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# Showcase Panel III: The States and Administrative Law

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Transcript\*

## Showcase Panel III: The States & Administrative Law

*Professor Nestor Davidson, Professor Christopher Green, Professor Miriam Seifter, The Honorable Jeffrey Sutton, & The Honorable Michael Scudder*

**Dean Reuter:** Good morning and welcome back to this, the third day, the best day of The Federalist Society's National Lawyers Convention. I am still Dean Reuter,<sup>1</sup> still Vice President, General Counsel, and Director of Practice Groups at The Federalist Society. But now I am also in charge of cleaning up the rooms after we finish here. So if you would please be careful with all your personal belongings, that would be helpful to me personally.

What a great second day I think we had, and a great night last night. I thought Jeff Sutton—Judge Jeff Sutton—was terrific as he delivered the Olson Lecture. So good, in fact, that we've invited him back to be on this morning's panel. In addition to having heard his lecture last night, I have read his book.<sup>2</sup> And I recommend it highly. It embraces a view of law and the practice of law that is, I'd say, near revolutionary but so obvious I wonder why nobody had come up with it before. It is obviously correct that to not adopt his views, I think, might rise to the level of legal malpractice.

**Hon. Jeffrey Sutton:** I've got you right where I want you.

**Dean Reuter:** Yeah. So you might want to buy a copy for yourself, but also for all your partners and associates to keep your firm out of trouble. So congratulations, Judge, and welcome back this morning.

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1. *Dean Reuter*, THE FEDERALIST SOCIETY, <https://fedsoc.org/contributors/dean-reuter> (last visited Mar. 10, 2019) [<https://perma.unl.edu/33ZF-Y5ZM>].

2. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

Our first panel this morning is titled “The States and Administrative Law.” And we’ve assembled for you this morning what I consider to be a truly first-class group of panelists. I do really mean first-class. I’m very proud of this panel.

But that term, “first-class,” gets overused sometimes. And that, of course, reminds me of a little story, which takes me back over twenty years. This story—it also happened in an airport, which might be of interest to you for that additional reason, since many of you travelled by plane to get here.

So, twenty years ago or so, I was working for the federal government and my children, who are now grown, were at the time very little. I was a single parent with custody of my kids so I tried to keep my travel to a minimum. But one time I had back-to-back trips and I went to the extraordinary measure of trying to come home just for an overnight.

But coming back on that first leg of the trip I had severe delays, landing well after midnight at Dulles airport. I was supposed to have arrived in time for dinner, tuck my kids into bed, and see them. But instead, I was merely able to just peek in on them. I climbed into bed and set my alarm for an early morning flight out. My kids never saw me, although I did see them, before I headed back to Dulles at daybreak the next day.

That morning I was in the check-in line—still dark outside—waiting. And I was on one of the budget airlines, which I would charitably describe as a younger airline. It no longer exists. It died before it reached puberty for reasons that might become apparent here in a minute. But I got to the front of the line, and I saw an impossibly young man behind the counter to greet me. He looked like he should have been catching the bus to his middle school at that hour of the day. And I was wearing a suit. I had a well-worn trench coat; a somewhat battered, wheeled suitcase; and a well-used briefcase—I looked just like the stereotypical business traveler. So I was a little surprised when the young man, way too happy at that hour of the morning, asked me, “Is this your first time flying?”

Now, having landed at that very airport just a few hours before—after midnight, in fact, that morning—I was able to reply, somewhat snarkily, “This isn’t my first time travelling *today*.” And, of course, that remark went right over his head.

Anyhow, I was worn out by this time and I thought I’d use my own money to try to get some extra leg room. So I said, “Do you have anything in the economy-plus section?” “No, sir,” he replied, without further elaboration. So now I was willing to plunk down my own money, some real money, to upgrade to first class. “Do you have anything available in first class?” I asked, hopefully. And then, without pausing, almost as if he had anticipated my question, he said, “Sir, all our

seats are first-class.” “Of course they are,” I said. By that time I was totally defeated.

But our panel is truly first-class.

And I’m very pleased to introduce our moderator—if you want to applaud, you can. Judge Michael Scudder of the Seventh Circuit, I believe, is making his first appearance at our convention as a moderator today. And we’re very pleased to have him here. Incidentally, if you haven’t noticed, we have over—I did the math on this—we have over 20% of the active federal appellate bench involved in the convention this year. They’re doing everything, including cleaning up rooms afterward.

Judge Scudder attended St. Joseph’s College and then Northwestern University Law School, a very fine institution. He clerked for Judge Niemeyer on the Fourth Circuit and then Justice Kennedy. He was at Jones Day Cleveland, which some people might know as the home office of that law firm, and then as an Assistant United States Attorney in the Southern District of New York. He’s also served in the White House Counsel’s Office and the National Security Council. He’s been serving on the Seventh Circuit since earlier this year. And I’m very pleased to have him with us this morning. So, please, do join me in welcoming Judge Michael Scudder.

**Hon. Michael Scudder:** Thank you, Dean. Good morning, everyone. It’s wonderful to be here. I want to start by just introducing our panelists and diving right into what I think will be a very vibrant and illuminating discussion covering a range of pretty timely topics from a variety of perspectives.

To my left is my good friend, Jeff Sutton.<sup>3</sup> Dean was right on the money, I think, in commending Judge Sutton’s Olson Lecture, yesterday evening, featuring his book, *Fifty-One Imperfect Solutions: States and the Making of American Constitutional Law*.<sup>4</sup> I think Jeff is going to elaborate on some of the points, and then maybe expand upon a couple of aspects of the points he made yesterday. And just briefly, I think as most people here know, Judge Sutton serves on the U.S. Court of Appeals for the Sixth Circuit. He, too, is a former Jones Day lawyer, and is actually the reason I joined Jones Day after clerking for Justice Kennedy. And, of course, Judge Sutton served as the State Solicitor of Ohio, was a law clerk to Justice Lewis Powell, Justice Antonin Scalia, and Judge Meskill on the Second Circuit.

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3. *Professors: The Honorable Jeffrey S. Sutton*, THE OHIO ST. U.: MORITZ C. OF L., <https://moritzlaw.osu.edu/faculty/the-honorable-jeffrey-s-sutton/> (last visited Mar. 10, 2019) [<https://perma.unl.edu/3NB5-LA9S>].

4. SUTTON, *supra* note 2.

To Jeff's left is Chris Green.<sup>5</sup> Chris is a law professor at the University of Mississippi, where he also teaches as a scholar in law and philosophy. Chris graduated from Princeton, Yale Law School, has a Ph.D. from Notre Dame in philosophy, clerked for Judge Barksdale on the Fifth Circuit, and teaches in the area of constitutional law, including state constitutional law. So, Chris, welcome.

To Chris's left is Miriam Seifter from the University of Wisconsin Law School.<sup>6</sup> Miriam is a graduate of Yale University, Harvard Law School, clerked for Chief Judge Garland of the D.C. Circuit and for Justice Ginsburg at the Supreme Court, worked in private practice a bit at Munger Tolles in Northern California, and is here this morning to focus on an aspect of state administrative law that we'll find pretty fascinating—looking at agency independence at the state level and what it says and doesn't say, more broadly, for the development of administrative law at the state and federal level.

And to Miriam's left is Nestor Davidson from Fordham Law School.<sup>7</sup> Nestor teaches in the area of property, land use, and real estate; has a casebook that came out last year on property law, practiced at Latham & Watkins after graduating from Harvard College and Columbia Law School; and clerked for Judge Tatel on the D.C. Circuit and then Justice Souter at the Supreme Court.

So welcome, one and all. Why don't we start with Judge Sutton here and invite him to offer his perspective this morning on the topic that brings us together: the states and administrative law.

**Hon. Jeffrey Sutton:** At the outset, let me point out one difference between state structural protections and state individual rights. With respect to individual rights protected in the state constitutions and the Bill of Rights, such as free speech, free exercise, and so forth, there is a two-shots phenomenon, where if you do not like what a state or local government has done, you can sue, for example, under the First Amendment's Free Speech Clause<sup>8</sup> and under the counterpart of that state's constitution. So that is the individual rights world in which the lawyer customarily has two shots.

With structure it's a different story. The U.S. Constitution does not speak to the structure of the states and their state constitutions. The republican form of government guarantee in the U.S. Constitution has

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5. *Faculty Directory: Christopher Green*, THE U. OF MISS. SCH. OF L., <https://law.olemiss.edu/faculty-directory/christopher-green/> (last visited Mar. 10, 2019) [<https://perma.unl.edu/2BCB-RTQQ>].

6. *Miriam Seifter*, U. OF WISCONSIN-MADISON L. SCH., <https://law.wisc.edu/profiles/seifter@wisc.edu> (last visited Mar. 10, 2019) [<https://perma.unl.edu/D8SA-4J6N>].

7. *Nestor M. Davidson*, FORDHAM U. SCH. OF L., [https://www.fordham.edu/info/23127/nestor\\_m\\_davidson](https://www.fordham.edu/info/23127/nestor_m_davidson) (last visited Mar. 10 2019) [<https://perma.unl.edu/HK2F-VQHC>].

8. U.S. CONST. amend. I.

been deemed judicially unenforceable to date.<sup>9</sup> So that you do not have this overlay where you can get a state separation of powers problem and say, “Aha, does the Federal Constitution speak to that? Is there a second shot?” Not really. You have to be pretty imaginative and a very persuasive advocate to get someone to think about it that way.

But we still have the dialogue issue, where what is going on at the state level remains influential at the federal level. And that goes back to the point that the state constitutions were really the ones that came up with our original separation of powers doctrine, concepts, and language, from 1776 up to 1787. They became the blueprint for what was pulled together in 1787.

This might be a first in Federalist Society National Conventions, but you’re getting an assignment today. Like the republican form of government guarantee, it may be unenforceable. But here it is. Each of you should take 15 minutes to read your own state constitution. You will be so struck by the differences in length, language, and specificity about structure.

One reason for the difference is that, at the U.S. level, there’s been just one Constitutional Convention. That’s it, followed by twenty-seven amendments. We know how difficult the Constitution is to amend. At the state level, there have been over 300 conventions. The norm at the state level is plenty of amendments, in part because they’re so easy to amend. All the state constitutions require, usually, is a fifty-one percent vote. So you have a lot more specificity, whether it’s structure or rights. You will learn a lot in a fifteen-minute overview of your state’s constitution.

