

ARTICLE

AN ENDURING, EVOLVING SEPARATION OF POWERS

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This Article sets forth the theory of an enduring, evolving separation of powers, one that checks and balances state power in whatever form that power happens to take. It shows how this constitutional commitment was first renewed and refashioned in the 1930s and 1940s, wherein the construction of a secondary regime of administrative checks and balances triangulated regulatory power among politically appointed agency leaders, an independent civil service, and a vibrant and pluralistic civil society. And it supplies the legal precedent, corrective blueprint, and normative imperative for subsequent generations (including ours) to reaffirm that commitment whenever new threats to limited, rivalrous government arise.

This commitment to an enduring, evolving separation of powers helps explain our past and our present—and it readies us for the future. First, reframing the administrative state through the lens of an enduring, evolving separation of powers provides a more seamless connection to the Founding. The twentieth-century shift to administrative governance toppled the Framers' tripartite constitutional regime. But the subsequent construction of an administrative separation of powers

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represented an act of constitutional restoration, anchoring the modern administrative state firmly within the constitutional tradition of employing rivalrous, heterogeneous institutional counterweights to promote democratic accountability and compliance with the rule of law. Second, this reframing resolves seemingly intractable normative and jurisprudential struggles in contemporary administrative law, harmonizing today's leading (but conflicting) theories and doctrines of public administration. And, third, this reframing prepares us for life in the post-administrative state, a reality that is already beckoning. Increasingly the forces of privatization are consolidating state and commercial power in ways that compromise administrative separation of powers. Understanding privatization not as a sui generis phenomenon but instead simply as the latest, perhaps greatest, threat to an enduring, evolving separation of powers enables us to employ the grammar and doctrinal imperatives of constitutional separation of powers to insist that privatization's proponents take on the responsibility for reestablishing limited and rivalrous governance amid the dynamic turn to the market—or else abandon the enterprise altogether.

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INTRODUCTION

This Article tells the story of the transition from constitutional to administrative to privatized governance. It is a story of the perennial struggle between state power and constraint, efficiency and accountability. It is a story that begins with the Founding and carries forward through the Industrial Revolution, the New Deal, Reaganomics, and contemporary, bipartisan movements surrounding business-like government and presidential aggrandizement. And it is a story that recognizes and endorses a deep and enduring commitment to separating, checking, and balancing state power in whatever form that power happens to take.

That political, legal, and normative commitment to an enduring, evolving separation of powers reaches across three centuries, countless policy domains, and multiple governing platforms. Specifically, at the time of the Founding, concerns arose over the prospects of an imperious, domineering national legislature. Such concerns resurfaced in the 1930s and 1940s, this time over the executive-driven administrative juggernaut of the New Deal.¹ Today, we worry about the rampant commingling and

1. Throughout, when discussing the rise of the administrative state, I will focus primarily on New Deal agencies rather than those that came into existence earlier, see generally Jerry L. Mashaw, *Creating the Administrative Constitution* (2012) [hereinafter Mashaw, *Administrative Constitution*]. I do so because the New Deal agencies posed qualitatively greater challenges than those that preceded them. They were far more numerous, far more powerful (in terms of their statutory charge and the powers conferred on them), and many were more closely tied to the President. See, e.g., Lawrence M. Friedman, *American Law in the Twentieth Century* 170 (2002) (describing the New Deal agencies as reflecting a dramatic uptick in administrative power); Stephen Skowronek, *Building a New Administrative State: The Expansion of National Administrative Capacities, 1877–1920*, at 290 (1982) (characterizing the New Deal administrative state as a

concentration of state and commercial power associated with privatization.² The common thread that connects these three pivotal moments is the emergence of a potentially abusive or corrupt wielder of consolidated sovereign authority. For those troubled by relatively unencumbered, concentrated power of this sort, the Framers' commitment to checks and balances provided, and still provides, an answer. It provided an answer not only to the First Congress but also to Franklin Roosevelt's alphabet agencies. That same commitment needs to be renewed today, to

"giant"); Alonzo L. Hamby, World War II: Conservatism and Constituency Politics, in *The American Congress 474, 479* (Julian E. Zelizer ed., 2004) (describing that, in the 1930s and 1940s, "[o]ne powerful administrative agency after another collectively became the face of a government that was the creature of the executive"); Mark Seidenfeld, The Role of Politics in a Deliberative Model of the Administrative State, 81 *Geo. Wash. L. Rev.* 1397, 1404 (2013) (noting that the limited delegations given to administrative agencies prior to the New Deal gave way to "broad and unstructured" ones during the New Deal).

2. For discussions of contemporary privatization and the fusing of political and commercial power, see Kevin R. Kosar, Cong. Research Serv., RL30533, *The Quasi-Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* (2011) [hereinafter Kosar, *Quasi-Government*] (on file with the *Columbia Law Review*); Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (2007) [hereinafter Verkuil, *Outsourcing Sovereignty*]; Matthew Diller, Form and Substance in the Privatization of Poverty Programs, 49 *UCLA L. Rev.* 1739, 1749 (2001); Matthew Diller, The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government, 75 *N.Y.U. L. Rev.* 1121 (2000) [hereinafter Diller, *Revolution*]; Jody Freeman, The Private Role in Public Governance, 75 *N.Y.U. L. Rev.* 543 (2000); Jon D. Michaels, All the President's Spies, 96 *Calif. L. Rev.* 901, 907–08 (2008); Jon D. Michaels, Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War, 82 *Wash. U. L.Q.* 1001 (2004) [hereinafter Michaels, *Privatizing War*]; Jon D. Michaels, Deputizing Homeland Security, 88 *Tex. L. Rev.* 1435, 1439 (2010) [hereinafter Michaels, *Deputizing*]; Jon D. Michaels, Privatization's Pretensions, 77 *U. Chi. L. Rev.* 717, 722, 724 (2010) [hereinafter Michaels, *Pretensions*]; Jon D. Michaels, Privatization's Progeny, 101 *Geo. L.J.* 1023, 1040–57 (2013) [hereinafter Michaels, *Progeny*]; Jon D. Michaels, The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond, 97 *Va. L. Rev.* 801, 810–17 (2011) [hereinafter Michaels, *(Willingly) Fettered*]; Martha Minow, Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy, 46 *B.C. L. Rev.* 989 (2005); Judith Resnik, Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century, 11 *Int'l J. Const. L.* 162 (2013) [hereinafter Resnik, *Globalization(s)*]; David A. Super, Privatization, Policy Paralysis, and the Poor, 96 *Calif. L. Rev.* 393 (2008); Benjamin Templin, The Government Shareholder: Regulating Public Ownership of Private Enterprise, 62 *Admin. L. Rev.* 1127, 1185 (2010); see also Daniel Guttman & Barry Willner, *The Shadow Government* (1976) (describing an earlier wave of government–commercial partnerships); Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 *Tex. L. Rev.* 1293 (2011) (examining the commingling of political–commercial power from a corporate law perspective); Jon D. Michaels, Running Government like a Business . . . Then and Now, 128 *Harv. L. Rev.* 1152 (2015) (book review) [hereinafter Michaels, *Running Government*].

address the state-aggrandizing challenges posed by twenty-first-century privatization.

I consider this Article to be the present-day equivalent to those written during the early years of the Administrative Era. At that time, it was hardly preordained that the administrative state we know today would take hold. Upstart agencies dotted rather than blanketed the federal terrain. And courts signaled considerable degrees of constitutional hostility to administrative governance.³ Yet despite this uncertainty, important work was done anticipating, challenging, and most significantly starting to constrain these burgeoning power players.⁴ The fruit of that work is known today as Administrative Law.

As was the case in the early twentieth century vis-à-vis administrative governance, one might today fairly question how broadly and deeply privatized governance will actually go. Over the past few decades (not a dissimilar time horizon from that of the initially slowly expanding modern administrative state), agency leaders have increasingly fused commercial and state power. Doing so has enabled those leaders to augment, concentrate, and extend their authority.⁵ Given contemporary privatization's remarkable ascent,⁶ the time is likewise right to anticipate, challenge, and again most significantly start to constrain these

3. See, e.g., *Morgan v. United States (Morgan I)*, 298 U.S. 468, 481 (1936) (expressing general concerns over delegations to agencies and requiring the statutorily entrusted administrative decisionmaker to be personally and materially involved in the deliberative process: "The one who decides must hear"); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (holding delegations under the National Industrial Recovery Act to be unconstitutionally broad); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (similar); *Crowell v. Benson*, 285 U.S. 22, 62–63 (1932) (construing narrowly a delegation to an administrative agency in order to avoid finding that delegation to be unconstitutional).

4. See, e.g., Felix Frankfurter, *Cases and Materials on Administrative Law* (2d ed. 1935); Walter Gellhorn, *Administrative Law: Cases and Comments* (1940); James Landis, *The Administrative Process* (1938); see also Lloyd Milton Short, *The Development of National Administrative Organization in the United States* 24, 26 (1923) (highlighting the challenges associated with early modern administrative agencies); W.F. Willoughby, *An Introduction to the Study of the Government of Modern States* 385–86 (1919) (raising concerns that emerging administrative agencies will be overly politicized and arguing that "[m]uch . . . still remains to be done if these evils [associated with administrative governance] are to be completely eliminated"). Of course, later generations of administrative lawyers continued, expanded, and refined the work of those early scholars, jurists, and policymakers. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667 (1975) (describing a subsequent wave of concerns with administrative governance and discussing new approaches to holding agencies and administrative officials accountable).

5. See Michaels, *Pretensions*, *supra* note 2, at 717–24 (explaining how privatization enables agency leaders to circumvent laws, sideline institutional rivals, and advance partisan goals).

6. See *infra* Part III.A.

burgeoning political–commercial partnerships. The fruit of that work may one day help determine the trajectory of post-administrative governance and, quite possibly, the future of our constitutional order.

