Vindicating the Nondelegation Doctrine: *FCC v. Consumers' Research*'s Four Perspectives on a "Principle Universally Recognized"

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That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.

—*Field v. Clark,* 143 U.S. 649, 692 (1892)

I. Overview

The nondelegation doctrine sits within the U.S. Supreme Court's separation of powers jurisprudence. It is a principle sourced from the structure, rather than the text, of the Constitution. Throughout the nearly 250 years of American history, the Supreme Court has repeatedly affirmed the validity of the doctrine in American law and embraced the Court's role in reviewing constitutional challenges arising from it. Although proponents of a vigorous nondelegation doctrine may complain that the Court has not wielded it to strike down a law more frequently, none of the Court's nondelegation precedents foreclose such a result in a future case. A close examination of the 2025 nondelegation decision, *FCC v. Consumers' Research*, reveals (1) the continued pattern of relying on principles of interpretation to save a statute, and (2) a glimpse into conceptual differences among the Justices that may divide the Court differently in future cases.

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A. The Nondelegation Doctrine—A Unifying Idea with Polarizing Implementation

What we now know as the "nondelegation doctrine" traces back at least as early as John Locke's 1690 "Second Treatise of Government."[1] The concept was important enough to Locke that he included it as one of only four explanatory points in Chapter XI: "Of the Extent of the Legislative Power."[2] Locke says, "The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others."[3]

Chief Justice John Marshall canonized this concept in American law within an 1825 Supreme Court decision, *Wayman v. Southard*: "It will not be contended that Congress can delegate to the courts or to any other tribunals powers which are strictly and exclusively legislative."[4] Two hundred years later, in *FCC v. Consumers' Research*, the Court described the doctrine this way:

> Article I of the Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.' §1. Accompanying that assignment of power to Congress is a bar on its further delegation: Legislative power, we have held, belongs to the legislative branch, and to no other.[5]

[1] John Locke, Second Treatise of Government ch. XI (The Project Gutenberg eBook 2003). The Latin maxim *delegatus non potest delegare* may trace back even earlier. *See* Patrick W. Duff and Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 Cornell L. Rev. 168, 171 (1929). The Supreme Court cited the maxim in a seminal nondelegation case, though noting it has its roots in agency law. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405–06 (1928) ("The well known maxim '*Delegata potestas non potest delegari*' applicable to the law of agency in the general and common law, is well understood, and has had wider application in the construction of our federal and state constitutions than it has in private law.").

[2] Locke, Second Treatise ch. XI.

[3] *Id.* at § 141. Locke's explanation of what this article calls "nondelegation" explicitly roots itself in the idea of "subdelegation." That is, Congress itself received a delegation from the people in the Constitution and cannot further delegate its powers without consent from the original source of Congress's own authority. Gary Lawson has explored this framework extensively—and helpfully—and says the "nondelegation doctrine" is better phrased as the "non-subdelegation" principle. *See* Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation*, No. 20-16 B.U. Sch. L. Pub. L. & Legal Theory Paper (2020).

[4] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

[5] FCC v. Consumers' Rsch., 145 S. Ct. 2482, 2496 (2025).

Indeed, it still holds true that "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend."[6]

Despite centuries of agreement that the U.S. Constitution prohibits Congress from delegating "powers which are strictly and exclusively legislative"[7] to other branches, the Supreme Court has been cautious about enforcing the doctrine. It has used this principle to strike down federal statutes only twice (both of those in 1935). Courts recognize that identifying which instructions within a statute (i.e., challenged "delegations") are permissible or impermissible is difficult.[8] The problem is one of line drawing, recognized in the 1825 decision rooting the nondelegation doctrine in American constitutional law. Chief Justice Marshall there acknowledged:

> 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.[9]

"Fill[ing] up the details" reflects a "practical understanding that, in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[10] Said differently, Congress may "seek[] assistance from another

[6] Pan. Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935).

[7] *Wayman*, 23 U.S. at 42.

[8] Justice Antonin Scalia's dissent in *Mistretta v. United States* expresses deep concern for courts' ability to police the nondelegation guarantee: "But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). He conceded that "no statute can be entirely precise" and, as a result, some level of policy judgments must inure to the executive branch implementing the statute. *Id.* He concluded that the "debate over unconstitutional delegation becomes a debate not over a point of principle, but over a question of degree" and opined that the "scope of delegation is largely uncontrollable by the court[s]." *Id.* at 415–16. That said, this discussion is in a footnote because neither a majority of the Court at any time, nor any Justice in the current Court, has blessed a notion that the nondelegation doctrine may be nonjusticiable.

[9] *Wayman*, 23 U.S. at 43.

[10] *Mistretta*, 488 U.S. at 372 (majority op.).

branch[,]"[11] including in areas that require "judgment on matters of policy."[12]

Whether a particular statute merely grants authority to "fill up the details"[13] of congressional intent or to actually "transfer the power of making laws"[14] has been the subject of frequent constitutional challenges throughout our nation's history. The spirited Supreme Court opinions resulting from those challenges—opinions of the Court, concurrences, and dissents—offer varied perspectives on *how* to ensure the "principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution"[15] is applied.

One decision stood out in its analysis of the line-drawing problem. In 1928, Chief Justice William Howard Taft authored the opinion of the Court in *J.W. Hampton, Jr. & Co. v. United States*.[16] The Court said, "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[17] Thus, the "intelligible principle" standard was born. Whether the Court intended to create a "test"[18] in *J.W. Hampton* is unclear, but the phrase "intelligible principle" has developed a legacy shaping the implementation of the nondelegation doctrine.

B. Recent Background of Nondelegation Doctrine Cases

In 2017, Keith Whittington and Jason Luliano identified a "predictable pattern" of nondelegation doctrine cases at the U.S.

[11] *J.W. Hampton, Jr. & Co.*, 276 U.S. at 406.

[12] *Mistretta*, 488 U.S. at 377 (majority op.).

[13] *Wayman*, 23 U.S. at 43.

[14] Locke, Second Treatise ch. XI, § 141.

[15] *Field*, 143 U.S. at 692.

[16] 276 U.S. 394.

[17] *Id.* at 408–09.

