

A Two-Way Lens on Agency Independence

Author : Anne Joseph O'Connell

Date : January 11, 2019

Miriam Seifter, *Understanding State Agency Independence*, 117 **Mich. L. Rev.** __ (forthcoming 2018), available at [SSRN](#).

In recent decades, our field of administrative law has taken an empirical turn, at least in part. We now know more about on-the-ground practices of federal agencies and their treatment in the federal courts, for example. Our focus, however, has been relentlessly on the federal level. To the extent that scholars look outside the federal government, to states or to private entities, for instance, they almost always examine the interaction with federal entities. [Miriam Seifter](#)'s work should divert your attention to the states—both to learn about state practices and to consider what those practices might tell us about federal institutions.

In her latest piece, *Understanding State Agency Independence*, Seifter examines agency independence at the state level and uses that examination to contribute a new perspective on agency independence at the federal level.

It would be easy to get lost in the details of state practices, but Seifter organizes the piece coherently to make important broader points (while not losing rich institutional details). Seifter first recaps debates about federal agency independence before looking at the constitutional origins of state agency independence, then moving onto state courts' treatment of agency independence, turning next to the contestation of independence (and shifting agency designs) outside the courts, and concluding by thinking about lessons for federal administrative law from the state practices she has studied.

There is so much to praise in this article. To start, the descriptive work about state practices is stunning. [Christopher Berry](#) and [Jacob Gersen](#), among others, [asked](#) us to contemplate whether a plural executive would be a better design for our federal system, drawing on the "unbundled executive" at the state level (where, for example, governors are often elected separately from attorneys general). Seifter starts with these state practices, some of which were "woven into the design of the earliest state constitutions." There are 43 states that elect an attorney general, but only one state (Louisiana) elects an ethics official. Overall, "state constitutions establish 497 constitutional offices, 210 of which are separately elected." You may have heard of the unbundled executive, but you may not know how many state constitutions "prescrib[e] legislative appointment of particular officials, or even an entire set of officials."

Seifter then pivots to these constitutional agencies, where the state's citizens do not elect their leaders and where the constitutional text does not provide for how the top officials are to interact with the governor. In addition, she considers multi-member boards and commissions that are not in states' constitutions (except, in some instances, as a general class). Seifter, however, does not simply show the complexity of state institutions at a particular point. She also demonstrates that agency designs at the state level have often shifted over time. I am less certain of, but quite intrigued by, her claim that the independence of federal agencies "has been a sticky phenomenon," by contrast. Federal agencies change structure too—for instance, the Post Office in 1971 and some financial agencies after the last financial crisis. These shifts at the federal level, however, do seem different from state legislatures changing agency designs to advance more nakedly partisan goals. Indeed, in lame duck sessions,

[several states](#) have worked to change agency independence. (And should we compare the federal system against all the states, or just against an average state?) I look forward to more empirical work assessing Seifter's provocative (and plausible) claim that state agency structures have been more malleable than federal ones.

Seifter makes a number of clever, original, and compelling observations and arguments from the descriptive details she has unearthed. Here are just three that struck me. First, the separate selection (by the legislature or election) of some agency leaders in the states—the unbundled executive—should not be conflated with independence. Separate elections, for example, play a role in, but do not determine, how such agency leaders will interact with the governor. Second, in contrast to the federal courts, state courts in New Mexico (and in other states) have taken a non-binary, non-categorical approach to agency independence. In other words, these courts do not see state entities as being in one of only two buckets (independent and non-independent), and they “do not use the term ‘independent agency’ (or any similar term) to invoke a trans-substantive category.” Third, unlike the federal system where removal is seen as an inherent executive power, governors' removal power is a matter of positive law.

This article has made me rethink federal practices, particularly issues surrounding the removal of agency officials. Seifter shows, first, how some states allow policy disagreements between an official and the governor to constitute cause for firing (which federal case law does not allow) and, second, how many states explicitly make removal decisions unreviewable by the courts. On the first, as she briefly notes, Judge Griffith's [concurrence](#) in the D.C. Circuit's recent en banc decision on the constitutionality of the Consumer Financial Protection Bureau argues that the for cause standard should be, or is, lower at the federal level than federal case law might suggest. On the second, differences between the states and the federal government on agency independence produce such stark differences in outcome—specifically, in modern times, state officials often get removed for cause by the governor, but federal officials almost never get removed *for cause* by the president.

More broadly, Seifter's impressive research on state administrative law should make all of us pause in our federal projects, to consider how state practices might shape our analysis. Inspired by her articles, I am currently learning about state practices for filling leadership vacancies on a temporary basis as I wrestle with “actings” and other interim leaders at the federal level. What might the states tell you about your work?

Cite as: Anne Joseph O'Connell, *A Two-Way Lens on Agency Independence*, JOTWELL (January 11, 2019) (reviewing Miriam Seifter, *Understanding State Agency Independence*, 117 **Mich. L. Rev.** __ (forthcoming 2018), available at SSRN), <https://adlaw.jotwell.com/a-two-way-lens-on-agency-independence/>.