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In the modern intellectual history of American administrative law, one figure looms especially large: Professor Louis Jaffe, the late Byrne Professor of Administrative Law at Harvard Law School. Professor Jaffe's efforts to organize the fast growing mass of legal materials bearing on public administration and regulation into a coherent, normative framework was critically important for the generation of administrative lawyers, judges, and legal scholars who faced the complex set of regulatory issues raised by the post-New Deal, pre-Civil Rights era of social and economic regulation, that is, the era of roughly the 1940s through the 1960s. This era is somewhat neglected by modern accounts of administrative law. While few new regulatory statutes were enacted during this era, much of the conceptual framework of the administrative law which so significantly gives shape to contemporary regulatory disputes was formed during the generation represented by Professor Jaffe and his contemporaries. The most significant elements of these new administrative law fundamentals concerned the proper scope of judicial review of agency action. Specifically, with Professor Jaffe's efforts, we have absorbed into our normative world view the idea that there remains, notwithstanding the admonitions of the key intellectual architects of the New Deal regulatory programs, a very significant and independent role for courts in reviewing administrative agency action. Relatedly, the explication of

* Professor of Law, University of California, Berkeley. I thank all the participants in the Chicago-Kent Administrative Law Conference and, especially, Harold Krent, for organizing this interesting gathering. Jim Rossi, Peter Strauss, Edward Rubin, and the other conference participants offered helpful comments on a version of this essay. Although this essay is not an in memoriam tribute or even a review of Professor Louis Jaffe's life and work, I do think it proper to acknowledge, given Professor Jaffe's death earlier this year, his extraordinary, influential career as a teacher and scholar in the field of administrative law. I had the good fortune of studying public law at the Harvard Law School, an institution which unmistakably bears his imprint. See Robert C. Clark, In Memoriam: Louis L. Jaffe, 110 Harv. L. Rev. 1203 (1997).


the right to judicial review through the development of doctrines such as the presumption of reviewability and the corresponding reluctance to find that review was precluded by statute, helped secure to the federal courts a vigorous, searching role in superintending the modern regulatory process. At bottom, Professor Jaffe was the intellectual architect of hard look review. More specifically, he was the architect of an approach which viewed the relationship between courts and agencies as an exercise in improving the performance of the regulatory process through tethering agency decisionmaking to substantive standards of reasonableness and fair play. While the federal courts of the late 1960s and 1970s were the front-line soldiers in this war against perceived regulatory defects, Professor Jaffe's normative legal analyses provided the intellectual ammunition.

My enterprise here is to add some analytical flesh to this insight by focusing closely on the contributions of Professor Jaffe to our understandings of judicial review of agencies. I take as my principal text for this examination Professor Louis Jaffe's 1965 treatise on administrative law entitled *Judicial Control of Administrative Action.* This work reflects the most ambitious effort during the period between the passage of the Administrative Procedure Act ("APA") on the one hand and the burst of federal regulatory activity marked by the emergence of the new social regulation of the late 1960s and 1970s on the other hand, both to synthesize and to comment upon the shape of federal administrative law. Professor Jaffe's treatise is far from a recollection of cases and principles. It is a deeply normative work, one informed by years of prescriptive scholarship and one which is organized around the following basic theme: courts ought to use their federal common law powers to scrutinize administrative action with the aims of correcting regulatory imperfections and of securing administrative action to the ideal of the rule of law. The basis of this strong defense of an administrative common law lies in a post-Legal Realist skepticism about the ability of the regulatory process to work itself pure without the palliative of augmented judicial control. The bulk


4. See Louis L. Jaffe, *Judicial Control of Administrative Action* (1965) [hereinafter *Judicial Control*]. As Professor Jaffe notes in his preface to *Judicial Control*, the treatise grows out of a series of articles published in the 1950s and early 1960s. See id. at vii. The treatise is thus a work of synthesis in every sense. Some of the sections draw rather directly from this earlier law review work; others reveal a substantial refinement of the previous ideas.

5. See infra text accompanying notes 36-56.
of *Judicial Control* is taken up with examining the mechanics of this control. Arriving as it does in the early stages of the emerging "hard look" era, the principal thrust of Jaffe's normative enterprise is a careful, elegant exegesis of the wisdom of strong control with examples of how such control might operate in the modern (read: 1960s) administrative state. Jaffe's far-flung discussion ranges from arguments against liberal legislative preclusion of review to a framework for making doctrinal sense of the hoary "questions of law versus questions of fact" distinction in administrative law.

Although *Judicial Control* is essentially a thick, analytical treatise of administrative law doctrine, it is hardly an ideologically agnostic recapitulation of case holdings and statutory meaning. Rather, Jaffe's opus follows in the traditionally more ambitious normative vein of post-Legal Realist treatises in its avowed agenda to reshape, and not merely to describe, extant law. Professor Jaffe describes his basic aspirations for American administrative law and does so just at the verge of a tremendously unsettled and politically active time in American regulatory politics. The key aspiration, as already mentioned above, is that courts fulfill their role as partners with Congress and the President in superintending the administrative process. This partnership required, Jaffe instructed, substantial judicial *independence* in considering the appropriateness of agency decisions. More than any other administrative law scholar of the Legal Process era, Professor Jaffe was successful in reorienting the key question away from the more narrow one of "is this agency action legal" to "is this agency action reasonable?"

I. JAFFE'S LAW

The agenda of this essay is not to comment on Professor Jaffe's contributions per se, but, rather, to address the ways in which the subject of American administrative law is conceptually shaped through the separation of the sources of judicial scrutiny. A more complete


8. See infra text accompanying notes 111-17.

historical exegesis would want, of course, to bring to the table some of the field’s other important contributions. Contemporaries of Professor Jaffe whose scholarship also helped shift the center of intellectual gravity include Henry Friendly,10 Kenneth Culp Davis,11 Walter Gellhorn,12 Clark Byse,13 and Bernard Schwartz.14 However, the focus on Louis Jaffe’s contributions is not random. Professor Jaffe’s work in conceptually reorganizing the subject of administrative law and, especially, in detaching statutory review from trans-statutory review is seminal and worthy of special scrutiny. Moreover, as discussed above, his magnum opus, Judicial Control of Administrative Action, appears right at the beginning of the emergence of the “new social regulation” and right in the middle of substantial ferment among political scientists, legal scholars, politicians, and administrators, concerning the problems with the performance of federal regulatory agencies. While the treatise reflects Professor Jaffe’s distinct normative vision of administrative law, it is, as with any other work of this scope, very much a product of its times. And “its times” were critical in shaping our modern administrative law.

