LAW & CIVIL LIBERTIES

The Supreme Court's Job after *FCC v. Consumers' Research*

The Court now must take the next step in restoring representative government.

BY DAVID SCHOENBROD

In 2019 a majority of the US Supreme Court indicated they wanted to curb Congress's practice of delegating vast legislative responsibilities to the executive branch and independent agencies. This was wonderful news: Limiting delegation would help restore the accountability of legislators upon which democracy depends. Yet, in 2025's *Federal Communications Commission v. Consumers' Research* argument, the parties that objected to delegation offered the Court no workable test for how to limit it.

While that decision was pending, I wrote "Restoring Representative Government" for the summer issue of *Regulation*. The article offered a test to limit delegations, one that is both judicially manageable and legislatively feasible. The magazine reached subscribers about the time the Court handed down its decision upholding the delegation in that case. I am writing now to explain how that decision sets the stage for the Court to do its job and limit delegation.

THE TEST IN *FCC V. CONSUMERS' RESEARCH*

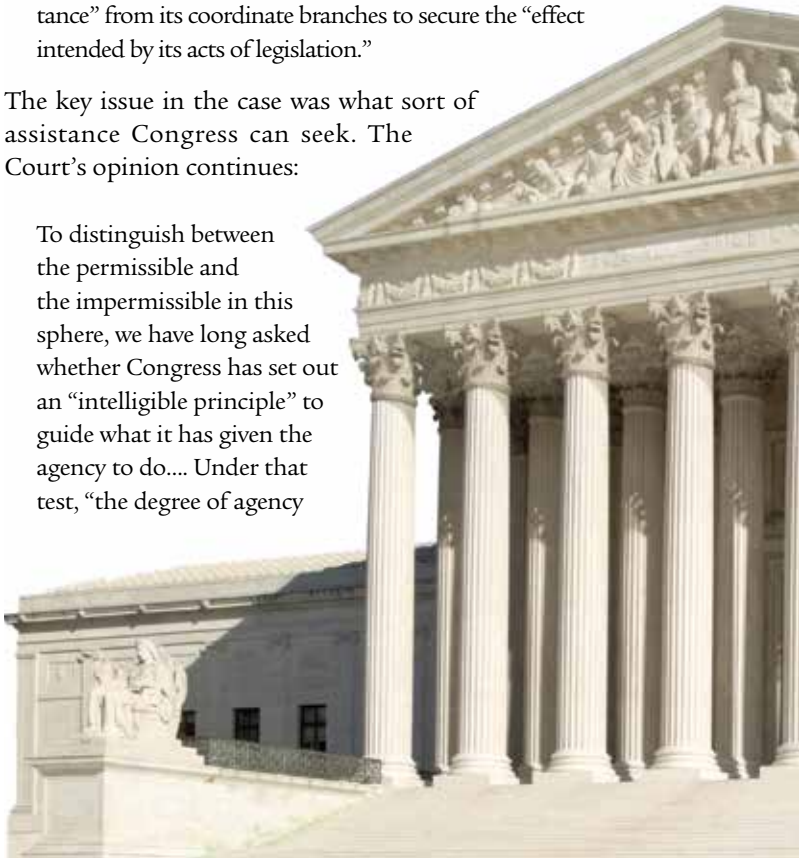
Consumers' Research, a conservative-leaning consumer issues group, and its allies argued that Congress had unconstitutionally delegated to the FCC its power to impose taxes. Congress had empowered the FCC to decide how much money telecommunication companies must pay to finance a fund to subsidize services to underserved communities.

Justice Elena Kagan wrote the opinion for the Court, in which Chief Justice John Roberts and Justices Sonia Sotomayor, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson joined. The opinion states:

> Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." 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.... At the same time, we have recognized that Congress may "seek[] assistance" from its coordinate branches to secure the "effect intended by its acts of legislation."

The key issue in the case was what sort of assistance Congress can seek. The Court's opinion continues:

> To distinguish between the permissible and the impermissible in this sphere, we have long asked whether Congress has set out an "intelligible principle" to guide what it has given the agency to do.... Under that test, "the degree of agency



