ARTICLE

MAJOR QUESTIONS ABOUT INTERNATIONAL AGREEMENTS

KRISTEN E. EICHENSEHR† & OONA A. HATHAWAY††

The Supreme Court's recent expansion of the major questions doctrine has rocked administrative law, throwing into doubt executive agencies' statutory authority for numerous regulations. Some Justices have suggested that they want to go further and reinvigorate the nondelegation doctrine as a constitutional limit on Congress's authority to delegate power to the executive branch. This Article is the first to consider how these developments might put at risk the United States' international commitments.

The Article first identifies the role of congressional delegations to the executive branch with respect to the formation and implementation of ex ante congressional–executive agreements, executive agreements pursuant to treaties, sole executive agreements, and nonbinding agreements. It then explains how the Supreme Court's recent decisions might spark challenges to the agreements themselves or to the executive's authority to implement them.

Turning from the diagnostic to the prescriptive, the Article takes the Supreme Court's recent cases as a given (problematic though they are) and argues that delegations involving international agreements differ from purely domestically focused delegations in material ways that counsel against applying the major questions doctrine or nondelegation doctrines to them. In particular, the existence of foreign state counterparties with whom the executive must negotiate means that Congress cannot simply direct the executive branch on international agreements with the same

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† Professor, University of Virginia School of Law.

†† Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School. For helpful comments and conversations, the authors thank Curtis Bradley, Daniel Deacon, Bill Dodge, Jean Galbraith, Leah Litman, Richard Re, Ganesh Sitaraman, and Mila Sohoni, as well as participants in the *University of Pennsylvania Law Review* Symposium, the ASIL Mid-Year Research Forum, and the NYU Law & Security Colloquium. Thanks to the *University of Pennsylvania Law Review* editors for their help in bringing the article to publication.

specificity that it can in domestically focused legislation. Moreover, declaring an existing international agreement or its implementing legislation invalid based on a domestic statutory interpretation doctrine risks causing the United States to violate international law, as well as harming its reputation as a reliable agreement partner. Treating international agreement-related delegations identically to domestically focused ones would also run counter to long-standing historical gloss from the Supreme Court itself that treats foreign-relations-related issues in exceptional ways.

After arguing against using the major questions and nondelegation doctrines to police delegations related to international agreements, the Article proposes steps that the courts, Congress, and the executive branch can each take to ensure that existing and future international agreements are well-grounded in constitutional and statutory law.

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INTRODUCTION

The Supreme Court's recent expansion of the major questions doctrine has rocked administrative law, throwing into doubt executive agencies' statutory authority for numerous regulations. Some justices have suggested that they want to go further and reinvigorate the nondelegation doctrine as a constitutional limit on Congress's authority to delegate power to the executive branch. This Article is the first to consider how these developments might put at risk the United States' international commitments.

The concern is a grave one. Only a handful of the international agreements made by the United States today are done through the process identified in Article II of the U.S. Constitution in which the President proposes a treaty and then two-thirds of the Senators present grant their advice and consent. An even smaller number are approved through the ordinary legislative process. Instead, the vast majority are made by the executive branch based on delegations to the executive branch in prior statutes (so-called ex ante congressional–executive agreements) or in prior treaties. We draw on newly available evidence that shows that most of these agreements rely on implied, rather than express, delegation. As a result, the capacity of the government to make those agreements, we show, could be placed at risk by the Court's new case law.

Sole executive agreements—that is agreements made by the President on his own constitutional authority—and nonbinding agreements—agreements that purport not to bind the United States legally but often serve as functional substitutes for binding agreements—are also put at risk by the Court's new doctrine. These agreements, which vie with ex ante congressional–executive agreements for importance in U.S. foreign affairs, do not rely on delegated authority for their creation. But they *do* rely on delegated authority for their implementation. Take, for example, the Joint Comprehensive Plan of Action, better known as the Iran Nuclear Deal. President Barack Obama relied on his own constitutional authority to conclude the agreement, which was considered nonbinding. But he relied on authority that Congress had

previously delegated to him to reduce sanctions on Iran to fulfill the commitments he made on behalf of the United States in the agreement. Many other sole executive agreements and nonbinding agreements similarly rely on previously delegated authority—authority that may now be at risk.

While the major questions and nondelegation doctrines might be read to invalidate either the creation or implementation of the vast majority of the United States' international agreements, we argue that would be in error. Delegations involving the creation and implementation of international agreements are different from purely domestic delegations in important ways. In particular, the existence of foreign state counterparties with whom the executive must negotiate means that Congress cannot simply direct the executive branch on international agreements with the same specificity that it can in domestically focused legislation. Moreover, declaring an existing international agreement or its implementing legislation invalid based on a domestic statutory interpretation doctrine risks causing the United States to violate international law, as well as suffer harm to its reputation as a reliable agreement partner. Such a decision with regard to even a single agreement could set a precedent that would call into question thousands of existing international agreements, causing grave harm to U.S. foreign relations in the process. The U.S. government would still be bound by those agreements as a matter of international law, even though the agreements themselves, or the executive's authority to implement them, might be considered invalid under domestic law. The impact, in short, could be catastrophic.

Treating international agreement-related delegations identically to domestically focused ones would also run counter to long-standing historical practice—sometimes called "historical gloss"—from the Supreme Court itself that treats foreign relations-related issues in exceptional ways. And, we argue, the courts should bear in mind that when the Supreme Court attempted to address what it regarded as excessive delegations from Congress to the President in *INS v. Chadha* its intervention had the effect of expanding, rather than limiting, those very delegations.[1] For these reasons, the courts should refrain from extending the major questions and nondelegation doctrines to international agreements.

The Article proceeds as follows: Part I explains the rise of the major questions doctrine and the quest by some Supreme Court Justices to revive the nondelegation doctrine. Part II identifies the role of congressional delegations to the executive branch with respect to the formation and implementation of ex ante congressional–executive agreements, executive agreements pursuant to treaties, sole executive agreements, and nonbinding agreements. It then explains how the Supreme Court's recent decisions might

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1 462 U.S. 919, 956-59 (1983).

spark challenges to the agreements themselves or to the executive's authority to implement them. Part III turns from the diagnostic to the prescriptive, the Article takes the Supreme Court's recent cases as a given (problematic though they are) and argues that delegations involving international agreements differ from purely domestically focused delegations in material ways that counsel against applying the major questions doctrine or nondelegation doctrines to them. After arguing against using the major questions and nondelegation doctrines to police delegations related to international agreements, Part IV proposes steps that the courts, Congress, and the executive branch can each take to ensure that existing and future international agreements are well-grounded in constitutional and statutory law. Doing so would not only better insulate international agreements from challenge but would also strengthen their legal foundation and thus their legitimacy going forward.

I. The Rise of the Major Questions Doctrine and Nondelegation Concerns

In recent years, courts have become increasingly skeptical of congressional delegations of authority to the executive branch. Some judges frame concerns about congressional delegations in terms of statutory interpretation, applying the "major questions doctrine" to invalidate exercises of agency authority unless the agency's action rests on pellucid authorization from Congress. Others have proposed reinvigorating the nondelegation doctrine as a constitutional limit on Congress's authority to empower executive branch agencies.

This Part provides an overview of the major questions doctrine's evolution and ties the doctrine to its constitutional cousin, the nondelegation doctrine. It discusses the limitations that even the nondelegation doctrine's biggest proponent—Justice Neil Gorsuch—has suggested for a reinvigorated constitutional restriction on delegations. This Part concludes with a discussion of the Court's embrace of the major questions doctrine as a clear statement rule in 2022's *West Virginia v. EPA* and the points of uncertainty that that decision, along with June 2023's *Biden v. Nebraska* decision, create for delegations going forward.

A. *The Evolution of the Major Questions Doctrine*

Since the 1980s, statutory interpretation by executive branch agencies has been nearly synonymous with the Supreme Court's two-step *Chevron*

framework.[2] At the first step, the court determines "whether Congress has directly spoken to the precise question at issue," and if so, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[3] If, however, "the statute is silent or ambiguous," the court proceeds to *Chevron*'s second step and will defer to an agency's "reasonable interpretation."[4] Despite *Chevron*'s apparently deferential approach, the Supreme Court in particular has never deferred to agencies as much as the *Chevron* framework suggests, limiting its application and sometimes ignoring it altogether.[5] And for cases involving what is now called the major questions doctrine, the Court has rejected *Chevron* and created a new framework for analysis.

The major questions doctrine solidified (though namelessly) in Justice O'Connor's opinion for the Court in *FDA v. Brown & Williamson Tobacco Corp.*[6] There, the Court concluded at *Chevron* Step 1 that the Food, Drug, and Cosmetic Act "clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."[7] The Court explained that *Chevron* deference to an agency's interpretation "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," but "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[8] Noting that the FDA claimed "jurisdiction to regulate an industry constituting a significant portion of the American economy," the Court concluded "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic

2 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-44 (1984).

3 *Id.* at 842-43.

4 *Id.* at 843-44.

5 *See* United States v. Mead Corp., 533 U.S. 218, 226-28 (2001) (setting conditions for when agency interpretations receive *Chevron* deference); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1124-28 (2008) (providing data to show the Supreme Court's inconsistency in applying *Chevron* deference).

6 529 U.S. 120 (2000); *see* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1021 (2023) ("Though it has roots in earlier cases such as *MCI Telecommunications Corp. v. AT&T*, the major questions inquiry was most clearly incorporated into the *Chevron* framework in *FDA v. Brown & Williamson Tobacco Corp.*") (footnote omitted); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787 (2017) ("Though it had precursors, the majorness inquiry first crystallized in *FDA v. Brown & Williamson Tobacco Corp.* . . . .") (footnote omitted). *But see* West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (asserting that "[s]ome version of this [major questions doctrine] clear-statement rule can be traced to at least 1897").

7 *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125-26.

8 *Id.* at 159.

a fashion."[9] Justice Scalia later described this holding as the idea that Congress "does not . . . hide elephants in mouseholes."[10]

The Court struggled to integrate the major questions doctrine with *Chevron*. Although *Brown & Williamson* applied the doctrine at *Chevron* Step 1, *Utility Air Regulatory Group v. EPA*, for example, applied the doctrine at *Chevron* Step 2 to reject as unreasonable an EPA interpretation of the Clean Air Act that would have expanded permitting requirements to millions of small pollution emitters throughout the country.[11] Justice Scalia explained that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism," and "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[12]

Then, in *King v. Burwell*,[13] the Court seemed to shift the major questions doctrine to *Chevron* Step Zero—that is, to "the initial inquiry into whether the *Chevron* framework applies at all."[14] *King v. Burwell* involved a challenge to an Internal Revenue Service (IRS) rule interpreting the Affordable Care Act to allow tax credits for health insurance purchased on health insurance exchanges established by both states and the federal government.[15] Writing for the Court, Chief Justice Roberts noted that "[w]hen analyzing an agency's interpretation of a statute, we *often* apply the two-step framework announced in *Chevron*," but not in "extraordinary cases."[16] This was just such an extraordinary case because whether the tax credits, which "involv[e] billions of dollars in spending each year and affect[] the price of health insurance for millions of people," "are available on Federal Exchanges is . . . a question of deep 'economic and political significance.'"[17] Therefore, the Court explained, if Congress had "wished to assign that question to an agency, it surely would have done so expressly."[18] The Court then went on to interpret the statutory

9 *Id.* at 159-60.

10 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

11 573 U.S. 302, 324 (2014); *see also* Deacon & Litman, *supra* note 6, at 1022 (noting that *Util. Air Regul. Grp.* rejected the EPA's statutory interpretation as unreasonable "seemingly at step two of *Chevron*").

12 *Util. Air Regul. Grp.*, 573 U.S. at 324 (citations omitted) (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159-60).

13 576 U.S. 473, 485-86 (2015).

14 Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

15 *King*, 576 U.S. at 482-84.

16 *Id.* at 485 (emphasis added).

17 *Id.* at 485-86 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

18 *Id.* at 486.

language itself, ultimately agreeing with the IRS's interpretation, but without affording the agency any deference whatsoever.[19]

King v. Burwell seems to mark a "critical pivot point" in establishing the major questions doctrine as an inquiry separate and apart from the *Chevron* framework,[20] which the Court is currently considering overruling, though what might replace it remains unclear.[21]

B. *The Push to Reinvigorate the Nondelegation Doctrine*

Beyond the major questions cases, a broader challenge to the administrative state, and to congressional delegations in particular, has come from those who propose to use the nondelegation doctrine to limit Congress's authority to delegate power to the executive branch. The nondelegation doctrine had "one good year"—1935—when the Supreme Court used it to invalidate two New Deal statutes.[22] Since that high water mark, the Supreme Court has required only that congressional delegations contain an "intelligible principle" to guide the exercise of authority by the person or entity to whom it is delegated.[23] The values animating the nondelegation doctrine found expression, scholars argued, in canons of construction used to interpret delegations narrowly, rather than in explicit constitutional holdings.[24]

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19 *Id.* at 485-86 (citing the government's interpretation of the statute but interpreting the statute without deference to the IRS's interpretation); *id.* at 498 (holding, in accord with the government's view, that the statute permits tax credits for insurance purchased on federal exchanges).

