

Delegation Running Ratchet

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Introduction

In the nondelegation doctrine’s “one good year,”¹ Justice Benjamin Cardozo famously denounced a portion of the National Industrial Recovery Act as “delegation running riot.”² Ninety years later during oral argument in *Learning Resources, Inc. v. Trump*³—the blockbuster case testing the validity of President Trump’s signature tariffs—Justices Neil Gorsuch and Amy Coney Barrett highlighted a unique structural problem accompanying congressional delegations of power to the President. Although Congress needs only a bare majority to delegate power to the President, the Justices observed, it likely needs a supermajority to retrieve that power because most Presidents will veto legislation curtailing their authority. Simply put, it is easier to delegate power than to retrieve it. This asymmetrical “retrieval problem,” in Justice Gorsuch’s words, acts as a “one-way ratchet toward the gradual but continual accretion of power in the executive branch.”⁴ With apologies to Justice Cardozo, one might call this phenomenon *delegation running ratchet*.⁵

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1. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) [hereinafter Sunstein, *Nondelegation Canons*].
2. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).
3. No. 24-1287 (U.S. argued Nov. 5, 2025).
4. Transcript of Oral Argument at 72, 74, *Learning Resources*, No. 24-1287.
5. *Cf. Ratchet*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ratchet> [<https://perma.cc/HP97-Y327>] (defining

This Essay explores the implications of the retrieval problem and its ratchet effect. First, it provides a brief background on the nondelegation doctrine, followed by a deeper dive into the retrieval problem. Second, this Essay differentiates the retrieval problem from other characteristics a delegation may have, such as whether statutory language sets out an intelligible principle or whether the delegation hands over criminal-law authority. In doing so, it offers a way to incorporate insights from the retrieval problem into nondelegation analysis. Third and finally, this Essay explains how some congressional delegations of power implicate a greater retrieval problem than others, as well as how Congress can mitigate the retrieval problem's ratchet effect.

I. Congressional Delegation and Retrieval

This Part offers a brief background on congressional delegations of power and the nondelegation doctrine. It then discusses in detail the “retrieval problem” identified in the *Learning Resources* oral argument.

A. Delegation and Nondelegation

Viewing the separation of powers as “essential to the preservation of liberty,”⁶ the framers of the Constitution adopted “a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”⁷ The Constitution's structural separation, which endows each of three

“ratchet” to mean “to cause to move by steps or degrees,” and recognizing slang meaning of “ratchet” as denoting something “trashy and disorderly, sometimes in a good way”).

6. THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961).

7. *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

branches with distinct powers, aims to “diffuse[] power the better to secure liberty”⁸ and promote the rule of law.⁹

The Constitution vests “[a]ll legislative Powers” in Congress.¹⁰ This simple text has spawned a longstanding quandary: how much, if any, of these “legislative powers” can Congress share with other branches or actors? For centuries, the Supreme Court has repeated the refrain that Congress “may not transfer to another branch ‘powers which are strictly and exclusively legislative.’”¹¹ All nine current Justices accept that basic premise.¹² At the same time, the Court has reiterated that “the Constitution does not ‘deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].’”¹³ The result of those competing principles is a jurisprudence that allows some, but not all, congressional delegations of power.

Under the nondelegation doctrine, “a delegation is constitutional so long as Congress has set out an ‘intelligible principle’ to guide the delegee’s exercise of authority.”¹⁴ Although the Supreme Court has only twice held a statute unenforceable on

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8. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
 9. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 645–47 (1996); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434 (1987).
 10. U.S. CONST. art. I, § 1.
 11. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)); see also *Field v. Clark*, 143 U.S. 649, 692 (1892).
 12. *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2496 (2025); see *id.* at 2519 (Gorsuch, J., dissenting).
 13. *Gundy*, 139 S. Ct. at 2123 (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)) (alterations in original).
 14. *Id.* at 2129 (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

nondelegation grounds,¹⁵ nondelegation concerns have influenced other doctrinal tests.¹⁶ Scholars¹⁷ and jurists¹⁸ continue to debate the scope and extent of the doctrine—and thus, the bigger question of Congress’s power to share its power.

