The Heritage Foundation

LEGAL MEMORANDUM

No. 376 | MAY 8, 2025

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

Awaiting the Nondelegation Doctrine's Return

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KEY TAKEAWAYS

This summer, the Supreme Court will decide a dispute over whether Congress has unlawfully delegated its taxing power to an executive branch agency.

The nondelegation doctrine holds that no branch of the federal government may give away its distinctive, constitutionally vested power to another branch.

If nondelegation reemerges as a limit on government power, it could curtail the otherwise unlimitable growth of the federal administrative state.

The end of mandatory judicial deference to agency legal interpretations in *Loper Bright v. Raimondo* took the federal government a step nearer to its roots in a political system in which questions big and small are matters of public debate, not bureaucratic discretion. By contracting the sphere of agency discretion, the Supreme Court ensured that a greater number of decisions must be resolved by Congress before an agency is allowed to administer the laws that result from those deliberations. To those who understand humans as naturally political, who think that an openness to politics is fundamental to the very legitimacy of democratic regimes, the Court's decision was, normatively speaking, a good thing.

But it was just *one* thing—an incremental step away from administrative governance and back toward political governance and an equivocal one at that because, as bureaucrats lost some interpretive power,

unelected judges regained some of the power they had forfeited. Now that deference has been minimized, it is necessary to pursue the problem of administrative governance closer to its source. The next logical step that the courts can take is to return to a jurisprudence that honors the principle of nondelegation.

The principle of nondelegation, or the nondelegation doctrine, holds that no branch of the federal government may give away its distinctive, constitutionally vested power to another branch. For purposes of this *Legal Memorandum*, nondelegation will stand for the more specific proposition that Congress may not give away its legislative power to the executive branch.

The nondelegation doctrine derives from constitutional principles of federalism and separation of powers, and it ranks alongside these as the most important constitutional boundary not expressly stated in the document. Collectively, these principles stand as reminders that even in written constitutions much importance necessarily attaches to the unwritten legal substrata from which the text emerges.[1] For although there is no nondelegation clause,[2] the principle of nondelegation follows naturally from the Framers' choice to create different branches of government and vest them separately with distinct forms of power.

The explicit statement that there are legislative, executive, and judicial powers implies that these powers can be used appropriately only when exercised by the designated branch. For constitutional purposes, then, power is not simply power; powers are a "they" not an "it," and while some might permissibly overlap, the presumption is that they are each exclusive. If they were not—if the Constitution contained no principle of nondelegation—then "Congress could presumably vote all powers to the President and adjourn."[3]

Even a more modest transfer of one power to another branch would tend to change the nature of the power, the nature of the branch, or—quite probably—both at once. That would seem to undermine, if not outright contravene, the Constitution's fifth article, which states that changes to the Constitution can only be accomplished via amendment, a process made intentionally difficult. Therefore, the Constitution's structure makes nondelegation quite nearly as explicit as if it had been installed in its own separate provision.

As recently as 2019, the Supreme Court seemed to reaffirm that fact, stating that the "nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[4] And yet without context, it would be terribly easy to misunderstand the significance of

that statement because for the better part of a century, all three federal branches have behaved as though the nondelegation doctrine were dormant or simply hortatory, honoring it, if at all, only in the breach. The decision to let the doctrine of nondelegation fall into disuse has been part of a gradually unfolding revolution in constitutional principles. Putatively a process of constitutional evolution needed to accommodate the complexities and exigencies of modern life, it is an undertaking in which the people, the supposed source of sovereignty, have seldom, if ever, been consulted.

Now, however, the nondelegation doctrine is poised for a revival, and the means of that revival might be *Federal Communications Commission v. Consumers' Research*, a case in which the challengers argue that Congress has unlawfully delegated its taxing power to an executive branch agency, and which the Supreme Court will decide by July 2025.[5] If nondelegation reemerges as an enforceable limit on the permissible combinations of government power, that change could justly be called a constitutional counterrevolution, striking against the evolutionary view of government that has produced, among other things, the otherwise unlimitable growth of federal administrative state.

This *Legal Memorandum* proceeds from an overview of the nondelegation doctrine and its origins to a discussion of how nondelegation drives the conflict in *FCC v. Consumers' Research* and concludes with some reflections on the relationship between American republicanism and the administrative centralization arising from the nonenforcement of the nondelegation doctrine.

The Roots Beneath "One Good Year"

Critics claim that the nondelegation doctrine has had only "one good year," implying that it emerged rootless from nowhere, was invoked by an overreaching court, and then sank back into a deserved obscurity.[6] Critics are correct that the Supreme Court last invoked nondelegation to strike down an act of Congress in 1935, but there is still much to disagree with in their narrative.

In *Panama Refining Co. v. Ryan* and *A. L. A. Schechter Poultry Corporation v. United States*, the Supreme Court struck down the National Industrial Recovery Act (NIRA) on nondelegation grounds because that law authorized the executive branch to enact "codes of fair competition" for a variety of industries.[7] By doing so, Congress had empowered the President to "enact[] laws for the government of trade and industry throughout the country," in a manner "virtually unfettered" by any governing standard.[8]

Although *Panama Refining* and *Schechter Poultry* provoked interbranch strife with the Franklin Roosevelt White House, the decisions' nondelegation holdings proved perfectly uncontroversial among the nine justices, even the most progressive of whom saw something constitutionally troubling in the NIRA's naked transfer of legislative power to the presidency. After *Schechter Poultry*, Justice Louis Brandeis, an ardent progressive in the old sense, famously told one of President Roosevelt's aides to "go back and tell the president that we're not going to let this government centralize everything."[9] Brandeis understood that the inevitable consequence of promiscuous delegation was the concentration of power in the executive branch.

