

LEADING CASES

CONSTITUTIONAL LAW

Article I — Separation of Powers — Nondelegation — FCC v. Consumers' Research

It's been another bad year for nondelegation.¹ Although Congress cannot delegate legislative power to other branches of government,² it can give executive agencies discretion to implement the laws it has enacted, so long as it provides an "intelligible principle."³ This doctrine has proven to be remarkably lax. The Supreme Court has only twice struck down a statute on nondelegation grounds, both times in 1935.⁴ Yet hope springs eternal.⁵ Just six years ago, commentators speculated about a nondelegation revival⁶ after four Justices signaled support for resurrecting the doctrine in *Gundy v. United States*.⁷ Once again, they were disappointed. Last Term, the Court rejected yet another nondelegation challenge in *FCC v. Consumers' Research*,⁸ holding that neither the FCC's authority to raise contributions for the Universal Service Fund (USF) nor its reliance on a private administrator for the USF violated nondelegation.⁹ Though the outcome was unsurprising, the debate between the Justices may shape future legal challenges to executive actions in the second Trump Administration. In particular, Justices who otherwise favor a stronger nondelegation doctrine have signaled support for some broad delegations where the President has substantial independent Article II authority. Other Justices with more permissive stances toward delegation hint that they could constrain executive discretion by narrowly reading statutory delegations. These distinct approaches, while not mutually exclusive, could lead to unexpected outcomes in upcoming battles before the Court ranging from tariffs and foreign affairs to immigration and border policy.

¹ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

² *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

³ *Id.* at 409.

⁴ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935); Sunstein, *supra* note 1, at 322.

⁵ See Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, REGUL. REV. (July 8, 2019), <https://www.theregreview.org/2019/07/08/hickman-nondelegation> [<https://perma.cc/X476-CT76>]; Adrian Vermeule, *Never Jam Today*, YALE J. ON REGUL.: NOTICE & COMMENT (June 20, 2019), <https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule> [<https://perma.cc/T476-NW7N>].

⁶ See, e.g., Mark Miller, *In Imperfect Gundy Decision, Supreme Court Opens Door to Strengthen Separation of Powers*, PAC. LEGAL FOUND. (June 20, 2019), <https://pacificlegal.org/in-imperfect-gundy-decision-supreme-court-opens-door-to-strengthen-separation-of-powers> [<https://perma.cc/EV47-74UY>].

⁷ 139 S. Ct. 2116 (2019); *id.* at 2130–31 (Alito, J., concurring in the judgment); *id.* at 2131 (Gorsuch, J., dissenting).

⁸ 145 S. Ct. 2482 (2025).

⁹ *Id.* at 2492.

The Communications Act of 1934¹⁰ requires the FCC to “make available . . . to all the people of the United States” reliable communication services “at reasonable charges.”¹¹ This objective, known as “universal service,” arose from the concern that a purely private telecommunications market would fail to serve rural and low-income consumers due to a lack of economic incentives.¹² Congress overhauled the universal service system in the Telecommunications Act of 1996¹³ by establishing the USF under the FCC’s administration.¹⁴ Section 254 of the Act requires private carriers to contribute to the USF¹⁵ according to a “contribution factor” set by the FCC.¹⁶ The FCC uses those funds to pay for programs such as reduced telephone bills for low-income consumers.¹⁷ The Universal Service Administration Company (USAC), “a private, not-for-profit corporation owned by an association of carriers,”¹⁸ assists the FCC by estimating the USF’s expenses and compiling the carriers’ expected total revenues, which the FCC uses to calculate the contribution factor.¹⁹

In 2022, the nonprofit Consumers’ Research, along with a carrier and several consumers, challenged the constitutionality of both the USF and USAC in a petition for review in the Fifth Circuit.²⁰ They argued that Congress’s delegation of administration of the USF to the FCC failed to provide an intelligible principle or limit the agency’s discretion in determining the contribution factor and that the FCC had violated the private nondelegation doctrine by delegating its authority to a private entity, the USAC.²¹

The Fifth Circuit panel rejected the petition.²² Writing for the panel, Judge Stewart²³ held that neither Congress’s delegation of control over the USF to the FCC nor the USF’s reliance on the USAC were unconstitutional.²⁴ The Court held that Congress had provided an intelligible principle by requiring the FCC to follow “certain enumerated principles” in § 254 of the Telecommunications Act, even while allowing

¹⁰ Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

¹¹ *Id.* § 1, 48 Stat. at 1064 (codified as amended at 47 U.S.C. § 151).

