Independence and Institutional Design: Gilson & Kraakman's Revolution, Postponed

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Although the concept of independence pervades much of institutional design, exactly what is meant by it suffers, ironically, between the grandiose hopes that institutional designers place upon independent actors and the highly legalistic structure that independence often takes. The result is that the analysis of independence becomes an exercise in deconstruction, usually with Manichean certainty: independence is either the only protection against corrupting outside influences or it is a charade that entrenches elite power.

In this Article, I build on and depart from Gilson & Kraakman's 1991 attempt to construct a meaningful role for independence in corporate governance by making three arguments: (1) independence in institutional design exists somewhere between a legal fiction and a political myth, (2) the ends of independence are varied and require specification, and (3) hopes pinned on independent institutions can creep, destabilizing new and old motivations for independence alike. Using examples principally from central banking and administrative law, but paying homage to corporate governance, I present a taxonomy of independence that means neither to praise this ubiquitous longing nor to bury it, but to accept the powerful social, legal, and political structures that trust in independent institutions—including in their imperfections—can provide.

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I. INTRODUCTION

What does it mean to have and exercise independence? Colloquially, independence is almost a synonym for integrity, excellence, expertise, purity. Legally and institutionally, the call for independence is ubiquitous. To take a partial list, law requires independence of

federal judges;[1] state judges;[2] professional military advisors;[3] special prosecutors;[4] professionals, such as lawyers,[5] accountants,[6] doctors,[7] expert witnesses,[8] banking analysts,[9] journalists;[10] government employees;[11] commissions that draw political district lines;[12] trustees in corporate reorganizations;[13] international financial rulemaking agencies;[14] mutual funds;[15] and in many, many other contexts.[16] Whatever "independence" is, we can take as a sociological fact that the American polity cares an awful lot about it.

In 1991, Ron Gilson and Reinier Kraakman took up the case of independence in the context of corporate governance and the role of the "outside director," an institution that, in their view, required a titular "reinvention."[17] I will have more to say about this

1. U.S. CONST. art. III, § 1; *see also* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 967 (2007) (describing that Article III judges have independence).

2. States differ in the mechanisms used to insulate their judges from the political process. *See* Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from the American States*, 35 J. LEGAL STUD. 399, 402 (2006) (explaining that judges in states with civil law tradition have less independence than judges in states with common law).

3. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 § 574, 118 Stat. 1811, 1921–23 (2004) (creating increased independence for JAG lawyers). *See also* David Luban, *On the Commander-in-Chief Power*, 81 S. CAL. L. REV. 477, 536–377 (2008) (stating that JAG lawyers offer independent legal advice).

4. 28 C.F.R. § 600.6 (1999). *See also* KATY. J. HARRINGER, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 141 (1992) (describing that independence was valued for the special prosecution).

5. MODEL RULES OF PROF. CONDUCT r. 2.1 (AM. BAR ASS'N 2020) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."). *See also* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6 (1988) (describing that lawyers have professional independence); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1931–32 (2008) (explaining that professional independence should be applied to attorneys general).

6. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 201, 116 Stat. 745, 771–72 (2002) (providing for mechanisms to preserve independence of accountants of public companies). *See also* Don A. Moore et al., *Conflicts of Interest and the Case of Auditor Independence: Moral Seduction and Strategic Issue Cycling*, 31 ACAD. MGMT. REV. 10, 11 (2006) (describing strategy for conflicts of interest).

7. *See* Andrew Stark, *Why are (Some) Conflicts of Interest in Medicine So Uniquely Vexing?*, *in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 152 (Don A. Moore et al. eds., 2005) (describing doctors' conflicts of interest).

8. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 GEO. J. LEGAL ETHICS 465, 467 (1999).

9. Jill E. Fisch, *Does Analyst Independence Sell Investors Short?*, 55 UCLA L. REV. 39, 41 (2007).

10. *See* state "shield" laws that allow journalists to refuse to uncover their sources; for example CAL. CONST. art. 1, § 2(b) and N.Y. CIV. RIGHTS LAW art. 7, § 79-(h). SCOTT GRANT, WE'RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE 3 (2007).

11. Dennis F. Thompason *Paradoxes of Government Ethics*, 52 PUB. ADMIN. REV. 254, 255 (1992).

12. Scott M. Lesowitz, *Independent Redistricting Commissions*, 43 HARV. J. ON LEGIS. 535, 540 (2006).

13. Bankruptcy Code, 11 U.S.C. §§ 101(14)(A), (C) (2019); 11 U.S.C. § 327(a), (c) (1986).

14. *See, e.g.*, Basel I, Basel II, Basel III, and the Financial Accounting Standards Board. *See also* Andreas M. Fleckner, *FASB and IASB: Dependence Despite Independence,* 3 VA. L. & BUS. REV. 275, 276–77 (2008) (describing the limitations of independence for accounting experts).

15. Stephanie Thielen Eckerle, *Three Strikes You're Out: The Effect and Controversies of the SEC's Attempted Mandate for Greater Independence on Mutual Fund Boards,* 40 IND. L. REV. 149, 150 (2007).

16. *See*, for example, the national taxpayer advocate, whose role to report to Congress on behalf of national taxpayers is codified in I.R.C. § 7811.

17. Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991).

remarkable article—an article that may well be a victim of its own successes thirty years later. But in this Article, my focus is on the theory of independence. Gilson & Kraakman have a steely-eyed practicality in their proposals—they offer, self-consciously, something "that is in even shorter supply among academics: a realistic agenda for institutional investors."[18] What they and many who have followed in their wake still lack is a good theoretical description of the many conflicting goals of independence and an understanding of why so powerful—and so flawed—a concept has crept into institutional design in almost every socio-legal-political endeavor.

The problem of independence in institutional design—whether in corporate governance or in central banking, the two areas that will receive the most attention in this Article, or in any of the hundreds of other areas that are touched—is that it aspires to an impossibility. Independence, as I use the term in these pages, implies a separation to accomplish some set of tasks apart from others who have interests in performing those same tasks differently. But there can be no separation from those others, their interests, their tasks. This is the defining conundrum of independence: various constituencies want very much to have confidence in decisions that elites make within institutions, but the separation needed to perform these tasks according to the Platonic ideal will never—can never—occur.