A. Louis Jaffe and His Times

Louis Jaffe began his teaching career at the University of Buffalo in 1936.15 He had been a lawyer-clerk at the Agricultural Adjustment Administration and the National Labor Relations Board and had served as a law clerk for Justice Louis Brandeis following the receipt of his S.J.D. degree at Harvard in 1932 (he received his L.L.B in 1928). During his fourteen years at Buffalo, including four years as Dean, he published articles on various aspects of regulatory policy and public administration. He authored a book on judicial aspects of foreign relations and also completed his casebook on administrative law with Professor Nathanson.16 He came to the Harvard Law School, as the Byrne Professor of Administrative Law, in 1951. In that same year, he published an article in the Harvard Law Review entitled Judi-

13. See id.
15. For a brief biography on Professor Jaffe, see Clark, supra note *.
16. See id. at 1204 & nn.1-3.
cial Review: "Substantial Evidence on the Whole Record," which pre-
scribed some of the key ideas that were later to make up the core of his
Judicial Review treatise. Jaffe's formula-
tion of the scope of judicial review and, specifically, his development
of the idea that questions of discretion rest alongside questions of fact
and of law, is a seminal part of the developing administrative law.

Three themes dominate the work. The first concerns issues of
regulatory failure. The normative foundations of the work build upon
a glossary of regulatory problems. Where New Dealers built their
case for broad administrative discretion on their faith in administra-
tion and the capacity of agencies to wield power wisely and effi-
ciently, by the 1950s and 1960s, skepticism about the performance of
regulatory agencies had grown. This doubt appears prominently by
the time Judicial Control appears in 1965. A second theme concerns
the source of the right to judicial review; this discussion of the right of
review represents a very important stage in the development of ad-
ministrative law. Third, and most famously, Professor Jaffe's formu-
ation of the scope of judicial review and, specifically, his development
of the idea that questions of discretion rest alongside questions of fact
and of law, is a seminal part of the developing administrative law.

To understand Professor Jaffe's innovations and the role of these
innovations in the redevelopment of modern administrative law, it is
important to recall the historical context within which Professor Jaffe
toiled on his subject. There is a resonant historical story which under-
girds contemporary administrative law scholarship. The story goes es-
cessentially as follows: in the beginning, the exercise of regulatory power
by administrative agencies was conceived by social scientists and legal

L. Rev. 1233 (1951).
18. See Rabin, supra note 1, at 1248.
19. In his contribution to this volume, Tom Merrill locates this skepticism about regulatory
administration in a later period. See Thomas Merrill, Capture Theory and the Courts: 1967-1983,
72 Chi.-Kent L. Rev. 1039 (1997). While I would not agree with Professor Merrill's assessment
that the legal scholars incorporated insights from "capture theory" into their work only after the
courts had advanced the ball through the hard look era cases of the early 1970s, I do not funda-
mentally disagree with Professor Merrill's central point, that is, that we ought not to overstate
the impact of scholarly trends on judicial rulings. To be clear, I do not claim that Professor
Jaffe's work was the cause of the D.C. Circuit's turn toward vigorous judicial scrutiny. The
agenda of liberal D.C. Circuit judges of this era was, as I think Merrill and I would agree, largely
ideologically driven rather than the product of epiphanies resulting from acquaintance with Pro-
fessor Jaffe's work. Instead, my point is the more narrow one: that Professor Jaffe's prescriptive
enterprise provided the intellectual cover, the normative rationalizations, for the judicial deci-
sions reached.
scholars—many of whom were, after all, architects of the modern administrative state—as the antidote to the politicization of public policy or, worse, the abandonment by the federal government of the project of regulating economic and, later, social systems in the pursuit of the common good.\textsuperscript{20} The critical agenda of these founding intellectual fathers was, of course, to legitimize the exercise of administrative power in the shadow of the recently interred, but still feared, \textit{Lochner-Hammer-Schechter} era of the Supreme Court and, perhaps even more important, the Republican-rich lower federal judiciary.\textsuperscript{21} Struggles between advocates of broader administrative power and advocates of laissez-faire constitutionalism and of private ordering more generally animated federal administrative law in the pre-APA years.\textsuperscript{22}

At the same time, many members of the founding generation were concerned with fashioning a system of administrative law which would provide appropriate constraints on administrative power.\textsuperscript{23} The APA was the most important manifestation of this concern; but so too were writings which counseled various proceduralist limits on agency action and also suggested to agencies what sorts of internal rules would effectively facilitate sound governance.\textsuperscript{24} Yet, it is important to recall that, under the political circumstances of the time, commitment to searching judicial review was a recipe for disaster. The main line of thought shared by intellectual architects of the administrative law of the early (read: 1930s and 1940s) period reflected serious doubts about the desirability of strong, trans-substantive judicial review. These founding fathers feared that judicial review would be implemented during this period by conservative courts. They, therefore, put their trust in the elected branches of government, Congress, and the President.\textsuperscript{25} After all, the Congress and Presidency of the founding era was dominantly Democratic and this translated into a substantial faith by elected officials in the enterprise of the modern

\textsuperscript{20} See, e.g., Landis, \textit{supra} note 2. See also Rabin, \textit{supra} note 1; Martin Shapiro, \textit{The APA: Past, Present, Future}, 72 \textit{V.A. L. Rev.} 447 (1986) [hereinafter Shapiro, \textit{APA}].

\textsuperscript{21} See the discussion of the New Dealers' "regulatory impulse," in \textit{Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War} 48-64 (1995).

\textsuperscript{22} See Shapiro, \textit{APA}, \textit{supra} note 20.


The federal judiciary was to remain for some time on a very different wavelength. By the time of the late 1950s and into the 1960s, there was a growing discontent among the New Dealers with the performance of regulatory agencies. James Landis's famous report to former President Kennedy encapsulates well the disillusionment of the optimistic advocate of Rooseveltian regulation. At the same time, the federal courts had gradually begun to turn over. By contrast to earlier Republican administrations, Eisenhower judges proved agnostic, ambivalent, or just undependable with respect to regulatory antagonism. Later, former Presidents Kennedy and Johnson succeeded in significantly remaking the federal bench, especially with regard to the key D.C. Circuit. So, merely from the perspective of ideology, the idealism of Landis and his contemporaries with regard to the benefits of administrative autonomy seemed at least challenged by the time of the late 1950s and early 1960s. Similarly, fear of an activist, laissez-faire judiciary had predictably waned as the distance in time from the anti-regulatory philosophy of the pre-Roosevelt Court increased.

It was in this political environment that a newer generation of administrative law scholars came of age. Writing a couple of decades after the development of New Deal era administrative law and after the creation of the APA, the aim of this generation was not especially to justify in normative and doctrinal terms the exercise of administrative power; instead, the more complicated project was to construct ways of rationalizing the processes by which courts could use their ample powers to improve regulatory performance.

