



The Future of Administrative Law

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Executive Summary

- The Administrative State has never been more powerful. Agencies govern virtually every nook and cranny of everyday life.
- The expansion of administrative power is due in part to court doctrines that have placed near unbounded power with administrative agencies and caused much mischief over the last century.
- The nondelegation doctrine was intended to bar Congress from giving away too much of its legislative power. But under the Supreme Court's current interpretation of the nondelegation doctrine, much of the substantive policy-making authority is left to administrative agencies. Agencies do about twelve times as much lawmaking as Congress.
- The *Chevron* doctrine requires federal courts to defer to an agency's interpretation of federal law. The doctrine wrests a good deal of interpretive authority from the federal courts.
- Two recent Supreme Court decisions offer hope that the Supreme Court will check administrative power in the near future.
- From cases in 2019, it is clear that the Supreme Court may be poised to reconsider the nondelegation doctrine and *Chevron* deference—doctrines that have placed vast authority with administrative agencies to make and interpret federal law.
- In *Gundy v. United States*, four justices suggested that they would revisit the nondelegation doctrine and require Congress to exercise more policy-making authority. (Justice Kavanaugh did not participate, but his views on the administrative state suggest that he, too, is interested in revisiting the doctrine.)
- In *Kisor v. Wilkie*, five justices suggested that *Chevron* deference might be up for a trim in the future.

What You Should Know

High school civics students learn that Congress makes the law, the President enforces the law, and the Supreme Court interprets the law. But, while this is how our government is supposed to function, a powerful “fourth branch” of government, referred to as the Administrative State, routinely performs all of these functions—and to vast effect.

The expansion of administrative power is due, in large measure, to court doctrines that have placed near unbounded power with administrative agencies and caused much mischief over the last century. Under current interpretations of the **nondelegation doctrine**, agencies have the power to craft policy-making regulations with the force and effect of law (the power, in other words, to legislate). Under the **Chevron doctrine**, federal courts have ceded to the Administrative State their core judicial power to interpret federal law and are now required to defer to an agency’s interpretation, even if it is not the most sensible interpretation of the law.

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The *Chevron* doctrine and the nondelegation doctrine are in tension with both **Article I** of the Constitution, which vests the power to make law in Congress, and with **Article III**, which vests the judicial power in the federal courts. The former also conflicts with the **Administrative Procedure Act**, which requires that in reviewing agency action, federal courts “interpret” federal law.

But two key Supreme Court cases from the October 2018 term suggest that a new day may be dawning. In ***Gundy v. United States***, four justices signaled their interest in revisiting the nondelegation doctrine and returning to Congress the power to make policy-setting decisions. Justice Kavanaugh did not participate in the decision, but his writings on the administrative state, suggest he, too, would welcome the chance to revisit the nondelegation doctrine. In ***Kisor v. Wilkie***, a majority of the Supreme Court narrowed one deference doctrine (*Auer* deference), and five justices suggested that they were open to reconsidering *Chevron* deference.

Two 2019 Supreme Court cases provide hope that the Court may curb the nondelegation doctrine and place power back where it belongs: with the people’s elected representatives (rather than with unaccountable agencies) and that it may

limit or overrule the *Chevron* doctrine, ensuring that the federal courts once again exercise the judicial power to interpret federal law.

Why You Should Care

The Administrative State has never been more powerful. Administrative agencies govern virtually every nook and cranny of everyday life—a state of affairs that would, **as Justice David Souter once put it**, “leave [the Framers] rubbing their eyes.”

Today, federal administrative agencies decide what permits farmers must obtain before they can plow their own fields, when a veteran’s benefits may be granted retroactively, what overtime laws apply to government contractors, and even what contraceptives must be included in employers’ insurance plans.

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Although they are not responsive to the will of the people, administrative agencies do 12 times as much law-making as Congress. In 2015 and 2016, for example, federal agencies promulgated about 7,000 final rules, while Congress enacted 329 public laws.

This is problematic because administrative agencies are not accountable. Bureaucrats at administrative agencies cannot be voted out of office if we do not like the policies that they enact. Although administrative agencies are best situated within the Executive Branch run by the President, agencies are filled with career employees who keep their jobs irrespective of who is in the White House. The Framers of our Constitution intended for us to be self-governing. They never intended for us to be governed by unelected and unaccountable bureaucrats.

