NOTE

Toward a Rebalanced Section 301 Authority: Reconsidering the Separation of Powers in International Trade

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ABSTRACT

Recent Supreme Court jurisprudence suggests that courts may play a greater role going forward in striking statutes that provide broad grants of authority to the executive branch as violations of the nondelegation doctrine. In the area of international trade law, the Court of International Trade and Court of Appeals for the Federal Circuit recently refused to find that a trade statute was an unconstitutional delegation of legislative authority. Other equally or more delegatory statutes, however, may not be on safe constitutional footing, such as section 301 of the Trade Act of 1974, which gives the executive branch broad discretion to retaliate against unfair foreign trade practices. This Note examines the Trump Administration's use of section 301 in its actions against China and argues that when applying Justice Gorsuch's three-part test for the nondelegation doctrine from his dissenting opinion in Gundy v. United States*, section 301 would not be able to withstand a constitutional challenge. This Note further argues that this new standard can be used as a tool to correct the current imbalance in the section 301 authority between Congress and the executive branch.*

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Introduction

In February 1788, as Americans considered ratification of the U.S. Constitution, James Madison published *The Federalist No. 53* concerning the U.S. House of Representatives.[1] The Constitution would vest Congress with the authority, inter alia, "[t]o lay and collect Taxes, Duties, Imposts and Excises" and "regulate Commerce with foreign Nations."[2] In advocating that House members should be elected to two-year rather than one-year terms, Madison suggested that the two-year term would ensure that those constitutionally tasked with legislating on international trade and commercial matters would have the time to become "acquainted . . . with the commercial policy and laws of other nations."[3]

Madison envisioned that Congress would play a central role in trade policymaking, as laid out in Article I, Section 8 of the Constitu-

1 The Federalist No. 53 (James Madison).

2 U.S. Const. art. I, § 8.

3 The Federalist No. 53, at 275 (James Madison) (Ian Shapiro ed., 2009).

tion,[4] but that bears little resemblance to how trade policy is made today. Over the course of the twentieth century, as various policymaking authorities became more concentrated in the executive branch to address the increasingly complex problems with which the federal government was tasked,[5] trade policy became executive-driven as well.[6] Indeed, proponents of a trade policy that pursues economic efficiency applauded statutory grants of authority to the executive[7] to negotiate trade agreements and implement other trade policies as a way to protect against the logrolling viewed as endemic to congressional trade and tariff policymaking.[8]

The Supreme Court interfered minimally in Congress's grants of authority to the executive through its application of the nondelegation doctrine, which the Court uses to determine whether Congress has impermissibly delegated legislative authority to the executive branch.[9] The Supreme Court used the "intelligible principle" standard for the nondelegation doctrine to approve these broad grants of authority, finding no fault with such laws as long as Congress provides a sufficiently "intelligible principle" to guide the executive.[10] Under that standard, the Supreme Court has only twice found that Congress impermissibly delegated legislative authority to the executive,[11] and both occurred at the height of President Roosevelt's New Deal-era reforms—the entire premise of which the majority of the Court questioned.[12] Although the intelligible principle standard still guides the Supreme Court's analysis of nondelegation doctrine challenges,[13] a majority of the Court recently expressed a willingness to hold delegations to more exacting scrutiny.[14] In *Gundy v. United States*,[15] Justice

4 U.S. CONST. art. I, § 8.

5 *See, e.g.*, Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (finding that courts approved "'broad' standards for administrative action" based on "the necessities of modern legislation dealing with complex economic and social problems").

6 *See* Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 600–01 (2019).

7 In this Note, the term "the executive" refers to "the executive branch" or "the President and his executive officers and agencies."

8 *See, e.g.*, Cory Adkins & David Singh Grewal, *Two Views of International Trade in the Constitutional Order*, 94 TEX. L. REV. 1495, 1499 (2016).

9 *See* KRISTEN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 27–28 (3d ed. 2020).

10 *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

11 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935).

12 HICKMAN & PIERCE, *supra* note 9, at 30.

13 *See* Gundy v. United States, 139 S. Ct. 2116, 2119 (2019).

14 *See id.* at 2130–31 (Alito, J., concurring in the judgment) (Gorsuch, J., dissenting, joined

Gorsuch's dissenting opinion put forth a possible new standard whereby a law will be upheld as constitutional only if it (1) leaves another branch merely to "fill up the details,"[16] (2) provides the rule that will apply conditioned on "executive fact-finding,"[17] or (3) authorizes the other branches to undertake "certain non-legislative responsibilities."[18] Such a standard would narrow the set of statutory grants of authority to the executive that would be able to withstand a nondelegation doctrine challenge.[19]

Coinciding with the Supreme Court expressing a willingness to revisit the intelligible principle standard for the nondelegation doctrine,[20] the Court of International Trade considered whether section 232 of the Trade Expansion Act of 1962 ("section 232")[21] violated the nondelegation doctrine.[22] Although the Court of International Trade held, and the Federal Circuit affirmed, that section 232 was constitutional, the holdings were grounded in stare decisis and the absence of a new nondelegation doctrine standard from the Supreme Court.[23] The particularities of the section 232 challenge—with existing Supreme Court jurisprudence finding that the statute was constitutional under the nondelegation doctrine[24]—are therefore not indicative of the Supreme Court's willingness to uphold similar grants of authority in different trade statutes going forward. Other trade statutes that lack binding Supreme Court jurisprudence and contain similar or more delegatory authority to the executive may face a more stringent analysis in future constitutional challenges if the Supreme Court develops a more exacting nondelegation doctrine standard. An example of such a

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by Roberts, C.J. & Thomas, J.); Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

15 139 S. Ct. 2116 (2019).

16 *Id.* at 2136 (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

17 *Id.*

18 *Id.* at 2137.

19 *See* Johnathan Hall, Note, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 178 (2020).

20 *See Gundy*, 139 S. Ct. at 2131, 2141, 2148 (Alito, J., concurring in the judgment) (Gorsuch, J., dissenting, joined by Roberts, C.J. & Thomas, J.).

21 Section 232 permits the President, after an investigation by the Department of Commerce, to take action to adjust import levels—such as by applying tariffs—if the President determines that the current levels of importation of such articles threaten the national security of the United States. *See* 19 U.S.C. § 1862.

22 *See* Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1337 (Ct. Int'l Trade 2019).

23 *See* Am. Inst. for Int'l Steel, Inc. v. United States, 806 F. App'x 982, 983, 989–90 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020).

24 *See* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559–60 (1976).

statutory grant of open-ended executive discretion is contained in section 301 of the Trade Act of 1974 ("section 301"),[25] which provides the Office of the United States Trade Representative ("USTR")[26] with the authority to self-initiate investigations of, and to determine appropriate retaliatory actions to, foreign government practices that USTR views as unfairly burdensome or discriminatory against American commercial interests.[27]

This Note examines the prospects of a constitutional challenge to section 301 under the Supreme Court's evolving jurisprudence on the nondelegation doctrine by applying Justice Gorsuch's test to the Trump Administration's section 301 investigation into China's forced technology transfer and intellectual property practices, the ensuing tariffs imposed, and the "phase one" agreement between the Trump Administration and China. This Note argues that when tested against Justice Gorsuch's three principles from his dissenting opinion in *Gundy*, section 301 would not withstand constitutional scrutiny. This Note also argues that by applying a more stringent standard for the nondelegation doctrine, the Court could help rebalance the section 301 authority more appropriately between Congress and the executive branch.

This Note proceeds in three parts. Part I examines the evolution of the nondelegation doctrine, the balance of trade and tariff policymaking authority between Congress and the executive, and how these two developments have interacted. Part I also reviews the Supreme Court's recent increased willingness to question the constitutionality of statutes as impermissible delegations of legislative authority to the executive and how that informed the section 232 case before the Court of International Trade and the Federal Circuit. In Part II, this Note examines section 301, its development, subsequent amendments, and present structure. Part III analyzes the Trump Administration's reliance on section 301 in its actions against China, and argues that section 301 would not be able to survive Justice Gorsuch's three-part test. This Note concludes that a nondelegation doctrine standard that requires more specific congressional guidance—like the one that Justice Gorsuch proposed—can ensure that section 301 more closely follows the balance prescribed in the Constitution.

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25 19 U.S.C. §§ 2411–2420.

26 USTR sits within the Executive Office of the President and develops and implements U.S. trade policy, which includes negotiating trade agreements and identifying unfair foreign trade practices. *See id.* § 2171.

27 *See id.* §§ 2411–2420.