The dominant normative strain in this generation of administrative law scholarship is of substantial, aggressive judicial review of ad-

28. See Shapiro, APA, supra note 20, at 456-57; see also Presumption of Reviewability, supra note 27, at 758.
31. See GUARDIANS, supra note 6, at 49-54; Colin S. Diver, Policymaking Paradigms in Administrative Law, 95 HARV. L. REV. 393 (1981).
ministrative action. Significantly, this strain has two distinct, yet complementary, elements of note. First, the case for vigorous review grows out of skepticism, sometimes elaborately and empirically defended, and other times more cursorily explained toward the performance of regulatory policy. Second, this judicial review is concerned not only with ensuring that agencies act within the scope of their statutory jurisdiction, but also that agencies act in accordance with norms of proper administration as these norms develop out of administrative law doctrine. It was in the scholarly reformulations of Jaffe and, later, caselaw which propelled administrative law toward themes of procedural regularity, reasonableness review, and the hard look review of administrative discretion, that the "administrative common law" became a prominent feature of federal administrative law.

B. The Shortcomings of the Administrative Process

In a seminal essay, The Effective Limits of the Administrative Process: A Reevaluation, Professor Jaffe offers a series of critiques of the performance of the administrative state during the period in which he writes. These critiques appear in substantially the same form in the introductory chapter of his treatise. This critique frames the prescriptive case for aggressive judicial review along the lines developed in the remainder of his opus. What are the elements of the critique?

Pertinent interest groups, Jaffe begins, "exert an effective pressure on the administrative agency in proportion to the importance of their economic function and to their organizational cohesion." This argument, of course, develops another variation on the capture theory of the 1950s and 1960s. Beyond this, Jaffe notes that agencies atrophy as they become old. Agencies become the victim of "arteriosclerosis" as the status quo shifts underneath the staid, stable, routine mechanisms of administrative power and agency behavior. Jaffe explains, "[i]n these situations the phenomenon loosely and invidiously de-

33. See the discussion of Jaffe on this point at infra text accompanying notes 36-52.
34. See supra text accompanying notes 5-9.
35. See id.
37. See JUDICIAL CONTROL, supra note 4, at ch. 1.
38. Id. at 10 (original in uppercase).
39. On this point, Jaffe's view is similar to Marver Bernstein's "lifecycle" theory of agencies. See MARVER BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955).
40. JUDICIAL CONTROL, supra note 4, at 12-13.
scribed as 'industry orientation' is much less a disease of certain administra
tions than a condition endemic in any agency which seeks to perform such a task. Jaffe develops the point with the help of standard pluralist theory:

It is a product of our political philosophy with its insistence on representation and the procedure through which representation functions, of our legislatures which are organized to register all significant groups, of our statutes which grant powers so wide that solutions will be much more the consequence of group interaction than of legislative formulation, of our theory of regulation which divorces legal command from managerial responsibility, of our dynamic economy which outruns prophecy and prescription, and of our administrators whose character and psychology is perforce the type of the American good fellow.

Furthermore, agencies develop "a presumption in favor of regulation." The regulatory bias is, as he spells it out, a species of the bias in favor of regulated industries and client groups. He uses the example of motor carrier regulation in the era of Joseph Eastman and the powerful ICC to draw the lesson that administrators employ their discretion to further regulation, even where regulation is inconsistent with the needs of the market.

The needs of the competitive market, Jaffe continues, have become seriously undervalued by contemporary regulatory administration. This is the third essential problem with the administrative process: "[r]egulation addresses itself to the problems of the past and gives too little weight to the dynamism of the industrial system." Regulation in the modern administrative state is inherently conservative; meanwhile, industrial progress renders continually moot many standard, off-the-rack regulatory solutions: "[w]hen a regulatory concept is finally evolved to deal with a problem, an unforeseen problem may render the current concept obsolete." By contrast, competition is a superior mechanism for the generation of "fresh solutions," given "its ruthless, unwitting, unrationlizing" tendencies.

41. Id. at 13.
42. For treatments of pluralist theory by some of Jaffe's contemporaries, see, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); V. O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS (1958); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951).
43. JUDICIAL CONTROL, supra note 4, at 13-14.
44. Id. at 14.
45. Id. at 14-16. For an extremely illuminating account of the origins of the regulatory program that Jaffe critiques, see STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920, at 248-84 (1982).
46. JUDICIAL CONTROL, supra note 4, at 16 (uppercase in original).
47. Id. at 18.
48. Id.
A final problem lies in the traditional structure of administrative agencies. In exacting commission-form agencies during the New Deal period, Congress insisted on the tripartite scheme which was characteristic of separation of powers in the federal and state constitutional systems. Yet, this scheme has proved unreliable and anachronistic given the exigencies of the modern industrial system. Jaffe mounts an attack on the independent agency. The problem, he notes, is both constitutional and political. There is not, as he sees it, a convincing constitutional basis for the assignment of vast executive, legislative, and judicial powers to an agency designated as independent.\(^{49}\) In short, *Humphrey's Executor v. United States*\(^{50}\) makes no sense: "[i]t surely is not a premise of the Constitution that the execution of a law must for its proper exercise be independent of Presidential control."\(^{51}\) Moreover, the greater the so-called independence of a regulatory agency, the greater the insulation from proper political supervision. So, Jaffe explains, "[t]he independent agency is criticized not only because it is said to be politically irresponsible, but because from the total body of policy powers, most of which are committed to the President, it arbitrarily abstracts a segment and thereby impedes policy coordination."\(^{52}\)

While there is nothing in Jaffe's brief account of the administrative state that is unfamiliar from the perspective of modern political science and political economy,\(^{53}\) it remains startling the lengths to which committed progressives like Jaffe would go to express grave doubts about how the regulatory process was functioning in the early decades following the origination of the regulatory "project." Yet these doubts were very important pieces in the puzzle of administrative law during Jaffe's generation. As Richard Stewart was to explain ten years later in his survey of thinking about the administrative process and its limits, the liberal-reformist instincts of administrative law scholars such as Jaffe and Kenneth Culp Davis inclined them toward a certain amount of skepticism about the performance of agencies.\(^{54}\)

50. 295 U.S. 602 (1935).
52. *Id.* at 23 (footnotes omitted).
Much of this skepticism was built upon a sense that the Progressive era-New Deal agency had failed its mission to navigate between political obedience on the one side and “independence” (read: industrial orientation and capture) on the other. It is important to keep in mind this skepticism and the developed critique of the regulatory process extant at the time in order to understand the contours of prescriptive administrative law during this era. One of the most salient feature of Jaffe’s scholarly accomplishment is his disconnection of administrative law from statutory and constitutional law. This disconnection was not the product of qualities intrinsic to the notion of administrative law as a legal subject. Rather, it stemmed from Jaffe and his contemporaries’ declining faith in the capacity of political institutions to impose the appropriate rules on the exercise of administrative discretion and thereby to “solve” some of the problems which were plaguing regulatory administration.

