No. 22-451

# In The
# Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, et al.,

*Petitioners,*

v.

GINA RAIMONDO, in her official capacity as secretary of commerce, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

TIMOTHY SANDEFUR*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

*Counsel for Amicus Curiae Goldwater Institute*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

## QUESTION PRESENTED

Whether the Court should overrule *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

IDENTITY AND INTEREST OF AMICUS CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. States that have abandoned their own versions of *Chevron* deference have not suffered negative consequences ..... 3

II. Deference to agencies has neither historical nor conceptual justification ..... 10

A. The Founders created an independent, not a deferential, judiciary ..... 10

B. Judicial deference is inconsistent with our Constitutional order ..... 17

C. Recent scholarship reveals how deference to agencies exacerbates problems of legitimacy, efficiency, and management ..... 21

CONCLUSION ..... 26

TABLE OF AUTHORITIES

Page

CASES

*Almond All. of Cal. v. Fish & Game Comm'n*, 299 Cal. Rptr.3d 9 (Cal. App. 2022) .....9

*Babbitt v. Sweet Home Chpt. of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) .....9

*Baldwin v. United States*, 140 S. Ct. 690 (2020).....1

*Bond v. United States*, 572 U.S. 844 (2014).....19

*Cal. Sea Urchin Comm'n v. Combs*, 139 S. Ct. 411 (2018).....1

*City of Arlington v. F.C.C.*, 569 U.S. 290 (2013) .....10

*Douglas v. Ad Astra Info. Sys., L.L.C.*, 293 P.3d 723 (Kan. 2013) .....6, 7

*Gonzales v. Arizona State Board of Nursing*, 528 P.3d 487 (Ariz. App. 2023).....3, 4

*Gregory v. Ashcroft*, 501 U.S. 452 (1991) .....19

*Hughes General Contractors, Inc. v. Utah Labor Comm'n*, 322 P.3d 712 (Utah 2014) .....5

*In re Certified Questions*, 958 N.W.2d 1 (Mich. 2020) .....8

*In re Complaint of Rovas*, 754 N.W.2d 259 (Mich. 2008) .....3, 8

*King v. Miss. Mil. Dep't*, 245 So.3d 404 (Miss. 2018) .....3

*Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) .....1

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).....14

TABLE OF AUTHORITIES—Continued

Page

*N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 574 U.S. 494 (2015) .....23

*Near v. Minnesota*, 283 U.S. 697 (1931) .....19

*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).....19

*Pourshirazi v. Arizona State Board of Dental Examiners*, No. 1 CA-CV 22-0351, 2023 WL 1113525 (Ariz. App. Jan. 31, 2023).....4

*Prohibitions del Roy*, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (1607).....12

*Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999) .....7

*Ruben v. Ariz. Med. Bd.*, No. 1 CA-CV 18-0079, 2019 WL 471031 (Ariz. App. Feb. 7, 2019).....3

*Solvay Chemicals, Inc. v. Wyoming Department of Revenue*, 517 P.3d 1146 (Wyo. 2022).....7

*T. P. Racing, L.L.L.P. v. Arizona Dep't of Gaming*, No. 1 CA-CV 22-0224, 2022 WL 17684565 (Ariz. App. Dec. 15, 2022).....4

*Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018) .....3

*Truax v. Corrigan*, 257 U.S. 312 (1921).....19

*TWISM Enter., L.L.C. v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, 2022-Ohio-4677 .....7

*United States v. Lopez*, 514 U.S. 549 (1995).....21

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. II § 3 .....14, 15

Va. Dec. of Rights (1776).....20

STATUTES

A.R.S. § 12-910.....3

Cal. Fish & Game Code § 45 .....9

Declaratory Act of 1766, 6 Geo. III.....20

Tenn. Code § 4-5-326 .....3

REGULATIONS

21 C.F.R. 155.194(b).....21

29 C.F.R. 1926.451(b)(3)(ii).....22

OTHER AUTHORITIES

1 *Blackstone's Commentaries* (Tucker ed., 1803) .....13

Adams, *Thoughts on Government* (1776), *reprinted in John Adams: Revolutionary Writings 1775-1783* (Wood ed., 2011) .....13

Associated Builders and Contractors, *State Construction Unemployment Is Down in 32 States from a Year Ago* (Feb. 6, 2023) .....6

Bernick, *Lions Under the Bureaucracy*, 18 Fed. Soc. Rev. 78 (2017).....16

TABLE OF AUTHORITIES—Continued

Page

Buchanan & Tullock, *The Calculus of Consent* (1962) ..... 22

Bureau of Labor Statistics, *State Occupational Injuries, Illnesses, and Fatalities (Archived State Tables)* ..... 6, 7

*EPA Says it Won't Repay Claims for Spill that Caused Yellow Rivers*, CBS News (Jan. 13, 2017) ..... 22

Greve, *Not Originally Intended*, Claremont Review of Books (Summer 2013) ..... 16

Hamburger, *Is Administrative Law Unlawful?* (2014) ..... 11, 14, 15

Hamburger, *Law and Judicial Duty* (2008) ..... 12

Hayek, *The Pretence of Knowledge*, Nobel Lecture (Dec. 11, 1974) ..... 24

Holmes, Letter from Oliver Wendell Holmes to Harold Laski, Sept. 15, 1916, *in The Essential Holmes* (Posner ed., 1996) ..... 19

