

**CLOSER TO THE PEOPLE IS BETTER: A RESPONSE TO
PROFESSOR MIRIAM SEIFTER’S ARTICLE *FURTHER
FROM THE PEOPLE***

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INTRODUCTION

University of Wisconsin Law Professor Miriam Seifter believes “state agencies are, on the whole, less transparent than their federal counterparts, less closely followed by watchdog groups, and less tracked by the shrinking state-level media.”¹ This adds up to her conclusion that “[s]tate bureaucracy does not operate in a fishbowl,”² which combined with its tremendous and growing power makes it “a largely unguarded giant.”³

I believe there are serious counterexamples to her claims. In fact, my experience after six years working in senior roles in a governor’s office convinces me that state-level administrations, though not perfect, vindicate the framers’ vision that the states “do a lion’s share of governance affecting people’s day-to-day lives.”⁴

In her article, Seifter sets out what she considers the administrative ideal: “[A] working state-level system of civil society oversight has three main components: (1) state agencies that are visible and accessible; (2) a civil society with the capacity to monitor state agencies; and (3) a media ‘megaphone’ for amplifying findings.”⁵ She also includes one comparison of oversight within government, as between Congress and state legislatures.⁶ My review of each of these four components shows a public accountability for state administration that is more robust, thorough, and meaningful than Seifter’s article posits. Throughout these sections, I will draw on examples from Wisconsin, our shared home state. I do not argue that Wisconsin is perfect, or even that it is representative of most states in these matters. Rather, it will serve usefully to illustrate the weaknesses in her empirical claims. Consequently, these illustrations undermine Seifter’s

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1. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 110 (2018).

2. *Id.*

3. *Id.* at 128.

4. *Id.* at 109.

5. *Id.* at 128.

6. *See id.* at 144–45.

normative arguments, which suggest that regulation is better handled by the federal government.

I. OPACITY

Seifter argues that “state bureaucracy can be opaque and byzantine,”⁷ largely because states do not have a system for collecting, retaining, and sharing data, especially in accessible electronic formats.⁸ She specifically worries that state agency information is not accessible due to failing freedom-of-information laws and controlling governors’ offices.⁹ States are increasingly adopting technology to improve records management and accessibility.¹⁰ Moreover, Seifter’s argument rests upon a comparative assessment between states and the federal government, yet she does not undertake a thorough analysis of the federal baseline before charging that states are worse in comparison.¹¹

For its part, Wisconsin has an extraordinarily open and transparent government in general, and its administrative processes have been made much more so in the past decade. Wisconsin’s public records statute is broader than the federal Freedom of Information Act,¹² and its open meetings statute mandates public notice and access similar to the Federal Advisory Committees Act.¹³

Moreover, in the past decade Wisconsin state government overall and the administrative process in particular have become more accessible, accountable, and transparent. All state employees are now required to

7. *Id.* at 130.

8. *Id.* at 131.

9. *Id.* at 132–34.

10. Colin Wood et al., *How Digital is Your State?*, GOV’T TECH. (Sept. 18, 2016), available at <https://www.govtech.com/computing/Digital-States-2016.html> [<https://perma.cc/3XHG-FBG9>].

11. *Id.* at 131–34. In fact, the National Freedom of Information Coalition, one of the organizations that Seifter relies upon, highlights a similar scorecard by OpenTheGovernment.org showing the secrecy prevalent across the federal government. *See generally* Patrice McDermott & Amy Bennett, *Secrecy Report Card 2010*, OPENTHEGOVERNMENT.ORG (2010), https://www.openthegovernment.org/wp-content/uploads/other-files/otg/SecrecyRC_2010.pdf [<https://perma.cc/E4DD-8FDL>]. On the same page, NFIC also points to a report by another organization showing that sixty-two out of ninety-nine federal agencies had failed to comply with an administration directive to update their information transparency policies. *Outdated Agency Regs Undermine Freedom of Information*, THE NAT’L SEC. ARCHIVE, (Dec. 4, 2012) <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB405/> [<https://perma.cc/B9X7-G85G>].

12. WIS. DEP’T OF JUSTICE, WISCONSIN PUBLIC RECORDS LAW COMPLIANCE GUIDE 2 (2015), <https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf> [<https://perma.cc/87Y3-2GT2>].

