President Trump and the Changing American Constitutional Order

Anuj C. Desai, Volkman-Bascom Professor of Law
University of Wisconsin Law School

Presentation at Universität Luzern,
Obwaldner Institut für Justizforschung
Juristenverein des Kantons Luzern
Dienstag 12 Mai 2026

Thank you all for being here. Ich fange mit ein bißchen Deutsch an. Ich bin echt begeistert hier in Ihrer schönen Stadt Luzern zu sein. Danke zu Professor Diebold für die Einladung—und auch für die Gelegenheit einen Kurzen Kurs diese letzte Woche zu unterrichten. Ich möchte mich im Voraus auch bei Richter Hänni und Professor Rütsche für ihre Kommentar bedanken und freue mich auf die Diskussion. Am Ende, freue ich mich auch Ihre Kommentar und Fragen zu hören. Auch, während des Redes, wenn etwas wichtig unklar ist, könnten Sie mich fragen. Wenn Sie langsam sprechen, könnten Sie sogar auf Deutsch die Frage stellen. Wie Sie sehen können, weiß ich wohl wie schwierig es ist, eine Fremdsprache zu sprechen! Aber jetzt muß ich auf Englisch sprechen oder sicher ist alles unklar!

Although my topic is President Trump and the Changing *American* Constitutional Order, those of you here in Switzerland have of course been quite directly affected by these changes, and my hope is to touch on an issue that I suspect you are all aware of, tariffs.

I hope to show that the question of President Trump's tariffs is deeply intertwined with American separation of powers—and thus with changes to the American constitutional order. The way in which

Trump imposed tariffs, followed by the Supreme Court declaring them illegal, his subsequent reimposition of some other tariffs, and now another court declaring those tariffs illegal is an illustration of how changes in the structure of American separation of powers have occurred since he took office. But they also tell us something about the fundamentals of the structure of American separation of powers and what changes are possible within that structure.

The tariffs illustrate the profound tension between what we could call revolutionary and evolutionary changes occurring in the American constitutional order. Legal and constitutional change is inevitable in any society: to survive, the constitutional structure needs to adapt to social, cultural, and technological change. Sometimes the pre-existing legal processes suffice and sometimes not. Because the U.S. Constitution is old, short, difficult to formally amend, often vague, and generally not drafted for modern conditions, we Americans rarely make constitutional change through the formal amendment process the way you do here. Indeed, even the process of passing legislation in the federal system has many so-called "veto-gates," making the formal legislative process very difficult too. This is why much of our legal and constitutional change occurs either in the courts or, as Professor Diebold alluded to, in the Executive branch, rather than in the legislature or through changes to the constitutional text.

For our purposes here in a law faculty, what makes tariffs a nice example is that they help illustrate the role courts play—some might say the role that law plays—in putting a thumb on the scale in favor of evolutionary over revolutionary change.

The American Founders, following John Locke and Edmund Burke, viewed constitutional change as the means by which peaceful societal change can occur. As you heard with many of the examples Professor Diebold mentioned, there is no doubt we are in the midst of

significant changes in the American constitutional order. How long-lasting they are—or perhaps more precisely, which ones last and which ones do not—is a question for sooth-sayers, not law professors. But I do think that understanding the institutions of the American constitutional structure, in both theory and fact, can help us in that effort.

So, let me begin with what I suspect most of you know: the theoretical basics of American separation of powers. You know it of course, because it is drawn from a seminal work of political theory first published in Geneva in 1748, and it inspired the Swiss Constitution a century later. Montesquieu's theory is that there are three functions of government, the legislative, the executive, and the judicial, and that the assignment of those functions to different bodies will prevent abuses of power.

Familiarity with that theoretical structure, however, only takes one so far to understand our topic today. To understand how the American constitutional order is changing, one needs to understand what the system looked like in practice, not just in theory, in the years before Trump.

I thought it might be nice to start with a set of frameworks laid out last year by Professors David Pozen and Jed Purdy. They described three ways in which to understand what is happening in the U.S. today: first, that we are in a constitutional crisis, a crisis of an authoritarian takeover of a democratic state; second, that Trump can be understood as a prototypical Republican President, essentially seeking to implement Republican policies through Republican means, and that he is therefore a continuation—in essence, what we have is just more of the same; and third, we are in a moment of constitutional regime change of reversion, a return to the pre-Warren Court-era of American law.