20 Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 66 (2023); *see also* Deacon & Litman, *supra* note 6, at 1022 (noting that *King v. Burwell* "applied the doctrine to take the question wholly outside *Chevron*").

21 Adam Liptak, *Conservative Justices Appear Skeptical of Agencies' Regulatory Power*, N.Y. TIMES (Jan. 17, 2024), https://www.nytimes.com/2024/01/17/us/supreme-court-chevron-case.html [https://perma.cc/Q77K-TYAL].

22 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000); *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (invalidating part of the National Industrial Recovery Act as an unconstitutional delegation from Congress to the executive); Panama Refining Co. v. Ryan, 293 U.S. 388, 430-33 (1935) (same).

23 *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 S. CT. REV. 223, 240-41 ("Virtually anything . . . counts as an intelligible principle.").

24 *See* Manning, *supra* note 23, at 223 (arguing that "the Court has long enforced the nondelegation doctrine by narrowly construing administrative statutes that otherwise risk conferring unconstitutionally excessive agency discretion," with the result that the doctrine "now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions"); Sunstein, *supra* note 22, at 315-16 (arguing that the nondelegation doctrine was

Dissatisfaction with this version of nondelegation grew and found voice on the Supreme Court in the person of Justice Gorsuch.[25] In *Gundy v. United States*, the Supreme Court considered a nondelegation challenge to a provision of the Sex Offender Registration and Notification Act (SORNA) that allowed the Attorney General to specify the statute's applicability to persons convicted of sex offenses prior to its passage.[26] Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, found that the statute contained an intelligible principle and rejected the nondelegation challenge.[27] Justice Alito concurred in the judgment because the statute was "adequate" under the Court's existing precedents.[28]

Justice Gorsuch dissented, joined by Chief Justice Roberts and Justice Thomas, in a full-throated embrace of a reinvigorated nondelegation doctrine and rejection of "the intelligible principle misadventure."[29] In its place, Gorsuch proposed a new test to determine "whether Congress has unconstitutionally divested itself of its legislative responsibilities."[30] Drawing on past Supreme Court cases, he identified only three circumstances in which congressional delegations are constitutionally permissible. First, he recognized that Congress can "make[] the policy decisions when regulating private conduct" and "authorize another branch to 'fill up the details.'"[31] Second, he noted that "once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."[32] And, finally, Gorsuch noted that Congress may "confer[] wide discretion to the executive" in areas where congressional and executive authorities overlap, citing the example of foreign affairs.[33]

Although Justice Gorsuch's opinion garnered only three votes (including his own), his views on nondelegation appeared to have broader appeal. While Justice Alito concurred in the judgment in *Gundy*, rejecting the nondelegation challenge to SORNA, he signaled a willingness to reconsider the intelligible principle test in a future case.[34] Justice Kavanaugh did not participate in

"relocated" into "nondelegation canons" that "forbid administrative agencies from making decisions on their own").

25 Justice Gorsuch had raised concerns about the intelligible principle test as a circuit judge. United States v. Nichols, 784 F.3d 666, 668-77 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc).

26 139 S. Ct. 2116, 2122 (2019).

27 *Id.* at 2129.

28 *Id.* at 2131 (Alito, J., concurring in the judgment).

29 *Id.* at 2131, 2141 (Gorsuch, J., dissenting).

30 *Id.* at 2135.

31 *Id.* at 2136.

32 *Id.* (citing a statute authorizing the President to impose a trade embargo if he found certain facts).

33 *Id.* at 2137.

34 *Id.* at 2131 (Alito, J., concurring in the judgment).

Gundy,[35] but he noted in a statement respecting denial of a certiorari in a later case that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[36]

C. *The New Major Questions Doctrine*

Against this background of building dissatisfaction from some quarters about congressional delegations, the Court has considered several important challenges to agencies' regulatory authority in the last few years.[37] Most significantly, in *West Virginia v. EPA*, the Court explicitly embraced the major questions doctrine for the first time and ramped it up.[38]

In *West Virginia*, the Court considered whether the Clean Air Act provided EPA with authority for its "Clean Power Plan."[39] In that rule, the EPA set guidelines for states that effectively directed them to require existing coal-fired power plants to shift away from coal power to natural gas or renewable energy.[40] Writing for a conservative majority, Chief Justice Roberts declared that "[u]nder our precedents, this is a major questions case."[41] Roberts explained that "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."[42]

What constitutes such an "extraordinary case"? Roberts explained this trigger for the major questions doctrine as "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before

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35 *Id.* at 2130.

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

37 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) (holding that the Biden Administration lacked statutory authority to cancel student loan debt); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (rejecting EPA's authority to issue the Clean Power Plan); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 663 (2022) (per curiam) (granting stay of Occupational Safety and Health Administration's COVID-19 vaccine mandate); Biden v. Missouri, 142 S. Ct. 647, 650 (2022) (per curiam) (upholding COVID-19 vaccine mandate imposed by the Secretary of Health and Human Services on facilities that receive Medicare and Medicaid funding); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam) (rejecting the Centers for Disease Control and Prevention's imposition of a nationwide eviction moratorium based on the COVID-19 pandemic).

38 142 S. Ct. 2587 (2022).

39 *Id.* at 2602-03.

40 *Id.*

41 *Id.* at 2610.

42 *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

concluding that Congress meant to confer such authority."[43] In such cases, he declared, "something more than a merely plausible textual basis for the agency action is necessary" and "[t]he agency instead must point to clear congressional authorization for the power it claims."[44] Applying this framework to the Clean Power Plan, the Court found that the EPA lacked the requisite clear congressional authorization "to substantially restructure the American energy market."[45]

In a separate concurrence, Justice Gorsuch framed the major questions doctrine as in line with other substantive canons of construction that protect constitutional values via clear statement rules, arguing "[t]he major questions doctrine works in much the same way to protect the Constitution's separation of powers."[46] Gorsuch identified multiple factors for determining when an agency action constitutes a major question, including whether "an agency claims the power to resolve a matter of great political significance, or end an earnest and profound debate across the country,"[47] whether "Congress has considered and rejected bills authorizing something akin to the agency's proposed course of action,"[48] whether the agency "seeks to regulate a significant portion of the American economy, or require billions of dollars in spending by private persons or entities,"[49] and whether the agency intrudes into domains traditionally regulated by states.[50]

In the wake of *West Virginia v. EPA*, there can be no doubt that the current Court will vigorously police executive branch exercises of delegated authority. The Court appears—at least for now—to have coalesced around using the major questions doctrine instead of the nondelegation doctrine as its tool of choice.[51] And that choice matters: using the nondelegation doctrine to invalidate congressional delegations would mean holding that Congress can *never* delegate the power at issue, while using the major questions doctrine to strike down agency action means only that Congress *has not yet* delegated the requisite authority—a potentially curable defect.[52] Nonetheless, as Justice

43 *Id.* at 2608 (alteration in original) (internal quotation marks omitted).

44 *Id.* at 2609 (internal quotation marks omitted).

45 *Id.* at 2610.

46 *Id.* at 2617 (Gorsuch, J., concurring).

47 *Id.* at 2620 (internal quotation marks omitted) (citation omitted).

48 *Id.* at 2621 (internal quotation marks omitted).

49 *Id.* (internal quotation marks omitted).

50 *Id.*

51 *Cf.* Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 84 (2022), https://harvardlawreview.org/2022/11/roberts-courts-structural-incrementalism/ [https://perma.cc/TBJ4-EGZN] (noting that "the vocal enthusiasm of some of the Justices for replacing the intelligible principle standard seems to be on hold").

52 *See, e.g.*, *id.* at 85 (noting that by relying on the major questions doctrine "the Court held that Congress, as a matter of statutory interpretation, *did not* give agencies the necessary authority

Gorsuch explicitly noted when discussing the nondelegation and major questions doctrines in another recent case, "[w]hichever the doctrine, the point is the same"[53]—namely, reining in congressional delegations. Unless or until Congress attempts to clarify statutory delegations found wanting under the major questions doctrine, the effect is also the same: preventing significant executive branch actions.[54]

The Court's recent major questions doctrine cases, particularly *West Virginia*, leave open important questions about both what triggers the major questions doctrine and what's required from Congress to constitute the now-requisite clear authorization for executive action.[55]

Mila Sohoni criticizes the Court's lack of clarity about the nature of the nondelegation concern that underlies its major questions doctrine holdings.[56] She warns that the lack of clarity

> threatens the dual harms of allowing courts to freely decide how stringently to enforce perceived nondelegation concerns through the mechanism of the new major questions doctrine, while also giving Congress and agencies essentially no notice about what they can and cannot do—both of which together will conduce not just to the enforcement of nondelegation but to the *overenforcement* of it.[57]

Daniel Deacon and Leah Litman critique the Court's new emphasis on the existence of political controversy about the agency action in determining whether a question is "major."[58] They warn that this aspect of the doctrine will allow "future political parties and people[,] . . . well after a statute was enacted, to create the conditions that increase the odds of an agency policy being deemed 'major,' and therefore unable to be enacted under a broad grant of authority that otherwise would authorize it."[59] Moreover, if Congress does

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to adopt the regulations at issue, not that Congress, as a matter of constitutional interpretation, *could not* give agencies that authority").

53 Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

54 *See* Deacon & Litman, *supra* note 6, at 1070 ("[T]he Court's focus on regulatory novelty turns the major questions doctrine into a potent de-regulatory tool that will do much of the work—if a more selective and ideologically targeted form of the work—that a revived nondelegation doctrine would do."); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 294-95 (2022) (noting that the major questions doctrine can "accomplish the most important work that the nondelegation doctrine would perform").

55 West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting) (critiquing the majority for "replac[ing] normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules" including "looking at some panoply of factors" to determine if the major questions doctrine applies); *see also* Meyer & Sitaraman, *supra* note 20, at 68 (noting that "[t]he Court has provided no clear answer" to how to determine whether an agency action is "major").

56 Sohoni, *supra* note 54, at 308-09.

57 *Id.* at 314 (emphasis added).

58 Deacon & Litman, *supra* note 6, at 1050.

59 *Id.* at 1059.

want to cure an invalidation of agency action by clarifying a delegation, it's not clear how specifically Congress must legislate.[60]

The Court muddied the waters still further in June 2023 when it held in *Biden v. Nebraska* that the Biden Administration lacked statutory authority to cancel student loan debt.[61] The majority opinion by Chief Justice Roberts relied primarily on a plain text reading of the underlying statute,[62] but it also invoked the major questions doctrine in the alternative to reject the Department of Education's reading of the statute.[63] In doing so, the majority rejected an argument offered by the government that the major questions doctrine did not apply because this case involves the government conferring a benefit as opposed to imposing a regulation.[64] The Court's rejection of such a limitation suggests that the major questions doctrine's scope of application may be very broad indeed, perhaps broad enough to apply to foreign relations in general and to international agreements in particular, as discussed in the next Part.

Not only does *Biden v. Nebraska* hold that the major questions doctrine reaches more broadly than previously understood, but it also reveals stark divergences among Justices in the majority about how to apply the doctrine.[65] Justice Barrett wrote a solo concurrence pushing back against understanding the major questions doctrine as a substantive canon and clear statement rule, and instead emphasizing that it is part of a commonsense understanding of context for statutory text.[66] Justice Barrett's opinion seems to seek to return the major questions doctrine to something akin to Justice Scalia's no-

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60 *See id.* at 1037 (noting that the Court has been "somewhat cagey" about how clearly Congress must authorize agency action); Hickman, *supra* note 51, at 85-86 (recognizing that "the Court has not provided Congress with magic words or otherwise offered extensive guidance regarding just how much more statutory detail it expects Congress to provide to avoid the major questions doctrine").

61 143 S. Ct. 2355, 2375 (2023).

62 *Id.* at 2368-71.

63 *Id.* at 2372-75.

