

---

---

BUREAUCRACY AND DISTRUST: LANDIS, JAFFE,  
AND KAGAN ON THE ADMINISTRATIVE STATE

*Adrian Vermeule\**

What, if anything, legitimates the administrative state? By “legitimacy” I refer not to any thick normative notion, but to sociological and public legitimacy<sup>1</sup> — the ambient sense in the polity that, whatever grievous errors or injustices the administrative state may inflict in particular instances, its basic existence is acceptable, and the errors and injustices are jurisdictionally valid; they do not amount to reasons for rejecting the extant institutional arrangements altogether. In American legal theory there is a rich intellectual tradition — actually a field or domain of overlapping, conflicting, and competing traditions — that attempts to answer this set of questions about the administrative state, and the Harvard Law School has historically been central to the enterprise.

In what follows I will examine three fundamentally important attempts to solve the administrative state’s legitimation problem, offered respectively by James Landis, by Louis Jaffe, and by Elena Kagan. The solutions have a common theme and a common structure: Each appeals more or less explicitly to “independence.” Each attempts to find a remedy for public distrust of unchecked administrative power, and each attempts to do so by identifying “independent” institutions that will monitor and oversee the bureaucracy.

On closer inspection, however, the answers are not only different but also answer different questions. The problem is that independence is always a relational notion — independence of what, and from what? For Landis, the key idea is that certain expert agencies should be independent of presidential control (although, as we will see, many people have misunderstood why Landis thought that desirable). For Jaffe, delegation to agencies is legitimated by courts independent of the whole

---

\* Ralph S. Tyler, Jr., Professor of Constitutional Law, Harvard Law School. Thanks to Nina Mendelson, Martha Minow, Jeff Pojanowski, Daphna Renan, Cass Sunstein, Francisco Urbina, and participants in faculty workshops at Fordham University School of Law and Harvard Law School for helpful comments, and to Jacqueline Trudeau for excellent research assistance.

<sup>1</sup> For the sociological sense of legitimacy, and alternative senses — moral and legal legitimacy — see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005). None of this is to say, of course, that the thinkers I will examine do not also address the legal (and to some extent moral) legitimacy of the administrative state; in truth the relevant arguments are interwoven and hard to disentangle. It is to say, however, that the case they make does not end with legal legitimacy and that each is self-consciously attempting to explain, and to understand, sociological legitimacy as a crucial political-psychology precondition for the administrative state’s success. We will see that Louis Jaffe puts this point with special clarity when he speaks of the “psychological[,] if not logical[,]” conditions for the administrative state’s legitimacy. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965); see *infra* p. 2472.

---

---

executive and administrative establishment altogether. For Kagan, the key idea is that presidential administration, combining Hamiltonian and technocratic features, succeeds when and to the extent that the presidency is independent of narrow interest groups, parochial legislators, and myopic line agencies. So Landis finds legitimation in agencies independent of the President, Jaffe finds it in courts independent of all executive officers, and Kagan finds it in a presidency independent of line agencies, interest groups, and the congressional committees that influence the independent agencies.

It is no accident that attempts to legitimate the administrative state hover or cycle restlessly among different senses of independence.<sup>2</sup> The basic reason is that judgments about which sort of independence the administrative state should embody themselves draw upon a plurality of normative ideals — accountability, representation, expertise, legality, rationality or reasonableness, welfarist efficiency, and speed of adjustment to changing circumstances (executive “energy”), to name a few. Although each of these ideals has attractive claims, they are not mutually compatible, in the pragmatic sense that not all of them can simultaneously be satisfied by real-world institutions laboring under real constraints. Thus different arguments for independence and its public legitimating effects are really drawing upon different underlying ideals, each of which suffers when others are emphasized. As we will see, Landis, Jaffe, and Kagan each locate the risk of undesirable dependence and partiality in the very institutions others praise as guarantors of independence.

However, each of my theorists implicitly understands this, for each compromises their claims in institutional circumstances where the force of competing ideals becomes particularly strong. The result, in each case, is that each theorist ends up adopting a kind of *roughly optimizing pluralism of values* for the administrative state — a pluralism in which expertise, political accountability, and legalism all have some claims. The views of my theorists still differ in emphasis, of course; where real-world institutional judgments are concerned, there is irreducible scope for reasonable good-faith disagreement. But the basically optimizing character of those judgments is unmistakable. Put differently, each theorist ends up making implicitly *marginalist* judgments — “rather than having too much X, legitimation will increase overall if we trade some X for some Y,” where X and Y are institutional ideals. In this sense, my theorists may be seen as complementing each other rather than competing with one another. Each supplies the administrative state with a rough, nonideal, and aggregate form of legitimacy, one that does nothing perfectly but attempts to do many things decently well — where

---

<sup>2</sup> For a somewhat different statement of this point, see Adrian Vermeule, *The Administrative State: Law, Democracy, and Knowledge*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 259 (Mark Tushnet et al. eds., 2015).

“well” means in a way that aims to generate a critical mass of public acceptance.

To be clear, I do not address here the distinct question whether this roughly optimizing pluralism of values does in fact succeed in generating a critical mass of public acceptance for the administrative state. I happen to believe that it does, and that outside of a largely elite discourse of “classical liberals,” libertarians, and nostalgists for an imagined common law past, the administrative state has never been more secure.<sup>3</sup> It is a conceptual mistake to think that complaints about the administrative state, even on constitutional grounds, are necessarily sociological evidence of the illegitimacy of the regime. Such arguments may also be conventional moves *within* the regime, which vent steam and thereby actually have a legitimating effect. If they result in more or less minor adjustments of legal and institutional rules — a bit more Office of Information and Regulatory Affairs (OIRA) oversight here, a bit less judicial deference there, and so on — that is a sign of the fundamental health, adaptability, and social legitimacy of the regime, not of crisis. In the brief compass of this Essay, however, I cannot defend these views.<sup>4</sup>

Before we turn to the theorists, two brief preliminaries — a word about delegation, and a word about methodology. As to delegation, each theorist takes it as more or less given that Congress often delegates expansively, in terms both vague and general (although Kagan, writing after the more specific delegations of the Great Society, understands that this is only a tolerable generalization). Each takes such delegation as a background condition of the administrative state, and also assumes that ongoing and active congressional adjustment of statutes is unlikely, for the very reasons that produced expansive delegation in the first place. On this set of premises, common to all three theorists, Congress’s de facto abdication blocks any simpleminded appeal to legislative oversight as the source of legitimation for the administrative state. The legitimation problem begins where Congress leaves off, as it were. (Although Congress may of course monitor the bureaucracy through committees, rather than through legislation, we will see that, for Kagan especially,

---

<sup>3</sup> There is a popular libertarian-constitutionalist discourse, in various media, which occasionally laments the fall of constitutionalism and the rise of the administrative state. This discourse (a) does not clearly distinguish complaints about the administrative state from complaints about the scope of government action generally (whether that action is effected through administration or legislation); (b) does not clearly distinguish complaints about the administrative state from complaints about the merits of policies; and, most importantly, (c) does not necessarily become a premise for voting decisions or other action, and is thus best seen as a form of quasi belief or cognitive consumption for entertainment — like believing in UFOs or watching dystopian movies.

