MAJOR QUESTIONS DOCTRINE, FOREIGN AFFAIRS, AND THE NEW ECONOMIC STATECRAFT

Over the past decade, economic intervention by the executive branch in the name of national security has become increasingly salient.[1] It has also taken new forms. Traditionally, executive economic interventions for national security primarily leveraged domestic economic strength to influence foreign entities' actions.[2] Yet, amid globalization's distributional impacts, rising geopolitical tensions, supply chain fragilities,[3] and political gridlock,[4] recent presidential administrations have inverted prior practice. Nowadays, purported foreign affairs and national security (FANS) events justify executive actions to fundamentally restructure the domestic economy.[5]

These "new economic statecraft" actions have largely relied on a handful of trade- and security-related statutes.[6] For example, the first Trump Administration imposed tariffs on various products[7] under Section 232 of the Trade Expansion Act of 1962[8] and Section 301 of the Trade Act of 1974.[9] President Biden blocked the Japanese company Nippon Steel's proposed $14.9 billion acquisition of U.S. Steel pursuant

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[1] *See* Kathleen Claussen & Timothy Meyer, *Economic Security and the Separation of Powers*, 172 U. PA. L. REV. 1955, 1956–57 (2024); *see also* Kristen E. Eichensehr & Cathy Hwang, Essay, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 551 (2023) (noting that the Committee on Foreign Investment in the United States, an interagency executive branch committee, has increased the scale and scope of its review of foreign investment for national security concerns).

[2] *See infra* section I.A, pp. 1966–68.

[3] *See* H.R. MCMASTER & ANDREW J. GROTTO, HOOVER INST., ECONOMIC STATECRAFT: THE NEED FOR AN INTEGRATED APPROACH 1–2 (2025) (characterizing economic statecraft as a useful tool in geopolitical competition); Clea Simon, *More Free Trade or Time to Give Tariffs a Chance? It Was Up for Debate.*, HARV. GAZETTE (Nov. 10, 2025), https://news.harvard.edu/gazette/story/2025/11/more-free-trade-or-time-to-give-tariffs-a-chance-it-was-up-for-debate [https://perma.cc/23PJ-C4KX] (discussing debate over the propriety of tariffs as a response to globalization, supply chain crises, and geopolitical threats).

[4] *See* Timothy Meyer & Ganesh Sitaraman, *Presidential Regulation*, 42 YALE J. ON REG. 803, 850–52 (2025).

[5] *See, e.g.*, OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, 2022 TRADE POLICY AGENDA & 2021 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 1, 8 (2022) (describing the Biden Administration's worker-centric trade policy); Jamieson Greer, Opinion, *The Year of the Tariff*, FIN. TIMES (Dec. 22, 2025), https://www.ft.com/content/774e7180-48b6-4813-969d-845462f5838f [https://perma.cc/Z7W3-CBJU] (asserting that the Trump Administration's "trade policy is geared towards [domestic] re-industrialisation").

[6] This Note considers an illustrative but non-exhaustive list of such statutes.

[7] *See* Economic Impact of Section 232 and 301 Tariffs on U.S. Industries, Inv. No. 332–591, USITC Pub. 5405, at 19 (Mar. 2023) (Corrected May 2023).

[8] 19 U.S.C. §§ 1801–1991; *see also id.* § 1862 (codifying Section 232 of the Trade Expansion Act of 1962).

[9] *Id.* §§ 2101–2497b; *see also id.* §§ 2411–2420 (codifying Section 301 of the Trade Act of 1974).

to Section 721 of the Defense Production Act[10] (DPA).[11] The second Trump Administration announced reciprocal tariffs pursuant to the International Emergency Economic Powers Act[12] (IEEPA)[13] and acquired equity stakes in "strategic" companies[14] by invoking the DPA and the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022.[15]

As political incentives to pursue protectionism and industrial policy have grown,[16] new economic statecraft initiatives have produced legal friction.[17] At first glance, the Supreme Court's endorsement of the major questions doctrine (MQD) seems to constrain the Executive's ability to claim expansive authority to reshape the domestic economy from statutory text.[18] Three Justices in *Learning Resources, Inc. v. Trump*[19] expressly applied MQD to cabin executive authority under IEEPA.[20] Yet

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[10] 50 U.S.C. §§ 4501–4589; *see also id.* § 4565 (codifying Section 721 of the Defense Production Act).

[11] Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation, 90 Fed. Reg. 2605, 2605 (Jan. 3, 2025); Alexandra Alper, *US Blocks Nippon Steel's Bid to Purchase U.S. Steel*, REUTERS (Jan. 3, 2025, at 08:31 ET), https://www.reuters.com/markets/deals/us-blocks-nippon-steels-bid-purchase-us-steel-2025-01-03 [https://perma.cc/GYB8-BZXC].

[12] 50 U.S.C. §§ 1701–1710.

[13] Exec. Order No. 14,257, 90 Fed. Reg. 15041, 15041 (Apr. 2, 2025).

[14] Ana Swanson, *$10 Billion and Counting: Trump Administration Snaps Up Stakes in Private Firms*, N.Y. TIMES (Nov. 25, 2025), https://www.nytimes.com/2025/11/25/us/politics/trump-intel-steel-minerals-china.html [https://perma.cc/SC2H-7PWR] (listing private companies in which the U.S. government owns a direct equity stake); Peter E. Harrell, *The Legal Bases for Government Stakes in Private Firms*, LAWFARE (Aug. 28, 2025, at 08:00 ET), https://www.lawfaremedia.org/article/the-legal-bases-for-government-stakes-in-private-firms [https://perma.cc/M5JD-REKF].

[15] Pub. L. No. 117-167, 136 Stat. 1372 (codified in scattered sections of 15 U.S.C.).

[16] *See* Emily Stewart, *The New American Capitalism*, BUS. INSIDER (Jan. 5, 2026, at 04:11 ET), https://www.businessinsider.com/new-era-america-capitalism-socialist-trump-economy-2026-1 [https://perma.cc/8LPM-TVGG].

[17] *See, e.g.*, V.O.S. Selections, Inc. v. United States, 772 F. Supp. 3d 1350, 1364–65 (Ct. Int'l Trade), *aff'd in part and vacated in part*, 149 F.4th 1312 (Fed. Cir. 2025), *aff'd*, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026); Learning Res., Inc. v. Trump, 784 F. Supp. 3d 209, 215 (D.D.C. 2025), *vacated*, 146 S. Ct. 628 (2026); Transpacific Steel LLC v. United States, 4 F.4th 1306, 1310, 1313 (Fed. Cir. 2021) (challenging 2018 Section 232 tariffs); Scott Horsley, *U.S. Steel Sues to Salvage Its Sale to Japan's Nippon Steel*, NPR (Jan. 6, 2025, at 11:25 ET), https://www.npr.org/2025/01/06/nx-s1-5249712/u-s-steel-japan-nippon-lawsuit [https://perma.cc/J92J-5MVU] (describing a lawsuit challenging President Biden's blocking of U.S. Steel's proposed merger); *cf.* J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1022, 1024, 1034–40 (2020) (describing how national security provisions might challenge the "international economic order," *id.* at 1022).

[18] *See* Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 281 (2022) (describing agency-action cases that would have been resolved differently under current MQD); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1094 (2023) ("The major questions doctrine is an important tool in the Court's anti-regulatory arsenal."); Louis J. Capozzi III, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. 509, 522 (2025) (noting that "the [Supreme] Court embraced [a] stronger variant" of MQD in recent terms).

[19] 146 S. Ct. 628 (2026).

[20] *Id.* at 638 (opinion of Roberts, C.J.); *id.* at 646 (Gorsuch, J., concurring); *id.* at 672 (Barrett, J., concurring).

