

## A Better Defense of Big Waiver: From James Landis to Louis Jaffe

Yair Sagy

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# A BETTER DEFENSE OF BIG WAIVER: FROM JAMES LANDIS TO LOUIS JAFFE

YAIR SAGY\*

*This Article is a rejoinder to Professors David J. Barron and Todd D. Rakoff's article, In Defense of Big Waiver, recently published in the Columbia Law Review. "Big Waiver" provisions, which figure prominently in the "No Child Left Behind" and the "Obamacare" legislation, authorize administrative agencies to displace the regulatory baseline established by Congress. Propounding a defense of big waiver statutory provisions, Barron and Rakoff ground their argument in James Landis's seminal work, The Administrative Process. This Article shows, however, that Barron and Rakoff's defense is misguided because it ignores Landis's work's focal point, the concept of administrative expertise, which had been widely discredited post-Landis. This Article offers instead an innovative, alternative justification for big waiver regulation, which draws on Louis Jaffe's construction of a decentralized, inter-branch dialogic theory of regulation. Therefore, this Article operates on three levels. On one level, it is a response to Barron and Rakoff. On a second level, the Article offers an in-depth innovative analysis of the writings of two of the most influential thinkers on regulation, Landis and Jaffe. In doing so, the Article questions the pervasive understanding of Landis's work and promotes a novel reading of both Landis's and Jaffe's scholarship. On yet a third level, this Article*

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\* Assistant Professor of Law, University of Haifa Faculty of Law, Israel. For their valuable thoughts and suggestions, I thank Noah Feldman, Morton Horwitz, Robert Katzmann, and Richard Primus, with whom I have discussed several of this Article's topics along the years. A special thanks goes to Orna Rabisnovich-Einy and Shmuel Leshem, whose support and help made me finish the Article. Finally, I am indebted to Ruthie Ben-David for wonderful research assistance.

This Article is intellectually based on the investigation I have pursued in my J.S.D. Dissertation into theories of administrative expertise in the history of regulation in the United States. See Yair Sagy, *The Manager, the Judge, and the Empiricist: American Administrative Law as a Theory of Expertise* (2006) (unpublished J.S.D. Dissertation, New York University) (on file with the New York University Law School Library), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=yair\\_sagy](http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=yair_sagy), archived at <http://perma.cc/P58R-5ARX>. The Article substantially reworks key parts of the analysis conducted therein. It also introduces a series of new arguments as it focuses on some of the most burning issues of the present.

*charts the contours of a new regulatory framework for the twenty-first century, which is rooted in the work of Jaffe.*

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## I. INTRODUCTION

This Article is a rejoinder to the just-published, comprehensive, and impressive article, *In Defense of Big Waiver*.<sup>1</sup> In that article, two

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1. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013). As illustrated by Professors Barron and Rakoff, big waiver provisions may take several forms. In fact, they insightfully present “waiver power as a continuum,” *id.* at 278, that covers also “little waivers” (i.e., provisions that “delegate a limited power to handle the exceptional case . . . to merely ‘modify’ or ‘tinker’ with a statute through the lifting of limited aspects of a requirement contained within it in order to handle an unusual application”), *id.* at 277. Still, Barron and Rakoff maintain that those different forms of waiver belong “to a single family” because—and to the extent that—they share the displacement power, namely,

prominent administrative-law scholars, Professor David Barron and Professor Todd Rakoff, plead the cause of “big waiver” provisions that figure prominently in “the signature regulatory initiatives of the last two presidential administrations—the No Child Left Behind Act<sup>[2]</sup> of President George W. Bush and the Patient Protection and Affordable Care Act<sup>[3]</sup> of President Barack Obama.”<sup>4</sup> Big waiver statutory provisions “confer broad policymaking discretion so that the agency may choose to displace a regulatory baseline that Congress itself has established.”<sup>5</sup> Barron and Rakoff base their support of big waiver on the seminal writing of James M. Landis.<sup>6</sup> In response, this Article will argue that the theoretical foundation for big waiver offered by Barron and Rakoff is ill-founded. The Article will develop instead a novel basis for justifying big waiver that draws on the work of Louis L. Jaffe. In doing so, this Article advances a new reading of the writings of the two leading thinkers whose work has profoundly influenced the theory, jurisprudence, and operation of the administrative state in the last century.<sup>7</sup>

Barron and Rakoff persuasively argue that in recent years big waiver has become a dominant feature of the American administrative state.<sup>8</sup> The two authors, who believe that big waiver is constitutionally

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the power to displace the regulatory baseline set by Congress. *Id.* at 291. This “family,” Barron and Rakoff emphasize, is to be set apart from administrative enforcement discretion, for while “waiver immunizes[,] non enforcement merely looks the other way.” *Id.* at 274. For further (and other) analytic descriptions of big waiver, see also *id.* at 290–91; Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegation of Waiver Authority in Environment Laws*, 34 HARV. ENVTL. L. REV. 257, 264–71 (2010); *infra* note 45 (describing big waiver’s “inversion” of traditional delegation).

Indeed, it seems that waiver provisions are drawing more and more scholarly attention. For recent analyses of waiver, see also, for example, Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 227 (Nathaniel Persily, Gilliam E. Metzger & Trevor W. Morrison eds., 2013), and the list of sources cited in Barron & Rakoff, *supra*, at 267 n.3.

2. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

3. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26, 42 U.S.C.).

4. Barron & Rakoff, *supra* note 1, at 268. For other examples of waiver provisions, see *id.* at 279–90. For a short, useful history of big waiver, see Bagenstos, *supra* note 1, at 228–31.

5. Barron & Rakoff, *supra* note 1, at 291.

6. *Id.* at 267 n.2, 292.

7. See *infra* Parts II–III.

8. See *infra* notes 33, 348 (explaining why big waiver is likely to figure even more prominently in the future).

warranted,<sup>9</sup> spend a considerable amount of time on the “*subconstitutional*” level of analysis with a view to illustrating “how to reconcile big waiver and the administrative law doctrines and principles that have developed in the wake of the rise of the classic delegation.”<sup>10</sup> At this, as well as at many other key junctures, they take “classic”<sup>11</sup> or “the traditional paradigm of delegation”<sup>12</sup> as their stepping stone on the way to ascertaining that big waiver is lawful, justified, and desirable. Their analyses on these three levels of discussion—constitutionality,<sup>13</sup> legitimacy,<sup>14</sup> and public policy<sup>15</sup>—start off on the assumption that

9. See Barron & Rakoff, *supra* note 1, at 312–18. But see R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L.Q. 525 (2013). As demonstrated by these sources, the two analytical frameworks that are most pertinent to testing the constitutionality of big waiver are the nondelegation doctrine and the bicameralism and presentment test. See also Bowers, *supra* note 1, at 292–93, who highlights the fact that waiver arrangements may include limitations on judicial review and argues that the combination of such limitations with the delegation of powers that inheres in the waiver power “may well present constitutional problems.”

10. Barron & Rakoff, *supra* note 1, at 335; see also *id.* at 318–41.

11. *Id.* at 335; accord, e.g., *id.* at 295 (mentioning “classic delegations”).

12. *Id.* at 281; accord, e.g., *id.* at 270 (“the traditional form of delegation”).

13. For sources dealing with the constitutionality of big waiver, see *supra* note 9.

14. For an up-to-date discussion of the complex issue of the legitimacy of the administrative state, see Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425, 457–59 (2011) [hereinafter Sagy, *Triptych of Regulators*]. See also *infra* note 296 and accompanying text (arguing that—as applied to regulation—commonly, legitimacy concerns center on the exercise of discretionary state-power by “politically unresponsive administrators”).

It is well known that this issue has been a trademark of the American administrative state and the literature surrounding it. As argued by Jody Freeman, “[A]dministrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy.” Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 (2000). See also *infra* text accompanying note 297; David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1460 (2013) (“Administrative law suffers from a prolonged sense of crisis regarding the legitimacy of regulatory action.”), and the contemporary controversy surrounding PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014), notably Adrian Vermeule, *No—Review of Philip Hamburger, Is Administrative Law Unlawful?*, TEX. L. REV. (forthcoming 2014) (book review). For recent comprehensive reviews of the legitimacy challenge and the means offered throughout the years to meet it, see, for example, Arkush, *supra*, at 1464–93; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003); David S. Rubenstein, “*Relative Checks*”: *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169 (2010).

15. The policy aspects of big waiver are discussed in Barron & Rakoff, *supra* note 1, at 292, 318, 332–39. See, e.g., Bagenstos, *supra* note 1; Bowers, *supra* note 1, at 297–304.

“traditional delegation,” which is attributed to the New Deal,<sup>16</sup> had already been properly established.<sup>17</sup> Therefore, Barron and Rakoff take it as their only mission to incrementally push the analysis (only) one step further. Standing on the shoulders of former jurists—actually, on the shoulders of one specific jurist in particular—they wish to explicate how arguments, which had proven successful in upholding “the classic New Deal type of regulation,”<sup>18</sup> could now likewise defend big waiver.<sup>19</sup>

This line of reasoning brings Barron and Rakoff, already at the outset of their discussion, to James Landis<sup>20</sup> and his New Deal book, *The Administrative Process*.<sup>21</sup> This is a natural, familiar move in the legal literature, which regards the New Deal as a critical juncture in the history, theory, and practice of the American administrative state, as the era during which a foundational—or “classic” as some would have it<sup>22</sup>—paradigm of regulation was established.<sup>23</sup> Typically, once this paradigm is included in the conversation, a string of classics ensues: the paradigm’s classic champion, the “New Deal architect,”<sup>24</sup> James Landis;<sup>25</sup> his book, *The Administrative Process*, acclaimed as “the most eloquent celebration of commission regulation ever written”;<sup>26</sup> arguments made

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16. Barron & Rakoff, *supra* note 1, at 266.

17. *See id.* at 292–312, 334–35.

18. *Id.* at 334.

19. *See, e.g., id.* at 340.

20. *See, e.g., id.* at 269, 271, 287, 292–95, 300, 303, 310, 341.

21. JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

22. *See supra* text accompanying note 18.

23. The literature on the New Deal’s place in the history of American regulation is enormous. *See, for example, RONALD EDSFORTH, THE NEW DEAL: AMERICA’S RESPONSE TO THE GREAT DEPRESSION* (2000), for a comprehensive survey of the different agencies that were established and the various governmental initiatives that were executed during the New Deal; *see also Robert L. Rabin, Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1243–53, 1262–63 (1986), for a powerful statement of the innovative message introduced by the New Deal to the realm of governmental regulation.

24. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *TEX. L. REV.* 15, 19 (2010); Jonathan H. Adler, *Placing “Reins” on Regulations: Assessing the Proposed Reins Act*, 16 *N.Y.U. J. LEGIS. & PUB. POL’Y* 1, 37 (2013) (“James Landis, who is often credited as the New Deal ‘architect’ of the modern administrative process, advocated extensive delegation of regulatory authority to administrative agencies. His arguments in support of delegation are commonly repeated to this day.”).

25. On Landis, *see infra* Parts II.A–B.

26. Thomas K. McCraw, *Regulation in America: A Review Article*, 49 *BUS. HIST. REV.* 159, 162 (1975).

“in . . . classic form[s]” in the latter book in defense of “the classic form of delegation.”<sup>27</sup>

Thus, like many others before them, Barron and Rakoff take this list of classics as their point of departure, and herein lies the rub. For Barron and Rakoff surely mount an impressive construction, yet—as I wish to show in this Article—it is unsound. Barron and Rakoff overlook the focal point in Landis’s *The Administrative Process*—the notion of administrative expertise. This oversight not only results in an inaccurate portrayal of Landis’s work but also, as I will show below, weakens Barron and Rakoff’s enterprise. Relying on Landis amounts to arguing that expertise is the only tenable basis for big waiver.<sup>28</sup> However, the two authors understandably sought to base their defense on a different theoretical foundation, as expertise had been widely discredited post-Landis.<sup>29</sup>

Indeed, Barron and Rakoff’s project should be grounded in a different body of work. Big waiver is both an important regulatory tool in its own right and a reflection of its era’s—this era’s—perceptions of regulation. Since this is the case, there is certainly much to be gained from placing big waiver on an appropriate, solid footing, as the prospect of big waiver and other modern regulatory tools are at stake. Badly conceived and inappropriately justified schemes of regulation simply do not stand a chance to succeed. This is where Jaffe’s construction of a decentralized, interbranch dialogic theory of regulation will provide an alternative basis for big waiver.<sup>30</sup> Jaffe, I will suggest, offers a vision of regulation much more in sync with the world of the twenty-first century than Landis.<sup>31</sup> Consequently, it appears more appropriate to follow

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27. Barron & Rakoff, *supra* note 1, at 267, 292.

28. *See infra* Part II.D.2.

29. Barron & Rakoff, *supra* note 1, at 271. As Barron and Rakoff openly acknowledge, “[the] modern world . . . lacks [Landis’s] . . . faith in expertise.” *Id.*; *see infra* note 298 (discussing literature arguing the same).

30. *See Infra* Part III.

31. *See* Barron & Rakoff, *supra* note 1, at 293; Yair Sagy, *The Manager, the Judge, and the Empiricist: American Administrative Law as a Theory of Expertise* 308–43 (2006) (unpublished J.S.D. Dissertation, New York University) (on file with the New York University Law School Library) [hereinafter Sagy, *The Manager, the Judge, and the Empiricist*], available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=yair\\_sagy](http://works.bepress.com/cgi/viewcontent.cgi?article=1004&context=yair_sagy), archived at <http://perma.cc/P58R-5ARX>.

Jaffe's, rather than Landis's, lead<sup>32</sup> when analyzing the contemporary administrative apparatus.

This Article, therefore, operates on three levels. On one level, it is a response to Barron and Rakoff's thought-provoking article on the big waiver era of the administrative state. As thoroughly illustrated by Barron and Rakoff, big waiver merits our attention not only because it is a novel regulatory tool to be found in most recent central federal regulatory schemes, but also as its centrality and growing popularity is a testament to the rise of a new regulatory age in the United States.<sup>33</sup> On a second level, the Article offers an in-depth, innovative analysis of the writings of two of the most influential thinkers on regulation: Landis and Jaffe. In doing so, the Article questions the pervasive understanding of Landis's work and promotes a novel reading of both Landis's and Jaffe's scholarship. On yet a third level, this Article charts the contours of a new regulatory framework for the twenty-first century, which is rooted in Jaffe's post-New Deal work.

The Article proceeds as follows: The next Part (Part II) will introduce James Landis, survey his writing throughout his life, and critically analyze his *magnum opus*, *The Administrative Process*. At several points in the discussion, the work of Louis Jaffe will be contrasted with that of Landis, thus foreshadowing the Article's following Part (Part III), which will be dedicated to illustrating in what ways Jaffe's scholarship may be of greater service to those seeking to advance the cause of big waiver. Part IV will conclude.

## II. LANDIS AND *THE ADMINISTRATIVE PROCESS*

### A. *Introduction: The New Deal's Icon and Classic*

The fact that *The Administrative Process* (the book) and its author are the fulcrum around which Barron and Rakoff construct their

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32. Cf. Barron & Rakoff, *supra* note 1, at 293 (conducting an analysis “[f]ollowing Landis’s lead”).

33. See *id.* at 293, 295. Hence, according to Barron and Rakoff, it is the functional fit between “relatively permanent features” “of the contemporary political economy” and the big waiver technique that “give[s] reason to suspect big waivers will become an even more prominent feature of the administrative state in the years ahead.” *Id.* at 293, 295. Professor Bagenstos similarly argues that the Supreme Court’s landmark decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), is likely to “accelerate” the use of waiver. Bagenstos, *supra* note 1, at 235 (“The *NFIB* case is therefore likely to accelerate the trend toward federalism by waiver.”). For further reference to “federalism by waiver,” see *infra* notes 344–47 and accompanying text.



remarkable intellectual edifice may be easily explained. Landis—called “Dean of Regulators” by his biographer<sup>34</sup>—is a celebrated figure in the history of American administrative law. According to Thomas McCraw’s authoritative description, “[i]n the history of regulation in America, few names loom larger than that of James M. Landis.”<sup>35</sup> And the book, which was published in 1938, was hailed as “the most eloquent celebration of commission regulation ever written.”<sup>36</sup> Louis Jaffe said likewise that the book “espoused a paradigm of broad delegation which was the icon of the New Deal.”<sup>37</sup> Hugely influential when published,<sup>38</sup> the book has long acquired the status of a classic.<sup>39</sup> However, it has never been an antiquated, dusty classic but rather a source repeatedly referred to, from the day of its publication to these very days.<sup>40</sup>

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34. DONALD A. RITCHIE, *JAMES M. LANDIS: DEAN OF THE REGULATORS* (1980).

35. THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 153 (1984).

36. See McCraw, *supra* note 26, at 162.

37. Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1186 (1973) [hereinafter Jaffe, *Illusion of Ideal Administration*].

38. For example, Jaffe wrote in the mid-1960s, “Landis spoke for all of us who had been deeply committed to the New Deal and who had been intimately associated with the administrative process.” Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 320 (1964) [hereinafter Jaffe, *James Landis*]. The book, he added, “became inevitably a celebration, a defense, and a rationalization of the magnificent accomplishment in which [Landis] had played so brilliant a part.” *Id.* at 320. The bulk of the article, written almost thirty years after the book was published, nevertheless presents a critical assessment of the views expressed by Landis in the book, views that, as noted, Jaffe shared at the time. See also A.H. Feller, *The Quasi-Judicial, Quasi-Legislative Agencies*, 27 SURVEY GRAPHIC 620, 620 (1938) (reviewing LANDIS, *supra* note 21) (“Here are the words of one who is both scholar and administrator; a philosopher who has himself labored in the vineyard.”), and the following three reviews of Landis’s *The Administrative Process*: Thomas T. Cooke, Book Review, 48 YALE L.J. 925 (1939); George K. Gardner, Book Review, 52 HARV. L. REV. 336 (1938); and George Nebolsine, Book Review, 48 YALE L.J. 929 (1939).

39. Barron & Rakoff, *supra* note 1, at 266–67. Thus, for example, Barron and Rakoff refer to the book’s key formulations regarding American administrative law—the “archetypal form of delegation” of “highly discretionary regulatory power”—as “classic.” *Id.*

40. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 213–17 (1992); MCCRAW, *supra* note 35, at 212–16; G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 114–16 (2000); Bruce A. Ackerman & William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466, 1471–72 (1980); James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363 (1976); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1318–19 (1984); Michael Ray Harris, *Breaking the Grip of the Administrative Triad: Agency Policy Making Under A Necessity-Based Doctrine*, 86 TUL. L. REV. 273, 283–84 (2011); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001); Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419 (1996); Rubenstein, *supra* note 14, at 2185; Mark Seidenfeld, *A Civic*

Curiously enough, as voluminous as it is, the commentary to the book's "meaning" seems to be of one mind. It is commonly considered a piece of robust advocacy for the entrusting of expansive regulatory powers in the hands of administrative agencies in the name of a model of administrative expertise that is outlined in the book.<sup>41</sup> On this reading of the book, agencies' authority derives—again in Jaffe's words—"from an assumed comprehensive body of expertise available for the implementation of legislative grants of authority."<sup>42</sup>

A book of this stature deserves—actually, it demands—to be critically revisited occasionally. This is what I set out to do in this Part. Reexamining an entrenched interpretation of any book is a tall order. It may also seem presumptuous or, worse still, superfluous. After all, one may ask, is there anything new and interesting to say about it? I think there is. It seems to me that former readers took the book "at face value" and failed to notice its many layers and, even, inconsistencies. They have also often failed to examine the book against the backdrop of the whole of the Landis corpus, which stretched from the mid-1920s to the beginning of the 1960s. As a correction, I will read the book with an eye on Landis's contemporaneous, previous, and later contributions to the study of American constitutional order. Such a comprehensive outlook is warranted, for it may highlight overarching themes running through the Landis corpus and may thus shed a new light on familiar aspects of the book.