Another feature you will see regarding separation of powers is a difference between the unitary executive at the federal level and what I’ll call the plural executive at the state level. In the states we typically have separate elections for state attorney general, secretaries of state, treasurers, auditors, and the like. That creates all kinds of fascinating separation of powers problems within the state. Having worked at a state attorney general’s office, I can attest to one in particular: Who is in charge of the litigating position of the state? A separately elected attorney general? A separately elected governor?

The state attorneys general usually win that battle, at least as a matter of case law. But I can tell you from experience that’s really not what goes on. I can illustrate it with a story. It may be apocryphal. But it has a ring of truth to it.

At the time, the Ohio governor and attorney general came from different parties. They had more than one reason to disagree about a politically charged case, the subject of which I do not recall. The attorney general and the governor went back and forth about what the

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9. *Id.* art. IV, § 4; see *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

state's litigation position was going to be. Finally, the attorney general had had enough. So he said to the governor, "Okay, fine. We will do it your way. I will send a lawyer over in 15 minutes."

Clever man that he was, the attorney general found the greenest, youngest guy in the office. He gave him a yellow pad and a pen and sent him over to the governor's office. In marches a young guy who does not know a lot—and looks like he knows even less. The governor, within five seconds, realizes, "Oh, this is not going to work." So he says, "Why don't you wait outside?" The governor calls the attorney general back and says, "You win." Sometimes practical realities carry the day.

Let me turn to two significant state separation of powers issues: nondelegation and deference to administrative agencies.<sup>10</sup> One gripe of mine is that state courts too often engage in lockstepping in construing their state constitutions—that is, they reflexively follow what the U.S. Supreme Court is doing with similar guarantees and similar issues. That is a serious problem in the individual rights arena. But it is not a problem in the structure arena. It turns out that the state courts are quite independent when it comes to construing the structural guarantees in their state constitutions. I don't know if that's because those issues have less political resonance, or whether it's because the state guarantees are so much more specific in terms of structure. But there are plenty of differences here.

You first see this in the gap between what's going on with the nondelegation doctrine at the state and federal levels. At the federal level it looks like a delegation doctrine. On the federal level there is not, save for 1935, a nondelegation doctrine. Whereas at the state level there is a judicially enforceable nondelegation doctrine. Judge Ginsburg, Jim Rossi, and Steve Menashi have shown that about half the states seriously enforce that doctrine.<sup>11</sup> That's interesting on two levels. First for the states. It's important to respect state separation of powers. But it's also quite fascinating for what that body of law means for the federal side. Those state experiences sometimes can be relevant from an originalist and pragmatic perspective.

The states' experience can be most relevant when it comes to dealing with what has been the biggest practical problem with the nondelegation doctrine at the federal level: the concern about line drawing. That concern seemed to be one of the things motivating Justice Scalia, who we all know cared deeply about structure, but was

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10. *Cf. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

11. See Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 492–93 (2016); James Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideas in the States*, 52 VAND. L. REV. 1167, 1196–97 (1999); see also SUTTON, *supra* note 2, at 177 n.15.

hesitant to enforce the nondelegation doctrine. He seemed to be concerned about the capacity of the courts to manage that line. What is fascinating—I think someone needs to look at this—is how the states are doing in the nondelegation area. Because if state courts can do it in a non-arbitrary fashion, it's fair to wonder whether the federal courts can do it.

The states are all over the map when it comes to deference to administrative agencies.<sup>12</sup> A growing number of state courts now take quite seriously the idea that courts, in contrast to *Chevron*, should not give deference to agencies' interpretations of statutes.<sup>13</sup> And not just for statutory reasons, but for constitutional separation of powers reasons under their state constitution. For example, Justice Dan Kelly of the Wisconsin Supreme Court wrote a wonderful opinion on the issue. And that case illustrates the state-level debate. Justice Kelly's opinion focuses on the state constitution and denies administrative deference as a matter of state constitutional requirements, while other justices on the court took a constitutional avoidance approach to the issue.<sup>14</sup>

For another example, a recent case in Mississippi viewed this as a pure constitutional separation of powers issue.<sup>15</sup> What's fun about this case is you have a dialogue between the states and the U.S. Supreme Court, at least with then-Judge Gorsuch on the Tenth Circuit, about how to manage the separation of powers issues underlying *Chevron*.<sup>16</sup> But again, to make a practical point: One of the great concerns at the federal level about getting rid of *Chevron* is this anxiety of how would this work in Washington with all these agencies and with so many laws to implement? What happened at the state level? What happened when the agencies didn't get deference? Did that really shut the agency down when it came to doing its job and administering this statute or that statute? So that experience too, not just doctrinally, but as a matter of practical, on-the-ground experience, is worth examining.

**Hon. Michael Scudder:** We'll go to Professor Green now. He's going to share the results of pretty extensive survey work that he's done looking at decisions at the state level and their application—or lack thereof—of some doctrines that many in the room will know well that exist in federal administrative law, and what the experience has been

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12. Compare *Kokochak v. W. Va. State Lottery Comm'n*, 695 S.E.2d 185 (W. Va. 2010) (recognizing *Chevron* deference) with *In re Complaint of Rovas*, 754 N.W.2d 259 (Mich. 2013) (declining to adopt *Chevron* deference).

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

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

15. *King*, 245 So.3d at 404.

16. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).



at the state level as far as enhancing accountability and transparency vis-à-vis agency action. So, Chris, it is in your hands.

**Prof. Christopher Green:** Well, thanks. Thanks for the opportunity to be here. I should say thanks especially for the opportunity to present something in such preliminary form. Last summer at the Southeast Association of Law Schools meeting, I was on a panel with Judge Sutton. And a law professor who had worked for the Judge as an associate said or joked, “We shouldn’t get paid by the hour, we should get paid by the fifty state survey.” I’ve got three surveys; but none of them are full fifty state surveys. I worry that I really shouldn’t get paid.

One of the most frustrating things I encounter looking at state constitutional law issues is the thirty-five state surveys. There are a whole bunch of states on one side of the issue. There are a bunch of states on the other. Well, what about the others?! And that maybe says something more about my presence on the Asperger’s spectrum that I can’t even until I get a fifty state survey.

So what am I talking about? I’m also, I think, the only presenter at the conference with a handout. I thought surely somebody else would have a handout, but it’s probably just me.<sup>17</sup> Maybe somebody later today.

These are three areas where judges are saying to state administrators, “Hey, you haven’t explained yourself enough.” These are three contexts in which that can happen; judges might or might not draw an adverse inference from the failure to explain a result.

Okay, so why might we want to have a doctrine like that? Because the experts might not know what they don’t know. The experts might think they know things that they don’t actually know. Socrates was said to be the wisest man because he knew he knew nothing.<sup>18</sup> Hayek focused on what the government doesn’t know about what prices ought to be.<sup>19</sup> I don’t remember the character in *Magnum Force* who said, “A man’s got to know his limitations.”<sup>20</sup> And women and agencies and artificial entities. It’s hard to know your own limitations.

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17. Handout, Christopher Green, *Three Ways to Make State Administrators Explain Themselves* (Nov. 17, 2018) (on file with Christopher Green).

18. See BENJAMIN JOWETT, 1 *THE DIALOGUES OF PLATO* 337 (1871) (“And I am called wise, for my haters always imagine that I myself possess the wisdom which I find wanting in others: but the truth is, O men of Athens, that God only is wise; and in this oracle he means to say that the wisdom of men is little or nothing; he is not speaking of Socrates, he is only using my name as an illustration, as if he said, ‘He, O men, is the wisest, who, like Socrates, knows that his wisdom is in truth worth nothing.’”).

19. See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945).

20. *Magnum Force* (The Malpas Company 1973).

Part of the idea is you have experts. They know stuff. Okay, no question about that. One way to test whether the experts *really* know stuff is to have the experts try to explain it to a generalist audience. As a normative matter, you might think, “Well, no. The generalists just can’t understand it; the failure of the generalists to understand some area might just be like, well, it’s like the failure of my seven-year-old to understand the sense-reference distinction, or something.” Although, my seven-year-old can. My three-year-old doesn’t get it. My seven-year-old does.

So normatively, I really don’t know. I’m just trying to get a description.

The three areas are, first, hard-look review where a court says, “Hey, you haven’t explained yourself enough.”<sup>21</sup> Second, the replacement of *Chevron*<sup>22</sup> by *Skidmore*.<sup>23</sup> So if you take away *Chevron* deference, you say, well, we’re not going to just defer to you because the statute’s ambiguous. One way to think about what happens when we cast *Chevron* overboard is you return to *Skidmore*.<sup>24</sup> So *Skidmore*, of course, in 1944, says, even though an agency doesn’t have authority, it might be able to persuade us.<sup>25</sup> Anybody might be able to persuade us. So Mike Rappaport argues that we shouldn’t even have *Skidmore* deference because, after all, private entities don’t get deference. Well, maybe private entities should. So I come into court, I develop an expertise, I have consistency over time, all those factors giving me—or a lawyer, or the American Law Institute, anybody—the “power to persuade, if lacking power to control.”<sup>26</sup> Well, you should defer to them in the sense of agreeing with them because they offer persuasive reasons. *Overton Park*<sup>27</sup> and *State Farm*<sup>28</sup> say, hey, you got to give a reason for your regulation. *Skidmore* says, you got to give a reason for your interpretation of the law.<sup>29</sup>

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21. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

22. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

23. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

24. *Id.*

25. *Id.* at 140 (“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

26. *Id.*

27. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

28. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

29. *Skidmore*, 323 U.S. 134.

The third area is I think considerably less well-known. It was abandoned by the U.S. Supreme Court in 1931 in a case called *O’Gorman & Young v. Hartford Fire Ins.*<sup>30</sup> So in 1931 you had *O’Gorman*.<sup>31</sup> In 1934 you had *Nebbia*.<sup>32</sup> In 1937 you had *West Coast Hotel*.<sup>33</sup> This is part of the surprisingly long story about the collapse of economic liberty during the New Deal in the 1930s under the Fourteenth Amendment. In 1931 we had a case where a state came in and said, “We’re going to have some restrictions.”<sup>34</sup> The litigants came in and said, “They haven’t explained why we need these restrictions. You’re telling insurers they had to have an in-state agent.” On its face, it looked like rent seeking legislation.<sup>35</sup> I’ve got my little deadweight loss diagram on the handout.<sup>36</sup> It looked like that. It looked like you’re just trying to restrict supply to redistribute wealth to the sellers, harming society but benefiting particular insurers.