Brandeis' reaction situates the nondelegation debate in a longer running contest about the proper modes of constitutional interpretation. From the time when ratification of the Constitution was being debated in the states, there has been disagreement between those who feared that the proposed charter might embarrass the national government by allotting it too little power to be effectual and those who foresaw mischief if too little provision was made against the centripetal tendencies of power. But the roots of that debate run deeper still, and a proper understanding of Americans' later efforts to adopt a written constitution can be had only if one is cognizant of the background disputes that the framing generation had with Great Britain.

The Colonies and Parliament. Beginning with the Stamp Act in 1765, the colonists and the British debated not just the general relationship between Britain and its colonies, but the specific relationship between British Parliament and colonial law. Although the American side of that debate is often summarized by the rallying cry "no taxation without representation," American criticism necessarily went further. The leading lights of British constitutional theory, Sirs Edward Coke and William Blackstone, had maintained that Parliament's sovereignty was absolute, an argument that only strengthened after Coke's time when Parliament successfully deposed one king and installed another in the "Glorious Revolution" of 1688. It was therefore within Parliament's ordinary lawmaking power to "change and create afresh even the constitution of the kingdom and of parliaments themselves."[10] Thus, in practice, Britain's unwritten constitution was only higher law until Parliament decided that it was not.

If Parliament was regarded as absolute in its ability to reframe government, then the lack of colonial representation in that body would lose much of its weight as an objection. Therefore, the Founding generation necessarily rejected the notion of absolute sovereignty to deny Parliament's taxing authority. In 1787, the Framers reaffirmed that no organ of government

would (or could) enjoy absolute sovereignty in the American system. All would be subject to the Constitution. In Article VI, they stated that the Constitution would be the "supreme law of the land," and by stating in Article V that said law could be changed only through the great public undertaking of an amendment, they placed the power to modify the constitutionally enshrined order beyond Congress's authority.

The Origin of Nondelegation. From that vein emerges the principle nondelegation. Even Chief Justice John Marshall, that inveterate expander of the federal remit, wrote that it "will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[11] The change affected by that kind of delegation would reallocate legislatively what had been vested constitutionally. That would tend to place Congress above the Constitution.

There was and remains a practical difficulty in distinguishing those powers that are purely legislative from other government activities. As Marshall formulated the matter:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[12]

The President's duty to faithfully execute the laws necessarily entails decisions about how best to implement Congress's directives. Such decisions involve a degree of discretion. And at the margins, there can be difficulty in cleanly dividing Congress's policymaking from the executive's legitimate exercise of discretion; the latter might readily shade into the former. The Framers, for their part, acknowledged that a complete separation of the branches would be unwise. Thus, they allowed for certain instances of mixed powers in the Constitution itself. The prime example of this is the President's veto power, which prevents measures with popular support from attaining the status of law.[13] The veto has nothing to do with the classically executive question of enforcement but with the antecedent legislative question of what policies become binding. Similarly, the Vice President, an executive branch official, gains by consequence of his office the status of President of the Senate, eligible to cast tie-breaking votes in legislative matters.[14]

Constitutional Allocation. These examples do not exhaust the Constitution's list, but its limited permissions for certain mixed powers give rise to an inference that those not provided for in the document are presumptively

excluded. As one scholar expressed it, "the Constitution's allocations of powers are not some set of default distributions to be traded in a Coasean fashion to reach supposedly Pareto optimal allocations."[15] Rather, the constitutional allocation is presumptively both floor and ceiling for the space in which the branches can mix until that space is renovated by amendment. The default stance, therefore, must be one of skepticism toward any novel combination of powers. Here, as much as in any question of constitutional structure, the "lack of historical precedent" indicates a "severe constitutional problem."[16]

To the extent that some admixture beyond those might be constitutionally acceptable, there must be some institution competent to pronounce when the combination is no longer consonant with the Constitution. Historically and logically, that institution is the federal courts. In his contributions to *The Federalist Papers*, Alexander Hamilton foresaw the federal judiciary as a mighty "bulwark" defending the "limited constitution" against the encroachments of the executive and legislative branches.[17] The courts would necessarily serve that role because many (though not all) of the most dangerous encroachments against the Constitution would come from the popular branches precisely because they enjoyed majority support at any given time.

The judiciary, by contrast, is capable of being a counterweight against transient majorities, and by exercising its "peculiar" expertise in "interpretation of the laws," the courts both interpose themselves as the protective "intermediate body between the people and the legislature" and keep the rival powers "within the limits assigned to their authority."[18]

Judicial Resolution. Given that framing, judicial passivity would be (and has been) particularly perverse in the nondelegation context. Both Congress and the executive stand to gain from promiscuous delegation. The former avoids responsibility for politically volatile compromises, while the latter has its sphere of unilateral action expanded. Because both benefit from the practice, neither can be a fit judge of its limits. To rephrase the old common law maxim, no branch can be a judge in its own case. Because the question is not one of mere efficiency, an appeal to the political branches' greater practical knowledge of government does not overcome the objection. Thus, the practical difficulty of drawing the line between hard cases hardly validates judicial abdication of the inquiry.