Hudson, *When Influence Encroaches*, 26 Wm. & Mary Bill Rts. J. 657 (2018) ..... 23

Jefferson, *Notes on Virginia* (1784) *reprinted in Jefferson: Writings* (Peterson ed., 1984) ..... 13

Kansas Dept. of Labor, *39th Ann. Stat. Rep: Workers Comp.* ..... 7

Kansas Dept. of Labor, *47th Ann. Stat. Rep.: Workers Comp. Div. 2021* ..... 7

Lavoie, *National Economic Planning* (1985) ..... 24

TABLE OF AUTHORITIES—Continued

Page

Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).....19

Lerner, *The Thinking Revolutionary* (1987) .....20

Levin, *The Great Debate* (2014).....20

Locke, *Second Treatise of Civil Government*, *in John Locke: Two Treatises of Government* (Laslett rev. ed., 1963).....12

Mashaw, *Creating the Administrative Constitution* (2013) .....15

Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal. L. Rev. 519 (2012).....18

Riches, *Ending Deference to the Administrative State in State Legislatures*, Goldwater Institute (July 27, 2021) .....1

Sandefur, *The Conscience of the Constitution* (2014).....18

Sandefur, *The First Line of Defense: Litigation for Liberty at the State Level*, Goldwater Institute (April 23, 2019).....2

Somin, *California Court Rules Bees Qualify as "Fish" Under the State's Endangered Species Act*, Volokh Conspiracy (May 31, 2022, 9:33 PM) .....9

Stigler, *The Theory of Economic Regulation*, 2 Bell J. of Econ. & Mgt. Sci. 3 (1971).....23

Sunstein, *Beyond the Precautionary Principle*, 151 U. Pa. L. Rev. 1003 (2003).....24

TABLE OF AUTHORITIES—Continued

Page

Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893) ..... 18

*The Federalist* No. 45 (J. Cooke ed., 1961) ..... 21

*The Federalist* No. 51 (J. Cooke ed., 1961) ..... 22, 25

*The Federalist* No. 78 (J. Cooke ed., 1961) ..... 14, 21

Thierer, *Permissionless Innovation* (rev. ed., 2016) ..... 25

Utah Labor Commission, *1992-2020 Utah Work Related Fatalities* ..... 5

Vermeule, *Law's Abnegation* (2016) ..... 11, 12, 20

Wilson, *Congressional Government* (1901) ..... 17

Wilson, *Constitutional Government in the United States* (1908) ..... 17

Wilson, *Lectures on Law, reprinted in* 1 *Collected Works of James Wilson* (Hall & Hall eds., 2007) ..... 13, 26

Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197 (1887) ..... 17

## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated. Among GI's priorities is the protection of individual rights against the often unaccountable regulatory agencies which, thanks largely to deference doctrines, contradict the separation of powers and exercise authority in undemocratic ways.

GI has often appeared in this Court as an amicus in cases involving such deference doctrines. *See*, *e.g.*, *Baldwin v. United States*, 140 S. Ct. 690 (2020); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Cal. Sea Urchin Comm'n v. Combs*, 139 S. Ct. 411 (2018). GI scholars have also published important research on the problems caused by deference. *See*, *e.g.*, Riches, *Ending Deference to the Administrative State in State Legislatures*, Goldwater Institute (July 27, 2021)[2]; Sandefur,

---

[1] Pursuant to Rule 37.6, counsel for amicus affirms that no counsel for any party authored this brief in whole or part and no person or entity, other than amicus, their members, or counsel, made a monetary contribution toward its preparation or submission.

[2] https://www.goldwaterinstitute.org/wp-content/uploads/2021/07/Ending-Deference-to-the-Administrative-State-in-State-Legislatures-7-27-21.pdf.

*The First Line of Defense: Litigation for Liberty at the State Level*, Goldwater Institute (April 23, 2019).[3] GI believes its legal experience and public expertise will assist this Court in deciding this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Many states have their own versions of "*Chevron* deference." And just as that doctrine has led to unwarrantable expansions of agency power at the federal level—conflicting with separation of powers principles and undermining democratic legitimacy—so it has also caused problems at the state level. Consequently, many states have abandoned their state versions of *Chevron* deference in recent years, either by court ruling or statute—and they have experienced no untoward consequences. On the contrary, this has enabled courts to better perform their job of saying what the law is, and ensured better accountability with respect to bureaucracies without obstructing legitimate regulation. But not only is *Chevron* unnecessary, it's also unwarranted. It's incompatible with our constitutional design and leads to intractable problems such as regulatory capture and rent-seeking.

[3] https://www.goldwaterinstitute.org/the-first-line-of-defense-litigation-for-liberty-at-the-state-level/.

## ARGUMENT

### I. States that have abandoned their own versions of *Chevron* deference have not suffered negative consequences.

Several states have recently abolished their state-level versions of *Chevron* deference with respect to their own agencies. Some, including Arizona and Tennessee, have done so by statute, *see* A.R.S. § 12-910(E) & (F); Tenn. Code § 4-5-326, others by court decision. *See*, *e.g.*, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018); *King v. Miss. Mil. Dep't*, 245 So.3d 404 (Miss. 2018). Still others refused to adopt an analogue to *Chevron* in the first place. *See*, *e.g.*, *In re Complaint of Rovas*, 754 N.W.2d 259, 270–72 (Mich. 2008).