<sup>4</sup> For discussion, see Adrian Vermeule, *What Legitimacy Crisis?*, CATO UNBOUND (May 9, 2016), <https://www.cato-unbound.org/2016/05/09/adrian-vermeule/what-legitimacy-crisis> [https://perma.cc/FVD7-DT77]. For speculation about how administrative law might look surprisingly unchanged during the Trump Administration, see Adrian Vermeule, *Two Futures for Administrative Law*, YALE J. REG.: NOTICE & COMMENT (Nov. 30, 2016), <http://yalejreg.com/nc/two-futures-for-administrative-law-by-adrian-vermeule/> [https://perma.cc/WR93-AVM6].

that behavior is part of the problem, not part of the solution.) For my purposes, I need not decide whether these premises are correct; I will assume them to be so, in order to engage the legitimation problem on the terms they define and to examine the internal logic of my theorists' views.

As for methodology, my approach is deliberately nonhistoricist. I make no effort to supply rich historical context for the theorists I will discuss, situating them within the debates and legal and political problems of their own eras. Instead I want to see what happens when we treat the theorists as though — counterfactually — they are in conversation with each other and with us, on the enduring structural problems of the administrative state and its institutional principles. The costs and benefits of this thought experiment are tolerably obvious; it risks distorting ideas by ripping them from their original setting, but it helps us identify exportable ideas and mechanisms that enhance our understanding in a different way.<sup>5</sup> There is also the academic division of labor to consider; legal historians and historians who happen to teach in law schools will carry forward the historicist project, whereas the comparative advantage of us lawyers lies, I believe, in the analysis of institutional problems that to some degree cut across the differences between historical eras.

### I. LANDIS AND THE INDEPENDENT AGENCIES

I begin with James Landis, Dean of the Harvard Law School between 1937 and 1946, and author, most famously, of *The Administrative Process*.<sup>6</sup> Landis's thought about the administrative state has been widely misunderstood. A conventional understanding is that Landis praised professional expertise, and (hence) independent agencies, because he believed, in some loosely "Progressive" way, that traditional legalism should give way to technocratic government. This is not exactly wrong, but it is a distortion of Landis's thought, which is more complex than the caricature. Professional expertise is, for Landis, rather more a guarantor of administrative independence, and a *constraint* on administrative discretion, than it is a goal to be achieved for its own sake. The essential legitimating project for the administrative state, on his view, is to develop a second-best counterbalance to the swelling power of the presidency — some independent locus of authority that can act as a countervailing power, in a kind of compensating adjustment.

---

<sup>5</sup> For the notion of "exportable mechanisms," see JON ELSTER, ALEXIS DE TOCQUEVILLE: THE FIRST SOCIAL SCIENTIST 9 (2009).

<sup>6</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

That independent locus is what Landis calls “the administrative tribunal” — an institution that he identifies on his first page as “a new instrument of government,”<sup>7</sup> and which is the basic subject of his book.

Throughout, Landis protests against the confusion between “administrative power”<sup>8</sup> and “executive power.”<sup>9</sup> The former, he urges, is not “an extension of” the latter.<sup>10</sup> It is a new institutional form, one that — as we will see — helps to offset executive power. In this sense independence is an essential category for Landis, meaning independence from the President. (This is not to say, of course, that Landis means by independence the narrowest legal sense that students learn in courses on administrative law — for-cause restrictions on removal. Landis is quite aware that legal independence in that narrow sense is neither necessary nor sufficient for the substantive, institutional, and sociological independence he sees as a hallmark of the administrative tribunal.<sup>11</sup>)

As we will further see, however, Landis also recognizes that independence must be qualified by an open-ended array of institutional considerations. Independence, in his sense, trades off against considerations of information, energy or institutional activity levels, and policy coordination across (independent) agencies. Where these other variables assume sufficient importance, Landis acknowledges that independence may be restricted or qualified. The result is a roughly optimizing approach to independence — one that ultimately seeks to legitimate the administrative state by reference to an institutional scheme that functions decently well overall.

#### A. Landis and the Balance of Powers

Landis is usually discussed as a theorist of administrative expertise, and thus associated with the technocratic approach developed by Justice Stephen Breyer<sup>12</sup> and others. I want to suggest that Landis’s interest in expertise, although undeniable, is derivative of his main concern, which arises from the very old notion of *the balance of powers*. He is thus better situated in the broad stream of balance-of-powers theory that begins with Book VI of Polybius,<sup>13</sup> sends off tributaries into international relations,<sup>14</sup>

---

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.* at 15–16.

<sup>9</sup> *Id.* at 15.

<sup>10</sup> *Id.*

<sup>11</sup> See *id.* at 22, 113–17. For an explanation of the unwritten conventions that surround, complement, or undermine formal for-cause independence, see generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

<sup>12</sup> STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

<sup>13</sup> 1 POLYBIUS, *THE HISTORIES OF POLYBIUS* 458–508 (Evelyn S. Shuckburgh trans., 1962).

<sup>14</sup> For a history of the development of the balance-of-powers theory, see MICHAEL SHEEHAN, *THE BALANCE OF POWER* (1996). For the balance of powers in modern international relations

and extends to modern iterations such as John Kenneth Galbraith's theory of "[c]ountervailing [p]ower."<sup>15</sup> My claim is interpretive; I need not address, and I bracket here, the questions whether balance-of-powers theory is conceptually coherent or normatively appealing.<sup>16</sup>

On this reconstruction, Landis draws upon the balance of powers for three interrelated purposes: (1) to justify an expansion in the scope of the administrative state's regulatory jurisdiction; (2) to justify a particular organizational structure within that scope — namely, a structure that combines executive, legislative, and judicial functions; and (3) to justify lodging those combined functions in independent "administrative tribunals" rather than in the executive branch proper, the presidency. Let me examine these three purposes in turn and then explain the role of expertise in this framework.<sup>17</sup>

At the first step, Landis suggests<sup>18</sup> that increased economic interdependence, the sheer density of economic interactions, has generated "pressure for efficiency"<sup>19</sup> that in turn generates massive corporations.<sup>20</sup> These corporations represent "concentrations of power on a scale that beggars the ambitions of the Stuarts."<sup>21</sup> Under developed capitalism, there is an "absence of equal economic power"<sup>22</sup> between corporation and individual. The consequence is "that the umpire theory of administering law is almost certain to fail. . . . [G]overnment tends to offer its aid to a claimant . . . because the atmosphere and conditions created by an accumulation of such unredressed claims is of itself a serious social threat."<sup>23</sup> The administrative state, whose defining feature is tribunals and bodies exercising active, ongoing supervision rather than reactive common law adjudication,<sup>24</sup> is necessary to redress the imbalance of

---

theory, see JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* (updated ed. 2014); and KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

<sup>15</sup> JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (1952).

<sup>16</sup> See generally Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive "Underenforcement,"* 164 U. PA. L. REV. 1677 (2016). For the record, I do not share Eric Posner's skepticism about the coherence of balance-of-powers theory, except on criteria of coherence so stringent that they would condemn almost all political ideas, including the "principal-agent" metaphor that Posner prefers. See Vermeule, *supra* note 2. For analysis of the very complex system dynamics of balance-of-powers theory in domestic constitutional settings, see ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 38–100 (2011).

<sup>17</sup> The next two paragraphs partly restate a brief discussion of Landis in Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 678–79 (2015).

<sup>18</sup> Here Landis follows ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

<sup>19</sup> LANDIS, *supra* note 6, at 46.

<sup>20</sup> See *id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 36.

<sup>23</sup> *Id.*

<sup>24</sup> See *id.* at 22–23.

economic power. The argument is familiar enough, but the analogy between corporate power and the Stuarts is significant. It is not just that Landis thinks that corporations exercise a kind of sovereign regulatory power, a form of “governance”;<sup>25</sup> the analogy also betrays a Whig sensibility that, we will see, animates Landis’s anxiety over excessive executive power, contrary to the usual picture of Landis.