B. *The Retrieval Problem and Its Ratchet Effect*

In November 2025, the Supreme Court heard oral argument in *Learning Resources, Inc. v. Trump*,¹⁹ a case about the legality of President Trump’s “reciprocal” and “trafficking” tariffs.²⁰ To impose tariffs on imports from the majority of the United States’ trading partners, the President relied on an expansive delegation of authority under the International Emergency Economic Powers Act (IEEPA).²¹ One of the questions presented in the case

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15. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).
 16. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring); *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring); Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 483–84 (2021); see generally Sunstein, *Nondelegation Canons*, *supra* note 1.
 17. See, e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280–81 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1499–500 (2021); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002).
 18. See, e.g., *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2497 (2025); *id.* at 2519 (Gorsuch, J., dissenting); *Gundy*, 139 S. Ct. at 2129; *id.* at 2139–41 (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari); *United States v. Pheasant*, 157 F.4th 1119, 1119 (9th Cir. 2025) (Bumatay, J., dissenting from denial of rehearing en banc).
 19. No. 24-1287 (U.S. argued Nov. 5, 2025).
 20. Petition for Writ of Certiorari at 17, *Learning Resources*, No. 24-1287 (June 17, 2025).
 21. See Joshua Villanueva, Kristijan Barnjak & Rebecca Qiu, *Oral Argument Summary: Learning Resources, Inc. v. Trump (Tariffs)*, LAWFARE (Nov. 10, 2025, at 14:30 CT),

was whether IEEPA unconstitutionally delegates power to the President in violation of the nondelegation doctrine.

Defending IEEPA's constitutionality, the Solicitor General tried to mollify concerns by pointing out that Congress could amend IEEPA if it was unhappy with the President's exercise of authority.²² Justice Gorsuch pushed back.²³ Calling it a "serious retrieval problem," Gorsuch worried that "once Congress delegates by a bare majority and the President signs it," "Congress can't take that back without a super majority."²⁴ Put differently, to delegate power, Congress needs only a bare majority. But to retrieve a delegation, Congress needs a supermajority: assuming most Presidents in most times will be reluctant to give up delegated power, most Presidents will likely veto any such retrieval legislation. Delegating, in short, is easier than retrieving.

"[A]s a practical matter," Justice Gorsuch continued, Congress "can't get this power back once it's handed it over to the President."²⁵ This "retrieval problem" constitutes a "one-way ratchet toward the gradual but continual accretion of power in the executive branch and away from the people's elected representatives."²⁶ Justice Barrett echoed these same concerns.²⁷

Justices Gorsuch and Barrett were not swimming in completely uncharted waters. Scholars have identified the retrieval problem and its ratchet effect. Philip Hamburger, for instance, recently explained that "when Congress transfers its powers, it

[https://www.lawfaremedia.org/article/oral-argument-summary--learning-resources--inc.-v.-trump-\(tariffs\)](https://www.lawfaremedia.org/article/oral-argument-summary--learning-resources--inc.-v.-trump-(tariffs)) [<https://perma.cc/2RMC-BJQ9>].

22. Transcript of Oral Argument, *supra* note 4, at 72–74.

23. See Villanueva et al., *supra* note 21.

24. Transcript of Oral Argument, *supra* note 4, at 72.

25. *Id.* at 74; see also *id.* at 73.

26. *Id.* at 74.