64 *Id.* at 2375 ("The Court has never drawn the line the Secretary suggests—and for good reason."); Reply Brief for the Petitioners at 20-22, Biden v. Nebraska, Nos. 22-506 & 22-535 (Feb. 15, 2023); *see also* Sohoni, *supra* note 54, at 304-06 (discussing the possibility that the Court through 2022 was restricting the major questions doctrine to cases involving private versus public rights).

65 *See, e.g.*, Erin Webb, *Analysis: Biden v. Nebraska Leaves Major Questions Unanswered*, BLOOMBERG (July 7, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-biden-v-nebraska-leaves-major-questions-unanswered [https://perma.cc/9BXG-3DKW] (discussing tensions between Justices Gorsuch and Barrett's understandings of the major questions doctrine and uncertainty about the views of Justices Kavanaugh, Alito, and Thomas in particular).

66 *Nebraska*, 143 S. Ct. at 2376-82 (Barrett, J., concurring); *see* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 253 (2024) (describing Barrett's view as a "more low-key defense of the major questions doctrine"). For a thorough refutation of textualists' attempts to defend their reliance on substantive canons, including the major questions doctrine, as compatible with textualism, see Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 539-44 (2023) (criticizing Justice Barrett's *Nebraska* opinion on this ground).

elephants-in-mouseholes principle and away from Justice Gorsuch's nondelegation-doctrine-lite, but at the same time, she explicitly notes that she is not addressing constitutional nondelegation concerns.[67]

The ongoing uncertainties about how the Court understands and will enforce its concerns cast a long shadow over a wide range of delegations, including those implicating international agreements. The next Part describes the congressional delegations underlying numerous U.S. international agreements and their implementation.

II. INTERNATIONAL AGREEMENTS, DELEGATIONS, AND THE COURT'S NEW DOCTRINE

The only process provided in the Constitution for making international agreements is set forth in Article II, which states that a President can make a treaty after obtaining the advice and consent of two-thirds of the Senators present.[68] This process, however, has been gradually declining in importance—and has been used only sporadically in recent years.[69]

As treaties have declined, they have been replaced by various forms of binding "executive agreements"—"ex post congressional–executive agreements" approved by Congress through normal legislation; "ex ante congressional–executive agreements" that are authorized in advance by Congress; agreements authorized by a prior Article II treaty; and "sole" executive agreements that are based on the President's independent constitutional authority.[70] There has also been a rise in nonbinding

67 *Nebraska*, 143 S. Ct. at 2381 n.4 (Barrett, J., concurring).

68 *See* U.S. CONST. art. II, § 2.

69 *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1355 (2008) (arguing that the Article II process has been and should be superseded by other ways of making international agreements); Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, 134 HARV. L. REV. 629, 632 (2020) (noting that per year the Clinton Administration submitted approximately twenty-three treaties, the Bush Administration around twelve, the Obama Administration around five, and the Trump Administration submitted only five treaties in Trump's first three and a half years in office). In the first three years of his presidency, President Biden submitted one amendment to a protocol, two protocols, and three treaties to the Senate. *See* S. TREATY DOC. NO. 118-1, at III (2023) (transmitting treaties with the Republic of Cuba and the Government of the United Mexican States on the Delimitation of Maritime Boundaries); S. TREATY DOC. NO. 117-1, at III (2021) (transmitting the Kigali Amendment to the Montreal Protocol); S. TREATY DOC. NO. 117-2, at III (2022) (transmitting the Extradition Treaty with the Republic of Albania); S. TREATY DOC. NO. 117-3, at III (2022) (transmitting Protocols to the North Atlantic Treaty of 1949 on the Accession of the Republic of Finland and the Kingdom of Sweden).

70 *See, e.g.*, Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 144, 144 n.5 (2009) (documenting "a little noticed transformation during the last half-century in the way international law is made in the United States" from Article II treaties to executive agreements).

agreements—agreements that often have the same form as executive agreements but do not create binding legal obligations and thus are not subject to any of the legal or regulatory constraints that apply to binding executive agreements.[71] Together, these forms of international agreement-making have come to far overshadow Article II treaties. In recent decades, there have been hundreds of binding executive agreements and nonbinding agreements concluded each year, compared to a small handful of Article II treaties.[72]

With the exception of ex post congressional–executive agreements, which are approved by Congress after they are negotiated, all of these forms of international agreement-making can involve delegations from Congress to the Executive, whether as the basis for the agreement itself or as authority for domestic implementation. In light of the rise of the major questions doctrine and revival of the nondelegation doctrine, it is not a stretch to imagine that these forms of international agreements could face future challenge. This Part begins by explaining the role of delegations in the creation and implementation of international agreements. It then turns to considering whether these delegations might be subject to legal challenge.

A. *The Role of Delegations with Respect to International Agreements*

This Section explains the foundational role of congressional delegations in the formation of ex ante congressional–executive agreements and executive agreements pursuant to a treaty, as well as how the executive branch uses delegated authorities to implement these types of executive agreements, sole executive agreements, and nonbinding agreements.

1. Ex Ante Congressional–Executive Agreements

The vast majority of binding international agreements made by the United States in the last several decades have been made through what are

71 *See* Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 1281, 1299-300 (2023) ("Nonbinding agreements do not have the status of domestic federal law. By definition, nonbinding agreements create no legal obligation . . . . Another remarkable characteristic of nonbinding international agreements is how differently they have been regulated compared to binding agreements.").

72 *Compare id*. at 1334 (showing annual rates of nonbinding and binding executive agreements for 1989-2016), *with* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1288 (2008) (showing annual rates of executive agreements and Articles II treaties for 1930-2006), *and* Hathaway, Bradley & Goldsmith, *supra* note 69 (citing decline in Article II treaties in recent years).

sometimes called "ex ante congressional–executive agreements."[73] The executive branch is able to conclude these agreements based on authority delegated to it in advance through a statute, which grants authority to the executive to negotiate and conclude a binding agreement that would otherwise exceed the President's independent authority.[74]

Not all delegations are created equal—some statutes are very clear about the authority that they grant to the President, but some are much less so. Until recently, it was impossible to know precisely what authority the executive branch relied on in making executive agreements. One of the authors of this Article has compiled a database of all executive agreements concluded between 1989 and 2016. The database includes information drawn from over 5000 "cover memos" produced by the Department of State pursuant to a court-supervised settlement of a lawsuit brought under the Freedom of Information Act.[75] These are cover memos that accompany executive agreements when the executive branch reports them to Congress, as required by the Case-Zablocki Act.[76] In the cover memos, which are typically not made public and are provided only to Congress, the executive branch cites the purported legal basis for the agreements. The collection of these memos and the database based on it thus offer an unprecedented look inside the legal authorities the executive relies on to conclude ex ante congressional–executive agreements.

The database records the legal authority that the memo identifies as the authority for concluding the agreement. Moreover, a team of research assistants working with the author reviewed those authorities and determined whether they provided express authorization to conclude an agreement (a "1"), authorization to negotiate but not conclude an agreement (a "2"),

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73 Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 145 (2009) ("As a result, ex ante congressional-executive agreements—which today make up roughly eighty percent of all U.S. international legal commitments—are made by an almost entirely unfettered President.").

74 *Id.* ("The agreements that the President negotiates under this advance authority are often referred to as 'ex ante' congressional-executive agreements.").

75 *See* Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis: Data Visualizations*, HARV. L. REV. (Dec. 10, 2020), https://harvardlawreview.org/executive-agreements-visualizations/ [https://perma.cc/DQ4X-EBPR] (containing data visualizations and links to Dataverse, where the cover memos and underlying data are posted). The database is described and analyzed in Hathaway, Bradley & Goldsmith, *supra* note 69, at 665-91. The cover letters are available at Dataverse, Executive Agreements Database (2020), https://dataverse.harvard.edu/dataverse/executiveagreements [https://perma.cc/UVR5-KJRV], and the data files are available at Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis*, HARV. DATAVERSE (2020), https://doi.org/10.7910/DVN/VMRNSP [https://perma.cc/GVV2-SAZD].

76 Pub. L. No. 92-403, 86 Stat. 619, 619 (1972) (codified as amended at 1 U.S.C. § 112b).

authorization to furnish assistance to foreign countries (a "3"), authorization to engage in international cooperation with foreign countries or establish a "program" with foreign countries (a "4"), or no arguable delegation of agreement-making authority (a "5").

Authorities in the first category give clear and express authority to the President to conclude an executive agreement. For instance, the Fishery Conservation and Management Act of 1976 expressly delegates authority to the Secretary of State to negotiate and conclude international fishery agreements on behalf of the United States.[77] The cited authorities that fall into the second, third, and fourth categories, however, are much less explicit and require inference of implicit delegation. The most cited authority in the second category, for example, is 22 U.S.C. § 2656d, which provides that the Secretary of State "shall have primary responsibility for coordination and oversight with respect to all major science or science and technology agreements and activities between the United States and foreign countries, international organizations, or commissions of which the United States and one or more foreign countries are members."[78] It only expressly provides for "coordination and oversight" of agreements, but that is arguably suggestive of implicit authority to make such agreements as well.

The other two categories require even greater willingness to read between the lines. A 2005 agreement providing additional assistance to Russia for the purpose of eliminating strategic offensive arms, for example, relies on the Cooperative Threat Reduction Act of 1993.[79] That Act finds that "it is in the national security interest of the United States [to] . . . [f]acilitate . . . the transportation, storage, safeguarding, and elimination of nuclear and other weapons of the independent states of the former Soviet Union," but it does not specifically mention the negotiation or conclusion of international agreements for that purpose.[80] That authority was therefore coded a "4." The several hundred agreements that relied on authority no higher than a "5" had even less claim to prior authorization from Congress, as coders could identify no language in the cited authority that related to international agreements or a program of foreign cooperation.

77 Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 339 (codified as amended at 16 U.S.C. §§ 1822–23).

78 22 U.S.C. § 2656d(a)(1).

79 Oona A. Hathaway, Curtis A. Bradley & Jack L. Goldsmith, *Executive Agreements Database, Statement Regarding Agreement Between the United States and The Russian Federation Amending the Agreement of August 26, 1993, as Amended and Extended, Concerning Cooperation in the Elimination of Strategic Offensive Arms. Signed at Moscow January 14, 2005. Entered into Force January 14, 2005*, HARV. DATAVERSE (June 11, 2022), https://doi.org/10.7910/DVN/KNCM7W [https://perma.cc/K8X6-N2ZQ].

80 Cooperative Threat Reduction Act of 1993, 22 U.S.C. § 5951.

Only 48 percent of executive agreements between 1989 and 2016 relied on an express legal authority (coded "1"). Meanwhile, 34 percent relied on authorities where the highest code was a 2, 3, or 4, and 19 percent relied only on statutes that granted no authority (coded "5").[81] In short, more than half of all executive agreements rely on a delegation that is not express.

2. Executive Agreements Pursuant to a Treaty

A second way in which authority to conclude agreements is delegated to the executive branch is through a prior Article II treaty. In the aforementioned dataset, there were over 100 unique international agreements cited in the cover letters submitted by the executive branch to Congress.[82] Many of these agreements provide for subsequent agreements only obliquely. For instance, Article 1 of the Universal Postal Union's Money Orders and Postal Travellers' Cheques Agreement, which the executive cited as an authority for a subsequent agreement, provides only that "[t]his Agreement shall govern the exchange of postal money orders, hereinafter called 'money orders', and the postal travellers' cheques service that contracting countries agree to set up in their reciprocal relations."[83] That is hardly an explicit grant of authority to enter into subsequent executive agreements. Most of the cited authorities similarly are taken as implicit authority to conclude a follow-on agreement, even though the cited agreement does not explicitly grant such authority. It is important to note, however, that the executive rarely relies on a prior treaty alone. Typically, when a treaty is cited as prior authority, it is cited alongside statutory or constitutional authority of the President.[84]

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81 Calculations based on data in Hathaway, Bradley & Goldsmith, *supra* note 69, at 684 (calculations exclude sole executive agreements—that is, agreements grounded exclusively in the President's constitutional authority).

82 The vast majority of these were Article II treaties; fifteen were executive agreements, and two were ex post congressional–executive agreements.

83 Universal Postal Union, Money Orders and Postal Travellers' Cheques Agreement art. 1, July 27, 1984, 1415 U.N.T.S. 23681.

84 For example, the cover note for the Background Statement Concerning the Protocol between the United States and Venezuela to the Agreement to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea cites the following as "Legal Authority": "Article 17 of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Treaty Doc. 101-4); Article 35 of the Single Convention on Narcotic Drugs (9 TIAS 6298, 18 UST 1407); section 1003 (a) of P.L. 98-164 (22 USC 2291(a)(2) (1988); section 2015(b)(1) of the Anti-Drug Abuse Act of 1986 (100 Stat. 3207-68, P.L. 99-570), as amended by 4802(a)(1) of P.L. 100-690, Title IV, 102 Stat. 4294, 46 App. USC 1902." Agreement To Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Sea, Background Statement Concerning the Protocol Between the United States and Venezuela, July 23, 1997, T.I.A.S. No. 12876, https://doi.org/10.7910/DVN/U5LTFO [https://perma.cc/TSG9-TYYA].

