

**BLOG**

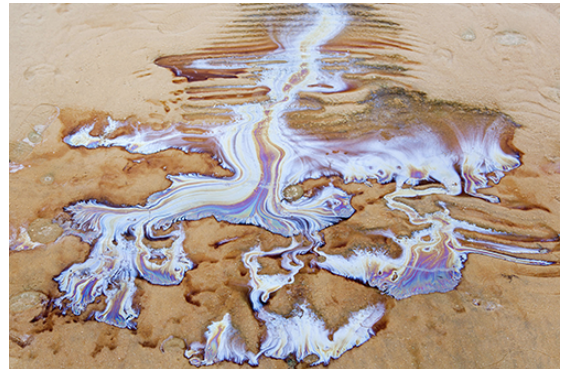
# Nondelegation Doctrine: Environmental Catastrophe or Business as Usual?

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Mar 9, 2020

Anyone who's paid attention to what's happening in the Supreme Court in the last six months has probably caught on to the issue of nondelegation and the potential it has to upend decades of federal regulations. There's a fear that it will weaken basic environmental laws like the Clean Air Act and strip the EPA of its authority to ensure public health and safety.

If nondelegation becomes the law of the land, will environmental contamination run wild from businesses no longer bound by strict EPA regulations? Will it completely alter the way businesses and developers operate? Or will it simply be business as usual?



## What Is Nondelegation?

Ever since the 1930s, Congress has written laws and then delegated authority to other government agencies to define them and lay out specific details in how they will be followed. This legislative process has been challenged several times in the last century under the nondelegation doctrine, which says that Congress is vested with legislative power by the Constitution and may not transfer powers to another branch. For the past 84 years, the Supreme Court has upheld all but two cases of delegation.

But the Court's opposing opinions on *Gundy* has brought the issue of nondelegation back into the headlines. While the majority ruling in *Gundy* upheld the delegation of power (in this case to the Attorney General), opinions written by Justices Alito and Kavanaugh indicate that a new majority of justices are willing to reinvigorate the nondelegation doctrine in the near future.

And this has many people wondering what it could mean for the future of environmental regulations.

While less regulation means that the government will have a diminished ability to drive policy regarding environmental contamination, I don't believe that nondelegation will have a significant impact on how businesses currently operate. Nondelegation doesn't remove the hammer of any business owner's requirement to be responsible for their actions. Here's why:

- **Environmental liability is a safeguard.** With the way environmental liabilities work and with



strict statutes in place, the obligation businesses have to the environment is not going away. Changes in governmental policy happen all the time, from administration to administration. Regulations are tightened and they're loosened. But businesses still have responsibilities and are still tied to strict liability statutes in their environmental insurance policies. In light of changes in regulations, businesses still have risk and a fiduciary responsibility to protect their companies from liabilities that could significantly affect their balance sheets. Environmental insurance continues to be an effective way of mitigating environmental risk.

- **The public demands transparency... and the media gives it to them.** In today's world, prudent owners need to make sure they're taking care of business from an environmental standpoint because that's what people expect. The public is informed in endless ways and is eager for transparency. Oversight doesn't just come from governmental agencies. Right-to-know groups, watchdog groups, social media and traditional media all play a part in raising public awareness and promoting transparency in how businesses operate. It is not just the public demands that keep businesses in line; businesses are aware of the reputational value they need to maintain. Environmental insurance also includes coverage to assist in retaining public relations firms to deal with crisis management if a lawsuit arises.
- **Self-regulation is already alive and well.** No matter whether there are stringent policies or not, industries will self-regulate. PFAS is a good example. This chemical group, found in products like non-stick cookware and food packaging, has been tied to serious health issues. But the effect of PFAS on humans hasn't been defined by any government agency, nor has it been regulated in a meaningful way. Instead of issuing strict PFAS standards, the EPA created a voluntary stewardship program in 2006 in which all the major companies in the PFAS industry committed to certain manufacturing and emissions restrictions. More recently, the EPA issued guidance documents on acceptable contamination levels, but the minimal threshold (17 parts per trillion) is so low that 18 states have adopted their own, more stringent rules. This example of self-regulation is growing momentum as more and more states take on the issue on their own, without federal government oversight.

In the end, everyone wants a safe environment. Everyone is concerned about clean air and clean water. No matter what rulings come down from the Court, the public's demand for a safe environment will ensure that businesses, owners and developers are adhering to commonsense day-to-day operations. Bad actors who will break with their environmental responsibilities because of changes in policy will do so even with all the regulations we have in place today.

The majority of owners will be socially and environmentally responsible and will conduct business in a way that's in keeping with what's happening in the environment.

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