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NOTE

Trading Power: Tariffs and the Nondelegation Doctrine

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Abstract. President Trump launched a global trade war when he imposed tariffs on steel and aluminum imports in early 2018. The President's authority for imposing these tariffs came from an exceedingly vague statutory provision, section 232 of the Trade Expansion Act of 1962, which allows the executive branch to tax or block imports that "threaten to impair the national security" of the United States. That vague statute leads to a deeper constitutional question: Can Congress completely transfer its Article I powers over trade policy to the President?

On the one hand, the nondelegation doctrine stipulates that Congress cannot give away its legislative authority completely; it must include an "intelligible principle" to guide the executive branch in enforcing a statute. But on the other hand, the Supreme Court in *United States v. Curtiss-Wright Export Corp.* held that the nondelegation doctrine is far more lenient in the realm of foreign affairs than it is for domestic policy. One way of resolving this tension is to argue that the nondelegation doctrine applies to only certain areas of law and that it may not apply to foreign commerce. As of now, there is no clear alternative to this argument: Courts and scholars have instead cited Congress's power to grant the President "broad authority" in foreign affairs, but they have not specified how broad this authority can be.

This Note argues that Congress can broadly delegate its authority to make trade policy, but that it cannot give this authority away entirely. The best way to make sense of the Supreme Court's nondelegation jurisprudence is to account for the breadth of the delegation at issue: The Court seems willing to strike down a statute only when it gives away so much power that it essentially transfers an entire Article I authority to another branch of government. This Note shows that this conception of the nondelegation doctrine also extends to enumerated authorities that pertain to foreign affairs, like Congress's authority to regulate foreign commerce. Constitutional text, purpose, practice,

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and precedent all show that Congress cannot completely transfer its foreign-commerce power to the President.

The Note then applies this analysis to a case study: section 232. It argues that this statute poses a constitutional issue under the nondelegation doctrine—not because the language related to "national security" is broadly worded, but because it could be understood to give away all of Congress's authority over trade policy. This Note concludes with the implications of its argument. Specifically, this Note establishes a clear test that courts can use to determine whether a foreign affairs statute runs afoul of the nondelegation doctrine: Did Congress articulate a limiting principle that constrains executive power? This test can be used as a tool to constrain presidential power in the foreign affairs realm without endangering the administrative state.

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Introduction

On the morning of December 2, 2019, Argentinian and Brazilian leaders awoke to a startling message from the President of the United States. "Brazil and Argentina have been presiding over a massive devaluation of their currencies[,] which is not good for our farmers. Therefore, effective immediately, I will restore the Tariffs on all Steel & Aluminum that is shipped into the U.S. from those countries."[1] The message blindsided officials in South America and the United States: The Trump Administration previously had exempted Argentina and Brazil from the tariffs it began levying on steel and aluminum imports in March 2018.[2]

President Trump appeared to retract this threat a few weeks later.[3] But most trading partners have not been similarly spared. Through the end of the Trump Administration, the United States levied steel tariffs on all but six countries and aluminum tariffs on all but four[4]—tariffs that have continued under the Biden Administration.[5] More broadly, President Trump's Twitter-based pronouncement showed just how quickly U.S. trade policy can change. In the time it takes to tweet, the President can upend billions of dollars' worth of commerce and affect the lives of people across the planet who work in the targeted industries.

But trade policy was never supposed to be based on presidential predilection. To the contrary, the Framers knew that tariffs would affect each state in different ways, so they entrusted the tariff power to a deliberative body that represented the interests of a diverse coalition of states.[6] That is why

1. Maegan Vazquez & Donna Borak, *Trump Renews Tariff Threat on Brazil and Argentina*, CNN (updated Dec. 2, 2019, 2:38 PM EST), https://perma.cc/W7SM-7KW3 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 2, 2019, 4:59 AM), https://perma.cc/B5NF-4JWW).
2. *See* Josh Zumbrun & Amrith Ramkumar, *Trump to Levy Tariffs on Brazil, Argentina*, WALL ST. J. (updated Dec. 2, 2019, 9:33 PM ET), https://perma.cc/CG86-4TLM; Ana Swanson, *Trump Says U.S. Will Impose Metal Tariffs on Brazil and Argentina*, N.Y. TIMES (Dec. 2, 2019), https://perma.cc/YDQ3-SQJA.
3. *See* Ana Swanson & Letícia Casado, *Trump Backs Down from Threat to Place Tariffs on Brazilian Steel*, N.Y. TIMES (Dec. 21, 2019), https://perma.cc/89YN-ABJ4; *Argentina Welcomes US Decision Not to Impose Steel Tariffs*, YAHOO! (Jan. 27, 2020), https://perma.cc/KL6X-78VS.
4. *See* BROCK R. WILLIAMS, CONG. RSCH. SERV., R45529, TRUMP ADMINISTRATION TARIFF ACTIONS: FREQUENTLY ASKED QUESTIONS 9 (rev. 2020), https://perma.cc/LJP4-WK4B; CHAD P. BOWN & MELINDA KOLB, PETERSON INST. FOR INT'L ECON., TRUMP'S TRADE WAR TIMELINE: AN UP-TO-DATE GUIDE 3-6 (rev. 2021), https://perma.cc/SG4K-GR92.
5. *See* David Lawder & Rajesh Singh, *Biden's EU Trade Dilemma: More Pain for Harley, Distillers or Back Off Metals Tariffs?*, REUTERS (Apr. 29, 2021, 4:31 AM CDT), https://perma.cc/M5JK-CE48.
6. *See* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 590-92, 629-34 (2019).

Article I specifically states that "*Congress* shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . [and] To regulate Commerce with foreign Nations."[7] Thus when Trump issued his steel and aluminum tariffs he was not acting under his own executive authority, but was instead using the power that Congress had delegated to the President. That delegation came from a relatively obscure statutory provision—section 232 of the Trade Expansion Act of 1962.[8]

Section 232 allows the President to impose tariffs and other restrictions on imports that "threaten to impair the national security."[9] The statute does not give a specific definition of "national security"; it instead directs the executive branch to consider a list of factors that includes "national defense requirements" and "the capacity of domestic industries to meet such requirements," along with "the close relation of the economic welfare of the Nation to our national security."[10] These factors are so broad—and the trade remedies available to the President so sweeping—that the statute could conceivably allow the President to tax or block any imported item under the guise of national security.[11]

This expansive grant of power leads to a thorny constitutional question: Are there limits on Congress's authority to transfer its power over trade policy to the President? On the one hand, under the nondelegation doctrine, Congress may not "transfer[] its legislative power to another branch of Government," and delegations are only permissible when "Congress has supplied an intelligible principle to guide the delegee's use of discretion."[12] But on the other hand, the Supreme Court held in *United States v. Curtiss-Wright Export Corp.*

7. U.S. CONST. art. I, § 8, cls. 1, 3 (emphasis added).

8. *See* Proclamation No. 9,704, 3 C.F.R. 39 (2019); Proclamation No. 9,705, 3 C.F.R. 46 (2019); Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862).

9. 19 U.S.C. § 1862(c).

10. *Id.* § 1862(d).

11. *See* Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1351 (Ct. Int'l Trade 2019) (Katzmann, J., concurring dubitante), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020); *see also* David Scott Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT'L L. 926, 948 (1990).

12. Gundy v. United States, 139 S. Ct. 2116, 2121, 2123 (2019) (plurality opinion). As explained below, the nondelegation doctrine comes from Article I's Vesting Clause, which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. 1, § 1. Congress is therefore the branch of government that is responsible for making law, and it cannot abdicate this responsibility by enacting a statute so unbounded that it gives the executive branch the authority to make law. *See infra* Part I.

that the nondelegation doctrine is more lax in the realm of foreign affairs.[13] That tension between domestic and foreign policy delegations is particularly evident in Justice Gorsuch's dissenting opinion in *Gundy v. United States*, which called for a robust nondelegation doctrine in the domestic sphere while also noting that "Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers."[14] Thus, the underlying question is about the scope of *Curtiss-Wright*'s holding. If "Congress may assign the President broad authority regarding the conduct of foreign affairs,"[15] *how broad* can that authority be?

Neither *Curtiss-Wright* itself nor subsequent Supreme Court decisions give a clear answer. Up to this point, the most straightforward response comes from Michael Rappaport, who argues that the nondelegation doctrine simply does not apply when it comes to foreign affairs and international trade. According to Rappaport, the "nondelegation doctrine does not apply uniformly across different areas of the law," and the Framers would have understood the President's "executive power" to include an independent power over foreign affairs and an unconstrained authority to receive delegations in this area of law.[16] Under this framework, statutes like section 232 would be free from scrutiny under the nondelegation doctrine. Section 232's vague "national security" criteria would pose no constitutional problem, because no criteria were needed in the first place.

As of now, no court or scholar has identified a clear, workable alternative to Rappaport's approach. Instead, judges and academics alike have hedged their language and avoided a specific answer: The nondelegation doctrine is said to be "largely irrelevant" in the foreign affairs realm,[17] and Congress can enact foreign affairs statutes that give the President "broad discretion"[18] or "broad authority."[19] These hazy phrases suggest there may be *some* foreign affairs statute that gives away too much authority to the President, but they never clarify what that statute might look like. In practice, it is hard to tell whether any daylight separates Rappaport's argument from its more evasive

13. *See* 299 U.S. 304, 320 (1936) ("[In foreign affairs], congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

14. 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

15. *Id.*

16. Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 271, 347-54 (2001).

17. Josh Blackman, *The Travel Ban, Article II, and the Nondelegation Doctrine*, LAWFARE (Feb. 22, 2018, 9:00 AM), https://perma.cc/WD35-HFTG.

18. Loving v. United States, 517 U.S. 748, 772-73 (1996).

19. *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).

counterparts. The Supreme Court has gone eighty-six years since it last used the nondelegation doctrine to strike down a statute, and the Court has never used the nondelegation doctrine to invalidate a law pertaining to foreign affairs.[20] A successful foreign affairs nondelegation claim must therefore overcome the judiciary's general reluctance to invoke the doctrine and its particular reluctance to invoke the doctrine in the foreign affairs realm. Accordingly, Rappaport's position is essentially the status quo: Without a coherent method of determining when a trade statute violates the nondelegation doctrine, courts are exceedingly unlikely to use the doctrine to rein in these statutes.

This murky status quo cannot continue. President Trump launched a global trade war using vague and expansive statutes like section 232.[21] If these kinds of statutes are indeed exempt from the nondelegation doctrine, then courts should make that clear. And if they are not exempt, then courts should specify a clear limit on Congress's authority to delegate in areas of foreign affairs like trade. In other words, courts should have a coherent and consistent way of resolving nondelegation claims made against trade statutes—particularly given the Supreme Court's interest in bringing the nondelegation doctrine back to life.[22]

20. *See* F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 289-90 (2021); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 332-35 (1999).

21. *See, e.g.*, William Mauldin, *U.S. Tariffs Prompt Anger, Retaliation from Trade Allies*, WALL ST. J. (updated May 31, 2018, 9:47 PM ET), https://perma.cc/3TBJ-CSQ6; Alanna Petroff, *Trump Is Starting a Global Trade War*, CNN BUS. (updated June 1, 2018, 7:56 AM ET), https://perma.cc/A2Y6-AMNE; BOWN & KOLB, *supra* note 4, at 1, 3-5.

22. Five Justices have signaled a willingness to revamp the nondelegation doctrine. *See Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the [nondelegation] approach we have taken for the past 84 years, I would support that effort."); *id.* at 2131-48 (Gorsuch, J., dissenting) (proposing a new framework for the nondelegation doctrine in an opinion joined by Chief Justice Roberts and Justice Thomas); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."); *see also* Evan C. Zoldan, *The Fifth Vote for Non-delegation*, JURIST (Dec. 14, 2019, 4:47:41 PM), https://perma.cc/G9WP-8BRY (noting that "Justice Kavanaugh [is] likely to provide a fifth vote to invigorate the non-delegation doctrine at some future time," as indicated by his statement in *Paul*). Justice Barrett is a possible sixth vote. Prior to her confirmation to the Supreme Court, in a 2014 article on the Suspension Clause, Barrett wrote that the modern nondelegation doctrine is "forgiving" but still "impose[s] some limit" on Congress's power to delegate. Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 320 (2014). Interestingly, Barrett indicated in a brief passage that this limit would extend to enumerated powers that pertain to foreign affairs, like the War Powers Clause. *See id.* at 320-21 (arguing that "[d]espite its leniency, the nondelegation doctrine does not maintain that Congress can change the constitutional allocation of power by shifting the sum of its power in a particular area to the Executive," and thus Congress could not

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This Note argues that Congress may indeed make broad delegations to the President to conduct trade policy, but that it cannot give away *all* of its authority over trade. To the Framers, the power to levy tariffs and regulate foreign commerce was first and foremost a matter of domestic policy: It was the power to raise revenue and protect nascent industries.[23] And because this power would profoundly impact the nation's budget and economy, it was specifically given to Congress, the most representative branch of government.[24] That fundamental allocation of power cannot be revised by statute. Constitutional text, history, and precedent all show that Congress is forbidden from enacting a law that gives all of its authority over trade to the President.[25] Thus, when a statute can be understood as transferring all such authority to the executive branch, it should not be saved from constitutional scrutiny simply because it falls under the vague umbrella of foreign affairs.