In tracing this multigenerational story of institutional innovation and retrenchment, this project rewrites an old chapter and commences a new one. First, it reframes administrative law through the lens of a secondary, subconstitutional separation of powers that triangulates administrative power among politically appointed agency leaders, an independent civil service, and a vibrant civil society. This revised understanding of American administrative governance has positive, normative, and constitutional purchase. It helps explain how administrative power is, in practice, shared and divided among actors within and outside of government agencies.⁷ It helps resolve seemingly intractable normative and doctrinal struggles that have gripped generations of scholars and jurists.⁸ And it helps provide a more seamless connection to the past. Notwithstanding administrative governance’s revolutionary toppling of the tripartite constitutional regime,⁹ the (eventual) engendering of an administrative separation of powers represents an act of constitutional restoration, anchoring administrative governance firmly within the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law.¹⁰

Second, this project insists that today’s increasingly sharp turn to privatized government is likewise best understood through a separation-of-powers framework. The lessons of an enduring, evolving commitment to separating and checking power¹¹ reveal that privatization is anything but

7. See, e.g., Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *Yale L.J.* 1032, 1035 (2011) (contending that in most conventional accounts about administrative power and control “agencies are typically treated as unitary entities”).

8. See *infra* Part II.B.1.

9. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (contending that the still-new administrative state “has deranged our three-branch legal theories”); Jacob E. Gersen, *Unbundled Powers*, 96 *Va. L. Rev.* 301, 305 (2010) (suggesting that the rise of administrative agencies equipped with legislative, executive, and judicial power “has long been an embarrassment for constitutional law”); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1248 (1994) (“The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution.”).

10. See *The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (describing the virtues of separating and checking state power); *The Federalist* No. 51, *supra*, at 322 (James Madison) (similar); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 *Wm. & Mary L. Rev.* 301, 303–04 (1988) [hereinafter Verkuil, *Separation of Powers*] (explaining how separation of powers promotes good governance).

11. Separation of powers and checks and balances have distinct meanings. See, e.g., Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 34

a sui generis phenomenon. Instead, privatization's union of state and commercial power represents simply the latest threat to that commitment. In this new, still largely unchartered domain populated by contractors who fight wars,¹² police communities,¹³ run prisons,¹⁴ draft agency rules,¹⁵ render public-benefits decisions,¹⁶ and monitor and enforce regulatory compliance,¹⁷ actions and actors blur the public-private divide. The specific instances of such consolidated, privatized power might look quite novel. But the underlying challenges are the same ones we've encountered before: to marshal the grammar, devices, and doctrines related to constitutional separation of powers; to justify the continued relevance of separation of powers amid dynamic regime change; and to consider whether new institutional counterweights can reestablish limited, rational government notwithstanding the centripetal, consolidating effects of privatization.

This Article proceeds in three parts. Part I follows the rise and fall of constitutional separation of powers. It travels this well-trodden terrain both to provide necessary background and to mark the genesis of a politi-

(2010) (distinguishing between the *independence* of separation of powers and the *interdependence* of checks and balances). Nevertheless, in this Article, I use these two terms interchangeably. I do so in part because either term—when used to describe our governing system—often is understood to imply both. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”). That is to say, in our constitutional scheme, separation routinely enables checking, and checking often depends upon the existence of separation.

12. See P.W. Singer, *Corporate Warriors* (2003); Michaels, *Privatizing War*, supra note 2; Minow, supra note 2.

13. See David A. Sklansky, *The Private Police*, 46 *UCLA L. Rev.* 1165, 1183–87 (1999).

14. See Sharon Dolovich, *State Punishment and Private Prisons*, 55 *Duke L.J.* 437, 457–62 (2005).

15. See Office of Tech. Assessment, *OTA-BP-ITE-51, Assessing Contractor Use in Superfund 2* (1989), available at http://govinfo.library.unt.edu/ota/Ota_2/DATA/1989/8903.PDF (on file with the *Columbia Law Review*) (discussing government contractors’ “major role in conceiving, analyzing, and structuring the policies and tasks which make up the Superfund program”); 4 William Rodgers, *Environmental Law* § 8.9, at 619 & n.139 (2009) (detailing the work of EPA contractors “prepar[ing] options, draft[ing] rules, review[ing] public comments, prepar[ing] the final drafts . . . and provid[ing] interpretive guidance”).

16. See Diller, *Revolution*, supra note 2, at 1182–83 (emphasizing the considerable authority and discretion private contractors are accorded in the administration of government welfare programs).

17. See Miriam Seifter, *Rent-A-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 *Ecology L.Q.* 1091, 1118–25 (2006) (describing the central role played by various private actors in monitoring, inspecting, and enforcing compliance with federal laws and rules).

cal, normative, and legal commitment to encumbered, rivalrous government. This Part first describes the Framers' tripartite system of checks and balances—a system that constrained and helped legitimate the exercise of newly expanded federal authority. It then explains how the constitutional tripartite system worked ostensibly too well, preventing later generations from responding swiftly and forcefully to social and economic dislocations associated with modernity. Stymied but undaunted, government reformers created and expanded administrative agencies and endowed them with lawmaking, enforcement, and adjudicatory responsibilities. Combining these powerful responsibilities meant that administrative agencies effectively short-circuited constitutional separation of powers.

Part II marks the rise of what I call administrative separation of powers. It first addresses the familiar: administrative lawyers' concern that the creation of supercharged, relatively unencumbered administrative agencies concentrated power in the hands of the Executive. It then introduces the novel: These concerned administrative lawyers erected a system of subconstitutional checks and balances. Renewing (while updating) the Framers' commitment to rivalrous government as a safeguard against state abuse and as a vehicle for legitimizing the exercise of sovereign power, they equipped civil servants and members of the general public with the tools to enrich administrative decisionmaking and to resist agency leaders' efforts to cut legal corners or implement hyperpartisan policies. Here I explain the concept of administrative separation of powers, connect administrative separation of powers to the principles and practices of the tripartite constitutional scheme, and show how these administrative checks and balances (like the constitutional ones that preceded them) legitimize this subconstitutional governing regime as a normative, institutional, and jurisprudential matter.

Part III brings us to the third destination in this recurring contest between power and constraint: the fall of administrative separation of powers and the corresponding emergence of a Privatized Era. Just as approximately a century ago the tripartite system of constitutional checks and balances buckled under the weight of its own (intentionally baked-in) inefficiencies—and ceded ground to administrative agencies that combined lawmaking, enforcement, and adjudicatory responsibilities all under one roof—today the tripartite system of administrative checks and balances is weakening in places. Once again, there is a consolidation of power promising unprecedented efficiencies while raising the specter of abuse and corruption. This time, however, the political leadership atop agencies is partnering with one of its administrative rivals and sidelining the other. Members of the public were supposed to be a foil, constraining agency leaders and adding distinctive, often adversarial, voices to the administrative process. Now some of them are facilitators, championing rather than checking and redirecting the agency leaders' agenda. Civil servants, too, were empowered in ways that enabled them to constrain

and educate agency leaders. Now they are either pushed to the side or effectively stripped of the very means to enforce those constraints and assert their expertise. For these reasons, fashioning yet another—*a tertiary*—system of rivalrous checks and balances seems to be a normatively and constitutionally necessary precondition to legitimizing these currently concentrated and unencumbered exercises of political-commercial power.

A note before proceeding: This is not a historiographic project, but rather an interpretive one. The account unfolds chronologically not in service of a grand, inevitable march through history. Rather, it is to show recurring patterns of innovation and retrenchment that have much more in common—analytically, doctrinally, normatively, and even causally—than has been heretofore understood. Indeed, I describe how the dynamics and tensions of the Framing moment resurface, first, at the administrative level and, now, seemingly, at the very intersection of public and private power. My account explains how the Framers' commitment to checking and balancing otherwise-unrivaled state power was renewed in the Administrative Era, wherein the construction of subconstitutional checks and balances effectively legitimized administrative governance. And my account provides the legal precedent and normative imperative for subsequent generations (including ours) to reaffirm that commitment whenever a threat to limited, rivalrous, and heterogeneous government arises.

I. THE CONSTITUTIONAL ERA

The Founding is a familiar story, briefly recounted here to foreground essential, legitimizing features of the Administrative Era and to demand the same of the Privatized Era that seems to beckon. Part I.A describes how the Framers, fearing tyranny and corruption, constrained the exercise of newly expanded federal powers. One of the principal methods of constraint was, of course, a system of checks and balances. These checks helped legitimize and rationalize sovereign authority. But they also wove considerable inefficiencies into the very fabric of day-to-day governance.

Part I.B considers how later generations responded to these constitutional inefficiencies. As the need became apparent for a more robust, responsive state, those later generations bypassed tripartite, constitutional government. They engineered powerful, relatively unencumbered administrative agencies and outfitted those agencies with legislative, executive, and judicial powers. In effect, the constitutional system of

separation of powers produced and then later gave way to these initially largely unitary¹⁸ and largely unchecked administrative agencies.¹⁹

A. *The Rise of Constitutional Separation of Powers: The Framers' Tripartite Government*

The United States' first foray into collective self-governance proved short lived. Within a few years of Independence, it became apparent that the Articles of Confederation foreclosed the ready exercise of even the most basic national powers.²⁰ This power deficit drove America's leading statesmen back to the drawing board. Convening in Philadelphia, these

18. By unitary, I mean internally undifferentiated and hierarchical, at least for purposes of understanding the exercise of power as an effectively unilateral act. Unitary agencies are monolithic and thus stand in contrast to fragmented agencies—that is, those agencies within which power is separated, checked, and balanced among institutional rivals. For fuller discussions of the distinction between unitary and fragmented agencies, see Magill & Vermeuele, *supra* note 7; Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers* (Mar. 4, 2015) (unpublished manuscript) (on file with the *Columbia Law Review*) [hereinafter Michaels, *Old and New Separation of Powers*].

