NOTES

NONDELEGATION'S UNPRINCIPLED FOREIGN AFFAIRS EXCEPTIONALISM

In their efforts to restrain the administrative state, the Supreme Court's conservative Justices face a quandary: The source of administrative agencies' power — statutory delegations from Congress — is also responsible for much of the presidential authority over foreign affairs and national security that these Justices hold in high regard.[1] Consider two delegations. One empowers the Environmental Protection Agency to set air quality standards at a level that is "requisite to protect the public health."[2] Another authorizes the President to impose tariffs on imports that he determines "threaten to impair the national security."[3] These delegations aren't easily distinguished by the amount of discretion they confer on the executive branch[4] — ostensibly the main factor the Court considers in assessing a delegation's constitutionality under the nondelegation doctrine.[5] Holding the first delegation unconstitutional would thus appear to require the same of the second. Undermining administrative power undermines presidential power — likely a bitter pill for the Court's conservative Justices to swallow.

Eighty-five years ago, in *United States v. Curtiss-Wright Export Corp.*,[6] another conservative Court faced a similar dilemma. Before the Court was a congressional resolution authorizing the President to declare an embargo on the sale of arms to Bolivia or Paraguay in a war between the countries if he found that doing so "may contribute to the reestablishment of peace."[7] After the President made the required finding, a corporation and its officers indicted for violating the embargo challenged the resolution as an unconstitutional delegation of legislative

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[1] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2408 (2018) (upholding President Trump's travel ban as "fall[ing] well within [a] comprehensive delegation" of authority to exclude foreign nationals).

[2] 42 U.S.C. § 7409(b)(1), *upheld by* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486 (2001). Justice Thomas, the only Justice in today's conservative majority then on the Court, concurred in the decision upholding this delegation but expressed interest in reviving the nondelegation doctrine were the opportunity to arise. *See Whitman*, 531 U.S. at 486–87 (Thomas, J., concurring).

[3] 19 U.S.C. § 1862(c)(1)(A), *upheld by* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558–59 (1976). President Trump used this authority in 2018 to impose tariffs on aluminum and steel imports. *See* Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 8, 2018); Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018).

[4] *Cf.* Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1352 (Ct. Int'l Trade 2019) (Katzmann, J., dubitante) ("If the delegation permitted by [19 U.S.C. § 1862] . . . does not constitute excessive delegation in violation of the Constitution, what would?").

[5] *See* Mistretta v. United States, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting).

[6] 299 U.S. 304 (1936).

[7] Joint Resolution of May 28, 1934, ch. 365, § 1, 48 Stat. 811, 811.

power.[8] Just a year before *Curtiss-Wright*, in 1935, the Court had struck down delegations as unconstitutional for the first time in its history, holding that the New Deal legislation at issue lacked sufficient standards to guide executive branch regulation of the domestic economy.[9] One thus might have expected the Court to resolve *Curtiss-Wright* according to the terms of its newly enforced doctrine.[10] Instead, the Court treated its 1935 decisions as all but irrelevant to the delegation before it in *Curtiss-Wright* because the prior cases "related solely to internal affairs."[11] Congress can delegate more broadly in the foreign affairs realm, the Court explained, because of the President's status "as the sole organ of the federal government in the field of international relations."[12]

The Court's current conservative majority, poised to revive a nondelegation doctrine that has lain dormant since 1935,[13] appears similarly inclined to embrace foreign affairs exceptionalism as the solution to its quandary.[14] Today's exceptionalism emerges in the way that those Justices who advocate reviving the doctrine and the scholars on whose work they build justify the delegations undertaken by early Congresses. Recognizing this early legislative practice to be in tension with nondelegation's purported originalist bona fides, revival proponents defend some of it as permissible because of the foreign affairs subject matter.[15] Yet unlike the *Curtiss-Wright* Court, which justified its foreign affairs exceptionalism on nontextual and functional grounds, today's proponents invoke formalist justifications. In recent opinions, Justices Thomas and Gorsuch have argued that Congress may confer a greater degree of discretion on the President in foreign affairs–related statutes not because foreign affairs issues lie wholly beyond constitutional strictures, as *Curtiss-Wright* suggested, but because the delegated authority overlaps with the President's foreign affairs powers under Article II, including an executive power to oversee foreign relations.[16]

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[8] *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 99 (1999).

[9] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935).

[10] *See* Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 6–8 (1973).

[11] *Curtiss-Wright*, 299 U.S. at 315.

[12] *Id.* at 320.

[13] *See* Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

[14] *See* Harlan Grant Cohen, *The National Security Delegation Conundrum*, JUST SEC. (July 17, 2019), https://www.justsecurity.org/64946/the-national-security-delegation-conundrum [https://perma.cc/DCY7-AJ9G].

[15] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 79–80 (2015) (Thomas, J., concurring in the judgment).

[16] *See Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting); *Ass'n of Am. R.Rs.*, 575 U.S. at 80 & n.5 (Thomas, J., concurring in the judgment).

This Note argues that the nondelegation advocates' efforts are unprincipled. Their theory cannot sustain their exceptionalism, as the Constitution offers no formal basis for the categorical treatment they seek to advance. Many foreign affairs–related delegations are made pursuant to powers that the Constitution vests exclusively in Congress such that the authority delegated to the President doesn't necessarily overlap with Article II powers. For instance, when it comes to trade, the President has no independent power that would permit broader delegations in the area solely because of the subject matter. Congressional debate over early foreign affairs–related delegations supports this conclusion: the constitutionality of these delegations was assessed like that of all other delegations — not in terms of subject matter, but by reference to the amount of discretion conferred. Subject matter reasoning arrived to the nondelegation doctrine much later, a product of legal and historical developments in the late nineteenth and early twentieth centuries that culminated in *Curtiss-Wright*. The absence of a principled formalist defense of *Curtiss-Wright*'s result suggests today's foreign affairs exceptionalism is, like the New Deal Court's, best understood by the results it permits — both preservation of the President's authority over foreign affairs and a campaign against the administrative state.

This Note proceeds in three parts. Part I introduces the formalist theory behind reviving the nondelegation doctrine, including its incorporation of foreign affairs exceptionalism. Part II examines historical practice and doctrine regarding foreign affairs–related delegations, concluding that today's exceptionalism fails to justify *Curtiss-Wright*'s distinctive treatment of the foreign affairs realm in formalist terms. Finally, Part III explains how a revived nondelegation doctrine might weaken the administrative state without weakening the President.

I. Reviving the Nondelegation Doctrine

Notwithstanding its purported commitment to the nondelegation doctrine, the Supreme Court has long permitted Congress to enact broad delegations of statutory authority. But in recent years, formalists on the bench and in the academy have sought to revive the doctrine in the service of a strict separation of powers. Their theories for a nondelegation revival incorporate foreign affairs exceptionalism by suggesting that foreign affairs–related and domestic delegations should be treated differently because of their subject matters. Whether their exceptionalism is principled depends on whether the Constitution provides a formal basis for the categorical subject matter treatment that they embrace.

The nondelegation doctrine rests on the premise that the Constitution's vesting of "[a]ll legislative Powers" in Congress also forbids the delegation of those powers.[17] The challenge in enforcing the doctrine is line-drawing. When policing delegations to the executive branch, whether to administrative agencies or to the President directly, one must determine where executive power ends and legislative power begins. The Court has historically considered governmental efficacy when drawing that line, qualifying the scope of the bar on delegation by reference to constitutional policy and practice.[18] For instance, in *Gundy v. United States*,[19] the Court's most recent nondelegation decision, Justice Kagan wrote for a plurality that because "the Constitution does not 'deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s],'" Congress "may confer substantial discretion on executive agencies to implement and enforce the laws."[20] According to the test that the Court has followed for almost a century, a statutory delegation is permissible if it includes "an intelligible principle" to guide the executive branch.[21] Only in two cases, both decided in 1935, has the Court invalidated a delegation under this standard.[22]

Despite the Court's long tradition of sustaining delegations, interest in reviving a rigorous nondelegation doctrine has surged in recent years, particularly with the appointment of new conservative Justices. Revival proposals are framed in formalist terms, centered on the need to enforce a strict separation of powers.[23] Justice Gorsuch has offered the clearest

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[17] U.S. CONST. art. I, § 1; *see, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2104–05 (2004). Some former Justices contested this premise, but all currently on the Court appear to accept it. *Compare Whitman*, 531 U.S. at 488 (Stevens, J., concurring in part and concurring in the judgment) (suggesting "that agency rulemaking authority is 'legislative power'"), *with, e.g.*, *Gundy*, 139 S. Ct. at 2123 (plurality opinion), *and id.* at 2135–36 (Gorsuch, J., dissenting).

[18] *See* Merrill, *supra* note 17, at 2105.

[19] 139 S. Ct. 2116.

[20] *Id.* at 2123 (plurality opinion) (alterations in original) (quoting Yakus v. United States, 321 U.S. 414, 425 (1944)).

[21] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[22] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935); *see also Whitman*, 531 U.S. at 474.

[23] *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336–43 (2002). Challengers of nondelegation revival efforts decline to cede the formalist ground, arguing that broad delegations are consistent with the separation of powers. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 4), https://ssrn.com/abstract=3512154 [https://perma.cc/EET8-B4VY] (last revised Dec. 9, 2020) ("As an originalist matter, the Constitution contained no legalized prohibition on delegations of legislative power . . . ."); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) ("A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power."). If the challengers are right, one might question the extent to which nondelegation's purportedly formalist proponents are actually driven by functional and consequentialist considerations. *See, e.g.*, Posner & Vermeule, *supra*, at 1743–54. But the validity of their underlying formalism is beyond the scope of this Note, which instead

explanation from the bench of the theory behind such a formalist revival — one that at least four other Justices may support.[24] Dissenting in *Gundy*, he argued that the Framers separated powers in the Constitution to protect individual liberty and that they expected the judiciary to enforce the separation.[25] Delegations of legislative power undermine this design by uniting executive and legislative powers in a single branch.[26] Whereas delegations before the 1930s were "modest and usually easily upheld," he explained, growth in the federal government since the New Deal had led to delegations of far broader authority.[27] The "intelligible principle" test used to assess such delegations "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional."[28]

As to the issue of line-drawing, Justice Gorsuch introduced a framework built around three considerations. First, while Congress "may authorize another branch to 'fill up the details'" in its legislation, it must "make[] the policy decisions when regulating private conduct."[29] In other words, statutes delegating the authority to make rules in a specified area must circumscribe the delegated authority with guidance more specific than the Court has traditionally held sufficient.[30] "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."[31] This would permit delegations that take the form of contingent legislation — statutes the operation of which is conditioned on a finding made by the executive branch — on the theory that such factfinding is distinct from

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assesses their foreign affairs exceptionalism on their own formal terms. *See infra* section II.C, pp. 1152–58.

