillman, *Trump's Use of Emergency Powers to Impose Tariffs Is an Abuse of Power*, LAWFARE (Mar. 24, 2025), https://www.lawfaremedia.org/article/trump-s-use-of-emergency-powers-to-impose-tariffs-is-an-abuse-of-power [https://perma.cc/2G4T-FF6D]; ED GRESSER, PROGRESSIVE POL'Y INST., TRADE POLICY, EQUITY, AND THE WORKING POOR: UNITED STATES MFN TARIFFS ARE REGRESSIVE TAXES WHICH HELP FEW WORKERS AND HARM MANY (2022), https://www.progressivepolicy.org/wp-content/uploads/2022/04/Trade-Policy-Equity-and-the-Working-Poor-ITC-Report_FINAL.pdf [https://perma.cc/5TE6-6SZG].

15. Importantly for this Article (and for critics of the external-revenue regime on distributive-justice grounds), the argument about the regressivity of tariffs stands even if consumers do not bear the entire economic incidence. That is, the costs of tariffs might be borne by a combination of consumers (who pay higher prices for imported goods), foreign manufacturers (who increase prices for their products, but not as much as the imposed tariffs, thus bearing a portion of the cost to compensate for the decline in demand due to increased price), importers or retailers (who pass some portion of the tariffs' costs to consumers in the form of increased prices and absorb the rest in the form of reduced profits), or even foreign consumers (whose country devalues its currency in response to tariffs). If domestic consumers bear at least a significant part of the burden—and preliminary data suggest that they do—

We do not dismiss these scholarly critiques. We may even agree with the substance of their analyses. The present project has a much more limited scope: Given the reality of tariffs' continued use, how might Congress design and administer tariffs in a way that mitigates their regressive distributive impact? We begin answering that question by first considering debates surrounding consumption taxation. Like tariffs, broad-based consumption taxes are regressive and disproportionately burden lower-income households that spend a larger portion of their income and save little. In response, scholars have developed various proposals of progressive consumption taxation.[16] Further, we suggest that the United States can learn from efforts to achieve greater progressivity in the fiscal system by offsetting the regressivity on the revenue side with income-tax adjustments or more robust spending for social welfare or income security.[17]

We argue that these scholarly and comparative data provide normative and practical lessons for the resurgent tariff regime. They hold the promise for making tariffs—as a revenue and trade tool—better cohere with the progressive commitment that has structured our fiscal constitution. Accordingly, Part I starts with a discussion of the principle of progressive distribution that has dominated federal tax lawmaking in the past century. Part II shows how tariffs break with this entrenched tradition, not through ordinary politics and increasingly by executive actions. In Part III, we examine how tariffs can fit into—perhaps even instantiate—this progressive fiscal commitment. In particular, we draw on the scholarly discourse to assess three possibilities: (1) varying tariff burdens in accordance with the consumption of imported goods; (2) designing progressive tariffs using

tariffs will have a regressive distributive effect. *See* Mary Amiti, Chris Flanagan, Sebastian Heise & David E. Weinstein, *Who Is Paying for the 2025 U.S. Tariffs?*, FED. RSRV. BANK N.Y.: LIBERTY ST. ECON. (Feb. 12, 2026), https://libertystreeteconomics.newyorkfed.org/2026/02/who-is-paying-for-the-2025-u-s-tariffs [https://perma.cc/3T28-7DTJ] ("In sum, U.S. firms and consumers continue to bear the bulk of the economic burden of the high tariffs imposed in 2025."); Ruth Simon, *The Break Is Over. Companies Are Jacking Up Prices Again.*, WALL ST. J. (Feb. 15, 2026), https://www.wsj.com/business/price-increases-consumers-businesses-b70e4542 [https://perma.cc/2JXY-LZMA]. Further, importers and retailers may pass the costs of the tariff regime to consumers through not only price increases (which contribute to broader inflationary pressures) but also indirect recovery mechanisms like the terms of seller-financing. *See, e.g.*, Kristine W. Hankins, Morteza Momeni & David Sovich, *Consumer Credit and the Incidence of Tariffs: Evidence from the Auto Industry*, 116 AM. ECON. REV. 627, 627 (2026) (showing that "consumers received higher interest rates from captive [automobile] lenders after the tariffs relative to unaffected noncaptive lenders" and noting "a disparate impact on low-income borrowers").

16. *See, e.g.*, William G. Gale, *Raising Revenue with a Progressive Value-Added Tax*, *in* TACKLING THE TAX CODE: EFFICIENT AND EQUITABLE WAYS TO RAISE REVENUE 191 (Emily Moss, Ryan Nunn & Jay Shambaugh eds., 2020); Manoj Viswanathan, *Implementing a (Modern) Progressive Consumption Tax*, 41 VA. TAX REV. 241 (2022); Steven A. Bank, *The Progressive Consumption Tax Revisited*, 101 MICH. L. REV. 2238 (2003) (book review). *But see* Michael J. Graetz, *Implementing a Progressive Consumption Tax*, 92 HARV. L. REV. 1575 (1979).

17. *See infra* Sections III.B, III.C.

income- or payroll-tax mechanisms; and (3) earmarking tariff receipts to support expanded government services like social-welfare programs. Ultimately, we see several main considerations in this choice: administrative capacity, the nature of our progressive constitutional commitment, the impact of the proposals on the effectiveness of other trade and tax levers, and the political-economy dynamics as our democracy seriously considers the revival of an external-revenue regime.

I. OUR PROGRESSIVE FISCAL CONSTITUTION

This Part discusses the development of our progressive fiscal constitution. It paves the path for Part II, which highlights how the newly ascendant tariff regime deviates from that normative commitment. For the first 124 years of its constitutional existence, Congress indeed relied on tariffs to fund the federal government. In 1792, for example, customs totaled 93.8 percent of all federal receipts, with the remainder made up mostly by domestic excises on alcohol.[18] With the exception of a few years of extraordinary public land sales and the Civil War, the dominance of external revenue persisted until World War I.[19]

War efforts, however, put a stop to Congress's heavy reliance on consumption taxation of imported goods, and income taxes became a key source of federal revenue. Congress had taxed income in the past. During the Civil War, fiscal exigency drove Congress to adopt an "income duty."[20] The Revenue Act of 1864, for example, taxed income with a progressive schedule: Above an exemption amount of $600, rates rose from 5 percent for income between $600 and $5,000 to 10 percent for income in excess of $10,000.[21] After letting the income tax lapse in 1871, Congress again attempted to tax income in 1894—this time at a flat rate of 2 percent for income above a $4,000 threshold, and as part of a tariff-reduction plan.[22] But in a controversial opinion, *Pollock v. Farmers' Loan & Trust Co.*, the

---

18. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945, at 298 (1949) (showing $3,669,960 of total federal receipts in 1792, of which $3,443,071 came from customs).

19. *See id.* at 297 (showing $50,826,796 of total federal receipts in 1836, of which $24,877,180 derived from the sale of public lands and $23,409,941 from customs, and showing $333,714,605 of total federal receipts in 1865, of which $60,979,329 derived from income and profits taxes and $84,928,261 from customs).

20. Revenue Act of 1862, ch. 119, § 90, 12 Stat. 432, 473 (levying a tax "upon the annual gains, profits, or income of every person residing in the United States"); *see* Alex Zhang, Essay, *Fiscal Citizenship and Taxpayer Privacy*, 125 COLUM. L. REV. 235, 247–48 (2025) (describing the Civil War income tax); Sheldon D. Pollack, *The First National Income Tax, 1861–1872*, 67 TAX LAW. 311 (2014).

21. Revenue Act of 1864, ch. 173, § 116, 13 Stat. 223, 281.

22. Wilson-Gorman Tariff Act, ch. 349, § 27, 28 Stat. 509, 553 (1894); F.W. TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES 284–320 (4th ed. 1899) (describing electoral backlash to the high burdens imposed by the protectionist McKinley tariffs, and the complex politics that led to the Wilson-Gorman Act, which reduced but did not radically reform the tariff regime).

Supreme Court struck down the 1894 income tax as an unapportioned direct tax, despite having upheld the Civil War income tax just fifteen years before.[23]

All this led to the Sixteenth Amendment. Ratified in 1913, the Amendment allowed Congress to tax income, from whatever source derived, without regard to the constitutional apportionment requirement.[24] Congress quickly exercised this power. The Revenue Act of 1913 levied taxes on income above the exemption amount of $3,000 (for single filers), again at graduated rates, rising from 1 percent to 7 percent.[25] In 1917, income-tax receipts exceeded customs for the first time in the nation's history.[26]

Since then, the federal income tax has formed the backbone of federal revenue. In 2024, income taxes on individuals constituted just about half of all federal receipts.[27] And federal receipts have grown substantially as a proportion of the nation's economic output. The needs of defense, income-security programs, and the modern regulatory state mean that federal revenue grew from a mere 3.7 percent of the gross domestic product in 1929 to roughly 17 percent in 2024.[28]

Unlike tariffs or excises, Congress has generally taxed income at progressive, graduated rates. That is, taxpayers' marginal tax rates—and by corollary, their average tax burdens—have increased in accordance with their income levels.[29] During the infancy of the income tax, the rates were low and marginal tax brackets few. From 1913 to 1915, for example, Congress taxed income at seven marginal rates: 1 percent, 2 percent, 3

---

23. Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601 (1895). For criticism of *Pollock*, see, for example, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4–5 (1999); Alex Zhang, *Rethinking* Eisner v. Macomber*, and the Future of Structural Tax Reform*, 92 GEO. WASH. L. REV. 179, 192–94 (2024).

24. U.S. CONST. amend. XVI.

25. Revenue Act of 1913, ch. 16, §§ II(A), II(C), 38 Stat. 114, 166, 168 (levying a 1 percent normal tax on income—subject to a $3,000 deduction for all filers and a $1,000 bonus deduction for those with a spouse, and additional taxes ranging from 1 percent to 6 percent for income exceeding $20,000).