19. Of course, no one mode of governance completely monopolizes any given era. Forms of administrative and privatized governance existed at the time of the Founding, and examples of these practices continued throughout what I call the Constitutional Era. See, e.g., Mashaw, *Administrative Constitution*, *supra* note 1 (describing administrative governance as widespread during the first hundred years of U.S. history); Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (2013) (describing many instances of administrative governance in the nineteenth century); see also William J. Novak, *Public–Private Governance: A Historical Introduction*, in *Government by Contract* 23, 32 (Jody Freeman & Martha Minow eds., 2009) (“The current turn toward privatization needs to be understood in the context of th[e] longer history of near-constant American governmental public–private cooperation in economic as well as social policy development.”). Likewise, during what I’m calling the Administrative Era, constitutional and privatized practices perdure. See, e.g., Jacob S. Hacker, *The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States 1979–80*, 292 (2002) (characterizing important roles played by private actors in twentieth-century social-services administration); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 *Admin. L. Rev.* 859, 863–85 (2000) (describing forms of privatized governance throughout the post-WWII period); see also James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 *Am. J. Comp. L.* 747, 748 (1991) (“To supporters and critics alike, [the National Recovery Administration,] a vast scheme for delegating governmental authority to private cartels, seemed akin to the ‘corporativism’ of Italian Fascism.”). Needless to add, the anticipated arrival of the Privatized Era is unlikely to signal the death knell of either constitutional or administrative governance. What marks the eras, therefore, is principally the emergence of a new mode of governance and the corresponding marginalization of the preexisting ones.

20. See *The Federalist* Nos. 15–17, 21–22, *supra* note 10 (Alexander Hamilton), Nos. 18–20, *supra* note 10 (James Madison) (detailing defects in the Articles of Confederation); Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 11–19 (2010) (characterizing the Articles' fundamental weaknesses).

statesmen fashioned a new governing blueprint. The Constitution they unveiled authorized considerably more federal power.²¹

The Framers were, however, cautious revolutionaries. Describing the concentration of sovereign power as “the very definition of tyranny,”²² they divided authority among a legislative, an executive, and a judicial branch.²³ For James Madison, “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”²⁴ Thus, no branch, on its own, could dominate.²⁵

The Framers did more than simply divide power among three groups. They endowed each group with distinct dispositional, political, and institutional characteristics.²⁶ And they made each group answerable to different sets of constituencies and subject to different temporal demands.²⁷ Because of these differing characteristics, bases of

21. See U.S. Const. arts. I–III; William P. Rogers, *Congress, the President, and War Powers*, 59 *Calif. L. Rev.* 1194, 1195 (1971) (explaining how the Constitution expanded the powers of the federal government).

22. *The Federalist* No. 47, *supra* note 10, at 301 (James Madison).

23. *Morrison v. Olson*, 487 U.S. 654, 697–98 (1988) (Scalia, J., dissenting) (describing separation of powers as “the absolutely central guarantee of a just Government”).

24. *The Federalist* No. 51, *supra* note 10, at 321–22 (James Madison). See generally Josh Chafetz, *Congress’s Constitution*, 160 *U. Pa. L. Rev.* 715, 771 (2012) (extolling the virtues of rivalrous separation of powers).

25. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 577 (1984) [hereinafter Strauss, *The Place of Agencies*] (“[The legislative, executive, and judicial] powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.”). See generally Laurence Claus, *Montesquieu’s Mistakes and the True Meaning of Separation*, 25 *Oxford J. Legal Stud.* 419 (2005) (emphasizing the importance of checks and balances to protect liberty and promote the rule of law); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. Chi. L. Rev.* 123, 142–53 (1994) (discussing the Framers’ insistence on checks and balances).

This understanding of separation of powers and checks and balances as central to our constitutional and political identity is not without its skeptics and critics. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *Harv. L. Rev.* 411, 443 (2012) (explaining the weakness of institutional rivalries “during times of unified government”); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2319 (2006) (“Madison’s design was eclipsed almost from the outset by the emergence of robust democratic political [party] competition.”).

26. *The Federalist* No. 51, *supra* note 10, at 321–22 (James Madison) (“[T]hose who administer each department [possess] the necessary constitutional means and personal motives to resist encroachments of the others.”).

27. *Id.* at 322–23 (explaining that to check legislative power, the Constitution does not just divide the two houses but also “render[s] them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions . . . will admit”).

accountability, and time horizons within which to work, the branches were expected to harbor conflicting agendas. These conflicts would, in turn, sharpen institutional rivalries, enlarge and improve federal decisionmaking, and, of course, impede the consolidation of federal power for potentially abusive or tyrannical ends.²⁸

B. *The Fall of Constitutional Separation of Powers: Administrative Agencies Supplanting Tripartite, Constitutional Government*

In time, the stymieing effect of constitutional separation of powers began taking its toll. As pressure mounted for government to be more responsive, interventionist, and national in scope, later generations turned increasingly to administrative agencies, essentially working around (rather than within) the system of constitutional tripartism.²⁹ The modern, federal administrative state really took off in the 1930s and 1940s.³⁰ Speaking in 1938, William O. Douglas remarked that “[o]ne can easily recall the time when . . . government was our great public futility The relentless pressures of modern times demanded that government do a streamlined job The vehicle for performance of this daily work of government has been more and more the administrative agency.”³¹ Mini-governments unto themselves, administrative agencies combined legislative, executive, and judicial functions in a way that effectively marginalized tripartite, constitutional government.³²

28. See Lloyd N. Cutler, *Some Reflections About Divided Government*, 18 *Presidential Stud. Q.* 485, 486 (1988) (stating that under the Framers’ tripartite regime, “one wonders how they ever got anything done”); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 *Va. L. Rev.* 471, 494–95 (1988) (emphasizing that separation of powers increases the cost of passing laws by lowering the probability of success).

29. See Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 *Chi-Kent L. Rev.* 953, 953 (1997) (noting that modern conditions and expectations demanded that “the constitutional mold had to be broken and the administrative state invented”).

30. See *supra* note 1.

31. William O. Douglas, Chairman, Sec. & Exch. Comm’n, *Speech Before the New York Lotos Club: Administrative Government in Action* (Nov. 1938), available at http://www.sechistorical.org/collection/papers/1930/1938_1100_Douglas_AdmGov.pdf (on file with the *Columbia Law Review*).

32. See *id.* at 3–4; see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) (“[Administrative agencies] exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.”).

These new agencies of the New Deal and beyond could—and did—promulgate rules³³ with great precision and relatively few hassles; unlike congressional leaders trying to pass legislation, agency heads engaging in rulemaking did not have to secure the support of hundreds of cantankerous representatives across two legislative bodies.³⁴ These agencies could enforce the rules they promulgated.³⁵ And they could resolve conflicts and make even more law through swift, in-house adjudications.³⁶ Additionally, unlike Article III courts, administrative agencies could effectively create their own cases, selecting optimal enforcement vehicles through which to establish agency policy.³⁷

Not surprisingly, these modern administrative agencies amplified federal power to a heretofore-unmatched degree.³⁸ After all, they were numerous, their powers broad, and their efficiencies unprecedented. They could respond quickly and aggressively even if—and perhaps especially when—two or all three constitutional branches were at loggerheads.³⁹

33. See Strauss, *The Place of Agencies*, *supra* note 25, at 576 (describing agencies engaging in rulemaking as “acting legislatively” and characterizing agency rules as “identical to statutes in their impact on all relevant legal actors”).

34. See, e.g., D. Roderick Kiewiet & Mathew D. McCubbins, *Parties, Committees, and Policymaking in the U.S. Congress: A Comment on the Role of Transaction Costs as Determinants of the Governance Structure of Political Institutions*, 145 *J. Institutional & Theoretical Econ.* 676, 677 (1989) (describing the high costs of securing and sustaining legislative majorities for any one vote); Kenneth A. Shepsle, *Representation and Governance: The Great Legislative Trade-Off*, 103 *Pol. Sci. Q.* 461, 464 (1988) (“[T]he process of passing a bill, much less formulating a coherent policy, is complicated, drawn-out, filled with distractions, and subjected to the whims of veto groups at multiple points.”).

35. See, e.g., *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973) (explaining how the FTC’s authority to promulgate rules improves and streamlines the Commission’s enforcement proceedings); Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 *Tul. L. Rev.* 877, 879 (1989) (emphasizing the linkage between agency rulemaking and enforcement).

36. See Mark H. Grunewald, *The NLRB’s First Rulemaking: An Exercise in Pragmatism*, 41 *Duke L.J.* 274, 275 (1991) (describing the NLRB’s largely unwavering “commitment to adjudication as its single method of policy formulation”).

37. See Strauss, *The Place of Agencies*, *supra* note 25, at 585, 615; see also Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 21–23 (1969) (explaining administrative agencies’ prosecutorial discretion, how it enables agencies to choose which cases to adjudicate, and how those choices help shape agency policy).

38. See Friedman, *supra* note 1, at 170 (characterizing the New Deal administrative state as a “Leviathan”); Skowronek, *supra* note 1, at 4 (documenting the expansion of federal power associated with the rise of administrative agencies).

39. William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (2003); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 *B.U. L. Rev.* 459, 485 (2008) (“When the parties are polarized and the White House and Congress are divided,

Of further note, these new agencies greatly enhanced the power of the presidency. Scholars and jurists are right to point out that agencies are creatures of all three constitutional branches.⁴⁰ Congress, the judiciary, and the President each continues to wield considerable power over agencies.⁴¹ But, at least with respect to executive agencies,⁴² the President is clearly in the driver's seat. The President directs the administrative agenda through a variety of informal and formal mechanisms,⁴³ including through the Appointments and Removal Powers.⁴⁴ These powers allow the President to choose agency leaders who share her ideological and policy affinities, and to fire or otherwise sanction those whose efforts prove unsatisfactory.⁴⁵ Thus, whereas the Framers

Presidents have strong incentives to pursue unilateral policymaking through loyal appointees.”); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2248 (2001) (describing the utility of administrative policymaking in times of divided, obstructionist constitutional government); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 *Geo. Wash. L. Rev.* 1293, 1322–23 (2012) (describing legislative gridlock as often prompting greater reliance on the policymaking authority of administrative agencies).

40. David S. Rubenstein, “Relative Checks”: Towards Optimal Control of Administrative Power, 51 *Wm. & Mary L. Rev.* 2169 (2010); Strauss, *The Place of Agencies*, *supra* note 25; see also *Mistretta v. United States*, 488 U.S. 361, 380–411 (1989) (describing and affirming the role played by Congress, President, and courts in overseeing and sometimes directing administrative agencies).