Marshall, though acknowledging that nondelegation "is a subject of delicate and difficult inquiry," never suggested that it was unsuited to judicial resolution. Instead, he inquired into "the character of the power given" by Congress and then examined its "extent."[19] In *Wayman*

v. Southard, for instance, he concluded that Congress had delegated to the courts only the power "to vary minor regulations" governing "the conduct of the officer of the Court in giving effect to its judgments" within "outlines" already established by Congress.[20] So limited, the delegation was constitutional.

Over time, however, the difficulty of conducting the inquiry made the justices embarrassed to attempt it. Prior to *Schechter Poultry*, the Supreme Court regrounded its nondelegation jurisprudence in the intelligible-principle test.[21] Intended to limit congressional delegations, that test required Congress to "lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."[22]

After *Schechter Poultry* and Roosevelt's infamous Court-packing threat, the intelligible-principle test, while unchanged in formulation, rapidly loosened in application. By the mid-20th century, the Court was blessing principles as vacuous as "public interest, convenience and necessity."[23] When platitudes qualify as limiting principles, it is no longer credible that one is enforcing any sort of boundary. Traffic departments might as well post road signs telling drivers to maintain an "advisable" speed.

Although nondelegation had fallen into desuetude before his time, Justice Antonin Scalia exemplified one line of thought that led to the doctrine's dormancy. Writing in 1980, then-Professor Scalia observed:

> [R]eferences to the doctrine have continued to crop up in Supreme Court opinions—usually as a justification for giving a statute a narrow construction, lest it be unconstitutional. Such references have increased in recent years, and the doctrine has acquired a renewed respectability.[24]

Scalia saw something useful in the influence nondelegation seemed to exert on the margins of judicial reasoning. He even expressed hope that the Court might single out and strike down one of Congress's more incontinent delegations just for the educational effect it would have on Congress.[25]

Nevertheless, he remained concerned primarily by what enforcement of the nondelegation doctrine would do to the judiciary, rather than to Congress. He considered nondelegation a "doctrine so vague" that it "is no doctrine at all, but merely an invitation to judicial policy making in the guise of constitutional law."[26] Writing from the bench less than a decade later, he reaffirmed that though "the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[27]

A man of his own institution, Scalia feared tests that conferred discretion on judges, and thus, he may have felt bound to make this concession, no matter its consequences. In his estimation, nondelegation left judges with too much to decide and too little guidance for doing so. But the consequences would be grave. As he put it:

> [T]he notion seems to have taken root that if a constitutional prohibition is not enforceable through the courts it does not exist. Where that mind set obtains, the congressional barrier to unconstitutional action disappears unless reinforced by judicial affirmation.[28]

What Scalia called a "notion" has since become a hard fact, compounded by time and evidenced by congressional insouciance about the matters it leaves to agency resolution.

An Obstacle to Evolutionary Government. Not all of the nondelegation doctrine's detractors had reservations as principled as Scalia's. Pragmatists who believed that modern exigencies demanded more dynamic, integrated government and legal realists who were sanguine about administrative agencies performing legislative functions surely hoped that nondelegation would disappear as an enforceable doctrine. It was an obstacle to imbuing government with a dynamic, evolutionary character in much the same way that strict construction of the Constitution's enumerated powers, the Necessary and Proper Clause, and the spending power had been in previous eras. It bears noting that these formalist restraints had not been defeated on the merits so much as they were overwhelmed by the pragmatic intrigues and bald assertions of ambitious men seeking to erect an "American empire."[29]

James Landis, who served as Dean of Harvard Law School and sat on the Federal Trade Commission and the Securities and Exchange Commission (SEC) during the Franklin Roosevelt Administration, spoke for many critics of the old order when in 1938, he asserted that the need for administrative governance "springs from the inadequacy of a simply tripartite form of government to deal with modern problems."[30] He went further, stating that:

> The insistence upon the compartmentalization of power along triadic lines gave way in the nineteenth century to the exigencies of governance. Without too much political theory but with a keen sense of the practicalities of the situation, agencies were created whose functions embraced the three aspects of government.[31]

Unlike more recent commentators, early progressives were under no illusions about the compatibility of their preferred schemes of governance with the constitutional framework. Agencies were natural growths responsive to an increasing public demand for government power, and their sheer naturalistic vigor was sure to burst all the artificial constraints and limiting contrivances of 18th-century politics. The irony is that as progressives sought to naturalize government into an evolutionary "organism," they sought to denature man and his society, erecting a science of administration that denied much of man's political nature and theorized that most of the problems afflicting him were technical rather than moral matters.

Agencies like the Interstate Commerce Commission had existed prior to the Progressive Era. But it was the conflict between the judiciary and the bumper crop of New Deal agencies that brought about the Court's retreat from nondelegation. The void created by that effective nonenforcement at least permitted, if it did not outright incentivize, the later proliferation of agencies managing the federal government's burgeoning safety, social, and civil rights agenda.[32]

The decades after *Panama Refining* and *Schechter Poultry* saw agencies grow in number and change in nature from adjuncts to the executive's power to enforce the laws to the semi-autonomous locus of a new, more comprehensive policymaking power. At least one scholar believes that it was the 1970s, not the Roosevelt era, that truly brought about the shift to administrative governance.[33] Only then did agencies, many of them freshly minted in response to the federal government's expanding social agenda, use Congress's broadly delegated authority to begin large-scale informal rulemaking, the executive branch's synthetic substitute for bicameral legislation. Judicial layering of agency-enabling doctrines like Chevron Deference, named for the 1984 decision,[34] fertilized agency growth, but Congress's profligate delegation of legislative power in the agencies' organic statutes was the seed.[35]

Signs of Life

Ninety years have passed since the nondelegation doctrine was last invoked to invalidate an act of Congress. Still, assertions that it is dead appear less true by the day. As a principle deeply rooted in the constitutional order, the nondelegation doctrine is unable to die so long as some pretense persists among government actors of hewing to the tripartite constitutional form. Indeed, some jurists insist that while the doctrine appears inoperative (maybe inoperable, by some lights), the principles animating it remain influential.