There's no evidence that these states have suffered as a consequence. Their people are not less safe or less prosperous; nor are their agencies unable to protect public safety. Actually, there's good reason to think the people there are better governed than in states that practice broad deference, such as California.

Arizona abolished its state version of *Chevron* by statute five years ago. *See Ruben v. Ariz. Med. Bd.*, No. 1 CA-CV 18-0079, 2019 WL 471031, at *6 ¶¶ 29–30 (Ariz. App. Feb. 7, 2019). There has been no administrative chaos or other untoward consequences. On the contrary, courts have been more diligent about protecting people from the wrongful acts of agencies. In *Gonzales v. Arizona State Board of Nursing*, 528 P.3d 487

(Ariz. App. 2023), for example, an agency suspended a nurse's license, and then held a hearing on the matter only 13 days after the notice, even though the statute specifies a 30-day deadline. The agency justified its act by saying the statute requires a "prompt" hearing, and that it was owed deference as to what "prompt" means—but the court disagreed. *Id.* at 490–91 ¶¶ 11–13. In holding to the 30-day requirement, it observed that the agency's action was a threat to due process, because the purpose of the 30-day rule is to enable licensees to prepare a defense. *Id.* at 492 ¶¶ 21–22.

The abolition of *Chevron* deference has not rendered agencies unable to enforce the law. In *T. P. Racing, L.L.L.P. v. Arizona Dep't of Gaming*, No. 1 CA-CV 22-0224, 2022 WL 17684565 (Ariz. App. Dec. 15, 2022), the agency denied a permit to a business seeking to host a sporting event, because the applicant did not own an "Arizona professional sports team or franchise," as the statute requires. *Id.* at *1. The business said it owned a horse-racing franchise, but the agency said that didn't count. The court applied a *de novo* review to the agency's interpretation, *id.* at *2, and upheld it, using ordinary non-deferential tools of statutory construction. *See id.* at *3. Similarly, in *Pourshirazi v. Arizona State Board of Dental Examiners*, No. 1 CA-CV 22-0351, 2023 WL 1113525 (Ariz. App. Jan. 31, 2023), the agency suspended the license of a dentist who sedated a patent without proper certification; the patient died. *Id.* at *1 ¶¶ 2–3. The court applied *de novo* review and affirmed the agency's decision. There is no indication that Arizona's *de novo*

requirement has hindered agencies in performing their legitimate duties.

Utah "openly repudiated" *Chevron* deference almost a decade ago, in *Hughes General Contractors, Inc. v. Utah Labor Comm'n*, 322 P.3d 712, 717 ¶ 25 (Utah 2014). That case involved a state agency's assertion that a general contractor was responsible for the safety of all workers on a worksite, including those she did not directly employ. *Id.* at 714 ¶ 1. The statute only said an "employer" was liable for "the employer's employees," *id.* at 715 ¶ 10, which certainly seems to confine liability to direct employment relationships. But the agency interpreted it more broadly, using the "multi-employer" doctrine, which holds general contractors to be the constructive employers of all workers on site (a doctrine federal agencies apply). *See id.* at 715 ¶ 7. The Utah Supreme Court, however, "[found] in our statute no room for the multi-employer worksite doctrine." *Id.* at 718 ¶ 26. It refused to "extend the statutory duties in [state law] to general contractors" without legislative warrant, *id.* ¶ 28, and rejected the agency's invocation of *Chevron* deference as "not a viable [theory] under Utah law." *Id.* at 717 ¶ 25.

Since then, there's no evidence that workplace accidents have worsened in Utah. In fact, both fatal and nonfatal workplace injuries decreased between 2014 and the present,[4] even as construction jobs increased:

---

[4] Fatalities decreased from 54 in 2014 to 48 in 2020, *see* Utah Labor Commission, *1992-2020 Utah Work Related Fatalities*, https://www.laborcommission.utah.gov/wp-content/uploads/2022/01/CFOI-Charts-Final-Draft.pdf, and nonfatal incidents decreased

Utah has one of the nation's lowest unemployment rates in the contracting trades. Associated Builders and Contractors, *State Construction Unemployment Is Down in 32 States from a Year Ago* (Feb. 6, 2023).[5]

In 2013, Kansas's Supreme Court emphatically rejected *Chevron* deference (which that state calls the "doctrine of operative construction"): "To be crystal clear," it said, "we unequivocally declare" that this doctrine is "abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books where it will never again affect the outcome of an appeal." *Douglas v. Ad Astra Info. Sys., L.L.C.*, 293 P.3d 723, 728 (Kan. 2013).

That case concerned an employee who was hurt while racing go-carts during a social event sponsored by his employer. *Id.* at 724–25. The state's Workers Compensation Board ruled the injury compensable, saying that because the statute did not define the phrase "arising out of and in the course of employment," it would apply a multi-factor test which asked, *inter alia*, whether the employer benefitted from the employee's activities, whether the activity giving rise to the injury occurred on the employer's land, etc. *Id.* at 556. On appeal, the employee claimed the Board was

---

from 3.3 per hundred to 2.6 per hundred. *See* Bureau of Labor Statistics, *State Occupational Injuries, Illnesses, and Fatalities (Archived State Tables)*, https://www.bls.gov/iif/state-data/archive.htm#UT.

