

6 Degrees of Delegation

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Cary Coglianese, [Dimensions of Delegation](#), 167 *U. Penn. L. Rev.* 1849 (2019).

In *Dimensions of Delegation*, [Cary Coglianese](#) provides a principled account of the U.S. Supreme Court's nondelegation jurisprudence. Specifically, he reconciles the seemingly idiosyncratic [Schechter Poultry](#) case with subsequent applications of the nondelegation doctrine by theorizing a multi-dimensional model of delegated power. In so doing, he provides a template for rethinking nondelegation as a matter of doctrine, rather than as a matter of political theory or political economy, as it is so often treated by partisans on both sides.

I long have puzzled over the jurisprudential treatment of *Schechter Poultry*. The Supreme Court has refused to overrule the case but yet has declined to follow it. More cryptically, even detailed discussions of nondelegation precedent, such as Justice Gorsuch's recent romp in [Gundy v. United States](#), fail to discuss important nuances of the case—including the fact that the National Industrial Recovery Act of 1933 (NIRA) contained explicit criteria for when the President could approve a code of fair conduct that would easily pass the modern “intelligible principle” test. The NIRA required that three criteria be met before the President could endorse a code of fair competition: (1) the trade association that proposed the code was “truly representative” of the regulated industry; (2) the code was not “designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them”; and (3) the code would “tend to effectuate the policy of this title.” While this standard leaves the president with broad discretion to choose which codes to approve, it can hardly be suggested that it constrains executive discretion *less* than delegations subsequently endorsed by the Court without a nod to *Schechter Poultry*—up to and including the statutory charge to many agencies to discharge their delegated authority in the “public interest.”

Instead of wrestling with the doctrinal difficulties this poses, the Court has attempted to reconcile *Schechter Poultry* with later and more capacious understandings of permissible delegation based on two distinctions. First, the provision of the NIRA challenged in *Schechter Poultry* conferred authority on the President to regulate the “entire economy.” [Whitman v. American Trucking](#), 531 U.S. 457, 474 (2001). Second, the challenged provision allowed this authority to be exercised “on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’” *Id.* I have always found both distinctions dubious. After all, the Clean Air Act regulations challenged in *Whitman* have sweeping impacts on the entire economy, as do regulations under many other broad statutory delegations to agencies that have been upheld by the Court—for instance to restructure securities markets ([American Power & Light Co. v. SEC](#), 329 U.S. 90 (1946)) or to regulate communications broadcast over the nation's airwaves ([National Broadcasting Co. v. United States](#), 319 U.S. 190 (1943)). And “fair competition” is no less precise a standard than the “public interest.”

Coglianese makes sense of all this by shifting the lens through which we view delegations. He starts by returning to constitutional first principles: the thing that Congress may not delegate to another branch is its vested *legislative authority*. The novel contribution of the article is to develop a new way of ascertaining when delegated authority is, indeed, *legislative*, and thus may not be delegated. Coglianese argues that we should conceptualize legislative authority much like we conceptualize property: as a bundle of sticks, or “distinct features which together are constitutive of that authority.” Applying this approach, it becomes clear that the intelligibility of the principle constraining delegated discretion—the current touchstone of the nondelegation doctrine—is but one of the sticks in the bundle comprising legislative authority. Even when delegated authority is not guided by clear statutory standards, it may be circumscribed on other dimensions. The constitutionality of a delegation thus depends on an assessment of all these dimensions.

Coglianesi's close reading of nondelegation precedent reveals that the constitutional permissibility of statutory delegations of authority to the executive branch is not—and never has been—solely about the intelligibility of the principle guiding the administrator's discretion. Rather, it has been about the overall “shape” and “size” of the authority a statute grants to an executive officer and whether this coincides with the “shape” and “size” of a legislative power granted to Congress by the Constitution.