¹² *Consumers’ Rsch.*, 145 S. Ct. at 2492.

¹³ Pub. L. No. 104-104, 110 Stat. 56, 71–75 (codified as amended in scattered sections of 47 U.S.C.).

¹⁴ *Id.* § 254, 110 Stat. at 71–75 (codified as amended at 47 U.S.C. § 254); *see Consumers’ Rsch.*, 145 S. Ct. at 2493.

¹⁵ 47 U.S.C. § 254(d).

¹⁶ 47 C.F.R. § 54.709(a) (2024).

¹⁷ *Consumers’ Rsch.*, 145 S. Ct. at 2494.

¹⁸ *Id.* at 2495 (citing 47 C.F.R. §§ 54.5, 54.701(a) (2024); *Wis. Bell, Inc. v. United States ex rel. Heath*, 145 S. Ct. 498, 502 (2025)).

¹⁹ *Id.* (citing 47 C.F.R. § 54.709(a)(2)–(3) (2024)).

²⁰ *Consumers’ Rsch. v. FCC*, 63 F.4th 441, 444–45 (5th Cir. 2023).

²¹ *Id.* at 448, 451.

²² *Id.* at 445.

²³ Judge Stewart was joined by Chief Judge Richman and Judge Haynes.

²⁴ *Id.*

significant discretion.²⁵ He also concluded there was no private non-delegation issue because the USAC is “wholly subordinate[]” to the FCC.²⁶ Consumers’ Research petitioned for en banc review, which was granted.²⁷

The en banc Fifth Circuit reversed.²⁸ Writing for the court, Judge Oldham²⁹ explained that the “USF’s double-layered delegation” was unconstitutional.³⁰ He suggested that Congress “may have [unconstitutionally] delegated legislative power to FCC” because it conferred the power to “levy” mandatory “contributions,” equivalent to the “quintessentially legislative power” of taxation, “without supplying an intelligible principle to guide FCC’s discretion.”³¹ He also argued that the FCC’s use of the USAC likely violated the private nondelegation doctrine.³² But Judge Oldham declined to hold that either prong independently violated nondelegation.³³ Rather, he stated that “*the combination* of Congress’s sweeping delegation to FCC and FCC’s unauthorized subdelegation to USAC violate[d]” the Constitution.³⁴ Judges Elrod³⁵ and Ho³⁶ wrote separate concurrences and joined in full.³⁷

Judges Stewart and Higginson dissented to defend the panel decision³⁸ and criticize the majority’s “combination” theory,³⁹ respectively. The Fifth Circuit’s decision split with the Sixth and Eleventh Circuits, which had rejected essentially identical challenges.⁴⁰

The Supreme Court reversed.⁴¹ Writing for the Court, Justice Kagan explained that Congress had not unconstitutionally delegated power to the FCC nor had the FCC violated the private nondelegation doctrine.⁴² She also “reject[ed] the Fifth Circuit’s combination theory.”⁴³ Justice

²⁵ *Id.* at 448–49 (citing 47 U.S.C. § 254(b)).

²⁶ *Id.* at 451.

²⁷ *Consumers’ Rsch. v. FCC*, 72 F.4th 107, 108 (5th Cir. 2023).

²⁸ *Consumers’ Rsch. v. FCC*, 109 F.4th 743, 786 (5th Cir. 2024) (en banc).

²⁹ *Id.* at 748. Judge Oldham was joined by Judges Jones, Smith, Elrod, Willett, Ho, Duncan, Engelhardt, and Wilson.

