

# THE **Federalist** PAPER

THE MAGAZINE OF THE FEDERALIST SOCIETY • FEDSOC.ORG



Summer 2020

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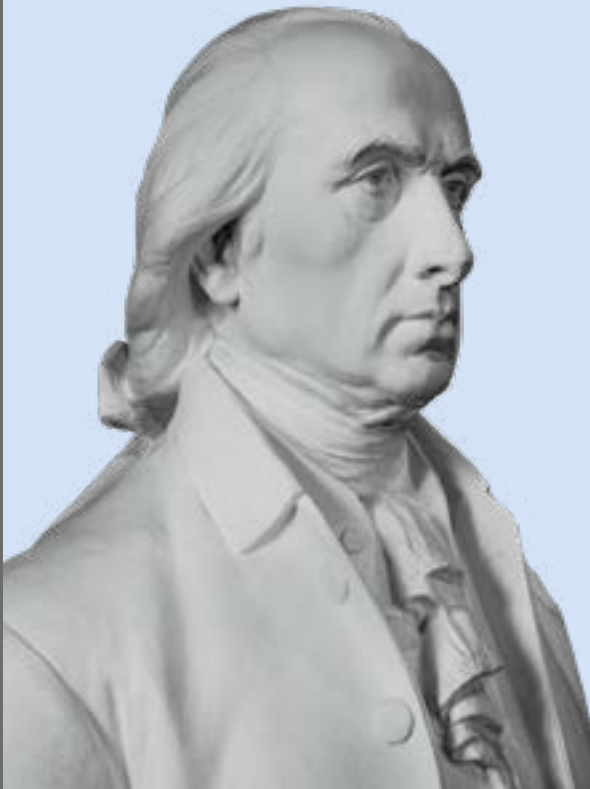
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“The courts must declare the sense of the law; and if they should be disposed to exercise **will** instead of **judgment**, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

**Federalist No. 78**



# EDITOR'S LETTER



The Federalist Society's Daniel Richards, VP and Director of Digital, and Gene Meyer, President, produce and watch the 2020 National Student Symposium webinar panels, which took place after large gatherings were cancelled but before the office was closed.

## Dear Friend,

COVID-19 has upended the Federalist Society's activities and plans, just as it has yours. Conferences and other events have been cancelled, and we've moved our content and interactions online to a greater degree than ever. Still, we have been very active with online programming, as this issue shows, and our audiences have been bigger than ever. Additionally, we are conducting a major virtual symposium on **COVID and the Law** June 11-12. We're grateful for the opportunity to stay in touch with members like you, and to keep you connected with other law students, lawyers, and law professors who are interested in current legal happenings and timeless constitutional principles.

Under normal circumstances, this issue would have featured a photograph of the National Student Symposium on its cover. Unfortunately, despite excellent planning by the leaders of the Michigan Student Chapter, the symposium was cancelled. Our Digital team made it possible to hold several of the planned panels online; find recordings at [youtube.com/thefederalistsociety](https://youtube.com/thefederalistsociety). See the Student Division page for pictures of student chapters that won Freddie Awards and the Faculty Division page for a profile of Prof. Stephen E. Sachs, who won the Joseph Story Award.

The Colorado Lawyers Chapter managed to host an event with Justice Neil Gorsuch before COVID-19 hit, and you can see photos from that event on the Lawyers Chapters page. Our Practice Groups had planned a great Executive Branch Review Conference that turned into Executive Branch Review Week, a series of video panel discussions and teleforum conference calls about important issues involving the executive branch. Watch the videos on our YouTube page, and listen to podcast recordings of the teleforums.

As always, the Article I Initiative and Regulatory Transparency Project have been actively producing videos, podcasts, and papers. Our Digital team is putting out some great videos, and External Relations is rebooting the State Court Docket Watch series. See inside for some of our new online resources, all of which are available at [fedsoc.org](https://fedsoc.org).

We hope you enjoy this issue of the **Federalist Paper**. Please send any comments to us at [info@fedsoc.org](mailto:info@fedsoc.org). We hope you are staying well, and we look forward to hearing from you!

Katie McClendon  
*Director of Publications*

# STUDENT DIVISION



The UVA Chapter received two Feddie Awards: the Sam Adams Award for Membership Growth and the James Madison Award for Chapter of the Year.



The Scalia Law Chapter received the Alexander Hamilton Award for Most Improved Chapter.