MQD's limiting disposition clashes with another judicial tool: FANS exceptionalism. Indeed, at least two Justices have recently invoked FANS exceptionalism to justify more relaxed review of executive action in the FANS space.[21] One Justice has even proposed categorically exempting FANS matters from MQD scrutiny.[22]

Commentators have also extensively documented the Court's hesitance to strike down executive actions in the FANS space.[23] Their commentary reflects widespread perceptions that the judicial branch generally applies deferential FANS exceptionalism, rather than more stringent tools like MQD, whenever an executive action implicates the FANS realm.[24] These perceptions have exacerbated perverse incentives within the executive branch. Presidential administrations frame their economic statecraft initiatives in increasingly wily ways: To the American public, such measures are framed as industrial policy with large domestic economic boons.[25] In court, these initiatives are classified as foreign affairs adjacent and thus merit deference on functionalist or structural grounds.[26] Moreover, this Janus-faced posturing has increasingly extended beyond political rhetoric. The policy substance of new economic statecraft has crept into targeting *domestic* production,[27] and

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[21] *See, e.g.*, *id.* at 691 (Kavanaugh, J., dissenting); FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2516 (2025) (Kavanaugh, J., concurring); *Learning Res.*, 146 S. Ct. at 679 (Thomas, J., dissenting) (endorsing Justice Kavanaugh's dissent); *cf.* Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (suggesting that nondelegation concerns arising from executive actions in the FANS space may prove limited because "Congress may assign the President broad authority regarding the conduct of foreign affairs").

[22] *See Learning Res.*, 146 S. Ct. at 706 (Kavanaugh, J., dissenting) ("[T]he major questions doctrine does not apply in the foreign affairs context.").

[23] *See, e.g.*, Brief of Professor Chad Squitieri as Amicus Curiae in Support of Respondents in No. 24-1287 and Petitioners in No. 25-250 at 33, *Learning Res.*, 146 S. Ct. 628 (Nos. 24-1287 & 25-250); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305 (1988).

[24] *E.g.*, *Learning Res.*, 146 S. Ct. at 706 (Kavanaugh, J., dissenting).

[25] *See supra* note 5 and accompanying text.

[26] *See* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 628–29 (2019); Kathleen Claussen & Timothy Meyer, *The Foreign Commerce Power*, 113 CALIF. L. REV. (forthcoming 2026) (manuscript at 4) (on file with the Harvard Law School library) ("The [P]resident . . . often point[s] . . . to a presidential foreign affairs power . . . as a foundation on which he can rely . . . in undertaking policies that are reshaping the U.S. economy . . . ."); *cf.* Chad Squitieri, *The President's Authority to Impose Tariffs*, HARV. J.L. PUB. POL'Y: PER CURIAM, Summer 2025, No. 12, at 7. Because the Constitution assigns foreign commerce powers to Congress, U.S. CONST. art. I, § 8, cl. 1, 3, the Executive must claim congressional authorization to pursue economic statecraft lest *unilateral* action prove legally dubious. *See* Ilya Somin, *The Constitutional Case Against Trump's Trade War*, LAWFARE (Apr. 18, 2025, at 10:00 ET), https://www.lawfaremedia.org/article/the-constitutional-case-against-trump-s-trade-war [https://perma.cc/UA7P-93QM]; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585, 589 (1952).

[27] *See* Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 72–78 (2023); Stewart, *supra* note 16. This Note descriptively notes how new economic statecraft has grown more domestic facing. It does not conclude that judges must directly classify an executive action as foreign or domestic to resolve a case, though the distinction may influence analysis of context.

the recharacterization of domestic economic activities as implicating FANS matters to legally justify executive interventions has only grown more brazen over time.[28]

To be sure, since the Founding era, U.S. policymakers have recognized links among domestic economic performance, national security, and foreign affairs leverage.[29] Yet historical efforts to bolster the country's long-term economic competitiveness via foreign commerce regulations usually involved Congress.[30] Therefore, by promoting novel conceptualizations of security as viable policy and legal justifications for executive intervention in broad swaths of the *domestic* economy, new economic statecraft can facilitate the transfer of traditionally congressional activity into executive hands.

Examining general separation of powers tensions in the new economic statecraft space will remain relevant in the upcoming years. In *Learning Resources*'s aftermath, the executive branch has persisted in pursuing novel measures.[31] These measures will likely spur additional litigation.[32] Accordingly, this Note maps the broadened scope of new economic statecraft, traces its creeping influence over domestic economic affairs, and examines legal challenges that it might raise in statutory delegation disputes. Assuming the continued interment of the nondelegation doctrine,[33] this Note argues that courts should apply MQD and forgo FANS exceptionalism when reviewing executive actions in new economic statecraft. Such an approach would have

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[28] *See* Claussen & Meyer, *supra* note 26 (manuscript at 44) ("In defending [President Trump's tariffs], the government has repeatedly argued that the president's [FANS] powers require courts to construe [tariff] statutes broadly such that even explicit limits should not apply."); *cf.* Stewart, *supra* note 16 ("A novel vision of American state capitalism is emerging right before our eyes."); John H. Cochrane, *Economic Statecraft and Trade: The General and the Economist*, GRUMPY ECONOMIST (Mar. 7, 2025), https://www.grumpy-economist.com/p/economic-statecraft-and-trade [https://perma.cc/2PEZ-Z6GM] ("[Economic statecraft] sounds like a military takeover of the whole economy. The Soviet Union was, after all, one big marshaling of national economic resources to the state's aims.").

[29] *See, e.g.*, THE FEDERALIST NO. 11, at 91 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (suggesting that the formation of a strong domestic economy will "enable . . . Americans [to] disdain to be the instruments of European greatness").

[30] *See, e.g.*, Merchant Marine Act of 1920, 46 U.S.C. §§ 50101–58109; Foreign Dredge Act of 1906, 46 U.S.C. § 55109; Tariff Act of 1930, 19 U.S.C. §§ 1202–1683g; Uruguay Round Agreements Act, 19 U.S.C. §§ 3501–3624.

[31] *See, e.g.*, Proclamation No. 11,012, 91 Fed. Reg. 9339, 9341 (Feb. 20, 2026).

[32] *See* Ana Swanson & Tony Romm, *Fresh Off a Supreme Court Loss, Trump Could Face New Challenges on Tariffs*, N.Y. TIMES (Feb. 24, 2026), https://www.nytimes.com/2026/02/24/us/politics/trump-tariffs-new-legal-challenges.html [https://perma.cc/6ZGC-8KGV].

[33] Despite some recent signals that the Court would revive the nondelegation doctrine, *see* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting), after *FCC v. Consumers' Research*, 145 S. Ct. 2482 (2025), constitutional nondelegation constraints likely remain negligible. *See Consumers' Rsch.*, 145 S. Ct. at 2496–97 (endorsing the "intelligible principle" standard for congressional delegations to executive branch agencies, *id.* at 2497 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928))); *cf.* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) ("[T]here just is no constitutional nondelegation rule, nor has there ever been.").

functionalist justifications, strengthen the separation of powers principles that new economic statecraft initiatives strain, and enshrine existing doctrinal commitment to MQD as a conventional tool of statutory interpretation.

Part I considers the expanding breadth, protectionist focus, and functionalist justifications underpinning the new economic statecraft. Through case studies of the 2018 steel and aluminum tariffs, the 2024 review of the U.S. Steel acquisition, and the 2025 "Liberation Day" tariffs, it documents how perceived judicial deference has exacerbated security creep and undermined functionalist rationales for FANS exceptionalism in the economic statecraft space.[34] Part II analyzes the separation of powers dilemmas that the new economic statecraft imposes. It concludes that applying MQD while declining to invoke FANS exceptionalism would best address the separation of powers concerns arising from these executive initiatives. Part III finds that applying MQD, rather than FANS exceptionalism, to new economic statecraft actions better aligns with existing case law. Though courts may have proven historically reticent to strike down executive actions implicating foreign affairs,[35] extending FANS exceptionalism to recent economic statecraft actions unnecessarily broadens facially narrow court holdings and creates irreconcilable conflicts with recent MQD developments.

I. NEW ECONOMIC STATECRAFT AND SECURITY CREEP

Economic statecraft, the leveraging of domestic economic power to pursue geopolitical goals,[36] has grown increasingly broad and Executive-led over the past decade.[37] Traditionally, Presidents have invoked economic statecraft statutes — such as IEEPA, Section 232, and Section 721 of the DPA — to pursue offensive economic actions tailored to impact foreign economies and influence foreign entities' actions in discrete and fundamentally noneconomic crises.[38] Resolving these noneconomic crises plausibly required executive expertise, speed, and secrecy — characteristics that traditionally justified deferential judicial review of FANS actions on functionalist grounds.[39] However, recent administrations have invoked the same statutory authorities to restructure the supply side of the *domestic* economy in response to more nebulous, abstract

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[34] *Cf.* Simon Johnson & Stan A. Veuger, *Trump's Supporters Should Be Careful What They Wish For*, PROJECT SYNDICATE (Oct. 30, 2025), https://www.project-syndicate.org/commentary/supreme-court-should-uphold-challenge-to-trump-tariffs-by-simon-johnson-and-stan-a-veuger-2025-10 [https://perma.cc/U3UM-HLX3] (suggesting that deferential judicial posture could enable swaths of economic regulation on overtly ideological grounds).