This Note makes its argument in four parts. Part I offers a legal backdrop, showing how the Supreme Court has waxed and waned in its enthusiasm for the nondelegation doctrine—and how a recent article by Cary Coglianese helps makes sense of this seemingly inconsistent precedent by showing that delegations are permissible so long as they do not entail a wholesale transfer of any one of Congress's enumerated powers. Part II draws on constitutional text, history, and precedent to demonstrate that, in contrast to what Rappaport has argued, the same logic applies to Congress's enumerated authorities over foreign affairs. Part III provides a case study, explaining how section 232 raises a nondelegation issue because it can be understood to give all of Congress's authority over trade to the President. Part IV explores the Note's implications, laying out a test that courts can use to decide whether a foreign affairs statute runs afoul of the nondelegation doctrine and examining how this test can constrain the accumulation of executive power in foreign affairs.

enact a statute that said "the President shall have the power to declare war"). Aside from this sparse commentary, however, Justice Barrett's views remain to be seen, and "the article does not shed definitive light on Barrett's predisposition for strengthening the nondelegation doctrine." Lorenzo d'Aubert & Eric Halliday, *Amy Coney Barrett on National Security Law*, LAWFARE (Oct. 20, 2020, 4:16 PM), https://perma.cc/5AQE-WBZB.

23. *See* Meyer & Sitaraman, *supra* note 6, at 590-94 ("[T]he central purposes of tariffs were all tied to domestic economics: revenue, internal improvements, protection of industry, encouragement of infant industry, and safeguarding labor.").

24. *See id.* at 591.

25. *See infra* Part II.

I. The Shifting Fortunes of the Nondelegation Doctrine

The nondelegation doctrine looms over administrative law, but it has been used only twice to strike down a statute.[26] This Part explains the Supreme Court's evolving approach to nondelegation: how the doctrine came to prominence in 1935 and how it has receded over the subsequent eighty-six years. Taken collectively, nondelegation jurisprudence seems inconsistent; the Court has never renounced the doctrine, but it has almost always upheld broadly worded statutes that give the executive branch vast discretion. This Part shows that the clearest explanation for this apparent inconsistency is that the Court looks to the amount of power—not simply the amount of discretion—that a statute gives the President. In practice, the nondelegation doctrine is only applicable when a statute confers so much power to the President that it constitutes a complete transfer of one of Congress's enumerated authorities, such as its power to regulate interstate commerce.

A. The Nondelegation Doctrine's Logic and History

The basic idea behind the nondelegation doctrine is that Congress cannot give its lawmaking authority to the executive branch.[27] The textual basis for the doctrine comes from Article I's Vesting Clause.[28] In particular, Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[29] Thus, Congress runs afoul of Article I when it enacts a statute so broad that it effectively entrusts making law to the executive branch.[30] To give an extreme example, Congress could not pass a law that simply barred "all transactions in interstate commerce that fail to promote goodness and niceness."[31] That broad statute would give the executive branch the power to regulate interstate commerce however it saw fit, since any conceivable regulation could qualify as promoting "goodness and niceness"; the President would be making law, not enforcing it.[32] This distinction is not just a matter of formalism. If the President could make and enforce the law at the same time, then a single individual would wield the unbridled power of the federal government.[33] The President could wake up one morning and

26. *See* Hessick & Hessick, *supra* note 20, at 289-90; Sunstein, *supra* note 20, at 332.
27. *See, e.g.*, *Gundy*, 139 S. Ct. at 2123 (plurality opinion).
28. *See id.*
29. U.S. CONST. art. 1, § 1.
30. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 339-40 (2002).
31. *Id.* at 340.
32. *Id.*
33. *See, e.g.*, *Gundy*, 139 S. Ct. at 2134-35 (Gorsuch, J., dissenting) (noting the concerns associated with a functionalist approach).

announce sweeping changes to national policy over Twitter—rewarding or crushing entire industries and livelihoods, without any input from elected representatives in Congress.

The nondelegation doctrine thus seems sensible in theory. But it turns out to be difficult to implement in practice.[34] Congress does not typically enact statutes that give away an enumerated legislative power on the basis of "goodness and niceness," or an equivalent. Courts instead usually have to wrestle with delegations that are broad, but not limitless. The challenge is in determining whether the delegation is so broad that it effectively becomes a transfer of lawmaking power—a tricky line-drawing question.[35]

In 1928, the Supreme Court established the framework for conducting this line-drawing exercise in *J.W. Hampton, Jr., & Co. v. United States*.[36] There, the Court considered a statute that enabled the President to adjust tariff rates upon a determination that the existing rates "do not equalize the . . . differences in costs of production in the United States and the principal competing country."[37] The statute was indeed somewhat vague: It allowed the President to decide what constituted unequal "costs of production" and then set tariffs accordingly.[38] But this vagueness "did not in any real sense invest the President with the power of legislation," because Congress had already decided what tariffs to impose; the President "was the mere agent of the law-making department," tasked with "ascertain[ing] and declar[ing] the event upon which [Congress's] expressed will was to take effect."[39] Delegations were permissible so long as Congress set guidelines for the executive branch's enforcement of the statute—a requirement that became known as the "intelligible principle" test.[40]

In the immediate aftermath of *J.W. Hampton*, the Supreme Court seemed adamant about ensuring that Congress set the necessary guidelines in its legislation. In 1935, the Court twice invalidated provisions of the National

34. *See* Cass R. Sunstein, Foreword, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1182 (2018) (noting that the nondelegation doctrine, as traditionally understood, "force[s] courts to answer a singularly difficult question: *how much discretion is too much discretion*?").

35. *See* Lawson, *supra* note 30, at 339-40.

36. 276 U.S. 394, 409 (1928).

37. *Id.* at 401 (quoting Tariff Act of 1922, ch. 356, § 315(a), 42 Stat. 858, 941-42 (repealed 1930)).

38. *See* Lawson, *supra* note 30, at 369 ("As any good accountant can verify, . . . a phrase like 'costs of production' does not lend itself to mechanical analysis.").

39. *J.W. Hampton*, 276 U.S. at 410-11.

40. *Id.* at 409; *see also* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1855 n.21 (2019).

Industrial Recovery Act on nondelegation grounds.[41] The more famous of the two decisions, *A.L.A. Schechter Poultry Corp. v. United States*, concerned a provision allowing the President to implement "codes of fair competition" for any industry, so long as the codes did not foster monopolization or impose inequitable restrictions on membership.[42] The Court noted that the key phrase—"fair competition"—was left undefined, and that the statute enabled the President to "enact[] laws for the government of trade and industry throughout the country" in a manner that was "virtually unfettered."[43] Accordingly, the statute ran afoul of the nondelegation doctrine.[44]

But since *Schechter Poultry*, the Court has never again invalidated a statute on nondelegation grounds.[45] Indeed, signs of the doctrine's decline emerged the very next year, beginning in the realm of foreign affairs. *United States v. Curtiss-Wright Export Corp.* concerned a statute that authorized the President to suspend the sale of weapons to countries at war in South America upon a finding that the suspension "may contribute to the reestablishment of peace between those countries."[46] The Supreme Court drew a distinction between foreign and domestic delegations of authority: When it came to foreign affairs, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[47] The Court based its reasoning on the notions that the executive branch had independent authority over foreign affairs and that Congress had a history of delegating broadly to the President in this domain.[48] The upshot was that the nondelegation doctrine would not

41. *See* Coglianese, *supra* note 40, at 1856-57, 1857 n.29.

42. 295 U.S. 495, 521-23 (1935) (quoting National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196 (1933)). The other decision is *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). There, the Court struck down a part of the National Industrial Recovery Act that permitted the President to partially restrict the trade of petroleum. *See id.* at 406, 430. *Panama Refining* tends to get far less attention than *Schechter Poultry*, probably because *Panama Refining* "is a controversial ruling, fitting poorly with post–World War II decisions," while *Schechter Poultry* "has not been overruled even implicitly." Sunstein, *supra* note 20, at 332; *see also* Coglianese, *supra* note 40, at 1878 ("The weak reasoning in the majority opinion in *Panama Refining* might by itself justify discounting the decision.").

43. *Schechter Poultry*, 295 U.S. at 531, 542.

44. *Id.* at 542.

45. *See* Hessick & Hessick, *supra* note 20, at 289-90; Sunstein, *supra* note 20, at 332-33.

46. 299 U.S. 304, 312 (1936) (quoting Joint Resolution to Prohibit the Sale of Arms or Munitions of War in the United States Under Certain Conditions, ch. 365, § 1, 48 Stat. 811, 811 (1934)).

47. *Id.* at 320.

48. *Id.* at 315-28.

rigidly police all grants of legislative power. Only domestic policy would receive *Schechter Poultry*–style review.

Yet in the years that followed, the Court seemed to extend the same leniency to domestic affairs as *Curtiss-Wright* had extended to foreign affairs. Again and again, the Court found "intelligible principles" in sweeping statutory language.[49] The Federal Communications Commission could issue broadcast licenses on the basis of the "public [convenience, interest], or necessity."[50] The Attorney General could temporarily classify a new drug as a Schedule I controlled substance if the classification was necessary to avoid an "imminent hazard to the public safety."[51] The Environmental Protection Agency could issue air quality standards that were "requisite to protect the public health."[52] Through it all, the Court never renounced the nondelegation doctrine; instead it used the doctrine as a canon of statutory construction, discerning "intelligible principles" in capacious language by narrowly interpreting the statutes in question.[53]

Taken together, the Supreme Court's approach to the nondelegation doctrine seems strikingly incoherent.[54] How can there really be an "intelligible principle" test when the Court is never willing to say that a statute has flunked it?

B. Explaining the Nondelegation Doctrine

There are two plausible ways to make sense of the nondelegation doctrine's development. The first is the possibility that the nondelegation doctrine is dead. Just as the Court abandoned its scrutiny of economic regulations under the banner of substantive due process, so too has it abandoned meaningful review of overbroad delegations to the executive

49. *See* Coglianese, *supra* note 40, at 1857-60, 1859 nn.40-44 (noting six such cases); Sunstein, *supra* note 20, at 333.

50. Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 137-38 (1940)).

51. Touby v. United States, 500 U.S. 160, 162, 165 (1991) (quoting Dangerous Drug Diversion Control Act of 1984, Pub. L. No. 98-473, § 508, 98 Stat. 2070, 2071 (codified as amended at 21 U.S.C. § 811)).

52. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting 42 U.S.C. § 7409(b)(1)).

53. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."); *see also* Sunstein, *supra* note 20, at 357-59; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223.

54. *See* Coglianese, *supra* note 40, at 1857-60 (describing this inconsistency as "the intelligibility puzzle").

branch.[55] For many liberals, this possibility is cause for celebration. The doctrine's apparent demise has enabled the delegations that form the basis of the expertise-driven administrative state.[56] Conversely, many conservatives decry the loss of a tool meant to guard the separation of powers.[57] Citing this concern, Justice Gorsuch called for the doctrine's revival in his *Gundy* dissent, in which he outlined a new approach to delegation that might soon replace the "intelligible principle" test entirely.[58] Under this approach, Congress could delegate authority to the executive in only three circumstances: (1) if the delegation leaves it to the executive to "fill up the details"; (2) if the delegation is based upon factfinding by the executive; or (3) if the delegation "regard[s] the conduct of foreign affairs or other matters where [the President] enjoys his own inherent Article II powers."[59] In other words, Justice Gorsuch would keep the *Curtiss-Wright* carveout for foreign affairs while subjecting domestic policy to renewed scrutiny. Accordingly, if the best explanation for the Court's

55. *See* Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 352-53 (1974) (Marshall, J., dissenting) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes . . . . This doctrine is surely as moribund as the substantive due process approach of the same era—for which the Court is fond of writing an obituary . . . ."); *see also* Coglianese, *supra* note 40, at 1849 & n.3.

56. *See, e.g.*, William D. Araiza, *Toward a Non-delegation Doctrine That (Even) Progressives Could Like*, AM. CONST. SOC'Y, https://perma.cc/S55A-HFTV (archived Mar. 30, 2021) ("[I]t is undeniable that the [nondelegation] doctrine's fall into desuetude has made it easier for the modern regulatory state to grow to its current size and complexity, with all the public benefits that growth has allowed. Thus, many progressives were dismayed when the Court granted a writ of certiorari in *United States v. Gundy*, a case that raised a non-delegation challenge to the Sexual Offender Registration and Notification Act (SORNA)." (footnote omitted)).

57. *See* Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

58. *See id.* at 2134-37; *see also supra* note 22.

59. *Gundy*, 139 S. Ct. at 2135-37, 2144 (Gorsuch, J., dissenting). Justice Gorsuch's first circumstance—in which Congress asks the executive branch to "fill up the details"—is based on a presumed distinction between "'important subjects, which must be entirely regulated by the legislature itself,' and 'those of less interest, in which a general provision may be made.'" *Id.* at 2136 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)). This approach seems to be a more stringent version of the intelligible-principle test. *See* Aditya Bamzai, Comment, *Delegation and Interpretive Discretion:* Gundy, Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 185 (2019) ("[T]he two approaches appear to converge in their fundamental analyses. . . . [T]he real difference between [the intelligible-principle test] and Justice Gorsuch's dissent lies in the application of the standard of review for constitutional questions: How robustly should the Court apply the requirement . . . that Congress be responsible for wielding the 'legislative Power' by making the laws that govern the nation?"); *see also* Jonathan Hall, Note, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 202-04 (2020).

nondelegation decisions is that the doctrine itself is dead, Justice Gorsuch's framework appeals to those who want to bring it back to life.