The four conservatives on the Court said, “In order to justify the denial of the right to make private contracts, some special circumstances sufficient to indicate the necessity therefore must be shown by the party relying upon the denial.”<sup>37</sup> They’re in litigation, okay? You’re arguing to an agency saying, “This regulation doesn’t make any sense.” The administrator says, “Well, it’s up to you to show that it’s unconstitutional. It’s not up to me to show that it’s justified. I have to have a reason for regulation?” So in 1931, the Supreme Court says, yeah, we’re not going to draw any adverse inference from the failure of an administrative agency or a litigant to justify that regulation.<sup>38</sup>

It seems to me, looking at the early, *early* state constitutional law that state courts exercising judicial review have a duty not to leave evidence on the table, not to fail to make proper inferences from things like that. I cited in the handout a bunch of early cases.<sup>39</sup> I call this the “duty to clarify.” So we have a duty not to strike down statutes unless

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30. *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931).

31. *Id.*

32. *Nebbia v. New York*, 291 U.S. 502 (1934).

33. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

34. *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 255 (1931) (quoting New Jersey Laws 1928, c. 128, p. 258).

35. *See id.* at 251.

36. *See Microeconomics Individual Assignment*, <https://sites.google.com/site/amieranmyusuf/shortages-led-to-deadweight-loss> (last visited May 19, 2019) [<https://perma.unl.edu/VS43-T2MM>].

37. *See id.* at 269 (Van Devanter, J., dissenting).

38. *Id.* at 257–58.

39. *Green*, *supra* note 18 (citing *Hayburn’s Case*, 2 U.S. 408 (1792); *Whittington v. Polk*, 1 H. & J. 236, 245 (Md. 1802); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822); *In re Wellington*, 33 Mass. (16 Pick.) 87 (1834); *U of Md. Regents v. Williams*, 9 G. & J. 365, 384 (Md. 1838), *Lane v. Doe*, 4 Ill. (3 Scam.) 237, 240 (1841), *Franklin Bridge Co v. Wood*, 14 Ga. 80, 83–84 (1853), *City of Lafayette v. Jenners*, 10 Ind. 70, 80 (1857), *Chesapeake & Ohio R.R. Co. v. Miller*, 19 W.Va. 408, 422 (1882), *Varner v. Martin*, 21 W.Va. 534, 543 (1883), *Farm Inv. Co. v. Carpen-*

it's clear that a statute violates a state constitution. But you also have a duty to clarify, and that means not leaving evidence on the table.

So these are three places where a court can tell an agency, hey, you haven't explained yourself. There's a bunch of other people who might tell an agency, "Hey, you haven't sufficiently explained yourself." So I think this is going to become an article—Ten Ways to Make State Administrators Explain Themselves. And I'll just rattle seven of these off.

First, what's a nondelegation doctrine? It says, hey, agency, you can't just adopt this. You've got to persuade the legislature. The legislature—a bunch of non-expert generalists. So you could have to persuade a legislature.<sup>40</sup>

Second, you could have to persuade a state OIRA (Office of Information and Regulatory Affairs), which is what Miriam has looked at in great detail.<sup>41</sup>

Third, you might have to persuade other agencies who have a stake, so that is another way that state OIRA would be involved.

Fourth, you might have to persuade the agency itself, if you have a separation of prosecution and adjudication within the agency—New Jersey and Georgia, I'm told by people at this conference, have that sort of doctrine.<sup>42</sup>

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ter, 61 P. 258, 263–64 (Wyo. 1900), *State ex rel. Hildebrandt v. Fitzgerald*, 134 NW 728, 730 (Minn. 1912), *State v. Snyder*, 212 P. 758, 759 (Wyo. 1923)).

40. See, e.g., Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1193–97 (1999); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997); *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1979); *State v. Williams*, 583 P.2d 251 (Ariz. 1978); *Stofer v. Motor Vehicle Cas. Co.*, 369 N.E.2d 875 (Ill. 1977); *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984); *Op. of the Justices to the House of Representatives*, 471 N.E.2d 1266 (Mass. 1984); *Bacus v. Lake Cty.*, 354 P.2d 1056 (Mont. 1960); *Kwik Shop, Inc. v. City of Lincoln*, 498 N.W.2d 102 (Neb. 1993); *Clark Cty. v. Luqman*, 697 P.2d 107 (Nev. 1985); *Guillou v. Div. of Motor Vehicles*, 503 A.2d 838 (N.H. 1986); *Montoya v. O'Toole*, 610 P.2d 190, 191–92 (N.M. 1980); *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987); *Blue Cross v. Ratchford*, 416 N.E.2d 614, 618 (Ohio 1980); *Oliver v. Okla. Alcoholic Beverage Control Bd.*, 359 P.2d 183, 187 (Okla. 1961); *Commonwealth v. Sessoms*, 532 A.2d 775, 784 (Pa. 1987) (Papadakos, J., concurring); *In re Application No. 5189-3*, 467 N.W.2d 907 (S.D. 1991); *Bauer v. S.C. State Hous. Auth.*, 246 S.E.2d 869 (S.C. 1978); *Chapel v. Commonwealth*, 89 S.E.2d 337 (Va. 1955); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981); *State v. Gallion*, 572 P.2d 683 (Utah 1977).
41. See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 484 (2017); Model State Administrative Procedure Act § 3-202(a) (1981) ("To the extent the agency itself would have authority, the governor may rescind or suspend all or a severable portion of a rule of an agency.").
42. See N.J. STAT. ANN. § 52:14B-10(c) (2014); GA. CODE ANN. § 50-13-41 (2018); *In re Op. No. 583 of the Advisory Comm. on Prof'l Ethics*, 526 A.2d 692, 696 (N.J. 1987) (stating that New Jersey statutes take "more direct approach to the conflicts raised by the dual functions of administrative agencies" than federal law); *cf.* 5

Fifth, you might have to persuade the agency at a later time. The agency adopts a rule, but it might be easy to reverse it. So *Fox v. FCC*<sup>43</sup> issues at the state level would be important, and there are a number of other doctrines that allow future agencies to reverse decisions.<sup>44</sup> So unless the agency makes a persuasive case to its future self, it's not going to last.

Sixth, you might have the public. A transparency requirement says, hey, if you're going to do something, you've got to tell the world, and give them a chance to overrule it and talk to their legislature.<sup>45</sup> That's less effective.

Seventh and finally, you might have juries. You might bring in twelve members of the public and say, well, you know, we think we should be at quantity one instead of quantity zero on this thing. We think we should ban cigarettes. What do you people think? That would be, as Philip Hamburger says, quite a limit on agencies.<sup>46</sup>

Anyway, am I out of my eight minutes? Maybe close to it. But there is exciting stuff going on in all of these areas.

William Funk in 1991 I think is, as far as I found, the only one to assess the ground of hard-look review in the states.<sup>47</sup> He said, it looks

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U.S.C. § 554(d) (providing that subject to certain exceptions, “[t]he employee who presides at the reception of evidence . . . may not . . . be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”).

43. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (holding that no special reason is required to change rule under arbitrary and capricious review).

44. *See, e.g.*, Model State Administrative Procedure Act § 3-201 (“For each rule, the [annual] report must include, at least once every [7] years, a concise statement of: (1) the rule’s effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached; (2) criticisms of the rule during the previous [7] years, including a summary of any petitions for waiver of the rule tendered to the agency or granted by it; and (3) alternative solutions to the criticisms and the reasons for the changes.”); *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015) (“Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.”).

45. *See, e.g.*, Model State Administrative Procedure Act § 3-201(3) (1981) (providing that periodic review of rules must be “available for public inspection”).

46. *See* Philip Hamburger, *The Inversion of Rights and Power*, 63 *BUFF. L. REV.* 731, 757 (2015) (“A further example of how power nowadays defeats enumerated rights can be found in the public rights doctrine. Under this doctrine, the government’s pursuit of its ‘public rights’ in administrative adjudications defeats the Seventh Amendment right to a jury.”); *see also* *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 444 (1977) (“Congress may create a new cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial.”); *cf.* *SCI Mgmt. Corp. v. Sims*, 71 P.3d 389 (Haw. 2003) (requiring a jury trial in review of Hawaii Human Rights Commission).

47. *See* William Funk, *Rationality Review of State Administrative Rulemaking*, 43 *ADMIN. L. REV.* 147 (1991).

like a lot of states don't have hard-look review.<sup>48</sup> I couldn't find that many. Wisconsin was actually one of them,<sup>49</sup> but not too many. It was a little unclear in Florida.<sup>50</sup> But lots and lots of states had something like hard-look review, at least in name.<sup>51</sup> Funk suggested that it was

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48. *Id.* at 147 (“[A] large number of states do not provide for and consciously avoid judicial review for rationality of rulemaking.”).

49. *See* Wis. Federated Humane Soc'ys v. Stepp, No. 2013AP902, 2014 WL 3359323, at \*15 (Wis. Ct. App. July 10, 2014) (holding “failure to explain its rulemaking decisions” does not entail that agency’s decision is arbitrary or capricious and discussing at length *Liberty Homes, Inc. v. Dep’t of Indus., Labor and Human Relations*, 401 N.W.2d 805 (Wis. 1987)).

50. *See* Dep’t of Highway Safety v. Marks, 898 So. 2d 1063, 1064 (Fla. Dist. Ct. App. 2005) (calling *Overton Park* “illuminating”); *Homich v. Lake Cty. Sch. Bd.*, 779 So. 2d 567, 567, 569 (Fla. Dist. Ct. App. 2001) (“Federal cases . . . statutes and . . . rules relied upon by the appellants are not applicable to this case” over *Overton Park*-relying dissent); *Bayonet Point Reg’l Med. Ctr. v. Dep’t of Health & Rehab. Servs.*, 516 So. 2d 995, 1001–03 (Fla. Dist. Ct. App. 1987) (Ervin, J., concurring) (discussing *Overton Park* approvingly).