Coglianesi argues that courts have assessed the “shape” and “size” of a delegated authority by reference to six key characteristics, or “six degrees of delegation.” Consistent with the reigning intelligible principle test, one dimension is the statutory basis for decision-making by the administrator, or the extent to which clearly stated standards guide the administrator's discretion in exercising delegated authority. Coglianesi's analysis surfaces five additional dimensions that have been relevant to the Court's nondelegation analysis. First, the Court has noted the nature of the statutorily authorized action—specifically, whether the statute authorizes the agency to take enforcement actions or make binding rules. Second, the Court has attended to the range of regulated targets, for instance, whether the delegated authority is over a single industry or a broader swath of the nation's economy. Third, the Court has considered the scope of activities the agency is authorized to regulate, for example, limiting air pollution or regulating the fairness of business practices of any kind. Fourth, the Court has been interested in the degree of sanctioning power delegated to the agency, including both the magnitude of penalties the agency is authorized to impose and whether they may be imposed directly on private businesses or individuals. Finally, the Court has considered the extent of required process an agency must observe and the extent of constraint this imposes on the agency's ability to exercise its delegated authority. Where a statutory delegation of authority falls on each of these dimensional spectrums determines whether it is *legislative* in nature and thus constitutionally impermissible.

Coglianesi's multi-dimensional approach goes a long way to providing a doctrinally coherent account of the Court's nondelegation jurisprudence. It helps explain, for instance, why the NIRA's delegation of authority to approve codes of fair competition is more constitutionally problematic than, for instance, the statutory delegation of authority to the FCC to allocate broadcast spectrum in the “public interest.” While the NIRA standards guiding code approval are arguably more “intelligible” than the “public interest” standard governing the FCC, the NIRA delegation of authority falls comparatively short on the other dimensions of delegation. The NIRA covered an unlimited range of regulatory targets, while the FCC regulates a single industry. The NIRA allowed the authorization of codes governing an unbounded range of business practices, while the FCC regulates a more limited set of practices by its regulated community. NIRA authorized criminal penalties for violation of approved codes, while the FCC has much more limited enforcement powers. Under the NIRA, the President's code approval decisions were unconstrained by any formal procedures, while the FCC is constrained by numerous procedural requirements, including administrative adjudication in many cases.

Beyond its immediate aims, Coglianesi's multi-dimensional approach also provides a useful way of thinking through the “major questions” thicket that the Court has allowed to grow up around its ambivalent streams of nondelegation and deference jurisprudence. Indeed, Justice Kavanaugh explicitly linked the nondelegation doctrine and the “major questions” doctrine in a recent statement respecting denial of *certiorari* in [Paul v. United States](#). After praising Justice Gorsuch's “scholarly analysis of the Constitution's nondelegation doctrine” in *Gundy*, Justice Kavanaugh suggested that perhaps there should be a “nondelegation principle for major questions.” Coglianesi's approach explains why this would be just as myopic as the “intelligible principle” test: whether a delegation authorizes an agency to address “major questions” focuses exclusively on one dimension of delegated authority—scope—without considering holistically the other dimensions that give a delegation its shape and size and determine whether it impermissibly coincides with legislative power. To be sure, under Coglianesi's approach, the scope of delegated authority is relevant to determining whether an impermissible delegation of legislative power has occurred. However, sweeping delegations of authority over major questions may nonetheless be constitutional if they are constrained on other dimensions, including clear statutory standards and rigorous decision-making procedures.

In sum, Coglianesi provides the first principled account of the widely misunderstood nondelegation doctrine as a *doctrine*. This is a welcome corrective to the present debate, characterized by histrionic appeals to resurrect the

“Constitution in exile” and dire warnings about the gutting of the administrative state. His approach invites partisans on all sides to look past the political rhetoric and to take nondelegation doctrine seriously if it is to be revived.

Editor’s note: For another review of *Dimensions of Delegation*, also published today, please see: Richard Pierce, [Reinvigorating the Non-Delegation Doctrine](#), JOTWELL (June 24, 2020).

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