

10-2023

## **The National Security Consequences of the Major Questions Doctrine**

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# Michigan Law Review

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Volume 122 | Issue 1

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2023

## The National Security Consequences of the Major Questions Doctrine

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### Recommended Citation

Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55 (2023).

Available at: <https://repository.law.umich.edu/mlr/vol122/iss1/3>

<https://doi.org/10.36644/mlr.122.1.national>

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# THE NATIONAL SECURITY CONSEQUENCES OF THE MAJOR QUESTIONS DOCTRINE

Timothy Meyer\* & Ganesh Sitaraman\*\*

*The rise of the major questions doctrine—the rule that says that in order to delegate to the executive branch the power to resolve a “question of ‘deep economic and political significance’ that is central to [a] statutory scheme,” Congress must do so expressly—threatens to unmake the modern executive’s authority over foreign affairs, especially in matters of national security and interstate conflict. In the twenty-first century, global conflicts increasingly involve economic warfare, rather than (or in addition to) the force of arms.*

*In the United States, the executive power to levy economic sanctions and engage in other forms of economic warfare are generally based on extremely broad delegations of authority from Congress. The major questions doctrine (MQD) threatens the ability to fight modern conflicts for two reasons. First, classic national-security-related conflicts—wars of territorial conquest, terrorism, or nuclear proliferation—increasingly are met with economic measures. But the statutes that authorize economic warfare actions are incredibly broad and recent administrations have interpreted these statutes in ways that risk running afoul of an expansive and free-form MQD. Second, “foreign affairs exceptionalism,” in which the Court decides not to apply the MQD to statutes involving foreign affairs, is not likely to work well as a response because what is “foreign” and “domestic” cannot be easily distinguished and attempts to do so will have perverse consequences.*

*The MQD raises serious problems for foreign affairs and national security. If the MQD is applied to domestic, but not foreign, delegations, then the executive branch will have an incentive to use broad foreign affairs delegations to accomplish domestic policy objectives in order to evade the safeguards and limits that attend domestic administrative action. At the same time, judges will have to police the porous boundary between “foreign” and “domestic,” with especially high error costs because wrong decisions will affect national security. If the MQD is applied to economic delegations that touch foreign commerce, the most*

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*likely consequence is that judges—particularly lower court judges—will be put in the position of second-guessing executive branch decisionmaking on precisely those questions—economic foreign policy questions of deep economic and political significance—on which the political branches enjoy both constitutional primacy and institutional expertise. This result is troubling; judges lack the knowledge and training to make effective decisions bearing on foreign policy, and putting them in the position to do so contravenes the norms of our legal system.*

#### TABLE OF CONTENTS

INTRODUCTION .....	56
I. THE RISE OF ECONOMIC WARFARE AS A NATIONAL SECURITY STRATEGY .....	59
II. ECONOMIC WARFARE AS A MAJOR QUESTION .....	64
A. <i>The Major Questions Doctrine</i> .....	64
B. <i>Why Economic Warfare Is a Major Question</i> .....	72
III. THE NATIONAL SECURITY CONSEQUENCES OF THE MAJOR QUESTIONS DOCTRINE .....	78
A. <i>How Major Questions Hamstrings the Executive’s Conduct of Foreign Affairs</i> .....	78
B. <i>The Inevitable Failure of Foreign Affairs Exceptionalism</i> .....	81
IV. MAJOR QUESTIONS AND THE FUTURE OF NATIONAL SECURITY .....	87
A. <i>Congressional Specifications</i> .....	87
B. <i>Doctrinal Retrenchment</i> .....	91
C. <i>Judicial Policymaking</i> .....	94
CONCLUSION .....	96

#### INTRODUCTION

The rise of the major questions doctrine—the rule that says that in order to delegate to the executive branch the power to resolve a “question of deep ‘economic and political significance’ that is central to [a] statutory scheme,” Congress must do so expressly<sup>1</sup>—threatens to unmake the modern executive’s authority over foreign affairs, especially in matters of national security and interstate conflict. In the twenty-first century, global conflicts increasingly involve economic warfare, rather than (or in addition to) the force of arms. In the wake of 9/11, the United States and its allies developed a global financial

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1. *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Regul. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

architecture that aimed to dry up the financing for al-Qaeda specifically and global terrorism generally.<sup>2</sup> Economic sanctions played a central role in enforcing the Joint Comprehensive Plan of Action, the agreement aimed at ending Iran's nuclear program.<sup>3</sup> And most recently, the United States and its allies have largely shut Russia out of the global economic system in response to Russia's invasion of Ukraine.<sup>4</sup>

In the United States, the executive power to levy economic sanctions, engage in other forms of economic warfare, or ensure U.S. resilience in the face of global dangers is generally based on extremely broad delegations of authority from Congress. The International Emergency Economic Powers Act (IEEPA), for instance, grants the president broad authority to regulate economic transactions with foreign persons. These powers are authorized if the president declares an emergency regarding an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."<sup>5</sup> IEEPA has provided the basis for a wide range of economic sanctions that various administrations have employed, including, for example, the current import bans on Russian products in response to that nation's invasion of Ukraine.<sup>6</sup> Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974 give the president expansive powers to wage trade wars—including by functionally revoking a country's most-favored-nation (MFN) status.<sup>7</sup> At a more granular level, the Defense Production Act (DPA) delegates expansive powers to the president to mobilize U.S. industry to produce goods necessary to U.S. national security<sup>8</sup>—a broad concept that can be considered either offensive (projecting U.S. interests abroad) or defensive (protecting U.S. interests). For example, the Biden administration invoked the DPA to spur the manufacture of a range of clean-energy and energy-efficient technologies in the United States, including solar cells and heat pumps. The administration took this action in the context of the conflict with Russia

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2. For an account of these developments, see JUAN C. ZARATE, *TREASURY'S WAR: THE UNLEASHING OF A NEW ERA OF FINANCIAL WARFARE* (2013).

3. KENNETH KATZMAN, CONG. RSCH. SERV., RS20871, *IRAN SANCTIONS* (2016).

4. Adam S. Posen, *The End of Globalization?*, FOREIGN AFFS. (Mar. 17, 2022), <https://www.foreignaffairs.com/articles/world/2022-03-17/end-globalization> [perma.cc/E6DY-VY6V].

5. 50 U.S.C. § 1701(a).

6. Exec. Order No. 14,068, 87 Fed. Reg. 14381 (Mar. 15, 2022).

7. See Timothy Meyer & Ganesh Sitaraman, *The Power to Declare Trade War*, LAWFARE (Mar. 13, 2018, 1:58 PM), <https://www.lawfareblog.com/power-declare-trade-war> [perma.cc/H2MU-GN9J]. Despite its name, most-favored-nation status refers to the baseline level of trade liberalization that applies to foreign countries by operation of trade agreements, including and especially the World Trade Organization's agreements. Under U.S. law, the same concept is referred to as "permanent normal trade relations." VLADIMIR N. PREGELJ, CONG. RSCH. SERV., RL31558, *NORMAL-TRADE-RELATIONS (MOST-FAVORED-NATION) POLICY OF THE UNITED STATES 1* (2005).

8. Defense Production Act of 1950, 50 U.S.C. §§ 4501–4568.

(which derives significant revenue and diplomatic leverage from the fossil fuel dependence of European nations), economic competition with China (which has threatened the development of renewable energy industries in developed countries by heavily subsidizing its own export-oriented renewable energy sector), and the global dangers of climate change.<sup>9</sup> The administration has also invoked the DPA to spur production of COVID-19 vaccines and infant formula in response to shortfalls of both medical necessities.<sup>10</sup>

The major questions doctrine (MQD) threatens the ability to use these kinds of authorities to fight modern conflicts for two reasons. First, classic national-security-related conflicts—such as wars of territorial conquest, terrorism, and nuclear proliferation—increasingly are met with economic measures. In a globalized economy, the ability to weaponize the economic system to punish violations of international peace and security is a valuable tool. But the statutes that authorize these actions are incredibly broad and recent administrations have interpreted these statutes in ways that risk running afoul of an expansive and free-form MQD. Second, “foreign affairs exceptionalism,” in which the Court would decide not to apply the MQD to statutes involving foreign affairs, is unlikely to work well as a response. The line between foreign and domestic economic statutes is blurry, and “foreign affairs” uses of economic powers cannot be neatly distinguished from domestic uses. For this reason, the Court may simply apply the MQD to economic statutes, regardless of whether they implicate foreign or domestic affairs. Alternatively, deciding *not* to apply the MQD to statutes the Court thinks implicate economic foreign affairs will incentivize the executive branch to use such statutes to achieve domestic regulatory objectives and still require judges to make decisions about where the boundary between foreign and domestic lies—a boundary that is porous in the context of economic conflict. In the long run, such use will further undermine Congress’s role in our democracy and potentially erode congressional support for delegating the economic powers the executive branch needs to fight modern conflicts.

In this Article, we show that the MQD raises serious problems for foreign affairs and national security. Part I describes the rise of economic warfare as a critical component of American national security and foreign affairs. The increasing importance of economic warfare means that economic regulators and policymakers, not just members of the military, play critical roles during modern national security crises and operations. In Part II, we show that foreign

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9. *President Biden Invokes Defense Production Act to Accelerate Domestic Manufacturing of Clean Energy*, DEP’T OF ENERGY (June 6, 2022), <https://www.energy.gov/articles/president-biden-invokes-defense-production-act-accelerate-domestic-manufacturing-clean> [perma.cc/JQY6-HAJ8].

10. Sydney Lupkin, *Defense Production Act Speeds Up Vaccine Production*, NPR (Mar. 13, 2021, 7:00 AM), <https://www.npr.org/sections/health-shots/2021/03/13/976531488/defense-production-act-speeds-up-vaccine-production> [perma.cc/Q2ZE-S5N7]; Myah Ward, *Biden Invokes Defense Production Act to Increase Supply of U.S. Infant Formula*, POLITICO (May 18, 2022, 6:37 PM), <https://www.politico.com/news/2022/05/18/biden-invokes-defense-production-act-to-increase-supply-of-u-s-infant-formula-00033618> [perma.cc/Y6MR-MR27].

economic statutes and regulations are likely to run afoul of the MQD when used for national security purposes. We first describe the doctrine and discuss some of the dynamics of its application. We then show that the United States' central economic warfare tools are based on such broad delegations of authority that they invariably implicate the MQD. Part III discusses the consequences of applying (or not applying) the MQD to foreign affairs and national security. We argue that the doctrine might preemptively chill executive branch officials from engaging in economic warfare, and that attempts to carve out exceptions to the doctrine for "national security" or "foreign affairs" will invariably fail—and in the process also have perverse consequences. Part IV looks to the future. We suggest that judicial hopes that Congress speak more clearly are unlikely to manifest, and that doctrinal retrenchment is unlikely as well. The most likely consequence, as a result, is that the Court will simply pick and choose when the doctrine applies to economic delegations that touch foreign commerce. This will turn judges—and particularly lower court judges—into some of the key policymakers in shaping the future of American foreign policy and national security. This prospect should be troubling, as judges are ill-suited to be foreign policymakers and the error costs of wrong decisions are high.

#### I. THE RISE OF ECONOMIC WARFARE AS A NATIONAL SECURITY STRATEGY

The last century has reshaped the nature of warfare. Two trends have driven that change: the decline in direct military confrontations between the world's leading military powers and increased economic interdependence. The two world wars demonstrated that in an industrial age, direct military conflicts among great powers are unlikely to remain limited, as wars were in the nineteenth century. Instead, twentieth-century warfare turned into civilizational conflicts that killed millions around the globe. The spread of nuclear weapons in the years after World War II made the prospect of a direct conflict between great powers even more catastrophic.<sup>11</sup> To avoid such horrors, militarized conflicts among the great powers took the form of proxy wars.<sup>12</sup> In the Vietnam War, for instance, the United States fought directly against a small nation backed by the Soviet Union and China, but without official direct involvement by either.<sup>13</sup> In Afghanistan in the 1980s, the roles were reversed, with the United States backing insurgent groups against a Soviet invasion.<sup>14</sup>

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11. For classic discussions of deterrence in this vein, see GLENN H. SNYDER, *DETERRENCE AND DEFENSE* (1961) and ROBERT JERVIS, *THE ILLOGIC OF AMERICAN NUCLEAR STRATEGY* 31 (1985), the latter arguing that, "[t]o the extent that the military balance is stable at the level of all-out nuclear war, it will become less stable at lower levels of violence."

12. See, e.g., ANDREW MUMFORD, *PROXY WARFARE* (2013); *PROXY WARS* (Eli Berman & David A. Lake eds., 2019).

13. DAVID L. ANDERSON, *THE COLUMBIA GUIDE TO THE VIETNAM WAR* 49, 97, 112 (2002).

14. STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* (2004).

With the end of the Cold War, international conflict morphed yet again. Nonstate actors and intrastate conflicts became more prominent.<sup>15</sup> The demise of the Soviet Union marked what seemed at the time to be the end of proxy wars and removed Soviet domination in Eastern Europe. This decline in interstate territorial conflicts led some to suggest that international law had succeeded in reducing armed conflict arising from territorial revisionism.<sup>16</sup>

Today, though, the state of military conflict looks more like it did during the Cold War. In particular, China and Russia have again asserted territorial ambitions that include the formal annexation or at least domination of independent nations and territory that those nations control or claim.<sup>17</sup> Russia, in particular, has repeatedly used military force against its neighbors—Georgia in 2008, Ukraine in 2014, and Ukraine again in 2022—in order to seize and annex territory and install friendly governments.<sup>18</sup> China has continued to make clear its ambition to reannex Taiwan, while also advancing territorial claims in the South China Sea.<sup>19</sup> The fact that both Russia and China are nuclear-armed powers makes the prospect of direct military confrontation very risky. As a result, the United States and its allies have been left searching for alternative modes of response.