[24] *See Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases."). Justice Barrett's position on the current revival efforts is less clear, though one might speculate based on her judicial philosophy that she would be supportive. *See* Jody Freeman, *What Amy Coney Barrett's Confirmation Will Mean for Joe Biden's Climate Plan*, VOX (Oct. 26, 2020), https://www.vox.com/energy-and-environment/21526207/amy-coney-barrett-senate-vote-environmental-law-biden-climate-plan [https://perma.cc/9DBW-Y888]. In academic writing, she has recognized the "broad leeway" the Court's nondelegation doctrine has traditionally afforded Congress. *See* Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 317 (2014).

[25] *Gundy*, 139 S. Ct. at 2133–35 (Gorsuch, J., dissenting).

[26] *Id.* at 2135.

[27] *Id.* at 2137.

[28] *Id.* at 2140.

[29] *Id.* at 2136.

[30] *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-19, at 979 (3d ed. 2000).

[31] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

lawmaking.[32] Lastly, "Congress may assign the executive and judicial branches certain non-legislative responsibilities."[33] It is here that Justice Gorsuch cited foreign affairs–related delegations as potentially permissible even under a revived nondelegation doctrine.[34]

Justice Gorsuch is not alone among revival advocates in suggesting that the nondelegation doctrine applies with less force to delegations related to foreign affairs. Proponents generally make this claim in the face of legislative and judicial precedent seemingly permissive of broad delegations.[35] Forced to either argue such precedent isn't worthy of respect because it violates the Constitution or rationalize it as somehow consistent with their theories of nondelegation,[36] proponents generally opt for the latter to excuse delegations related to foreign affairs. Because foreign affairs–related delegations have often taken the form of contingent legislation,[37] some are defended along the lines of the second part of Justice Gorsuch's *Gundy* framework.[38] But, consistent with the third portion of that framework, other foreign affairs–related delegations are justified on the basis of their subject matter. Professor David Schoenbrod, a nondelegation proponent on whose work both Justices Gorsuch and Thomas have relied,[39] defends a number of decisions upholding delegations of trade-related and wartime authority on this ground.[40]

This subject matter approach to nondelegation exhibits what Professor Curtis Bradley has termed "foreign affairs exceptionalism" — "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers."[41] Exceptionalism in separation of powers cases typically emerges through functionalist reasoning, with the Court citing factors such as expertise, secrecy, flexibility, and speed as categorically favoring the Executive in the foreign affairs realm.[42] *Curtiss-Wright*

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[32] 1 TRIBE, *supra* note 30, § 5-19, at 979; Aditya Bamzai, *The Supreme Court, 2018 Term — Comment: Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 182–85 (2019).

[33] *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

[34] *Id.*

[35] *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 79–80, 80 n.5 (2015) (Thomas, J., concurring in the judgment); Lawson, *supra* note 23, at 400–02; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260–65 (1985); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 782–86, 794–95 (2019).

[36] *See* Schoenbrod, *supra* note 35, at 1227.

[37] *See infra* section II.A, pp. 1140–46.

[38] *See Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting); *Ass'n of Am. R.Rs.*, 575 U.S. at 81 (Thomas, J., concurring in the judgment).

[39] *See Gundy*, 139 S. Ct. at 2137 n.43 (Gorsuch, J., dissenting); *Ass'n of Am. R.Rs.*, 575 U.S. at 79 (Thomas, J., concurring in the judgment).

[40] *See* Schoenbrod, *supra* note 35, at 1260–65.

[41] Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999).

[42] *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 14–15 (2015); *see also* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1907–08 (2015).

is the paradigmatic example.[43] But today's revival proponents incorporate a sharp divide between foreign and domestic affairs into their formalist theory. While their discussions of foreign affairs–related delegations have been limited, what Justices Gorsuch and Thomas have offered so far suggests a categorical subject matter approach to nondelegation under which a delegation receives diminished scrutiny solely by virtue of its connection to foreign affairs.[44]

Such foreign affairs exceptionalism is principled in formalist terms only if the Constitution itself affords distinctive treatment to foreign affairs–related delegations.[45] *Curtiss-Wright* cannot make the case for a formalist revival because it rested on functionalist and nontextual reasoning.[46] Today's advocates rely on Article II. Justice Gorsuch has argued that delegations of foreign affairs–related authority do not violate the separation of powers because the President has independent authority over foreign affairs.[47] Justice Thomas has made the related claim that, in light of the President's foreign affairs authority, her exercise of discretion pursuant to a foreign affairs–related statute "arguably [does] not involve an exercise of core legislative power."[48]

These arguments are assessed in greater detail below.[49] For now, it is worth noting that they justify exceptionalism only to the extent that relevant constitutional lines correspond with a categorical subject matter divide. Structural reasoning may support broader delegation in a statute that implicates, say, the President's commander-in-chief authority.[50] But it does not necessarily follow that the Constitution permits broader delegations in all statutes related to foreign affairs. Nondelegation proponents bear the burden of justifying their exceptionalism, particularly given the strong tendency of functional considerations to drive purportedly formalist constitutional interpretation in the Court's foreign affairs decisions.[51] *Zivotofsky v. Kerry*[52] — the Court's most important separation of powers decision on foreign affairs in the past decade, concerning which political branch holds the power to recognize foreign

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[43] *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

[44] *See Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting); *Ass'n of Am. R.Rs.*, 575 U.S. at 80 (Thomas, J., concurring in the judgment).

[45] *See* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism,"* 128 HARV. L. REV. F. 294, 295 (2015).

[46] *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 238–39 (2001); 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, 346 (2001).

[47] *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

[48] *Ass'n of Am. R.Rs.*, 575 U.S. at 80 (Thomas, J., concurring in the judgment).

[49] *See infra* section II.C, pp. 1152–58.

[50] *See, e.g.*, Loving v. United States, 517 U.S. 748, 772–73 (1996).

[51] *See* Bradley, *supra* note 45, at 296.

[52] 576 U.S. 1 (2015).

sovereigns — is a clear example of this tendency. While the *Zivotofsky* Court centered its analysis around text and structure, its holding in favor of the President appeared to be most influenced by "'functional considerations' — principally the Court's perception that the Nation 'must speak with one voice,'" as Justice Scalia noted in dissent.[53] Just as functional arguments might be strong in the case of the recognition power, so they might also be in the context of nondelegation. But insofar as nondelegation's proponents argue for revival of the doctrine on formal grounds, a principled theory requires that their formalism be applied across the board — to domestic and foreign affairs–related delegations alike.

II. FOREIGN AFFAIRS EXCEPTIONALISM

An examination of legislative and judicial precedent reveals that the foreign affairs exceptionalism of today's nondelegation proponents is unprincipled. Congress has made and the Supreme Court has upheld delegations on foreign affairs since the Founding. But for at least the first century of this practice, the constitutionality of such delegations was neither debated nor resolved in subject matter terms. Foreign affairs–related delegations were assessed just like all other delegations — by reference to the amount of discretion conferred. Subject matter reasoning wasn't a factor until *Curtiss-Wright*, in which the Court held on functional and nontextual grounds that a nondelegation doctrine it had invigorated just a year prior did not apply to foreign affairs. Today's revival advocates now aim to justify *Curtiss-Wright*'s result in formalist terms, but their theory fails to support their exceptionalism.

In reaching these conclusions based in part on early legislative practice, this Note does not purport to advance conversation about the Constitution's original meaning on the issue of delegation.[54] Nor does it aim to shed new light on disagreement among originalists over the extent to which post-ratification practice constitutes evidence of original meaning.[55] It simply seeks to show how, in attempting to "square the statutes with [their] theory,"[56] nondelegation proponents sidestep the contemporary understanding of the delegations they cite. Absent evidence the delegations were assessed in subject matter terms when enacted,

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[53] *Id.* at 80 (Scalia, J., dissenting) (quoting *id.* at 14 (majority opinion)); *see also* Jack Goldsmith, *The Supreme Court, 2014 Term — Comment:* Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 123 (2015).

[54] *Compare, e.g.*, Mortenson & Bagley, *supra* note 23, *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. (forthcoming 2021), https://ssrn.com/abstract=3559867 [https://perma.cc/NL4H-E3WG].

[55] *Compare, e.g.*, Lawson, *supra* note 23, at 398 (arguing that "statutes of early Congresses are at best weak evidence of original meaning"), *with* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (suggesting historical practice can help settle the Constitution's meaning).

[56] Posner & Vermeule, *supra* note 23, at 1737 n.61 (2002) (describing the efforts of "[n]ondelegation proponents [to] chip away at the early statutes").

they can hardly have settled constitutional meaning along foreign/domestic lines. This is particularly true to the extent that one credits research suggesting an extensive early practice of delegations in domestic areas as well.[57]

This Part proceeds in three sections. The first considers early legislative practice. The second analyzes the doctrine and history leading up to *Curtiss-Wright*. The third responds to the Article II–centered arguments that formalists raise in defense of *Curtiss-Wright*'s holding.