The Illinois Chapter received the Thomas Paine Award for Creative Publicity.



The Fordham Chapter met Hon. Nikki Haley.



DC Circuit Judge Greg Katsas spoke at the Notre Dame Chapter.



Prof. Nadine Strossen spoke at an event hosted by the Marquette Chapter.

## National Student Symposium

February 26-27, 2021

Philadelphia, PA

Hosted by Penn Law

Theme: International Law & U.S. Foreign Policy

50% travel scholarships available

Pre-COVID-19 Student Chapter Events

# LAWYERS CHAPTERS



The Colorado Lawyers Chapters hosted Supreme Court Justice Neil M. Gorsuch for a conversation about his new book, **A Republic, If You Can Keep It**, moderated by Judge Timothy Tymkovich of the Tenth Circuit.

Lawyers Chapters around the country are doing lots of Zoom meetups and discussions. Keep an eye out for events happening in your local chapter!

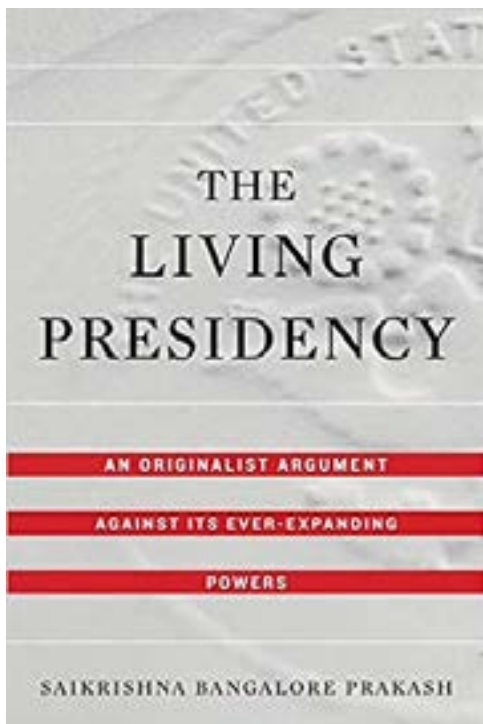
*Save the Date*

## 6th Annual Texas Chapters Conference

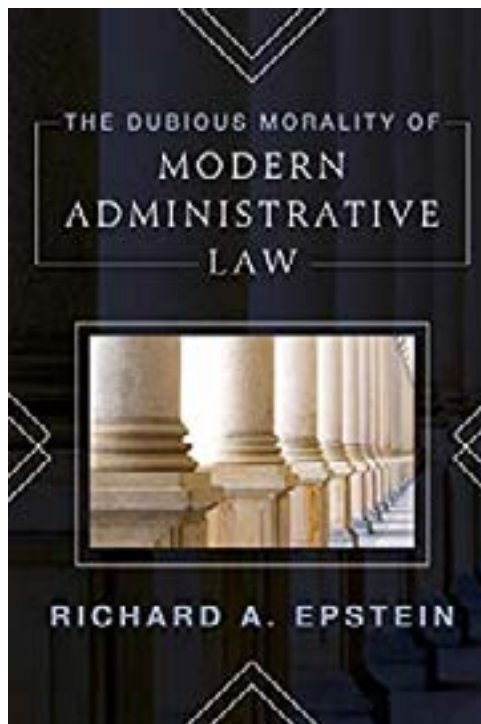
September 25-26, 2020 • Houston, Texas

# FACULTY DIVISION

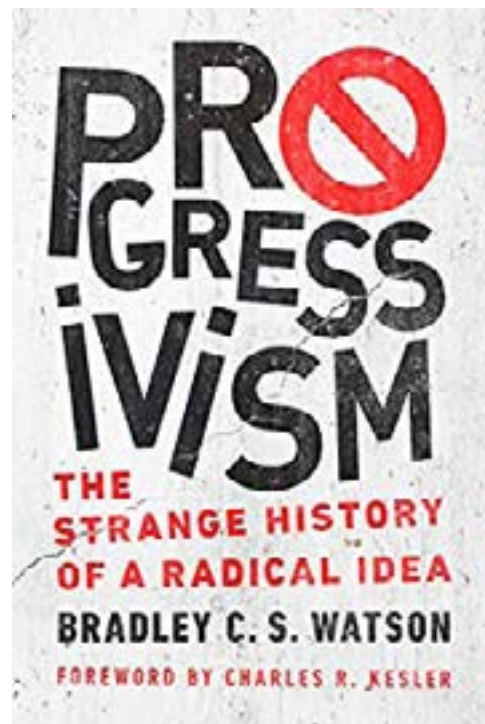
## New Books By Academics



Harvard University Press (Belknap)



Rowman & Littlefield/Manhattan Institute



University of Notre Dame Press

## 2020 Joseph Story Award

The Joseph Story Award is the successor to the Paul M. Bator Award, and is given annually to a young academic (40 and under) who has demonstrated excellence in legal scholarship, a commitment to teaching, a concern for students, and who has made a significant public impact in a manner that advances the rule of law in a free society.