I. Historical Foundations and Recent Developments

Since the early years of the republic, the Supreme Court has been asked to grapple with the appropriate division of power between Congress and the executive.[28] Indeed, the seminal cases that defined the bounds of congressional grants of authority to the executive in the nineteenth and early twentieth centuries involved issues of executive discretion over foreign commercial and tariff powers.[29] Simultaneously, the nature of trade policymaking has changed immensely throughout American history. Initially, trade policymaking was predominantly congressionally led, tariff-driven, and aimed to serve domestic economic interests. Since the 1930s, however, the executive has driven trade policymaking, principally through executive-negotiated trade agreements subject to simple majority votes in the House and Senate that address both foreign affairs and ideological—the pursuit of global trade liberalization—ends.[30] The Trump Administration's embrace of section 301 and other delegated authorities, however, reflected a possible shift in the ends that trade policy serves back to purely domestic economic concerns.[31]

A. Jurisprudential History of the Nondelegation Doctrine

The existing nondelegation doctrine standard is rooted in Supreme Court jurisprudence that clarified an increasingly broad scope of constitutionally permissible authorizations of executive discretionary authority.[32] This standard is based on a conjunctive reading of Congress's authority over "[a]ll legislative Powers" within Article I, Congress's power to make all laws that are necessary and proper to carry out its constitutional duties, and the President's authority to execute the laws.[33] The Supreme Court has accordingly long recognized that certain delegations to the executive are constitutionally permissible.[34]

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

29 *See, e.g.*, J.W. Hampton, Jr. Co. v. United States, 276 U.S. 394, 394 (1928); Field v. Clark, 143 U.S. 649, 650 (1892); *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 383.

30 *See* Meyer & Sitaraman, *supra* note 6, at 586. *See generally* Douglas A. Irwin, Clashing Over Commerce: A History of US Trade Policy (2017).

31 *See* Meyer & Sitaraman, *supra* note 6, at 587.

32 *See J.W. Hampton, Jr. & Co.*, 276 U.S. at 394; *Field v. Clark*, 143 U.S. at 649; *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 382.

33 *See* U.S. Const. art. I, §§ 1, 8; *id.* art. II, § 3; Cary Coglianese, *Dimensions of Delegation*, 167 U. Pa. L. Rev. 1849, 1852–54 (2019).

34 Coglianese, *supra* note 33, at 1856.

Several challenges to allegedly unconstitutional delegations of legislative authority have come before the Supreme Court throughout American history, with many of the early nondelegation doctrine cases centering on Congress's ability to delegate trade authority to the executive. In *Cargo of the Brig Aurora v. United States*,[35] the Court reviewed the President's authority to determine via proclamation whether a trade embargo on goods from Great Britain or France should be applied, conditioned on either country refusing to recognize the United States' right to neutral commerce with both nations.[36] The Court upheld the law without addressing the appellant's claim that the proclamation authority unconstitutionally delegated legislative power to the President.[37] In *Field v. Clark*,[38] another seminal nondelegation case, the plaintiff challenged a law that gave the President the authority to change duty rates on five duty-free products if the President determined that the countries from which the products were sent did not provide reciprocal market access to U.S. products.[39] The Court found that the law was not an impermissible delegation of legislative authority because "Congress itself prescribed, in advance, the duties to be levied, collected and paid" on the products "produced by or exported from such designated country, while the suspension lasted."[40] The Court explained that Congress had not delegated legislative authority to the executive because the law imposed upon the President the "named contingency" that must occur before he could impose tariffs on the specified products, leaving discretion only as to the length of the duty suspension.[41]

J.W. Hampton, Jr. & Co. v. United States[42] set the modern standard for the Court's nondelegation doctrine analysis. There, the Supreme Court considered the constitutionality of a law that gave the President the authority to equalize prices between domestic and foreign producers through a mechanism of raising tariffs on cheaper foreign products with the goal of both raising revenue and benefiting domestic industry.[43] The Court determined that the statute was a clear manifestation of Congress identifying a problem that it did not have

35 11 U.S. (7 Cranch) 382 (1813).

36 *Id.* at 382–83.

37 *See id.* at 388–89.

38 143 U.S. 649 (1892).

39 *See id.* at 680–81.

40 *Id.* at 692–93.

41 *Id.* at 693.

42 276 U.S. 394 (1928).

43 *See id.* at 404.

the tools itself to address, so it prescribed a method for the President, with the assistance of the United States Tariff Commission,[44] to execute its policy.[45] According to the Court, as long as Congress provides "an intelligible principle" to the executive branch, "such legislative action is not a forbidden delegation of legislative power."[46] Following the *J.W. Hampton* decision, the Court has only twice found that a delegation was constitutionally impermissible under the intelligible principle standard.[47] Nonetheless, the Court has relied on the standard to limit possibly problematic grants of executive discretion, using it as a tool of statutory construction to uphold a statute that appeared to delegate legislative authority to the executive by interpreting it not to provide such delegations.[48] The intelligible principle standard continues to guide the Court's nondelegation doctrine analysis.[49]

In 2019, the Supreme Court signaled that it might be ready to revisit the intelligible principle standard, almost a century after the Court first announced the standard in *J.W. Hampton*. In *Gundy v. United States*, the Court considered whether the Sex Offender Registration and Notification Act ("SORNA") amounted to an impermissible delegation of legislative authority to the Attorney General by giving the Attorney General the power to issue regulations that clarified how SORNA applied to those offenders convicted before its enactment.[50] Justice Kagan, writing for herself and three other justices, found that SORNA is constitutional because Congress merely left the Attorney General to deal with implementation issues that may arise with registering pre-Act offenders in line with SORNA's goal of regis-

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44 The United States Tariff Commission was the predecessor agency to the modern-day United States International Trade Commission. *See* 19 U.S.C. § 2231.

45 *See J.W. Hampton*, 276 U.S. at 404–05.

46 *Id.* at 409.

47 Gundy v. United States, 139 S. Ct. 2116, 2120 (2019) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (finding the President's authority under the National Industrial Recovery Act to create codes of fair competition amounted to an impermissible delegation of legislative authority)); Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935) (finding section 9(c) of the National Industrial Recovery Act, which authorized the President to prohibit transport of interstate and foreign sales of oil exceeding state quotas, violated the nondelegation doctrine).

48 *See* Indus. Union Dep't v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607, 646 (1980) (Stevens J., plurality) (holding that the Secretary of Labor's interpretation of his authority under sections 3(8) and 6(b)(5) of the Occupational Safety and Health Act to regulate carcinogens in the workplace could not be accepted because, if the statute was interpreted in such a way, it would impermissibly delegate legislative authority to the executive).

49 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001); Mistretta v. United States, 488 U.S. 361, 372, 374 (1989).

50 *Gundy*, 139 S. Ct. at 2121–22.

tering this class of offenders as soon as it was "feasible."[51] Writing in concurrence, Justice Alito expressed a willingness to revisit the intelligible principle standard if the majority of the Court was willing to do so, but he concluded that "it would be freakish to single out the provision at issue here," given the Court's practice of approving "extraordinarily capacious" grants of executive authority.[52]

In dissent, Justice Gorsuch, writing for himself and two others,[53] invoked the Framers' intent that the Constitution specifically vests Congress with legislative powers to ensure that any laws that "restrict[] the people's liberty" fulfill the requirements of bicameralism and presentment to guarantee accountability.[54] According to Justice Gorsuch, the Framers thus provided three "important guiding principles" for a nondelegation doctrine analysis.[55] First, Congress can make policy decisions and give another branch the power to "fill up the details."[56] Congress's standards must be "'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed."[57] Second, Congress may state the rule and have its application conditioned on "executive fact-finding."[58] Justice Gorsuch cited the legislative authorization to impose a trade embargo on Great Britain or France based on express conditions in *Cargo of the Brig Aurora* as an example.[59] Third, Congress can "assign the executive and judicial branches certain non-legislative responsibilities."[60] Justice Gorsuch suggested that if, for example, a statute mandates the executive to exercise broad discretion in foreign affairs—an Article II power—it would not raise any separation of powers concerns, again citing the statute at issue in *Cargo of the Brig Aurora* as a possible example.[61]

Thus, there is likely a willingness by a majority of the Supreme Court[62] to assert the judiciary in enforcing their view of how the Fram-

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51 *Id.* at 2125.

52 *Id.* at 2130–31 (Alito, J., concurring in the judgment).

53 Justice Kavanaugh took no part in the consideration of *Gundy*, but subsequently suggested potential support for Justice Gorsuch's approach. *See infra* note 62.

54 *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

55 *Id.* at 2135–36.

56 *Id.* at 2136.

57 *Id.* (quoting Yakus v. United States, 321 U.S. 414, 426 (1944)).

58 *Id.*

59 *Gundy*, 139 S. Ct. at 2136.

60 *Id.* at 2137.