[35] *See* Koh, *supra* note 23, at 1305.

[36] MCMASTER & GROTTO, *supra* note 3, at 3.

[37] *See* Claussen & Meyer, *supra* note 1, at 1956–58.

[38] *See infra* section I.A, pp. 1966–68.

[39] For further description of these functionalist rationales, see Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 232 (2010).

threats.[40] The Executive's perception of judicial deference in the FANS realm may have emboldened national security creep into economic policy.[41] Far from being innocuous, security creep has resulted in increasingly contorted and frequent recharacterization of domestic economic policies as matters under FANS's purview. As a result, economic and national security policy has grown more politicized while becoming less predictable, transparent, and reflective of expertise[42] — values that underpin the prevailing functionalist justifications for FANS exceptionalism.

A. The Expansion of Economic Statecraft

The scope of executive action pursuant to economic statecraft statutes has considerably widened in recent years. The evolving invocations of three statutes highlight this trend.

First, consider Section 232, which authorizes the President, after a Commerce Department investigation, "to adjust . . . imports . . . so that such imports will not threaten to impair the national security."[43] Before the 2010s, Section 232 actions generally consisted of limited import adjustments tailored to address noneconomic foreign affairs crises[44]: President Carter imposed an embargo on Iranian oil to gain leverage in hostage negotiations,[45] President Reagan imposed an embargo against Libyan oil to pressure the Libyan government against supporting terrorism,[46] and Presidents Nixon and Ford replaced oil quotas with licensing fees to blunt OPEC threats to withhold oil.[47] By contrast, the first Trump Administration's 2018 Section 232 tariffs covered (among multiple products) *all* steel and aluminum imports from *all* countries to address "insufficient" *domestic* steel and aluminum production.[48]

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[40] *See, e.g.*, Vinod K. Aggarwal & Andrew Reddie, *Putting the Biden Administration's "New Economic Statecraft" in Context*, LAWFARE (Aug. 21, 2023, at 11:00 ET), https://www.lawfaremedia.org/article/putting-the-biden-administration-s-new-economic-statecraft-in-context [https://perma.cc/PX2V-7DHB]; *cf.* Meyer & Sitaraman, *supra* note 4, at 835 ("Only in the last eight years, however, have presidents normalized the use of their [national security] powers as a means of unilaterally regulating the domestic economy.").

[41] *See, e.g.*, Eichensehr & Hwang, *supra* note 1, at 556–57 ("The U.S. understanding of national security threats has clearly moved far beyond traditional state-to-state conflict . . . .").

[42] *See infra* sections I.B–C, pp. 1968–71.

[43] 19 U.S.C. § 1862(c)(1)(A)(ii).

[44] *See* RACHEL F. FEFER ET AL., CONG. RSCH. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 60–63 (2021).

[45] Proclamation No. 4702, 44 Fed. Reg. 65581, 65581 (Nov. 12, 1979).

[46] Proclamation No. 4907, 47 Fed. Reg. 10507, 10507 (Mar. 10, 1982).

[47] Proclamation No. 4210, 38 Fed. Reg. 9645, 9645–46 (Apr. 18, 1973); Proclamation No. 4341, 40 Fed. Reg. 3965, 3965–66 (Jan. 27, 1975).

[48] OFF. OF TECH. EVALUATION, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY 5, 50–51 (2018); FEFER ET AL., *supra* note 44, at 62.

Next, consider IEEPA, which allows the President to "regulate"[49] imports "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States."[50] Again, pre-2010s usage of IEEPA generally addressed noneconomic foreign crises[51]: President Carter froze Iranian government assets to induce Iran to release American hostages,[52] President George H.W. Bush placed an embargo on Iraq to force the country to abandon its invasion of Kuwait,[53] and President George W. Bush froze assets of terrorist groups after September 11.[54] By contrast, the second Trump Administration used IEEPA to impose global reciprocal tariffs, on the theory that inducing a *domestic* manufacturing upswing could counter trade deficits and "the hollowing out of [the U.S.] manufacturing base."[55]

Lastly, Section 721 of the DPA allows the President, after a review by the Committee on Foreign Investment in the United States (CFIUS), "to suspend or prohibit any . . . transaction that threatens to impair the national security," so long as the President finds "credible evidence" indicating that any foreign entity "that would acquire an interest in a United States business . . . might take action that threatens to impair the national security."[56] Presidential blocking of transactions pursuant to Section 721 has increased in both frequency and scope in recent years.[57] Seven of the nine total Section 721 blockings occurred after 2015.[58] Early blockings primarily targeted Chinese-owned companies' potential acquisition of *militarily* relevant frontier technologies.[59] However, President Biden's recent blocking of Nippon Steel's proposed acquisitions of U.S. Steel prevented a non-Chinese firm from acquiring a low-tech steel producer,[60] likely on grounds that Japanese ownership of U.S. steel production facilities would endanger domestic economic security.[61]

Some commentators view new economic statecraft actions simply as contemporary variants of prior actions undertaken pursuant to the same

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49 50 U.S. § 1702.

50 *Id.* § 1701.

51 *See generally* CHRISTOPHER A. CASEY, JENNIFER K. ELSEA & LIANA W. ROSEN, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 69–74 (2025) (documenting all executive actions undertaken pursuant to IEEPA from the 1970s to September 2025).

52 Exec. Order No. 12,170, 44 Fed. Reg. 65729, 65729 (Nov. 14, 1979).

53 Exec. Order No. 12,722, 55 Fed. Reg. 31803, 31803 (Aug. 2, 1990).

54 Exec. Order No. 13,224, 66 Fed. Reg. 49079, 49079 (Sep. 23, 2001).

55 Exec. Order No. 14,257, 90 Fed. Reg. 15041, 15041 (Apr. 2, 2025).

56 50 U.S.C. § 4565(d).

57 Eichensehr & Hwang, *supra* note 1, at 549.

58 *See* CATHLEEN D. CIMINO-ISAACS & KAREN M. SUTTER, CONG. RSCH. SERV., IF10177, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 2 (2025).

59 *See id.*

60 *See id.*

61 *See* Todd N. Tucker, *Biden Was Right to Block the US Steel Takeover*, THE NATION (Jan. 7, 2025), https://www.thenation.com/article/economy/biden-us-steel-nippon [https://perma.cc/ZP2Z-8MC5].

statutes. For example, Professor Jack Goldsmith has suggested that the Liberation Day tariffs did not prove "unheralded," in part because prior duties had been imposed under IEEPA's predecessor, as part of an economic security action.[62] Similarly, Professors Timothy Meyer and Ganesh Sitaraman have likened the first Trump Administration's Section 232 tariffs to anti-terrorism and anti-nuclear sanctions measures that the George W. Bush and Obama Administrations pursued.[63] However, these commentators understate the extent to which recent actions depart from prior practice by targeting domestic production and framing long-term, structural, and fundamentally economic phenomena as security threats per se. Twentieth-century oil embargoes and sanctions sought to incentivize foreign political actors to resolve discrete, noneconomic foreign crises.[64] In contrast, new economic statecraft actions implemented under the same statutes have primarily aimed to bolster *long-term domestic* economic production.[65]

Still, before *Learning Resources*, executive assertions of authority to conduct new economic statecraft initially faced virtually no pushback from courts on statutory-authorization grounds.[66] According to Professors Kathleen Claussen and Timothy Meyer, lower courts have been unwilling to push back on broad assertions of authority to implement Section 232 tariffs.[67] Relatedly, Meyer and Sitaraman have suggested that the Supreme Court will likely "attempt to employ foreign affairs exceptionalism" to eschew MQD scrutiny of executive economic statecraft actions.[68]

B. New Economic Statecraft in Practice

Perhaps anticipating FANS-specific judicial deference, the executive branch has increasingly stretched the definition of "national security" to insulate unilateral pursuit of domestic political objectives from judicial scrutiny.[69] For instance, President Biden blocked Nippon Steel's proposed acquisition of U.S. Steel by invoking "credible evidence" that Nippon Steel "might take action that threatens to impair" U.S. security

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[62] *See* Jack Goldsmith, *The Tariff Case and the Major Questions Doctrine*, EXEC. FUNCTIONS (Sep. 12, 2025), https://www.execfunctions.org/p/the-tariff-case-and-the-major-questions [https://perma.cc/9FEV-JFQF].