Major Questions Doctrine. Justice Neil Gorsuch has written that by shutting off the nondelegation doctrine, the Court unwittingly triggered "the hydraulic pressures of our constitutional system," channeling the logic undergirding nondelegation into other doctrines, most prominently, the major questions doctrine. That doctrine holds that in cases where the agency asserts authority to deal with matters of great "economic and political significance," it must "point to 'clear congressional authorization' for the power it claims."[36] "Although it is nominally a canon of statutory construction," Gorsuch explains that "we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[37] In his estimation, the Court "still regularly rein[s] in Congress's efforts to delegate legislative power"; it just uses a "different name" to characterize that effort.[38]

Major questions arose on the boundary between doctrines of deference and nondelegation. It can be used to counteract delegations that are both ambiguous and broad. Ambiguous delegations were, until recently, the stuff of Chevron Deference. Before that doctrine's demise in *Loper Bright*, a court was bound to defer to an agency's reasonable interpretation of an ambiguous law.[39] Major questions displaced that paradigm in cases of major political and economic significance, allowing courts a more searching review of the agency's asserted authority where it might otherwise have deferred.

With Chevron Deference gone, major questions still has the purpose that Gorsuch attributed to it as a means of policing broad, underdetermined delegations, those that one might criticize as lacking a principle to guide the agency's exercise of discretion. *West Virginia v. EPA*, the decision which formalized major questions as a standalone doctrine, was arguably such a case. There, the statutory phrase on which the agency's asserted authority rested—"best system of emission reduction"—presented an interpretive challenge because its sheer breadth turned judicial efforts to discern a boundary into an unseemly guessing game. The word "system" is, as the majority opinion observed, "an empty vessel" when "shorn of all context."[40]

The *Gundy* Dissent. Yet even as Gorsuch has noted the parallels between major questions and nondelegation, he has been trying to redirect the Constitution's hydraulic pressures back toward their originally intended valve. Gorsuch's dissent in the 2019 case *Gundy v. U.S.* has become the primary blueprint for those portions of the legal community seeking to revive the nondelegation doctrine. There, Gorsuch surveyed the Court's 19th-century jurisprudence for guidance and distilled from it three principles governing the doctrine's applicability. First, when "Congress makes the policy decisions when regulating private conduct, it may authorize another

branch to 'fill up the details.'"[41] "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."[42] Third and finally, "Congress may assign the executive and judicial branches certain non-legislative responsibilities," those that are incident to matters of internal executive or judicial branch management such as the judiciary's power to regulate the rules of practice before the courts.[43]

Infusing these principles into the Court's intelligible-principle framework, Gorsuch posed three questions that a court must answer in the affirmative to uphold a delegation:

1. Does the statute assign to the executive only the responsibility to make factual findings?

2. Does it set forth the facts that the executive must consider and the criteria against which to measure them?

3. And, most importantly, did Congress, and not the executive branch, make the policy judgments?[44]

Gorsuch's *Gundy* dissent carried the votes of Chief Justice John Roberts and Justice Clarence Thomas, and because only eight justices were presiding, nondelegation might have notched a victory that day had not Justice Samuel Alito decided to vote with the four Democrat-appointees, while penning a gnomic concurrence in which he stated that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[45]

Justice Brett Kavanaugh, who had recused himself from *Gundy*, wrote only a few months later that he was willing to consider Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent... in future cases."[46] Thus, as of 2019, there were five votes for reconsidering the nondelegation doctrine, an unmissable invitation to the bar to produce the proper vehicle for that reconsideration. All five of those votes remain on the Court as of 2025. Justice Amy Coney Barrett, who joined the Court after *Gundy*, has yet to offer her own views on the subject. But certain of her writings in connection with the major questions doctrine suggest an openness to the nondelegation doctrine.[47]

Momentum has only gathered since the close call in *Gundy*. In 2022, the U.S. Court of Appeals for the Fifth Circuit invoked nondelegation as one basis for striking down a portion of the Securities Exchange Act that

permitted the agency to choose whether it pursued its enforcement actions before independent federal judges or before an in-house SEC tribunal.[48] The Supreme Court granted certiorari on the nondelegation question but ultimately ruled in the challenger's favor on Seventh Amendment grounds.[49]

FCC v. Consumers' Research. In 2024, the Fifth Circuit teed up the question again in the aforementioned case of *FCC v. Consumers' Research*.[50] The theory of the case is that when Congress passed the Telecommunications Act of 1996, it unlawfully delegated its taxing power (vested by Article I, Section 8, Clause 1) to the Federal Communications Commission (FCC), which then subdelegated that power to a private industry group called the Universal Service Administrative Company or USAC.[51] The act authorizes the FCC to raise an unspecified amount of money to be spent on "universal service," i.e., providing certain communications services to rural and low-income areas.[52]

The law was Congress's bid to continue a system of subsidies available under the old AT&T monopoly in the telecoms market. The FCC raises the money for these subsidies by requiring contributions from telecoms providers, who source that money by charging fees to customers, which Consumers' Research says is a tax.[53] The rate at which customers are taxed is set quarterly by the FCC, but in practice the rate is predetermined by calculations of the commission's industry adjunct, USAC.[54]