The second trend—the increased economic interdependence of nations—has offered an answer to the problem posed by the resurgence of territorial revisionism by nuclear-armed countries. Globalization and economic interdependence have long been thought of as tools of economic peace and prosperity.<sup>20</sup> Nations that trade together will not go to war, the thinking has gone. The

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15. See, e.g., LARS-ERIK CEDERMAN & YANNICK PENGL, GLOBAL CONFLICT TRENDS AND THEIR CONSEQUENCES 3 (2019), [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/SDO\\_BP\\_Cederman\\_Pengl.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/SDO_BP_Cederman_Pengl.pdf) [perma.cc/Y842-URMR]; THOMAS S. SZAYNA ET AL., RAND CORP., WHAT ARE THE TRENDS IN ARMED CONFLICTS, AND WHAT DO THEY MEAN FOR U.S. DEFENSE POLICY? (2017).

16. OONAA. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017).

17. Elbridge A. Colby & A. Wess Mitchell, *The Age of Great-Power Competition*, FOREIGN AFFS. (Dec. 10, 2019), <https://www.foreignaffairs.com/united-states/age-great-power-competition> [perma.cc/36YD-VWQC].

18. See Michael Kofman, *The August War, Ten Years On: A Retrospective on the Russo-Georgian War*, WAR ON THE ROCKS (Aug. 17, 2018), <https://www.warontherocks.com/2018/08/the-august-war-ten-years-on-a-retrospective-on-the-russo-georgian-war> [perma.cc/A44H-BYMG]; Max Fisher, *Everything You Need to Know About the 2014 Ukraine Crisis*, VOX (Sept. 3, 2014, 11:01 AM), <https://www.vox.com/2014/9/3/18088560/ukraine-everything-you-need-to-know> [perma.cc/TK4L-SFN3].

19. See Peter Gries & Tao Wang, *Will China Seize Taiwan?*, FOREIGN AFFS. (Feb. 15, 2019), <https://www.foreignaffairs.com/articles/china/2019-02-15/will-china-seize-taiwan> [perma.cc/5C44-9RZG]; Bonnie S. Glaser & Gregory Poling, *China's Power Grab in the South China Sea*, FOREIGN AFFS. (Aug. 20, 2021), <https://www.foreignaffairs.com/articles/china/2021-08-20/chinas-power-grab-south-china-sea> [perma.cc/88P8-MJH6].

20. For a general discussion of liberal and realist views of this point, see Dale C. Copeland, *Economic Interdependence and War: A Theory of Trade Expectations*, INT'L SEC. Spring 1996, at 5, 8–16. For an account of interdependence and liberal theory, with particular attention to Immanuel Kant's concept of perpetual peace, see Michael W. Doyle, *Kant, Liberal Legacies, and*

persistence of Russia and China's territorial ambitions, despite their integration into the global economy, suggests that this conventional wisdom is at least partly wrong.<sup>21</sup> But there is also some truth in it, albeit in a sense not intended by globalization's proponents.

It is now clear that the globalized economy allows for what has been termed "weaponized interdependence."<sup>22</sup> Economic ties between nations, the globalization of the financial system, and the dollar's enduring status as a reserve currency all mean that the United States and its allies can deploy sophisticated economic sanctions as a means of attempting to disrupt and discourage the use of force by both traditional state actors and nonstate actors. Breaches of international peace and security and violations of international obligations that support international peace and security are thus increasingly met with a wide range of economic measures designed to punish, cripple, and deter American enemies. Those measures include trade sanctions,<sup>23</sup> divestment and investment restrictions,<sup>24</sup> and financial blockades.<sup>25</sup> Moreover, as geopolitical competition re-emerges, the United States and its allies have also (perhaps belatedly) begun to consider how to proactively reduce their own economic dependence on geopolitical rivals. Reducing such dependence—such as by weaning the European Union off of Russian natural gas or reducing U.S. dependence on critical minerals from China and Russia<sup>26</sup>—is critical to enabling a more robust response to these nations' aggressive territorial conduct.

In response to these two trends, the United States government has increasingly relied on tools of economic warfare in order to advance its foreign policy and national security goals. Four major developments are worth noting, one from each of the last four administrations. First, in the wake of 9/11, the

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*Foreign Affairs*, 12 PHIL. & PUB. AFFS. 205 (1983), and Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, Part 2, 12 PHIL. & PUB. AFFS. 323 (1983). For an account more specifically focused on capitalism, see Erik Gartzke, *The Capitalist Peace*, 51 AM. J. POL. SCI. 166 (2007).

21. Of course, much of the political science on this question has been trying to explain under what circumstances such a peace might last. See sources cited in *supra* note 20 for overviews of the debate.

22. THE USES AND ABUSES OF WEAPONIZED INTERDEPENDENCE (Daniel W. Drezner, Henry Farrell & Abraham L. Newman eds., 2021); Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, INT'L SEC., Summer 2019, at 42.

23. See, e.g., Exec. Order No. 14,068, 87 Fed. Reg. 14381 (Mar 15, 2022).

24. See, e.g., Exec. Order No. 14,071, 87 Fed. Reg. 20999 (Apr. 6, 2022).

25. See, e.g., Jeff Stein, *U.S. Pushes Russia Toward Default by Blocking Debt Payments*, WASH. POST (May 24, 2022, 3:00 PM), <https://www.washingtonpost.com/us-policy/2022/05/24/treasury-russia-debt-default> [perma.cc/ZK2U-BRUN].

26. See, e.g., Kim Mackrael & Joe Wallace, *Europe Agrees to Cut Natural-Gas Consumption as Russia Crimps Supplies*, WALL ST. J. (July 26, 2022, 5:10 PM), <https://www.wsj.com/articles/europe-checks-its-thermostats-as-russia-crimps-natural-gas-supplies-11658827804> [perma.cc/BJ7D-GSF7]; *Fact Sheet: Securing a Made in America Supply Chain for Critical Minerals*, THE WHITE HOUSE (Feb. 22, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/22/fact-sheet-securing-a-made-in-america-supply-chain-for-critical-minerals> [perma.cc/D998-A33].

Bush administration built an impressive war machine out of the Treasury Department, as part of its broader War on Terror. The Treasury Department used its legal authority on economic sanctions and banking to prevent terrorists from gaining access to global financial networks—thereby limiting their ability to fund future terror campaigns.<sup>27</sup> Second, the Obama administration used economic sanctions to push Iran to join the Joint Comprehensive Plan of Action (JCPOA), an international agreement aimed at preventing Iran from developing nuclear weapons.<sup>28</sup> The sanctions regime included legislatively specified sanctions, executive branch sanctions, and international sanctions from the United Nations and allied countries.<sup>29</sup> Third, the Trump administration began a trade war with China, elevating a range of authorities to raise tariffs to the forefront of policymaking.<sup>30</sup> It also took an aggressive posture on foreign tech platforms and foreign investment, including restricting outbound U.S. investment in China and authorizing the Commerce Department to develop rules and regulations for foreign tech platforms operating in the United States.<sup>31</sup> Finally, as noted above, under the Biden administration, the federal government has used economic warfare tools in its response to the Russian invasion of Ukraine, including economic sanctions and the Defense Production Act.<sup>32</sup>

As these examples show, economic warfare has increasingly become a complement to, and sometimes a substitute for, direct military confrontation and the provision of military aid to proxies. This regular weaponization of economic power is not limited to the United States, and it has already sent shockwaves through the international legal system governing trade. International trade agreements, such as the General Agreement on Tariffs and Trade (GATT), and domestic trade laws, such as Section 232 of the Trade Expansion Act, contain rules governing economic measures that affect national security.<sup>33</sup> In general, these rules act as exceptions. They allow governments to raise economic barriers in contravention of regularly applicable rules that establish low

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27. See generally ZARATE, *supra* note 2 (describing these developments).

28. See Kali Robinson, *What Is the Iran Nuclear Deal?*, COUNCIL ON FOREIGN RELS. (July 20, 2022, 3:43 PM), <https://www.cfr.org/backgroundunder/what-iran-nuclear-deal> [perma.cc/A33L-KK5F].

29. *Id.*; HARV. KENNEDY SCH., BELFER CTR. FOR SCI. & INT'L AFFS., SANCTIONS AGAINST IRAN: A GUIDE TO TARGETS, TERMS, AND TIMETABLES (2015), <https://www.belfer-center.org/sites/default/files/legacy/files/Iran%20Sanctions.pdf> [perma.cc/9E4W-HZVP].

30. Chad P. Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. FOR INT'L ECON. (Mar. 24, 2023, 1:00 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-trade-war-timeline-date-guide> [perma.cc/Q36S-GK6L].

31. Exec. Order No. 13,959, 85 Fed. Reg. 73185 (Nov. 17, 2020); Exec. Order No. 13,873, 84 Fed. Reg. 22689 (May 17, 2019).

32. See *supra* Introduction.

33. General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; 19 U.S.C. § 1862.

trade barriers.<sup>34</sup> In international trade disputes at the World Trade Organization (WTO), countries have begun to regularly invoke national security exceptions to defend economic security measures.<sup>35</sup> The United States, for instance, has done so in disputes over the Trump administration's national security tariffs on steel and aluminum, and in disputes over trade sanctions against Hong Kong stemming from Chinese efforts to squash democracy there.<sup>36</sup> Russia successfully invoked the exception against Ukraine in an economic dispute stemming from its 2014 conflict,<sup>37</sup> and Saudi Arabia was partially successful in invoking the exception to justify an economic blockage of Qatar.<sup>38</sup>

As a result, the securitization of international economic affairs is well underway. This has sometimes concerned scholars and commentators, who argue for clearer lines as to when national security is a valid justification for using economic tools.<sup>39</sup> But while the exceptions to international economic rules date from the Cold War and often were based on assumptions about traditional military conflicts,<sup>40</sup> governments have moved effectively to repurpose these rules for modern conflicts, and to date international tribunals have generally upheld the use of national security as a justification for economic warfare.<sup>41</sup>

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34. Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020) (describing a trade system of generally low trade barriers coupled with security-based exceptions for raising barriers).

35. A substantial literature on the origins and invocation of the WTO's security exceptions has emerged in the last few years. See, e.g., Pramila Crivelli & Mona Pinchis-Paulsen, *Separating the Political from the Economic: The Russia-Traffic in Transit Panel Report*, 20 WORLD TRADE REV. 582 (2021); Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109 (2020); J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020); Julian Arato, Kathleen Claussen & J. Benton Heath, *The Perils of Pandemic Exceptionalism*, 114 AM. J. INT'L L. 627 (2020).

36. Bryce Baschuk, *Biden Picks Up Where Trump Left Off in Hard-Line Stances at WTO*, BLOOMBERG (Feb. 22, 2021, 8:55 AM), <https://www.bloomberg.com/news/articles/2021-02-22/biden-picks-up-where-trump-left-off-in-hard-line-stances-at-wto#xj4y7vzkg> [perma.cc/5D6A-88P8].

37. Panel Report, *Russia - Measures Concerning Traffic in Transit*, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019).

38. Panel Report, *Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R (June 16, 2020).

39. See, e.g., Arato et al., *supra* note 35 (arguing that the exceptions paradigm is structurally weak); Mona Pinchis-Paulsen, *Let's Agree to Disagree: A Strategy for Trade-Security*, 25 J. INT'L ECON. L. 527 (2022); Simon Lester & Huan Zhu, *A Proposal for Rebalancing to Deal with National Security Trade Restrictions*, 42 FORDHAM J. INT'L L. 1451 (2019); Simon Lester & Inu Manak, *A Proposal for a Committee on National Security at the WTO*, 30 DUKE J. COMP. & INT'L L. 267 (2020).

40. Pinchis-Paulsen, *supra* note 35, at 116–17.

41. See *supra* notes 37–38.

## II. ECONOMIC WARFARE AS A MAJOR QUESTION

If international economic law and practice is moving toward greater acceptance of economic warfare, domestic law in the United States risks moving in the other direction. The importance of economic warfare to contemporary foreign policy and national security runs into direct conflict with the major questions doctrine. The reason is that the legal structure of economic warfare in the United States depends on statutes that delegate authority broadly to the executive branch in ways that cannot be neatly divided between foreign and domestic. From these vague delegations, the executive branch has fashioned economic policies that have significant political, social, and economic impacts in the United States and globally. And while many of these tools have been used for decades, some of them are quite novel—another factor that triggers application of the major questions doctrine. Here, we first provide an overview of the major questions doctrine, and then show that actions taken under critically important economic warfare statutes are likely to run afoul of the doctrine.

### A. *The Major Questions Doctrine*

Under the major questions doctrine, the Supreme Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>42</sup> So stated, the doctrine has two critically important parts for thinking about national security and foreign affairs issues: the consequences of applying the doctrine and the factors that courts would use in determining a major question.

For a time, it was unclear whether the Supreme Court saw the major questions doctrine as a carve-out from *Chevron* deference or as entailing a clear statement rule that prevented agency action without specific congressional authorization.<sup>43</sup> In recent cases, it has become increasingly clear that the consequence of applying the MQD is the latter—a requirement that Congress speak clearly if it wishes for agencies to regulate in ways that have significant economic or political impacts.