26. BUREAU OF THE CENSUS, *supra* note 18, at 296 (showing customs totaling $225,962,393 and receipts from income and profit taxes totaling $359,681,228 in 1917). Income-tax receipts ballooned the next year and outstripped customs almost thirteen to one, as the War Revenue Act of 1917, ch. 63, §§ 1–2, 40 Stat. 300, 300–01, dramatically raised income-tax rates.

27. Press Release, Janet L. Yellen, Sec'y of Treas., and Shalanda D. Young, Dir. of Off. of Mgmt. and Budget, Joint Statement on Budget Results for Fiscal Year 2024 (Oct. 18, 2024), https://home.treasury.gov/news/press-releases/jy2657 [https://perma.cc/7CRX-JMVK] (showing $4.919 trillion of total federal receipts, of which $2.426 trillion derived from individual income taxes).

28. *Federal Receipts and Net Outlays as Percent of Gross Domestic Product*, FED. RSRV. BANK ST. LOUIS (2025), https://fred.stlouisfed.org/graph/?g=ockN [https://perma.cc/E97K-KNGM].

29. Jason S. Oh, *Are Progressive Tax Rates Progressive Policy?*, 92 N.Y.U. L. REV. 1909, 1910 (2017) (describing marginal rate progressivity, under which "[a]s taxpayers earn more income, the tax rate they face on each additional dollar increases," as "a near universal feature of statutory income tax rates").

percent, 4 percent, 5 percent, 6 percent, and 7 percent.[30] But as fiscal needs swelled—and the calculus of fairness and efficiency became more complex—rates rose and brackets proliferated. The Revenue Act of 1916 divided marginal rates into fourteen brackets and taxed the highest income level, above $2 million, at the then-record of 15 percent.[31] Congress more than quadrupled that top rate to 67 percent the next year, and determined income-tax liability through twenty-one marginal-rate brackets.[32] The 1920s saw retrenchment: Wartime fiscal needs subsided, and the business-friendly Republican administration pushed for a tax cut.[33] Although Treasury Secretary Andrew Mellon (one of the wealthiest men at the time) succeeded in cutting taxes at the top income levels, the structure of graduated rates has persisted ever since.[34] Today, Congress taxes income at seven marginal tax rates, ranging from 10 percent to 37 percent.[35] And in the interim, the income tax turned from a class tax on the rich to a mass tax on a majority of Americans.[36]

In the entire history of the federal income tax—from 1861 to the present—Congress arguably deviated from progressive rates only at three junctures. And of these three occasions, it attempted to tax income at a flat rate twice. Both attempts came in the nineteenth century, only once with success. First, in the final six years of the Civil War-era income tax, Congress imposed a 5 percent and then a 2.5 percent flat tax rate.[37] The use of the flat rate from 1867 to 1872 took place after the war, when fiscal pressure diminished and Congress had not weaned itself off tariffs and

30. Revenue Act of 1913 §§ II(A), II(C), 38 Stat. at 166, 168. The Civil War income tax featured even fewer brackets. *See, e.g.*, Revenue Act of 1862, ch. 119, § 90, 12 Stat. 432, 473 (taxing income at two marginal rates: 3 percent and 5 percent).

31. Revenue Act of 1916, ch. 463, § 1(a)–(b), 39 Stat. 756, 756–57 (levying a 2 percent normal tax on net income and a 13 percent additional tax on net income in excess of $2 million).

32. War Revenue Act of 1917, ch. 63, §§ 1–2, 40 Stat. 300, 300–01 (levying, in addition to the normal tax and additional tax levied by the Revenue Act of 1916 § 1(a)–(b), a 2 percent like normal tax on net income and a 50 percent like additional tax on income in excess of $1 million).

33. *See* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877-1929, at 33, 349–408 (2013) (describing the "paradoxical process of retrenchment" in which "Mellon and like-minded Republicans swiftly dismantled the steeply progressive rate structure of the wartime tax regime").

34. *E.g.*, Revenue Act of 1926, ch. 27, §§ 210–211, 44 Stat. 9, 21–22 (reducing individual income tax burdens but preserving the graduated rate structure).

35. I.R.C. § 1.

36. Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685 (1988); *Who Will Pay No Federal Individual Income Tax in 2025?*, TAX POL'Y CTR. (June 4, 2025), https://taxpolicycenter.org/fiscal-facts/who-will-pay-no-federal-individual-income-tax-2025 [https://perma.cc/4H5M-85T4] (estimating that 60 percent of American households will pay federal income taxes in 2025).

37. Revenue Act of 1867, ch. 169, § 13, 14 Stat. 471, 478 (levying "a tax of five per centum on [net income] so derived over one thousand dollars"); Revenue Act of 1870, ch. 255, § 6, 16 Stat. 256, 257 (levying, for 1870 and 1871, "and no longer, a tax of two and one half per centum upon the gains, profits, and income of every person residing in the United States, and of every citizen of the United States residing abroad").

consumption taxation more broadly. Indeed, 1866 saw the highest federal income-tax receipt at the time (not to be surpassed until 1915), and it was still only 41 percent of customs.[38] As a distributive matter, the flat tax rate was still progressive: The high exemption amount meant that only the wealthy paid any income tax at all.[39]

Second, the Wilson-Gorman Tariff Act imposed a flat 2 percent rate.[40] But as discussed, this 1894 income tax never generated significant revenue, and the Supreme Court struck it down as an unapportioned direct tax in violation of Article I of the Constitution.[41]

Third, the Tax Reform Act of 1986 reduced rates and condensed the then-operative fourteen brackets, taxing income earned from 1988 to 1990 at two main marginal rates: 15 and 28 percent.[42] But it was short-lived. The Budget Reconciliation Act of 1990 soon added another top rate of 31 percent, making President George H.W. Bush break his campaign promise of "no new taxes" and contributing to his loss in the 1992 presidential election.[43] The Clinton administration continued to add to the top rates, returning the federal tax structure to the graduated, progressive rates that we have today.[44] Further, at least in rhetoric if not in effect, the Tax Reform Act of 1986 was distribution-neutral.[45] That is, the base-broadening provisions of the Act curbed the use of tax shelters at the top and were not supposed to shift substantially the distribution of tax burdens across income levels. The refrain is clear: Congress has rarely taxed income at a flat rate. When it did,

38. *See* BUREAU OF THE CENSUS, *supra* note 18, at 297 (showing receipts from income and profit taxes totaling $72,982,159 and customs totaling $179,046,652 in 1866); *id.* at 296 (showing receipts from income and profit taxes totaling $80,201,759 in 1915).

39. The Civil War income tax provided an exemption amount of $600. *See* Revenue Act of 1864, ch. 173, § 116, 13 Stat. 223, 281. At that time, laborers made roughly $0.92 to $1.50 per day. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., HISTORY OF WAGES IN THE UNITED STATES FROM COLONIAL TIMES TO 1928, at 254 tbl.G-1 (1934), https://fraser.stlouisfed.org/title/history-wages-united-states-colonial-times-1928-4126 [https://perma.cc/LJ6U-LSNE] (showing a low average compensation of $0.92 per day for laborers in Rhode Island in 1864, and a high average compensation of $1.50 per day for laborers in Ohio).

40. Wilson-Gorman Tariff Act, ch. 349, § 27, 28 Stat. 509, 553 (1894).

41. Pollock v. Farmers' Loan & Tr. Co., 158 U.S. 601 (1895); *supra* notes 22–23 and accompanying text.

42. Tax Reform Act of 1986, Pub. L. No. 99-514, § 101, 100 Stat. 2085, 2096 (taxing income at 15 percent and 28 percent).

43. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11101, 104 Stat. 1388, 1388–403; Michael J. Graetz, *Tax Reform Unraveling*, 21 J. ECON. PERSPS. 69, 71 (2007) (describing the "Omnibus Budget Reconciliation Act of 1990 [as] a bipartisan deficit-reduction measure that broke George H.W. Bush's famous 'no new taxes pledge,' probably costing him reelection").

44. *E.g.*, Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13202, 107 Stat. 312, 461 (adding surtax marginal rates of 36 percent and 39.6 percent on "high-income taxpayers").

45. Louis Kaplow, *A Distribution-Neutral Perspective on Tax Expenditure Limitations*, 31 TAX POL'Y & ECON. 161, 172 (2017) ("An example of particular note is the Tax Reform Act of 1986, which (speaking roughly) broadened the base by reducing tax expenditures and simultaneously lowered rates, and in a manner that linked the two together, specifically, to achieve distribution neutrality (as well as revenue neutrality).").

the flat tax either failed constitutional scrutiny (i.e., in 1894) or was on its way out (i.e., in 1872).

Progressive rate structure has thus propped up the modern fiscal state. For the 112 years since the ratification of the Sixteenth Amendment, Congress has generally imposed heavier income-tax burdens (as a proportion of their income) on the wealthy than the middle class or the impoverished.[46] This bears out not only as a formal matter of statutory rates but also in practice. Recent studies by the Treasury Department and the Yale Budget Lab have shown that average effective tax burdens rise with income.[47] To be sure, they also show the immense variation of tax burdens at the top—with most households in the top 0.01 income percentile paying anywhere between 16 percent and 37 percent as their effective tax rates.[48] And scholars have recognized that the realization doctrine and stepped-up basis at death enable extraordinary tax avoidance by households whose income derives from capital.[49] Such observations point to the importance of foundational reform like taxing accrued gains.[50] They also reveal the gap between rhetoric—the top 37 percent rate is salient in public discourse—and the reality that the ultra-wealthy pay far less.[51] But they do not defeat the core claim that *some* progressivity—even if less robust in reality than the schedule of tax rates or political rhetoric would suggest—has structured the federal income tax throughout its lifetime.

In our view, this statutory regime and history—as well as their distributive effects—evidence a *constitutional* progressive commitment. To be sure, progressivity is not expressly written into the text of the Sixteenth Amendment, or for that matter, any grant or restriction of the federal taxing power in Article I of the Constitution.[52] Indeed, Steven Bank has argued that the political contest surrounding the ratification of the Sixteenth Amendment aimed to replace a regressive tax system with a proportional

46. *See supra* notes 29–35 and accompanying text.