3. Sole Executive Agreements & Nonbinding Agreements

Sole executive agreements and nonbinding agreements are made on the basis of the President's independent constitutional authority. Hence, they do not rely on delegated authority. But for many, if not most, of these agreements, the executive branch relies on authority delegated by Congress in order to *implement* the agreements.

For example, the United States entered an agreement with Canada in 2008 in which each country agreed to, among other things, "use its best efforts to facilitate the movement of evacuees, emergency personnel, equipment or other resources into its territory or across its territory when it is agreed that such movement will facilitate emergency operations by both Parties."[85] To implement the agreement, the executive branch relied on its existing regulatory authority to engage in emergency management.[86] Another example is the Algiers Accords, in which the United States and Iran resolved the Iran hostage crisis.[87] The President carried out the United States' obligations under the agreement using powers already delegated to him in the International Emergency Economic Powers Act (IEEPA).[88]

These agreements are far from unusual. Congress has delegated regulatory authority to the President in broad terms across a range of topics. This enables the executive branch to enter into binding agreements that it otherwise could not make (or at least could not make without serious risk of noncompliance) because implementation would exceed the President's own constitutional authority in the absence of prior statutory grants of authority.

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85 Agreement Between the Government of the United States of America and the Government of Canada on Emergency Management Cooperation, Dec. 12, 2008, T.I.A.S. No. 09-707 [https://perma.cc/2H8A-986F]. The cover letter that accompanied the Case Act report to Congress cites "Article II of the United States Constitution" as its legal authority. Agreement Between the Government of the United States of America and the Government of Canada on Emergency Management Cooperation, Statement, Dec. 12, 2008, T.I.A.S. No. 09-707, https://drive.google.com/file/d/1wOB3JTbxMZh6OWhB1dddUdtCJEyp18Qg/view [https://perma.cc/2H8A-986F].

86 DEP'T OF HOMELAND SEC., COMPENDIUM OF U.S.-CANADA EMERGENCY MANAGEMENT ASSISTANCE MECHANISMS (2022), https://www.dhs.gov/publication/compendium-us-canada-emergency-management-assistance-mechanisms [https://perma.cc/L2DF-VC5U] (describing the output of the first meeting of the Consultative Group established under the agreement, including the creation of a compendium of existing laws and procedures that support emergency services).

87 Declaration of the Government of the Democratic and Popular Republic of Algeria, Iran-U.S., Jan. 19, 1981, 20 I.L.M. 224, https://www.parstimes.com/history/algiers_accords.pdf [https://perma.cc/K7DH-F5HB] ("The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran . . . .").

88 International Emergency Economic Powers Enhancement Act,50 U.S.C. § 1701.

Nonbinding agreements, too, often rely on pre-existing authority delegated by Congress in order to implement the agreement. Take one prominent example: For the Joint Comprehensive Plan of Action (better known as the Iran Nuclear Deal), the Obama Administration relied on power that Congress had granted the President to put in place or waive economic sanctions in accordance with the national interest.[89] (Indeed, Congress pressed back on the President's reliance on this delegated authority in the Iran Nuclear Agreement Review Act,[90] which suspended authority previously delegated to the President to waive U.S. sanctions while Congress reviewed the draft agreement.) Similarly, for the nonbinding emissions reductions portions of the Paris Agreement on Climate Change, the executive branch relied on delegated authority granted earlier in several domestic statutes when it made new regulations to meet its obligations under the agreement.[91]

More run-of-the-mill nonbinding agreements similarly rely on preexisting regulatory authority that Congress has delegated. For example, the Environmental Protection Agency concluded a Joint Contingency Plan with Mexico in which they agreed to work together to prepare for and respond to emergencies caused by chemical hazardous substances in the inland border area.[92] To carry out the various obligations specified in the fifty-one-page agreement, the EPA relies on prior delegated authority to monitor and respond to environmental threats.[93]

B. *Potential Questions Under the Major Questions Doctrine and Nondelegation Doctrine*

The previous Section laid out the many ways in which the executive branch relies on delegated authority to make and implement international

89 *See* Exec. Order No. 13,716, 81 Fed. Reg. 3693, 3693 (Jan. 16, 2016) ("By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) . . . ."). In addition, the agreement was the basis for, and incorporated by reference into, a U.N. Security Council resolution that terminated the international sanctions against Iran. *See* S.C. Res. 2231, ¶¶ 1–3 (July 20, 2015) ("The Security Council . . . [*e*]*ndorses* the [Joint Comprehensive Plan of Action], and *urges* its full implementation on the timetable established in the JCPOA" and "[*c*]*alls upon* all Member States . . . to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA . . . .").

90 42 U.S.C. § 2160e.

91 For an overview of the domestic regulations that supported the nonbinding commitment in the Paris Agreement, see Cass R. Sunstein, *Changing Climate Change, 2009–2016*, 42 HARV. ENV'TL L. REV. 231, 270 (2018) (describing the ability of the executive branch to take administrative action in the absence of congressional action).

92 EPA, MEXICO-UNITED STATES JOINT CONTINGENCY PLAN: PREPAREDNESS FOR AND RESPONSE TO EMERGENCIES AND CONTINGENCIES ASSOCIATED WITH CHEMICAL HAZARDOUS SUBSTANCES IN THE INLAND BORDER AREA 1 (2017).

93 *Id*. at 40-41.

agreements. Here, we turn to considering whether these delegations to the executive branch might run afoul of the new major questions doctrine or the reinvigorated nondelegation doctrine. We consider, too, how such challenges might arise.

We note at the outset that, in their article for this symposium, Professors Curtis Bradley and Jack Goldsmith challenge our analysis that congressional–executive agreements could be subject to challenge under the major questions doctrine. They argue that this concern is "unlikely to be realized"[94] because "the major questions doctrine does not apply when independent presidential power is appropriately in play."[95] They would instead solve the challenge to congressional–executive agreements by relying on the President's independent powers to negotiate international agreements.[96] Yet, as the following will show, our point is that much of the President's modern international agreement-making does *not* rely on the President's independent powers, at least not exclusively. Redescribing the issue as simply about the President's independent powers risks ignoring the distinctive difficulties of delegating authority to make international agreements—and the distinctive problems that would arise if that authority were invalidated by the courts.[97]

1. Possible Challenges Under the New Major Questions Doctrine

a. *Agreements Created Using Implied Delegated Authority*

A challenge under the new major questions doctrine might arise in cases where an executive agreement is created based on an implied, rather than an express, delegation. As noted in Section I.C, the Supreme Court has applied the doctrine to insist on an unambiguous delegation of authority in extraordinary cases. Yet what constitutes an "extraordinary case" is far from clear.[98]

The Court's lack of clarity about what counts as a "major" question and its demanding standard for congressional clarity about the existence and scope of delegations may leave a range of executive agreements vulnerable to challenge. In negotiating and concluding ex ante congressional–executive agreements and executive agreements concluded pursuant to a treaty, the

[94] Curtis Bradley & Jack Landman Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. 1743, 1790 (2024).

[95] *Id.* at 1798.

[96] *Id.*

[97] Bradley and Goldsmith's congressional intent approach acknowledges this: "There is a strong functional need for broad delegation in the agreement-making sphere." *Id.* In the end, our analyses lead to the same conclusion—that delegations of authority to make international agreements should not be subject to the major questions doctrine. *Id.* at 1797.

[98] *See supra* Section I.C.

executive branch relies on prior delegations of authority by Congress (or the Senate alone). But, as explained in Section II.A, many of the statutes and treaties on which the authority rests are far from express in their delegations. More than half of all executive agreements—both ex ante congressional–executive agreements and executive agreements concluded pursuant to a treaty—rely on delegated authority that is, at best, implied.

Even those agreements that rely on express authority could potentially be at risk. Under *West Virginia v. EPA*, it is far from clear whether even express delegations would meet the standard set by the Court. If the Court considers an issue to be a question of major political or economic significance, it is possible that the Court may require more particularized delegations than are found in these advance grants of authority to the executive to conclude agreements. As Chief Justice Roberts explained, "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."[99] What is an "extraordinary case" and what is "ambiguous statutory text"?

In cases where authority is expressly granted in advance to conclude an executive agreement, it is possible to imagine a Court finding the text "ambiguous." The most heavily cited express statutory authority (coded "1") for ex ante congressional–executive agreements is the Foreign Assistance Act of 1961, which the executive branch cited as a source of legal authority to conclude over 500 executive agreements between 1989 and 2016.[100] The Act includes a number of different authorizations, including, for example, the following:

> In order to promote such cooperation [in narcotics control programs], the President is authorized to conclude agreements, including reciprocal maritime agreements, with other countries to facilitate control of the production, processing, transportation, and distribution of narcotics analgesics, including opium and its derivatives, other narcotic and psychotropic drugs, and other controlled substances.[101]

This authorization, coded as an express authorization to conclude an executive agreement, leaves some ambiguity about the nature of the agreements authorized. Could a court decide that concluding agreements to address the narcotics trade is important enough that it should be *more* expressly delegated? Existing case law creates sufficient uncertainty to cause

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99 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

100 Hathaway, Bradley & Goldsmith, *supra* note 69, at 679-80.

101 Foreign Assistance Act of 1961, 22 U.S.C. § 2291(a)(2).

concern. Indeed, in recent cases involving the major questions doctrine, the Court did not question whether the agency possessed rulemaking authority in a general sense—the question was whether the rulemaking authority extended to the matter at hand. In a similar vein, the Court could potentially conclude that an agency possesses the authority to make international agreements in general but that a *particular* delegation is insufficiently clear to authorize a given agreement.

b. *Agreements Implemented Using Previously Delegated Authority*

Delegation works differently for sole executive agreements and nonbinding agreements, but it potentially could run into concerns under the major questions doctrine as well. As explained above, sole executive agreements and nonbinding agreements are created by the President based on his sole constitutional authority. So far, so good. Where they may run into difficulty, however, is when they rely on previously delegated authority for implementation, which they frequently, if not nearly always, do.[102]

As discussed earlier, the executive branch sometimes uses sole executive agreements in combination with previously granted domestic regulatory authority to forge consequential international cooperation without the involvement of Congress.[103] Indeed, most sole executive agreements rely on the capacity of agencies to use their preexisting delegated authority to carry out the binding obligations the agreements entail. The same is true of nonbinding agreements such as the Iran Nuclear Deal and the emissions targets in the Paris Climate Change Agreement. This mechanism is lawful as long as the agreement is in fact within the scope of the President's authority and the President properly exercises the authority delegated by Congress to implement that agreement.[104]

One might imagine a challenge to such an agreement where the delegated authorities the President seeks to use to implement the agreement involve questions that are too "major" and on which Congress has not been sufficiently clear in its delegation. While such a challenge would not prevent the conclusion of the agreement, it could render the executive incapable of carrying out the United States' side of the bargain. Were that to happen, it

102 The use of delegated authority to implement sole executive agreements and nonbinding agreements, and thus to enable the President to enter into international agreements that would otherwise be out of reach, also raises constitutional concerns about the executive's use of this strategy to work around the need to obtain legislative consent. Indeed, it is possible the courts would be *more* tempted to use the new major questions doctrine and nondelegation doctrine if they harbor constitutional concerns that do not easily fit into an existing doctrinal framework.

103 *See supra* subsection II.A.3.

104 *See* Hathaway, *supra* note 70; Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1257-59 (2018).

could damage the reputation of the United States, frustrate the purpose of the agreement, and even place the United States in breach of its obligations under international law (if the agreement is a binding sole executive agreement)—thus potentially even subjecting the United States to countermeasures as a result. Even a single challenge to the capacity of the President to implement sole executive agreements and nonbinding agreements using preexisting delegated authority could upend U.S. international diplomacy, which relies heavily on both forms of agreements.[105]

2. Potential Challenges Under the Reinvigorated Nondelegation Doctrine

a. *Agreements Created Based on Implied Delegation*

As noted above, many international agreements today are concluded using authority delegated to the executive branch in statutes. The agreements made through this process, while termed "executive agreements" in the domestic context, are nonetheless "treaties" as that term is understood in international law. They have the same binding legal effect, and noncompliance can lead to the same consequences as any treaty made with the advice and consent of the Senate under Article II. Hence, where Congress has delegated express authority to make binding international agreements, the Court might potentially decide that Congress delegated too much authority to the executive and thus divested itself—in particular the Senate—of its constitutional role.

