Stevens & Lee

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The Administrative State, a Three-Legged Stool, the Supreme Court and *FCC v. Consumers' Research*

This white paper discusses the U.S. Supreme Court's recent decision in *Federal Communications Commission v. Consumers' Research*, a case involving the extent to which Congress may delegate regulatory authority to a federal agency, including the Federal Trade Commission, without violating Article I of the Constitution.

The case is of importance because the Court in recent years has been sharply divided as to the scope of permissible delegations and as to whether the standard for testing the same should be applied differently than it has in the past or be abandoned, in either case in favor of a nondelegation doctrine that narrows the permissible range.

It is also important because the constitutionality of delegations under Article I is deeply intertwined with questions as to scope of presidential authority to execute the laws under Article II and the federal courts' exercise of independent authority under Article III when considering an agency's interpretation of a law – and all of this ultimately goes to the heart of the ongoing dispute as to whether there is in fact an administrative state ripe for dismantling.

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Of late, there has been an enormous amount of interest in and discussion and disagreement as to whether there is an administrative state ripe for dismantling.

Most recently, an important issue relating to this was front and center in a case decided by the U.S. Supreme Court on June 27. In *Federal Communications Commission v. Consumers' Research*, 24-354, U.S. (June 27, 2025), a case we have been following, the Court was called upon to consider the question whether and when Congress can delegate authority to an independent regulatory agency without violating Article I of the Constitution.

I. Introduction

Assuming there is an administrative state ripe for dismantling, it has functionally rested on a three-legged stool:

- The first being that Congress by legislation may create a regulatory agency and delegate authority to that agency without violating Article I, Section 1 of the Constitution (all legislative powers to be vested in Congress), provided Congress lays down by legislative act an "intelligible principle" to which the agency is directed to conform;

- The second being that, pursuant to such a delegation, Congress may provide that agency officials are only removable by the President for cause without violating Article II, which provides that "the executive power shall be vested in a President" whose duty it is to "take Care that the Laws be faithfully executed"; and

- The third (known as *Chevron* deference) being that whenever the language of a statute is ambiguous, it should be assumed that Congress has conferred interpretive authority to the agency, and courts must therefore defer to the agency's interpretation as reflected in its rules and regulations, provided that interpretation is reasonable.

The third leg effectively fell off the stool when in 2024 the Supreme Court in *Loper Bright Enterprises v. Raimondo*[1] overruled its prior decision in *Chevron USA v. Natural Resources Defense Council*,[2] thereby eliminating *Chevron* deference and instead

[1] 603 U.S. 369 (2024)
[2] 467 U.S. 837 (1984)

requiring that courts exercise their independent judgment when considering an agency's interpretation of an ambiguous statute.[3]

The second leg has stood principally on the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*[4] in which the Court held that the Federal Trade Commission Act did not violate Article II notwithstanding that Commissioners of the Federal Trade Commission (FTC or Commission) can only be removed by the President for cause. That leg is wobbling and will almost certainly tumble when *Humphrey's Executor* is either directly or effectively overruled by the Court when it is called upon to decide one of the cases now being litigated on account of President Trump's recent without cause firing of members of the National Labor Relations Board (NLRB), Merit System Selection Board (MSSB) and Consumer Products Safety Commission (CPSC) along with Commissioners of the FTC.[5]

The integrity of the first leg (congressional delegation to an agency) was most recently tested and left standing when the Court handed down its decision in the *Consumers' Research* case. There the Court applied the intelligible principle test and ruled by a six to three vote that Congress had not acted unconstitutionally when it passed the Telecommunications Act of 1996 (the Act) and granted the FCC the power to administer it.

Significantly, however, and as more fully discussed below, the decision and the Justices' opinions suggest that when the stool finally topples, it may do so with this leg wobbling but still in place, at the same time incapable on its own of providing any real support.

II. The Constitutionality of Delegations: The Intelligible Principle Test

Prior to this most recent case, the basic principles with respect to the constitutionality of a congressional delegation were summarized by Justice Kagan writing a plurality opinion for the Court in *Gundy v. United States*, 588 U.S. 128 (2019). In *Gundy*, the Court rejected the petitioners' argument that there had been an unconstitutional delegation of

[3] Notably, the Court in *Loper Bright* recognized a distinction between deference and delegation. "When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the [Administrative Procedure Act] is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." 603 U.S. at ___..