³⁰ *Id.* at 782.

³¹ *Id.* at 756.

³² *Id.*

³³ *Id.* at 778.

³⁴ *Id.*

³⁵ *Id.* at 786 (Elrod, J., concurring). Judge Elrod was joined by Judges Ho and Engelhardt.

³⁶ *Id.* at 787 (Ho, J., concurring).

³⁷ *See id.* at 748 (majority opinion).

³⁸ *Id.* at 788–89 (Stewart, J., dissenting). Judge Stewart was joined by Chief Judge Richman and Judges Southwick, Haynes, Graves, Higginson, and Douglas.

³⁹ *Id.* at 801 (Higginson, J., dissenting). Judge Higginson was joined by Judges Stewart, Southwick, Graves, and Douglas.

⁴⁰ *See Consumers’ Rsch. v. FCC*, 67 F.4th 773, 797 (6th Cir. 2023); *Consumers’ Rsch. v. FCC*, 88 F.4th 917, 928 (11th Cir. 2023).

⁴¹ *Consumers’ Rsch.*, 145 S. Ct. at 2511.

⁴² *Id.* at 2492. Justice Kagan was joined by Chief Justice Roberts and Justices Sotomayor, Kavanaugh, Barrett, and Jackson.

⁴³ *Id.* at 2496.

Kagan began by stating that “Congress may ‘vest[] discretion’ in executive agencies to implement and apply the laws it has enacted” so long as it supplies an “intelligible principle,”⁴⁴ which requires that Congress “ma[k]e clear both ‘the general policy’ that the agency must pursue and ‘the boundaries of [its] delegated authority.’”⁴⁵ Furthermore, the degree of permissible agency discretion varies depending on “the scope of the power” conferred by Congress.⁴⁶

Justice Kagan rejected respondents’ argument that statutes that raise revenue must set a specific numeric cap or fixed rate.⁴⁷ The Court had previously rejected stricter standards for delegations of taxing power,⁴⁸ and requiring numerical limits for revenue-raising statutes would also call into question many other federal agency delegations.⁴⁹ Nor did it matter whether the contributions constituted a tax — as the respondents and dissent argued — or a fee, since, to Justice Kagan, this distinction was unworkable in practice, irrelevant to the nondelegation issue at hand, and contrary to precedent.⁵⁰

Applying the intelligible principle test, Justice Kagan then determined that § 254 both articulated a “‘general policy’ the FCC must pursue” and set binding limits on its discretion.⁵¹ First, by specifying that the fee must be “sufficient” to support universal service,⁵² the statute both set “a floor and a ceiling” on the contribution amount and imposed a “qualitative limit[] on how much” funding the FCC may raise.⁵³ Section 254 also identified both the intended beneficiaries of universal-service programs and the criteria by which to assess which services should be included.⁵⁴ Justice Kagan found these criteria to be mandatory and therefore to constrain the FCC, while still leaving discretion for the agency to balance between competing goals.⁵⁵ And neither the “evolving” definition of universal service nor the FCC’s ability to articulate additional principles beyond those listed in § 254 posed constitutional problems because any new definitions or principles must be consistent with existing statutory limitations.⁵⁶ Hence, the Court

⁴⁴ *Id.* at 2496–97 (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406, 409 (1928)).

⁴⁵ *Id.* at 2497 (second alteration in original) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

⁴⁶ *Id.* (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 2497–98 (citing *J.W. Hampton*, 276 U.S. at 409; *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220–21 (1989)).

⁴⁹ *Id.* at 2498 (discussing the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation as examples).

⁵⁰ *Id.* at 2499–501.

⁵¹ *Id.* at 2501 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

⁵² *Id.* (quoting 47 U.S.C. § 254(b)(5), (d), (e)).

⁵³ *Id.* at 2501–02.

⁵⁴ *Id.* at 2503–04 (citing provisions of 47 U.S.C. § 254).