There is some modest reason for comfort in earlier opinions on the topic. Gorsuch's opinion in *Gundy*, the most thorough judicial articulation of a more robust nondelegation doctrine to date, specifically cited foreign affairs as an example of a situation in which congressional and executive authorities overlap and therefore Congress may "confer[] wide discretion to the executive."[106] It is possible that this carve-out might insulate international agreements from challenge.[107]

And yet the reasoning deployed by Gorsuch in *Gundy* suggests that international agreements might not escape scrutiny so easily. Congress has long assented to a system in which the Senate's authority under the Constitution to agree to binding international agreements is overshadowed by the President's making of executive agreements using authority delegated by Congress in advance. Congress has simply insisted on a transparency regime (not always perfectly observed) aimed at allowing it to know how the

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105 *See infra* Section III.B.

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

107 We think it should. *See infra* Part III & Section IV.A.

President uses this delegated power.[108] Gorsuch worries that, "[w]ithout the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President."[109] One could imagine a similar concern that, without the involvement of members of the Senate, international agreements would become nothing more than the will of the current President. Sensitive to this, the courts could possibly decide that even the express delegations by Congress to the executive branch to conclude executive agreements violate the nondelegation doctrine because they take the Senate out of the treaty-making process.

Moreover, there are reasons to think that Gorsuch's foreign affairs exception may not fully insulate international agreements from nondelegation concerns. In *Gundy*, Gorsuch writes: "for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise *if* '*the discretion is to be exercised over matters already within the scope of executive power*.'"[110] Does that mean *wholly* within the scope of executive power, or is partly within executive power sufficient?[111] Sole executive agreements and nonbinding agreements are solely within the scope of executive power, but ex ante congressional–executive agreements, which are by far the most numerous form of executive agreement, are in an area of overlapping authority with Congress. In short, it is not clear that the exception, even if adopted by the Court, would protect international agreements from scrutiny entirely.

b. *Agreements Implemented Using Previously Delegated Authority*

Sole executive agreements and nonbinding agreements may escape a nondelegation challenge to their formation, but they may face one when it comes to the authority used to implement the agreements. As already noted, Presidents increasingly use sole executive agreements and nonbinding agreements in place of Article II treaties. While the agreements themselves cannot commit the United States to actions that exceed the President's own authority, the President often relies on delegated authority to carry out the agreements. That use of delegated authority might be challenged as a use of delegated authority to evade the constitutional requirements of Article II. And while the formation of executive agreements potentially might fall

108 Hathaway, Bradley & Goldsmith, *supra* note 69, at 645-57.

109 *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

110 *Id.* at 2137 (emphasis added) (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1260 (1985)).

111 With respect to international agreements, we argue below that the latter should be sufficient. *See infra* Section IV.A.

within the foreign affairs exception Gorsuch identified in *Gundy*, the exercise of domestic legislative authority to carry those obligations out very well might not.

C. *Where Challenges Might Manifest*

A final question to consider is where a challenge under either the new major questions doctrine or the rejuvenated nondelegation doctrine might play out.

The most likely venue for such a challenge would be in the courts. A person or entity affected by an executive agreement might challenge an agreement or implementation of an agreement. For example, an agreement that provides for the application or lifting of economic sanctions using authority delegated under IEEPA could affect a commercial entity that would have an incentive to file suit to challenge the agreement.[112]

Such cases do not often arise, but they are possible.[113] In *Wilson v. Girard*, for example, the Supreme Court gave effect to an executive agreement defining jurisdiction over U.S. forces in Japan.[114] In that case, a security treaty between the United States and Japan expressly stated that "[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan shall be determined by administrative agreements between the two Governments."[115] Under this provision, the two countries signed an Administrative Agreement covering, among other things, the jurisdiction of the United States over offenses committed by members of the U.S. armed forces in Japan and allowing the United States to waive that jurisdiction. The Agreement also provided that the countries would subsequently conclude an agreement on criminal jurisdiction, which they did in a subsequent Protocol. The Court, considering a challenge by the accused, Girard, to the United States' decision to waive its jurisdiction and hand him over to the Japanese authorities for trial, enforced the agreement and its waiver provision, explaining that it was "satisfied that the approval of Article

112 *See, e.g.*, Kristen E. Eichensehr & Cathy Hwang, Essay, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549, 584, 589-90 (2023) (discussing how companies affected by U.S. economic national security actions will likely have standing, resources, and incentives to challenge the government).

113 The Restatement (Third) of Foreign Relations Law addresses standing to challenge the validity of international agreements, citing a range of cases in which standing to challenge a treaty was found and stating, "[s]imilar principles govern standing to challenge an international agreement made by the President other than as a treaty (§ 303) on the ground that he lacked authority to make the agreement." *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 302 reporters' n.5 (AM. L. INST. 1986).

114 354 U.S. 524, 527-30 (1957) (per curiam).

115 *Id.* at 526-27; Security Treaty between the United States and Japan, Japan-U.S., art. 3, Sept. 8, 1951, 3 U.S.T 3329.

III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses."[116] Notably, the Senate's authorization of the agreements at issue in this case was unusually clear: the Administrative Agreement was available to the Senate when it voted to grant its advice and consent to the Security Treaty.

It is not only a person or entity injured by an agreement that might bring a challenge in court. Congress itself (or some meaningful subset of Congress) might also file a court challenge. The D.C. Circuit has held that when the House as a whole has Article III standing, it can designate a member to act on its behalf.[117] The D.C. District Court, moreover, has concluded that congressional committees have Article III standing where they were expressly authorized by Congress and had concrete and particular injuries to their respective powers.[118] In 2014, the House passed a resolution authorizing the Speaker of the House to bring "one or more civil actions on behalf of the House of Representatives in a Federal court of competent jurisdiction" against the President or other executive branch official or employee for their failure to implement the Patient Protection and Affordable Care Act (ACA).[119] When the House of Representatives sought to act under this resolution, the D.C. District Court found that the House did not have standing to sue for improperly amending the ACA, but it did have standing to pursue the claims that the administration had violated the Constitution by spending funds Congress did not appropriate.[120]

More recently, the U.S. Court of Appeals for the D.C. Circuit, sitting en banc in *Committee on the Judiciary of the U.S. House of Representatives v. McGahn*, held that the House Judiciary Committee, acting on behalf of the full House of Representatives, had standing to seek judicial enforcement of

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116 *Gundy*, 354 U.S. at 528-29.

117 United States v. Am. Tel. & Tel. Co. (AT&T), 551 F.2d 384, 391 (D.C. Cir. 1976) ("It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.").

118 *See* Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 20-21 (D.D.C. 2013); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 68 (D.D.C. 2008).

119 H.R. Res. 676, 113th Cong. (2014).

120 U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 76 (D.D.C. 2015). The Obama Administration appealed the case, but the suit was stayed and eventually settled, leaving the district court's decision in place. The Supreme Court later raised questions about the capacity of a single house of a bicameral legislature to sue in *Virginia House of Delegates v. Bethune-Hill*, but the case was focused on a peculiar state-specific situation. 139 S. Ct. 1945, 1950 (2019) (concluding that "the House, as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part").

its duly issued subpoena.[121] And in *U.S. House of Representatives v. Mnuchin*, the U.S. Court of Appeals for the D.C. Circuit found that the House had standing in a case alleging that the executive branch violated the Appropriations Clause and Administrative Procedure Act (APA) when transferring funds to build a physical barrier along the southern border of the United States.[122]

In short, a resolution of one or both houses of Congress could authorize a congressional committee to sue to challenge international agreements that raise questions under the major questions doctrine or nondelegation doctrine. For instance, one or both Houses might challenge the conclusion of an ex ante congressional–executive agreement that they think raises a major question and thus is not a proper exercise of delegated authority. Indeed, had the case law reviewed in this Article been as developed then as it is today, one could imagine that members of Congress might have mounted a challenge in court to the Iran Nuclear Deal instead of passing the Iran Nuclear Agreement Review Act, which suspended authority that Congress had previously delegated to the President to waive U.S. sanctions on Iran while Congress reviewed the draft Iran nuclear deal.[123] In the event of such a challenge, the courts would then decide whether the international agreement or the congressional statutes used to implement it run afoul of the new major questions doctrine or the nondelegation doctrine.

III. THE DISTINCTIVE FEATURES OF DELEGATIONS FOR INTERNATIONAL AGREEMENTS

While Part II outlined possible major questions doctrine and nondelegation challenges to international agreements and statutes used to implement such agreements, this Part argues that courts should refrain from using such doctrines to invalidate existing agreements or the authorities used to implement existing agreements. International agreements differ from other exercises of executive power in a variety of ways that make policing them with the major questions doctrine or nondelegation doctrine problematic both as a practical matter and for reasons of international relations and international law. Moreover, the Supreme Court's own opinions support greater tolerance for broad delegations in cases that involve foreign relations than in those that do not. Finally, the lack of congressional oversight over some of the delegations supporting international agreements traces

121 968 F.3d 755, 760 (D.C. Cir. 2020) (en banc). The en banc court remanded the case back to the original panel for further proceedings in light of its decision that the Committee had standing under Article III of the Constitution. *Id.* at 778.

122 976 F.3d 1, 13-15 (D.C. Cir. 2020), *vacated as moot*, 142 S. Ct. 332.

123 42 U.S.C. § 2160e (authorizing Congress to review nuclear agreements with Iran).

directly to the Supreme Court's decisions in *INS v. Chadha* and *Alaska Airlines v. Brock*.[124] The Court should not attempt to remedy a problem of its own making by infringing further on the practice established by the political branches.

A. *International Agreements Involve Negotiations with Another State*

Perhaps the most basic difference between delegations for domestic and international purposes is that delegations of authority for international purposes involve other sovereign states. That is particularly true of delegations for the purposes of concluding international agreements.

When a diplomat or other government official working for the executive branch negotiates an international agreement with a foreign state, that process is often time-consuming, intensive, and entails a range of tradeoffs and compromises for each side. The text that results represents the best effort of each side to achieve their cooperative ends, given their individual aims and constraints. Once the process of negotiation is complete, it is extraordinarily difficult to reopen. Doing so is much like striking a bargain to purchase a car, signing the paperwork, and then seeking to reopen discussions over the price when it is time to drive the car off the lot. In short, it is highly unlikely to work—and even raising the issue could upset everyone involved.

Not only is a deal, once struck, difficult if not impossible to reopen, but the contours of a deal are impossible to know in advance. This, then, is one reason why Congress simply cannot delegate authority to make and implement international agreements with the same level of specificity as it does when making wholly domestic delegations: international agreements, by definition, involve negotiations with another sovereign state about which the U.S. Congress lacks key knowledge and over which the U.S. executive branch lacks control. Introducing the major questions doctrine or nondelegation doctrine into this complex process could have a chilling effect on diplomats on both sides—discouraging them from doing the hard work of finding common ground given the possibility that the rug could be pulled out from under them by the Court.

The Supreme Court took precisely this view in *United States v. Curtiss-Wright Export Corp*.[125] There, the Supreme Court rejected a nondelegation challenge to a congressional joint resolution that authorized the President to prohibit the sale of arms and munitions to countries (namely Bolivia and Paraguay) involved in the Chaco War if he found that doing so would

124 *See infra* Section III.D.

125 299 U.S. 304 (1936).

"contribute to the reestablishment of peace between those countries."[126] This case has become a landmark establishing a broad scope for the President's foreign affairs powers.

Sutherland, writing for the Court, noted that treaty negotiations involve an array of challenges and tradeoffs that make it impossible for Congress to participate or specify terms in advance.[127] He explained, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."[128] Sutherland acknowledged that under Article II, the President makes treaties with the advice and consent of the Senate, "but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[129]

Foreign affairs differ from domestic affairs, Sutherland explained, in ways that mean a greater degree of freedom often must be granted to the President:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[130]

When the President is authorized by legislation, Sutherland explained, "to act in respect of a matter intended to affect a situation in foreign territory," the President's action (or inaction) "may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations."[131] The Court thus noted the "unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."[132] In short, the Court made clear that foreign affairs are distinctive in that specific delegations are often neither possible nor desirable. Whatever one's view of foreign affairs exceptionalism more generally, it is undeniable that there are distinctive

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126 *Id.* at 312; *see also* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 103-04 (1999) (providing background on *Curtiss-Wright*).

127 Curtiss-Wright, 299 U.S. at 319.

128 *Id.*

129 *Id.*

130 *Id.* at 320.