61 *Id.*

62 In addition to the four justices that account for the dissenting and concurring opinions in *Gundy*, Justice Kavanaugh wrote in his statement respecting the denial of certiorari in *Paul v.*

ers understood the separation of powers.[63] It should be noted that not all scholars agree on the historical legitimacy of the nondelegation doctrine and whether, in fact, the Framers recognized such a check on congressional delegations of legislative authority to the executive.[64] However, scholars have identified the *Gundy* decision as indicative of the Court's willingness to enforce the nondelegation doctrine more strictly going forward.[65] It is therefore quite possible that the Supreme Court may invoke a stricter nondelegation doctrine standard that aligns with the three principles that Justice Gorsuch cited in his *Gundy* dissent. Although the legitimacy of a robust reading of the nondelegation doctrine is open for scholarly debate, the judiciary could use a more stringent nondelegation doctrine standard to rebalance section 301 authority between Congress and the executive.

B. The History of Congressional and Executive Trade Policymaking

Trade was of critical importance in the early American republic. A mere two days after Congress achieved its first quorum, James Madison introduced a bill in the House to provide a tariff scheme to raise revenue for the new federal government.[66] Tariff policy continued to define the trade policy debate throughout the nineteenth century.[67] Congress viewed tariffs both as a tool to protect against foreign competition and unfair foreign labor practices and as a means for generating revenue, while using that revenue to fund domestic improvements in infrastructure and as a vehicle for economic redistribution.[68]

United States that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari).

63 *See, e.g.*, *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) ("The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch. . . . [E]nforcing the separation of powers . . . [is] about respecting the people's sovereign choice to vest the legislative power in Congress alone.").

64 *See generally* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

65 *See, e.g.*, Alan B. Morrison, *The Supreme Court's Non-Delegation Tease*, YALE J. ON REG.: NOTICE & COMMENT (July 29, 2020), https://www.yalejreg.com/nc/the-supreme-courts-non-delegation-tease-by-alan-b-morrison/ [https://perma.cc/6U4R-8DMM]; Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REG. REV. (July 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation/ [https://perma.cc/Z8S6-8X9X].

66 IRWIN, *supra* note 30, at 73.

67 *See* Meyer & Sitaraman, *supra* note 6, at 592–93.

68 *See id.* (describing Henry Clay's proposed "American System").

Meanwhile, the President's role in trade policy was largely limited to those actions that fell within the President's Article II powers: negotiating friendship, commerce, and navigation treaties that included commercial and customs provisions;[69] gathering information through the Tariff Commission that was created in the late nineteenth century;[70] or implementing flexible tariff provisions under the guidance of Congress.[71]

Tariffs continued to be an important source of federal government revenue until the passage of the Sixteenth Amendment in 1913, which created the federal income tax.[72] Simultaneously, the trade policy consensus moved away from a focus on competing regional economic interests—for which Congress is the better policymaking forum given the geographic representation of its members[73]—to an emphasis on a singular national interest.[74] By the 1930s, a multitude of factors led to trade policy becoming a largely executive-driven affair.[75] One factor was the *Field v. Clark* and *J.W. Hampton* decisions that upheld broad authorizations to the President in tariff-making authority as constitutional.[76] Another factor was the increased view that congressional tariff policymaking led to negative outcomes—most notably, the Smoot-Hawley Tariff,[77] which raised tariff rates during the Great Depression and led to retaliatory tariffs from foreign countries, resulting in a significant decrease in trade.[78] Additionally, the executive's power over trade policy gained prominence during the 1930s when President Roosevelt exercised his executive authority to address the country's economic woes.[79]

Another major innovation for trade policy in the 1930s was the enactment of the Reciprocal Trade Agreements Act ("RTAA")[80] in 1934, which authorized the President to negotiate trade agreements

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69 *See* John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 307 (2013).

70 Meyer & Sitaraman, *supra* note 6, at 599.

71 *Id.*

72 Although in 1880 customs and excise taxes were the source of 90% of the federal government's revenue, it fell to 25% by 1930, and the income tax went from nonexistent in 1880 to accounting for 59% of revenues in 1930. *See id.* at 596.

73 *Id.* at 591.

74 *See* Adkins & Grewal, *supra* note 8, at 1507.

75 *See* Meyer & Sitaraman, *supra* note 6, at 597–98.

76 *See id.* at 599–600.

77 *See* Tariff Act of 1930, ch. 497, 46 Stat. 590.

78 *See* Meyer & Sitaraman, *supra* note 6, at 600.

79 *See* Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 735–37 (1984).

80 *See* Reciprocal Trade Agreements Act, Pub. L. No. 73-316, 48 Stat. 943 (1934).

and lower tariffs without input from Congress.[81] This transfer of authority reflected a trade policy increasingly driven by foreign affairs considerations, and it coincided with a Supreme Court that was hesitant to adjudicate foreign affairs matters and the United States occupying a position of global economic dominance by the end of World War II.[82] In wielding this trade policy authority, the President increasingly negotiated congressional-executive agreements, which required support from simple majorities in the House and Senate rather than the supermajority of the Senate required for treaties, as a means of balancing the constitutional authority over trade between Congress and the executive.[83] Although this was not the first time that congressional-executive agreements were used in lieu of treaties, the postwar period saw their use on a scale unseen before that period.[84]

Congress did impose some checks on the President's trade policymaking authority in the postwar period, but the march toward an increasingly empowered executive continued with the Trade Expansion Act of 1962[85] and the Trade Act of 1974.[86] The Trade Act of 1974 created the modern framework for U.S. trade policy through private sector consultation requirements, the authority to negotiate non-tariff barriers ("NTBs"), and a fast track process that provided for expedited congressional consideration of trade agreements while keeping the agreements closed for amendments.[87] The fast track procedure for trade agreements put the executive in the driver's seat of negotiations and limited congressional input largely to ex post consideration of whatever agreement the executive reached with the other parties.[88] Although Congress attempted to reassert its constitutional prerogative over trade in the 1980s to address the United States' consistently large trade deficits and their impact on certain workers and industries,

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81 *See* Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1112 (2020).

82 *See* Meyer & Sitaraman, *supra* note 6, at 601–02 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

83 *See* Adkins & Grewal, *supra* note 8, at 1501–02.

84 *See id.* at 1502 (finding that although 88% of international agreements from 1946–1972 took the form of congressional-executive agreements, only twenty-seven international agreements were concluded in the early period of the American republic without a treaty underlying it).

85 Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified as amended at 19 U.S.C. § 1801).

86 Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended at 19 U.S.C. § 2101); *see* Meyer & Sitaraman, *supra* note 6, at 603–04.

87 Meyer & Sitaraman, *supra* note 6, at 606–07.

88 Adkins & Grewal, *supra* note 8, at 1511.

the ultimate culmination of those efforts was the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act").[89] The 1988 Act gave the President the authority to negotiate the North American Free Trade Agreement and the agreements that transformed the General Agreement on Tariffs and Trade into the World Trade Organization ("WTO").[90] The 1988 Act did contain new reporting mechanisms and directed the President to conduct negotiations with consideration for American competitiveness, but left discretion to USTR.[91] On balance, all of the major trade bills enacted in the postwar period reflected the acceptance of an executive-led trade policy.[92]

Following the end of the Cold War, U.S. trade policy focused on the creation of the WTO and negotiating trade agreements, which emphasized executive leadership with Congress merely considering trade agreements through fast track procedures.[93] During this period, however, Congress questioned the wisdom of an executive-driven trade policy that sought global trade liberalization, as their constituencies felt the distributional impacts of various economic policies, including trade policy.[94] For example, scholars have associated China's entry into the WTO and the United States' permanent normalizing of trade relations with China with a corresponding loss of jobs in U.S. industries facing import competition that has not yet been offset by job gains in other industries.[95] Congress therefore became less willing to provide the executive with the authority to negotiate trade agreements.[96] The foundations upon which postwar trade policy were built began to crack.

C. Developments in United States Trade Policy Under the Trump Administration

Although trade policymaking has remained largely unchanged since the Trade Act of 1974, the debate about the appropriate balance

89 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. § 2901); *see* Adkins & Grewal, *supra* note 8, at 1511.

90 Meyer & Sitaraman, *supra* note 6, at 613–14.

91 *Id*. at 614.

92 Claussen, *supra* note 81, at 1113–14.

93 *See* Meyer & Sitaraman, *supra* note 6, at 614, 617.

94 *See id*. at 616.

95 *See* David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21906, 2016), http://www.nber.org/papers/w21906 [https://perma.cc/EM9U-A6KH].