41. See Louis L. Jaffe, *Judicial Control of Administrative Action* 320–27 (1965) (emphasizing judicial review as a check on administrative officials); Jack M. Beermann, *Congressional Administration*, 43 *San Diego L. Rev.* 61, 103 (2006) [hereinafter Beermann, *Administration*] (describing judicial and congressional influence over administrative officials); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 *Am. J. Pol. Sci.* 165 (1984) (describing congressional oversight of administrative actors); Barry Weingast & Mark Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC, Regulation*, May/June 1982, at 33, 33–34 (discussing congressional monitoring of agency activities).

42. See *infra* notes 45, 87, 102–103 and accompanying text (discussing the special case of independent agencies).

43. See David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *Geo. Wash. L. Rev.* 1095 (2008) (describing presidential control over administrative officials); Kagan, *supra* note 39, at 2284–2303 (describing and often endorsing various forms of presidential control over administrative agencies); Peter L. Strauss, *Overseer, or “The Decider”?*—The President in Administrative Law, 75 *Geo. Wash. L. Rev.* 696, 715–38 (2007) (providing a comprehensive overview of presidential oversight of agencies and agency officials).

44. U.S. Const. art. II, § 2.

45. See *Morrison v. Olson*, 487 U.S. 654, 706–10 (1988) (Scalia, J., dissenting) (emphasizing the importance of presidential Removal Power). Obviously, the President's control is attenuated in the case of independent agencies, whose leaders serve fixed, staggered terms and may be removed only for cause. *Id.* But as recent scholarship and judicial thinking suggest, the “independence” of independent agencies can be overstated. See *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3170–73 (2010) (Breyer, J., dissenting) (describing forms of presidential control over ostensibly independent agencies); Kirti

considered Congress the most dangerous branch,⁴⁶ the emergence of modern administrative agencies answerable to the President signaled that the Executive was now the constitutional institution to reckon with.⁴⁷

II. THE ADMINISTRATIVE ERA

This Part explores a similar clash between power and constraint—this time on the administrative rather than constitutional stage. Part I began with the Framers coming to terms with the revolution that they fought hard to realize—and then labored to contain. Part II commences at the dawn of the modern Administrative Era. Just like the Framers, the progenitors of the modern administrative state—admittedly, a multigenerational and more haphazard undertaking—had to come to terms with

Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769, 772–73 (2013) (explaining that the difference between “independent” and “executive” agencies is often exaggerated); Devins & Lewis, *supra* note 39, at 491–92 (contending that presidential control over independent agencies is strong notwithstanding limited Removal Power because presidents can and do appoint especially loyal and partisan commissioners to those bodies); Aziz Z. Huq, *Removal as a Political Question*, 65 *Stan. L. Rev.* 1, 26–32 (2013) (contending that the Removal Power is only one of many powers that presidents can use to influence agency leaders).

46. See *The Federalist* No. 48, *supra* note 10, at 309 (James Madison) (“The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”); *The Federalist* No. 49, *supra* note 10, at 315–36 (James Madison) (“[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 *Va. L. Rev.* 631, 639 (1999) (“The Framers assumed that Congress would be the most powerful, and most feared, branch of the national government.”).

47. See Bruce Ackerman, *The Decline and Fall of the American Republic* 15 (2010) [hereinafter *Ackerman, Decline and Fall*] (“[O]ver the course of two centuries, the most dangerous branch has turned out to be the presidency.”); Peter Shane, *Madison’s Nightmare: How Executive Power Threatens American Democracy* 3 (2009) (describing the “gathering concentration of power in the hands of the federal executive” as a major threat to the constitutional system of checks and balances); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1816–20 (1996) (emphasizing the increasing power of the Executive Branch); Greene, *supra* note 25, at 125 (suggesting that with the advent of the administrative state, the “framers’ factual assumptions [regarding which branch is the most dangerous] have been displaced” and insisting that “[n]ow, it is the President whose power has expanded and who therefore needs to be checked”); Jonathan Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 *Yale L.J.* 2416, 2418 (2006) [hereinafter *Macey, Executive Branch Usurpation*] (describing the increasing concentration of federal power in the Executive Branch); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 *Emory L.J.* 423, 428–29 (2009) [hereinafter *Metzger, Internal and External Separation of Powers*] (characterizing as widespread the belief that the “greatest threat of aggrandized power today lies in the broad delegations of power to the Executive Branch”); see also Posner, *supra* note 29, at 960 (“[A]dministrative agencies . . . are under far greater control by the President than by Congress.”).

this supercharged (and thus potentially abusive) state apparatus that they spawned. In some respects, these administrative architects had the more difficult task: to not only constrain but also to legitimate the exercise of power that lacked the imprimatur of formal constitutional ratification (and to do so after the administrative leviathan was already loose).

Part II.A captures the concern that the emergence of the modern administrative state concentrated too much state power in the hands of the appointed officials running government agencies. It is my contention that those so concerned fashioned what amounted to a system of subconstitutional checks and balances. In effect, they fashioned a new separation of powers, elevating civil servants and members of the general public and furnishing them with the resources to challenge and constrain agency leaders.⁴⁸

Part II.B then shows how the separating and checking of administrative power is about more than simply preventing abuse. Administrative separation of powers has an affirmative component as well: the legitimization of administrative power. This section explains the legitimating function of the tripartite administrative structure along three dimensions: fidelity to the normative values widely associated with public administration; fidelity to the Framers' institutional design and to the dispositional characteristics of the three great constitutional branches; and fidelity to constitutional doctrine, as evidenced by the Court's seemingly implicit endorsement of administrative separation of powers.

Combined, these two sections depict the first renewal and refashioning of the Framers' tripartite scheme, a renewal and refashioning that bespeaks an enduring, evolving commitment to separation of powers that constrains and legitimates state power even as that power shifts away from the constitutional branches.

By way of conclusion to this Part, Part II.C considers separation of powers' durability amid the twentieth-century turn to a more activist, welfare state.

A. *The Rise of Secondary, Administrative Separation of Powers: Administrative Law's Refashioned Tripartite Scheme*

Not all were pleased with an unencumbered federal administrative juggernaut. For many, their displeasure was little more than sour grapes.

48. For ease of narrative, I refer here to administrative lawyers as if they were a coherent group, envisioning and executing a master plan to reaffirm and refashion separation of powers at the subconstitutional level. This is a highly stylized presentation. In truth and as will be discussed below, different groups, working across several decades, pieced together an edifice of constraint. See *infra* text accompanying note 58. With the benefit of hindsight and a 30,000-foot perch, that patchwork edifice resembles the Framers' intentional scheme.

They opposed what the agencies were doing—namely, aggressively regulating the American political economy in ways that interfered with extant business practices.⁴⁹ These opponents of the administrative state prized the languidness of the tripartite constitutional system;⁵⁰ they did so not necessarily because they were devotees of “the finely wrought procedure that the Framers designed”⁵¹ but because a relatively inert federal government furthered their own interests.⁵²

Others expressed more principled reservations.⁵³ Even if trying to govern across the three constitutional branches was stultifying, powerful administrative agencies presented the converse problem.⁵⁴ Regardless what these critics thought of the policies agencies promoted, they feared an unconstrained vehicle of government intervention,⁵⁵ largely procedurally unfettered and potentially politically intemperate—capable of, among other things, unabashedly championing the interests of the

49. See Kenneth Finegold & Theda Skocpol, *State and Party in America's New Deal* 138 (1995) (discussing business leaders' opposition to New Deal regulatory initiatives).

50. See sources cited *supra* note 28.

51. *Clinton v. City of New York*, 524 U.S. 417, 440 (1998) (internal quotation marks omitted) (describing the Constitution's bicameralism and presentment requirements).

52. See Kim Phillips-Fein, *Invisible Hands: The Businessmen's Crusade Against the New Deal* 9 (2010) (“Many of [the New Deal administrative] programs were measures that America's business class had resisted for a generation The employer's paradise had been lost.”).

53. See, e.g., Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & Liberty 491, 495–503, 515 (2008) (explaining that the modern administrative state reflects the “excessive scope of government action in what was once a nation of limited government”); Lawson, *supra* note 9, at 1231 (“The post–New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.” (footnote omitted)).

54. Harold H. Bruff, *Presidential Power and Administrative Lawmaking*, 88 Yale L.J. 451, 451 (1979) (“The increasing sprawl of the federal agencies has challenged the effectiveness of the checks and balances designed by the Constitution.”).

55. See Brownlow Comm., *Report of the President's Committee on Administrative Management*, in *Basic Documents of American Public Administration: 1776–1950*, at 110 (Frederick C. Mosher ed., 1976) (recommending the adoption of stronger administrative procedures to render administrative governance more accountable); Robert M. Cooper, *Administrative Justice and the Role of Discretion*, 47 Yale L.J. 577, 577 (1938) (characterizing critics as framing their concerns over administrative agencies in terms of “tyranny” and “despotism”); Lawson, *supra* note 9, at 1231 (describing the administrative state as bringing about the “[d]eath” of limited government and separation of powers); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (“The administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today's vast and varied federal bureaucracy and the authority administrative agencies now hold The administrative state with its reams of regulations would leave them rubbing their eyes.” (quoting *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3155–56 (2010); *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting))) (internal quotation marks omitted).

incumbent Administration.⁵⁶ The discomfort of these two, sometimes overlapping, constituencies helped fuel the development of administrative law.

Administrative law, at root, is the process by which otherwise-unencumbered agency officials are legally and politically constrained in an effort to prevent abuse and to confer legitimacy on the power that is exercised. It is how both rational and accountable administration is promoted.⁵⁷ Critical to the engendering of these constraints has been the gradual and admittedly somewhat haphazard construction of a secondary, administrative separation of powers. I emphasize *gradual* and *haphazard* for a reason: The original architects of the modern administrative state left it to future generations to cobble together clusters of constraints that, only over time and somewhat serendipitously,⁵⁸ began to function in much the same way as did the Framers' tripartite scheme.⁵⁹

* * *

Most scholars focus on how the three constitutional branches directly intervene in the activities of administrative agencies.⁶⁰ They do so for good reason. Congress prescribes the procedural and substantive

56. Mashaw, *Administrative Constitution*, supra note 1, at 288 (“[A]gencies’ combination of legislative, executive, and judicial functions struck many as dangerously aggrandizing executive power and creating the potential for bias and prejudice in administrative determinations.”); see also Stewart, supra note 4, at 1671–88, 1712–13 (emphasizing the importance of ensuring heterogeneous participation in administrative governance). But see infra note 70 and accompanying text (acknowledging that administrative power consolidated in other hands—such as in civil servants’—would be similarly problematic).