Early MQD cases operated within the *Chevron* framework.<sup>44</sup> Under that framework, a court will grant deference to agency rulemaking if Congress has delegated authority to the agency to issue rules with the force of law (*Chevron* Step Zero), the statute is ambiguous (*Chevron* Step One), and the agency’s interpretation is reasonable (*Chevron* Step Two).<sup>45</sup> Early MQD cases operated at *Chevron* Step One by concluding that a statutory term was not ambiguous in

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42. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

43. Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

44. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

45. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188–94 (2006), for an overview of the doctrine.

light of the larger context of the policy question at issue, and thus the agency was not entitled to deference. For example, in *MCI Telecommunications Corp. v. AT&T Co.* the Court held that the FCC could not eliminate certain tariff filings in the telecommunications sector under its authority to “modify” tariffs.<sup>46</sup> The Court determined that the Communications Act of 1934 was a comprehensive regulatory system, and that the FCC could not functionally eliminate regulation by claiming that “modify” was an ambiguous term. Analyzing the meaning of “modify” in context of the statute, the Court held that the agency’s regulation failed at *Chevron* Step One.<sup>47</sup> Similarly, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court found that Congress had regulated tobacco in a variety of statutes—and had always exempted cigarettes from regulation.<sup>48</sup> It therefore held that the FDA could not interpret “drug” or “device” in the Food, Drug, and Cosmetics Act to include cigarettes. The Court analogized to *MCI* in making this Step One decision, but in the same breath planted the seeds for a massive doctrinal shift: “As in *MCI*,” the Court said, “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>49</sup>

Decades later, in *King v. Burwell*, the MQD migrated from *Chevron* Step One to Step Zero, providing a reason to infer that Congress had not intended to delegate interpretive authority to the agency in the first place.<sup>50</sup> There, Chief Justice John Roberts declined to apply *Chevron* analysis at all to an interpretation of the Affordable Care Act:

Whether [tax] credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.<sup>51</sup>

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46. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994).

47. *Id.*; see also Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 52 (2016) (characterizing Congress’s unlikelihood of “leav[ing] the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion” as a factor at Step One of the *Chevron* analysis).

48. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

49. *Id.* at 160.

50. *King v. Burwell*, 576 U.S. 473 (2015). Although the Court framed them as Step One cases, Cass Sunstein has suggested that *MCI* and *Brown & Williamson Tobacco* can be understood as *Chevron* Step Zero cases. Sunstein, *supra* note 45, at 193.

51. *King*, 576 U.S. at 485–86 (citations omitted).

In other words, the Chief Justice concluded that interpretive authority had not been delegated to the IRS, meaning that *Chevron*'s two-step test did not apply, and that the Court would interpret the statute itself.<sup>52</sup>

Looking backwards, *King* appears to have been a critical pivot point. More recent cases have simply abandoned the relationship between the MQD and the *Chevron* framework altogether.<sup>53</sup> In the seminal case establishing the contemporary MQD, *West Virginia v. EPA*, the Court's opinion does not cite *Chevron* once.<sup>54</sup> Instead, the Court made plain that it is applying a distinct mode of statutory interpretation to what it decides are major questions.<sup>55</sup> As the Court put it, "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."<sup>56</sup> The separation of powers concerns, presumably, sound in the key of nondelegation—a concern that broad statutes should be read narrowly to avoid constitutional concerns that Congress has given away its legislative power.<sup>57</sup> The "practical understanding of legislative" history turns on the larger context in which the agency asserts delegated authority.<sup>58</sup>

This history and the MQD's twin justifications in constitutional and statutory interpretation considerations could have left the doctrine's consequences unsettled. Its roots in *Chevron* analysis could have suggested that the only consequence is a lack of deference to agency interpretations of ambiguous statutes, while the allusion to nondelegation concerns could have suggested that the statute (at least as applied by the agency) is unconstitutional.

But the Court seems to have landed on a clear statement rule. This approach will likely result in courts setting aside executive action in a much wider range of cases than they would if the consequences of applying the MQD were merely reduced deference or even finding some agency actions unconstitutional.<sup>59</sup> When the MQD applies, the requirement of clear congressional

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52. For a discussion of the case, see Abbe R. Gluck, *The Supreme Court, 2014 Term—Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015).

53. See, e.g., Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022) (using the major questions doctrine to invalidate OSHA regulations designed to address COVID-19); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

54. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

55. *Id.* at 2609 ("The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of 'clear congressional authorization'—confirms that the approach under the major questions doctrine is distinct." (citations omitted)).

56. *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

57. *Id.* at 2620 (Gorsuch, J., concurring).

58. *Id.* at 2607–08 (majority opinion).

59. Clear statement rules have a long history of use as what Eskridge and Frickey have called "quasi-constitutional" law. In a seminal article, they argued that, as the Rehnquist Court became more circumspect about holding statutes directly unconstitutional, they became more active in using presumptions and clear statement rules to limit the impact of congressional legislation. Eskridge and Frickey worried that this approach amounted to a "backdoor" effort at constitutional activism. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional*

authorization means that Congress must have spoken to the precise issue at hand for agencies to have authority to act. It is worth noting that this is a complete inversion of the *Chevron* rule. Under *Chevron* Step One, the agency gets deference unless Congress has spoken on the precise question; here the agency can regulate only if Congress has spoken on the precise question at issue.<sup>60</sup> Although in theory a court could decide the MQD applies and still uphold the agency action by finding clear congressional authorization,<sup>61</sup> in practice this clear statement rule is likely to mean that the MQD's application results in striking down the agency's action as exceeding the scope of its authority.

The second important feature of the doctrine is what factors determine when it applies. These factors do not focus on the text of the statute itself. The main factor is whether the issue is one of "economic and political significance."<sup>62</sup> This was not always so. In the early cases, it was possible to understand the doctrine as determining "majority" with reference to the underlying statute. As Michael Coenen and Seth Davis have observed, the much-quoted analogy that Congress does not place "elephants" in "mouseholes"<sup>63</sup> required analyzing not only the magnitude of the agency's *claim* of statutory power (the elephant) but also the *underlying statute* from which the claimed power emerged (the mousehole).<sup>64</sup>

The more recent cases, however, shift the baseline reference point from the underlying statutory authority to the *societal* consequences of the agency's policy choice. As the Court put it in one recent case, it will "typically greet" an assertion of "extravagant statutory power over the national economy" with "skepticism."<sup>65</sup> This formulation would appear to require analyzing the relationship between the breadth of the agency's claim of authority and society as a whole, rather than the claim of authority and the underlying statutory text or congressional purposes. If an agency action will have significant societal consequences, that is now sufficient ground for courts to require clear congressional authorization for the action.

Other contextual aspects of the statutory scheme and its relation to the claimed authority are also relevant. For example, several of the Court's cases

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*Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); see also John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010) (arguing that clear statement rules "impermissibly abstract from concrete constitutional means to general constitutional ends").

60. We are indebted to Michael Coenen for this point.

61. *West Virginia*, 142 S. Ct. at 2614 ("[T]he Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner.") (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

62. *Id.* at 2605; *id.* at 2625–26 (Gorsuch, J., concurring) ("If this case does not implicate a 'question of deep economic and political significance,' it is unclear what might." (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015))).

63. *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

64. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 794–95 (2017).

65. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

have focused on the novelty of the agency's claim of authority.<sup>66</sup> This suspicion of novelty is found in other strands of the Roberts Court's constitutional decisions, and it has played a particular role in structural constitutional law cases involving appointments and removal.<sup>67</sup> If traditional statutory analysis compares the claimed authority to statutory text and purpose, and the first factor of the MQD compares the claimed authority to its societal consequences, this factor compares the claimed authority to prior claims of authority.<sup>68</sup> The MQD thus operates to require a clear statement of congressional authorization when an agency seeks to issue a new type of policy initiative that arguably requires a broader understanding of its delegated authority than the agency has previously adopted.<sup>69</sup>

These two elements—the consequences of the MQD's application (the clear statement rule) and the factors that determine its application—raise a variety of serious problems. First and foremost is the question of “majorness.”<sup>70</sup> What constitutes a major action?<sup>71</sup> How economically or politically significant must an action be for clear congressional authorization to be necessary? If an action is economically significant but politically insignificant, or vice versa, would it still qualify? The Court has provided no clear answer to these questions.<sup>72</sup>

Second is the question of institutional competence and the judicial role. While the MQD claims to shift authority from agencies to Congress, in reality, it aggrandizes the power of the courts.<sup>73</sup> Under the doctrine, judges do not ask whether *Congress* thought an issue was major. They decide for themselves

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66. *Id.*; *West Virginia*, 142 S. Ct. at 2595, 2605 (noting the novelty of the EPA's scheme).

67. *See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (“[T]here are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director.”); *see also* Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 355 (2020) (arguing that the single director “did not simply arise, as the Court suggested, from novel legislative design”). For a discussion of the novelty cases—and a rebuttal of novelty arguments—see Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

68. It is possible that novelty could be assessed (a) with respect to the statutory scheme or (b) with respect to the agency's prior claims of authority and policy initiatives. It appears that the Court's approach may be the latter, perhaps because the former replicates the question of congressional authorization.

69. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (discussing the novelty prong of the “new” major questions doctrine).

70. Note, *Major Questions Objections*, 129 HARV. L. REV. 2191, 2198 (2016) (noting that agencies decide big issues all the time).

71. Coenen and Davis smartly observe that “majorness” does not align with the nondelegation doctrine's focus on distinguishing legislative and executive power. A question could be major and merely executive, or minor and legislative. So “majorness” is a bad proxy for formalistic nondelegation values. Coenen & Davis, *supra* note 64, at 806.

72. Indeed, one wonders what “judicially manageable standards” could possibly make such assessments, or whether the major questions doctrine has a political-question-doctrine problem. But that is an issue for another day.

73. *See* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

whether an agency action has “economic and political significance.”<sup>74</sup> It is not clear why judges are better at making such decisions than agencies—or whether they are well-suited to make such decisions at all. Indeed, in the same term that the Court decided *West Virginia v. EPA*, it held in *Dobbs v. Jackson Women’s Health Organization* that courts are especially ill-suited to make determinations about societal impacts, and that courts should not make decisions based on assessments of politics.<sup>75</sup> *Dobbs*’s skepticism that courts can or should evaluate societal and political consequences sits in a great deal of tension with the MQD cases that direct courts to do just that.

Third, the MQD might have a “chilling effect” on agencies that has high error costs. Given the vagueness of the test, agencies may not promulgate valid regulations for fear of running afoul of the doctrine or simply being tied up in litigation even if courts ultimately uphold the regulation.<sup>76</sup> This concern raises its own separation of powers issues. If a vague and uncertain test chills valid regulation, then both Congress’s ability to legislate and the president’s duty to take care that the laws are faithfully executed will be negatively impacted.

Fourth, and relatedly, by requiring congressional authorization for actions with “economic and political significance,” the MQD is likely to operate as a form of what Cass Sunstein and Adrian Vermeule have called “libertarian administrative law.”<sup>77</sup> In other words, the doctrine is likely to operate asymmetrically, serving libertarian values by preventing or striking down regulations that impose new obligations more than it is used to strike down deregulatory action.<sup>78</sup> The reason for this asymmetric effect is the current MQD’s inversion of the *Chevron* rule. Early MQD cases prevented agencies from unwinding regulated sectors by denying the existence of agency-empowering ambiguity in the statute.<sup>79</sup> In this way, early MQD cases operated like

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74. Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463, 465 (2021) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

75. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277 (2022) (“That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.”); *id.* at 2278 (“[W]e cannot allow our decisions to be affected by extraneous influences such as concern about the public’s reaction to our work.”).

76. Daniel Hornung, Note, *Agency Lawyers’ Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759, 761–62 (2020); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 476 (2016).

77. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015). Sunstein and Vermeule do not reference the doctrine in their Article, but others have made this connection. See, e.g., Chafetz, *supra* note 47, at 58 n.47.

78. See Heinzerling, *supra* note 73, at 1980, 1988; Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024 (2018) (observing that the doctrine has an antibureaucratic foundation).

79. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (striking down the FCC’s abandonment of tariff filings for nondominant telephone carriers). Despite *MCI*, the lower courts soon began upholding similar types of deregulatory action. See, e.g., *California ex rel. Lockyer v. Fed. Energy Regul. Comm’n*, 383 F.3d 1006 (9th Cir. 2004).

much of administrative law, including the *Chevron* doctrine, applying to both regulatory and deregulatory decisions.<sup>80</sup>

Unlike *Chevron*, though, which asks whether agencies have discretion, the current free-form MQD asks whether agencies have *authorization*. The MQD's framework can certainly be applied to deregulatory acts. Such acts are just as likely as regulatory acts to have great economic and political significance, triggering the MQD's application. Moreover, in some cases Congress may have either mandated regulation or approved an agency's regulatory scheme in subsequent legislation (i.e., by legislating in a way that presumes the continued existence of a specific set of agency regulations). In such situations, it may make sense to ask whether Congress, having mandated or approved of agency action, has now clearly authorized the agency to deregulate.

In many other contexts, though, agencies will have regulated in a manner neither required by Congress nor subsequently blessed by it. In these cases, courts may find it odd to apply the MQD to ask whether Congress has clearly authorized a deregulatory act when Congress never specifically authorized the initial regulatory act being undone. Instead, they may view such cases as ones in which the agency has discretion. The MQD's clear statement rule may thus end up applying only to a subset of economically or politically significant deregulatory actions—those in which Congress either mandated regulation or subsequently approved the agency's regulation now sought to be undone—but it would apply to all economically or politically significant regulatory acts that are not specifically required.

Finally, the doctrine raises a number of other problems.<sup>81</sup> Indeed, in a remarkable concurrence in *Biden v. Nebraska*, Justice Barrett conceded as much. She argued that major questions analysis involves, at bottom, a judge consult-

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80. The Trump administration's deregulatory efforts were famously stymied by its inability to follow basic administrative practices. See Tucker Higgins, *The Trump Administration Has Lost More Than 90 Percent of Its Court Battles over Deregulation*, CNBC (Jan. 24, 2019, 6:51 PM), <https://www.cnbc.com/2019/01/24/trump-has-lost-more-than-90-percent-of-deregulation-court-battles.html> [perma.cc/RHE3-Y2VW].