A. Early Legislative Practice

Beginning early in U.S. constitutional history, Congress enacted statutes that delegated authority to the President in the area of foreign affairs. These statutes generally took the form of contingent legislation and very often involved trade, which was expected at the Founding to constitute much of the country's foreign relations.[58] Acting pursuant to its Article I power "[t]o regulate Commerce with foreign Nations,"[59] Congress authorized the President to lift or impose suspensions of trade upon the making of certain findings. Many of these delegations encountered no serious constitutional challenge. On the occasions when there was such a challenge, congressional debate focused on the amount of discretion conferred — whether the factfinding required by a statute crossed the line into policymaking. No one suggested the delegations were permissible solely by virtue of their foreign affairs subject matter.

The country's first delegations that arguably implicated foreign affairs were made by the First Congress, in statutes concerning relations with tribal nations.[60] Among Congress's powers in Article I, Section 8 is "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[61] Responding to hostilities between Native Americans and western settlers in 1789 and 1790, Congress enacted statutes under this power that authorized the President to "call into service . . . such part of the militia of the

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[57] *See, e.g.*, Mortenson & Bagley, *supra* note 23 (manuscript at 76–119); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696860 [https://perma.cc/3ASG-5P2W] (last revised Nov. 15, 2020) [hereinafter Parrillo, *A Critical Assessment*]; *see also* Nicholas R. Parrillo, Supplemental Paper to Parrillo, *A Critical Assessment*, *supra*, at 10–24, https://ssrn.com/abstract=3696902 [https://perma.cc/T2V6-32KR] (last revised Sept. 21, 2020) [hereinafter Parrillo, Supplemental Paper].

[58] Lofgren, *supra* note 10, at 30; *see also* Field v. Clark, 143 U.S. 649, 681–92 (1892).

[59] U.S. CONST. art. I, § 8.

[60] The divide between foreign and domestic affairs is often unclear. *See infra* p. 1160. In this Part, the Note focuses on delegations that seem to fall most clearly on the foreign side of the line, particularly those that proponents of a revived nondelegation doctrine seek to justify on a subject matter basis. *See, e.g.*, Lawson, *supra* note 23, at 401–02 (classifying the First Congress statute on Indian commerce as "plainly" concerning foreign affairs); Gordon, *supra* note 35, at 794–95 (same).

[61] U.S. CONST. art. I, § 8.

states . . . as he may judge necessary for the purpose" of "protecting the inhabitants of the frontiers."[62] Later in 1790, under its power "to regulate Commerce . . . with the Indian Tribes,"[63] Congress passed a statute that forbade any person from engaging in trade with tribal nations absent a license.[64] Beyond that general bar, it delegated seemingly complete authority over Indian commerce to the Executive, allowing licensees to be governed "by such rules and regulations as the President shall prescribe."[65]

The first delegation involving trade with nontribal nations was in 1794, after Congress imposed an embargo on the departure of ships bound for foreign ports as part of a package of laws intended to avoid the country's entanglement in a European war.[66] Congress initially managed the embargo's timing itself, putting it in place in March and extending it for another month in April.[67] From the start, however, it authorized the President to issue instructions to revenue officers on how to execute the embargo.[68] And in May it extended to the President additional authority, allowing him to exempt ships bound for "any port beyond the Cape of Good Hope" from the embargo as he saw fit.[69] Then, in June, after the initial extension of the embargo had expired and the congressional session was about to end, Congress relinquished control over even the embargo's timing to the President by empowering him to renew it on his own during Congress's recess.[70] The delegation did little to channel the President's discretion, authorizing him to lay the embargo "whenever, in his opinion, the public safety shall so require" and "under such regulations as the circumstances of the case may require" and to end it "whenever he shall think proper."[71] Despite the delegation's

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[62] Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96; Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121; *see also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 81–82 (1997) [hereinafter CURRIE I]; Mortenson & Bagley, *supra* note 23 (manuscript at 96 & n.350). Congress later conferred additional discretion on the President over these hostilities in a statute providing for the raising of three regiments. *See* Act of Mar. 5, 1792, ch. 9, §§ 12–13, 1 Stat. 241, 243 (permitting the President to raise fewer troops than authorized "in case events shall in his judgment, render his so doing consistent with the public safety," *id.* § 12, and to "call into service . . . for such periods as he may deem requisite[] such number of cavalry as, in his judgment, may be necessary for the protection of the frontiers," *id.* § 13). No objection to these statutes on delegation grounds is recorded as having been made. CURRIE I, *supra*, at 163 n.240.

[63] U.S. CONST. art. I, § 8.

[64] Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137.

[65] *Id.*; *see also* CURRIE I, *supra* note 62, at 86; Mortenson & Bagley, *supra* note 23 (manuscript at 85–88); Lawson, *supra* note 23, at 401–02.

[66] CURRIE I, *supra* note 62, at 172, 183–86.

[67] *See* Joint Resolution of Mar. 26, 1794, 1 Stat. 400, 400; Joint Resolution of Apr. 18, 1794, 1 Stat. 401, 401.

[68] *See* Joint Resolution of Mar. 26, 1794, 1 Stat. 400, 400.

[69] Joint Resolution of May 7, 1794, 1 Stat. 401, 401; *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 322 (1936) (describing this as a delegation of "*unqualified* power").

[70] Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372; *see also* Louis Fisher, *Delegating Power to the President*, 19 J. PUB. L. 251, 253 (1970).

[71] Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372.

breadth, no congressman is recorded as having raised a constitutional challenge.[72]

Congress enacted a similar set of trade-related delegations in the late 1790s during the Quasi-War with France, a naval conflict involving French attacks upon American commercial ships.[73] In suspending trade with France in 1798, Congress again took account of its upcoming recess, authorizing the President to lift the suspension before its next session if he found France had accepted U.S. neutrality and "refrain[ed] from . . . aggressions, depredations and hostilities."[74] One congressman explained that delegating this authority to the President ensured the country could respond to developments abroad "without waiting for an extraordinary call of Congress."[75] Congress renewed the delegation over the next two years, though it loosened the statutory standard, permitting the President, whenever he "shall deem it expedient" and in the country's interest, to lift the suspension with regard to French ports or territories where "commercial intercourse may safely be renewed."[76] President John Adams twice relied on this delegation to open trade with ports in the French colony of Saint-Domingue (now Haiti).[77] Unlike earlier delegations, this authority was not limited to Congress's summer recess.[78]

The suspension of trade with France was just one of several delegations in a package of legislation related to the Quasi-War.[79] The delegation that prompted the strongest objection was a proposal authorizing the President to raise a provisional army.[80] During congressional debate

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[72] CURRIE I, *supra* note 62, at 186. A year later, Congress enacted a similar delegation before the end of a session, authorizing the President "to permit the exportation of arms, cannon and military stores" in spite of a law prohibiting their export. Act of Mar. 3, 1795, ch. 53, 1 Stat. 444, 444; *see* CURRIE I, *supra* note 62, at 186 n.96.

[73] *See* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 595–96 (2019).

[74] Act of June 13, 1798, ch. 53, § 5, 1 Stat. 565, 566.

[75] 9 ANNALS OF CONG. 2757 (1799).

[76] Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613, 615; Act of Feb. 27, 1800, ch. 10, § 6, 2 Stat. 7, 9–10.

[77] Proclamation of June 26, 1799, *reprinted in* 9 THE WORKS OF JOHN ADAMS 176, 176 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854); Proclamation of May 9, 1800, *reprinted in* 9 THE WORKS OF JOHN ADAMS, *supra*, at 177, 178.

[78] *See* Fisher, *supra* note 70, at 255.

[79] *See* CURRIE I, *supra* note 62, at 244.

[80] *Id.* at 245. Congress had previously permitted the President to forbear from raising troops it authorized. *Id.* at 246; *see also supra* note 62. It had also delegated to him authority to call forth the militia, contingent on conditions that mirror the cases specified in Article I, Section 8 — the need to execute the laws, suppress insurrections, and repel invasions. *See* Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264, 264; Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424; *see also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) ("[T]he authority to decide whether the exigency has arisen[] belongs exclusively to the President."). *See generally* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 159–63 (2004). The 1792 militia act delegation was criticized as too broad, *see* CURRIE I, *supra* note 62, at 160–62, but it did not face as pointed a nondelegation challenge as the one made to the 1798 provisional army delegation, *see* Mortenson & Bagley, *supra* note 23 (manuscript at 116 n.40); *see also* CURRIE I, *supra* note 62, at 246.

over this delegation, its subject matter was raised as constitutionally relevant — but as an argument against the delegation, not for it.[81] An initial version of the bill required only that the President find such an army to be necessary for public safety before exercising delegated authority to enlist up to 20,000 men.[82] This specified contingency was narrowed after much protest to "the event of a declaration of war against the United States, or of actual invasion of their territory by a foreign Power, or of imminent danger of such invasion."[83] Despite the narrowing, opponents argued that the discretion conferred remained too broad because the power involved — "[t]o raise and support Armies"[84] — was "one of the most important powers that could be vested in Congress," akin to its taxing power or the power to declare war.[85] In other words, instead of concluding that the foreign affairs subject matter of the statute allowed more room for delegation, opponents argued that the nature of the congressional power at issue made delegation less permissible.[86]

The biggest debate over foreign affairs–related delegations before the Supreme Court's first case involving a nondelegation challenge came amid backlash to an embargo enacted during the Jefferson Administration. In response to British interference with U.S. merchant ships and sailors, Congress passed a bill in April 1806 forbidding the importation of certain goods from Britain and its colonies.[87] It suspended the bill in December out of respect for treaty negotiations that U.S. diplomats were then pursuing with Britain, but only through July 1807, authorizing the President to suspend it again afterward "if in his judgment the public interest should require it."[88] Instead, after a British vessel fired on a U.S. warship off the coast of Virginia in June 1807, the President requested that Congress impose a full embargo.[89] Congress heeded that call in December, imposing an embargo on the departure of all ships from U.S. ports.[90] The embargo soon gave rise to what Professor Jerry Mashaw has described as "regulatory authority of astonishing breadth and administrative discretion of breathtaking

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81 *See* Mortenson & Bagley, *supra* note 23 (manuscript at 115).