96 *See* Meyer & Sitaraman, *supra* note 6, at 623 (explaining that Congress, since 1994, has only twice provided the President with trade agreement negotiating authority).

between Congress and the executive reemerged with the Trump Administration's renewed emphasis on tariffs as a policy tool.[97] Following President Trump's use of section 232[98] to impose tariffs on imports of steel and aluminum, the Court of International Trade considered a challenge to section 232 as an unconstitutional delegation of legislative authority in *American Institute for International Steel, Inc. v. United States*.[99] The court found for the government on the grounds that the Supreme Court directly addressed the constitutionality of section 232 in *Federal Energy Administration v. Algonquin SNG, Inc.*[100] in the 1970s.[101] The Court of International Trade acknowledged that section 232 gave the President immense "flexibility," which could be used as a pretext for an "impermissible encroachment into the role of Congress," but found it was not an issue in the case.[102]

In a *dubitante* opinion, Judge Katzmann stated that, even though stare decisis governed the court's decision, he maintained "grave doubts" about the constitutionality of section 232, given the Constitution's commitment of authority over foreign commerce to Congress in Article I, Section 8.[103] Judge Katzmann distinguished the Trump Administration's use of section 232 from the permissible delegations of trade and tariff policymaking authority in *Cargo of the Brig Aurora*, *Field v. Clark*, and *J.W. Hampton* by noting that the statutes in those cases "provided ascertainable standards to guide the President . . . such that the congressional will had been articulated and was thus capable of effectuation."[104] In contrast, Judge Katzmann found that "section 232 . . . provides virtually unbridled discretion to the President" to make determinations of the appropriate policy within the scope of the statute, without any requirement that Congress

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97 *See, e.g.*, Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT'L L. ONLINE 16, 16 (2018).

98 Section 232 gives the President the authority to restrict imports that threaten national security. *See* 19 U.S.C. § 1862(a).

99 Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019); *see* Todd N. Tucker, *New Challenge to Trump's National Security Tariffs and Executive Power*, LAWFARE (July 5, 2018, 3:44 PM), https://www.lawfareblog.com/new-challenge-trumps-national-security-tariffs-and-executive-power [https://perma.cc/K7V8-G4E5].

100 426 U.S. 548 (1976).

101 *See Am. Inst. for Int'l Steel, Inc.*, 376 F. Supp. 3d at 1340 (citing *Algonquin*, 426 U.S. at 559–60).

102 *Id.* at 1344–45.

103 *Id.* at 1346–47 (Katzmann, J., dubitante).

104 *Id.* at 1351–52.

lodge its approval of the action.[105] In Judge Katzmann's view, this was a clear transfer of legislative authority to the President.[106]

According to the Federal Circuit on appeal, because the *Algonquin* Court found section 232 to be constitutional as part of its ultimate analysis for finding that section 232 gave the President the authority to increase license fees, it was controlling in the case before the court.[107] The Federal Circuit acknowledged that the nondelegation doctrine standard appeared ripe for possible reconsideration by the Supreme Court, but it refused to let that possibility affect its judgement in the case before it, absent any action from the Supreme Court to replace the intelligible principle standard with a new standard.[108] In addition, the Federal Circuit recognized that section 232 involves the President's independent national security and foreign affairs powers, which would affect a constitutional analysis under any possible new standard.[109] The Federal Circuit also noted that its inquiries into the President's exercise of national security powers must be "highly constrained," given the flexibility needed by the President to address problems in an ever-changing world.[110]

Evolutions in the Supreme Court's nondelegation doctrine analysis[111] and in the implementation of an increasingly executive-driven U.S. trade policy[112] thus reflect the potential that certain trade statutes could be considered as unconstitutional delegations of legislative authority. Section 232 survived a constitutional challenge based principally on stare decisis;[113] however, challenges to other trade statutes will not be able to rely on that existing jurisprudence. Indeed, Judge Katzmann's critique of section 232 as providing "virtually unbridled

105 *Id.* at 1351–52.

106 *Id.* at 1352.

107 Am. Inst. for Int'l Steel, Inc. v. United States, 806 F. App'x 982, 989 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020). It should be noted that the plaintiffs in *Am. Inst. for Int'l Steel, Inc.* argued that *Algonquin* was not controlling because the question before the Supreme Court in *Algonquin* was really one of statutory interpretation based on constitutional avoidance, making it therefore sufficiently distinct from the assertion in *Am. Inst. for Int'l Steel, Inc.* that section 232 is facially unconstitutional. *See* Corrected Brief of Plaintiffs-Appellants at 21–30, *Am. Inst. for Int'l Steel, Inc.*, 806 F. App'x 982 (No. 19-1727). The Federal Circuit did not agree and upheld the holding of the Court of International Trade. *See Am. Inst. for Int'l Steel, Inc.*, 806 F. App'x at 988–89.

108 *Am. Inst. for Int'l Steel, Inc.*, 806 F. App'x at 990.

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

110 *Id.* (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2419–20 (2018)).

111 *See supra* Section I.A.

112 *See supra* Section I.B.

113 *See supra* Section I.C.

discretion to the President"[114] aligns with Justice Gorsuch's requirement that permissible statutes merely leave the executive to "fill up the details."[115] As Part II explains, section 301 provides significant discretionary authority to the President and USTR when investigating other countries' allegedly burdensome or discriminatory practices,[116] making it vulnerable to challenge under Justice Gorsuch's proposed test.

II. Section 301 of the Trade Act of 1974

Section 301 authorizes USTR to make determinations regarding a foreign nation's compliance with its obligations under its trade agreements or whether it is otherwise unfairly burdening U.S. commerce.[117] As explained below, Congress has repeatedly granted the President a certain amount of discretion in identifying and responding to unfair foreign trade practices that harm U.S. commercial interests abroad.[118] The section 301 authority, however, made a number of innovations off of previous grants of analogous authority and, as it currently stands, provides the executive with broad discretion when determining whether to take action against perceived unfair foreign practices.[119] Section 301 currently "permits action against 'virtually any trade practice the USTR wishes to attack.'"[120]

A. The History and Development of Section 301

Section 301 is the current manifestation of an authority that Congress has given to the executive throughout American history to respond to foreign nations that discriminate against or restrict U.S. commerce. Such powers can be found as early as the authority granted to President Washington to put restrictions on imports from countries that discriminated against U.S. products, and subsequent Presidents

114 Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1352 (Ct. Int'l Trade 2019).

115 Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 31, 43 (1825)).

116 *See infra* Part II.

117 *See* Travis H. Mallen, Note, *Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory*, 81 Notre Dame L. Rev. 419, 436 (2005).

118 *See infra* Section II.A.

119 *See* Kathleen Claussen, *Can International Trade Law Recover? Forgotten Statutes: Trade Law's Domestic (Re)turn*, 113 AJIL Unbound 40, 40–41 (2019).

120 *Id.* at 41 (quoting Alan Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 Law & Pol'y Int'l Bus. 263, 281 (1992)).

enjoyed similar discretion.[121] Other examples of authority that Congress gave to the executive to respond to unfair foreign trade practices can be found in the Tariff Act of 1890,[122] the RTAA of 1934,[123] and section 252(c) of the Trade Expansion Act of 1962,[124] which was the immediate predecessor to section 301.[125]

A multitude of factors informed Congress's decision to include more expansive authority under section 301, including the increased economic competition from Europe and East Asia that followed the United States' initial postwar economic dominance[126] and the economic malaise of the 1970s, for which Congress hoped section 301 could target foreign export restraints to alleviate shortages and inflation.[127] Section 301 gave the executive the power to retaliate if a foreign country instituted trade restrictions, including those that "are unjustifiable or unreasonable and which burden or restrict United States commerce."[128] This retaliatory authority applied to discriminatory treatment of both U.S. goods and services abroad,[129] and the retaliatory measures included the ability to suspend concessions made under trade agreements or to impose tariffs or other restrictions on imports.[130] As the scope of potential trade commitments expanded to include a wider variety of NTBs under the Trade Act of 1974, the scope of measures that could be considered trade restrictive grew as well.[131]

In its original form, section 301 provided exporters with a complaint system to petition USTR when the exporter believed it faced discriminatory foreign trade practices.[132] USTR could then initiate an investigation into the alleged unfair foreign practice and subsequently attempt to negotiate a settlement.[133] If no settlement seemed possible,

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121 K. Blake Thatcher, Comment, *Section 301 of the Trade Act of 1974: Its Utility Against Alleged Unfair Trade Practices by the Japanese Government*, 81 Nw. L. Rev. 492, 495 (1987).

122 Tariff of 1890, ch. 1244, 26 Stat. 567.

123 Reciprocal Trade Agreements Act, Pub. L. No. 73-316, 48 Stat. 943 (1934).

124 Trade Expansion Act of 1962, Pub. L. No. 87-794, § 252(c), 76 Stat. 872, 879.

125 Thatcher, *supra* note 121, at 495.

126 *Id.* at 492–93.

127 Staffs of S. Comm. on Fin. & H. Comm. on Ways & Means, 93d Cong., Summary of the Provisions of H.R. 10710, at 11 (Comm. Print 1974) [hereinafter Trade Act of 1974 Committee Print].

128 Trade Act of 1974, Pub. L. No. 93-618, § 301(a)(2), 88 Stat. 1978, 2041–42 (codified as amended at 19 U.S.C. § 2411).