[4] 295 U.S. 602 (1935)

[5] The demise of *Humphrey's Executor* was most recently telegraphed when the Supreme Court in *Trump v. Boyle et. al.*, No. 25A11, U.S. (July 23, 2025) stayed the enforcement of a district court order relating to President Trump's without cause firing of members of CPSC. The district court applying *Humphrey's Executor* had ordered their reinstatement. In an unsigned order on the emergency docket, the Court cited to the stay it had previously issued in *Trump v. Wilcox*, 24A966, U.S (May 22, 2025) concerning the without cause firing of a member of the NLRB and of the MSSB. While the Court in both cases stated that its stay orders were not conclusive as to the merits, they strongly signal what a decision on the merits will be.

authority by Congress to the Attorney General involving portions of the Sex Offender Registration and Notification Act. Per Justice Kagan:

- Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."
- Based on that provision, Congress may not transfer to another branch powers which are strictly and exclusively legislative.
- Congress may, however, confer substantial discretion on executive agencies to implement and enforce the laws.
- A statutory delegation is constitutional provided Congress lays down by legislative act an "intelligible principle" to which the agency is directed to conform.[6]

As she further explained, under prevailing law, these standards are not demanding. In fact, "[o]nly twice in this country's history (and that in a single year) have we found a delegation excessive — in each case because Congress had failed to articulate any policy or standard to confine discretion. … We have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."

Justices Ginsburg, Breyer and Sotomayer joined in Justice Kagan's opinion.

Justice Gorsuch wrote a dissenting opinion joined in by Justices Roberts and Thomas. He concluded that there had been an unconstitutional delegation and that, in any case, a more "robust" nondelegation doctrine should apply. He wrote that it would "frustrate the system of government ordained by the Constitution if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals."

Justice Alito, signaling agreement with the dissenters, wrote an opinion concurring with the judgement but stating that if a majority of the Court were willing to "reconsider the approach we have taken for the past 84 years," an approach he characterized as

[6] The intelligible principle doctrine dates back to the Court's 1928 decision in *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). There, the Court upheld Congress's empowering and directing the President to increase or decrease duties under the Tariff Act of 1922. Chief Justice Taft, delivering the opinion of the Court, wrote: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

"[upholding] provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards," he would support that effort

Justice Kavanaugh did not participate in the *Gundy* case as he was not yet on the Court. However, like Justice Alito and based on a concurring opinion he wrote concerning the Court's later denial of rehearing in the *Gundy* case and in *Paul v. United States*, he seemed ready to reconsider the Court's approach to delegation questions. "I agree with the denial of certiorari because this case ultimately raises the same statutory interpretation issue that the Court resolved last Term in *Gundy* ….I write separately because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."

Accordingly, while the intelligible principle test as historically applied determined the outcome in *Gundy*, it seemed relatively clear that in another case a majority of the Court would in fact adopt a more robust nondelegation doctrine. This could take the form of either eliminating the test in favor of a different standard or retaining it but applying it such that delegations were less leniently scrutinized.

III. The Intelligible Principle Test in Consumers' Research

Notwithstanding what seemed likely to be its fate, the intelligible principle test has survived at least for now, albeit with less importance. As explained above, the Court by a six to three vote applied the test and upheld Congress's delegation of authority to the FCC under the Act.

The majority opinion was written by Justice Kagan, an opinion in which Justices Roberts, Sotomayor, Kavanaugh, Barrett and Jackson joined. Justices Kavanaugh and Jackson wrote concurring opinions and a dissenting opinion was written by Justice Gorsuch in which Justices Alito and Thomas joined.

The Facts and Issues Presented

In 1996, Congress passed the Act in which it directed the FCC to preserve and advance universal service to all telecommunications subscribers and establish and operate a Universal Service Fund (USF) designed to fund telecommunications subsidies to schools, libraries, healthcare facilities, and low-income individuals.

The FCC proceeded to establish the USF and then appointed Universal Service Administrative Company (USAC), a private nonprofit company, as the program's administrator, authorizing that company to perform various administrative tasks.

Pursuant to Section 254 of the Act, Congress set forth six basic principles governing the USF's operations:

I. Quality services should be available at just, reasonable and affordable rates;

II. All regions should have access to those services;

III. All consumers, including low-income consumers and those in rural, insular and high cost areas, should have access to services that are ‘‘reasonably comparable” in quality and price to those in urban areas;

IV. Every carrier should make ‘‘an equitable and nondiscriminatory contribution” to the achievement of universal service;

V. The subsidies given to advance that goal should be specific, predictable and sufficient; and

VI. Schools, libraries and health care providers should have access to services.

Section 254 does not set forth a numerical limit on the amount the FCC may raise but instead directs the FCC to collect contributions “sufficient” to support universal services programs.

In addition, along with the six principles, Section 254 empowers the FCC to take into account such other principles as it determines are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with the statute.