⁵⁵ *Id.* at 2506.

⁵⁶ *Id.* (quoting 47 U.S.C. § 254(c)(1)).

concluded that the delegation from Congress to the FCC did not violate the Constitution.⁵⁷

Next, Justice Kagan held that the USAC did not violate the private nondelegation doctrine.⁵⁸ While agencies may not confer governmental power to private entities,⁵⁹ they “may enlist private parties to give [them] recommendations” so long as the agencies “retain[] decision-making power.”⁶⁰ Here, Justice Kagan held that the FCC retained decisionmaking power because it “appoints the [USAC]’s Board of Directors and approves its budget”;⁶¹ the USAC cannot “make policy” and must act “consistent with” the FCC’s rules and orders;⁶² the FCC reviews complaints against actions taken by the USAC *de novo*;⁶³ and the FCC “alone has decision-making authority” to set the contribution factor.⁶⁴ Thus, the FCC is in control “[i]n every way that matters to the constitutional inquiry.”⁶⁵

Finally, Justice Kagan dismissed the Fifth Circuit’s “combination theory” — that even if the public delegation and private delegation were separately constitutional, their combination was not.⁶⁶ She noted that the two “doctrines do not operate on the same axis” — while public nondelegation concerns executive agencies exercising legislative power, private nondelegation concerns private entities exercising governmental power.⁶⁷ Thus, an arrangement that implicates both doctrines, yet violates neither, “does not compound” to “push[] the combination over a constitutional line.”⁶⁸

Justice Kavanaugh concurred and wrote separately to argue that delegations to independent agencies raise separate Article II problems.⁶⁹ He began by observing that delegations of “policymaking authority” to the President have been a longstanding “feature of American Government.”⁷⁰ In his view, the intelligible principle test’s “staying power” is due to either a lack of viable alternatives or a fear of “diminish[ing] the President’s longstanding Article II authority to implement legislation.”⁷¹

⁵⁷ *Id.* at 2507.

⁵⁸ *Id.* at 2508–10.

⁵⁹ *Id.* at 2508 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–11 (1936)).

⁶⁰ *Id.*

⁶¹ *Id.* (citing 47 C.F.R. §§ 54.703(b)–(c), 54.715(c) (2024)).

⁶² *Id.* (quoting 47 C.F.R. § 54.702(c) (2024); Memorandum of Understanding Between the FCC and the Universal Serv. Admin. Co. 2 (2024), <https://www.fcc.gov/sites/default/files/usac-mou.pdf> [<https://perma.cc/XCF2-3VXF>]).

⁶³ *Id.* (citing 47 C.F.R. § 54.719–.725 (2024)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 2510.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2511.

⁶⁹ *Id.* at 2511–12 (Kavanaugh, J., concurring).

⁷⁰ *Id.* at 2512 & n.2.

⁷¹ *Id.* at 2515.

Justice Kavanaugh emphasized three points about the nondelegation doctrine: First, he agreed with both the majority and dissent that “the degree of [acceptable] agency discretion” is proportional to the authority conferred by Congress.⁷² Second, he argued that many of the “concerns about expansive delegations” have been addressed by other recent developments in administrative law, such as the major questions doctrine and the overruling of *Chevron*⁷³ deference.⁷⁴ Third, he stressed that nondelegation was even more limited in the arenas of national security and foreign affairs, where the President’s policy discretion is at its zenith.⁷⁵

Finally, Justice Kavanaugh explained why delegations to independent agencies are constitutionally problematic. Because independent agency heads enjoy for-cause removal protections, they are insulated from presidential control and hence unaccountable to any democratically elected branch of government despite wielding substantial authority.⁷⁶ Justice Kavanaugh suggested two solutions: First, the Court could substantially narrow or overrule *Humphrey’s Executor v. United States*⁷⁷ and subject nearly all agency heads to at-will removal by the President.⁷⁸ Second, the Court could apply a stricter intelligible principle test to independent agencies, which could include requiring independent agencies to submit proposed rules to Congress for approval.⁷⁹ Justice Kavanaugh ended by noting that this issue was not before the Court because the government had conceded that the FCC was not an independent agency.⁸⁰