C. The Right to Judicial Review

The central normative theme of Professor Jaffe’s argument in favor of trans-statutory judicial review is spelled out in Chapter 9 on the The Right to Judicial Review. He begins the chapter with the statement that “[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.” This necessity grows out of a number of related sources. While Jaffe, following others, invokes the Constitution as a source of the right, a close reading of the chapter reveals great ambivalence concerning whether

55. See supra text accompanying notes 18-19.
56. Professor Jaffe sees the principal threat to agency independence—and reasonable agency decisionmaking—as coming from outside the political process. Although this is not a focus of his work, Jaffe (and many of his contemporaries, for that matter) appears to place a great deal of faith in the goodwill and capacities of the Presidency and of Congress to work in partnership with the courts to control agency action. To be sure, Jaffe’s preoccupation is with judicial scrutiny, but seldom does he consider the relationship between the flaws he insists are characteristic of contemporary regulation and the politicization of administrative agency processes. One can only speculate about the reasons for his and others’ relatively greater confidence in Congress and the President. It may be that, because the public choice critique of legislative behavior would come later and, thus, the main scholarly perspective on Congress and the Presidency was that of the rather Panglossian interest group pluralists. See Merrill, supra note 19. Or it may be that the liberal-Democratic thrust of both the Presidency (Kennedy-Johnson) and of the 1960s Congress may have given the on-the-whole pro-regulatory administrative law scholars of the era reason to trust the political branches. In any case, the omission in Jaffe’s treatise of careful analysis of the role of Congress and of the President in regulatory administration is a key one.
57. See Judicial Control, supra note 4, at ch. 9.
58. Judicial Control, supra note 4, at 320.
and to what extent judicial review is constitutionally compelled. Instead, the principal theme of the chapter is that the right to review is a prudential, pragmatic idea, one rooted in concerns about excessive administrative power and also rooted in a gradually growing faith among liberals in the federal courts and thus in the quality of judicial scrutiny.

1. The source of the right

To locate Jaffe's argument in debates about the nature of the so-called "right" to judicial review, I need to add a few sentences about the constitutional debate. A key feature in many modern discussions about administrative law and judicial review is the claim, sometimes tacit and other times express, that judicial review is a constitutional imperative.

The argument for the right to review has two parts, one of which is resolutely constitutional in nature and the other of which is only remotely tied to constitutional law or history. The first is the argument from *Marbury v. Madison*. The basic idea is that the Constitution preserves the power of the federal courts to "say what the law is" and this means more than the power of constitutional review but entails, as well, at least some element of judicial judgment which ensures that the agency is acting properly within the scope of its jurisdiction.

Furthermore—and this is the most controversial part—this view presupposes that the courts will stand ready to maintain, as well, that agencies are not acting outside the scope of discretion as that discretion is defined *apart* from statutory or constitutional commands. The second part is what might be called a constitutional quid pro quo. As part of the agreement for permitting broad delegation of authority to administrative agencies, judicial power is preserved in order to ensure that agencies are not acting outside the pale of appropriate discretion. This argument is drawn from different legal sources. In

59. 5 U.S. 137 (1803).
61. For reasons beyond the scope of this essay, I agree with the basic analysis of Professor Henry Monaghan who considers closely this *Marbury*-based argument in *Marbury and the Administrative State*. 83 Colum. L. Rev. 1 (1983).
62. See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 925 (1988) ("Anticipating the vital role of administrative adjudication, *Crowell* sought to preserve the role of the article III courts not by excluding agencies from adjudication altogether, but by requiring *de novo* judicial review of the most important agency decisions in private rights cases.").
Professor Henry Hart’s famous “Dialogue,” the interlocutors confessed that the caselaw was cloudy, but still found support for the argument in *Crowell v. Benson* and in *St. Joseph Stockyards Co. v. United States*. It is this second part of the argument, at most only quasi-constitutional, that appears prominently in Professor Jaffe’s formulation of the right to judicial review. Essential to the legislative delegation of administrative power is judicial scrutiny through administrative law. “[A] delegation of power implies some limit [and] the availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity.” Indeed, the most arresting feature of Jaffe’s argument is that administrative law is seen as growing out of the essence of administrative power. More specifically, it is for pragmatic, functional reasons that judicial review is necessary, rather than because of a constitutional attachment to due process or separation of powers.

In this vein, Professor Jaffe ties the history of administrative law to the prerogative writs. In an essay which presages the beginning of Chapter 9 of the treatise, Louis Jaffe and Edith Henderson describe the origins of administrative review with reference to the Sewer Commissions of the 16th and 17th centuries. Even earlier, English courts had developed the writ of certiorari, trespass, and mandamus. Each of these writs had, in common, the concern with enforcing the rule of law against otherwise discretionary executive decisionmaking. The essence of the famous *Dr. Bonham’s Case*, as Professor Jaffe views it, was the concern with limiting the ability of the Board of Censors to be judges in their own case (that is, to exercise administrative discretion) and thereby to act “against common right and reason.” Later, Coke described what Professor Jaffe took to be the basis of judicial review

64. 285 U.S. 22 (1932).
67. Id. at chs. 5, 9.
70. 77 Eng. Rep. 646 (C.P. 1610).
71. Id.
under the prerogative writs:72 "[t]hese proceedings ought to be limited and bound within the rule of reason and law. For discretion is a science or understanding to discern between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections . . ."73

Professor Jaffe’s discussion of the origins of administrative law in the United States is fascinating, but surely controversial. He argues that “[t]he colonies to a limited . . . extent transplanted the assumptions and procedures of the English system.”74 He extrapolates from this the view that the writ of mandamus, conspicuous in Marbury, underlay not only the power of the federal courts to grant redress for executive violations of duties per emerging American public law, but also the right of individuals to seek judicial review of administrative action regardless of any statute granting such review.75 Once again, it is the absence of any reliance on a constitutional basis for such a right that is the arresting feature of Professor Jaffe’s story. At bottom, Jaffe’s argument appears to be that the writ of mandamus has been gradually incorporated into the American federal common law through the mechanism of administrative law. Marbury is a doctrinal road sign in this development; but the incorporation of the writ of mandamus is the product of a distinctly common law—not constitutional law—process.76

To be sure, Jaffe addresses the constitutional basis of review near the end of Chapter Nine. He begins with an equivocation: “For the very reason that judicial review is usually available, the question of its constitutional protection is seldom directly presented, and speculation on the subject is both difficult and hazardous.”77 But where the issue is squarely posed, Jaffe rests the constitutional case for administrative law on the basis of the constitutional grant of judicial power. Of course, this claim at once narrows the scope of constitutionally prescribed review to those instances “in which judicial process is used to enforce an obligation upon an unwilling defendant . . . .”78 He concedes, as does Professor Hart’s interlocutor in the “Dialogue,” that