81. Squitieri, *supra* note 74, at 465–68. A variety of critiques that have been leveled at the nondelegation doctrine would also seem to apply equally well to the MQD. For example, both arguably contribute to legislative gridlock by preventing Congress from engaging in broad, non-specific delegations in order to ensure the passage of legislation. See Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 267 (2016); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224. And to the extent that the MQD rests on nondelegation considerations, recent scholarship has shown that a strong version of the nondelegation doctrine makes little textual, historical, or analytic sense. See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

ing her view of whether a particular interpretation of a delegation is “reasonable.”<sup>82</sup> A judge should reach that judgment by consulting a range of factors ordinarily rejected or at least deemphasized by textualists, including legislative history and postenactment interpretations by agencies.<sup>83</sup> As such, the MQD runs contrary to standard versions of textualism, in that it rules out textually plausible readings of a statute based on considerations—such as the political and economic significance of a regulatory program or its novelty—entirely outside the scope of the statutory scheme.

But perhaps most damaging for the ability of future administrations to use economic tools to fight conflicts, the focus on novelty constrains Congress’s ability to grant the president the authority to respond to crises that may not be economic in origin but to which an economic response may be most effective. The world, after all, changes frequently and there is little reason to think

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82. Justice Barrett explained this reasonableness standard in three moves designed to show that the MQD is textualist. In fact, though, the gaps between the analogies she uses highlight how the MQD has become, at best, a kind of purposivist analysis and, at worst, simply a judge substituting her judgment for Congress’s.

First, Justice Barrett wrote that a statute’s context “also includes common sense.” *Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring). Justice Barrett offers an example of how common sense might clarify the meaning of an ambiguous statutory term, arguing that no one would understand a law punishing those who “drew blood in the streets” to include “a surgeon accessing a vein of a person in the street,” even though such an act is within the literal meaning of the prohibition. *Id.* This example, of course, involves textualist analysis because the “common sense” brought to bear involves the meaning in context of an idiomatic expression, “drew blood,” that could refer to either a violent act or a medical one.

Second, Justice Barrett then seeks to analogize this use of “common sense” regarding language to “common sense” regarding unspoken limitations in instructions, such as a babysitter who takes kids to an amusement park having been told to make sure the kids “have fun.” *Id.* (emphasis omitted). Justice Barrett argues that the question an interpreter should ask herself is whether such an interpretation is “consistent with a reasonable understanding” of the instruction. *Id.*

Third, moving to the context of statutory interpretation, Justice Barrett argues that “in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on ‘important subjects’ while delegating away only ‘the details.’” *Id.* at 2380–81. Of course, the history of administrative law in the twentieth century—with extremely broad delegations and the resulting agency actions routinely upheld against nondelegation challenges and the like—belies Justice Barrett’s claim about the “reasonable interpreter” if the claim is understood to be a descriptive claim about ordinary interpretation. Instead, it appears to be a normative claim about how judges should read statutes.

83. For example, Justice Barrett invokes the analysis in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), as illustrative of the kind of factors a judge should consult in assessing reasonableness. She wrote that the “assertion of authority—which depended on the argument that nicotine is a ‘drug’ and that cigarettes and smokeless tobacco are ‘drug delivery devices’—would have been plausible if the relevant statutory text were read in a vacuum.” *Biden*, 143 S. Ct. at 2382 (Barrett, J., concurring). But this reading was not reasonable in light of context, including “tobacco’s ‘unique political history’: the FDA’s longstanding disavowal of authority to regulate it, Congress’s creation of ‘a distinct regulatory scheme for tobacco products,’ and the tobacco industry’s ‘significant’ role in ‘the American economy.’” *Id.* at 2382 (quoting *Brown & Williamson*, 529 U.S. at 159–60).

that Congress intended future administrations to be limited to early interpretations of the scope of their delegated powers. These problems, as we shall see, raise serious concerns about how the United States will make foreign policy and national security decisions in the future.

### B. *Why Economic Warfare Is a Major Question*

A wide range of economic tools used to respond to interstate conflict—or, critically, reduce global dependence on supply chains located in countries with whom we might come into conflict—would likely become unavailable or would be substantially curtailed in terms of their usefulness should the MQD be applied to them. These tools typically rest on broad statutory delegations and have economic consequences akin to or bigger than those that have been struck down already. For purposes of comparison, in *King v. Burwell*, the Court held that the MQD applied to the question of the availability of subsidies for the purchase of healthcare on federal exchanges established in states that declined to establish their own exchanges.<sup>84</sup> In *Alabama Ass’n of Realtors v. HHS*, the Court held that the MQD applied to the legality of the Biden administration’s COVID-19 eviction moratorium.<sup>85</sup> And in *National Federation of Independent Businesses v. Department of Labor*, the Court held that the MQD applied to OSHA’s COVID-19 “shot-or-test” rule.<sup>86</sup> While these cases do virtually nothing to clarify what, in general, counts as a question of economic or political significance sufficient to implicate the MQD,<sup>87</sup> they do provide comparisons on which courts can rely in a common-law-like decisionmaking process. And by comparison, the agency actions involved in these decisions stop well short of the kind of economy-wide measures that are common in the national security context.

In the interest of brevity, this Section will only outline some of the authorities that could be implicated by the MQD.<sup>88</sup> The International Emergency Economic Powers Act is perhaps the most obvious. Recall that IEEPA gives the president expansive authority to limit international transactions upon the declaration of an emergency with regard to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”<sup>89</sup> IEEPA serves as the basis for most of the sanctions against Russia,

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84. *King v. Burwell*, 576 U.S. 473 (2015).

85. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

86. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022).

87. See Daniel Farber, *Major Questions About the Major Questions Doctrine*, CTR. FOR PROGRESSIVE REFORM (Nov. 4, 2021), <http://www.progressivereform.org/cpr-blog/major-questions-about-major-questions-doctrine> [perma.cc/WZ9W-PK5V].

88. A number of the trade authorities are analyzed in Kathleen Claussen, *Trade’s Security Exceptionalism*, 72 STAN. L. REV. 1097 (2020).

89. 50 U.S.C. § 1701.

including import prohibitions on Russian oil and gas products and the freezing of Russian central bank assets in the United States.<sup>90</sup> During 2021, the United States imported roughly 672,000 barrels of petroleum products per day.<sup>91</sup> The total value of Russian oil and gasoline imports was roughly \$13 billion in that year.<sup>92</sup> De jure and de facto restrictions on Russian imports, via financial restrictions on doing business with Russian entities, contributed to historic highs in gasoline prices.<sup>93</sup> If economy-wide increases in energy prices—including politically and economically salient increases in gas station prices—do not count as having vast “economic and political significance,” it is hard to imagine what does. IEEPA was also famously the domestic legal basis invoked by President Carter for freezing Iranian assets following the 1979 Iranian Revolution and for later implementing the Algiers Accords.<sup>94</sup> The Algiers Accords extinguished over \$20 billion (in 1981 dollars) in domestic legal claims U.S. investors had against Iran for expropriations following the 1979 Iranian Revolution.<sup>95</sup> While not the kind of economy-wide measures at issue in the Russia conflict, such measures were of undoubted political significance and of considerably more dubious statutory provenance.<sup>96</sup>

Section 301 of the Trade Act offers another example. That statute authorizes the U.S. trade representative to, inter alia, suspend the benefits a country is owed under U.S. trade agreements or impose duties on imports if the trade representative determines that “an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce.”<sup>97</sup> The Trump administration relied on Section 301 to impose tariffs

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90. Exec. Order No. 14,024, 86 Fed. Reg. 20249 (Apr. 19, 2021); Exec. Order No. 14,071, 87 Fed. Reg. 20999 (Apr. 6, 2022).

91. Arathy Somasekhar & Marianna Parraga, *Factbox: U.S. Imports of Russian Oil and Refined Products*, REUTERS (Mar. 8, 2022, 10:43 AM), <https://www.reuters.com/business/energy/us-imports-russian-oil-refined-products-2022-03-08> [perma.cc/XQ3G-PTRJ].

92. Ken Roberts, *Russia Is United States' Top Source of Imported Gas, Refined Petroleum*, FORBES (Feb. 24, 2022, 4:44 PM), <https://www.forbes.com/sites/kenroberts/2022/02/24/russia-is-united-states-top-source-of-imported-gasoline/?sh=38e80b8e1b18> [perma.cc/6FVF-34QY].

93. Trevor Hunnicutt, Steve Holland & Andrea Shalal, *Biden Bans Russia Oil Imports to U.S, Warns Gasoline to Rise Further*, REUTERS (Mar. 8, 2022, 8:59 PM), <https://www.reuters.com/business/biden-bans-russia-oil-imports-us-warns-gasoline-prices-will-rise-further-2022-03-08> [perma.cc/2S4D-Z2HL].

94. See Exec. Orders Nos. 12,276–12,285, 46 Fed. Reg. 7913–7932; Exec. Order No. 12,294, 46 Fed. Reg. 14111; see also *Dames & Moore v. Regan*, 453 U.S. 654, 654–69 (1981) (recounting the history of the Algiers Accords and ultimately upholding the president’s executive orders).

95. Christopher Massaroni, *The United States-Iran Hostage Agreement: A Study in Presidential Powers*, 15 CORNELL INT’L L.J. 149, 162 (1982).

96. Indeed, in *Dames & Moore v. Regan*, while the Supreme Court ultimately concluded that IEEPA itself authorized the president to nullify the attachment of Iranian assets and order their transfer, the Court concluded that IEEPA did not authorize the suspension of U.S. claims against Iranian assets. *Dames & Moore*, 453 U.S. at 675. The Court, however, read IEEPA and other legislative activity as indicating congressional consent to the president’s action. *Id.* at 679–88.

97. 19 U.S.C. § 2411(b).

on most imports from China.<sup>98</sup> These tariffs have been linked to domestic price increases in the United States.<sup>99</sup> Moreover, China retaliated with similar measures that had the effect of significantly reducing certain U.S. agricultural exports.<sup>100</sup> Estimates are that these measures cost the U.S. 250,000 jobs.<sup>101</sup> The Congressional Budget Office estimated that in 2020 the tariffs led to a decrease of 0.5% in GDP and increased consumer prices by 0.5%, an estimated \$1,277 decrease in average household income.<sup>102</sup> Those kinds of domestic economic effects would certainly seem to be of deep economic and political significance and not clearly authorized by a statute that is focused on resolving trade disputes. Nor can there be any doubt about the novelty of these measures, which had never before been invoked to effectively suspend normal trading relations with a major trading partner.

Section 232 of the Trade Expansion Act allows the president to take action that, “in the judgment of the President, must be taken to adjust the imports” of products that the secretary of commerce and the president agree present a threat to national security, defined broadly to include a range of domestic economic considerations such as unemployment, government revenue, the skills of domestic workers, and domestic investment.<sup>103</sup> From the 1950s through the 1970s, presidents used Section 232 and its predecessor statute to reduce oil imports into the United States (and thus raise energy prices) as part of a strategy to encourage domestic production.<sup>104</sup> More recently, President Trump used Section 232 to impose 25% tariffs on steel imports and 10% tariffs on aluminum imports.<sup>105</sup> Those tariffs have increased prices within the United States, hurting U.S. producers of products that use steel as an import, and led

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98. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28710 (June 20, 2018).

99. GARY CLYDE HUFBAUER, MEGAN HOGAN & YILIN WANG, PETERSON INST. FOR INT’L ECON., FOR INFLATION RELIEF, THE UNITED STATES SHOULD LOOK TO TRADE LIBERALIZATION (2022) (finding that removing Section 301 tariffs would cause a one-time price decrease of 1.3% as measured against the Consumer Price Index).

100. Stephen Morgan, *Retaliatory Tariffs Reduced U.S. States’ Exports of Agricultural Commodities*, U.S. DEP’T OF AGRIC. (Mar. 7, 2022), <https://www.ers.usda.gov/amber-waves/2022/march/retaliatory-tariffs-reduced-u-s-states-exports-of-agricultural-commodities> [perma.cc/R9P9-CGC7]. See generally Chad P. Bown, *US-China Trade War Tariffs: An Up-to-Date Chart* (Apr. 6, 2023), <https://www.piie.com/research/piie-charts/us-china-trade-war-tariffs-date-chart> [perma.cc/9UMW-VAZV].

101. Michael Pettis, *How Trump’s Tariffs Really Affected the U.S. Job Market*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 28, 2021), <https://www.carnegieendowment.org/chinafinancialmarkets/83746> [perma.cc/8SXJ-YXPV].

102. *The Budget and Economic Outlook: 2020 to 2030*, CONG. BUDGET OFF. (Jan. 2020), <https://www.cbo.gov/publication/56073> [perma.cc/6N8G-L26F].

103. 19 U.S.C. § 1862.

104. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 552–53 (1976).

105. RACHEL F. FEFER ET AL., CONG. RSCH. SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 7 (2021).

to the loss of at least 75,000 jobs in those downstream sectors.<sup>106</sup> President Trump's imposition of tariffs (and the Biden administration's initial decision to continue those tariffs) is also unprecedented. Section 232 does not explicitly authorize tariffs as a remedy and for many years Section 232 was thought to authorize only quantitative restrictions on imports.<sup>107</sup> Moreover, in the fifty-six years between Section 232's passage in 1962 and President Trump's imposition of tariffs, Section 232 had never been used to impose tariffs.<sup>108</sup>

The trade authorities are significant because they are economy-wide in their effects, are massive in their economic impacts, and have been politically significant to the point of forming key foreign policy priorities for the administrations in question. But other examples abound with economic or political consequences at least as significant as federal subsidies for health insurance purchases on federal exchanges. The Committee on Foreign Investment in the United States (CFIUS) reviews inbound foreign investment for national security implications and has the authority to block these private transactions.<sup>109</sup> Prior to an expansion of CFIUS's mandate in 2018, presidents had blocked five transactions after CFIUS review, but four of those transactions were blocked between 2012 and 2018.<sup>110</sup> The last of these, the proposed acquisition of chip-maker Qualcomm by Singapore-based Broadcom, was valued at \$130 billion<sup>111</sup>—surely a transaction of economic, if not political, significance.