But there is a second explanation for the nondelegation doctrine's apparent inconsistency: The statutes considered since *Schechter Poultry* have all been constitutionally permissible delegations, despite their broad and amorphous language. In a recent article, Cary Coglianese argues that the Court's intelligible-principle test has, in practice, encompassed more than the question whether Congress has guided executive discretion with clear statutory text. Rather, the Court has consistently considered both the *amount* of discretion and the *breadth* of power that the statute confers.[60]

To illustrate this point, consider *A.L.A. Schechter Poultry Corp. v. United States*.[61] The statutory provision at issue there certainly conferred broad discretion to the executive branch, allowing the President to fashion labor codes that would achieve the nebulous goal of promoting "fair competition."[62] But that language is no broader than language permitted by the Court just a few years later, including the FCC's requirement that broadcast licenses serve the "public interest, convenience, or necessity."[63] And the Court could have seized upon elements of the *Schechter Poultry* statute that did indeed provide some constraints on executive discretion: The President could not promulgate labor codes that would "promote monopolies" or "eliminate or oppress small enterprises."[64] Yet rather than focusing on these aspects of executive discretion, the Court dwelled on the breadth of power that the statute conferred.[65] The Court noted that the National Industrial Recovery Act encompassed "a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."[66] Justice Cardozo reiterated this point in his concurring opinion: "[A]nything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code."[67] The statute was unconstitutional not simply because it had vague language, but

60. Coglianese, *supra* note 40, at 1863-70.
61. 295 U.S. 495 (1935).
62. *Id.* at 530.
63. Coglianese, *supra* note 40, at 1858-59 (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943)).
64. *Id.* at 1858 (quoting *Schechter Poultry*, 295 U.S. at 522).
65. *Id.* at 1871-72.
66. *Schechter Poultry*, 295 U.S. at 539.
67. *Id.* at 553 (Cardozo, J., concurring).

because it essentially transferred Congress's authority to regulate interstate commerce to the executive branch.[68]

The Court has further emphasized the importance of statutory breadth in more recent cases. In the *Benzene Case*, the Court considered a statute authorizing the Occupational Safety and Health Administration (OSHA) to regulate benzene exposure in the workplace.[69] Under the statute, OSHA sets exposure limits that "most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity" due to benzene exposure.[70] Writing for the plurality, Justice Stevens narrowly construed the statute in order to avoid a nondelegation issue, requiring the agency to show that benzene exposure posed a "significant risk."[71] Justice Stevens rejected the government's interpretation of the statute, which would have enabled OSHA to regulate benzene exposure given evidence of *any risk at all*, because that would give OSHA "unprecedented power over American industry"—the authority to enact "pervasive regulation limited only by the constraint of feasibility."[72] Once again, what truly troubled the Court was not merely the vague text, but the possibility of a "sweeping delegation of legislative power."[73] The Court summarized this concern in *Whitman v. American Trucking Ass'ns*, which noted "that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[74]

Seen from this vantage point, *Schechter Poultry* is fully consistent with the cases that followed. Many of the statutes that the Court found constitutionally permissible were just as vague as the National Industrial Recovery Act, but none could conceivably be understood to transfer an entire legislative power to the President.[75] Congress does not often pass sweeping laws that implicate every aspect of an enumerated legislative authority; instead, it "usually passes legislation focused on particular problems, which means that rulemaking

68. Coglianese, *supra* note 40, at 1873.

69. Indus. Union Dep't v. Am. Petrol. Inst. (*Benzene Case*), 448 U.S. 607, 611, 614-15 (1980) (plurality opinion).

70. *Id.* at 612 (quoting 29 U.S.C. § 655(b)(5)).

71. *Id.* at 642-43.

72. *Id.* at 645.

73. *Id.* at 646 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935)); *see also* Rappaport, *supra* note 16, at 284 & n.70.

74. 531 U.S. 457, 475 (2001). For another example of this focus on statutory breadth, see *Clinton v. City of New York*, 524 U.S. 417, 486-87 (1998) (Breyer, J., dissenting) (arguing that the Line Item Veto Act comported with the nondelegation doctrine, in part because it was "aimed at a discrete problem" and "concern[ed], not the entire economy, but the annual federal budget" (citation omitted)).

75. Coglianese, *supra* note 40, at 1870-77, 1880-81.

authorizations will often be naturally circumscribed."[76] Statutes that gave the executive branch wide discretion over broadcast licenses or drug schedules or air-quality standards were thus all permissible—not because they cabined executive discretion with clear text, but because they inherently limited executive power by focusing on discrete fields.[77]

The nondelegation doctrine is thus not dead; it is just more nuanced than a search for intelligible principles in broad statutes. That insight clarifies why the Court has consistently referred to the doctrine as if it were a genuine constitutional requirement, while at the same time consistently upholding statutes that give the executive branch considerable discretion.[78] Under current law, the only statute that would run afoul of the nondelegation doctrine would be the rare kind that could be understood as giving away one of Congress's Article I authorities entirely, such as its power to regulate interstate commerce.[79] Congress therefore has wide latitude to delegate control over particular subjects and areas *within* interstate commerce,[80] but it cannot "confer[] authority to *regulate the entire economy* on the basis of no more precise a standard than . . . assuring 'fair competition.'"[81]

II. Nondelegation and Trade Policy

This Part shows that the analysis above also applies to trade policy: Just as Congress cannot give away all its power over interstate commerce, it also cannot give away all its power over foreign commerce. This Part begins with the counterargument, explaining Michael Rappaport's theory that the nondelegation doctrine does not apply to certain areas of law and his suggestion that foreign commerce is one such area. This Part then explains why Rappaport's conclusion is wrong. Constitutional text, purpose, practice, and precedent all show there is no exception that allows Congress to completely transfer away its enumerated authority over trade policy. To be sure, there is plenty of evidence that the Constitution allows Congress to delegate broad power over trade to the President[82]—just as Congress can in all

76. *Id.* at 1877; *see also* Rappaport, *supra* note 16, at 284.
77. *See* Coglianese, *supra* note 40, at 1876-77.
78. *See id.* at 1877-79; *see also* Rappaport, *supra* note 16, at 283.
79. *See* Coglianese, *supra* note 40, at 1879.
80. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001).
81. *Id.* at 474 (emphasis added) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).
82. *See infra* Parts II.B-.D.

areas of authority it possesses under Article I, Section 8.[83] But the Framers made a conscious choice to vest authority over trade policy in Congress, the most democratic branch of government.[84] That choice cannot be fundamentally altered by legislation that completely transfers Congress's power over foreign commerce to another branch of government.

A. The Counterargument: A "Selective Nondelegation Doctrine"

According to Rappaport, the nondelegation doctrine requires Congress to make "the policy decisions"—but only in certain areas.[85] Rappaport begins with *Curtiss-Wright*, which held that the nondelegation doctrine does not apply as strictly to foreign affairs as it does in the domestic arena.[86] From that premise, Rappaport contends that the Framers likely understood the President's "executive power" to include the authority to receive sweeping delegations in areas like foreign affairs, with no nondelegation doctrine standing in the way.[87] Specifically, Rappaport contends "that history, structure, and purpose strongly suggest that this interpretation [of executive power] was the one adopted by the Framers of the Constitution."[88] His historical argument is that the Framers were shaped in their understanding of executive power by the executive that loomed largest in their minds: the King of England.[89] The King had an enormous array of powers over foreign affairs and foreign commerce as part of "[t]he King's prerogative."[90] As Rappaport acknowledges, the Framers did not give all of this power to the President; to the contrary, they specifically gave Congress the authority to regulate foreign commerce.[91] Nonetheless, the argument goes, the Framers would have understood the President's "executive

83. *See, e.g.*, Barrett, *supra* note 22, at 325 ("The Necessary and Proper Clause grants Congress broad authority to implement legislation as it sees fit."); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2129 (2004) ("There is . . . a direct implication in the Necessary and Proper Clause that Congress has the power to transfer significant powers of implementation to executive and judicial actors."); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 291 n.73 (2021) (collecting sources showing that Congress can enact broad delegations).
84. Meyer & Sitaraman, *supra* note 6, at 590-92, 629-34.
85. Rappaport, *supra* note 16, at 311, 313.
86. *See id.* at 313 & n.162.
87. *Id.* at 313.
88. *Id.* at 314.
89. *See id.* at 352-53.
90. *Id.* at 353.
91. *Id.* at 353; *cf.* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 183 (2021) (reviewing and critiquing the argument that "the executive power" includes "an inherent removal power").

power" to include "a portion of the [King's] prior power: the power to exercise discretion in the area" of foreign affairs and foreign commerce "pursuant to a statutory delegation."[92] In part, this understanding would have come from the presumption that the executive power gave the President independent authority to conduct foreign policy for the nation.[93] Rappaport cites broad trade-based delegations by early Congresses as evidence that the Framers had this conception of executive power.[94] He also gives functionalist reasons for why the Framers would have permitted the President to receive expansive delegations of power in this area, including the President's access to national intelligence and capacity to make decisions swiftly—features that Congress may not possess.[95] In sum, Rappaport argues that foreign commerce is exempt from the nondelegation doctrine, since the President's executive power includes independent authority over foreign affairs.[96]

Rappaport admits that his analysis is cursory: The majority of his article is dedicated to showing that the nondelegation doctrine does not apply to appropriations laws.[97] His analysis of foreign commerce comes amid a section in which he "briefly discuss[es] some of the other areas where . . . the selective approach suggests that the nondelegation doctrine does not apply."[98] Accordingly, Rappaport's analysis "should be understood as tentative, because

92. Rappaport, *supra* note 16, at 352.

93. *Id.* at 346-47.

94. *Id.* at 347 & n.292, 353-54, 353 n.309.

95. *Id.* at 350-51.

96. Rappaport's specificity is refreshing—and it is also necessary for his argument to make sense. According to Rappaport, the nondelegation doctrine requires Congress to "mak[e] fundamental policy decisions." *Id.* at 305-06. In arguing that the nondelegation doctrine is selective, and thus only applies to certain areas of law, Rappaport says that the exempted areas *do not* require Congress to "mak[e] fundamental policy decisions"—and that it can enact statutes that give *the President* the power to make these choices. *Id.* It would not make sense for Rappaport to insist that the nondelegation doctrine "does not apply" to areas like foreign affairs, *id.* at 271, while also insisting that Congress is somehow prevented from making certain delegations that were too expansive in these areas. How could a court strike down a foreign affairs statute on nondelegation grounds if the President is free to "mak[e] fundamental policy decisions" in foreign affairs? *See id.* at 305-06. Put simply, Rappaport's reasoning calls for a genuine exception to the nondelegation doctrine. Once a court or scholar accepts this argument, there is no principled basis on which to conclude that a foreign affairs statute runs afoul of the nondelegation doctrine—no matter how broad that statute may be.

97. *See id.* at 345-46.

98. *Id.* at 346; *see also id.* at 271 ("In areas where executives have traditionally received broad delegations and where limiting delegation would promote the structure of the Constitution much less than it ordinarily would, there is a strong case for concluding that the nondelegation doctrine *does not apply.*" (emphasis added)).

clearly establishing an exception [to the nondelegation doctrine] would require substantial historical research and sustained argumentation."[99]

While it may be tentative, Rappaport's suggestion that the nondelegation doctrine does not apply to foreign commerce carries enormous implications. It suggests that Congress could enact a statute authorizing the President to regulate all of trade policy on the basis of nothing more specific than it being "good and nice." And it suggests that courts would have no role in scrutinizing trade-based delegations: With respect to tariffs and trade, the separation of powers would depend entirely on what Congress found appropriate, because there would be no basis on which a court could strike down a trade delegation.[100] With these implications in mind, the rest of this Part refutes Rappaport's tentative conclusion.

B. Constitutional Text, History, and Purpose

The Constitution itself says nothing about a selective nondelegation doctrine. It does not draw a line between foreign affairs and domestic affairs, permitting delegations in the former context but barring them in the latter. Indeed, when the Supreme Court made the distinction between these two realms in *Curtiss-Wright*, it did not even pretend to do so based on constitutional text.[101] Rather, the Court made the striking assertion that the

99. *Id.* at 352.

100. In a forthcoming work, Rappaport expands upon his argument, and contends that areas like foreign affairs may be subject to a "lenient approach" to the nondelegation doctrine. *See* Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine* 4 n.5 (San Diego Legal Stud. Paper No. 20-471, 2020), https://perma.cc/E98J-8H9P. Rappaport writes that "[t]he lenient approach includes both a version that would allow unlimited delegation and a version that would allow substantial but not unlimited delegation," and does not address which of the two is to be preferred. *Id.* This language is notably softer than the kind he uses in his 2001 article. *See* Rappaport, *supra* note 16. Perhaps it indicates that Rappaport hopes to hedge in his analysis of how broad a statute can be in an area like foreign affairs—much as other commentators have done. *See supra* notes 17-19 and accompanying text. In any event, this Note challenges the version of Rappaport's argument that would allow for unlimited delegation in foreign commerce and foreign affairs. That argument is not a fringe position or a straw man; in fact, it is far from the most extreme claim made by a leading scholar on the nondelegation doctrine. Julian Davis Mortenson and Nicholas Bagley have recently argued that the Constitution does not include a nondelegation doctrine *at all*—and that, as a matter of original understanding, Congress can delegate freely in *all areas of law* so long as it does not permanently give away all lawmaking authority. *See* Mortenson & Bagley, *supra* note 83, at 279-81.