129 Trade Act of 1974 Committee Print, *supra* note 127, at 11.

130 Thatcher, *supra* note 121, at 495–96.

131 *See* Adkins & Grewal, *supra* note 8, at 1510–11.

132 Irwin, *supra* note 30, at 554.

133 *Id.*

the President could impose trade restrictive measures on the offending country's exports to the United States in response to the harmful practice.[134] Congress maintained a legislative veto provision that would allow it to overrule the President's actions by concurrent resolution and mandated that USTR submit semiannual reports to Congress on the actions taken under section 301.[135]

Successive amendments to section 301 broadened the scope of executive authority from what was provided in the initial law.[136] The Trade Agreements Act of 1979[137] clarified that the President had the authority to enforce the rights of the United States under trade agreements, with the legislative history specifically highlighting section 301 as a tool to address NTBs.[138] It also subjected USTR to more requirements with its section 301 investigations, including specified time limits.[139] Thereafter, with the Trade and Tariff Act of 1984,[140] Congress provided examples of foreign trade practices that would be investigable, clarified the President's authority to retaliate, and required that USTR send Congress an annual report on foreign trade barriers.[141] With the 1988 Act, Congress mandated that USTR act in specific circumstances, but the executive branch maintained significant discretion, and the bill merely reflected Congress's desire that the executive use section 301 more aggressively.[142] Section 301 thus began as an expansion of prior authority to the executive to investigate unfair foreign trade practices and was successively enlarged to provide even greater opportunities to act.

B. The Current Structure of Section 301

In its current incarnation, section 301 provides both mandatory and discretionary avenues for executive action to address allegedly unfair foreign trade practices.[143] Under section 301(a), if USTR determines that U.S. rights under a trade agreement are being denied or

134 *Id.*

135 TRADE ACT OF 1974 COMMITTEE PRINT, *supra* note 127, at 11.

136 Thatcher, *supra* note 121, at 496–97.

137 Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended at 19 U.S.C. § 2501).

138 Thatcher, *supra* note 121, at 496 & n.34.

139 *Id.* at 496.

140 Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (codified as amended at 19 U.S.C. § 1654).

141 Thatcher, *supra* note 121.

142 *See* 19 U.S.C. § 2901; Alan F. Holmer & Judith Hippler Bello, *The 1988 Trade Bill: Savior or Scourge of the International Trading System?*, 23 INT'L LAW. 523, 528–29 (1989).

143 19 U.S.C. § 2411(a)–(b).

that a foreign country is taking an action that "is unjustifiable and burdens or restricts United States commerce," then it is required to act.[144] Alternatively, USTR has discretionary authority under section 301(b) to take action if it determines that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce" and that "action by the United States is appropriate."[145]

If USTR decides to act—whether under its mandatory or discretionary authorities—it has a series of tools at its disposal. These options include suspending or removing trade benefits under a trade agreement with the country; imposing tariffs on goods or fees on services; or entering into an agreement with the country to address the allegedly unfair practice, even if the agreement does not benefit the sector harmed by the unfair foreign practices.[146] USTR is also not limited in its retaliatory actions to those goods within the same sector of the harmed U.S. interests.[147] Section 301 provides a list of examples of practices that would be "unreasonable," but USTR is not limited only to retaliate against the examples identified.[148]

The law also lays out the procedures for USTR to undertake during investigations. It provides the process by which interested parties can petition USTR, how USTR must respond, and provides USTR with a route for self-initiation of investigations.[149] USTR maintains full discretion over the decision to initiate an investigation and to determine whether an action would be effective in correcting the challenged conduct.[150] If USTR makes an affirmative finding, it then determines the appropriate course of action.[151] USTR must consult with advisory committees of affected stakeholders, provide notice and an opportunity to be heard—including by public hearing—to interested members of the public, and can consult with the U.S. International Trade Commission on the economic impact of taking action.[152] If USTR makes an affirmative determination about a foreign country's conduct, USTR has thirty days to act.[153] In many instances,

144 *Id.* § 2411(a).

145 *Id.* § 2411(b).

146 *See id.* § 2411(c).

147 *See id.* § 2411(c)(3).

148 *Id.* § 2411(d)(3)(B).

149 *See id.* § 2412(a)(b).

150 *See id.* § 2412(c).

151 *See id.* § 2414(a)(1).

152 *Id.* § 2414(b). If "expeditious action is required," USTR may also make these consultations after the fact. *Id.*

153 *Id.* § 2415(a).

USTR may delay such action for up to 180 days if, among other things, it determines "substantial progress is being made, or that a delay is necessary or desirable, to obtain United States rights or a satisfactory solution" to the conduct that prompted the investigation.[154]

Thereafter, USTR also has the authority to monitor whether the foreign country is correcting the practices subject to investigation in a "satisfactory" manner.[155] If the foreign country is not sufficiently addressing USTR's concerns, USTR has discretion over whether to take further action.[156] USTR also has the authority to remove or adjust the retaliatory measures, subject only to notification of the petitioner or relevant domestic industry, notice to Congress, and publication in the Federal Register.[157]

USTR therefore has many options for taking action against a foreign country under section 301. At its most discretionary, section 301 gives USTR the ability to decide by itself whether to initiate an investigation, to make a determination on that investigation, the types of countermeasures to employ, and for how long those measures should be in place.[158] The only guidance from Congress is that USTR must find that the foreign practice "is unreasonable or discriminatory and burdens or restricts United States commerce" and that such action "is appropriate."[159] The only significant check on USTR's authority comes from within the executive branch, as the President can direct USTR's actions.[160] Indeed, Congress's ability to override USTR's actions by concurrent resolution is no longer available because the Supreme Court ruled that such legislative veto provisions are unconstitutional as a violation of the bicameralism and presentment requirements for legislation under the Constitution.[161] Congress now lacks any meaningful way of checking the executive's actions under section 301.[162]

III. Possible Constitutional Challenge to Section 301

Although President Trump began his presidency with Republican majorities in the House and Senate, trade policy was one area in

154 *Id.*
155 *Id.* § 2416(a).
156 *See id.* § 2416(b).
157 *See id.* § 2417.
158 *See id.* § 2411(b).
159 *Id.*
160 *See id.*; Meyer, *supra* note 97, at 22.
161 *See* INS v. Chadha, 462 U.S. 919, 956–58 (1983).
162 Meyer & Sitaraman, *supra* note 6, at 650.

which the President disagreed with congressional Republicans.[163] Indeed, the President's combative approach toward trade was met with reluctance on Capitol Hill,[164] incentivizing President Trump to rely on delegated authority for his more aggressive trade enforcement actions.[165] The President turned to section 301 in order to take action against China, whose trade and economic practices often drew criticism from then-candidate Trump during the 2016 presidential campaign.[166] On August 14, 2017, President Trump issued a memorandum to USTR, finding that China's "laws, policies, and practices . . . related to intellectual property, innovation, and technology" may impinge on U.S. economic interests by forcing the transfer of American intellectual property and technology to Chinese firms.[167] President Trump directed USTR to determine whether it should self-initiate a section 301 investigation into China's conduct for being "unreasonable or discriminatory," and if it harmed "American intellectual property rights, innovation, or technology development."[168]

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163 *See* Katherine Gypson, *New Congress Marks Start of Republican Domination in Washington*, VOICE AM. (Jan. 3, 2017, 12:52 AM), https://www.voanews.com/a/republicans-to-pull-all-levels-of-power-in-washington/3660902.html [https://perma.cc/AV8F-NAEQ].

164 *See, e.g.*, Louis Nelson, *McConnell Offers Olive Branch as Trump Furthers Feud*, POLITICO (Aug. 24, 2017, 10:18 AM), https://www.politico.com/story/2017/08/24/mitch-mcconnell-trump-trade-241980 [https://perma.cc/S9HR-T5GB].

165 In addition to the section 301 investigations and actions, the Trump Administration imposed tariffs on solar panels and washing machines under section 201 of the Trade Act based on industry petitions, tariffs on steel and aluminum under section 232 after launching a self-initiated investigation, and threatened tariffs on Mexico relying on authority under the International Emergency Economic Powers Act, among others. *See* Chad P. Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. INT'L ECON. (May 17, 2021), https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf [https://perma.cc/SYK5-TPJB].

166 *See, e.g.*, *Trump Targets China Trade, Says Plans Serious Measures*, REUTERS (Aug. 24, 2016, 3:06 PM), https://www.reuters.com/article/us-usa-election-trump-china/trump-targets-china-trade-says-plans-serious-measures-idUSKCN10Z2JN [https://perma.cc/Y3WJ-QLSV]; Nick Corasaniti, Alexander Burns & Binyamin Appelbaum, *Donald Trump Vows to Rip Up Trade Deals and Confront China*, N.Y. TIMES (June 28, 2016), https://www.nytimes.com/2016/06/29/us/politics/donald-trump-trade-speech.html [https://perma.cc/X89U-6TAR].