51. *See* *Wilson v. Madison Cty. Bd. of Educ.*, 984 So. 2d 1161 (Ala. 2007); *Denali Citizens Council v. Dep’t of Nat. Res.*, 318 P.3d 380 (Alaska 2014); *Cali. Hotel & Motel Ass’n v. Indus. Welfare Comm’n*, 599 P.2d 31 (Cal. 1979); *AMAX, Inc. v. Colo. Water Quality Control Comm’n*, 790 P.2d 879, 883 (Colo. 1989) (“[T]he reasoning process that led to the adoption of the rule must be defensible.”); *Manchester Envtl. Coal. v. Stockton*, 441 A.2d 68 (Conn. 1981); *Kreshtool v. Delmarva Power & Light*, 310 A.2d 649 (Del. Super. Ct. 1973); *Greer v. Ill. Hous. Dev. Auth.*, 524 N.E.2d 561 (Ill. 1988); *Ombudsman v. Edwards*, 825 N.W.2d 8 (Iowa 2012); *Friends of Bethany Place v. City of Topeka*, 307 P.3d 1255 (Kan. 2013); *Faust v. Commonwealth*, 142 S.W.3d 89 (Ky. 2004); *Cannatella v. City Civil Serv. Comm’n*, 381 So. 2d 1278, 1280 (La. Ct. App. 1980) (holding that agency decisions must attend to “relevant considerations”); *Frederick Classical Charter Sch. v. Frederick Cty. Bd. of Educ.*, 164 A.3d 285 (Md. 2017); *Great Lakes Steel Div. of Nat’l Steel Corp. v. Mich. Pub. Serv. Comm’n*, 344 N.W.2d 321 (Mich. 1983); *Manufactured Hous. Inst. v. Petterson*, 347 N.W.2d 238, 243–46 (Minn. 1984) (holding that the agency Commissioner’s determination violates substantive due process if “no explanation of how the conflicts and ambiguities in the evidence are resolved, no explanation of any assumptions made or the suppositions underlying such assumptions, and no articulation of the policy judgments”); *In re Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 838 N.W.2d 747, 767 (Minn. 2013) (Anderson, J., dissenting) (“[I]t may be time to adopt a version of hard look review in Minnesota”); *Titan Tire of Natchez v. Miss. Comm’n on Envtl. Quality*, 891 So. 2d 195 (Miss. 2004); *Enters v. Dep’t of Soc. Servs.*, 349 S.W.3d 337 (Mo. Ct. App. 2008); *Hobble Diamond Ranch v. State ex rel. Mont. Dep’t of Transport.*, 268 P.3d 31 (Mont. 2012); *In re Conservation Law Found. of New England, Inc.*, 507 A.2d 652, 659 (N.H. 1986) (explaining that reasoned “reasoned consideration” must be given to each pertinent factor); *Webster Assocs. v. Town of Webster*, 447 N.Y.S.2d 401 (N.Y. Sup. Ct. 1981); *Abell v. Nash Cty. Bd. of Educ.*, 321 S.E.2d 502 (N.C. Ct. App. 1984); *In re Ohio Power Co.*, 40 N.E.3d 1060 (Ohio 2015); *Metcalf v. Okla. Bd. of Med. Licensure & Supervision*, 848 P.2d 48 (Okla. Civ. App. 1992); *State Bd. of Health v. Godfrey*, 290 S.E.2d 875 (Va. 1982); *Conservation Law Found. v. Burke*, 645 A.2d 495 (Vt. 1993); *Frymier-Halloran v. Paige*, 458 S.E.2d 780 (W. Va. 1995); *Wilson Advisory Comm. v. Bd of Cty. Comm’rs*, 292 P.3d 855 (Wyo. 2012).

just boilerplate in all of them. But if you have a regulation and if no one else can help, maybe you can cite one of these cases.

*Chevron*—there have been four states that have cast it off this year in four different ways. Mississippi cast it off quite summarily, suddenly, and unanimously in our *King* case,<sup>52</sup> a few weeks before the extremely extensive and widely discussed-at-great-length opinion in Wisconsin.<sup>53</sup> Arizona got rid of it by statute<sup>54</sup> and then Florida got rid of it by constitutional amendment.<sup>55</sup>

Beyond those, you have a lot of states that the way they apply *Chevron*, or the way they apply deference, really has a much more *Skidmore* flavor to it.<sup>56</sup> So some people call that “*Chev-more*,” a blend of *Chevron* and *Skidmore*. Justice Breyer’s approach in the *Mead Corp.* line suggests that the trigger for *Chevron* deference is giving a persuasive reason.<sup>57</sup> Okay, that’s essentially like having *Skidmore* instead of *Chevron*. So there’s lots of cases saying that.

Finally, in *O’Gorman*<sup>58</sup> you find a bunch of states that actually do draw an adverse inference,<sup>59</sup> including Florida.<sup>60</sup> They say, “*O’Gorman*? That’s not the rule here. If an agency doesn’t give an explanation for why they’re doing it, we’re going to draw an adverse in-

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52. *King v. Miss. Military Dep’t*, 245 So. 3d 404 (Miss. 2018).

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

54. ARIZ. REV. STAT. ANN. § 12-910 (2018).

55. FLA. CONST. art. 5 § 21.

56. *See, e.g.*, *Huber v. Kenna*, 205 P.3d 1158 (Colo. 2009).

57. *See Barnhart v. Walton*, 535 U.S. 212, 225 (2002) (following *United States v. Mead Corp.*, 533 U.S. 218 (2001)) (noting the “need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority”); *Christiansen v. Harris Cty.*, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting) (following *Skidmore*, stating that “*Chevron* made no relevant change”).

58. *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931).

59. *Hoover, Inc. v. Dep’t of Revenue*, 833 So. 2d 32 (Ala. 2002) (finding no defense of regulation under dormant commerce clause), *State v. Norene*, 457 P.2d 926, 930, 936 (Alaska 1969) (enjoining fireworks regulation where “no showing at all as to what state interest would be served” over dissent complaining on basis of *O’Gorman*, noting “no dissent in any jurisdiction”); *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948); *Dade Cty. Consumer Advocate’s Office v. Dep’t of Ins.*, 457 So. 2d 495 (Fla. Dist. Ct. App. 1984) (finding *O’Gorman* unpersuasive and striking down anti-insurance-commission-rebate law because of “revolution in consumer’s rights” undermining “paternalistic approach to a consumer’s ability to make reasonable decisions without government intervention”); *People v. Victor*, 283 N.W. 666, 670 (Mich. 1939) (striking down inadequately defended law despite dissent’s invocation of *O’Gorman*: “No evidence was introduced to prove the contention and there is no logical connection between the practice of giving a premium and a tendency to defraud the public. Nor is there any showing that the public is deceived into buying inferior gasoline by the offering of a premium.”), *State v. Guyette*, 102 A.2d 446 (R.I. 1954) (quoting *O’Gorman*, but finding presumption rebutted by failure of state to justify).

60. *See Dade Cty. Consumer Advocate’s Office v. Dep’t of Ins.*, 457 So. 2d 495 (Fla. Dist. Ct. App. 1984).

ference.”<sup>61</sup> That was 1984. It feels like a long, long time ago, but this was a long time after 1931. So there is quite a lot of ferment. I hope to have fifty-state surveys of all these ten areas, so 500 rules of law nailed down at some point. But watch, google my name at some point in fifteen years and see if I ever do get these ten surveys done. Thank you.

**Hon. Michael Scudder:** Thank you, Chris. So Professor Seifter has an article that I mentioned coming out in the *Michigan Law Review* early next year, is it, Miriam?

**Prof. Miriam Seifter:** That’s right.

**Hon. Michael Scudder:** And exploring a very fascinating topic. Perhaps, for the first time that it’s ever really been looked at. And that is agency independence at the state level. We know well considerations of agency independence at the federal level. And there is lots of debate, lots of case law, and lots of ink spilled on just how much independence is required of the President for an agency to be independent—and there are broader structural questions about whether that’s even constitutional or not. But Professor Seifter is looking at this at the state level and her forthcoming article,<sup>62</sup> I think, pays particular focus to considerations of independence between a governor and state agencies. So with that, we’ll ask for an overview.

**Prof. Miriam Seifter:** Thank you so much. Thank you. I’m very happy to be here. I’m pleased to be on a “first-class” panel. I didn’t realize that was going to be the case. And I’m thrilled to be on a panel that’s focused on the states. I could not agree more with my co-panelists that states are really worth studying.

States are, of course, deeply important in their own right because it’s state government, after all, through which most of us experience regulation. State approaches to common problems can also provide an instructive comparative lens, reminding us that there is more than one way to do things.

As Judge Scudder said, I’m going to talk today about what agency independence looks like in the states. By agency independence I mean the relationship between executive entities and the Chief Executive, so, of course the President at the federal level and the governor at the state level.

My focus won’t be on the normative question from yesterday’s terrific panel on agency independence: How much agency independence

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61. *See id.* at 498–99.

62. Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. (forthcoming 2019).



is too much? I think in the states we actually need to go one step prior to that and just try to unearth a descriptive picture of what is happening.

What are the legal contours of agency independence in the states? This is more than just an academic question. Take a recent conflict in Arizona. Was there anything unlawful or incongruous about a proposition that just passed giving the governor more authority over the state's Clean Election Commission, which has identified itself as an independent body? Or, for that matter, was it constitutionally required for the governor to have that sort of authority over the Commission? Or take North Carolina. Was it permissible for the state legislature there to divest the governor of substantial power over certain executive commissions? Or in a number of states, as Judge Sutton alluded to, what if the governor and the state attorney general disagree?

The question I've been looking at is, what is the going legal framework for analyzing these questions? I've studied state constitutions, state legislation, and state judicial decisions doing the beloved fifty state surveys, and I've looked specifically at issues like the selection of an officer, the removal of an officer, and the ability of the governor to direct the officer once they are in office. For the full story, you can check out my forthcoming article that Judge Scudder mentioned, but it's barely ten a.m. You don't want to read that. So I'm here to give you the Cliffs-Notes version.

My thesis, basically, is that states' approach to agency independence is very different from the way the federal realm has approached it. States employ a version of agency independence that is different for different agencies, unclear legally, and unstable over time. To flesh this out, let me draw out four big picture differences. I'll draw upon differences regarding state constitutions, state courts, state legislatures, and state norms.

The first difference is in state constitutional law. Perhaps this is the most obvious difference. It's the one that Judge Sutton mentioned. Almost every state constitution creates what we can call a "plural" executive branch in which multiple officers are, first of all, created separately from the governor, and then many of them are also elected separately. This obvious difference might seem to lead to an obvious conclusion that states are, therefore, home to a more robust independence all around. But that conclusion is actually not obvious, and, in fact, most state courts have not so held. And the reason for this is that most state constitutions also have clauses that empower their governors, often to a degree that's not present in the Federal Constitution. Many constitutions say that the governor has the "supreme executive

power.”<sup>63</sup> A number of state constitutions have gubernatorial supervision clauses or particularly robust take care clauses,<sup>64</sup> all of which seem to support an argument for gubernatorial control.