101. *See, e.g.*, Rappaport, *supra* note 16, at 346 ("[T]here is a serious problem with the opinion in *Curtiss-Wright*: it rests on the view that the powers of the national government regarding international affairs do not derive from the constitutional text. To the formalist, this is simply unacceptable."). For a recent critique of the line drawn between domestic and foreign affairs in nondelegation inquiries, see Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1133-34 (2021).

federal government's powers over foreign affairs "did not depend upon the affirmative grants of the Constitution," but were instead "necessary concomitants of nationality."[102] That extratextual presumption has been decried—in part because it runs headfirst into the Tenth Amendment, which gives "[t]he powers not delegated to the United States by the Constitution . . . to the States respectively, or to the people."[103]

There is no need to go beyond the constitutional text, because Article I says several things about delegation and international trade. Article I's Vesting Clause is the textual hook for the nondelegation doctrine: "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[104] Proponents of the nondelegation doctrine have often emphasized the word "all" in order to show that the constitutional text implies only Congress can exercise legislative power.[105] But the more instructive bit of text from the Vesting Clause is the phrase "herein granted." That phrase implies that the Constitution specifically bars Congress from giving away its enumerated authorities because those are the legislative powers that have been vested in Congress.[106] As James Madison explained, the separation of powers "did not mean that [the legislative and executive] departments ought to have no *partial agency* in, or no *control* over, the acts of each other."[107] Rather, "the powers

102. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

103. *See, e.g.*, Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 239 n.14 (2001) (quoting U.S. CONST. amend. X).

104. U.S. CONST. art. I, § 1.

105. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (noting that "'[*a*]*ll* legislative Powers'" were given to Congress, and that "cessions of legislative power" were therefore forbidden (quoting U.S. CONST. art. I, § 1)); *see also* Coglianese, *supra* note 40, at 1852 & n.11 (collecting cases emphasizing this language).

106. Coglianese, *supra* note 40, at 1869. To see why the phrase "herein granted" is clarifying, one can also consider a simple logic game. Imagine a sign on a shared family fridge that says "all fruit belongs to Jane." If Jack opens up the fridge and takes a tomato, has he violated the rule? That would be unclear; it would depend on whether a tomato counted as a fruit. But now imagine the sign says that "all fruit *herein granted* belongs to Jane: apples, pears, and strawberries." Jack would not run afoul of the rule if he takes a tomato from the fridge. It does not matter that some people might consider the tomato to be a fruit—the rule has specified *which fruits* belong to Jane, and tomatoes are not on the list. Likewise, in the nondelegation context, we need not squabble over whether a statute is so vague that it constitutes "legislative power" rather than "executive power": We know what constitutes "legislative power" because the Framers enumerated legislative powers in Article I. *See id.*; *cf.* Mortenson & Bagley, *supra* note 83, at 293-332 (detailing and criticizing the formalistic debates about whether the executive branch could exercise legislative power).

107. THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961).

properly belonging to one of the departments ought not to be *directly and completely administered* by either of the other departments."[108]

Under Article I, the power to make trade policy for the nation belongs to Congress. Specifically, Article I, Section 8 states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . [and] To regulate Commerce with foreign Nations."[109] The power to levy duties and imposts can be described in today's parlance as the power to impose a tariff—a tax on imports.[110] The Foreign Commerce Clause sweeps more broadly: The power to regulate foreign commerce effectively encompasses the power to "prohibit[] or limit[] transactions" between entities in the United States and those in other countries.[111] All told, Article I gives Congress control over the nation's trade policies: The legislative branch is entrusted with the authority to tax, monitor, or block imports and exports.[112]

Historical context explains why the Framers found these powers important enough to enumerate in the Constitution. At the time of the Founding, trade policy was a matter of domestic economic policy, not foreign policy priorities.[113] The most urgent economic goal concerned the nascent nation's need for revenue. The United States had to finance the government, the military, and the debts it owed other countries.[114] But the Articles of Confederation allowed the federal government to impose tariffs only if each state agreed to do so.[115] When states like Rhode Island refused to support national tariffs, the revenue-starved states decided to raise taxes, spurring a public outcry.[116] As Alexander Hamilton put it, "[i]mpost begat Convention"[117]: The need for national tariffs was so great that it helped

108. *Id.* NO. 48, at 308 (James Madison) (emphasis added).

109. U.S. CONST. art. I, § 8, cls. 1, 3; *see also* Meyer & Sitaraman, *supra* note 6, at 590.

110. *See, e.g.*, Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 CASE W. RSRV. L. REV. 297, 318-24 (2015).

111. *See* Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 FORDHAM L. REV. 1955, 1976 (2015).

112. *See id.* at 1976-77; Meyer & Sitaraman, *supra* note 6, at 590. For the sake of simplicity, this Note generally refers to Congress's power to conduct trade policy. As the discussion above elucidates, this power consists of Congress's authority to both tax and regulate trade. And as demonstrated in this Part, Congress cannot give *either* of these powers away by statute.

113. Meyer & Sitaraman, *supra* note 6, at 592.

114. *Id.* at 591.

115. *Id.* at 591-92.

116. *Id.* at 592.

117. *Id.* (quoting Alexander Hamilton, New York Ratifying Convention. Notes for Second Speech of July 17 (July 17, 1788), *in* 5 THE PAPERS OF ALEXANDER HAMILTON 173, 173 (Harold C. Syrett & Jacob E. Cooke eds., 1962)).

motivate the Framers to create a Constitution that gave the federal government the power to levy them. A second economic goal was that tariffs would protect domestic businesses from foreign competitors by raising the price of imported goods.[118] This goal was less pressing than the need to raise revenue, but it would grow increasingly important as the United States moved to an industrial economy.[119]

These twin economic objectives—raising revenue and protecting industries—illustrate why the Framers gave the power over trade to Congress and not to the President. Trade policy implicates industries in different ways; some businesses benefit from a decline in foreign competition, while others suffer from having to pay more for the imports they need.[120] Those differences often implicate regional divides, with many areas of the country having their own sets of preferences on tariffs.[121] Congress was therefore the obvious branch of government to make trade policy. Individual legislators could represent their constituencies' interests, and members of the House of Representatives would be particularly attentive to those interests given how often they were up for reelection.[122] By contrast, the President was far more distant from the people, representing the nation as a whole rather than individual states or districts, and coming to office by virtue of the Electoral College instead of the voters themselves.[123]

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118. *See id.* at 591-94.

119. *See id.*

120. *See id.* at 591. For a modern illustration of how tariffs can distinctly affect different sectors of the economy, see *How Higher Tariffs Affect Different Industries*, WALL ST. J. (updated May 11, 2019, 11:09 AM ET), https://perma.cc/C8KK-YS3X.

121. *See supra* note 120.

122. *See* Meyer & Sitaraman, *supra* note 6, at 591; *see also* THE FEDERALIST NO. 53 (James Madison), *supra* note 107, at 333 ("How can foreign trade be properly regulated by uniform laws without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States?"); Ilan Wurman, Feature, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1524 (2021).

123. Meyer & Sitaraman, *supra* note 6, at 591. Some may argue that the President is best suited to handle trade policy due to the "functional arguments for expansive foreign affairs deference to the President—expertise, speed, and secrecy." *Id.* at 632; *see also id.* at 628-32 (describing and then attacking these arguments). But this view has little relevance for the Founding, since trade policy was seen by the Framers as a *domestic* issue, not a foreign affairs issue. *See id.* at 586 ("[B]y and large, the domestic economics paradigm defined trade law from the founding into the early twentieth century, with Congress in the driver's seat."). Moreover, these arguments are unpersuasive on their own terms. Trade agreements deal more with congressional expertise than presidential expertise, since they "implicate[] jobs, wages, economic competition domestically, and a variety of other constituent interests" in which "Congress is considered to have superior institutional competence because of its representative nature." *Id.* at 629. And they need not depend on speed or secrecy in the way that other international agreements do; trade negotiations are lengthy and "have no inherent need for secrecy." *See id.* at 630-32.

Accordingly, Article I's text, history, and purpose all undermine the notion that the Framers would have exempted trade policy from the nondelegation doctrine. The Framers were acutely aware of how trade and tariffs would affect different parts of the nation, and they consciously designed a constitutional structure that gave that power to the most representative branch of government.[124] To be sure, there is no indication in the constitutional text that Congress could not make broad delegations of trade authority to the President. But if Congress could enact a law providing that *the President* "shall have Power To lay and collect" duties and "To regulate Commerce with foreign Nations," then it would be able to fundamentally change the Framers' design without having to go through the process of amending the Constitution.[125]

For advocates of a selective nondelegation doctrine, the only text-based rebuttal is the notion that Article II's vesting of the "executive power" gives the President the authority to receive sweeping grants of authority in the realm of international trade.[126] That argument rests on three assumptions. The first is that the Framers understood "executive power" to entail an independent authority over foreign affairs.[127] The second is that this authority over foreign affairs means that the President can receive broad or unlimited delegations of power in this area—what Alexander Volokh calls the "Inherent-Powers Corollary" to the nondelegation doctrine.[128] And the third is that this generalized presidential power to receive broad foreign affairs delegations also extends to the related but nonetheless distinct category of foreign commerce—what Volokh terms "the 'Interlinking Extension' to the Inherent-Powers Corollary."[129] Each of these assumptions is questionable.

124. *See id.* at 591, 629-30.

125. U.S. CONST. art. I, § 8, cls. 1, 3; *see also* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 181-82 (2017). While Congress could hypothetically reclaim this power by passing a new statute, that would in turn depend on the executive branch acceding in the relinquishment of its own power, or on Congress's ability to summon the two-thirds majority needed to override a presidential veto. *See* Wurman, *supra* note 122, at 1521-22.

126. *See* Rappaport, *supra* note 16, at 346-47 ("[O]ne meaning of the term executive power in 1789 included the power to receive broad delegations of the power to impose embargoes during peacetime . . . .").

127. *See, e.g.*, *id.* at 346-47, 347 n.289; Prakash & Ramsey, *supra* note 103, at 234.

128. Alexander Volokh, *Judicial Non-delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1394 (2017); *see also* Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting); Rappaport, *supra* note 16, at 347.

129. Volokh, *supra* note 128, at 1394 (describing the "Interlinking Extension" as the idea that "Congress can delegate without an intelligible principle even when the delegate lacks inherent power, as long as the subject matter of the delegation is *interlinked* with an area where the delegate does have inherent power").

First, as a matter of original understanding, originalists may have systematically erred in their presumption that the "executive power" implied an independent grant of foreign affairs authority. Though there is nothing in the text of Article II that gives the President a general foreign affairs power,[130] many commentators have argued that the Framers would have understood "executive power" in light of the powers held by the executive they were most familiar with, the King of England.[131] The King had broad, independent authority to act in foreign affairs, so presumably the Framers gave the President a "residual foreign affairs authority" under the Constitution.[132] Some of the King's foreign affairs powers, like the authority to regulate foreign commerce or to declare war, were given to Congress under Article I, but the rest were left to the President.[133]

But in a recent article, Julian Davis Mortenson deconstructs this idea. Drawing on "more than a thousand contemporaneous published texts by hundreds of commentators, with a research methodology that involved reviewing every instance of the word root 'exec-' and reading most of the texts cover to cover,"[134] Mortenson shows that the "executive power" was not synonymous with the "Royal Prerogative," the term used to describe the King's array of independent authorities.[135] Instead, the "executive power" was just *one* of the many powers that the King had,[136] and it meant "exactly what it sounds like: the power to execute the law."[137] That understanding of executive power is far more intuitive than one that conjures up an ill-defined residual foreign affairs authority.[138] And it also better fits the text and structure of the

130. *See, e.g.*, Prakash & Ramsey, *supra* note 103, at 240 (acknowledging an "apparent dearth of textual presidential powers over foreign affairs"); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran–Contra Affair*, 97 YALE L.J. 1255, 1292 (1988) ("[A]rticle I gives Congress almost all of the enumerated powers over foreign affairs, and article II gives the President almost none of them . . . .").

131. *See* Prakash & Ramsey, *supra* note 103, at 253.

132. *Id.* at 253-54.

133. *See id.*; *see also* Rappaport, *supra* note 16, at 353 (noting that the King had "significant power to regulate foreign commerce without statutory authority," but that "the Framers clearly transferred this power to the Congress, depriving the President of the power to regulate foreign commerce without statutory authority").

134. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1187 (2019).

135. *Id.* at 1220-43.

136. *Id.* at 1229.

137. *Id.* at 1180; *see also id.* at 1263-66 (citing more than two dozen dictionaries from the time of the Founding, each of which supplied a constrained definition of the word "executive").