The problem is made worse because agencies not only make the bulk of rules by which individuals live, they also interpret and enforce those rules. The Framers designed our government with three separate spheres so that the branches would all be forced to work in concert to curtail individual liberty. But administrative agencies frequently exercise all three of the core governmental powers: they legislate, they rule on questions of law, and they execute the law. This makes it easier for the government to cut back on liberty: as James Madison put it in **Federalist Number 47**, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”

The Supreme Court is supposed to protect the separation of powers. And yet two judicially-created doctrines give wide leeway to agencies to enact regulations with the force of law and also to interpret federal law. In combination, these administrative law doctrines leave much of the business of government—of legislating and of interpreting—to federal agencies. These court-created doctrines are in tension with the constitutional commands of Article I (which requires that Congress make the law) and Article III (which vests the power to interpret federal law in the federal courts) as well as the Administrative Procedure Act (APA).

Two cases from last term suggest, however, that the Supreme Court may finally be poised to enforce separation of powers principles against administrative agencies.

Legal Background

Nondelegation Doctrine

The nondelegation doctrine, as originally intended, bars Congress from giving away its legislative power. **Article I of the Constitution** provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” Thus, in 1825, the **Supreme Court explained** that Congress may not transfer to another branch “powers which are strictly and exclusively legislative.”

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In recent times, however, the nondelegation doctrine has been dead letter. Since the “Sick Chicken” case in 1935—a case in which a unanimous Supreme Court struck down the National Industrial Recovery Act because it gave the President power to draft criminal codes—the Court has been content to allow agencies to legislate under broad congressional directives. All the Court requires is that Congress lay out an “intelligible principle.” Under this lenient test, the Court has blessed broad statutes that, among other things, allow the Price Administrator to **fix commodity prices** at a “generally fair and equitable” level, and grant to the Federal Communications Commission the power **to regulate** in the (very general) “public interest.”

Given the Supreme Court’s undemanding nondelegation test, policy-making decisions routinely are left up to administrative agencies. To take the Affordable Care Act as an example, Nancy Pelosi was quite correct **when she said** Congress would “have

to pass the bill to find out what’s in it.” That statute left many crucial questions, like what types of procedures and contraceptives must be offered to women as insured preventative care, to the Department of Health and Human Services.

In short, the abandonment of the nondelegation doctrine gives agencies near *carte blanche* as it goes about promulgating rules with the force of law. Under current Supreme Court precedent, so long as Congress provides an “intelligible principle” in a statute, the federal courts will permit a delegation of even core policy-making authority to administrative agencies.

Chevron

In ***Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, 467 U.S. 837 (1984)***, the Supreme Court held that federal courts are required to defer to an agency’s interpretation of federal law. Further, the agency’s interpretation does not have to be the most sensible one, it need only be a permissible one. This doctrine wrests a good deal of statutory interpretation authority away from the federal courts, leading Professor Cass Sunstein to **label *Chevron*** a “counter-*Marbury*.” That is, under *Chevron*, it is no longer the duty of the federal courts to say what the law is; that’s for federal agencies.



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In sum, *Chevron* requires the judiciary to abdicate the core judicial function of interpreting the law, requiring federal courts instead to defer to an agency’s interpretation of federal law even when that interpretation is not the best one.

Two Recent Cases Offer Hope

Two recent Supreme Court decisions offer hope that the administrative power will be checked.

Gundy v. United States

Gundy v. United States involved a 2006 statute, the Sex Offender Registration and Notification Act (SORNA), which required convicted sex offenders to register before being released from prison. For pre-Act offenders, however, the statute is less specific, merely providing:

The Attorney General shall have the authority to *specify the applicability* of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to *prescribe rules* for the registration of any such sex offenders.

Herman Gundy was a pre-Act offender who was convicted of failing to register and sentenced to ten additional years in prison. He argued that SORNA unconstitutionally delegated legislative power to the Attorney General because the statute authorized the AG to decide *if* and *how* to apply SORNA's registration requirements to pre-Act Offenders.

A plurality of the Court upheld SORNA, but only by redlining the statute, finding that its text required the Attorney General "to apply SORNA to all pre-Act offenders as soon as feasible." Given that interpretation, the delegation was "within permissible bounds."

Justice Alito filed a concurrence agreeing with the outcome in the case, but stating that he would be willing to reconsider the nondelegation doctrine in another case.

The Chief Justice and Justices Gorsuch and Thomas would have held SORNA invalid under the nondelegation doctrine. Writing for the minority, Justice Gorsuch explained, "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty." Yet SORNA "scrambles that design" because it "purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens." Further, Justice Gorsuch argued that the plurality's statutory interpretation was erroneous; the authority conferred on the Attorney General by the plain text of SORNA was "vast" authorizing the AG to determine whether and how to apply SORNA to pre-Act offenders.

Justice Gorsuch then laid out a new approach under the nondelegation doctrine, focusing on the government branch with which policy-making authority lies.

- "Does the statute assign to the executive only the responsibility to make factual findings?"
- "Does it set forth the facts that the executive must consider and the criteria against which to measure them?"
- "And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands."