[63] *See* Meyer & Sitaraman, *supra* note 27, at 61–62.

[64] *See supra* notes 44–47, 51–54 and accompanying text.

[65] *See supra* notes 48, 55 and accompanying text.

[66] *Cf., e.g.*, Transpacific Steel LLC v. United States, 4 F.4th 1306, 1319 (Fed. Cir. 2021) (dismissing nondelegation challenge). *But see* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 637 (2026).

[67] Claussen & Meyer, *supra* note 1, at 1974–78.

[68] Meyer & Sitaraman, *supra* note 27, at 81 n.137; *see also Learning Res.*, 146 S. Ct. at 713–20 (Kavanaugh, J., dissenting) (invoking foreign affairs exceptionalism to explain why MQD should not have applied in the case at issue).

[69] *Cf.* Eichensehr & Hwang, *supra* note 1, at 557, 583–84 (describing expanding scope of national security and outlining challenges that it poses for the judiciary).

interests through acquiring U.S. Steel.[70] Based on President Biden's statement, the acquisition may inferably impair long-term U.S. steelmaking capacity and employment.[71] Yet recharacterizing fluctuations in steelmaking capacity as a national security threat may have simply offered President Biden a procedurally safe route to achieving domestic political goals. On closer consideration, national security consequences appeared beside the point to President Biden's decision. First, CFIUS review of the merger's national security risks proved inconclusive.[72] Second, in blocking the merger, President Biden reportedly sided with *domestic* political advisors over his National Security Advisor, Secretary of State, and Secretary of Defense.[73] Even if national security risks existed, it seems doubtful that many domestic political advisors, but few national security advisors, would accurately identify such risks.[74]

Similar dynamics may have influenced President Trump's tariffs. In imposing Section 232 tariffs on steel and aluminum imports in 2018,[75] President Trump accepted the Commerce Department's assessment that such imports threatened the Defense Department's ability to satisfy national defense requirements,[76] despite the Defense Department's assessment to the contrary.[77] Moreover, independent empirical studies suggest that domestic political objectives drove such policy: The 2018 tariffs did not cause substantial upticks in manufacturing output or employment,[78]

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[70] Order Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation, 90 Fed. Reg. 2605, 2605 (Jan. 13, 2025).

[71] *See* Tucker, *supra* note 61.

[72] *See* Alan Rappeport & Lauren Hirsch, *National Security Committee Forgoes Decision on U.S. Steel Acquisition*, N.Y. TIMES (Dec. 23, 2024), https://www.nytimes.com/2024/12/23/business/us-steel-nippon-biden-cfius.html [https://perma.cc/487D-YFJ6].

[73] *See* Ellen Nakashima, Jeff Stein & David J. Lynch, *Biden Rejected Appeals of Several Top Advisers in Blocking U.S. Steel Bid*, WASH. POST (Jan. 4, 2025), https://www.washingtonpost.com/business/2025/01/04/biden-steel-nippon-advisers [https://perma.cc/L2PM-J7D6]; Alexander Ward, Catherine Lucey & Bob Tita, *Biden's National-Security Aides Wanted to Keep Steel Deal Alive*, WALL ST. J. (Jan. 4, 2025, at 01:04 ET), https://www.wsj.com/politics/national-security/bidens-national-security-aides-wanted-to-keep-steel-deal-alive-8de93003 [https://perma.cc/G6KE-VVGG]; Matt Egan, *Biden Killed US Steel Deal Even Though Some US Officials Rejected National Security Concerns*, CNN (Jan. 6, 2025, at 16:38 ET), https://www.cnn.com/2025/01/06/business/us-steel-biden-japan-nippon [https://perma.cc/SD84-QEMN].

[74] *Cf.* Jason Furman (@jasonfurman), X (Jan. 3, 2025, at 10:21 ET), https://x.com/jasonfurman/status/1875200932176175556 [https://perma.cc/TCN7-JZAR] ("President Biden claiming Japan's investment in an American steel company is a threat to national security is a pathetic and craven cave to special interests that will make America less prosperous and safe.").

[75] *See* Proclamation No. 9705, 83 Fed. Reg. 11625, 11625 (Mar. 8, 2018).

[76] *Id.*

[77] Memorandum from James N. Mattis, Secretary of Defense, to Wilbur Ross, Secretary of Commerce, Response to Steel and Aluminum Policy Recommendations (on file with the Harvard Law School Library).

[78] *E.g.*, Aaron Flaaen & Justin Pierce, *Disentangling the Effects of the 2018–2019 Tariffs on a Globally Connected U.S. Manufacturing Sector*, REV. ECON. & STAT. (forthcoming) (manuscript

but their imposition shifted voters in protected industries, on balance, toward greater support for Republican candidates in subsequent elections.[79] Likewise, when announcing the 2025 reciprocal tariffs, President Trump acknowledged that efforts to induce changes in trading partners' behavior "ha[d] stalled" and framed the primary emergency as arising from the effect of trade "asymmetries . . . on U.S. domestic production."[80] Moreover, the Administration's reciprocal tariff rates were nearly four times higher than what their own rate-setting formula and cited research papers appeared to propose.[81] Whether deliberate or not, such upward unmooring of final tariff rates from the Administration's own purported rate formula reinforced the perceived primacy of domestic economic concerns in shaping the Administration's tariff policy.

C. Security Creep and Functionalist Failures

The recharacterization of long-term domestic production as a national security matter risks politicization and mission creep. Such risks compel the application of MQD, while undermining the functionalist justifications for FANS exceptionalism — expertise, secrecy, and dispatch.[82] Politicization and self-aggrandizing mission creep in executive regulation are nothing new.[83] Yet concerns about politicization and mission creep are especially severe in the definitionally nebulous new economic statecraft context. Indeed, expansive economic statecraft frameworks grant the executive branch enormous leeway over domestic economic activity.[84] Reshaping long-term domestic production trajectories via executive-led economic statecraft also raises transparency and variability concerns. For example, as Meyer and Sitaraman note,

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at 45) (on file with the Harvard Law School Library); *see also* Economic Impact of Section 232 and 301 Tariffs on U.S. Industries, Inv. No. 332-591, USITC Pub. 5405, at 91 (March 2023) (Revised) (finding similar results).

[79] David Autor et al., *Help for the Heartland? The Employment and Electoral Effects of the Trump Tariffs in the United States* 23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32082, 2024).

[80] *See* Exec. Order No. 14,257, 90 Fed. Reg. 15041, 15043 (Apr. 2, 2025).

[81] Kevin Corinth & Stan Veuger, *President Trump's Tariff Formula Makes No Economic Sense. It's Also Based on an Error.*, AEI (Apr. 4, 2025), https://www.aei.org/economics/president-trumps-tariff-formula-makes-no-economic-sense-its-also-based-on-an-error [https://perma.cc/Z3LC-3C3U] ("[I]f we are going to pretend that [tariffs are] a sound basis for US trade policy, we should at least be allowed to expect that the relevant White House officials do their calculations carefully."); Brent Neiman, Opinion, *The Trump White House Cited My Research to Justify Tariffs. It Got It All Wrong.*, N.Y. TIMES (Apr. 7, 2025), https://www.nytimes.com/2025/04/07/opinion/trump-tariff-math-formula.html [https://perma.cc/J6ZD-Y2HV].

[82] *See supra* note 39 and accompanying text.

[83] *See, e.g.*, Dan Goldbeck & Shantanu Kamat, *The Administrative State After* Chevron, AM. ACTION F. (Aug. 8, 2023), https://www.americanactionforum.org/insight/the-administrative-state-after-chevron [https://perma.cc/5V56-UTH2] (arguing that ruling against government in Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024), would help "to arrest the decades-long and accelerating trend of regulatory expansionism").