138. Justice Scalia encapsulated Mortenson's critique in his dissenting opinion in *Zivotofsky ex rel. Zivotofsky v. Kerry*, in which he criticized Justice Thomas's "assertion of broad, unenumerated 'residual powers' in the President" as indicative of "a presidency more

footnote continued on next page

Constitution: The Framers specified that Congress had particular authorities over foreign affairs, and they could have similarly specified that the President had the remaining power over the area.[139] Of course, a comprehensive discussion of the Executive Vesting Clause is beyond the scope of this Note. What matters is that the first assumption behind the selective nondelegation doctrine is on shaky ground.

The second assumption is similarly shaky. As noted above, the inherent-powers corollary presumes that Congress can make broad delegations to the President in the realm of foreign affairs, based on the idea that the executive branch has its own "inherent powers" over that domain.[140] But even if one assumes that the residual-foreign-affairs theory is correct, the inherent-powers corollary would still be inapplicable to trade policy. That is because the President has no inherent power over trade. The President's foreign affairs power is said to be "residual" because it is the remaining authority that the Framers chose not to give to Congress—and the Framers clearly decided to give Congress the authority to implement tariffs and to regulate foreign commerce.[141] The leading proponents of the residual theory make that point clear, noting that "[t]he powers explicitly conveyed to Congress by the Constitution are conveyed away from the President and are not in any sense shared powers."[142]

Thus, the only way that one can argue that the Executive Vesting Clause somehow negates the nondelegation doctrine when it comes to international trade is with a third assumption—that trade is *related* to foreign affairs, over which the President has independent power. This "Interlinking Extension" has no basis in the text of the Constitution, and it finds support from only a "small handful of cases that merely state the conclusion without any analysis."[143] And

reminiscent of George III than George Washington." 135 S. Ct. 2076, 2126 (2015) (Scalia, J., dissenting). Justice Thomas countered Justice Scalia's criticism of the "residual powers" theory by noting that Justice Scalia "offer[ed] no response to my interpretation of the words 'executive Power' in the Constitution." *Id.* at 2108 (Thomas, J., concurring in the judgment in part and dissenting in part). Mortenson, however, offers a compelling response: Executive power is best understood as referring only to the capacity to enforce the law. Mortenson, *supra* note 134, at 1180.

139. *Cf.* Prakash & Ramsey, *supra* note 103, at 259-60 (acknowledging concerns that their conception of "executive power" could make certain enumerated authorities in Article II, such as the Commander-in-Chief Clause, redundant).

140. *See supra* notes 128-29 and accompanying text.

141. *See* Prakash & Ramsey, *supra* note 103, at 355 ("When the Constitution assigns a foreign affairs power to Congress, that allocation is an exception to the President's executive power. Hence the President cannot declare war, *regulate foreign commerce*, and so forth." (emphasis added)).

142. *Id.* at 262.

143. Volokh, *supra* note 128, at 1407.

these cases appear to feature rather tight "interlinking" between the delegation and the President's own independent power.[144] For example, in *Loving v. United States*, the Court upheld a delegation to the executive branch that gave it the authority to determine aggravating factors in a murder case tried by a court-martial, in part because "the delegation here was to the President in his role as Commander in Chief."[145] There is certainly a clear relationship between the field of military justice and the "*express terms* of the [Commander-in-Chief Clause]."[146] But there is no similarly clear relationship between the field of trade policy and the *presumed* foreign affairs power of the Executive Vesting Clause. The President may have the independent constitutional power to "speak internationally on behalf of the United States" or "to recall ambassadors,"[147] but these powers are nowhere near as close to trade policy as the Commander-in-Chief Clause is to regulation of the military.

In sum, constitutional text, history, and purpose all show that foreign commerce is not exempt from the nondelegation doctrine. The Framers chose to give Congress specific authority over trade policy, and Congress cannot give *all* of that power away without altering the constitutional design. In the face of the clear text of Article I, the only text-based rebuttal is that Article II somehow creates a vast loophole allowing Congress to transfer its foreign-commerce authority to the President. But that rebuttal depends on a series of dubious assumptions. As Chief Justice Rehnquist would say, "we would have to pile inference upon inference" in order to accept this counterargument[148]—and those inferences are all flawed.

C. Congressional Practice

With no foothold in the text of the Constitution, Rappaport also argues that Congress has evinced an understanding that it can freely delegate trade-based authority to the President.[149] Congressional practice indeed makes a difference in helping to discern contested constitutional provisions,[150] especially in foreign affairs. Yet when it comes to trade policy, the actions of early Congresses lend support to the idea that Congress cannot fully delegate its authority in this domain. Early Congresses certainly wrote broadly worded

144. For an overview and critique of these cases, see *id.* at 1398-407.

145. 517 U.S. 748, 751, 772 (1996).

146. *See id.* at 772 (emphasis added).

147. *See* Prakash & Ramsey, *supra* note 103, at 258.

148. *See* United States v. Lopez, 514 U.S. 549, 567 (1995).

149. *See* Rappaport, *supra* note 16, at 353-54.

150. *See, e.g.*, Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 78-79 (2014).

statutes regarding arms embargoes and wartime trading arrangements—but none of those statutes could possibly have conferred all of the legislative authority over trade policy to the President. And with respect to tariffs, the mainstay of early American trade policy,[151] early Congresses were zealous about writing the specific rules that would apply.

To start, consider the expansive delegations made by early Congresses. The *Curtiss-Wright* Court seized upon a pattern of broadly worded statutes in the realm of embargoes and trade to make the point that a looser nondelegation doctrine for foreign affairs "find[s] overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government."[152] Rappaport repeats these examples in arguing that the nondelegation doctrine may not apply to embargoes and trade.[153] The most striking delegation is the first one cited in *Curtiss-Wright*'s string of examples: a law giving the President the power to issue embargoes "whenever, in his opinion, the public safety shall so require . . . under such regulations as the circumstances of the case may require."[154] Further examples include statutes enabling the President to bypass statutory restrictions on arms sales when "the security of the commercial interest of the United States" was implicated,[155] to reestablish trade with France "if he shall deem it expedient and consistent with the interest of the United States,"[156] and to end embargoes on certain goods "if in his judgment the public interest should require it."[157]

To be sure, these statutes are broadly worded. But that early Congresses enacted broadly worded statutes does not mean that legislators thought they could give *all* of their trade authority away. As the analysis in this Part shows, statutory phrasing is not dispositive in a nondelegation analysis—what matters instead is whether the statute can be seen as giving away Congress's entire authority over trade policy. With that point in mind, none of these delegations raise a constitutional problem.

Take the first statute cited in *Curtiss-Wright*'s jaunt through congressional practice. The Court intimated that the statute gave President Washington a free hand to do whatever he wished with respect to international trade by

151. *See* Meyer & Sitaraman, *supra* note 6, at 592.

152. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 322 (1936).

153. Rappaport, *supra* note 16, at 347-48, 347 n.292 (citing *Curtiss-Wright*, 299 U.S. at 322-24, 324 n.2).

154. 299 U.S. at 322 (quoting Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372 (expired 1794)).

155. *Id.* at 322-23 (quoting Act of Mar. 3, 1795, ch. 53, 1 Stat. 444).

156. *Id.* at 323 (quoting Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613, 615 (expired 1800)).

157. *Id.* at 324 n.2 (quoting Act of Dec. 19, 1806, ch. 1, § 3, 2 Stat. 411, 411). This Act repealed an earlier statute, Act of Apr. 18, 1806, ch. 29, 2 Stat. 379 (repealed 1806).

levying embargoes when "the public safety shall so require."[158] But a closer look at the statute quickly dispels that misconception. While Congress did enable the President "to lay an embargo on all ships and vessels in the ports of the United States," it put an important limit on this grant of power: "The authority aforesaid shall not be exercised, while the Congress of the United States shall be in session . . . [a]nd any embargo, which may be laid by the President . . . shall cease and determine in fifteen days from the actual meeting of Congress, next after laying the same."[159] Thus, the statute did not give carte blanche to the President, as *Curtiss-Wright* implied.[160] Rather, it was a practical measure meant to ensure that the United States could stay out of a war between Britain and France by remaining neutral at its ports, regardless of whether Congress happened to be in session.[161] Congress still retained its power over trade policy. Once it returned to session, the President's embargo would "cease" and the statute itself would "not be exercised."[162]

The other delegations discussed in *Curtiss-Wright* similarly constrained presidential power over trade policy. Many of these broadly worded statutes concerned specific countries for specific periods of time. For instance, Congress allowed the President to reestablish trade ties with France "if he shall deem it expedient and consistent with the interest of the United States."[163] Congress gave this statute a strict expiration date: Enacted on February 9, 1799, the Act would expire on March 3, 1800.[164] Other statutes concerned specific goods, such as when Congress enabled the President "to permit the exportation of arms, cannon and military stores," so long as the exports occurred "in cases connected with the security of the commercial interest of the United States, and for public purposes only."[165] These statutes often included time limits as well. For example, after Congress banned imports of goods like leather and silk from Great Britain and Ireland,[166] it passed a follow-up statute that suspended

158. *Curtiss-Wright*, 299 U.S. at 322 (quoting Act of June 4, 1794, § 1, 1 Stat. at 372).

159. *See* Act of June 4, 1794, § 1, 1 Stat. at 372.

160. *See Curtiss-Wright*, 299 U.S. at 322.

161. Meyer & Sitaraman, *supra* note 6, at 595.

162. Act of June 4, 1794, § 1, 1 Stat. at 372.

163. Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613, 615 (expired 1800).

164. *Id.* § 8, 1 Stat. at 616. A similar statute cited by both the Court in *Curtiss-Wright* and Rappaport cut off trade with Santo Domingo. *See Curtiss-Wright*, 299 U.S. at 324; Rappaport, *supra* note 16, at 347 n.292. While the statute allowed the President to reestablish trade ties "if he shall deem it expedient," it only applied to Santo Domingo and was subject to the strict time constraint of "be[ing] in force for one year, and no longer." Act of Feb. 28, 1806, ch. 9, §§ 1, 4-5, 2 Stat. 351, 351-52 (expired 1807).

165. Act of Mar. 3, 1795, ch. 53, 1 Stat. 444.

166. Act of Apr. 18, 1806, ch. 29, § 1, 2 Stat. 379, 379 (repealed 1806).

the ban for a six-month period.[167] That follow-up statute allowed the President "to suspend" the resumption of trade in these particular goods "if in his judgment the public interest should require it: *Provided*, that such suspension shall not extend beyond the second Monday in December next."[168]

Accordingly, these statutes do not show that early Congresses felt free to give up their authority over trade policy. None of these laws raise a nondelegation problem, because none transfer Congress's entire legislative power over trade to the President. Rather, they mostly concern particular goods or particular trading partners for a particular length of time. The time limits are especially telling: If Congress saw no constraints on giving up its trade authority, and if it acknowledged the President to be "the sole organ of the federal government in the field of international relations,"[169] it would not have been insistent upon confining presidential power in this area for short periods of time.[170] The most plausible account of this early congressional practice is that Congress did not see a constitutional problem with these delegations[171] because the statutes constrained presidential power in terms of time and subject matter—not because foreign commerce was exempt from the nondelegation doctrine.

Indeed, these statutes are constitutionally questionable only if one believes that the nondelegation doctrine prohibits broadly worded statutes. That is why scholars like Rappaport tie themselves in knots over a supposed doctrinal exception for foreign commerce. The Framers could not simultaneously believe that Congress must legislate with the specificity needed to "make all the important policy decisions,"[172] while also finding no fault in statutes that allowed the President to take action on trade policy based on "the public interest."[173] Instead of questioning their assumptions about the nondelegation doctrine itself, these scholars assume that the Framers envisioned a massive carveout for trade policy and other issues of foreign affairs.[174]

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167. Act of Dec. 19, 1806, ch. 1, § 1, 2 Stat. 411, 411.

168. *Id.* § 3, 2 Stat. at 411.

169. *Curtiss-Wright*, 299 U.S. at 320.

170. For a broader discussion of congressionally imposed time limits, and an argument that these limits could serve a similar constraining function on Congress as a revived nondelegation doctrine, see Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1974-82 (2020). By calling attention to time limits, this Note does not mean to suggest that time limits alone could make a delegation permissible. Rather, these limits are significant because they indicate early Congresses' insistence upon constraining executive power over trade policy.

171. *See* Wurman, *supra* note 122, at 1554 (concluding that "[t]he First Congress did not even come close to testing" the idea "that there were no limits on delegation at all").

172. *See* Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).

173. *See supra* note 168 and accompanying text.

174. *See, e.g.*, Rappaport, *supra* note 16, at 345-55.