82 CURRIE I, *supra* note 62, at 245.

83 8 ANNALS OF CONG. 1631 (1798).

84 U.S. CONST. art. I, § 8.

85 8 ANNALS OF CONG. 1655–56 (1798) (statement of Rep. Gallatin).

86 CURRIE I, *supra* note 62, at 247. In 1794, the House rejected a delegation to the President authorizing him to raise 10,000 troops on similar grounds — that it was "an especially dangerous delegation . . . in view of the Framers' clear decision to separate the power to raise troops from the power to command them." *Id.* at 186; *see also infra* p. 1157.

87 Act of Apr. 18, 1806, ch. 29, 2 Stat. 379; *see also* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 145 (2001) [hereinafter CURRIE II].

88 Act of Dec. 19, 1806, ch. 1, § 3, 2 Stat. 411, 411; *see also* CURRIE II, *supra* note 87, at 147.

89 *See* CURRIE II, *supra* note 87, at 147.

90 *See* Embargo Act of 1807, ch. 5, 2 Stat. 451.

scope."[91] As just two examples of the sweeping delegations contained in laws related to the embargo, Congress empowered the President "to give such instructions" to revenue officers "as shall appear best adapted for carrying the [embargo] into full effect,"[92] and "to employ such part of the land or naval forces or militia of the United States . . . as may be judged necessary" to enforce the embargo.[93] Over the fifteen months that the embargo remained in place, Jefferson's Treasury Secretary issued hundreds of circulars to federal officers providing guidance on its execution.[94]

The embargo engendered extreme political resistance, particularly in New England's trade-dependent communities, and much of the opposition surfaced in constitutional challenges.[95] The central debate concerned Congress's power under the Commerce Clause to enact the embargo — specifically, whether the power to "regulate" commerce included the power to prohibit it.[96] But the debate in Congress began as one about delegation, during consideration of a bill that would have permitted suspension of the embargo were changes to occur in foreign affairs to "render . . . the United States sufficiently safe, in the judgment of the President of the United States."[97] Those opposed to the bill argued that authorizing the President to suspend the embargo constituted an impermissible delegation of legislative power.[98] Those supporting the bill countered that tying the President's authority to contingencies specified in the statute ensured that the President would be exercising only executive power.[99] The opponents acknowledged that this might

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[91] Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1655 (2007).

[92] Embargo Act of 1807, ch. 5, § 1, 2 Stat. 451, 452. In debate over a similar provision enacted during this period, *see* Enforcement Act of 1809, ch. 5, § 10, 2 Stat. 506, 509, one congressman argued that the President's issuance of instructions would impermissibly render him a lawmaker. *See* 19 ANNALS OF CONG. 294–95 (1808) ("[A]ccording to this section, the President's instructions, proceeding from the recesses of the palace . . . are to have the binding force of law — are to affect the property and concerns of the citizens of the United States . . . — and thus violate that sanctuary which has always been esteemed a great bulwark to guard the liberties of a free people.").

[93] Enforcement Act of 1809, ch. 5, § 11, 2 Stat. 506, 510; *see* Mashaw, *supra* note 91, at 1654.

[94] *See* Mashaw, *supra* note 91, at 1661–62.

[95] *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 341, 356–58 (1922); Mashaw, *supra* note 91, at 1655–56.

[96] *See* CURRIE II, *supra* note 87, at 148–51. A federal court upheld the embargo in September 1808 as an exercise of Congress's commerce and war powers. United States v. The William, 28 Fed. Cas. 614, 620–22 (D. Mass. 1808) (No. 16,700). *See generally* 1 WARREN, *supra* note 95, at 341–51.

[97] Act of Apr. 22, 1808, ch. 52, 2 Stat. 490, 490; *see* CURRIE II, *supra* note 87, at 148–49.

[98] *See, e.g.*, 18 ANNALS OF CONG. 2212 (1808) (statement of Rep. Key) ("Is the power to suspend a law a Legislative act? Certainly; because it changes the law to a new rule of conduct."); *id.* at 2236 (statement of Rep. Rowan) ("The Executive cannot combine in himself two powers which the Constitution declares shall be forever separate.")

[99] *See, e.g.*, *id.* at 2115 (statement of Rep. Masters) ("We command; he obeys. He is the agent, we the principal."); *id.* at 2141 (statement of Rep. Campbell) ("[H]e is only made the judge that such events do occur as are described in the law . . . ."); *id.* at 2216 (statement of Rep. Holland) ("When

be true were the stated contingencies more narrowly defined but that, as formulated, the delegation conferred boundless discretion upon the Executive.[100] The supporters responded that the Constitution grants Congress the flexibility to delegate as required by the circumstances.[101] The congressmen thus differed over whether the delegation violated the Constitution. But as Professor David Currie has observed: "All agreed that the issue turned on the breadth of presidential discretion."[102]

Only one supporter of the suspension delegation, Pennsylvania Congressman William Findley, defended it in clear subject matter terms. But Findley's argument was functionalist, not formalist — and concerned the regulation of foreign commerce, not foreign affairs generally. Findley argued that "[l]aws for the internal government of a nation seldom require large portions of discretion to be vested in the Executive," while "regulations of commerce with foreign nations always do, because their operations are so much under the control of the regulations of other commercial nations, all of whom vest large portions of discretion in the Executive."[103] He identified the President as "the Constitutional organ" responsible for negotiations with foreign countries but drew from this only that it was thus "*expedient* to vest [the President] with such legislative powers as [are] calculated to facilitate an amicable negotiation."[104] Findley concluded that the "latitude of discretion in the execution of the law" that the Constitution permits in any one case turns on "the nature and necessity of the case, and must be justified from that necessity."[105]

The controversy over the embargo largely ended when Congress replaced it with a more modest ban on trade with Britain and France in the Non-Intercourse Act of 1809,[106] but it is this latter law that led to the Court's first decision in a case raising a delegation challenge.[107] Enacted at the end of the Jefferson Administration, the Act authorized the President to lift the suspension on trade if he determined that either Britain or France had "cease[d] to violate the neutral commerce of the United States."[108] When the law expired in 1810, Congress made revival

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a power is invested to suspend the operation of a law, the person who exercises this authority acts in an Executive capacity . . . .").

100 *See, e.g.*, *id.* at 2213 (statement of Rep. Key) ("The President is to exercise his sole judgment, upon the happening of these events, whether it is consistent with the safety of the United States to remove the embargo.").

101 *See, e.g.*, *id.* at 2201 (statement of Rep. Quincy) ("To the execution of many of the powers vested in us, by the Constitution, a discretion is necessarily and properly incident.").

102 CURRIE II, *supra* note 87, at 148; *see also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, at 108–09 (2014).

103 18 ANNALS OF CONG. 2229 (1808).

104 *Id.* at 2231 (emphasis added).

105 *Id.* at 2229.

106 Ch. 24, 2 Stat. 528.

107 *See* CURRIE II, *supra* note 87, at 154.

108 Non-Intercourse Act of 1809, ch. 24, § 11, 2 Stat. 528, 530.

of the suspension as to one country contingent on a finding by the President that the other country had met the original condition — that it had "cease[d] to violate . . . neutral commerce."[109] President Madison found that France met the condition in November of 1810, thereby reviving the statutorily authorized suspension as to Britain.[110] When a ship's goods were subsequently seized in accordance with the Act, its owner argued Congress had impermissibly "transfer[red] the legislative power to the President."[111] In *The Cargo of the Brig Aurora v. United States*,[112] the Court noted "no sufficient reason, why the legislature should not exercise its discretion in reviving [the original suspension], *either expressly or conditionally, as their judgment should direct*."[113] In terms consistent with those of the constitutional debates in Congress, the Court recognized Congress's authority to condition the operation of its legislation "upon the occurrence of any subsequent combination of events,"[114] and in so doing seemed to accept a presidential factfinding role.[115] The Court said nothing about the subject matter of the delegation.[116]

B. The Road to Curtiss-Wright

The Court was mostly quiet on delegation in the decades that followed.[117] When it finally returned to the issue in a series of cases decided in the late nineteenth and early twentieth centuries, things seemed much as they were before: the delegations at play were again trade-related, and they continued to be assessed and upheld on grounds unrelated to their subject matter. Beneath the surface, however, broader historical and legal developments that would give rise to foreign affairs exceptionalism were starting to take hold. These developments might not have affected the nondelegation doctrine had the Court maintained its permissive approach toward delegations. But in 1935, the Court invigorated the doctrine, twice striking down domestic regulatory legislation enacted as part of the New Deal. Forced to distinguish these cases in *Curtiss-Wright* the next year, the Court latched onto subject matter

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109 Act of May 1, 1810, ch. 39, § 4, 2 Stat. 605, 606.

110 *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 423–24 (1935).

111 The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 386 (1813).

112 11 U.S. (7 Cranch) 382.

113 *Id.* at 388 (emphasis added).

114 *Id.*

115 *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 394 (2017).

116 *Cf.* Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (suggesting a foreign affairs justification for *Brig Aurora* but acknowledging "the case was decided on different grounds").

117 *See* Whittington & Iuliano, *supra* note 115, at 394–96 (discussing just two 1820s cases involving delegations related to the judiciary).

reasoning, introducing to the nondelegation doctrine a categorical distinction between the domestic and foreign affairs realms.