13. *Compare* WIS. DEP’T OF JUSTICE, WISCONSIN OPEN MEETINGS LAW COMPLIANCE GUIDE (2018), *with* GENERAL SERVICES ADMINISTRATION, SECRETARIAT JAMES L. DEAN, PUBLIC ACCESS TO RECORDS (2000).

undertake enterprise-wide public records training and agencies must post public records fulfillment tracking on the Performance.wi.gov dashboard.¹⁴ A new website places every state expenditure online.¹⁵ Users can search by agency, category, or vendor.¹⁶ Another site collects all open meetings notices and meeting minutes in one place.¹⁷

The past decade has also seen adoption of an aggressive regulatory reform agenda that has increased public accessibility and accountability.¹⁸ 2011 Wisconsin Act 21 requires gubernatorial approval to begin the rules drafting process (previously agencies could begin the process on their own volition), requires scope statements for emergency rules (previously only permanent rules required scope statements), requires an economic impact analysis for every rule (previously only five agencies had to do EIAs), and requires that all final rules be approved by the Governor and reviewed by the Legislature's Joint Committee for the Review of Administrative Rules (JCRAR).¹⁹

Several years later, another round of substantial rules reform added additional opportunities for public input.²⁰ Now, agencies have the option to hold public comment periods and hearings at additional points in the process, and either cochair of JCRAR may direct public hearings on a rule during its development.²¹ The new law also required that any rule with an estimated economic impact of more than \$10 million must be enacted by the legislature as a statute.²² Taken together, the 2011 and 2017 bills and the administration's implementation represent a sea change in Wisconsin's

14. Wis. Exec. Order No. 189, Wis. Admin. Reg. No. 723A3 (Mar. 11, 2016); Wis. Exec. Order No. 235, Wis. Admin. Reg. No. 735A2 (Mar. 9, 2017).

15. See OPENBOOK WISCONSIN, www.openbook.wi.gov [<https://perma.cc/MX57-4U3V>].

16. *Id.*

17. *Public Meeting Notices & Minutes*, WIS. PUBLIC MEETING NOTICES & MINUTES, publicmeetings.wi.gov [<https://perma.cc/VHB7-99YE>].

18. Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 504 (2017). It has also increased gubernatorial and legislative responsibility, which is representative of a trend Seifter has documented elsewhere. See *id.* at 488, 503.

19. 2011 Wisconsin Act 21, 100th Wis. Leg., Jan. 2011 Special Sess., <https://docs.legis.wisconsin.gov/2011/related/acts/21.pdf>; see also JESSICA KARLSRUPLINGER & PAM SHANNON, WIS. LEGIS. COUNCIL ACT MEMO, 2011 WIS. ACT 21: ADMINISTRATIVE RULES (2011).

20. 2017 Wisconsin Act 57, 103rd Wis. Leg., 2017 Reg. Sess.

21. *Wisconsin REINS Act Signed Into Law*, GODFREY & KAHN, S.C. (August 10, 2017), <http://www.gklaw.com/NewsUpdatesPressReleases/Wisconsin-REINS-Act-signed-into-law.htm> [<https://perma.cc/B4JE-5CV5>].

22. Eric Bott, *Reining In Wisconsin's Regulatory State*, FORBES (July 31, 2017 1:50 PM), <https://www.forbes.com/sites/realspin/2017/07/31/reining-in-wisconsin-regulatory-state/#9b2f16e45137> [<https://perma.cc/62U4-A2T4>].

administrative procedure, all in the direction of greater transparency and accountability.²³

II. CIVIL SOCIETY

Much of the focus of Seifter's article is on the important role that civil society plays in the administrative process, creating the "monitory democracy" that characterizes much of modern American government.²⁴ Seifter says:

To constitute a plausible check on executive action, civil society must encompass individuals or groups who consider themselves independent of, and who are inclined to question, the executive. This must include some groups often called 'public interest' groups--those that can be classified as pursuing the interests of a diffuse public, on either side of the partisan aisle." Seifter recognizes that civil society embraces a broad range of interests groups, including "particular constituencies, corporate entities, or levels of government," plus those that "pursue advocacy based on issues or causes."²⁵

Seifter acknowledges that there has been a significant uptick in lobbying at the state level,²⁶ which tracks the increase over the same time in state administrative authority.²⁷ Seifter complains of a "bias towards business" in lobbying, a problem she believes is more acute in the states.²⁸ Yet, the evidence she cites does not actually show that business interests engage in a markedly greater proportion of overall lobbying at the State level versus the federal level.²⁹

23. Though others would characterize them as reducing the independence of nonpartisan career agency experts and increasing political control in response to special interests. See, e.g., Kathleen Vinehout, *REINS Act—New Power for Leaders to Stop Public Protections*, KATHLEEN VINEHOUT PEOPLE FIRST, https://www.kathleenvinehout.org/_reins_act_new_power_for_leaders_to_stop_public_protections [https://perma.cc/G5GW-56TX].