131 *Id.* at 321.

132 *Id.* at 321-22.

challenges to negotiating and concluding international agreements that make specific delegations by Congress to the Executive difficult, if not impossible.

B. *International Ramifications*

Reliance on the nondelegation doctrine or major questions doctrine to invalidate international agreements or legislation used to implement them could have significant negative international repercussions for the United States. Prominent among these risks is that courts could cause the United States to violate international law, potentially subjecting the country to retaliatory countermeasures as well as reputational harm that could significantly impair future diplomatic relations.

Consider what happens internationally if a court declares an international agreement—or domestic statutory authority that the President has used to implement an international agreement—invalid on the basis of the nondelegation doctrine or the major questions doctrine. In either case, the court's action does not terminate the United States' obligations as a matter of international law. The international agreement would remain in force for the United States unless or until the President terminated it internationally.

The President would face several options, none of them attractive. The President could decline to terminate the agreement, but in doing so, he would open the United States to charges that it is violating the agreement by failing to implement it and thereby risk exposing the United States to countermeasures by injured foreign states.[133]

Alternatively, the President might terminate the international agreement, but that approach, too, risks violating international law. One potential problem is timing. Many international agreements to which the United States is a party include termination provisions, but such provisions typically include a waiting period, requiring a state to give notice of its intent to withdraw from a multilateral treaty or terminate a bilateral one some months prior to the withdrawal or termination taking effect. Most executive agreements include such a provision. For example, the Agreement Between the Department of Defense of the United States of America and the Department of the Navy of the United Mexican States Concerning Security Measures for the Protection of Classified Information, an ex ante congressional–executive agreement, provides that it shall remain in force "unless one of the Parties notifies the other Party in writing through diplomatic channels 90 days in advance of its intention to terminate the

133 Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, arts. 49–53, Rep. of the Int'l Law Comm'n on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 129-37 (2001) (describing the conditions under which states may resort to countermeasures and limitations on such countermeasures).

Agreement."[134] Sole executive agreements, too, typically have withdrawal periods. For instance, the Agreement between the United States of America and the Government of the Republic of Botswana Concerning the Operation of a Seismic Monitoring Station in Botswana requires a six-month advance written notice to terminate the agreement.[135]

For treaties that do not include a termination or withdrawal provision, the Vienna Convention on the Law of Treaties (VCLT) specifies that denunciation or withdrawal is permissible *only* if "it is established that the parties intended to admit the possibility of denunciation or withdrawal" or if "a right of denunciation or withdrawal may be implied by the nature of the treaty."[136] Even then, there is a temporal restriction on withdrawal, namely that "[a] party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty."[137] A President who withdrew the United States from an international agreement from which withdrawal was not permitted at all would clearly violate international law. So too could a President who reacted promptly to a domestic court decision. A President who terminated an international agreement immediately in accordance with a U.S. court decision would likely run afoul of the timing requirements imposed by international law. It is not clear that such an outcome could be avoided. Would a U.S. court stay its ruling for a period of time to permit the executive branch to comply with the timing requirements? Such an option seems unlikely, if it would even be within the court's power.

Another international law problem could come from the *reason* for termination or withdrawal, rather than from the fact of or the timing of it. Although some international agreements allow termination or withdrawal for any reason (after the appropriate notice period), not all agreements permit such easy, reason-free exit. For those agreements, the VCLT specifies a

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134 Agreement Between the Department of Defense of the United States of America and the Department of the Navy of the United Mexican States Concerning Security Measures for the Protection of Classified Information, Mex.-U.S., art. 22(c), Sept. 15, 2008, T.I.A.S. No. 08-915 [https://perma.cc/HGC5-VLWT].

135 Agreement between the Government of the United States of America and the Government of the Republic of Botswana Concerning the Operation of a Seismic Monitoring Station in Botswana, Bots.-U.S., art. 18, Feb. 16, 2000, T.I.A.S. No. 00-216, https://www.state.gov/wp-content/uploads/2019/02/00-216-Botswana-Arms-Control-Seismic-Monitoring-10.14.1999.pdf [https://perma.cc/QW3N-CUTQ].

136 Vienna Convention on the Law of Treaties, art. 56(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The United States is not a party to the VCLT but has recognized that many of its provisions reflect customary international law. *See, e.g.*, STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 2 n.13 (2023), https://sgp.fas.org/crs/misc/RL32528.pdf [https://perma.cc/NTM2-NNJR] ("Although the United States has not ratified the Vienna Convention, courts and the executive branch generally regard it as reflecting customary international law on many matters.").

137 VCLT, *supra* note 136, art. 56(2).

number of permissible grounds justifying treaty termination or withdrawal, including, for example, breach by a treaty party, impossibility of performance, and fundamental change of circumstances.[138] None of them encompass a domestic court ruling that the agreement is invalid on the basis of internal law or a determination that the domestic legal authorities used to implement the international agreement are unlawful as a matter of domestic law. Indeed, the VCLT specifically precludes reliance on internal law as grounds to denounce a treaty as invalid.[139] Article 46(1) of the VCLT specifies:

> A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.[140]

The VCLT further defines a "manifest" violation as one that "would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."[141] Even if some might argue that the nondelegation or major questions doctrines are "of fundamental importance," it would be hard to claim that a violation of one of them would have been "manifest" at the time the United States concluded many of its international agreements, particularly those concluded after the nondelegation doctrine fell into desuetude and before the Supreme Court even developed the major questions doctrine.

In addition to these potential international law violations, there could be international political ramifications for the United States as well. Having the United States forced by domestic court decisions to violate or withdraw from its international commitments upsets foreign partners' reliance interests and undermines the reliability of the United States as a partner in international agreements. These disruptions in international relations are all the more salient because they might occur over the objections of the President and Congress—the political branches with responsibility for U.S. international agreement-making.[142] Judicial disruption of international agreements concluded or implemented with delegated authority risks rendering executive agreements unreliable, with potentially serious consequences for the

138 *Id.* arts. 60–62.

139 *Id.* art. 46.

140 *Id.* art. 46(1).

141 *Id.* art. 46(2).

142 *Cf.* Goldwater v. Carter, 617 F.2d 697, 706 (D.C. Cir. 1979) ("[O]ut of all the historical precedents brought to our attention, in no situation has a treaty been continued in force over the opposition of the President.").

willingness of other countries to negotiate agreements with the United States going forward.[143]

Finally, it is worth noting that the application of the major questions doctrine or nondelegation doctrine to a single international agreement could have implications far beyond that individual agreement. The precedent such a decision would set would call into question thousands of international agreements. And it would be infeasible for the executive branch to repair that broader damage by seeking legislation to more expressly delegate authority to it to conclude those agreements anew. The result, then, would be catastrophic for U.S. foreign relations.

C. *Historical Gloss*

In addition to the legal and practical difficulties discussed in the prior two Sections, significant Supreme Court precedent supports treating foreign affairs-related delegations differently from their more domestically focused counterparts.[144] This historical practice, or "historical gloss," in favor of allowing broader and less specific delegations of authority from Congress to the President on issues related to foreign relations encompasses the international agreements-related delegations that this Article addresses.

Even at the height of the nondelegation doctrine's power in the 1930s, the Supreme Court that invalidated domestic delegations applied a decidedly different approach to delegations that it determined involved foreign relations. Justice Sutherland, who voted to invalidate several domestically focused statutory provisions on nondelegation grounds in 1935, wrote the foundational decision justifying a different approach to foreign relations the very next year.[145] As noted above, in *United States v. Curtiss-Wright Export*

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143 There is a robust literature about the importance of reputation in international law. *See, e.g.*, ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71-118 (2008) (arguing that even rational and selfish states are motivated to comply with their international legal commitments by concerns about their reputation); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S97 (2002) (examining the role of reputation in motivating compliance with international law); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 533 (2005) (examining the role of reputation as part of an integrated theory of international law); *see also* William S. Dodge, Chevron *Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911, 949-50 (2017) (arguing for deference at *Chevron* step two to agencies' interpretation of statutes' geographic scope on the grounds that agencies are better situated than courts to understand international ramifications).

144 *See, e.g.*, Field v. Clark, 143 U.S. 649, 691 (1892) ("[I]n the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.").

145 *See* White, *supra* note 126, at 101 (discussing Sutherland's votes to invalidate New Deal statutes on nondelegation grounds).

Corp., the Supreme Court rejected a nondelegation challenge to a congressional joint resolution that authorized the President to prohibit the sale of arms and munitions to countries involved in the Chaco War.[146] Sutherland framed the constitutional question as resting on the distinction between internal and external affairs. He noted that it was "unnecessary to determine" whether the statute would have been "an unlawful delegation of legislative power to the Executive" if it had involved "solely . . . internal affairs" because "[t]he whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs."[147] The question at issue, he explained, was: "assuming . . . that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?"[148] The Court answered yes.

Sutherland emphasized the "fundamental" "differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs."[149] He explained that:

> if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[150]

Sutherland pointed to what he called the "unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed."[151]

Substantial historical gloss supports the differential treatment of foreign affairs-related delegations. Although *Curtiss-Wright* crystallized the tolerance of broad delegations in foreign relations, it had antecedents.[152] Sutherland's

146 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 312 (1936); *see also* White, *supra* note 126, at 103-04 (providing background on *Curtiss-Wright*).

147 *Curtiss-Wright*, 299 U.S. at 315.

148 *Id.*

149 *Id.*

150 *Id.* at 320.

151 *Id.* at 321-22.

152 *See* CURTIS A. BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS: CONSTITUTIONAL AUTHORITY IN PRACTICE ch. 8 (forthcoming 2024) (discussing the long-standing practice of broad delegations in foreign relations and rejection of nondelegation challenges to them); White, *supra* note 126, at 4-5 (describing *Curtiss-Wright* as "the culmination of a trend that had begun at least sixteen years earlier and had been urged by commentators two decades before" and concluding that "by the late 1930s federal executive hegemony in foreign relations had become constitutional orthodoxy").

opinion relied on long-standing congressional practice of broad delegations in foreign relations.[153] In subsequent decades, the Supreme Court has continued to set different standards for congressional actions related to foreign relations,[154] albeit based on somewhat different justifications than those offered by Sutherland.[155] For example, in *Dames & Moore v. Regan*, the Supreme Court considered a challenge to the executive branch's implementation of an executive agreement that the United States negotiated with Iran to end the Iran hostage crisis.[156] In applying Justice Jackson's tripartite *Youngstown* framework to evaluate whether the President's actions were authorized by Congress, the Court pointed to the specificity with which Congress must act when legislating with respect to foreign relations as opposed to domestic matters.[157] Writing for the Court, Chief Justice Rehnquist explained that "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," and that Congress's "failure . . . 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."[158]

As discussed in Part I, Justice Gorsuch's dissent in *Gundy v. United States* suggests that proponents of the nondelegation doctrine are prepared to continue the Court's historical practice of treating delegations involving

153 *Curtiss-Wright*, 299 U.S. at 324 ("Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.").

154 *See* BRADLEY, *supra* note 152, at ch. 8 (cataloguing numerous historical and contemporary examples of broad delegations from Congress to the President in foreign affairs and the rejection of nondelegation challenges to such delegations); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1917 (2015) ("From the 1930s forward, exceptionalism dominated foreign relations law, but not on the exact foundations that Sutherland had offered.").

155 The theory of extra-constitutional sovereignty that Sutherland used as one justification for his distinction between foreign relations-related and domestic delegations has provoked significant criticism. *See, e.g.*, Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000) (providing an originalist argument against Sutherland's extraconstitutional sovereignty theory); Sitaraman & Wuerth, *supra* note 154, at 1917 & n.86 (noting criticism of Sutherland's theory and collecting critical sources); White, *supra* note 126, at 108-09 (critiquing Sutherland's theory about the "extraconstitutional" source of the U.S. government's foreign relations powers).

156 453 U.S. 654 (1981).