To be sure, the Part's cross-generational analysis is not based on the (Talmudic) interpretive principle that "[t]here is no chronological order in the Torah,"<sup>43</sup> and nowhere will it be argued that Landis's various publications form one coherent body of literature (in this respect, my talk of "the Landis corpus" may be misleading). Quite the contrary, as we shall see, with Landis there *was* "earlier" and "later." Nevertheless, there were also certain concerns that continuously troubled Landis throughout his life.<sup>44</sup>

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*Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513, 1518–19 (1992); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1677–79 (1975); Mark Tushnet, Lecture, *Administrative Law in the 1930s: The Supreme Court's Accommodation to Progressive Legal Theory*, 60 DUKE L.J. 1565, 1569–72 (2011).

41. This characterization applies to all the many sources cited *supra* note 40.

42. Jaffe, *Illusion of Ideal Administration*, *supra* note 37, at 1187.

43. THE BABYLONIAN TALMUD, *Pesahim* 6b (Rabbi Dr. I. Epstein ed., Rabbi Dr. H. Freedman trans., spec. limited anniversary ed.) (1938) (emphasis added).

44. See *infra* Parts II.B, II.F.

My reading of the book will display two soft points in earlier readings of the book. First, according to Barron and Rakoff, “The desire to overcome the dead hand of the past was a central impetus for the modern administrative process Landis championed. Big waiver, [they] believe, is rooted in a similar impulse to make way for the new.”<sup>45</sup> This and similar formulations depict Landis’s (and the book’s) campaign with too-broad strokes. What is missing from the picture is the entire book’s—if not Landis’s complete corpus’s—gravitational point: the concept of expertise. Landis does indeed stand for broad delegation of power; however, he justifies it *based on the idea of administrative expertise*.<sup>46</sup> Barron and Rakoff do make references to Landis’s belief in expertise,<sup>47</sup> but the concept’s pivotal role in the construction of the book’s thesis is not adequately considered. Thus, we get a dim portrayal of the administrative state, allegedly as conceived in the book, without its organizing principle. No true depiction of the book can be had without heeding well this recurrent theme nor without its detailed analysis. This is what I would like to do in this Part. Specifically, this Part will expose several of the book’s abstruse intricacies in its treatment of administrative expertise. It will bring out and assess the various components of the expertise model(s) propagated in the book. Significantly, this close reading of the book will unveil its unsettled, *dual* image of expertise. This duality has largely gone unnoticed thus far.

Second, Landis’s attempt to legitimize the administrative state on the basis of expertise was a failure. The waning credibility of administrative expertise in the days following the New Deal has already been noted in the literature<sup>48</sup> and obviously should be noted again in light of the current attempt to found big waiver on the iconic New Deal model of expert regulation. This Part will further reveal that Landis’s model of expertise was flawed *already at birth*, as it were, and was hence destined to fail. It will bring to light the book’s intricacies in constructing a coherent model, thus revealing its shaky foundations *ab*

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45. Barron & Rakoff, *supra* note 1, at 271. It should be noted, however, that Barron and Rakoff are careful to point out that waiver power is “akin to the Landis-like mode of big delegation, albeit in an inverted form.” *Id.* at 278; *cf., e.g., id.* at 291, 295. As they explain, “big waiver inverts” “the classic type of delegation” because big waiver is “[t]he delegation of the power to do the opposite of what the delegator [(i.e., Congress)] has itself done.” *Id.* at 269, 271.

46. *Id.* at 271.

47. *Id.* at 271, 294–95.

48. *See supra* note 29 and *infra* note 298.

*initio*. It will further highlight the model's naturalistic approach to regulation,<sup>49</sup> thus exposing a major reason for its ultimate demise with the declining currency of naturalism in the course of the twentieth century.<sup>50</sup>

It should be stated already here that these two points are the root causes of the Barron and Rakoff project's untenability: not only is it founded on a cultural disposition that has fallen into disrepute (naturalism), but more fundamentally it relies on a (theoretically) flawed perception of administrative expertise.<sup>51</sup>

In short, I will argue that Barron and Rakoff rely on Landis in their defense of big waiver, yet their description of Landis is seriously misplaced for it lacks the focal point of Landis's book's enterprise—the idea of administrative expertise. Due to their oversight, incomplete portrayals of Landis and the book—again, the very foundations of Barron and Rakoff's project—are produced. This Part will first emphasize expertise's centrality in *The Administrative Process*, thus providing a credible rendering of the book. After providing such a perspective on the book, this Part will take a critical look at the notions of expertise lying at the book's core and demonstrate how feeble they are.

### B. Landis's *Odyssey: Three-Part Saga*

This Part will sequentially follow Landis's work. The ensuing paragraphs, accordingly, nest in a rough chronological order. As noted, the bulk of the discussion will revolve around the book, which is universally held to present the most lucid and thorough treatment of the concept of administrative expertise offered by an American legal scholar to this day.<sup>52</sup> Moreover, as noted, this Part's expansive

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49. See *infra* Part II.G.2.

50. In other words, this Article does *not* base its arguments on a denial of the “actual,” or possible, existence of administrative expertise. For literature directly debating the issue, see *infra* note 298. This is not the question at bar. Rather, the question is this: Whether basing the legitimacy of waiver provisions on a manuscript completely committed to the ideal of administrative expertise makes sense, given the scathing criticism leveled at the ideal over the years and in light of the inadequate defense provided for this ideal in the specific manuscript at hand? See Koch, *supra* note 40. The Article's answer is in the negative.

51. As a final clarification, this Part, generally, will limit its treatment of constitutional issues relating to big waiver—or, more broadly, to regulation—to a minimum. See *supra* note 9. Its focal point is, in a word, the foundational question of the legitimacy of regulation. See *supra* note 14.

52. See *supra* notes 36–38 and accompanying text.

commentary will expose some of Landis's overlooked inconsistencies but also themes running through his manifold corpus of literature. I will demonstrate that, turbulent as his history and that of the regulatory machinery were, Landis remained throughout his torturous scholarly journey a devout believer in the great potentials of the regulatory endeavor.<sup>53</sup>

Who was, then, James McCauley Landis, and how did he come to gain such a mythological stature in the annals of American regulation? Born in 1899, Landis graduated from Harvard Law School as an outstanding student already at the age of twenty-five and went to clerk for Justice Brandeis. Having assumed professorship at his alma mater, he was appointed at the tender age of thirty-eight as the youngest dean in Harvard Law School's history.<sup>54</sup> While at Harvard and later on, he acquired an extensive experience as a regulator.<sup>55</sup> Landis served as a commissioner in three agencies: first at the Federal Trade Commission (FTC) and later at the SEC.<sup>56</sup> In 1935, he became the SEC Chairman.<sup>57</sup>

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53. *See infra* Part II.F.

54. For Landis's biography, see MCCRAW, *supra* note 35, 153–209; RITCHIE, *supra* note 34, at 79; Koch, *supra* note 40.

55. Indeed, it may be suggested that it was Landis's own experience as a commissioner that inspired his great faith in the potential contribution of an agency's competent staff to the administrative process. *See* LANDIS, *supra* note 21, at 68. In the first year after its establishment, the staff of the Securities and Exchange Commission (SEC) had to deal with incredible workload, as so many corporations and exchanges had to be registered for the first time. Thus, according to Landis, everybody—the commissioners and their able staff, accountants, and statisticians—worked very hard, all infused with a shared spirit of common mission. Landis was very impressed by his staff; he said there were

very able people in there . . . . Some of them worked around the clock in order to meet the deadline, which they did. But that was the kind of aura and atmosphere under which people worked. There was no question about hours or anything of that nature. There was a tremendous enthusiasm to see that these pieces of legislation would work, and would work to the benefit of the financial community as well as everybody else.

MCCRAW, *supra* note 35, at 184 (quoting THE REMINISCENCES OF JAMES M. LANDIS 225 (1964) (Interview by Neil Gold, Oral History Research Office, Columbia University, with James M. Landis, in Harrison, New York (1963–1964)) (internal quotation marks omitted)). Landis makes explicit references at various points in the book to his experience as an administrator. *See*, for example, LANDIS, *supra* note 21, at 68, 75; *see also* Tushnet, *supra* note 40, at 1602–13, relating the controversy surrounding *Jones v. Securities and Exchange Commission*, 298 U.S. 1 (1936), in which Landis was implicated as an SEC Commissioner and following which Landis—adverting to Justice Sutherland's opinion in *Jones*—commented, “Such an outburst indicates that one is in the field where calm judicial temper has fled,” LANDIS, *supra* note 21, at 139.

56. RITCHIE, *supra* note 34, at 74.

(Later on, in 1946 he was named the chairman of the Civil Aeronautics Board (CAB).)<sup>58</sup> Landis is also remembered for his role during the New Deal, when he, along with Benjamin Cohen and Thomas Corcoran,<sup>59</sup> played a pivotal role in the drafting of the two keystones of federal securities legislation, the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as in the preparation of the highly contested Public Utility Holding Company Act of 1935.<sup>60</sup>

Landis's career as a scholar can be divided into the following three (somewhat overlapping) periods:

1. At the inception of Landis's career, his main interests lay in the study of "how business comes to the Court and the manner of its disposition"<sup>61</sup> and in the analytical study of legislation.<sup>62</sup> Having been named the first Professor of Legislation at Harvard Law School,<sup>63</sup> Landis made it his business to reprimand the legal profession in general, but courts in particular, for ignoring legislation and limiting its interest to the study of (judge-made) common law.<sup>64</sup> Further, Landis's early work advocated courts' deference to Congress. "Essential to the proper scope of judicial review over legislation," he wrote in 1931, "is a sense of respect for the legislature's conclusions."<sup>65</sup>

2. Starting in the mid-1930s until his death in 1964, Landis focused his attention more directly on issues of administrative regulation. Elaborating on his previous, often sarcastic, assessment of the role played by courts in frustrating progressive legislative intent,<sup>66</sup> Landis

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57. *Id.* at 68. On Landis's chairmanship of the SEC, see *id.* at 68–78.

58. *Id.* at 140. Landis served on the CAB from June 1946 to December 1947, when Truman declined to renew his appointment. When the two men met, President Truman told Landis that when he became President he had been told, "[Y]ou'll have to be a son-of-a-bitch half the time." This is one of the times," Truman said. *Id.* at 153 (internal quotation mark omitted).

59. On these and other New Deal lawyers, see, for example, PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982), and WILLIAM LASSER, *BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL* (2002).

60. On the drafting of these three Acts, see LASSER, *supra* note 59, at 65–129; MCCRAW, *supra* note 35, at 153–209; RITCHIE, *supra* note 34, at 43–61.

61. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 271 (1931).

62. *Id.* at 271.

63. RITCHIE, *supra* note 34, at 35.

64. James M. Landis, *The Study of Legislation in Law Schools*, 39 HARV. GRADUATES' MAG. 433, 441 (1931) [hereinafter Landis, *The Study of Legislation in Law Schools*].

65. *Id.*

66. See *infra* text accompanying notes 79, 89.

carried over the analysis to a more general level by conducting a comparative institutional study<sup>67</sup> in which he critically examined the (in)adequacy of the three “constitutional” branches of government to constructively regulate the modern economy. This study led him to underscore the necessity of entrusting wide discretion in the hands of administrative agencies. He concluded that in many incidents the judiciary, in particular, should pull out and let expert agencies do their jobs.<sup>68</sup> The exact ingredients of this “expertise” will be parsed out below.<sup>69</sup> It was during this period of his life that Landis produced his most influential and everlasting contribution to the theory of administrative regulation: his 1938 book, *The Administrative Process*, which contains Landis’s Storrs Lectures at Yale Law School.<sup>70</sup> A close reading of it will stand, therefore, at the center of this Part.

3. Finally, in the “Landis Report”<sup>71</sup>—composed in 1960 at the request of a son of a friend, President-elect Kennedy, to whom he had been “something of an honorary uncle” for many years<sup>72</sup>—Landis took a retrospective look at the administrative apparatus as it had come to pass since the New Deal.<sup>73</sup> Much less exuberant and buoyant in spirit than the book, the Report pillories many predicaments that afflicted federal agencies in the preceding decades and calls for agencies’ deference to the Executive.<sup>74</sup>

### C. Prologue: On the Business of the Court and Legislation

Beginning in 1924, the year of his graduation from Harvard Law School, Landis introduced himself to the legal community through a series of articles that focused on two topics: (1) a study of the mechanics

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67. For the theoretical contextualization of Landis’s institutional competence analysis, see Jeffrey Rudd, *The Evolution of the Legal Process School’s “Institutional Competence” Theme: Unintended Consequences for Environmental Law*, 33 *ECOLOGY L.Q.* 1045, 1055 (2006) (“The Great Depression sparked the institutional competence idea as part of a broader theoretical movement to constrain industrial monopolists from disrupting social order and threatening democratic principles of self-governance.”).

68. See *infra* Part II.D.2.

69. See *infra* Part II.G.

70. The lectures took place in January 1938. See RITCHIE, *supra* note 34, at 84–86.

71. JAMES M LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (1960) [hereinafter THE LANDIS REPORT].

72. RITCHIE, *supra* note 34, at 168. Landis was a close friend of the Kennedys and remained in close contact with Joseph P. Kennedy throughout his life. See *id.* At some point, Landis even worked for “Joe Senior.” See *id.* at 158–59.

73. See *infra* Part II.E.

74. RITCHIE, *supra* note 34, at 177–78.

of the federal judiciary, which he conducted with Felix Frankfurter,<sup>75</sup> and (2) the tension between the common law tradition and modern legislation.<sup>76</sup>

This literature introduces two emphases to the present investigation. First, it bears testimony to Landis's long-standing understanding that this was an era of sea change in the economic and political history of the United States. He realized that a series of profound historical processes had ushered in a new era, which called for a radical change in the way lawyers think of social changes, government's role, and, ultimately, law itself.<sup>77</sup> Second, contemporary courts, led by the Supreme Court, came to symbolize for Landis reactionary forces in the American polity.<sup>78</sup> To him, courts' "conservative tendencies" had first to be eradicated for the law "to cope adequately with the problems raised by a rapidly changing civilization."<sup>79</sup> By naming several traits embedded in the common law tradition that impede any substantial progress on this front, Landis prefigured future institutional analyses, which he would bring to center stage later on in his writing.<sup>80</sup>

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75. The two already published in May 1925 an article dealing with mechanisms to alleviate problems of coordination among the legal regimes of the several states (particularly, "the Compact Clause" of the Constitution, U.S. CONST. art. I, § 10, cl. 3). See Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). The most notable product of their joint venture was the book, FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928). The book's eight articles had been individually presented in the Harvard Law Review, beginning in June 1925. See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System* (pts. 1, 6–8), 38 HARV. L. REV. 1005 (1925), 40 HARV. L. REV. 431, 834, 1110 (1927); Felix Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System* (pts. 2–5), 39 HARV. L. REV. 35, 325, 587, 1046 (1925–1926). Half of the articles are presented as Frankfurter's alone (the second, third, fourth, and fifth), since "Landis's position with Brandeis prevented his name as appearing as co-author." RITCHIE, *supra* note 34, at 25. See also Frankfurter & Landis, *supra* note 61; Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1 (1928).

76. See, e.g., James McCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7 (1965) [hereinafter Landis, *Statutes and the Sources of Law*]. The article was original published in 1934 as James McCauley Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS WRITTEN IN HONOR OF AND PRESENTED TO JOSEPH HENRY BEALE AND SAMUEL WILLISTON 213 (1934).

77. See *infra* text accompanying notes 85–88.

78. LANDIS, *supra* note 21, at 33–36. Clearly, Landis was not unique in holding this view. See, e.g., Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1403–05 (2000).

79. Landis, *The Study of Legislation in Law Schools*, *supra* note 64, at 435.

80. See *infra* Part II.D.2.



As a young scholar, Landis (writing alone) drummed home the message that legislation as lawyers had known it in the past had gone through a transformation in recent history.<sup>81</sup> So much so, he was sure, that the advent of this new phase in the history of legislation warranted a reconfiguration of the extant body of law so that legislation's primacy as a legal source would be acknowledged and acted upon.<sup>82</sup> While preaching to law school professors, too,<sup>83</sup> his target audience was the Supreme Court.

Legislation has much advanced in recent times, Landis claimed in one essay. It "represent[s] a wide[] and . . . comprehensive grasp of the situation."<sup>84</sup> It is better drafted than in the past, more systematic, handled by expert draftsmen, and attuned to pending social needs.<sup>85</sup> Furthermore, democratic legislation does not suffer from legitimacy deficit<sup>86</sup> and is better informed than common law judges who customarily draw on "an outmoded age or a narrower experience."<sup>87</sup> As such, lawyers and courts have much to learn from it, rather than stubbornly adhere to the view that "the statute . . . [is] merely . . . the voice of a majority, and seemingly only as durable as that majority. It simply states its commands and pleas no reason for its cause."<sup>88</sup>

Already at this stage of his academic career, Landis believed that the courts' role in industry regulation should be carefully demarcated due to their judicial imperialism and "barbaric rules of interpretation";<sup>89</sup> they must learn to heed well the intent of the Legislature when interpreting the regulations; and in any event they should be deferential to

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81. Landis, *Statutes and the Sources of Law*, note 76, at 13.

82. *Id.* at 12–13.

83. See Landis, *The Study of Legislation in Law Schools*, *supra* note 64, at 433.

84. Landis, *Statutes and the Sources of Law*, note 76, at 14.

85. *Id.* at 13. On this article's place in the long-standing debate about the interplay between the common law and statutes, see Alexandra B. Klass, *Common Law and Federalism in the Age of Regulatory State*, 92 IOWA L. REV. 545, 548–57 (2007).

86. I will return to this subject below, of course. See *infra* notes 205, 296 and accompanying text.

87. Landis, *The Study of Legislation in Law Schools*, *supra* note 64, at 437; see also *id.* at 436; *infra* note 110 (Landis's listing courts' inadequacies as regulators).

88. Landis, *The Study of Legislation in Law Schools*, *supra* note 64, at 433 (arguing that, in so doing, lawyers and judges ignored the important role legislation had played in the development of the common law); see also Landis, *Statutes and the Sources of Law*, *supra* note 76, at 8 ("[M]uch of what is ordinarily regarded as 'common law' finds its source in legislative enactment.").

89. James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 890 (1930).

Congress.<sup>90</sup> In a 1924 piece, which he co-authored with Frankfurter, the writers told the Supreme Court that (a) in handling the issue of separation of powers, “[i]t is futile to draw the answer from abstract speculation”;<sup>91</sup> and (b) Congress is “that branch of the government upon which is cast the primary responsibility for adjusting public affairs.”<sup>92</sup>

Now, we turn to the book.

#### D. Landis and The Administrative Process

##### 1. Some Context

Landis’s main intent in authoring the book seems evident: he wished to present a lucid, coherent, and unrepentant justification for the burgeoning agencies, those always-contested governmental devices, which were enthusiastically used by the New Dealers.<sup>93</sup> Importantly, he did so in the face of a *hostile* environment.