[84] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 641 (2026) (asserting that Liberation Day tariffs "dwarf . . . other major questions cases").

without procedural guardrails, "presidential regulation" can prove especially opaque and unstable.[85] Exacerbating these worries, presidential decisions under Section 721 are subject to heavily limited judicial review,[86] and courts have proven especially reluctant to "second-guess[]" factual determinations of emergency situations by the executive branch.[87]

On the flip side, the domestic economic focus of new economic statecraft renders invocations of expertise, speed, and secrecy unpersuasive. Even when the executive branch has successfully avoided mathematical miscalculations in applying international economic expertise, recent economic statecraft actions have consistently disregarded national security advisors' tautological expertise on national security matters in favor of domestic political advisors' non-expert opinions on such matters.[88] Nor does new economic statecraft require secrecy or dispatch. As Meyer and Sitaraman observe, trade policy's domestic economic dimensions diminish secrecy's value and increase opacity's costs.[89] More broadly, because new economic statecraft targets long-term *domestic* production, little need for clandestine or speedy action exists. Fundamental reshaping of U.S. industries' economic performance will almost inevitably take time to achieve.[90] Likewise, secrecy is less vital when *domestic* economic transformation serves as the primary mechanism to address a global emergency or security threat.[91] Overall, by focusing on domestic economic output as the result of and solution to global emergencies and security threats, recent executive economic statecraft actions have undermined the traditional functionalist justifications for FANS exceptionalism.

II. SEPARATION OF POWERS STRAINS AND THE MAJOR QUESTIONS SOLUTION

By recasting long-term domestic productive capacity in national security terms, the new economic statecraft raises not only functionalist but also separation of powers concerns. To some degree, all forms of executive-led economic statecraft raise such concerns by implicating both foreign commerce and FANS.[92] When evaluating economic statecraft actions, courts face conflicting separation of powers risks: allowing infringement on congressional authority or second-guessing executive judgment. Caught between Scylla and Charybdis, jurists have often

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[85] *See* Meyer & Sitaraman, *supra* note 4, at 861–62, 867.
[86] Eichensehr & Hwang, *supra* note 1, at 563–64.
[87] *See* Nathaniel Glass, Note, *Partisan Emergencies*, 111 VA. L. REV. 379, 392 (2025).
[88] *See supra* pp. 1968–69.
[89] Meyer & Sitaraman, *supra* note 26, at 630–32.
[90] *See* Greer, *supra* note 5 ("[R]ebuilding [industrial primacy] won't happen overnight.").
[91] *Cf.* Meyer & Sitaraman, *supra* note 26, at 630–32 (claiming that secrecy rationale for foreign affairs deference does not apply in the trade policy context).
[92] *See, e.g.*, Claussen & Meyer, *supra* note 1, at 1975–77.

turned to historical interbranch practices in the foreign commerce and FANS spaces.[93]

New economic statecraft actions amplify the risk of the Executive infringing on congressional authority and mitigate the risk of courts second-guessing executive judgments by aiming to regulate *domestic* economic activity, traditionally Congress's domain,[94] in service of (ill-defined) national security goals.[95] Formally, the Constitution assigns authority to regulate foreign commercial activity to Congress.[96] Moreover, whereas twentieth-century historical practice may to some degree soothe separation of powers concerns raised by traditional economic statecraft actions, new economic statecraft initiatives conflict with historical understandings of separation of powers boundaries.[97] Therefore, MQD, rather than FANS exceptionalism, serves as the more suitable judicial tool to ascertain congressional intent and safeguard congressional powers during review of new economic statecraft actions.[98]

A. *General Separation of Powers Dilemmas in Economic Statecraft*

In addition to implicating functionalist concerns of speed, secrecy, and expertise, virtually all delegations of foreign commerce powers raise two conflicting separation of powers concerns. On the one hand, strict interpretations of FANS-adjacent delegations risk unwittingly impinging on the President's ill-defined Article II powers.[99] Consequently, courts have frequently construed such delegations broadly to avoid determining Article II powers.[100] Furthermore, because constitutional text defining executive FANS powers is generally viewed as sparse, courts have at times used historical "gloss" to infer congressional authorization when executive action in FANS has gone unchallenged.[101]

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[93] *See infra* notes 112–13 and accompanying text.

[94] Claussen & Meyer, *supra* note 1, at 1987.

[95] *See* Meyer & Sitaraman, *supra* note 27, at 61–62, 74–76.

[96] U.S. CONST. art. I, § 8, cls. 1, 3; *see* Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. 1743, 1788–89 (2024).

[97] *See infra* section II.B, pp. 1973–76.

[98] This Note presumes that MQD effectively ascertains congressional intent. *Contrast, e.g.*, Capozzi, *supra* note 18, at 570, *with, e.g.*, Deacon & Litman, *supra* note 18, at 1047–48. If one rejects this presumption, this Note can still be read to argue that MQD is more effective at patrolling statutory delegations in the new economic statecraft space than FANS exceptionalism.

[99] Eitan M. Ezra, Note, *Foreign Affairs Exceptionalism in Statutory Interpretation: A Reverse Major Questions Doctrine*, 58 COLUM. J.L. & SOC. PROBS. 253, 272–73 (2025).

[100] *Id.*; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051 (2005).

[101] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). *But see* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001) ("[M]odern scholarship should stop assuming that the Constitution's text says little about foreign affairs . . . ."). For more on historical gloss, see generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–24 (2012); Allison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77–79 (2013); and CURTIS A. BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS 1–10 (2024).

On the other hand, excessive deference in FANS-related delegations may enable the executive branch to increasingly infringe Congress's enumerated constitutional powers. General concerns about executive mission creep and aggrandizement at Congress's expense extend beyond FANS: Such concerns have animated recent MQD and agency deference jurisprudence.[102] Yet perceived proximity to Article II powers can exacerbate these general concerns. As Claussen and Meyer note, deferential judicial posturing has invited the executive branch to tie foreign commerce delegations to the President's inherent foreign affairs powers.[103] This tying strategy can raise immediate concerns about second-guessing executive judgment, engender continued judicial deference, and cumulatively undermine Congress's control over foreign commerce by condoning executive aggrandizement.[104]

Therefore, of all FANS-related congressional delegations,[105] foreign-economic-relations delegations pose some of the trickiest questions for judicial review. As Meyer and Sitaraman observe, many foreign commerce–related statutes delegate authorities that implicate both foreign and domestic issues.[106] Courts may not be well-positioned "to disentangle domestic and foreign economic aspects"[107] of these delegations without resorting to "foreign policymaking."[108] Such line-drawing difficulties persist when determining whether a statutory delegation touches on independent executive powers.[109] Whereas some commentators have suggested that most economic security statutes do not implicate independent powers,[110] others have suggested that economic security measures naturally implicate independent executive powers over FANS.[111]

B. Dichotomous History and Practice

To navigate the multifaceted separation of powers concerns in the foreign affairs space, courts have relied on historical gloss[112] and practical context[113] to ascertain boundaries between executive authority

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[102] *See, e.g.*, *supra* note 83 and accompanying text.

[103] *See* Claussen & Meyer, *supra* note 1, at 1975–77.

[104] *See* Claussen & Meyer, *supra* note 26 (manuscript at 5–6, 16).

[105] *See generally* Bradley & Goldsmith, *supra* note 96, at 1773–89 (assessing FANS-related delegations of power to the executive branch).

[106] Meyer & Sitaraman, *supra* note 27, at 83–84.

[107] *Id.* at 84. *But cf.* Bradley & Goldsmith, *supra* note 96, at 1790 (concluding that such disentangling is not inevitable or necessary).

[108] Meyer & Sitaraman, *supra* note 27, at 94.

[109] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 717 n.23 (2026) (Kavanaugh, J., dissenting) (suggesting that identifying independent powers could prove "jurisprudentially chaotic").

[110] *E.g.*, Bradley & Goldsmith, *supra* note 96, at 1783, 1796.

[111] *E.g.*, Squitieri, *supra* note 26, at 7; *cf.* Claussen & Meyer, *supra* note 26 (manuscript at 4) (commenting that the Trump Administration claimed delegated tariff authority as supplementary to independent Article II powers).

[112] *See supra* note 101 and accompanying text.

[113] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 675, 677 (1981).

(whether inherent or delegated) and congressional authority. When evaluating history and context in foreign economic relations, a dichotomy between traditional economic statecraft actions geared toward generating international agreements or resolving discrete, noneconomic foreign crises and new economic statecraft actions aimed at reshaping the domestic economy emerges.