24. Seifter, *supra* note 1, at 116.

25. *Id.* at 119.

26. *Id.* at 136.

27. See Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017) (documenting growth in state administration).

28. *Id.* at 137–38 (citing Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006)).

29. *Id.* at 138 (indicating 86% business lobbying at state level versus 75–84% at federal level).

More importantly, Seifter's account simplistically treats "business interests" as monolithic.³⁰ She fails to appreciate the fact that business interests are often opposed to one another in regulatory fights.³¹ To pick one recent example from Wisconsin, a coalition of medical providers has been duking it out with a coalition of trade associations over workers compensation rates.³² In another instance, tourism interests and the realtors are facing off against agricultural groups over high-capacity wells.³³ And in the alcoholic beverage sphere, there are constant fights between different business sectors ("tiers"), including the taverns, vineyards, craft brewers, macrobrewers, distillers, restaurants, gas stations and grocers, wholesalers, and even farm groups (because of wedding barns).³⁴

Other times battles break out over rules within a governing coalition even if not within the business coalition. Wisconsin recently witnessed a significant back-and-forth between public-safety groups (especially the fire chiefs) and the homebuilders association over sprinklers in apartment buildings.³⁵ In many other instances, especially around occupational

30. *Id.* (referring several times to "business-oriented" lobbying).

31. See, e.g., James Hohmann, *The U.S. Chamber Wants To Disentangle Its Brand From The GOP And Hopes To Rebuild The Center*, WASH. POST (April 25, 2019), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2019/04/25/daily-202-the-u-s-chamber-wants-to-disentangle-its-brand-from-the-gop-and-hopes-to-rebuild-the-center/5cc08e551ad2e52459e24671/?utm_term=.eb2e0243c083 [<https://perma.cc/TDB3-P7CL>] (reporting on a disagreement between the Koch network and the U.S. Chamber of Commerce over infrastructure policy).

32. See Laurel White, *Medical Society, Business Group Clash Over Proposed Workers' Compensation Changes*, WIS. PUBLIC RADIO (Oct. 3, 2017) <https://www.wpr.org/medical-society-business-group-clash-over-proposed-workers-compensation-changes> [<https://perma.cc/66WB-SFBB>]; *Without Government Fee Schedule, Work Comp Rates Drop 8.46%*, WIS. HOSPITAL ASS'N (Oct. 2, 2017) <https://www.wha.org/WisconsinHospitalAssociation/media/WHANewsLetters/2017PDF/nr10-2-17workerscomp.pdf> [<https://perma.cc/YN6Y-BCFD>] (joint press release by Wisconsin Hospital Association, Wisconsin Chiropractic Association, Wisconsin Medical Society and the Wisconsin Physical Therapy Association); *WMC Launches Coalition of 46 Employer Associations to Support Worker's Compensation Medical Cost Containment*, WIS. MNFGS. & COMMERCE, (Sept. 27, 2017) <https://www.wmc.org/news/press-releases/wmc-launches-coalition-of-46-employer-associations-to-support-workers-compensation-medical-cost-containment/> [<https://perma.cc/U5YS-EY6L>].

33. *2015 Assembly Bill 874*, WIS. ETHICS COMM'N: EYE ON LOBBYING, <https://lobbying.wi.gov/What/BillInformation/2015REG/Information/13373>; *2015 Senate Bill 239*, WIS. ETHICS COMM'N: EYE ON LOBBYING <https://lobbying.wi.gov/What/BillInformation/2015REG/Information/12244> [<https://perma.cc/VX6Q-EW6Y>].

34. See, e.g., Justin Kendall, *Wisconsin Brewers, Wholesalers At Odds Over Proposed Changes to Alcohol Laws*, BREWBOUND (June 7, 2017), <https://www.brewbound.com/news/wisconsin-brewers-wholesalers-odds-proposed-changes-alcohol-laws> [<https://perma.cc/573D-XVQE>].