In the 1996 Act, Congress set forth six principles governing the FCC's pursuit of universal service. These include that "[t]elecommunications services 'should' be 'available at just, reasonable, and affordable rates'; accessible 'in all regions of the Nation'; and available to 'low-income consumers and those in rural, insular, and high cost areas' at rates 'reasonably comparable to rates charged for similar services in urban areas.'"[55]

In some obvious ways the 1996 Act, which regulates only telecoms, seems far afield from the National Industrial Recovery Act's economy-striding mandate for fair competition. Congress also appeared to give several guideposts for the FCC's decision of how much money to raise, albeit none that is quantitative.[56] But Consumers' Research contends that despite the appearance of intelligible principles, Congress merely gave the FCC a mass of words signifying nothing. The FCC, it maintains, has unchecked discretion to select which among the principles it chooses to adhere to in its pursuit of universal service.[57] It may also choose to adopt a new principle subject only to the illusory restraint that any new principle be consistent with those set forth by Congress.[58]

Moreover, the core statutory concept, universal service, is one that Consumers' Research says possesses no stable content of its own, given that it was not derived from a settled background understanding and can be evolved by the FCC according to its preferences.[59]

Consumers' Research contends that to satisfy the nondelegation doctrine, Congress must make the policy choice of how much money to raise for universal service by specifying either an amount or a formula for the FCC to use when calculating contributions.[60] Defenders of the universal service program contend that Congress already provided qualitative limits that are more than adequate for nondelegation purposes.[61]

Oral Argument in *Consumers' Research*. During oral arguments, it seemed that the Justices had mixed views on the legal sufficiency of Congress's qualitative limits, but several balked at the idea that a quantitative threshold was inherently limiting. "What exactly are we accomplishing?" wondered Justice Kavanaugh, if Congress could satisfy nondelegation's demands by setting a trillion-dollar cap?[62] What indeed? A quantitative limit may not suffice when it is evident that behind the choice is a congressional desire to avoid decisions rather than making them.

Although more vivid because quantitative, Kavanaugh's question returns us to the same problem that Chief Justice Marshall acknowledged when he said that "the line has not been exactly drawn which separates those important subjects" from the lesser details, and it may never be.[63] But the questions remain whether the impossibility of drawing that line perfectly in each instance delegitimizes the effort to do so—and whether the constitutional structure can retain its tripartite form when there is in effect no enforcement of nondelegation.

The tenor of oral arguments in *FCC v. Consumers' Research* might have dimmed the hopes that this case would be the one to break the 90-year drought.[64] Justice Elena Kagan was adamant that courts should not read laws cynically, attributing no meaning to the statutory principles Congress had selected.[65] Several justices, including conservatives like Justice Samuel Alito, expressed concern over the practical fallout if rural communities were left without communications subsidies.[66]

Interestingly, neither lawyer defending the universal service program asserted that there was no nondelegation doctrine, nor did they contend that it was judicially unworkable. When Justice Barrett asked if there "are just not judicially manageable standards" for the nondelegation doctrine, Acting Solicitor General Sarah Harris responded that there were. Specifically, she pointed to a common law method in which courts "look to previous delegations and see how they stack up" against newer instances. She also posited an alternative using the vocabulary of the intelligible-principle test with a nod to Justice Gorsuch, which required Congress to "provide parameters" by which courts could "tell, yes or no," whether "the agency transgress[ed] the boundaries."[67]

Later, when Gorsuch asked former Solicitor General Paul Clement, arguing on behalf of telecoms providers, if he would "agree that there are some judicially manageable standards that we can apply when it comes to delegations," Clement responded, "Absolutely."[68] Based on his answers, though, he seemed to view it as a doctrine limited to cases where Congress attempted to regulate economy-wide and/or did so without standards for the agency to follow—essentially another National Industrial Recovery Act, but probably little else.[69]

Still, the shadow of Gorsuch's *Gundy* dissent and the deeper shift in legal culture that it represents forces lower court judges and the advocates appearing before them to reconsider the doctrine's relevance. Even if *FCC v. Consumers' Research* is not the case in which the doctrine is fully reinvigorated, the arguments produced by the case are more evidence for that trend.

What Does Nondelegation Look Like?

What the nondelegation doctrine might look like in practice if it reemerges—or when it reemerges—is a matter still undetermined. Justice Gorsuch has offered a valuable framework to guide further efforts at articulation. There is appeal in the proposition that courts should calibrate the nondelegation inquiry to the specific power delegated.[70]

The Power Asserted. As Justice Alito noted during arguments in *FCC v. Consumers' Research*, the power to tax is the power to destroy, while the same cannot be said about Congress's power to "establish post offices."[71] Moreover, legislative powers like the authority to run a post office are internally oriented, directed primarily at the management of government resources over which more power can be presumed, whereas taxation is externally oriented, affecting the property of private citizens, an object of greater judicial solicitude.[72] Judicial scrutiny might, therefore, adjust itself to accord with the object and potency of the power asserted.

Judicial Discretion. It is hard to discern at this point how the doctrine might work in practice. Many incisive thinkers have meditated on the question without arriving at a rule-like formulation. But again, the lack of such a formulation cannot be per se disqualifying. For all his ambivalence about nondelegation, the late Justice Antonin Scalia conceded that "vague constitutional doctrines are not automatically unacceptable. The Court's opinions from obscenity to church–state relations to the commerce clause are full of them."[73] And, of course, he was right. The caselaw reifying guarantees like free speech and free exercise have only tenuous toeholds in the Constitution's written text.

