

## LEARNING FROM LABORATORIES OF LIBERTY

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The states are our laboratories of democracy.<sup>1</sup> But they are also laboratories of administration and laboratories of liberty. We all can learn from the states' experiments.

Scholarship on state administrative law and regulatory reform has flourished in recent years.<sup>2</sup> So has the work of state courts,

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1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. The C. Boyden Gray Center for the Study of the Administrative State has prioritized scholarly research and debate on state administrative law and regulatory reform, hosting research roundtables to develop and workshop such papers. See, e.g., James Broughel, *The Regulatory Budget In Theory And Practice: Lessons From The U.S. States*, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, No. 25, at 11, <https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2022/09/Budget-Symposium-vF.pdf> [<https://perma.cc/68VK-9Q6W>]; Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879 (2022); Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211 (2022); Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417 (2022); Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651 (2023); Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263 (2022); Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021); Daniel Ortner, *Ending Deference?: Why Some State Supreme Courts Have Chosen to Reject Deference and Others Have Not* (2021), <https://ssrn.com/abstract=3798079> [<https://perma.cc/T5AP-C4U4>]; Brian R. Knight & Trace E. Mitchell, *The Sandbox Paradox: Balancing the Need to Facilitate Innovation with the Risk of Regulatory Privilege*, 72 S.C. L. REV. 445 (2021); Daniel Ortner, *The End of Deference: How Some States Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrine* (2020), <https://ssrn.com/abstract=3552321> [<https://perma.cc/5URF-Y4QM>].

taking harder looks at administrative law doctrines that too often are cited more reflexively than reflectively.

In Georgia, for example, the supreme court's presiding justice recently recognized that the state's own version of *Chevron* deference, adopted eight years ago, was a misapplication of the state's constitution and of prior precedent: "[O]ur history of deference is messy," he wrote, "our precedent is all over the place," and in an appropriate case the state court "should reconsider the matter."<sup>3</sup> If the full court takes this path in a future case, then it will join Wisconsin and several others in reforming or rescinding the doctrine.<sup>4</sup>

Similarly, Kansas's supreme court recently reiterated the importance of legislative specificity and clarity, as embodied by non-delegation and void-for-vagueness doctrines: "The primary problem with a law that fails to 'provide explicit standards' for enforcement . . . is that such laws 'invite arbitrary power,'" the court explained. "That is, these laws 'threaten to transfer legislative power to' police, prosecutors, judges, and juries, which leaves 'them the job of shaping a vague statute's contours through their enforcement decisions.'"<sup>5</sup>

There is a bit of irony in this new era of state experiment. The modern administrative state itself was conceived and defended in terms of experiment—not just at the federal level,<sup>6</sup> but in the states,

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3. *Cazier v. Ga. Power Co.*, No. S22C0513, slip op. at 4 - 5 (Ga. Jan. 27, 2023) (Peterson, P.J., concurring in denial of cert.), <https://www.gasupreme.us/wp-content/uploads/2023/01/s22c0513.pdf> [<https://perma.cc/N69M-S28H>].

4. *See, e.g., Tetra Tech EC, Inc. v. Wisc. Dep't of Rev.*, 914 N.W.2d 21 (Wis. 2018); *see generally* Ortner, *The End of Deference*, *supra* note 2 (collecting examples).

5. *State v. Harris*, 311 Kan. 816, 822 (2020) (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223, 1228 (2018) (Gorsuch, J., concurring)).

6. *See, e.g.,* President Franklin D. Roosevelt, Address at Oglethorpe University in Atlanta, Georgia (May 22, 1932) ("The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something."), <https://www.presidency.ucsb.edu/documents/address-oglethorpe-university-atlanta-georgia> [<https://perma.cc/RS59-Q2HU>].

too.<sup>7</sup> We should think of the current debates in similar terms: informed by modern administrative experience and by a better understanding of constitutional principles.

States are learning from each other's experiments, most recently in Ohio, where the state supreme court's decision to recalibrate its deference to administrative agencies was informed by other states' decisions.<sup>8</sup> But federal judges can learn from the states, too. As Judge Sutton recently observed, "state and federal courts may borrow historical, practical, and other useful insights from each other," particularly in "how best to construe generally phrased, sometimes implied, limitations on the powers of each branch."<sup>9</sup>

In short, there is "plenty of opportunity for state-federal dialogue" in administrative law.<sup>10</sup> Too often, that dialogue has been a one-way conversation, from federal courts to the states. We hope that this symposium helps to foster conversation in the other direction. We are grateful to Justices Hagedorn, Hart, Peterson, Stegall, and Wecht for reflecting on their own states' respective experience, and to Judge Sutton for connecting these developments to federal law.

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7. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *State ex rel. Wisconsin Inspection Bureau v. Whitman*, State Commissioner of Insurance, 220 N.W. 929, 942 (Wis. 1928) ("Consequently the Legislature may withdraw powers which have been granted, prescribe the procedure through which granted powers are to be exercised, and, if necessary, wipe out the agency entirely.").

8. *TWISM Enterps. L.L.C. v. State Bd. of Registration for Prof. Engineers & Surveyors*, 2022 WL 17981386 (Ohio Dec. 29, 2022).

9. JEFFREY S. SUTTON, *WHO DECIDES?* 184 (2022).

10. *Id.*