57. This is true even with respect to eighteenth- and nineteenth-century administrative governance. See Mashaw, *Administrative Constitution*, supra note 1, at 6, 8 (describing forms of administrative accountability that predate the rise of modern administrative law).

58. See supra note 48; see also infra note 115 (acknowledging early civil-service reform aims seemingly unrelated to insulating rank-and-file government workers from undue political influence).

59. Perhaps this patchwork origin story—so different from the constitutional framing—helps explain why administrative separation of powers has been underappreciated for so long.

60. See, e.g., Greene, supra note 25, at 184–95; Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 *J.L. Econ. & Org.* 93 (1992) [hereinafter Macey, *Organizational Design*]; McCubbins & Schwartz, supra note 41, at 165–66; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431, 434, 481 (1989); Strauss, *The Place of Agencies*, supra note 25, at 640, 648–52.

requirements for administrative agencies,⁶¹ appropriates or withholds funds,⁶² confirms or rejects presidential appointees,⁶³ and exercises oversight via hearings and investigations.⁶⁴ And, of course, the judiciary determines agency compliance with constitutional and statutory requirements.⁶⁵ One might think of these interventions from “above”—that is, from constitutional institutions—as akin to the various Olympian gods intervening in the lives of the mere mortals of ancient Greece.

But just as the Greek gods were a fickle, easily distracted lot, so too are the constitutional interveners. There is, after all, a reason why Congress signed off on an expansive administrative state: The sheer complexity and diversity of federal responsibilities in modern times is often too much for the legislators, by themselves, to manage on a day-to-day basis. To be sure, Congress hasn’t completely abandoned its direct oversight responsibilities. But because congressional oversight takes considerable effort,⁶⁶ focuses principally on highly salient matters, and is often realistic only in periods of divided government,⁶⁷ the most durable, consistent checks on agency heads do not necessarily come from “above.”⁶⁸ Instead, the durable, consistent checks operate on the ground.

61. See Macey, *Organizational Design*, supra note 60; McCubbins, Noll & Weingast supra note 60.

62. See Kate Stith, *Congress’ Power of the Purse*, 97 *Yale L.J.* 1343, 1350–51 (1988).

63. U.S. Const. art. II, § 2, cl. 2.

64. See Beermann, *Administration*, supra note 41, at 70, 121–30.

65. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); Strauss, *The Place of Agencies*, supra note 25, at 591–92.

66. See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 13 (1995). Eric Posner has charted the disproportionate growth of the Executive Branch relative to Congress. It seems likely that members of Congress and their staffs are increasingly hard pressed to keep up with all the activities undertaken by the much larger Executive Branch. See Eric Posner, *Imbalance of Power*, EricPosner.com (Feb. 7, 2014), <http://ericposner.com/imbalance-of-power/> (on file with the *Columbia Law Review*) (showing that “the ratio of federal (civilian, non-post office) employees to legislative employees (Congress and its staff)” has increased from approximately ten to one in the early years of the New Deal to nearly forty-four to one in 2010).

67. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *Yale L.J.* 2314, 2322, 2342 (2006) (suggesting congressional checks on the Executive “work in eras of divided government, but . . . fail[] to control [executive] power the rest of the time” and emphasizing in particular that congressional investigations work only if the presidency and Congress are controlled by different parties); see also supra note 25.

68. See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. Rev.* 1559, 1562 (2007) (recommending intra-executive legal constraints in light of the “inherent inadequacies of the courts and Congress as external checks on the President”); Metzger, *Internal and External Separation of Powers*, supra note 47, at 437–40 (explaining the comparative benefits of intra-executive constraints given the limited capacity of Congress and the courts to check executive

Spawned, nurtured, and sustained by Congress and the judiciary, these subconstitutional, rivalrous counterweights constrain the political leadership atop administrative agencies in ways more reliable and immediate than anything the legislature or courts could regularly do.

The first subconstitutional counterweight is the professional, politically insulated civil service. The second counterweight comes from civil society. Combined, these counterweights are the guardians of more than just what we think of as everyday administrative law. They are also the guardians of second-generation constitutional law and of the normative vision of constrained, rational, rivalrous, and republican government that undergirds it.

This section begins by explaining, briefly, why agency leaders need to be constrained.⁶⁹ It then explores how Congress and the courts emboldened and expanded what was then the nascent, fledgling federal civil service. Specifically, Congress and the courts broadened the protections government workers enjoyed and sharpened the tools those workers could use to check presidentially appointed agency leaders potentially indifferent, if not hostile, to statutory directives and apt to prioritize partisan interests. Next, this section shows how Congress and the courts also deputized civil society, empowering members of the general public to hold ambitious agency heads (and, of course, obstinate civil servants) legally and politically accountable. These two counterweights, when placed alongside agency leaders, constitute a secondary, administrative system of checks and balances. It is a system that, once again, in many ways carries forward and breathes new life into the Framers' normative, constitutional, and functional commitment to limited, encumbered government. (It will be the work of the following section to establish administrative separation of powers' bona fides as an instrument of administrative legitimacy.)

Four notes before proceeding. First, this section generally depicts agency leaders as dangerously political, civil servants as upstanding and capable, and members of civil society as diverse and vigilant. Of course, these parties will not always act in the ways presently characterized. But I aim to capture a persistent fear and an enduring hope: a fear of executive abuse and a hope of bureaucratic and public constraint. (To be sure, a similar disclaimer could be appended to the Constitution itself—about the fear that motivated constitutional encumbrances and about the hope

agencies); see also Macey, *Executive Branch Usurpation*, *supra* note 47, at 2419 (explaining that Congress and the courts “have taken on merely supporting roles” in administrative governance).

69. The same is true, of course, with respect to civil society and the civil service. Those two rivals must likewise be checked (otherwise they too might become too powerful and domineering). See *infra* notes 70–71 and accompanying text.

that institutional rivals would serve as reliable, forceful counterweights.) I recognize that at times agency leaders will not overreach. I also recognize that at other times civil servants will fail to act impartially, professionally, or boldly. In the former instances, administrative separation of powers will seem superfluous. And, in the latter, administrative separation of powers will seem inadequate. (Again, the same could be said with respect to the constitutional separation of powers. The Framers' tripartite scheme is unnecessary when none of the branches attempts to overreach; and it provides little security when the branches do not act vigilantly or rivalrously.)

Second, and related, some identify the unelected bureaucracy as the most dangerous component of administrative governance.⁷⁰ Others, fearing administrative capture, zero in on the undue influence wielded by particular segments of civil society.⁷¹ Those worried chiefly about the civil service or public participation will no doubt take umbrage at my presentation, which emphasizes the threat agency leaders pose (rather than details, Rashomon-style, the threat each of the administrative rivals poses).⁷² Nevertheless, they might still find reason to embrace administrative separation of powers: first as a truly triangular framework within which agency leaders likewise have the tools and incentives to prevent civil servants and members of the public from overreaching; and second (and more broadly) as a framework for understanding and addressing new governance regimes beyond the administrative state.

Third, in proffering my theory of administrative separation of powers, I am aided by the work of scholars such as Elizabeth Magill and

70. See, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive Theory: Presidential Power from Washington to Bush 17* (2008) (emphasizing the dangers associated with a powerful, unelected, and unaccountable federal bureaucracy); Theodore J. Lowi, *The End of Liberalism* 93–94 (1979) (questioning broad congressional delegations to undemocratic agency officials); see also Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 *Harv. J.L. & Pub. Pol'y* 219, 224 (1998) (expressing some concern with the rise of modern administrative governance insofar as it coincided with a “repudiat[ion of] the unitary executive” and the arrival of “headless fourth branch of government”).

71. For seminal discussions of agency capture, see, e.g., Marver H. Bernstein, *Regulating Business by Independent Commission* 7 (1955); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *Yale L.J.* 467, 508 (1952).

72. My focus on agency leaders is, importantly, not a random choice. It is my sense that agency leaders do pose a comparatively greater threat than either of their administrative rivals. Among other things, agency leaders possess far greater legal powers than do their rivals, and they might well work in tandem with the President, who has strong incentives and ample resources to control and shape administrative governance. See *supra* note 47 (describing presidential influence over administrative governance); Michaels, *Old and New Separation of Powers*, *supra* note 18 (emphasizing that the President can bolster the agency heads' position vis-à-vis their administrative rivals).

Adrian Vermeule,⁷³ Neal Katyal,⁷⁴ and Gillian Metzger,⁷⁵ who have put forward their own packages of institutional constraints on administrative power. Nevertheless, my tripartite scheme stands out as a framing device. It does so because the interplay among agency leaders, civil servants, and civil society is the common, *transsubstantive* denominator in administrative governance, with all three rivals empowered (and motivated) to participate in practically all matters spanning the entire domestic regulatory and public-benefits landscape. The same cannot be said about the other proposals, which do not apply as broadly, comprehensively, or regularly. For example, because Katyal focuses principally on internal separation of powers within national-security agencies,⁷⁶ his framing does not do much to incorporate core principles of domestic administrative law⁷⁷ or the broader universe of public participants (who are often excluded from the decisionmaking process in matters of national defense and foreign affairs).⁷⁸ Metzger, for her part, focuses primarily on the internal dynamics within any one of the constitutional branches and on the relationship between those intra-branch dynamics and the broader constitutional separation of powers.⁷⁹ Likewise, Magill and Vermeule zero in on various stakeholders within administrative agencies, including different professionals within the civil service itself.⁸⁰ Generally speaking, contributors to this literature typically emphasize either the disaggregation of power within administrative agencies⁸¹ or the power of civil society to check and enlighten monolithic, unitary agencies.⁸² My

73. Magill & Vermeule, *supra* note 7.

74. Katyal, *supra* note 67.

75. Metzger, *Internal and External Separation of Powers*, *supra* note 47, at 426, 430.

76. See Katyal, *supra* note 67, at 2324–27.

77. See, e.g., Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *Yale L.J.* 140, 221–24 (2009) (explaining that administrative law’s central safeguards do not operate as fully in areas of foreign affairs and national defense).