[5] https://www.abc.org/News-Media/News-Releases/entryid/19760/abc-state-construction-unemployment-is-down-in-32-states-from-a-year-ago.

entitled to do this because of "operative construction" deference. But the court said no, and applied *de novo* review. It was not "credib[le]," the court concluded, to deny "that the pizza eating and go-cart racing in this case were recreational or social activities," and therefore the injury was non-compensable. *Id.* at 728–29.

Again, there's no reason to think things have worsened in Kansas. The nonfatal occupational injury rate fell from 3.7 per hundred in 2013 to 2.8 per hundred in 2021.[6] There were 56,009 claims for compensation in Kansas in 2013, and 44,506 in 2021. *Compare* Kansas Dept. of Labor, *39th Ann. Stat. Rep: Workers Comp.* at 33,[7] *with* Kansas Dept. of Labor, *47th Ann. Stat. Rep.: Workers Comp. Div. 2021* at 11.[8]

Other states, too, have rejected a state analogue of *Chevron*, without apparent adverse consequences. These include Delaware, *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999); Wyoming, *Solvay Chemicals, Inc. v. Wyoming Department of Revenue*, 517 P.3d 1146, 1148–49 ¶ 7 (Wyo. 2022); and Ohio. *TWISM Enter., L.L.C. v. State Bd. of Registration for Pro. Eng'rs & Surveyors*, 2022-Ohio-4677. In none

---

[6] *See* Bureau of Labor Statistics, *State Occupational Injuries, Illnesses, and Fatalities (Archived State Tables)*, https://www.bls.gov/iif/state-data/archive.htm#KS.

[7] https://www.dol.ks.gov/documents/20121/91185/annualreportfy13.pdf/542b155b-6605-b1cf-7a47-c71945f7159e?t=1614320967501#page=34.

[8] https://www.dol.ks.gov/documents/20121/91185/CombinedAnnualReport.pdf/30449899-ff44-726b-7e9b-4c737f7141ea?t=1643660972811#page=12.

of these states is there reason to think that employing *de novo* review to agency statutory interpretations has worsened public safety.

Michigan refused to adopt *Chevron* deference in 2008, finding it "very difficult to apply," and incompatible "with . . . separation of powers principles." *In re Complaint of Rovas*, 754 N.W.2d at 271–72. Not only is there no evidence that this has harmed the state, but there's reason to believe it has helped. During the pandemic, the state's governor asserted an extremely broad theory of executive power, requiring employers to make daily health screenings of employees, requiring people to wear facemasks, closing restaurants, bars, and other businesses, and even prohibiting boating and golfing. *In re Certified Questions*, 958 N.W.2d 1, 20–21 (Mich. 2020). When that was challenged as beyond the governor's statutory powers, the court used non-deferential, *de novo* review. *Id.* at 7. It found the governor's assertion of "power to reorder social life and to limit, if not altogether displace, the livelihoods of residents across the state" was invalid. *Id.* at 21.

Yet there's no reason to believe the court's vigilance hampered the state's ability to respond to the pandemic. There have been about 42,000 reported deaths from COVID in Michigan out of a population of 9.9 million (0.4%), compared to, say, Arizona, which imposed minimal restrictions on its population and suffered about 30,000 deaths out of a population of 7.4 million (also 0.4%), and Rhode Island, widely considered the most aggressive in imposing COVID

restrictions, which suffered about 4,000 deaths out of a population of 1 million (again, 0.4%).

States which practice extensive deference, by contrast, have experienced absurd rulings such as the now infamous California decision upholding an agency determination that bumble bees are "fish." *Almond All. of Cal. v. Fish & Game Comm'n*, 299 Cal. Rptr.3d 9 (Cal. App. 2022). That case involved a statute which empowered the agency to place "fish" on an endangered species list, and defined "fish" as "wild fish, mollusk, crustacean, *invertebrate*, amphibian, or part, spawn, or ovum of any of [these]." Cal. Fish & Game Code § 45 (emphasis added). The agency decided that bees qualify because they're invertebrates. On review, the court said: "we give deference to an agency's interpretation if warranted by the circumstances," *Almond All. of Cal.*, 299 Cal. Rptr.3d at 22 (citation omitted), thereby vastly expanding the agency's power.

As Justice Scalia observed with reference to a similarly "fallac[ious]" analysis, that interpretation "reads the defined term . . . out of the statute altogether." *Babbitt v. Sweet Home Chpt. of Cmtys. for a Great Or.*, 515 U.S. 687, 718 (1995) (Scalia, J., dissenting). Such a bizarre reading might meet some standard of semantic cleverness, but it undermines the legitimacy of the government's action because no ordinary person reading the statute would imagine that bees fall within its ambit. *See* Somin, *California Court Rules Bees Qualify as "Fish" Under the State's Endangered Species Act*,

Volokh Conspiracy (May 31, 2022, 9:33 PM).[9] That state-law case indicates the degree to which deference can undermine the democratic legitimacy of government action.