Now, the positive law picture gets even more complex once you fold in state legislation. One of the things that I found really interesting in my study was that of the vast majority of officials within the plural executive branch nationwide, the state constitution leaves either all or some of their powers to state legislatures. A typical formulation is something like, “There shall be a state treasurer with duties to be prescribed by the legislature.” And many state legislatures have, at various times, particularly during times of executive branch reorganization, decided to give the governor power over various executive officials, including those that might superficially seem to be independent. So, in many states, the question of independence presents an interpretive challenge.

Now, that leads me to the second part of our descriptive journey here. What have state courts done in confronting this challenge, and how is it different from what federal courts do? To paraphrase everybody’s favorite administrative law case, *United States v. Mead*<sup>65</sup>—that was an administrative law joke—the states have generally tailored independence to variety. Now, there are a few state courts that don’t fit this description. There are a few state courts that have held that the governor’s supreme executive authority means that the governor has to control all agencies. And on the flip side there’s at least one state court that has indicated that the plural executive structure creates a sort of categorical, constitutional independence across the board.

But most state courts have proceeded with what I call a non-binary, non-categorical approach. Non-binary because they don’t divide the world into independent agencies and not independent agencies the way we sometimes teach at the federal level. And non-categorical because most states don’t even use the term “independent agency.” It’s not a “thing,” as my students would say. And they don’t use any similar, synonymous terms to invoke this idea that there’s a trans-substantive category of this “thing” called an independent agency. Most state courts also don’t assume from the presence of one factor—like, let’s say, tenure protection—that an agency must fit some set, predetermined mold of independence. Instead, most state courts resolve questions of independence in a clause-based and context-sensitive way.

For example, it’s not unusual for a state court facing an intra-executive dispute to say, okay, this is an officer or agency that the governor either doesn’t appoint because they’re separately selected or whom

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63. See, e.g., CAL. CONST. art. V, § 1; KAN. CONST. art. I, § 3.

64. See ALA. CONST. art. V, § 120.

65. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

the governor can't remove at will. But that doesn't preclude us from concluding that the governor can nonetheless direct or veto this agency or official over certain decisions if that's the best reading of the statute.

It's worth noting here that this state approach resonates with a rising critique regarding federal jurisprudence on agency independence and on the separation of powers more broadly. Scholars of varied perspectives have argued that federal courts do too much abstracting on these issues. John Manning, for example, has argued that there's no freestanding separation of powers doctrine, and so courts should engage in what he calls "ordinary interpretation" of the most relevant clauses at issue.<sup>66</sup>

Similarly, on this specific topic of independent agencies, Kirti Datla and Ricky Revesz have asserted an idea that courts shouldn't embrace abstractions about agency independence either.<sup>67</sup> They should just follow the terms of whatever the statute says. The states present this real-life judicial system in which to see this alternative approach in action.

The third difference I want to talk about has to do with legislatures. State legislatures—and for that matter, state initiatives and state referenda—have played a more active role in tinkering with agency independence over time. I think this is different from the federal realm where we often think of, at least, the highest levels of agency structure as part of the rules of the game: those features that stay put even when political fortunes change. Even if Congress, for example, is upset with the decision by, say, the FCC, we don't imagine that Congress's next move will be to change the FCC from an independent agency to an executive agency. Or at least that would be a big deal.

But state legislatures do that pretty regularly, as I document in the article. One implication that is worth noting here is this sort of legislative volatility raises the possibility that it will really undermine independence in a deep way. How independent can you be if your independence itself is up for grabs depending on what you decide?

The fourth and final difference I want to point out has to do with norms. The state sphere may reflect weaker norms about what independence means. I think partly this flows from the legislative volatility I've described and from the lack of a categorical, judicial approach to independence. In other words, maybe agency independence in the states is just too much of a moving and evolving target for a strong norm to emerge. Partly, it may also be because state legal communi-

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66. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011).

67. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013).

ties tend to lack some of the norm producing institutions that the federal government has. Most law schools, to Judge Sutton's and my disappointment, don't teach classes in state constitutional law. And also, not all state executive branches or state bars have entities analogous to, say, the Office of Legal Counsel, who really devote their time to developing a keen and lasting understanding of executive power.

Unlike at the federal level where scholars have recently been documenting how unwritten rules regarding independence actually explain a lot of the behavior that you see from both presidents and agency officials, in many states, the issue seems to be more up for grabs.

Let me close with just a few implications of these findings. The first—and this echoes something that Judge Sutton said—is that state courts deserve credit, I think, in this area. They're dealing with really challenging materials. They are not lockstepping with federal law the way they're sometimes criticized for in other areas. And these cases are really a rich resource for anyone who's interested in studying executive power.

A second implication has to do with what I think of as the twin effects of precision on one side of the coin and uncertainty on the other. So, state legislatures' practice of creating different independence for different agencies and then changing it over time, and state judicial practice of hewing to those choices have this democratic appeal. Maybe the people are getting exactly the independence they want in each different context. But the flip side of that narrow, clause-based, context-specific approach, may be that the law is less certain and less predictable and harder to anticipate for any given actor.

Now, this raises a question about practical effects. In particular, does the uncertainty and instability for some officers mean that they have less operational independence? Even if the law makes them nominally independent, will they feel less independent because of lawmakers frequently revisiting their independence?

And then, finally, whatever the answer is to these other questions, I'll come back to the value of teaching state administrative law and state constitutional law in law schools. It can add so much to our understanding and to our discourse. In all events, I'm happy to be on a panel highlighting state law, so thanks for having me today.

**Hon. Michael Scudder:** Thank you, Miriam. Nestor Davidson has done some work and published it in the *Yale Law Journal*, if memory serves, on administrative law at the local level—at the municipal level, at the county level, at the village level—and is going to offer

some perspectives today on what we can learn from administrative law at that level.<sup>68</sup>

**Prof. Nestor Davidson:** Thank you so much. And thank you all for showing up at 9:00 in the morning on a Saturday to think about state, and I will now add, local administrative law. We literally have people in the rafters. This is pretty stunning. So thank you. I also think it's a particularly timely moment to be thinking about the sub-federal level. Given the nature of the hydraulics of policymaking in this country when we are having a very deregulatory moment at the federal level and some gridlock on areas where the federal government has been traditionally very active, a lot of the energy for regulating is moving to the state and I think local level, as well. And so I think it's appropriate, as governance is evolving in many areas, to be paying very close attention to the mechanics and the law that is governing that evolutionary, regulatory environment.

My brief this morning, as Judge Scudder mentioned, is a pretty simple one. I want to argue that it's important to pay attention not just to the critical questions at the state level about agency independence and about deference, but at the local as well. And Miriam has unpacked some of the horizontal questions that are so critical. And let me try and unpack some of the vertical questions within the states that I think are also fairly critical.

To begin, I think it's important to remember that much of what we think of as within the realm of how states operate is through local governments. And whether we think that local governments are an arm of the state or a local polity or some hybrid version of that, many, many areas in our federal system that we delegate or that have begun as matters of state competence and importance are really exercised through local governments. And it's terrific to be focusing, as Judge Sutton has done, on individual rights at the state level, but governmental structure, I think, is equally important.

So much of what local governments do—and this is not just in the delivery of services, which is obviously a critical aspect of what cities and counties and suburbs and small towns do—but also as regulators. Local governments are increasingly acting as regulators—they do so through administrative bodies. And on the regulatory front, local governments are increasingly involved in regulating everything from workplace conditions to public health, to the environment, to technology—many, many areas that I think maybe a generation ago we would've thought of as largely federal areas of concern that states have always been involved in to some extent are really increasingly

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68. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564 (2017).

playing out at the local level. And that's true not just for large cities but also for smaller, local governments.

And if you look at how local governments are structured, and not just in New York, or D.C., or Los Angeles, or Chicago, but Oak Park, and Tuscaloosa, and Barrow, Alaska—and I spent a lot of time looking at the structure of lots and lots of local communities—you will find a little, mini version of the alphabet soup we have in terms of agencies at the federal level. You'll find a really remarkable array even in relatively small communities. And when I was working on this article, I would go around the country giving versions of a talk about the article, and wherever I was, I would google the night before that particular local government and you could always find ten, twelve, fifteen agencies, even in the smallest community. It became a little bit of a parlor game. But you'll find health departments, zoning boards, school boards, police commissions—an entire panoply I like to call this—it's not so much the administrative state, but it's kind of an administrative city-state. It may not be the FCC, it may not be the EPA, but it's actually a very important layer of governance.

And if you think about where governance happens today in the United States, one in thirty-eight people in the country live in New York City where I live. New York City has more people than Idaho, Montana, Wyoming, North Dakota, South Dakota, and Nebraska combined. More than eighty percent of the people in the country live in urban areas, and in many important respects, cities, suburbs, counties are the most important regulatory layer for that.

Let me just say a few words about structure. Structure is obviously critical to doctrine. And it's important to pay attention to structure, and as interesting as things get on the state level—and they get very interesting—I think they get even more interesting when you turn the lens on the microscope and begin to look a little bit lower in the federalist stack. So, for example, many local governments have little or actually no separation of powers whatsoever. In many local governments, you have a legislative body that also happens to have an executive as part of it, or you may have no recognizable elected chief executive at all. We tend to think of a model of the mayor because that's our popular culture. I live in New York and we have a very strong mayor, relatively speaking.

But in more than half of all local governments, the person who we would think of as the chief executive of the executive branch is just an appointed civil servant—a city manager. And they just perform functional duties. Important and critical duties, but there's no electoral responsibility, so forget what we know about the unitary executive at the federal level. Imagine a system where courts are reviewing action by a government that has no executive or at least no elected executive.

What does that mean for how we think about separation of powers?  
What does that mean for how we think about deference?

Similarly—and I think this is really important—local governments and local government agencies, in particular, often have a dual structure of accountability. So local agencies are accountable in the way we traditionally think of federal agencies towards both the executive and legislature in their local government of general jurisdiction. And as hard as it is for fifty-one jurisdictions to draw generalities, there are over 90,000 local governments in the United States, so I'm radically oversimplifying here.

But many, many agencies are accountable both to their local government of general jurisdiction and also to the state. And in many instances, they may have power delegated directly from the state to an agency. And so we get into these very interesting, almost triangular relationships between agencies—whose jurisdiction is at a particular locality and who may have a close or a distant relationship with the state. I'm talking about independence from the general local government, but may have an even closer relationship with the state itself. And, again, as we think about a jurisprudence of accountability and transparency, which is really what we're talking about this morning, that dual reporting structure and how much power the state delegates to a local government is really critical.