Justice Jackson wrote separately in a brief concurrence to question the viability of the private nondelegation doctrine.⁸¹

Justice Gorsuch dissented.⁸² He first characterized the universal service contribution as a tax.⁸³ He then argued that the Court had historically never permitted “an executive agency to tax domestically unless Congress itself ha[d] prescribed the tax rate” because taxation was uniquely important among Congress’s powers.⁸⁴ Since § 254 specified

⁷² *Id.* (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001)).

⁷³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 387 (1984).

⁷⁴ *Consumers’ Rsch.*, 145 S. Ct. at 2515.

⁷⁵ *Id.* at 2516.

⁷⁶ *Id.* at 2517–18.

⁷⁷ 295 U.S. 602 (1935). *Humphrey’s Executor’s* days are likely numbered. See *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

⁷⁸ *Consumers’ Rsch.*, 145 S. Ct. at 2518 (Kavanaugh, J., concurring).

⁷⁹ *Id.*

⁸⁰ *Id.* “[T]he Government correctly pointed out that the FCC formally is not an independent agency because . . . no statutory text restricts the President’s authority to remove FCC Commissioners at will.” *Id.* at 2517.

⁸¹ *Id.* at 2518 (Jackson, J., concurring) (citing Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203 (2023)).

⁸² *Id.* (Gorsuch, J., dissenting). Justice Gorsuch was joined by Justices Thomas and Alito.

⁸³ *Id.* at 2525.

⁸⁴ *Id.* at 2525–26.

neither a fixed rate nor a numeric cap on contributions, Justice Gorsuch determined it violated this “historic rule.”⁸⁵

Justice Gorsuch next disputed whether § 254’s qualitative standards sufficiently constrained the FCC, finding both the concept of “universal service” and the principles codified in the statute too vague and subject to shifting interpretation to function like a numeric cap.⁸⁶ He accused the majority of “rewriting the statute” to require that the FCC fulfill *all* four of the § 254 criteria, contrary to how even the FCC had previously understood that section.⁸⁷ He also criticized the majority for ignoring two other provisions of the statute that were not subject to the limitations in § 254(c)(1).⁸⁸ He then distinguished the majority’s precedents as cases concerning not taxes but instead “fees,” which “carry a built-in intelligible principle.” They are compensation for a specific service or cost (rather than a general benefit to the public) and therefore cannot exceed the value of the “real-world cost or benefit.”⁸⁹ And he rejected the majority’s analogy to broad statutory terms like “public interest,” arguing that because the intelligible principle test was context dependent, the term “universal service” did not similarly invoke a longstanding and well-understood meaning in this particular context.⁹⁰ Finally, Justice Gorsuch lamented that while the Court had “vigorously” enforced the separation of powers in other contexts,⁹¹ its efforts in the nondelegation arena had been comparatively “feeble,” effectively allowing unelected bureaucrats to make federal law.⁹²

While *Consumers’ Research* did not inaugurate a nondelegation revolution, its implications are significant for future nondelegation challenges to executive actions taken by the Trump Administration, particularly those cloaked in foreign affairs and national security justifications.⁹³ Dicta in Justice Kavanaugh’s concurrence and Justice Gorsuch’s dissent suggest they and like-minded Justices could uphold broad delegations in foreign affairs under the President’s Article II authority.⁹⁴ By contrast, Justice Kagan’s preferred method — on display in *Consumers’ Research* — of narrowly interpreting statutes to avoid nondelegation problems suggests a different (though not necessarily

⁸⁵ *Id.* at 2526–27.

⁸⁶ *Id.* at 2527–28.

⁸⁷ *Id.* at 2529.

⁸⁸ *Id.* at 2531 (discussing 47 U.S.C. § 254(c)(3), (h)(2)).

⁸⁹ *Id.* at 2532 (citing *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 341–42 (1974)).