27. *Id.* at 89.

cannot always recall them.”²⁸ “[W]hen Congress authorizes the Executive to exercise legislative power, even if only temporarily, Congress cannot predictably recover that power, as it may have to overcome a presidential veto.”²⁹

Vikram Amar has written similarly. The President’s “dual role” as both “recipient of delegated authority” and “participant in decisions about its retrieval” through the veto power, Amar observed, “creates the very real potential that lawmaking power is ceded in such a way that Congress’s ultimate power to make laws is diminished.”³⁰ Because of the veto power, “Congress’s ability to reclaim broad authority delegated to the President may require more than just agreement of a majority of both Houses.”³¹ Indeed, “[r]etrieval might require a super-majority of both Houses if the President rebuffs the retrieval attempt.”³² Amar and Hamburger are not alone in their concerns.³³

28. Philip Hamburger, *Delegating or Divesting?*, 115 NW. U.L. REV. ONLINE 88, 109 (2020) [hereinafter Hamburger, *Delegating or Divesting?*].

29. *Id.*

30. Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1384 (1996).

31. *Id.*

32. *Id.*; see also *id.* at 1351. Amar also filed an amicus brief in *Learning Resources*, raising similar points. Brief of Amici Curiae Vikram David Amar and Mickey Edwards in Support of the Petitioners at 6–7, *Learning Resources*, No. 24-1287 (Oct. 22, 2025).

33. See, e.g., David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REG. 60, 107 (2024) (observing a similar “one-way ratchet problem”). But see Josh Blackman, *The Tariff Case and Veto Overrides*, REASON: VOLOKH CONSPIRACY (Nov. 6, 2025, at 10:21 CT), <https://reason.com/volokh/2025/11/06/the-tariff-case-and-veto-overrides/> [<https://perma.cc/4MBV-46SC>] (downplaying retrieval concerns).

II. The Retrieval Problem's Insights for Nondelegation Jurisprudence

Although Justices and scholars have identified the retrieval problem's existence, they have not situated it within the non-delegation doctrine. Nor have they considered whether the retrieval problem afflicts all statutory delegations (or merely some), or whether some delegations present a greater retrieval problem than others. This Essay addresses those issues.

To begin, courts could account for the retrieval problem when analyzing nondelegation questions. This means more than simply concluding that because the retrieval problem exists, courts should declare delegations unconstitutional more often. Instead, as explored in Part III, the retrieval problem afflicts some but not all delegations. Some delegations—from Congress to the Judiciary, for instance—do not implicate the retrieval problem, because the delegate entirely lacks veto authority to forestall retrieval legislation. Delegations that do implicate the retrieval problem, moreover, are not all created equal. Although some delegations include no features that mitigate the retrieval problem, others do.

With these observations in mind, it seems appropriate for courts scrutinizing a delegation's constitutionality to consider the existence and degree of the delegation's retrieval problem. The greater the retrieval problem, a court might reason, the less likely the delegation is constitutional. Conversely, the lesser the retrieval problem, the more likely the Constitution tolerates the delegation.

To be clear, this Essay does not advocate for the existence and degree of a delegation's retrieval problem to be the sole determinant of constitutionality. It rather suggests that the retrieval problem be a factor for consideration alongside other factors already present in nondelegation jurisprudence and

scholarship. Briefly taking stock of some of those other factors also highlights what the retrieval-problem factor *does not* account for.

To start, many prevailing and proposed nondelegation tests focus on the clarity and specificity with which Congress has delegated. The Court, for instance, has “long asked whether Congress has set out an ‘intelligible principle’ to guide what it has given the agency to do.”³⁴ Under the intelligible principle test, “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”³⁵ And the need for congressional guidance is greater “when an agency action will ‘affect the entire national economy’ than when it addresses a narrow, technical issue.”³⁶ Other guideposts have also been suggested. For example, perhaps Congress must “entirely regulate[]” “important subjects,” while leaving subjects of “less interest” to another branch “to fill up the details.”³⁷ Or maybe Congress can “prescribe[] the rule governing private conduct” and “make the application of that rule depend on executive fact-finding.”³⁸ In all events, Congress must legislate with “sufficiently definite and precise” language “to enable Congress, the courts, and the public to ascertain” the law’s bounds.³⁹ Whatever the exact standard, a unifying principle emerges: the greater the power delegated, and the more expansive the language used,

34. *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2497 (2025) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

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

36. *Id.* (quoting *Whitman*, 531 U.S. at 475); *see also id.* at 2525 (Gorsuch, J., dissenting) (agreeing that the “intelligible principle” test “is not one size fits all”).

37. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

38. *Id.*

39. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

the less likely a delegation survives scrutiny. Delegations of lesser power or with greater specificity, by contrast, are more likely constitutional. All that said, none of these formulations asks whether and to what extent a delegation implicates the retrieval problem. A delegation's clarity and specificity, on the one hand, and its propensity to cause a ratchet effect, on the other, are separate issues.

It has also been suggested that a delegation's constitutionality depends on the presence and degree of institutional safeguards. As Michael Greve has argued, a delegation's constitutionality is more doubtful when the delegation lacks (or has insignificant) procedural safeguards or when it denies judicial review.⁴⁰ A statute with more robust safeguards, by contrast, will more likely pass muster.⁴¹ With respect to the retrieval problem, however, the only relevant safeguards are those that involve Congress; the availability of judicial review, for instance, is beside the point.

Others still have contended that the constitutionality of a delegation to the President depends on the type of power authorized. This view was recently advanced by Curtis Bradley and Jack Goldsmith.⁴² On the one hand, a delegation might be suspect if it gives the President power he otherwise would not have under Article II. On the other hand, Bradley and Goldsmith maintain, a delegation might be safer if it merely grants “unlocking authorizations” (“where congressional action unlocks the President's independent authority to take actions”) or “independent discretion authorizations” (where “Congress

40. Michael S. Greve, *Delegation in Context* 33–34, 39 (Antonin Scalia L. Sch. Ctr. for the Study of the Admin. State, Working Paper 23-09, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4486697 [<https://perma.cc/B8ZK-NBDS>].

41. *Id.*

42. Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. PA. L. REV. 1743, 1768–69 (2024).

authorizes the President to take actions that he could not otherwise take, but that are premised or conditioned on a determination or exercise of power that the President is empowered to make when exercising his or her independent authority”).⁴³ Michael Rappaport has set forth a variation of this argument.⁴⁴ As with the other factors influencing a delegation’s constitutionality, the type of power delegated is not relevant to the retrieval problem.

Finally, jurists and scholars have argued that statutes delegating criminal-law authority should be viewed with greater scrutiny than those delegating civil-law authority. Judge Patrick Bumatay of the Ninth Circuit recently advocated for “differential treatment of criminal law for purposes of the non-delegation doctrine.”⁴⁵ In his view, constitutional text, political theory, and Founding Era practice and precedent all support requiring Congress to delegate with heightened precision in the criminal-law context.⁴⁶ “The special concerns raised by delegating the authority to make criminal laws,” Andrew and Carissa Hessick have likewise argued, “suggest that the usual nondelegation doctrine should not apply in this context.”⁴⁷ In the Hessicks’ view, “tighter restrictions should apply to delegations authorizing agencies to make criminal rules”—up to and including “a

43. *Id.* at 1769.

44. Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE* 195, 195–96 (Peter J. Wallison & John Yoo eds., 2022) (proposing that constitutional limits on delegation are “lenient” in “traditional areas of executive responsibility”).

45. *United States v. Pheasant*, 157 F.4th 1119, 1125 (9th Cir. 2025) (Bumatay, J., dissenting from denial of rehearing en banc).

46. *Id.* at 1126–31.

47. F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 338 (2021).

prohibition” on such delegations.⁴⁸ Whether a delegation confers criminal-law authority is separate from whether and to what extent it implicates the retrieval problem.