So, briefly, how might we think about what's different—taking a step back—about the context and the structure and what does this actually mean? I think it's important to recognize there are reasons why courts—and here, again, to be clear these are mostly the jurisprudence that's developed around state administrative law, and certainly around local administrative law is largely a body of state law. It's state courts reviewing state actors, which is not to say the federal courts don't have something to do with that, but they're largely not at the center of this conversation.

How do state courts approach this? I think there are reasons why at the local level—and whatever we think about state structure—we tend to see less deference. We tend to see a more intrusive local jurisprudence to the extent that courts segregate at all. And they generally don't, but I think you see concerns in the jurisprudence about capacity at the local level, about expertise at the local level, and about informality. In roughly half the states, there's no equivalent at the local level to a state Administrative Procedure Act. Having practiced in land use, when I began as a young lawyer and dutifully looked for what procedure governed when we were trying to get some zoning change, I was often very surprised to realize that nobody had any idea what the procedure was. And you would go into a board and kind of make it up as you would go along. And that's not unusual and courts

do some work in imposing a formality, but really not all that much at the local level.

And then I think some courts are concerned about parochialism, scale, and the tendency of some local governments to really not internalize the external effects of what their regulatory choices are. In this article, I also lay out some arguments for why we might actually give more deference or courts might actually give more deference at the local level. This hasn't really shown up in the jurisprudence, but I think it's important to have out there.

I do think subsidiarity is a really important principle. I think recognizing that in many regulatory areas, land use being a good example, the level of government—to cite the cliché—is closest to the people who are being regulated should be able to regulate. That's not necessarily only a question of power, but that's also a question of deference. So I think scale can be a reason for giving more deference to the output of local agencies.

I also think there's a different kind of expertise you get at the local level. If you think about the kinds of areas where local governments may regulate best, local governments can be a kind of tool that aggregates a particular kind of local knowledge. And if you think about how a state, in the generic sense, sees, local governments have an ability to see in a more precise and very localized way. And that's a reason for, perhaps, giving a little more deference. And I think the fact that the public is much more involved. So, if you think about zoning boards, school boards, police commissions, and a lot of local administration—whether it's in the quasi-lawmaking context or in the more discretionary application of delegated authority—a lot of local administration is marbled throughout with public involvement in a way that's unusual at the federal level. And I do think that kind of inherent involvement of the public, which has lots and lots of downsides, may have some upsides in terms of legitimacy and a ground for deference.

Let me just close with one brief, doctrinal example, and then I look forward to the Q&A. And we, I think, can talk about what a localist *Chevron*,<sup>69</sup> or a localist *Skidmore*,<sup>70</sup> or a localist “*Chev-more*”<sup>71</sup> might look like. But let me pivot to something that Judge Sutton mentioned, which is nondelegation doctrine. It is true that the nondelegation doctrine has more teeth at the state level. It has a lot of teeth at the local level, and this is really the doctrine that got me interested in thinking about the interplay between courts and local administration. And it's fascinating to see that state courts demand at the local level—again, recognizing how hard it is to generalize across 90,000 local govern-

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69. See *Jou v. Hamada*, 201 P.3d 614 (Haw. Ct. App. 2009).

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

71. See *Huber v. Kenna*, 205 P.3d 1158 (Colo. 2009).



ments—a much more precise specification of the authority that has been delegated to an administrative body.

In the article, I give one example of a case out of Maine where a zoning board was given the authority to review land use decisions—something called conditional use permits—and the standard was that they had to evaluate whether or not the change in zoning would “conserve natural beauty.”<sup>72</sup> And for those of us who look at the state of delegation at the federal level that’s actually more precise than “regulate the air waves in the public interest,” right? That would likely be upheld at the federal level, but the court in this particular case said that was not nearly specific enough and struck down the exercise of that delegated authority.<sup>73</sup> And that’s a very typical example.

You often get state courts saying, if a legislature, city council, county council, or another local legislative body is going to give discretionary authority to a zoning board, a school commission, or the like, it has to be very precise in the metes and bounds of that delegation. We can debate the merits of that, but I think it’s interesting to note that the lower you go down in our federalist structure, the more courts may be actually requiring some precision in this kind of accountability conversation.

So I’ll just close by saying I think it’s important, if we think about the states, to disaggregate between states and local governments. I think there are many areas where the doctrine is very similar and appropriately so, and I think that’s true of federal, state, and local doctrine. But there are many areas where, as Miriam mentioned, if you look very specifically at a given agency, the given statutes that govern it, and the structure of a particular local government then you’re going to come to different answers than you would certainly at the federal level. And so, I think it’s very important to pay attention to those given contexts, and I don’t think state courts often do that enough. And I think we could have a more intentional jurisprudence as we think about the kind of plurality of structures, and that holds important, comparative lessons as well. Thank you.

**Hon. Michael Scudder:** So I want to open it up to the room. I’m sure there are some questions from the podium, but I invite anyone with questions. There are microphones on the side aisles or raise your hand and speak loudly, and we can get some dialogue going in the room here this morning.

**Prof. Nestor Davidson:** Good to know you’re not all leaving. You’re actually going for the microphones.

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72. See Davidson, *supra* note 52, at 623 (citing *Kosalka v. Town of Georgetown*, 752 A.2d 183 (Me. 2000)).

73. *Id.*

**Hon. Michael Scudder:** Let me put a question out there.

**Hon. Jeffrey Sutton:** I have to say just one thing. I've already decided what I'm doing in my retirement years. I want to be the first person in American legal history to do a 90,000 city survey.

**Prof. Nestor Davidson:** I've tried. It's not easy.

**Prof. Christopher Green:** I have two bad jokes I wanted to tell. So if you have a nondelegation doctrine at the city level, a city can't just have a dictator.

**Prof. Nestor Davidson:** Right.

**Prof. Christopher Green:** So you can't have Cincinnatus for Cincinnati.

**Prof. Nestor Davidson:** There you go.

**Prof. Christopher Green:** So has it been taken? I'm looking for a crazy idea about hard-look review that'll get something from off the wall to on the table to expand the *Overton Park*, *Overton Window*.<sup>74</sup> So, anyway, you won't ask me back.

**Hon. Michael Scudder:** Okay. We got our queue. I see Steve Calabresi.

**Steve Calabresi:** Steve Calabresi.<sup>75</sup> I'm the Chairman of The Federalist Society Board of Directors. And I wanted to begin by commending this panel for a fascinating discussion about state and local administrative law. I also have to apologize. I have laryngitis, so I can't be heard very clearly. My question was particularly directed to Judges Sutton and Scudder, but I'd be interested in what the other three panelists think of it as well. And it goes to something that I learned from Judge Ralph Winter when I clerked for him in 1983. He said that when he was young and in law school, there used to be a saying, "Don't make a federal case out of this." And Judge Winter said in 1983 that that saying should be amended to mean, "Don't utterly trivialize this." In other words, a lot of things that are very trivial are

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74. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); Joseph Lehman, *The Overton Window*, MACKINAC CTR., <https://www.mackinac.org/overton-window> (last visited May 19, 2019) [<https://perma.unl.edu/9HCD-TS29>].

75. Professor Steven Calabresi has been the Chairman of the Federalist Society's Board of Directors since 1986 and is the Clayton J. & Henry R. Barber Professor of Law at Northwestern Pritzker School of Law. Professor Calabresi's areas of expertise include federal courts, comparative law, and constitutional law.

finding their way into federal court that may properly belong in state court.

My question for the two federal judges and for the other panelists is if you have a filing before you or an appeal before you that raises some important federal constitutional question, say, on a controversial issue like abortion or affirmative action, would it be appropriate to ask the plaintiffs to amend their complaint to add any state constitutional law claim that they could have so that the court would have the option of deciding the issue on state constitutional grounds rather than federal constitutional grounds? The federal interest in that is if a federal court of appeals decides a case on state constitutional grounds, its ruling can be overruled by the state supreme court. Its ruling applies to only one state, not to the three states in the Seventh Circuit or the four states in the Sixth Circuit. And it might be compatible with the discussion in *Younger v. Harris* about the importance of our federalism and of emphasizing the role of the state courts.<sup>76</sup> Any thoughts?

**Hon. Jeffrey Sutton:** What you're saying, and what makes a lot of sense, is an exhaustion requirement. And a way to think about this doctrinally is most federal constitutional claims run through the Due Process Clause right?<sup>77</sup> That's incorporation, the Liberty Clause.<sup>78</sup> And so why wouldn't you ask yourself if there's any way in which the state could fix this problem short of there being a federal constitutional problem? And it is, after all, a due process clause, so it suggests process; that process could include avoidance—interpret the state statute to avoid the problem. It could involve a state regulation. And, of course, it could involve the state constitution, which would take the problem off the table.

But I don't think there is an exhaustion requirement. I don't think there should be one. And I think our federal rights are our federal rights. And if someone's violating them, and if you want to go to federal court and just take one shot you're allowed to do that.

At the state level Oregon is a good example of doing this the right way. In dual-claim cases, they have something like an exhaustion requirement. The only other thing I would say, which is implicated by your question, is when you do have two claims—state and federal—at the federal level, it's often a very good idea, I think, for the federal court to certify the state constitutional claim to the state supreme court. In fact, for a litigant, it can be a quick way to get something to the state supreme court. You try certification at the federal district court level, then you're right there at the state supreme court. I think the certification process could be improved from both sides—state and

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76. *Younger v. Harris*, 401 U.S. 37 (1971).

77. U.S. CONST. amend. XIV, § 1.

78. *Id.*

federal. I blame state court judges in part because it takes a little too much time, and I blame federal judges in part because we're too impatient. But we've got to fix that system because it would be quite respectful and very federalism driven.

**Hon. Michael Scudder:** Yeah, Nestor, go ahead.

**Prof. Nestor Davidson:** I just want to add one footnote to this discussion, which is we do have one area of constitutional law where we have this kind of exhaustion . . .