The case basically focuses on whether these six principles constitute intelligible principles for purposes of satisfying Article I or whether instead the delegation was unconstitutional either because:

I. Without a numerical limit on the amount to be collected, and instead pegging it to an amount “sufficient” to fund universal services, Congress had not given the FCC the guidance required for there to be an intelligible principle;

II. The FCC in operating the program was empowered to take into consideration such other principles as it determines are appropriate thereby rendering the congressional guidance too open-ended;

III. The fees charged to carriers under the USF are taxes and therefore should be subject to a stricter nondelegation standard; or

IV. The FCC's appointment of USAC as the program's administrator resulted in an unconstitutional private sub-delegation.[7]

The Decision

Justice Kagan, writing for the majority and applying the intelligible principle test, concluded that no impermissible transfer of authority had occurred.

According to Justice Kagan, under the Court's prior nondelegation precedents, Congress in Section 254 sufficiently guided and constrained the discretion that it lodged with the FCC to implement the universal service contribution scheme, and numeric limits were not required because the principles set forth in the Act to guide the FCC themselves established the boundaries, minimum and maximum, for funding purposes.

As for the lack of a numerical limit and the sufficiency issue, the Act sets forth both a floor and a ceiling — i.e., the FCC can neither raise less nor more than is adequate or necessary to finance the universal services programs and they themselves are adequately defined by determinate standards. The statute makes clear whom the program is intended to serve: those in rural and other high-cost areas with particular attention to rural hospitals, low-income consumers, and schools and libraries, and includes provisions defining universal service and stating the program's core "principles," and providing specific criteria. Congress has given appropriate guidance about the nature and content of universal service, and that plus the "sufficiency" ceiling defeats this challenge.

Justice Kagan also wrote that there is no precedent for distinguishing fees from taxes and taxes from fees for purposes of applying the intelligible principle test and therefore no stricter nondelegation principles were required.

Further, authorizing the FCC to take into consideration other principles did not result in the delegation being impermissibly open-ended as those other principles had to be both consistent with the Act and "necessary and appropriate for the protection of the public interest, convenience, and necessity."

As for improper sub-delegation to a private party, the FCC retained all decision-making authority relying on USAC only for non-binding advice. Accordingly, she concludes that neither the delegation nor the sub-delegation on their own violated Article I and nothing

[7] The case was an appeal from a Fifth Circuit decision which held that the combination of the delegation and sub-delegation resulted in the delegation violating Article I. While Consumers' Research itself almost wholly ignored this basis for invalidating the delegation, the Court considered and rejected it.

in the delegation or the sub-delegation, either separately or together, violated the Constitution.

In describing how the intelligible principle test operates and how to distinguish between the permissible and the impermissible, Justice Kagan explains that under the test:

- The degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred, i.e., the guidance needed is greater when an agency action will affect the entire national economy than when it addresses a narrow, technical issue.
- Congress must have made clear both the "general policy" that the agency must pursue and the boundaries of its delegated authority.
- Congress must have provided sufficient standards to enable both the courts and the public to ascertain whether the agency has followed the law.

"If Congress has done so – as we have almost always found – then we will not disturb its grant of authority." 603 U.S. ____ (2025).

With this articulation of the test and its application to the case at hand, Justices Roberts, Sotomayer, Kavanaugh, Barrett and Jackson joined in the opinion thereby forming a majority.

IV. Justice Kavanaugh's Concurrence and the Future of the Intelligible Principle Test

In his concurring opinion, Justice Kavanaugh notes that the intelligible principle test has been the foundational test for the 97 years following the Court's decision in *J.W. Hampton*, and under the test, Congress may lay down the general policy and standards that animate the law, leaving the agency to refine those standards.

That said, he also writes that the test is not "toothless" and that the Court has not said that "anything goes" with respect to those delegations. He suggests that the intelligible principle test may have had staying power because of the difficulty of agreeing on a workable and constitutionally principled alternative, or because it has been thought that a stricter test could diminish the President's longstanding Article II authority to implement legislation.

In any case, he sees no need to attempt to spell out a definitive guide for applying the test and notes that it would probably not be possible to do so anyway. Recognizing, as did both Justice Kagan in her majority opinion and Justice Gorsuch in his dissent, that the degree of agency discretion that is acceptable varies according to the scope of the

power congressionally conferred and that context matters, and in light of the particular facts and circumstances involved in the case, he agrees with how the Court has applied the test and, accordingly, concurs in the opinion.