The experiences of states rejecting *Chevron* theory as a state-law matter shows why judicial independence is a better path: it prevents undemocratic and unpredictable expansions of government authority while still leaving government capable of protecting public health and safety.

## II. Deference to agencies has neither historical nor conceptual justification.

### A. The Founders created an independent, not a deferential, judiciary.

In theory, administrative agencies fall within the executive branch. Because the executive must weigh prudential and budgetary factors before enforcing statutes, it must be able to determine the circumstances under which it will do so. Thus regulations, guidances, etc., are essentially internal deliberations within the executive branch, not *laws* as contemplated by the Constitution, which means separation of powers issues don't arise; all the executive is doing is deliberating about when and how to enforce the statute. *See*, *e.g.*, *City of Arlington v. F.C.C.*, 569 U.S. 290, 304 n.4 (2013). Once the executive branch enforces the statute, *then*

---

[9] https://reason.com/volokh/2022/05/31/california-court-rules-bees-qualify-as-fish-under-the-states-endangered-species-act/.

citizens will have an opportunity for judicial review, which is all the Constitution requires.

Unfortunately, this model hardly resembles the reality of today's pervasive regulatory state. What really happens is that Congress adopts broadly worded legislation forbidding some vaguely described harm (say, "pollution"), and leaves it to agencies to define these terms and, thereby specify the nature of the offense. The agency's regulations bind the citizen: they specify prohibited behavior, and are typically wedded to administrative adjudication and administrative penalties. Then, when enforcement occurs and the citizen seeks judicial review, she discovers it's effectively too late: the court "defers" to what the executive branch decided before enforcement occurred. All of this is done under the aegis of the statute, but in substance what has happened is a delegation of lawmaking power to the enforcer.

As Professor Hamburger showed in *Is Administrative Law Unlawful?* (2014), today's administrative law resembles seventeenth-century monarchical rule more than the separation-of-powers system the Founders created. And the most outspoken defenders of today's administrative state *concede* this. Professor Vermeule, for example, approvingly characterizes today's administrative law as a "considered, deliberate, voluntary, and unilateral surrender" of the principles of constitutional lawmaking, and "an abnegation of authority by the law" to the power of administrative bureaucrats. *Law's Abnegation* 6–10 (2016).

That's another way of admitting that the Constitution contains no warrant for the modern administrative state. The Founders, after all, rebelled *against* monarchical rule, and did their best to establish an alternative: a system whereby the people would give law to themselves and obey it, as opposed to a system whereby the people enjoy only those freedoms given to them by the state.

It's notable that Vermuele quotes Francis Bacon to describe his own view: "The law itself decided to bow to the administrative state," he writes, "to leash itself—in Francis Bacon's image—'under the throne.'" *Id.* at 6. That quote comes from Bacon's 1617 speech urging judges to "show their stoutness in elevating and bearing up the throne." Quoted in Hamburger, *Law and Judicial Duty* 155 (2008). Such a conception of judges as servants of the king was common in that era; even John Locke, who believed in separation of powers, thought the judiciary was part of the executive. *See Second Treatise of Civil Government* §§ 136, 141, *in John Locke: Two Treatises of Government* 404–05, 408–09 (Laslett rev. ed., 1963).

But the Constitution's authors rejected that idea. They adhered to the views of Bacon's greatest rival, Lord Coke, who despised the "under the throne" notion and insisted that the king was *subordinate* to the law. *See*, *e.g.*, *Prohibitions del Roy*, 12 Co. Rep. 63, 77 Eng. Rep. 1342 (1607). John Adams was outspoken on this point. "[T]he judicial power," he thought, "ought to be distinct from both the legislative and executive, and independent upon both, that so it [*sic*] may be a check

upon both." *Thoughts on Government* (1776), *reprinted in John Adams: Revolutionary Writings 1775-1783* at 54 (Wood ed., 2011). Jefferson agreed, complaining in 1784 that Virginia's Constitution made courts too "dependent on the legislative," so that "no opposition [was] likely to be made" if the legislature exceeded its authority. *Notes on Virginia* (1784) *reprinted in Jefferson: Writings* 245 (Peterson ed., 1984).

James Wilson declared the tripartite American system superior to the British system. He thought the latter made courts too dependent on Parliament and the throne, preventing judges from declaring laws unconstitutional. *See Lectures on Law, reprinted in* 1 *Collected Works of James Wilson* 738–39 (Hall & Hall eds., 2007). He believed the basic problem with Britain's constitution lay in the principle of absolute parliamentary sovereignty. Rejecting Blackstone's idea that "'no court has power to defend the intent of the legislature,'" Wilson said "it is [their] right and it is [their] duty" to do so when the legislature exceeds its powers. *Id.* at 742. St. George Tucker, too, wrote in his celebrated edition of Blackstone that "[t]he absolute independence of the judiciary, both of the executive and the legislative departments" is indispensable to "the liberty and security of the citizen." 1 *Blackstone's Commentaries* 355 (Tucker ed., 1803) (App. Note D). Tucker underscored the importance of separating the judicial from the executive branch where "the will of the [executive] . . . [is] likely to influence the conduct of judges." *Id.*

It's unsurprising that a generation that valued judicial independence so highly made no mention of "deference" in the Constitution, but, on the contrary, gave courts their own constitutional article, separating them from the Executive. This was meant to *prevent* courts from what Publius called "an improper complaisance" with the executive or legislative branches. *The Federalist* No. 78 at 529 (J. Cooke ed., 1961). He warned against courts becoming "unwilling[] to hazard the displeasure" of the executive branch, and insisted that "nothing" should be consulted by a judge "but the constitution and the laws." *Id.*

Hamburger, *Administrative Law, supra*, at ch. 5, notes that the closest thing to "administrative rulemaking" which existed under the pre-Revolutionary system was the king's power to suspend laws on a case-by-case basis. America's founders considered this anathema, and accordingly the Constitution expressly mandates that the President "take care that the laws be *faithfully* executed." U.S. Const. art. II § 3 (emphasis added).