2020 Story Award Chair Brendan Anderson was delighted to present the 2020 Story Award to Prof. Stephen E. Sachs of Duke Law School: “Prof. Sachs meets and exceeds all of the qualifications for this award. His scholarship on originalism, legal interpretation, and civil procedure is illuminating, insightful, and willing to challenge conventional academic attitudes. He has done seminal work reconceptualizing originalism as a rule of legal change and reinvigorating the notion that judges can and do find law rather than make it.” His articles have appeared in leading publications, including the *Yale Law Journal*, the *Harvard Law Review*, and the *University of Pennsylvania Law Review*, as well as top specialty journals.

Professor Sachs is moreover admired by his students, who appreciate his engaging teaching style. One remarked that “his exams were genuinely enjoyable to read.” Another said, “He is clearly a brilliant scholar, but I was impressed by how clearly he is able to articulate complicated legal concepts.” And outside of the classroom, Prof. Sachs is known to be very generous in making himself available for student questions and discussion.

“I’m particularly honored to receive this award,” Prof. Sachs noted in his acceptance speech, “because it shows something very special about Fed Soc, something that’s unfortunately in diminishing supply today. When I was a student, I wasn’t sure about joining Fed Soc. I was still figuring out what I thought about things; I would never have attended one of these symposia, and I would never have expected to receive an award like this one. But one of Fed Soc’s true advantages, and the point I want to leave you with tonight, is that this openness, this willingness to bring people in to think things through and get to better answers, is its extraordinary strength.”

Sachs concluded: “In an age when disagreement is often treated like disloyalty, and when curiosity is often confused with cowardice, a commitment to open discussion and truth is like water in the desert.” Read more at <https://fedsoc.org/joseph-story-award>.



Prof. Stephen E. Sachs

*Ordinarily the Story award is presented at the Student Symposium banquet. Because the symposium was held virtually this year, the presentation this year was also virtual.*

# PRACTICE GROUPS



The Federalist Society's Practice Groups present

## EXECUTIVE BRANCH REVIEW WEEK

April 27 – May 1, 2020

[fedsoc.org/ebr8](https://fedsoc.org/ebr8) • #ebr8

### Webinar Panels

Restoring the Executive Power:  
Revisiting *Humphrey's Executor*,  
Reviving the Unitary Executive

- Hon. W. Neil Eggleston, Partner, Kirkland & Ellis LLP, and former White House Counsel
- Hon. Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice
- Mr. Jesse Panuccio, Partner, Boies Schiller Flexner LLP, and former Acting Associate Attorney General, United States Department of Justice

Restoring Judicial Power: Righting the  
Ship of Judicial Review and Deference  
Doctrines

- Hon. Ronald A. Cass, Dean Emeritus, Boston University School of Law and President, Cass & Associates, PC
- Prof. Kristin E. Hickman, Distinguished McKnight University Professor, Harlan Albert Rogers Professor in Law, University of Minnesota Law School
- Prof. Sally Katzen, Professor of Practice and Distinguished Scholar in Residence; Co-Director of the Legislative and Regulatory Process Clinic, NYU School of Law
- Dean Alan B. Morrison, Lerner Family Associate Dean for Public Interest and Public Service Law; Professorial Lecturer in Law, George Washington U. Law School
- Hon. Beth A. Williams, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice

Restoring the Legislative Power to  
Congress: The Role of the Nondelegation  
Doctrine and Legislative Vetoes

- Prof. Jack Beermann, Harry Elwood Warren Scholar and Professor of Law, Boston University Law School
- Prof. Michael B. Rappaport, Hugh and Hazel Darling Foundation Professor of Law; Director, Center for the Study of Constitutional Originalism, U. San Diego Law
- Prof. David S. Schoenbrod, Trustee Professor of Law, New York Law School
- Prof. Christopher J. Walker, Professor of Law; Director, Washington, D.C., Summer Program, The Ohio State University Moritz College of Law
- Moderator: Mr. Thomas G. Hungar, Partner, Gibson, Dunn & Crutcher LLP