[18] *Mistretta*, 488 U.S. at 409 ("Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that, in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

Supreme Court.[19] "Every few years," they said, a court of appeals invalidates a federal statute on the doctrine's basis, then the Supreme Court takes the case and "overturns the appellate decision, holding that the statute is a constitutional delegation of legislative authority."[20] Since that writing, the Court has issued two more nondelegation decisions, in 2019 and again in the 2024-2025 term, both times sanctioning the doctrine's importance while holding that the challenged statute does not run afoul of the separation of powers.[21] In both cases, the majority and dissents preliminarily diverged not on the validity or importance of the nondelegation doctrine, but on the scope of the power conferred because of differing interpretations of the challenged statute.

The concurring and dissenting opinions accompanying the Court's 2019 nondelegation decision, *Gundy v. United States*, hinted at changes to the Court's approach toward the nondelegation doctrine. The Court split 5–3,[22] and Justice Samuel Alito concurred, saying he would "support [the] effort" to reconsider the intelligible principle approach in a case where the majority of the Court was likewise willing.[23] As Gary Lawson put it that year, it was "very hard to read *Gundy* and not count to five under your breath."[24] Fast forward to July 2, 2024, and Justice Clarence Thomas similarly observed in a dissent from denial of certiorari in a nondelegation challenge that "[a]t least five Justices have already expressed an interest in reconsidering this Court's approach to Congress's delegations of legislative power."[25]

Consequently, court watchers were justified in eagerly awaiting a decision in *FCC v. Consumers' Research*, an appeal from the *en banc* Fifth Circuit's ruling that the Federal Communication Commission's funding mechanism of programs to fulfill a statutory mandate for "universal services" violated the Constitution's separation of powers.

[19] Keith E. Whittington & Jason Luliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 380 (2017).

[20] *Id.*

[21] Gundy v. United States, 588 U.S. 128, 132 (2019); *Consumers' Rsch.*, 145 S. Ct. at 2492.

[22] The newly confirmed Justice Brett Kavanaugh did not participate in the decision.

[23] *Gundy*, 588 U.S. at 149 (Alito, J., concurring in the judgment).

[24] Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018–2019 Cato Sup. Ct. Rev. 31 (2019).

[25] Allstates Refractory Contractors, LLC v. Su, 603 U.S. ___, slip op. at 3 (2024) (Thomas, J., dissenting).

C. Consumers' Research Challenge of the Universal Services Funding Mechanism

The case leading to the 2025 nondelegation buzz arose over the funding structure for the Universal Service Fund (the "fund"). The fund is mandated by a 1996 amendment to the Communications Act of 1934. The original act created the Federal Communications Commission (FCC), and the 1996 amendment (the "Telecommunications Act") established a "new framework" for a longstanding requirement that the FCC ensure that "basic communications services extend across the country" ("universal services").[26] In pursuit of universal services, the FCC must provide communication assistance to rural hospitals, schools, and libraries; expand communications access for consumers in rural or other high-cost areas; and pay subsidies for designated populations in need of better communication services.[27]

Achieving the guarantee of universal services costs money, of course, and Congress embedded a plan to fund the requirement in the Telecommunications Act. The statute requires qualifying telecommunication carriers to contribute to the fund and allows those carriers to pass on the costs to consumers (check your phone bill for a universal services line item!). There is no pre-established rate for contribution or a cap on the amount that carriers will be required to contribute.[28] Instead, the FCC developed a formula to decide who pays how much: the amount is determined by multiplying a participating carrier's own projected revenue by a fraction (expressed as a percentage) that changes quarterly. The numerator of the fraction is the projected expenses for providing universal services for the upcoming quarter (both the actual services and administrative expenses of maintaining the program), and the denominator is the total projected revenue of all "contributing carriers" during the same period.[29]

Shortly after the act's amendment, the FCC appointed the Universal Service Administrative Company (the "administrator") to maintain the fund. Relevant to the nondelegation challenge, the administrator

[26] *Consumers' Rsch.*, 145 S. Ct. at 2493.

[27] *Id.*

[28] *Id.* at 2626 (Gorsuch, J., dissenting).

[29] *Id.* at 2494 (majority op.).

calculates the fund's projected expenses and the total projected revenue of the contributing carriers and supplies that information to the FCC for approval when establishing each new quarter's contribution rate. Since the administrator began operating the fund (two years after the Telecommunications Act was enacted, redefining universal services), the rate that carriers have paid has gone from 4 percent to 37 percent of their revenue from interstate and international telecommunications.[30] (Notably, the percentage of total carrier revenue attributable to these services has decreased in the same period, so the increase in percentage of total is not completely attributable to rate increases.) Thus, the payment has gone from $2.29 billion to about $8.59 billion.[31] Relevant to the legal challenge of the fund, the government was willing to assume for purposes of this case that the required contributions constituted a tax on the carriers.[32]

Consumers' Research[33] challenged the constitutionality of the universal services funding mechanism on two relevant grounds: (1) Congress's failure to specify a rate or a cap on the amount of revenue the FCC could require from contributing carriers was an unconstitutional delegation of legislative power, and (2) the FCC's involvement of a private organization (the administrator) in calculating the rate of contribution and collecting the funds was an impermissible delegation of authority to a private party (the "private nondelegation doctrine").

A three-judge panel of the Fifth Circuit rejected Consumers' Research's claims, holding that no unconstitutional delegation occurred either from Congress to the FCC or from the FCC to the administrator. Three months after the decision, the *en banc* Fifth Circuit agreed to reconsider the challenge. The full Fifth Circuit ruled in Consumers' Research's favor on the grounds that the "combination of delegations" between Congress to the FCC and the FCC to the administrator violated the Constitution.

30 *Id.* at 2526 (Gorsuch, J., dissenting).

31 *Id.* at 2523; *but see id.* at 2504 n.8 (claiming that the dates used did not represent a fair benchmark year) (majority op.).

32 Oral Argument Transcript at 53, FCC v. Consumers' Rsch., No. 24-354 (U.S. Mar. 26, 2025).

33 Consumers' Research was joined by a group of petitioners. The litigants challenging the statute are collectively referred to herein as "Consumers' Research."