“[T]hose who hailed” regulation by agencies and “those who hated it”<sup>94</sup> were engaged in an extensive, convoluted, and sometimes acrimonious intellectual brawl, which was wide-ranging and long-lasting.<sup>95</sup> While it had already reached a noticeable climax during the Progressive Era, by the New Deal, new records were broken.<sup>96</sup> With the advent of the New Deal, three fairly distinct coalitions took part in the

90. *Id.* (“[S]trong judges prefer to override the intent of the legislature in order to make law according to their own views . . .”).

91. Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1018 (1924).

92. *Id.* at 1016.

93. *See supra* note 23.

94. Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1105 (1954) [hereinafter Jaffe, *A Reevaluation*].

95. On the commotion that the delegation of administrative discretion to agencies stirred, see also LANDIS, *supra* note 21, at 2, 49–52, 92; RITCHIE, *supra* note 34, 43–78; MCCRAW, *supra* note 35, 210–21; G. EDWARD WHITE, *supra* note 40, 94–127; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Sagy, *The Manager, the Judge, and the Empiricist*, *supra* note 31, ch. 90–123.

96. *See generally* RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955); MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920* (2003); ROBERT H. WIEBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* (1962); Yair Sagy, *The Legacy of Social Darwinism: From Railroads to the “Reinvention” of Regulation*, 11 GEO. J. L. & PUB. POL’Y 481 (2013) [hereinafter Sagy, *The Legacy of Social Darwinism*]; Tushnet, *supra* note 40.

discussion. First, there was a party headed by pro-commission lawyers, some of whom lent a hand in the design of major pieces of legislation advanced by the FDR administration; these were the panegyrics of the administrative state—dominant members included Landis, Thomas Corcoran, and Benjamin Cohen.<sup>97</sup> The second group was a coalition of anti-commission thinkers, led by conservative lawyers and coordinated by the American Bar Association, such as Arthur Vanderbilt, its president during the years 1937–1938; Louis Caldwell, who was the first chairman of the Special Committee on Administrative Law of the ABA (established in 1933),<sup>98</sup> and the eminent Roscoe Pound, who had a stint as one of Caldwell’s successors as chairman of the Special Committee.<sup>99</sup> The last camp consisted of scholars outside the legal academy, led by political scientists, such as the members of the President’s Committee on Administrative Management (“the President’s Committee”), which famously wrote of the administrative arm of government in its 1937 report, “Without plan or intent, there has grown up a headless ‘fourth branch’ of the Government . . . .”<sup>100</sup>

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97. See *supra* notes 59–60 and accompanying text.

98. See Louis G. Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966 (1936).

99. In that capacity, Pound was responsible for the famous “Pound Report.” Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 REP. AM. B. ASS’N 331 (1938) [hereinafter Pound Report]; see also Tushnet, *supra* note 40, at 1629–31 (relating the Special Committee’s story).

100. THE PRESIDENT’S COMM. ON ADMIN. MGMT., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 30 (1937) [hereinafter THE PRESIDENT’S COMMITTEE REPORT]. For later uses of similar language, see *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (“[The administrative bodies] have become a veritable fourth branch of the Government . . . .”); Rubenstein, *supra* note 14, at 2215 (referring to the administrative state as “a hydra-headed fourth player”).

The three members of the President’s Committee were Luther Gulick, who was one of the heads of the Institute of Public Administration, established in New York in 1921; Charles Merriam, at one point the president of the American Political Science Association; and Louis Brownlow, a former city manager of Petersburg, Virginia. For the biography of the three members of the President’s Committee, see BARRY DEAN KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL: THE GENESIS OF ADMINISTRATIVE MANAGEMENT 1900–1939 (1963).

Generally, in its report, the Committee proposed a highly centralistic reorganization plan whereby the President, in person or through his executive office, would effectively command the whole federal administrative apparatus—independent agencies included, see *infra* note 121—and all parts of the Executive. Compare contemporary arguments put forward in support of the Presidential-Control Model. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 581 (1994) (“Congress . . . may not create inferior entities that will be constitutionally empowered to exercise the executive power without the acquiescence of the President. Once created, these

Landis, for his part, heaped criticism on his opponents' head. He maintained in the book that unless a functional (rather than "formal") reading of the Constitution is accepted, one which validates the administrative endeavor, the federal government will not be able to perform its multifaceted duties, the list of which has substantially increased since the advent of the industrial age and the unprecedented challenges it had introduced.<sup>101</sup> I will not dwell on Landis's constitutional discussion. Suffice it to say that his solution to the pending constitutional inquiry rests on the claim that the agency is subjected in its operation to the command of the three branches of government; thus, these three have a share in keeping it within acceptable boundaries.<sup>102</sup> Accordingly, in the book the principle of separation of powers is satisfied in the *combined* supervision of the agencies.<sup>103</sup>

## 2. And Expertise to All

Once the need for a flexible interpretation of the American constitutional jurisprudence is acknowledged and (in Landis's view) met, Landis moves to present a criterion for distributing the diverse governmental duties among the various branches—the Legislative, Executive, Judicial, and administrative—while advocating the delegation of broad powers to the administrative in the appropriate cases.<sup>104</sup> Here enters the concept of relative institutional competence, namely, of expertise. The boldness of this thrust should be underlined. Landis seems to be all but positive that he is able to provide a sufficient justification for the erection of a mammoth administrative apparatus—not at all a trifling matter, given his formidable opponents.<sup>105</sup> But it goes

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agencies . . . must . . . be subject to Presidential superintendence . . ."); see also Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Kagan, *supra* note 40; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Rubenstein, *supra* note 14, at 2200–04. For counterarguments, see, for example, Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227 (1998).

101. See *supra* text accompanying note 79 (referring to a "rapidly changing civilization" (internal quotation mark omitted) (quoting Landis, *The Study of Legislation in Law Schools*, *supra* note 64, at 435)).

102. For contemporary support in this approach, see Rubenstein, *supra* note 14, at 2213–14.

103. LANDIS, *supra* note 21, at 46, 60, 111.

104. See *id.*, at 66–70, 75.

105. See *supra* Part II.D.1.

further than that, as Landis treats the administrative agencies as *equal* to the three “constitutional” branches when he examines the relative advantages and disadvantages of each branch in serving the public good.<sup>106</sup> This leads him to conclude that in many incidents the judiciary, in particular, should pull out and let the agencies do their job—they are simply better equipped to do it, as it is in their expertise.<sup>107</sup> What exactly are the ingredients of this “expertise” will be examined below, yet it should be emphasized that a notion of expertise not only affords the animating spirit of the administration but also provides the dividing line between the administrative branch and the other branches of government.<sup>108</sup> In other words, it gives life to all of them—each one and its own field of expertise. “[F]rom the standpoint of affording conceptions of liberty real meaning,” says Landis, “one can ask little more than to have issues decided by those best equipped for the task.”<sup>109</sup>

Landis’s discussion of the merits and flaws of the judiciary in this context is by far the most elaborate. He takes great pains to name all the many deficiencies of the judicial process in providing a satisfactory response to contemporary regulatory requirements.<sup>110</sup> Particularly important for our purpose is Landis’s following observation:

A general jurisdiction leaves the resolution of an infinite variety of matters within the hands of courts. In the disposition of these claims judges are uninhibited in their discretion except for legislative rules of guidance or such other rules as they themselves may distill out of that vast reserve of materials that

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106. See also *supra* note 67 (describing the theoretical foundations of Landis’s institutional analysis) and *infra* note 118 (citing a contemporary example of such analysis). Compare the analysis conducted in Rubenstein, *supra* note 14.

107. See *infra* notes 110–11 and accompanying text.

108. Sagy, The Manager, the Judge, and the Empiricist, *supra* note 31, at 201.

109. LANDIS, *supra* note 21, at 153.

110. *Id.* at 33–36. Landis provides here a lengthy litany, as he enumerates many predicaments that are related to the option of regulation by the courts (and not by the administration). He asserts that the courts’ process is not well suited for the maintenance of supervision over a pending issue for the long haul, *id.* at 30; as there are many judicial instances, it is difficult to achieve a final unified legal rule that governs a particular question, *id.* at 33, 134; the judicial process is largely in the hands of the interested parties, *id.* at 34–36; legal proceedings are often lengthy and expensive, *id.* at 33; and judicial remedies cannot meet the demands of the regulatory enterprise, *id.* at 89. For a review of comparable contemporary analyses, which generally go along the same lines, see Rubenstein, *supra* note 14, at 2190–99. *But see* Cooke, *supra* note 38, at 928 (replying to Landis’s call for a more efficient resolution of controversies than the one offered by courts) (“[T]he rise of democracy has resulted, to a greater or less degree, in the doing away with . . . summary and arbitrary methods.”).

we call the common law. This breadth of jurisdiction and freedom of disposition tends somewhat to make judges jacks-of-all-trades and masters of none.<sup>111</sup>

What is, then, the role assigned by Landis to courts in the overall management of the state? Landis unequivocally stipulates here again the pervasiveness and determinacy of the category of expertise in his proposed scheme. Yet again, expertise is the yardstick, even—as we shall now see—in his definition of “law.”

*Law*, for Landis, is the realm of the judiciary.<sup>112</sup> Landis has a seemingly simple definition of the relationship between “law” and “courts”: what judges *ought to do*—“ought” as derived from Landis’s methodology of comparative competence—is law.<sup>113</sup>

Thus viewed, the duties that the other branches of government are less capable of performing are in the province of the courts and are hence regarded as “law.” Landis emphatically declares:

*Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions. It is from that very desire that the nature of questions of*

111. LANDIS, *supra* note 21, at 31. Landis goes on to argue that the reasons for entrusting “an extended police function of a particular nature” in the hands of agencies “[i]n large measure . . . sprang from a distrust of the ability of the judicial process to make the necessary adjustments in the development of both law and regulatory methods as they related to particular industrial problems.” *Id.* at 30.

For similar arguments made in later years, see, for example, 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 1.05 (1958) (arguing that courts (and Congress) are “ill-suited for handling masses of detail, or for applying to shifting and continuing problems the ideas supplied by scientists or other professional advisers”); Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1195 (1995) (“[A]gencies have developed the sort of expertise and technical knowledge that gives them a comparative advantage in interpreting such texts over a generalist court that lacks such qualifications.”); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) (“For the resolution of ambiguities in statutory law, technical expertise and political accountability are highly relevant, and on these counts the executive has significant advantages over courts. Changed circumstances, involving new values and new understandings of fact, are relevant too, and they suggest further advantages on the part of the executive.”).

112. For more current similar views, see, for example, David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 748 (2009) (“Courts are . . . specialists and experts in the interpretation and application of law.”); Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 523 (“[C]ourts have a comparative advantage over agencies in deciding what the law is.”).

113. Sagy, *The Manager, the Judge, and the Empiricist*, *supra* note 31, at 242.

*law emerges. For, in the last analysis, they seem to me to be those questions that lawyers are equipped to decide.*<sup>114</sup>

Congress, likewise, has a particular role in Landis's scheme. It should be the arena where—to use a term famously invoked by Justice Scalia in *Romer v. Evans*—*Kulturkampf* takes place.<sup>115</sup> That is, the Legislature's function is to process “those postulates [that] have . . . enlisted the loyalties and faiths of classes of people.”<sup>116</sup> It should first intercept the popular will and then synthesize and translate it into a coherent legislative edict, thus pointing the agencies to a certain direction but leaving the latter to devise a detailed road map.<sup>117</sup> By so doing, Congress confers on the ensuing administrative action “that finality and moral sanction necessary for enforcement.”<sup>118</sup>

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114. LANDIS, *supra* note 21, at 152. Accordingly, Landis chides courts for overstepping their sphere of expertise in passing upon the constitutionality of administrative decisions. *See, e.g., infra* text accompanying note 197. Note, however, that later in the book Landis also maintains that courts are “experts in the synthesis of design.” LANDIS, *supra* note 21, at 154–55.

115. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Indeed, it appears that Landis tries to put forward a viable boundary to Congress's sphere of operation, which would replace the Court's jurisprudence of his time without discarding the nondelegation doctrine altogether. In this regard my reading of Landis's approach to the *Schechter* doctrine is different from that of Morton Horwitz. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court struck down the National Industrial Recovery Act of 1933 (NIRA), as it provided for an unconstitutional delegation of legislative powers from Congress to an administrative agency. Whereas Horwitz maintains that “[a]n important part of *The Administrative Process* was devoted to attacking the delegation theory,” HORWITZ, *supra* note 40, at 217, I believe that the book was attacking only *the way the doctrine was implemented by the Court*. Actually, on my reading, the doctrine, properly applied, played an important role in the constitutional Landisian scheme. *See* James M. Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1102 (1940) (“[I]n *Schechter Poultry Corp. v. United States*, the Supreme Court . . . expunged from the statute book an act that was bound to fail of its high purpose because behind it was none of that understanding essential to the effectiveness of reform.”); *infra* text accompanying note 195 (discussing Landis's outlook on courts' institutional role vis-à-vis the other branches of government).

116. LANDIS, *supra* note 21, at 59.

117. Adolph Berle nicely captured this idea when he wrote in 1917 that when “the function of the general body—Congress—stopped, . . . that of the special body—the commission—began.” A.A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 439 (1917).

118. LANDIS, *supra* note 21, at 60. A similar position with regard to Congress was taken in the course of the debate following *Bush v. Gore*, 531 U.S. 98 (2000). There, the argument was applied with regard to the division of labor between Congress and the courts. *See* Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975, 975 (2001) (“[T]he Bush–Gore election concretely illustrates that institutional design is a crucial consideration in determining which part of the government is best suited to render particular decisions. When institutions must become involved in majoritarian political

Lastly, the book also implies that the function of the other political branch, the Executive, *qua* political branch, is to focus on solving questions of high politics with executorial tools.<sup>119</sup> It is not to be confused with the administrative branch.<sup>120</sup> The Executive is a political branch while the administrative is a policy branch.<sup>121</sup> (I will return to the politics/policy dichotomy.)<sup>122</sup>

Having reviewed the comparative expertise of each branch of government, Landis provides a detailed description of the administrative branch's expertise.

### 3. A Duet of Expertise Types

This Section has one major finding, which cuts against the book's common interpretation. The finding is this: Landis espouses more than one type of administrative expertise in the book. As will now be disclosed, the book embraces two paradigms of expertise. Thus, while my reading of the book may deepen our understanding of administrative expertise (or assertions thereof), it will surely call into question the coherence of the concept, at least as it is presented by its great advocate.

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decisions such as the selection of a President, it may be better to rely largely on the political branches than on the judiciary . . . . This allocation of decisionmaking authority is preferable because of the greater democratic credentials of Congress.”).

119. Sagy, *The Manager, the Judge, and the Empiricist*, *supra* note 31, at 247–48.

120. LANDIS, *supra* note 21, at 15 (“[I]t is obvious that the resort to the administrative process is not, as some suppose, simply an extension of executive power.”).

121. Thus, for example, when championing the independent agency (i.e., an agency, like the FTC and the SEC, whose head the President cannot remove without cause, *see, e.g.*, Barkow, *supra* note 24, at 16–17), Landis explains why it is important to maintain a dividing line between the executive and the administrative:

The reasons for favoring this form seem simple enough—a desire to have the fashioning of industrial policy removed to a degree from political influence. At the same time, there seems to have been a hope that the independent agency would make for more professionalism than that which characterized the normal executive department.

LANDIS, *supra* note 21, at 111.

122. *See infra* Part II.G.4. According to Landis's approach, the prototypical executive activity seems to be the handling of foreign and security affairs; allocation of funds by the treasury is also an appropriate example. It seems that Section 553(a) of the Administrative Procedure Act, 5 U.S.C. § 553(a) (2012), which is dedicated to “Rule making,” is based on a similar rationale. It provides that “[t]his section applies, according to the provisions thereof, except to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” *Id.*



It turns out that Landis was not exceptional in propagating more than one paradigm of expertise. Rather, in so doing, he was falling in line with a distinct pattern that cuts across the legal and non-legal American literature dedicated to the administrative state in the United States from the late nineteenth century to this day. As I have illustrated elsewhere,<sup>123</sup> from a bird's-eye-view on that expansive literature, one can detect three types of regulators, each with its own unique expertise, which are embedded in it. I have named them "the Guardian," which corresponds to Landis's description of the regulator as a general manager;<sup>124</sup> "the Technician," which is identical to Landis's (other) description of the regulator as "an ordinary guy";<sup>125</sup> and "the Facilitator," which is a mediator-like regulator, whose role is to facilitate public deliberation.<sup>126</sup> Admittedly, the finally type is hardly to be found in the book.

### **The Guardian**

The image of the regulator as the Guardian is best described in the book in the following manner:

One of the ablest administrators that it was my good fortune to know, I believe, never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with broad problems of an industry and, upon that understanding, he sought his own solutions.<sup>127</sup>

Two traits of this regulator support its claim to expertise: (1) its managerial abilities; and (2) its visionary, interdisciplinary, and overarching outlook.<sup>128</sup> Thus, for example, at one point Landis opines that "[t]he direction of any large corporation presents difficulties

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123. See Sagy, *Triptych of Regulators*, *supra* note 14.

124. *Id.* at 435–41, 467–70.

125. *Id.* at 441–44, 470–72.

126. *Id.* at 432–35, 463–67; see also Sagy, *The Legacy of Social Darwinism*, *supra* note 96.

127. LANDIS, *supra* note 21, at 75. Landis does not tell us who the administrator is but adds, "Limitations upon his powers that counsel brought to his attention, naturally, he respected." *Id.* This admission is noteworthy, for it brilliantly captures Landis's idea of the perfect legislation—ultimately, one that the administrator does not really need to be bothered with but just to know that it is out there.

128. This is also the interpretation presented in Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 355 (1998) (arguing that Landis "likened the role of the administrative agency to that of a board of directors for an industry, able to use its fact-finding powers and panoramic perch to reach judgments more balanced and farsighted than those accessible to more partial parties").

comparable in character to those faced by an administrative commission.”<sup>129</sup> This was a pregnant analogy in post-1929 America. The demand for the regulation of many “industries with sickness,”<sup>130</sup> in the wake of the Great Crash,<sup>131</sup> showed that this corporate-style model of governance was far from flawless. It did not guarantee beneficial results; it had not in the past. Still, what Landis had in mind is a “more comprehensive, more responsible”<sup>132</sup> mega-management of a *whole* industry (for example, the railroad) by the appropriate agency. This kind of management would attend both to the “public needs” as well as to “achieving the best possible operation of the [industry].”<sup>133</sup> Landis would reiterate this formula in later years.<sup>134</sup> So would others.<sup>135</sup>

Ingrained in this approach is the understanding that sound regulation depends on disruption of “the traditional tripartite theory of governmental organization”<sup>136</sup>—and herein lay, of course, a serious bone of contention between the New Dealers and opposing lawyers<sup>137</sup>—

129. LANDIS, *supra* note 21, at 10. Jaffe would later on reject this analogy, arguing that “it is not in my opinion sound to compare the Government to a large corporation. Relative to government a corporation is a single-purpose organization. Our federal establishment must take account of a vast congeries of interests.” Louis L. Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U. L. REV. 1273, 1277 (1955) [hereinafter Jaffe, *Basic Issues*].

130. LANDIS, *supra* note 21, at 14.

131. On the Great Crash, see, for example, JOHN KENNETH GALBRAITH, *THE GREAT CRASH, 1929* (1954); CHARLES P. KINDLEBERGER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES 64–68* (4th ed. 2000); MAURY KLEIN, *RAINBOW’S END: THE CRASH OF 1929* (2001).