⁹⁰ *Id.* at 2535 (citing *Nat’l Cable*, 415 U.S. at 341).

⁹¹ *Id.* at 2538 (citing *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting)).

⁹² *See id.*

⁹³ *See, e.g., V.O.S. Selections, Inc. v. Trump*, No. 2025-1812, 2025 WL 2490634, at *22 (Fed. Cir. Aug. 29, 2025) (per curiam) (ruling that delegation of unlimited tariff authority would violate nondelegation), *cert. granted*, No. 25-250, 2025 WL 2601020 (U.S. Sep. 9, 2025).

⁹⁴ *See Consumers’ Rsch.*, 145 S. Ct. at 2516 (Kavanaugh, J., concurring); *id.* at 2538 (Gorsuch, J., dissenting).

incompatible) approach for determining the scope of executive discretion.⁹⁵ Following *Consumers' Research*, nondelegation challenges to actions such as President Trump's "Liberation Day" tariffs⁹⁶ must overcome both a deferential intelligible principle test and an expansive theory of Article II authority, but such suits could potentially find an easier path to five votes if instead presented as questions of statutory interpretation.

Justices Gorsuch and Kavanaugh noted an exception to the nondelegation doctrine in areas where the President enjoys existing independent Article II authority. Justice Kavanaugh made the point explicitly.⁹⁷ His retreat from his earlier receptiveness to nondelegation⁹⁸ is especially striking, but could be explained by his emphasis on "respect[ing] the President's Article II authority to execute the laws" and avoiding "undue judicial interference."⁹⁹ This deferential stance toward the President is also evident in his proposed solutions for delegations to independent agencies: Either presidential oversight or congressional approval is sufficient to resolve democratic accountability concerns under the current intelligible principle test.¹⁰⁰ While Justice Gorsuch is more concerned about which institution exercises lawmaking authority — namely, the legislature as opposed to the executive¹⁰¹ — he similarly recognized that "delegations posed fewer problems in the field of foreign affairs, where many 'powers are constitutionally vested in the president under Article II.'"¹⁰² Despite the permissive posture, adopting a nondelegation exception for foreign affairs would be consistent with Justice Gorsuch's

⁹⁵ See *id.* at 2506 (majority opinion).

⁹⁶ See George F. Will, Opinion, *This Tariff Court Case Could Rein in the Rampant Trump Presidency*, WASH. POST (July 25, 2025), <https://www.washingtonpost.com/opinions/2025/07/25/trump-tariffs-power-courts> [https://perma.cc/9RFS-44S5]. As of writing, the Court has consolidated two International Emergency Economic Powers Act (IEEPA) cases and scheduled them for argument on November 5, 2025. See *V.O.S. Selections*, 2025 WL 2490634, *cert. granted*, 2025 WL 2601020; *Learning Res., Inc. v. Trump*, 784 F. Supp. 3d 209 (D.D.C. 2025), *cert. granted*, No. 24-1287, 2025 WL 2601021 (U.S. Sep. 9, 2025).

⁹⁷ *Consumers' Rsch.*, 145 S. Ct. at 2516 (Kavanaugh, J., concurring).

⁹⁸ See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("Justice GORSUCH's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

⁹⁹ *Consumers' Rsch.*, 145 S. Ct. at 2514 (Kavanaugh, J., concurring).

¹⁰⁰ *Id.* at 2518; see Josh Blackman, *Justice Kavanaugh Lays Out His Roadmap in FCC v. Consumers' Research*, REASON: VOLOKH CONSPIRACY (July 6, 2025, at 18:41 ET), <https://reason.com/volokh/2025/07/06/justice-kavanaugh-lays-out-his-roadmap-in-fcc-v-consumers-research> [https://perma.cc/FZU2-NCWQ] ("[F]or Justice Kavanaugh, the accountable President, and those agencies under his supervision, can be trusted to exercise discretion.").