The Supreme Court granted certiorari on the following questions presented:

1. Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund.
2. Whether the Commission violated the nondelegation doctrine by using the Administrator's financial projections in computing universal service contribution rates.
3. Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative responsibilities to the Administrator violates the nondelegation doctrine.[34]

II. The Four Opinions of *FCC v. Consumers' Research*

The Supreme Court's *FCC v. Consumers' Research* decision was one of five cases resolved on the last decision day of the 2024-2025 term. Despite the prospect of change teased in the 2019 *Gundy* dissent and subsequent writings, the Court soundly affirmed (6–3) the longstanding "intelligible principle" test for the constitutionality of a congressional delegation and rejected attempts to articulate a unique standard for delegations related to revenue-raising. It also rejected the "private nondelegation doctrine" claims in this case because the administrator's role "is broadly subordinate to the Commission."[35] Thus, no delegation occurred that needed to be scrutinized.[36]

The case yielded four opinions: the opinion of the Court (authored by Justice Elena Kagan and joined by Chief Justice John Roberts and Justices Kavanaugh, Sonia Sotomayor, Amy Coney Barrett, and Ketanji Brown Jackson), a concurrence by Justice Jackson, a concurrence by Justice Kavanaugh, and a dissent authored by

[34] Petition for a Writ of Certiorari, FCC v. Consumers' Rsch., No. 24-354 (U.S. Sept. 30, 2024). The grant of certiorari identified the following additional question: "Whether this case is moot in light of the challenger's failure to seek preliminary relief before the Fifth Circuit." The Court resolved this question in a footnote, noting that the parties agree that the case is not moot, as does the Court, and noting that the Court's decisions "have never hinted" at a requirement to seek preliminary relief "in order to avail itself of the capable-of-repetition rule." *Consumers' Rsch.*, 145 S. Ct. at 2496 n.1.

[35] *Consumers' Rsch.*, 145 S. Ct. at 2508.

[36] *Id.*

Justice Neil Gorsuch and joined by Justices Thomas and Alito. Court watchers who think back to the 2019 *Gundy* decision may be surprised at which side of the "v" Chief Justice Roberts appeared on. In *Gundy,* Chief Justice Roberts joined Justice Gorsuch's dissenting opinion which said, among other things, that the intelligible principle test came from "divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling."[37] In *Consumers' Research,* Chief Justice Roberts joined, without any noted hesitation, the majority opinion, stating that the Court "set out the 'intelligible principle' standard as the universal method for assessing delegations" and blessing its continued use.[38] The other Justice that proponents of a revitalized nondelegation doctrine were closely watching was Justice Kavanaugh. Justice Kavanaugh did not participate in the *Gundy* decision but authored a "statement" respecting the denial of certiorari in a later, similar case, noting "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." [39] Defying the expectations of some, Chief Justice Roberts and Justice Kavanaugh both supported the application of the longstanding intelligible principle standard and refused to apply it more stringently to a revenue raising statute.

Regardless, the majority and dissenters were united both in recognizing the nondelegation doctrine as a necessary part of the Court's constitutional jurisprudence and in acknowledging the difficulty of drawing the line in close cases. As the dueling opinions wrestled with potential consequences of the opposing perspective, they preached the justification of their own. One line stood out from the opinion of the Court when grappling with the dissent and the argument of the respondent. The Court said, "the Consumers' Research approach does nothing to vindicate the nondelegation doctrine or, more broadly, the separation of powers."[40]

What would "vindicate the nondelegation doctrine"? Journey with me through the four opinions of *FCC v. Consumers' Research* to explore the diversity of perspectives on nondelegation: the "principle

[37] *Gundy*, 588 U.S. at 163 (Gorsuch, J., dissenting).

[38] *Consumers' Rsch.*, 145 S. Ct. at 2501.

[39] Paul v. United States, 140 S. Ct. 342, 342 (2019).

[40] *Consumers' Rsch.*, 145 S. Ct. at 2501.

universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[41]

A. The Opinion of the Court

Justice Kagan wrote for the majority and was joined by Chief Justice Roberts and Justices Sotomayor, Barrett, Jackson, and Kavanaugh. To the majority, reviewing the Universal Services Fund was business as usual for a nondelegation case. First, as noted above, the Court comfortably blessed the longstanding principle that bars the delegation of legislative power.[42] Nevertheless, the Court echoed the familiar refrain in nondelegation cases that Congress may "seek[] assistance" from coordinate branches, often by vesting "discretion" in agencies to "fill up the details" of how to implement a particular law.[43]

Thus, the question in most nondelegation challenges is merely where to draw the line between permissible and impermissible grants of authority to another branch. The "standard" or "test" for determining the line is "whether Congress has set out an 'intelligible principle' to guide what it has given an agency to do."[44] This test depends on context, allowing courts to consider the scope of the powers the agency can wield based on Congress's instructions (i.e., the grant of authority) when evaluating the level of detail needed for those instructions to meet constitutional muster.[45] To pass the intelligible principle test, Congress must have identified a "general policy" animating the instructions and provided some "boundaries" of what the agency (or other recipient of the grant of authority) can do to further that policy. Relatedly, the instructions must be clear enough to allow "'the courts and the public [to] ascertain whether the agency' has followed the law."[46]

If Congress has followed those steps, the Court "will not disturb its grant of authority."[47] Indeed, in nearly 250 years, the Supreme

41 Field v. Clark, 143 U.S. 649, 692 (1892).

42 *Consumers' Rsch.*, 145 S. Ct. at 2496.

43 *Id.* at 2496–97.

44 *Id.* at 2497 (quoting *J.W. Hampton, Jr. & Co.,* 276 U.S. at 409).

45 *Id.*

46 *Id.* (quoting OPP Cotton Mills, Inc. v. Adm'r of Wage & Hour Div., 312 U.S. 126, 144 (1941)).

47 *Id.*

Court has only invalidated a statutory provision based on the nondelegation doctrine twice, both in 1935.[48]

What Consumers' Research claimed was special in this case is the delegation of a revenue-raising function without a precise rate or a numerical limit on the amount of money the agency could require companies to pay. Consumers' Research argued that "Congress must set a 'definite' or 'objective limit' on how much money an agency can collect—a numeric cap, a fixed rate, or the equivalent."[49] The Court made swift work of this argument, both rejecting a "special nondelegation rule for revenue-raising legislation" and saying that the current standard is "trained on intelligible principles, not on numeric caps and 'mathematical formula[s].'"[50]

The Court looked to two prior nondelegation decisions in declining to treat revenue-raising statutes differently: *J.W. Hampton* (the 1928 decision establishing the intelligible principle test) and *Skinner v. Mid-America Pipeline Co.* (a 1989 decision). In *J.W. Hampton*, the Court evaluated the constitutionality of a provision that allowed the president to increase certain tariff rates upon factual findings related to the cost of growth or production of goods in competing countries.[51] While the Court was not presented with the exact question of a need for a precise rate or cap, it proceeded with analysis that created the test now known as the "intelligible principle" standard without specifying that judicial review would differ in cases not involving revenue. Sixty years later, in *Skinner*, the Court applied the language of "intelligible principle" from *J.W. Hampton* to the evaluation of a statute that allowed an executive department to set fee rates, and specifically rejected applying a "two-tiered theory of nondelegation" to differentiate between taxation and nontaxation cases (though the statute evaluated in that case did include a cap).[52] In the Court's view, these precedents foreclosed the ability to specially review grants of authority involving

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

[49] *Consumers' Rsch.*, 145 S. Ct. at 2497 (quoting Brief for Respondents, FCC v. Consumers' Rsch., No. 24-354 (Feb. 11, 2025)).