132. LANDIS, *supra* note 21, at 13.

133. *Id.* at 13–14.

134. Thus, in 1961 Landis called for “the development of procedures of a non-judicial nature that are more readily adaptable to the resolution of issues arising in complicated administrative proceedings. . . . [F]or the issue in these cases is fundamentally that of reaching a sound business judgment that takes into account the public interest.” James M. Landis, *Perspectives on the Administrative Process*, 14 ADMIN. L. REV. 66, 73 (1961) [hereinafter Landis, *Perspectives on the Administrative Process*]. Complaints of agencies’ over-judicialized procedures were common in the 1950s. See, e.g., MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 29, 34, 58, *passim* (1955).

135. See, e.g., Harvey Pinney, *The Case for Independence of Administrative Agencies*, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 44 (1942) (“Regulation as Management”). But see *supra* note 129 (Jaffe’s rejection of the analogy).

136. LANDIS, *supra* note 21, at 11–12 (“[W]hen government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of governmental organization.”).

137. See, e.g., Caldwell, *supra* note 98, at 973 (“If there is anything of which we can be relatively sure after some hundred, even thousands, of years of experience with judicial

and of traditional disciplinary divisions.<sup>138</sup> As Landis makes clear when he invokes the analogy between regulation and business management, “incredible areas of fact may be involved in the disposition of a business problem that calls not only for legal intelligence but also for wisdom in the ways of industrial operation.”<sup>139</sup>

### The Technician

The other paradigm of expertise—that of the Technician type—is straightforwardly presented toward the end of the book’s first chapter,<sup>140</sup> when Landis compares two possible ways of presenting cases dealing with potential breaches of a security-acquisition rule:

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machinery, it is that no man can be trusted to be judge in his own case.”); Pound Report, *supra* note 99, at 342 (“The increased tasks of the central government and new demands upon federal administration . . . give rise to more rather than less need of checks upon the central authority . . .”); *see also* Ernst Freund, *Historical Survey, in THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* 9, 33–37 (1923); Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 *YALE L.J.* 781, 783–86 (1921); Schuyler C. Wallace, *Nullification: A Process of Government*, 45 *POL. SCI. Q.* 347 (1930); Cooke, *supra* note 38, at 928–29. Friends of the commission movements were also aware of the difficulty. Jaffe, as a notable example, wrote in 1955, “Without doubt the most acute problem of our administrative system is created by the so-called combination of prosecuting and adjudicating functions within one agency.” Jaffe, *Basic Issues, supra* note 129, at 1278. For further analysis of this debate, *see generally* Sagy, *The Manager, the Judge, and the Empiricist, supra* note 31, at 109–21.

The concern about the commingling of the various constitutional powers remained uppermost in the minds of legal thinkers throughout the twentieth century. Notably, *see* THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979); *see also*, for example, David SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

138. *See, e.g.*, LANDIS, *supra* note 21.

139. *Id.* at 31; *see also* Landis, *Perspectives on the Administrative Process, supra* note 134, at 67. In this 1961 article, Landis said, among other things, “I cannot stress too emphatically the need inherent in the administrative process for the utilization of disciplines other than law.” *Id.* This is clearly a Realist argument, as best exemplified in the classic Oliver W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 474 (1897), where Holmes famously said,

I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics.

*See also, e.g.*, Roscoe Pound, *The Place of Procedure in Modern Law*, 1 *SW. L. REV.* 59, 63 (1917) [hereinafter Pound, *The Place of Procedure in Modern Law*]; Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 *COLUM. L. REV.* 925 (1931); *see also infra* note 232 (suggesting Landis was a “constructive” Realist).

140. LANDIS, *supra* note 21, at 27, 30, 35, 87. It is hinted elsewhere in the book as well. *See id.* at 76.

The presentation of these and other cases by one body [(here, the FTC)], rather than by a heterogeneous group of individual claimants or even by district attorneys with varying sympathies and abilities, permits the development of consistency in approach to such problems, as well as the creation of effective routines of investigation and examination. The deep significance of these factors has been aptly phrased by Gerard Henderson in his observation that “. . . the science of administration owes its being to the fact that most government affairs are run by *men of average capabilities*, and that it is necessary to supply such men with a routine and ready-made technique . . . .”<sup>141</sup>

This is a startling series of statements.<sup>142</sup> It is clear that, as Jaffe put it, “they are offered by Landis not to discount his glowing picture of administrative potentiality but rather to spur agencies on to even greater accomplishments and to secure for them the fullest measure of power to overcome these latent threats to their effective action.”<sup>143</sup> However, according to Jaffe, be it as it may that Henderson’s views pull in the opposite direction, they “add up in essence to the traditional wisdom concerning the routine conservatism of bureaucracies.”<sup>144</sup> Additional analysis of Landis’s passage reveals even further how material this passage is.

Consider primarily Henderson’s “observation.”<sup>145</sup> Reading Henderson’s words, the first question that comes to mind is, Where did a “science of administration” come from all of a sudden? When the book was written, the science of administration was associated with political scientists, notably the members of the President’s Committee on Administrative Management,<sup>146</sup> whose pronounced centralist vision

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141. *Id.* at 40–41 (second and third alterations in original) (emphasis added) (quoting GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 328 (1924)); *see also* Nebolsine, *supra* note 38, at 1930 (“[O]ur administrative agencies, in the long run, will be operated by people of average ability . . .”).

142. To be sure, the invocation of the Technician paradigm is not just an unfortunate slip-of-tongue. *See* similarly LANDIS, *supra* note 21, at 87 (“In the business of governing a nation—to paraphrase Gerard Henderson again—we must take into account the fact that government will be operated by men of average talent and average ability and we must therefore devise our administrative processes with that in mind.”).

143. Jaffe, *James Landis*, *supra* note 38, at 323.

144. *Id.*

145. *Id.*

146. On the science of administration and the President’s Committee, *see*, for example, PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE*

of the federal administrative state<sup>147</sup> ran afoul of Landis's endorsement of independent commissions.<sup>148</sup>

By subscribing to Henderson's approach, Landis comes as close as he gets in the book to adopting the Committee's vantage point on the administrative process, which indeed assumes that administrators are "men of average capabilities," who must be routinely and minutely directed.<sup>149</sup> Regulators, opined Henderson in the lines (that Landis chose to omit) following the just-quoted paragraph, should also be "confine[d] . . . to a formal procedure."<sup>150</sup> These constraints, Henderson goes on to note, "may indeed at times clip the wings of genius, but . . . will serve to create conditions under which average men are more likely to arrive at just results."<sup>151</sup>

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REORGANIZATION PLANNING, 1905–1980 (1986); KARL, *supra* note 100; Nicholas Henry, *The Emergence of Public Administration as a Field of Study*, in A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE 37 (Ralph Clark Chandler ed., 1987); Paul P. Van Riper, *The American Administrative State: Wilson and the Founders*, in A CENTENNIAL HISTORY OF THE AMERICAN ADMINISTRATIVE STATE, *supra*, at 3; Wallace S. Sayre, *Premises of Public Administration: Past and Emerging*, 18 PUB. ADMIN. REV. 102 (1958).

147. Indeed, *the* operative principle that reigned supreme in the realm of public administration at the time was of centralization, as "[a]dministration is that function of government which demands for its proper exercise centralization of power and responsibility." Herman G. James, *The City Manager Plan, The Latest in American City Government*, 8 AM. POL. SCI. REV. 602, 608 (1914). *See generally* ARNOLD, *supra* note 146, at 11–14; KARL, *supra* note 100, at 92–113; MARTIN J. SCHIESL, *THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA, 1800–1920*, at 68–87, 133–48, 171–88 (1977).

Accordingly, the principle of centralization pervades *The President's Committee Report* and is replicated at all levels of the bureaucracy. *See* THE PRESIDENT'S COMMITTEE REPORT, *supra* note 100, at 30 (asserting the need for "centralizing the determination of administrative policy [so] that there is a clear line of conduct laid down for all officialdom to follow"); *infra* note 149; *see also* DAVID H. ROSENBLOOM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946–1999*, at 12–20 (2000).

148. *See supra* note 121 (Landis pleading the cause of independent commissions).

149. *See* THE PRESIDENT'S COMMITTEE REPORT, *supra* note 100, at 2 (calling for "the establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management; the systematic organization of all activities in the hands of a qualified personnel under the direction of the chief executive; and to aid him in this, the establishment of appropriate managerial and staff agencies"). The administrator is a "specialist," to use Weber's term. 2 MAX WEBER, *ECONOMY AND SOCIETY* 1001 (Ephraim Fischhoff et al. trans., Guenther Roth & Clauss Wittich eds., 1978); *cf.* STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 47–84, 177–211 (1982) (describing the U.S. civil service reform movement in the Progressive Era).

150. HENDERSON, *supra* note 141, at 328.

151. *Id.*

Whence, then, do regulators acquire expertise? “[E]xpertness,” Landis declares in a passage that clearly relates to the Technician type of regulator, “springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem.”<sup>152</sup> These are the two key components in his definition. First is the regulators’ “continuity of concern”<sup>153</sup> with commission business.<sup>154</sup> Elsewhere Landis speaks of regulators as “men ready to devote their lives” to regulation<sup>155</sup> and goes so far as to stipulate that “in the final analysis it will be seen that the term ‘independence’ is but synonymous with the professional attitude of the career man in government.”<sup>156</sup> Second is the “single-mindedness of devotion to a specific problem.”<sup>157</sup> The resultant imagery could not be more antithetical to that of the Guardian regulator: whereas the former seeks to transcend the sectional, bounded perspective,<sup>158</sup> the latter is single-minded.<sup>159</sup>

#### E. Epilogue: Disenchantment?

On December 26, 1960, Landis handed to President-elect John F. Kennedy a detailed report appraising the performance of federal administrative agencies.<sup>160</sup> Landis conducted a general survey of the field along with a specific study of a number of key agencies, such as the

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152. LANDIS, *supra* note 21, at 23.

153. *Id.* at 120.

154. This is a repeated theme in the book. *See id.* at 26, 96, 144.

155. James M. Landis, *Significance of Administrative Commissions in the Growth of the Law*, 12 IND. L.J. 471, 477 (1937) [hereinafter Landis, *Significance of Administrative Commissions*].

156. *Id.* at 481.

157. LANDIS, *supra* note 21, at 35; *see also id.* at 27, 30, 87.

158. *See supra* text accompanying notes 136–139 (describing the Guardian type of expertise).

159. It may indeed be argued that they contradict each other. *See infra* Part II.G.1.

160. RITCHIE, *supra* note 34, at 178. This was not the first report Landis wrote at the behest of JFK. In June 20, 1952, he handed to then-Representative Kennedy a *Report on the Capital Transit Co.* *See* PUB. UTILS., INS. & BANKING SUBCOMM. OF THE COMM. ON THE DIST. OF COLUMBIA, 82D CONG., CAPITAL TRANSIT: REPORT ON THE CAPITAL TRANSIT CO. (Comm. Print. 1952) [hereinafter CAPITAL TRANSIT] (prepared by James M. Landis). That report reviewed contending claims regarding the rates charged by Capital Transit, the transit corporation serving the District of Columbia at the time. This investigation again took Landis to the realm of public utilities, a subject he was well versed in as one of the drafters of the Public Utility Holding Company Act of 1935. MCCRAW, *supra* note 35, at 170–71. Kennedy was at the time the Chairman of the Public Utilities, Insurance, and Banking Subcommittee of the Committee on the District of Columbia. CAPITAL TRANSIT, *supra*.

FTC, the Federal Power Commission, and the CAB.<sup>161</sup> The report concluded with a series of recommendations.<sup>162</sup> Its contents tell us a lot about Landis's assessment of the course taken by the federal administrative apparatus in the preceding two decades and about his understanding of administrative expertise.<sup>163</sup>

The report clearly indicates that Landis was not particularly pleased with the way in which federal agencies had conducted themselves and had been dealt with by others during the 1940s and 1950s. Among the issues he found distressing was (what he saw as) the deterioration in the quality of personnel, "both at the top level and throughout the staff,"<sup>164</sup> that led to "the absence of leadership at the top" and which, in turn, brought about a situation where "the staffs ha[d] captured the commissions."<sup>165</sup>

Consequently, the report's recommendations revolve around the need to draw an able cadre of regulators to run agencies.<sup>166</sup> To that end, this time around, Landis emphasized the necessity of centralizing the administrative apparatus, from top to bottom.<sup>167</sup> He prescribed the upgrading of commission chairmen's standing so that it would be comparable to that of the President in terms of the wide scope of powers they could exert in the management of agencies. Landis believed that

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161. RITCHIE, *supra* note 34, at 184.

162. THE LANDIS REPORT, *supra* note 71, at 84–87. Having written the report, Landis became a special presidential assistant in charge of regulatory policy. RITCHIE, *supra* note 34, at 181; MCCRAW, *supra* note 35, at 220. In this capacity he promoted the various reorganization plans outlined in the report. RITCHIE, *supra* note 34, at 181; MCCRAW, *supra* note 35, at 220. Due to substantial congressional and lobbyist opposition, he was only moderately successful in this effort. See RITCHIE, *supra* note 34, at 179–86; see also MCCRAW, *supra* note 35, at 220–21.

163. Interestingly enough, Landis devoted a large portion of the discussion to Congress's and the President's control of agencies but did not say on this occasion what role courts should play in the administrative state. If I am not mistaken, the only reference to courts in the report is made in conjunction with Landis's denunciation of agencies' unsound ethical behavior. See THE LANDIS REPORT, *supra* note 71, at 36 ("Never before recent time in the history of the administrative process have the federal courts been compelled to return administrative decision to the agencies, not because they have erred, but because they have departed from those fundamentals of ethics that must characterize equally the performance of quasi-judicial and judicial duties.").

164. THE LANDIS REPORT, *supra* note 71, at 11.

165. *Id.* at 12.

166. See, for example, *id.* at 68, for his suggestion to devise an attractive compensation scheme and enact long tenure for commissioners. See also *infra* text accompanying note 182.

167. Cf. *supra* note 121 (describing Landis's argument in favor of the independence of agencies).

such re-organization of agencies would turn them into more efficient bodies.<sup>168</sup> Under this scheme, a chairman would “take the lead in the formulation of policies[,] . . . appoint[] . . . all personnel[, and] . . . have complete authority as to the internal organization of the agency.”<sup>169</sup> This, Landis argued in a language reminiscent of the President’s Committee Report, “would permit the centralization of responsibility for the operations of the agency in a manner whereby its operation can be far more easily evaluated by the Congress, the President and the public.”<sup>170</sup> Concomitantly, Landis recommended that the President, via an “Office of Oversight,”<sup>171</sup> would assume full control of regulatory bodies, issue necessary reorganization plans to that effect, and be granted the authority to appoint agencies’ chairmen, who would serve at his pleasure.<sup>172</sup>

In so holding, Landis in effect endorsed the core of the President’s Committee’s plan.<sup>173</sup> He insisted on the desirability of centralization of the entire administrative apparatus to a point where it is managed

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168. THE LANDIS REPORT, *supra* note 71, at 3.

169. *Id.* at 37.

170. *Id.* at 38; *cf.* THE PRESIDENT’S COMMITTEE REPORT, *supra* note 100, at 43.

171. This recommendation resonates well with the current dominant role in regulatory affairs of the Office of Management and Budget (the OMB) at the Executive Office of the President. For a short history and analysis of the OMB, see Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003) [hereinafter Stewart, *Administrative Law in the Twenty-First Century*]. See also, e.g., Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1257 (2006) (“The Office of Information and Regulatory Affairs (OIRA) is one of several statutory offices within the Office of Management and Budget (OMB).”); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21 (2001).

172. THE LANDIS REPORT, *supra* note 71, at 84–86. Landis explains his position based on two reasons: first, the President has a constitutional duty to “take Care that the Laws be faithfully executed,” see U.S. Const. art. II, § 3, and second, “The Executive . . . is less beset by the vested interests in bureaucracy that too often find support from members of the Congress,” THE LANDIS REPORT, *supra* note 71, at 36.

For criticism on the latter argument, see, for example, Rubenstein, *supra* note 14, at 2203 (highlighting the role played by White House officials in (allegedly) controlling agencies and arguing that, “[a]part from the fact that these officials are not democratically elected, they may be just as or more susceptible to the narrow interests that threaten agency objectivity”), and Farina, *supra* note 100, at 231–32 (“[I]t oversimplifies the motivational structure and political environment of officials in both [the legislative and executive] branches.”).

173. See *supra* note 100. This was noticed by commentators as the Landis Report was publicized. On reactions to the report, see RITCHIE, *supra* note 34, at 178–79.



directly, but also indirectly, by the President.<sup>174</sup> Note that this latter approach is most compatible with the Technician paradigm of regulator and of expertise. As noted, this paradigm was already invoked by Landis in the book.<sup>175</sup> In the last chapter of his life, however, Landis seemed to wholeheartedly embrace it.

Lastly, in 1963 Landis practically called for agencies' restraint, emphasizing that "[l]aw can promote but it can also impede."<sup>176</sup> He even went so far as to declare that "the administrative agencies should make a better demonstration of their much vaunted expertise . . . . The courts, the bar and the public might then tender them the respect they were intended to deserve."<sup>177</sup> Harsh words indeed, especially from someone who had been the foremost eulogist of that "much vaunted expertise."

One can only speculate where his mounting criticism of administrative commissions would have taken Landis had he not died in 1964. Still, I would argue that the Landis Report did not signify "a stunning turnaround," as argued by McCraw, in Landis's thinking.<sup>178</sup> The list of concerns and suggestions mentioned in the Landis Report illustrates, I believe, that, although deeply disappointed by the state of the regulatory branch, Landis's belief in the importance and tenability of successful regulation had not faltered along the years. At the beginning of the report he wrote, "[Agencies'] continued existence is obviously essential for effective government. The complexities of our modern society are increasing rather than decreasing."<sup>179</sup> A year later, he would exclaim that the administrative process "is a lusty infant, growing daily in vigor and force. Its ability to further our democratic society and hold together the forces of private enterprise to work for the general good, is the great issue that is at stake."<sup>180</sup> Indeed, even in his later pronouncements, it is difficult to discern a wavering faith in the potential of the administrative process in a democratic society or in its

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174. Thus, although Landis underscores Congress's role in the supervision of agencies, THE LANDIS REPORT, *supra* note 71, at 83, he maintains that "[t]he leadership of the President in these matters [relating to the organization of regulatory agencies] should be respected by the Congress unless he is palpably wrong," *id.* at 37. *See also id.* at 36.

175. *See supra* text accompanying note 141.

176. James M. Landis, Book Review, 30 U. CHI. L. REV. 597, 600 (1963).

177. *Id.* at 601; *see also* RITCHIE, *supra* note 34, at 188; *infra* text accompanying note 194.

178. McCraw, *Regulation in America*, *supra* note 26, at 163.

179. THE LANDIS REPORT, *supra* note 71, at 1.

180. Landis, *Perspectives on the Administrative Process*, *supra* note 134, at 74.

vehicles, i.e., agencies and those who direct them. Likewise, although he went so far as to speak in the report of the “breakdown of the administrative process,”<sup>181</sup> Landis was still confident that “[t]he prime key to the improvement of the administrative process is the selection of qualified personnel. . . . As long as the selection of men for key administrative posts is based upon political reward rather than competency, little else that is done will really matter.”<sup>182</sup> Landis was similarly still certain that a long tenure would instill a sense of “devotion to a career.”<sup>183</sup> Harkening back to the crest of the administrative process, he was confident as ever that it would create an environment where “[e]xpertise would have a better chance to develop and the sense of security would inculcate the spirit of independence.”<sup>184</sup>

#### F. *Running Themes in Landis’s Work*

Versatile as it was, several themes did run through Landis’s impressive corpus of literature. I wish now to briefly highlight three such themes: Landis’s unwavering belief in regulation, his preoccupation with the judiciary, and his continuing search for the protector of the public interest.