Expansive delegations of trade authority played a large role in shaping the nondelegation doctrine during the lead-up to *Curtiss-Wright* — a period of dramatic growth in the country's global footprint.[118] The McKinley Tariff Act of 1890[119] contained the first such delegation. Congress exempted certain imported goods from U.S. tariffs but authorized the President to suspend the exemption "for such time as he shall deem just" with regard to countries that imposed duties the President "deem[ed] to be reciprocally unequal and unreasonable."[120] Notwithstanding its familiar contingent structure, this delegation effectively empowered the President to negotiate reciprocal trade agreements with foreign countries seeking to maintain tariff-free treatment.[121] The Secretary of State negotiated twelve such agreements after the Act was passed[122] — the beginnings of what is now a well-developed practice of the executive branch conducting foreign policy by executive agreement.[123] This practice marked a shift in the balance of foreign policymaking authority between the political branches: while at least one house of Congress had a constitutionally prescribed role in approving both treaties and tariff legislation — the traditional instruments by which the federal government transacted with foreign countries[124] — the President could conclude executive agreements on his own.

When the Court upheld the delegations that gave rise to these new instruments of foreign policymaking, it did so on grounds that had nothing to do with the foreign relations subject matter.[125] In *Field v. Clark*[126] — its first case on a foreign affairs–related delegation since *Brig Aurora*, and its first decision ever explicitly recognizing a nondelegation doctrine — the Court rejected a challenge to the McKinley Tariff Act by falling back on the delegation's contingent structure. Either overlooking or ignoring the broad discretion the Act allowed the President, the Court concluded he was "the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take

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118 *See* FAREED ZAKARIA, FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA'S WORLD ROLE 128–80 (1999).

119 Ch. 1244, 26 Stat. 567.

120 *Id.* § 3, 26 Stat. at 612; *see also* Meyer & Sitaraman, *supra* note 73, at 599.

121 *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 56 (1965); Francis B. Sayre, *The Constitutionality of the Trade Agreements Act*, 39 COLUM. L. REV. 751, 761–62 (1939).

122 Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 822 (1995); *see also* ZAKARIA, *supra* note 118, at 138–39.

123 *See* White, *supra* note 8, at 15–18.

124 *See id.* at 12, 17; *see also* Ackerman & Golove, *supra* note 122, at 821–22, 830.

125 *Cf.* Clinton v. City of New York, 524 U.S. 417, 495 (1998) (Breyer, J., dissenting) ("I do not believe the Court would hold the same delegations at issue in *J.W. Hampton* and *Field* unconstitutional were they to arise in a more obviously domestic area.").

126 143 U.S. 649 (1892).

effect."[127] The Court considered the subject matter of the legislation but only to explain the reasons Congress might have delegated, noting that "it is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations."[128]

Similarly, in *J.W. Hampton, Jr., & Co. v. United States*,[129] the Court upheld a "flexible tariff" provision on the ground that it sufficiently circumscribed the President's discretion.[130] The delegation authorized the President to adjust tariffs up to fifty percent to "equalize differences in the costs of production" in the United States and other countries.[131] Introducing its "intelligible principle" standard, the Court defended Congress's delegation to the President as justified by "[t]he same principle that permits Congress to exercise its rate making power in interstate commerce" through the aid of "a rate-making body" — that is, by the same principle that permits delegations in the domestic context.[132]

Most foreign affairs–related delegations in this era continued to take the form of contingent legislation, but the Court also confronted one delegation of rulemaking authority in the area of trade.[133] In 1897, Congress passed a law outlawing the importation of tea that did not meet certain standards of "purity, quality, and fitness."[134] Instead of setting these standards itself, Congress delegated the authority to the Secretary of the Treasury, who was himself to appoint a board of tea tasters on whose recommendations he would rely.[135] The Court rejected a nondelegation challenge to this law in *Buttfield v. Stranahan*[136] — a decision cited by Justice Thomas in support of his claim that "the Constitution grants the President a greater measure of discretion in the realm of foreign relations."[137] He has argued that the *Buttfield* Court "expressly relied on this rationale to sanction a delegation of power to make rules governing private conduct in the area of foreign trade."[138] But what the Court in fact relied on was "the principle of *Field*," holding

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127 *Id.* at 693. Two dissenting Justices understood the Act differently, arguing that the statute "vest[ed] in the President the power to regulate our commerce with all foreign nations." *Id.* at 700 (Lamar, J., dissenting from opinion but concurring in the judgment).

128 *Id.* at 691 (majority opinion).

129 276 U.S. 394 (1928).

130 *See id.* at 404–11.

131 Tariff Act of 1922, Pub. L. No. 67-318, ch. 351, § 315(a), 42 Stat. 858, 941–42; *see also* Meyer & Sitaraman, *supra* note 73, at 599–600; Sayre, *supra* note 121, at 763.

132 *J.W. Hampton*, 276 U.S. at 409.

133 *See* Whittington & Iuliano, *supra* note 115, at 398–99.

134 Tea Importation Act of 1897, ch. 358, § 1, 29 Stat. 604, 605.

135 *See id.* §§ 2–3, 29 Stat. at 605.

136 192 U.S. 470 (1904).

137 Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 80–81 n.5 (2015) (Thomas, J., concurring in the judgment).

138 *Id.*

that the law "devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute."[139] The Court did state that holding otherwise would "amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."[140] But this was a consideration not obviously limited to foreign relations powers; the Court suggested that Congress could delegate when so compelled by "the necessities of the case."[141]

So it seemed until 1935, when the Court invalidated statutes under the nondelegation doctrine for the first time in its history. The two cases — *Panama Refining Co. v. Ryan*[142] and *A.L.A. Schechter Poultry Corp. v. United States*[143] — both involved delegations under the National Industrial Recovery Act of 1933, legislation enacted as part of President Franklin D. Roosevelt's economic recovery program known as the New Deal. The provision at issue in *Panama Refining* authorized the President to prohibit the transportation in interstate and foreign commerce of oil produced in excess of state quotas,[144] and the one in *Schechter Poultry* empowered the President to approve industry-specific "codes of fair competition."[145] According to the Court, the problem with each was that Congress had failed to include standards or policies sufficient to guide the President's statutory authority.[146] The discretion conferred was instead "unfettered," the Court explained, rendering both the provisions unconstitutional delegations of Congress's legislative power.[147]

In neither of the 1935 decisions did the Court suggest that its newly enforced nondelegation doctrine was necessarily limited to domestic legislation. It addressed practice and precedent related to foreign affairs in *Panama Refining*, explaining that Congress's pre–*Brig Aurora* trade delegations "were inspired by the vexations of American commerce through the hostile enterprises of the belligerent powers."[148] And Chief Justice Hughes, writing for the Court, added to this historical context a hint of subject matter reasoning, noting that the early statutes "confided to the President . . . an authority which was cognate to the conduct by him of the foreign relations of the Government."[149] But in assessing the precedent it had itself established in *Brig Aurora*, *Field*, and *J.W. Hampton*,

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139 *Buttfield*, 192 U.S. at 496.
140 *Id.*
141 *Id.*; *see also* Whittington & Iuliano, *supra* note 115, at 398–99.
142 293 U.S. 388 (1935).
143 295 U.S. 495 (1935)
144 *See Panama Refining*, 293 U.S. at 405–06.
145 *See Schechter Poultry*, 295 U.S. at 521–22.
146 *See Panama Refining*, 293 U.S. at 430; *Schechter Poultry*, 295 U.S. at 541–42.
147 *Panama Refining*, 293 U.S. at 431; *Schechter Poultry*, 295 U.S. at 542.
148 *Panama Refining*, 293 U.S. at 422.
149 *Id.*; *see* Lofgren, *supra* note 10, at 10.

the Court seemed to conclude that it had upheld the delegations in those cases not on account of their subject matter but because they were sufficiently circumscribed in formal nondelegation terms.[150]

It wasn't until the next year that the Court explicitly endorsed a subject matter distinction. Two developments in the preceding half century laid the foundation for *Curtiss-Wright*. First, in a series of late nineteenth and early twentieth century cases on immigration, tribal nations, and U.S. territories, the Court had repeatedly concluded that the federal government possessed powers inherent in sovereignty — that is, powers existing outside the Constitution.[151] Second, executive power had been on the upswing since the late nineteenth century. The President's role in foreign affairs, in particular, had grown in tandem with the country's global footprint.[152] Increasingly broad delegations contributed to presidential power.[153] Just a year before *Curtiss-Wright*, Congress enacted legislation that for the first time openly granted to the President the authority to modify tariff rates by executive agreement.[154] Add to all of this the ominous rise of totalitarian states in Europe, creating a geopolitical state of affairs seemingly fit for a strong Executive,[155] and the momentum seemed to favor broad foreign affairs–related delegations. The question was whether a Court that had just breathed new life into the nondelegation doctrine would permit such delegations to stand.

In an opinion by Justice Sutherland, the *Curtiss-Wright* Court answered that question resoundingly in the affirmative. Before the Court was a congressional resolution authorizing the President to declare an embargo on arms shipments to Paraguay and Bolivia if he found that doing so "may contribute to the reestablishment of peace between those countries."[156] The Court could have struck down this delegation on the ground employed in *Schechter Poultry* and *Panama Refining*, as the resolution seemed to do little to constrain presidential discretion.[157] Alternatively, it might have distinguished the delegation as permissible executive factfinding, requiring the President simply to determine when

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150 *See* Lofgren, *supra* note 10, at 10; Schoenbrod, *supra* note 35, at 1264.

151 *See* Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. COLO. L. REV. 1127, 1133 (1999); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 7 (2002) [hereinafter Cleveland, *Powers Inherent in Sovereignty*].

152 *See* ZAKARIA, *supra* note 118, at 128–80.

153 *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948); Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 308–09 (1933).

154 *See* Ackerman & Golove, *supra* note 122, at 847–48, 847 n.209, 848 n.213; Meyer & Sitaraman, *supra* note 73, at 600–01.

155 *See* White, *supra* note 8, at 102.