Conditional on creating a tribunal with active, supervisory regulatory jurisdiction, what form should the tribunal take? Here is the famous argument for combination of powers or functions in agencies — the argument that “[i]f in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu’s lines.”<sup>26</sup> The form of the agency must follow the form of the concentrated entities it regulates. This is not *just* magical thinking, although there may be a dash of that. Rather, the point is that the supervisory character of the agency’s role implies that it will be performing the same sort of tasks as the regulated entities; it is thus “intelligent realism”<sup>27</sup> for government to adopt a functionally similar form.<sup>28</sup> The imperative is to counterbalance concentrated corporate power by means of supervisory agencies, and that imperative dictates not only the scope of regulatory jurisdiction, but also the organizational form for exercising that jurisdiction.

So far Landis reads as a New Dealer *par excellence*. Yet for many New Dealers the answer to concentrated corporate power was to concentrate power in the presidency, and that answer is something Landis rejects. We should take seriously his references to Montesquieu and his fear of the Stuarts; there is a strong streak of Whig liberalism in Landis, an underlying fear of imbalance among the branches created by excessive executive power. It is just that he sees independent administrative power as something different than executive power in the presidential sense. Indeed, Landis is so much of a traditionalist about the separation of powers that he thinks the creation of agencies wielding administrative power is itself the key mechanism for restoring the original balance of powers among the branches. Conditional on the failure of the original Constitution to provide an adequate counterbalance to corporate power, concentrated administrative power that also counterbalances swelling executive power is the attainable second-best.<sup>29</sup>

It is remarkable how many people quote Landis’s famous dismissal of the original Madisonian scheme — “the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems” — without going on to quote the rest of

---

<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.* at 10.

<sup>27</sup> *Id.* at 11.

<sup>28</sup> *Id.* at 11–12.

<sup>29</sup> See VERMEULE, *supra* note 16, at 33–34.

the paragraph, in which Landis makes clear that the administrative tribunal is an attempt to “preserve those elements of responsibility and *those conditions of balance that have distinguished Anglo-American government.*”<sup>30</sup> The heart of the whole book, in my view, is this passage:

The administrative process is, in essence, our generation’s answer to the inadequacy of the judicial and the legislative processes. It represents our effort to find an answer to those inadequacies *by some other method than merely increasing executive power.* If the doctrine of the separation of power implies division, it also implies balance, and balance calls for equality. *The creation of administrative power may be the means for the preservation of that balance, so that paradoxically enough, though it may seem in theoretic violation of the doctrine of the separation of power, it may in matter of fact be the means for the preservation of the content of that doctrine.*<sup>31</sup>

The independence of the administrative power from the President, in other words, is a compensating adjustment or “[t]ranslation”<sup>32</sup> that attempts to recreate the original constitutional balance of powers under changed circumstances.

The role of expertise in all this is twofold. Trivially, causal, scientific, and policy knowledge are necessary for ongoing administrative supervision of concentrated corporate power. Somewhat less trivially, expertise implies professionalism, and “professionalism of spirit”<sup>33</sup> is one of the major *checks* on the administrative “fusion of prosecution and adjudication”<sup>34</sup> and concentrated administrative power in general. Landis’s larger point is that the fusion of powers in a single agency “does not imply the absence of all checks. It implies simply the absence of the traditional check.”<sup>35</sup> The need to justify administrative action by reference to the specialized norms of a professional community constrains arbitrary administrative action. The role of professional expertise in Landis’s scheme, then, is to constrain independent tribunals as well as to empower them; Landis sees expertise not so much, or not only, as a good to be promoted, but also as a limit on administrative discretion. The underlying instinct is to recreate original checks and balances in new forms. That instinct ultimately flows, via Montesquieu, from the balance-of-powers tradition in political thought.

### *B. The Limits of the Independent Administrative Tribunal*

All that said, independence is hardly an unqualified good in Landis’s scheme. For Landis, as for all three of my theorists, the attempt to

---

<sup>30</sup> LANDIS, *supra* note 6, at 1 (emphasis added).

<sup>31</sup> *Id.* at 46 (emphases added).

<sup>32</sup> Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

<sup>33</sup> LANDIS, *supra* note 6, at 99.

<sup>34</sup> *Id.* at 98.

<sup>35</sup> *Id.*



legitimate the administrative state through the independence of some institution (different institutions for the different theorists) tends to become a rough process of institutional optimization, in which independence becomes a consideration to be traded off against others.

The administrative tribunal, for Landis, is a fundamental institutional innovation whose qualified but real success<sup>36</sup> stems from its independence of the Executive<sup>37</sup> — with independence always understood, by Landis, in a practical and sociological sense rather than a technical legal sense. Yet how far should such independence extend? What policies, if any, should not be made by independent administrative tribunals, and how insulated exactly should such tribunals really be? The running subtext of *The Administrative Process*, which contributes to the muddled, digressive quality of its prose, is that Landis is constantly exploring the limits of independence, attempting to illustrate its costs and failures as well as its benefits and successes.

One cost of insulation is informational — it tends to cut off “the administrative official from the public and consequently depriv[es] him of a sounding-board for his views.”<sup>38</sup> Another cost involves policy conflict and lack of coordination — the “danger of [the administrative tribunal] pursuing a policy that runs counter to the general direction of the executive.”<sup>39</sup> A third is inaction — the worry that the independent tribunal, insulated from the spur of presidential authority, will shirk or lack executive energy.<sup>40</sup> (As we will see, this Hamiltonian concern for the activity level of the agencies will become crucial for Kagan.)

Landis’s concerns with the justifiable limits of independence underpin his emphasis on professionalism and expertise, which as we have seen are best understood, in Landis’s scheme, as constraints on administrative discretion rather than as goods to be maximized. Acting as a check that substitutes for the obsolete checks of the Madisonian separation of powers, professional expertise helps to shape the appropriate limits of administrative independence. If the administrator is independent of the President, the administrator is simultaneously dependent upon the technical and professional community from which the agency’s expertise is drawn; the internalized values of that community, and concern for reputation in that community, both help to ensure that the independence and the resultant discretion of the tribunal do not slide into arbitrariness.

---

<sup>36</sup> *Id.* at 113–14 (contrasting technocratically successful policy outputs from independent agencies with failed policies of executive agencies).

<sup>37</sup> *Id.* at 114 (“[P]rofessionalism in the nonindependent agencies has suffered on occasion at the hands of political superiors.”).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 116.

<sup>40</sup> *Id.* (“The real danger to the executive from the independent Commission lies in the possibility of inaction on the part of its members.”).

For Landis, ultimately, the independent administrative tribunal is a qualified good. Writing against a backdrop of traditionalist criticism, based on a Madisonian conception of tripartite separated powers, his main concern is of course to establish that such tribunals have a legitimate title to existence, and that their combination of legislative, executive, and adjudicative functions, however shocking to the traditional mind, serves valuable institutional purposes. But the independent tribunal is limited in many ways under Landis's own conception. It is limited by its ultimate purpose of counterbalancing presidential power; by professional norms within expert communities; and by an open-ended, multifarious array of other institutional considerations that Landis details, among them information, coordination costs, and institutional energy or activity levels. Independence, rightly understood, becomes one good among others, to be limited and traded off in the service of a well-functioning scheme of administrative institutions.