But the effort to find a workable implementing test is nonetheless important. After all, "it is a constitution we are expounding."[74] And critical aspects of the Constitution would be without practical effect unless courts found ways to adopt implementing doctrines. In allowing that courts must adopt the necessary means of implementation, one concedes nothing greater than the equally perilous but necessary concession of discretion that the executive has in executing laws.

Values vs. Fads. That must not be mistaken as an apology for every doctrine or unwritten principle that enterprising jurists manage to read into the Constitution's "penumbras." Such efforts do not so much go astray as start from the wrong place. What they seek to implement are not constitutional values, but values that they would like to constitutionalize—the fads and mores popular with certain influential or intellectual sets at a given historical moment. Movements that use 20th-century ideas as their master interpretive concepts, such as critical legal studies or the law-and-economics movement, would be examples of this kind of error. These are attempts, whether conscious or not, to break with the constitutional design instead of giving that design effect.

There is a reason why the current originalist-sympathetic Supreme Court so often resorts to history-and-tradition inquiries when wrestling with esoteric but indispensable legal concepts. It is not because these inquiries are more straightforward. It is not because they are immune from tendentious reinterpretations. And it is certainly not because workaday lawyers and judges think them easier to apply. It is because they afford the constraint of an external reference point grounded in verifiable historic facts that evidence enduring American support for a particular right or practice.

Those facts, while not self-interpreting, are the most realistic guides available for getting at tougher questions that courts must occasionally address, i.e., the maintenance of American federalism and the tradition of ordered liberty that it guards. By orienting themselves around an effort to rightly understand the past, judges fulfill their role as stewards of a gift they have received, not created. Similar considerations, therefore, should guide the effort to articulate a more fulsome nondelegation doctrine.

Historical Warrant. Looming behind this is a post-*Gundy* spate of scholarly disagreements over the historical evidence for the existence of the nondelegation doctrine. At their boldest, scholars have asserted that "the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power."[75] The historic examples their studies cite from the Founding Era, like the direct-tax legislation of 1798, might well provide some historical warrant for limited departures from a strict separation among the branches, at least with respect to the specific

powers implicated by those delegations.[76] But other equally august publications have concluded with no less confidence that there is "abundant" evidence for the historical existence of the nondelegation doctrine.[77]

It is not the purpose of this *Legal Memorandum* to contribute to those debates. Nevertheless, by demanding historic proof of nondelegation as a consistently active force, critics of the doctrine are looking at things in the wrong light. Discontented by the constraints of tradition, they begin instead from a radical skepticism, holding that the popular understanding of the separated powers the Constitution appears to guarantee is just a popular delusion, one that stems from "our modern turn of mind" even as that "modern" view somehow threatens "the wholesale repudiation of modern American governance."[78]

But it is not the nondelegation doctrine that stands in need of historic proof. If one knew only the Constitution's text, without knowledge of the circumstances under which it came to be, "a reasonably informed interpreter," upon seeing that document's "system of separated powers," "would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"[79] That is because "[i]t is difficult to imagine a principle more essential to democratic government than that...the basic policy decisions governing society are to be made by the Legislature."[80]

Delegation virtually ensures that technicians installed across the executive branch will do so instead. Add to this the historic context, the Framers' stated fear of combinations of powers,[81] their conscious choice to depart from the British and confederation models of blended authority,[82] and their decision to denominate powers as legislative, executive, and judicial in the Founding document—and this creates a presumption that will withstand no small amount of divergent historical evidence in the later practice of government.

The Dangers of Unchecked Delegation

A few decades into America's republican experiment, Alexis de Tocqueville surveyed the country and observed that in it "administrative centralization does not exist."[83] And this he saw as good. The "extraordinary fragmentation of administrative power" coexisted with "the greatest national freedom combined with local freedoms of every kind."[84] Administrative governance was inimical to this because to centralize administration was to "concentrate the power to direct" the varied interests that are "special to certain parts of the nation" in ways destructive of local freedom.[85] It caused the "continual abstraction [of men] from their wills," it "enervate[d] the peoples who submit to it,"[86] and it produced "a sort of administrative

somnolence that administrators are accustomed to calling good order and public tranquility"; "it excel[ed], in a word, at preventing, not at doing."[87] In the absence of centralized administration, de Tocqueville witnessed "Americans of all ages, all conditions, all minds constantly unite" in varied civil associations addressed to their present needs and their future hopes.[88]

One cannot read of that America—one that de Tocqueville chronicles only a few decades after its constitutional founding—and believe that the nation he describes was prepared to see its representatives delegate law-making power until they produced the very mode of governance that de Tocqueville feared would create a "despotism" "more intolerable than in any of the absolute monarchies of Europe."[89] Nor can one look at the modern, centralized administrative state and conclude that it is a faithful development of the principles of governance around which America's Founding generation organized their union. A change has occurred without the process of amendment, a change that cannot be wholly justified by appeals to modern expedience or explained away by asserting that the very separation of powers written into America's highest temporal law is an illusion. The vanishing restraint on the delegation of unique powers to other branches *is* a partial explanation for that change.

That does not mean that a renewed respect for the nondelegation doctrine would suddenly revive the America de Tocqueville saw. Other causes, both material and spiritual, have intervened to make that world largely inaccessible. But it would, at a minimum, return significant amounts of responsibility to Congress.