In this Article, I make some admittedly tentative progress on this theoretical puzzle in the context of corporate governance, in homage to Gilson & Kraakman, and more concretely in the context of the apotheosis of independent institutional reason, the central bank. There are two unequal parts. In Part II, I summarize the aspirations of *Rethinking the Outside Director* and describe briefly where the idea of professionalized independence has landed in corporate governance and central banking. Part II then introduces, following Jon Macey, independence as something between legal fiction and political mythology. These myths serve important purposes, but the ideas need to be attached to specific roles. In other words, the myths need clerics, adherents, and skeptics.

Part III introduces the *taxonomy of independence,* a categorization that outlines the kinds of policy motivations that might justify institutionalized independence. In all cases, independence denotes a separation, but the motivations for separation are not common throughout independent structures. The taxonomy of independence identifies three broad benefits of independence, which may overlap. They are (1) independence as technical expertise, (2) independence as personal neutrality, and (3) independence as partisan neutrality. Each broad category subdivides further to describe more of the variety of independent institutions that exist in our three contexts, including mediating disputes, explaining retroactive scandal or crisis, and providing political cover for unpopular decisions, among several others. Part III concludes by describing the mythologized benefits of well-defined independence in institutional design, but also warns of *independence accretion*, or the process of putting more meaning on independence than the original policy design can permit.

18. *Id.* at 865.

II. Reinventing the Outside Director: Fictions and Myths

A. The Original Argument

In 1991, Ron Gilson and Reinier Kraakman described a division in the capital markets and corporate governance that required, in their titular terms, to "reinvent the outside director."[19] The original invention had been a Platonic ideal, the creation of "outsiders" who could exercise independent judgment and represent the interests of shareholders in corporate governance to manage the agency costs that the managerial structure of the firm imposed on those absent owners.[20]

Gilson & Kraakman's reinvention was to deconstruct ideals of independence—and the noble aspirations that such high-flying rhetoric suggested—to make corporate governance more systemic and less idiosyncratic. "To reduce a familiar story to a syllogism," they wrote, "the dominant characteristic of the large American public corporation is the separation of ownership and management."[21] Given the market—not corporate—exposure of institutional investors, "[i]t follows that the indexed institutional investor should seek a corporate governance system that, by improving the monitoring of management in general, can improve the performance of all companies."[22]

After critiquing some alternative approaches—intervening against some takeover defenses, creating shareholder advisory committees, and pushing for more sway in individual elections—the authors make their proposal: take the already sufficient motivation for effective monitoring and add to it a body of genuine, independent expertise such that a new corps of professional outside directors can do real corporate governance.[23] Here, Gilson & Kraakman discuss a useful theoretical challenge to the Platonic ideal: independence directly or by implication describes a relationship and thus begs the question: independent from whom?[24] In the corporate governance context, Gilson & Kraakman take greatest issue with the outside directors' relational independence: "outside directors tend to be far more independent of a company's shareholders than of its managers."[25] Independence from managers is a good outcome, they argue, but shareholders must retain control of outside directors.[26]

Gilson & Kraakman, as practical as they are, do not pretend that the problem of independence is an easy one. They admit: "In sum, the range of current proposals for reforming the selection of outside directors is neither politically feasible nor likely to be effective."[27] The longed-for creation of a vacuum separation from the impulses that might corrupt decision-making is real, but nothing on tap provided anything like an institutional arrangement that could meet that burden. Even so, this did not cause the authors to despair: "[T]he outside director remains key to any plausible effort to introduce effective monitoring."[28]

19. *Id.* at 863.
20. *Id.* at 889.
21. *Id.* at 867.
22. Gilson & Kraakman, *supra* note 17, at 867.
23. *Id.* at 865.
24. *Id.*
25. *Id*. at 879.
26. *Id.* at 874–75.
27. Gilson & Kraakman, *supra* note 17, at 883.
28. *Id.* at 882.

Their denouement is to introduce a professional corps of directors who have "an incentive to act as ongoing monitors of management performance" and who lack the social and ideological ties to managers that most directors have.[29] They must also have the time to commit to the hard work of monitoring a corporation.

B. Assessing the Argument

Because I am not primarily a scholar of corporate governance, I will leave to others an assessment of the powerful argument that Gilson & Kraakman lodged against the directorate class and the need for more independence from management and less from shareholders.

It is worth noting, however, that their project—as rigorous as the authors made it in terms of political feasibility and legal practicality—did not take. Directors are as likely as ever to share social and ideological ties to management. They remain as busy as ever. And monitoring of corporations seems as contested and indeterminate as ever.[30]

That might be overselling it a bit, but it is indeed remarkable how little has changed in the way that directors are hired, retained, and conduct their work. Despite the scandals and massive legal changes in what is expected of boards,[31] and despite some efforts to add even more flesh to the Gilson & Kraakman bones,[32] there remains a very real sense that all of the pathologies that Gilson & Kraakman identified remain with us.

C. Independence as Fiction and Myth

Part of the reason that Gilson & Kraakman's ideas didn't take root may be that they misjudged the incentives, the political landscape, the power of institutional investors, or the entrenched interests of corporate directors. But part might also be that the limits of independence in institutional design make impossible the hopes for separation that independent structures aim to offer in the first place.

In that sense, it may be appropriate to think of independence as something between "legal fiction" and a "myth." In the classic articulation, a "legal fiction" is "(1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."[33] In corporate law, "personhood" is an obvious legal fiction—no one actually believes corporations are people, but it is very useful to allow them to hold property, to sue and be sued, etc.

Is independence a legal fiction? As a sociological fact, no. As a normative matter, perhaps it should be. Descriptively, independent institutions—and the people who embody them—do not seem to have "complete or partial consciousness" that they are deeply embedded within social, political, and even legal structures from which they assert their separation. It comes close and depends on its operational definition.

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29. *Id.* at 884.

30. For one good example on the business of directors, see generally Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877 (2018).

31. For a summary of the scandals and aftermath, see generally Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).

32. Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1081 (2014).

33. LON L. FULLER, LEGAL FICTIONS 9 (1967).

The recent and ongoing kerfuffle between President Donald Trump and the Federal Reserve represents an important example of the failure of fictions to describe the world of independent institutions. As President Trump's criticisms of the Fed increased since the summer of 2018,[34] current and former central bankers have insisted over and over again that ideology and politics play no role in the execution of their important work.