72. In the case at issue—Rooke’s Case, 77 Eng. Rep. 209 (C.P. 1598)—the action was one of replevin.
73. JUDICIAL REVIEW ORIGINS, supra note 68, at 353 (quoting Rooke’s Case, 5 Co. Rep. at 100).
74. JUDICIAL CONTROL, supra note 4, at 334.
75. Id. at 334-53; see also JUDICIAL REVIEW ORIGINS, supra note 68.
76. See JUDICIAL CONTROL, supra note 4, at 334-53; see also JUDICIAL REVIEW ORIGINS, supra note 68.
77. JUDICIAL CONTROL, supra note 4, at 376.
78. Id. at 385.
there remains little caselaw support for such a constitutional reading; moreover, the requirement of judicial forum even in those cases may well be confined to a determination of whether the administrative action complies with the Constitution, rather than the central administrative law determination of whether the action complies with the procedural and substantive requirements of "legality" in the sense in which Jaffe uses the term in his treatise. In the end, Jaffe offers the rather weak conclusion that whatever constitutional basis (due process? judicial power?) there is for a right to review, it is applicable, at most, to the following two situations: "when a person is the object of an administrative order which will be enforced by a writ levying upon his property or person," and, second, "when the United States levies directly upon property to satisfy a tax, or takes property under claim of title ... ." In Professor Jaffe's formulation, the argument for the right to judicial review is much more centrally located in the purposes underlying administrative power and, relatedly, in the English common law history of public administration and control. It is to Coke and Dr. Bonham's Case, rather than to Marshall and Marbury, that the case for judicial review is made.

What, if anything, turns on this discussion of the source of administrative law?

2. Pragmatic politics and the right to review

Professor Jaffe was very much the pragmatist; he was also vitally concerned with what might be called the imperatives of sound governance and workable administration. Resting the right of review on practical considerations commands our attention to the political structure of agencies and the practical relationships among Congress, courts, and agencies. In his seminal essays, The Effective Limits of the Administrative Process: A Reevaluation and The Illusion of Ideal Administration, Jaffe insists on the needs of law and legal institutions to promote effective administration through legal mechanisms such as administrative law. Professor Jaffe's conception of the role of the common law, in both ancient and modern iterations, was rather tied to these practical imperatives.

79. Id. at 388-89.
80. Professor Jaffe's pragmatic streak resonates throughout the effort of Professor Christopher Edley to tie administrative law to themes of sound governance. See CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990).
Intriguingly, the key lesson Jaffe draws from *Dr. Bonham's Case* is that administrators cannot be judges in their own proceedings. His focus is on the administrative flaws in the arrangement, rather than the more abstract concern with fidelity to the rule of law for its own sake. Perhaps Jaffe was concerned with expressing the view that administrative law was an essentially proceduralist enterprise. In that vein, the early hard look cases from the D.C. Circuit—*Greater Boston Television*, *Friends of the Earth*, *International Harvester*, and others—expressed, especially in the opinions of Judge Harold Leventhal, this proceduralist, pragmatic approach.

But the picture is not so neat. Professor Jaffe, after all, expected administrative law to improve public administration. At various junctures in his discussions of judicial review, both "availability" and "scope," he ties augmented judicial scrutiny to improved regulatory performance. Insofar as the principal mechanism for courts to implement these improvements in invalidation of administrative decisions, there is a considerable "substantive" strain running through his prescriptive analysis. In the end, the key point is that Professor Jaffe saw the case for heightened review to build on a pragmatic edifice; the right to judicial review was tethered to an understanding—an understanding which predated the administrative state by a considerable margin—of the role of courts in safeguarding sound administration and in reigning in official malfeasance.

3. Reviewability and preclusion

Resting the right to judicial review on a more historically complex and pragmatic basis presents a double-edged sword, of course. After all, relying on the common law, rather than the Constitution, for the source of the right to review attenuates the right; it subjects it to Congressional preclusion of review. This was a risk, however, Professor Jaffe was willing to take, for he harbored doubts about the constitutional basis for the right to review, and he also was content to entrust at least a central element of the decision about review to the legislative branch. At bottom, it is important to understand Jaffe's formulation of review as an elaborate *presumption*, as an argument for

83. *Judicial Control*, supra note 4, at 332-33.
vigorous review in the shadow of political choice. Therefore, it would be a serious mistake to align Professor Jaffe with the view that Congress lacks the power to preclude judicial review either expressly or impliedly. Although Professor Jaffe makes the case for the presumption of reviewability—a case which gathers clear doctrinal support with the Supreme Court's decision in Abbott Laboratories v. Gardner, 88 decided two years after the publication of his treatise—he also accepts Congress's power to overcome the presumption by statute. To be sure, he expects such preclusions to be rare. Moreover, he insists that Section 701 of the APA represents the codification of the review presumption, 89 and so ingeniously suggests that Congress has manifest its political choice, in the main, in favor of judicial review. But the acceptance of statutory preclusion represents the main break from a view of administrative law as a constitutional right of individuals to be invoked against arbitrary governmental action. 90

We ought not, following Jaffe, equate constitutional right with important right. After all, Jaffe expected that judicial review would be a central, ubiquitous element in modern public administration. He understood the APA as codifying the essential role of the court in reviewing administrative action; and he believed that the common law of judicial review had gradually increased—and needed to increase more—in the face of emerging problems and dilemmas in regulatory administration. 91 Tying judicial review to issues of political choice did not reflect, in Jaffe's view, a retreat from the notion that judicial review was essential. Rather, it entailed a view of the courts in partnership with other political institutions, each participating in the system of checks and balances.

Jaffe the Pragmatist feared agency discretion. Hence, the principal aim of judicial control was to check the agency, not Congress nor the President. This view accorded with his commitment to interest group pluralism. 92 Jaffe did not regard the principal dangers as flowing from congressional or presidential malfeasance, but rather from bad regulatory administration within the agencies. Hence, the risks

89. "The Administrative Procedure Act has had a negligible effect on the basic right to judicial review. The act does have, however, the merit of codifying the presumption of reviewability." JUDICIAL CONTROL, supra note 4, at 372.
91. It remains unclear how much Jaffe rested his argument for augmented judicial review on the intent of the framers of the APA.
92. See supra note 56.
associated with preclusion of judicial review were worth taking; they would be rare and, significantly, the federal courts could be depended upon (armed with a "presumption") to safeguard their own, essential role in the process of regulatory supervision.