### Teleforum Discussions

Nationwide Injunctions

- Hon. Scott Keller, Partner, Baker Botts LLP
- Hon. Ken Paxton, State Attorney General, Texas
- Hon. Beth A. Williams, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice

The Unitary Executive & Independent  
Agencies

- Prof. William Buzbee, Georgetown U. Law Center
- Hon. Daniel Gallagher, WilmerHale and former SEC Comm'r
- Hon. Maureen Ohlhausen, Baker Botts and former FTC Comm'r
- Prof. David Vladeck, Georgetown U. Law Center, former Director of the FTC's Bureau of Consumer Protection

Federalism, COVID-19, & the Admin. State

- John G. Malcolm, Vice President, Institute for Constitutional Government, The Heritage Foundation
- Prof. John C. Yoo, UC Berkeley School of Law

Executive Orders on Guidance: Implications  
and Next Steps

- Hon. Steven Bradbury, GC, U.S. Dep't of Transportation
- John Walke, Director, Clean Air Project, Climate & Clean Air Program, Natural Resources Defense Council
- Prof. Adam White, Antonin Scalia Law School

Regulating by Consent Agreement:  
Examining FTC's YouTube Settlement

- Jessica Rich, Institute for Technology Law & Policy, Georgetown Law
- Sean Royall, Partner, Kirkland & Ellis
- Gerard Stegmaier, Partner, Reed Smith
- Neil Chilson, Senior Research Fellow for Technology and Innovation, Charles Koch Institute (moderator)

COVID Liability Issues

- Christopher M. Carr, Attorney General, State of Georgia
- Harold Kim, President, U.S. Chamber of Commerce Institute for Legal Reform

Address by Hon. Paul J. Ray,  
Administrator of the Office of  
Information & Regulatory Affairs

Visit [fedsoc.org](https://fedsoc.org) to listen to recordings of these events.

## New at the Regulatory Transparency Project



### Papers

Putting the Public Back In “Public Interest” in Patent Law

*Hon. Paul R. Michel, Adam Mossoff (Chair), Kristen Osenga, Brian O’Shaughnessy, Hon. Randall Rader*

Competitor’s Veto: State Certificate of Need Laws Violate State Prohibitions on Monopolies

*Christina Sandefur*

Promoting a More Adaptable Physician Pipeline

*James C. Capretta*



### Videos



**Government Surveillance: Security v. Liberty?**

*Faisal Gill, Matthew R. A. Heiman, Julian Sanchez*



### Podcasts

Driverless Cars and Artificial Intelligence

*Adam Thierer, Caleb Watney*

A Recipe for A Better World: Nine Parts Innovation, One Part Regulation

*Jeff Stier*

Certificate of Need Laws and Healthcare Access

*Christina Sandefur, Josh Windham*

Regulatory Reforms & the COVID Pandemic

*David A. Hyman, Roger D. Klein, Shoshana Weissmann*

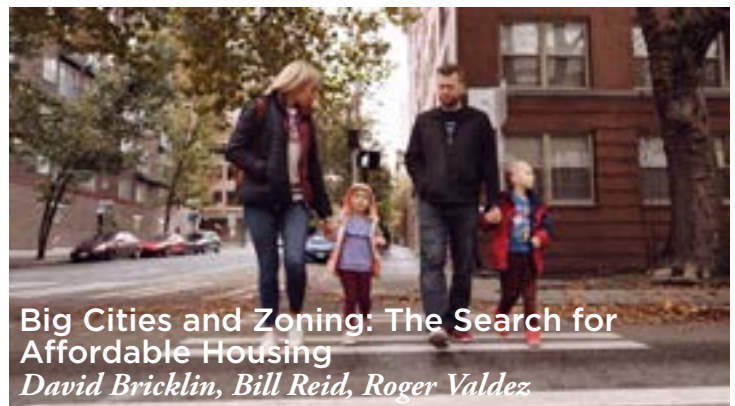
Litigation Update: Neora v. FTC

*Deborah Heisz, Ed Burbach*



**Does Federal Permitting Under the National Environmental Policy Act Need Reform?**

*James W. Coleman*



**Big Cities and Zoning: The Search for Affordable Housing**

*David Bricklin, Bill Reid, Roger Valdez*



Learn more at [regproject.org](https://regproject.org).