In so articulating and applying the test, Justice Kavanaugh, while choosing not to upend it, effectively makes clear that his concurrence is specific to those facts and circumstances and should not be interpreted to mean that he endorses application of the test such that it is easily satisfied as a matter of law. He is certainly not rejecting Justice Gorsuch's critique of the test and in some ways appears to be bridging the divide between Justices Kagan and Gorsuch, especially since all three Justices expressly acknowledge the relationship between agency discretion and scope of power conferred.[8] All that said, the bottom line appears to be that the intelligible principle test, while remaining alive, may in fact be more difficult to satisfy in future cases — the bar set higher for purposes of garnering a five vote majority.

What is also clear is that the intelligible principle test may be of diminished significance going forward. In his concurrence, Justice Kavanaugh notes that the structural concerns with the test i.e., the fact that its boundaries are often near impossible to discern and that it has been relatively easy to satisfy, have been separately addressed and at least to some extent assuaged by application of the "major questions" doctrine and the rejection of *Chevron* deference.

Under the major questions doctrine as explained by the Court in *West Virginia v. EPA*, 597 U.S. 697 (2022), there are cases in which the history and breadth of the authority that an agency is claiming pursuant to a congressional delegation are of such economic and political significance that there is reason to hesitate before concluding that Congress meant to confer such authority. The agency instead must point to "clear congressional authorization" for the power it claims.

The application of the major questions doctrine thereby nicely dovetails with the intelligible principle test as explained by both Justice Kagan and Justice Kavanaugh — once again that the degree of acceptable discretion varies according to the scope of the power congressionally conferred, i.e. the authorization needed being greater when an agency action will affect the entire national economy than when it addresses a narrow, technical issue.[9]

[8] In this way, it seems likely that Justice Kavanaugh was effectively the swing vote bringing together Justices Roberts and Barrett with Justices Kagan, Sotomayer and Jackson to form the six-vote majority.
[9] In a similar vein, the elimination of *Chevron* deference will result in courts' having greater power and responsibility to scrutinize agency action pursuant to a delegation irrespective of whether the delegation itself is constitutional.

V. The Dissenters

Justice Gorsuch, who had previously advocated for application of a more robust nondelegation doctrine (see his dissenting opinion in *Gundy*), joined by Justices Thomas and Alito, filed a dissent calling out the universal services fees as taxes and asserting that only Congress has the taxing power — it cannot be delegated to an executive agency which then decides for itself what rates to apply and what amounts to collect.

He reaches this conclusion applying the intelligent principle test as applied by the Court in *Gundy* and as applied by the majority in this case. He does this in lieu of applying a stricter standard because Consumers' Research itself did not advocate for application of a more robust nondelegation doctrine along the lines of what Justice Gorsuch had called for in his *Gundy* dissent.

While agreeing with the majority that the intelligible principle test is not one size fits all, that context matters, and that the degree of agency discretion that is acceptable depends on the scope of the power congressionally conferred, he writes that, in order to survive the intelligible principle test in the case of a delegation involving the power to tax, Congress must supply more significant limits on an agency's discretion than when Congress confers some lesser authority. And he asserts that the Court has never approved legislation allowing an executive agency to tax domestically unless Congress itself has prescribed the tax rate.

VI. The Sub-Delegation Question

The issue concerning the constitutionality of the sub-delegation to a private party did not ultimately play much of a role in deciding the case.

Justice Kagan quickly dispensed with the argument having found that the FCC retained all decision-making authority relying on USAC only for non-binding advice. Justice Kavanaugh in his concurrence makes no mention of it. For Justice Gorsuch, there was no reason to address the sub-delegation question because Congress' delegation to the FCC was itself unconstitutional.

Justice Jackson in her concurring opinion does discuss it, voicing her skepticism as to whether the private nondelegation doctrine is a viable and independent doctrine in the first place. She writes that "[n]othing in the text of the Constitution appears to support a per se rule barring private delegations. And recent scholarship highlights a similar lack of support for the doctrine in our history and precedents."

VII. A Final Word

Post-*Consumers' Research*, the intelligible principle test survives and the first leg of the three-legged stool (Congress' authority to delegate) remains standing, but in a weakened state and playing a less important role in support of the stool as the other legs collapse.

VIII. Endnotes

Presidential Removal Authority – Independent Agencies – Humphrey's Executor – Reinvigorating Delegation

In his concurrence, Justice Kavanaugh also touches on the constitutional issue relating to presidential removal authority in respect of officials of independent agencies. The issue here is whether Article II of the Constitution, which provides that the executive power shall be vested in the President who shall take care that the laws are faithfully executed, is violated when the President can remove an agency official only for cause. (As explained in footnote 5, this issue is "front and center" in various pending cases, including those involving challenges to President Trump's without cause firing of members of the NLRB, MSSB, and CPSC along with Commissioners of the FTC, cases which are undoubtedly headed to the Supreme Court.)