4. Administrative law as a changing, evolving system

By tethering the common law right of judicial review to the practical need to cabin administrative power in the face of broad legislative delegation, Jaffe contemplated that the scope of judicial review may well change with the times. Form follows function, in Jaffe's account.

Recall that Professor Jaffe insisted, in his introductory chapter, that one of the key faults with the modern regulatory process was that it adapted poorly to the "dynamism" of the industrial system. Unlike the active, fluid system of industrial competition and the market, the administrative process was plagued by arteriosclerosis and timidity. Professor Jaffe proposed that the system of administrative law be much more capable of adapting easily and promptly to the exigencies of the industrial system; and he proposed that the system therefore adapt and evolve in ways that would keep the administrative process as fresh as the processes within which capitalists functioned. While judicial review was expected to modulate in the shadow of industrial change, it remains unclear whether Professor Jaffe and his contemporaries expected administrative law to ever fade away. There is not much room, to be sure, for pure administrative discretion in the prescriptive administrative law crafted by Jaffe and the others. And the concept of discretion was tied quite deliberately by Professor Jaffe in his chapters on the scope of review, to the functional idea that the lawmaking functions of agencies should be regulated by an administrative common law. So, the evolving, shifting judicial review described by Jaffe, and in resolutely functional terms, was, still and all, a vigorous, secure judicial review. Whether one comes to view Louis Jaffe as more or less of a judicial activist, the essential point of his Chapter 9 is that there is, in fact, a right of judicial review. And the lengths to which he goes to explain the sources of this right and also the reasons why this right is essential indicate the liberal-reformist committed to resisting efforts to either legislative administrative law

93. See Judicial Control, supra note 4, at 13-14.
94. See infra text accompanying notes 110-16.
out of existence or to curtail it to the point of meaninglessness through judicial fiat.

**D. The Scope of Review**

The basic puzzle which frames Professor Jaffe’s discussion of the scope of judicial review is the following: How do we see the federal courts’ review function where what is in issue, in the examination of an administrative record, is whether the agency has properly exercised its discretion? Jaffe’s task is essentially the same as the architects of the judicial review provisions of the APA, namely, to provide a framework for the evaluation by courts of the scope of administrative agency discretion. Significantly, Professor Jaffe organizes his analysis of judicial review and agency discretion around the conceptual distinction between judicial review of questions of fact and questions of law. Although the perennial law/fact distinction frames the inquiry, Jaffe’s signal contribution is to push administrative law beyond this mechanical distinction and toward a more pragmatic, and searching, judicial approach to examining agency decisionmaking.

1. From Categorization to Comparative Competence

Judicial review of agency action has always been plagued by a conceptual puzzle. The puzzle is how to disentangle an agency’s legal judgments from its findings of fact. The APA makes resolving this duality crucial, for it provides that the agency must set forth, in formal proceedings, its “findings and conclusions . . . on all the material issues of fact, law, or discretion presented on the record . . . .” Furthermore, American courts have long rested their judgments about appropriate standards of deference and judgment upon their views about the type of questions before them. In the 20th century history of American administrative law, both pre- and post-APA, federal courts have embraced the law/fact duality and have recreated the traditional spectrum of deference in the context of administrative agency decisionmaking. It is against this backdrop that Louis Jaffe offers a third way. His analytical contribution comes in the form of an elaborate defense of the notion that there are agency decisions which are more in the nature of exercises of discretion, than either the finding of fact,

96. See *JUDICIAL CONTROL*, supra note 4, at chs. 14-15.
the conclusion of law, or the application of facts to law. He begins by asking the following:

How then do we distinguish fact from law? It will be more meaningful, I think, to put the question: how do we distinguish a finding of fact from a conclusion of law? In this way we emphasize that we are concerned with the function and the functioning of the decisional process: what is the officer doing, we ask, when he "finds" a fact and how does this action differ from his making a conclusion of law? Thus we may perhaps avoid the unanchored abstractness of distinguishing between fact and law simpliciter. A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect. It can, for example, be made by a person who is ignorant of the applicable law. Thus a statute may provide compensation for injuries arising out of and during the course of employment. It has been found that an employee while at work has been intentionally hit on the head by a fellow employee. This is a finding of fact. It owes nothing to the compensation statute. If, however, it is asserted that the injury arose out of the employment and is therefore compensable, the assertion is something more than a finding of fact; it is, in our view, a conclusion of law. The assertion cannot be derived by one who is ignorant of the applicable statutes. It is, unless it is a purely arbitrary exercise of power, an assertion that the purpose of the statute will be served by awarding compensation.98

The key contribution of Jaffe's reformulation, in addition to providing a clearer test for separating out findings of fact from conclusions of law in administrative proceedings, is to confine the scope of mere factual findings. It is, as Jaffe stresses, a very rare administrative proceeding indeed in which the agency's decisions rests solely or even primarily on a factual finding. Rather, the seminal question for most circumstances in which a federal court in called upon to examine agency decisions is what is the appropriate sphere of agency discretion. In essence it is this: who gets to decide, courts or agencies? The law/fact dichotomy, then, is all well and good; however, judicial review will ordinarily be taken up with the harder question of whether and to what extent the agency has rested its decision on considerations which are properly the province of the agency or the courts or—to zero in on the most vexing of administrative law questions—a combination of both.

The ordinary case in which the question of agency discretion—and, hence, the core question of administrative law—arises is where the court is asked to examine the agency's application of a statutory term to a situation at hand. To take the easiest case first, Jaffe notes

98. Judicial Control, supra note 4, at 548.
that cases in which the agency is merely applying an uncontroversial statutory term to a particular circumstance, the agency is entitled to deference "not because it is a finding of fact," but, rather, because "a law-applying judgment is presumptively within the area of the agency's discretion." Harder are the cases in which the statutory terms are ambiguous and thus where the agency is exercising an admixture of political judgment, expertise, and common sense. Jaffe draws for examples on the cases in which the early National Labor Relations Board was grappling with the meaning of the term employee in the Labor Act. Professor Jaffe is prepared to concede that these judgments might be characterized as conclusions of law; but this characterization is not outcome-determinative, for the key question remains whether the agency's judgment is within the proper scope of the agency's discretion. And this question entails judgments both about the scope of the agency's delegated power and, perhaps even more pertinently, the agency's policymaking expertise.

Professor Jaffe has little to say about the first dimension of this "discretion" inquiry, that is, the question of delegated power. It is therefore never made clear how a court ought best to discern whether Congress has clarified satisfactorily the proper roles of the courts and the agencies in making a determination about whether the agency has acted properly. Perhaps we can say with the hindsight of thirty years and, especially, with the experience of a dozen years of the Chevron test for determining when an agency's interpretation is entitled to deference, that Professor Jaffe failed to solve an administrative law puzzle which, after all, puzzles us still. However, it might be more useful to emphasize instead that Professor Jaffe's principal intellectual project in regard to scope of review was to describe how the court ought to make sense of agency decisions where the statute is simply not helpful in guiding either agency or judicial discretion.