# ARTICLE I

New at the  
**Article I Initiative**



## The Nondelegation Doctrine: Intelligible Principle or Unworkable Standard?

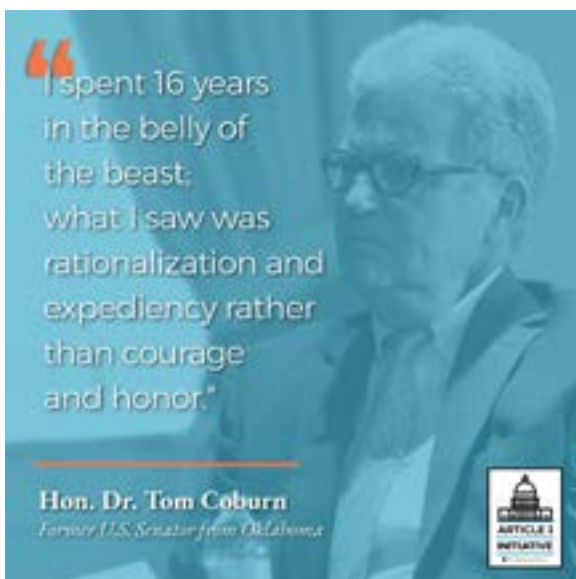
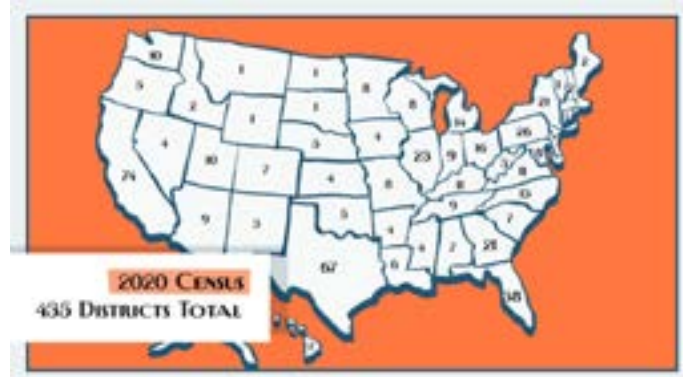
Our esteemed writing contest judges, Prof. Lillian BeVier, Hon. C. Boyden Gray, and Hon. Chris DeMuth, recently selected the winning entry from Mike Jayne, an attorney at the U.S. Department of Education. The excellent piece is titled, *As Far As Reasonably Practicable: Reimagining the Role of Congress in Agency Rulemaking*.

**Abstract:** This paper argues that the nondelegation doctrine is in need of resuscitation. It argues for adoption of a new, “as far as reasonably practicable” standard, first articulated in the lesser-known case of *Buttfield v. Stranahan*, and for effectuating that standard with the application of statutory construction principles, like the major questions doctrine, to issues of nondelegation. The practical effects of this approach would be a judiciary more faithfully policing the constitutional separation of powers and spurring Congress to govern more responsibly. With the assistance of a revamped CBO, and informed by the examples of British Columbia and Idaho, Congress should take a greater role in generating regulations by establishing legislative impact accounting of proposed bills, institutionalizing the Congressional Review Act, and implementing the twin reforms of regulatory budgeting and retrospective review.

The full paper is available in the current volume of the *Federalist Society Review*, which you can read at [fedsoc.org/commentary/publications](https://fedsoc.org/commentary/publications).

## Should We Change the Size of Congress?

The Initiative recently released a mini-documentary video on the size of the U.S. House of Representatives. The video presents a balanced discussion and asks: How are Congressional seats allotted to the various states? Why has the total number of seats remained the same, despite the population growth of the United States? Former Representative Martin Frost, Professor Derek Muller, and Professor Keith Whittington joined us to explain the size and structure of the House of Representatives as it exists today and as envisioned by the Founders. These experts also discuss the pros and cons of expanding the size of the House, including repercussions for the Electoral College. The video can be viewed at [articleiinitiative.org](https://articleiinitiative.org).



## Highlights from Sen. Tom Coburn

In Episode 56 of the *Necessary & Proper* podcast, we look back to the late Dr. Tom Coburn’s panel discussion from the 2015 National Lawyers Convention. The panel was titled, *Agency Rule: How Congress Can Reclaim its Legislative Authority?* The former Senator Coburn spoke about a range of topics, including congressional leadership, limited government, federal debt, and the importance of debate. His full remarks can be heard on the *Necessary & Proper* podcast or at [articleiinitiative.org](https://articleiinitiative.org).