Ultimately, this Essay advocates for a pluralistic nondelegation doctrine that considers several factors. If a litigant contends that a statute violates the nondelegation doctrine, the court could weigh the specificity with which Congress delegated, the presence and vitality of institutional safeguards, whether and how much the delegation overlaps with the delegee’s existing power, whether the delegation grants criminal- or civil-law authority—and the presence and degree of the delegation’s retrieval problem. Nondelegation jurisprudence already admits of much degree-speak—and some have asked for more.⁴⁹ Under this Essay’s framework, a delegation to the President of domestic criminal-law authority without significant institutional safeguards and vague language might very well be unconstitutional. A time-limited delegation of civil-law authority to an independent agency with significant procedural safeguards and precise language probably will pass muster. And a delegation to the Executive Branch of civil-law authority without significant safeguards but specific language—well, that close case will call for an exercise of judgment.

48. *Id.*; see also Nicolas Elliott-Smith, Comment, *Crimes Without Law: Administrative Crimes and the Nondelegation Doctrine*, 115 J. CRIM. L. & CRIMINOLOGY 429, 438 (2025).

49. See, e.g., Philip Hamburger, Foreword, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1090 (2023) (discussing, from multiple angles, the reasons that Congress cannot delegate the power to make “binding rules”); Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1241 (2022) (arguing for “a series of nondelegation doctrines” rather than a single doctrine); Greve, *supra* note 40 at 59 (arguing that nondelegation doctrine should look beyond “one-dimensional” tests to “broader . . . considerations”); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) (proposing a nondelegation doctrine organized around the dimensions of “power” and “discretion”).

III. Delegations Through the Retrieval-Problem Lens

This Part classifies different categories of delegations based on the existence and degree of the retrieval problem.

A. *Delegations Raising the Greatest Retrieval Problem*

The retrieval problem is at its zenith in delegations to the President that lack any mitigating features.⁵⁰ In these delegations, which raise the greatest threat of a “one-way ratchet toward the gradual but continual accretion of power in the executive branch,”⁵¹ the President both receives the delegated power and holds veto authority, making retrieval of the delegated power extremely difficult. IEEPA, the statute at issue in *Learning Resources*, is a prime example. Among many other things, IEEPA empowers the President, “by means of instructions, licenses, or otherwise,” to “regulate . . . importation or exportation” during a declared national emergency.⁵²

The retrieval problem is materially identical in delegations to Executive Branch officers who serve at the President’s pleasure, including Cabinet members. As just one example, take the Federal Land Policy and Management Act, which grants the Secretary of the Interior power to “issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon.”⁵³ The Senate, to be sure, plays an advice-and-consent role in confirming officers like the Secretary. But once confirmed, such officers can be removed at will. Given the significant control the President exercises over these officers, he

50. See *infra* subpart III(B) (discussing mitigating features).

51. Transcript of Oral Argument, *supra* note 4, at 74.

52. 50 U.S.C. § 1702(a); *id.* § 1701. Although the National Emergencies Act empowers Congress to terminate a national emergency, it does not mitigate the retrieval problem since Congress’s action is still subject to presidential veto. See *infra* note 73 and accompanying text.

53. 43 U.S.C. § 1733(a).

has effectively the same incentive to veto legislation retrieving delegations made to them as he does to veto legislation retrieving delegations made directly to him.

B. Delegations with a Mitigated Retrieval Problem

Next, some delegations to the President or the Executive Branch implicate the retrieval problem but also include some feature that mitigates the problem and lessens its ratchet effect. At least four categories of such delegations exist. However, as this subpart will show, one of those categories has been invalidated by the Supreme Court, with a second likely facing the same fate.

First are delegations to what are sometimes called “independent agencies,” in which the delegees are officers the President traditionally cannot remove at will.⁵⁴ Although nominated by the President, these officers often have fixed terms and are removable only for cause;⁵⁵ a prior President’s nominees can continue to serve under a hostile administration. A representative example of such a delegation is the Federal Mine Safety and Health Amendments Act of 1977, which delegates certain authority over mine safety and compliance to the Federal Mine Safety and Health Review Commission, a body of five members serving staggered six-year terms and removable only “for inefficiency, neglect of duty, or malfeasance in office.”⁵⁶ For delegations like this, the President’s incentive to resist retrieval legislation is tempered.