More generally, in 2020, President Trump issued an executive order preventing any person owned, controlled by, or under the jurisdiction or direction of a foreign adversary from operating information and communications technologies in the United States if they are a threat to national security, as determined by the secretary of commerce.<sup>112</sup> The order, issued pursuant to IEEPA and other authorities, also grants the secretary the power to issue regulations to determine what persons, countries, and technologies are covered, and to develop criteria and mitigation measures to address possible dangers.<sup>113</sup>

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106. Lydia Cox & Katheryn Russ, *Steel Tariffs Hurt Manufacturers Downstream, Data Shows*, PBS NEWSHOUR (Feb. 7, 2020, 9:13 AM), <https://www.pbs.org/newshour/economy/making-sense/steel-tariffs-hurt-manufacturers-downstream-data-shows> [perma.cc/6BLS-LMLP] (collecting data).

107. See 19 U.S.C. § 1862; *Algonquin SNG*, 426 U.S. at 561 (reversing the D.C. Circuit on the grounds that “[w]e find no support in the language of the statute for respondents’ contention that the authorization to the President to ‘adjust’ imports should be read to encompass only quantitative methods”).

108. See FEFER ET AL., *supra* note 105, at app. b.

109. For an analysis of executive authority to control investment in tech platforms, see Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073 (2022).

110. JAMES K. JACKSON & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF10952, CFIUS REFORM UNDER FIRRMA (2020).

111. *Broadcom Proposes to Acquire Qualcomm for \$70.00 per Share in Cash and Stock in Transaction Valued at \$130 Billion*, BROADCOM (Nov. 6, 2017), <https://investors.broadcom.com/news-releases/news-release-details/broadcom-proposes-acquire-qualcomm-7000-share-cash-and-stock-0> [perma.cc/ZBD9-6STQ].

112. Exec. Order No. 13,873, 84 Fed. Reg. 22689 (May 17, 2019).

113. *Id.*

In other words, it authorizes the secretary, without specific congressional authorization, to craft an entire legal regime for excluding foreign countries' tech companies. In separate executive orders also based on IEEPA, Trump ordered the banning of TikTok and WeChat.<sup>114</sup> Given that more than a hundred million Americans use TikTok each month,<sup>115</sup> it is hard to see how a ban on the app pursuant to this executive order does not reach the MQD's threshold required for significance. Likewise, setting up a regulatory system for the secretary of commerce to potentially ban dozens of companies from operating in the United States is considerably more novel than the EPA's proposed method of regulating greenhouse gas emissions at issue in *West Virginia*. While restrictions on foreign ownership have been historically common in other sectors, they have been statutorily authorized.<sup>116</sup>

The government's broad actions extend to other sectors of the economy as well. In the wake of a series of shortages of critical products—including semiconductors, critical minerals, high-tech batteries (in which those critical minerals are used) necessary to store electricity in products like electric vehicles, and medical supplies during the COVID-19 crisis—the Biden administration has taken a number of actions aimed at addressing supply chain resilience.<sup>117</sup> These actions aim to restructure supply chains for critical products in an effort to reduce blockages by boosting domestic production (and potentially production in allied countries).<sup>118</sup> In so doing, these programs also aim to reduce U.S. dependence on potentially unreliable trading partners, such as China and Russia, where, for instance, many of these critical minerals are located. As such, they represent a major effort at domestic industrial policy in a bid to address some of the risks created by interdependent but concentrated global supply chains.<sup>119</sup>

But these industrial policy efforts rest on a range of statutory authorities not clearly drafted with such policies in mind and are thus subject to potential application of the MQD. For example, the Biden administration has relied on

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114. Exec. Order No. 13,942, 85 Fed. Reg. 48637 (Aug. 11, 2020); Exec. Order No. 13,943, 85 Fed. Reg. 48641 (Aug. 11, 2020).

115. Alex Sherman, *TikTok Reveals Detailed User Numbers for the First Time*, CNBC (Aug. 24, 2020, 3:53 PM), <https://www.cnbc.com/2020/08/24/tiktok-reveals-us-global-user-growth-numbers-for-first-time.html> [perma.cc/G7KB-R8BU].

116. See Sitaraman, *supra* note 109.

117. Exec. Order No. 14,017, 86 Fed. Reg. 11849 (Feb. 24, 2021); *Fact Sheet: Biden-Harris Administration Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities*, THE WHITE HOUSE (June 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities> [perma.cc/WJ3J-CTMZ].

118. 86 Fed. Reg. at 11849 (Feb. 24, 2021); THE WHITE HOUSE, *supra* note 117.

119. *Remarks on a Modern American Industrial Strategy by NEC Director Brian Deese*, THE WHITE HOUSE (Apr. 20, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/04/20/remarks-on-a-modern-american-industrial-strategy-by-nec-director-brian-deese> [perma.cc/N5GS-P3A3].

the Defense Production Act to expedite the production of critical medicines.<sup>120</sup> The general grant of authority in the DPA provides that

The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.<sup>121</sup>

Nothing in the statute speaks specifically to medicines. Indeed, like Section 232, the statute speaks in open-textured terms but the specific examples it gives seem to focus on needs related to defense production.<sup>122</sup> Other domestic production programs depend on more specific authority, such as the Advanced Technology Vehicles Manufacturing Loan Program, which has \$15.1 billion of loan authorities.<sup>123</sup>

These examples highlight some of the most important economic initiatives for the two most recent presidential administrations. In particular, President Trump's administration made his tariffs on Chinese imports, his review of Chinese investments, and his tariffs on steel and aluminum a central—if not the central—component of his economic policy, both foreign and domestic.<sup>124</sup> President Biden's efforts to tackle supply chain resilience in the face of the COVID-19 pandemic and Russia's invasion of Ukraine and the global trade disruptions they have caused have likewise been central to his administration's policy objectives.<sup>125</sup> Both sets of policies have had massive, economy-wide effects, are novel applications of the underlying statutes (or are at least arguably

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120. See Lupkin, *supra* note 10.

121. 50 U.S.C. § 4511(a).

122. 50 U.S.C. § 4517(b)(1) (“The President shall take appropriate actions to assure that critical components, critical technology items, essential materials, and industrial resources are available from reliable sources when needed to meet defense requirements during peacetime, graduated mobilization, and national emergency.”).

123. *Advanced Technology Vehicles Manufacturing Loan Program*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/lpo/advanced-technology-vehicles-manufacturing-loan-program> [perma.cc/YL2H-JDPX]; *DOE Announces First Advanced Technology Vehicles Manufacturing Loan in More than a Decade*, U.S. DEP'T OF ENERGY (July 27, 2022), <https://www.energy.gov/articles/doe-announces-first-advanced-technology-vehicles-manufacturing-loan-more-decade> [perma.cc/R6MA-TNKD].

124. See Amanda Holpuch & Dominic Rushe, *Trump Defends China Tariffs and Claims ‘Great Patriot Farmers’ Will Reap Benefits*, THE GUARDIAN (May 14, 2019), <https://www.theguardian.com/us-news/2019/may/14/trump-china-tariffs-farmers-trade-war> [perma.cc/9VQG-E3SJ].

125. See notes 117–119 and accompanying text; Lauren Gambino, *Biden Imposes New Sanctions on Russia: ‘America Stands Up to Bullies’*, THE GUARDIAN (Feb. 24, 2022, 4:49 PM), <https://www.theguardian.com/us-news/2022/feb/24/joe-biden-us-russia-sanctions-ukraine> [perma.cc/X48V-62PK].

so), and lack clear textual authorization. In short, it is easy to imagine that both of the last two administrations, to say nothing of future administrations, would have been or could be crippled in their efforts to address economic conflicts and difficulties, especially ones that have both foreign and domestic components, if the MQD applies. And as we explain below, there is every reason to think that it would.

### III. THE NATIONAL SECURITY CONSEQUENCES OF THE MAJOR QUESTIONS DOCTRINE

The application of the major questions doctrine to national security questions involving economic affairs creates significant risks. In this Part, we highlight those risks and explain why the traditional tools of foreign affairs exceptionalism cannot prevent the MQD's application to foreign economic affairs.

#### A. *How Major Questions Hamstrings the Executive's Conduct of Foreign Affairs*

The MQD risks hamstringing the executive branch's power to respond to threats to national security. As we have explained above, unless Congress is sufficiently clear in its delegation of authority to the executive, the courts may find that the executive branch lacks the power to respond to crises abroad with economic tools. The loss of those tools, in turn, may affect U.S. government policies across a wide range of critical areas. Many of the effects of this loss are obvious and need not be enumerated in depth. If the aim of economic sanctions is to dry up funding for terrorism or investment in a rogue nuclear program, for instance, preventing the use of those tools will allow funding of those activities to continue. If the United States' leverage in foreign policy negotiations is reduced by its dependence on foreign trading partners like China or Russia for critical materials, medicines, or fuels, and economic tools are unavailable to reduce that dependence, then the United States will enter foreign policy crises at a disadvantage. Imagine, for example, if the United States had not been able to negotiate the Algiers Accords, which freed the U.S. hostages in Iran, because it lacked the power to block Iranian assets and trade those assets and U.S. claims against them for the freedom of the hostages.<sup>126</sup>

The loss of economic tools to address foreign policy issues also creates a number of risks that are less obvious. Most alarmingly, the MQD's application to economic policies used in foreign conflicts may, in some situations, increase the likelihood that traditional military assets will be used, or will be used for longer, in direct confrontations with foreign powers. We are not, to be clear, claiming that presidents are more likely to commit U.S. troops to hostilities if economic tools are unavailable. The disincentives to becoming entangled in prolonged military conflicts should dissuade presidents from using such force

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126. See *supra* note 94.

unless necessary to achieve important foreign policy objectives. But the loss of economic sanctions may prolong conflicts that are already under way by denying the United States a tool to cut off funding for an adversary's war efforts or pushing presidents to engage in other military operations short of committing troops. For example, drone strikes or limited air strikes are low-risk to U.S. personnel, but they can cause significant harm in the target countries and can be as disruptive to diplomatic relations as more significant shows of force.<sup>127</sup> Economic tools have the same advantages—low risk to U.S. personnel while minimizing the direct loss of life and potential to spawn retaliatory use of force against U.S. or U.S.-aligned targets. Limiting presidents' freedom to use economic tools to sanction an enemy may make the use of these kinds of targeted uses of force—with their higher risk of collateral consequences to U.S. interests—more likely.

In addition, presidents often shape foreign policy by simply *threatening* to use force.<sup>128</sup> If a foreign government takes an action that would trigger the threat, a president who was bluffing might feel compelled to take action to preserve their credibility.<sup>129</sup> Or the president might see “the cost of a prior threat as sunk” and therefore feel a need to follow up even if taking action would be irrational.<sup>130</sup> The range of tools a president has in these contexts is critical. Shrinking the toolset reduces the set of options for issuing credible threats or choosing a proportional response.

Finally, for domestic political reasons, presidents often wish to be seen responding to a foreign conflict.<sup>131</sup> In such situations, the effectiveness of the response may be secondary to being able to announce a response. President Clinton, for instance, was widely thought to have ordered missile strikes on Afghanistan and Sudan in 1998 in order to distract from his domestic political troubles.<sup>132</sup> President Trump was accused of ordering a drone strike to kill Ira-

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127. See “Targeted Killing” and the Rule of Law: *The Legal and Human Costs of 20 Years of US Drone Strikes: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 1–3 (2022) (statement of Nathan A. Sales, former U.S. Dep’t of State Ambassador-at-Large and Coordinator for Counterterrorism).

128. For a discussion, see Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626 (2014).

129. Though there is reason to believe such credibility-based arguments are unjustified. Ganesh Sitaraman, *Credibility and War Powers*, 127 HARV. L. REV. F. 123 (2014).

130. Ganesh Sitaraman & David Zions, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 550 (2015).

131. See Kevin H. Wang, *Presidential Responses to Foreign Policy Crises: Rational Choice and Domestic Politics*, 40 J. CONFLICT RESOL. 68 (1996) (finding that presidents are more likely to respond to foreign policy crises when presidential elections are proximate or when domestic economic conditions are poor).

132. Steven Simon & Daniel Benjamin, *Trump’s ‘Wag the Dog’ Moment*, FOREIGN POL’Y (Jan. 7, 2020), <https://www.foreignpolicy.com/2020/01/07/trump-suleimani-iran-assassination-wag-dog-clinton> [perma.cc/9X3P-JZCE].

nian General Qassem Suleimani in Iraq in order to distract from his impeachment.<sup>133</sup> In these cases, presidents used military force, but economic sanctions can be an alternative when politics demand a response.

The MQD's application to economic warfare would also reduce the president's ability to deter foreign aggression through a credible commitment to an economic policy measure. The use of any particular economic authority to respond to a national security threat could be subject to litigation under the MQD. Thus, foreign enemies and domestic actors may not respond to the executive branch's actions, holding out for the possibility of relief through the courts. Judicial action can thereby weaken the executive branch's hand on the international plane.<sup>134</sup> Indeed, precisely to avoid compromising the executive branch's authority on the international stage, Congress typically does not allow private suits to enforce the United States' international trade agreements.<sup>135</sup> Applying the MQD to economic statutes thus risks undermining the functional advantages courts widely extol in the executive branch's conduct of foreign affairs and which Congress itself has sought to bolster.