35. Jessie Opioen, *Wisconsin Fire Officials Ask Gov. Walker to Adopt Proposed Safety Measures*, CAPITAL TIMES (Feb. 13, 2017), <https://madison.com/ct/news/local/govt-and-politics/election-matters/wisconsin-fire-officials-ask-gov-walker-to-adopt-proposed>

licensing (which Seifter mentions³⁶), center-right free-market groups clash with center-right trade associations over regulations that may fence out competition.³⁷

Seifter's account also misses two other critical civil society voices that often engage on regulatory matters—unions and academics—and underappreciates a third—local governments. Labor unions are active participants in the regulatory process.³⁸ Sometimes unions are guaranteed participation by law in state administrative bodies that affect them. The Wisconsin Worker's Compensation Council and Unemployment Insurance Advisory Council both have five seats reserved for organized labor and five seats reserved for management.³⁹ The State's apprenticeship advisory council has nine seats reserved for representatives of employees (equal to the number representing employers); seven of those are held by union representatives.⁴⁰ Unions may also speak out on administrative actions that impact their organization or members, either through front-

safety/article_778adbba-cffd-5e5f-870d-2496454aaa91.html [https://perma.cc/5VYZ-MGF3].

36. Seifter, *supra* note 1, at 166–68.

37. See, e.g., Jenni Bergal, *A License To Braid Hair? Critics Say State Licensing Rules Have Gone Too Far*, PEW: STATELINE (Jan. 30, 2015) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/30/a-license-to-braid-hair-critics-say-state-licensing-rules-have-gone-too-far> [https://perma.cc/35AW-25BJ].

38. Josh Bivens, et al., *How Today's Unions Help Working People*, ECONOMIC POLICY INSTITUTE (Aug. 24, 2017), available at <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/> [https://perma.cc/T2VJ-JR5W].

39. *Worker's Compensation Advisory Council Membership List*, STATE OF WIS. DEP'T OF WORKFORCE DEVELOPMENT <https://dwd.wisconsin.gov/wc/councils/wcac/wcacmembers.htm> [https://perma.cc/GV7J-Q22C]; *Unemployment Insurance Advisory Council (UIAC) Members*, WIS. DEP'T OF WORKFORCE DEVELOPMENT, <https://dwd.wisconsin.gov/uibola/uiac/members/> [https://perma.cc/L4M7-MD8C].

40. *Wisconsin Apprenticeship Advisory Council*, WIS. DEP'T OF WORKFORCE DEVELOPMENT, https://dwd.wisconsin.gov/apprenticeship/advisory_council.htm [https://perma.cc/A6DE-DDE3]. Other examples include the Wisconsin national and community service board and the Prison Industries Board. Wis. Stat. § 15.105(24)(c)6 (reserving one seat on the Service Wisconsin board for a representative of organized labor) and Wis. Stat. 15.145(2) (reserving three seats for representatives of private labor organizations).

end engagement in the rule development process⁴¹ or end-stage challenges through litigation.⁴²

University professors also often engage in a state's regulatory sphere. Professors may lend their expertise and experience by serving on state regulatory boards and commissions,⁴³ by providing trainings to agency staff,⁴⁴ by giving commentary in news media coverage of regulatory decisions,⁴⁵ by publishing academic or professional works on state regulations,⁴⁶ by supervising students engaged in the regulatory process as part of clinical education,⁴⁷ or by serving as consultants or volunteers with other civil society groups that file comments or litigation.⁴⁸ In many ways this is the "Wisconsin Idea" at work: the century-old tradition of Seifter's predecessors and colleagues as University of Wisconsin academics

41. See, e.g., *WNA Legislative and Regulatory Update April 13, 2018*, WIS. NURSES ASS'N (April 13, 2018), available at <https://wisconsinurse.wpengine.com/wp-content/uploads/2018/04/WNA-Legislative-and-Regulatory-Update-April-1.pdf>. (discussing nurses' union engagement with Wisconsin Nursing Board over proposed rules).

42. See, e.g., *Wisconsin Ass'n of State Prosecutors v. Wisconsin Employment Relations Commission*, 907 N.W.2d 425, 428 (two public employee unions file challenges to administrative rules and administrative actions of a state agency).

43. Sometimes this is as an appointee like Mount Mary University Professor Tammy Scheidegger, Chair of the Joint Board for Marriage and Family Therapy, Professional Counseling, and Social Work, Bruce Vielmetti, *The Wisconsin Senate Approved 82 Scott Walker Appointees in the Lame Duck: Here's the Full List*, MILWAUKEE J. SENTINEL, Dec. 5, 2018, available at <https://www.jsonline.com/story/news/politics/2018/12/05/lame-duck-session-81-walker-appointees-senate-approved/2214006002/> [<https://perma.cc/85MZ-SLDY>], and other times this is by law. E.g., WIS. SUPREME COURT RULE 30.01(1) (designating seats for faculty of the state's law schools on the Board of Bar Examiners).