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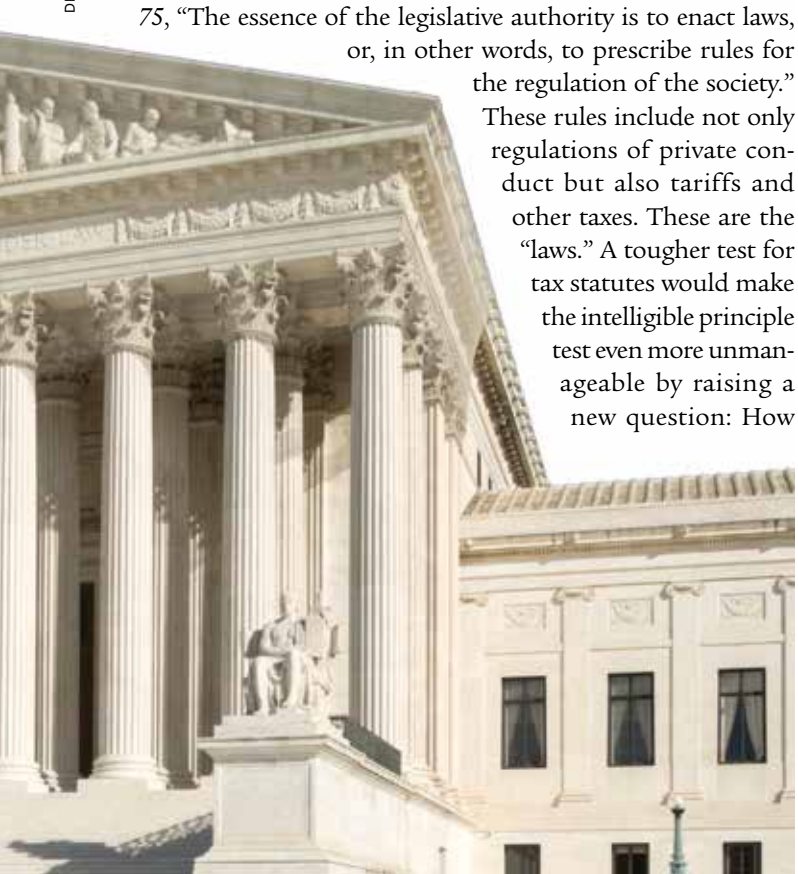
> discretion that is acceptable varies according to the scope of the power congressionally conferred." ... The "guidance" needed is greater, we have explained, when an agency action will "affect the entire national economy" than when it addresses a narrow, technical issue....

The problem with this test is that it depends on two questions of degree: How much guidance is enough, and how small must the effect on the economy be to make the degree of guidance sufficient. As there are no scales on which to measure these amounts, the Court finds itself on two slippery slopes at once. The upshot is that the test is not judicially manageable. As a result, under this test federal courts have done nothing to limit delegation for almost a century, a vacuum that has allowed legislators to shirk the responsibility upon which democracy depends.

Yet, instead of attacking the "intelligible principle" test as wholly inadequate for the purpose of enforcing the Constitution, other respondents in *Consumers' Research* sought to get the Court to tweak this test to allow a narrow victory. One tweak they suggested was for the Court to apply the intelligible principle more strictly when Congress delegates the power to set domestic tax rates. This change would not ruffle as many feathers as a broader test given the relatively narrow subset of statutes to which it would apply.

What's more, while the patriots who revolted against British rule fought under the banner of "no taxation without representation," the Framers of the Constitution *also* insisted upon representation in regulation. As noted in my previous article, Alexander Hamilton wrote in *Federalist No. 75*, "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society." These rules include not only regulations of private conduct but also tariffs and other taxes. These are the "laws." A tougher test for tax statutes would make the intelligible principle test even more unmanageable by raising a new question: How much more intelligible must be the guidance in a tax statute to pass the test?



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Respondents further muddied the waters by arguing that the delegation of the power to tax must be accompanied by a numeric cap on the size of the tax. Yet, Congress could, as Justice Kagan's opinion argued, readily skirt this requirement by adopting a sky-high cap in future statutes (something like $1 trillion would do the trick). Adopting these respondents' test, then, would produce a one-off victory in this case, but would leave Congress free to duck its responsibilities in the future. True, as Justice Neil Gorsuch, joined by Justices Clarence Thomas and Samuel Alito, argued in a dissenting opinion, legislators would take some blame for choosing a very high cap. Yet, that blame would pale compared to the blame they would likely take for imposing a specific tax.

HOW THE COURT GOT AN UNMANAGEABLE TEST

For the Constitution's first century, the Court had a judicially manageable test for delegation. It was the test in Hamilton's statement that it is the job of Congress "to prescribe rules for the regulation of the society." So, for example, in *Cargo of the Brig Aurora v. United States* (1813), the Court upheld the statute that had stated the rule, even though the application of the rule depended upon a finding of fact by the president. The Court recognized that it was Congress's job to adopt the rules of private conduct and the job of the executive and judicial branches to apply those rules. This original test for unconstitutional delegation was judicially manageable because it rode on a difference of kind: Did Congress give others the power to *make* rules, or only the power to *execute* and *apply* rules? By contrast, the intelligible principle test rides on a difference of degree: How much congressional guidance in rulemaking is enough?