Each of these stories depends on different premises about the American constitutional system—and in particular, about 20th-century

American history. The first—the story of authoritarian, constitutional crisis—starts with the premise that the U.S. had achieved in the 20th century what Pozen and Purdy refer to as "a special degree of moral and political legitimacy—and a seemingly safe distance from authoritarianism—following *Brown v. Board of Education*, the Voting Rights Act of 1965, and [what is known] as the Second Reconstruction," the broader civil rights era of the second half of the 20th century. The second—what they call the "more of the same" story—starts with the premise that the U.S. has always been flawed, an illiberal, anti-democratic regime that suppresses minorities, caters to the rich, and ignores the concerns of the broader public. Or, at least, I might put it, even if you don't go that far, you might say that about the Republican Party and so say that this is an important strand of the American constitutional order. Finally, the third story—the story of a return to a golden age—starts from the premise that the past, say, 75 years or so, were an aberration of liberal hegemony and that Trump is engaged in a counterrevolution to revert to the true American constitutional regime. This view obviously takes the opposite view of the late 20th century changes from the first story, the story of authoritarian takeover of the American constitutional system.

Let me start with a point that is obvious to any student of American political development but that pure constitutional theory sometimes ignores: the consolidation of authority in the executive branch of government is a long-running trend in American history. And, let me emphasize that when I say consolidation of authority, I mean consolidation by means of pushing on legal and constitutional boundaries—or, at least, unsettled legal and constitutional questions.

A quick brief trek through American history gives us plenty of examples. A mere four years after adoption of the Constitution, in 1793, when France and Great Britain went to war, George Washington issued a neutrality proclamation. The Secretary of State, Thomas

Jefferson, argued vociferously that Washington didn't have the legal authority to do that under the Constitution. In effect, Washington's Proclamation amounted to the unilateral suspension of a 1778 treaty with France. Yet, the U.S. Constitution says nothing about breaching, suspending, or terminating treaties and, to the extent that suspending a treaty is the converse of establishing a treaty obligation, the Constitution specifically gives the Senate a role in the making of treaties.

Immediately after taking office as President in 1801, Jefferson sent the American navy to the Barbary Coast without any constitutional or statutory authority, arguing that to do so was an exercise in his discretionary executive power.

Lincoln famously suspended what common-law lawyers call the writ of habeas corpus during the Civil War—a fundamental right in the Anglo-American legal tradition—despite the fact that the Constitution explicitly gives authority to suspend the writ to Congress.

Teddy Roosevelt claimed that he was "the steward of the people" and that the Executive Power authorized him to do anything that was not explicitly forbidden by law or the Constitution. As an ardent conservationist, he increased the amount of protected land in the U.S. from about 16 million hectares to 70 million hectares, created 150 national forests, 18 national monuments, 5 national parks, and 51 wildlife refuges, all based on relatively vague statutory language. He protected the Grand Canyon, for example, based on language in a statute called the "Antiquities Act" that authorized the President to designate quote "historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest." The Grand Canyon is apparently an "*object* of historic or scientific interest."

In these examples, the President is exercising authority beyond explicit legislative authority. But sometimes Congress, the federal legislature, has authorized the executive to do things that separation-of-

powers theory might tell us are "legislative"—and generally, Presidents have run with the authority.

After Washington issued the Neutrality Proclamation, Congress passed the Neutrality Act of 1794, essentially ratifying and extending his unilateral proclamation—and also giving him further statutory tools to act with discretion.

Thomas Jefferson famously believed the Louisiana Purchase—an acquisition that nearly doubled the size of the United States—was not within the federal government's power, certainly not within his own as President. But, he did it anyway, with Congress's blessing.

And, on an issue we will return to, the Tariff Act of 1890 gave the President discretionary authority to reimpose certain tariffs if other nations placed tariffs on American goods in ways that the President "may deem to be reciprocally unequal and unreasonable". Under the statute, then, it was the executive rather than the legislature that would decide if and when a tariff was to be imposed.

Now, the U.S. does have what we call the non-delegation doctrine—something akin to what I think you would call "Wesentlichkeitstheorie." But this idea is rarely something the courts enforce—one scholar joked that, in American history, the non-delegation doctrine has had only one good year, 1935, because the Supreme Court has invalidated statutes on non-delegation grounds only twice, both in 1935. Indeed, the Tariff Act of 1890 was challenged as an unconstitutional delegation of legislative power, but the Supreme Court upheld the law. When the President was determining whether a foreign nation had imposed tariffs in a "reciprocally unequal and unreasonable" way, the President was, according to the Court, simply "executing" an act of Congress, not legislating.