## II. JAFFE AND THE INDEPENDENT JUDICIARY

Louis Jaffe, professor at Harvard Law School from 1950 onward, looked to a different independent institution to legitimate the administrative state: the courts. Jaffe's most famous sentence, and one of the best-known ideas in administrative law theory, is his pronouncement that "[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."<sup>41</sup> Elsewhere Jaffe clarifies the relationship between legitimacy and legal validity; the latter, in his view, is at least a precondition for the former. "The guarantee of legality by an organ independent of the executive," he writes, "is one of the profoundest, most pervasive premises of our system."<sup>42</sup> Indeed, anticipating later arguments by Jack Goldsmith with respect to presidential powers,<sup>43</sup> Jaffe suggests that some form of constraint is itself the precondition of expansive executive power: "Indeed I would venture to say that [judicial review] is the very condition which makes possible, which makes so acceptable, the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility."<sup>44</sup> On psychological grounds, national publics will rebel against "monstrous expressions of administrative power"<sup>45</sup> that are unconstrained by law.

---

<sup>41</sup> JAFFE, *supra* note 1, at 320.

<sup>42</sup> *Id.* at 324.

<sup>43</sup> See JACK GOLDSMITH, POWER AND CONSTRAINT xv–xvi (2012) (arguing that constraints arising from accountability legitimate expansive executive power).

<sup>44</sup> JAFFE, *supra* note 1, at 324.

<sup>45</sup> *Id.* at 323.

So far, I have sketched a relatively standard account of Jaffe's thinking. Now let me undermine it. In fact Jaffe's view is much more nuanced — and much more deferential to the administrative state — than this capsule summary suggests. In a sense there is much less to his version of judicial independence than meets the eye. Anticipating the *Chevron*<sup>46</sup> doctrine and its intellectual underpinnings, in work by Henry Monaghan among others,<sup>47</sup> Jaffe in fact pioneers a remarkably thin or narrow version of judicial review, according to which courts decide the law, but the law itself includes agency power to formulate legally binding rules. And the impetus for this narrow version of judicial review is an implicit logic that trades off various political and institutional risks. The judicial independence that Jaffe sees as legitimating the administrative state is judicial independence appropriately delimited and defined, where the placeholder “appropriately” does most of the work and picks up an array of institutional considerations.

The result is that although courts have the power to say what the “law” is, the law they are to identify is law made by administrative agencies, unless the statutory purpose is clearly to the contrary. Jaffe does not of course hollow out judicial review altogether; the principal constraint he retains is judicial authority to review agency action for reasonableness — an approach that courts later expanded, probably well beyond Jaffe's intentions, in the era of “hard look review” following the *Citizens to Preserve Overton Park, Inc. v. Volpe*<sup>48</sup> decision in 1971. But of course, reasonableness is a flexible parameter, and in later decades hard look review became softer and softer.<sup>49</sup>

#### A. Agency Power to “Make Law”

One might be forgiven for thinking that Jaffe is best understood as a forerunner, and perhaps even progenitor, not of *Chevron* deference, but of the current set of *Chevron* skeptics, who occupy positions mostly but not wholly in the legal academy and think tanks.<sup>50</sup> On the skeptical

<sup>46</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>47</sup> See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 25–28 (1983). Monaghan's formalist, delegation-based rationale for reconciling the rule of (judicially declared) law with the administrative state was eventually elevated into the official justification for *Chevron* deference. See *United States v. Mead Corp.*, 533 U.S. 218, 227–29 (2001).

<sup>48</sup> 401 U.S. 402 (1971).

<sup>49</sup> See Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016) (arguing that current judicial reasonableness review of agency action is “far more flexible, accommodating, and intelligent about agency rationality . . . than is the hard look approach,” *id.* at 1360).

<sup>50</sup> See, e.g., *Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 52–82 (2015) (testimony of Andrew M. Grossman, Adjunct Scholar, Cato Institute, Associate, Baker & Hostetler LLP); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989);

view, the Administrative Procedure Act's<sup>51</sup> (APA) requirement that courts "decide all . . . questions of law,"<sup>52</sup> and the vesting of the "judicial Power" in Article III courts,<sup>53</sup> jointly and severally entail that courts should decide legal questions for themselves. (There are further questions, and nuances, about whether "for themselves" is compatible with listening to agency views for their persuasive power — so-called *Skidmore*<sup>54</sup> deference — but the great point of agreement among all the skeptics is opposition to authoritative deference, of which *Chevron* is the symbol.) The ancestor of this view, in the modern era, is Chief Justice Hughes's opinion in *Crowell v. Benson*,<sup>55</sup> which — very roughly speaking — said that courts would defer to agencies on questions of fact, if supported by substantial evidence,<sup>56</sup> but would review questions of law and questions of "constitutional" fact de novo,<sup>57</sup> lest our government become one "of a bureaucratic character alien to our system."<sup>58</sup>

The temptation to associate Jaffe with a robust view of judicial supremacy arises from two features of his approach. First is his emphasis on the presumption of reviewability, which heavily influenced the Supreme Court's subsequent jurisprudence.<sup>59</sup> The second is his insistence on independent judicial assessment of the law. Taken together, these two features naturally suggest a view that entails not only judicial independence, but a kind of judicial autarchy, such that judges decide legal questions without respect to agency views (or, in the softer version, attending to agency views for whatever persuasive power they may contain, but without paying any respect to agency views *qua* legal authority).

But it turns out that Jaffe not only does not hold this view; he emphatically objects to it and attempts at length to refute it. The fallacious leap in the usual view of Jaffe is the implicit belief that a presumption of reviewability, and plenary judicial control over questions of law, are somehow incompatible with deference to agencies on the merits of legal

---

Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016). Few current judges have expressed thoroughgoing skepticism of *Chevron* (as opposed to proposing additional constraints around the edges). The set of thorough skeptics includes Justice Thomas, Justice Gorsuch, and that's about it. For Justice Thomas, see *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); for then-Judge Gorsuch, see *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

<sup>51</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>52</sup> 5 U.S.C. § 706 (2012).

<sup>53</sup> U.S. CONST. art. III, § 1.

<sup>54</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

<sup>55</sup> 285 U.S. 22 (1932).

<sup>56</sup> *See id.* at 51–54.

<sup>57</sup> *See id.* at 54–63.

<sup>58</sup> *Id.* at 57.

<sup>59</sup> *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (relying on Jaffe as authority for the presumption of reviewability).

questions. In fact there is no inconsistency at all. Even today, critics who insist on independent judicial assessment of the law sometimes fail to come to grips with Monaghan's critical point: *deference to agencies on legal questions is in principle fully compatible with independent judicial assessment of the law*.<sup>60</sup> The law may itself just be that, within a certain domain or within certain limits, agencies have power to make law or to say what law is already in existence.

Jaffe deserves credit for pioneering this point. The main thrust of his chapter on questions of law is that — as Jaffe wrote in italics — “[i]f we admit that the administrative as well as the judiciary can, and within limits should, make law, our analytic problem is much simplified.”<sup>61</sup> He is clear throughout that the simple association of courts with law and agencies with factfinding and policymaking will not do. At least as early as *NLRB v. Hearst Publications, Inc.*<sup>62</sup> in 1944, when the Court announced that an agency determination of a mixed question of fact and law would be upheld so long as it had both “‘warrant in the record’ and a reasonable basis in law,”<sup>63</sup> it became clear that *Crowell*'s line between fact and law was untenable. After all, if the law may entrust decisions on questions of fact to agencies, why may not the law entrust questions of law to agencies? The judicial power to “say what the law is”<sup>64</sup> is fully satisfied and exhausted by the courts' power to determine whether the law has committed interpretive authority to an agency. As a corollary, Jaffe disposes of the objection from the text of section 706 of the APA in simple terms:

It has been argued that under this section all questions of law, in the sense in which we are using this term, must be decided by the court. But it excepts from review action “committed to agency discretion” and limits review to “abuse of discretion.” A court, therefore, must decide as a “question of law” whether there is “discretion” in the premises, and once the discretion is established, its exercise if “reasonable” is free of control.<sup>65</sup>

The crucial legitimating feature of the administrative state, then, is review by an independent judiciary, but that review itself recognizes that the law might entrust agencies with the power to say what the law is, in some domains.

