

Reinvigorating the Non-Delegation Doctrine

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

[Cary Coglianese](#)'s article, *Dimensions of Delegation*, is timely. The Court has invoked the non-delegation doctrine as the basis to invalidate a statute only once 85 years ago. The only statute that the Court has ever invalidated based on application of the non-delegation doctrine actually delegated extraordinarily broad power to private participants in markets rather than to an agency. During the past year, however, five Supreme Court Justices have made it clear that they are open to the possibility of relying on the non-delegation doctrine as the basis to hold statutes unconstitutional. Even many scholars who have long opposed attempts to reinvigorate the non-delegation doctrine have become more receptive to that possibility in today's conditions.

A recent online symposium published by *The Regulatory Review* illustrates the state of the debate. Jonathan Adler and Chris Walker [introduced](#) the symposium with their excellent essay: "[Delegation and Time](#)." They made the point that the increasing inability or unwillingness of Congress to amend broadly worded statutes that confer regulatory power on agencies has created a situation in which agencies are forced to apply statutes that are so old that they were drafted when no one could have anticipated the uses to which they are now being put. Thus, for instance, the FCC is using the Communications Act of 1934 as the basis to regulate the internet and the EPA is using the Clean Air Act of 1970 as the basis to take the actions required to mitigate climate change. The result increasingly is a series of agency actions that Congress never contemplated and that might not be consistent with the values of the Congress that enacted the old statute, the present Congress, or the people.

Other contributors to that [symposium](#) identified the hundreds of statutes that confer seemingly unlimited "emergency" powers on the President as candidates for application of a newly invigorated non-delegation doctrine. President Trump has relied on the National Emergencies Act of 1976 as the basis for his reallocation of the funds that Congress refused to appropriate to build a wall along the southern border. Senator and Presidential candidate Sanders has stated his intention to rely on the "emergency" powers conferred on the President in various statutes to support expenditure of trillions of dollars to mitigate climate change.

The Regulatory Review is published by the Penn Program on Regulation. That program is run by Cary Coglianese, the author of "Dimensions of Delegation." Before the Justices take any action to follow through on their stated intention to reinvigorate the non-delegation doctrine, they should study with care both the symposium that Professor Coglianese's Center published and his article.

Professor Coglianese makes two related points in the article. First, courts and scholars have traditionally framed the non-delegation debate with reference to a single dimension. They should focus instead on six dimensions of the constitutional problem that can be created by broad delegations of power. Second, if the non-delegation doctrine is understood as a response to a multi-dimensional constitutional problem, it is easy to identify ways in which courts have long addressed the problem and can continue to address the problem effectively.

Professor Coglianese begins by explaining how courts and scholars have traditionally decided whether a statutory delegation of power is constitutional by focusing exclusively on the presence or absence of an "intelligible principle" that a court can enforce to keep the agency's exercise of discretion within boundaries set by Congress. He argues persuasively that courts should also consider the nature of the action the agency has taken, the extent of the power that Congress has delegated to the agency, the scope of the activities that the agency has been authorized to regulate,

the nature and degree of sanctions that the agency is empowered to impose, the quality and quantity of the reasoning and evidentiary support for the agency action, and the nature and extent of the process the agency used to make the decision to act.

Professor Coglianese then devotes eighteen pages to a detailed discussion of the many ways in which courts have long enforced the non-delegation doctrine once we recognize that it has many dimensions. He urges courts and scholars to abandon the simplistic and futile search for an “intelligible principle” that limits agency exercises of discretion. He argues that courts can ensure that Congress and agencies act in ways that are consistent with the Constitution by continuing to apply the many administrative law doctrines that respond effectively to the multi-dimensional nature of the potential constitutional problem that can be created by broad delegations of power to agencies.

Editor’s note: For another review of *Dimensions of Delegation*, also published today, please see Jodi Short, [6 Degrees of Delegation](#), JOTWELL (June 24, 2020).

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