The first theme follows my last remarks on the report. True, taking a panoramic view of Landis’s various essays, it is evident that he believed all along in the great promise of regulation by “qualified” administrators.<sup>185</sup> He had never forsaken his conviction that agencies properly construed could live up to the high expectations of those who had envisaged them as powerhouses of social progress. Barron and Rakoff are, therefore, correct in referring to Landis as a former great supporter of regulation.<sup>186</sup> However, as noted, they wish to make a stronger argument with reference to Landis, namely, that he has offered a suitable justification for *commission-run* regulation.<sup>187</sup> As this Article seeks to illustrate, this latter step is more questionable.

A second recurring theme in Landis’s work was his preoccupation with the judiciary. Landis kept a running quarrel with the judiciary

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181. THE LANDIS REPORT, *supra* note 71, at 54.

182. *Id.* at 66.

183. *Id.* at 68.

184. *Id.*

185. *See supra* note 182 and accompanying text.

186. *See Barron & Rakoff, supra* note 1, at 266–67.

187. *See id.* at 269.

during most of his life. He took great pains to expose what he regarded as its inadequacies to handle, and prejudices against, administrative regulation.<sup>188</sup> But it was a passionate battle. It was an emotional rivalry probably because, at heart, Landis was a staunch believer in the great role the common law courts could and should play in a modern state<sup>189</sup>—if only they were guided by the prescience and astuteness of Holmes and Brandeis.<sup>190</sup> Landis's work, taken as a whole, was therefore also an effort to redefine the courts' place in modern America.

James Landis was indeed a "Dean of Regulation," as Donald Ritchie put it, but he was also, and even more so, Dean Landis of Harvard Law School.<sup>191</sup> So, it seems, just like his mentor and co-writer, who harshly criticized the Court for many years only later to become *Justice* Frankfurter, Landis never divorced himself from the courts and the rest of the legal community. For however critical Landis was of the courts of his times, he still thought that there was something to be learned from the judiciary when regulating the market.<sup>192</sup> Although he berated the judiciary's performance in recent history, he did not suggest the altogether doing away with its *modus operandi*.<sup>193</sup>

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188. See *supra* text accompanying notes 79, 111–14.

189. See, e.g., LANDIS, *supra* note 21, at 135 ("In contract, in tort, in negotiable instruments, in trusts—the body of our law is judge-made and represents the successive reactions to practical situations of a professional class that was nurtured in the same traditions and was subject to the limitations of the same discipline. That class has had pride in its handiwork. Nor can one deny its right to pride. But the claim to pride tends, especially in the hands of lesser men, to be a boast of perfection." (footnote omitted)); cf. Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617 (1916).

190. See *infra* note 193. Frankfurter and Landis dedicated their *The Business of the Supreme Court* to Justice Holmes. FRANKFURTER & LANDIS, *supra* note 75, at iii. The dedication reads as follows: "To Mr. Justice Holmes who, after twenty-five terms, continues to contribute his genius to the work of a great court." *Id.*

191. See *supra* text accompanying note 54.

192. See, e.g., LANDIS, *supra* note 21, at 135.

193. Nor did he suggest adopting a more progressive judicial attitude, manifested by Justice Brandeis, to whose minority opinions Landis repeatedly referred in the last chapter of the book. *Id.* at 124, 134, 141–42, 151 n.41, 153. Thus, for example, Landis stipulated that "[t]he positive reason for declining judicial review over administrative findings of fact is the belief that the expertness of the administrative, if guarded by adequate procedures, can be trusted to determine these issues as capably as judges." *Id.* at 142. Namely, rather than suggesting a distinctive standard with regard to administrative "findings of fact," Landis incorporated an idealized notion of the judicial standard of fact-finding into his defense of administrative autonomy. Here is a point where the judicial is evidently not antithetical to the administrative but rather its *alter-ego*. This suggestion is based on the recognition of a distinct legal expertise. See *supra* text accompanying note 114.

Hence, at some point in the book, Landis, while still calling upon the courts to be deferential to agencies, conceded that deference should be given differentially and not across the board. Rather, he wrote, “[D]ifferences in treatment should be accorded to findings of fact by different administrative officials, because of differences in the facts and in the qualities of the administrative to be expert in finding the facts.”<sup>194</sup> This proposition is striking: if it were to be acted upon, the *courts* would become the ultimate evaluators of expertise. Only when they are certain that the regulator under review qualifies as an “expert” should they be deferential. To be sure, even if that were the case, they should not withdraw completely from the scene but rather ought to limit themselves to truly “legal” questions, that is, questions which are, according to the court’s own judgment, in its expertise.<sup>195</sup> No wonder, then, the role Landis assigns to law, as conceived by courts, is of “commanding discipline.”<sup>196</sup>

More dramatically, at the end of the book, in its very last paragraph, Landis lets loose and prophetically writes:

Such difficulties as have arisen have come because courts . . . assume to themselves expertness in matters of industrial health, utility engineering, railroad management, even bread baking. The rise of the administrative process represented the hope that policies to shape such fields could most adequately be developed by men bred to the facts. That hope is still dominant, but its possession bears no threat to our ideal of the “supremacy of

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194. LANDIS, *supra* note 21, at 153; *see also* Louis L. Jaffe, *Administrative Procedure Re-Examined: The Benjamin Report*, 56 HARV. L. REV. 704, 726–30 (1943); Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 265 (1955) [hereinafter Jaffe, *Question of Law*] (“Not every agency is envisaged by its legislative creator as expert nor is agency expertise always relevant.”); *cf.* Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

195. *See* LANDIS, *supra* note 21, at 55, 63, 152–55; *see also* Frug, *supra* note 40, at 1335–38; *supra* text accompanying note 114. Indeed, it appears that what the book sponsors is an invigorated *Skidmore*-like rule, even more than a *Chevron*-like rule. *See* LANDIS, *supra* note 21, at 144; *see also* *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). At any rate, Landis, it seems, would not have settled for the Court’s holding in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). There the Court (seemed to have) made the distinction between “pure” questions of law (that should be decided independently by the courts) and questions of application of law to fact (that should be reviewed only under a standard of reasonableness).

*Cf.* Barron and Rakoff’s discussion of the proper scope of judicial review of—and deference accorded to—agencies under big waiver, *supra* note 1, at 323–24.

196. LANDIS, *supra* note 21, at 154.

law.” Instead, it lifts it to new heights where the great judge, like a conductor of a many-tongued symphony, from what would otherwise be discord, makes known through the voice of many instruments the vision that has been given him of man’s destiny upon this earth.<sup>197</sup>

This “supremacy clause” vividly shows that, with all his bitter condemnation of the courts, Landis wanted to preserve the supremacy of law, which is in the realm of the courts, as we have seen. All this leads to the conclusion that, “in the last analysis,” it is the destiny of “the great *judge*,” who, as we have seen, is proficient (only) in answering “questions that lawyers are equipped to decide,” to be the ultimate conductor of public affairs.<sup>198</sup>

A third frequent theme in Landis’s diverse writings is his acute concern for the public interest in the face of recalcitrant financial markets, monopolies, and reactionary forces within and without the legal arena.<sup>199</sup> I suggest we read his scholarship with an eye on the question: Which branch of government is the true depositor, and thus the trustworthy guardian, of the public interest? Throughout the years, Landis gave three answers to this question.

First, Landis put his trust in Congress as a representative body.<sup>200</sup> Later, during the New Deal, he was certain that powerful, independent agencies, instead of Congress, were the ones to safeguard the public interest.<sup>201</sup> Now, he derided “the turmoil of a legislative chamber.”<sup>202</sup> Finally, in the Landis Report, he turned to the Executive for solace. Whereas in the book he spoke of the debilitating effect of “the varying tempers of changing administrations” on regulatory tribunals,<sup>203</sup> at that point he put his trust in the very head of the (presidential) administration.<sup>204</sup>

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197. *Id.* at 155.

198. *Id.* at 152, 155 (emphasis added). Needless to say, this approach is not compatible with Barron and Rakoff’s understanding of courts’ part in big waiver regulation. See Barron & Rakoff, *supra* note 1, at 323–24.

199. See, e.g., LANDIS, *supra* note 21, at 42–43.

200. See Landis, *The Study of Legislation in Law Schools*, *supra* note 64, at 436 (“The currents of public opinion, changes in the postulates of our civilization, express themselves in the legislative chamber . . .”); *supra* text accompanying note 92.

201. See LANDIS, *supra* note 21, at 76.

202. *Id.* at 70.

203. *Id.* at 113.

204. *Supra* text accompanying note 172.

Landis's meandering through the various branches of government obviously involves the issue of legitimacy. Having left behind his first choice (Congress), Landis was faced with the lack-of-democratic-legitimacy argument.<sup>205</sup> Accordingly, his conception of administrative expertise, certainly as prescribed in the book, brings questions of commissions' democratic legitimacy to the fore.<sup>206</sup> There is a good reason for this. In the book, Landis does not seem to be particularly impressed by a majority show of hands when questions of expertise are debated.<sup>207</sup> At any rate, at that stage, Landis does not seem to put too much trust in the "mass."<sup>208</sup> He demands that regulators follow suit.<sup>209</sup> Actually, it is the very concept of expertise that demands it. At the heart of any conceivable model of expertise lies the exclusion of the non-expert "mass." As Harold Laski stated it in 1930, "The expert, in short, remains expert upon the condition that he does not seek to coordinate his specialism with the total sum of human knowledge."<sup>210</sup> "The moment that he seeks that coordination," Laski concluded, "he ceases to be an expert."<sup>211</sup>

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205. See Sagy, *Triptych of Regulators*, *supra* note 14, at 458 n.190; *supra* note 14; *infra* note 296 and accompanying text (exploring the proverbial meaning of such an argument).

206. Landis was of course aware of that. See Tushnet, *supra* note 40, at 1574 ("Frankfurter and Landis worried that expert administrative agencies—however effective they were as instruments of governance—might lack democratic legitimacy. Both men struggled to articulate accounts that explained why agencies were indeed properly democratic."). In a wonderful remark included in a 1937 article, Landis commented, "[A]s the public finally determined to place itself in the driver's seat with reference to some of the major problems of its life, it created these new mechanisms of administration to serve its ends." Landis, *Significance of Administrative Commissions*, *supra* note 155, at 473. The message was clear: it was the public who was sitting all along in the driver's seat, not unelected agencies.

207. See LANDIS, *supra* note 21, at 57–59. This was another reason for Landis's dislike of the NIRA. See *id.*; see also *supra* note 115. To be sure, this is not the only case where Landis criticized agencies' performance. See also LANDIS, *supra* note 21, at 68, 75, 78, 104, 106.

208. LANDIS, *supra* note 21, at 61; see also *id.* at 43.

209. This is made clear, *inter alia*, by Landis's approval of the fact that "[t]he administrative is not open to the broad range of human sympathies to which the judicial process is subject." *Id.* at 99.

210. Harold J. Laski, *The Limitations of the Expert*, HARPER'S MONTHLY MAG., Dec. 1, 1930, at 101, 105.

211. *Id.* Generally, as we know, the rise of professionalism has been widely rooted in claims of expertise. The study of administrative expertise can therefore insightfully draw on literature dedicated to the study of professionalism. In the present context, see, for example, MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977), and Stanley Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645, 646 (1986) ("[P]rofessions characteristically justify their special status by claiming 'cognitive

Already, Socrates, more than two millennia ago, held that view:

[*Socrates.*] . . . Was the disciple in gymnastics supposed to attend to the praise and blame and opinion of every man, or of one man only—his physician or trainer, whoever that was?

[*Crito.*] Of one man only.

. . . .

[*Socrates.*] And he ought to live and train, and eat and drink in the way which seems good to his single master who has understanding, rather than according to the opinion of all other men put together?

[*Crito.*] True.<sup>212</sup>

Encapsulated in this dialogue is not only the democratic-legitimacy difficulty but also Landis's book's answer to the challenge. When it comes to regulation, Landis was adamant that the "single master" must be the administrative commission of his design.<sup>213</sup> The question is, of course, How tenable was—and is—this answer? Soon we will delve deeper into this question. But before we do so, we must note this: Landis's later endorsement of the model of presidential regulation clearly signifies his growing recognition that, standing alone, *assertions of expertise could not justify the administrative state.*<sup>214</sup>

#### G. The Administrative Process *In Defense of Big Waiver?*

The book, with which Landis is associated more than any other publication, will be the focal point of the following discussion. In this Part I will explain my position that supporting big waiver based on *The Administrative Process* and Landis, especially Landis as seen through the prism of that book, is theoretically unsound and even risky from a practical point of view. Put differently, this Part will be bi-focal. It will jointly address two levels of analysis: the more "theoretical" level, which will highlight "*what Landis failed to notice,*" along with the more "practical" level, which will suggest, "*why Landis won't work today.*" To be sure, I do not argue for a clear separation between these two

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exclusiveness', a unique access to some area of knowledge that is deemed crucial to the well-being of society . . ." (footnote omitted) (quoting MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 15 (1977)).

212. PLATO, *Crito*, in 3 *THE WORKS OF PLATO: FOUR VOLUMES IN ONE* 135, 146–47 (Benjamin Jowett trans., Tudor Publishing Co. 1945) (1875).

213. See LANDIS, *supra* note 21, at 1–2.

214. See *THE LANDIS REPORT*, *supra* note 71, at 85–87.

levels of discussion; they are merely given as points of orientation. Basically, they both revolve around the issue of the legitimacy of regulation in the United States. Since legitimacy is such a complex concept—potentially involving issues of legality, public acceptance, and morality<sup>215</sup>—it is only to be expected that addressing legitimacy concerns will touch upon both the more “purely” theoretical as well as the more practical aspects of regulation.

This Part will present five major reasons to consider the book as ill-founded to the extent that it is likewise unsound to base big waiver (and other like instruments) on the book’s framework:

- (1) the book’s unsettled, dual vision of administrative expertise;
- (2) its naturalistic undertone;
- (3) the fact/theory binary opposition that pervades it;
- (4) Landis’s (surprising) lack of realism in the investigation of regulation; and, most damaging,
- (5) the fact that, at bottom, the book fails to provide an adequate description of expertise.

Just as important to this Article’s thesis, throughout the following scrutiny of these five reasons for the book’s failure, mention shall be made of Jaffe’s position on each of the five counts. This will introduce Jaffe’s—often contrasting—views on fundamental theoretical aspects of regulation.

#### 1. Which Landis? What Type of Expertise?

Landis’s reputed principal mission in *The Administrative Process* was to establish a relatively clear, relatively certain, and relatively accessible model of “grand” expertise.<sup>216</sup> Primarily, what he failed to notice was that, rather than presenting a good-enough portrayal of the expert regulator he probably sought to propagate, he provided his readers with two *conflicting* images of expert regulators.<sup>217</sup> Indeed, it may be argued that the two types of regulators are mutually contradictory: the Guardian is defined as the mirror image—as the negation—of the Technician, and the manner in which the latter is described casts a doubt

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215. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–802 (2005) (exploring the different meanings of “legitimacy”); Sagy, *Triptych of Regulators*, *supra* note 14, at 457–59.

216. See Koch, *supra* note 40, at 426.

217. See *supra* text accompanying notes 151, 158–159.



on the aspirations of the former, laudable as they may be, to transcend a bureaucratic parochial outlook and offer an imaginative perspective.<sup>218</sup>

Yet one does not have to buy into the latter argument in order to realize that the mere coexistence of more than one prototype of regulator and of expertise in the book must call into question any reliance on it in support of regulatory practices. After all, if I am correct in arguing for the book's duality of paradigms, those relying on Landis, the book, or both must first explain on which image of Landisian regulation they base their arguments. Neither the book nor the diverse scholarship Landis has produced in the various stations of his professional life support a unitary perception of "the Landis model of regulation/expertise."

Nor, I should add, can readers of the book take refuge in the common understanding the book has acquired over the years. The contradictory evidence found in the book is simply overwhelming, as had been noted before by at least one prominent former reader of the book—Jaffe.<sup>219</sup> Indeed, the two visions of the administrator as a Guardian, or commander-in-chief, on the one hand, or as a Technician civil servant or a pen pusher, on the other, are recapitulated time and again in the book.

## 2. Naturalism for Our Age?

Naturalism<sup>220</sup> was at the zenith of its influence in the United States during the half century stretching from, say, the mid-1880s forward.<sup>221</sup> It

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218. See also Sagy, *Triptych of Regulators*, *supra* note 14, at 432, 462–63, for a comparison between the types.

219. See *supra* text accompanying note 144.

220. A clarification—the terms naturalism and empiricism (both terms could be used interchangeably in this Article's context) lend themselves to various interpretations. There is obviously no need to conclusively define these terms here. All that is needed, it seems to me, is to interpret them consistently. I chose to follow Edward Purcell's definition not because it is the most cogent, but because his work will be heavily drawn on in the following paragraphs. Purcell's analysis is based on the understanding that "*scientific naturalism*" stands for the following two principles: (1) a rejection of absolute thinking—"No a priori truths existed, and metaphysics was merely a cover for human ignorance and superstition"; and (2) scientificity—"Only concrete, scientific investigations could yield true knowledge, . . . and that knowledge was empirical, particular, and experimentally verifiable." See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 3 (1973). To repeat, thus understood, naturalism is scientific positivism. See generally the excellent discussion in IAN HACKING, *REPRESENTING AND INTERVENING: INTRODUCTORY TOPICS IN THE PHILOSOPHY OF NATURAL SCIENCE* (1983), and especially see *id.* at 2–6, 41–57. Compare the definition of "naturalism" in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 596 (Robert Audi ed., 2d ed. 1999), with DAVID J. HESS,

was an epoch enamored with Darwinism<sup>222</sup> and Pragmatism,<sup>223</sup> the period of the rise of the great universities and of the scientific ethos and the decline of seminaries and theology.<sup>224</sup> No wonder that legal academia was also drawn into naturalism in the beginning of the twentieth century.<sup>225</sup>

Naturalism overtly and happily accords priority to observable facts over conjunctures.<sup>226</sup> A naturalistic approach prides itself in *not* reverting to metaphysical, non-experimentally-verifiable formulae when explicating a given phenomenon.<sup>227</sup> Simply put, a naturalistic perspective demands that previously held convictions be cleansed of every trace of metaphysics.<sup>228</sup> This is to be done by exposing them to a strict factual examination.<sup>229</sup> The deep belief in the power of ascertained facts—as opposed to metaphysics—and trustworthy fact finding to assure the progress of society could not be overstated.

So, too, with Landis's book.<sup>230</sup> As an illustration, here is one important example of the book's naturalistic viewpoint. Landis rests the arc of this plot on the assumption that, if you left the regulatory decision

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SCIENCE STUDIES: AN ADVANCED INTRODUCTION 30–34 (1997). But see also ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 79–87 (2d ed. 1984), for an argument that naturalism and empiricism are *not* compatible concepts.

221. See PURCELL, *supra* note 220, at 3–39.

222. See RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed. 1955); Sager, *The Legacy of Social Darwinism*, *supra* note 96, at 500–11; see also Joseph B. Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95, 97 (1928) (“The independent commissions are the evolutionary product of public need.”).