156 Joint Resolution of May 28, 1934, ch. 365, § 1, 48 Stat. 811, 811.

157 *See* White, *supra* note 8, at 103–04.

the stated condition had been satisfied.[158] Instead, Justice Sutherland introduced foreign affairs exceptionalism to the nondelegation doctrine. Assuming without deciding that the arms delegation would have been unconstitutional if it similarly "were confined to internal affairs," he reframed the question as whether it could "nevertheless be sustained" given that it fell "within the category of foreign affairs."[159]

Justice Sutherland's decision to uphold the delegation because of its subject matter rested on two bases that swept beyond the delegation issue at hand. First, building on existing inherent powers doctrine, he concluded that foreign affairs powers are derived not solely from the Constitution but from powers inherent in sovereignty.[160] As a result, he seemed to suggest, foreign affairs powers are not subject to constitutional restraints like the nondelegation doctrine in the way domestic powers are.[161] Second, making a claim increasingly reflective of real-world practice, he described the President as the "sole organ" in foreign affairs, citing as support functional considerations such as the ability to operate with speed, secrecy, and dispatch.[162] Given the Executive's status, foreign affairs–related statutes "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."[163] He argued that his conclusions found "overwhelming support in . . . unbroken legislative practice" as well,[164] though, as this Note has shown, the early delegations he described were not understood at the time they were enacted as turning on subject matter considerations.[165]

Justice Sutherland's inherent powers reasoning has been criticized since *Curtiss-Wright* was decided,[166] but the case's functionalism remains influential.[167] For instance, in *Zivotofsky*, the 2015 decision holding that the recognition power rests exclusively with the President, the Court leaned on *Curtiss-Wright*'s practical justifications for executive primacy even while distancing itself from the case's extraconstitutional reasoning.[168] Most importantly for this Note's purposes, *Curtiss-Wright*'s

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158 Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 138 (1971). *But cf.* Lofgren, *supra* note 10, at 6–8 (arguing such an approach would have been unpersuasive).

159 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936); *see also* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 476 (1946).

160 *See Curtiss-Wright*, 299 U.S. at 315–19; *see also* Cleveland, *Powers Inherent in Sovereignty*, *supra* note 151, at 273–77.

161 *See Curtiss-Wright*, 299 U.S. at 315–18; *see also* White, *supra* note 8, at 104–05.

162 *See Curtiss-Wright*, 299 U.S. at 319–22; *see also* Goldsmith, *supra* note 53, at 128.

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

164 *Id.* at 322; *see also id.* at 323–24 & n.2.

165 *See supra* section II.A, pp. 1140–46; *see also* White, *supra* note 8, at 107.

166 *See, e.g.*, Levitan, *supra* note 159, at 489–90; Lofgren, *supra* note 10, at 28–32.

167 *See* Goldsmith, *supra* note 53, at 128; Sitaraman & Wuerth, *supra* note 42, at 1917.

168 *See* Zivotofsky v. Kerry, 576 U.S. 1, 20–21 (2015).

core holding of a reduced role for the nondelegation doctrine in the foreign affairs context has been widely accepted.[169] Yet because the Court's 1935 New Deal decisions proved to be the aberrations in a doctrine that has otherwise consistently permitted even broad domestic delegations, the impact of its subject matter distinction has — at least up until now — been limited.[170]

C. Formalist Exceptionalism

Curtiss-Wright remains available as a basis for distinguishing foreign affairs–related delegations, but its functionalism and inherent powers reasoning render it out of bounds for a formalist.[171] Justices Gorsuch and Thomas have included the case in string cites justifying their foreign affairs exceptionalism, but neither has relied on its reasoning.[172] Instead, the Justices seeking to revive the nondelegation doctrine and the academics on whose work they build have outlined a different justification for *Curtiss-Wright*'s exceptionalism, arguing that foreign affairs–related delegations are permissible because of the foreign affairs powers the Constitution explicitly vests in the President.[173] Thus far, however, nondelegation proponents have failed to adequately justify in formalist terms the categorical subject matter treatment they embrace.

The idea underlying the formalists' defense of their exceptionalism is that Congress can confer greater discretion on an agent when the agent has independent power over the subject matter of the delegation.[174] This idea isn't limited to the President and foreign affairs.

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[169] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 124–25 (1972); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2101 & n.239 (2005); William H. Rehnquist, *The Constitutional Issues — Administration Position*, 45 N.Y.U. L. REV. 628, 636–37 (1970) ("I think it is plain from [*Curtiss-Wright*] . . . that the principle of unlawful delegation of powers does not apply in the field of external affairs.").

[170] *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-self-execution*, 55 STAN. L. REV. 1557, 1584 (2003).

[171] *See* Prakash & Ramsey, *supra* note 46, at 238–39; Rappaport, *supra* note 46, at 346.

[172] Gundy v. United States, 139 S. Ct. 2116, 2137 n.42 (2019) (Gorsuch, J., dissenting); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 80 n.5 (2015) (Thomas, J., concurring in the judgment).

[173] *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (citing Schoenbrod, *supra* note 35, at 1260). Justice Thomas has made an argument seemingly less reliant on Article II as well, noting that "[t]he definition of 'law' in England at the time of the ratification did not necessarily include rules — even rules of private conduct — dealing with external relations." *Ass'n of Am. R.Rs.*, 575 U.S. at 80 n.5 (Thomas, J., concurring in the judgment). This Note does not focus on this claim, as it does not seem to have gained traction among nondelegation proponents. It is worth noting, however, that the claim's legitimacy as an originalist matter, which Justice Thomas has done little to support, is far from established. *See* Parrillo, Supplemental Paper, *supra* note 57, at 19; *see also* Briehl v. Dulles, 248 F.2d 561, 592–94 (D.C. Cir. 1957) (en banc) (Bazelon, J., dissenting) (discussing the writ *ne exeat regnum*, the only piece of evidence Justice Thomas has cited), *rev'd sub nom.* Kent v. Dulles, 357 U.S. 116 (1958).

[174] *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 684 (1980) (Rehnquist, J., concurring in the judgment); Alexander Volokh, *Judicial Non-delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1397–1407 (2017).

Traces of it can be found in decisions upholding delegations to courts of authority to make rules governing judicial matters, such as rules of procedure.[175] And it was applied clearly by the Court to a statute delegating authority to tribal nations to regulate the introduction of liquor into Indian country.[176] In that case, *United States v. Mazurie*,[177] the Court underscored that the nondelegation doctrine's strictures are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," citing *Curtiss-Wright* as support.[178] Applying this proposition to the liquor statute at issue, the *Mazurie* Court held that tribal nations' sovereign authority permitted Congress to "vest in tribal councils [a] portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'"[179]

Today's nondelegation proponents apply this same notion to foreign affairs–related delegations, claiming a constitutional ground for the President's independent authority in Article II.[180] They find support for this theory in *Loving v. United States*,[181] which involved a nondelegation challenge to a statute that authorized the President to define the aggravating factors permitting imposition of the death penalty in a military case before a court martial.[182] The *Loving* Court recognized that "more explicit guidance" than Congress provided might have been "necessary if delegation were made to a newly created entity without independent authority in the area."[183] But, citing *Mazurie*, it upheld the delegation because the "delegated duty" was "interlinked with duties already assigned to the President by express terms of the Constitution," namely the Commander in Chief Clause.[184] Application of this structural theory doesn't require that the President could have acted absent statutory authority.[185] Indeed, the *Loving* Court declined to decide

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175 *See* Mistretta v. United States, 488 U.S. 361, 386–87 (1989); *id.* at 417 (Scalia, J., dissenting); Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825); *see also* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 838–46 (2008).

176 United States v. Mazurie, 419 U.S. 544, 556–59 (1975).

177 419 U.S. 544.

178 *Id.* at 556–57.

179 *Id.* at 557 (omission in original) (quoting U.S. CONST. art. I, § 8).

180 *See, e.g.*, Schoenbrod, *supra* note 35, at 1260.

181 517 U.S. 748 (1996).

182 *Id.* at 751.

183 *Id.* at 772.

184 *Id.* (citing *Mazurie*, 419 U.S. at 556–57); *see also id.* at 776 (Scalia, J., concurring in part and concurring in the judgment); Bradley & Goldsmith, *supra* note 169, at 2100–01.

185 *See* Volokh, *supra* note 174, at 1394. Of course, the theory also doesn't bar the stronger claim that a President could have acted independently. Justice Thomas seemed to make such a claim in an immigration case, suggesting that a statute delegating deportation authority might not raise any issues under the nondelegation doctrine because of "founding-era evidence that 'the executive Power' includes the power to deport aliens." Sessions v. Dimaya, 138 S. Ct. 1204, 1249 (2018) (Thomas, J., dissenting) (citation omitted); *see also id.* at 1248 ("Congress does not 'delegate' when it merely authorizes the Executive Branch to exercise a power that it already has.").

"whether the President would have inherent power as Commander in Chief to prescribe aggravating factors."[186] All that application of the theory requires is that the discretion a statute confers on the President be "interlinked" with her independent powers.

Because *Loving*'s holding was limited to a statute implicating "[t]he President's duties as Commander in Chief,"[187] extending the case's reasoning to foreign affairs–related statutes across the board requires a basis for a broader independent presidential power, one over foreign affairs generally. *Curtiss-Wright* identified such a power through a combination of inherent powers reasoning and functionalism. And the Court picked up on that functionalism in *Zemel v. Rusk*,[188] which concerned a statute delegating authority over the issuance of passports to the Executive.[189] In rejecting a challenge to this statute, the Court took note of "the changeable and explosive nature of contemporary international relations" and the Executive's access "to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature."[190] It concluded on account of these considerations that "Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas."[191]

Formalist nondelegation advocates purport to reject such functionalism as a legitimate basis for establishing independent presidential authority, relying instead on constitutional text and structure.[192] In particular, they rely on the Vesting Clause thesis — the contested notion that Article II's vesting of "the executive Power" in the President constitutes a grant of substantive powers not otherwise enumerated in the

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186 *Loving*, 517 U.S. at 773.

187 *Id.* at 772.

188 381 U.S. 1 (1965).