This is an impossibility. As the Fed navigates a world where the technical answer is unavailing—the technocrats themselves disagree on what the correct course of action is—then empirical evidence doesn't supply the necessary guidance that the Fed insists it does. But we do not have that conversation, at least from within the Fed itself, because doing so would undermine the image of independence and, with it, legitimacy, that the Fed requires to function.

That reality, that something false cannot be admitted as such because of the utility that the falsehood entails, makes me think that independence is not a legal fiction, but more like a myth. Here, I follow Jon Macey's recent work on political myths in corporate law.[35] In Macey's view, myths are "principles and assumptions that have neither factual basis nor historical validity" but "despite being inaccurate descriptively, . . . serve a significant palliative role in society, making the central societal role . . . in American life more politically and culturally acceptable and more apparently consistent with societal values."[36]

Independence, despite the impossibility of the hopes of separation and expertise we place upon it, does not accurately describe these institutions in history or in the present. But independence *does* serve useful purposes. In the next Part, I provide a taxonomy of those purposes.

III. THE TAXONOMY OF INDEPENDENCE

If independence is a myth, not a fiction—or at least has elements of both—why does this matter? In other words, what kinds of problems arise in social, economic, and political life that would require independent institutions?

The skeptics' answer may well be "none at all." In the context of institutional design of political institutions—and given that corporate boards and central banks are themselves creatures of statute, it's fair to call both "political institutions"—the answer might be that there is no "design" at all. As the political scientist Terry Moe pithily argued about political institutions, "American public bureaucracy is not designed to be effective," but rather "reflects the interests, strategies, and compromises of those who exercise political power."[37] In that view, questions of independence in institutional design—whether in the American public bureaucracy or in other institutional contexts—is simply a question of power struggles, electoral successes, and ultimately partisan compromise.

But even if true, that assessment is also incomplete. As with any affirmative policy

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34. *See* Peter Conti-Brown, *The Fed's Job Isn't to Make Trump Happy*, WALL ST. J. (July 22, 2018, 4:04 PM), https://www.wsj.com/articles/the-feds-job-isnt-to-make-trump-happy-1532289865 [https://perma.cc/2LZJ-YBLG] (demonstrating the growing tension between President Trump and the Fed).

35. Jonathan R. Macey, Corporate Law Myths (Aug. 22, 2019) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435676 [https://perma.cc/2KT5-T6NV].

36. *Id.* at 3.

37. Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN? 267, 267 (John E. Chubb & Paul E. Peterson eds., 1989).

choice, there are bounds within which interest groups can pursue their interests. If independence were a naked effort to grab power for one group at the expense of the other, it would not last long as a tool in institutional design that endured repeated changes in power—it would become simply the convenient arguments that would permit Oceania to switch effortlessly in its allegiances and hostilities between Eurasia and East Asia without public comment.

Instead, while these threshold decisions in institutional design may well reflect political compromises by rival factions, answering the question "why independence?" requires a different inquiry than merely a political one. Independence is a viable option in the resolution of political logjams: why? What problems is it designed to solve?

At its broadest level, independence can be conceived as an attempt at separation.[38] But this is somewhat tautological and in any case question-begging: why, then, the separation? There are three reasons: independence as expertise, independence as personal neutrality (i.e., to resolve conflicts of interest), and independence as partisan neutrality.

The categories in the taxonomy of independence are not mutually exclusive, nor collectively exhaustive. There are some motivations for independence that broach several categories. I mean this taxonomy as a first pass to explain the obsession in law and policy for independence, not as the final word.

A. Independence As Expertise

Independence as expertise is the most time-honored of definitions.[39] Administrative agencies, for example, were conceived to be spaces where "expertness" could dominate "politics."[40] But there are varying subcategories of this expert dominance, including independence to provide reliable work, independence to provide nonpartisan information, and independence to conduct policy.

1. Independence to Provide Reliable Work

The first three categories—independence to provide reliable work, expert opinion and analysis, and expert policy—broach separate but overlapping concerns. The first is the need to provide a non-political force to accomplish the work of governance.[41] This reflects an interest in efficiency, rather than expertise. Life is complex; delegating institutions are busy. There are many aspects of governance that require detailed fact-finding by competent experts. These tasks are thus delegated to those experts.

The best example of this kind of independence is the entire body of civil servants in the federal government, culminating in the Pendleton Civil Service Reform Act of 1883.

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38. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010).

39. *Id.* at 19 n.12; *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935) ("Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts. . . .").

40. JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23 (1938). As Barkow notes, the question of whether Landis' vision of expert dominance of politics actually succeeded is an open one. *See* Barkow, *supra* note 38, at 19–20.

41. Governance is defined as "government" or the "exercise of authority." *Governance*, DICTIONARY.COM, http://dictionary.reference.com/browse/governance [https://perma.cc/RK4F-9W5T] (last visited Nov. 1, 2011).

The Act, catalyzed by the assassination of President James Garfield by a frustrated federal office seeker,[42] restructured the transfer of the federal government's workforce from a "spoils system" to one based more on meritocracy.[43] But what is meritocracy? Who decides? That is the answer that Civil Service Reform, initially in 1883 and subsequently through the latest iteration in 1978, sought to provide. The idea is that the work of the federal government—from basic mail delivery to the design of the International Space Station—is performed by those whose employment does not depend on partisan patronage. The consequence is that the work of the federal government can go forward at a higher level of expertise than the non-independent process could create.[44]

Another example, which bleeds into the second category, is the Congressional Budget Office (CBO).[45] The CBO is designed, under the Congressional Budget and Impoundment Control Act of 1974, to provide Congress with 1) "objective, nonpartisan, and timely analysis to aid in economic and budgetary decisions on the wide array of programs covered by the federal budget" and 2) "[t]he information and estimates required for the Congressional budget process."[46] The second charge is simply to perform work: the "information and estimates." In this sense, they are effectively Congress's research assistants. The work is specialized and needs to be conducted by experts. Congress has established an agency that is independent of any single members' office, or party, and therefore seeks to continue to receive technical insight on the consequences of the budgetary process and its implications for the maintenance of the federal government. The first charge becomes relevant in the next Part.