44. Joanne M. Haas, *WDNR Wardens, State Patrol & University of Wisconsin Train Together to Assess Drone's Role in Investigations*, WIS. DEPT. OF NATURAL RESOURCES (Dec. 6, 2017), https://dnr.wi.gov/topic/WardenWire/WardenWire_Lookup.asp?id=470.

45. Hope Kirwan, *Environmental Law Experts Weigh In On DNR Lawsuit Over CAFO Permits*, WIS. PUBLIC RADIO (Aug. 7, 2017), <https://www.wpr.org/environmental-law-experts-weigh-dnr-lawsuit-over-cafo-permits> [<https://perma.cc/Z33A-7562>].

46. Paul Kent & Tamara Dudiak, *Wisconsin Water Law: A Guide to Water Rights and Regulations* (2d ed. 2001).

47. See *Clinical Programs*, UW L. SCH., <https://law.wisc.edu/clinics/> (listing clinics that may intersect with state administrative law issues such as the Center for Patient Partnerships, Consumer Law Clinic, Government and Legislative Clinic, and Neighborhood Law Clinic).

48. See, e.g., Scott Gordon, *Not All 'Waters Of The State' Are Alike In Wisconsin Law: High-Capacity Wells Lawsuits Hinge On Distinctions Between Surface and Groundwater*, WISCONTEXT (Oct. 25, 2017), <https://www.wiscontext.org/not-all-waters-state-are-alike-wisconsin-law> [<https://perma.cc/AS3Z-TQT8>] (quoting a UW Law Professor who is a board member of an environmental group that filed an amicus brief in a regulatory case).

applying their knowledge and research to the policy challenges of the day.⁴⁹

Seifter mentions local governments but does not focus on their role in a state's administrative bureaucracy.⁵⁰ Yet, local governments should be seen as vigorous participants in the regulatory process. Over half of the top twenty-five organizations lobbying in the Wisconsin legislature's 2015–17 regular session came from the local government sector, outpacing such expected heavy-weights as the restaurants, bankers, and state AFL-CIO.⁵¹ Moreover, local governments in many states (including Wisconsin) enjoy a constitutional right to home rule⁵² that can provide a basis to challenge statutes conferring regulatory powers on administrative agencies.⁵³

Finally, at least in Wisconsin, Seifter's account of traditional public-interest groups underestimates the vibrancy of their engagement. Wisconsin politics enjoys a healthy diversity of organizations, including environmental groups and general public-interest groups. Among the 758 organizations that logged lobbying expenditures in the Wisconsin legislature's 2015 regular session, seven of the top 250 were environmental groups and seven more were general public-interest

49. See *The Wisconsin Idea*, U. WISCONSIN-MADISON, <https://www.wisc.edu/wisconsin-idea/> [<https://perma.cc/GFX9-8294>] (“[UW President Charles Van Hise] also took advantage of his friendship with Governor Robert M. La Follette, a former classmate at the university, to help forge closer ties between the university and state government; during the early part of the 20th century, faculty experts consulted with legislators to help draft many influential and groundbreaking laws, including the nation’s first workers’ compensation legislation, tax reforms and the public regulation of utilities.”).

50. See Seifter, *supra* note 1, at 110, 119 (mentioning state agencies’ “complex relationships with local governments” and listing “groups . . . representing levels of government” as part of civil society).

51. Wis. Counties Assn. (#4), City of Milwaukee (#7), Wis. Assn. of School Boards (#9), League of Wis. Municipalities (#10), Wis. Assn. of School Business Officials (#11), Wis. Assn. of Towns (#12), Wis. Council for Administrators of Special Services (#13), Wis. Assn. of School Administrators (#14), Wis. Assn. of School Personnel Administrators (#15), Wis. Assn. of School District Administrators (#16), Outagamie County (#18), Milwaukee Public Schools (#23), and Milwaukee County (#24). The other three came in at numbers 26, 27, and 28: Wis. Restaurant Assn., Wis. Bankers Assn., and Wis. State AFL-CIO. , *2015 Regular Session: Total Lobbying Expenditures*, WIS. ETHICS COMM’N (sorted by total hours), <https://lobbying.wi.gov/Reports/Report.aspx?ReportPath=/GAB/Lobbying/Public&ReportName=TotalLobbyingExpenditures&SessionID=2015REG&SortField=TotalHours&OutputFormat=PDF> [<https://perma.cc/G2G4-27FT>].