189 *Id.* at 7–8. The nondelegation case to rely most clearly on *Curtiss-Wright*'s inherent powers reasoning is *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), which upheld a delegation to the Executive of broad authority over the exclusion of foreign nationals. *See id.* at 542–43 ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Id.* at 543.). Other cases potentially susceptible to or even influenced by independent powers or subject matter reasoning have generally been decided on different grounds. *See* Schoenbrod, *supra* note 35, at 1264–65; Volokh, *supra* note 174, at 1403–04.

190 *Zemel*, 381 U.S. at 17.

191 *Id.* The Court was careful to note that "[t]his does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice." *Id.*

192 Their rejection of functionalism would seem to require they also reject the style of analysis in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), a stronger version of *Zemel* in which the Court upheld the President's suspension of claims pending against Iran in U.S. courts despite the lack of a statute directly on point. *See id.* at 675–88; *see also* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2289–90 (2006). The *Dames & Moore* Court didn't establish a clear, formal basis for *independent* presidential authority but rather held that he "was authorized," 453 U.S. at 686, to suspend the claims in light of "legislation closely related" to the authority at issue and "a history of congressional acquiescence in conduct of the sort," *id.* at 678.

Constitution.[193] Most important here, proponents of this thesis claim that at the time of the Founding, "the executive Power" was understood to include a general power over foreign affairs, excepting only those powers explicitly vested in another branch of government.[194]

Assuming arguendo the validity of the Vesting Clause thesis, the problem for today's nondelegation proponents is that not all foreign affairs–related delegations apply to areas interlinked with the President's foreign affairs powers. The interlinking claim makes sense in formalist terms when the Constitution suggests a particular relationship between a power allocated to Congress and an independent presidential power. This is clearest in the case of war powers, which are constitutionally divided between the branches; the Constitution plainly contemplates that when Congress declares war, the President plays a role as Commander in Chief in executing that war.[195] The interdependency of the powers not only permits but even requires broader delegation. For instance, in the First Barbary War at the start of the nineteenth century, Congress authorized the President to take a series of specified actions to protect Atlantic and Mediterranean commerce as well as "all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require."[196] This conferral of discretion is justified for a formalist if, as Currie notes, one considers "that the Constitution itself makes the President Commander in Chief and that the unpredictable course of hostilities makes it imperative that that officer enjoy great flexibility in deploying his forces once war has been declared."[197]

But the formalists' interlinking theory is less persuasive with regard to delegations made pursuant to powers the Constitution confers solely upon Congress.[198] For example, formalist nondelegation proponents have a hard time explaining the early trade cases.[199] The President has no independent constitutional authority to regulate foreign commerce.[200]

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193 *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004).

194 *See* Prakash & Ramsey, *supra* note 46, at 252–54.

195 *See* Schoenbrod, *supra* note 35, at 1260–61; *cf.* Lichter v. United States, 334 U.S. 742, 778–82 (1948) ("The war powers of Congress and the President are only those which are to be derived from the Constitution but . . . the primary implication of a war power is that it shall be an effective power to wage the war successfully." *Id.* at 782.).

196 Act of Feb. 6, 1802, ch. 4, § 2, 2 Stat. 129, 130; *see also* CURRIE II, *supra* note 87, at 125.

197 CURRIE II, *supra* note 87, at 125 n.15.

198 *Cf.* James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 336 (1976) (book review) (proposing a structural theory of nondelegation that would bar delegation of powers whose exercise the Framers saw "as closely dependent upon the unique institutional competence of Congress").

199 *See* Parrillo, Supplemental Paper, *supra* note 57, at 18–19.

200 *See* H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 549 (1999); Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT'L L. ONLINE 16, 21 (2018) ("[I]nternational trade policy

The monarch had some authority over trade in the British system, but the Constitution made it an exclusive power of Congress under Article I, Section 8.[201] And unlike the war powers, the foreign commerce power isn't clearly tied to or dependent on a specific Article II power.[202] When Congress delegates authority to the President to suspend trade or set tariffs — classic exercises of its commerce power — the "delegated duty" is thus not "interlinked with duties already assigned to the President."[203] Any powers the President has over foreign commerce exist by virtue of prior practice or delegation.[204] At a high level of generality, there is subject matter overlap between trade and the President's authority to set U.S. foreign policy insofar as both involve matters beyond U.S. borders. But the Constitution isn't organized by subject matter; it's organized by powers.[205] A theory that turns on a statute's mere relationship to foreign affairs regardless of the power being exercised runs afoul of a formalist's strict commitment to the principle of enumerated powers.[206]

The interlinking theory is in particular tension with nondelegation formalism as applied to powers that were allocated to Congress precisely to keep them away from the Executive.[207] The concerns about aggrandizement of power that motivate nondelegation proponents do not disappear just because a statute is related to foreign affairs. Such concerns may be less acute where foreign affairs–related delegations do not affect private rights,[208] but as the trade examples show, statutes regulating private conduct fall on both sides of the domestic/foreign line.[209] One might instead argue that the aggrandizement concerns demand heightened scrutiny of foreign affairs–related delegations, particularly in the

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differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress.").

201 *See* Prakash & Ramsey, *supra* note 46, at 263, 349.

202 *Cf.* JAFFE, *supra* note 121, at 36 ("Congress for many years wrote every detail of the tariff laws.").

203 Loving v. United States, 517 U.S. 748, 772 (1996); *cf.* Prakash & Ramsey, *supra* note 46, at 263 n.123 (distinguishing the President's authority to adopt a low-tariff policy "and announce it to the world" from Congress's authority to "establish high tariff rates even in opposition to the President's policy").

204 *See* United States v. Yoshida Int'l, Inc., 526 F.2d 560, 572 & n.13 (C.C.P.A. 1975) ("[N]o undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency." *Id.* at 572 (emphasis omitted).); SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 192, 205 (2020).

205 *See* Lawson, *supra* note 23, at 336.

206 *Cf.* Volokh, *supra* note 174, at 1407 ("If [the President's] power derives purely from Congress — if he's close to an area where he could act on his own, *but isn't quite there* — why shouldn't Congress have to legislate with the usual degree of specificity?").

207 *See* CURRIE I, *supra* note 62, at 247; Barrett, *supra* note 24, at 319 n.213. Justice Barrett has made such a claim of the power to suspend the writ of habeas corpus. *See id.* at 298–319. Noting that the Framers allocated suspension authority to Congress as a "structural protection from executive excess," *id.* at 259, she has interpreted the Suspension Clause to limit Congress's ability to delegate this authority beyond what the nondelegation doctrine would otherwise require, *see id.* at 317–19.

208 *See* Bamzai, *supra* note 32, at 181–82; Schoenbrod, *supra* note 35, at 1261.

209 *See* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 51 (1993).

war powers context.[210] Bradley has argued that the allocation of foreign affairs power reflects an effort by the Founders "to limit aggrandizements of power . . . through divisions of responsibility."[211] Using such divisions to justify delegations would thus seem to pervert the Framers' intent.[212] Opponents of early troop-raising delegations made arguments along these lines.[213] During a 1794 debate over a delegation that would have authorized the President to raise 10,000 troops but was ultimately rejected by the House,[214] then-Representative James Madison remarked "that it was a wise principle in the Constitution, to make one branch of Government raise an army, and another conduct it."[215] Combining these powers in the President would undermine "this barrier of public safety."[216]

Recognizing the Constitution's careful allocation of foreign affairs powers, Professor Michael Rappaport takes a slightly different tack in arguing that the President's executive power justifies distinctive treatment of foreign affairs–related delegations.[217] He argues that such delegations are permitted not because of the President's independent authority over foreign affairs but because it is "an area where the executive historically exercised significant discretion" pursuant to statutory delegations.[218] His primary example concerns trade: recognizing that the imposition of embargoes (at least during peacetime) is "not part of executive power," Rappaport argues that "the meaning of executive power in 1789" as incorporated into the Constitution nonetheless included "the power to *receive* statutory delegations of discretion in this area."[219] As historical support, he cites Parliament's century-long practice of delegating to the King "the statutory authority to prohibit arms sales when he deemed it advisable" as well as early congressional practice.[220] He does not examine foreign affairs issues aside from trade in depth but tentatively extends his claim to "military and foreign relations generally."[221]

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[210] *See* Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1621–22 (2002).

[211] Bradley, *supra* note 170, at 1585.

[212] *See* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 198 (1990).

[213] *See supra* pp. 1142–43.

[214] *See* CURRIE I, *supra* note 62, at 186.

[215] 4 ANNALS OF CONG. 738 (1794).

[216] *Id.* In reflecting on this debate later, and extending the point to Congress's power to declare war, Madison wrote that "[a] delegation of such powers would have struck, not only at the fabric of our constitution, but at the foundation of all well organized and well checked governments." James Madison, Political Observations (Apr. 20, 1795), *in* 15 THE PAPERS OF JAMES MADISON 511, 521 (Thomas A. Mason et al. eds., 1985).

[217] *See* Rappaport, *supra* note 46, at 345–54.

[218] *Id.* at 352.

[219] *Id.* at 347 (emphasis added).

[220] *Id.* He also finds support in constitutional structure and purpose. *Id.* at 348.

[221] *Id.* at 353.

Rappaport's theory sweeps more broadly than the interlinking argument, but it doesn't support a neat foreign affairs carveout to the nondelegation doctrine. His general argument is that "the doctrine applies selectively," permitting Congress to delegate broadly in areas where executives traditionally received broad delegations.[222] This idea isn't limited to foreign affairs; he also concludes that appropriation laws — laws that authorize the Executive to withdraw money from the treasury — are not subject to the nondelegation doctrine.[223] As in the case of foreign affairs, this conclusion rests most heavily on eighteenth-century practice, as confirmed by early congressional practice.[224] But recent research has revealed both pre- and post-ratification practice of broad delegations in a wide range of areas, including patent decisions and federal taxation.[225] Careful application of Rappaport's "selective nondelegation" theory thus might result in lenient treatment of particular domestic regulatory delegations as well.