¹⁰¹ *Consumers' Rsch.*, 145 S. Ct. at 2538 (Gorsuch, J., dissenting) ("[T]he power to make the laws that govern our society belongs to elected representatives more accountable to the people in whose name they act."); see *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

¹⁰² *Consumers' Rsch.*, 145 S. Ct. at 2539 n.20 (Gorsuch, J., dissenting) (quoting *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting)).

position in *Gundy* and some originalist scholarship,¹⁰³ though he notably does not adopt Justice Kavanaugh’s generally deferential attitude toward the executive branch.

Following such an exception would allow strong nondelegation proponents to nevertheless uphold broad delegations in the foreign affairs arena. President Trump’s “Liberation Day” tariffs are a salient example. The President claimed authority to set tariffs under the International Emergency Economic Powers Act¹⁰⁴ (IEEPA), a statute that allows him to regulate international trade pursuant to a national emergency but does not explicitly authorize tariffs and has never previously been used for tariffs.¹⁰⁵ While plaintiffs have characterized the government’s interpretation of IEEPA as a “limitless delegation” of Congress’s taxing power,¹⁰⁶ the tariff policy could fall within a broad reading of the President’s independent Article II foreign affairs and national security powers under the views of Justices Gorsuch or Kavanaugh. This theory remains debatable on originalist terms given the ambiguity of the historical evidence.¹⁰⁷ It also clashes with the view that a strong nondelegation doctrine is a necessary counterbalance to a unitary executive.¹⁰⁸ Nor is it obvious that setting tariffs pursuant to an economic emergency sufficiently implicates the President’s independent foreign affairs powers, given Congress’s explicit foreign commerce and taxation powers under Article I.¹⁰⁹ Still, prior to the most recent challenges under the

¹⁰³ *Id.* (citing *Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting)); see, e.g., MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 334 (2020). But see Nicholas R. Parrillo, *Foreign Affairs, Nondelegation, and Original Meaning: Congress’s Delegation of Power to Lay Embargoes in 1794*, 172 U. PA. L. REV. 1803, 1808–09 (2024).

¹⁰⁴ 50 U.S.C. §§ 1701–1706.

¹⁰⁵ *Learning Res., Inc. v. Trump*, No. 25-1248, 2025 WL 1525376, at *8–10 (D.D.C. May 29, 2025).

¹⁰⁶ *V.O.S. Selections, Inc. v. Trump*, No. 2025-1812, 2025 WL 2490634, at *22 (Fed. Cir. Aug. 29, 2025).

¹⁰⁷ See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 357 (2021); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 248 (2021); Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1139 (2021).

¹⁰⁸ See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254 (2010). “[S]ome scholars argue that the concerns underlying the nondelegation doctrine are actually heightened when the authorization is made directly to the President, since . . . presidential action is not subject to the process requirements of the Administrative Procedure Act (APA).” Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. 1743, 1795 (2024).

¹⁰⁹ U.S. CONST. art. I, § 8, cls. 1, 3; see Ilya Somin, *The Constitutional Case Against Trump’s Trade War*, LAWFARE (Apr. 18, 2025, at 10:00 ET), <https://www.lawfaremedia.org/article/the-constitutional-case-against-trump-s-trade-war> [https://perma.cc/HG3M-FSLG]. But see Jack Goldsmith, *The Weaknesses in the Trump Tariff Rulings*, EXEC. FUNCTIONS (May 30, 2025), <https://executivefunctions.substack.com/p/the-weaknesses-in-the-trump-tariff> [https://perma.cc/C8UM-T8NB]. The notion of independent executive power under Article II is itself contested as a matter of original meaning. See generally Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269 (2020) (arguing that the Vesting Clause Thesis is wrong as an original matter).

Trump Administration, “lower courts ha[d] consistently rejected non-delegation challenges to IEEPA” and upheld it under the intelligible principle test.¹¹⁰ Foreign affairs deference raises yet more obstacles for litigants to overcome on top of an already lax intelligible principle test.