2. *Independence to Provide Expert Opinion*

This subcategory differs from the previous example in the nature of the work contemplated. Whereas the first subcategory dealt with the need to move the work of the polity by disinterested delegates, this second category contemplates the need to provide the polity with expert opinion concerning matters of political dispute, where alternative, partisan views are simultaneously presented. The polity will require the delegation of authority to develop expertise and provide expert opinions free from partisan influence.

In other words, the polity will face a recurring set of questions that cannot be answered or handled using the ordinary means established for information gathering. Indeed, these processes may even be under constant pressure from factional interests that would try to

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42. This was, of course, just the culmination. Civil service reform had been a political hot spot for decades before the Pendleton Act. *See* Richard White, *The Bullmoose and the Bear: Theodore Roosevelt and John Wanamaker Struggle Over the Spoils*, 71 PENN. HISTORY 1, 3 (2004) (describing the politics of civil service reform).

43. H. Manley Case, *Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 HOW. L.J. 283, 287 (1986).

44. Civil service reform was not and is not without its detractors. *See* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN THE EXECUTIVE AGENCIES, 1862–1928 37–64 (2001) (providing a summary of the many arguments against civil service reform).

45. The CBO spans the first two categories of both provider of specialized skills and provider of expert opinion.

46. Jeffrey R. Kling, *CBO's Use of Evidence in Analysis of Budget and Economic Policies*, CONG. BUDGET OFF. (Nov. 3, 2011), https://www.cbo.gov/sites/default/files/presentation/11-03-appam-presentation 00.pdf [https://perma.cc/6QFE-9UN7].

manipulate the presentation of information for the benefit of some powerful constituency.[47] Independence is thus created to ensure that the ultimate conclusions provided by the independent institution will reflect the most expert determination that could be provided, independent of partisan influence. In this way, the need for unbiased, independent expert opinion is redolent of a Rawlsian "veil of ignorance," or the device by which we might imagine policy recommendations or the provision of information without the knowledge of how different constituencies would be ultimately affected by those recommendations or information.[48] The goal is expertise, not politics, and independence is created in order to ensure that politicians do not dictate the results to the experts.

An administrative agency that provides an example of an independent provider of expert opinion[49] is the Government Accountability Office (GAO), an agency established by Congress.[50] The GAO, also called the "Congressional Watchdog,"[51] is designed to provide Congress with information about where and how American tax dollars are spent. According to GAO's own mission statement, the Office embodies the "independent expert:" "We provide Congress with timely information that is objective, fact-based, nonpartisan, nonideological, and balanced."[52] The GAO, then, is designed to provide Congress with *real* data concerning the consequences of executive and legislative action, rather than data that most conforms with one or another partisan telling of the story.

The second example is, again, the CBO. Note again its two statutory duties: 1) "objective, nonpartisan, and timely analyses to aid in economic and budgetary decisions on the wide array of programs covered by the federal budget" and 2) "[t]he information and estimates required for the Congressional budget process."[53] While the second makes the CBO Congress's research gathering arm, the first is significantly different. The task to provide "[o]bjective, nonpartisan . . . analyses" is one for an expert opinion-maker.[54]

In theory, the goal to secure an independent source of analysis for important matters of interest to the entire polity is extremely desirable. One might imagine, behind a Rawlsian veil, that all partisans would benefit from the establishment of a provider for independent

47. I use the term "constituency" to refer broadly to some form of represented group that acts, through its representatives, to establish policy. In our three contexts, such constituencies would include, for administrative agencies, Congress, political parties, caucuses, the executive branch, judges, scholars, interest groups, or voters writ large; for the Federal Reserve, Congress, the President, professional economists, private industry, career employees, or voters writ large; and for corporate boards, shareholders, management, Congress, state regulators, scholars, judges, or voters writ large. Of course, this is also necessarily a partial list.

48. JOHN RAWLS, A THEORY OF JUSTICE 17 (1971).

49. Again, many more than two illustrate this part of the taxonomy. Professions are, effectively, designed for this purpose. *See* Gordon, *supra* note 5. For accountants, see generally Robert K. Elliott & Peter D. Jacobson, *Audit Independence Concepts*, 68 CPA J. 30 (1998).

50. Established by the Budget and Accounting Act of 1921, Pub. L. 67-13, 42 Stat. 20 (1921).

51. *Overview*, U.S. GOV'T ACCOUNTABILITY OFF., http://www.gao.gov/about/index.html [https://perma.cc/7B84-R67F], (last visited Feb. 25, 2020).

52. *What GAO Is*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about/what-gao-is/ [https://perma.cc/C253-728W] (last visited June 24, 2020).

53. Kling, *supra* note 46, at 4.

54. One distinct class of examples that, despite its name, does not fit within this category is the "opinion letters" offered by agencies in response to inquiries from regulated industry regarding specific practices. These letters are designed to clarify questions asked by industry participants without the necessity of litigation. For reasons that will become clear, this function is best categorized not as an opinion-offering role, but in the policy-making task discussed below.

information. Such a source would allow members of the polity to gain insight without fear of ulterior motives.

In practice, of course, the arrangement is more complex. The provision of expert opinion and information can be controversial for the obvious reason that the "facts," as presented by the independent expert, may not serve the interests of certain constituencies. When that occurs, the affected constituency will seek to undermine the credibility and independence of the independent institution in question.

One problem with expertise is that it is often in the eye of the beholder. The implication for independent experts is that they can either be 1) captured by those partisans who seek to introduce facts and opinions more favorable to their ultimate interests, or 2) so thoroughly attacked by partisans that their credibility is lost.[55] When this occurs, the expert opinions provided by the institutions are no longer viewed as expert, but mere partisan propaganda. Hence, the need to establish independence that makes the provenance of the expert opinion beyond reproach.

B. Independence As Personal Neutrality

Political bodies also create separate, independent entities in order to accomplish tasks where partisan influence is particularly ill-suited, since partisans will be among those with an interest in the outcome of the process under consideration. The need to resolve conflicts of interest breaks down further into the following subcategories: independence to conduct policy, independence to investigate wrongdoing, independence to investigate previous crises/scandals, independence to mediate dispute, and independence to monitor the delegated efforts of others.