For purposes his concurrence, Justice Kavanaugh does not treat the FCC as an independent agency because there is no statutory text that restricts the President's authority to remove FCC Commissioners at will, and he is of the view that removal protection should not be inferred from statutory silence.

If, however, the FCC were an independent agency with the President not empowered to remove agency officials without cause, he states that a serious Article II issue would arise. Quoting Justice Scalia in *Freytag v. Commissioner*, 501 U. S. 868, 921 (1991), he writes that "[such agencies] belong to what has been aptly labeled a 'headless' Fourth Branch."

According to Justice Kavanaugh:

> "When 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."

Justice Kavanaugh then goes on to describe two ways to deal with the constitutional problem arising from independent agencies, one of which interestingly takes him and us back to the delegation question.

First, the Court could either overrule or significantly narrow *Humphrey's Executor,* where, as explained, the Court held that Article II was not violated, notwithstanding that under the FTC Act, Commissioners can only be removed by the President for cause. The effect of this would be that the heads of all or most independent agencies would be removable at will by the President.

Alternatively, the Court could apply a more stringent version of the nondelegation doctrine to delegations to independent agencies, by, for example, requiring independent agencies to first submit proposed rules to Congress for approval in the legislative process before the rules can take effect**.**

He concludes:

> "I will not prolong the point here. Congressional delegations of policymaking authority to independent agencies raise significant Article II issues. In an appropriate case, this Court should address that problem."

The Significance of Consumers' Research as to the Federal Trade Commission

Under Section 5 of the FTC Act, the FTC is empowered to prevent persons, partnerships and corporations, subject to various exceptions, from engaging in unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

Rules and regulations promulgated by the FTC under Section 5 are susceptible to challenge as arising from unconstitutional delegations by Congress to the FTC. This is because the term "unfair methods of competition" is not defined in the statute and the FTC has therefore been effectively delegated authority to interpret and apply it.

The fundamental question is whether "unfair methods of competition" constitutes an intelligible principle taking into consideration the scope of the power congressionally conferred, the presence or absence of a general policy that the FTC must pursue and the boundaries of its delegated authority, and whether Congress has provided sufficient standards to enable both the courts and the public to ascertain whether the FTC has followed the law. To date, this has been relatively easy to satisfy, there having been only two instances in history in which the Court found there to be no intelligible principle.

Were the intelligible principle test to be applied such that it is more difficult to satisfy, i.e., a more robust nondelegation doctrine, rules and regulations promulgated by the FTC would be more likely subject to successful challenge.

The delegation issue is present with respect to the rule promulgated by the FTC in April 2024 which effectively bans most noncompete agreements and was scheduled to take effect in September 2024. In the cases in which parties have sued to enjoin the rule from taking effect, which challenges have been successful in two instances *Ryan, LLC v. Federal Trade Commission*, No. 3:2024cv00986 (N.D. Tex. August 20, 2024), now on appeal to the Fifth Circuit, and *Properties of the Villages, Inc. v. Federal Trade Commission*, No. 5:24-cv-316, TJC-PRL (M.D. Fla. August 15,2024), the plaintiffs have argued, among other things, that the rule is invalid because it was promulgated pursuant to a congressional delegation in violation of Article I.

Neither of those arguments were ultimately addressed by the courts in those cases. In the *Ryan* case, the court invalidated the rule having concluded that the FTC lacked statutory authority to promulgate it and that, in any case, the rule was "arbitrary and capricious" and therefore invalid under the Administrative Procedure Act.

In *Properties of the Villages*, the court concluded that the promulgation of the rule involved a major question and that there was not the requisite clear and specific authorization from Congress to support the rule.

Prior to President Trump's inauguration, the FTC appealed those decisions, but with a reconstituted FTC following his inauguration and his subsequent firing of the two remaining Democratic Commissioners, and with Commissioner Andrew Ferguson now the Chairman accompanied by the two other Republican Commissioners, Melissa Holyoak and newly confirmed Commissioner Mark Meador, it seems likely that those appeals will be dropped — the reconstituted Commission no longer advocating for application of the intelligent principle rule as historically applied,

Significantly, in his strongly worded dissent to the Commission's promulgation of the rule, Commissioner Ferguson made clear his view that, even if Congress had in fact given the Commission statutory authority to promulgate the rule, that delegation would violate Article I as in his view there was no intelligible principle provided to support it in any case.