78. *Id.* But see Jack Goldsmith, *A Reply to Professor Katyal*, 126 *Harv. L. Rev. F.* 188, 191 (2013), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol126_goldsmith.pdf (contending that the public carefully scrutinizes executive activity in national-security domains).

79. Metzger, *Internal and External Separation of Powers*, *supra* note 47, at 428 (“The defining characteristic of internal separation of powers measures is that they . . . operat[e] within the confines of a single branch.”).

80. Magill & Vermeule, *supra* note 7.

81. See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 *Colum. L. Rev.* 759, 761–77, 779–81 (1981); Magill & Vermeule, *supra* note 7, at 1035; Strauss, *The Place of Agencies*, *supra* note 25, at 577–79.

82. See Ian Ayres & John Braithwaite, *Responsive Regulation* 57–60 (1992) (describing a tripartism that triangulates power among seemingly unitary agencies, firms, and public-interest groups); Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11*, at 209–10 (2012) (characterizing the “modern presidential synopticon” as civil society monitoring executive activity).

formulation of administrative separation of powers does both. It thus captures, as a descriptive matter, the intra-agency and external dimensions of rivalrous administrative design and—as I’ll discuss in the following section—confers normative and jurisprudential legitimacy on the administrative state.

Fourth, there are, of course, additional actors and institutions besides the three central administrative rivals capable of enriching and moderating administrative policy. International organizations, personnel within other federal agencies, state governments, and municipalities can push and pull on any one agency’s appointed leaders, civil servants, and public participants.⁸³ There is also the parallel and seemingly expanding universe of purely private regulation that serves as a competitive alternative to public administrative governance.⁸⁴ Nevertheless, I do not focus on this broader constellation of actors and institutions—and *do not stress a theory of administrative pluralism over administrative tripartism*—in part for the same reason I do not rely on others’ formulations of internal administrative checks and balances: These supplemental, potential rivals aren’t as legally salient or ever present as is the immediate, constant administrative trinity that operates within and across practically all of the federal domestic administrative domains. Additionally, many of these supplemental, potential rivals are apt to assert themselves just as forcefully on the constitutional principals—and yet we have little difficulty in cabining their involvement when we talk about constitutional separation of powers.⁸⁵ For these reasons (among others I’ll discuss in Part II.B), I’m comfortable distinguishing between the administrative mainstays and, say, part-timers, the latter of which are likely to participate only in select policy spaces, are likely to rely primarily on informal channels of influ-

83. Such additional potential rivals include states, see Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *Colum. L. Rev.* 459, 486–98 (2012); Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256 (2009); political parties, see Levinson & Pildes, *supra* note 25, at 2329–30; duplicative or overlapping delegations involving more than one federal agency, see Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 *Sup. Ct. Rev.* 201, 211–12, 214; Jason Marisam, *Duplicative Delegations*, 63 *Admin. L. Rev.* 181, 231–36 (2011); and inspectors general, see Paul C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* 2–4, 7–8 (1993).

84. See, e.g., Michael P. Vandenberg, *Private Environmental Governance*, 99 *Cornell L. Rev.* 129 (2013).

85. But see M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. Pa. L. Rev.* 603, 605–06 (2001) [hereinafter Magill, *Beyond Powers*] (deemphasizing the importance of the constitutional separation of powers and stressing instead that governmental power is shared and divided among a “large and diverse set of government decisionmakers”).

ence, or are likely to act indirectly—that is, through influencing one of the chief administrative rivals.⁸⁶

1. *The Agency Leadership.* — The President appoints agency leaders.⁸⁷ Appointees usually share the President’s ideological and programmatic commitments and can generally be relied on to promote the White House’s substantive agenda.⁸⁸ Appointees can also be expected to internalize the time pressures felt by a driven, term-limited President to enact her policy priorities quickly and efficiently.⁸⁹ Agency leaders who stray or fail to act expeditiously run the risk of being politically marginalized,⁹⁰ if not summarily fired.⁹¹

Given these pressures from the White House, executive agency heads have reason, occasionally if not regularly, to give short shrift to procedurally or substantively burdensome statutory directives⁹² and to

86. See, e.g., *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1101 (4th Cir. 1985) (describing state and local government agency officials filing comments in a federal rulemaking proceeding).

87. The President has more limited appointment power with respect to commissioners of independent agencies. See Huq, *supra* note 45, at 27–28 & n.144 (identifying temporally staggered appointments and “bipartisan requirements” as circumscribing presidential control over the heads of independent agencies).

88. See David Fontana, *The Second American Revolution in the Separation of Powers*, 87 *Tex. L. Rev.* 1409, 1414–15 (2009) (describing “substantial partisan and ideological homogeneity” among Executive Branch leaders); see also Ackerman, *Decline and Fall*, *supra* note 47, at 33 (emphasizing the President’s reliance on the loyalty of her appointed agency heads).

89. See Joel D. Aberbach & Bert A. Rockman, *Mandates or Mandarins? Control and Discretion in the Modern Administrative State*, 48 *Pub. Admin. Rev.* 606, 606 (1988) [hereinafter *Aberbach & Rockman, Mandates or Mandarins*] (characterizing presidential administrations as driven to advance their administrative agendas); Barron, *supra* note 43, at 1121–22; Terry M. Moe, *The Politicized Presidency*, in *The New Direction in American Politics* 235, 244–46 (John E. Chubb & Paul E. Peterson eds., 1985) [hereinafter *Moe, Politicized Presidency*]; Anne Joseph O’Connell, *Ctr. for Am. Progress, Cleaning Up and Launching Ahead 6–10* (2009), available at http://cdn.americanprogress.org/wp-content/uploads/issues/2009/01/pdf/regulatory_agenda.pdf (on file with the *Columbia Law Review*) (characterizing new presidential administrations as intent on shaping and controlling the administrative agenda); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263, 318–19 (2006) (remarking on the pressure agency heads feel to champion the President’s agenda). Increased reliance on the Office of Management and Budget and on White House aides with agency oversight responsibilities further helps the President direct, monitor, and sanction agency leaders.

90. See Kagan, *supra* note 39, at 2299–2303.

91. Again, this is not true with respect to agency leaders protected against at-will termination. See *supra* note 45.

92. See Kagan, *supra* note 39, at 2349 (“Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes.”); Katyal, *supra* note 67, at 2317 (“Executives of all stripes offer the same rationale for forgoing bureaucracy—executive energy and dispatch.”); Heidi Kitrosser, *The Accountable Executive*, 93 *Minn. L. Rev.* 1741, 1743–44 (2009) (suggesting that a unitary executive model of governance is

bypass those employees who seek to enforce those directives or who otherwise question the President's agenda.⁹³ After all, compliance with such directives takes time.⁹⁴ It provides would-be detractors with notice, information, and access.⁹⁵ It restricts the agency leaders' programmatic discretion.⁹⁶ And it requires the expenditure of resources that could otherwise be put to more "productive" use elsewhere.⁹⁷

Thus there is reason to expect agency leaders to promote their boss's initiatives (and cater to the specific political constituencies that elected the President and sustain her in office)⁹⁸ even at the expense, perhaps, of rational and more democratically inclusive public administration.⁹⁹ And there is, in turn, reason for those concerned about such

often at odds with a commitment to open, deliberative public administration); James Q. Wilson, *Reinventing Public Administration*, 27 *Pol. Sci. & Pol.* 667, 672 (1994) (finding that agency heads would prefer to be less encumbered by "red tape"). But see generally Elizabeth Magill, *Agency Self-Regulation*, 77 *Geo. Wash. L. Rev.* 859 (2009) (noting occasions where the President and agency heads impose constraints on themselves).

93. See Aberbach & Rockman, *Mandates or Mandarins*, *supra* note 89, at 606–08 (contending that agency leaders assert and preserve their power by centralizing and politicizing administrative authority).

94. See Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 *U. Chi. L. Rev.* 443, 463–64 (1990) (noting that the rulemaking process seems "endless"); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 *Duke L.J.* 1385, 1410–26 (1992) [hereinafter McGarity, *Deossifying Rulemaking*] (emphasizing how laborious rulemaking can be).

95. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 *Duke L.J.* 1321, 1331, 1355 (2010) (arguing that interested parties can often inundate agencies with extensive comment submissions); cf. E. Donald Elliot, *Re-Inventing Rulemaking*, 41 *Duke L.J.* 1490, 1492–93 (1992) (suggesting that agency heads prefer quicker, more informal means of public outreach over those associated with the notice-and-comment rulemaking process).

96. See *Massachusetts v. EPA*, 549 U.S. 497 (2007); see also Terry M. Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* 267, 277–79 (John E. Chubb & Paul E. Peterson eds., 1989) (explaining how and why Congress imposes stringent procedural requirements on agencies that have the effect of limiting those agencies' discretion).

97. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 277–79 (1970) (Black, J., dissenting) (suggesting that the ratcheting up of administrative procedural safeguards associated with welfare hearings could divert funds away from tangible benefits programs); Kagan, *supra* note 39, at 2339–41.

98. David E. Lewis, *The Politics of Presidential Appointments* (2008) (describing the political nature of presidential appointments).

99. Cf. Ackerman, *Decline and Fall*, *supra* note 47, at 37 (describing "politicized efforts to implement the president's 'mandate'" and noting that those efforts shift the "balance of policy making away from agency expertise" and run the potential risk of agency "lawlessness"); Moe, *Politicized Presidency*, *supra* note 89 (emphasizing that presidents value competence but that they want politically "responsive competence," not "neutral competence"); Richard P. Nathan, *Institutional Change Under Reagan*, in

unilateral exercises by agency leaders to identify and empower administrative counterweights.¹⁰⁰

* * *

My account focuses principally on executive agencies, whose leaders serve at the pleasure of a powerful, and potentially power-aggrandizing, president. In these respects, I draw upon the work of Bruce Ackerman, David Barron, and Elena Kagan, among others, who capture presidential efforts to more fully control the administrative state.¹⁰¹ Yet the underlying analysis is not limited to executive agencies and domineering presidents. A system of administrative checks and balances is also necessary when it comes to independent agencies. Though the heads of independent agencies are at least in some respects more insulated from White House influence,¹⁰² they still have the capacity and any number of incentives to abuse the authority they've been granted.¹⁰³ Thus, a subconstitutional regime of institutional counterweights is necessary in that sphere, too.¹⁰⁴

2. *The Civil Service.* — The first administrative counterweight is the professional civil service.¹⁰⁵ Civil servants are politically insulated. They

Perspectives on the Reagan Years 121, 130–33 (John L. Palmer ed., 1986) (contending that it is rational for presidents to seek to politicize the bureaucracy).