1. To Resolve Conflicts of Interest

Here, the legal demands on outside directors are at their highest. Although Gilson & Kraakman see outside directors as having much more of a role in expertise,[56] most of the company-specific expertise that is most valuable will be held by insiders, not outsiders. The role for independent directors that the law imagines is much more about resolving conflicts of interest by ensuring that, for example, transactions that involve the corporation and one of its officers are in fact in the best interests of that corporation.

Here, separation can accomplish this task, but only if it occurs as a social fact and not according to some narrow reading of the law. A close golfing buddy of the CEO may satisfy all the legal criteria of independence but still not be able to separate herself from the CEO's own interests in approving a transaction. This failure has led, in part, scholars such as Usha Rodrigues to lament the "fetishization" of independence in corporate law.[57]

The mythology of independence does not mean that conflicts of interest cannot be

55. For an example of the former case, see Robert L. Brent, *The Irresponsible Expert Witness: A Failure of Biomedical Graduate Education and Professional Accountability*, 70 PEDIATRICS 754, 754 (1982) ("[Expert witnesses] are frequently manipulated by the attorneys and function as partisans rather than scholars."). For an example of the latter, see L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1435–40 (1995).

56. Gilson & Kraakman, *supra* note 17, at 872.

57. *See generally* Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447 (2008) (describing how current rules overemphasize the importance of an independent board of directors).

managed or that the impossibility of separation makes self-dealing inevitable. Instead, independence suggests that management of conflicts is indeed possible at the extreme margins and only when the mechanisms of separation match the interests that may be conflicted. This is why an overly legalistic approach to independent directors falls so far short of the hopes that adherents to independence mythology espouse.

2. *Investigate Wrongdoing—Cop on the Beat*

Independent institutions can also be created to solve the problem of adequate and fair enforcement of previously established social and political norms—the independent "cop on the beat." The main problem here is that, while there can be some rough consensus on the established law *ex ante*, *ex post* enforcement will almost always include some modicum of discretion. When the enforcer is partisan and the individual or entity against whom enforcement is sought is a partisan of an opposing stripe, allegations of abuse of discretion and arbitrary exercise of bald political power becomes the rallying cry for the oppressed party. Thus, without an independent "cop on the beat," it is difficult to imagine a process wherein investigation is, in reality or perception, simply a political exercise by the empowered constituencies against their opponents. Hence, the need for independence: an independent cop on the beat is not trying to settle scores or enforce political dogma but find out the "truth" of the violated conduct. In an ideal world, the independent investigator can never be challenged for playing politics, because the independent enforcer has no politics to play.

If the independence of the institution charged with such investigation is questioned, the investigation itself can be compromised. This dynamic has come to prominent national and international display during the SEC's post-crisis investigation of, and subsequent lawsuit against, Goldman Sachs. Goldman Sachs structured and sold financial instruments, known as collateralized debt obligations, to a variety investor-clients without first disclosing that the instruments were structured, in part, at the request of short-seller John Paulson. The lawsuit, since settled, was the source of criticism in some corners, including those who viewed the timing of the lawsuit with skepticism.[58] Some thought that the administration had influenced the SEC in its decision to sue Goldman in order to bolster public opinion for the passage of its financial regulatory reform legislation, which eventually became the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Many have credited the publicity that followed the SEC's action as serving as the decisive catalyst for the ultimate passage of Dodd-Frank.[59] Indeed, in an interview with CNBC's John Harwood, President Obama had to "categorically" deny that the administration influenced the timing of the SEC's investigation and subsequent filing of a lawsuit against the investment bank. In the President's words, "[T]he SEC is an entirely independent agency that [] we have no day to day control over. . . . [T]hey never discussed with us anything [] with respect to the charge that will be brought. . . . [T]his notion that somehow there would be any

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58. *E.g.*, Don McNay, *Goldman Sachs: Too Big for Jail?*, HUFFINGTON POST (June 18, 2010, 5:12 AM), http://www.huffingtonpost.com/don-mcnay/goldman-sachs-too-big-for_b_542160.html [https://perma.cc/X83J-H9AF] (discussing the ongoing lawsuit).

59. *See, e.g.*, Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 1026 (2011) (explaining the increase in momentum).

attempt to interfere in an independent agency is completely false."[60]

Examples of investigations tainted with politics are legion; indeed, perhaps the easiest accusation against an investigation is to accuse the investigator of "playing politics." Independence, as a tool for institutional design, is intended to make that accusation far more difficult to make.

3. To Investigate the Past

The somewhat regular appointment of outside individuals with sterling reputations to investigate past crises or other protracted problems provides the context for the next category of independence. The examples are many: the Iraq Study Group,[61] the Iraq Intelligence Commission,[62] the BP Deepwater Horizon Oil Spill and Offshore Drilling Commission,[63] the Pecora Commission (studying the stock market crash of 1929),[64] among countless hundreds of others, both presidential and congressional. On the international scale, and far more politicized than these examples, are the truth and reconciliation commissions in countries following the fall of dictatorial regimes.[65] The idea here is that a crisis occurred that is not widely understood, providing the need to discover the "truth" behind the cause of the crisis.

Independence figures prominently in the appointment of those who serve on these commissions. Here, though, their independence is designed not just to ensure that others' partisan influence does not color the conclusions of the commission's report, but that the individuals themselves will be of adequate reputational standing such that their opinions must only reflect their informed expertise, rather than more partisan considerations. In the words of the Fraud Enforcement and Recovery Act of 2009 (creating the Financial Crisis Inquiry Commission), such commissioners must be "prominent United States citizens with national recognition and significant depth of experience in such fields as banking, regulation of markets, taxation, finance, economics, consumer protection, and housing."[66] The

60. Interview by John Harwood with Barack Obama, President, United States of America (Apr. 21, 2010) (transcript available at https://www.cnbc.com/id/36666434 [https://perma.cc/6QTG-A5H6]).

61. *See* Press Release, Belfer Ctr. for Sci. & Int'l Affairs, PDP Co-Director William J. Perry Named to Bipartisan Iraq Study Group (Mar. 2006), *available at* http://belfercenter.ksg.harvard.edu/publication/17285/pdp_codirector_william_j_perry_named_to_bipartisan_iraq_study_group.html [https://perma.cc/H7RB-FTXM] (listing study group members); *see also Iraq Study Group: Expert Working Groups*, U.S. INST. OF PEACE, http://www.usip.org/iraq-study-group/expert-working-groups [https://perma.cc/LN62-33WV] (last visited Nov. 7, 2011) (listing study group members).