The Supreme Court has recently signaled that most, if not all, removal restrictions unconstitutionally interfere with the

54. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 3 (2021).

55. *See id.* at 66.

56. Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, § 113, 91 Stat. 1290, 1313 (1977) (codified at 30 U.S.C. § 823).

President's removal power.⁵⁷ The Court appears poised to overrule or weaken *Humphrey's Executor v. United States*⁵⁸ and declare that the President can remove most principal officers at will, regardless of legislatively conferred removal protections.⁵⁹ If that occurs, the mitigating feature described above will largely vanish.

Delegations of this first category mitigate the retrieval problem by diminishing the President's incentive to veto retrieval legislation. In the remaining categories, Congress mitigates the retrieval problem by building a mechanism into the delegation itself that assists with (full or partial) retrieval.

Second are delegations with a legislative veto. A legislative veto is a mechanism by which Congress—or a single House thereof—can vote by a bare majority to reject the Executive

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57. *Trump v. Wilcox*, 145 S. Ct. 1415, 1416–17 (2025) (granting application in President's favor, allowing him to remove members of the National Labor Relations Board and the Merit Systems Protection Board); *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (same, regarding the Consumer Product Safety Commission); Amy Howe, *Court Seems Likely to Side with Trump on President's Power to Fire FTC Commissioner*, SCOTUSBLOG (Dec. 8, 2025), <https://www.scotusblog.com/2025/12/court-seems-likely-to-side-with-trump-on-presidents-power-to-fire-ftc-commissioner/> [https://perma.cc/28AL-Y29M]. The possible exception is the Federal Reserve. *See Wilcox*, 145 S. Ct. at 1417 (suggesting that the Federal Reserve is differently situated than other independent agencies for the purposes of this question); Amy Howe, *Supreme Court Appears Likely to Prevent Trump from Firing Fed Governor*, SCOTUSBLOG (Jan. 21, 2026), <https://www.scotusblog.com/2026/01/supreme-court-appears-inclined-to-prevent-trump-from-firing-fed-governor/> [https://perma.cc/P98P-JHEQ] (interpreting the oral argument in *Trump v. Cook* to suggest that the Supreme Court will allow a Federal Reserve governor to retain her seat while she challenges the President's attempt to remove her).
58. 295 U.S. 602 (1935).
59. *See Trump v. Slaughter*, No. 25-332, 2025 WL 2692050, at *19 (U.S. Sept. 22, 2025) (Kagan, J., dissenting) (observing that the Court majority appears to be “raring” to overrule *Humphrey's Executor*).

Branch’s exercise of a delegated power. In the Immigration and Nationality Act of 1924, for example, Congress delegated to the Attorney General authority to suspend a person’s deportation, but “either the Senate or the House of Representatives” could veto the Attorney General’s determination by “pass[ing] a resolution” by majority vote.⁶⁰ Although a legislative veto does not give Congress the ability to truly *retrieve* delegated power (by repealing the delegation itself) without a supermajority, it nevertheless empowers a bare majority to *stop the exercise of* the delegated power. Practically speaking—and for purposes of mitigating the retrieval problem—no daylight exists between those two concepts.

Of course, the Supreme Court held legislative vetoes unconstitutional in *INS v. Chadha*.⁶¹ The Court reasoned that all legislative vetoes violate the Presentment Clause and that one-House legislative vetoes also violate the bicameralism requirement.⁶² The Court further held that the legislative veto at issue was severable,⁶³ meaning the delegation survived—and survived supercharged, without anything to mitigate the retrieval problem. So whereas before *Chadha*, “Congress could construct statutory regimes that subjected presidential invocations of broad authority under vague statutory terms to *ex post* congressional review, with the prospect of a legislative veto to rein in presidential adventurism,” that prospect no longer remains.⁶⁴ And while

60. 8 U.S.C. §§ 1254(a)(1), (c)(2) (1982) (repealed 1986); see Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2175–78 (2024) (describing the history of legislative veto provisions); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2117–18 (2022) (similar).