[50] *Id.* at 2498.

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

[52] *See* Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212 (1989).

revenue raising, including setting numeric caps if a sufficient nonnumeric boundary exists in the statute.

The Court opined that this outcome was preferable as a policy matter because, it claimed, accepting Consumers' Research's and the dissent's proposed cap or rate-setting requirement would "throw a host of federal statutes into doubt."[53] Indeed, the government identified a list of statutes—from FDIC insurance to postage rates—that contain revenue raising provisions to be set by the executive branch that do not contain set rates or revenue caps.[54] These statutes drew much discussion at oral argument, including whether there should be a distinction in constitutional analysis between revenue raisers that constitute a fee versus a tax. According to the majority, applying the same nondelegation analysis to revenue-raising grants of authority as to any other type of alleged delegation would have the benefit of avoiding the "morass"[55] of determining whether a required payment was a fee or a tax.

With that conclusion made, the Court was able to move on to the fact-bound determination of whether the particular grant of authority to the FCC to collect revenue to fund universal services was an impermissible delegation of legislative power.

First, the Court recognized a limiting principle in the word "sufficient." The statute "directs the FCC to collect the amount that is 'sufficient' to support the universal-service programs Congress has told it to implement."[56] "[I]n fact," the Court said, "the word 'sufficient' sets a floor and a ceiling" in the amount of money the FCC is allowed to raise.[57] If the FCC raises much above or below the amount necessary, "it violates the statute."[58] This limitation is more meaningful than a mere cap on the total amount, according to the Court.

Second, the Court said Congress satisfactorily set boundaries on the "nature and content of universal services," so the FCC is limited

[53] *Consumers' Rsch.*, 145 S. Ct. at 2498.

[54] Reply Brief for the Federal Petitioners at 8, FCC v. Consumers' Rsch. (Nos. 24-354, 24-422) (Mar. 13, 2025).

[55] *Consumers' Rsch.*, 145 S. Ct. at 2499.

[56] *Id.* at 2501.

[57] *Id.* at 2502.

[58] *Id.*

in what kinds of things it can "sufficiently" fund.[59] In this portion of the analysis, the majority and dissent differed in their statutory interpretation of exactly what authority Congress granted to the FCC. The Court viewed the principles guiding universal services as required limitations on what can be a part of the universal services program.[60] Moreover, it was unconcerned by the inclusion of a provision "enabling the FCC to articulate '[a]dditional principles'" beyond the ones delineated in guiding the development of universal services because, in its view, any new principles must be "consistent with" the remainder of the statute.[61] Notably (or, tellingly, according to Justice Gorsuch's dissent), the Court included a footnote in its analysis of this component, referencing three sections of the Telecommunications Act. It clarified that it based its holding on an analysis of only Section 254, which governs the basic universal services funding model, adding, "[w]e have no occasion to address any nondelegation issues raised by" two other sections that allow for the funding of "advanced" or "additional" services.[62]

It is worth pausing here to dwell on the importance of the prior two conclusions. Using its statutory interpretation muscles, the Court identified "meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers."[63] The Court acknowledged that giving the FCC license to raise an unlimited amount of money would likely pose "constitutional problem[s]"[64] but disagreed with the *interpretive* claim that the word "sufficient" had only a downward limit. Next, the Court's interpretation of the role of certain "principles" for the FCC to consider varied sharply from Consumers' Research's and the dissent's view, saying that "we view the statutory criteria—which, contra the dissent, . . . define universal service—as

[59] *Id.*

[60] *Id.*

[61] *Id.* at 2506. Indeed, the Supreme Court has upheld broad statutory grants of discretion, such as decisions promoting the "public interest" because the phrase is deemed to "take meaning from the purposes of the regulatory legislation." *Id.* at 2507 (quoting NAACP v. FPC, 425 U.S. 662, 669 (1976)).

[62] *Id.* at 2505 n.9.

[63] *Id.* at 2501.

[64] *Id.* at 2502.

separately mandatory."[65] The Court took pains to distinguish its interpretation of the scope of authority actually granted in the statute from what was posited by Consumers' Research:

> At every turn, [Consumers' Research] read[s] Section 254 extravagantly, the better to create a constitutional problem. . . . All in all, the arguments do not show statutory construction at its best. Nor, relatedly, do they show proper respect for a coordinate branch of Government. Statutes (including regulatory statutes) should be read, if possible, to comport with the Constitution, not to contradict it. That disposition nowhere appears in the efforts Consumers' Research and the dissent make to force Section 254 past the Constitution's breaking point.[66]

To focus on a point of agreement among the Justices: there is a breaking point! The outcome in *FCC v. Consumers' Research* is similar to the 2019 *Gundy* nondelegation decision. There, the opinion of the Court and the dissent were working from different sets of "facts." Or, more precisely, were working from different interpretations of what responsibilities the statute actually gave the executive branch. Although Justice Gorsuch claimed that this was done disingenuously in both cases (in *Gundy*, claiming the Court "reimagines the term[s] of the statute,"[67] and in this case saying, "the Court eventually resorts to rewriting the statute"[68]), the different perspectives are essential to recognize when contemplating the Court's greater nondelegation jurisprudence. Everyone agrees the nondelegation principle is operative and requires an assessment of the scope of authority conveyed in determining the line between permissible and impermissible. In recent cases, the Court and the dissent have been applying the intelligible principle test to *different scopes of authority* because of disagreeing interpretations of the grant of authority. More on this later.