### *B. The Limits of Judicial Independence*

So far Jaffe's argument, like Monaghan's after him, is entirely formal. The law may itself be that agencies have power to say what the law is. Fine; but even if this approach is consistent with the text of the APA and of the Constitution, why exactly *should* law be taken to give

<sup>60</sup> See Monaghan, *supra* note 47, at 25–28.

<sup>61</sup> JAFFE, *supra* note 1, at 547.

<sup>62</sup> 322 U.S. 111 (1944).

<sup>63</sup> *Id.* at 131.

<sup>64</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>65</sup> JAFFE, *supra* note 1, at 570 (emphasis added) (footnotes omitted).

agencies any such power? Jaffe's answer does not itself rest on formal grounds, not at all. Rather it rests on a roughly pragmatic, optimizing institutional calculus, in which independence more or less drops out as a legitimating force. The law should recognize agency lawmaking power, and courts should defer to "reasonable" administrative answers, because of a set of static and dynamic institutional considerations:

[I]n a great many cases the court will grant that any one or two or more proposed answers is consistent with the statute. In such a situation its function is complete when it decides that the administrative answer is reasonable . . . . The agency is in as good and, because of its specialization, presumptively in a better position to make the choice. There is, furthermore, a value in this recognition of administrative autonomy; it may invigorate the sense of responsibility, stimulate initiative, and encourage resourcefulness.<sup>66</sup>

These considerations are, strikingly, reminiscent of James Bradley Thayer's arguments for judicial deference to legislatures in matters of constitutional interpretation, unless the constitutional rule is clear.<sup>67</sup> Among them is the dynamic consideration that scope for lawmaking (within the bounds of legal silence or ambiguity) "invigorate[s] the sense of responsibility."<sup>68</sup>

For Jaffe, this complex of pragmatic justifications is made relevant through and by means of a certain type of Legal Process approach to legal interpretation, such that institutional considerations of this sort might count as legitimate indicators of Congress's "purpose" (a reconstructed counterfactual purpose, to be sure).<sup>69</sup> In this Jaffe was a creature of his era. But there is nothing methodologically special about agency lawmaking in this regard. Legal Process interpreters used these same sorts of indicators, which attribute to Congress a larger purpose to ensure the successful functioning of the institutional order overall, when interpreting all sorts of statutes, even where no agency was in the picture.<sup>70</sup> If Jaffe was wrong to approach the problem this way, that is so only if and because the Legal Process approach was wrong altogether; but that is not a tailored objection to Jaffe's view of agency authority in particular.

Quite remarkably, but with admirable consistency, Jaffe goes on to extend this rough institutional calculus to agency discretion over proce-

---

<sup>66</sup> *Id.* at 573 (footnote omitted).

<sup>67</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-44 (1893).

<sup>68</sup> JAFFE, *supra* note 1, at 573.

<sup>69</sup> See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS 1-181* (William N. Eskridge Jr. & Philip P. Frickey eds., 1994).

<sup>70</sup> See *id.*

dural law.<sup>71</sup> A basic assumption of *Crowell's* attempt to establish boundary conditions between the administrative state, on the one hand, and the rule of law, on the other, is that courts police the adequacy of agency procedures, which — although not necessarily the same as common law judicial procedures — must meet judicially established standards of fundamental fairness.<sup>72</sup> To the traditional legal mind, the association between judicial independence and judicial control over procedure is ironclad, such that it seems unimaginable that agencies should receive deference on the procedural requirements that govern their decisionmaking.<sup>73</sup> Jaffe, however, pursues his rough optimization even to this extreme, noting that agencies must allocate resources over a total suite of programs, and that procedure is just one more claim on resources, so that courts must give agencies leeway to allocate procedure across programs.<sup>74</sup>

To be sure, Jaffe stops well short of complete abnegation to the administrative state. The principal check he retains is reasonableness review, which he justifies partly under the APA's provision for arbitrary and capricious review and partly under a Legal Process assumption that legislative purposes are best seen as reasonable, so that unreasonable agency action would contravene those purposes.<sup>75</sup> Yet there is little in Jaffe's work to suggest that he would have favored the kind of searching quasi-procedural hard look scrutiny later developed by the D.C. Circuit in the 1970s.<sup>76</sup> The later arc of arbitrariness review, which has become more deferential over time,<sup>77</sup> fits Jaffe at least as well.

Jaffe's thought begins with a strong pronouncement that independent judicial review is the essential guarantor of the legitimacy of the administrative state. When fully worked through, however, his view contemplates an essentially deferential regime, lightly clothed in the

---

<sup>71</sup> For an attempt to update and improve this part of Jaffe's argument, see Adrian Vermeule, Essay, *Deference and Due Process*, 129 HARV. L. REV. 1890 (2016).

<sup>72</sup> See *Crowell v. Benson*, 285 U.S. 22, 48 (1932) (“[T]he fact that the deputy commissioner is not bound by the rules of evidence which would be applicable to trials in court or by technical rules of procedure does not invalidate the proceeding, provided substantial rights of the parties are not infringed.” (citation omitted)).

<sup>73</sup> See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (rejecting argument that state legislatures can dictate whatever procedures they wish to govern legislatively conferred rights, *id.* at 541, and instead judicially imposing procedural requirements, *id.* at 547–48).

<sup>74</sup> See JAFFE, *supra* note 1, at 567 (“I, therefore, conclude (1) that the exercise of discretion is relevant to the making of procedural decisions; (2) that in the absence of a clear legal prescription, a reasonable procedural decision should withstand judicial interference; and (3) that reasonableness should be considered in terms of the responsibility of the agency for a total program, allowing for the fact that the agency's resources are limited.”).

<sup>75</sup> See *id.* at 563–64.

<sup>76</sup> See, e.g., *Ethyl Corp. v. EPA*, 541 F.2d 1, 34–35 (D.C. Cir. 1976) (en banc); see also Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 761–62 (2008).

<sup>77</sup> See Gersen & Vermeule, *supra* note 49, at 1358.

forms of law. As to factual questions (under *Crowell*), as to legal questions (under *Hearst* and its successors, justified by Jaffe as a plausible reconstruction of congressional purposes in light of institutional considerations<sup>78</sup>), and as to procedural questions (under Jaffe's own remorseless expansion of the institutional logic) — in all three cases, judicial review, although independent, decides that the law itself, rightly understood, is best taken to cede judicial authority to agencies. On these dimensions at least, and perhaps even with respect to reasonableness review, independent judicial review becomes a kind of constitutional monarch, who by convention always accepts the advice of ministers — a monarch who reigns but does not govern.<sup>79</sup> The distance between the starting point and the conclusion is traveled by a set of rough institutional judgments that trade off various static and dynamic considerations. In the end the legitimacy of the administrative state, for Jaffe, is guaranteed not so much by judicial independence in any robust sense. Rather, the function of judicial review is to produce legitimacy by shaping and contributing to a set of institutional arrangements, a heavily deferential set of institutional arrangements, that help the administrative state to work decently well overall.