As we will see when I discuss the tariffs case shortly, the non-delegation idea does animate some aspects of *statutory* interpretation.

In this sense, then, despite the fact that U.S. courts have the authority to invalidate federal legislation whereas I believe the Swiss Federal Supreme Court does not, the American approach to non-delegation questions may be similar in practice to the Swiss Wesentlichkeitstheorie doctrine: rather than invalidate the legislation, courts will instead invalidate the executive action as incompatible with the statute. As I understand the Swiss approach, the ordinance would be treated as ultra vires, while the statute remains in place. If so, that would be exactly how at least some judges in the U.S. enforce non-delegation principles. And, as we will see, that is one framework for understanding the recent tariffs case in the U.S. Supreme Court.

Key, though, is that Congress has delegated large swathes of lawmaking power—what, if we are honest, can only be described as *legislative* power—to the executive, even though there is no constitutional provision that authorizes such delegations. We have nothing comparable to Article 182 of the Swiss Constitution, no explicit power in the executive even to enact Verordnungen, let alone to do the extremely consequential lawmaking that Presidents have engaged in throughout American history.

Given this history of accretions of governmental power to the executive, the question becomes: is Trump different from his predecessors? Let me look at a few examples of Trump acting unilaterally in ways that arguably go beyond his predecessors. One that we of course find on the front page of current international news is the U.S. strikes on Iran. Trump did that without any Congressional authorization. Yet, the U.S. Constitution explicitly gives *Congress* the power to (1) declare War, (2) raise and support Armies, and (3) provide and maintain a Navy. According to the text of the U.S. Constitution, the only power the President has is that "he shall be Commander in Chief of the Army and Navy of the United States."

There is no doubt that the framers of the U.S. Constitution would have been aghast at what Trump is doing without Congressional authorization. From that perspective, there have almost certainly been breaches of the separation-of-powers' principles in the Constitution. But, in practice, so much has changed over the now 237 years that it is very difficult to say exactly what constitutes military action that requires Congressional approval. This is because of the slow accretion of executive power over time. Congress has funded the world's largest military force, and over time, Presidents have used that force in a variety of military actions.

This is certainly not my expertise at all, but a few examples of large scale military actions that previous presidents have engaged in without Congressional authorization include the Korean War in 1950—known legally at the time not as a war but as an "international police action"— the invasion of Panama in 1989, the military action in Kosovo in 1999, and the military intervention in Libya in 2011.

Since the constitutionality of these military actions are never answered in court, the only legal standard we have comes from what is known as the Office of Legal Counsel in the United States Department of Justice. A written Office of Legal Counsel opinion has concluded that a military action constitutes "war" as a legal matter only if its "anticipated nature, scope, and duration" amounts to war. As a constitutional matter, then, it is probably accurate to say, as one prominent scholar, Jack Goldsmith, has put it, there is effectively no constitutional law at all and that politics—in particular, Congress—is the only possible constraint.

A second example involves the power of the President to remove—in other words, fire or discharge—high-ranking officials from so-called "independent agencies." These agencies—which are usually styled as "boards" or "commissions"—have been established by

Congress to be multi-member and bi-partisan. So, for example, a five-member Commission, like the Federal Trade Commission, would under statute be legally required to have at least two Democrats and at least two Republicans, no matter who is President. The law would give members of the Commission a fixed tenure, protecting them from being fired except for cases of neglect of duty or malfeasance, what the law refers to as "for cause." As you might imagine, the rationale for such protection is to ensure that these independent agencies act on the basis of what one might call technocratic competence and without political interference.

Importantly, not only are the statutes clear about these officials being protected from Presidential firing, but the constitutional law has, since a 1935 Supreme Court decision, been equally clear: the President may not fire these officials except for cause. But what isn't clear at all is the constitutional text, the language in the Constitution. The Constitution explicitly describes the appointment of these officials but is silent about removal. So, despite the 1935 Supreme Court case, the lack of clarity in the constitutional text leaves open the possibility of constitutional change without a formal amendment.