That italicized word is important because it underscores the logic of judicial review. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803), this Court pointed out a syllogistic argument for judicial review of statutes: (1) the Constitution says laws "in pursuance of" the Constitution are the supreme law of the land. (2) Laws *not* "in pursuance of" the Constitution are therefore *not* law of the land. And because the judiciary's job is to say what the *law* is, (3) courts cannot evade the duty to decide whether a given statute is "in

pursuance of" the Constitution. By **exactly the same logic**, the word "faithfully" in Article II section 3 justifies judicial vigilance in ensuring that the Executive is *faithfully* executing the statute when it takes administrative action. The question of whether its rules are *faithful* interpretations of the law, and therefore in keeping with the Executive's duty, is as much a *judicial* question as whether a statute is "in pursuance of" the Constitution in the first place.

Some claim deference theories are consistent with the Constitution's "original meaning," and that the framers expected executive entities to have wide discretion in enforcing the law. *See*, *e.g.*, Mashaw, *Creating the Administrative Constitution* (2013). Their arguments, however, fall short of demonstrating that anything like *Chevron* deference is consistent with the Constitution's separation of powers.

For one thing, as Hamburger observes, the examples these scholars offer typically involved "executive regulations"—i.e., regulations governing executive agencies' internal operations, not the conduct of private citizens. *Administrative Law, supra*, at 83. Thus, for example, a 1790 statute directing that handicapped citizens entitled to certain benefits "shall be placed on the list of the invalids . . . under such regulations as shall be directed by the President," governed the internal operations of an agency rather than specifying an offense binding citizens. *Id.* at 86–87. Such regulations were therefore not even published.

For another, the examples offered to establish the antiquity of the administrative state do not truly represent ancestors of today's bureaucracy. As Professor Greve puts it, the idea that "the Steamboat Inspection Service" was "a forerunner of New Deal and modern safety agencies" is

> wildly overblown. . . . Our administrative law goes well beyond boiler inspections. It says that your land is our land, which you may occupy only upon proof that it is not a wetland, an owl habitat, or otherwise connected to the planet. . . . If you have to bargain with EPA over the "reasonable" use of your half-acre, subject to deferential judicial review, of how much use are your property rights? Maybe we should ask whether the land was yours or the government's to begin with. The 19th century insisted on asking that question. For precisely that reason, it had no administrative law. . . .

*Not Originally Intended*, Claremont Review of Books (Summer 2013).[10] Even if there were more analogous examples, they would prove nothing for the simple reason that "those responsible for the practices may well have been mistaken about whether their actions were authorized by the Constitution." Bernick, *Lions Under the Bureaucracy*, 18 Fed. Soc. Rev. 78, 84 (2017).[11]

---

[10] https://claremontreviewofbooks.com/not-originally-intended/.

[11] https://fedsoc.org/commentary/publications/lions-under-the-bureaucracy-defending-judicial-deference-to-the-administrative-state.

Actually, today's administrative state bears no resemblance to the conception of lawmaking held by the Constitution's authors. Not only do today's more candid defenders of the administrative state admit this, but the administrative state's founders said so at the time. Foremost among them was Woodrow Wilson, who wrote that the Constitution's authors "constructed the federal government upon a theory of checks and balances which was meant to limit [its] operation . . . but no government can be successfully conducted upon so mechanical a theory." *Constitutional Government in the United States* 54 (1908). He thought "checks and balances have proved mischievous," *Congressional Government* 285 (1901), that "large powers and unhampered discretion" were "indispensable," and that "the greater his power the less likely [a bureaucrat] is . . . to abuse it." *The Study of Administration*, 2 Pol. Sci. Q. 197, 213–14 (1887). He and his colleagues accordingly laid the groundwork for today's bureaucracy while frankly admitting it was contrary to the Constitution's design.

### B. Judicial deference is inconsistent with our Constitutional order.

The framers had no theory of judicial restraint. They considered a vigilant, engaged judiciary indispensable to a successful Constitution. True, they and their successors thought courts should stay within their limits like the other branches, and disputes occasionally arose as to whether the judiciary had gone too far. But no general notion of judicial deference was

devised in the United States until the early twentieth century.[12]

As Woodrow Wilson's words suggest, that theory was fashioned by thinkers who believed the Constitution's purpose was not to protect what the document calls "the blessings of liberty," but instead to promote *democracy* (a word not found in the Constitution). Its first stage came with James Thayer's article *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893), which argued that courts should only declare laws unconstitutional if they were utterly unreasonable, as opposed to being logically incompatible with the Constitution. That formulation was flawed because, as Judge Posner observed, "it had no stopping point—once you embraced it, you could not explain why a law would ever be declared unconstitutional." *The Rise and Fall of Judicial Self-Restraint*, 100 Cal. L. Rev. 519, 522 (2012). But it influenced those, such as Justices Holmes and Brandeis, who sought legal doctrines that would "eliminate or at least postpone occasions on which a federal court deems itself authorized to declare a legislative or executive measure unconstitutional." *Id*. at 528.