**Hon. Jeffrey Sutton:** For now.

**Prof. Nestor Davidson:** For now, and the Supreme Court's going to look at it. And it's been very fraught in the takings context, which is to say that before you can bring a federal constitutional takings claim, you have to decide whether the state has or has not given you just compensation.<sup>79</sup> And in order to do that, you have to go through state process.<sup>80</sup> And the Supreme Court's going to likely decide this year whether or not that exhaustion requirement will survive.<sup>81</sup> But it has been quite controversial, and it's created a lot of tension, precisely for the reason Judge Sutton pointed out, which is that a lot of people believe that it denies the ability to get into federal court on the core question of a federal right. It does, as a practical matter, require you to litigate questions of federal takings law in state court and then be precluded if you try to go back to federal court. So I think that there are complications here that we should pay attention to and the Takings Clause is an area where we actually do have a body of law on that.

**Prof. Christopher Green:** There is something to be said for having the same rule for all the rights. You could have *Williamson County* for everything, but that would be different.<sup>82</sup>

**Hon. Michael Scudder:** Okay, we'll shift over to this side.

**Stephen Casey:** Stephen Casey, Austin, Texas Lawyer's Chapter. Within the last ten years, there's been an increased ground swell of people moving to Texas from high-tax, high-regulatory states, like New York and California. It'd be interesting to get the panel's perspec-

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79. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

80. *Id.*

81. *Knick v. Twp. of Scott*, 862 F.3d 310 (3d. Cir. 2017), *cert. granted*, No. 17-647 (U.S. argued Jan. 16, 2019).

82. *See Williamson Cty.*, 473 U.S. at 172.

tive. Do you think it's going to lead to a feedback in those states from where they're moving to a lessening of the regulatory burden and lessening of the administrative state, or do you think that it's going to boost Texas a little bit and turn it a little more "purple," I would guess, than blue?

**Prof. Christopher Green:** Well, a lot of those people are from Mississippi; it tends to take our best people and it makes Texas better and makes Mississippi a little weaker.

**Prof. Nestor Davidson:** I would just say one thing about that, which is that people are moving to Texas, of course. But in many ways, they're moving to Austin, and they're moving to Dallas, and they're moving to Houston, and they're moving to San Antonio, and I think one dynamic that we already see is that we have a greater level of friction and I think it's really developed over the last ten years. It's always been there, but it's increasing with mobility between the policy preferences at the state level in a place like Texas and the increasingly divergent policy preferences in a place like Austin. And those conflicts are playing out largely as a question of home rule—immunity at the local level. If you look at the top ten fastest growing cities in the country, four of them are in Texas right now. And I think it's really the urban areas in Texas that are drawing population. And that is increasing the political power, relatively speaking, within the state. The state may not be purple, but there are some really deep blue pockets within Texas.

In the mid-terms, there was a story that could be told about even the area around Fort Worth, which has traditionally been a relatively conservative urban area, is now trending more Democratic. And I think a lot of other factors are driving that mobility. But I do think it's a stark reality and I do think you can tell a similar story in Georgia, in North Carolina, in Florida, and other places. I think it's going to increase tensions between the cities in a place like Texas, the Texas triangle, and the State.

**Hon. Michael Scudder:** Over here, then. Sir?

**Questioner 3:** Thanks so much. Each of the panelists has talked about the very distinct differences of state administrative law from federal administrative law. Judge Sutton urged us all to read the local state constitution, Professor Green remarked upon the tyranny of the fifty state survey, Professor Seifter said, "No state administrative law in law school," and Professor Davidson said there are distinct, local doctrinal differences in nondelegation. So what I'd like to do is have the panel act as our ad hoc marketing firm, and I'd like a marketing

suggestion from each of the panelists about how local lawyers can highlight in an educational way the distinct local and state differences to the bench and bar. What suggestions about highlighting the differences would each of you give us?

**Prof. Miriam Seifter:** May I recommend my forthcoming article?

**Prof. Nestor Davidson:** I would second that.

**Prof. Christopher Green:** Judge Sutton's book, really, is far better marketing than I've ever seen.<sup>83</sup> It's great.

**Hon. Jeffrey Sutton:** Well, I mean we should read each other's stuff.

**Prof. Christopher Green:** I should write my stuff.

**Hon. Jeffrey Sutton:** Knowledge is power in this area. It surprises me to see so many disputes locally, city versus state, where people are not paying attention to state constitutional opportunities.

Now, of course, that makes sense. At the federal level, the stakes are so high you can afford to hire 100 lawyers to figure this out. You cannot normally do that at the state and local level. But there are just so many opportunities here to help a client, I guess is the way I would put it. No one's paying attention to this. Nestor made the point that there is a distinction between whether a state is red or blue statewide and how that breaks down within a state. That's the Ohio story. The cities in this last election became bluer, and the suburbs, particularly the counties, and rural areas became redder. And that will lead to conflict from time to time.

**Prof. Miriam Seifter:** Yeah. So more serious than my previous answer, I would say there are actually a number of ways to start to build this familiarity. One of them we've already mentioned is teaching classes in this. It's very doable. My law school, in particular, was very open to this. So if you're a law professor, you can go to your law school and suggest it. If you're a law student, you can go to your law school and suggest it.

Another is the state bar. Does your state bar have a practice group or a focus group on matters of local government? Most of them do. What about state constitutional law? Not all of them do. And then another is thinking about ways to invest in state and local government to have them create long-standing offices that are building up this

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83. SUTTON, *supra* note 2.

knowledge base and are available to educate people, to talk to people. Those are all other ways than reading all these books. But really the literature is great in this area and probably under-read to get this information out there.

**Hon. Michael Scudder:** Go ahead.

**Richard Samp:** Richard Samp with the Washington Legal Foundation. I guess my question is for Professor Seifter. It's a separation of powers issue. Basically, what should federal courts be doing when they have to decide state law separation of powers issues? I'm thinking of the case in the Supreme Court right now about gerrymandering in Virginia, where the state legislature says, we have ultimate litigating authority over issues having to do with how we get redistricted.<sup>84</sup> The state's attorney general says no. In the Florida recount situation, the Florida Supreme Court says, we are the ultimate arbitrator of election results, and the state legislature says, no, pay no attention to the state courts, we decide these questions. Are there any neutral principles that federal courts can apply when deciding these state issues? Or do they just have to read the state constitution and do their best guess?

**Prof. Miriam Seifter:** This is a really hard and important question. And in my article, actually, I talk about this as one of the costs of the lack of clarity at the state level. For all its benefits, it does have this feature where federal courts, and in particular the Supreme Court, sometimes deny certiorari because this is a vehicle problem. We're not really sure if we're even talking to the right state entity.

How to solve it in a neutral way, I mean I think probably the classic answer would be that you would look to the final decisions of the state supreme court if there are decisions on a relevant question. But, often, there aren't. I'm not sure that there's a ready solution to this. I mean, other than certification or denying certiorari until the state can sort its own house out.

**Hon. Michael Scudder:** Sir?

**Brian Bishop:** Brian Bishop. I come from Rhode Island, where, for the first fourscore years, we didn't have a constitution and operated under the Royal Charter. But one thing that I observe about our system—I'm wondering for the folks that research state and municipal undertakings—my observation in Rhode Island, and I think it fits

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84. *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018), *juris. postponed pending hearing on the merits sub nom.* *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 481.

with the wider fifty states, is local government is actually far more parliamentary in nature. So while you look very specifically at the delegations, and it's not that they don't exist and that there aren't an alphabet soup of agencies, but the local municipal legislatures and even state legislatures seem much less chary. And that's simply coming in and settling a thing or making, literally, an individualized zoning decision at the level of a state legislative statute. And I'm not actually sure that that's unhealthy, at least in a small state with a lot of access to the legislature. That has been a far more responsive avenue for myself than the purported responsiveness of agencies. And I'm wondering if you've looked at that in your undertakings.

**Prof. Nestor Davidson:** Yeah, so it's a great point. And one of the arguments that people make in favor of local empowerment is local legislatures can be much more nimble. We don't have a tradition of bicameralism, for example. Again, I mentioned in many local governments there is no presentment equivalent, right? And so local governments can move much more quickly. There is also a tradition talking about norms of non-partisanship. And, actually, in some states it's explicit. Some local charters, some municipal charters, explicitly say that local office holders cannot identify themselves by their partisan affiliation. So it's a very different norm. And you do, then, have the ability in small and even medium size governments, but it doesn't work so much in a place like New York with 8.5 million people and budgets that are larger than many states. But in a lot of smaller, local governments, and even medium-sized, you do get individualized attention, and kind of an accountability feedback loop that's very immediate. And I would say that courts have been a little bit chary of that as well.

And there is a body of law, at least in the land use context and it's bled into a few other areas. But it's clear it's in the land use context, where courts have looked at legislative bodies, for instance, a city council clearly delineated as a legislative body, when they are making an individualized determination. For example, amending a zoning code in order to change the rules for one individual owner. Courts will sometimes treat those legislative bodies as quasi-administrative. And it has generated a really interesting body of law, largely around proceduralizing. So you could have due process rights before a city council if you think about the *Londoner*<sup>85</sup> *Bi-Metallic*<sup>86</sup> tradition. That actually doesn't apply in a lot of local governments. You actually get fairly vigorous procedural rights as a matter of due process at the state level before a legislative body. And I don't know that that's a bad idea, I think that's actually not a bad idea at all.

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85. *Londoner v. City of Denver*, 210 U.S. 373 (1908).

86. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).



**Prof. Christopher Green:** And arguably, constitutionally compelled because you can't have bills of attainder. You can't have local bills of attainder. So *Londoner/Bi-Metallic* is important.

**Prof. Nestor Davidson:** Which, by the way, were local government cases.

**Prof. Christopher Green:** Yeah.

**Hon. Michael Scudder:** Okay. Let's jump back here.

**Alden Abbott:** Thank you, Judge. Alden Abbott, long-time member of the Federalist Society. I think it's fair to say that regulatory takings doctrine is severely limited under federal constitutional laws. Some total destruction of value, that sort of thing. To what extent are state constitutional provisions in state litigation pointing to a broader ability to recover under state constitutional takings clauses? In short, is there more of an opportunity, perhaps, to find regulatory takings under certain state constitutions? Is there a trend anyone could identify? Thank you.

**Prof. Nestor Davidson:** Judge Sutton?

**Hon. Jeffrey Sutton:** I'll tell you the part of the story I know and the part of the story I'm going to guess at. What I know is that, within a year of *Kelo*,<sup>87</sup> several state courts were rejecting *Kelo* under their state constitutions, and therefore providing remedies for the plaintiffs in those cases.<sup>88</sup> Those are not regulatory takings. We're talking about eminent domain. But just to complete that story, and it's not just a state constitutional law story; it's a state legislative story. The states really responded legislatively as well.