Under the Court's original test, Congress could and did leave the executive branch with discretion on matters other than establishing domestic rules of private conduct, such as managing government property or dealing with foreign nations. Also passing this test was the Interstate Commerce Act of 1887, which gave the Interstate Commerce Commission (ICC) authority to bring enforcement actions against railroads that charge rates that are not "just and reasonable." The Court found in *ICC v. Cincinnati, New Orleans, and Texas Pacific Railway* (1897) that this stated a rule long applied by courts to require that railroads charge customers no more than the cost of the service provided, including the cost of raising the necessary capital in the financial marketplace.

In other cases, the Court struck down statutes in which Congress left others to choose the rules of private conduct. In *United States v. L. Cohen Grocery Co.* (1921), the Court found unconstitutional a statute that criminalized charging "unjust or unreasonable prices" for "any necessaries." Although this rule sounds like that in the railroad rate statute, there was no

common law rule that put substance into these words. Congress thereby avoided responsibility for the policy judgments. In *Knickerbocker Ice Co. v. Stewart* (1920) and *Washington v. W.C. Dawson* (1924), the Court decided that Congress, in requiring federal courts to apply state workmen's compensation laws in federal admiralty cases, had unconstitutionally delegated its rulemaking job to state legislatures.

The Court did, however, begin to run into a problem: The country and the economy were becoming too big and complicated for Congress to make all the rules of private conduct. This problem became especially apparent in setting tariffs, as the variety of goods traded and the variety of nations trading got larger. In the early years of the Constitution, Congress itself set specific tariff rates on each good. Come the second century of the Constitution, this practice became daunting. One way that Congress tried to deal with the difficulty was the US Tariff Act of 1922, which allowed the president to increase or decrease tariffs by up to 50 percent to "equalize ... differences in the cost of production in the United States and the principal competing country." That sounds like no less a rule than the "just and reasonable" standard in the Interstate Commerce Act. But the statute went on to instruct the president to consider additional factors. In upholding this tariff statute in *J.W. Hampton, Jr. Co. v. United States* (1928), Chief Justice William Howard Taft wrote in his opinion for the Court that it had long found that Congress did not have to make all the discretionary judgments, that it could leave some of them to the judgment of others if it guided them by providing an "intelligible principle." This suggested that Congress did not need to state the rule if it told the delegate what goals to pursue. Five years later, in *Norwegian Nitrogen Products Co. v. United States* (1933), the Court held that some delegation of the power to make rules was "permissible."

As Justice Gorsuch points out in his dissent in *FCC v. Consumers' Research:*

> When Chief Justice Taft first used the phrase "intelligible principle," he did not aim to displace these traditional guides, only to summarize them. Someday, soon, we should find our way back.

These guides had meant that Congress must set the rules of private conduct. We should call the test applicable before *Hampton* "intelligible principle 1.0." Whether Taft thought he was changing this test, I don't know. In any event, the test after *Hampton*, which does not require Congress to state the rule, is different. Let us call it "intelligible principle 2.0."

Under intelligible principle 2.0, the Court utterly fails to define the boundary beyond which Congress cannot go in delegating legislative powers. In two decisions, *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*, both handed down in 1935, the Court struck down statutory provisions for failing to provide an intelligible principle. However, before and since, the Court has not and cannot define the degree of guidance that this test requires. In those two cases, the amount of power delegated was vast or unguided. Justice Benjamin Cardozo famously wrote in *Schechter*, the legislative power granted there was "delegation running riot," but the Court has never defined how close to running riot Congress can go.

After *Panama Refining* and *Schechter*, the Court denied that it no longer forbade Congress to shirk its legislative powers by saying Congress had done enough if it provided guidance to those it empowered to make the laws. As the Court began down this path, the nation faced huge crises, first the Great Depression and then World War II. While they lasted, the Court could not restructure the nation's lawmaking process. In other words, during the crises and afterwards, the Court allowed Congress to pass the buck. For example, in *National Broadcasting Co. v. United States* (1943), the Court upheld a statute that told the agency to regulate an important part of the economy—broadcasting and other uses of the radio waves—"in the public interest" on the basis that this, taken in context, provided an intelligible principle. While context may give an agency head a pretty good sense of what some of the legislators hoped would happen, it gives legislators ample room to evade blame for unpopular results. The current test is, in fact, that Congress can duck responsibility all it wants, so long as it mumbles pleasantries.