47. Akcan Balkir, Emmanuel Saez, Danny Yagan & Gabriel Zucman, Estimating Tax Burdens by Wealth Groups 10 tbl.1 (Feb. 28, 2025) (IRS Statistics of Income working paper), https://www.irs.gov/pub/irs-soi/24rpestimatingtaxburdens.pdf [https://perma.cc/T4MH-MZ69]; YALE UNIV. BUDGET LAB, WHO IS PAYING THEIR FAIR SHARE OF TAXES?: A NEW ANALYSIS AND INTERACTIVE TOOL (Nov. 15, 2024), https://budgetlab.yale.edu/sites/default/files/2024-09/The%20Budget%20Lab%20Horizontal%20Equity%20Report%202024.pdf [https://perma.cc/4GMY-BDT8].

48. YALE UNIV. BUDGET LAB, *supra* note 47, at 2.

49. *E.g.*, Brian Galle, David Gamage & Darien Shanske, *Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth*, 72 DUKE L.J. 1257, 1259–61 (2023); Alex Zhang, *The Forgotten Income-Attribution Power*, 135 YALE L.J. 923 (2026).

50. *E.g.*, Lily Batchelder & David Kamin, *Policy Options for Taxing the Rich*, *in* MAINTAINING THE STRENGTH OF AMERICAN CAPITALISM 200 (Melissa S. Kearney & Amy Ganz eds., 2019).

51. YALE UNIV. BUDGET LAB, *supra* note 47, at 2.

52. U.S. CONST. art. I, § 8, cl. 1; *id.* amend. XVI.

one.[53] That is, the income tax would reduce regressivity elsewhere in the tax system (e.g., in federal consumption taxation like tariffs) and subject the wealthy to a proportional share in bearing the costs of governance.[54]

However, scholars have long recognized that extra-canonical norms—for example, statutes as opposed to provisions in the canonical 1787 Constitution—structure our governance and are thus "constitutional" in a functional sense. As early as 1934, Karl Llewellyn contended that it was not essential for constitutional "practice or institution [to] be in any way related to the Document."[55] More recently, Ernest Young has argued that "the American 'constitution' consists of a much wider range of legal materials than the document ratified in 1789 and its subsequent amendments."[56] Instead, constitutional norms—whether they take the form of constitutional texts, statutes, regulations, practices, or institutions—perform two key functions. They constitute the government by establishing governance institutions and their modes of operation.[57] They also confer rights on individuals against state intrusion.[58] Some constitutional norms are entrenched in the canonical Constitution through the cumbersome Article V amendment process.[59] But they need not be: In both theory and practice, constitutional *function* is separated from *entrenchment*. Importantly, extra-canonical norms implement (i.e., flesh out in institutional form the canonical Constitution's "skeleton of a government"), specify (i.e., particularize canonical norms "to aid their application in specific situations"), supplement (i.e., speak where the canonical Constitution is silent), and supersede (i.e., replace obsolete principles with extra-canonical rules).[60]

Viewed through this lens, the 112 years of statutory history and practice have fulfilled core constitutional ends. The graduated rate structure and distribution of income-tax burdens have constituted the modern federal fiscal machinery. They have guided its operation through a progressive principle. Depending on one's views of values animating the canonical text (that is, the Sixteenth Amendment and Article I's relevant provisions of the

53. Steven A. Bank, *Origins of a Flat Tax*, 73 DENV. U. L. REV. 329, 333 (1996) ("The history of income taxation in this country before and immediately after the ratification of the Sixteenth Amendment, however, reveals a struggle of more than fifty years to replace a regressive tax system with a proportional, not progressive, one."); *cf.* Akhil Reed Amar, Comment, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 291 (1987) ("The popular legislative history of [the Sixteenth Amendment's] ratification reveals not merely an endorsement of an income tax *simpliciter*, but popular approval of a predictably progressive—that is, a redistributive—income tax.").

54. Bank, *supra* note 53, *passim*.

55. K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 30 (1934).

56. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 410 (2007).

57. *Id.* at 412–13.

58. *Id.* at 416.

59. *Id.* at 412.

60. *Id.* at 443–48.

federal taxing power), this progressive commitment results from the distinct extra-canonical functions it has performed: (1) implementation: it fleshes out the Sixteenth Amendment's vision of distributive justice (if one subscribes to a progressive view of the Sixteenth Amendment like Akhil Amar); (2) specification: it particularizes norms implicit in Article I and the Sixteenth Amendment by making them applicable to a mass-based income tax; (3) supplementation: it fills the normative gap left open by the Sixteenth Amendment, which by its literal terms does not mandate progressivity, proportionality, or regressivity in federal income taxation; or (4) supersession: it supersedes the Sixteenth Amendment's original vision of proportionality, as argued by Bank.[61]

Importantly, framing progressive income taxation as a quasi-constitutional commitment rather than a stand-alone, even if longstanding, federal policy accentuates its spillover effects on other areas of democratic and distributive calculus.[62] That is, public assumption of the federal income tax's critical role in forming the foundations of the fiscal state—and thus helping it achieve a baseline level of redistribution—allows (perhaps improperly capacious) room for inequality to creep into nontax areas of law and regulation.[63] That is, the perceived entrenchment of progressive income taxation has structured how the ordinary political process calibrates and contests egalitarianism.[64]

One final note before moving on to tariffs: Could the progressive income tax continue to instantiate a distributive commitment to proportionality, given the rise of payroll taxation? That is, as Bank has argued, the Sixteenth Amendment was originally ratified after a struggle to use the income tax to reduce the regressivity of federal consumption taxation, thus resulting in an

61. *See id.*; Bank, *supra* note 53, *passim*; Amar, *supra* note 53, at 291.

62. We thank Samuel Bagenstos for flagging this distinction.

63. A version of this point has played out in an influential strand of the law and economics literature. *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495 (2022).

64. Indeed, the discrepancy between the statutory scheme (which suggests that high-income groups are generally subject to a tax rate of 37 percent on their marginal income) and the actual distribution of burdens (which vary widely from the perceived 37 percent marginal rate) already contributes to cognitive biases that reduce mobilization for egalitarian tax reform despite rising economic inequality. *E.g.*, Alex Zhang, *Tax Procedure and Distributive Discourse: The Case of Classical Athens*, 73 AM. J. COMPAR. L. 747 (2025). The regressive distributive effects of tariffs add to these biases that distort democratic fiscal governance. This is especially the case because the burdens of income taxes tend to be much more salient than those of consumption taxes like tariffs, and because President Trump has made repeated claims that foreign countries rather than Americans bear the costs of tariffs—claims whose accuracy scholars have contested. *See infra* note 117 (describing scholars' conclusion that domestic importers and consumers have borne most of the costs of tariffs).

overall proportional tax scheme.[65] Tariffs and excises, of course, diminished in the past century.[66] But other forms of regressive taxes emerged. Payroll taxes today account for roughly one-third of federal receipts.[67] They burden solely income derived from labor, and are (for the most part) capped on a wage tax base of $184,500.[68] Earnings above the tax base are subject to much lower rates of taxation than earnings below the tax base.[69] Payroll taxes thus burden lower-income groups much more than high-income households. This is both due to the lower rates on the higher portions of labor income and because capital income—exempt from payroll taxation by definition—is distributed more heavily at top income levels.[70] Combining payroll and income-tax rates means that federal taxation of labor income is relatively flat, contrary to public discourse and rhetoric.[71]

The federal income tax can thus be thought of as a progressive complement to the regressive payroll tax. However, this view is not persuasive for purposes of theorizing our fiscal constitution. To be sure, payroll taxes are regressive as to revenue generation. But they fund the Social Security program, which distributes benefits through a progressive formula. Indeed, this type of earmarking—collecting revenue through regressive, administratively efficient means and distributing earmarked benefits through progressive formulae—is a policy option to make tariffs cohere with our fiscal constitution. We will have more to say about it in Part III.

II. THE RETURN OF TARIFFS

Ongoing and likely paradigmatic shifts in U.S. trade policy threaten our progressive fiscal commitments. Recent presidential administrations have shown a penchant for tariffs, with the current administration especially touting their revenue-generating potential.[72] Unlike the income tax, tariffs

65. Bank, *supra* note 53, at 333 (arguing that the slightly progressive rate structure was originally designed "to equalize the overall regressive effects of the tariffs and internal excise taxes which provided the federal government with the bulk of its revenues").

66. BUREAU OF THE CENSUS, *supra* note 18, at 295–96.

67. *What Are the Sources of Revenue for the Federal Government?*, TAX POL'Y CTR. (Jan. 2024), https://taxpolicycenter.org/briefing-book/what-are-sources-revenue-federal-government [https://perma.cc/TGZ4-TFQ9].

68. *Topic No. 751, Social Security and Medicare Withholding Rates*, INTERNAL REVENUE SERV. (Jan. 20, 2026), https://www.irs.gov/taxtopics/tc75 [https://perma.cc/3Y4P-YTGA]. Exceptions include Medicare and Additional Medicare Taxes. *Id.*

69. *See id.*

70. *Who Has Capital Gains?*, TAX POL'Y CTR. (Nov. 26, 2024), https://taxpolicycenter.org/fiscal-facts/who-has-capital-gains [https://perma.cc/UE4F-2UTZ] ("Those earning at least $1 million realized 69 percent of all long-term capital gains in 2021, with those earning at least $10 million realizing 42 percent of the total.").

71. McCaffery, *supra* note 2, at 1292 fig.14.

72. *See infra* notes 102–104 and accompanying text.

likely have a disproportionate impact on lower-income Americans.[73] Given that regressive character, we argue that the growing popularity of and stated justifications for tariffs stand in opposition not only to the status quo ante in favor of trade liberalization but also to our progressive fiscal constitution.