157 *Id.* at 678 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

158 *Id.* at 678 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)).

foreign affairs differently from other kinds of delegations.[159] Doing so would offer a modern echo of the New Deal era, when the Justices who took a narrow view of the permissibility of domestic delegations were the same ones offering wide scope for congressional delegations and executive action in the foreign relations arena.[160]

D. *The Potential to Exacerbate Court-Created Disruptions*

In considering whether delegations by Congress to the executive branch relating to international agreements run afoul of the major questions doctrine or reinvigorated nondelegation doctrine, courts would be well advised to bear in mind the last major ruling that had a significant—and likely unintended—impact on foreign affairs delegations: *INS v. Chadha*.[161] Indeed, it is not an exaggeration to say that the current system for making international agreements is as reliant as it is on broad delegations of authority by Congress to the executive precisely because of the Court's earlier intervention in *Chadha*. In other words, the delegation problem, if there is one, is arguably one of the Court's own making.[162]

Let us explain: *INS v. Chadha* presented the Court with a challenge to the legality of the "legislative veto"—a procedure that allows one or both houses of Congress to nullify (or "veto") an administrative regulation or action.[163] The Court held that the one-House veto of executive actions was an exercise of legislative power that violated the separation of powers by bypassing bicameralism and presentment.[164] The Court's decision upended foreign relations law in the United States. Justice White's dissent had given a preview

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159 *See infra* notes 176-179 (discussing Gorsuch's *Gundy* dissent); *see also* Eichensehr & Hwang, *supra* note 112, at 586 n.184 (discussing the implications of changes in administrative law for foreign relations law).

160 *See* White, *supra* note 126, at 119 ("[T]he same majority of Justices that actively resisted the extension of national powers in the domestic arena in the late 1930s had already committed themselves to a potentially much broader extension of national powers in the arena of foreign affairs.").

161 462 U.S. 919 (1983).

162 *See* Kristen E. Eichensehr, *The* Youngstown *Canon: Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1274-75 (2021) (discussing how *Chadha* and the Court's decision to sever legislative vetoes from underlying delegations in *Alaska Airlines v. Brock* upset the balance of powers between Congress and the executive). The conventional wisdom about *Chadha* has its critics. Curtis Bradley, for example, "argues that the availability of the [legislative] veto was less important before *Chadha*" than legal scholars "commonly assumed." Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439, 441 (2021). Yet whether the concern is overstated or not, it is clear that Congress changed its delegations as described herein in response to the decision and that change led to broader delegations than existed before it. *See infra* text accompanying notes 165-172.

163 *Chadha*, 462 U.S. at 951-52.

164 *Id.* at 956-59.

of the problem, citing fifty-six separate legislative veto provisions across fifteen major foreign affairs laws, including several legislative authorizations to the President to enter into international agreements.[165] A search of the U.S. Code Annotated revealed ninety-nine provisions that contained or once contained legislative veto provisions similar to those found unconstitutional in *Chadha*, forty-two of them with some foreign or international aspect.[166]

Rather than reinforcing the separation of powers, the decision has had the opposite effect. At the time of the decision, many of the express delegations of authority to the executive to conclude international agreements included a legislative veto to temper the delegation. Typically, the statute granted the executive branch authority to negotiate an agreement, but the negotiated treaty had to be submitted to Congress prior to entering into force. Congress then had a period of time—usually sixty days—to decide whether to disapprove the agreement through a one-house or two-house veto. If Congress did not act (which it typically did not), the agreement would enter into effect. Congress responded to *Chadha* by stripping the legislative vetoes from the laws, leaving behind bare—and vast—delegations of international lawmaking authority.[167]

To take another important example: the War Powers Resolution (WPR) provides that Congress may suspend hostilities if it directs that the armed forces be removed "by concurrent resolution."[168] However, the *Chadha* decision has led many to conclude that Section 5(c)'s legislative veto is unconstitutional.[169] *Chadha* thus eliminated the WPR's key enforcement mechanism, leaving Congress impotent when presidents wage war in violation of the Resolution and the Constitution.[170] A similar dynamic plagues the international agreement context: Incapable of revisiting every law that delegated authority to the President conditioned on a legislative veto

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165 *Id.* at 1003-13 (White, J., dissenting).

166 Hathaway, *supra* note 70, at 198.

167 *See id.* at 201 ("Congress responded in most cases either by eliminating the veto provision altogether, as it had in the case of the Foreign Assistance Act of 1961, or by rewriting it to require the full legislative process in place of the veto.").

168 50 U.S.C. § 1544(c).

169 *See Article I: Reforming the War Powers Resolution for the 21st Century: Hearing Before the H. Comm. on Rules*, 117th Cong. 10 (2021) (statement of Rebecca Ingber, Professor of Law, Cardozo School of Law) ("Many have understood the result of *Chadha* to include an effective neutering of this enforcement provision in the War Powers Resolution.").

170 *Id.* at 39 (statement of Tess Bridgeman, Co-Editor-in-Chief, Just Security). Congress subsequently enacted a separate provision creating an expedited procedure for congressional consideration of a joint resolution directing removal of U.S. forces from hostilities, but joint resolutions, which comply with *Chadha's* bicameralism and presentment requirements, are subject to presidential veto. *See* 50 U.S.C. § 1546a; LOUIS FISHER, CONG. RSCH. SERV., RS22132, LEGISLATIVE VETOES AFTER *CHADHA* 2 (2005), www.loufisher.org/docs/lv/4116.pdf [https://perma.cc/22L9-AYX3] (explaining the passage of 50 U.S.C. § 1546a in response to *Chadha*).

giving Congress final say over whether a given agreement would enter into effect, Congress stripped out the vetoes, leaving large unconstrained delegations in place.[171] This had the effect of expanding presidential discretion and control, rather than, as many had expected, constraining it.[172]

While *Chadha* was not initially thought of as a foreign affairs case, its impact has been most keenly felt in foreign affairs in ways the Court never anticipated. This history ought to give the Court pause before intervening in the delegation of powers from Congress to the President in the area of foreign affairs again.

IV. THE WAY FORWARD

If using the major questions doctrine and nondelegation doctrine to police delegations with respect to international agreements is not the right approach, then what is? This Part addresses each of the three branches and proposes steps they can take with respect to both existing and future international agreements.

A. *Courts*

For judges who are concerned about the scope of congressional delegations (or at least about the Supreme Court's direction on such delegations), but also persuaded by the arguments made in Part III about why international agreements are different, the most straightforward approach is to carve out international agreements from the general application of the major questions doctrine and the nondelegation doctrine. Doing so would be consistent with "foreign affairs exceptionalism"—an approach that "distinguishes sharply between domestic and foreign affairs"[173] and holds that "the usual constitutional restraints on the federal government's exercise of power do not apply in the area of foreign affairs."[174]

As explained above, substantial Supreme Court precedent and historical gloss, including *Curtiss-Wright* and *Dames & Moore*, support treating foreign relations-related cases and issues differently than purely domestically focused

171 Hathaway, *supra* note 70, at 200-01.

172 *Id.* at 254 ("When Congress responded to *Chadha* by simply removing the legislative vetoes, it left in place broad delegations that Congress never intended to leave unsupervised."); Eichensehr, *supra* note 162, at 1275 (noting that *Chadha* and *Alaska Airlines* "locked in delegations to the executive that Congress had intended to subject to ongoing congressional monitoring and clawback").

173 Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 461 (1998).

174 Curtis A. Bradley, Breard*, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51 (1999); *see also* Sitaraman & Wuerth, *supra* note 154, at 1907-08 (describing foreign affairs exceptionalism as the idea that "domestic and foreign affairs-related issues are analyzed in distinct ways as a matter of function, doctrine, or methodology").

ones.[175] Whatever one may think of these precedents, they suggest that the Court, operating on its own terms, ought to treat international agreements differently. Similarly, and more recently, Justice Gorsuch's dissent in *Gundy* suggests that proponents of the nondelegation doctrine are willing to treat foreign relations-related delegations in an exceptionalist fashion. One of the areas Gorsuch identifies where delegations would remain permissible, even with a reinvigorated nondelegation doctrine, is where "Congress's legislative authority . . . overlaps with authority the Constitution separately vests in another branch," citing *Curtiss-Wright* and *Youngstown* and specifically noting that "many foreign affairs powers are constitutionally vested in the president under Article II."[176] In addition, Justice Gorsuch would permit congressional delegations where the exercise of the delegated authority depends on executive factfinding.[177] He gives yet another foreign relations-related example to illustrate this exception: "During the Napoleonic Wars, . . . Britain and France each tried to block the United States from trading with the other."[178] In response, Congress passed "a statute instructing that, if the President found that either Great Britain or France stopped interfering with American trade, a trade embargo would be imposed against the other country."[179] The Court, Gorsuch noted, upheld the law, permitting the legislature to express its discretion *conditionally*.

Taken together, Gorsuch's suggested exceptions would cover most, if not all, delegations involving international agreements. International agreements necessarily involve foreign relations and, at least at the negotiation stage, communications with foreign governments—areas of presidential power. Some international agreements, like commercial agreements, will fall within areas of shared presidential and congressional power. For sole executive agreements or nonbinding agreements that the President has authority to conclude alone, executive reliance on delegated authorities for implementation suggests that they, too, relate to areas of shared constitutional authority. Where the President has some independent authority to act—as he almost always will with respect to the negotiation, and sometimes conclusion, of international agreements—"the delegation can in effect be combined with the President's own authority, and there is less concern that the President is acting in place of Congress."[180]

175 *See supra* Section III.C.

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

177 *Id.* at 2136 ("[O]nce Congress prescribes the rule governing private conduct, it may make the application of that rule depend on the executive fact-finding.").

178 *Id.*

179 *Id.*

180 BRADLEY, *supra* note 152, at ch. 8. Professors Bradley and Goldsmith agree that the President's independent "power over negotiation of international agreements" means that the

In addition, many authorizations to conclude congressional–executive agreements expressly or implicitly rely on executive factfinding. Consider one of the earliest statutes expressly delegating significant authority to the President to conclude congressional–executive agreements: the McKinley Tariff Act of 1890. That Act provided that sugar, molasses, coffee, tea, and raw hides would be on the free list (those that pay no duty) unless the President determined that the exporting country had imposed unjust and unreasonable duties on American products.[181] The provision was understood to authorize the President to conclude reciprocal free trade agreements with other countries, and many such agreements followed.[182]

Although Gorsuch's *Gundy* dissent addresses only nondelegation, his reasoning logically applies to the major questions doctrine as well. The major questions doctrine's foundational interpretive presumption that Congress does not intend to or would not wish to delegate substantial authority and discretion to the executive clearly does not hold with respect to statutory delegations related to international agreements. As explained in Part II, Congress has a long history of broad delegations to the executive regarding international agreements—a historical gloss bolstered by the Supreme Court's own precedents permitting, and indeed enforcing, such delegations.[183]

The competing approach to foreign affairs exceptionalism, set out most prominently by Ganesh Sitaraman and Ingrid (Wuerth) Brunk in 2015, is "normalizing" foreign relations law toward a baseline of domestic administrative law.[184] One of the main critiques of exceptionalism that scholars have lodged involves the boundary problems inherent in the idea of foreign affairs exceptionalism. In particular, scholars have questioned the

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nondelegation doctrine should not disrupt congressional–executive agreements. Bradley & Goldsmith, *supra* note 94, at 1786.

181 Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 567, 612; *see* H.R. REP. NO. 51-1466, at 14-15 (1890).

182 *See* Hathaway, *supra* note 69, at 1293-94 ("[T]he McKinley Act also embodied a new provision that authorized the President to negotiate reciprocal agreements with foreign nations.").

183 *See supra* Section III.C. In their article for this symposium, Professors Bradley and Goldsmith note that they agree with us "that congressional-executive agreements should not be subject to the major questions doctrine," and they share some of our reasons for this view, including the "strong functional need for broad delegation in the agreement-making sphere," and "long historical practice . . . of Congress authorizing presidents to make congressional-executive agreements with limited specified guidance." Bradley & Goldsmith, *supra* note 94, at 1797-98; *supra* Sections III.A & III.C.

184 Sitaraman & Wuerth, *supra* note 154, at 1958-74. Of course, domestic administrative law doctrines have changed dramatically since 2015. The shifts highlighted in Part I toward restricting delegations and decreasing deference to agencies' statutory interpretations may put greater pressure on proponents of normalization to disentangle whether normalization requires tying foreign relations to the moving target of administrative law, even if that means substantially decreasing deference to the executive branch on foreign relations questions. This may be particularly challenging in a post-*Chevron* world.

extent to which judges can determine that some statute or executive action is foreign relations-related versus domestic.[185] In a recent article that considers the implications of the major questions doctrine for national security, Timothy Meyer and Ganesh Sitaraman argue for the "inevitable failure of foreign affairs exceptionalism" because of the difficulties inherent in determining whether—and, if so, how—the economic national security statutes on which they focus involve foreign relations or not.[186]

These scholars make powerful points about "foreign affairs exceptionalism" in general.[187] Yet many of these arguments carry less weight when it comes to the narrower version of exceptionalism we endorse here—call it "international agreements exceptionalism." Wherever one stands on the debate over foreign affairs exceptionalism in general,[188] international agreements exceptionalism is narrower and more defensible, for many of the reasons discussed in Part III. In addition, the presence of an international agreement is determinative evidence that foreign relations are at issue,[189] as well as an enormous red flag with respect to the international ramifications of invalidating the agreement itself or the statutory authority used to implement it. And courts will not need to guess about whether an international agreement is involved in a particular case. The executive branch, as well as other parties, will inform the court about the existence, importance,

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185 *See, e.g.*, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1257-62 (2006) (critiquing "boundary problems" with respect to foreign relations and noting that "[t]he foreign is not easily distinguished from the domestic"); Sitaraman & Wuerth, *supra* note 154, at 1942-44 (arguing against foreign affairs exceptionalism partly because of difficulties in determining the boundaries of foreign affairs).