On the one hand, twentieth-century practice has arguably ameliorated concerns over flexible executive interpretation of statutes authorizing traditional economic statecraft measures in response to fickle foreign events.[114] As Professors Curtis Bradley and Jack Goldsmith note, presidential implementation of emergency trade measures to address foreign crises has occurred since at least the early twentieth century.[115] Under certain assumptions, such longstanding historical practice may counsel against MQD and for broad interpretation of congressional delegations in the sanctions space.[116] Relatedly, Professors Kristen Eichensehr and Oona Hathaway document an extensive history of congressional delegations that conferred on the President broad authority to craft executive agreements with foreign nations during the twentieth century.[117] They conclude, on more functionalist grounds, that congressional delegations to construct such agreements should not be subject to MQD constraints.[118]

On the other hand, historical practice proves less favorable to deferential review of new economic statecraft. From the Founding era to the early twentieth century, foreign commercial measures aimed at shaping the domestic economy proceeded via congressional legislation.[119] Whereas Congress delegated some discretion to the President for sanctions related to national security,[120] it directly legislated on peacetime regulations of foreign commerce.[121] As a result, regulatory measures aimed at promoting long-term domestic industry clearly fell under Congress's purview.[122] By contrast, presidential actions shaping long-run foreign commerce policy occurred "pursuant to express statutory delegation[s]" that were primarily "narrow in scope and highly conditional."[123] For example, even as Alexander Hamilton considered using

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[114] *See, e.g.*, Bradley & Goldsmith, *supra* note 96, at 1796–97; Kristen E. Eichensehr & Oona A. Hathaway, *Major Questions About International Agreements*, 172 U. PA. L. REV. 1845, 1858–59, 1872–73 (2024); *see also* Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1112–13 (2020) (discussing how Congress acquiesced to ever-wider executive action in foreign commerce pursuant to various trade-liberalization statutes).

[115] Bradley & Goldsmith, *supra* note 96, at 1796–97.

[116] *Id.*

[117] Eichensehr & Hathaway, *supra* note 114, at 1858–59.

[118] *Id.* at 1872.

[119] *See* Claussen, *supra* note 114, at 1110; *see, e.g.*, Tariff of 1790, ch. 39, 1 Stat. 180.

[120] *See* Bradley & Goldsmith, *supra* note 96, at 1787.

[121] *See, e.g.*, *supra* note 30 and accompanying text.

[122] Claussen, *supra* note 114, at 1110.

[123] Claussen & Meyer, *supra* note 26 (manuscript at 36).

tariffs to build a domestic industrial base to enhance national security,[124] he went through Congress to pass the Tariff of 1790.[125] When northern manufacturers sought to handicap foreign competition and promote national economic security, Congress passed the Tariff of 1828.[126] In short, congressional primacy in foreign economic relations was at its peak when foreign economic policy measures aimed at promoting and protecting domestic economic activity.[127]

Nor did twentieth-century delegations authorize the President to unilaterally pursue broad protectionist intervention without clear congressional guidance. Twentieth-century Congresses delegated broad executive discretion over foreign commerce only in areas directly linked to war, foreign diplomacy, and negotiation with foreign counterparties.[128] For example, the Reciprocal Tariff Act[129] conferred broad authority on the President to adjust tariff rates "as [was] required or appropriate" for executing trade agreements with foreign governments.[130] Likewise, the Trading with the Enemy Act[131] (TWEA) originally granted the President authority to regulate various types of transactions in times of war.[132] In contrast, provisions authorizing foreign commerce regulations to promote domestic production existed as narrow appendages, within broader statutes authorizing negotiation of (liberalizing) trade agreements, that allowed presidential action in narrow, clearly specified circumstances. For example, Section 232 was attached to the Trade Expansion Act of 1962, which authorized the President to negotiate tariff reductions of up to fifty percent.[133] The Trade Act of 1974 contained three separate sections allowing for protectionist measures to respond to balance of payment crises (Section 122),[134] privately claimed domestic industry threats (Section 201),[135] and unfair foreign trade practices (Section 301).[136] All sections include substantial procedural hurdles to establish that the underlying situation actually exists. Moreover, when Presidents invoked statutory language to pursue

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[124] *See, e.g.*, THE FEDERALIST NO. 11, *supra* note 29, at 91 ("Let the thirteen States . . . concur in erecting one great American system . . . to dictate the terms of the connection between the old and the new world!"); *see also* DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY 79–82 (2017) (describing Hamilton's negotiations with Congress over early tariff and subsidy measures).

[125] Ch. 39, 1 Stat. 180.

[126] Ch. 55, 4 Stat. 270; *see also* IRWIN, *supra* note 124, at 136–37.

[127] Claussen & Meyer, *supra* note 26 (manuscript at 36).

[128] *See* Claussen & Meyer, *supra* note 1, at 1962–64; Claussen, *supra* note 114, at 1112; Eichensehr & Hathaway, *supra* note 114, at 1859–60.

[129] Ch. 474, 48 Stat. 943 (1934).

[130] *Id.* § 1, 48 Stat. at 943.

[131] Ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. §§ 4301–4336, 4338–4341).

[132] *Id.* § 5(b), 40 Stat. at 415.

[133] *See* 19 U.S.C. § 1821.

[134] *Id.* § 2132(a).

[135] *Id.* § 2251.

[136] *Id.* § 2411.

domestic-facing goals,[137] Congress responded by subsequently limiting the delegated statutory authority. For example, after President Nixon invoked TWEA to impose a ten-percent import surcharge to prevent short-term dollar depreciation,[138] Congress passed Section 122 to specifically limit presidential authority to resolve balance of payment crises and narrowed TWEA via IEEPA.[139]

In sum, far from establishing congressional inclination to delegate broadly in *all* foreign commerce settings, twentieth-century foreign commerce delegations limited use of broader language to particular situations involving war, diplomatic crises, and negotiation of international agreements.[140] By contrast, Congress has consistently delegated foreign commerce regulatory authority more narrowly and specifically when enabling inward-facing protection of domestic industry.

C. The Major Questions Solution

In light of the competing separation of powers values and the dichotomy in historical practice, applying MQD, rather than FANS exceptionalism, to executive-led new economic statecraft actions better secures separation of powers norms and reflects congressional intent. Currently, MQD mandates "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[141] Some jurists view the doctrine as a substantive canon that deliberately construes statutory delegations narrowly to preserve congressional power.[142] Others view the doctrine as a semantic canon that leverages ordinary language's inclination against fitting "elephants in mouseholes" to properly ascertain textual meaning.[143] Under either rationale, MQD works to safeguard congressional power from encroachment by

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[137] *E.g.*, Proclamation No. 4074, 36 Fed. Reg. 15724 (Aug. 17, 1971) (implementing Nixon tariff).

[138] *But cf.* Alan Wm. Wolff, *How Unprecedented Are Trump's "Emergency Tariffs"?*, PETERSON INST. FOR INT'L ECON. (Oct. 28, 2025, at 09:30 ET), https://www.piie.com/blogs/realtime-economics/2025/how-unprecedented-are-trumps-emergency-tariffs [https://perma.cc/RHN3-NZNQ] (noting that President Nixon "claim[ed] emergency authority for [his surcharge] . . . under trade agreement laws" rather than TWEA).

[139] *Professor Michael McConnell Breaks Down the Separation-of-Powers Fight at the Heart of the Trump Tariffs Case*, STANFORD L. SCH.: SLS BLOGS (Oct. 13, 2025), https://law.stanford.edu/2025/10/13/professor-michael-mcconnell-breaks-down-the-separation-of-powers-fight-at-the-heart-of-the-trump-tariffs-case [https://perma.cc/D6DN-ZNSW]. While IEEPA preserved the "regulate . . . importation" language that had been incorporated into TWEA by the early 1970s, Ch. 593, § 301(1)(B), 55 Stat. 838, 839 (1941), it novelly required an "unusual and extraordinary threat" to trigger its application. *See* 50 U.S.C. §§ 1701–1702.

[140] *See supra* p. 1975.

[141] NFIB v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2022) (per curiam)); *accord* Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[142] *E.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); *id.* at 2616–18 (Gorsuch, J., concurring); Learning Res., Inc. v. Trump, 146 S. Ct. 628, 658–59 (2026) (Gorsuch, J., concurring).