61. 462 U.S. 919, 959 (1983).

62. *Id.* at 952–59.

63. *Id.* at 931–35.

64. Froomkin, *supra* note 33, at 106.

Congress later enacted the Congressional Review Act⁶⁵—which enables Congress by joint resolution to reject agency rules adopted under delegations⁶⁶—that Act does nothing to address the retrieval problem because resolutions under it are subject to presidential veto.⁶⁷

Chadha's elimination of the legislative veto and the impending overturning of *Humphrey's Executor* may or may not be correct as a matter of first principles. But those two jurisprudential moves, on their own and especially in combination, no doubt compound the retrieval problem in many existing delegations. The Court has converted mitigated retrieval problems into full-blown retrieval problems, enhancing the delegations' ratchet effect.⁶⁸ To be sure, the Court has arguably counterbalanced the effect of *Chadha* and the impending overruling of *Humphrey's Executor* through other jurisprudential moves like the invigoration of the major questions doctrine⁶⁹ and the overturning of *Chevron* deference.⁷⁰ But it is unclear whether those moves meaningfully counteract the loss of retrieval-problem mitigation tools.

65. 5 U.S.C. §§ 801–808.

66. *Id.* § 802.

67. *See id.* § 801(a)(3)(B) (providing for agency rules to take effect if the President vetoes a joint resolution of disapproval); *see also* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1952–53 (2020) (“[O]nly those rules adopted near the end of a President’s term are vulnerable to CRA repeal. This is because a President is likely to veto any legislative effort to overturn a regulation issued by his own administration.” (footnote omitted)).

68. *See also* Kristen E. Eichensehr, *The Youngstown Canon: Vetoes Bills and the Separation of Powers*, 70 DUKE L.J. 1245, 1300 (2021) (noting that “*Chadha* essentially created a one-way ratchet”).

69. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

70. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overturning precedent under which courts deferred to agencies’ own interpretations of ambiguous congressional delegations).

Third, consider time-limited delegations. Under such delegations, Congress gives the President or an officer authority to exercise power for a set time period, the expiration of which automatically terminates the exercise of power. In Section 122 of the Trade Act of 1974, for example, Congress authorized the President, upon making certain findings, to impose a “temporary import surcharge” or quota “for a period not exceeding 150 days.”⁷¹ In delegations like this, Congress automatically retrieves the delegated power once the time period ends, unless it affirmatively acts to extend the period.⁷²

Although automatic time limitations serve as a powerful retrieval-problem mitigator, time limitations that require congressional action do not mitigate the retrieval problem whatsoever. An example of the latter is the National Emergencies Act, under which the President can declare a national emergency and unlock substantial delegated power—unless and until Congress passes a joint resolution to end the emergency.⁷³ The problem, of course, is that the joint resolution can be vetoed by the very President who declared the emergency in the first place.

Fourth and finally, some delegations are more sensitive to appropriations control. Congress has the power of the purse and can stymie certain executive action under delegations by refusing to appropriate sufficient funds to enable the Executive Branch to meaningfully act. Even though the President has veto power over appropriations legislation, the veto cannot be used to *obtain* more funds. And appropriations requiring reauthorization

71. Trade Act of 1974, Pub. L. No. 98-618, § 122, 88 Stat. 1978, 1987-88 (1975) (codified at 19 U.S.C. § 2132).

72. Congress can also go further and sunset an entire delegation—as opposed to merely sunseting individual instances of exercise of the delegated power—after a time period elapses. *See, e.g.*, Act of June 4, 1794, ch. XLI, 1 Stat. 372, *available at* <https://tile.loc.gov/storage-services/service/l1/l1sl/l1sl-c3/l1sl-c3.pdf> [<https://perma.cc/2DPU-XG73>].