167 Memorandum on Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 14, 2017).

168 *Id.*; *see also* Initiation of Section 301 Investigation: China's Acts Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40,213, 40,214 (Aug. 24, 2017) (announcing that USTR had indeed initiated a section 301 investigation).

A. The Section 301 Investigation into China and Subsequent Action

In accordance with the President's memorandum, USTR self-initiated a section 301 investigation into China on August 18, 2017.[169] USTR relied on its discretionary authority to investigate actions that "are unreasonable or discriminatory and burden or restrict U.S. commerce," which can include actions that may not violate the United States' international legal rights but that are still "unfair and inequitable."[170] In its notice, USTR highlighted four categories of China's policies, laws, actions, and practices that it would investigate for harm to U.S. economic interests: (1) incentivizing or demanding that U.S. companies transfer their intellectual property and technology to Chinese companies, (2) preventing American businesses in "technology-related negotiations" and in licensing from "set[ting] market-based terms," (3) using the strategic investment in and acquisitions of U.S. companies to benefit Chinese companies, and (4) leading or supporting cybertheft and hacking of U.S. businesses.[171] USTR explained that China took these actions to pursue its "Made in China 2025" plan.[172]

In March 2018, USTR published a report with its findings from the investigation.[173] The report found that the four categories of conduct identified at the start of the investigation, among others, work in conjunction to further "China's industrial policy objectives" and "are unreasonable or discriminatory and burden or restrict U.S. commerce."[174] President Trump directed USTR to take "all appropriate action under section 301 . . . to address" China's conduct.[175] Within weeks, USTR identified $50 billion worth of goods from China that it proposed to subject to tariffs as a result of the section 301 investigation.[176] In July 2018, USTR imposed 25% tariffs on $34 billion worth

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169 Initiation of Section 301 Investigation, 82 Fed. Reg. at 40,213.

170 *Id.* at 40,213–14.

171 *Id.*

172 *Id.* at 40,213. "Made in China 2025" is an industrial plan that the Chinese government launched in 2015 to foster China's domestic capacity in ten identified emerging technologies to ensure its global leadership in these sectors by 2025. *See* KAREN M. SUTTER, CONG. RSCH. SERV., IF10964, "MADE IN CHINA 2025" INDUSTRIAL POLICIES: ISSUES FOR CONGRESS (2020).

173 OFF. OF THE U.S. TRADE REP., FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018).

174 *Id.* at 17.

175 Memorandum on Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation, 2018 DAILY COMP. PRES. DOC. 2 (Mar. 22, 2018).

176 Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to

of goods from the proposed list based on the relation of these products to China's "Made in China 2025" plan and identified an additional $16 billion worth of goods that could be hit with tariffs.[177] In retaliation, China imposed tariffs on $50 billion worth of American goods.[178] Thereafter, USTR imposed a 25% tariff on the $16 billion list of Chinese goods,[179] and in September 2018, USTR imposed a 10% tariff on $200 billion worth of Chinese products with the rate to increase to 25% on January 1, 2019, on the grounds that the existing tariffs proved insufficient in forcing China to change its practices.[180]

On December 1, 2018, at the margins of the G20 meeting in Buenos Aires, President Trump and President Xi of China agreed that the United States would not raise the tariff rate on the $200 billion product list from 10% to 25% on January 1, 2019, in exchange for China agreeing to purchase a "very substantial[] amount of agricultural, energy, industrial, and other product[s] from the United States."[181] In addition, both parties agreed to negotiate a resolution to "structural changes with respect to forced technology transfer, intellectual property protection, non-tariff barriers, cyber intrusions and cyber theft, services and agriculture" with the goal of completing negotiations within ninety days.[182] In the event that an agreement could not be reached, the 10% tariffs on the $200 billion worth of goods list would be raised to 25%.[183]

In March 2019, USTR delayed the imposition of the tariff rate increase on the $200 billion list despite the expiration of the ninety-

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Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14,906, 14,907 (Apr. 6, 2018).

177 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. 28,710, 28,711–12 (June 20, 2018).

178 Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 33,608, 33,608–09 (July 17, 2018).

179 Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40,823, 40,823–24 (Aug. 16, 2018).

180 Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974, 47,974–75 (Sept. 21, 2018).

181 Press Release, White House, Statement from the Press Secretary Regarding the President's Working Dinner with China (Dec. 1, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-presidents-working-dinner-china/ [https://perma.cc/DX44-KPFT].

182 *Id.*

183 *Id.*

day deadline due to the "progress in discussions."[184] Two months later, however, President Trump announced that, because of the slow pace of the negotiations, the tariff rate would increase to 25%.[185] Following the increase, USTR announced that 10% tariffs on $300 billion of additional products would go into effect in two tranches on September 1, 2019 and December 15, 2019.[186] Following an announcement from China that it would retaliate, USTR announced that the duty rate on the $300 billion list would increase to 15%.[187]

On October 11, 2019, after imposing tariffs on the September 2019 tranche, President Trump announced that a "phase one deal" with China would be forthcoming in a matter of weeks and would not only include intellectual property and technology transfer obligations but also various purchase commitments and financial services, agriculture, currency, sanitary and phytosanitary measures, and biotechnology obligations.[188] The United States agreed not to raise tariffs on the initial $250 billion worth of goods from 25% to 30%, as had been threatened,[189] and thereafter suspended the December 15, 2019 tranche "until further notice."[190]

On January 15, 2020, the United States and China signed the phase one deal, which entered into force thirty days later.[191] USTR announced that in addition to the indefinite suspension of the December 15, 2019 tariffs, it would lower the duties imposed on the Septem-

184 Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 7966, 7967 (Mar. 5, 2019).

185 Ana Swanson & Keith Bradsher, *Trump Threatens China with More Tariffs Ahead of Final Trade Talks*, N.Y. Times (May 5, 2019), https://www.nytimes.com/2019/05/05/business/trump-tariffs-china-trade-talks.html [https://perma.cc/YTV4-7TV3].

186 Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43,304, 43,304 (Aug. 20, 2019).

187 Notice of Modification of Section 301 Action: China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 45,821, 45,822 (Aug. 30, 2019).

188 Remarks in a Meeting with Vice Premier Liu He of China and an Exchange with Reporters, 2019 Daily Comp. Pres. Doc. 1 (Oct. 11, 2019).

189 Ana Swanson, *Trump Reaches 'Phase 1' Deal with China and Delays Planned Tariffs*, N.Y. Times (Dec. 13, 2019), https://www.nytimes.com/2019/10/11/business/economy/us-china-trade-deal.html [https://perma.cc/PNU8-EQ7F].

190 Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 69,447, 69,447 (Dec. 18, 2019).

191 Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 3,741, 3,741 (Jan. 22, 2020).

ber 1, 2019 list from 15% to 7.5%.[192] The United States and China memorialized the deal in a ninety-one page agreement, which included chapters on intellectual property, technology transfer, agricultural trade, financial services, currency, and purchase commitments, with separate chapters laying out the enforcement mechanism and final provisions.[193]

In sum, relying on the authority granted under section 301, USTR self-initiated an investigation into China's intellectual property and technology practices at the direction of the President alone. USTR made a determination that these practices were unreasonable and discriminatory and burdened and restricted U.S. commerce, and it imposed tariffs on hundreds of billions of dollars of products coming from China.[194] Thereafter, USTR negotiated a resolution with China that not only addressed the issues that it identified in its investigation but also included obligations that covered a wide array of other policy areas, and memorialized the outcome in a binding agreement that, unlike normal comprehensive trade agreements, did not need a congressional vote to ratify the agreement.[195]

B. The Constitutional Challenge

The Trump Administration's use of section 301 has not been without controversy. Starting in September 2020, over 3,000 importers who paid tariffs on goods from China sued USTR at the Court of International Trade, alleging that USTR's imposition of some of the tariffs did not comport with section 301.[196] Although the crux of these challenges is not that Congress impermissibly delegated legislative authority to the executive, if the Supreme Court adopted a new nondelegation doctrine standard in line with Justice Gorsuch's three-part test

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192 *Id.*

193 Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, China-U.S., Jan. 15, 2020, [hereinafter China-U.S. Economic and Trade Agreement], https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf [https://perma.cc/N2YK-PSUY].

194 *See, e.g.*, Notice of Modification of Section 301 Action, *supra* note 180.

195 *Compare* 19 U.S.C. § 2411, *with* 19 U.S.C. §§ 4202–4203 (granting President authority to negotiate trade agreements conditioned, inter alia, on specific congressional consultations to qualify for procedural protections in congressional consideration).