THE COURT DENIES IT HAS FAILED DEMOCRACY

The Court's opinion in *FCC v. Consumers' Research* obscures its failure to enforce the prohibition on the delegation of legislative powers by ignoring the cases in which the Court *did* require Congress to state the rules of private conduct. The opinion does not acknowledge that it does not enforce the original test of unconstitutional delegation or even try to enforce it to the extent practical. It obscures these failures by conflating the discretion a legislature must exercise in writing rules of private conduct and the discretion the executive branch and the courts exercise in enforcing such laws. Meanwhile, the Court upholds delegations of rulemaking power even though the guidance provided by the statute is glop and the effect on the economy is large.

Similarly, Justice Kavanaugh's concurring opinion in *Consumers' Research* covers up the Court's abandonment of the original test of unconstitutional delegation by conflating the discretion a legislature must exercise in writing laws of private conduct with the discretion that the executive power exercised in managing public property and in foreign relations. Justice Barrett did recognize this sort of distinction in a 2014 law review article that she wrote when she was a law professor. (The article cites me on this point.)

Furthermore, Justice Kavanaugh seeks to uphold the FCC's requiring contributions from telecom firms on the basis that

the FCC's commissioners serve at the pleasure of the president, who he says is "accountable." Yes, the president is elected, but that is not what the Framers of the Constitution considered accountability. As Justice Kagan, quoting James Madison, wrote in a dissenting opinion in *Rucho v. Common Cause* (2019):

> If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign.... To retain an "intimate sympathy with the people," [members of Congress] must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

The Framers thus saw accountability as coming from elected officials being judged by the people at the polls for their policy choices. The Framers focused particularly on the accountability of legislators, especially members of the House of Representatives because back then they were the only officials sure to be directly elected, served shorter terms than other officials, and were more likely to run for reelection. Today, moreover, a constitutional amendment bars presidents from being reelected more than once; as a result, second-term presidents are unaccountable in the sense the Framers meant because they will not be judged by the people at the polls for their policy choices.

A WAY FORWARD

Only decades after the nation began going down the intelligible principle 2.0 path did a more constitutionally responsible way of dealing with delegation appear. A step in that direction, but not a sufficient step, was James Landis's 1938 proposal that administrative agencies refrain from promulgating major actions and instead propose them for Congress to enact. That would combine agency expertise with legislative responsibility. He did not, however, specify how agencies could get around their enabling statutes requiring them to act and that Congress might, in any event, simply sit on such proposals rather than voting on them. Another step was then-Judge Stephen Breyer suggesting in a 1984 *Georgetown Law Review* article that Congress could replace the legislative veto, which the Court had struck down, with a fast-track process for new regulations that would be immune to filibusters and other delaying tactics. This would cut through the gridlock.

I suggested in my previous *Regulation* article that the Court limit the application of the intelligible principle test to rules that are not major but require that major rules be enacted. We could call this "intelligible principle 3.0." To summarize, the Court could limit the application of the Constitution's requirement that Congress make the rules of private conduct to major rules. Lawmakers could postpone new major rules' implementation until a specified date so that they would have time to, if they wished, vote on those rules. The statute would have to define "major rules," but the Court could review that definition to ensure it is no broader than necessary to make Congress's job feasible. For some perspective, the tax at issue in *FCC v. Consumers' Research* was 80 times larger than the Office of Management and Budget's first criterion for a major rule: "having annual economic impact of $100 million or more." There were 554 major rules under OMB's test in 2024.

THE COURT'S JOB

The Court's job is to follow the Constitution. It is entirely feasible to do so for major rules reasonably defined.

The Court should be asked to do so. In *FCC v. Consumers' Research*, the Court did not review two particularly vulnerable provisions of the statute because, as its opinion states in a footnote, "Consumers' Research does not argue [they] are unconstitutional and it does not advance any arguments that are specific to those provisions."

If presented with the issue of whether the intelligible principle 2.0 test should stand as is, the Court could overrule it as it applies to new major rules because this would satisfy the three-part test for overruling opinions. After all, the precedent is (1) clearly erroneous, (2) causes grave harm, and (3) the reliance interests could be managed by giving Congress time to prepare to do its lawmaking job. As I wrote in my previous *Regulation* article:

> The Court could accommodate this reliance by stating that, in other cases, it will apply the correct test only to laws promulgated after a certain date. The Court should set that date to give Congress time to prepare to do its lawmaking job. In other words, the new test would have delayed prospective effect.

In the specific case before the Court in which the new test would be stated, however, it would apply the correct test.

The Framers of the Constitution wanted to prevent rule by a king. Yet, for many decades, Congress has handed more and more of its responsibilities to the presidents, and presidents have taken those and additional responsibilities, increasingly giving them king-like powers. To break this cycle, the Court should do its job and so prompt Congress do its job. *R*

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