Finally, the Court quickly rejects the theory that the FCC impermissibly delegated authority to the administrator or that, in turn, the combination of authority granted to the FCC and the administrator

[65] *Id.* at 2506 (emphasis added).

[66] *Id.* at 2507 (internal citations omitted).

[67] *Gundy*, 588 U.S. at 149 (Gorsuch, J., dissenting).

[68] *Consumers' Rsch.*, 145 S. Ct. at 2529 (Gorsuch, J., dissenting).

together yielded an unconstitutional delegation. Dispositively, the FCC did not actually give the administrator authority for the Court to analyze in the nondelegation lens.[69] Rather, "the Administrator is broadly subordinate to the Commission."[70] In the Court's view, the administrator does not make policy or set rules but rather merely collects numbers, offers recommendations, and provides documents to the FCC. The FCC, then, is the final authority in all processes anticipated in the statute. As for the "combination" theory the Fifth Circuit adopted, the Court easily summed up: "a meritless public nondelegation challenge plus a meritless private nondelegation challenge cannot equal a meritorious 'combination' claim."[71]

B. Justice Kavanaugh's Concurrence

Despite joining the majority opinion in full, Justice Kavanaugh wrote separately for two stated purposes: (1) to "outline" the "background and rationale behind the intelligible principle test," and (2) to explain his view that delegations to independent agencies raise enhanced constitutional concerns that may require different treatment.[72] Perhaps the first point was necessary because of a belief that the Court's history with the nondelegation doctrine was in need of vindicating?

1. The intelligible principle test—Kavanaugh style

Justice Kavanaugh leads his reflection on the intelligible principle test with an emphasis on permissible "delegations," citing early examples of Congress instructing the president or executive branch officials to issue regulations or decide details of implementation of various statutes.[73] While he blesses the notion that "the Court has not said that 'anything goes' with respect to those delegations[,]" Justice Kavanaugh draws a slightly different analytical line to divide permissible and impermissible delegations.

[69] *Id.* at 2508 (majority op.).

[70] *Id.*

[71] *Id.* at 2511.

[72] *Id.* at 2511–12 (Kavanaugh, J., concurring).

[73] *Id.* at 2512.

Conceptually, to Justice Kavanaugh, a permissible delegation is merely guidance for the president in fulfilling his *executive* role of ensuring the laws are faithfully executed. Thus, no separation of powers problem would exist because the "delegation" is not even a limited grant of an Article I power, but an instruction for fulfilling an Article II power in the context of the relevant statute. As he described the Court's prior holdings, "any congressional grant of authority must supply some guidance to the President—*otherwise the President would no longer be exercising 'executive Power' when implementing legislation*."[74] He thus frames the intelligible principle test as a means to "ensure that the President is exercising executive power when implementing legislation[.]"[75]

Justice Kavanaugh's formulation of what occurs during a contested delegation is an extension of Justice Scalia's framework as described in his dissent in *Mistretta v. United States*:[76]

> The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided, and can therefore assign its responsibility of making law to someone else, but rather that a certain degree of discretion, and thus of lawmaking, ***inheres* in most executive or judicial action,** and it is up to Congress, by the relative specificity or generality of its statutory commands, **to determine—up to a point—how small or how large that degree shall be**. . . . [T]he Executive could be given the power to adopt policies and rules specifying in detail what radio and television licenses will be in the 'public interest, convenience or necessity,' **because that was ancillary to the exercise of its executive powers** in granting and policing licenses[.][77]

[74] *Id.* at 2513 (emphasis added).

[75] *Id.* at 2514. Notably, this formulation may not mesh with Justice Robert H. Jackson's conception of the separation of powers articulated in his concurrence in *Youngstown*. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring). Jackson said, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right *plus* all that Congress can delegate." *Id.* at 635 (emphasis added). Justice Jackson appears to acknowledge that some amount of legislative power may be truly shared with the executive branch but, other than a footnote extensively quoting *United States v. Curtiss-Wright*, does not offer significant insight into the nondelegation doctrine. *Id.* at 635 n.2.

[76] 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

[77] *Id.* at 418 (bold emphasis added).

Justice Scalia emphasized the point by saying that "[s]trictly speaking, there is *no* acceptable delegation of power[,]" and went on to quote John Locke's *Second Treatise of Government* in support of the statement.[78] Instead, he said:

> The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount* to a delegation of legislative powers.[79]

Clarifying this conceptual formulation may have been an important part of why Justice Kavanaugh chose to write separately. Regardless of any differences in perspective on what occurs on either side of the line of permissible and impermissible delegation, Justice Kavanaugh and the rest of the majority are comfortable using the same test to figure out where the line is drawn: the intelligible principle standard. Justice Kavanaugh blesses the test, saying it is "not toothless" and "has had staying power[.]"[80] He rejects the opportunity to "try to spell out a definitive guide for applying the intelligible principle test" but still went on to "emphasize three points" before transitioning to his perspective on grants of authority to independent agencies.

First, he simply echoes a common thread between the majority opinion and Justice Gorsuch's dissent. Both agree that the scope of power embedded in a delegation is relevant to determining whether the delegation is permissible.[81] While he elaborates on his final two points, this two-sentence paragraph appears to offer a noncontroversial olive branch noting that all members of the Court may have skepticism over an extremely powerful delegation and would use "common sense" to assess future challenges. This point is extremely relevant in outcomes like *Gundy* and this case, where the majority and the dissent are operating under different

[78] *Id.* at 419 (emphasis in original).

[79] *Id.* (emphasis in original).

[80] *Consumers' Rsch.*, 145 S. Ct. at 2515 (Kavanaugh, J., concurring).

[81] *Id.*

interpretations of the relevant statutory grant. While Chief Justice Roberts did not write separately in either case, this point may very well be why he landed on "opposite" sides in those cases—perhaps disagreeing with the Court's statutory interpretation in *Gundy* while agreeing with it here.