196 NINA M. HART & BRANDON J. MURRILL, CONG. RSCH. SERV., LSB10553, SECTION 301 TARIFFS ON GOODS FROM CHINA: INTERNATIONAL AND DOMESTIC LEGAL CHALLENGES 3 (2020).

during the course of the litigation, a constitutional challenge to section 301 would be possible.[197]

If the Supreme Court adopted Justice Gorsuch's dissent in *Gundy* as the new standard for its nondelegation doctrine analysis, it would correct the impermissible delegation within section 301 that has strayed from the Constitution's delineation of trade authority. Section 301 would not be able to withstand scrutiny under Justice Gorsuch's three-part test. According to Justice Gorsuch's test, a law will not violate the nondelegation doctrine if it (1) merely leaves another branch to "fill up the details," (2) conditions the implementation of a policy "on executive fact-finding," or (3) delegates "certain non-legislative responsibilities" to the executive or judicial branches.[198]

1. Fill up the Details

Justice Gorsuch's first example of a permissible delegation of authority from Congress to another branch is one that leaves the other branch merely to "fill up the details" of the law.[199] Justice Gorsuch pulled the "fill up the details" formulation from *Wayman v. Southard*,[200] in which Chief Justice Marshall drew a distinction between "those important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details."[201]

In his statement respecting the denial of certiorari in *Paul v. United States*,[202] Justice Kavanaugh directly tied Justice Gorsuch's "filling up the details" standard with what he described as the "major policy questions" standard that then-Justice Rehnquist outlined in his concurring opinion in the *Benzene* case.[203] Justice Kavanaugh drew a

197 Although the plaintiffs may limit such a challenge to the application of certain tariffs promulgated under section 301 in the investigation into China, the law as written does not provide direction from Congress on the types of foreign conduct that USTR should investigate. *See* Trade Act of 1974, Pub. L. No. 93-618, § 301(a)(2), 88 Stat. 1978, 2041. There are therefore no constitutional applications of section 301, so a facial—rather than an as-applied—challenge of section 301's constitutionality would be appropriate. *See* United States v. Salerno, 481 U.S. 739, 745 (1987).

198 Gundy v. United States, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting).

199 *Id.* at 2136.

200 23 U.S. (10 Wheat.) 1 (1825).

201 *Id.* at 43.

202 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari) (writing that "Justice Gorsuch's scholarly analysis . . . in his *Gundy* dissent may warrant further consideration").

203 448 U.S. 607 (1980); *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J., respecting denial of certiorari) (citing *Benzene*, 448 U.S. at 685–86 (Rehnquist, J., concurring in the judg-

connection between Justice Gorsuch's *Gundy* dissent and Justice Rehnquist's concurring opinion in the *Benzene* case, with the following tool of statutory interpretation in administrative law:

> In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.[204]

According to Justice Kavanaugh, "Justice Rehnquist and Justice Gorsuch would not allow that second category—congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority."[205]

It is very difficult to see how section 301 could be read as only allowing the executive to fill up the details of the authority granted, or—as Justice Kavanaugh described it—how Congress has decided a major political and economic question that USTR merely enforces through section 301. As the law evolved over time, it now includes multiple avenues for action, either initiated by an outside petition or self-initiated, and either mandatory or discretionary action.[206] Congress did not even include explicit direction on what types of foreign government conduct amount to unreasonable burdens or restrictions on U.S. commerce to warrant an investigation and subsequent action.[207] Once such an investigation is initiated, Congress also does not provide the standard against which USTR is to make such a determination.[208] Any finding of an unreasonable burden or restriction is based solely on USTR's judgment,[209] and the retaliatory actions taken

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ment)); *see Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). According to Justice Rehnquist, the nondelegation doctrine in part "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." *Benzene*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment).

204 *Paul*, 140 S. Ct. at 342 (statement of Kavanaugh, J., respecting denial of certiorari).

205 *Id.*

206 *See supra* Part II.

207 *See* 19 U.S.C. § 2411(d)(3)(B) (providing a list of examples, but expressly stating that the universe of practices that USTR can address is "not limited to" the practices included on the list); *see also id.* §§ 2412(b), 2414.

208 *See id.* § 2414(a).

209 *See id.*

are also entirely at the discretion of USTR, subject only "to the specific direction, if any, of the President."[210]

For the section 301 investigation into China, USTR relied on its most permissive avenues of authority.[211] It self-initiated the action at the direction of the President, rather than waiting for a petition.[212] Instead of relying on the authority for mandatory action, USTR initiated the investigation based on its discretionary authority.[213] It also did not cite any specific examples of the unreasonable or burdensome behavior that Congress included in the law and instead invoked its authority to investigate any foreign government conduct that is "unreasonable or discriminatory and burden[s] or restrict[s] U.S. commerce."[214] When USTR undertook actions to induce China to change its behavior, USTR also relied on the broad authority to impose tariffs "for such time as [USTR] determines appropriate" and to enter into "binding agreements" with China.[215] When imposing the tariffs, USTR ultimately determined it appropriate to impose tariffs on over $370 billion worth of Chinese goods and to threaten to impose tariffs on an additional $160 billion worth of Chinese goods,[216] amounting to virtually all products that the United States imported from China.[217] In addition, USTR did not limit its subsequent agreement to the intellectual property and forced technology transfer issues identified in the section 301 investigation, but also included commitments on agricultural trade, currency, financial services, and product purchase commitments.[218]

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210 *Id.* § 2415(a)(1).

211 *See, e.g.*, Initiation of Section 301 Investigation: China's Acts Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40,213, 40,214 (Aug. 24, 2017) (stating that the USTR was using their own authority to initiate an investigation).

212 *See id.* at 40,213.

213 *See id.* at 40,214 (citing section 302(b), 19 U.S.C. § 2412(b), discretionary authority as statutory basis for investigation).

214 *See id.*

215 19 U.S.C. § 2411(c)(1); *see, e.g.*, Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43,304, 43,304 (Aug. 20, 2019).

216 *See What's in the U.S.-China Phase 1 Trade Deal*, REUTERS (Jan. 15, 2020, 7:16 PM), https://www.reuters.com/article/us-usa-trade-china-details-factbox/whats-in-the-u-s-china-phase-1-trade-deal-idUSKBN1ZE2IF [https://perma.cc/2HC4-V62X].

217 *See Factbox: Tariffs in Place or Planned for Nearly All Goods Traded by U.S. and China*, REUTERS (Sept. 20, 2019, 12:36 AM), https://www.reuters.com/article/us-usa-trade-tariffs-factbox/factbox-tariffs-in-place-or-planned-for-nearly-all-goods-traded-by-u-s-and-china-idUSKBN1W4344 [https://perma.cc/9L5K-H4PY]; *see also* Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43,304, 43,304 (Aug. 20, 2019).

218 *See generally* China-U.S. Economic and Trade Agreement, *supra* note 193.

To highlight the limited guardrails that exist when the executive exercises its authority under section 301, it is worth contrasting that authority with the authority granted through trade promotion authority to negotiate trade agreements. Under the time-limited authorizations of trade promotion authority, Congress provided specific direction to the President on the nature and scope of the President's authority to negotiate trade agreements while demanding extensive reporting and consultation with Congress.[219] Section 301 mandates no such continuous consultations nor does the authority lapse and require congressional reauthorization,[220] and the Court removed one of the most meaningful congressional checks on the executive's action—the legislative veto—from the statute decades ago in *INS. v. Chadha*.[221] Section 301 provides very little guidance to the executive on what constitutes an actionable unfair foreign government practice, and USTR has the authority to make decisions at every meaningful step of the section 301 process with no requirements for serious congressional input.[222] Thus, section 301 does not merely leave the executive to fill up the details, as Justice Gorsuch would require,[223] because it delegates to USTR the authority to decide the major political and economic questions that should reside in Congress.

2. *Executive Factfinding*

Justice Gorsuch's second category of permissible delegations is one where a law's application is conditioned on the outcome of an executive factfinding exercise.[224] Justice Gorsuch cited to the statute in *Cargo of the Brig Aurora* as an example of one that fits this category.[225] Given the facial similarities with section 301, *Cargo of the Brig Aurora* provides a useful point of comparison for whether section 301 can be analyzed through the lens of a law conditioned on executive factfinding. In *Cargo of the Brig Aurora*, the statute provided that trade embargoes against Great Britain and France would be in place unless the President, by proclamation, determined that the embargo should be lifted with respect to either because the country stopped interfering with U.S. commercial interests abroad.[226] The law expired

219 Claussen, *supra* note 81, at 1126–27.

220 *Id.* at 1127.

221 462 U.S. 919, 956–58 (1983); *see also* Claussen, *supra* note 81, at 1127.

222 *See generally* TRADE ACT OF 1974 COMMITTEE PRINT, *supra* note 127, at 11.

223 Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

224 *Id.*

225 *Id.* (citing Cargo of Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813)).

226 *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) at 383.

at the end of that session of Congress, but Congress renewed the law for another session, which was when the President issued the proclamation at issue.[227] The statute therefore was a time-limited grant of authority from Congress to the President to apply a rule against two countries conditioned on a specific finding by the President.