### III. KAGAN AND THE INDEPENDENT PRESIDENCY

With Elena Kagan, Dean of the Harvard Law School from 2003 to 2009 (and subsequently a holder of other posts), the idea of legitimating the administrative state through independence comes full circle. We have seen that Landis — usually cast in simpleminded terms as an advocate of expertise at all costs — actually pursues a sophisticated plan of translation, attempting to recreate the original constitutional balance in changed circumstances, and (thus) to create a countervailing power in the independent agencies. Independence for Landis thus becomes a central desideratum, but it means independence of presidential control. For Kagan, on the contrary, “presidential administration” — the title of one of the most prominent articles in administrative-law theory in recent decades<sup>80</sup> — is a guarantor of independence, not a threat to it. Kagan means that presidential control in important respects protects the regulatory process from pernicious outside influences, from particularistic interest groups and local constituencies who may have outsized influence in mission-oriented line agencies and congressional committees.<sup>81</sup> The President is not independent of voters, but the presidency is independent of particular local constituencies, line agencies, congressional committees, and the interest groups that tend to influence them. The

<sup>78</sup> See JAFFE, *supra* note 1, at 558–63.

<sup>79</sup> The analogy is drawn from, and discussed further in, ADRIAN VERMEULE, *LAW'S ABNEGATION* 2 (2016).

<sup>80</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>81</sup> See *id.* at 2336.



contrast between Landis and Kagan underscores that independence is a relational term, which presupposes some baseline understanding of desirable institutional goods.

I should confess at the outset that, awkwardly for my account, Kagan does not often use the term “independence” or its relatives, except to refer to the independent agencies. It is not an explicit watchword for her as it is for Landis and Jaffe. However, I believe that a fair reading of Kagan’s thought shows that the substance of the idea is central to her approach. Presidential administration is desirable, in my reconstruction of Kagan’s view, because the presidency stands independent of various forces and pressures that tend to distort policymaking by line bureaucracies.

#### A. *Presidential Administration’s Two Strands*

Kagan’s article captured something in the intellectual atmosphere, but something that no one else had been able to distill. Starting at the latest with the Reagan Administration, presidents have attempted to centralize oversight of line agencies in the Office of Management and Budget (OMB), and more generally in the Executive Office of the President and the White House staff. The basic facts of the relevant presidential orders, and the broader trend toward executive centralization, were familiar.<sup>82</sup> What Kagan added was not so much the identification of a new institutional phenomenon, as a new and more subtle legal rationale, combined with intellectual and constitutional underpinnings for that legal rationale.

As to the rationale itself, then-prevailing theories of expansive executive power, structured around the theory of the “unitary Executive,” had primarily appealed directly to the President’s constitutional powers of removal and direction. Although Kagan hardly disavowed those appeals, her primary focus was on statutory interpretation and default rules for interpretation. Rather than appealing directly to Article II power, Kagan argued that statutes delegating lawmaking powers to agencies and cabinet departments should presumptively be construed to allow the presidency directive powers over the actions of line agencies.<sup>83</sup> Such arguments had of course been made before, especially by government lawyers in the Office of Legal Counsel<sup>84</sup> — no legal argument is

---

<sup>82</sup> See, e.g., Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219 (1993); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

<sup>83</sup> See Kagan, *supra* note 80, at 2364.

<sup>84</sup> See sources cited *infra* note 107.

---

---

ever wholly original — but Kagan systematized the approach and gave it new substance and prominence.

But why exactly should the interpretive default rule be set in favor of presidential administration, rather than against it? On a Landis-style vision, after all, one might appeal to the value of independence precisely in order to constrain presidential influence over line agencies, and certainly over independent agencies. Indeed, we will see that Kagan herself stops short of advocating for presidential influence in formal adjudication<sup>85</sup> and in areas in which “scientific expertise” is essential.<sup>86</sup> Yet there is a real core of incompatibility between the Landis and Kagan approaches because the guiding presumptions are different for each. For Landis, presidential control is to be constrained and cabined by independent expertise; for Kagan, presidential control promotes independence and, in some domains anyway, expertise.

Here then was Kagan’s second and most enduring contribution: a constitutional vision that attempted to combine two intellectual and constitutional strands that had often been assumed to be in tension with one another, or even outright contradiction. The first strand was technocratic administration, whose major tool is quantified cost-benefit analysis; the second was Hamiltonian political leadership by an energetic, elected President, whose hallmark is accountability to a broad national public.<sup>87</sup>

In Kagan’s intellectual universe, each strand, in its own way, contributes to the right sort of independence in the regulatory and policy-making process. The technocratic strand, centralized in OMB and the other organs of presidential administration, helps to ensure independence from parochial or myopic mission-oriented line agencies and the narrow interests that have outsized influence on such agencies.<sup>88</sup> The Hamiltonian strand, which arises from the presidency’s appropriate *dependence* on “the people” in the sense of a broad national public, helps to ensure the independence of the bureaucracy from local, parochial, and factional interests that would otherwise distort policymaking.<sup>89</sup> Direction by a presidency that takes a broader national perspective does not necessarily compete with technical expertise (although, as we will see, Kagan admits that it sometimes may); indeed such direction helps liberate policymaking from parochial influences, and in that sense protects its independence. The strong hand of the presidency keeps self-

---

<sup>85</sup> Kagan, *supra* note 80, at 2362–63.

<sup>86</sup> *Id.* at 2308; *see also id.* at 2353–54.

<sup>87</sup> I mean here to elicit the logic of Kagan’s view, not to ask the separate question whether its premises are correct. For some skepticism about the President’s claim to represent the nation as a whole, see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. REV.* 1217 (2006).

<sup>88</sup> *See* Kagan, *supra* note 80, at 2336, 2340.

<sup>89</sup> *See id.* at 2337.

interested legislators and outside groups at bay, and thus clears away space within which policy expertise can operate. As Kagan put it:

Not all presidential dictation of agency action, however, entails the displacement of bureaucratic expertise — initially, because not all agency action entails the application of expertise, even when the action properly should do so. A given agency decision (or nondecision) might derive instead from congressional pressure, interest group lobbying, bureaucratic (but nonexpertise-based) policy views, or bureaucratic protection of turf or other self-interest. The refusal to acknowledge this reality — and the consequent apprehension of a straight-line trade-off between presidential influence and administrative expertise — rests on an odd romanticism about bureaucracy . . . .<sup>90</sup>

As the passage shows, Kagan's approach rests on a nonideal theory of agency decisionmaking, in which agencies buffeted and hampered by congressional committees, interest groups, mission myopia, and institutional self-interest may be improved and protected by an outside entity who is sufficiently powerful to stand independent of lesser institutions and groups — the presidency. In this sense, Kagan is an intellectual heir not only to Hamilton, but even more directly to Max Weber, whose vision of the President of the Reich as a nationally elected check on the ills of bureaucracy<sup>91</sup> adapts the Hamiltonian vision to the modern administrative state.

One might think it odd that Kagan sees the presidency and its associated institutions as *both* more accountable *and* more technocratic than line agencies, congressional committees, and the interest groups that influence both. Isn't there a well-known tension or at least tradeoff between political judgment and technocratic judgment? Not necessarily. For one thing, as Kagan argues, the policymaking process includes both judgments of fact and causation on the one hand, and judgments of value and priority on the other.<sup>92</sup> On that view, political accountability ensures that the presidency makes judgments of value that better reflect the preferences of enduring national majorities, and that there is no conflict between those judgments and expert judgments of fact and causation; the two types of judgments just address different questions and occupy different spheres. For another thing, the presidency is independent in another crucial sense: it is the only general-purpose office in the executive establishment, which stands above particular subject areas and particular statutory regimes. That systemic view makes the presidency uniquely positioned to set rational risk-regulation and resource-

---

<sup>90</sup> *Id.* at 2354.