But if the Framers believed in such a carveout, they seemed to do so without saying it aloud. Rappaport infers an understanding by the Framers from what early Congresses did, but he never provides statements indicating that legislators actually shared that understanding[175]—likely because there is no direct evidence that legislators thought these delegations fell into an exception to the nondelegation doctrine.[176]

In fact, several of the select group of statutes that *did* provoke audible nondelegation objections concerned foreign affairs and the military.[177] The infamous Alien and Sedition Acts included a provision that gave the President the power "to order all such aliens as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States."[178] James Madison objected: "A delegation of power in this latitude, would not be denied to be a union of the different powers. . . . They leave every thing to the President. His will is the law."[179] This statute, unlike the trade laws discussed above, could be understood to give away an entire legislative power—Congress's authority "[t]o establish an uniform Rule of Naturalization."[180] If Congress could indeed give away an enumerated authority because that authority pertained to foreign affairs, one would expect at least some legislators to have raised that argument in response to Madison. But none made this point.[181]

A similar sequence of events arose when Congress enacted a law that gave the President the power "to call into actual service, a number of troops, not exceeding ten thousand."[182] This statute implicated Congress's enumerated authority "[t]o raise and support Armies,"[183] and legislators made that point known. As Representative Albert Gallatin put it, "[t]he Constitution has declared that the raising of an army is placed in Congress . . . . [I]f Congress

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175. *See id.*

176. *See* Mortenson & Bagley, *supra* note 83, at 334-35.

177. For a longer discussion of these nondelegation disputes, see Wurman, *supra* note 122, at 1504-18.

178. An Act Concerning Aliens, ch. 58, § 1, 1 Stat. 570, 571 (1798) (expired 1800) (emphasis omitted).

179. *The Report of 1800, [7 January] 1800*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/H259-3DL3 (archived Apr. 6, 2021).

180. U.S. CONST. art. I, § 8, cls. 1, 4; *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 300.

181. *See* Wurman, *supra* note 122, at 1514 ("[N]ot a single representative argued in response [to Madison] that Congress could freely delegate power—an argument surely they would have been motivated to make if it were true.").

182. An Act Authorizing the President of the United States to Raise a Provisional Army, ch. 47, § 1, 1 Stat. 558, 558 (1798) (repealed 1802).

183. U.S. CONST. art. I, § 8, cls. 1, 12.

were once to admit the principle that they have a right to vest in the President powers placed in their hands by the Constitution, that instrument would become a piece of blank paper."[184] No legislator responded by saying that *these powers* could be given to the President because they pertained to military affairs.[185]

In concluding this review of early congressional practice, it is worth appreciating how *specific* Congress was when it came to most aspects of trade policy. While Rappaport focuses mainly on embargoes,[186] Congress spent far more time trying to tax imports than trying to block them.[187] And when it set tariffs on particular goods, Congress was remarkably precise.[188] To get a flavor, consider the tariffs that the First Congress established shortly after convening for the first time.[189] The tariff statute goes through dozens of items, specifying exactly how much the duty would be on each, down to an extraordinarily granular level. For example: "On Madeira wine, per gallon, eighteen cents. On all other wines, per gallon, ten cents. . . . On pickled fish, per barrel, seventy-five cents. On dried fish, per quintal, fifty cents."[190] Congress kept up that item-level specificity for more than one hundred years; only much later, after the income tax provided the country's main source of revenue, did Congress begin to make sweeping delegations of its trade authority.[191]

In sum, Founding-era congressional practice conforms with a sensible reading of Article I: that Congress has authority over trade and foreign commerce, and that it cannot completely give that authority away. That Congress enacted broadly worded statutes in this area does not warrant inferring an unspoken exception to the nondelegation doctrine. Those statutes were directed at specific subjects and limited to specific timeframes. If anything, Congress's primary trade statutes reveal a branch of government

184. Wurman, *supra* note 122, at 1515 (quoting 8 ANNALS OF CONG. 1526 (1798)).

185. *See id.* at 1515-16; *see also* Mortenson & Bagley, *supra* note 83, at 359-64 (discussing the debate over this statute and noting how it undermines Justice Gorsuch's foreign affairs carveout to the nondelegation doctrine).

186. *See* Rappaport, *supra* note 16, at 345-51.

187. *See* Meyer & Sitaraman, *supra* note 6, at 592; *see also id.* at 605-06 (noting that it was only during the twentieth century that "international trade negotiations became increasingly concerned with matters beyond simply the tariff—the centerpiece of trade policy since the founding of the Republic").

188. *See id.* at 594.

189. *See id.* at 592; An Act for Laying a Duty on Goods, Wares, and Merchandises Imported into the United States, ch. 2, § 1, 1 Stat. 24, 24-26 (1789) (repealed 1790).

190. An Act for Laying a Duty on Goods, Wares, and Merchandises Imported into the United States, § 1, 1 Stat. at 25.

191. *See* Meyer & Sitaraman, *supra* note 6, at 590-601.

that was intensely *protective* of its authority. The First Congress—which specified different tariff rates for pickled fish and dried fish[192]—would not have thought that it could give the President complete control over its trade authority.

D. Early Precedent

Before this Note moves on to application and implications, this Subpart briefly considers how the analysis matches up with early and important Supreme Court cases. Notably, the nondelegation doctrine itself was largely born over the course of three seminal cases involving trade policy. All support the view that Congress can delegate broadly, but not completely, in this area.

The Court's first foray into nondelegation came in a trade case.[193] In *Cargo of the Brig Aurora v. United States*, the Court considered a statute that blocked imports from the United Kingdom and France while authorizing the President to resume trade with either nation upon a finding that it had "cease[d] to violate the neutral commerce of the United States."[194] The party challenging this statute argued that "Congress could not transfer the legislative power to the President."[195] The Court did not precisely address the nondelegation principle in this case—that would come twelve years later in *Wayman v. Southard*.[196] Rather, the Court in *Brig Aurora* upheld the "neutral commerce" statute because it saw "no sufficient reason[] why the legislature should not exercise its discretion . . . either expressly or conditionally."[197]

Two centuries after *Brig Aurora*, some have tried to cast the case as an early example of the Court permitting broad delegations in the realm of foreign affairs. Justice Gorsuch attempted to do so in his *Gundy* dissent: "Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II."[198] But this analysis invents a rationale for the

192. *See supra* note 190 and accompanying text.

193. *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 421-23 (1935) (tracing the history of the nondelegation doctrine); Mortenson & Bagley, *supra* note 83, at 282-85, 282 n.24 (same).

194. 11 U.S. (7 Cranch) 382, 383-84 (1813) (statement of the case) (quoting Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605, 606).

195. *Id.* at 386 (argument of the appellant).

196. 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."); *see also* Mortenson & Bagley, *supra* note 83, at 282 & n.24 (noting how the Supreme Court dodged the main delegation issue in *Brig Aurora*).

197. *Brig Aurora*, 11 U.S. (7 Cranch) at 388; Act of May 1, 1810, § 4, 2 Stat. at 606.

198. Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

opinion that is nowhere in the opinion itself. There is no need to search for an alternative rationale for *Brig Aurora*. The Court provided a perfectly sensible rationale: There is no constitutional problem when Congress decides which countries to target and what trade restrictions to apply, leaving the President to decide merely *when* the policy will take effect.[199] In other words, Congress was not giving free rein to the President—it was authorizing a specific course of action directed toward specific countries.

The second major nondelegation case to deal with trade made a similar point. In *Field v. Clark*, the Court considered one of the first significant delegations of trade authority to the President, the Tariff Act of 1890.[200] This statute exempted a specific list of goods from tariffs, while allowing the President to reimpose tariffs on those goods upon a finding that other countries had been "reciprocally unequal and unreasonable" in their trade policies toward the United States.[201] The Court held that the statute complied with the nondelegation doctrine because Congress had specifically detailed the exact goods to be targeted and the exact tariff rates that would apply.[202] As such, "[n]othing involving the expediency or the just operation of such legislation was left to the determination of the President."[203]

To be sure, part of the Court's reasoning was based on the line of broadly worded trade statutes discussed above.[204] The Court noted that these statutes "show that, in the judgment of the legislative branch of the government, it is often desirable . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations."[205] But permitting broad delegations is different from permitting unlimited delegations. The Court could have explicitly recognized a foreign affairs exception to the nondelegation doctrine, but it did not: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[206] What saved the Tariff Act was not that it was a foreign-affairs-related statute, but that Congress had set

199. *See Brig Aurora*, 11 U.S. (7 Cranch) at 388; *see also Gundy*, 139 S. Ct. at 2136-37 (Gorsuch, J., dissenting) (recognizing how the *Brig Aurora* Court justified the delegation at issue because it simply "depend[ed] on executive fact-finding"); Lawson, *supra* note 30, at 363-64.

200. *See* 143 U.S. 649 (1892); Meyer & Sitaraman, *supra* note 6, at 599-600.

201. *Clark*, 143 U.S. at 680 (quoting Tariff Act of 1890 (McKinley Tariff), ch. 1244, § 3, 26 Stat. 567, 612).

202. *Id.* at 692-93.

203. *Id.* at 693.

204. *See id.* at 682-92.

205. *Id.* at 691.

206. *Id.* at 692.

specific tariffs for specific goods, which the President could only reimpose upon a particular determination.[207] The law thus did "not, in any real sense, invest the President with the power of legislation."[208]

That reasoning reappeared in the seminal case of *J.W. Hampton, Jr., & Co. v. United States*, the decision that gave birth to the "intelligible principle" test.[209] As noted above,[210] the Court considered a statute that enabled the President to adjust preexisting tariff rates when he or she determined that the established tariff rates did not "equalize the . . . differences in costs of production in the United States and the principal competing country."[211] Once again, there was no mention of a foreign-commerce exception to the nondelegation doctrine. Rather, the statute was constitutional because it set limits upon the executive branch. The President could not impose new tariffs or get rid of those already on the books; instead, the President was a factfinder entrusted to adjust tariff rates so as "to compete on terms of equality with foreign producers."[212]

These seminal cases provide yet more support for what is already clear from text, history, purpose, and congressional practice. Congress can make broad delegations of its trade authority, but it cannot transfer that authority in full to the President. If there were a foreign-commerce exception to the nondelegation doctrine, as Rappaport argues and as Justice Gorsuch suggests, then why would the first delegation case to ever appear before the Supreme Court be in that exact area? Why would the Court never explicitly announce this exception in any of these three cases? Why would the modern test for nondelegation inquiries—the intelligible-principle requirement—come from the field where no test was needed at all? The questions answer themselves. There is no foreign-commerce exception to the nondelegation doctrine.

III. Case Study: Trump's "National Security" Tariffs

The nondelegation doctrine applies to trade and prevents a complete abdication of Congress's trade authority. This Part explains why that understanding matters. In doing so, it returns to the point where the Note began, using section 232 of the Trade Expansion Act of 1962 as a case study.

207. *Id.* at 692-93.

208. *Id.* at 692. There would have been no need for the Court to make this point if Congress could give the President the power to make trade legislation. Indeed, the Court could have simply stated that Congress *ordinarily* cannot give the President lawmaking authority but that trade policy is an exception to that rule.

209. 276 U.S. 394, 409 (1928).

210. *See supra* Part I.A.

211. *J.W. Hampton*, 276 U.S. at 401 (quoting Tariff Act of 1922, ch. 356, § 315(a), 42 Stat. 858, 941-42 (repealed 1930)).

212. *Id.* at 404.

That section raises a nondelegation issue because it is the rare law that can be understood to give away all of Congress's authority over trade policy. Specifically, section 232 can be understood as enabling the President to take any trade action whatsoever, all in response to a purported "economic security" threat. After providing some background on section 232 and explaining why it raises a constitutional problem, this Part argues that the most sensible way to resolve the problem is to interpret the statute narrowly.

A. Section 232 and the Supreme Court

Section 232 is a statutory provision that allows the President to take action against imports that "threaten to impair the national security" of the United States.[213] The provision provides for a three-step protocol. First, the Secretary of Commerce launches an investigation into a good or service that is believed to pose a national-security threat.[214] Second, within 270 days of that investigation's launch, the Secretary produces a report submitted to the President that determines whether or not the import in question actually threatens national security.[215] And third, if the Secretary concludes that the import is a threat and the President agrees, then the President is authorized "to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[216]

The statute never offers a specific definition of "national security."[217] Rather, it gives a list of factors to which "the Secretary [of Commerce] and the President shall, in light of the requirements of national security and without excluding other relevant factors, give consideration."[218] These factors include an array of concerns that deal with military capabilities, such as "domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, [and] existing and anticipated availabilities of . . . supplies and services essential to the national defense."[219] The factors align closely with a common understanding of the phrase "national security"—the capacity to defend the country, particularly from a military

213. 19 U.S.C. § 1862(c)(1)(A); Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862).

214. 19 U.S.C. § 1862(b)(1).

215. *Id.* § 1862(b)(3).

216. *Id.* § 1862(c)(1).

217. *See* Nance & Wasserman, *supra* note 11, at 946 (emphasizing "the lacuna that exists at the very heart of [section 232], namely, the definition of national security"); *see also* 19 U.S.C. § 1862.

218. 19 U.S.C. § 1862(d).