223. On the age of Pragmatism, see BRUCE KUKLICK, *A HISTORY OF PHILOSOPHY IN AMERICA, 1720–2000*, at 95–197 (2001), and LOUIS MENAND, *THE METAPHYSICAL CLUB* 337–75 (2001).

224. See KUKLICK, *supra* note 223, at 97–110. Kuklick writes that “[t]he amateur men of letters who were a force to be reckoned with in the middle of the nineteenth century suffered about as much as professional theologians.” *Id.* at 107. See generally THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977).

225. PURCELL, *supra* note 220, at 83–91; see also *infra* note 232 (describing “constructive” Legal).

226. See MACINTYRE, *supra* note 220, at 79–81.

227. See *id.* at 80–81.

228. See *id.* at 79–81.

229. This proposition has its problems, of course. See *infra* Part II.G.2 & 3.

230. Rudd similarly argues that Landis's analysis relied on “a form of scientific reductionism,” a characterization that seems to correspond nicely to my use of the term “naturalism.” Rudd, *supra* note 67, at 1057.

to those few who are really doing the job on the ground,<sup>231</sup> their intimate knowledge of the subject matter—*indeed, the subject-matter itself*—would dictate the right decisions.<sup>232</sup> Hence, for example, as we have seen, Landis held that “expertness . . . springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, to a particular problem.”<sup>233</sup> We have already noted the two components of this approach (“continuity of interest” and the focus on one “particular problem”).<sup>234</sup> Landis insisted that, without fail, both elements yield the most beneficial and efficacious agencies. What interests me at this point is to demonstrate that he applied a naturalistic logic with respect to both elements: (1) for instance, he contends that, due to judicial conservatism, “[t]here was . . . hesitation by the Congress to wait for the viewpoint of the judiciary to tally with the growing conceptions that an administrative agency might evolve [(the effect)] as a consequence of its continuing concern with the well-being of industry [(the cause)],”<sup>235</sup> and (2) “as an agency of government confined to a fairly narrow field [(the cause)], its singleness of concern quickly

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231. See LANDIS, *supra* note 21, at 69 (“The agency’s compactness gives some assurance against the entry of impertinent considerations into the deliberations relating to a projected solution.”).

232. See *id.* at 49, 51. Again, Landis was not alone in this. In fact, this approach was typical of the “constructive,” as opposed to the “deconstructive,” side of Legal Realism, as depicted by Gary Peller. See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1219–59 (1985), where the author explains that, “[i]n contrast to the deconstructive strand of legal realism which denied that any social phenomena could be rationally or neutrally grouped under generalities, this [constructive] approach implicitly accepted the possibility of neutral generality, insofar as it was ruled by objective reality,” *id.* at 1225–26. Compare Purcell’s similar characterization of theoretical differences between Karl N. Llewellyn and Jerome Frank. PURCELL, *supra* note 220, at 81–86; see also HORWITZ, *supra* note 40, at 208–12 (“Realism: Critical or Scientific?”); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467–77 (1988) (book review).

According to “constructive” Legal Realism, Peller explains, “Determinacy could be achieved by focusing on the objectively observable tangibles presented in [pending legal] . . . cases, which determined the true similarity or difference that the legal categories obscured. Legal activity then could be seen as determinate to the extent that it was a derivative function of these facts.” Peller, *supra*, at 1242. In other words, according to this view, only observable, objective facts—rather than words, categories, and other theories—could ensure determinacy. They also ensured, according to Thurman Arnold, moral clarity. See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 125 (1935) (“[S]ociety is able to suppress its humanitarian instincts by looking at the suffering of its unfortunate members through the darkened windows of fundamental economic theories.”).

233. LANDIS, *supra* note 21, at 23.

234. See *infra* text accompanying note 152.

235. LANDIS, *supra* note 21, at 96.

develops a professionalism of spirit — an attitude that perhaps more than rules affords assurance of informed and balanced judgments [(the salutary effect)].”<sup>236</sup>

Moving to current affairs, the fact that the book’s key theses smack of naturalism does not bode well for their success in shoring up big waiver today. Already in Landis’s lifetime, not long after the New Deal, naturalistic perceptions would be widely, even scornfully, rejected and eclipsed by relativistic attitudes about science and culture.<sup>237</sup> Space clearly does not permit a fuller treatment of this subject. Suffice it to note that, following the atrocities of World War II, the advent of the Cold War, and the rise of new revolutionary scientific theories (such as Einstein’s General Theory of Relativity and the Heisenberg Uncertainty Principle), naturalism’s deterministic, progressive attitude lost much of its luster, especially among the intelligentsia.<sup>238</sup>

As we shall see, Jaffe’s work would reflect the shift from naturalism to relativism in his post-New Deal essays.<sup>239</sup> We need not trouble

236. *Id.* at 99.

237. “Relativism” may be a confusing term, especially in the philosophy of science. See HESS, *supra* note 220, at 34–39. Often a distinction is made between “*epistemic* relativism,” which holds that “knowledge is rooted in a particular time and culture . . . [and] does not just mimic nature,” and “*judgment* relativism,” which asserts that “all forms of knowledge are ‘equally valid,’ and . . . we cannot compare different forms of knowledge and discriminate among them.” Karin D. Knorr-Cetina & Michael Mulkay, *Introduction: Emerging Principles in Social Studies of Science, in SCIENCE OBSERVED: PERSPECTIVES ON THE SOCIAL STUDY OF SCIENCE* 1, 5 (Karin D. Knorr-Cetina & Michael Mulkay eds., 1983) (emphasis added). Note that the second proposition is exposed to an obvious criticism: “To deny that there are any fixed or universal criteria of truth or rationality does not necessitate the abandonment of any criteria at all.” DAVID TURNBULL, *MASONS, TRICKSTERS AND CARTOGRAPHERS* 221 (2000). Richard Brown, in rejecting the abovementioned “absolutist type of judgmental relativism,” formulates a “nonabsolutist” version, which holds, “Judgment relativism does not flatten or negate all judgments; it only advises that they are unlikely to be universally adequate.” RICHARD HARVEY BROWN, *TOWARD A DEMOCRATIC SCIENCE: SCIENTIFIC NARRATION AND CIVIC COMMUNICATION* 11 (1998). This formulation, I believe, best captures Jaffe’s relativism, which is discussed *infra* Part III.B.

238. See PURCELL, *supra* note 220, at 47–114; PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 133–67 (1988). I should also note that, at times, Purcell appears to ignore the important distinction between the two kinds of relativisms. See, e.g., PURCELL, *supra* note 220, at 51–62. It seems to me that, for the most part, “relativism” in his analysis is judgment (or ethical) relativism united with strict empiricism. In his story opponents of relativism (e.g., the church and people like Roscoe Pound) resented what seemed to them as its no-matter-what adherence to empiricism and refusal of an a priori prioritizing of one set of ethical or ideological codes over another. Novick’s account, on the other hand, explains the spread of the Theory of Relativity and relativism with a careful use of these terms. NOVICK, *supra*, at 133–67.

239. See *infra* text accompanying note 321.

ourselves with the intriguing question of whether the cultural mood in the United States of today may be still characterized as “relativistic” or whether a different characterization is more apt.<sup>240</sup> Be that as it may, it does not seem sensible to base a major regulatory innovation, such as big waiver, on a discredited worldview — especially after, as we shall now see, its applicability in the construction of a justification for regulation had already been widely denounced.

### 3. The Fact/Theory Dichotomy

Strong evidence for the book’s naturalism can be found in the distinction between fact and theory, which permeates its reasoning.<sup>241</sup> The many dichotomies that circulate in the book gravitate towards this meta binary opposition.<sup>242</sup> According to Landis, the first concept is the realm of commissions, while the second is essentially that of the other branches of government.<sup>243</sup> This juxtaposition of the theoretical versus the practical has a personal dimension in Landis’s narrative.<sup>244</sup> On one side of the divide stand Landis and his allies and, on the other side, those who draw “too readily upon words”<sup>245</sup> and who are drawn to “finely spun logomachy which is the delight of lawyers and judges.”<sup>246</sup> Similarly, already in 1924 Landis admonished the courts for “think[ing] words instead of things.”<sup>247</sup> Now, in the book, he contrasted arguments

240. See, e.g., Leon M. Lederman, *The Bizarre and Serendipitous History of Discovery*, in NEXT: THE COMING ERA IN SCIENCE 3 (Holcomb B. Noble ed., 1988); Leo Marx, *The Idea of “Technology” and Postmodern Pessimism*, in TECHNOLOGY, PESSIMISM, AND POSTMODERNISM 11 (Yaron Ezrahi, Everett Mendelsohn & Howard Segal eds., 1994); see also MARCEL C. LAFOLLETTE, MAKING SCIENCE OUR OWN: PUBLIC IMAGES OF SCIENCE, 1910–1955 (1990).

241. LANDIS, *supra* note 21, at 31. It certainly had antecedents in Landis’s work. See, e.g., FRANKFURTER & LANDIS, *supra* note 75, at 153 (arguing that regulation of railways and other utilities “turns fundamentally not upon any settled and easily applied legal rules but upon judgments of policy resting on an understanding of economic and industrial facts”).

242. See *infra* text accompanying notes 248–53.

243. See LANDIS, *supra* note 21, at 48–49.

244. LANDIS, *supra* note 21, at 67–68. Indeed, it may be suggested that, basically, to Landis, the first concept in the pair is attributed to the agency, while the latter to the forces of tradition (conservative judges and lawyers in particular).

245. *Id.* at 88.

246. *Id.* at 48. Harvey Pinney argued similarly, in response to the Committee’s “strong language,” “Independence . . . should be judged by its fruits — not by theoretical abstractions applicable in bygone era to a different area of governmental action.” Pinney, *supra* note 135, at 47; see also Robert H. Jackson, *An Organized American Bar*, 18 A.B.A. J. 383 (1932).

247. Frankfurter & Landis, *supra* note 91, at 1023.

that emanate from “logic-chopping”<sup>248</sup> or are advanced by “theorists,”<sup>249</sup> on the one hand, with “practical,” “pragmatic,”<sup>250</sup> and realistic<sup>251</sup> arguments, ones that are based on what happens in the “world,”<sup>252</sup> on the other hand. Landis distinguished between discourses spoken “in terms of reality” and those expressed “in terms of political dogma or of righteous abstractions.”<sup>253</sup>

The separation between talk and action runs deep in the United States.<sup>254</sup> This matter-of-fact position was held in high esteem, within and without legal circles, in the age of naturalism when (as noted) academics were keen on replacing stale absolutes with factual data. Suffice it to mention here Roscoe Pound’s Sociological Jurisprudence<sup>255</sup> and “law in books” versus “law in action”<sup>256</sup> in the Progressive Era, and Thurman Arnold’s “Spiritual vs. Temporal Government”<sup>257</sup> at the time of the New Deal. In this respect, Landis was undeniably a man of his age.

Yet enamored as he was with naturalism and facts, Landis could not let go of metaphysics, even when the New Deal was in full swing. Indeed, as I shall argue below, Landis’s very confidence in administrative expertise was steeped in metaphysics.<sup>258</sup> Just as important, his very staunch belief in the determinacy of facts was a just-as-clear case of metaphysical thinking. As Alasdair Macintyre phrased a staple objection to naturalism, “Perceivers without concepts, as Kant

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248. LANDIS, *supra* note 21, at 2.

249. *Id.* at 23.

250. *Id.* at 33.

251. *Id.* at 28.

252. *Id.* at 64.

253. *Id.* at 153.

254. See DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 7 (1987) (“It has been one of our boasts since the beginning of this [twentieth] century that Americans did not go in for abstract thinking.”). See specifically with regard to administrative regulation K.C. Davis’s “practical” (in his own words) approach. He writes of one regulatory initiative endorsed by Congress: “The impetus came not from philosophers or theorists, not from abstractions like those about separation of powers and supremacy of law, but from such people as leaders of the Granger movement, down-to-earth men who were seeking workable machinery for stamping out particular evils.” DAVIS, *supra* note 111, § 1.05.

255. See, e.g., Pound, *The Place of Procedure in Modern Law*, *supra* note 139.

256. Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 465 (1909).

257. ARNOLD, *supra* note 232, at 123–26.

258. See *infra* Part II.G.5.

almost said, are blind.”<sup>259</sup> This truism did not escape the minds of some New Dealers. Thus, Walter Cook spoke of the “recognition of the extent to which all our thinking is based upon underlying postulates of which frequently we are entirely unaware but which color all our mental processes.”<sup>260</sup> Jaffe would embrace this view, applying it more directly to administrative expertise.<sup>261</sup> He would insightfully speak of “[t]his law-making aspect of the fact-finding process[es].”<sup>262</sup> As indicated by Jaffe’s remark, at issue here are the tricky subjects of regulators’ expansive latitude and consequently their ideological disposition. For this reason, undermining the fact/theory dichotomy clearly defeats Landis’s attempt to construct a model of neutral expertise; it obviously turns his model into a much-less-defensible model of democratically-legitimate regulation. As then-Dean Kagan explained—having maintained that, according to Landis, “‘expertness’ imposed its own guideposts, effectively solving the problem of administrative discretion”<sup>263</sup>—

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259. MACINTYRE, *supra* note 220, at 79; see PETER MUNZ, BEYOND WITTGENSTEIN’S POKER: NEW LIGHT ON POPPER AND WITTGENSTEIN 57–59 (2004) (“[O]bservations which were not guided by a prior hypothesis to guide one’s senses in a certain direction could yield nothing but confusion.”). See also JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 151 (1958) (“What a person wants and likes influences what he sees; what he sees influences what he wants and likes.”), and the acrimonious exchange between Mortimer J. Adler, *Legal Certainty*, 31 COLUM. L. REV. 91 (1931), and Walter W. Cook, *Legal Logic*, 31 COLUM. L. REV. 108 (1931). Peller, basing his argument of post-structuralism, uses a similar argument with direct reference to “constructive” Realism. Peller, *supra* note 232, at 1244 n.20, 1249–50, 1258.

260. Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 306 (1927); see also Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1247 (1966) (“[S]cience knows very little about what makes people happy or what adds to the richness and satisfaction of life.”); Schwartz, *supra* note 194, at 472–73; Laski, *supra* note 210, at 102.

261. See Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1244–45 (1939) [hereinafter Jaffe, *Invective and Investigation in Administrative Law*].

262. Jaffe, *Question of Law*, *supra* note 194, at 245. Other commentators in Jaffe’s days would reiterate the same message. See, e.g., Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 82 (1959) (“[E]valuation and empirical analysis are intertwined . . . .”); see also Reich, *supra* note 260, at 1242 (“Is not ‘expertise’ merely another term for knowledge of facts outside the record plus built-in predispositions? Is not the administrator who is free of such contamination also free of any claim to be an expert?”).

263. Kagan, *supra* note 40, at 2261; see also Frug, *supra* note 40, at 1318–35; Stewart, *supra* note 40, at 1678 (describing expertise model’s response to the democratic legitimacy challenge as predicated on the understanding that “persons subject to the administrator’s control are no more liable to his arbitrary will than are patients remitted to the care of a skilled doctor”).

At the heart of the critique [of this latter perception of Landis] lay a growing skepticism about the possibility of neutral or objective judgment in public administration. Whereas the questions of what and how to regulate seemed to Landis matters of fact and science, they appeared to his detractors, ever more numerous as time passed, to involve value choices and political judgment, thus throwing into question the legitimacy of bureaucratic power.<sup>264</sup>

#### 4. “Law Must Be Made to Look Outside Itself”

“Student, lawyer, teacher, judge tend to narrow their horizon to their material,” Landis declared in 1931.<sup>265</sup> In this sense they were conservatives and not up-to-date with the demands of heavily industrial society. As first order of the day, therefore, Landis declared, “[L]aw must be made to look of outside of itself.”<sup>266</sup> Landis, however, I will now argue, did not meet his own standard. The book’s study of regulation was, in important respects, *unrealistic* in that it was steeped in (certain) idealized perceptions of regulation.

Landis’s *lack* of realism surfaces time and again in the book. Consider, notably, Landis’s staunch attempt to divide between policy (to be handled by agencies) and politics (to be handled by the other branches of government) in the business of regulation.<sup>267</sup> The divorce between politics and policy is put forward in the book with the understanding that agencies should engage only in policy. In most cases “the administrative suffers . . . because of its closeness to the political branches of government.”<sup>268</sup> The separation is between the place where social power struggles are conducted (politics) and the meticulous

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264. Kagan, *supra* note 40, at 2261; *see, e.g.*, Rubenstein, *supra* note 14, at 2176 (“The once heralded ideal of administrative objectivity is now widely regarded as myth. Administrative policymaking is now understood to be as much or more about politics as it is about expertise and science.” (footnote omitted)); Seidenfeld, *supra* note 40, at 1520 (“When all is said and done, . . . expertise rarely eliminates the need for the agency to choose among competing values—a choice that is the essence of political decisionmaking.”); *infra* note 274. Cf. Jaffe’s views, *infra* text accompanying note 274 (criticizing Landis’s policy/politics dichotomy and illustrating Jaffe’s competing view of the matter), and accompanying notes 316–39, 344 (presenting arguments that regulation is political).

265. Landis, *The Study of Legislation in Law Schools*, *supra* note 64, at 435.

266. *Id.*

267. LANDIS, *supra* note 21, at 59–60.

268. *Id.* at 60.



systematic process of materializing beneficial social goals (policy).<sup>269</sup> It resurfaces frequently in the text.<sup>270</sup>

Now, it is patently difficult to accept a straightforward refusal to acknowledge the role played by politics in the shaping of policies.<sup>271</sup> Note Landis's following description of the dynamic whereby Congress, a "political" body, grants power to an agency, a "policy" body. "[I]t should be remembered," he said, "that the objectives which frequently characterize political action may not be too discernable."<sup>272</sup> And Landis went on to note:

Legislation by the democratic method has this tendency. Wise and honest public men may become jointly interested in the need for altering the trend in a particular industry. They will agree that, basically, the public interest ought to be the governing factor in that industry's future activities, but, for various reasons, they will hold conflicting opinions as to how that public interest can best be served. Legislation, which thus is forced to represent compromise, does so by the use of vague phraseology.<sup>273</sup>

Reading this description, it is not clear how a subject matter becomes apolitical once it is transmitted from a wise and honest legislator to a wise and honest regulator. The vague language of the legislation embraces indecision regarding the political issues at stake. How, then, could the enforcement of vague legislation by an agency not be marred by politics? As succinctly put by Jaffe, "[A] political conflict [cannot] be avoided by relegating a problem to the care of an agency and invoking the talisman of 'expertise.'"<sup>274</sup> Thus, if in the previous

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269. See *supra* text accompanying note 116.

270. See *supra* note 121. See similarly Landis, *Significance of Administrative Commissions*, *supra* note 155, at 475–76. See also HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 360–61 (Transaction Publishers 1988) (1914) ("Representing, as they would, the knowledge gained by the attempt to realize an accepted social policy, [administrative experts] . . . would be lifted out of the realm of partisan and factious political controversy and obtain the standing of authentic social experts."). See generally Sagy, *Triptych of Regulators*, *supra* note 14, at 448–54.

271. Landis, *Significance of Administrative Commissions*, *supra* note 155, at 480–81 ("Unquestionably, whereas the ebb and flow of political dominance has on occasion brought about an equal ebb and flow in the policies of the executive departments, the administrative agencies have pursued a more even course.").