Many separation-of-powers theorists in the United States, including several Justices on the Supreme Court, believe that the mere fact that the executive power is vested in a single President requires that he have the unfettered discretion to fire anyone in the government. The details of the argument aren't crucial here, but the basic idea is that the President is the only democratically elected official in the executive branch, and thus to ensure democratic accountability for the actions of executive branch officials, the President must have discretion to remove them. This is what theorists refer to as the Unitary Executive Theory, and this theory long pre-dates Trump in certain legal circles.

In keeping with this theory but in violation of the 1935 Supreme Court case, Trump fired numerous top-level officials from these agencies without showing cause, and we now have a couple of cases before the United States Supreme Court challenging those removals. The courts could push back, but notice that, as a legal matter, there is nothing the legislature can do. Why? The argument is that the statutes providing this removal protection are unconstitutional—and so Trump is asking the Supreme Court to render the statutes void and beyond the legislature's competence.

We'll see what happens—I expect a decision by the Court by the end of June—but most knowledgeable observers expect the Supreme Court to overturn the 1935 decision.

Yet, the Supreme Court seems poised to simultaneously create an exception to its new rule for the Federal Reserve, our central bank. Why? There is certainly no legally relevant distinction between the Federal Reserve and the dozens of other independent agencies. But an independent central bank is indispensable to the U.S.—indeed, the global—financial system. Technocratic competence is more important than political accountability when running a central bank.

At the same time, the majority of the Supreme Court both accepts the Unitary Executive Theory as a theory and is broadly sympathetic to Trump's anti-regulatory agenda—an agenda that Democratic members of independent agencies could thwart if they were to remain in power. So, it is likely to permit the President to fire officials in independent agencies other than the Fed.

Let me mention one final issue before I return to the question of the tariffs, the issue of what we call appropriations. Again, this is an area where the constitutional law before Trump was clear, although the constitutional text is arguably unclear. Under the U.S. Constitution, the legislature has what is often referred to as the "power of the purse."

The specific language in the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." That's all. There is nothing specific about how the Executive can spend money or, for example, what kinds of constraints can be placed on the Executive once an "Appropriation made by law" has occurred.

In particular, one question the text does not answer is what is known as "impoundment": The Constitution is clear that the President cannot spend without an "appropriation", but it says nothing about whether the President *must* spend if an appropriation directs him to do so. A question thus arises whether the President can "impound" appropriated funds—that is, refuse to spend the money that Congress has appropriated if the President disagrees with the policy goals that the appropriation is furthering. Many Presidents have believed that impoundment should be within their executive discretion, but since a case in the 1970s, the constitutional law has been clear that Presidents do not have the authority to impound.

Trump has done this in countless circumstances since taking office. As Professor Diebold mentioned, Trump has in effect unilaterally and without legislative authority destroyed the U.S. Agency for International Development and tried to withhold research funds for universities. But there are many other examples. Because the pre-existing constitutional jurisprudence is quite clear, this seems on its face to be a good place for the courts to pushback. And on occasion, the courts have done so. But the Executive is massive and has the capacity to do a lot, while the courts have a much more limited capacity—indeed, courts are designed to be deliberative and thus slow. The sheer volume of impoundments that the Executive is capable of means that, in practice, the courts will have little power.

So, in effect, only Congress can constrain the President. But even then, this requires Congress to act—and with the Republican Party in the majority, the pressure to do this is lower.

This raises a fundamental problem with separation of powers in practice in the United States. We have a structure that is premised on the idea that each branch of government would check the other branches, that, in James Madison's famous words, ambition must be made to counteract ambition. But those who established that structure did not contemplate political parties—and certainly didn't contemplate the system we have now, where in practice, members of the legislature vote their party's position, rather than act as a check on the President. We effectively have what Professors Darryl Levinson and Rick Pildes have called a "separation of parties, not separation of powers." Congress, then, will only play a checking role on the President if Congress is controlled by the opposing party.

This then brings us back to the courts. It is certainly true that courts in the U.S. exercise more governmental power than in most other countries—perhaps all other countries. The French political thinker Alexis de Tocqueville famously observed that in the U.S., law, lawyers, and the judicial system play an outsized role in the political structure: "There is hardly any political question in the United States," he wrote, "that sooner or later does not turn into a judicial question." But even if de Tocqueville is still correct—and I believe he is—courts have a limited purview and, more importantly, are institutionally bound. As I described in the context of impoundment of government spending, courts have limited capacity to respond to the onslaught of activity generated by the executive branch.