62. *See Commissioners*, COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, http://govinfo.library.unt.edu/wmd/commissioners.html [https://perma.cc/UL96-DCY6] (listing commission members).

63. *See Commission Members*, NAT'L COMMISSION ON BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, http://oscaction.org/resource-center/commission-reports-papers/ [https://perma.cc/EF4U-PQTA].

64. For an excellent recent history of the Pecora Commission, see MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA'S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE (2010).

65. *See, e.g.*, Kevin Avruch & Beatriz Vejarano, *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, 4 ONLINE J. PEACE & CONFLICT RESOL. 37 (2002), *available at* http://humiliationstudies.org/documents/AvruchTRC.pdf (outlining the use of TRCs and citing to many specific examples of TRCs' use following dictatorial regimes).

66. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5(b)(2)(A), 123 Stat. 1617, 1626 (2009).

idea is that experts so situated will be able to produce the "answers" that have eluded others in attempting to answer the same questions. The 9/11 Commission was not the first entity to consider what went wrong in the United States prior to 9/11; but its results were considered authoritative, and its recommendations were taken seriously by policy-makers following the Commission's release of its report.[67] The 9/11 Commission had credibility, which gave its conclusions more weight than if the same conclusions came from other sources. One of the primary ways to achieve that credibility is by showing that the members of such commissions do not have a political or financial interest in the outcome of the commission's findings. When there is such a cloud over a commission or commissioner, its utility is compromised, if not lost altogether.

4. Independence to Mediate Disputes

The most obvious example in society of independence as a mechanism for dispute mediation is the judiciary, a topic so big that I won't pretend to touch it in this Article. But it's worth thinking through non-judicial aspects of dispute mediation and how independence interacts with each.

Most obviously, the many adjudicators located throughout the administrative state fit this mold. Those include Administrative Law Judges who determine an appellant's social security benefits eligibility, the members of the National Labor Relations Board in their adjudication of labor disputes, or commissioners of the Commodity Futures Trading Corporation in their adjudication of disputes between brokers and investors.

In these contexts, independence matters. The concept is central to fair adjudication in ways even more pronounced than occurs in the policy-making context of independence. Indeed, courts in the United States have made unbiased adjudicators essential to the adjudicatory process.[68] The logic here, followed by the Supreme Court in its jurisprudence on the independence of administrative adjudicators, is that due process requires that adjudicators be free not only from any improper influence from one litigator over another, but also improper influence from the adjudicator's own experiences. Thus, the focus in this line of cases is on the adjudicators' own pre-litigation actions and words. Here, then, independence refers not only to the institution—the adjudicators—but to the entire process, separate from the individuals who enforce it.

5. Independence as Monitor

The need to ensure that some institutions or players are performing according to their mandate prompts the category of "independence as monitor." Here, the contributions from agency theory (alluded to in the introduction) are most prevalent. Agency theory predicts that principals will want to invoke agency cost-saving mechanisms to bring agent and principal incentives into alignment. One mechanism for doing so is the appointment of

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67. For an overview of the Commission and its effects on policy, see Mark Fenster *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239 (2008).

68. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2008) (holding that state judges violate the 14th amendment when their participation in adjudication presents specific conflicts of interest). Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (holding that the test for disqualification is "whether a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing" (internal quotations omitted)).

"monitors," separate agents charged with ensuring that the first agent is following the principal's will, and not acting in his own self-interest. Gilson & Kraakman have criticized the efficacy of such monitors—including by citing Dr. Seuss's Hawtch Hawtchers—who turn the enterprise of monitoring into a farcical and endless game of "Who is Monitoring the Monitor?" But that criticism notwithstanding, there is an enduring role for independent monitors in institutional design.

In the administrative state, the institution of Inspector General fulfills this duty. Inspectors General are charged with functioning as something of an investigator and an ombudsman. But they do not fit neatly into either the role of investigator or adjudicator. Instead, they are charged with making their presence felt in the agencies which they oversee to ensure, usually to the appropriate Congressional committee and to the agencies themselves, that the institution they oversee is conforming with its statutory charge.[69]

In corporate governance, the "board as monitor" theory is one of the most cited theories of why we have boards of directors in the first place.[70] The board acts as the shareholders' representative to ensure that the management is best maximizing the shareholder/owners' interests. Under this theory, such monitoring infuses every board action and meeting—every part of the job is aimed at monitoring management. Overstepping that boundary by engaging in the practice of management itself is inefficient; understepping that boundary and becoming an imprimatur for all management action is a dereliction of duty.

C. Independence as Partisan Neutrality

1. Odyssean Independence

One of the most important reframing questions that Gilson & Kraakman offer is often the one asked least: "independent from whom?" In several contexts, the party from whom independence is sought is precisely the institutional designer itself. This dynamic is different from the agency theory of independence, which seeks to separate an independent institution from its own conflicting interests. Instead, the party establishing the institution recognizes that there will be some future circumstances in which the party's instincts will not serve that party's long-term interests. This is also different from *personal* separation because the identity of the individuals—either the subjects of an independent institution's power, or the holders of that power. As such, independence is sought to protect the founding party from itself. In this way, those who establish such independent institutions are like Odysseus seeking to hear the Sirens' song without destroying himself.[71] In order to escape the consequence of hearing the song without any kind of protection, but without missing on the benefits associated with hearing the song, Odysseus ordered his sailors to stuff their ears with bees' wax and tie him to the mast, with specific orders that they not release him until they were well past the Sirens. The design worked, and Odysseus became the first to hear the Sirens' song and live to tell the story.

69. Inspectors General Act of 1978, Pub. L. No. 95-452, § 5, 92 Stat. 1101, 1103-04 (1978).

70. See JON MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN (2008) (describing the "board as monitor" theory).

71. For much more on the development of this model of independence, see generally PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2016).

Economists call this phenomenon a time-inconsistency problem.[72] Like Odysseus, it is sometimes desirable for the polity to seek to tie itself to the mast, to prevent meddling with a process that will ultimately redound to the polity's benefit, but usually cannot be trusted to the polity itself.