# DIGITAL

## No. 86 Lecture Series

How well do you know the Constitution? In a new audio lecture series, we go into depth on all things Constitutional Law. Leading law professors share their knowledge and expertise outside of the traditional classroom.

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- **Understanding the Constitution: What Kind of Document is it?** with Prof. Gary Lawson
- **How does the Constitution protect individual rights?** with Prof. Randy Barnett
- **Understanding federalism in the context of the US Constitution** with Prof. Steven Calabresi

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Stay tuned for more Constitutional Law content, and a series on the Common Law, coming later this year.



## State Court Docket Watch

### *Indiana Department of Natural Resources v. Kevin Prosser*

By Aaron Nielson

If you are like most people, when you hear the words “administrative law,” you think about big buildings in Washington D.C. where everyone wears suits and speaks in acronyms. Your mind probably does not turn a property owner seeking to install 117 feet of concrete seawall on Lake Manitou in Rochester, Indiana. Yet administrative law is everywhere, including on the shore of Lake Manitou.

On February 24, 2020, the Indiana Supreme Court denied review in *Indiana Dep’t of Natural Resources v. Prosser*, a case about concrete seawall. The legal issue in Prosser is a familiar one in administrative law: What does “substantial evidence” review require?

In 2015, Kevin Prosser needed a permit under state law to install a concrete seawall on his property. After the permit was denied, Mr. Prosser sought review from an administrative law judge (“ALJ”). The ALJ concluded that because Mr. Prosser’s property is not “developed,” it is subject to special requirements, including that a seawall must be built with bioengineered materials. Mr. Prosser argued, however, that the area is developed. Both sides agreed that the relevant area had been excavated in 1947. The question was whether that excavation “result[ed] in an increase in the total length of shoreline around the lake.” According to Mr. Prosser, the shoreline was extended, and he had two eyewitnesses (who were children at the time) to prove it. Aerial photos also arguably supported that position. The State, however, offered evidence of its own that cast doubt on Mr. Prosser’s position. The ALJ concluded that there was “insufficient” evidence that “the shoreline of Lake Manitou was increased . . . by dredging or other means” and that the eyewitness testimony was not dispositive.

Mr. Prosser sought judicial review—at first, successfully. He appealed the ALJ’s ruling to the trial court, which concluded that the State’s evidence was insufficient to overcome the eyewitness testimony. The appellate court, however, disagreed. The court reasoned that it was “bound by the agency’s findings of fact if those findings are supported by substantial evidence,” which standard, under both Indiana and federal precedent, is “more than a scintilla, but something less than a preponderance of the evidence.” Applying that deferential standard, the court sided with the State. After all, as the court explained, “it was ALJ’s job to evaluate the testimony of witnesses and other evidence for credibility and weight, and the ALJ’s evaluation of their evidence strikes us as neither arbitrary nor capricious.” The Indiana Supreme Court denied review.

Prosser is especially noteworthy because of a concurrence by Justice Geoffrey Slaughter. Although Slaughter agreed with his colleagues not to hear Prosser, he wrote separately to express concern about substantial evidence review itself. Slaughter observed that “what qualifies as ‘substantial’ evidence is not substantial at all.” Rather, “if there is sufficient evidence in the record, a reviewing court must defer to an agency’s factfinding,” with no de novo review by a jury or judge. Slaughter also expressed discomfort with deference more generally and explained that in a future case he is “open to entertaining legal challenges to this system.” Presumably litigants in Indiana will now begin formulating arguments in response to Slaughter’s call. What those arguments will be remains to be seen. But it is safe to say that administrative law creates difficult questions. Coming up with the right answers will be even more difficult. But it is important to ask questions—and Indiana isn’t a bad place to start.

*The Federalist Society takes no positions on legal and public policy matters. Any expressions of opinion are those of the author.*

We’ve rebooted our popular **State Court Docket Watch** series, which features state-based experts weighing in on important state court decisions throughout the country. Visit the **FedSoc Blog** to read more articles like this!

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# TELEFORUM

## Conference Calls

Visit [fedsoc.org/events](https://fedsoc.org/events) to view the schedule of upcoming teleforum calls, and join in!

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