---

[12] Even in the wake of the *Dred Scott* ruling, critics such as Abraham Lincoln, did not accuse this Court of failing to defer—and did not attack the principle of "substantive due process," which was accepted by all lawyers at that time. *See* Sandefur, *The Conscience of the Constitution* 111 (2014). They believed the *Dred Scott* case was wrong on the merits, not that it represented "judicial activism."

Their rationale was that the separation of powers had been intended to protect individual rights—as indeed it was, *see Bond v. United States*, 572 U.S. 844 (2014); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)—but that such rights either did not actually exist,[13] or that such rights "must be remolded, from time to time, to meet the changing needs of society." *Truax v. Corrigan*, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting).

As their contemporaneous critics observed, Holmes and Brandeis were sometimes disingenuous in applying their restraint theory: they supported restraint when they favored the challenged statute, and opposed it when they did not. *Compare New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, dissenting, arguing for upholding a law barring entrepreneurs from starting new businesses without effectively getting permission from their own competitors) *with Near v. Minnesota*, 283 U.S. 697 (1931) (Brandeis, for majority, not permitting a state to "experiment" through censorship). But it was really during the Franklin Roosevelt Administration that the Court began fashioning a general theory of deference. *See generally* Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

Professor Vermuele characterizes this history as a "cumulative" or "ongoing adjustment of authority"

---

[13] *See*, *e.g.*, Letter from Oliver Wendell Holmes to Harold Laski, Sept. 15, 1916, *in The Essential Holmes* at xxv (Posner ed., 1996) ("All my life I have sneered at the natural rights of man—and at times I have thought that the bills of rights in Constitutions were overworked.").

between law and the administrative system. *Supra* at 17–18. And if our Constitution were an unwritten matter of common-law evolution, that might not raise concerns. But it *is* written—and with the specific purpose of *resisting* "ongoing adjustments." The founding era called such adjustments "prescription,"[14] and they had experienced its consequences in the decades before the Constitution: either Parliament's cronies exercised vast, autonomous bureaucratic power—as with the East India Company—or Parliament asserted power to bind the people "in all cases whatsoever,"[15] acting in some ways like today's regulatory agencies do. The Founders knew that government inevitably involves "ongoing adjustments." That was why they insisted that "no free government, or the blessings of liberty, can be preserved to any people but by . . . frequent recurrence to fundamental principles." Va. Dec. of Rights § 15 (1776).

Among the institutions they considered essential to that process was the judiciary. They expected courts, in Ralph Lerner's famous phrase, to serve as a "republican schoolmaster"—teaching the citizenry "the modes of thought lying behind legal language and the notions of right fundamental to the regime," *The Thinking Revolutionary* 136 (1987), **by engaging—not by deferring**. Most of all, they expected courts to

---

[14] *See* Levin, *The Great Debate* ch. 5 (2014) (describing prescription).

[15] Declaratory Act of 1766, 6 Geo. III c. 12.

keep the other branches "within the limits assigned to their authority. " *The Federalist* No. 78, *supra* at 525.

### C. Recent scholarship reveals how deference to agencies exacerbates problems of legitimacy, efficiency, and management.

Government by administrative agency presents significant problems of legitimacy because the Constitution does not contemplate these bodies, and because their staffs are not meaningfully answerable to voters. Also, the modern administrative state was created before such phenomena as regulatory capture, rent-seeking, or the knowledge problem were well known. Scholarship has since demonstrated that these problems are intractable, and judicial vigilance—the opposite of restraint—is an important, if imperfect, means of addressing them.

With respect to legitimacy: the Constitution creates a government of limited, enumerated powers. *United States v. Lopez*, 514 U.S. 549, 552 (1995). Most powers—those relating to "internal order, improvement, and prosperity"—remain at the state level. *Federalist* No. 45, *supra* at 313. A government institution is constitutionally legitimate when, *inter alia*, it is called for by the Constitution's language or necessary implication. Yet the Constitution makes no reference to agencies wielding power to decide such questions as, say, how thick ketchup in fast-food restaurant packets shall be, *see* 21 C.F.R. 155.194(b), or how far scaffolding

should be from a building if a worker is engaged in plastering. 29 C.F.R. 1926.451(b)(3)(ii).

Also essential to constitutional legitimacy is that government be answerable to the people. *See Federalist* No. 51, *supra* at 349 ("A dependence on the people is no doubt the primary controul on the government."). Agencies, however, are not staffed by elected officials but by hired employees—often members of public sector unions who are essentially unfireable. When Enron collapsed in 2001 due to financial fraud, those responsible suffered financial and legal penalties. When the EPA caused a disastrous spill of mining waste into the Animas River in Colorado in 2016—turning the river yellow with toxic waste and causing $1.2 billion in damage—it paid nothing to affected landowners. *EPA Says it Won't Repay Claims for Spill that Caused Yellow Rivers*, CBS News (Jan. 13, 2017).[16] Congressional oversight committees can call bureaucrats to testify at hearings, but such exercises are typically more theatrical than effectual.