52. WIS. CONST. art. XI, § 3(1).

53. See, e.g., *Adams v. State Livestock Facilities Siting Review Bd.*, 820 N.W.2d 404 (Wis. 2012) (deciding a case based on a town’s defense of its zoning ordinance on home-rule grounds).

organizations.⁵⁴ In fact, the Wisconsin League of Conservation Voters engaged in more lobbying than the Wisconsin Farm Bureau Federation last session.⁵⁵ Moreover, these levels of lobbying occurred during unified Republican control of the governorship and both legislative houses, which may have led some organizations to focus their energy on litigation or other venues more conducive to advancing their goals. As Democrats have now captured the governorship or if in the future legislative majorities shifted, the center-left organizations would likely focus more resources on lobbying.⁵⁶ This state-level engagement in Wisconsin reflects a national trend wherein left-leaning philanthropists are increasingly investing resources in state-focused advocacy groups.⁵⁷

All of this, in my view, adds up to a state-level civil society that is vigorously engaged in the administrative law process, ensuring that a wide range of viewpoints are considered as government goes about its work formulating rules and issuing permits.

III. NEWS MEDIA

Seifter's final component of a successful accountability ecosystem is a vigilant press corps to "amplify and publicize" administrative actions, especially failures, and to ring loudly alarm bells set off by civil society.⁵⁸ Seifter correctly diagnoses that state and local coverage has contracted due

54. See *2015 Regular Session: Total Lobbying Expenditures*, WIS. ETHICS COMM'N, available at <https://lobbying.wi.gov/Reports/Report.aspx?ReportPath=/GAB/Lobbying/Public&ReportName=TotalLobbyingExpenditures&SessionID=2015REG&SortField=TotalHours&OutputFormat=PDF> [<https://perma.cc/J2WK-Y7Y4>]. Environmental: Wis. League of Conservation Voters, Wis. Wildlife Federation, Clean Wis., Rivers Alliance of Wis., Wis. Assn. of Lakes Inc., The Nature Conservancy, Gathering Waters: Wis. Alliance for Land Trusts, General public interest: AARP, Citizen Action of Wis., Legal Action of Wis., Wis. Community Action Program Association, Common Cause in Wis., Wis. Democracy Campaign, Wis. Council on Children and Families.).

55. WLCV (#17), WFBF (#21).

56. Charles S. Bullock, III and Karen Padgett, *Partisan Change and Consequences for Lobbying: Two-Party Government Comes to the Georgia Legislature*, 39 STATE & LOCAL GOV'T REV. 61 (2007) (tracking how lobbying expenditures fluctuate based on the party in power).

57. Matea Gold, *Wealthy Donors on Left Launch New Plan to Wrest Back Control in the States*, WASH. POST (April 12, 2015) https://www.washingtonpost.com/politics/wealthy-donors-on-left-launch-new-plan-to-wrest-back-control-in-the-states/2015/04/12/ccd2f5ee-dfd3-11e4-a1b8-2ed88bc190d2_story.html; see also Andy Kroll, *This Is the Left's Confidential \$100 Million Plan to Win Back the States*, MOTHER JONES (Nov. 14, 2014) <https://www.motherjones.com/politics/2014/11/committee-on-states-democracy-alliance-redistricting-2020/> [<https://perma.cc/BF8Q-VQFB>].

58. Seifter, *supra* note 1, at 141.

to larger trends in the newspaper industry.⁵⁹ Though her article is a comparison between state and federal administration, she fails to note that size of the press corps focused on monitoring the federal government has evolved as well, with many state and local newspapers dropping their D.C. bureaus.⁶⁰

Most importantly, Seifter fails to consider the substantial interest of political opponents and news media in any scandal that can develop around a state executive's administrative actions.⁶¹ With the increase in gubernatorial administration comes a corresponding increase in political accountability for administrative acts.⁶² One form of political accountability is the aggressive engagement of partisan groups and legislators with partisan motives. For instance, in 2018, Wisconsin's superintendent of public instruction was a candidate for governor.⁶³ A key issue in the race centered on administrative decisions the superintendent made to not withdraw the licenses of teachers accused of immoral conduct.⁶⁴ Several weeks later, the *Milwaukee Journal Sentinel* reported on the failure of the incumbent governor's administration to withdraw professional licenses of Catholic priests with histories of sexual abuse.⁶⁵ In both cases, after the initial news reports legislators or advocacy groups piled on with their own loud denunciations.⁶⁶ These stories illustrate the