272. LANDIS, *supra* note 21, at 51.

273. *Id.*

274. Jaffe, *Illusion of Ideal Administration*, *supra* note 37, at 1190. Jaffe openly acknowledged that regulation was a political business already in 1955. See Jaffe, *Basic Issues*, *supra* note 129, at 1283 ("Most rule-making involves the weighing of a complex of

Section the idea of a neutral administrative expertise was discredited, this Section ends with the resounding understanding that administrative policy-making is normally a political business.<sup>275</sup> It is clear therefore that the sharp distinction between politics and policy is untenable and thus cannot serve as a criterion to distinguish the administrative from the other branches of government.

Having dealt with the undergirding assumptions sustaining Landis's description of expertise, the table is now set for us to tackle head-on what should be considered the primary source for the book's failure.

### 5. Accounting for Expertise

We have seen that, according to Landis, the Technician's expertise is based on an intimate acquaintance with facts, out of which regulations should emanate.<sup>276</sup> But we still do not know how this transition from facts to administrative conclusions is to come about. As noted, Landis did not give an account of that process. It appears as though he believed that the mere wallowing (or basking) in the relevant facts for a considerable length of time is bound to get the aspiring regulator "there."<sup>277</sup>

Thus, Landis, who prided himself on crisp administrative expertise, was unable to confirm what makes his administrator—be its type as it may—such an expert in regulating the market that the contending branches of government must withdraw from the regulatory arena. Evidently, Landis's momentous failure has to be duly noted. After all, the book is the most thorough attempt to conceptualize regulators' expertise. Landis's failing strongly suggests, therefore, that any attempt at threshing out the essentials of such an assertion of expertise would reveal the ineluctability of a residual inexplicable element lying at its heart—this something about expertise that we cannot quite close our

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considerations, many of them of the kind we call political . . ."); *see also* Pound Report, *supra* note 99, at 359 ("The professed ideal of an independent commission of experts above politics and reaching scientific results by scientific means, has no correspondence with reality."). For more recent similar pronouncements, *see*, for example, CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 239–43 (2005); Kagan, *supra* note 40, at 2261–62; Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 274 (1987) ("Thus, in the end, the politics of the bureaucracy will mirror the politics surrounding Congress and the president.").

275. And as I shall note below, there were those who wholeheartedly embraced this conclusion. *See infra* note 342.

276. *See* Sagy, *Triptych of Regulators*, *supra* note 14, at 441.

277. *See supra* note 232 and accompanying text (describing naturalism).

fists over. It lends credence to George Gardner's observation that "the . . . claim of 'expertness'" is essentially an assertion "of a divine power and calling to govern."<sup>278</sup>

Curiously, Landis seemed to be "aware" of the fact that the cure-all medicine he prescribed in the book for modern illnesses — expertise — is actually a nostrum. Traces of this line of thought can be found in Landis's discussion of judicial supervision over agencies. At one point, Landis relates parts of the story of the SEC's "pricking out [by regulations] the content of the statutory concept of 'manipulative, deceptive and fraudulent' devices" in the sale of securities, as provided for in the pertinent SEC Act.<sup>279</sup> Then, he tells us that the Court ordered agencies to explicitly spell out the factual data that led to the adoption of certain regulations.<sup>280</sup> "How far this suggestion should be taken seriously is a matter of considerable doubt,"<sup>281</sup> Landis comments, and he goes on to explain his reasons for stating so:

Rules of this character are themselves evidence of administrative judgment that the particular conduct embraced by them does normally promote fraud and deceit. A further recital to that effect would be a matter of mere formality.<sup>[282]</sup> The evidence upon which the conclusions that lead to the adoption of such rules rests is *rarely of a type that is legally admissible . . .* In the main it consists of opinions of men acquainted with the practices of the security markets. . . . But the ultimate judgment of the administrative rests on considerations that evolved out of a wide range of *experience and observation and out of its study of security practices*. To set them forth in detail would make a treatise on practices in . . . [that] market rather than a limited series of recitals.<sup>283</sup>

Here, of course, is the rub. Landis's statement amounts to openly conceding that it is impossible to give an account of the thought process that produced a given administrative resolution. The only

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278. Gardner, *supra* note 38, at 339. See similarly *infra* note 287 and text accompanying note 294.

279. LANDIS, *supra* note 21, at 147.

280. *Id.* at 148.

281. *Id.*

282. Yet elsewhere in the book Landis named recitals that accompany congressional legislation as one significant means "of grasping the legislative thought." *Id.* at 67. *But cf. id.* at 149 n.38.

283. *Id.* at 148–49 (emphasis added).

(unreasonable) alternative Landis could think of is the agency writing down a treatise specifying all the germane facts spawning the rules in question, i.e., the practices of the regulated market.<sup>284</sup> Hence, while the outcome “evolve[s] out of a wide range of experience and observation *and* out of . . . [a] study of securities practices,” only the last component can be accounted for; what is certainly beyond any doubt is the fact that this “wide range of experience and observation” cannot be canvassed in a “legally admissible” manner.<sup>285</sup>

This point thwarts the whole Landisian naturalistic approach. For in his rage at intrusive courts, Landis debunks the conception that the right facts alone would somehow yield the right conclusions; after all, he acknowledges the central role played by a persistent residual “experience” in the administrative process.<sup>286</sup> Alas, what this experience is remains in the end inscrutable, it appears; for this reason, Laski said in 1930 that the expert “practices a mystery.”<sup>287</sup>

Clearly, the whole Landisian enterprise is at stake in the passage, yet it is not James Landis’s momentary inattentiveness that should be “blamed” for its far-reaching outcomes. It is, at least in part, the “fault” of the separation between fact and theory—which in itself is a reflection of naturalism—and this separation’s role in the book’s discussion. The fact/theory binary opposition is based on the claim of a tangible difference between the two: the one begins where the other ends.<sup>288</sup> It follows that “facts,” the lifeblood of regulation, are—by (Landis’s) definition—placed in a theory-less world. This holds true also to other permutations of the dichotomy, such as action/inaction and practical/theoretical. Therefore, as “theorizing” is opposed to “doing”—that is, as theory is equated with useless chatter (associated with *inaction*) and diametrically opposed to the practical action—

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284. *Id.* at 149.

285. *Id.* at 148–49 (emphasis added).

286. *Id.* at 149.

287. Laski, *supra* note 210, at 104; *see also, e.g.*, Rudd, *supra* note 67, at 1058 (describing Landis’s argument as predicated on the idea that “the administrative expert’s ‘black box’ would solve social problems”); *cf.* Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 SETON HALL L. REV. 760, 800, 805–06 (2001).

288. Dichotomies, or binary oppositions, occupy a special place in the structuralist tradition. *See, e.g.*, JONATHAN CULLER, *STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS AND THE STUDY OF LITERATURE* 14–16 (1975); TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 90 (2d. ed. 1996) (explaining that structuralist thinkers explored “universal mental operations . . . such as the making of binary oppositions”).

nothing of essence could be said about the conditions that brought about the administrative action.<sup>289</sup> Not unlike the “early” Wittgenstein, who most famously said in the *Tractatus*, “[w]hereof one cannot speak, thereof one must be silent,”<sup>290</sup> Landis held that whatever is said about regulators’ action – the very essence of their expertise – is useless. Thus viewed, Landis had embarked on a book-project *en route* to nowhere.

#### H. The Administrative Process *Paradigm(s)* Revealed: Conclusion

We can conclude that the book’s failure was rooted in Landis’s neglect to notice the many uncertainties and pervasive metaphysical thinking lying at the core of his very own concept(s) of expertise. The same metaphysical thinking was exemplarily expressed by Landis’s co-author of the securities legislation of the early 1930s, Tom Corcoran,<sup>291</sup> in the course of his testimony on the Securities Exchange Act of 1934 at the House Commerce Committee in 1934. The following dialogue took place on that occasion between Corcoran, as a representative of the Roosevelt Administration, and one of the House Committee members:

MR. MAPES. The law ought to be made to apply to all alike and I hate the idea that some man can go on an administrative official and get something done that another fellow on the street cannot.

MR. CORCORAN. You have to have the power to make rules and regulations in every administrative body. The answer is to pick good men on your commissions.

MR. MAPES. Well, that sometimes is no answer at all.

MR. CORCORAN. It is the ultimate answer to any governmental problem.<sup>292</sup>

I believe that E.P. Herring best captured the thrust but also the insufficiency of the book’s endeavor to duly justify – at Landis’s time,

289. Cf. Landis’s discussion, LANDIS, *supra* note 21, at 28, where he states: “[B]lueprint symmetry is a poor substitute for realism in organization.” Indeed, Landis is hoist with his own petard for the obvious reason that his is also a “theoretical” discourse.

290. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* ¶ 7 (C.K. Ogden trans., 1922).

291. On Thomas Corcoran, see *supra* note 59 and accompanying text.

292. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 101 (3d ed. 2003) (quoting *Stock Exchange Regulation: Hearing Before the H. Comm. on Interstate and Foreign Comm. on H.R. 7852 and H.R. 8720*, 73d Cong. (1934) (statement of Thomas G. Corcoran)).

but even more so, today—the bulk of what we call “regulation,”<sup>293</sup> let alone big waiver’s expansive delegation of powers. He wrote in 1936:

We want good men but we are unable to define virtue. . . . We do not know just what sphere is proper for these commissions. We dare not make them purely expert bodies because we distrust experts; we dare not lease them to lawyers because we recognize the limitations of the legal approach; we dare not place men of vision in command because we know not where their visions may take them.<sup>294</sup>

At face value, the two passages seem to contradict one another, but actually both Corcoran and Herring speak about the universal human desire to have things run by the right people. As revealed in both passages—Corcoran’s dialogue with Mapes and Herring’s insightful musing—this desire is often tempered by a countervailing “disenchantment with the idea of policymaking by expert and nonpolitical elites,”<sup>295</sup> or anxieties that go to the heart of the democratic-legitimacy challenge attending regulation: that “important choices of social policy” would be made by “politically unresponsive administrators.”<sup>296</sup>

This “expertise ambiguity” (or “expertise schizophrenia”)—the understanding that there are cases where it may be best to let competent administrators regulate yet not being “comfortable with the administrative state and . . . therefore always demand[ing] that it be justified afresh”<sup>297</sup>—is well reflected in the extant literature, which

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293. For a recent discussion of the various definitions of “regulation,” see David Levi-Faur, *Regulation and Regulatory Governance*, in *HANDBOOK ON THE POLITICS OF REGULATION* 3 (David Levi-Faur ed., 2011).

294. E. PENDLETON HERRING, *FEDERAL COMMISSIONERS: A STUDY OF THEIR CAREERS AND QUALIFICATIONS* 96 (1936).

295. Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 *CHI.-KENT L. REV.* 1039, 1043 (1997) (“[T]he courts’ assertiveness during the period from roughly 1967 to 1983 can be explained by judicial disenchantment with the idea of policymaking by expert and nonpolitical elites.”).

296. *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 686–87 (1980) (Rehnquist, J., concurring in judgment) (“Indeed, a number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators.”); see also Sagy, *Triptych of Regulators*, *supra* note 14, at 458 n.190.

297. PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* 7 (2d ed. 2004) (“In contrast to most of the rest of the world (including most democracies), Americans have never been comfortable with the administrative state and have therefore always demanded that it be justified afresh.”).

explodes with critical assessments of administrative expertise<sup>298</sup> while clinging to the idea of expertise in the context of central regulatory issues.<sup>299</sup>

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298. See, e.g., *supra* text accompanying note 263 (citing then-Dean Kagan's review of denunciatory estimates of expertise); *supra* notes 262, 274 (citing Reich's and the Pound Report's critical views of administrative expertise, respectively). See also *supra* text accompanying note 287, where Laski's skepticism of the very idea of expertise is cited.

Indeed, as suggested by Laski's comment, throughout the years, the idea, or ideal, of administrative expertise was generally attacked from different angles and on the basis of different methodologies. This Article does not purport to provide a comprehensive account of the intellectual history of administrative expertise—for such an account, see Sagy, *The Manager, the Judge, and the Empiricist*, *supra* note 31—but only to discuss the problems raised by one, central model of expertise of one, central regulator and theoretician.

Hardly exhausting the subject, I will note that already when the book was written, and even more so in the following years, scholars pursued two lines of attack on administrative expertise, arguing that—

(1) it was unrealistic to assert that regulators were “experts,” either on account of their short term in office or because of the political dynamics of appointments. See, e.g., BERNSTEIN, *supra* note 134, at 112 (“[O]n the whole commissioners have not inspired confidence as outstanding public servants and vigorous defenders and promoters of the public interest.”); Caldwell, *supra* note 98, at 971 (“Like the climate of Los Angeles, theoretically this conception of expert commission is perfect. Sometimes, it is true, experts are appointed, but no more than you would expect under the law of averages.”); Pound Report, *supra* note 99, at 345; see also HERRING, *supra* note 294, at 96 (arguing that, although effective, the presidential appointment process was “almost casual in its lack of system”). In fact, complaints about the low caliber of commissioners had attended the administrative apparatus in the United States already during the nineteenth century. Charles Francis Adams observed in 1871 that commissions “have almost invariably been made up of very inferior and, not seldom, corrupt men.” Charles F. Adams, Jr., *The Railroad System*, in *CHAPTERS OF ERIE AND OTHER ESSAYS* 333, 428 (1871).

(2) Concurrently, it was argued that, even if (somehow) administrative expertise took root in a certain regulatory setting, it was very doubtful whether the resultant regulation would be in the public interest due to (for example) experts' narrow perspective. See, e.g., ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 197 (Free Press 1997) (1925) (“Effective knowledge is professionalised knowledge, supported by a restricted acquaintance with useful subjects subservient to it. This situation has its dangers. It produces minds in a groove.”). Interestingly, Marver Bernstein takes issue with Landis on this point exactly. In response to Landis's positive description of the merits of commissions' “singleness of concern,” LANDIS, *supra* note 21, at 99, Bernstein turns these words against Landis. It is, again, precisely the “[s]ingleness of concern” of expert regulators he finds so vexing. BERNSTEIN, *supra* note 134, at 119 (emphasis added). Naturally, also pivotal in this camp was the hugely influential literature on capture, which is canvassed, for example, in McCraw, *supra* note 26, and Schiller, *supra* note 78, at 1405–06. For an early seminal discussion, see Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467 (1952).

299. An excellent illustration is provided by the vast literature dedicated to the immensely central *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and subsequent related cases (notably *United States v. Mead Corp.*, 533 U.S. 218 (2001)). See, e.g., Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative*

Be that as it may, it seems unwise to base big waiver on the foundations of a regulatory theory surrounded by ambiguity. Yet as noted, we have not yet reached the final destination in our discussion. The next Part will indicate why those seeking to defend big waiver should consult the work of Jaffe (rather than that of Landis).

### III. THE JAFFE ALTERNATIVE: AN OVERTURE

#### A. Introduction to Jaffe

Louis Leventhal Jaffe (1905–1996) was undoubtedly one of the most original and prolific legal scholars in mid-century America.<sup>300</sup> He started off as an avowed New Dealer and retired in 1976, bearing the title of Harvard Law School’s Byrne Professor of Administrative Law *Emeritus*, as one of the most penetrating critics of the administrative process.<sup>301</sup> Gradual as his shift away from New Deal regulatory ideas had been, by the mid-1950s it could not be denied.<sup>302</sup> In a 1954 article, he reflected upon “the thinking of the thirties”<sup>303</sup> and arrived at unfavorable conclusions, which he publicly announced. “We have,

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*Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 141 (1997) (arguing that *Chevron*’s holding “is a judicial determination that agencies, by virtue of their democratic pedigree and expertise, are more competent to interpret ambiguous statutes than are courts”); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1033 (2005) (similarly arguing that, at least in part, *Chevron* deference is based on the fact that “agencies generally possess greater technocratic expertise than courts”). To recall, the Court explicitly invoked agencies’ expertise in its *Chevron* holding. *See Chevron*, 467 U.S. at 865 (“Perhaps [Congress] . . . consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . .”).

300. In fact, according to Professor Rodriguez, “In the modern intellectual history of American administrative law, one figure looms especially large: Professor Louis Jaffe.” Daniel B. Rodriguez, *Jaffe’s Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1159 (1997).

301. For Jaffe’s biography, see *id.* at 1162–63; Justice Stephen Breyer, *In Memoriam: Louis L. Jaffe*, 110 HARV. L. REV. 1205 (1997); Nathaniel L. Nathanson, *The Contribution of Louis L. Jaffe to Administrative Law*, 89 HARV. L. REV. 1667 (1976).

302. See Yair Sagy, *The Transformation of Louis Jaffe* (forthcoming manuscript on file with author) [hereinafter Sagy, *The Transformation of Louis Jaffe*]; see also Nathanson, *supra* note 301; Schiller, *supra* note 78, at 1398–416.

303. Jaffe, *A Reevaluation*, *supra* note 94, at 1119; *cf.*, *e.g.*, Jaffe, *Invective and Investigation in Administrative Law*, *supra* note 261, at 1242 (“[T]he Committee has presented almost no proof to support its violent, unmeasured condemnation of the independent commissions.”); *id.* at 1239–40; Louis L. Jaffe, Book Review, 42 COLUM. L. REV. 1382 (1942) (reviewing ROSCOE POUND, *ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE AND SIGNIFICANCE* (1942)) (criticizing Pound primarily, but also Pound’s opponents—Jaffe explicitly counts himself among them—for their rhetoric).



perhaps, succumbed too easily to the siren song of regulation,” he wrote of those earlier years.<sup>304</sup>

In this Part, I will not provide a conclusive account of Jaffe’s scholarly “pilgrimage” (as he himself put it)<sup>305</sup> over the years.<sup>306</sup> It will rather only describe Jaffe’s emergent understanding of regulation as he distanced himself from “the thinking of the thirties.”<sup>307</sup> Key building blocks of his post-New Deal thinking were already mentioned above in the course of our critical assessment of Landis’s construction of *The Administrative Process*.<sup>308</sup> The discussion below will draw on the references made thus far in the Article to Jaffe and elaborate upon them. This Part will be brief and, again, focused only on outlining the contours of Jaffe’s “mature” thinking with a view to demonstrating their compatibility with, and usefulness for, shoring up such regulatory devices as big waiver.<sup>309</sup>

### B. Snippets of Post-New Deal Jaffe

Slowly but surely distancing himself from Landis’s expansive model of expertise in the 1940s and ‘50s, Jaffe came to embrace a competing model for legitimizing the federal administrative apparatus. It was the judicial-review model,<sup>310</sup> which he advocated in a long series of publications and for which he is best remembered.<sup>311</sup> As Jaffe probably

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304. Jaffe, *A Reevaluation*, *supra* note 94, at 1134.

305. Louis L. Jaffe, *A Pilgrimage: Reflections on a Career in Administrative Law*, 45 IND. L.J. 171 (1970).

306. For such an account, see Sagy, *The Transformation of Louis Jaffe*, *supra* note 302.

307. Therefore, any mention of “Jaffe” in the ensuing paragraphs should usually be read as “post-New Deal Jaffe.”

308. See *supra* text accompanying notes 144, 263, 275.

309. Jaffe’s “pilgrimage” could undoubtedly be told along different lines than those of my narrative. See notably the insightful discussion in Schiller, *supra* note 78, at 1398–416, in which Jaffe’s change of heart regarding the administrative process is seen to mirror the broader intellectual shift from postwar “interest group pluralism” to the “participatory administration” of later decades. As will become evident below, while different in important respects, the trajectory charted by Professor Schiller clearly parallels the trajectory charted in this Article. Noticeably, both highlight the emerging democratic-participatory undertone in Jaffe’s late thinking (yet each paper anchors that change in Jaffe’s thinking elsewhere).