In practical terms, the expansion of the administrative state has allowed Congress to avoid not only political accountability but practical constraints on its workload. Congress has been willing to draw more power away from state governments precisely because delegation allows it to feel secure that it will not have to do much of the work associated with that growing array of responsibilities. Legislating nationally on matters once handled locally can seem quite easy when Congress need do little more than express a mood, a hope, and a wish, to which executive agencies will then give practical form.

Nothing prevents Congress from availing itself of an agency's technical expertise (assuming that is what the agency offers) in the process of legislating. But to ensure that Congress itself makes the consequential trade-offs, that consultation must occur during the drafting process; it cannot be deferred to a time after enactment when direct congressional involvement with the law has, for practical purposes, ceased. That would indeed make the legislative process more laborious for a body already ill-disposed toward any work not required by the budget process.

But a revived nondelegation doctrine, shutting off one escape valve, would direct considerable political pressure into Congress and require renewed consideration of what laws and programs that body actually considers indispensable. Congress might have no option but to respond to such a legal change with legislation, though such change may come gradually as each law must be challenged individually.

If Congress nonetheless finds itself struggling to come to terms with too varied an array of responsibilities, then perhaps Congress ought to be diligent in doing a few things well rather than pretending to do many things. Better to let the state governments resume some of their traditional duties from an overextended national government.

Conclusion

By the end of June—July at the very latest—the Supreme Court will render its decision in *FCC v. Consumers' Research*. The Court might find the apparent mass of principles in the 1996 act to be, as stated before, a mass of words signifying nothing. That would send the Court off to the races, using a majority opinion for the first time since 1935 to give guidance to lower courts on applying the nondelegation doctrine.

The Court also might conclude that the case is not the best vehicle and decline to apply the nondelegation doctrine. Still, if they should reach that conclusion, it would be an extraordinary about-face for a majority of justices to join an opinion signaling that their previous interest in the doctrine had suddenly ended. In other words, the decision might or might not promote the cause, but it is unlikely to do it any harm.

Should the FCC escape with a win here, the Court will not want for other opportunities to reconsider the doctrine. Broadly phrased laws abound, the bequest of successive Congresses whose parade of Members have long since lost the internal discipline required to police the powers that body gives away.

The executive branch is also likely to tempt the Court with occasions to revive the nondelegation doctrine. That is due to the increasing, bipartisan tendency of Presidents to govern by emergency declarations, which ensures that an array of especially vague laws will become the targets of litigation. As things stand then, there will likely be more than "one good year" to challenge the complacent consensus of the past 90 years.

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Endnotes

1. Joseph de Maistre, Essay on the Generative Principle of Political Constitutions (Little and Brown, 1847).
2. James Madison proposed the following amendment in 1789 as part of the original bill of rights: "The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments." 1 Annals of Cong. 789 (1789) (Joseph Gales ed., 1834). That amendment won the approval of the House of Representatives, but it never emerged from the Senate. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1504–05 (2021). The reasons for its failure are obscure due in part to the fact that Senate deliberations were then secret on all subjects. The recorded debate in the House indicates that the members who objected did so because they found the amendment to be redundant, restating principles that the existing articles already instantiated with sufficient clarity. *Id.* Madison himself, agreed, *id.*, but by proposing amendments, Madison was fulfilling a promise made to mollify the Constitution's skeptics rather than indicating his own sense of shortcomings in the originally ratified draft.
3. Antonin Scalia, *A Note on the Benzene Case*, Amn. Enter. Inst. (Aug. 6, 1980), https://www.aei.org/articles/a-note-on-the-benzene-case/.
4. Gundy v. United States, 588 U.S. 128, 132 (2019).
5. Case No. 24–354.
6. *See, e.g.*, Cass Sunstein, *Nondelegation Canons*, John M. Olin Law & Economics Working Paper No. 82 at 3–5 (1999); Amy Howe, *Justices Appear Likely to Uphold FCC Telecom Access Subsidy*, SCOTUSblog (March 27, 2025) (blithely describing the nondelegation doctrine simply as "a theory on which the Supreme Court has relied on twice, nearly a century ago"), https://www.scotusblog.com/2025/03/justices-appear-likely-to-uphold-fcc-telecom-access-subsidy/.
7. 293 U.S. 388, 432–33 (1935); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
8. *Schechter* at 542 (1935).
9. John E. Moser, *Introduction to Schechter Poultry Corp. v. United States by Charles Evans Hughes*, Teaching Amn. Hist., https://teachingamericanhistory.org/document/schechter-poultry-corp-v-united-states/.
10. 1 William Blackstone, Commentaries 91.
11. Wayman v. Southard, 23 U.S. 1 (1825).
12. *Id*.
13. U.S. Const. art. 1, § 7, cl. 2.
14. U.S. Const. art. I, § 3, cl. 4.
15. Saikrishna Bangalore Prakash, *Against Constitution by Convention*, 108 Cal. L. Rev. 1975, 1977 (2020).
16. Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 220 (2020) (internal quotations and citations omitted).
17. The Federalist No. 78 (Alexander Hamilton).
18. The Federalist No. 78 (Alexander Hamilton).
19. Wayman v. Southard, 23 U.S. 1, 45, 6 L. Ed. 253 (1825).
20. *Id*.
21. *See* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
22. *Id.* at 409.
23. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 194, 226 (1943).
24. Scalia, *supra* note 3.
25. *Id.*
26. *Id*.
27. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).
28. Scalia, *supra* note 3.
29. The Federalist No. 22 (Hamilton).
30. James M. Landis, The Administrative Process 1 (Yale Univ. Press, 1938).
31. *Id*. at 2.
32. Christopher DeMuth, *Can the Administrative State Be Tamed?* 124–25 J. Legal Analysis (2016).
33. *Id*. at 128–29.