Even aside from its legitimacy problems, though, bureaucracy suffers from insoluble problems of rent-seeking, capture, and ignorance.

**Rent-seeking** is the result of government's power to redistribute wealth or power from a large number of citizens to a concentrated number of beneficiaries. *See generally* Buchanan & Tullock, *The Calculus of Consent* (1962). As the potential windfall from success at

[16] https://www.cbsnews.com/news/gold-king-mine-spill-colorado-rivers-epa-claims/.

lobbying increases, pressure groups will devote more time and energy to lobbying, in hopes of winning that competition. But because the costs of wealth redistribution are thinly spread among many people, there's little incentive for opponents of redistribution to lobby *against* such redistribution. This creates a ratchet effect so that legislators only hear from those who support new or expanded government programs.

Also, because lobbyists gain experience over time, they gradually become better at it, and reap ever-greater rewards from lobbying. Consequently, beneficiaries of government largesse benefit more and more, whereas ordinary citizens lack the political wherewithal to resist. And the structure of agencies rewards well-organized repeat players who know how to participate in the rule-making process, and have connections with bureaucratic officials—unlike ordinary citizens. Consequently, just as the rich get richer, the bureaucratically favored get more bureaucratic favors.

**"Capture"** refers to the phenomenon whereby the agency falls into the hands of the regulated industry. *See generally* Stigler, *The Theory of Economic Regulation*, 2 Bell J. of Econ. & Mgt. Sci. 3 (1971). Capture results from many factors. For one thing, bureaucracies are often staffed by members or former members of the industry. *Cf. N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 574 U.S. 494, 505–06 (2015). Also, regulators gradually come to sympathize with the industry they're charged with overseeing. *See* Hudson, *When Influence Encroaches*, 26 Wm. & Mary Bill Rts. J. 657, 672 (2018) ("[I]ndividuals constitute agencies,

and ultimately capture is about the thoughts and decisions of those individuals."). Further, the regulated industry will devote its resources to gaining control over the bureaucracy through the rent-seeking problem.

**The "knowledge problem"** refers to the fact that no individual or central authority can possibly know all the information necessary to organize complex undertakings. *See generally* Lavoie, *National Economic Planning* (1985). It's sometimes said that at an earlier, more primitive stage in American history, there was no need for an administrative state, but that our more "interdependent," "complex," modern society requires centralized planning. In fact, the opposite is true: the more complicated a society becomes, the *less* likely that any central entity can even comprehend it, let alone regulate and organize it efficiently or justly. *See generally* Hayek, *The Pretence of Knowledge*, Nobel Lecture (Dec. 11, 1974).[17]

Undoubtedly the knowledge problem's worst manifestation comes in what scholars call "Type II errors"—i.e., over-precaution which stifles innovation. Bureaucracies are inherently risk-averse, because officials risk embarrassment if they approve an innovation that turns out to be bad, but risk no penalty if they fail to approve an innovation that would be good. As Professor Sunstein puts it, that "precautionary principle . . . imposes a burden of proof on those who create potential risks, and . . . requires regulation of activities

---

[17] https://www.nobelprize.org/prizes/economic-sciences/1974/hayek/lecture/.

even if it cannot be shown that those activities are likely to produce significant harms." *Beyond the Precautionary Principle*, 151 U. Pa. L. Rev. 1003, 1003 (2003). That principle "is literally paralyzing," and deprives the public of technological and social improvements that could literally save lives. *Id.*; *see further* Thierer, *Permissionless Innovation* (rev. ed., 2016).

These three problems don't just undermine the bureaucracy's legitimacy, but cause "inefficiencies," meaning that they encourage businesses to devote resources to wooing bureaucrats rather than improving products and services. That reduces consumer welfare and transfers wealth from the private to the public sector and, ultimately, from the less politically adept to the more politically adept.

Judicial deference exacerbates these problems. It leaves bureaucracies free to expand their authority with few meaningful limits, thus giving agencies more control in ways that stifle innovation and increase economic and social costs—all without constitutional warrant.

Active judicial review is not a cure-all, but it does dampen these problems, as the Constitution's authors recognized. In *Federalist* 51, *supra* at 351, Publius called these problems "the mischiefs of faction," and concluded that there are only two ways to address the problem: "The one by creating a will in the community independent of the majority," and the other by a establishing a checks-and-balances system that would make "an unjust combination of a majority of [the people]

very improbable." An active judiciary combines both solutions. Courts aren't truly independent of the people—since judges are chosen by elected representatives—but they're independent enough that they can act as checks and balances, reducing problems of efficiency and legitimacy.

What James Wilson said of the executive's power to create new offices typifies his generation's attitude toward executive rule-making: "We reprehend not the nature of this power. . . . In every government there must be such a power. . . . What we censure is, that this power is not circumscribed by the necessary limitations." 1 *Collected Works of James Wilson, supra*, at 732. *Chevron* deference worsens all these problems and should be abandoned.

## CONCLUSION

The judgment should be *reversed*.

Respectfully submitted,

TIMOTHY SANDEFUR*
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*