A more promising path may instead be indirect enforcement of non-delegation via narrowing statutory interpretation, as Justice Kagan arguably did in both *Consumers’ Research*¹¹¹ and *Gundy*.¹¹² Such a strategy is hardly new to the Court,¹¹³ but could see increased usage by Justices skeptical of broad assertions of Article II authority under the second Trump Administration.¹¹⁴ This approach would act as a species of constitutional avoidance, where the Court would construe otherwise broad statutory language to narrow the scope of the delegated authority.¹¹⁵ It could also be conceived as a kind of major questions doctrine enforcement of an underlying nondelegation concern,¹¹⁶ though Justice Kavanaugh indicated that the major questions doctrine itself may be subject to a foreign affairs exception.¹¹⁷ Even so, lower court rulings on the “Liberation Day” tariffs have already taken this approach and held that IEEPA does not permit the President to set tariffs because it does not expressly grant that power as a matter of text.¹¹⁸

Whether the Justices ultimately credit such arguments remains to be seen. A narrow statutory interpretation of IEEPA is vulnerable to

¹¹⁰ Bradley & Goldsmith, *supra* note 108, at 1783.

¹¹¹ See 145 S. Ct. at 2506; *see also id.* at 2529 (Gorsuch, J., dissenting) (arguing that “the Court eventually resorts to rewriting the statute”).

¹¹² See 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *see also id.* at 2145 (Gorsuch, J., dissenting) (accusing the plurality of “recasting the statute in a way that might satisfy any plausible separation-of-powers test”).

¹¹³ See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 242–43 (2001).

¹¹⁴ See *Consumers’ Rsch.*, 145 S. Ct. at 2501 (“The purpose of the nondelegation doctrine is to enforce limits on the ‘degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); Ilya Somin, *Nondelegation and Major Questions Doctrines Can Constrain Power Grabs by Presidents of Both Parties*, JUST SEC. (June 26, 2025), <https://www.justsecurity.org/115540/doctrines-constrain-presidents-power-grabs> [<https://perma.cc/2B3Z-LB8X>].

¹¹⁵ See Manning, *supra* note 113, at 224 (discussing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)); *see also Indus. Union Dep’t v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607, 646 (1980) (plurality opinion).

¹¹⁶ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (“[T]he Court routinely enforced ‘the non-delegation doctrine’ through ‘the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.’” (quoting *Mistretta*, 488 U.S. at 373 n.7) (second alteration in original)).

¹¹⁷ *Consumers’ Rsch.*, 145 S. Ct. at 2516 (Kavanaugh, J., concurring). Note that the major questions doctrine is a canon of statutory interpretation and not a constitutional limitation. *Id.*

¹¹⁸ See *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1373 (Ct. Int’l Trade 2025) (“[T]his court does not read the words ‘regulate . . . importation’ in IEEPA as authorizing the President to impose whatever tariff rates he deems desirable. Indeed, such a reading would create an unconstitutional delegation of power.”); *Learning Res., Inc. v. Trump*, No. 25-1248, 2025 WL 1525376, at *13 (D.D.C. May 29, 2025) (“The statutory phrase ‘regulate . . . importation,’ as used in IEEPA, does not encompass the power to tariff.”).

criticism on ordinary statutory interpretation grounds.¹¹⁹ Moreover, the nondelegation avoidance approach may very well be compatible with a foreign affairs exception or even a strong nondelegation position. After all, a Justice may seek to avoid nondelegation concerns through statutory interpretation while still recognizing a foreign affairs exception (an issue that was not squarely presented in *Consumers' Research*). And even a nondelegation revivalist like Justice Gorsuch may approve of indirect enforcement through narrowing interpretation where the statutory text is sufficiently ambiguous.¹²⁰ Given these competing tensions, *Consumers' Research* may very well presage an unusual arrangement of Justices that defies surface-level expectations about nondelegation in future cases that push the boundaries of executive power.

¹¹⁹ See Goldsmith, *supra* note 109.

¹²⁰ See *West Virginia v. EPA*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).