With that background, let us return to the tariffs case. In the tariffs case, the Supreme Court held that Trump's tariffs were invalid because the statute he relied on to impose them did not authorize

tariffs at all. My key point about the case is that it is in fact a case about separation of powers as practiced in modern-day America.

As you probably recall, Trump deemed April 1st, 2025, "liberation day" and imposed a wide range of tariffs on virtually every country in the world under authority granted to him by a 1977 federal statute called the International Emergency Economic Powers Act, or IEEPA ("eye-ee-pah"). You'll recall that, initially, Trump announced a 31% rate on Swiss exports to the United States and then an increase of that rate to 39% after a telephone call with then-Swiss President Karin Keller-Sutter last August. Eventually, in November, Switzerland negotiated a rate of 15%.

We don't need to get into all the details about the statute, but key is that, first, IEEPA required the President to identify an "unusual and extraordinary [foreign] threat" to American national security, foreign policy, or the economy. He must then declare a national emergency. If he does so, IEEPA gives him a wide variety of powers. Here is the relevant statutory language: the statute authorizes the President to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest." Of most relevant interest is his power to "regulate ... any ... importation ... of any [foreign] property [fade out all the words except these ones]."

Trump determined that both an influx of illegal drugs from Canada, Mexico, and China and the large and persistent trade deficits with most nations in the world were foreign threats. And he claimed that his power to "regulate ... any ... importation of any [foreign]

property" encompassed the power to impose tariffs of any amount on any imports from any country. The Supreme Court said nothing about the declaration of emergency and instead addressed the question of whether the statute authorized tariffs under *any* scenario. Thus, the core interpretive question was whether the power to "regulate" the "importation" of goods included the power to impose tariffs on those goods.

As a legal interpretive matter, there were plenty of good arguments on both sides of this question. And, if people are interested, I am happy to talk about them during the question period. But, the key is that using the principles of American statutory interpretation—principles which, by the way, closely mirror the Auslegungen you use here, Grammatische, Systematische, Historische, and Teleologische—but key is that applying these principles would allow the Court to rule either that the statute authorizes the tariffs or that the statute does not authorize the tariffs.

Rather than explain each and every argument that the majority and dissenting judges made, I'd like to focus on two aspects of the case because they illustrate two important aspects of American public law generally. First, the fact that the opinion's analysis starts with a discussion of Congress's power to tax. And second, a paragraph in the opinion describing the constantly changing nature of the tariffs.

The opinion starts with discussion of Congress's power to tax, including a famous quotation from one of the most cited cases in American history, *McCulloch v. Maryland*, written by the great Chief Justice John Marshall. The quote is that "the power to tax is the power to destroy." This idea is a fundamental principle in the American constitutional order, an expression of the American anti-tax credo. Of course, the principle is tempered; we do have taxes. But opposition to taxes is built into constitutional *law*—not into the constitutional text, but

as a legal principle that judges incorporate into their thinking—and so it shows up in this case.

But Congress's power to tax is irrelevant to the logic of interpretation of the statute--*every* federal statute comes from some authorization to legislate explicitly in the Constitution—and so the point is logically unnecessary for the judicial opinion. This tells us that the Court viewed the delegation of the taxing authority as particularly problematic, even though, as I said, the words "regulate the importation" could easily encompass tariffs.

The second aspect of the opinion I'd like to highlight is a paragraph in the introductory sections describing the facts of the case. The majority includes what can only be called a gratuitous and unnecessary paragraph about the arbitrariness of both the goods and countries subject to the tariffs and the tariff rates. I'd like to read the whole paragraph to give you a flavor:

> "Since imposing each set of tariffs, the president has issued several increases, reductions and other modifications. One month after imposing the 10 percent drug trafficking tariffs on Chinese goods, he increased the rate to 20 percent. One month later, he removed a statutory exemption for Chinese goods under $800. Less than a week after imposing the reciprocal tariffs, the president increased the rate on Chinese goods from 34 percent to 84 percent. The very next day, he increased the rate further still, to 125 percent. This brought the total effective tariff rate on most Chinese goods to 145 percent. The president has also shifted sets of goods into and out of the reciprocal tariff framework ([e.g.,] exempting from reciprocal tariffs beef, fruits, coffee, tea, spices and some fertilizers). And he has issued a variety of other adjustments

([e.g.,] extending "the suspension of heightened reciprocal tariffs" on Chinese imports)."