186 Meyer & Sitaraman, *supra* note 20, at 81-87 (capitalization omitted). They do, however, note that despite their critiques, they "think it likely that the Court will attempt to employ foreign affairs exceptionalism to the" major questions doctrine. *Id.* at 81 n.137.

187 One of us has made related arguments. *See, e.g.*, Hathaway, *supra* note 70, at 239-41 (proposing to "normalize [U.S.] international lawmaking," but acknowledging that some differences are necessitated by the distinctive features of international lawmaking).

188 *Compare* Sitaraman & Wuerth, *supra* note 154 (arguing against foreign affairs exceptionalism and in favor of "normalization" of foreign affairs both descriptively and normatively), *with* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away From "Exceptionalism,"* 128 HARV. L. REV. F. 294, 297-301 (2015) (challenging Sitaraman and Wuerth's account of normalization), *and* Carlos M. Vázquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARV. L. REV. F. 305, 305 (2015) (same), *and* Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322, 322-23 (2015) (same).

189 Justice Scalia speculated in another context that "the possibilities of what the Federal Government may accomplish, with the right treaty in hand, are endless," including "abrogation of [the Supreme] Court's constitutional rulings." Bond v. United States, 572 U.S. 844, 878 (2014) (Scalia, J., concurring in the judgment). This is, however, highly unlikely. Foreign governments are not in the habit of creating international agreements to allow the U.S. executive to circumvent domestic legal restrictions. For a discussion of pretextual use of the Treaty Clause, see Oona Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei & Haley Nix Proctor, *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 290-304 (2013).

and international ramifications of agreements implicated in any case, even one perhaps strategically framed by challengers as domestically focused.[190]

The arguments in favor of exceptionalism are strongest with respect to the invalidation of international agreements themselves. Extending international agreements exceptionalism to encompass domestic statutes used to implement international agreements also presents a strong case for exceptionalism: failure to implement binding international agreements poses similar risks from an international law and international reputation perspective as terminating or violating the agreements. However, we recognize that in some cases, the domestic law used to implement international agreements may not otherwise appear to involve international law or foreign relations, making foreign relations exceptionalism an unusual fit. In addition, applying international agreements exceptionalism to statutes that are used to implement international agreements creates the possibility that a statute might benefit from exceptionalism if considered in a case involving an international agreement, while remaining subject to the major questions doctrine or nondelegation doctrine if considered in a different case where the statute is used for purposes other than implementing an international agreement. Such a divergence would only be possible in cases where the executive relies on statutory authority that is general—that is, not specific to implementing the international agreement. We suspect that such a situation will be fairly rare, but the Paris Climate Agreement, which the executive branch attempted to implement via authorities in the Clean Air Act, including the Clean Power Plan struck down in *West Virginia v. EPA*,[191] is a prominent example.

In such cases, we urge judges, at the very least, to consider the international ramifications of invalidating authorities necessary to the implementation of international agreements. The Court's current iteration of the major questions doctrine is, after all, a multifactor test,[192] and the international implications of invalidation should be one factor. Alternatively, taking Justice Barrett's approach from *Biden v. Nebraska*, the international ramifications of invalidating an international agreement or its implementing legislation form an important part of the context for interpreting related

190 Meyer and Sitaraman argue that if judges apply foreign affairs exceptionalism to the major questions doctrine, they will incentivize the President to use foreign affairs authorities for domestic purposes. Meyer & Sitaraman, *supra* note 20, at 85. This sort of strategic "gaming" is less of a concern with respect to the "international agreements exceptionalism" we defend here because the existence of an international agreement negotiated based on delegated authority or an international agreement implemented via delegated authorities is objectively ascertainable.

191 *See supra* Section I.C; CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 416 (7th ed. 2020) (noting that the Obama Administration planned to use the Clean Power Plan to fulfill the Paris Agreement's emissions reduction obligations).

192 *Supra* notes 47-50 and accompanying text.

delegations, and considering them would be "common sense" in light of Congress's long history of painting with a broader brush in international as opposed to purely domestic delegations.[193]

B. *Congress*

There is a role for Congress, as well. While specific instructions to the executive branch regarding the *contours* of international agreements may not be possible, as explained above, it is possible for Congress to be clearer and more specific about its intent to delegate authority to the executive to conclude and implement international agreements in the first place. Going forward, Congress should aim for greater clarity and, where possible, specificity when it envisions international agreements as part of the execution of congressional intent.

Congress has recently taken steps that demonstrate its interest in the topic and willingness to legislate on it. As part of the National Defense Authorization Act for Fiscal Year 2023, Congress enacted a new law that will provide Congress with greater visibility into how the executive currently uses its delegated authority.[194] The law makes a number of important improvements to the existing oversight system for international agreements, which was, until now, largely defined by the 1972 Case-Zablocki Act.[195] Among them, the new law requires the State Department to provide a "detailed description of the legal authority" or authorities that the executive branch believes authorize each international agreement as well as certain nonbinding agreements.[196] Moreover, citations to statutes, treaties, and the Constitution must identify the specific provisions that are relevant. These new requirements will allow Congress to better understand how its prior legislation is used to conclude agreements going forward. And it will presumably require the executive branch to be more attentive to carefully documenting the legal basis for international agreements it concludes (more on this in the next subsection).

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193 Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring); *see also* Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

194 Pub. L. No. 117-263, 136 Stat. 2395 (2022).

195 1 U.S.C. § 112b (revisions effective Sept. 19, 2023); *see* Curtis A. Bradley, Jack Goldsmith & Oona A. Hathaway, *Congress Mandates Sweeping Transparency Reforms for International Agreements*, JUST SEC. (Dec. 23, 2022), https://www.justsecurity.org/84443/congress-mandates-sweeping-transparency-reforms-for-international-agreements/ [https://perma.cc/LSH6-MRPG] (describing Congress's 2023 amendments to the Case-Zablocki Act).

196 *Id.* § 112b(a)(1)(A)(iii) (as amended).

The new legislation also requires more robust reporting of the international agreements themselves, and it includes the first legal requirement to report nonbinding agreements. As of April 2024, the State Department had not yet begun reporting agreements under the new law, making it unclear precisely how extensive reporting will be. The legislation requires the executive to report what it refers to as "qualifying nonbinding agreements"—which it defines as any nonbinding agreement that "could reasonably be expected to have a significant impact on the foreign policy of the United States"[197] or that is the subject of a written request from the Chair or Ranking Member of the House Foreign Affairs Committee or Senate Foreign Relations Committee.[198] These new transparency requirements will make clearer to Congress how its delegated authority is used to implement nonbinding agreements.

Congress could go yet a step further and adopt an "APA for International Law."[199] At present, international lawmaking is exempted from the APA because it excludes foreign affairs.[200] Congress could adopt a process of review designed specifically for international agreements. Doing so would go some distance toward insulating international agreements from challenge, as it would create a structure that clearly delegates authority to the executive to conclude agreements, while providing for significant oversight.

Even in the absence of further legislative reform, the recent Case-Zablocki Act revisions should place Congress in a better position going forward to be more explicit in its delegations to the executive branch. Doing so will make future delegations less vulnerable to challenge. It will also strengthen the legitimacy of future delegations. The process of concluding executive agreements, after all, could be seen as diluting the constitutional role of the Senate in overseeing decisions to make binding Article II treaties. Binding executive agreements are also federal law, capable of overriding inconsistent state and local law.[201] And these agreements create international legal obligations that could subject the United States to international sanctions if it fails to live up to its side of the bargain. Ensuring clarity regarding the inter-branch cooperation that led to these agreements is

197 1 U.S.C. § 112b(k)(5)(A)(ii)(I). The law exempts any agreement "that is signed or otherwise becomes operative or is implemented pursuant to the authorities relied upon by the Department of Defense, the Armed Forces of the United States, or any element of the intelligence community." 1 U.S.C. § 112b(k)(5)(B).

198 1 U.S.C. § 112b(k)(5)(A)(ii)(II). For more on these provisions, see Bradley, Goldsmith & Hathaway, *supra* note 195.

199 Hathaway, *supra* note 70, at 242-53 (proposing an "APA for international law").

200 5 U.S.C. § 553(a)(1) (stating that the rulemaking requirements do not apply to "a military or foreign affairs function of the United States").

201 RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §§ 301, 308 (AM. L. INST. 2018).

therefore wise regardless of any concerns generated by the Court's recent jurisprudence.

C. *The Executive Branch*

Last, there is a role for the executive branch in responding to the possible hurdles the emergence of the major questions doctrine and revived nondelegation doctrine might pose to its practice of concluding and implementing hundreds of binding executive agreements and nonbinding agreements each year. Its practice of concluding executive agreements on a wide range of topics has already come under increasing scrutiny. The recent legislation imposing new transparency requirements demonstrates Congress's renewed interest in the topic. Before that, the debate over the Iran Nuclear Deal showed Congress's concerns about the use of delegated authority to implement nonbinding agreements in ways Congress had not anticipated. During the Trump Administration, there was debate between Congress and the State Department over, among other things, an agreement with Mexico concerning migration.[202] That debate helped prompt the recent legislative reform.

Going forward, the executive branch should work more closely with the relevant congressional committees to ensure that agreements rest on a solid legal foundation. Doing so is the best way to be certain that their work in creating and implementing international agreements is insulated from disruption by the courts. The executive branch should also be more careful than it has been in the past to tie binding agreements to clear prior statutory authorization. And, indeed, the executive should be more cautious about concluding important binding agreements based on implied, rather than express, legal authority. This is not only a matter of good governance; failing to do so could render international agreements and implementation measures ripe for judicial challenge.

In response to heightened scrutiny by the public and the courts, there may be a temptation for the executive to shift toward doing more international agreements as nonbinding political commitments, rather than as legally binding agreements. After all, in making nonbinding commitments, the executive branch does not rely on any delegation of authority from Congress, and thus, that delegation cannot be found to be wanting. But, as we have shown, these agreements often *do* rely on delegated authority for their

202 *See* Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, Mex.–U.S., June 7, 2019, T.I.A.S. No. 19-607 (agreeing to address "entry of migrants into the United States in violation of U.S. law"); *see also* Letter from Mary Elizabeth Taylor, Assistant Sec'y, Bureau of Legis. Affs., U.S. Dep't of State, to Robert Menendez, Ranking Member, U.S. Senate Comm. on Foreign Rels. (Sept. 9, 2019) (on file with authors).

implementation. Excessive reliance on nonbinding agreements could open that regulatory pathway to greater scrutiny as well. A shift away from legally binding agreements and toward nonbinding commitments would also be undesirable from a democratic perspective, as these agreements are subject to weaker transparency requirements. Greater reliance on nonbinding agreements is thus likely to mean that more of the country's foreign affairs practice will fall outside the visibility of Congress and the American public. That, in turn, may lead to new demands for greater transparency for such agreements—scrutiny the executive has been clear it does not want.

CONCLUSION

Delegations from Congress to the executive are a crucial feature of U.S. international agreement-making, allowing the executive branch to both enter into and implement international agreements. As the Supreme Court works to reshape domestic law on delegations, the courts should proceed with caution when it comes to delegations related to international agreements. The international agreements exceptionalism that we advocate here comports with historical understandings of how foreign affairs are different. It also takes into account the practical reality that the involvement of international negotiating parties makes it impossible for Congress to delegate with the same level of specificity with respect to international agreements as it does for domestic administrative agencies. Perhaps most important of all, strict application of the major questions doctrine or nondelegation doctrine to international agreement-related delegations risks forcing the United States to violate international law.

This is not to say, however, that more cannot be done to ensure that U.S. international agreement-making and implementation are better insulated from challenge. As we have argued, Congress and the executive each have roles to play: Congress should legislate as clearly as possible when authorizing the executive to enter international agreements, and the executive branch should be careful and transparent about the authorities on which it relies. Together the political branches can go a great distance toward addressing any concerns about delegations related to international agreements, without the potential for disruption that would result from misguided intervention by the courts.

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