The scope and scale of the authority granted by section 301 compared with the statute at issue in *Cargo of the Brig Aurora* can be easily distinguished. Although both, in theory, condition the application of the statute on executive factfinding because they both directed the executive to take action if certain conditions are met, section 301 provides much greater discretionary authority. As described above, section 301 allows USTR to determine what types of actions amount to unfair trade practices that unreasonably burden or restrict U.S. commerce and the retaliation that can be taken by the executive to incentivize the other country to change its conduct.[228] Indeed, unlike the statute from *Cargo of the Brig Aurora*, section 301 does not require reauthorization,[229] so if Congress did want to withdraw the authority from the President, it would have to do so over the President's veto, providing a considerable procedural hurdle that does not exist when the delegation merely expires.[230]

Temporally unconstrained delegations pose unique separation-of-powers issues that do not apply when Congress grants authority for specified periods of time. In particular, delegations that do not lapse allow the executive to use the authority in ways that may no longer be supported by Congress or may be outside what Congress contemplated at the time of enactment.[231] Again, the trade promotion authority that Congress gave to the President to negotiate trade agreements is a useful statute to distinguish from section 301. When Congress granted trade promotion authority in 2002, it identified nine negotiating objectives for the executive ranging from market access, to the environment, to labor protections, to small business promotion.[232] When Congress reauthorized trade promotion authority in 2015, it kept those nine objectives,[233] but also added four additional objectives

227 *Id.*

228 *See* 19 U.S.C. § 2411.

229 *See generally* TRADE ACT OF 1974 COMMITTEE PRINT, *supra* note 127, at 11.

230 *See* Claussen, *supra* note 81, at 1137–38.

231 Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1936 (2020).

232 Trade Act of 2002, Pub. L. No. 107-210, § 2102, 116 Stat. 933, 994 (codified at 19 U.S.C. §§ 3802–3803).

233 *Compare id.*, *with* Bipartisan Congressional Trade Priorities and Accountability Act of

relating to investment, the internet, the preservation of regulatory space, and protections of religious freedom.[234] Meanwhile, section 301 has faced little congressional attention and has been subject to limited changes since the 1980s, none of which addressed the scope of executive authority.[235]

Section 301 therefore can be readily distinguished from *Cargo of the Brig Aurora* to which Justice Gorsuch cited in his *Gundy* dissent. Section 301 is not a statute that conditions action on executive factfinding, but rather it provides the executive with the ability to determine what forms of conduct would be unreasonable or burdensome on U.S. commerce, to conduct the investigation, to determine the appropriate action, and to negotiate an agreement with that country if USTR determines such a course of action is appropriate. In the case of China, that meant USTR imposing hundreds of billions of dollars of tariffs on Chinese products and entering into a binding agreement with China, subject only to the President's direction.

3. Non-Legislative Responsibilities

The final category of constitutionally permissible statutes under Justice Gorsuch's test for the nondelegation doctrine are those that authorize the other branches to exercise "non-legislative responsibilities."[236] Justice Gorsuch again cited to *Cargo of the Brig Aurora* for a statute where Congress authorized the President to take certain non-legislative measures given that it was a "foreign-affairs-related statute" and "that many foreign affairs powers are constitutionally vested in the President under Article II."[237] This category may be the most likely basis for section 301 to withstand a constitutional challenge, given that "[t]rade is a classic 'intermestic' issue" that touches on both domestic and foreign policy.[238]

Although the executive branch has been viewed as the natural home for foreign affairs,[239] congressional direction of trade policy is

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2015, Pub. L. No. 114-26, § 102(a)(1)–(9), 129 Stat. 320, 320 (codified at 19 U.S.C. § 4201(a)(10)–(13)).

234 § 102(a)(10)–(13), 129 Stat. at 320–21. Congress added two additional objectives guaranteeing that trade agreements do not address immigration or greenhouse gas emissions with the passage of the Trade Facilitation and Enforcement Act of 2015. *See* Pub. L. No. 114-125, § 914, 130 Stat. 122, 273 (2016) (codified at 19 U.S.C. § 4201(a)(14)–(15)).

235 Claussen, *supra* note 81, at 1129 & n.157.

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

237 *Id.*

238 Meyer & Sitaraman, *supra* note 6, at 626.

239 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

appropriate because trade addresses issues that are squarely within Congress's competence such as "jobs, wages, economic competition domestically, and . . . other constituent interests."[240] The diversity of competing interests in economic policy makes Congress the more appropriate place for policymaking.[241] For example, because the modern trade agreement covers a broad array of domestic regulatory commitments that only receive fast track consideration by Congress and are enshrined as obligations enforceable under international law,[242] trade promotion authority mandated congressional oversight over the negotiating process.

Applying these considerations to the section 301 action against China, it becomes clear that the executive's actions reflected economic considerations that should involve congressional input. The President initiated the action to protect American companies that operate in China from intellectual property theft and forced technology transfer.[243] In making a decision that these U.S. economic interests needed to be protected, the executive took action that ultimately led to the application of tariffs on hundreds of billions of dollars of goods, placing a cost on those American businesses and consumers that purchased these products.[244] In addition, because China retaliated with its own tariffs in response to the United States imposing tariffs,[245] the Trump Administration also made a determination that the benefits of a change in the Chinese government's conduct was worth the cost put on these American exporting interests. There are undoubtedly foreign affairs considerations in making these determinations, but having Congress wholly absent from the process reflects an underappreciation for the economic impacts that section 301 actions have, and it subverts the constitutional design of Congress's central role in the economic policymaking process.[246]

The section 301 action against China thus offers a perfect example of the type of economic policy decisions that should involve Congress. Proponents of an executive-driven trade policy emphasize the

240 Meyer & Sitaraman, *supra* note 6, at 629.

241 *Id.* at 591.

242 *See* Adkins & Grewal, *supra* note 8, at 1516.

243 Memorandum on Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 14, 2017).

244 *See supra* Section III.A.

245 *See* Bown & Kolb, *supra* note 165.

246 *See* Meyer & Sitaraman, *supra* note 6, at 628.

policy benefits of economic efficiency,[247] but this argument fails to account for the inefficiency purposefully built into the constitutional system.[248] Inefficiency provides local constituent interests and various other interest groups, who may not have easy access to executive policymaking, access to the legislative process.[249] By giving these interests a voice, it ensures that policymakers will give consideration to the distributional impacts of the policy before them.[250] Alternatively, by making trade policy through an executive-driven foreign affairs lens, it limits the participatory opportunities for this variety of interests to have meaningful input in the policymaking process.[251] In sum, section 301 should not be viewed as a non-legislative responsibility that would give the executive greater discretion than would otherwise be constitutionally permissible.

Conclusion

After many years of a hands-off approach from the Supreme Court in deciding the constitutional bounds of Congress's ability to delegate authority to the executive, there is potential for a sea change in the Court's approach to its nondelegation doctrine analysis following *Gundy*. Given that two other Justices joined Justice Gorsuch's opinion,[252] that Justice Kavanaugh wrote that Justice Gorsuch's *Gundy* analysis "may warrant further consideration in future cases,"[253] and that Justice Alito indicated support for revisiting the intelligible principle standard if a majority of the Court was willing to do so,[254] it seems likely that the Supreme Court will enunciate a new standard, such as the one that Justice Gorsuch articulated.[255] As the Supreme Court considers which new standard it may apply for the nondelegation doctrine, understanding the implications of such standards in specific contexts is worthwhile. As administrative law scholars continue to debate the merits of a new standard across the wide spectrum of its possible applications, this Note maintains that a more stringent stan-

247 *See* Adkins & Grewal, *supra* note 8, at 1499.

248 *See* Meyer & Sitaraman, *supra* note 6, at 634.

249 *See id.*

250 *See id.* at 633–34.

251 *See id.* at 634–35.

252 Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.).

253 Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

254 *See Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment).

255 *See* William D. Araiza, *Toward a Non-Delegation Doctrine that (Even) Progressives Could Like*, 3 Am. Const. Soc'y Sup. Ct. Rev. 211, 247–49 (2019).

dard has the potential to rebalance international trade authorities like section 301 in a more constitutionally appropriate manner between Congress and the executive.

Section 301 would not be able to withstand a constitutional challenge under Justice Gorsuch's test for the nondelegation doctrine standard. Congress would thus need to redesign section 301 to give the legislature a greater role in identifying the types of foreign government conduct that it would like USTR to investigate and the types of retaliatory actions USTR can take. A rebalanced section 301 would reflect Congress's and the executive's relative institutional strengths. For Congress, that is its unique position to consider the distributional impacts of economic policy. For the executive, that is its ability to apply Congress's preferred economic policy conditioned on findings of prescribed facts and in light of foreign affairs considerations. In doing so, section 301 would more closely align with the congressional-executive balance over trade policy as provided in the Constitution.