59. *Id.*

60. Margaret Sullivan, *Washington-Based Regional Journalism Is Crucial. It's Also In Serious Trouble*, WASH. POST (March 14, 2019), https://www.washingtonpost.com/lifestyle/style/washington-based-regional-journalism-is-crucial-its-also-in-serious-trouble/2019/03/14/431c65be-45a6-11e9-8aab-95b8d80a1e4f_story.html?utm_term=.f656ccf5e89f [<https://perma.cc/B22J-CLE5>].

61. *See* Seifter, *supra* note 1, at 141–42.

62. *See id.* at 133.

63. *Meet Tony*, TONY EVERS, <https://tonyevvers.com/meet-tony/> [<https://perma.cc/G5AN-X958>].

64. Matt Defour, *DPI Hasn't Revoked Teacher's License In 1 Out Of 5 Immoral Conduct Cases*, WIS. STATE J. (Aug. 24, 2018), https://madison.com/wsj/news/local/govt-and-politics/dpi-hasn-t-revoked-teacher-s-license-in-out-of/article_3dff3633-42c8-580b-894d-d546c7e0aab4.html [<https://perma.cc/G4U4-CBGR>] (reporting on research disclosures and advertising by the Republican Party of Wisconsin); Laurel White, *Walker Campaign Doubles Down, Attacks Evers On Teacher License Case: Governor's Campaign Launches Its First Attack Ad of Election Cycle*, WIS. PUBLIC RADIO (Sept. 5, 2018), <https://www.wpr.org/walker-campaign-doubles-down-attacks-evvers-teacher-license-case> [<https://perma.cc/5LMR-7TLC>] (reporting on TV ad by opponent's campaign).

65. Dan Bice, *Four Pedophile Ex-Priests Had Their Professional Licenses Granted Under Gov. Scott Walker's Administration*, MILWAUKEE J. SENTINEL (Nov. 2, 2018), <https://www.jsonline.com/story/news/investigations/daniel-bice/2018/11/02/four-defrocked-priests-had-professional-licenses-renewed-awarded-under-walker/1856197002/> [<https://perma.cc/VXZ9-W6EZ>].

66. Jessie Opioen, *Republican Leaders Say Tony Evers Didn't Take Lead On Bill To Punish Problem Teachers*, CAPITAL TIMES (Sept. 5, 2018), https://madison.com/ct/news/local/govt-and-politics/election-matters/republican-leaders-say-tony-evvers-didn-t-take-lead-on/article_d7f42689-38fd-5834-9fdc-ee9fcb484028.html

fundamental reality that the news media will regularly report on administrative decisions, not because an experienced statehouse reporter sits in on every advisory committee meeting, but because partisan interests are anxious to pounce at any vulnerability.

IV. LEGISLATIVE OVERSIGHT

Though she focuses on forces external to government (i.e., civil society and media), Seifter also includes a brief discussion of legislative oversight of agency rule-making.⁶⁷ She acknowledges that legislatures may play a role in oversight, but concludes that they will do less agency oversight than Congress.⁶⁸ She fails to mention that unlike Congress, many legislatures have dedicated committees focused on administrative rules. Many states have some process to review administrative rules—thirteen states have a scheme similar to the Congressional Review Act and an additional eleven have a two-house veto.⁶⁹ As of 2005, almost all states had an independent legislative agency cognate to the federal Government Accountability Office (GAO) to investigate administrative failures.⁷⁰ But unlike the federal government, many legislatures also have a dedicated joint committee to review administrative rules.⁷¹

In Wisconsin, the Joint Committee on Review of Administrative Rules (JCRAR) reviews all final rules promulgated by agencies and has the power to suspend any rule by majority vote.⁷² It may require an agency to hold a public comment period on a proposed rule,⁷³ require that informal guidance documents go through the rules process if they are sufficiently substantive,⁷⁴ and (through its cochairs) request an second, independent

[<https://perma.cc/VZP4-JDNG>]; *Scott Walker Gave Pedophile Ex-Priests Professional Licenses: Breach in Public Safety Overseen By Scott Walker Puts Sex Predators In Positions Where They Could Strike Again*, ONE WIS. NOW (Nov. 2, 2018), <https://onewisconsinnow.org/press/scott-walker-gave-pedophile-ex-priests-professional-licenses/>.