The classic example of an institution designed with Odyssean independence is central banks. Central Banks are designed to conduct monetary policy through, among other mechanisms, the alteration of the economy's prevailing interest rates. When the economy faces the potential for recession, a central bank can decrease the interest rates, making credit flow more easily. When the economy's robust performance threatens inflation, the central bank can raise rates, shrinking credit and slowing growth. The consequences of this tinkering, in the words attributed to one former Chair of the Federal Reserve, are to order "the punch bowl removed just when the party was really warming up."[73]

Central banking, assuming (admittedly a heroic assumption) that the Fed can always spot economic overheating and recessions in time to make a difference, thus allows the polity to reap the benefits of price stability in times of economic expansion, and a softer landing in times of recession.[74] But it raises the question: Why can't the polity simply self-police, if these are both important goals for the polity? The answer is quite basic: the short-term interests of the polity can be frequently at loggerheads with its own long-term interests. At some point, usually due to harsh experience with this reality, the polity decides to tie itself to the mast, asks its bankers to put beeswax in its ears, and let it enjoy the good life of a managed economy. In the words of prominent economist and former Fed Governor Alan Blinder, "monetary policy, by its very nature, requires a long time horizon."[75]

As I have argued at great length elsewhere, very little about this Ulysses-Punch Bowl conception of central bank independence accurately describes the way the Fed or any other central bank actually functions.[76] But this conception continues to be very powerful in defending the Fed's institutional integrity.

One articulation of corporate governance also illustrates Odyssean independence. Lynn Stout presents the compelling view that Odyssean independence—what she calls "the Shareholders as Ulysses"—explains the delegation of the management of the corporation to directors in general (and not just independent directors).[77] The logic, argues Stout, is that shareholders not only delegate management authority to monitor their capital investments, but also to "*rein in themselves* by weakening shareholder control over firm assets

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72. The time-inconsistency problem was first introduced by Nobel Prize winners Finn Kydland & Edward Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977), and more fully developed by Guillermo Calvo, *On the Time Consistency of Optimal Policy in the Monetary Economy*, 46 ECONOMETRICA 1411 (1978) and Robert J. Barro & David Gordon, *A Positive Theory of Monetary Policy in a Natural Rate Model*, 91 J. POL. ECON. 589 (1983).

73. William McChesney Martin, Jr., Chairman, Bd. of Governors of the Fed. Reserve Sys., Address before the New York Group of the Investment Bankers Association of America (Oct. 19, 1955) (available at http://fraser.stlouisfed.org/docs/historical/martin/martin55_1019.pdf) [https://perma.cc/D4EJ-TYLD].

74. WILLIAM BERNHARD, BANKING ON REFORM: POLITICAL PARTIES AND CENTRAL BANK INDEPENDENCE IN THE INDUSTRIAL DEMOCRACIES 11 (2002).

75. ALAN S. BLINDER, CENTRAL BANKING IN THEORY AND PRACTICE 55 (1998).

76. CONTI-BROWN, *supra* note 71, at 3.

77. *See generally* Lynn Stout, *The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance*, 152 U. PA. L. REV. 667 (2003) (calling the shareholders as Ulysses through the entire article).

and outputs."[78]

2. *Independence as Legalized Politics*

Closely related to Odyssean independence is what we might term "independence as legalized politics." At times, it will become expedient for institutional designers to create independence for an institution for no other reason than to prevent political opponents from reinserting a policy discussion into the political discourse. That is, if a political majority were able to guarantee indefinite control over an institution, independence would be unnecessary—the institution itself would be subject to the political majority, because no other particular reason for independence was necessary. But because the majority cannot guarantee such control, and indeed there is a high risk that political opponents will undo the work of the present political majority, the majority secures independence that the majority itself would not prefer, all else being equal. That independence is simply to make doubly certain that a future majority is similarly restricted in its ability to meddle with the institution's tasks.

The best example of independence as legalized politics may be the Consumer Financial Protection Bureau (CFPB). One of the many features of independence that the CFPB enjoys is a budgetary independence almost unrivaled in the administrative state. According to Dodd-Frank, the CFPB is to be funded at a level "determined by the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau," subject to the following guarantees and limitations: the Director cannot request more than 10% of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, in fiscal year 2011; 11% in FY 2012; and 12% in fiscal year 2013, and "in each year thereafter."[79]

Thus, CFPB is funded, not through annual appropriations, which could be manipulated by future Congressional majorities, nor through assessments on regulated institutions, which create their own political logic. The CFPB is funded through a fixed "appropriation" attached to the Federal Reserve's own budget.[80] I put quotes around "appropriation" for a reason that illustrates the "legalized politics" that Congressional Democrats[81] employed in creating the CFPB: Dodd-Frank further provides that the funds to cover the CFPB come not from Congressional appropriations at all. To quote the Act itself, "[n]otwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."[82] Thus, future Congressional delegations cannot review the funding status of the CFPB without wholesale repeal of this section of Dodd-Frank itself.

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78. *Id.* at 670 (emphasis in original).

79. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1017(a)(1), (a)(2), 124 Stat. 1975 (2010).

80. 12 U.S.C. § 5497 (2020).

81. The final vote in the Senate included only three Republicans in favor—Scott Brown in Massachusetts, and Susan Collins and Olympia Snowe in Maine. *See* Brady Dennis, *Congress Passes Financial Reform Bill*, WASH. POST (July 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071500464.html [https://perma.cc/P5V8-9DAJ] (describing the politicization of the reform bill).

82. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1017(a)(2)(C), 124 Stat. 1976 (2010).

Why is this "independence as legalized politics" instead of simply independence to perform the basic functions that the CFPB was designed to perform, like enforcement and rulemaking? The answer is that the CFPB is vulnerable, as other institutions, to performance out of step with the intentions of its institutional designers. As the Bureau's own changes in priorities following the election of Donald Trump illustrate, the Bureau can change its posture vis-à-vis regulated industry, or simply fail to live up to its mandate, as was the accusation against others who sought to enforce consumer protection.[83] That is a risk that Congressional Democrats were willing to take much more than to have Congressional Republicans to use the cudgels of Congress to force these modifications.[84] In other words, whatever the change in direction that has occurred at the CFPB following the 2016 election when a new president could appoint new leadership at the Bureau, the same did not occur after 2010 when new congressional leadership attempted to do the same.