Second, Justice Kavanaugh pivots from strict constitutional analysis to policy considerations. He claims that "many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law[.]"[82] While a strict constitutionalist[83] may not care whether the policy aims of a particular doctrine are met elsewhere when considering when and how to apply that doctrine, Justice Kavanaugh appears to be comforted that limitations on executive power related to congressional action are possible based on two other lines of Supreme Court precedents: (1) the elimination of *Chevron* deference, and (2) the growth of the major questions canon of interpretation.[84]

Citing *Loper Bright Enterprises v. Raimondo,*[85] Justice Kavanaugh notes that the "President's actions when implementing legislation *are* constrained . . . by the scope of Congress's authorization and by any restrictions set forth in that statutory text."[86] Indeed, while he does not say so explicitly, that is exactly what happened here: the Court interpreted the statutory provision on its own and articulated a more limited scope of authority than the litigant claimed or the dissent

[82] *Id.*

[83] *See* Lawson, *supra* note 24, at 64 ("But if one is less a constitutionalist than a *conservative*, one might worry a great deal about the 'appropriate' judicial role, public perceptions of the Court, the dangers of judicial 'activism,' and a host of other policy-laden considerations that are not grounded in constitutional meaning.").

[84] *Consumers' Rsch.*, 145 S. Ct. at 2515–16 (Kavanaugh, J., concurring) ("Second, many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law in related areas—in particular (i) the Court's rejection of so-called *Chevron* deference and (ii) the Court's application of the major questions canon of statutory interpretation.").

[85] 603 U.S. 369, 394–406 (2024). In *Loper Bright*, the Supreme Court overruled *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which held that courts should defer to permissible agency interpretations of statutes.

[86] *Consumers' Rsch.*, 145 S. Ct. at 2515 (Kavanaugh, J., concurring) (emphasis in original).

believed existed.[87] Additionally, in a sense, the constitutional underpinnings of *Loper Bright*[88] are its own flavor of the nondelegation doctrine. In that context, neither Congress (by statute) nor the courts (by a judicially created doctrine of deference) can delegate the Article III responsibility for interpreting the law to Article II executive agencies. While Justice Kavanaugh does not use the language of nondelegation in respect to *Loper Bright's* overruling of *Chevron* deference, he is reassured by the ability of the judiciary to independently recognize limits to congressionally granted delegations within a statute's text.[89]

Justice Kavanaugh goes on to point out that the major questions canon of construction may result in similar policy outcomes as a robust application of the nondelegation doctrine. He says that canon "reflects both the background separation of powers understandings and the commonsense interpretive maxim that Congress does not usually 'hide elephants in mouseholes' when granting authority to the President."[90] Notably, he retreats from the idea he floated in a statement respecting the denial of certiorari in a separate case of a "nondelegation principle for major questions."[91] Instead, he embraces major questions merely as a canon of construction, rather than a constitutional principle to apply with (or instead of) the intelligible principle standard.

Third, Justice Kavanaugh's final point arguably strays even farther afield of the actual constitutional question at hand. He declares that the nondelegation doctrine plays an "even more limited

[87] Indeed, Consumers' Research asserted at oral argument that the FCC itself interpreted the statute in a more expansive manner than the Court eventually held. Oral Argument Transcript at 115, FCC v. Consumers' Rsch., No. 24-354 (March 26, 2025) ("[T]he principles in 254(b) are ones that the FCC does not have to substantively comply with. This is not some extreme, unusual reading as they try to make it sound. That's been their uniform interpretation for 25 years."). Regardless, the Court cited *Loper Bright* in defense of reading the statute independently to determine "what power Congress has conferred." *Consumers' Rsch.*, 145 S. Ct. at 2506.

[88] The Court in *Loper Bright* based its holdings on the statutory text of the Administrative Procedure Act, rather than constitutional requirements. However, the Court noted the statute "incorporates the traditional understanding of the judicial function" and repeatedly invoked constitutionally sourced concepts in justifying its holding. *See* Loper Bright Enter. v. Raimondo, 603 U.S. 369, 386–390, 394, 403 (2024).

[89] Notably, any statute that does not contain limitations that the judiciary can examine may be at risk under the intelligible principle test.

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

[91] Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J.).

role" in national security and foreign policy matters "in light of the President's constitutional responsibilities *and independent Article II authority*."[92] The latter part of his sentence gives away the disconnect with the nondelegation doctrine. The nondelegation doctrine—as the Supreme Court has defined it without fail—deals with the ability of one branch (typically, Congress) to delegate some or any of *that branch's* authority. A court interpreting a congressional delegation to the executive branch in a subject where both branches have overlapping powers will be faced with a different set of questions than another case interpreting a delegation of a "strictly and exclusively legislature power" (such as the power to tax).[93]

Indeed, judicial review of a congressional grant of authority in a subject matter that involves independent Article II or Article III powers (such as national security and foreign policy) must include an analysis of the extent of the *independent* powers of the branch that is receiving the delegation. To the extent the two branches powers *truly overlap*, then Congress's "delegation" of part of its nonexclusive legislative authority in that context (such as foreign policy) may actually transform into a "regulation" of executive or judicial powers. Indeed, the authority Justice Kavanaugh relies on to support his third point anticipates regulation (i.e., restriction or limitation) of authority, rather than delegation.[94] This would certainly be a

[92] *Consumers' Rsch.*, 145 S. Ct. at 2516 (Kavanaugh, J., concurring) (emphasis added).

[93] *Wayman*, 23 U.S. at 42. The Court has previously implied a more stringent nondelegation test in foreign affairs matters but did not elaborate on whether such an analysis would only apply *after* analyzing independent authority for the relevant conduct and finding it lacking as to the specific foreign affairs issue challenged under the nondelegation doctrine. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321–22 (1936). There, the difference in analysis was justified by prudential reasons, rather than a strict separation of powers review. *Id.* ("When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's actions—or, indeed, whether he shall act at all—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. This consideration, in connection with what we have already said on the subject, discloses 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.").

[94] *See, e.g.*, *Consumers' Rsch.*, 145 S. Ct. at 2516 (Kavanaugh, J., concurring) (noting that the president must often be accorded freedom "from statutory restriction") (quoting Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 684 (1980)).

separation of powers question, but not necessarily a nondelegation one, in the sense it has been applied historically.[95]

Alternatively, the congressional grant of authority may apply to a different aspect of the subject matter not wrapped up in the independent executive or judicial authority. In that case, the traditional nondelegation test would apply. A timely (as of the time of this writing) example of a connected but not overlapping topic is tariff authority. Multiple challenges are making their way through the courts of appeals on whether Congress delegated authority to the executive branch to enact tariffs through the International Economic Emergency Powers Act. And, more importantly for our purposes, if Congress did so, does the Constitution allow the delegation of that power in the manner it has been used (i.e., application of the nondelegation doctrine)?[96] Justice Kavanaugh's third point shows he is hesitant to apply the nondelegation doctrine in cases involving foreign policy and national security, but his concurrence fails to recognize that such large fields may involve separate—and *potentially nonoverlapping*—executive and legislative independent powers.