Moreover, Rappaport's selective nondelegation theory is out of sync with the formalism of leading nondelegation proponents. In his *Gundy* dissent, Justice Gorsuch sought to establish a framework for distinguishing permissible from impermissible delegations built around bright-line rules and clear categories. As part of this effort, he defined legislative power in essentialist terms as "the power to adopt generally applicable rules of conduct governing future actions by private persons."[226] Rappaport's selective nondelegation theory fills in a gap in the framework by ascribing content to executive power as well. But in requiring a case-by-case assessment of areas in which the Executive traditionally exercised discretion, Rappaport's approach, however accurate it might be as an originalist matter,[227] makes for an inquiry more complex than Justice Gorsuch's *Gundy* framework contemplates. To the extent the framework was intended to show how a revived nondelegation doctrine might be judicially administrable, incorporating Rappaport's theory would set the project back. Even before the suggestion that the doctrine operated selectively, Justice Scalia, by all accounts a stalwart formalist, concluded that the doctrine was not "readily enforceable by the courts."[228] The selective nondelegation theory raises that same problem to a greater degree.

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[222] *Id.* at 271.

[223] *Id.* at 320–45.

[224] *See id.* at 320–40.

[225] *See* Mortenson & Bagley, *supra* note 23 (manuscript at 39–46, 76–119); Parrillo, *A Critical Assessment*, *supra* note 57.

[226] Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

[227] *Cf.* Lawson, *supra* note 23, at 395 n.263 (contrasting the author's "essentialist" or "conceptualist" approach to discerning the meaning of "executive Power" with Rappaport's "nominalist" approach — that is, an approach reliant chiefly on historical usage).

[228] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); *see* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 483–86 (2014).

III. AN ANTI-ADMINISTRATIVE DOCTRINE

Today's efforts to revive the nondelegation doctrine form part of a broader political, academic, and judicial campaign against the administrative state — one that parallels antiregulatory attacks on the New Deal in the 1930s.[229] A key characteristic of this campaign among the conservative Justices is their split treatment of executive power — opposition to power held by administrative agencies but support for power in the hands of the President, particularly when exercised in the foreign affairs and national security arenas.[230] Absent a principled basis for distinguishing foreign affairs–related delegations from domestic delegations categorically, nondelegation's foreign affairs exceptionalism is best understood through this anti-administrative lens. Like the *Curtiss-Wright* Court, the current conservative Justices appear inclined toward a nondelegation framework that can accommodate both presidential power and their campaign against the modern administrative state.[231]

Foreign affairs exceptionalism helps the Justices achieve those aims by ensuring that a nondelegation revival does not threaten the delegations supporting much of the President's power over foreign affairs and national security. This Note has examined many such delegations from the Founding through the early twentieth century. Since then, delegations to the President have only grown in scope, conferring on the President vast and open-ended power over trade, immigration, and military action.[232] As Professor Harlan Grant Cohen has explained, if a revived nondelegation doctrine applied to delegations uniformly, it would weaken not only administrative agencies but also the President.[233] Limiting revival of the nondelegation doctrine to domestic delegations, on the other hand, protects presidential power over foreign affairs and national security while undermining the source of the administrative state's regulatory power.

To be sure, the foreign/domestic distinction itself doesn't require an anti-administrative result. Congress can delegate domestic regulatory authority to the President, just as it can confer foreign affairs–related authority on an administrative agency. The reason the distinction might

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[229] *See* Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 1–6, 22–24 (2017).

[230] *See id.* at 3, 36–37.

[231] *See* Cohen, *supra* note 14. There are potential principled grounds on which to distinguish delegations to the President from delegations to agencies. An emphasis on democratic accountability might favor the former and rule of law values the latter. *See* Clinton v. City of New York, 524 U.S. 417, 489–90 (1998) (Breyer, J., dissenting); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364–72 (2001). But today's nondelegation proponents, perhaps constrained by their formalism, have not factored such considerations into their exceptionalism.

[232] *See, e.g.*, Andrew Kent, *Don't Forget Congress When Assigning Blame: Thoughts on* Trump v. Hawaii, HARV. L. REV. BLOG (June 27, 2018), https://blog.harvardlawreview.org/dont-forget-congress-when-assigning-blame-thoughts-on-trump-v-hawaii [https://perma.cc/22ZB-GDQ4].

[233] *See* Cohen, *supra* note 14.

nonetheless further an anti-administrative campaign is that the foreign/domestic descriptors alone determine very little. This Note has so far accepted the premise of a clear boundary between domestic and foreign affairs, but many policy areas test that clarity.[234] One could argue that trade-related issues, for instance, are less about foreign policy than they are domestic economic policy.[235] A domestic paradigm of trade was in fact dominant from the Founding through the early twentieth century[236] — a fact that underscores the misguided nature of the formalist advocates' reliance on early trade delegations as supportive of a subject matter distinction. The boundary problem is particularly acute in today's globalized era, where domestic issues increasingly have foreign impacts and vice versa.[237] Consider environmental regulation. While pollution might have traditionally been viewed as a primarily local issue, climate change demonstrates how activity regulated at the domestic level also has foreign policy consequences.[238]

Without a neutral legal principle to decide what counts as foreign affairs, the Justices' anti-administrative inclinations are left to fill the void. And their preference for presidential power would be bolstered by another component of the *Gundy* dissent's framework — the permissibility of executive factfinding. Contingent legislation is a more common way of delegating to the President than it is of delegating to administrative agencies.[239] Factfinding thus might be used in combination with subject matter considerations to justify broad delegations to the President.[240] Delegations whose triggers are themselves subject matter related, such as a delegation requiring a determination that something is in the interest of "national security," would stand on particularly strong ground. This despite the fact that, as Cohen writes, such triggers "lack any stable meaning" — they "pretend to be factual scenarios that can be ascertained when they are, in fact, nothing of the sort."[241]

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234 *See* Sitaraman & Wuerth, *supra* note 42, at 1943.

235 *See* Meyer & Sitaraman, *supra* note 73, at 626.

236 *See id.* at 590–97.

237 *See, e.g.*, Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1672 (1997); *see also* Briehl v. Dulles, 248 F.2d 561, 591 (D.C. Cir. 1957) (en banc) (Bazelon, J., dissenting) ("In our complex world there are very few purely internal affairs. Foreign problems cast their shadows on the domestic scene and internal events influence foreign policy."), *rev'd sub nom.* Kent v. Dulles, 357 U.S. 116 (1958).

238 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 533–34 (2007) (identifying foreign policy considerations as among the reasons EPA offered for not regulating greenhouse gases).

239 *See* Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1174 (2009); Cohen, *supra* note 14.

240 *Cf.* Gundy v. United States, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting) (justifying the delegation at issue in *Brig Aurora* on both grounds); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 79–80 (2015) (Thomas, J., concurring in the judgment) (describing the 1794 embargo as involving "at least an implicit policy determination," *id.* at 79, before excusing it as related to foreign affairs).

241 Cohen, *supra* note 14.

If a framework like the *Gundy* dissent's were adopted, it could support an anti-administrative agenda even without the Court directly confronting a foreign affairs–related delegation on its merits docket.[242] The presence in the doctrine of subject matter and factfinding elements would be enough for lower courts and the executive branch to distinguish between presidential and administrative delegations. A year after deciding *Gundy*, for instance, the Court denied certiorari in a case concerning the tariff delegation that began this Note — the one that authorizes the President to impose tariffs on imports he determines "threaten to impair the national security."[243] One can't know for certain the Court's grounds for doing so; perhaps the reason was stare decisis, as it had rejected a nondelegation challenge to the statute in 1976.[244] But in its brief in opposition to certiorari, the government invoked foreign affairs exceptionalism, combining a citation to *Curtiss-Wright* with citations to today's nondelegation proponents[245] — a clean demonstration of how, regardless of any purported methodological differences, the theories can be deployed together toward shared anti-administrative ends.

CONCLUSION

A majority of the current Supreme Court appears poised to revive a nondelegation doctrine that has lain dormant since the New Deal. Whatever practical justifications there may be for statutory delegations, these Justices emphasize that it is the Court's role to "call foul when the constitutional lines are crossed."[246] But the foreign affairs exceptionalism that they have incorporated into their theory bears no principled connection to established constitutional lines, at least according to their own preferred formalist method of interpretation. Today's exceptionalism is instead best understood as a revival of *Curtiss-Wright* — an effort to ensure that, in restraining the administrative state, no harm is done to presidential power.

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[242] *Cf.* Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322, 323 (2015) (explaining that "foreign relations exceptionalism in contemporary U.S. litigation is alive and well everywhere" outside the Supreme Court's merits docket).

[243] *See* Am. Inst. for Int'l Steel, Inc. v. United States, 141 S. Ct. 133 (2020) (mem.).

[244] *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558–60 (1976); *see also* Alan B. Morrison, *The Supreme Court's Non-delegation Tease*, YALE J. REG.: NOTICE & COMMENT (July 29, 2020), https://www.yalejreg.com/nc/the-supreme-courts-non-delegation-tease-by-alan-b-morrison [https://perma.cc/598X-JPRB].

[245] *See* Brief for the Respondents in Opposition at 9–11, *Am. Inst. for Int'l Steel*, 141 S. Ct. 133 (No. 19-1177) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 324 (1936); *Ass'n of Am. R.Rs.*, 575 U.S. at 80 n.5 (Thomas, J., concurring in the judgment); *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting)); *cf.* Monaghan, *supra* note 209, at 51 n.244 (describing the Court's prior rejection of a nondelegation challenge to the statute as "showing the evident weakness in the foreign affairs context of any strictures against delegation"). Petitioners replied by noting, consistent with section II.C's argument, that the President "has no express or implied powers to do what he did here: impose $7 billion in tariffs on steel imports." Reply Brief in Support of Petition for a Writ of Certiorari at 8, *Am. Inst. for Int'l Steel*, 141 S. Ct. 133 (No. 19-1177).

[246] *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).