Throughout the beginning of President Trump's second term, tariffs have captured headlines in ways not seen since the early twentieth century. On the campaign trail, President Trump proclaimed his desire for "a system of universal baseline tariffs on most imported goods."[74] Since taking office in January 2025, Trump has announced, paused, and ultimately imposed tariffs on numerous allies and adversaries, including China, Canada, Mexico, and the European Union.[75] The most dramatic announcement of the President's first year back in office came on April 2, 2025. On "Liberation Day," the President promised to impose "reciprocal" tariffs that would result in a 10 percent baseline tariff on almost all U.S. imports.[76] Imposition of these actions has been uneven as the President has simultaneously sought to negotiate new trade agreements.[77] Nonetheless, many of these tariffs did go into effect on August 7, 2025, raising the overall average effective tariff rate to 18.6 percent—a level not seen since the early 1930s.[78] President Trump's reliance on tariffs as a bargaining chip has continued into year two of his second term, as evidenced by his since-withdrawn threat to impose tariffs on European NATO allies over Greenland.[79]

The interest in tariffs from the second Trump administration is neither new nor unexpected. The President during his first term initiated a trade "war" with China, reinvigorated dormant statutes to raise import duties, and threatened withdrawal from the World Trade Organization (WTO).[80] Nor is

73. *See supra* note 15 and accompanying text.

74. *Agenda47*, *supra* note 5.

75. For a helpful summary of the President's tariff actions since taking office again in January 2025, see Talya Minsberg, *A Timeline of Trump's On-Again, Off-Again Tariffs*, N.Y. TIMES (Oct. 14, 2025), https://www.nytimes.com/2025/03/13/business/economy/trump-tariff-timeline.html [https://perma.cc/73TY-FZF7].

76. *See* Danielle Kurtzleben, *Trump Unveils Sweeping 10% Tariff and 'Reciprocal' Tariffs on Dozens of Nations*, NPR (Apr. 2, 2025), https://www.npr.org/2025/04/02/nx-s1-5345802/trump-tariffs-liberation-day [https://perma.cc/2G8U-RYFR].

77. *See* Minsberg, *supra* note 75.

78. *State of U.S. Tariffs: August 7, 2025*, YALE UNIV. BUDGET LAB (Aug. 7, 2025), https://budgetlab.yale.edu/research/state-us-tariffs-august-7-2025 [https://perma.cc/WJT7-DTCS].

79. Kevin Breuninger, *Trump Says He Reached Greenland Deal 'Framework' with NATO, Backs Off European Tariffs*, CNBC (Jan. 21, 2026), https://www.cnbc.com/2026/01/21/trump-tariffs-nato-greenland-davos.html [https://perma.cc/ZC2U-WW3Z].

80. *See* Ana Swanson, *Trump's Trade War with China Is Officially Underway*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html [https://perma.cc/8JB4-P5VV]; Christine Wang, *Trump Threatens to Withdraw from World Trade Organization*, CNBC (Aug. 30, 2018), https://www.cnbc.com/2018/08/30/trump-threatens-to-withdraw-from-world-trade-organization.html [https://perma.cc/7X4E-F7DB]; Glenn Thrush, *Trump's Use of National Security to Impose Tariffs Faces Court Test*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html [https://perma.cc/ZD8C-MYV8].

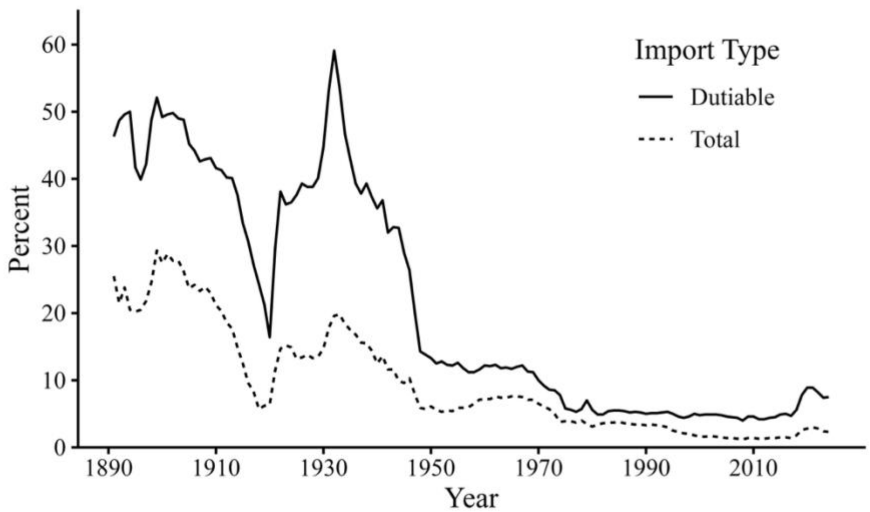
the rising use of tariffs and defensive trade measures limited to President Trump. President Biden kept much of President Trump's first-term tariffs in place, further increased duties on Chinese imports, and continued to apply pressure on the WTO.[81]

This growing bipartisan deployment of tariffs contrasts with a near-century of moves towards trade liberalization. For much of that time, U.S. trade policy had centered on the negotiation of trade agreements and the development of international institutions aimed at reducing barriers to trade.[82] As illustrated in Figure 1, although the average tariff rate on dutiable imports had reached nearly 60 percent in the 1930s, that number had fallen to and stabilized around 5 percent by the mid-1970s before climbing again in recent years.

81. *See, e.g.*, Bryce Baschuk, *Biden Picks Up Where Trump Left Off in Hard-Line Stances at WTO*, BLOOMBERG NEWS (Feb. 22, 2021), https://www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto [https://perma.cc/DU5X-UQFX]; Ryan Mulholland & Mike Williams, *The Biden Administration's Targeted, Strategic Tariffs Are Effective Industrial Policy at Work*, CTR. FOR AM. PROGRESS (May 29, 2024), https://www.americanprogress.org/article/the-biden-administrations-targeted-strategic-tariffs-are-effective-industrial-policy-at-work [https://perma.cc/5WEZ-T38X]; *U.S. President Biden Raises Tariffs on Russian Imports*, CURTIS (June 28, 2022), https://www.curtis.com/our-firm/news/u-s-president-biden-raises-tariffs-on-russian-imports [https://perma.cc/U23U-X5SF].

82. *See* Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495 (2016); Meyer & Sitaraman, *supra* note 3, at 612–25; Claussen, *supra* note 12, at 1109–15.

FIGURE 1: AVERAGE TARIFFS OF THE UNITED STATES, 1894–2025[83]



To facilitate this drop in trade barriers, Congress had delegated much of its Article I powers to regulate foreign commerce and collect duties to the President. Whereas Congress had once set tariffs in the service of raising revenue or defending domestic industries, the aforementioned growing reliance on the progressive income tax was accompanied by statutory grants of authority that allowed the President to negotiate trade agreements and reduce import restrictions with limited congressional review.[84] Although U.S. presidents once largely wielded those powers to reduce tariffs, congressional delegations allow for increasing tariffs as well, powers that recent administrations are deploying in novel ways.[85]

Why are U.S. presidents increasingly exercising their delegated authority to impose defensive trade measures like tariffs? Much attention has focused on the national security dimensions of the actions. Behind any executive-led move to raise tariffs is a domestic trade statute, many of which contain provisions that empower the President to impose trade barriers in the name of national security. As catalogued by Kathleen Claussen, "hard" security exceptions to trade liberalization permit the President to act only if he has

83. These numbers come from the Office of Analysis and Research Services within the International Trade Commission. *See* U.S. INT'L TRADE COMM'N, U.S. IMPORTS FOR CONSUMPTION, DUTIES COLLECTED, AND RATIO OF DUTIES TO VALUE, 1891-2025 (2026), https://www.usitc.gov/documents/dataweb/ave_table.pdf [https://perma.cc/G86B-QQ7R].

84. *See* Meyer & Sitaraman, *supra* note 3, at 590–625.

85. *See* Claussen, *supra* note 12; Claussen & Meyer, *supra* note 12.

identified a threat to national security.[86] Such exceptions include the International Emergency Economic Powers Act (IEEPA)[87]—which requires declaration of a national emergency—Section 232 of the Trade Expansion Act of 1962[88]—which permits restrictions on imports found to threaten U.S. national security—and Section 201 of the Trade Act of 1974[89]—which permits "safeguards" against imports that are imported in such increased quantities that they are a substantial cause of serious injury to a domestic industry. Other statutory provisions contain what Claussen calls "soft" exceptions, permitting presidential action against trading partners perceived to threaten U.S. commerce.[90] Soft exceptions include Section 301 of the Trade Act of 1974[91]—which permits retaliatory actions to combat unreasonable or discriminatory acts, policies, and practices—and Section 338 of the Tariff Act of 1930[92]—which permits tariffs on countries that discriminate against the commerce of the United States.

Many of the actions taken by the Trump and Biden administrations might be fairly understood through an economic security lens.[93] Whereas most import duties prior to 2016 resulted from the mobilization by primarily private actors of non-security-focused exceptions like the antidumping and countervailing duty laws, there has been increasing attention on security exceptions since President Trump's decision to impose Section 232 tariffs on steel and aluminum imports in 2018.[94] Perhaps most jarring was Trump's reliance on IEEPA, an authority that had never been used to impose tariffs but which had been the President's tool of choice throughout year one of his

86. Claussen, *supra* note 12, at 1115–22.

87. 50 U.S.C. §§ 1701–07. Although the Supreme Court has held that IEEPA does not authorize the imposition of *tariffs*, it did not "attempt to set forth the metes and bounds of the President's authority to 'regulate . . . importation'" via non-tariff measures. Learning Res., Inc. v. Trump, 146 S. Ct. 628, 643 (2026).

88. 19 U.S.C. § 1862.

89. *Id.* § 2251.

90. Claussen, *supra* note 12, at 1122–25. The exercise of many, though not all, of these statutory authorities involves varying amounts of administrative process. *See* Lawrence J. Liu, *Opening the Tariff Toolkit: The Demand for U.S. Administrative Trade Remedies*, 101 N.Y.U. L. REV. 520 (2026); Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845 (2021).

91. 19 U.S.C. § 2411.

92. *Id.* § 1338.