So now I'm going to get to the part that I don't know. But I have my suspicions. You're going to have a lot of state courts with respect to regulatory takings now that would be much more sensitive to that kind of argument than I think they would've been before *Kelo*. What's fascinating about how this works between the state and federal courts is when you get a controversial U.S. Supreme Court decision that allegedly under-enforces a right, it makes the papers. Suddenly, the state supreme courts are all over this. And instead of lockstepping, they're looking at it independently.

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87. *Kelo v. City of New London*, 545 U.S. 469 (2005).

88. *See City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006).

**Prof. Christopher Green:** *Buck v. Bell* was sort of the opposite.<sup>89</sup> So when the U.S. Supreme Court says, “Well, if the feds said it’s okay,” then that shuts down. But sometimes you get with *Kelo* the opposite effect. There are lots of cases in Mississippi, certainly.

**Prof. Nestor Davidson:** And I would just add specifically on regulatory takings, you also have a dynamic at the state level which you really don’t have at the federal level, which are state statutory regimes that give property rights recognition. So in Florida,<sup>90</sup> actually—and there was a constitutional initiative on the books in Colorado in the midterms that failed but would’ve had a very similar compensation requirement for any regulation that lowers the value of property.<sup>91</sup> So a very, very different doctrinal answer to the question of incidental effects of regulation on property rights. But several states have those property rights statutes, and they are constraints on regulation, and they are compensatory regimes. And so that’s an important distinction at the state level. Well, and that’s not so much constitutional as it is statutory.

**Hon. Jeffrey Sutton:** The other thing as I think about it and listen to my co-panelists, it’s dangerous to pigeonhole these things. If you read Judge Willet’s opinion in *Patel*, the way that it’s written, it looks an awful lot like a regulatory takings decision.<sup>92</sup> I mean, it’s a due process decision under the Texas Constitution. But if you read it, it really is very similar. So I wouldn’t think of it purely as takings. That’s really the way he was framing the issue.

**Hon. Michael Scudder:** Sir?

**Kai Allbrook:** I’m Kai Allbrook from the State of Washington. Our West Coast states have policies on climate change that are very much opposed to those of the current federal government. As a result, you see denials by regulatory agencies of permits necessary to create and export infrastructure for carbon and hydrocarbon coal from the West Coast. And I’d be interested to see how you would analyze state regulatory agencies frustrating federal policy and, in fact, interfering with interstate commerce because of an ideological opposition to coal being burned in China as opposed to remaining in the ground in Wyoming.

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89. *Buck v. Bell*, 274 U.S. 200 (1927).

90. FLA. STAT. § 70.001 (1995).

91. See John Aguilar, *Amendment 74, with Its Private Property Mandates, Goes down to Defeat*, THE DENVER POST (Nov. 6, 2018, 7:51 PM), <https://www.denverpost.com/2018/11/06/colorado-amendment-74-results/> [https://perma.unl.edu/5JFT-DCXR].

92. *Patel v. Tex. Dep’t of Licensing and Regulation*, 469 S.W.3d 69, 92 (Tex. 2015) (Willet, J., concurring).

**Hon. Jeffrey Sutton:** I don't have a great sense for all of the particulars of the West Coast constitutions, but I will say this, this is an important point about state constitutions and a big difference between state and federal constitutions. The Federal Constitution is negative, almost biblical—"Thou shalt not do this, thou shalt not do that," and so forth. State constitutions have many positive rights. Emily Zackin wrote a great book about this, *Looking for Rights in All the Wrong Places*, and makes the point that some state constitutions contain positive rights, such as education rights, labor rights, and environmental rights. And I think about a third, at least, of the state constitutions have similar guarantees.<sup>93</sup> So now you have this interesting dynamic where the state legislature, perhaps with state agencies, has an affirmative obligation to protect water/air resources. But, of course, we know there is a Supremacy Clause, so that's where it gets a little complicated with potential preemption issues.

**Prof. Miriam Seifter:** And I would just add to that in addition to the affirmative constitutional rights, another difference at the state level is that under most state constitutions, state legislatures have plenary power. So the state constitution limits them. It doesn't enumerate their rights the way we have at the federal level. So I think the answer to your question would have to proceed on two lines. One: Is it legal under state law? And if the state legislature has said something about this or if they've delegated power to an agency, often that's going to be constitutional at the state level because unless the constitution says no, a state legislature can presumably do it. But then, of course, there's the federal question. So is it actually preempted under the Supremacy Clause?<sup>94</sup> And then you just have to do a close reading of what the federal law is and what the state law is.

**Prof. Nestor Davidson:** And I would just add, I think one of the hardest questions in all of this when you're thinking about the federal-state relationship, and, frankly, it plays out as well on the state-local relationship, is: Do we really have neutral principles that apply across policy disagreements? So we get these swings where in one administration states are asserting policy preferences about immigration, about other areas, and we look to how do we adjudicate those. And then the politics change and you get a set of different states opposing the federal government. And it is very, very hard, I think, to come up with general, neutral principles in the kind of Wechslerian sense to adjudicate that distribution of power. But I think it's the right thing to try to do whatever your individual policy preferences might be.

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93. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013).

94. U.S. CONST. art. VI, cl. 2.

**Hon. Michael Scudder:** I think we've got a little over five minutes left, so we'll try to get the next couple of questions, and I may offer a parting thought of my own. Go ahead.

**Mark Middleman:** I'm Mark Middleman from St. Louis. And this is particularly addressed to Professor Davidson. A great part of our jurisprudence in Missouri on local law is that there is no sovereign power in local communities. Sovereignty is restricted to the state government, but as Professor Seifter suggested, it's plenary. We have what are called home rule charters, but they're not really total home rule because there's some limitation on what a locality can do through its own city council or its local legislative body. Do you find this in other states that there is a difference in the administrative powers of localities precisely because they don't have complete sovereignty?

**Prof. Nestor Davidson:** Yeah, it's a great question. And I have found, again, in the world of our fantasy 90,000 local-government surveys that home rule is one of those areas of state jurisprudence in state constitutional law that varies, not only across fifty jurisdictions, the District of Columbia has its own unique particular version of home rule, but within states. And so you have a range that varies in really broad terms between what we call a Dillion's Rule state where the only power that a local government has is that which is explicitly legislatively delegated from the state,<sup>95</sup> from that exercise of plenary power, versus home rule,<sup>96</sup> which in its strongest form in state constitutional law actually changes that paradigm about where sovereignty rests.

And so you have states—and a not insignificant number of states—where as a matter of black-letter, structural constitutional law, the state constitution actually says that at least with respect to local matters—and courts have no idea what that actually means—but with respect to local matters, a local government, a city, a county, or a suburb is sovereign. And so it's a choice within the state. If you think about the federalist system, sovereignty resides at the state level. Within a state, a state constitution can make a choice to subdelegate—to locate—that sovereignty at the local level. And in many states—I can't give you a number because the jurisprudence is all over the place—but in a critical mass of states, as a matter of formal state

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95. *See* *City of Richmond v. Confrere Club of Richmond*, 387 S.E.2d 471, 473 (Va. 1990) (“The Dillion Rule provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”).

96. *See* TENN. CONST. art. 11, § 9 (permitting municipalities to adopt home rule).

constitutional law, a great deal of that sovereignty that we think of at the state actually resides at the local level.

Now as that has been litigated, and it gets litigated all the time, state courts are reluctant to recognize that. And I have begun to noodle on an article that I'm thinking of as home rule originalism because you have a lot of these state constitutional conventions that have adopted home rule not only were in the 1910s and the Progressive Era but actually through the '60s and into the '70s. And so the founders or framers debates are really accessible. And you have some home rule constitutional amendments—and New York, frankly, is a good example—where the founders' intent was to be fairly strong on the delegation to local democracies, to have a conception that people should be governing themselves at the local level. And state courts haven't respected that at all. So the black-letter law of localism in New York, which is the state I know best, the formal structure that we get in the state constitution and the functional structure that appears in the jurisprudence are radically different. And so I think there's an incredibly interesting variety. And we haven't quite figured out what that all means.

**Prof. Christopher Green:** Bob Ellickson from time to time would say, “Do you want to be James Madison? Do you want to be a Founder? Well, go get involved in your local homeowner's association because that's where you can establish a new polity and you will be the founder.”

**Hon. Michael Scudder:** One last question.

**Sam McVey:** Sam McVey. I'm a retired Utah state court judge. One of the reasons for giving judicial deference to and review of agency adjudication proceedings is that these agencies are supposedly endowed with a lot of expertise and so forth, and the judges are apparently too technically challenged to figure some of these things out. To paraphrase my former boss, a judge knows what he or she knows and a judge knows what he or she doesn't know. So if a judge doesn't know, can't the judge just proceed under Rule 53 of the Federal Rules of Civil Procedure and its state equivalents?<sup>97</sup> Get a special master to help them on these technical issues and forget the agency bias that occurs when you render agency deference.

**Prof. Christopher Green:** If they do know what they don't know, that's great. I mean, the judges sometimes have the same problem. Not these. [Referring to Judges Sutton and Scudder]

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97. FED. R. CIV. P. 53.

**Hon. Jeffrey Sutton:** Ouch. This is what happens now that you're a new federal judge. They're not usually explicit about it. They laugh at your jokes in your face, and when you're not there, they tell you that you're wrong and full of yourself.

**Hon. Michael Scudder:** So thanks everyone. Let me offer a bit of a suggestion, perhaps, to Dean and Steve. First, I think on behalf of all of us up here, thanks for covering the topic and everyone's engagement. I can tell you from just talking to my colleagues on the panel and reading a bit of their work, one of the questions that was coming to mind constantly as I read this was there's embedded in a lot of the discussion a bit of a normative preference to govern at the local level as much as possible, at the state and local level for all the reasons that are obvious: closer to the people, and the like. And then as you read some of Miriam and Nestor's work—at least I did—I really realized how much the state, local, municipal, administrative apparatus has grown, and just how expansive it really is, and how many different aspects of our lives it touches. And what also comes to mind is I read very little about it from day to day. The local newspaper has tended to focus on national coverage so much. The local newspaper is not at the end of the driveway anymore. It fell by the wayside.

So one of the questions that I'd encourage the Society to consider asking is: Are we really able to realize the transparency and accountability that is kind of embedded in this normative preference we have to govern at the local level? Or put differently, are we realizing the federalism benefits that I think are kind of embedded in a lot of the discussion? Are we able to, or how are we better able to, perhaps? So with that, thank you.