100. Again, unilateral actions taken by civil servants would raise similar concerns—and would likewise warrant interventions by the other two administrative rivals.

101. Ackerman, *Decline and Fall*, supra note 47; Barron, supra note 43, at 1128; Kagan, supra note 39. To be clear, there are differences of opinion among these scholars regarding the virtues of greater presidential control.

102. See supra note 45 and accompanying text.

103. See, e.g., *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591–92 (D.C. Cir. 1970) (describing the FTC chairperson as having acted improperly on several occasions); Matea Gold, *FEC Engulfed in Power Struggle over Staff Independence*, Wash. Post (July 13, 2013), http://www.washingtonpost.com/politics/fec-engulfed-in-power-struggle-over-staff-independence/2013/07/13/72134cae-e8d5-11e2-a301-ea5a8116d211_story.html (on file with the *Columbia Law Review*) (characterizing FEC commissioners as unduly interfering with the work of the Commission's career employees).

104. It is beyond the scope of this project to consider whether an administrative separation of powers regime surrounding independent agencies is as constitutionally or normatively sound as the one that attaches to executive agencies. It is, however, a question I take up elsewhere. See Michaels, *Old and New Separation of Powers*, supra note 18.

105. For discussions of the civil service as a check on agency leaders, see generally Katyal, supra note 67; Metzger, *Internal and External Separation of Powers*, supra note 47; Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 *Wake Forest L. Rev.* 463 (2012). For these purposes, I define the civil service to include those who are formally members of the federal civil service as well as other career staffers who are afforded considerable job security such that they cannot be fired or demoted by agency leaders absent a for-cause showing. See Kevin M. Stack, *Agency Independence After PCAOB*, 32 *Cardozo L. Rev.* 2391, 2398–99 (2011). Again, I recognize that there are other strategically placed officials within the Executive Branch

often spend their entire careers as government employees. And they are well positioned to push back on any tendency agency leaders might have to skirt laws and promote hyperpartisan interests.

Three factors explain the civil service's potential effectiveness as an institutional rival. First, as suggested, its members are capable of speaking truth to power without fear of serious reprisal.¹⁰⁶ Unlike those laboring under the old, premodern Spoils System—a system that often required government workers to internalize the political agenda and short-term thinking of their patrons¹⁰⁷—civil servants enjoy categorical protections against politically motivated employment actions.¹⁰⁸ These insulated, effectively tenured government workers¹⁰⁹ can, if they so choose,¹¹⁰ help insist that the political leadership act fairly and rationally and comply with congressionally and judicially imposed mandates.

Second, agency heads must take civil servants seriously. Appointed leaders in all federal domestic agencies necessarily rely on civil servants to help develop and carry out the presidential administration's agenda.¹¹¹

who from time to time help to constrain agency leaders. See, e.g., Light, *supra* note 83 (describing the role played by inspectors general).

106. Civil-service laws are “designed to protect career employees against improper political influences or personal favoritism” as well as from reprisal for “speak[ing] out about government wrongdoing.” Katyal, *supra* note 67, at 2331 (quoting in part from a Senate report published in conjunction with the Civil Service Reform Act of 1978).

107. See S. Rep. No. 47-576, at iv (1882) (explaining the need to replace the Spoils System in part because it engendered an employment regime where “official positions are bought and sold, and the price is political servitude”). See generally Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement 1865–1883* (1961); Carl Joachim Friedrich, *The Rise and Decline of the Spoils Tradition*, 189 *Annals Am. Acad. Pol. & Soc. Sci.* 10, 10–13 (1937).

108. See, e.g., 5 U.S.C. § 2301(b)(8)(A) (2012) (“Employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes”); *id.* § 2302(b)(9)(D) (protecting civil servants from being sanctioned, demoted, or fired for “refusing to obey an order that would require [them] to violate a law”); see also *Bush v. Lucas*, 462 U.S. 367, 381–84 & n.18 (1983) (describing federal law as protecting civil servants from being assigned highly politicized work responsibilities); Patricia Wallace Ingraham, *Building Bridges over Troubled Waters: Merit as a Guide*, 66 *Pub. Admin. Rev.* 486, 490 (2006) (“The career civil service, whose legitimacy hinges on its members’ competence and expertise . . . permits questioning political directives if they are questionable or unsound.”).

109. *Richardson v. McKnight*, 521 U.S. 399, 421 (1997) (Scalia, J., dissenting) (describing tenured civil servants).

110. See *infra* notes 118–130 and accompanying text (describing the civil service’s general commitment to nonpartisan professionalism).

111. See Magill & Vermeule, *supra* note 7, at 1037–38 (emphasizing the significant role civil servants play in rulemaking and adjudications); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *Cornell L. Rev.* 549, 579 (2002) (underscoring the degree to which agencies rely on career civil servants whose expertise shapes most administrative decisions).

On their own, agency leaders simply are not numerous enough or, in many cases, experienced or sophisticated enough to conduct research or promulgate rules.¹¹² That is why agency heads delegate, among other things, “the drafting, analysis, and policy design to career civil servants.”¹¹³ In addition, the coterie of agency leaders cannot actually administer programs on the ground, where, once again, heavily relied-upon civil servants have some say over how policy is actually implemented and enforced.¹¹⁴

Coinciding with the rise of the administrative state, the politically insulated civil service expanded relative to the overall government workforce. Around the time Congress created what many view as the first modern administrative agency, the Interstate Commerce Commission, in 1887, civil servants represented little more than ten percent of the federal workforce.¹¹⁵ (And even this ten percent didn’t enjoy meaningful job

112. See David E. Lewis & Jennifer L. Selin, *Admin. Conference of the U.S., Sourcebook of United States Executive Agencies* 68–69 (2012), available at http://permanent.access.gpo.gov/gpo37402/Sourcebook-2012-Final_12-Dec_Online.pdf (on file with the *Columbia Law Review*) (documenting the high ratio of civil servants to political appointees in most federal agencies); Lewis, *supra* note 98, at 195–97 (finding that career officials run administrative programs more effectively than do presidential appointees); Strauss, *The Place of Agencies*, *supra* note 25, at 586 (“The President and a few hundred political appointees are at the apex of an enormous bureaucracy whose members enjoy tenure in their jobs, are subject to the constraints of statutes whose history and provisions they know in detail, and often have strong views of the public good in the field in which they work.”); David M. Cohen, *Amateur Government: When Political Appointees Manage the Federal Bureaucracy* 1–4 (Brookings Inst., Ctr. for Pub. Mgmt. Working Paper No. 96-1, 1996), available at <http://www.brookings.edu/~media/research/files/papers/1996/2/bureaucracy%20cohen/amateur.pdf> (on file with the *Columbia Law Review*) (characterizing the difficulties political appointees encounter and create when directing agency programs).

113. Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 *I/S: J.L. & Pol’y for Info. Soc’y* 33, 36 (2005).

114. See, e.g., Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* 13–18 (1980); Norma M. Riccucci, *How Management Matters: Street-Level Bureaucrats and Welfare Reform* 59–76 (2005) (emphasizing the central role played by rank-and-file workers in the administration of welfare programs); Tersh Boasberg & Laurence I. Hewes III, *The Washington Beat: Federal Grants and Due Process*, 6 *Urb. Law.* 399, 404 (1974) (“The discretion of administrative officials is practically boundless to select among the mass of potential grantees.”); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *Yale L.J.* 1245, 1252 (1965) (“[W]elfare administrators are permitted broad areas of discretion in which they make the law by administrative interpretations . . .”).

115. Lewis & Selin, *supra* note 112, at 46, 66–67. The Pendleton Act, though groundbreaking in its turn away from the patronage system, initiated only modest reforms. See Skowronek, *supra* note 1, at 64–80 (explaining the limited impact of the Pendleton Act); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *Yale L.J.* 1362, 1390–91 (2010) (“The Pendleton Act was both unsurprising and limited in its basic principles.”). Perhaps this is because the administrative state at that

security.¹¹⁶) By the end of the Truman Presidency—at which point the administrative state was in full bloom—civil servants constituted over ninety percent of the overall workforce. And practically all of these civil servants were protected against at-will termination.¹¹⁷

Third, the independent and much relied-upon civil service¹¹⁸ has institutional, cultural, and legal incentives to insist that agency leaders follow the law, embrace prevailing scientific understandings, and refrain from partisan excesses. That is to say, these professional civil servants regularly do have reason to “choose” to hold agency leaders accountable.¹¹⁹

Buttressing the expansion of civil-service protections are whistleblower laws that allow (and encourage) agency employees to report misdeeds directly to Congress¹²⁰ and antipartisan laws such as the 1939 Hatch Act. The Hatch Act insists that federal employees refrain from partisan political activities.¹²¹ This prohibition on politicking helps

time was still inchoate and because the Act’s sponsors prioritized other aims over professionalizing and insulating the government workforce. See Ronald N. Johnson & Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy: The Economics and Politics of Institutional Change* (1994) [hereinafter Johnson & Libecap, *Federal Civil Service*]; Skowronek, *supra* note 1, at 47–84; Sean M. Theriault, *Patronage, the Pendleton Act, and the Power of the People*, 65 *J. Pol.* 50, 60–65 (2003).

116. See Johnson & Libecap, *Federal Civil Service*, *supra* note 115, at 51, 68 (noting that the Pendleton Act did not protect members of the newly classified service from at-will termination).

117. President Harry S. Truman, Address at the 70th Anniversary Meeting of the National Civil Service League (May 2, 1952), available at <http://www.trumanlibrary.org/publicpapers/index.php?pid=1284&st=&st1> (on file with the *Columbia Law Review*); see also Lewis & Selin, *supra* note 112, at 69 fig.1 (showing that, by the end of the Truman Presidency, over ninety percent of federal civilian employees were classified as civil servants). See generally Skowronek, *supra* note 1, at 67, 83–84 (suggesting that the true significance of the nineteenth-century civil-service initiatives were in laying the groundwork for later generations of good-government reforms and in “recasting . . . the foundations of national institutional power”).