93. *See* Claussen, *supra* note 12; Claussen & Meyer, *supra* note 12. For more general discussions of the impact of national security rhetoric on global economic affairs in the United States, but also elsewhere, see J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020); Harlan Grant Cohen, *The International Order, International Law, and the Definition of Security*, 47 MICH. J. INT'L L. 1, 28–36 (2026).

94. *See* Liu, *supra* note 90; Claussen, *supra* note 12, at 1117. Notably, although many of these moves were initiated by presidential action, still many others were triggered following petitions by private actors. And, the popularity of the antidumping and countervailing duty laws, for instance, continues. *See* Liu, *supra* note 90.

second term.[95] Although the Supreme Court ultimately rejected the President's use of IEEPA to impose tariffs,[96] the administration almost immediately began efforts to reinstate its tariffs under alternative legal authorities.[97]

President Trump's rhetoric, calling for tariffs to deal with "unfair" relationships that are "ripping off" the United States, has further underscored the security valence of his actions.[98] Similarly, President Biden focused on the security implications of defensive trade actions, especially vis-à-vis competitors like China. The Biden administration sought to "derisk" from China by cutting it out of global supply chains, limiting inbound or outbound Chinese investment, and restricting trade with China.[99] As explained by then-National Security Advisor Jake Sullivan in late 2024, targeted tariffs were considered necessary to resist China's "domination of . . . supply chains," "its willingness to weaponize such dependencies," and "to prevent a second China shock."[100] Together, both word and deed break with the previously held belief that trade liberalization would lead to more economic interdependence and, by extension, peace.[101]

Without discounting the validity of the economic security rationale, we train attention on another key but less discussed justification among scholars: raising revenue. The focus of legal academics notwithstanding,

---

95. Brad W. Setser, *How Court Rulings Could Affect Trump's Aggressive Trade Policies*, COUNCIL ON FOREIGN RELS. (Aug. 31, 2025), https://www.cfr.org/expert-brief/how-court-rulings-could-affect-trumps-aggressive-trade-policies [https://perma.cc/67D8-5H37] (describing how IEEPA underlies "the bulk of the tariffs" that the President has imposed in 2025); Hillman, *supra* note 14.

96. Learning Res., Inc. v. Trump, 146 S. Ct. 628, 637 (2026). It is worth noting that the Court's decision invalidated the use of IEEPA to impose *tariffs*, but not necessarily a future use of IEEPA to impose other non-tariff trade restrictions explicitly stated in the statute.

97. *See* Liu, *supra* note 9.

98. *See Fact Sheet: President Donald J. Trump Declares National Emergency to Increase Our Competitive Edge, Protect Our Sovereignty, and Strengthen Our National and Economic Security*, WHITE HOUSE (Apr. 2, 2025), https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security [https://perma.cc/8PR7-98VU]; David Goldman, *Tariffs, Explained: What Trump Wants from All These Trade Deals*, CNN (July 7, 2025), https://www.cnn.com/2025/07/07/economy/tariffs-trump-deals-explained [https://perma.cc/3KPC-5R23].

99. *See* Mark Jia, *American Law in the New Global Conflict*, 99 N.Y.U. L. REV. 636, 652–53 (2024); Peter S. Goodman, *The Rise and Fall of the World's Most Successful Joint Venture*, N.Y. TIMES (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/business/us-china-economy-trade.html [https://perma.cc/4UC4-44CS]; Greg Ip, *A China-U.S. Decoupling? You Ain't Seen Nothing Yet*, WALL ST. J. (Feb. 7, 2024), https://www.wsj.com/economy/trade/a-china-u-s-decoupling-you-aint-seen-nothing-yet-12c0828e [https://perma.cc/AXR9-3YUX]; Damien Cave, *How 'Decoupling' From China Became 'De-risking'*, N.Y. TIMES (May 22, 2023), https://www.nytimes.com/2023/05/20/world/decoupling-china-de-risking.html [https://perma.cc/FPB6-35B8].

100. Jake Sullivan, Nat'l Sec. Advisor, Remarks at the Brookings Institution (Oct. 23, 2024), https://www.presidency.ucsb.edu/documents/remarks-national-security-advisor-jake-sullivan-the-brookings-institution [https://perma.cc/98B8-6WGJ].

101. *See* Sannoy Das, *Giving Peace a Chance? Decolonization, Development, and the Foundations of the GATT*, 49 YALE J. INT'L L. 53 (2024); Patrick J. McDonald, *Peace Through Trade or Free Trade?*, 48 J. CONFLICT RESOL. 547 (2004).

President Trump and his administration have consistently emphasized the revenue-raising benefits of tariffs. During his campaign, Trump alluded to the potential of tariffs to once again serve as a primary source of federal revenue.[102] Since retaking office, he has consistently touted tariffs as a means not only to reduce the federal debt but also to justify large cuts to or even replacement of the income tax.[103] As more and more tariffs went into effect, the administration reported positively on the billions, and eventually trillions, of dollars generated by the expanding tariff regime.[104] And, in holding that IEEPA does not authorize the President to impose tariffs, the Court's reasoning frequently emphasized their tax- and revenue-generating character.[105]

This is not to say the supposed revenue benefits of this tariff regime go unquestioned. Some critics point out that tariff revenue, though not insignificant, nonetheless remains a drop in the ocean necessary to fund the federal government.[106] Still others question the feasibility of administering a customs system that can collect the required duties.[107] One of the loudest criticisms is that broad-based tariffs effectively function as a regressive tax on U.S. consumers. Even accepting that certain industries are unfairly burdened by import competition, critics nonetheless worry that large-scale and wide-ranging duties will result in higher prices that disproportionately impact poorer Americans.[108] Coupled with President Trump's large tax cuts,

---

102. *Agenda47*, *supra* note 5.

103. *See* Danielle Kurtzleben, *Trump's Tariff Revenue Has Skyrocketed. But How Big Is It, Really?*, NPR (Aug. 11, 2025), https://www.npr.org/2025/08/11/g-s1-81934/trump-tariffs-record-revenue [https://perma.cc/35LB-SADY]; Kate Dore, *Trump Said 'There Is a Chance' Tariff Revenue Could Replace the Income Tax. Economists Are Skeptical*, CNBC (Apr. 22, 2025), https://www.cnbc.com/2025/04/22/trump-tariffs-replace-income-tax.html [https://perma.cc/NJN7-8MX2]; Scott Lincicome, Opinion, *Republicans Can't Pay for Their Tax Cuts with Fantasy Revenue Sources*, WASH. POST (May 26, 2025), https://www.washingtonpost.com/opinions/2025/05/26/trump-tariffs-revenue-big-beautiful-bill [https://perma.cc/AAA7-VS63].

104. Alicia Wallace, *New Tariffs Are Generating Billions of Dollars in Revenue, but Bessent Says That Will Go Toward Paying National Debt*, CNN (Aug. 19, 2025), https://www.cnn.com/2025/08/19/economy/us-tariff-rebate-checks-bessent [https://perma.cc/F8M9-VLX7]; Andrew Duehren, *Trump's Tariffs Are Making Money. That May Make Them Hard to Quit.*, N.Y. TIMES (Aug. 3, 2025), https://www.nytimes.com/2025/08/03/business/trump-tariffs-how-much-money-debt.html [https://perma.cc/8S7N-KHL8]; Tami Luhby, *Trump Is Crowing About His Tariffs Reducing the Debt by $4 Trillion. But There Are Some Caveats*, CNN (Aug. 26, 2025), https://www.cnn.com/2025/08/26/politics/us-national-debt-trump-tariffs [https://perma.cc/69C8-PXLG].

105. Learning Res., Inc. v. Trump, 146 S. Ct. 628, 638, 643–44 (2026).

106. *See, e.g.*, Kurtzleben, *supra* note 103; Dore, *supra* note 103; Ari Hawkins, *How Trump's $150 Billion Tariff Brag Could Backfire*, POLITICO (Aug. 6, 2025), https://www.politico.com/news/2025/08/06/how-trumps-150-billion-brag-could-backfire-00494882 [https://perma.cc/56QU-BDZC].

107. *See* Ari Hawkins, *Trump Tariff Agency Plan Stalls amid White House Turf Battle*, POLITICO (Aug. 16, 2025), https://www.politico.com/news/2025/08/16/trump-tariffs-lutnick-bessent-imports-economy-00512234 [https://perma.cc/DD4C-Q5ZW].

108. *See* CLAUSING & LOVELY, *supra* note 14; GRESSER, *supra* note 14; Eduardo Porter & Guilbert Gates, *How Trump's Protectionism Could Backfire*, N.Y. TIMES (Mar. 20, 2018), https://

some even complain that tariffs will only further accelerate a large transfer of wealth from poorer to richer Americans.[109] Viewed from this perspective, tariffs threaten not only our longstanding reliance upon the income tax but also the notably *progressive* commitment behind that revenue source.

Without weighing in on the economic, political, or legal wisdom of increasing tariffs, we assume that tariffs will continue to be a prominent policy tool in the years to come. As described, the President still wields significant authority to raise tariffs, litigation is unlikely to curb the full extent of that authority, and "tariff men" from both sides of the political spectrum have been happy to flex that authority. Even the administration's defeat in *Learning Resources* has not dulled the President's tariff enthusiasm.[110] At the same time, we take seriously the concern about the regressive nature of tariffs. In the sections to follow, we discuss how such concerns mirror longstanding debates surrounding other forms of regressive taxation. We draw insights from those discussions to assess whether and how U.S. tariff policy can be made more progressive, in better keeping with our progressive fiscal constitution.

III. DESIGNING PROGRESSIVE TARIFFS

Part III explores three main statutory and administrative mechanisms that effect a *progressive* tariff regime by: (1) varying tariff burdens in accordance with consumption, either based on (a) actual consumption of imported goods, or (b) consumption of certain types of goods; (2) varying tariff burdens in accordance with metrics of the taxpayer's economic power like income, including (a) providing an income-tax credit for lower- and middle-income households through tariff receipts or (b) eliminating or reducing income-tax or payroll-tax burdens for lower-income households; and (3) earmarking tariff revenue for social welfare. We do not endorse any of them as perfect instantiations of the federal commitment to progressivity in taxation and fiscal governance. Nor do we speak to the political feasibility of any of these proposals by assuming their persuasiveness to Congress or the administration. Instead, we outline the operation of each and evaluate its relative normative merits.