[143] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2382 (Barrett, J., concurring) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)); *Learning Res.*, 146 S. Ct. at 672–74 (Barrett, J., concurring).

executive action.[144] In contrast, FANS exceptionalism assumes that Congress typically intends to delegate broadly in these spaces, either because of adjacent independent presidential powers or based on historical practice.[145] Either way, limited judicial interference is viewed as best preserving separation of powers when there exists laconic and vague constitutional text.[146]

MQD more suitably mitigates the separation of powers strains raised by presidential action in new economic statecraft, on formalist and historical grounds. Formalistically, the Constitution's text clearly vests in Congress the power to regulate interstate and foreign commerce.[147] This textual clarity weakens the rationale for exceptionalism: Interpreting statutes to foreclose executive action over foreign commerce regulation does not risk encroaching on Article II powers because constitutional text proves clear, rather than vague, on the delegated matter.[148] Delegated duties are not "interlinked with duties" constitutionally "assigned to the President."[149] Nor does subject-matter adjacency to foreign powers automatically trigger inherent executive authority.[150] If anything, subject-matter overlap could strengthen the case for MQD. True, some commentators have noted that foreign commerce's subject-matter adjacency to FANS and independent Article II powers has been used by the executive branch to advocate for broad interpretation of foreign commerce delegations.[151] However, to paraphrase Professor Jed Shugerman, subject-matter adjacency to inherent executive powers can constitute a "double-edged sword"[152]: Such powers could properly accommodate functionalist justifications for broad delegations based on comparative executive competence, yet they could also invite executive abuse.[153] As functionalist justifications for executive branch competence

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[144] *See* Joseph Postell, *Does the Major Questions Doctrine Get Congress Right?*, HARV. J.L. & PUB. POL'Y: PER CURIAM, Summer 2024, No. 15, at 5–6.

[145] *See* Bradley & Goldsmith, *supra* note 96, at 1796.

[146] *See supra* notes 94–96 and accompanying text.

[147] U.S. CONST. art. I, § 8, cls. 1, 3.

[148] *See supra* notes 94–99 and accompanying text; *see also* Prakash & Ramsey, *supra* note 101, at 235 (arguing that constitutional text clearly proscribes the President from "regulat[ing] international commerce").

[149] Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1156 (2021) (quoting Loving v. United States, 517 U.S. 748, 772 (1996)).

[150] *See* Claussen & Meyer, *supra* note 26 (manuscript at 4); Bradley & Goldsmith, *supra* note 96, at 1783.

[151] *See* Claussen & Meyer, *supra* note 26 (manuscript at 3–4).

[152] *See* Jed Handelsman Shugerman, *The Major Questions Doctrine, Post-*Chevron*?:* Skidmore, Loper-Bright, *and a Good-Faith Emergency Question Doctrine*, 48 HARV. J.L. PUB. POL'Y 73, 73–74 (2025).

[153] *Id.*; *see also* Transcript of Oral Argument at 113, Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026) ("[W]hen you're in an emergency situation, the statutes actually have to speak with more precision . . . because emergencies beget emergencies.").

in foreign commerce prove more limited,[154] the case for construing delegations narrowly strengthens.[155]

Moreover, historical practice and context fail to establish that Congress has broadly delegated to the President across all aspects of trade and foreign commerce. True, some commentators, including Bradley and Goldsmith, have concluded that such historical practices imply a *general* tendency for Congress to delegate sweeping authority to the President in the trade policy and economic security context.[156] But this inference proves overbroad,[157] especially when one considers courts' narrow treatment of historical context in prior MQD settings.[158] Furthermore, congressional delegations that enable the President to adjust trade policy to protect domestic industry have generally done so narrowly. For example, Section 122 of the Trade Act of 1974 limited "import surcharges" designed to resolve balance-of-payment deficits to fifteen percent.[159] The Tariff Act of 1922[160] only enabled the President to impose tariffs that scientifically equalized importers' and domestic producers' production costs.[161] The Tariff Act of 1890[162] allowed the President to adjust tariff rates on five specific products only when nonreciprocal import policy existed abroad.[163] The narrowing of TWEA also suggests that Congress has historically disapproved when Presidents' invocation of foreign economic powers could overburden the domestic economy.[164] Taken together, far from allowing new economic statecraft actions to escape MQD scrutiny, historical context rebuts the application of FANS exceptionalism in the new economic statecraft space.

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[154] *See* Meyer & Sitaraman, *supra* note 26, at 630–31.

[155] *Cf.* Shugerman, *supra* note 152, at 88 (arguing that emergencies' "salience . . . reduce[s] the need to rely on" the executive's "comparative expertise").

[156] Bradley & Goldsmith, *supra* note 96, at 1796–97; *cf. Learning Res.*, 146 S. Ct. at 691 (Kavanaugh, J., dissenting) (arguing that the "text, history, and . . . foreign affairs context" suggest a general tendency for sweeping delegation under IEEPA).

[157] *Cf. Learning Res.*, 146 S. Ct. at 661–62 (Gorsuch, J., concurring) ("Whatever one makes of [IEEPA's] history, it hardly reveals . . . [an] interpretation that might advance the dissent's cause.").

[158] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143–44, 161 (2000) (concluding that prior congressional regulation in a subject matter area offers contextual support for construing statutory delegations in that area narrowly).

[159] 19 U.S.C. § 2132(a).

[160] Ch. 356, 42 Stat. 858.

[161] *Id.* § 315(a), 42 Stat. at 941–42.

[162] Ch. 1244, 26 Stat. 567.

[163] *Id.* § 3, 26 Stat. at 612.

[164] *Cf. Professor Michael McConnell Breaks Down the Separation-of-Powers Fight at the Heart of the Trump Tariffs Case*, *supra* note 139 (suggesting that Congress was "alarmed by the scope of power . . . claimed" by President Nixon).

III. Major Questions and Economic Emergency Case Law

Applying MQD to review executive action in new economic statecraft also better enforces existing doctrinal commitments. First, such application will reinforce recent Court precedent that prevents FANS implications and emergency situations from circumventing MQD scrutiny of executive action. Second, applying MQD better aligns with courts' historical commitment to applying contemporaneously prevalent tools of statutory interpretation and eschewing categorical conferral of FANS deference in the review of economic statecraft actions with nonnegligible domestic effects.

A. Major Questions and Emergencies

Recent Supreme Court jurisprudence has applied MQD in emergency contexts, even when underlying emergencies plausibly implicate FANS. In *Alabama Ass'n of Realtors v. Department of Health and Human Services*,[165] the Court effectively struck down an eviction moratorium implemented in response to the COVID-19 pandemic.[166] Likewise, in *Biden v. Nebraska*,[167] the Court struck down President Biden's student loan forgiveness program, also implemented in response to the pandemic.[168] Most recently, in *Learning Resources*, the Court struck down President Trump's 2025 tariff measures implemented via IEEPA.[169] Although the majority's grounds for striking down the tariffs technically remained ambiguous,[170] three Justices in the majority expressly applied MQD to justify their invalidation of the tariffs.[171]

All three cases involved sweeping regulatory actions that occurred pursuant to statutes touching on FANS matters.[172] Yet arguments invoking executive competence in exercising emergency discretion did not win over the Court's majority.[173] For example, President Biden's order to waive student loan debt facially implicated an emergency situation,[174] and loan relief authorized under the HEROES Act *could* implicate FANS matters depending on the triggering event.[175] The eviction moratorium in *Alabama Ass'n of Realtors* began as a COVID-19 emergency

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165 141 S. Ct. 2485 (2021).

166 *Id.* at 2486–87, 2490 (vacating the stay preventing the district court's grant of summary judgment against the CDC from taking effect).

167 143 S. Ct. 2355 (2023).

168 *Id.* at 2364, 2368.

169 *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 646 (2026).

170 *Id.* at 674 (Kagan, J., concurring in part and concurring in the judgment). Justices Kagan, Sotomayor, and Jackson joined in invalidating the tariffs but expressly did not rely on MQD. *Id.*

171 *See id.* at 638–40 (opinion of Roberts, C.J.).

172 *See Biden*, 143 S. Ct. at 2391–92 (Kagan, J., dissenting); *Learning Res.*, 146 S. Ct. at 641; Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021).

173 *Cf., e.g.*, *Biden*, 143 S. Ct. at 2396 (Kagan, J., dissenting).

174 *See id.* at 2364 (majority opinion).

175 *See* 20 U.S.C. § 1098bb(a)(1).

measure,[176] and Section 361(a) of the Public Health Service Act[177] allows for executive branch regulation "necessary to prevent the . . . spread of communicable diseases from foreign countries."[178] Most obviously, the Liberation Day tariffs reviewed in *Learning Resources* invoked IEEPA, which clearly implicates foreign emergencies,[179] as legal justification.[180] Executive-led new economic statecraft actions may implicate discrete, noneconomic elements of foreign affairs. Yet, when a President leverages economic statecraft statutes to fundamentally reshape domestic economic conditions and impose billions in costs on domestic entities, Supreme Court precedent would suggest no exemption from MQD scrutiny.