Although Justice Kavanaugh claims the nondelegation doctrine and major questions canon (which he incorporates into point three after also invoking it in point two) do "not translate" to the national security or foreign policy contexts, the underlying questions in those contexts may involve Article II powers distinct from the Article I powers that would trigger a nondelegation analysis.

[95] As an example, *Trump v. United States*, 603 U.S. 593 (2024) (the executive "immunity" decision), could be read as establishing a "non*regulation*" doctrine. There, the Supreme Court held that Congress cannot legislatively regulate (in that case, by generally applicable criminal laws applied to the president) areas within the "conclusive and preclusive" authority the Constitution grants to the executive branch. *Id.* Notably, *Youngstown Sheet & Tube Co. v. Sawyer* may have envisioned some congressional ability to regulate even independent executive authority: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*." 343 U.S. 579, 638 (1952) (emphasis added).

[96] *See* Petition for a Writ of Certiorari Before Judgment, *Learning Res., Inc. v. Trump*, No. 24-1287 (June 17, 2025); Notice for Oral Argument Proceedings in *V.O.S. Selections, Inc. v. Trump*, V.O.S. Selections, Inc. v. Trump, No. 25-1813 (Fed. Cir. July 15, 2025).

2. Independent agencies

Justice Kavanaugh's perspective on delegation to independent agencies flows naturally from his view on permissible grants of authority from Congress to another branch. If a permissible grant is merely an instruction for how the president is to perform his Article II responsibility (in the Congress-to-executive context) to see that the law is faithfully executed, then the same nondelegation analysis could not apply to a recipient of congressional delegation that has no independent constitutional authority (i.e., an agency that is truly independent from the executive branch).[97]

Instead of dwelling on the analytical difference, however, Justice Kavanaugh returns once again to a policy point. He stresses the problem of lack of accountability of independent agencies with rule-making power:

> [W]hen Congress delegates authority to an independent agency, no democratically elected official is accountable. Whom do the people blame and hold responsible for a bad decision or policy adopted by an independent agency? Such a system of disembodied independent agencies with enormous power over the American people and American economy operates in substantial tension with the principle of democratic accountability incorporated into the Constitution's text and structure, as well as historical practice and foundational Article II precedents.[98]

Because Justice Kavanaugh views the lack of statutory for-cause removal protections for the FCC as rendering the FCC fully within the purview of the executive branch (and, thus, not an independent agency), he does not define exactly how a different standard for non-delegation review in the independent agency context should play out. He does say that "[i]n an appropriate case, [the] Court should address that problem."[99]

[97] Indeed, this is the basis of Justice Scalia's dissent in *Mistretta*, despite his agreement with the Court's intelligible principle analysis that upheld the United States Sentencing Commission. Mistretta v. United States, 488 U.S. 361, 420–27 (1989) (Scalia, J., dissenting).

[98] *Consumers' Rsch.*, 145 S. Ct. at 2518 (Kavanaugh, J., concurring).

[99] *Id.*

C. Justice Jackson's Concurrence

Justice Jackson authored a solo two-page concurrence to express her "skepticism that the private nondelegation doctrine—which purports to bar the Government from delegating authority to private actors—is a viable and independent doctrine in the first place" because "[n]othing in the text of the Constitution appears to support a *per se* rule barring private delegations."[100] She cautions that "we should not lightly assume that Article III implicitly directs the Judiciary to find" a limit to another branch's power.[101]

Assuming her brief comments indicate a willingness to entertain some grants of authority to a private party, this understanding of the nondelegation doctrine immediately clashes with Justice Kavanaugh's formulation of the nondelegation doctrine. If permissible delegations are mere instructions to another branch on how to fulfill that branch's constitutional duties, then it is entirely possible that a future Court could interpret the Constitution to prohibit, per se, delegations to groups without any independent constitutional authority—be they independent agencies or private actors. Justice Jackson rightly recognizes the lack of constitutional text differentiating recipients of grants of constitutional authority but does not grapple with the structural, separation of powers considerations animating the doctrine in her short concurrence. She will likely have a chance in a future case, which will shine additional light on the varied perspectives of delegation.

D. The Dissent

Justice Gorsuch, joined by Justices Thomas and Alito, calls the universal services funding mechanism a "delegation beyond anything yet seen in the U.S. Reports[.]"[102] In his view, the case "begins and ends" with the first question presented. He formulated the question[103]

[100] *Id.* at 2518 (Jackson., J., concurring).

[101] *Id.* (quoting Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 446 (2024) (Jackson, J., concurring)).

[102] *Consumers' Rsch.*, 145 S. Ct. at 2519 (Gorsuch, J., dissenting).

[103] Though later conceding the universal services fund may be a tax, the government's cert petition avoided the word in its phrasing of the first question presented, putting it this way: "Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund." Petition for a Writ of Certiorari, FCC v. Consumers' Rsch., No. 24-354 (Sept. 30, 2024).

as follows: "did Congress violate the Constitution by delegating to the FCC the power to tax?"[104]

The emphasis on taxation is apparent from the starting lines of the dissent, which opens with the observation that "[w]ithin the federal government, Congress 'alone has access to the pockets of the people.' The Constitution affords only our elected representatives the power to decide which taxes the government can collect and at what rates." [105]

Without advocating for overturning precedent, Justice Gorsuch was forced to work within the same intelligible principle test for grants of authority related to taxes as delegations for anything else.[106] In 1989, the Supreme Court considered a challenge to a delegation to the Secretary of Transportation to "establish a system of user fees to cover the costs of administering certain federal pipeline safety programs[.]"[107] There, the Court paid homage to the taxing power but said that Congress, "when enacting tax legislation, has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive in such enactments"[108] and largely applied the typical intelligible principle standard.