67. Seifter, *supra* note 1, at 144–45.

68. *Id.*

69. See “Separation Of Powers—Legislative Oversight,” NAT. CONF. OF STATE LEGIS., <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-legislative-oversight.aspx> [<https://perma.cc/TV2E-JMVC>].

70. ROBERT D. BOERNER, NAT’L CONFERENCE OF STATE LEGISLATURES LEGISBRIEF, LEGISLATIVE OVERSIGHT IN THE STATES (2005).

71. See *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 HARV. L. REV. 613, 623–24 (2017); see generally SBA OFFICE OF ADVOCACY, RESEARCH ON STATE REGULATORY FLEXIBILITY ACTS, MICROECONOMIC APPLICATIONS, INC., FOR THE SMALL BUSINESS ADMINISTRATION, (2013).

72. Wis. Stat. § 227.26(2)(d) (2017–18).

73. *Id.* § 227.26(3).

74. *Id.* § 227.26(2)(b).

economic impact analysis of any rule.⁷⁵ These powers are more than theoretical; though it has a Republican majority, the committee recently voted to suspend a major natural resources rule that was a highly visible initiative of the state's Republican governor.⁷⁶

Additionally, the Wisconsin Supreme Court recently fundamentally changed its doctrine on judicial deference to agency decision-making.⁷⁷ Under federal jurisprudence, agencies are entitled to deference during judicial review of their interpretation of statutes (*Chevron* deference)⁷⁸ and of agency rules (*Auer* deference).⁷⁹ For decades, Wisconsin courts have followed a similar scheme, granting deference to agencies based on their supposed expertise on the statutes and rules they administer.⁸⁰ However, in June 2018 the Wisconsin Supreme Court overturned its prior doctrine in a trio of cases, significantly curtailing the deference given agencies.⁸¹ Thus, litigants challenging an agency's rule or administrative action in Wisconsin courts are entitled to a much greater level of judicial scrutiny than an applicant filing an analog suit in federal court.

The implications of legislative and judicial checks on executive action run to the heart of Seifter's arguments. Even if one granted Seifter's premise that external checks are less robust at the state level, one would still need to assess the comparative internal checks before deciding whether federal or state administration was superior. Indeed, the internal checks that come from the separation of powers are the primary means of controlling the executive branch. To the extent those checks function better at the state level (such as this vigorous legislative and judicial oversight), deficiencies in the external checks that Seifter identifies may ultimately be immaterial.

CONCLUSION

In the American constitutional order, the federal government possesses limited, enumerated powers, whereas the state governments have general police powers to protect the health, welfare, and safety of

75. *Id.* § 227.137(4m).

76. Danielle Kaeding, *Rules Committee Scraps Provision Restricting Movement Of Harvested Deer: Committee Votes To Keep Additional Deer Farm Fencing Requirement*, WIS. PUBLIC RADIO (Oct. 1, 2017), <https://www.wpr.org/rules-committee-scraps-provision-restricting-movement-harvested-deer> [https://perma.cc/EGS9-FN3F].

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

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

79. *Auer v. Robbins*, 519 U.S. 452 (1997).

80. See Daniel R. Suhr, *Interpreting Wisconsin Administrative Law* (2017), available at <https://ssrn.com/abstract=3025085>.

81. *Tetra Tech*, 914 N.W.2d 21; *Wis. Bell, Inc. v. Labor & Indus. Review Comm'n*, 914 N.W.2d 1 (Wis. 2018); *Dep't of Workforce Dev. v. Labor & Indus. Review Comm'n*, 914 N.W.2d 625 (Wis. 2018).

their citizens.⁸² It is entirely appropriate, then, that states are primarily responsible for issuing and enforcing the regulations that put those powers into effect. Seifter's concerns that states will fail in this duty are overstated in Wisconsin. In fact, civil society is robust at the state level, and these actors have the tools they need to meaningfully influence the administrative rules process. Moreover, legislative and judicial checks may be more meaningful at the state level, providing additional accountability for the executive.

All that said, I can happily embrace Seifter's conclusion. We should desire and expect vigorous civil society in the states, and though I believe that goal is already actualized more than she does, and thus that "the most sacred arguments in favor of state power" are vindicated, I would also happily see "more dollars and attention [given] to the states that govern us."⁸³ Her article and this response are hopeful contributions toward that shared goal.

82. See *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906) ("[T]he police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.").

83. Seifter, *supra* note 1, at 174.