B. Judicial Scrutiny of Economic Statecraft

Applying MQD to executive actions in new economic statecraft would also reinforce prior cases' commitment to applying prevailing statutory interpretation tools in the economic statecraft space. True, at least before *Learning Resources*, courts often ruled in favor of the executive branch in FANS-related economic statecraft cases.[181] Yet, when domestic economic impacts proved salient in a reviewed action, courts applied established statutory interpretation tools and forwent broad proclamations of categorical deference. Three pre–*Learning Resources* cases are instructive.

In *United States v. Yoshida International, Inc.* (*Yoshida II*),[182] the United States Court of Customs and Patent Appeals upheld President Nixon's ten-percent surcharge on dutiable imports.[183] To some, *Yoshida II* appeared to support a more *general* authorization to impose tariffs pursuant to IEEPA due to the nearly identical language shared within the statute that authorized Nixon's tariffs.[184] However, *Yoshida II* had limited scope: "To uphold the specific surcharge . . . is not to approve . . . any future surcharge of a different nature."[185] Moreover, the *Yoshida II* court conducted means-ends review on the surcharge's nexus with the declared emergency and "the power delegated."[186] To the *Yoshida II* court, means-ends scrutiny served as an established statutory

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[176] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486.
[177] 42 U.S.C. § 264(a).
[178] *Id.*
[179] *See* 50 U.S.C. §§ 1701–1702.
[180] Learning Res., Inc. v. Trump, 146 S. Ct. 628, 636 (2026).
[181] *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327 (1936).
[182] 526 F.2d 560 (Cust. Ct. App. 1975). *Yoshida II* reversed the United States Customs Court's decision. *Id.* at 584; *see generally* Yoshida Int'l, Inc. v. United States, 378 F. Supp. 1155 (Cust. Ct. 1974) (lower court case).
[183] *Yoshida II*, 526 F.2d at 584.
[184] *See* Squitieri, *supra* note 26, at 11; Goldsmith, *supra* note 62.
[185] *Yoshida II*, 526 F.2d at 577.
[186] *Id.* at 578.

interpretation "standard inherently applicable to the exercise of delegated emergency powers."[187]

Similarly, in *Dames & Moore v. Regan*,[188] the Supreme Court upheld President Carter's nullification of liens on Iranian assets and suspension of legal claims against Iran.[189] Beyond forswearing the creation of "general 'guidelines'" and "confin[ing] the opinion only to the very questions necessary to [deciding] the case,"[190] the *Dames & Moore* Court employed prevailing tools of statutory interpretation. First, the Court held that IEEPA specifically authorized nullification on plain textual grounds.[191] Second, contrary to the government's position, it concluded that IEEPA alone could not "be read to authorize the suspension of the claims."[192] Instead, it resolved the claim-settlement issue by referencing the "history of congressional acquiescence in" President-led international claim settlement based on the 1949 International Claims Settlement Act.[193] This Act, as well as congressional acquiescence to executive-led international claim settlement agreements pursued under its auspices, proved "[c]rucial to [the] decision."[194] In sum, authority to suspend claims against foreign governments did not arise exclusively from IEEPA, an economic security statute. Rather, it also arose from the 1949 International Claims Settlement Act, which unlocked independent executive responsibilities in foreign policymaking by focusing on foreign claim settlement.[195] *Dames & Moore*'s careful treatment of IEEPA's text thus cuts against the conclusion that the case evinces the Supreme Court's inclination to interpret statutes like IEEPA "with a broad brush."[196]

Finally, judicial review of Section 232 also involved application of established statutory interpretation tools.[197] In *Federal Energy Administration v. Algonquin SNG, Inc.*,[198] the Court upheld petroleum license

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[187] *Id.*

[188] 453 U.S. 654 (1981).

[189] *See id.* at 662–68, 688. Dames & Moore initially sued to recoup $3.7 billion from Iran's Atomic Energy Organization. *See* Sharon D. Liko, Developments, *The Settlement Claims Case:* Dames & Moore v. Regan, 10 DENV. J. INT'L L. & POL'Y 577, 578 (1981).

[190] *Dames & Moore*, 453 U.S. at 661.

[191] *Id.* at 672 & n.5.

[192] *Id.* at 675.

[193] *Id.* at 678, 680; *see* 22 U.S.C. §§ 1621–1627. Rather than concluding that IEEPA implicitly delegated claim suspension authority, the Court more narrowly stated that failure to specifically delegate congressional authority does not decisively "imply 'congressional disapproval'" of executive action in the FANS space. *Dames & Moore*, 453 U.S. at 678 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)).

[194] *Dames & Moore*, 453 U.S. at 680; *see id.* at 677–80, 682.

[195] The Court also noted that the President "entered into at least 10 binding settlements with foreign nations" over the 1952–81 period. *Id.* at 680.

[196] Goldsmith, *supra* note 62 (quoting Bradley & Goldsmith, *supra* note 96, at 1797).

[197] Challenges to Section 721 of the DPA have not involved delegation, but FANS implications have not shielded executive action under Section 721 from constitutional scrutiny on other grounds. *See* Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 325 (D.C. Cir. 2014).

[198] 426 U.S. 548 (1976).

fees as an import adjustment measure.[199] Yet again, however, the Court employed then-predominant statutory interpretation tools to reach its conclusion. Along with labeling its "holding . . . a limited one,"[200] the Court drew upon legislative history, a then-prevalent tool of statutory interpretation,[201] to arrive at its result.[202]

Altogether, the most salient pre–*Learning Resources* cases involving statutory interpretation of delegations in economic statecraft statutes do not suggest that courts have categorically accepted unduly broad interpretations of those delegations under the guise of FANS exceptionalism. Far from eschewing statutory interpretation in favor of categorical deference,[203] judicial review of economic security statutes has applied prevailing statutory interpretation tools to delineate the scope of delegations conferred by such statutes.[204] Thus, as *Learning Resources* might suggest,[205] MQD should likewise govern in the economic statecraft domain, because it has emerged as a widely used statutory interpretation tool.[206]

Conclusion

The executive branch increasingly seeks to reshape the domestic economy by invoking security rationales. This Note demonstrates why enshrining FANS exceptionalism and deferential review of these executive efforts, rather than applying MQD, would prove misguided on functionalist, structural, and doctrinal grounds. To some, perceived judicial inaction implies that only Congress can effectively restrain executive-led national security creep.[207] Yet, with Congress largely paralyzed, encouraging legislative action may prove an ineffective substitute for judicial inaction.[208] Lack of congressional action over executive agency initiatives did not stop courts from constraining such initiatives in the early 2020s.[209] Analogously, a strong case exists for courts to constrain

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[199] *Id.* at 570–71.

[200] *Id.* at 571.

[201] John F. Manning & Matthew C. Stephenson, Legislation & Regulation 163 (2010).

[202] *See Algonquin*, 426 U.S. at 564–68.

[203] FANS cases that expressly suggest categorical FANS exceptionalism more directly implicated foreign crises than domestic economic performance. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936).

[204] *See supra* pp. 1980–82.

[205] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 638–39 (2026).

[206] *See* Capozzi, *supra* note 18, at 526 (describing "general consensus" on the contours of MQD). *But see Learning Res.*, 146 S. Ct. at 675 (Kagan, J., concurring in part and concurring in the judgment) (arguing that MQD falls outside "ordinary principles of statutory interpretation").

[207] Claussen & Meyer, *supra* note 1, at 1978.

[208] *Cf.* Molly E. Reynolds & Scott R. Anderson, *Can Congress Reverse Trump's Tariffs?*, Lawfare (Apr. 9, 2025, at 08:00 ET), https://www.lawfaremedia.org/article/can-congress-reverse-trump's-tariffs [https://perma.cc/5QRC-46EN].

[209] *See* Goldbeck & Kamat, *supra* note 83; *see also* Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 105 (2021) (noting that issues with agency deference stem from Congress's low capacity to legislate).

executive actions in new economic statecraft with MQD. As executive-led regulation in national security's name threatens to swallow domestic economic policy, MQD offers a viable restraint to mitigate the separation of powers strains and perverse policymaking incentives that might arise from the new economic statecraft.