<sup>91</sup> See Max Weber, *The Reich President*, 53 SOC. RES. 125, 128–29 (1986) (Gordon C. Wells trans.).

<sup>92</sup> See Kagan, *supra* note 80, at 2356–57.

allocation priorities across administrative programs<sup>93</sup> and to coordinate the activities of line agencies, through OIRA.<sup>94</sup> Finally, bracketing the first two points, even if there is some frontier at which there is a general tension or tradeoff between political accountability and technocratic expertise, it is still the case that one institution might be both more accountable *and* more technocratically competent than another institution — just as one person might be both larger and faster than another, even if there is some tradeoff between size and speed at the margins of athletic performance.<sup>95</sup>

Kagan thus offers a vision that has the same sort of structure as Landis's vision, but with sharply different, nearly opposite content. Both accounts stress the independence of a particular institution as the legitimating guarantor of the administrative state, but with opposite assessments of the role of the presidency. For Landis, the presidency is a threat to independence and the institution that independent tribunals aim to counterbalance, while for Kagan, the presidency is the institution whose independence allows it to coordinate and systematize genuinely public priorities, free of the parochialisms and myopia of a fragmented bureaucracy overrun by interest-group influence.

On Kagan's approach, what happens to Jaffe's vision of judicial review as the independent, legitimating institution for the administrative state? For Kagan the judicial role is subordinate and derivative. "[T]he courts today," she writes, "do not so much exercise an independent check on agency action as they protect or promote (in various ways and to varying degrees) the ability of . . . other entities . . . to perform that function."<sup>96</sup> On this view, the courts have more or less abandoned what Kagan calls "direct[]" control of agency action — the direct control of legality that Chief Justice Hughes portrayed in *Crowell* as a bulwark against "government of a bureaucratic character alien to our system"<sup>97</sup> — in favor of indirect control, "supporting, through various rules of procedure and process, other institutions and groups that can influence agency policymaking."<sup>98</sup> Although courts help to structure the terrain, they do not themselves play a leading role in the resulting action. The presidency has become the main check upon, supervisor of, and legitimating institution for the administrative state.

<sup>93</sup> See BREYER, *supra* note 12, at 59–68.

<sup>94</sup> See Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1871–74 (2013).

<sup>95</sup> For a similar point in the *Chevron* setting, see Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 690 (2007).

<sup>96</sup> Kagan, *supra* note 80, at 2254.

<sup>97</sup> *Crowell v. Benson*, 285 U.S. 22, 57 (1932).

<sup>98</sup> Kagan, *supra* note 80, at 2269.

### B. *The Limits of Presidential Administration*

As with Landis and Jaffe, however, Kagan's thinking is hardly unqualified. The logic of presidential administration encounters limitations in certain domains, some well defined, others less so. The best understanding of these limitations is that Kagan implicitly engages in an optimizing calculus that attempts to trade off various institutional goods.

Kagan's first exception involves formal adjudication. She writes that "[t]he only mode of administrative action from which [President] Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers that a department head possesses over an agency's on-the-record determinations."<sup>99</sup> Note that this conclusion applies even to formal adjudication in executive branch agencies and cabinet departments, bodies as to which presidential directive power is usually thought to be at its zenith.

Despite case law asserting, in more or less conclusory fashion, that presidential administration has to stop short of formal adjudication,<sup>100</sup> it is hardly obvious why that must be so, at least conditional on accepting Kagan's other premises. Kagan is explicit that President Clinton shied away even from formal adjudication as to which the relevant department heads or executive agencies (not independent agencies) would have legal control. But if the department or agency heads have legal control, and independent agencies are not involved, why would not the logic of presidential administration apply? After all, adjudication is just one more instrument that agencies use to make law and policy, along with rulemaking, guidances, licenses, funding decisions, and on and on. All of these instruments, when used by agencies acting within the boundaries of their statutory delegations, are exercises of "executive power" within the meaning of Article II of the Constitution, as Justice Scalia emphasized for the Court in 2013.<sup>101</sup>

Kagan offers a somewhat half-hearted explanation that sounds in terms of procedure and participation. The rationale seems to be that formal adjudication builds in structural protections for participation by all affected interests and prohibitions on *ex parte* contacts (say, by legislators). These protections do not apply (at least not in full) in notice-

---

<sup>99</sup> *Id.* at 2306.

<sup>100</sup> *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1536–37 (9th Cir. 1993). The idea is that presidential direction amounts to an *ex parte* contact under the APA. For critiques, see Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1222–28 (2013); and Michael A. Bosh, Note, *The "God Squad" Proves Mortal: Ex Parte Contacts and the White House After Portland Audubon Society*, 51 WASH. & LEE L. REV. 1029, 1067–68 (1994).

<sup>101</sup> *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013).

and-comment rulemaking or other modes of agency action.<sup>102</sup> Therefore, the logic runs, the need for presidential oversight to protect the independence of the lawmaking process from organized interests and congressional pressure is reduced.

But this reasoning seems to change the subject. The issue, recall, is why the President should not be allowed to direct formal adjudication *when the relevant agency heads otherwise have undisputed power to do so*. So the proper focus of analysis is not really the distinction between adjudication and rulemaking; after all, the agency heads themselves, also executive officials, may direct and rule upon the relevant adjudicative proceedings. The real question is *who* may engage in such direction — the President or the subordinate officials in executive branch agencies and cabinet departments. Why should executive direction cut out the very head of the executive branch?

Similar problems arise regarding another of Kagan's exceptions, for an ill-defined category of agency decisions involving "scientific expertise," as to which presidential administration should voluntarily stay its hand.<sup>103</sup> This exception stands in tension with the larger structure of Kagan's argument, which was not just Hamiltonian, and which did not praise the presidency solely on the ground of its superior political accountability. Rather, the novelty of Kagan's argument was that presidential administration is itself supposed to be superior on systemic grounds — because the presidency can set rational risk priorities, and engage in rational resource allocation, across programs.<sup>104</sup> Subject-specific experts, no matter how informed and impartial, may nonetheless lack lateral vision and suffer from a kind of technocratic myopia, ignoring spillover effects on other programs and priorities. In theory, presidential administration has a role to play in coordinating and checking the myopia of the experts.

The last exception involves the independent agencies. While Landis celebrates the independent agencies as a countervailing power to the presidency and a locus of special expertise, Kagan clearly sees the President's lack of full control (other than through appointments) as a constraint, rather than something desirable in itself. She tends, with varying degrees of explicitness, to associate independent agencies with Congress and congressional committees, who will act to protect those agencies if the President overreaches to control them.<sup>105</sup> And throughout, Kagan tends to associate congressional committees with narrow, focused interests that work through such committees to influence bureaucracies that affect them.<sup>106</sup> Why then does Kagan stop short of

---

<sup>102</sup> As to the supposed absence of ex parte protections in rulemaking, see *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

<sup>103</sup> Kagan, *supra* note 80, at 2308; see also *id.* at 2353–54.

<sup>104</sup> See *id.* at 2340.

<sup>105</sup> See, e.g., *id.* at 2308–09.

<sup>106</sup> See, e.g., *id.* at 2259–60.

calling for presidential administration of the independent agencies as well? Other scholars have done so, and there are straight-faced legal arguments one can muster, whether or not they are convincing. In the Reagan Administration, when Executive Order 12,291 on cost-benefit analysis was in development, the Office of Legal Counsel circulated carefully qualified arguments to the effect that the President may exercise procedural and supervisory powers over independent agencies (at least as to rulemaking), requiring them to conduct cost-benefit analysis, to consult, and to take account of relevant policy considerations.<sup>107</sup> But Kagan shows no interest.

