



My New Article on "Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases"

The eviction moratorium and Title 42 "public health" expulsion cases have many parallels that may have been ignored because of their differing ideological valence. Both strengthen the case for nondeferential judicial review of the exercise of emergency powers.

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My forthcoming article "Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases," is now [available on SSRN](#). Here is the abstract:

Two legal battles over Covid pandemic emergency measures highlight the dangers of excessive delegation of emergency power to executive branch agencies: the recently concluded litigation over the Centers for Disease Control nationwide eviction moratorium, and the still-ongoing legal battle over that same agency's Title 42 "public health" expulsions of immigrants. While superficially different, the two legal battles actually raise very similar issues. Both involve exercises of power by the exact same federal agency, utilizing authority it claims was delegated to it under consecutive provisions of the Public Health Service Act of 1944. Both measures were first adopted under the Trump Administration, and later continued—with some modifications—under the Biden Administration. The bipartisan nature of the policies suggests that the problems they raise are not limited to one party, nor to one side of the political spectrum.

Both policies were open to serious challenge under the constitutional nondelegation doctrine, and under the related "major question" doctrine. These vulnerabilities eventually led to the judicial invalidation of the eviction moratorium, and may have contributed to the DC Circuit's partial invalidation of the Title 42 expulsions. Finally, it is notable that both policies caused great harm, while doing little to stop the spread of the disease; both were enacted by the executive despite skepticism from public health experts.

Part I of this article provides an overview of the eviction moratorium and Title 42 policies, and the resulting litigation. In Part II, I explain why both policies violate the constitutional nondelegation principles. Part III shows how, for very similar reasons, both also run afoul of the major question doctrine. Finally, Part IV outlines some lessons that can be gleaned from these cases. Among other things, they strengthen the case for nondeferential judicial review of emergency powers and delegations to supposedly expert executive agencies. They also highlight the need for greater cross-ideological cooperation and dialogue on these issues. Nondelegation and major question limits on emergency powers will be on firmer ground if they enjoy cross-

ideological support and cannot be stigmatized as mere partisan tools of one side of the political spectrum.

The article is part of an *NYU Journal of Law and Liberty* Symposium on "Responding to Emergency: A Blueprint for Liberty in A Time of Crisis" (co-sponsored by the Pacific Legal Foundation). Prof. Steve Vladeck (University of Texas) has posted his own contribution to the same symposium, which critically assesses the Supreme Court's treatment of religious-liberty challenges to Covid-era public health restrictions.

NOTE: I previously authored an amicus brief in the Title 42 case, on behalf of the Cato Institute. The plaintiffs in some of the lawsuits against the eviction moratorium (though not the one the Supreme Court ruled on in August) are represented by the Pacific Legal Foundation, where my wife works (though she herself did not work on these cases). I myself played a minor (unpaid) role in advising PLF on this litigation. For the record, my wife did not play any part in PLF's decision to invite me to participate in this symposium.