---

www.nytimes.com/interactive/2018/03/20/business/how-trumps-protectionism-backfires.html [https://perma.cc/A6AD-W45Y].

109. *See* Vishaal Sanjay, *Trump's 'One Big, Beautiful Bill' Is 'The Largest Redistribution from Poor to Rich in American History,' Says Economist Justin Wolfers amid Tax Cuts, Spending Slashes and Tariffs*, YAHOO! FINANCE (June 13, 2025), https://finance.yahoo.com/news/trumps-one-big-beautiful-bill-003121937.html [https://perma.cc/M3R9-J3K8].

110. *See* Ana Swanson, *Trump's Trade Gamble Will Continue, Despite Supreme Court Rebuke*, N.Y. TIMES (Feb. 21, 2026), https://www.nytimes.com/2026/02/21/business/economy/trump-tariffs-trade-war.html [https://perma.cc/YLR6-US6J].

Tariffs are, by definition, taxes on the consumption of imported foreign goods.[111] They thus exempt the consumption of foreign services. For example, the United States does not impose an import tariff on a U.S. citizen's vacation trip to—and consumption of services provided abroad in—the United Kingdom. Scholars have long debated—and many have recognized—the desirability of a broad-based consumption tax either in place of or in addition to an income tax.[112] But commentators have traditionally also acknowledged the regressivity of a flat-rate consumption tax: Lower-income households spend a larger portion of their income while higher-income households can afford to save. Consumption taxation thus imposes higher proportionate burdens on the former than the latter because it by nature exempts savings from tax. Indeed, the debate about the choice of a tax base (income versus consumption) from the 1970s to the 2000s began in large part because scholars showed that a consumption tax can be made progressive: for example, by preserving the existing income tax and providing a deduction for savings.[113] The regressivity point is especially important for tariffs because they burden only consumption of imported *goods*. The United States imports a large volume of services from overseas, with their value reaching $814 billion in 2024.[114] Such foreign services, including tourism (e.g., traveling overseas for vacation), transportation

---

111. U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES REVISION 22, at General N.1 (2025), https://hts.usitc.gov/reststop/file?release=2025HTSRev22&filename=finalCopy [https://perma.cc/E9AD-79HC] (providing the general tariff treatment of "goods . . . imported into the customs territory of the United States").

112. The modern scholarly debate began in earnest with William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974). Andrews's proposal of a consumption tax generated voluminous echoes (e.g., on the grounds of efficiency, administrative ease compared to an income tax, as well as the potential to incentivize savings and therefore productivity) and criticism (e.g., on the grounds that empirical evidence of a consumption tax's effect on savings is mixed and that the administrative virtues of a consumption tax depend on unlikely congressional restraint in handing out tax exemptions) in the academy. *E.g.*, Alvin C. Warren, *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931 (1975) (criticizing on distributive-justice grounds the decision to tax labor and exempt capital income—a key feature of any consumption tax); Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413 (2006) (favoring consumption taxation because it produces efficiency gains and can be made progressive like the income tax); Daniel Shaviro, *Beyond the Pro-Consumption Tax Consensus*, 60 STAN. L. REV. 745 (2007) (arguing that the assumptions made to justify consumption taxation do not hold). For an overview about how scholarly and policy commentary has evolved on the relative merits of consumption versus income taxation, see, for example, Reuven S. Avi-Yonah, *The Rise and Fall of the Consumption Tax*, 146 TAX NOTES 247 (2015).

113. *E.g.*, Andrews, *supra* note 112. *But see* Graetz, *supra* note 16 (analyzing the administrative difficulties in implementing progressive consumption taxation). As Avi-Yonah details, the movement to adopt a federal consumption tax lost steam during the late 2000s and mid-2010s because of rising economic inequality, which has shifted the debate to egalitarian reforms like taxing the wealthy. Avi-Yonah, *supra* note 112. Much of the ultrawealthy's economic power takes the form of capital appreciation, which a consumption-tax regime does not burden.

114. Press Release, Bureau Econ. Analysis, U.S. International Trade in Goods and Services, December and Annual 2024 (Feb. 5, 2025), https://www.bea.gov/news/2025/us-international-trade-goods-and-services-december-and-annual-2024 [https://perma.cc/289H-Y6S2].

(e.g., provided by international airlines), financial and management consulting, and intellectual property, are disproportionately consumed by higher-income households and are untaxed in a tariff regime.

A. Varying Tariff Burdens in Accordance with Consumption

1. Actual Consumption of Imported Goods

We begin with proposals to vary tariff burdens according to an individual's actual consumption of imported goods. This approach would borrow most directly from proposals to implement a progressive consumption tax. The variety of progressive consumption tax proposals notwithstanding,[115] we focus here on a system that tracks an individual taxpayer's consumption and issues a rebate either at point of sale or annually after income-tax filing. When goods enter the United States via ports of entry, relevant duties are assessed and paid by the importer.[116] Although importers had initially seemed to absorb much of the burden brought by President Trump's new tariff regime, that has since shifted to U.S. consumers, with projections estimating that the burden will only further increase in 2026.[117] Assuming then that at least some of these additional costs are passed on to consumers via higher prices, the intuition behind the individual accounting approach is that consumers who spend a greater amount on imported goods each year ought to bear a greater burden of those costs than those who spend less on imported goods. Moreover, to the extent the tariffs are intended to boost U.S. manufacturing or reduce consumption of foreign-made products, shifting the burden towards higher spenders would seemingly cohere with such policy goals.

---

115. For a discussion of the various approaches, see Viswanathan, *supra* note 16, at 245–54. Two other common proposals to implement progressive consumption taxation are (1) deducting savings to indirectly measure and then tax consumption or (2) taxing wages. Neither is well-suited to the tariff context because tariffs are only levied on a subset of a consumer's purchases, i.e., the consumption of imported goods.

116. CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11030, U.S. TARIFF POLICY: OVERVIEW (2025).

117. *See supra* note 15 and accompanying text; Heidi E. Crebo-Rediker, Benn Steil, Erin D. Dumbacher, David M. Hart & Linda Robinson, *Visualizing 2026: Five Foreign Policy Trends to Watch*, COUNCIL ON FOREIGN RELS. (Dec. 17, 2025), https://www.cfr.org/articles/visualizing-2026-five-foreign-policy-trends-watch [https://perma.cc/2HAF-TSRA]; JULIAN HINZ, AARON LOHMANN, HENDRIK MAHLKOW & ANNA VORWIG, KIEL INST. FOR WORLD ECON., KIEL POL'Y BRIEF NO. 201, AMERICA'S OWN GOAL: WHO PAYS THE TARIFFS? 7 (2026), https://www.kielinstitut.de/fileadmin/Dateiverwaltung/IfW-Publications/fis-import/92fb3f30-07b8-4dcf-b2bc-fbefb831f1a1-KPB201_EN.pdf [https://perma.cc/958N-644W] (noting that American importers and consumers have borne 96 percent of the tariff costs). As one illustration of this shift, the Trump administration decided to exempt agricultural imports like coffee, cocoa, and bananas from higher tariff rates after distributors raised prices on those and other products. *See* Luke Fountain, *Trump Cuts Tariffs on Goods like Coffee, Bananas and Beef in Bid to Slash Consumer Prices*, CNBC (Nov. 15, 2025), https://www.cnbc.com/2025/11/14/trump-cuts-tariffs-goods-prices.html [https://perma.cc/3SMU-ANGK].

One way of implementing an individual scheme is by issuing rebates to consumers at the point of sale, an approach that draws inspiration from Manoj Viswanathan's description of an individual accounting progressive consumption tax.[118] Similar to Viswanathan, the agency tasked with collecting tariff receipts—currently the Customs and Border Protection (CBP)—would maintain a secure database that tracks the aggregate amount each individual spends on imported goods each year. At the point of sale of an imported good, the retailer would communicate the amount spent to the agency database, which would return a marginal rebate to the retailer based on the aggregate consumption by that consumer up to that point. That rebate amount would then be immediately remitted to the consumer.[119]

For purchases made by electronic payments such as credit or debit cards, which make up most and an increasingly large percentage of purchases,[120] the third party facilitating the transaction would be tasked with transmitting the purchase amount to the agency database. As explained by Viswanathan, imposing this additional reporting requirement on electronic payment systems is a straightforward extension of existing obligations.[121] Cash transactions would rely on consumer self-reporting, which could be accomplished at point-of-sale via an app or QR code.[122] Although such self-reporting would be voluntary, we imagine that many consumers would be interested in participating given the instant savings they might receive.

A less administratively burdensome approach might be to issue rebates via the existing income tax system. Similar to the point-of-sale method, consumer purchases of imported goods would still need to be reported and logged in a secure government database.[123] Rather than calculating the amount to be refunded in real time, however, the purchase would be added to a taxpayer's annual aggregate consumption amount. At the beginning of the following year, around the time that taxpayers receive other tax documents like W-2s or 1099-INTs, a taxpayer would receive a report listing the purchases and aggregate consumption of imported goods. The appropriate refund amount would then be determined with reference to a graduated scale that varies based on the total amount consumed, and taxpayers would receive their refunds after filing their income taxes.

118. *See* Viswanathan, *supra* note 16.

119. *See id.* at 257.

120. BERHAN BAYEH, ISAIAH NARDONE, SHAUN O'BRIEN & HAILEY PHELPS, FED. RSRV. FIN. SERVS., 2025 FINDINGS FROM THE DIARY OF CONSUMER PAYMENT CHOICE 5 (2025), https://www.frbservices.org/binaries/content/assets/crsocms/news/research/2025-diary-of-consumer-payment-choice.pdf [https://perma.cc/BEZ8-RVYC].