219. *Id.*

standpoint.[220] But the statute does not end there. It continues with another set of factors to consider:

> In the administration of this section, the Secretary [of Commerce] and the President *shall further recognize the close relation of the economic welfare of the Nation to our national security*, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.[221]

With this exhaustingly long sentence, Congress gave the executive branch permission to consider a panoply of economic concerns as part of what constitutes "national security." And nothing limits the President from going beyond the factors listed; in fact, the statute seems to invite the President to do so, since it says that the factors listed should be considered "without excluding other factors."[222]

It was only a matter of time before a statute this broad wound up in court. In *Federal Energy Administration v. Algonquin SNG, Inc.*, the Supreme Court considered the scope of the trade remedies available under section 232(b).[223] The Nixon Administration had declared that oil imports threatened national security, and the President sought to impose license fees on foreign oil rather than limit the amount of oil that could be imported.[224] In the ensuing lawsuit, plaintiffs challenged the President's authority to implement license fees under the statute, arguing that the statute would violate the nondelegation doctrine if interpreted to allow President Nixon to impose whatever trade-based remedy he wished.[225] The Court disagreed. It found that the statute enabled the President to both block and tax imports, and that this range of available trade

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220. *See, e.g.*, Nance & Wasserman, *supra* note 11, at 946-47. Some scholars argue that the concept of "national security" extends beyond military affairs and should include issues like "economic considerations and concerns over the state of the industrial base." *See* Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L BUS. L. 235, 262 (1989). That may well be true as a theoretical matter. But when it comes to a nondelegation inquiry, "national security" cannot be equated with "economic considerations," because that would impose no restrictions whatsoever on the President's ability to enact trade policies under the statute. *See infra* Part III.B.

221. 19 U.S.C. § 1862(d) (emphasis added).

222. *See id.*; *see also* Petition for a Writ of Certiorari at 5-6, Am. Inst. for Int'l Steel, Inc. v. United States, 141 S. Ct. 133 (2020) (mem.) (No. 19-1177) (emphasizing the nonexclusive nature of the factors to be considered under section 232).

223. 426 U.S. 548, 551-52 (1976).

224. *Id.* at 552-55.

225. *See id.* at 556-59, 561.

remedies did not raise a constitutional problem.[226] Writing just two paragraphs on nondelegation, the Court proclaimed that section 232 "establishes clear preconditions to Presidential action," namely "a series of specific factors to be considered by the President."[227] Accordingly, the Court saw "no looming problem of improper delegation that should affect [its] reading of § 232 (b)."[228]

There are two plausible explanations for why the Court in *Algonquin* gave such short shrift to the nondelegation question posed by section 232. The first is textual. Section 232's capacious language leads to multiple possible interpretations of the phrase "national security." It could refer only to threats implicating the military, or it could go so far as to include threats implicating the economy writ large.[229] The former is naturally constrained, since it deals with a specific sector and specific imports relevant to that sector—but the latter is unconstrained.[230] The Court almost certainly had the narrower interpretation in mind when considering the nondelegation inquiry. It practically said as much when it concluded its opinion on a note of caution:

> Our holding today is a limited one. . . . [O]ur conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232 (b) in no way compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized.[231]

The second explanation for the Court's cursory analysis is pragmatic: No President before Nixon had sought to interpret the statute that broadly, or even to use it much at all. Following section 232's enactment, the statute mostly lay dormant.[232] In more than half of the section 232 investigations launched between 1962 and 2019, the Department of Commerce determined that the imports in question did not pose a national security threat.[233] From a practical

226. *Id.* at 558-70.

227. *Id.* at 558-60.

228. *Id.* at 560 (footnote omitted).

229. *See* Nance & Wasserman, *supra* note 11, at 946-48 (noting the different permissible interpretations of "national security" under section 232, including "defense needs for the product in question" and "economic security"); *see also* Bialos, *supra* note 220, at 259-60.

230. *See* Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1351 (Ct. Int'l Trade 2019) (Katzmann, J., concurring dubitante), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020).

231. *Algonquin*, 426 U.S. at 571.

232. *See* RACHEL F. FEFER, KEIGH E. HAMMOND, VIVIAN C. JONES, BRANDON J. MURRILL, MICHAELA D. PLATZER & BROCK R. WILLIAMS, CONG. RSCH. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 3-4 (rev. 2020), https://perma.cc/3XCU-86LS.

233. *Id.* at 3 (noting that in 16 of 31 investigations, the Department of Commerce "determined that the targeted imports did not threaten to impair national security").

standpoint, there was no imminent concern about the statute's breadth.[234] There was no sign that a President would seek to abuse the law.

And then came Donald Trump. The forty-fifth President had campaigned on remaking U.S. trade policy,[235] and he began to do so in 2017, when his Administration initiated section 232 investigations into steel and aluminum imports.[236] In early 2018, the Department of Commerce issued a report that found that steel imports threatened national security.[237] The Department based its conclusion on a sweeping interpretation of section 232: that the statute could be invoked in response to imports of products that (1) are "important to U.S. national security" and (2) are economically harmed by foreign competition, thereby "weakening our internal economy."[238] Steel supposedly fit these criteria because it was "essential for defense requirements and critical infrastructure needs," and domestic steel production was "adversely impacted" by "[e]xcessive steel imports."[239] Trump agreed with the Department's conclusion and imposed tariffs on steel and aluminum imports in March 2018, becoming the first President in more than three decades to take action under section 232.[240]

Once again, the federal government found itself in court defending section 232's constitutionality—this time from a group of steel importers who launched a facial challenge to the statute.[241] The Court of International Trade rejected the challenge, noting that it was "bound by *Algonquin*."[242] But just as in *Algonquin*, the court expressed some unease about an expansive reading of the

234. *See Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1346-47 (Katzmann, J., concurring dubitante) (suggesting that *Algonquin* may need updating in light "of the fullness of time and the clarifying understanding borne of recent actions").

235. *See, e.g., Read Donald Trump's Speech on Trade*, TIME (June 28, 2016, 4:55 PM EDT), https://perma.cc/XZ2P-ZJF7.

236. *See* FEFER ET AL., *supra* note 232, at 5-6.

237. BUREAU OF INDUS. & SEC. OFF. OF TECH. EVALUATION, U.S. DEP'T OF COM., THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED 2-5 (2018) [hereinafter THE EFFECT OF IMPORTS OF STEEL], https://perma.cc/Z76B-4YY8. Soon after its report on steel imports, the Department issued a similar report on aluminum imports. *See* BUREAU OF INDUS. & SEC. OFF. OF TECH. EVALUATION, U.S. DEP'T OF COM., THE EFFECT OF IMPORTS OF ALUMINUM ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED 2-6 (2018), https://perma.cc/WS5P-JPW6.

238. *See* THE EFFECT OF IMPORTS OF STEEL, *supra* note 237, at 2-3, 5 (capitalization altered).

239. *Id.* at 2, 4.

240. FEFER ET AL., *supra* note 232, at 4-8.

241. Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1337 (Ct. Int'l Trade 2019), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020).

242. *Id.* at 1340, 1345.

statute. It noted that "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach."[243] Judge Katzmann went further, writing a separate opinion in which he called upon the Supreme Court to revisit its holding in *Algonquin*.[244] As Judge Katzmann put it, section 232's "national security" criteria ultimately constituted "a definition so broad that it not only includes national defense but also encompasses the entire national economy."[245] Thus, the statute "provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress."[246]

B. Analyzing Section 232

This Note has shown that a statute cannot give the President virtually unbridled discretion over trade policy. But the analysis goes further. The arguments presented in Parts II and III.A also show *why* section 232 raises a constitutional problem when so many other trade statutes do not. The problem is not that the statute is broadly worded; it is that it can be understood to give away all of Congress's authority over trade and tariffs. That kind of problem must be taken seriously by courts—it cannot be waved away merely because the statute is in the realm of foreign affairs. The analysis above also suggests a natural solution. When a statute like section 232 can be interpreted to transfer authority over trade policy to the executive branch, courts should interpret the statute in a way that rejects this understanding if at all possible.

As noted in Subpart A, section 232 can be interpreted in several ways.[247] If the statute is understood to refer only to imports implicating the military and national defense, then it is perfectly constitutional.[248] Under this reading, the

243. *Id.* at 1344.

244. *See id.* at 1346-47, 1352 (Katzmann, J., concurring dubitante).

245. *Id.* at 1351.

246. *Id.* at 1352.

247. *See supra* note 220 and accompanying text.

248. To further crystallize why this interpretation is plausible, consider the following analogy. A clothing outlet announces a new sale, and to decide which items will be on sale, the store says that it will consider factors like (1) whether the item is red, and (2) whether the item is fashionable. The second factor is far broader than the first, but it is entirely sensible to construe the store's policy as only applying to clothes that are red—and that redness is therefore a necessary condition. Similarly, the economic factors listed in section 232 are far broader than the defense-related factors, but one can read the statute as requiring some connection to national defense. *See* Severstal Exp. GMBH v. United States, No. 18-00057, 2018 WL 1705298, at *10 (Ct. Int'l Trade 2018) ("The factors listed in Section [232(d)] are *required*, but not exclusive." (emphasis added)).

executive branch would have authority to regulate only a specific group of imports, because many imports have nothing to do with defense policy. To give an example that appeared in the Court of International Trade's oral argument in *American Institute for International Steel*, the President could not restrict trade of peanut butter under this view of the statute.[249] Section 232 would thus survive a nondelegation inquiry: As we have seen, a broadly worded trade statute is constitutional so long as Congress chooses a particular range of subjects over which the President has influence.

But what about the other plausible interpretation? If the executive branch were to say that "national security" was synonymous with "economic security," then there would be nothing to stop the President from taxing or banning peanut butter imports. The federal government could credibly argue that foreign competition threatens "the economic welfare" of the peanut butter industry, and that the "close relation of the economic welfare of the Nation to our national security" meant that this competition has to be reduced.[250] If this hypothetical seems outlandish, consider the fact that the federal government would not concede that the President lacked the authority under section 232 to restrict the importation of peanut butter.[251] And consider that President Trump sought to use the statute to impose tariffs on Brazil and Argentina in response to currency manipulation that hurt American farmers[252]—a far cry from anything having to do with the military.[253]

This broad interpretation raises a nondelegation problem. It would mean that Congress had essentially given away its authority over trade policy to the executive branch, because the President would be free to impose any trade restriction on any import.[254] To borrow from Justice Cardozo: "If that conception shall prevail, anything that Congress may do within the limits of

249. *See* Petition for a Writ of Certiorari, *supra* note 222, at 26 n.3.

250. *See* 19 U.S.C. § 1862(d); *see also Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1351-52 (Katzmann, J., concurring dubitante) (describing this kind of broad interpretation of the statute).

251. *See* Petition for a Writ of Certiorari, *supra* note 222, at 26 n.3.

252. *See* Zumbrun & Ramkumar, *supra* note 2.

253. To be sure, Congress has directed the Department of Commerce to "further recognize the close relation of the economic welfare of the Nation to our national security," 19 U.S.C. § 1862(d), so the Department is fully justified in considering the economic impact on goods and services *pertaining to national defense*. But if it could consider the economic impact on *any good at all*, regardless of its connection to defense, then the statute would impermissibly allow the executive branch to impose any sort of trade remedy it wished on any conceivable import. *See Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1351-52 (Katzmann, J., concurring dubitante).

254. *See Am. Inst. for Int'l Steel*, 376 F. Supp. 3d at 1351-52 (Katzmann, J., concurring dubitante).

the commerce clause for the betterment of business may be done by the President .... This is delegation running riot."[255]

To be clear, the Trump Administration did not openly adopt this interpretation of section 232. Rather, the Department of Commerce grounded its conclusion that steel imports were "important to U.S. national security" in the defense-related criteria included in the statute.[256] That is certainly a stretch of the statute's language, particularly since the Administration's own Secretary of Defense reported that "the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production."[257] But the Department's interpretation of the statute does not run afoul of the nondelegation doctrine, because it would only encompass certain defense-related imports. In other words, the Department could not use the same interpretation it used in its steel report to find that peanut butter imports also threatened national security.

With that said, it is entirely conceivable that a future administration could adopt the economic-security interpretation. If that occurs, courts should first acknowledge that there is a constitutional problem. The federal government will almost certainly cite *Curtiss-Wright*, arguing that there is no delegation issue because the statute deals with foreign affairs.[258] But that, as we have seen, is wrong: The Constitution does not permit Congress to completely give away its power over trade, even if it can be considered a foreign affairs power. More broadly, courts should recognize the problem for the right reasons. Section 232 is not constitutionally suspect because it has broad language. If Congress kept the broad language but amended the statute to be applicable only to certain imports, then there would be no constitutional issue. The problem with section 232 is the power that its broad language gives the President—the power over the nation's trade policies.

With the problem clearly in sight, the solution is straightforward. There are several interpretations of section 232, and one of them is unconstitutional while the others are not. A court should therefore interpret the statute in the manner that preserves it.[259] This interpretive strategy would align with the series of Supreme Court cases that have narrowly interpreted statutes in order

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255. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

256. *See* THE EFFECT OF IMPORTS OF STEEL, *supra* note 237, at 2-3 (capitalization altered); *see also* 19 U.S.C. § 1862(d).

257. FEFER ET AL., *supra* note 232, at 7 (quoting Memorandum from James N. Mattis, Sec'y of Def., to Wilbur L. Ross Jr., Sec'y of Com. 1 (n.d.), https://perma.cc/N59V-RWNR).

258. *See* Harold Hongju Koh & John Choon Yoo, Perspective, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 728 & n.58 (1992).

259. *See, e.g.*, Manning, *supra* note 53, at 223-24.

to avoid nondelegation issues, rather than striking them down entirely.[260] The upshot would be that section 232 only applies to imports that implicate the military or defense policy in some way.[261] Threats to national security would mean genuine risks to the nation—not risks to the peanut industry's profits.