3. Independence as Political Cover

Independence may also be used as a device for political cover. This is similar to Odyssean independence, but less "pure," so to speak. In the former case, the polity's motivation is entirely benevolent—the polity recognizes that some decisions are better left to those with a longer-term time horizon. Like a partygoer giving his keys to a teetotaler friend with strict instructions not to return them, the polity creates Odyssean independence in order to prevent its own poor decision-making from creating serious policy problems down the road.

Not so when the polity creates independent institutions for political cover. Instead, such independence is created in order to create something of a scapegoat for hard political decisions. In other words, a decision-making body is charged with determining some piece of policy. Instead, that body creates a second institution, gives it independence, and charges it to make the decisions that the body itself should instead be making. The consequence is that the body can avoid taking blame for unpopular decisions, but still get credit for popular decisions.

The most prominent examples of independence as political cover come, again, from the administrative state. Some have argued that the design of independent agencies represents nothing more than the political branches' attempts to dodge the consequences of difficult political decisions. Justice Rehnquist made this point in the case determining the constitutionality of one section of the Occupational Health and Safety Act (1970). In that specific context, Justice Rehnquist argues:

> It is difficult to imagine a more obvious example of Congress simply avoiding a

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83. Daniel Carpenter, *Why Consumers Can't Trust the Fed*, N.Y. TIMES (Mar. 16, 2010), http://www.nytimes.com/2010/03/17/opinion/17Carpenter.html [https://perma.cc/ZUE6-H6PC] (criticizing the Fed's failure to devote sufficient attention to consumer protection in the years preceding the financial crisis); Zach Carter, *A Master of Disaster*, NATION (Dec. 16, 2009) (criticizing the Office of the Comptroller of the Currency for their failure to protect consumers during the years preceding the financial crisis); *see also* Arthur E. Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004) (criticizing the OCC for its affirmative prevention of the enforcement of consumer protection laws).

84. *See supra* notes 1–18.

> choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge. . . . If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislative is formulated. But that is the very essence of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.[85]

Congress, then, in some cases, may establish independent institutions in order to make the hard legislative decisions that it could not make itself without facing stiff political resistance. If such motivations are not exposed or the delegation itself invalidated, then such independence can be an extremely useful political tool—a sort of "heads I win, tails you lose" for the political creators of such institutions, since good decisions can be claimed and bad decisions blamed by the politicians.

D. Implications for Gilson & Kraakman and Central Banks: The Problem of Independence Accretion

A taxonomy of independence helps us identify the parts of independence in institutional design that are tethered to the goals we have for the separation. It is not enough to announce that independence will yield better outcomes. The task, then, is to match the policy goal with the independence motivation and then to assess the match—or mismatch—that results.

How does *Reinventing the Outside Director* fare against this taxonomy? I don't think very well, which may well explain why institutional investors—despite the clear incentives that Gilson & Kraakman identify—did not take up the cause of a professional corps of outside investors.

The problem with the Gilson & Kraakman model is that it engages in a kind of independence accretion that is common, but deeply damaging in institutional design. By independence accretion, I mean something similar to the "mission creep" explored by scholars of the military.[86] An independent institution is created—some kind of separation is made—for one purpose, but then various constituencies put hopes of a *different* kind of independence that the institution cannot support.

Outside directors may be most effective as a mechanism for managing conflicts of interest. Gilson & Kraakman imagine a different role. Their "reinvention" is to create "governance" as a separate corporate epistemology that should exist alongside operations, finance, accounting, law, or, most important of all, strategy. But can it be that? Can there be expertise in governance that requires full-time devotion in ways that will be immediately relevant to a business trying to achieve profitability in a competitive landscape? I doubt

85. Indus. Union Dep't., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., Concurring).

86. *See, e.g.*, Jessica Einhorn, *The World Bank's Mission Creep*, 80 FOREIGN AFF. 22, 22 (2001) (discussing the complexity and expansion of the World Bank's mission).

that it can. The most important expertise that a company can get is on the process of reaching that profitability. Governance as expertise seems something different entirely.

Ironically, the expertise that a professional board would require to be of significant use to shareholders and companies could run the risk of making these directors *more* tethered to management, not less. This illustrates the danger of independence accretion. Once a director has become a genuine expert in the affairs of the company, that director's very proximity to the company and its management makes its ability to manage conflicts—the quintessential outside director role—much less effective.

Central banks provide another important example of independence accretion. Of our three tent-pole motivations for separation—independence as expertise, as personal separation, and as partisan separation—central banks are most relevant to the first and last. The concerns with central banking and the mythology of independence is just how much uncertainty central banks face in exercising the hard-fought expertise that they have gained. At present, central bankers the world over essentially do not know what they are going to do next, something that economist Larry Summers has called "the black hole" of central banking.[87] The United States has joined the rest of the world for the last decade in having negative or near negative real interest rates. It may yet join much of the rest of the world in having negative nominal interest rates.

What should be done? It is not a question of getting experts together. The experts disagree vehemently. It is a question of values, judgment, and ideology. In those contexts, independence presents obstacles, not opportunities.

IV. Conclusion

Independence comes as close as we can to proverbial apple pie in institutional design. But it has its detractors. Just as previous generations of realists and critical theorists have called the entire enterprise of law into question, many continue to raise concerns that the enterprise of independence is a hopeless one.

I don't agree. In this Article, I have argued that independence, if it is to succeed as a tool of institutional design, must be better matched to the motivation we have for independent institutions. Independent institutions cannot be all things to all people. Law's preference to expand, rather than narrow, the bailiwicks of independent institutions should be checked as a warning. But this is not to say that the enterprise, however mythological and even, at times, fictional, is not important. Indeed, independent institutions perform vital functions in a variety of different areas. We just need more clarity and better managed expectations about what those functions can be.

87. Craig Torres, *Larry Summers Says Central Bankers Confront a "Black Hole" for Policy*, BLOOMBERG (Aug. 22, 2019, 11:12 AM), https://www.bloomberg.com/news/articles/2019-08-22/summers-says-central-bankers-confront-a-black-hole-for-policy [https://perma.cc/CC38-AQR8].