121. Viswanathan, *supra* note 16, at 257.

122. *Id.* at 258.

123. If maintenance of a government database proves too cumbersome, the companies facilitating payments could be relied upon to collect and share this information instead. This would, however, preclude the recording of any cash transactions.

One of the challenges in implementing either individual accounting approach is administratively determining what counts as purchasing an imported good. For products purchased directly by consumers online, any product that is shipped from outside the United States would qualify the consumer for a potential rebate. For final goods sold in stores or mailed from a U.S.-based warehouse, such as laptops or pieces of furniture, those goods could be logged as imports in a CBP database upon entry. Some imports, however, are input goods that will go into a final product further into the manufacturing process. Steel nails from China, for instance, might be imported and then included in an automobile assembled in the United States. One option might be to require manufacturers who use imported inputs in a product to include the finished product in a CBP database, and future sale of that product would trigger the rebate process described above. Another option is to treat any purchaser of an imported good, even if it is a U.S. manufacturer rather than a consumer, as an entity whose purchases are tracked and can receive a point-of-sale rebate. A third is to implement this system only for consumers purchasing imported final goods and not for those who purchase goods that have imported inputs.

Another primary drawback concerns privacy. Although consumers already provide more information to, say, their credit-card companies than they would the CBP under this scheme,[124] the CBP would be receiving more consumer-related information than it currently has. Moreover, one might be especially concerned about providing information to the CBP because of its organizational home within the Department of Homeland Security—the department also charged with immigration enforcement. Because the IRS already receives sensitive individual-level information, one response is to have the IRS implement an individual accounting system, with support and in coordination with the CBP only as necessary. However, this design would be vulnerable to similar criticisms concerning collaboration between the IRS and Immigration and Customs Enforcement, another DHS agency.[125]

To the extent there are fewer privacy concerns with the IRS and the Department of the Treasury than with DHS, the collection of duties could be moved out of DHS into Treasury. Indeed, prior to 2003, customs administration was part of Treasury, and President Trump's proposed External Revenue Service would likely be within Treasury.[126] Related to

124. *See* Viswanathan, *supra* note 16, at 260.

125. *See* William Turton, Christopher Bing & Avi Asher-Schapiro, *The IRS Is Building a Vast System to Share Millions of Taxpayers' Data with ICE*, PROPUBLICA (July 15, 2025), https://www.propublica.org/article/trump-irs-share-tax-records-ice-dhs-deportations [https://perma.cc/Z4XM-J4YC].

126. *See* Robert Goulder, *Trump and the External Revenue Service: What Just Happened?*, TAX NOTES (Jan. 27, 2025), https://www.taxnotes.com/featured-analysis/trump-and-external-revenue-service-what-just-happened/2025/01/24/7qj45 [https://perma.cc/BH95-3G74]; Ana Swanson, *Trump's*

these privacy concerns, certain populations like noncitizens or the unhoused might generally be less willing to self-identify and would thus have difficulty accessing the benefits of an individual accounting system.[127]

2. Type of Imported Good Consumed

Another consumption-based approach is to adjust the tariff rate based on the type of good involved. Expensive, luxury imports can be subject to higher tariff rates while cheaper necessities can be subject to lower rates or even exempt. The intuition behind this scheme is that wealthier individuals are more likely to spend on pricier imports than less wealthy individuals, while the latter are more likely to spend on cheaper goods or necessities.

Helpful to implementation, differentiation by product is already present in U.S. tariff-rate schedules. Tariff rates and classifications are listed out in the Harmonized Tariff Schedule (HTS), which is published and maintained by the International Trade Commission, an independent agency, and enforced by the CBP.[128] Rather than only differing rates based on, say, the customs value of import categories[129] or exempting cheap goods altogether from duties,[130] the tariff rate for a given product could further differ based on whether an import is considered a luxury or a necessity. Luxury items like high-end watches, handbags, or clothing could be tariffed at higher rates than goods such as pharmaceuticals or food products.

This approach, of course, raises the question of what counts as a luxury versus a necessity. Although price might be a good proxy, prices are relatively easy for sellers to manipulate, and the determination of what is a luxury or a necessity is ultimately subjective. Application of the appropriate tariff rate would thus potentially come down to a discretionary decision by the CBP agents who enforce the HTS and make final determinations as to the correct duty rate.[131] Moreover, this approach does not account for

---

Proposed Tariff Agency Raises Questions, and Confusion, for Experts, N.Y. TIMES (Jan. 21, 2025), https://www.nytimes.com/2025/01/21/us/politics/trump-tariffs-external-revenue-service.html [https://perma.cc/3AVV-CAJ4]; Hawkins, *supra* note 107.

127. *See* Viswanathan, *supra* note 16, at 262–63.

128. *See Harmonized Tariff Schedule – General Information*, U.S. CUSTOMS & BORDER PROT. (Feb. 13, 2026), https://www.help.cbp.gov/s/article/Article-1015 [https://perma.cc/EN7H-53WG].

129. *See* Drew Desilver, *U.S. Tariffs Vary a Lot, but the Highest Duties Tend to Be on Imported Clothing*, PEW RSCH. CTR. (Mar. 28, 2018), https://www.pewresearch.org/short-reads/2018/03/28/u-s-tariffs-vary-a-lot-but-the-highest-duties-tend-to-be-on-imported-clothing [https://perma.cc/6DFM-2Z5X].

130. This de minimis exemption, which had exempted goods valued at $800 or less from import duties, was stopped by President Trump in August 2025. *See* Bill Chappell, *This Rule Made Many Online Purchases Dirt Cheap for U.S. Consumers. Now It's Ending*, NPR (Aug. 28, 2025), https://www.npr.org/2025/08/28/nx-s1-5519361/de-minimis-rule-tariffs-consumers-imports-trump [https://perma.cc/H34V-JC3Y].

131. *Determining Duty Rates*, U.S. CUSTOMS & BORDER PROT. (Nov. 25, 2024), https://www.cbp.gov/trade/programs-administration/determining-duty-rates [https://perma.cc/KKC3-RFV2].

abnormal spending patterns. For instance, under this scheme, a consumer who makes $60,000 annually and consumes only a $10,000 Swiss watch might be subject to a higher tariff burden than an individual who makes $500,000 a year but buys no luxury imports and primarily consumes imported clothing, food, and other necessities or lower-end products.

B. Designing Progressive Tariffs from the Income-Tax System

This Section explores how Congress and the executive branch can design and implement features of the income-tax system to make tariffs cohere with our progressive fiscal constitution. As the previous section shows, varying tariff burdens in accordance with actual consumption of imported commodities has the virtue of furthering certain trade policy—for example, by disincentivizing individual consumption of foreign goods and *potentially* encouraging domestic manufacturing. But accounting and administrability costs reduce the attractiveness of such proposals. Further, the progressive commitment of our fiscal constitution has centered on measures of economic power—for example, income as a proxy for ability to pay.[132] Actual consumption of imported commodities may correlate with economic power, but not always accurately. Idiosyncrasies in preferences may lead, for example, a small subset of middle-income households to consume a high volume of imported commodities and a small subset of higher-income households to consume a low volume of imported commodities. In those cases, varying tariff burden based on consumption of imports may not mitigate the regressive effects of tariffs (i.e., conceptualizing regressivity as a distributive effect with respect to income levels), even if it furthers trade-policy goals.

Income-tax mechanisms are less cumbersome in administration, and we sketch two possibilities. First, Congress and the executive branch can design and distribute annually income-tax credits based on revenue from tariffs. Customs receipts have unsurprisingly reached records under the Trump administration, totaling $28 billion in December 2025 and constituting 7.34 percent of all federal fiscal-year-to-date revenue.[133] The continuation of the existing tariff regime (after accounting for a substantial decline in tariff revenue when importers stop stockpiling inventory in anticipation of rate hikes) means that the federal government can expect roughly $200 billion in customs receipts each year. Half of the proceeds can thus allow Congress

132. *See supra* Part I.

133. BUREAU FISCAL SERV., U.S. DEP'T OF TREASURY, MONTHLY TREASURY STATEMENT: RECEIPTS AND OUTLAYS OF THE UNITED STATES GOVERNMENT FOR FISCAL YEAR 2026 THROUGH DECEMBER 31, 2025, AND OTHER PERIODS 4 fig. 1 (2026), https://fiscaldata.treasury.gov/static-data/published-reports/mts/MonthlyTreasuryStatement_202512.pdf [https://perma.cc/Y9HK-XPZS].

and the executive branch to distribute about $1,300 on average in refundable income-tax credits to the bottom half of U.S. households.[134] Senator Josh Hawley has thus proposed using tariff proceeds to fund rebates—in the form of income-tax credits at $600 per person—for individuals earning less than $75,000 (and $150,000 for married couples).[135] The amount of the credit, of course, can vary based on the taxpayer's income: Larger benefits may go to lower-income taxpayers if the goal is to increase progressivity in the overall tax system, or to another group (likely middle-income taxpayers) that both purchases imported commodities and lacks the economic power of high-income households.

Second, as previously discussed, the Trump administration has suggested abolishing the individual income tax and replacing it with tariffs.[136] Stated without qualification, that proposal is unrealistic. Even under the rosiest estimates, tariff proceeds are unlikely to match the scale of individual-income-tax receipts, the largest source and about half of all federal revenue.[137] On the other hand, scholars like Michael Graetz have previously suggested abolishing the federal income tax for *some* taxpayers and financing the cost with a federal-level consumption tax. One proposal, for example, calls for the abolition of the income tax for 90 percent of filers and the adoption of a 10 to 15 percent, broad-based value-added tax, thus returning federal income taxation to its function before World War II—a class tax on the wealthy.[138] We suggest that a version of this kind of proposal can increase the progressivity of the tariff regime. Again, assuming roughly $200 billion of additional customs receipts each year, the federal government can abolish the individual income tax for a large segment of taxpayers—probably at least half of income-tax filers.[139] This can be implemented by dramatically raising the standard deduction or simply exempting households earning less than an income threshold (e.g., $55,000) from the income tax. Of course, a large subset of those taxpayers either already pays no income tax or even faces negative income-tax rates because of transfer programs like the earned income tax credit. The federal

134. *See* Erica York, *Summary of the Latest Federal Income Tax Data, 2025 Update*, TAX FOUND. (Nov. 18, 2024), https://taxfoundation.org/data/all/federal/latest-federal-income-tax-data-2025 [https://perma.cc/7DYG-JCWX].