34. Under the doctrine that emerged from the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, judges were required to defer to agency legal interpretations where the law in question was silent or ambiguous and where the agency's interpretation of that silence or ambiguity was "reasonable." That deceptively simple rule required several subsequent caveats and reformulations before it was overruled in 2024 by the decision *Loper Bright v. Raimondo*. See note 39, *infra*.
35. DeMuth, *supra* note 32, at 129 (noting that "most of the new agencies, such as the EPA and OSHA," made new polices via rulemaking "under highly elastic congressional standards with little more in the way of 'intelligible principles' than the old 'public interest' licensing statutes.").
36. W. Va. v. Env't Prot. Agency, 597 U.S. 697, 723 (2022).
37. Gundy v. United States, 588 U.S. 128, 166–67 (2019) (Gorsuch, J. dissenting).
38. *Id*. at 167.
39. Subject to numerous (now mercifully irrelevant) caveats, *e.g*., that the law in question be the agency's organic statute, that it be vested by that statute with the appropriate rulemaking authority, and so on. See Loper Bright Enters. v. Raimondo, 603 U.S. 369, 404 (2024) (canvassing "the many refinements" the court made to the *Chevron* doctrine prior to its overruling).
40. *W. Va*., 597 U.S. at 732.
41. Gundy, 588 U.S. at 157 (Gorsuch, J., dissenting).
42. *Id*. at 158.
43. *Id*. at 159.
44. *Id*. at 166.
45. Gundy, 588 U.S. at 149 (Alito, J., concurring).
46. Paul v. United States, 140 S. Ct. 342, 205 L. Ed. 2d 368 (2019).
47. *See, e.g.*, Biden v. Nebraska, 600 U.S. 477, 515 (2023) (Barrett, J., concurring) ("Because the Constitution vests Congress with '[a]ll legislative Powers,' Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch.").
48. Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 461–62 (5th Cir. 2022).
49. Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 121 (2024) ("Since the answer to the jury trial question resolves this case, we do not reach the nondelegation or removal issues.").
50. Consumers' Rsch. v. Fed. Commc'ns Comm'n, 109 F.4th 743 (5th Cir.).
51. Brief of Respondents at 1–4, Consumers' Rsch., No. 24–354 (5th Cir. 2024), https://www.supremecourt.gov/DocketPDF/24/24-354/342527/20250211165522207_24-354%20Brief%20for%20the%20Respondents.pdf.
52. 47 U.S.C. § 254.
53. Brief of Respondents at 6–7, 19–20, Consumers' Rsch.
54. *See Consumers' Rsch*., 109 F.4th at 750.
55. Brief of Respondents at 7, Consumers' Rsch.
56. *See* 47 U.S.C. § 254(b).
57. Brief of Respondents at 47–50, Consumers' Rsch.
58. Brief of Respondents at 50–51, Consumers' Rsch.
59. Brief of Respondents at 53–56, Consumers' Rsch.
60. Brief of Respondents at 45, Consumers' Rsch.
61. Brief of Petitioners at 24–31, Consumers' Research; Brief of Petitioners at 20–26, SHLB Coalition; Brief of Petitioners at 19–26, Competitive Carriers Ass'n.
62. Transcript of Oral Argument at 124, FCC v. Consumers' Research, 5th Cir. (2025) (No. 23–354), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-354_ca7d.pdf.
63. Wayman v. Southard, 23 U.S. 1, 43, 6 L. Ed. 253 (1825).
64. *See* Jack Fitzhenry, *Supreme Court Reconsiders Constitutionality of Agency Policymaking*, Daily Signal (March 26, 2025), https://www.dailysignal.com/2025/03/26/supreme-court-reconsiders-constitutionality-agency-policymaking/; Howe, *Justices Appear Likely to Uphold FCC Telecom Access Subsidy*.
65. Transcript of Oral Argument at 116–17, FCC v. Consumers' Research.
66. *Id*. at 147–48.
67. *Id*. at 61.

68. *Id*. at 74.
69. *Id.* at 95.
70. *See* Chad Squitieri, *Towards Nondelegation Doctrines*, 86 Mo. L. Rev., No. 4, (2022).
71. Transcript of Oral Argument at 84–85, FCC v. Consumers' Research, *supra* note 62.
72. *See* Paul Larkin, *Revitalizing the Nondelegation Doctrine*, 23 Federalist Soc. Rev. (Sept. 26, 2022) (discussing that distinction drawn by Professor Jonathan Adler), https://fedsoc.org/fedsoc-review/revitalizing-the-nondelegation-doctrine.
73. Scalia, *supra* note 3.
74. M'Culloch v. Maryland, 17 U.S. 316, 407 (1819).
75. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Columbia L. Rev. 277 (2021).
76. Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288 (2021).
77. Wurman, *supra* note 2, at 1490.
78. *Id*., at 278, 281.
79. Biden v. Nebraska, 600 U.S. 477, 515 (2023) (Barrett, J., concurring) (quoting Wayman v. Southard, 23 U.S. 10 Wheat. 1 (1825)).
80. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).
81. Wurman, *supra* note 72, at 1524–26.
82. *Id*. at 1539.
83. Alexis de Tocqueville, Democracy in America 84 (Univ. of Chi. Press 2000).
84. *Id*. at 495.
85. *Id*. at 82.
86. *Id*. at 83.
87. *Id.* at 86.
88. *Id*. at 489
89. *Id*. at 251.