As we discussed in Part II, uncertainty and lack of uniformity as to the MQD's application may also have a severe chilling effect.<sup>136</sup> The factors that lead to the MQD's application are, after all, vague; and judicially manageable standards to apply those factors in a principled way seem elusive, if not non-existent. Importantly, because MQD decisions will be made in the first instance by lower court federal judges spread across the United States, the chilling effect may be particularly acute. Executive branch lawyers would rationally reason that opponents of the executive branch's economic measures will forum-shop, file suit in the most favorable federal court, seek an immediate injunction halting the government's action, and thereby mire the policy in monthslong litigation. Moreover, agencies may waste a lot of time putting together regulatory programs that to them seem legally available under the governing statute, only to find out that the economic consequences of the program are sufficiently major and/or the policies chosen seem novel to some judges, and thus the MQD applies. National security problems that could be dealt with as economic problems may be addressed through the use of force because the executive branch is unwilling or unable to make use of economic tools to head off or cool down a conflict. In sum, if agency lawyers need to

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133. *Id.*

134. *Cf.* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988) (offering the classic analysis of domestic constraints affecting foreign affairs).

135. *See, e.g.*, Uruguay Round Agreements Act, 19 U.S.C. §§ 3501, 3511–56, 3571–72, 3581–92, 3601–24. The European Union, which does generally allow for the direct effect of treaties domestically to a much greater extent than in the United States, has an exception to this rule for trade agreements for the same reason. Marco Bronckers, *The Effect of the WTO in European Court Litigation*, 40 TEX. INT'L L.J. 443 (2005) (describing European case law denying GATT/WTO decisions direct effect); Alik Semertzi, *The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements*, 51 COMMON MKT. L. REV. 1125 (2014).

136. *See* Hornung, *supra* note 76 (making the chilling effect argument generally).

adopt a course of action swiftly or simply want a policy that is reliable, the MQD takes a wide range of options—including ones that are possibly legal—off the table.

### B. *The Inevitable Failure of Foreign Affairs Exceptionalism*

One way the Court could attempt to avoid the problems we have identified is to take a categorical approach and decide by fiat which subjects are “domestic” and thus qualify for normal application of the MQD and which are “foreign” and thus qualify for a more deferential application of the doctrine.<sup>137</sup> Such an approach would reflect a full-throated return to foreign relations exceptionalism.<sup>138</sup> It would essentially embrace the 1930s approach, during which time the Supreme Court struck down New Deal legislation delegating broad economic powers to the executive branch,<sup>139</sup> while upholding delegations involving national-security-related transactions.<sup>140</sup> Although the Court has recently embraced foreign affairs exceptionalism in other contexts,<sup>141</sup> the approach will not be successful as applied to the MQD for four reasons: 1) because the MQD focuses on congressional delegation, any coherent foreign affairs exceptionalism should also focus on statutes, rather than executive branch actions; doing so, however, is problematic because many contemporary statutes either cover both foreign and domestic issues, or are vague as to their coverage; 2) in an era of globalization, most statutes, and any executive branch action that implicates “a question of deep economic and political significance,” will likely have significant foreign *and* domestic aspects that are intertwined; 3) the Court lacks the tools to disentangle these aspects; and 4) any effort at a categorical approach will likely result in the executive branch using “foreign” policies to achieve domestic ends.

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137. Although we think it likely that the Court will attempt to employ foreign affairs exceptionalism to the MQD, we note that it is not inevitable. Several of the Court’s recent MQD decisions involve interpretations of emergency authorities. See *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022) (interpreting the emergency provisions of the Occupational Safety and Health Act); *Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (interpreting the Higher Education Relief Opportunities for Students (HEROES) Act of 2003, passed in the wake of 9/11 to provide relief—especially to members of the military—from the resulting economic turmoil). While emergency authorities are not the same as foreign affairs authorities, they do implicate some of the same kinds of functional considerations—such as speed, expertise, and high error costs—that are said to justify foreign affairs exceptionalism. See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015). Applying the MQD in these cases could suggest a broader application to economic foreign affairs.

138. For a discussion, see Sitaraman & Wuerth, *supra* note 137.

139. *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

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

141. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (“For one, [j]udicial inquiry into the national-security realm raises concerns for the separation of powers’ by intruding on the President’s constitutional responsibilities in the area of foreign affairs.” (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 142 (2017) (internal quotation marks omitted))).

First, to apply foreign affairs exceptionalism to the MQD, courts would have to define the subject matter as foreign or domestic. But it isn't clear at what level—the executive action or the statute—courts should assess the subject matter. Applying foreign affairs exceptionalism would also require courts to decide whether the “exceptional” treatment occurs at MQD Step One (does the executive action apply to an economic and politically significant issue?) or Step Two (does the statute clearly authorize the action?). Applying foreign affairs exceptionalism at Step Two would mean that the MQD does not apply to statutes that cover “foreign affairs” in subject matter. Applying it at Step One would involve assessing whether the executive action is “foreign” or “domestic” in nature. In *Curtiss-Wright*, the Supreme Court famously held that a more relaxed version of the nondelegation doctrine applies to statutes intended “to affect a situation entirely external to the United States[] and falling within the category of foreign affairs.”<sup>142</sup> Nondelegation challenges, after all, are about the statute, not the executive action pursuant to the statute.<sup>143</sup> Given the close connections between the nondelegation doctrine and the MQD, as well as the MQD's emphasis on the breadth of Congress's intended delegation in context, analyzing the foreign or domestic nature of what Congress regulated makes the most sense conceptually.

The difficulty with this approach is that many contemporary statutes either cover both foreign and domestic subject matters or are vague with respect to their coverage—the very problem the MQD is meant to solve. As they have done in other contexts, courts might use the revived presumption against extraterritoriality to infer that statutes are intended to apply only domestically unless they say otherwise.<sup>144</sup> But this approach would only limit the scope of any exception from the MQD to statutes in which Congress makes plain that the statute applies abroad. This is only a limited solution because it does not address the problem of domestic actions with foreign effects nor, as we shall see below, does it address the problem of presidents using foreign statutes to achieve domestic effects.

The second possibility is that courts could classify the subject of the executive branch's action, rather than the statute, as “foreign” or “domestic.” The appeal of this approach is twofold. First, it might be thought to rely on the president's independent foreign affairs powers.<sup>145</sup> Many, although not all, of

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142. *Curtiss-Wright*, 299 U.S. at 315 (emphasizing the aim of the legislation, not the executive action).

143. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (“We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

144. See, e.g., *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247 (2010). But this approach would dramatically limit the scope of any foreign affairs exceptionalism to statutes in which Congress makes plain the foreign nature of the statute. In other words, it essentially replaces one clear statement rule with another, resulting in the MQD constraining the executive branch's use of general statutes to wage economic warfare.

145. Such powers are, of course, contested. See, e.g., Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255

the statutes we used as examples above involve delegations to the president, rather than to other executive branch actors. Courts might reason that such delegations are special.<sup>146</sup> Second, it makes the “subject” in question more tractable by not requiring courts to classify general statutes as “foreign” or “domestic.”

Unfortunately, neither of these justifications makes sense in the context of economic matters. With respect to the former, whatever the president’s independent foreign affairs authorities may be, the Constitution is clear that economic regulation—both foreign and domestic—is an exclusive congressional prerogative.<sup>147</sup> Thus, the executive branch’s constitutional powers cannot prevent the conceptual difficulties with the MQD as applied to economic affairs. Additionally, apart from textual concerns, treating economic delegations to the president as special would only further undermine Congress’s role in our constitutional scheme.

The latter justification is inconsistent with the MQD itself. The MQD rests on a presumption that Congress would not have delegated a “major” power to the executive branch unless it did so expressly. But if a statute is too nonspecific to tell whether Congress authorized a particular action, how does treating the executive branch’s action as foreign make Congress’s intent any clearer? Such a move is inconsistent with the MQD’s emphasis on Congress’s intent for the same reasons that an agency cannot cure a nondelegation problem.<sup>148</sup>

The second problem is that determining whether a particular economic authority is “foreign” or “domestic” is difficult, if not impossible. Many will be both. Consider two examples: the Foreign Corrupt Practices Act (FCPA) and the Securities Exchange Act. The FCPA and statutes that operate in tandem with it 1) create civil and criminal penalties for covered entities that give anything of value to a foreign official when certain conditions are met and 2) require entities covered by U.S. securities laws to comply with bookkeeping requirements that the Securities and Exchange Commission (SEC) may promulgate by regulation.<sup>149</sup> Is the statute foreign or domestic for purposes of considering the SEC’s delegated authority under the statute? On the one hand, the focus of the statute is on eliminating bribes to foreign officials, an activity that presumably is focused overseas. That makes it seem foreign; indeed, “foreign” is in the title! On the other hand, many (but not all!) of the covered entities are located in the United States. Covered entities are 1) companies covered by

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(1988); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

146. Cf. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (holding that the Administrative Procedure Act does not apply to the president, and thus is not applicable to delegations directly to the president); *Dalton v. Specter*, 511 U.S. 462, 476–77 (1994).

147. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”).

148. *Whitman*, 531 U.S. at 472.

149. 15 U.S.C. §§ 78m, 78dd-1 to -3.

U.S. securities laws (mostly U.S. companies but also foreign companies listed on U.S. exchanges); 2) U.S. nationals; and 3) anyone who commits an act within the United States.<sup>150</sup> Therefore, any SEC regulations under the FCPA are likely to apply mostly to U.S. entities, but also to foreign entities listed on U.S. exchanges. Moreover, the statute covers any act “in furtherance of” giving anything of value, which would include a wide range of acts committed in the United States, even if the bribe is ultimately paid overseas.<sup>151</sup>

The Securities Exchange Act of 1934, and in particular recent proposals to add to its disclosure rules thereunder, offers a countervailing example. The SEC has recently proposed requiring companies to disclose their climate risks and their efforts to mitigate those risks.<sup>152</sup> At first blush, the Securities Exchange Act might seem like a domestic statute. It aims to deal with risks arising from securities transactions on domestic exchanges.<sup>153</sup> On the other hand, the statute applies to foreign entities trading on U.S. exchanges.<sup>154</sup> If viewed in terms of the executive action, the foreign-versus-domestic issue becomes even cloudier. Climate change is clearly a foreign affairs issue, having been the subject of multiple treaties and repeatedly labeled as a national security threat by the Defense Department.<sup>155</sup> The climate disclosure rules would deal with the foreign effects of domestic actions and would also apply to a U.S.-listed foreign company and require it to account for its foreign-related climate risks and mitigation efforts.<sup>156</sup> How to treat the proposed rule under the MQD is thus far from obvious—either on its own terms or with reference to the statute.

The third problem is that the Court does not have the tools to disentangle domestic and foreign economic aspects of issues in statutes and regulations.

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150. *Id.* §§ 78dd-1 to -3.

151. *Id.* § 78dd-1(a).

152. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

153. *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2015). Notably, the Securities Exchange Act does not itself contain this emphasis on domestic transactions. Indeed, the statute’s definition of an “exchange” is not territorially limited to the United States. 15 U.S.C. § 78c(a)(1).

154. For an overview of the rules on when the statutory provision applies to foreign entities, see *Accessing the U.S. Capital Markets—A Brief Overview for Foreign Private Issuers*, SEC (Feb. 13, 2013), <https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml> [perma.cc/32H3-8EYU].

155. See, e.g., Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849; Environment Agreement Under the United Nations Framework Convention on Climate Change, Apr. 22, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016); OFF. OF THE UNDERSECRETARY FOR POL’Y (STRATEGY, PLANS, & CAPABILITIES), U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE CLIMATE RISK ANALYSIS (2021), <https://media.defense.gov/2021/Oct/21/2002877353/-1/-1/0/DOD-CLIMATE-RISK-ANALYSIS-FINAL.PDF> [perma.cc/EEG3-TARG].

156. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21345 (noting that the proposed rule would apply to both domestic and foreign entities).

Most obviously, a court of nine lawyers and their law clerks are not functionally well-positioned to assess, in the context of litigation, all the possible uses of a particular statute, nor the consequences for the globalized economy of a particular regulatory action. Those kinds of judgments are best left to the political branches that are sure to have considerably more expertise in economic matters.

Finally, and perhaps most importantly, solving these problems through a robust application of foreign affairs exceptionalism, one in which courts err on the side of permitting regulations that seem to target national security or foreign affairs issues, or when the underlying statute arguably engages “foreign” questions, will create perverse consequences in which the executive branch has an incentive to use “foreign” authorities to achieve domestic economic policy goals. By further insulating executive regulation of the domestic economy from both congressional and judicial oversight, such a move runs directly contrary to the MQD’s stated purposes of increasing democratic accountability. The problem is that the categorical approach occurs in a dynamic context. Once the Court has said that a statute or a particular kind of regulation is “foreign” and thus exempt from the MQD, the executive branch has an incentive to pursue policies under that statute, even if domestic economic policy is the administration’s aim. Put differently, many policies can be pursued using “domestic” economic authorities or “foreign” economic authorities. Applying the MQD only to “domestic” statutes or regulations means that “foreign affairs” statutes and regulations are more likely to be used for domestic purposes in order to evade the application of the MQD.<sup>157</sup> This expansive use of statutory authority may stretch the bounds of the statutes in question, distorting them beyond recognition. It may also cause the executive branch to design inferior policies to address an underlying problem in order to fit within the bounds of a particular statute.<sup>158</sup>

This kind of use of foreign affairs statutes is not hypothetical. In 1980, President Jimmy Carter proclaimed the Petroleum Import Adjustment Program pursuant to Section 232.<sup>159</sup> Although the program operated in the first instance as a fee on imported oil, the scheme ultimately displaced the fee onto both imported and domestic oil in a bid to reduce oil consumption domestically regardless of origin.<sup>160</sup> More recently, President Trump employed Section 232 as a tool to bolster the domestic steel industry and considered its use

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157. Such actions could, of course, be challenged under any ordinary basis for challenging executive action, such as a claim that an action exceeds the bounds of statutory authorization. Our point, though, is that the MQD would apply to some, but not all, actions having domestic economic effects.