99. Id. at 549.
101. JUDICIAL CONTROL, supra note 4, at 560.
102. Professor Jaffe's approach to statutory interpretation remains elusive. About the Supreme Court's analysis in Hearst, he says the following: "It is my contention that every case involves a question of 'statutory interpretation' and that every statutory term is only as 'broad' as the court makes it; a 'term' has no inherent character independent of interpretation." Id. at 560. Just so; except Jaffe nowhere makes clear what is the courts' proper approach to interpretation of ambiguous statutory phrases.
Turning to the second dimension of "discretion," Professor Jaffe has much more to say about the relative institutional competence of the typical administrative agency and the typical federal court in wrestling with issues of statutory standards and so-called "law-application" decisions. As you consider how Professor Jaffe compares the competencies of courts and agencies, recall that he is writing in 1965, in the heart of the Legal Process era, and at the dawn of the hard look era:\textsuperscript{104}

The more things change, it has been said, the more they are the same. This cynical—or perhaps reassuring—observation may be as vulnerable as most generalizations, but at least it implies the verity that there is more than one way to skin a cat. The judges have been notably adept in the past at removing the hide of an administrative agency. If in these more enlightened times they have, with elaborate pronouncements of virtuous self-denial, relinquished the butcher knife, the glint of the scalpel is still detectable behind the voluminous folds of their robes. . . .

Deference is characteristically based on the assumed expertness of the administrator, and this may be thought more relevant to substantive than to procedural decisions. And insofar as procedural questions involve estimates of fairness, the judges are not only expert, but are free from the pressure on the administrator to realize his program. But even as to procedure there is discretion. Procedural questions arise (both in courts and agencies) under rules embodying general standards requiring the exercise of discretion. . . .

There will be a web of substantive and procedural rules and considerations applicable to any one case. Some rules are more important than others; some more capable of application; some more amenable to proof. This kind of special knowledge is an aspect of a more general criterion. An agency entrusted with grandiosely stated responsibilities and far-reaching powers can only realize a modest measure of its potential. It must ration its limited resources of time, energy and money. It must devote them to those exigent and soluble problems which are most nearly related to its core responsibility. What problems are most exigent, how they can best be solved—and by implication, which problems must be put aside or left to other agencies—are questions the solution to which peculiarly demands a feeling for the whole situation. It is in terms of this whole situation that responsibility must be fixed and its fulfillment judged. If a court is not as well fitted to solve substantive problems as the agency, if on this level intermittent, disjected criticism disperses accountability, how much more is this true where the deployment of forces is involved.\textsuperscript{105}


\textsuperscript{105} Judicial Control, supra note 4, at 565-67.
And Jaffe offers this formulation of the proper judicial role in scrutinizing the scope of agency's procedural decisions:

I, therefore, conclude (1) that the exercise of discretion is relevant to the making of procedural decisions; (2) that in the absence of a clear legal prescription, a reasonable procedural decision should withstand judicial interference; and (3) that reasonableness should be considered in terms of the responsibility of the agency for a total program, allowing for the fact that the agency's resources are limited.\textsuperscript{106}

The extended inquiry into the competence of agencies and courts is subtle yet transformative. It counsels a decisive turn away from the law/fact dichotomy and toward the much more nuanced "lawmaking, interpretation, law-application" trichotomy as a means of organizing the scope of review project. The object, \textit{pace} Jaffe, of administrative law is to plumb more deeply into the details of agency decisionmaking in order to consider whether the agency has reasoned its way through the decision in a reasonable, responsible fashion.\textsuperscript{107}

2. Unpacking discretion

"Discretion . . . is not self-defining; it does not arise parthenogenetically from 'broad' phrases. Its contour is determined by the courts, which must define its scope and its limit."\textsuperscript{108} To begin with, courts ought to look to statutory purpose to determine whether the agency is expected to exercise discretion in a particular regard. Significantly, Professor Jaffe sees this task as discerning the "clear" purpose of the statute, rather than, say, its general object, its overarching purpose, or some other standard. This assignment of role to the courts is one way out of the corner into which Jaffe has painted himself into in describing discretion as both a \textit{reason} for judicial deference to agencies in appropriate cases and also as a \textit{characteristic} of both administrative and judicial decisionmaking. Agencies continually exercise discretion; yet, courts, armed with evidence of statutory purpose, must stand at the ready to determine the extent to which discretion exercised by agencies is proper in the case at hand.

From the vantage point of the past quarter century of administrative law—and here, once again, our experience with \textit{Chevron} and its legacy is pertinent—Professor Jaffe's trust in the ability of the courts

\textsuperscript{106} \textit{Id.} at 567.

\textsuperscript{107} See \textit{id.; see also} Edley, supra note 80, at 215-34 (describing "sound governance" review).

\textsuperscript{108} \textit{Judicial Control, supra} note 4, at 572 (emphasis omitted).
to discern the clear statutory purpose strikes us as a tad naive. Of course, Jaffe himself recognized the interpretive difficulties: "[t]his discretion should normally be permitted to function short of the point where the court is convinced that the purpose of the statute is contradicted . . . . But in a great many cases the court will rant that any one or two or more proposed answers is consistent with the statute." Yet, even with this qualification, the tethering of the discretion inquiry to statutory purpose is hard to reconcile with Professor Jaffe's overall normative project of articulating a trans-statutory role for judicial review of agency action. Perhaps a more accurate take on Professor Jaffe's judicial solution to the discretion dilemma is to emphasize, as he does, the important role played by courts in developing trans-statutory legal principles for agency reasonableness.

3. Trans-statutory judicial review

As I have emphasized earlier, a key feature of Professor Jaffe's formulation of the responsibility of courts in reviewing agency action is the defense of an administrative common law. Administrative law is formed by many different bases of review, including review which looks to agency fidelity with standards of sound governance beyond those encoded in the regulatory statute which gives shape to the agency's jurisdiction and authority. As Jaffe explains:

An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. 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; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the "common law," and the ultimate guarantees associated with the Constitution.