The plurality opinion in *Gundy* thus upheld SORNA, but only by interpreting that statute to say something different than its text. And four justices signaled their interest in reinvigorating the nondelegation doctrine. Because Justice Kavanaugh joined the Court after *Gundy* was argued, he took no part in the decision, but his past writings on separation of powers and administrative law suggest he may have voted with the dissent.

Kisor v. Wilkie

Kisor v. Wilkie involved *Auer* deference—a second order deference doctrine which requires federal courts to defer not only to an agency’s interpretation of a statute (*Chevron*), but also to the agency’s interpretation of its own regulation (*Auer*). Thus, one can understand Justice Scalia’s critique of *Auer* (ironically, a decision he authored) as impermissibly placing “the power to write a law and the power to interpret it in the same hands.”

Mr. Kisor, a Vietnam War veteran and participant in Operation Harvest Moon, was denied disability benefits in 1982. In 2006, based on a new psychiatric evaluation, the Department of Veterans Affairs (VA) concluded that Mr. Kisor qualified for benefits but interpreted its regulations to deny retroactive benefits. The Federal Circuit deferred to the VA’s interpretation of its own regulation under the *Auer* doctrine.



A weakened version of Auer survived Kisor, but five justices suggested that Chevron deference might be on the chopping block—or at least up for a trim.



A fractured Supreme Court limited, but did not overrule, *Auer*. A plurality of justices, Justices Kagan, Ginsburg, Breyer and Sotomayor, wrote that *Auer* deference is consistent with the Constitution and the Administrative Procedures Act. Yet, even the plurality circumscribed *Auer*, noting that *Auer* applies only where a catalogue of conditions is met: “The underlying regulation must be genuinely ambiguous; the agency’s interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise.”

The Chief gave the plurality a win, joining the four so-called liberal justices, but only on stare decisis grounds (the idea that it is more important that the law be settled, than it be right).

Justice Gorsuch, writing for himself and Justices Thomas, Alito, and Kavanaugh, dissented, arguing that *Auer* is incompatible not only with the APA, which requires that federal courts interpret federal law, but also sits uneasily with the constitutional command of Article III. Quoting Chief Justice Marshall in *Marbury v. Madison*, Justice Gorsuch explained that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”

In a separate concurrence, the Chief Justice (joined by Justice Kavanaugh) contended that the Court’s decision regarding *Auer* had nothing to do with the question whether *Chevron* was consistent with the APA and Constitution.

In sum, a weakened version of *Auer* survived *Kisor*, but five justices suggested that *Chevron* deference might be on the chopping block—or at least up for a trim.

The Future

From cases decided in 2019, it is clear that the Supreme Court may be poised to reconsider two judicially-created administrative law doctrines that vest massive power in federal agencies to make policy and interpret federal law.

In *Gundy*, four justices clearly signaled a willingness to look more closely at broad congressional delegations of policy-making authority to administrative agencies under the nondelegation doctrine. They are likely to have a fifth vote in Justice Kavanaugh. While the fractured opinions in *Gundy* left SORNA on the books, they collectively suggest that, for the first time since 1935, a nondelegation challenge may be viable. Going forward, there may well be a majority of the current Court that is willing to require Congress to make more policy decisions rather than leaving broad legislative power to administrative agencies.



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In *Kisor*, four justices voted to overrule the judicially-created *Auer* doctrine, which requires federal courts to defer to an agency’s interpretation of its own regulation. And the *Auer* doctrine that emerges from the case is non-recognizable, an enfeebled

version that leaves the doctrine on the books but allows for many exceptions. Further, the concurrence by the Chief Justice suggests that he (the deciding vote to uphold *Auer*) would view a Chevron deference case much differently. Collectively, the opinions in *Kisor* suggest that the Supreme Court may view Chevron deference with skepticism in the future, potentially one day restoring to the judiciary its duty to interpret federal law under the APA and Article III.

What You Can Do

Get informed and learn about organizations and legislation that will protect the separation of powers.

To read up on the separation of powers, see IWF's **legal brief** detailing how the administrative state fits (or does not fit) with our Constitution.

For more information about current litigation regarding the administrative state visit:

- The **New Civil Liberties Alliance**, an organization formed to defend the Constitution against the administrative state.

Write Your Representatives

There are also a number of congressional bills aimed at enforcing the separation of powers vis-a-vis the administrative state. Consider reading these bills and writing to your representatives in Congress to express your support for them.

- The **Separation of Powers Restoration Act**: This bill would reverse *Chevron* and restore to the federal courts the ability to interpret federal law.
- The **REINS (Regulations from the Executive in Need of Scrutiny) Act**: This bill would require Congress to approve every new major rule—defined as a regulation resulting in an economic impact of \$100 million or greater each year—proposed by the Executive Branch.