158. See Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT’L L. ONLINE 16 (2019) (arguing that President Trump used tariffs on imports to address domestic economic insecurity in part because control over tariffs is delegated and treated deferentially, whereas domestic subsidies require congressional authorization).

159. Proclamation No. 4744, 45 Fed. Reg. 22864 (Apr. 2, 1980).

160. *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 617 (D.D.C. 1980).

to protect U.S. automotive and auto parts producers.<sup>161</sup> There was little serious argument that either of these actions were motivated by national security concerns, classically understood as related to national defense or foreign policy, with skepticism coming from such places as the Trump administration's own Defense Department.<sup>162</sup> Rather, these were straightforward efforts to use Section 232 to intervene in the domestic economy's production and consumption decisions.

Or consider the Defense Production Act and actions taken thereunder. If the executive branch uses the Act to facilitate the domestic manufacturing of ventilators during a pandemic, is that action "domestic" because it effectuates industrial policy at home or is it sufficiently tied to "foreign policy" and "national security" because it seeks to address a dried-up global supply chain? If instead, the issue is creating domestic manufacturing capacity for semiconductors needed for computers—which is part of a long-term resilience strategy, rather than tied to an acute emergency or crisis—does that make it more or less like "national security"? What if the needed items are ventilators, which would be used for U.S. military personnel and military hospitals—but also in civilian hospitals? Line drawing here too is extremely difficult, especially when the nation is not engaged in a "hot" war. But even in a hot war, line drawing is extremely difficult. Consider President Truman's decision to nationalize steel mills during the Korean War. In the famous *Youngstown* case that resulted, the Supreme Court's decision ultimately finding against the president rested in large part on a disagreement about whether to characterize the president's decision as a military one, based on its implications for the Korean War, or a domestic one because it involved a labor dispute.<sup>163</sup> Where one comes down on that case is not the point; with the MQD, the Supreme Court is inviting dozens of *Youngstowns*. And yet, it is not at all clear that federal judges have the competence to assess the balance of foreign and domestic effects and make such determinations, particularly when the consequences of their errors could severely harm national security.

The result is that the MQD's application to policies aimed at addressing economic conflicts is likely to have consequences beyond merely denying the executive branch access to those tools. Likewise, the courts' preferred method of managing these conflicts—a categorical distinction between "foreign" and "domestic"—is both unworkable in a principled way in the modern globalized

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161. Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018).

162. Memorandum from James N. Mattis, U.S. Sec'y of Def., U.S. Dep't of Def., to Wilbur Ross, U.S. Sec'y of Com., U.S. Dep't of Com. (Feb. 16, 2018), [https://www.commerce.gov/sites/default/files/department\\_of\\_defense\\_memo\\_response\\_to\\_steel\\_and\\_aluminum\\_policy\\_recommendations.pdf](https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf) [perma.cc/AQ7G-Q3G9] (noting that "DoD does not believe that the findings in the [Commerce Department] reports [that steel and aluminum imports impair national security] impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements" and noting the concern that tariffs will adversely impact U.S. allies).

163. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 587–89 (1952).

economy and, if attempted, creates incentives for even greater reliance on foreign and emergency powers by administrations, as opposed to less. The MQD, in other words, risks achieving the exact opposite of its intended effect.

#### IV. MAJOR QUESTIONS AND THE FUTURE OF NATIONAL SECURITY

The MQD, as the courts are currently developing it, presents a significant challenge to the government's ability to conduct economic foreign relations, a problem that the courts are not well-suited to manage because they are not equipped to distinguish between international and domestic economic policies in a globalized economy. There are at least three possible ways forward. The first, and the most normatively desirable, involves greater congressional involvement in the design and use of economic weapons. By legislating both more comprehensively and with greater precision, Congress can cure any concerns about the scope of delegations. However, hoping for comprehensive congressional action on any issue seems increasingly unlikely. The second alternative is to limit application of the MQD to situations in which an agency is working in opposition to congressional schemes. Such a solution avoids the problem of having to apply the MQD differently in different contexts, as well as the dynamic problems that such a move creates. But this too seems unlikely given the direction the Court has thus far taken in its MQD jurisprudence. The third, and most likely, possibility is judicial foreign policymaking. Judicial foreign policymaking could take a number of forms. As discussed in Part III, courts could attempt to apply foreign affairs exceptionalism. As we have shown, this will involve judges drawing boundaries between foreign and domestic in ways that will invariably prove problematic. Of course, this might not stop the Court from adopting this approach. Judges might also assess the applicability of the MQD based on their own policy views, ideological preferences, or partisanship—and each of these might also flow into determining whether a statute or action is “foreign” or “domestic.” In any case, this likely future is undesirable for the standard reasons why judges are ill-equipped for policymaking.

##### A. *Congressional Specifications*

The purpose of the MQD, in the Supreme Court's telling, is to leave the resolution of major economic and social questions to Congress.<sup>164</sup> In the abstract, this is a desirable goal.<sup>165</sup> In practice, though, the MQD is unlikely to spur Congress to exercise its constitutional powers at the level of particularity that the Supreme Court has suggested might be required. Thus, while congressional action is the best solution both normatively and under the MQD, it is

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164. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

165. See generally Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583 (2019) (describing congressional primacy in trade and international economic affairs).

likely not possible, at least on a large enough scale to head off problems with the executive branch's ability to use economic tools in international conflicts.

As between the executive and legislative branches, Congress has the exclusive constitutional prerogative to regulate commerce, both foreign and domestic.<sup>166</sup> Moreover, traditional arguments for executive dominance in the international trade space make little sense compared with the reality of modern economic policymaking. For example, the functional advantages that the executive branch enjoys, such as speed and secrecy, make considerably less sense in the economic context than in, say, the context of traditional shooting wars.<sup>167</sup>

Executive dominance over international trade is also often justified on accountability grounds. The president represents a national constituency, the story goes, while Congress represents a series of parochial local interests that combined work against the aggregate national interest.<sup>168</sup> Yet this conception of the national interest elevates a notion of aggregate welfare—one based on treating economic efficiency as the primary goal policy should pursue—over the interests of local communities that the Constitution aims to protect by giving Congress control over economic regulation. Nor does the president necessarily have the “national interest” or efficiency at heart. The executive branch is at least as prone to capture by interest groups or to favoring political supporters as Congress.<sup>169</sup> For that reason, entrusting economic regulation to an institution, Congress, that has deeper lines of accountability with the diverse communities that make up the United States ensures a broader range of interests can participate in the policymaking process.<sup>170</sup>

This argument for congressional control sounds in a constitutional key. The claim is that Congress rightfully retains control over economic regulation, and thus executive claims of a constitutional power over foreign economic relations, simply because they touch foreign affairs, are misplaced. Indeed, the very idea of a constitutionally rooted executive power over *foreign* economic relations, but not domestic economic affairs, suffers from the same problem as the MQD itself: foreign and domestic economic affairs cannot be neatly

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166. See U.S. CONST. art. I, § 8.

167. Meyer & Sitaraman, *supra* note 165, at 628–32.

168. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (discussing and critiquing the argument that the president will pursue policies that advance the aggregate national interest, while Congress will pursue policies that only advance narrow local interests).

169. The best recent example of this is President Trump's “national security” tariffs on steel and aluminum imports. Studies have repeatedly found benefitted domestic steel and aluminum producers at the expense of the aggregate welfare of consumers and foreign producers. See Benn Steil & Benjamin Della Rocca, *Unalloyed Failure: The Lessons of Trump's Disastrous Steel Tariffs*, FOREIGN AFFS. (May 7, 2021), <https://www.foreignaffairs.com/articles/united-states/2021-05-07/trump-disastrous-steel-tariffs> [perma.cc/XW45-HJFC]; Chad P. Bown, *Trump's Steel and Aluminum Tariffs are Cascading Out of Control*, PETERSON INST. FOR INT'L ECON. (Feb. 4, 2020, 4:00 AM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-steel-and-aluminum-tariffs-are-cascading-out-control> [perma.cc/4PTL-U4A4].

170. See Nzelibe, *supra* note 168; Meyer & Sitaraman, *supra* note 165, at 632–37.

disentangled in the twenty-first century, and power over one can be used to control the other. Put in terms of Justice Jackson's famous tripartite framework from *Youngstown*, conflicts between the executive and the legislative branches over economic affairs can only be sustained if the president has independent constitutional power.<sup>171</sup> Because he has none over economic affairs, the president remains but an agent of Congress with no independent constitutional scope for action.

The level of granularity at which Congress exercises its constitutional powers—the specificity of its delegations—is a different question. Modern Congresses have passed considerably less legislation than previous Congresses.<sup>172</sup> Commentators have linked Congress's decreased productivity to a range of causes, including political polarization, Congress's (and especially the Senate's) internal rules, and the ability to claim credit for popular policies while blaming the executive branch for unpopular regulations.<sup>173</sup> The idea that doctrines such as the MQD or nondelegation doctrine will spur Congress to action by making action possible only if it originates in Congress is at best an unproven empirical conjecture and at worst ignores the larger set of political factors that have increasingly paralyzed Congress.<sup>174</sup>

To some proponents of these doctrines, congressional inaction may be nothing to worry about. Indeed, it may be the point. Justice Gorsuch has argued that entrusting Congress—with its many veto points, high transaction costs, and slow decisionmaking—with the power to legislate protects individual liberty from an overreaching government.<sup>175</sup> On this view, less legislation results in greater space for individual action. Proponents of this view think of the separation of powers as protecting negative liberty, the right to be free from

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171. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636–38 (1952) (Jackson, J., concurring).

172. Ezra Klein, *Congressional Dysfunction*, VOX (May 15, 2015, 6:18 PM), <https://www.vox.com/2015/1/2/18089154/congressional-dysfunction> [perma.cc/PST2-93FV].

173. See *id.*

174. We also do not think it is likely that we should systematically expect Congress to act—or act swiftly—when foreign relations are at issue. First, during divided government, members of the party that does not control the White House might have an interest in preventing the president from succeeding. For a discussion of the dominance of partisanship in shaping inter-branch dynamics, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, not Powers*, 119 HARV. L. REV. 2311 (2006). Second, Congress may not be able to act quickly enough to address the issues at hand. Third, many important foreign issues may not rise to the level of salience that would spur members of Congress to elevate the issue to the level of priority needed. Most foreign affairs issues, in other words, are not crises that might unite an otherwise divided Congress.

175. *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (“An ‘excess of lawmaking’ was[] [in the Framers’ view] one of ‘the diseases to which our governments are most liable.’ To address that tendency, the framers went to great lengths to make lawmaking difficult.” (quoting THE FEDERALIST NO. 62 (James Madison))).

government interference.<sup>176</sup> But there are also opposing views. One is that government exists in part to ensure freedom from *private* oppression and exploitation as well. Laws of all sorts—from the criminal law to consumer protection laws—thus promote a vision of freedom as nondomination.<sup>177</sup> Another, related, view is that the government partly exists to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty” and that these activities require affirmative government actions.<sup>178</sup>

For our purposes, though, we need not resolve the debate between different conceptions of liberty. Where security is concerned, the Constitution has always been understood to promote a conception of positive liberty. That is, the Constitution grants the federal government the power to affirmatively protect against threats in the name of preserving and expanding liberty.<sup>179</sup> Courts have repeatedly recognized that security matters permit a more activist and interventionist model of government at odds with the negative liberty conception of government underlying the MQD and nondelegation doctrine.<sup>180</sup> In a globalized economic system, in which economic tools are used in lieu of traditional means of protecting security and in which there is no bright line between foreign and domestic economic matters, this positive notion of liberty conflicts with the conception of negative liberty on which the MQD and nondelegation doctrine might be said to rest.

Congressional inaction in the face of executive disempowerment under the MQD is thus both likely as an empirical matter and problematic as a normative matter. While greater congressional action and specificity are desirable—and may be legally required in the case of at least some trade agreements<sup>181</sup>—the use of economic tools to pursue national security objectives means that the real-world implications of the MQD risk imperiling important constitutional values. This is not to deny that open-textured delegations create the possibility of abuse by the executive branch, nor, again,

176. See Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006 (2014); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). For the distinction between negative and positive liberty, see ISALAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

177. For this idea, as applied to regulation, see, for example, Sitaraman, *supra* note 67, and Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 735–37 (2019), describing this point and characterizing the alternative as falling into the “safeguards of liberty fallacy.” In political theory, this approach is associated with republicanism and its view of freedom as nondomination. See, e.g., PHILIP PETTIT, *REPUBLICANISM* (2004).

178. U.S. CONST. pmbli; see, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* 17 (2022) (observing that the preamble not only *justifies* affirmative government actions but creates an *obligation* for action).

179. See U.S. CONST. art. I, § 8; art. IV, § 4; amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.

180. The most infamous such case is *Korematsu v. United States*, 323 U.S. 214 (1944), which upheld an executive order interning Japanese Americans during World War II.