IV. Implications: Trade Policy, Foreign Affairs, and Presidential Power

As this Note has shown, the power over trade policy belongs to Congress, and Congress cannot transfer this power to the President. When a statute like section 232 can be understood as such a transfer, it raises a nondelegation issue and should be interpreted in a way that avoids a constitutional violation. In turn, this Note yields two practical implications: It provides a clear test for determining when a foreign affairs statute runs afoul of the nondelegation doctrine, and that test can constrain presidential power without sabotaging the administrative state.

A. A Nondelegation Test for Foreign Affairs Statutes

First, this Note has provided a clear and administrable method to determine when a foreign affairs statute runs afoul of the nondelegation doctrine. When faced with an expansive statute concerning trade, immigration, or warfare, courts should ask whether the statute can be understood to give away all of Congress's enumerated authority to "lay and

260. *See supra* notes 49-53 and accompanying text.

261. In their reply brief in support of a petition for certiorari in *American Institute for International Steel*, the steel importers argued that section 232 cannot be narrowly interpreted in order to escape a constitutional challenge. *See* Reply Brief in Support of Petition for a Writ of Certiorari at 2-3, Am. Inst. for Int'l Steel, Inc. v. United States, 141 S. Ct. 133 (2020) (mem.) (No. 19-1177). The plaintiffs contended that a narrow interpretation saving section 232 "would permit the Government to defend a narrow reading of a statute as constitutional in one case, and then later embrace an essentially limitless reading of the same statute while claiming that its later interpretation is insulated from constitutional review by the earlier decision." *Id.* at 3.

But this argument flips the doctrine of constitutional avoidance on its head. It says that since section 232 *could be interpreted* in an unconstitutional manner, the entire statutory provision should be struck down. This reasoning is out of step with a long list of modern nondelegation cases in which the Supreme Court has embraced narrow interpretations of vague statutes so as to avoid nondelegation issues. *See, e.g.*, Sunstein, *supra* note 20, at 357-59. As these cases demonstrate, a statute should be struck down under the nondelegation doctrine only if it *could not be interpreted* in a manner that was constitutional. *See id.* Since a nondelegation challenge to section 232 asks a court to strike down the provision, the challenge should only succeed if it is inescapably unconstitutional. The analysis above shows that this is not the case, since section 232 can be interpreted in a way that comports with the nondelegation doctrine.

collect . . . Duties," "[t]o regulate Commerce with foreign Nations," "[t]o establish an uniform Rule of Naturalization," or "[t]o declare War."[262] The easiest way to determine whether the statute has crossed this constitutional line is to ask the government to provide a limiting principle: What aspect of trade, immigration, or military policy is unavailable to the President under this statutory provision? Can the President use the statute to block peanut butter imports, ban peanut farmers from entering the country, or launch a unilateral military strike against a peanut-producing competitor nation?

A snack-themed search for a limiting principle would not be a novel approach for constitutional law. In *National Federation of Independent Business v. Sebelius*,[263] the Supreme Court considered the constitutionality of the Affordable Care Act's individual mandate by asking a hypothetical: If Congress had authority under the Commerce Clause to require people to buy health insurance, did it also have authority to require people to buy broccoli?[264] While the Justices disagreed on whether the market for health insurance was akin to the market for broccoli, all nine of them appeared to agree that Congress could not compel people to purchase broccoli—and that Congress could use its Commerce Clause authority to implement the individual mandate only if that same logic had a clear endpoint.[265] In other words, Congress's power under the Commerce Clause was broad but not unlimited, so the government needed to specify a limiting principle in defense of the individual mandate.

The same logic applies here: Congress's authority to enact foreign affairs statutes is broad but not unlimited, and courts should therefore require the government to articulate a limiting principle that shows that Congress has not completely transferred one of its enumerated powers to the President.[266] The only difference between the two frameworks is the relevant branch of government and the body of law being interpreted. The Commerce Clause inquiry asks, "If *Congress* can do *X* (for example, requiring people to buy health

262. U.S. CONST. art. 1, § 8, cls. 1, 3-4, 11.

263. 567 U.S. 519 (2012).

264. *See id.* at 557-58 (opinion of Roberts, C.J.); Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 69-70 (2013).

265. *See* Rosen & Schmidt, *supra* note 264, at 70 (noting how "[a]ll the justices took for granted that the Court had to provide a response to the broccoli hypothetical," and how "the *NFIB* Court assume[d] that it could uphold the individual mandate on Commerce Clause grounds only if a limiting principle could be found").

266. This Note is not the first source to recognize a possible link between approaches to the Commerce Clause and the nondelegation doctrine. *See* Petition for a Writ of Certiorari, *supra* note 222, at 27 ("The absence of boundaries [in section 232] is comparable to the absence of limits on the reach of the Commerce Clause that was fatal to the statute at issue in *Lopez*.").

insurance) under *the Commerce Clause,* what would stop it from doing *Y* (for example, requiring people to buy broccoli)?" The section 232 inquiry asks, "If *the President* can do *X* (for example, imposing tariffs on Brazilian steel manufacturers) under *this statute,* what would stop the President from doing *Y* (for example, blocking peanut butter imports)?" Both hypotheticals require the federal government to specify a clear limit on its exercise of power—to show what the government *cannot do.*

Under this kind of nondelegation framework, advocates will disagree over whether a particular statutory provision can be fairly read to include a limiting principle—just as they disagree over specific hypotheticals when it comes to the Commerce Clause. Courts can resolve these disagreements through statutory interpretation: When litigants spar over whether a vague provision allows the President to block peanut butter imports, judges can look to the text and other interpretive tools in order to determine who is right. To prevail, the government must show that the statute does not transfer an enumerated power to the executive branch—that there are goods it cannot block, services it cannot tax, immigration rules it cannot write, or wars it cannot start. If there is a "fairly possible" way of reading the statute that would limit executive power, then courts should embrace this reading as part of the canon of constitutional avoidance.[267] But if the statute cannot be read to include a limiting principle, then it should be struck down, because it runs afoul of the nondelegation doctrine.

Some may wonder whether Congress would ever enact a statute that could be understood as giving away one of its enumerated powers over foreign affairs. Recent history reveals a pointed answer.[268] In addition to section 232, President Trump imposed tariffs and sanctions using the International Emergency Economic Powers Act, which authorizes the President to tax or regulate imports in response to "any unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States."[269] He barred immigrants from Muslim-majority nations using the Immigration and Nationality Act, which permits the President to "suspend the entry of all aliens or any class of aliens," upon a finding that their "entry . . . would be detrimental

267. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 563 (opinion of Roberts, C.J.) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

268. For a list of statutory provisions that make sweeping foreign affairs delegations and may be subject to nondelegation claims, see Harlan Grant Cohen, *The National Security Delegation Conundrum*, JUST SEC. (July 17, 2019), https://perma.cc/U3SX-Z6Z6.

269. International Emergency Economic Powers Act, Pub. L. No. 95-223, § 202(a), 91 Stat. 1626, 1626 (1977) (codified at 50 U.S.C. § 1701(a)); CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 10, 20 (rev. 2020), https://perma.cc/6JEE-W7EM.

to the interests of the United States."[270] He launched military strikes against Syria—and hinted that he might do the same against Iran—by invoking the 2001 Authorization for Use of Military Force.[271] That law empowers the President "to use all necessary and appropriate force" against those responsible for the September 11, 2001 attacks "in order to prevent any future acts of international terrorism against the United States."[272]

Litigants can raise plausible nondelegation claims against these kinds of statutes. Courts should not wave these claims away on the basis of a foreign affairs exception to the nondelegation doctrine. Nor should courts anchor their analysis in nebulous phrases like the "intelligible principle" requirement and the "broad discretion" permitted in foreign affairs. The question is instead whether these statutes have given away one of Congress's enumerated powers, and the answer depends on whether the government can provide a plausible limiting principle.

B. Solving the "National Security Delegation Conundrum"

The second implication concerns legal strategy. Many lawyers and commentators rightfully worry about the expansive foreign affairs statutes cited above.[273] But they also worry that the tool that might restrain these statutes—the nondelegation doctrine—could in turn endanger the administrative state.[274] Harlan Cohen calls this "the national security delegation conundrum" and writes that Justice Gorsuch's efforts to revive the nondelegation doctrine "set those favoring a regulatory state and those worried about a national security one on a collision course. A win for environmental regulation would be a loss for constraining emergency powers and vice versa."[275]

This Note's analysis suggests a way to resolve that conundrum. To start, this Note shows that there is no constitutional problem when Congress delegates some of its authority to regulate in a specific area. Such regulations deal with particular pollutants or particular businesses or particular areas of the country;[276] they cannot be understood to confer all of Congress's authority over interstate commerce to the executive branch. For instance, the Clean Air

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270. Immigration and Nationality Act, ch. 477, § 212(e), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(f)); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018).

271. *See* Cohen, *supra* note 268.

272. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified as amended at 50 U.S.C. § 1541 note).

273. *See, e.g.*, Cohen, *supra* note 268.

274. *See id.*

275. *Id.*

276. *See supra* notes 74-77 and accompanying text.

Act is perfectly constitutional—even though it broadly empowers the Environmental Protection Agency to set air-quality standards that are "requisite to protect the public health"[277]—because that expansive statutory language cannot possibly cover any aspect of interstate commerce other than air quality. The limiting principle is clear: Congress did not transfer its power to regulate interstate commerce when it enacted the Clean Air Act, because it did not give the President any of Congress's powers to regulate in domains like water quality or food safety or health care or interstate crime.

Accordingly, this Note's interpretation of the nondelegation doctrine would pose no risk to the administrative state, since the statutes that make up administrative law concern specific subjects and specific regulatory functions. From a functionalist standpoint, this Note's approach is far better than Justice Gorsuch's alternative, which would only allow domestic delegations that entrusted the executive branch to "fill up the details" in a statutory scheme or take action based on factfinding.[278] As the *Gundy* plurality noted, Justice Gorsuch's paradigm would mean that "most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[279] This Note offers a method of reviving the nondelegation doctrine in a way that would not threaten modern governance.

At the same time, this method would not be toothless. Rather, it would guard against the most extreme transfers of power to the President, which have often come in the foreign affairs realm. Once again, consider the statutes that President Trump has used to wage trade wars, ban immigration from Muslim-majority countries, and launch unilateral military strikes.[280] These statutes sweep far wider than regulatory schemes like the Clean Air Act. They do not focus on particular subjects *within* trade, immigration, or military policy, as they would if they concerned only certain imports or countries. They instead implicate entire enumerated powers—the authority to levy tariffs, regulate foreign commerce, establish a rule for naturalization, or declare war—and they might be interpreted in a way that completely gives those powers to the President. What is to stop a President from blocking all imports, stopping all immigration, or launching a military strike against any country on earth? The federal government should have to answer these kinds

277. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting 42 U.S.C. § 7409(b)(1)).

278. *See* Gundy v. United States, 139 S. Ct. 2116, 2136-37, 2145 (2019) (Gorsuch, J., dissenting).

279. *Id.* at 2130 (plurality opinion).

280. *See supra* notes 268-72 and accompanying text.

of hypotheticals, thereby identifying the clear limits on executive authority that these statutes must have in order to pass constitutional muster.[281]

Conclusion

When President Trump announced that he was imposing tariffs on Argentina and Brazil for currency manipulation that hurt American farmers, he seemed to behave as if the President could unilaterally make trade policy. But that power belongs to Congress, and Congress may not completely transfer its authority. Trade policy was enormously important to the Framers, since it provided the revenue necessary to run a new nation, so they entrusted it to the most representative branch of government. Early Congresses understood that they could delegate trade power broadly but could never give it up entirely. And the Supreme Court has consistently recognized this understanding, holding that Congress cannot abandon one of its enumerated powers even though it can legislate in broad terms. Taken together, constitutional text, history, practice, and precedent all show that a statute cannot be understood to give the President complete authority over trade policy. Accordingly, a statute like section 232 raises a nondelegation problem and should be interpreted in a way that avoids violating the Constitution.

This Note accordingly offers a clear test for how to resolve nondelegation challenges against foreign affairs statutes. Just like in Commerce Clause inquiries, courts must ask whether a particular interpretation of a statute has a limiting principle. The government must show that a particular statute does not confer an entire enumerated power to the President by demonstrating that the statute limits presidential power in some way. In this way, the nondelegation doctrine could keep presidential power in check without implying that "most of Government is unconstitutional."[282] Litigants could challenge sweeping foreign affairs statutes like the Trade Expansion Act without worrying that they were inadvertently endangering domestic statutes like the Clean Air Act. That approach provides a more sensible legal landscape than the one that exists today. There should not be a tradeoff between protecting the planet and protecting the Constitution.

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281. As a further benefit, this Note's view of the nondelegation doctrine would give clear guidance to future Congresses that seek to enact broad foreign affairs statutes. The easiest way for Congress to write such statutes in a constitutionally permissible way is to focus on particular areas within trade, immigration, or military policy. For instance, a statute that allowed the President to block all imports would be constitutionally suspect, but a statute directed solely at a specific type of import would be perfectly constitutional.

282. *Gundy*, 139 S. Ct. at 2130 (plurality opinion).