In sections of his *Judicial Review: Questions of Law* chapter entitled, respectively, *The Role of Discretion Misconceived: the Duty of the Judge* and *The Correct Relation of Expertness to the Scope of Review*, Professor Jaffe spells out the criteria by which judges are to bring to bear on their review function external criteria of sound agency decisionmaking. Among them are:

(1) the degree to which the framing of a rule appears to depend on expertise, (2) the clarity with which a rule can be made to emerge

111. Id. at 590.
112. Id. at 575-84.
and be given a stable form and content, (3) the importance of the rule in statutory and administrative scheme, (4) the possible psychological advantage of judicial as compared with administrative pronouncement, and (5) the role of the court as the guardian of the integrity of the law system. Thus, there will be cases where though the rule to be laid down or the decision to be made does not clearly emerge from a study of the statute, nevertheless the court will—indeed should—take upon itself the power and responsibility for decision.\textsuperscript{113}

While there are trans-statutory themes in administrative law decisions of the early administrative state,\textsuperscript{114} Professor Jaffe’s analysis is by far the most extended and complex analytical defense of the role of the courts in developing a common law of judicial review of agency action.

In many ways, this call for an administrative common law presaged the hard look review era of the 1970s. After all, the architecture of hard look review of the 1970s is, in essence, a trans-statutory edifice which features aggressive interventions into the reasoning and, ultimately, the reasonableness of agency decisionmaking.\textsuperscript{115} The hard look era is notable precisely because it is a revolution wrought by activist judges each concerned with articulating standards of proper agency performance higher than those standards enacted by Congress. Courts added requirements to those established by both the agencies’ organic statutes and, as the Supreme Court noted with disapproval in its scolding Vermont Yankee decision,\textsuperscript{116} the Administrative Procedure Act.\textsuperscript{117}

\textsuperscript{113} Id. at 576.
\textsuperscript{115} See, e.g., Stewart, Reformation, supra note 30, at 1676-81, 1760-76.
\textsuperscript{117} Having described Professor Jaffe’s defense of trans-statutory review, it is important to acknowledge that the precise relationship between statutory and trans-statutory review is complex. Can we, following Jaffe, truly divorce the question of the agency’s legal authority as set out by the terms and history of the organic statute from the question of whether and to what extent the agency has acted reasonably? If the court’s review turns fundamentally on the question of discretion, aren’t courts ultimately tethered to the standards of agency authority as measured by the statute? Or, to put it in more negative terms, what can be the standards of proper agency discretion if not the regulatory legislation?

The complexity of this nexus between discretion and the source of authority is well-illustrated by the Court’s treatment of Section 701(a)(2) of the APA. In that section, the APA precludes judicial review of decisions “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (1994). In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), and, later, in Heckler v. Chaney, 470 U.S. 821 (1985), the Court limited Section 701(a)(2) to circumstances in which there was “no law to apply.” This limitation makes sense, however, only insofar as the law to apply is the product of the regulatory statute; if law, instead, includes the standards which may...
II. Concluding Remarks

In this essay, I take a seminal text of administrative law, *Judicial Control of Administrative Action*, and consider its contributions in re-shaping contemporary understanding of the role of courts in regulatory decisionmaking and therefore reshaping the nature of the subject of administrative law. As modern debates concerning the proper role of courts in agency review continue to rage unabated, it is worth taking stock of our recent intellectual history. A substantial conceptual step was taken with the writings of a generation of administrative law scholars reared on the *realpolitik* of administration and regulation in the generation following the New Deal. The fact that these scholars faced the reality of regulatory politics and not merely the utopia of public administration described in the foundational writings of the Progressive Era and the New Deal make what they have to say especially interesting. Moreover, if we believe that administrative law scholarship has had anything of note to teach courts embarking on the hard look project of the late 1960s and 1970s, then the scholarship of Jaffe and his allies was the principal intellectual source of prescriptive analysis for administrative law during this key era.118

The contributions of this important generation of administrative law scholarship are four-fold. First, this generation articulated more comprehensively than before a vision of the field of administrative law in which federal courts were charged with the responsibility of being the guardians of the public interest and of regulatory rationality. To be sure, "hard look" review and, perhaps, its doctrinal antecedents represents the essence of this charge. But my claim is that the roots of this development are grounded squarely in writings which presaged the lodestar cases.

Second, this guardianship was detached, as an intellectual matter, from statutory guidelines. Judicial review was, as Professor Jaffe put it, one "of the rooms in the magnificent mansion of the law."119 This is a singularly important development. It permits substantive rational-

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118. I take this to be one of the conclusions of Professor Stewart in his "Reformation" article. See Stewart, *supra* note 30.
119. *Judicial Control*, *supra* note 4, at 590.
ity review, as well as whatever procedural scrutiny is deemed appropriate, regardless of the *ex ante* choices made by political decisionmakers in Congress and the executive branch. I assume—and, indeed, I believe that this is a vital, under-appreciated element of the regulatory process—that political branches manage to wield control and influence in a variety of ways apart from express statutory guidelines. So, I would not suggest that Jaffe accepts the rough dichotomy between *politics* on the one hand, and *administration* on the other; nor do I suggest that they ought to. Yet, the dislodging of statutory from trans-statutory review is proposed as a supplementary process, as a judicial adjunct to ubiquitous political controls and to jurisdictional, *ultra vires* review. A key lesson of the hard look era which follows Professor Jaffe's reformulative project is that trans-statutory review is a critical linchpin in the expansion of the federal judiciary in the regulatory process.

Third, this heightened judicial scrutiny was expressed in fundamentally proceduralist terms. That is, even as representative scholars advocated vigorous judicial scrutiny of administrative decisionmaking, this pitch was seen as requiring more sensible—and more substantial—procedural requirements. Rational regulatory behavior was seen as a procedural enterprise; so, scholars could insist both on aggressive review, but still on the desirability of judicial restraint. For example, *Citizens to Preserve Overton Park, Inc. v. Volpe* is a quintessential Jaffe-esque opinion. It reflects the tension between vigorous review and deference; the resolution is a procedural one: provide adequate reasons, argues the Court, to believe that the administrators considered the appropriate factors. And whatever *Overton Park* leaves is also Jaffe-esque. Professor Jaffe was a pragmatist with a considerable amount of ambivalence and, at times, even confusion (see, for instance, the discussion of “scope of review” above), about the proper *level* of judicial scrutiny. The principle that courts ought to work in partnership with agencies and with the political branches was, for Jaffe, the easy part of the equation. The harder part was to describe the mechanisms of review and the appropriate limits on that review.121

Although I do not consider this issue in any detail in this essay, I would add a fourth dimension to Jaffe’s contribution: scholarship of

120. 401 U.S. 402 (1971).
this era purposively and successfully preserved the domain of adminis-
trative law from incursions by other doctrinal categories, such as con-
stitutional law or agency-specific "regulatory" law; it also resisted the
inter-penetration of political science and economics into administra-
tive law scholarship. This is too bad, for administrative law might well
have profited from a richer, inter-disciplinary study. The hegemony of
lawyers in the development of contemporary administrative law has
generated a serious separation between the study of regulatory
processes and public administration on the one hand, and the essen-
tially normative project of constructing schemes of legal and political
control on the other. This separation was as problematic for Jaffe's
generation as it is for ours.