181. See Kathleen Claussen, *Trade’s Mini-Deals*, 62 VA. J. INT’L L. 315 (2022).

to let Congress off the hook for failing to exercise its constitutional powers in a more responsible way. Congressional action is the best solution. It just may not be a realistic one. Unless the MQD is a “suicide pact,” the need to protect the nation’s security thus means that we need second-best solutions.<sup>182</sup>

### B. *Doctrinal Retrenchment*

A second possibility is that courts, especially lower courts forced to evaluate MQD claims, could resist the urge to apply the doctrine in an expansive way. Instead, they might apply the doctrine in ways that tend to uphold executive action unless that action is contrary to congressional text or purpose.

First and foremost, the Supreme Court could revise its usage of the MQD and instead return it to its earliest origins. If the Court began again to reframe the MQD as looking for “elephants” in “mouseholes”—that is, looking at “majority” with reference to the statutory scheme,<sup>183</sup> that would not only address many of the problems described here but also root the doctrine more firmly in statutory interpretation. But given that the Court has shifted away from this approach, we hold out little hope that it will return to it.

A second possibility is that both the Supreme Court and lower courts could simply try to find more statutory clarity. This approach would work regardless of whether a court’s decision will ultimately uphold or strike down the executive’s action. From the perspective of limiting agency action, this would likely look like bringing back ordinary statutory interpretation. After all, setting aside executive action as contrary to the text of congressional statutes can result from ordinary statutory interpretation and does not require resort to the MQD. Where the MQD breaks new ground is in the analysis of the larger context for the claimed delegated authority and determination of whether a clear statement of congressional consent is necessary.

Indeed, one of the other ways that courts have narrowed the scope of *Chevron* deference is by increasingly finding statutes unambiguous at *Chevron* Step One.<sup>184</sup> Then-Judge Brett Kavanaugh was a major proponent of this tactic, arguing in 2017 that “we can stop using ambiguity as the trigger for applying these canons of statutory interpretation.”<sup>185</sup> Instead, in Judge Kavanaugh’s view, judges should use the ordinary tools of statutory construction to find the meaning of a statute.

Note, however, that the contemporary version of the MQD from cases like *West Virginia* and *Alabama Ass’n of Realtors* does just the opposite. Once a

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182. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

183. See Coenen & Davis, *supra* note 64, at 794.

184. See *supra* text accompanying notes 44–49.

185. Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1912 (2017).

court decides that the MQD applies, it must decide whether congressional authorization is “clear.”<sup>186</sup> If it decides that the statute is not “clear,” then it invalidates the executive action. While the question of whether a statute is “clear” is perhaps not exactly the same as determining whether a statute is “ambiguous,” one could be forgiven for having to squint to see the difference. Earlier versions of the MQD, tethered to *Chevron*, did not suffer from this problem. Because the effect of finding a major question was simply that the court did not defer to the agency’s interpretation of the statute, they were consistent with Justice Kavanaugh’s call to avoid using ambiguity. The current version of the MQD, though, does not require courts to interpret whether a policy falls within the scope of a statute as interpreted; it uses a lack of clarity to decide that the policy is not authorized.

In applying the MQD’s clear statement rule, courts would also strive to avoid finding a lack of clarity. This analysis would come into play once a court has decided that the MQD applies in the first place. Courts would try, to the best of their ability, to interpret statutes to determine the bounds of the delegated authority definitively. While clarity in language is often elusive (as is the lack of ambiguity),<sup>187</sup> putting a thumb in favor of finding clarity through ordinary tools of statutory interpretation would mitigate some of the worst consequences of the MQD.

This analysis would not involve ignoring the MQD. Rather, it might involve looking for clarity at a higher level of abstraction. For example, whether one views wholesale restrictions on Chinese investment in certain sectors, such as technology, in the United States as clearly authorized by Congress depends on the level at which one asks the question. Has Congress specifically authorized the president to create a system of *ex ante* restrictions on Chinese investment? No, Congress has not explicitly authorized that policy. But has Congress authorized the president to restrict investment that poses a threat to national security? Yes, in a number of statutes.<sup>188</sup> That authorization is clear and could be interpreted to include lesser instances of the general phenomenon that the president is clearly authorized to regulate.

The third tactic, familiar in the foreign affairs literature, would involve analyzing context in light of Justice Jackson’s tripartite framework from *Youngstown*.<sup>189</sup> While the previous tactic of textual interpretation is useful once a court decides that the MQD applies, this tactic is useful in assessing whether the MQD applies at all. Applying *Youngstown* involves making a determination as to whether 1) Congress has expressly or impliedly authorized the executive action, 2) whether Congress has acquiesced or remained inert in the face

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186. See *supra* text accompanying notes 59–61.

187. *Id.* at 1911–12.

188. See International Emergency Economic Powers Act, 50 U.S.C. § 1701; Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 2174.

189. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

of executive action, or 3) whether Congress has expressly or impliedly forbidden the executive action in question.<sup>190</sup> This analysis is strikingly similar to the MQD analysis because it involves inferring whether Congress intended to delegate or acquiesced in the exercise of executive power through congressional action that may be broader than the specific issue in question. For example, Justice Jackson reasoned that President Truman's seizure of the steel mills directly contradicted Congress's will because Congress had declined to give the president the seizure power in the face of labor disruptions.<sup>191</sup>

By contrast, in *Dames & Moore v. Regan*, the Court treated the president's decision to extinguish U.S. citizens' claims against Iran as unauthorized by the International Emergency Economic Powers Act itself but consistent with "the general tenor of Congress' legislation in this area."<sup>192</sup> The Court went on to caution:

Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility[.]" At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.<sup>193</sup>

The analysis of context in *Youngstown*, *Dames & Moore*, and the prodigious number of cases that rely on those two decisions suggests a much more forgiving use of context. If the first step of an MQD analysis is determining whether the doctrine applies from an analysis of the surrounding context, that context should take into account prior congressional action and inaction on related issues. As *Youngstown* itself demonstrated, such an analysis does not always result in upholding executive action. But it likely results in upholding executive action as congressionally authorized in a wider range of circumstances.<sup>194</sup>

Both of these modes of analysis—textual interpretation that looks for clarity rather than an absence of it when the MQD applies, and a broad contextual analysis to determine whether the MQD applies in the first place—would result in courts applying the MQD to strike down executive action that is inconsistent with congressional will. But they would moderate some of the extreme

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190. *Id.* at 635, 637.

191. *Id.* at 586 (majority opinion); *id.* at 640 (Jackson, J., concurring).

192. *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981).

193. *Id.* at 678–79 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981); *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

194. See Koh, *supra* note 145, at 1310.

results in which the strong version of the MQD results in striking down executive action merely because Congress has not expressly authorized the specific policy at issue.

### C. Judicial Policymaking

The final possibility is that, if courts apply the strong version of the MQD across fields, they will inevitably become policymakers, including foreign policymakers. In foreign policy, and in international conflicts in particular, the courts have long extolled the superior virtues of the executive branch as compared to the other branches: speed, information, expertise, and secrecy, to name a few.<sup>195</sup> Applying a strong version of the MQD, one that will inevitably sweep in the use of economic policy to fight foreign conflicts, will place the judiciary squarely in the center of foreign policymaking. Courts will have to sign off on executive branch policies before they are free from the possibility (or the reality, in the case of preliminary injunctions) of judicial interference. The criticism of courts as foreign policymakers is widespread, and we need not review that literature here.<sup>196</sup> For our purposes, we outline three possible roles that courts could play as foreign policymakers should they embrace the strong version of the MQD. These roles reflect three different approaches courts could take in applying the MQD. While they are not completely distinct from each other, they capture three different ways in which judges might evaluate the significance of a policy and the degree of clarity required under the MQD.

First, courts could be sucked into making substantive policy choices. The criteria that determine the MQD's application—especially a judicial evaluation of the economic and political significance of a policy—directs lower courts to decide what kinds of substantive policies rise to the level of economic or political significance. More so than process-based judgments under the Administrative Procedure Act, comparisons between a claim of delegated authority and a statute in a *Chevron* analysis, or even efforts to classify exercises of power as executive or legislative under the nondelegation doctrine,<sup>197</sup> this judgment explicitly asks courts to make a determination about the economic and political value and impact of a policy. Apart from being poorly situated to make such judgments as a matter of institutional competence, as the Court conceded in *Dobbs*,<sup>198</sup> judges applying the MQD also have to make subjective judgments about which policies to subject to a form of heightened scrutiny. The “significance” of a policy depends, at least in part, on the judge's view of the importance of the underlying policy.

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195. For a discussion of these factors, see Sitaraman & Wuerth, *supra* note 137, at 1935–49.

196. For a particularly sharp comment on the point, see Thomas M. Franck, *Courts and Foreign Policy*, FOREIGN POL'Y, Summer 1991, at 66, stating that “[n]o one, however critical of U.S. officials, seriously suggests that the judiciary should make foreign policy.”

197. See Coenen & Davis, *supra* note 64, at 819.

198. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

A second possibility is that courts will apply the MQD in an ideologically charged way. This possibility is a version of courts as substantive policymakers. Because the MQD expressly directs courts to evaluate the significance of a policy, judges are likely to make that evaluation in light of their own ideological preferences.<sup>199</sup> For instance, courts may be more likely to find reasons under the MQD to uphold efforts to decouple the United States economy from the Chinese economy, such as through the Section 301 tariffs imposed by the Trump administration or limits on inbound Chinese investment or outbound U.S. investment to China. Concern about China and its geopolitical ambitions, including the role of economic power in those ambitions, is widespread and has no particular partisan valence.<sup>200</sup> Policies to address environmental objectives, such as addressing climate change,<sup>201</sup> may be more likely to fall under the MQD. While not an MQD case, this kind of ideological decisionmaking is perhaps most clear in Justice Alito's strange concurrence in *Gundy v. United States*.<sup>202</sup> That case presented a nondelegation challenge to certain provisions of the Sex Offender Registration Act. Justice Alito concurred in the judgment (with Justices Kagan, Ginsburg, Breyer, and Sotomayor forming the plurality), arguing that while he supported a more expansive interpretation of the nondelegation doctrine, "it would be freakish to single out the provision at issue here for special treatment."<sup>203</sup> Since any change in doctrine must be applied first to the provision at issue in a particular case, it is hard to see Justice Alito's opinion as being anything other than a rejection of constitutional protections for sex offenders.

As noted above, unlike other administrative law doctrines, the MQD is especially susceptible to asymmetric use along ideological lines. Most administrative law doctrines, such as process rules under the Administrative Procedure Act or deference doctrines, apply to both regulatory and deregulatory actions.<sup>204</sup> Moreover, research on the *Chevron* doctrine has found that the difference in deference being applied to "liberal" versus "conservative" outcomes is not nearly as wide as often imagined.<sup>205</sup> But the MQD is likely to apply primarily to policies that expand regulation, rather than policies that contract regulation. Because Congress has not specifically authorized most regulatory

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199. A large literature substantiates the hypothesis—often described as the "attitudinal model"—that judges resolve difficult questions in light of their ideological preferences, even if only unconsciously. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

200. Benjy Sarlin & Sahil Kapur, *Why China May Be the Last Bipartisan Issue Left in Washington*, NBC NEWS (Mar. 21, 2021, 10:03 AM), <https://www.nbcnews.com/politics/congress/why-china-may-be-last-bipartisan-issue-left-washington-n1261407> [perma.cc/WD68-LNXZ].

201. See sources cited *supra* note 155.

202. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

203. *Id.* at 2130–31 (Alito, J., concurring).

204. See *supra* note 80 and accompanying text.

205. See Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) (finding that doctrine constrains partisan effects in the application of the *Chevron* doctrine by lower courts).

actions, asking whether Congress clearly authorized the rollback of those same regulations will likely not make sense to courts. In the international economic context, this asymmetry could lead to courts upholding policies that lower trade barriers—the traditional focus of international economic law—but applying the MQD to measures that raise trade barriers in the service of tackling international conflicts, such as those with China and Russia. Ideological application of the MQD, in other words, could be among the most damaging ways to apply the MQD to national security questions.

The third possibility is the most troubling: that judges will act in a strictly partisan fashion, upholding the policies of administrations from one party but not the other party. Again, this possibility is not entirely distinct from ideological motivations and could be hard to distinguish from ideological motivations empirically, given the overlap between ideology and party, but in principle it does capture a distinct mode of analysis. The MQD's asymmetry between regulation and deregulation does not neatly capture partisan dynamics in foreign policy. Presidents George W. Bush and Trump, after all, were aggressive in using economic tools in novel ways to wage foreign conflicts, the War on Terror in the first instance and the push for economic decoupling with China in the second.<sup>206</sup> This fact, though, means that courts—and especially the Supreme Court, which has control over its docket and can favor one party simply by declining to hear challenges to the policies of its favored administration—are likely to be put to the test.

#### CONCLUSION

The rise of the major questions doctrine in recent years threatens a revolution in administrative law. But it may also significantly impact foreign relations and national security law. National security and foreign affairs issues have increasingly become economic, and executive actions in these areas have long depended on extremely broad delegations of power. The MQD calls executive actions under these delegations into question, as they frequently have deep economic and political significance and may often involve novel policy solutions to address new problems. And because foreign and domestic policies cannot be easily distinguished, a foreign relations exception is likely to fail—or perversely to push the executive to “securitize” domestic policy issues. Realistically, it is unlikely that Congress will be able to respond by codifying specific uses, and neither the Supreme Court nor lower court judges are likely to retreat from the doctrine. The shadow of litigation will also likely chill significant policy actions, curtailing the executive's ability to pursue policies in the national interest on a range of foreign affairs questions. The MQD means that judges will play a bigger role in shaping the future of American national security, whether they like it or not.

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206. See *supra* notes 26, 30–31 and accompanying text.