135. American Worker Rebate Act of 2025, S. 2475, 119th Cong. (2025).

136. David Goldman & Matt Egan, *Trump Says He'll Eliminate Income Taxes. There's a Problem with That*, CNN (Apr. 28, 2025), https://www.cnn.com/2025/04/28/business/taxes-trump-tariffs [https://perma.cc/439H-ELYS].

137. *How Much Revenue Has the U.S. Government Collected This Year?*, U.S. DEP'T OF TREASURY, https://fiscaldata.treasury.gov/americas-finance-guide/government-revenue/ [https://perma.cc/QJ8L-FL78].

138. Michael J. Graetz, Essay, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261 (2002).

139. *See* York, *supra* note 134.

government can thus combine this second possibility with the first by providing lower-income groups with a refundable tax credit funded by tariff proceeds.

Though easier to implement, the income-tax mechanisms are imperfect. By design, they suffer from the same problems that plague any administration of social welfare with the income-tax system. For example, beneficiaries are required to file tax returns to claim their statutory entitlements and will receive benefits only once a year.[140] The administrative burden is not negligible, and lower-income groups who disproportionately bear the costs of tariffs may need resources throughout the year, not only around April 15, to fund household expenses. And even a straightforward credit regime will increase the complexity of the tax system, leading to errors in filing, delays in processing the returns, and incentives for third-party tax preparers to exploit unsophisticated taxpayers and profit from a refundable-tax-credit regime.[141] Such administrative concerns might counsel the adoption of higher standard deductions rather than the provision of refundable tax credits.

C. Earmarking Tariff Revenue for Tax and Fiscal Expenditures

Perhaps more importantly, any direct link between expenditure programs (e.g., refundable tax credits or higher standard deductions) and revenue collection changes the political-economy dynamics of taxation. This is an important point against stringent earmarking of tariff revenue for expenditure programs, whether they are tax expenditures or direct spending. That is, if Congress seriously considers any of the proposals described thus far in this Article, we recommend framing the legislative fix as a mechanism to reduce the regressivity of the tariff regime and funded by general revenue, at least in the short term. Democratic regimes confront a recurring policy problem when they create concentrated sets of beneficiaries, and they exacerbate the problem when they fund benefits for such groups through taxes that burden a broad swath of the public.[142] The concentrated beneficiaries can efficiently mobilize to defend their fiscal entitlements, whether in court or through the political process. By contrast, the expected gain from nonpayment of the tax (which funds such benefits) is relatively

140. *See* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995).

141. Scholars have documented these features in the context of the Earned Income Tax Credit. *See id.*; Danshera Cords, *Paid Tax Preparers, Used Car Dealers, Refund Anticipation Loans, and the Earned Income Tax Credit: The Need to Regulate Tax Return Preparers and Provide More Free Alternatives*, 59 CASE W. RSRV. L. REV. 351 (2009); Hadi Elzayn et al., *Measuring and Mitigating Racial Disparities in Tax Audits*, 140 Q.J. ECON. 113 (2025).

142. Susannah Camic Tahk, *Public Choice Theory and Earmarked Taxes*, 68 TAX L. REV. 755 (2015).

small, and few would incur the costs of mobilization to fight for its repeal. As a result, the earmarked tax survives—perhaps even thrives—despite overall democratic opposition in a costless regime. Indeed, one study shows that "earmarked taxes that have concentrated benefits and diffuse costs are associated with a substantial increase in revenue over time relative to taxes with other cost-benefit configurations."[143]

This line of reasoning applies to the tariff context. If a smaller, defined group receives tax credits expressly funded by tariff revenue, their political preferences and mobilization will contribute to the preservation of the tariff regime. Without commenting on the economic wisdom behind the continuation of such a regime or drawing firm conclusions about its long-term desirability as a matter of distributive justice,[144] we suggest that this might nonetheless be democratically suboptimal in the short run given significant ongoing debate about tariffs' desirability, and at least some judicial skepticism as to their validity.[145] For the same reason, we also counsel against earmarking tariff revenue toward specific social-welfare spending. That would similarly amplify the political-economy dynamics: Expenditure programs for specific purposes (e.g., education, healthcare, or industries perceived to have been harmed by retaliatory tariffs like agriculture) tend to feature even more concentrated beneficiaries than tax credits generally available to groups below an income threshold.[146] And the salience of the benefits may trigger cognitive biases to make future repeal

143. *Id.* at 756.

144. Indeed, even among ourselves, we are ambivalent about who should benefit from a tariff regime. We both appreciate the argument that a policy outcome is undesirable if a majority of the population would prefer otherwise. And most of this Article has focused on using tariff revenue to the general benefit of low- or moderate-income groups. At least one of us is sympathetic, however, to the argument that specific groups that have long borne the costs and consequences of imports—say, workers in manufacturing industries—might deserve concentrated benefits even if that comes at the expense of a larger population—say, consumers. And those groups that have historically borne the costs of offshoring and a more globalized economy do not precisely coincide with the lower end of the income distribution. In any event, what is desired as a matter of distributive justice or majority preference is at least contested and depends on our democracy's views on the relative importance of current-time distributive justice and a more historically anchored view of *corrective* justice. Such considerations further counsel against stringent earmarking for expenditures.

145. *See* Jocelyn Kiley, Gabriel Borelli, Joseph Copeland & Shanay Gracia, *Trump's Tariffs and 'One Big Beautiful Bill' Face More Opposition Than Support as His Job Rating Slips*, PEW RSCH. CTR. (Aug. 14, 2025), https://www.pewresearch.org/politics/2025/08/14/trumps-tariffs-and-one-big-beautiful-bill-face-more-opposition-than-support-as-his-job-rating-slips [https://perma.cc/6ENG-XT4P] (showing that 61 percent of Americans either strongly disapprove or somewhat disapprove, and only 38 percent strongly approve or somewhat approve, of "the Trump administration substantially increasing tariffs on goods imported from most countries that trade with the U.S."); Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026) (invalidating Trump's IEEPA tariffs).

146. *See* Press Release, U.S. Dep't Agric., Trump Administration Announces $12 Billion Farmer Bridge Payments for American Farmers Impacted by Unfair Market Disruptions (Dec. 8, 2025), https://www.usda.gov/about-usda/news/press-releases/2025/12/08/trump-administration-announces-12-billion-farmer-bridge-payments-american-farmers-impacted-unfair [https://perma.cc/AKH4-3W8X].

of the funding source—and future deprivation of a highly visible benefit—even more difficult.[147]

* * *

This Part of the Article has described and analyzed policy options to reduce the distributive regressivity of the tariff regime. None is perfect. Varying tariff burdens in accordance with actual consumption of imported goods raises administrability concerns, especially as to input imports. Varying tariff burdens in accordance with consumption of different types of goods raises additional problems like defining the boundaries between luxuries and necessities, which ultimately come down to subjective consumer preferences and discretionary decision-making by administrative agencies. Mechanisms through the income-tax system (e.g., providing refundable tax credits for lower- and middle-income households, or reducing/eliminating income-tax or payroll-tax burdens for lower-income households) carry the familiar disadvantages of tax administration. Most prominent are the need for annual filing and annual, rather than more frequent, distribution of benefits. And earmarking revenue for expenditure programs risks cementing a tax regime criticized by both economists and certain theories of distributive justice.

One broader implication of these imperfect solutions might be for policymakers to rethink seriously the desirability of such a wide-ranging and volatile tariff regime. But our external-revenue regime shows no signs of diminishing. Indeed, the Trump administration has already begun to reinstate its tariff regime through independent statutory authorities despite a loss at the Supreme Court.[148] And the astonishing level of our national debt may make the repeal of any significant source of federal revenue difficult in future administrations.[149]

Assuming tariffs' continuing existence, and acknowledging the imperfections of these proposals, we tentatively conclude that reducing income- or payroll-tax burdens for lower-income groups might present a workable plan in the short to medium term. This would not implicate the costly administrability problems involved in attempting to vary tariff burdens based on actual consumption. It would also mitigate—even if not completely avoid—the political-economy dynamics generated by the creation of concentrated beneficiaries and diffuse payers, thus allowing our

147. *See generally* Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REGUL. 253 (2011); Alex Zhang, *Pandemics, Paid Sick Leaves, and Tax Institutions*, 52 LOY. U. CHI. L.J. 383 (2021).

148. *See* Romm & Swanson, *supra* note 13; Liu, *supra* note 9.

149. *See* BUREAU FISCAL SERV., U.S. DEP'T OF TREASURY, *supra* note 133, at 4 fig. 2 (showing a $602 billion federal deficit through December 2025 for fiscal year 2026).

democracy time to deliberate on the resurgence of tariffs without making lower-income groups bear disproportionate costs. And by integrating the tax benefits into paycheck withholding, the Treasury Department can deliver at least some benefits to taxpayers throughout the year.

CONCLUSION

This Article assesses the resurgence of tariffs within the progressive fiscal system of the United States. For more than a century, the federal income tax has featured graduated tax rates, imposing higher tax burdens on high-income groups. This longstanding statutory regime evidences a quasi-constitutional commitment to progressive distribution. Tariffs deviate from this commitment. They are consumption taxes on imported goods and disproportionately burden lower- and moderate-income households that consume larger portions of their economic power. The Article evaluates policy options for diminishing tariffs' regressive distributive effects, including varying tariff burdens in accordance with consumption, reducing or eliminating select households' income- or payroll-tax burdens, and earmarking tariff revenue for spending programs. Although none is perfect, this Article's account helps lawmakers navigate the difficult distributive calculus of using an external-revenue regime to vindicate trade or industrial-policy goals.