In these cases, then, Kagan pulls her logic up short. Why? The best reconstruction, I believe, is that Kagan is implicitly trading off competing institutional goods. In a range of cases across the administrative state, her view runs, presidential administration is legitimating because it tends, at least on average, to cure problems of factionalism, narrow interests, and administrative myopia. On this account, concerns about political interference idealize agency decisionmaking and risk overlooking the many forces and pressures that may distort such decisionmaking. They simultaneously miss that presidential administration may offer a broader perspective that is both more technocratic and more politically accountable in ways that may help to liberate line agencies from distorting pressures.

Where specific formal adjudications or scientific questions are involved, however, the risks on either side of this ledger take on different values. The risk of administrative politicization is at a nadir because formal procedure or the professional norms that structure expertise tend to hamper or at least flush out unjustifiable agency rationalizations chosen on political grounds. (Here Landis's theme, that professional norms constrain arbitrariness, reemerges.) Conversely, presidential administration poses the greatest risks of "telephone justice" in this setting; a single channel of influence running through the White House may distort deliberation in particular cases. For present purposes, we don't need to ask whether this (implicit) conjecture I have attributed to Kagan is correct; on the logic of her premises the conjecture makes the most sense, perhaps, with respect to formal adjudication, the least with respect to

---

<sup>107</sup> See Memorandum from Larry L. Simms, Acting Assistant Att'y Gen., Office of Legal Counsel, to Hon. David Stockman, Dir., Office of Mgmt. & Budget, Proposed Executive Order on Federal Regulation (Feb. 12, 1981), reprinted in *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 97th Cong. 152-69 (1981). For helpful background, and an answer to the question why Executive Order 12,291 stopped short of asserting presidential supervisory power over the independent agencies, see *Reviewing Independent Agency Rulemaking: Hearing Before the Subcomm. on Regulatory Affairs & Fed. Mgmt. of the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 48-68 (2016) (testimony of Adam J. White, Research Fellow, Hoover Institute). Thanks to Adam White for his help with these issues.

independent agencies. What matters is just the structure of the conjecture, which balances competing institutional risks and concerns in a value-pluralist and roughly optimizing fashion.

As I have suggested throughout, the search for an independent legitimating institution in the administrative state systematically tends to devolve, or evolve, into this sort of optimizing institutional calculus. Kagan, like Landis and like Jaffe before her, is no fanatic about her institutional prescriptions. In Kagan's hands, like Landis's and Jaffe's, independence, rather than being some sort of master key to the legitimation of the administrative state, just refers to a particular set of institutional goods. The presidency plays a leading role in the legitimation of the bureaucracy by providing independent oversight — independent not of the people, whose views the President represents, but of parochial interests and myopic, mission-oriented line agencies. But there are other goods, and competing goods, in Kagan's view, and her ultimate commitment is to making the administrative regime function tolerably well overall.

#### IV. LEGITIMATION, PLURALISM, AND OPTIMIZATION

Let me describe the overall picture. Although each of my theorists attempts to legitimate the administrative state by appealing to independence somehow defined, each implicitly defends a different conception of independence, which is possible because independence is a relational term; it is independence of something from something else. For Landis the focus is the independence of administrative tribunals from the presidency; for Jaffe it is the independence of courts from the Executive as a whole; for Kagan it is the independence of the President from line agencies, interest groups, and captive legislators.

Why do conceptions of independence proliferate so? My suggestion is that independence is a placeholder for an appeal to a pluralism of underlying values. Each of my theorists motivates the value of independence by appealing to (different) institutional goods that independence putatively secures. For Landis, the goods are balanced and constrained public power, in a world in which concentrated corporate power and a rapidly mutating economy require a strong presidency. For Jaffe, the goods are reasoned decisionmaking, understood as the antonym of arbitrariness, and compliance with law. For Kagan, the goods are accountability, technocratic competence, and institutional energy.

Critically, these values are not fully and maximally compatible; not all can simultaneously be satisfied in full. The tipoff is that the values that are ideals for one theorist pose a threat for another. Kagan's political accountability and energy, channeled through the presidency, are precisely what Landis's administrative independence is intended to constrain, and so forth. Each appeals to independence as the guarantor of



---

---

legitimacy, yet each means something very different and there are patent tensions among them.

In this sense, the theory of the administrative state is pluralist *across* the theorists I have examined. Yet the account is more nuanced than that, because pluralism also obtains *within* the approach of each theorist. I have tried to show that each is more practical, and more open-minded, than the baseline statement of their approaches suggests. Each is alert to the values approved by the others and each explicitly accommodates the values approved by the others. In other words, while treating their own values as preferred, each admits the others' values as either a side constraint or just an additional variable. Kagan explicitly qualifies her praise for presidential administration in cases where it would encroach upon the independence of scientific and technical bodies and experts (important to Landis) or adjudicative tribunals using classical court-like formal procedures (important to Jaffe). Jaffe qualifies his brief for independent judicial judgment, indeed hollows it out altogether, by reference to values not only of expertise (important to Landis) but also of the institutional responsibility and energy that would be sapped by plenary judicial review (important to Kagan). Landis qualifies his case for the independent administrative tribunal by reference to coordination of policy across agencies (important to Kagan).

Starting from different conceptions of independence, the theorists converge upon a common roughly optimizing approach, one that is fundamentally *marginalist*. The common approach, in other words, attempts to ensure that the institutions of the administrative state do not display too much of any one value. Expertise, legalism, democracy, and political accountability — for each of my theorists, all these have their claims, but none can be allowed exclusive sway. Where competing values take on particular force, such that greater institutional gains overall can be made by compromising the baseline value, each theorist is willing to do so.

It remains true that each theorist does start from a different baseline and retains a different emphasis throughout; that is what gives each approach a distinctive flavor. Starting from different presumptions, they are forced by the pressures of institutional realism to walk partway, but only partway, toward one another.<sup>108</sup> But substantial convergence occurs because each thinks the administrative state should do — to quote former Harvard University President Abbott Lawrence Lowell's conception of a proper education — “a little of everything and something well.”<sup>109</sup>

---

<sup>108</sup> In Jaffe's case, in particular, the hollowing out of independent judicial authority, by means of a process of judicial abnegation, goes far indeed; but it is also doubtless true that he intended the residual constraint of reasonableness review to have some teeth.

<sup>109</sup> BERNARD BAILYN ET AL., *GLIMPSES OF THE HARVARD PAST* 93 (1986).

---

---

I have suggested elsewhere that this roughly optimizing, pragmatic, pluralist approach to the administrative state and its institutions is the best approach on offer, given realistic institutional constraints.<sup>110</sup> At the highest level of abstraction, law (Jaffe), democratic accountability (Kagan), and expert knowledge (Landis) all have their claims, yet those claims cannot simultaneously be maximized or fully satisfied. Some rough accommodation, balancing, or trading-off is inevitable. At the level of theory, at least, the legitimation of the administrative state is a problem that has worked itself out in a kind of exhausted consensus (meaning consensus as to high-level principles; the ongoing disagreements as to particulars and policies are bitter). The mainstream of the theoretical discourse has converged on a pragmatic, roughly optimizing approach to administrative institutions, one that hopes to make those institutions function tolerably well overall — with “well” defined not in philosophers’ terms, but with reference to sociological legitimacy, acceptance by the broad mass of the public. There is neither reason, nor cause, to hope for much more than that.

---

<sup>110</sup> See Vermeule, *supra* note 2.