Of course, Trump's comments about why he increased the Swiss rate to 39% after his call with the Swiss President show arbitrariness too. So, the Court could have easily alluded to that episode as well.

Now, why is that language in the opinion important? On the one hand, that language may seem relatively mild if the goal is to show the tariffs' arbitrariness. On the other hand, the point is completely irrelevant to the interpretive question of whether the phrase "regulate the importation" includes the power to impose tariffs. After all, that question is an interpretive question about statutory language, not a question about whether the President's actions were, or were not, arbitrary.

Importantly, in administrative law, but not in statutory interpretation, courts have a doctrine that prohibits administrative agencies from acting in "arbitrary and capricious" ways. But the President is exempt from the "arbitrary and capricious" doctrine. So, the Court was not able to make a legal argument based on the arbitrariness of the goods, countries, or rates of the tariffs.

At core, though, one role for courts in the broader American constitutional order is to ensure a level of rationality in government policymaking. Though the Supreme Court did not have any doctrinal tool to enforce that rationality, the Court clearly recognized how obviously irrational the tariffs were.

This shows us the extent to which courts in the U.S. *can* act. Because much law, like IEEPA, uses language vague enough to encompass presidential exercises of power, courts effectively have discretion to consider aspects of a case that don't fit into the ordinary rules of statutory interpretation—again, what you would call Juristische Methoden. Of course, in many circumstances, vagueness in statutory

language is by statutory design. It amounts to a form of delegation from the legislature to someone else, either the courts or the executive—interpretive discretion allows either courts or the executive to exercise power.

So, let us return to Professors' Pozen and Purdy's framework that I began the talk with. Sixteen months into Trump's second term, there is some evidence for each of the three lenses for understanding what we are living through.

Trump's approach to, for example, appropriations is a good illustration of the authoritarian crisis view. He has largely been able to act outside pre-existing legal constraints—and neither the courts nor Congress have been able to do much about it.

Much of Trump's deregulatory agenda arguably fits the "more of the same" model. Deregulation is clearly in keeping with a longstanding Republican Party goal, and that goal is broadly shared by Republicans in Congress, the courts, and of course, the Executive branch.

Although I did not discuss the immigration crackdown that Professor Diebold mentioned in his introduction, I think those changes can largely be seen through either of those first two lenses, either as part of the authoritarian crisis or more of the same, insofar as the U.S. has long had a nativist strand of thinking. And so, this somewhat extreme approach to outsiders can be thought of as merely an extension of a pre-existing view about immigration.

Finally, is there any evidence for what I called the "constitutional regime change" framework? I think the issue of removal nicely fits that model. Although the question of removal of high-ranking government officials probably seems like a minor issue to you all here—and I suspect will turn out to be less important than most current observers think—it is a major issue in American constitutional jurisprudence. And again, it is one where the Trump Administration and the current U.S.

Supreme Court are ideologically aligned. But key is that it arguably takes constitutional law back to the pre-1935 era.

What about the tariffs decision? As I said, the decision has to be seen as steeped in separation-of-powers ideas. Even though the formal doctrinal decision is based on statutory interpretation, the Supreme Court is in effect saying that Congress, not the President, must impose the tariffs—and that Congress did not do it in the 1977 IEEPA.

But, which of Posen and Purdy's frameworks does it fit into? Some will see it as a vindication of the rule of law, a judicial pushback against either authoritarianism or constitutional regime change. And there is certainly some truth to that. At the same time, others might see it as consistent with the "more of the same" thesis, since it is a "pro-business", "anti-tax" ruling. That is, a ruling that, despite invalidating the actions of a Republican President, aligns with longstanding Republican Party principles.

Perhaps, in the end then, understanding Trump's actions—along with the ways in which both Congress and the courts respond—depends upon the starting premises in one's views about law in the American political system. The system manages legal and constitutional change through a complex array of exercises of power by all three branches of government. That is, again, because of the difficulty of formal changes to both the Constitution and statutory law in a time of intense polarization. Given the need for processes of change and the relative power of the Executive vis-à-vis the courts—and indeed, vis-à-vis Congress, it strikes me as inevitable that the executive will always drive much legal and constitutional change in America. One doesn't need to agree with most of—indeed, with any of—Trump's attempts to change the constitutional order. But a country with an old, vague, and hard-to-change constitutional text will unfortunately muddle along with

numerous unanswered questions that legal and political actors will try to fill.