73. 50 U.S.C. § 1622.

allow Congress to stop or limit some executive action without having to overcome the President's veto. All that said, appropriations control is not effective at mitigating the retrieval problem accompanying certain delegations—particularly those that enable the Executive Branch to generate revenue, such as Section 232 of the Trade Expansion Act of 1962, which empowers the President to impose “national security” tariffs.⁷⁴ Similarly, Congress has “grant[ed] some agencies with fee-setting authority,” which blunts the effectiveness of appropriations control.⁷⁵

C. *Delegations with No Apparent Retrieval Problem*

Finally, not all congressional delegations of power come with a retrieval problem. No retrieval problem arises when the delegee lacks veto authority to interfere with an effort to retrieve the delegation.

Consider four examples. First, delegations to congressional agencies do not create a retrieval problem. “[W]hen Congress delegates authority to the Congressional Budget Office,” for instance, “it has full discretion to retrieve any of the delegated authority.”⁷⁶ Second, the same is true for delegations to the

74. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962) (codified as amended at 19 U.S.C. § 1862).

75. Adler & Walker, *supra* note 67, at 1957 (quoting Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1108 (2018)).

76. Hamburger, *Delegating or Divesting?*, *supra* note 28, at 109. The U.S. Copyright Office, the subject of pending Supreme Court litigation, might likewise fall into this camp because it is housed within the Library of Congress. See *Blanche v. Perlmutter*, No. 25A478, 2025 WL 3290061, at *1 (U.S. 2025) (order deferring the government's application for a stay of a lower-court decision ordering the reinstatement of the head of the Copyright Office during litigation about her removal); Amy Howe, *Supreme Court Defers Decision on Whether Trump Can Fire Head of U.S. Copyright Office*, SCOTUSBLOG (Nov. 26, 2025), <https://www.scotusblog.com/2025/11/supreme-court-defers-decision-on-whether-trump-can-fire-head-of-u-s-copyright-office/> [<https://perma.cc/M8W5-GSR5>] (providing context on the case).

Judiciary,⁷⁷ such as those in the Rules Enabling Act⁷⁸ or the Sherman Antitrust Act.⁷⁹ Third, especially given that Senators are now directly elected, congressional delegations to states also do not implicate the retrieval problem.⁸⁰ And fourth, the same goes for delegations to private parties, which of course lack veto power.⁸¹

Of course, for all these examples, legislation retrieving a delegation still requires the consent of the President or a supermajority. And it may be the case that a sitting President will favor the status quo of a particular delegation or of delegations generally. But the point is that the delegations listed in this subpart do not implicate the particular retrieval problem discussed in this Essay—that is, they do not combine in the same actor *both* the delegated power and veto authority over retrieval legislation. Delegations to the President create *sui generis* incentives and structural issues that delegations to other actors simply do not.

Conclusion

The President’s veto authority often makes it more difficult for Congress to retrieve previously delegated power than for it to delegate in the first place. Yet this retrieval problem—and its

77. See generally Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391 (2017) (discussing nondelegation in the judicial context); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008) (same).

78. 28 U.S.C. § 2072; see also *Sibbach v. Wilson*, 312 U.S. 1, 9–10 (1941) (upholding rules enacted under the Rules Enabling Act).

79. 15 U.S.C. § 1–7; see also Volokh, *supra* note 77, at 1453–56; Lemos, *supra* note 77, at 462–65.

80. Amar, *supra* note 30, at 1380.

81. Regarding the “private nondelegation doctrine,” see, for example, *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121–22 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912); and Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203, 256–57 (2023).

attendant ratchet effect—is not created equal. Some delegations implicate a greater retrieval problem than others; some do not implicate the problem at all. The existence and degree of a delegation’s retrieval problem can and should be one factor among many that courts weigh when evaluating a delegation’s constitutionality.