Staying within that framework, Justice Gorsuch stresses the oft-repeated adage that the "intelligible principle test is context dependent"[109] and describes the historical and textual importance of the taxing power. He claims, "the Constitution does not require Congress to make every decision, [but] there are some choices that belong to Congress alone—including setting a tax's rate or, at least, capping receipts."[110] Like Justice Kavanaugh's discussion of the nondelegation doctrine in the context of independent agencies, Justice Gorsuch highlights the policy results of requiring Congress to set a tax rate or, at a minimum, a numeric cap on the amounts an individual or body other than Congress could require, saying that if Congress were to enact a ridiculously high cap that an executive

[104] *Consumers' Rsch.*, 145 S. Ct. at 2524 (Gorsuch, J., dissenting).

[105] *Id.* at 2519 (internal citation omitted) (quoting The Federalist No. 48 at 334 (J. Cooke ed. 1961) (James Madison)).

[106] *See* Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 212 (1989).

[107] *Id.* at 214.

[108] *Id.* at 221.

[109] *Consumers' Rsch.*, 145 S. Ct. at 2535 (Gorsuch, J., dissenting).

[110] *Id.* at 2532.

agency could charge up to, "the American people would at least know whom to thank when the corresponding charges showed up on their phone bills."[111]

Near the end of his dissent, Justice Gorsuch points out that "[i]n so many other arenas, this Court vigorously polices the Constitution's allocation of power."[112] This accountability has applied to both delegations of the giving branch's power and regulations of a neighboring branch's power. "Yet there is one exception[,]" he says:

> When Congress has willingly surrendered its power to the Executive Branch, this Court's responses can only be described as feeble. . . . What happens when Congress, weary of the hard business of legislating and facing strong incentives to pass the buck, cedes its lawmaking power, clearly and unmistakably, to an executive that craves it? No canon of construction can bar the way.[113]

Such an admonition not only rejects the ability for statutory interpretation, generally, to save the day (indeed, this is where he claims the majority's interpretation in this case was not in good faith but, instead, was itself a "usurp[ing] of legislative power"[114]). It also rebuts Justice Kavanaugh's comfort in the major questions canon.

Despite Justice Gorsuch's hostility to the Court's statutory interpretation of Section 254, he embraces the majority's footnote 9, which peels off from its analysis two broader statutory sections, saying that even the Court cannot "bring itself to bless such a lavish delegation of taxing authority."[115] Whether a reader joins Justice Gorsuch's perspective that the Court is engineering a statutory interpretation of Section 254 to avoid applying the nondelegation doctrine or trusts the good faith interpretation of the majority of the Court, the result is the same: the scope of the power delegated matters to the full Court. None of the opinions of *FCC v. Consumers' Research* embraces an ability of Congress to delegate unlimited revenue-raising powers to the executive branch. Closing with a

[111] *Id.* at 2537.

[112] *Id.* at 2538.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 2531.

restatement of a principle all members of the Court appear to agree with, Justice Gorsuch reminds us:

> The Constitution promises that our elected representatives in Congress, and they alone, will make the laws that bind us. . . . When it comes to other aspects of the separation of powers, we have found manageable ways to honor the Constitution's design. This one requires no less of us.[116]

III. Putting It All Together: The Future of the Principle Universally Recognized

FCC v. Consumers' Research is one of those cases in which what the Court *didn't* do is bigger news than what the Court *did* do. On the one hand, the Court didn't "reconsider the approach"[117] of how to analyze nondelegation challenges (i.e., the intelligible principle test), and it didn't adopt a heightened or different standard for reviewing revenue-raising grants of authority. On the other hand, it *also* didn't question the longstanding doctrine that the Constitution bars Congress from delegating legislative authority, or that courts must examine the scope of power conferred by Congress in determining whether the grant of authority is a permissible or impermissible "delegation."

So—yet again—we can say that "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend."[118] Indeed, this "principle universally recognized" is so unanimous among the members of the Court that the majority condemns the approach of the dissent as failing to "vindicate the nondelegation doctrine or, more broadly, the separation of powers."[119] Instead of weakening the doctrine, the dueling opinions justify their conflicting conclusions with different interpretations of the statute: both the majority and the dissent imply that if their counterpart read the statute to confer the same scope of power as they did, all would be on the same side.

[116] *Id.* at 2539.

[117] In the words of Justice Alito's concurrence in *Gundy v. United States,* 588 U.S. 128, 149 (2019).

[118] *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

[119] *Consumers' Rsch.*, 145 S. Ct. at 2501 (majority op.).

Thus, the first takeaway from a close look at the four opinions of *FCC v. Consumers' Research* is the vital importance of tools of statutory interpretation. Mundane? Maybe. Dispositive even in nondelegation cases? Absolutely.

Next, the concurrences in *FCC v. Consumers' Research* preview a conceptual difference in what is happening on either side of the line of permissible versus impermissible grants of authority. This difference is likely to splinter the Court along different lines in the future. In Justice Kavanaugh's view, grants of authority to the executive branch are mere instructions for exercising independent executive branch authority in implementing that law. In this view, because the validity of assignments relies on another branch's independent powers, grants of authority to independent agencies or private parties will almost certainly fall on the impermissible line. Justice Jackson's caution over "limit[ing]" another branch's authority indicates a different view on permissible grants of power, untethered to an independent source of power held by the recipient of such a grant. If the view revealed in the short concurrence reflects her conception of delegations, then she will likely apply the same intelligible principle analysis to private parties and to the mine run of executive grant cases. And though Justice Kavanaugh spoke only for himself, his views on the nondelegation doctrine in the context of national security and foreign policy are likely to play a pivotal role in future cases.

Thus, the second takeaway is that litigants advancing nondelegation arguments, and scholars analyzing them, should consider carefully how each justice views what is actually taking place when Congress embeds within a statute duties for another branch or body (public or private) to perform. Is the validity of the assignment reliant on independent authority of the recipient (i.e., Article II or Article III powers) or wholly dependent on the statute's grant? The several justices who have not separately written in recent nondelegation cases may be willing to adopt unexpected outcomes if convinced to adopt one formulation or the other of what occurs during a permissible "delegation."

Ultimately, the Court still has not contested the 1892 Supreme Court declaration that the statement, "Congress cannot delegate legislative power to the President[,]" remains a "principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[120] Rather, *FCC v. Consumers' Research* demonstrates that conflicting outcomes of nondelegation challenges are vindicated by the use of ordinary tools of statutory interpretation to limit the scope of power conferred and provides insights into the differing conceptual frameworks of what Congress is achieving through those contested "delegations" that will likely shape the outcomes of future nondelegation challenges.

[120] Field v. Clark, 143 U.S. 649, 692 (1892).