310. For general overviews and critique of the judicial review model, see Frug, *supra* note 40, at 1334–55; Rodriguez, *supra* note 300; Rubenstein, *supra* note 14, at 2187–99; Stewart, *supra* note 40, at 1675, 1678–80.

311. A great many of Jaffe’s articles were assembled in LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

had hoped, his model did indeed ruffle Landis's neat vision of public regulation. That was the way he put it in 1958:

The guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system. Indeed I would venture to say that it is the very condition which makes possible, which makes so accessible, the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility.<sup>312</sup>

The gist of the judicial-review model is that the courts' independent review of agencies provides the needed footing for anchoring administrative actions.<sup>313</sup> More accurately, given the fact that review is not always sought or granted, Jaffe argues that it is the presumption of reviewability that serves the purpose.<sup>314</sup> Reviewability was therefore pivotal in his conception of regulation.

Another pillar in the theoretical edifice erected by Jaffe in the course of his career was the conviction that regulation was a through-and-through political occupation.<sup>315</sup> Simply put, as opposed to Landis (and many other lawyers),<sup>316</sup> according to Jaffe regulation is—*and should be*<sup>317</sup>—more a matter of politics and less of expertise. “Most rule-making,” Jaffe explained in 1955,

involves the weighing of a complex of considerations, many of them of the kind we call political; the judgments to be made are judgments of more or less, of feasibility, of prognosis. Ordinarily such decisions are the product of the staff—the technical officers embodying special knowledge and continuity of experience—and the political officers who must rely on the technical experience of the staff, but temper and direct it.<sup>318</sup>

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312. Louis L. Jaffe, *The Right to Judicial Review* (pt. 1), 71 HARV. L. REV. 401, 406 (1958).

313. See, e.g., *id.* at 405 (“[W]e, in common with nearly all of the Western countries, have concluded that the maintenance of legitimacy [of an agency's action] requires a judicial body independent of the active administration.”).

314. See *id.* at 423–37.

315. Sager, *The Manager, the Judge, and the Empiricist*, *supra* note 31, at 312.

316. See *id.* at 308–43 (“Louis Jaffe: The Realist of Realists”).

317. See *infra* text accompanying note 344.

318. Jaffe, *Basic Issues*, *supra* note 129, at 1283; see also Louis L. Jaffe, *The Federal Regulatory Agencies in Perspective: Administrative Limitations in a Political Setting*, 11 B.C. INDUS. & COM. L. REV. 565, 567 (1970) [hereinafter Jaffe, *Agencies in Perspective*] (“The

A third component in Jaffe's "mature" thinking was its relativistic undertone. In short, while at first the rise of relativism startled Americans and wreaked havoc on American academia, it was eventually embraced, especially during the Cold War, and relied upon in drawing a contrast between the ("relativistic" and democratic) West and the ("absolutist" and tyrannical) East.<sup>319</sup> Thus, the division between "relativism" and "absolutism" dominated political and social thinking in the United States up to the end of the 1950s. It was, again, the former view that ultimately emerged triumphant. At the height of the Cold War, Americans made ample use of the relativism/absolutism binary, arguing that dogmatism and absolutism ruled in the Soviet Union while the United States relished in social experimentation, diversity, popular participation in government, and freedom. "Relativist democratic theory and the cold war," concludes Edward Purcell, "were mutually reinforcing."<sup>320</sup>

Based on these and other above-mentioned theoretical components, Jaffe's scholarly trajectory can be described in the following terms: rejecting the naïve naturalistic viewpoint, replacing it with the rising relativistic justification of democracy, and acknowledging that regulation was a political business, Jaffe prescribed a "relativistic" and thus decentralized, non-exclusive, and participatory mechanism of regulation, which was open to all branches of government. In keeping with this approach, he insisted already in 1955 that

[i]n no case is independence absolute nor should it be. Every organ of government in a democracy—even the Supreme Court—is bottomed on representativeness. . . . If the Commission [(here, the ICC)] has for decision an issue no one—least of all the President—should be silenced. The Commission's independence lies in its power to choose, not in its power to not hear.<sup>321</sup>

In so holding, he clearly rejected the New Dealers' prototypical scheme of the division of labor within the administrative state, which accorded a commanding position to administrative commissions and

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stuff of great public policy controversies is basically political and can only be solved in the political arena."); *supra* text accompanying note 274; *infra* text accompanying note 341.

319. See PURCELL, *supra* note 220, at 238–39; see also Sagy, *The Transformation of Louis Jaffe*, *supra* note 302.

320. PURCELL, *supra* note 220, at 239; see also *id.* at 200–02, 265–66.

321. Jaffe, *Invective and Investigation in Administrative Law*, *supra* note 261, at 1240.

advocated their independence.<sup>322</sup> One should note that on this reading of Jaffe's overall work the contribution of the courts to the administrative apparatus was but one, albeit central, element in a multi-vocal administrative process.<sup>323</sup> Further, the democratic-participatory worldview was plainly premised on a limited conception of agency expertise for at least two reasons. First, as suggested, such a limited conception was the order of the day, as "America's encounter with the bureaucratic totalitarianism of Hitler and Stalin sullied the promise of expert administration."<sup>324</sup> Second, a robust, open conversation could be had only if the relevant knowledge informing it were deemed accessible to all colloquists. As we have noted, assertions of "strong," expansive administrative expertise, however, are essentially warning signs; they tend to narrow the scope of deliberation; they are inimical to a cooperative-participatory approach to public regulation.<sup>325</sup>

What Jaffe understood, and welcomed, was that a system of checks and balances allows for only a limited sphere of expertise.<sup>326</sup> Apart from the assumption that regulators could err, the very idea of (meaningful) judicial review implies that regulators' decisions *can* be meaningfully reviewed by others; the greater the reviewable scope, the more check and balance there is. However, as suggested by Laski, the greater that scope is, the smaller the reputed expertise.<sup>327</sup> Jaffe was pleased with this result. He was wary of absolute, metaphysical assertions of the sort Landis had made with regard to the expert administrator.<sup>328</sup> It seems that especially during the Cold War, Jaffe, like other prominent thinkers around him (like John Dewey and Reinhold Niebuhr),<sup>329</sup> believed that

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322. *Id.* at 1242; *see also supra* note 121.

323. *See supra* text accompanying note 321; *infra* text accompanying note 344.

324. Schiller, *supra* note 78, at 1404.

325. *See* Rudd, *supra* note 67, at 1058 (arguing that Landis's "new administrative order reduced public participation by narrowing the field of qualified opinions to those held by 'experts'").

326. *Compare supra* text accompanying note 103 (describing Landis's position), with Jaffe, *Question of Law*, *supra* note 194, at 275 ("The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law . . .").

327. *See supra* text accompanying note 210 ("The expert . . . remains expert upon the condition that he does not seek to coordinate his specialism with the total sum of human knowledge." (internal quotation marks omitted) (quoting Laski, *supra* note 210, at 105)).

328. *See supra* Part II.G.5. *See also* the sources cited *supra* note 302 (detailing Jaffe's "pilgrimage").

329. *See, e.g.*, JOHN DEWEY, FREEDOM AND CULTURE 102 (Capricorn Books 1963) (1939) ("[F]reedom of inquiry, toleration of diverse views, freedom of communication, the

the more cacophonous the institutionalized conversation was allowed to be, the more relativist, and thus the freer, society was.<sup>330</sup> Taking into account the problem of perspective—that is, the fact that human knowledge is “invariably tainted with an ‘ideological’ taint of interest,” as Niebuhr put it<sup>331</sup>—a multi-vocal process of deliberation was also projected to produce salutary social ends.<sup>332</sup> Surely, again, this line of reasoning depended on a modest perception of administrative, and any other, expertise.

It may be thus said that, while Jaffe endorsed Landis’s position that every branch of government had an expertise of its own, he endorsed it with one important modification. Landis thought that the territorial spread of each branch’s authority must be strictly conterminous with its unique expertise, so that the administrative process would be neatly compartmentalized and “boarder disputes” among the branches minimized.<sup>333</sup> Jaffe, on the other hand, came to advocate a multi-party, participatory, and inclusive view of the administrative process, a process whose boundaries were more amorphous.<sup>334</sup> To Landis the recognition in diversity of expertise allowed for a comfortable disengagement among the branches. As Jaffe saw it, it allowed for a rich and multifaceted public dialogue.

I believe Professor Cynthia Farina’s following *cri de coeur* reflects a sentiment that Jaffe held dear: “[W]e have a common stake in articulating a vision of the regulatory state that encourages us to understand legitimacy and competence as a collaborative enterprise that

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distribution of what is found out to every individual as the ultimate intellectual consumer, are involved in the democratic as in the scientific method.”); REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE* 70–71 (1944) (“The reason this final democratic freedom is right . . . is that there is no historical reality, whether it be church or government, whether it be the reason of wise men or specialists, which is not involved in the flux and relativity of human existence; which is not subject to error and sin, and which is not tempted to exaggerate its errors and sins when they are made immune to criticism.”).

330. Note that at this point Jaffe diverged from orthodox science of administration, whose first article of faith was Executive enhancement and the exclusion of the other branches of government from executive duties. *See supra* note 147.

331. 2 REINHOLD NIEBUHR, *THE NATURE AND DESTINY OF MAN: A CHRISTIAN INTERPRETATION* 214 (one vol. ed. 1949).

332. This theme was developed already in the late-1950s, notably in the seminal Lindblom, *supra* note 262. *Cf.* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

333. *See supra* Part II.D.2 (describing Landis’s institutional competence analysis).

334. *See supra* note 318.

must be pursued through a variety of official actors and institutional practices.<sup>335</sup>

Finally, it was, among other things, Jaffe's exceptional realism that set him apart from Landis.<sup>336</sup> Jaffe was indeed exceptionally realistic compared to his colleagues when it came to regulation. By "realist" I mean simply that he went further than other jurists in rejecting idealized visions of public regulation and its mechanics, which lawyers like Landis could not let go of.<sup>337</sup> More often than not, lawyers had looked at agencies from the top, unheeding the lower echelons of the administrative process, or simply confined themselves to courts' perspective on the administrative apparatus.<sup>338</sup> Jaffe, conversely, attended to the actual workings of the administrative process and took interest also in the organizational perspective of regulation.<sup>339</sup> Viewed through this prism, the process revealed itself to Jaffe as political in the plainest sense of the word.

Jaffe applied his realism to his own thinking. Putting much stress on personal predilections and political preferences in the carrying out of regulation, it was Jaffe himself who indicated the limitations of one of his claims to fame, namely, of the judicial-review model.<sup>340</sup> In 1970 he declared, "[J]udicial activities continue to be of great importance in stimulating and guiding the agencies in their new endeavors. But ultimately the conflict of interests which lie at the bottom of most of the great controversies must be resolved by the more particular *political*

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335. Farina, *supra* note 100, at 238.

336. *Cf. supra* Part II.G.4.

337. See Sagy, *Triptych of Regulators*, *supra* note 14, at 431 n.22, 459–62.

338. See, e.g., Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 347 (1988) ("American administrative law remains a court-centered field . . ."); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 72 (2005); see also Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 25–31 (1998); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 408–09 (1990) ("In even the most prominent evaluations of the performance of the regulatory state, explorations of the real world consequences of regulatory intervention are strikingly infrequent.").

339. For Jaffe's acute realism, see Rodriguez, *supra* note 300, at 1166–69 (describing Jaffe's critique of the shortcomings of the administrative process); Sagy, *The Transformation of Louis Jaffe*, *supra* note 302.

340. For such critical discussions, see sources cited *supra* note 310.

process represented by administrative and legislative power.”<sup>341</sup> This was the end-point in the pilgrimage of Louis Jaffe: administrative agencies’ importance primarily lies no more in the distinct expertise they are able to offer to society, but rather in the political services they render to it.<sup>342</sup>

### C. Conclusion: Jaffe in Defense of Big Waiver

It seems that big waiver has quite a lot in common with Jaffe’s “relativist” vision of regulation. Several central features of waiver regulation immediately come to mind. I begin with a distinct feature that seems to be particularly controversial<sup>343</sup>: big waiver’s cooperative and dialogic nature. As emphasized by Professor Bagenstos, at the heart of “federalism by waiver”<sup>344</sup> are “cooperative state-federal spending statutes . . . [that] giv[e] states space to experiment with new means of achieving the goals of those statutes.”<sup>345</sup> This characterization is closely tied to the fact that waiver regimes are decentralized,<sup>346</sup> or at least less centralized, in their very nature—certainly when compared to top-down, uniform, hierarchical, often rigid command-and-control regulation.<sup>347</sup>

341. Jaffe, *Agencies in Perspective*, *supra* note 318, at 569 (emphasis added); *see also*, e.g., BERNSTEIN, *supra* note 134, at 161 (“Only in a totalitarian society is the general welfare a matter of private, nonpolitical concern.”).

342. Jaffe, *Illusion of Ideal Administration*, *supra* note 37, at 1188. Following this approach, Jaffe noted in 1973, “Indeed, the criticisms of administration must be recognized as themselves a component of the political process, and critics’ invocation of the ‘public interest’ as a standard with readily discoverable content should be viewed as but a useful tactic in the political debate.” *Id.* at 1191. Jaffe took this piece of wisdom to heart when it came to his own positions as well. *See id.* at 1197 (“[Previous] descriptions of the administrative process . . . may express a political bias, as may be true of this attempt to correct them.”).

343. Compare Richard A. Epstein, *Government by Waiver*, NAT’L AFFAIRS, Spring 2011, at 39, 40 (decrying “the risks that come with the [government’s] power to create exceptions and to grant dispensations”), with Bagenstos, *supra* note 1, at 228 (emphasizing the great potentials of “cooperative state-federal spending statutes”).

344. Hugh Hecl, *Poverty Politics*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 396, 415 (Sheldon H. Danziger, Gary D. Sandefur & Daniel H. Weinberg eds., 1994).

345. Bagenstos, *supra* note 1, at 228.

346. *Id.* at 238 (“Reliance on the waiver mechanism helps to realize many of the benefits of decentralization—notably the benefits of experimentation and accounting for local variation—within the context of a national program.”).

347. On command-and-control regulation and its critiques, *see*, for example, Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 103–18 (1998), and Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 171, at 446–48, 454. Indeed, Barron and Rakoff explicitly argue, based on the fact that big waiver allows for “relaxing strictures on what states

Another element of waiver that must be mentioned here is that it is based on the understanding that in many cases it is wrong to assume *ex ante* that one organ of government—even if it is a specialized federal regulatory agency—would get it right. Indeed, big waiver regimes’ commitment to experimentation may be said to spell their skepticism that there is an a priori right answer to a regulatory problem. No wonder, then, that Barron and Rakoff are open to the option that “[i]f, for example, Congress wanted to allow for waiver partly to encourage experimentation among those who are regulated, it might make sense to allow for waiver when a proposed option is as good as, though not necessarily better than, the specified statutory pattern.”<sup>348</sup>

Post-New Deal Jaffe came to espouse a vision of regulation much in line with such an experimental, cooperative, decentralized—in a word, relativistic—approach to regulation. Supporters of big waiver, therefore, should look to him and to his post-New Deal way of thinking as sources of inspiration,<sup>349</sup> rather than seek support in the unitary, naturalistic, deterministic, allegedly-non-political,<sup>350</sup> and socially “stratified”<sup>351</sup> world of *The Administrative Process*.

#### IV. CONCLUSION

This Article’s point of departure was that the regulatory instrument of big waiver is crucially important not just in its own right but also because it represents a distinct, new regulatory age in the United States. Barron and Rakoff’s defense of big waiver should therefore be

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and localities may do,” that big waiver “is here to stay.” Barron & Rakoff, *supra* note 1, at 301.

348. Barron & Rakoff, *supra* note 1, at 332.

349. It is important here to put things in perspective as this Part and the entire Article draw to a close. Since the discussion in the Article revolved mainly around the issue of legitimate regulation, *see supra* note 51, its concluding observations—including, of course, the argument about Jaffe’s probable endorsement of big waiver—should not be read as an endorsement of every form of big waiver nor of every detail of big waiver regulatory arrangements. *Accord* Barron & Rakoff, *supra* note 1, at 335–37 (differentiating between “well developed” extant waiver provisions and “poorly thought out” provisions).

More specifically with regard to Jaffe—the father of the judicial-review model, *see supra* text accompanying notes 310–12—we can assume that generally he would have sympathized with Kate Bowers’ concerns regarding “limitations on judicial review contained in some waiver provisions.” Bowers, *supra* note 1, at 298; *see also id.* at 297–301 (explaining her concerns).

350. *See supra* Part II.G.4.

351. Rudd, *supra* note 67, at 1085 (“James Landis sketched a stratified social world . . .”).



commended both for identifying the advent of the new age of big waiver as well as for making a serious attempt at legitimizing it. As the Article demonstrated, however, this attempt has been misguided. In particular, instead of resorting to James Landis and *The Administrative Process*, Barron and Rakoff should have turned to Jaffe's work to defend waiver regulation.

As we have seen, Barron and Rakoff's entire construction is based on a particular reading of the Landisian corpus and of *The Administrative Process*. By illustrating that these perceptions are flawed, the Article exposes key weaknesses of the defense offered by Barron and Rakoff to big waiver. Since Landis's work has exerted outstanding influence on the regulation literature in the United States,<sup>352</sup> this Article's critical and innovative study of Landis is relevant to the work of a great many other scholars and in various regulatory contexts.

As was also demonstrated in the Article, rather than basing their defense of big waiver on Landis, sympathizers of big waivers, including Barron and Rakoff, should have turned to Jaffe, the leading administrative law scholar of the post-New Deal era, whose theories of regulation are more compatible with big waiver and similar regulatory techniques. Jaffe's work, I have argued, offers a superior defense of big waiver. Simply put, post-New Deal Jaffe's thinking is more in tune with the American *zeitgeist* of today, especially with regard to the role of government and the level of trust in government. The shift away from the Landisian world of regulation, which has been a decisive move toward Jaffe's world, manifested itself with the now-commonplace post-command-and-control regulation.<sup>353</sup> This shift, which is exemplified by big waiver's increasing popularity,<sup>354</sup> should serve as a clear indication that the top-down, uniform, and centralized model of regulation, espoused in *The Administrative Process*, has lost much of its luster. At the same time, this move toward a decentralized, check-and-balance, multi-party mode of regulation indicates how relevant Jaffe's thinking is to our age, the big waiver age. Therefore, the proposal to found big waiver and like administrative tools on Jaffe, rather than on Landis, is not a mere quibble or a nicety. It is undoubtedly vital for the regulatory enterprise of today, especially if, as maintained by Barron and Rakoff,

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352. See *infra* note 40 and accompanying text.

353. See *supra* note 347.

354. See Barron & Rakoff, *supra* note 1, at 299–301 (“The Waning Appeal of Command and Control Regulation”).

big waiver is poised to be “foundational to modern administrative governance.”<sup>355</sup>

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355. *Id.* at 341 (“[B]ig waiver is just as foundational to modern administrative governance—or, on the way to becoming so—as traditional delegation . . . .”); *see also id.* at 285 (“[W]aiver provisions become of central import—in much the way that grants of rulemaking power once were—to the future direction a given regulatory framework will take . . . .”).