118. See Strauss, *The Place of Agencies*, *supra* note 25, at 586 (“[T]he bureaucracy constitutes an independent force . . . and its cooperation must be won to achieve any desired outcome.”).

119. See Harold Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* 408 (2006) [hereinafter Bruff, *Balance of Forces*] (considering civil servants’ respect for legal constraints as bolstering the “rule of law”); Metzger, *Internal and External Separation of Powers*, *supra* note 47, at 445 (remarking that civil servants “are committed to enforcing the governing statutory regime that sets out the parameters of their authority and regulatory responsibilities”); see also *infra* notes 126–130 and accompanying text.

120. See Louis Fisher, Cong. Research Serv., RL33215, *National Security Whistleblowers 3–9* (2005) (describing whistleblower laws covering employees of federal agencies); Myron Peretz Glazer & Penina Migdal Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* 63–65 (1989).

121. Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified in scattered sections of 5 U.S.C.).

ensure that “employment and advancement in the Government service [do] not depend on political performance.”¹²² It also reduces pressure to “perform political chores in order to curry favor with their superiors.”¹²³ In short, the bar on civil servants’ partisan activities furthers “the impartial execution of laws.”¹²⁴

Accordingly, civil servants have broad responsibilities and the legal authority and institutional inclination to resist and redirect agency leaders’ intent on shortchanging procedures, ignoring or downplaying congressional directives or scientific findings, or championing unvarnished partisan causes.¹²⁵ Civil servants’ loyalties generally lie with their professional commitments (as trained biologists, lawyers, engineers, etc.), the programs they advance, and the organizations they serve.¹²⁶ And their means of advancement and validation come largely from within the civil service itself, where expertise is prized and political activism is discouraged.¹²⁷

This set of understandings is supported by the likes of David Lewis, who finds that civil servants across all agencies “often feel bound by legal, moral, or professional norms to certain courses of action and these

122. U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 566 (1973).

123. *Id.*

124. *Id.* at 565.

125. Another basis for civil servants’ relative independence from agency leaders stems from the career workforce receiving directions not just from those presidential appointees but also from the enabling Congress that gave them their initial authority and from the current Congress that continues to fund their work. Civil servants’ responsiveness to multiple principals, even apart from their job security, limits the degree to which they would reflexively follow orders from agency heads. I thank Nick Parrillo for this point.

126. See, e.g., Daniel Carpenter, *The Forging of Bureaucratic Autonomy* 26–33 (2001) [hereinafter *Carpenter, Bureaucratic Autonomy*] (describing the importance of intra-agency and external professional networks to career civil servants); Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* 4–5 (2010) (describing FDA employees as insistent on scientific rigor even in the face of countervailing political pressure); Donald P. Moynihan & Sanjay K. Pandey, *The Role of Organizations in Fostering Public Service Motivation*, 67 *Pub. Admin. Rev.* 40 (2007) (characterizing government workers as highly committed to the project of public service); James L. Perry, *Bringing Society In: Toward a Theory of Public-Service Motivation*, 10 *J. Pub. Admin. Res. & Theory* 471 (2000) (emphasizing government workers’ interest in promoting their agencies’ programs in service of the “common good”).

127. See Hugh Hecl, *OMB and the Presidency—The Problem of “Neutral Competence,”* 38 *Pub. Int.* 80, 81–83, 93 (1975); Robert Maranto & Douglas Skelley, *Neutrality: An Enduring Principle of Federal Service*, 22 *Am. Rev. Pub. Admin.* 173, 183–84 (1992); see also Shane, *supra* note 47, at 170 (describing career agency personnel as being rewarded for the “quality of their work and their conformity to the ethical norms that prevail in the professional bureaucracy”).

courses of action may be at variance with the President's agenda,"¹²⁸ and of Harold Bruff, who contends that "[b]y training and inclination," civil servants "seek legal authority for their actions . . . [and thus] constitute an often unappreciated bulwark to the rule of law in its everyday application to the citizens."¹²⁹ After all, as Peter Strauss remarks, "Presidents come and go while the governing statutes, the bureaucrat's values, and the interactions he enjoys with fellow workers, remain more or less constant."¹³⁰

For all of these reasons, if a President's preferred position lacks scientific support or sound policy justifications, civil servants preparing the administrative record are unlikely to be easily pressured to gloss over contradictory findings.¹³¹ They'll be aided in their endeavors by the courts, which generally make sure that the civil servants' resistance is given its due. Indeed, various canonical administrative law doctrines emphasize the importance of administrative records¹³² and factual findings¹³³—much of which civil servants necessarily compile.¹³⁴ As Metzger

128. Lewis, *supra* note 98, at 30; cf. Charles T. Goodsell, *The Case for Bureaucracy* 88–89 (1983) (cataloging reports finding that career government workers readily embrace their professional and legal duties).

129. Bruff, *Balance of Forces*, *supra* note 119, at 408.

130. Strauss, *The Place of Agencies*, *supra* note 25, at 586.

131. See Magill & Vermeule, *supra* note 7, at 1037–38 (“The conflicts between political appointees and the ‘bureaucracy’—usually taken to refer to well-insulated-from-termination members of the professional civil service—are legion.”); Richard Simon & Janet Wilson, *EPA Staff Turned to Former Chief on Warming*, *L.A. Times* (Feb. 27, 2008), <http://articles.latimes.com/2008/feb/27/nation/na-waiver27> (on file with the *Columbia Law Review*) (chronicling career employees’ opposition to the politically appointed EPA Administrator after he “acted against the advice of his legal and scientific advisors” regarding global warming); see also U.S. Gov’t Accountability Office, *GAO-06-109, Food and Drug Administration: Decision Process to Deny Initial Application for Over-the-Counter Marketing of the Emergency Contraceptive Drug Plan B Was Unusual* 5–6 (2005), available at <http://www.gao.gov/new.items/d06109.pdf> (on file with the *Columbia Law Review*) (characterizing agency leaders as overruling the recommendations of career employees).

132. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (stressing the importance of developing “full administrative record[s]”); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977) (insisting on the existence of an “adequate [administrative] record” to ensure “meaningful [judicial] review”).

133. See, e.g., *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56–57 (1983) (invalidating an agency action as arbitrary and capricious because that agency failed to give due consideration to alternative policy approaches). See generally Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 *Sup. Ct. Rev.* 51, 52 (indicating that *Massachusetts v. EPA*, *Gonzales v. Oregon*, and *Hamdan v. Rumsfeld* all “override executive positions [that the Court] found untrustworthy, in the sense that executive expertise had been subordinated to politics”).

134. See *supra* note 111 and accompanying text.

observes, “Evidence that decisions were made over the objections of career staff and agency professionals often triggers more rigorous [judicial] review.”¹³⁵ Thus in these important respects, judicial review reinforces the role civil servants play in checking agency leaders.¹³⁶

Similarly, if the agency leaders are intent on ignoring or selectively following agency rules or congressional legislation, that intent might well be frustrated by civil servants on the ground.¹³⁷ Civil servants might push back in the context of public-benefits determinations as well as when they are tasked with enforcing regulatory policies.¹³⁸ Again, unlike the political leadership beholden to a particular presidential agenda, the civil servants are career servants of the State—generally understood to be animated by professional norms and legal commitments to fair administration and enforcement of the laws.

To be sure, this characterization of the civil service is a sanguine one. Civil servants might well be inept. They might, like their political bosses, be frustrated by burdensome congressional directives. They might be captured by regulated industry. Or they might seek to advance their own ideological interests.¹³⁹ But given the civil service’s internal norms

135. Metzger, *Internal and External Separation of Powers*, *supra* note 47, at 445.

136. See Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 *Harv. L. Rev.* 528, 560–63 (2006) (describing ways in which courts can encourage agencies to employ more formal administrative procedures). Sometimes, of course, the courts lessen their reliance on the civil service. Such efforts ought not be viewed as evidence of the weakening of administrative separation of powers *per se*. Rather, they should be understood as attempts to adjust and recalibrate the relative strength of the administrative rivals. See *infra* Part II.B.1; *infra* notes 235–236, 255 and accompanying text.

137. See sources cited *supra* note 114 and accompanying text.

138. Civil servants who lack such discretion to resist or modify unsound directives might sue, alleging that the orders issued by agency leaders conflict with what Congress has, by statute, commanded them to do. See *Crane v. Napolitano*, 920 F. Supp. 2d 724, 739–40 (N.D. Tex. 2013) (holding that ten immigration enforcement agents had standing to sue the Secretary of Homeland Security on the ground that her directive ordering the agents to refrain from enforcing certain immigration laws was at odds with those agents’ statutory responsibilities). See generally Alex Hemmer, Note, *Civil Servant Suits*, 124 *Yale L.J.* 758, 762 (2014) (“[C]ivil servant suits may represent one tool for ensuring executive compliance with the rule of law.”).

139. See Lewis, *supra* note 98, at 30–31 (recognizing that career employees might hold and express strong opinions in matters of policy or politics); Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 *Am. J. Pol. Sci.* 873, 874, 886 (2007) (noting the “heterogeneity of public service motivation among bureaucrats” and suggesting that those with a “stake” in policy are most likely to invest in developing expertise); Ronald N. Johnson & Gary D. Libecap, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 *Ariz. L. Rev.* 791, 820–21 (1995) (“Highly protected career bureaucrats . . . may also be motivated by partisan objectives, and these objectives can be inconsistent with the goals of elected officials.”); Lawrence

discouraging partisanship,¹⁴⁰ the federal statutory prohibitions on civil servants' participation in political activities,¹⁴¹ and the fact that even a politicized bureaucracy is unlikely to be homogeneously politicized (let alone to march in lock-step with the agendas of most presidential administrations, Republican and Democratic alike),¹⁴² this fear should not obscure the potentially effective, if imperfect, role these tenured government workers play in constraining and guiding administrative action and thus helping to preserve encumbered, heterogeneous government at the subconstitutional level.

3. *Civil Society*. — The second institutional check on the agency leadership comes from the public at large. These empowered and often highly motivated members of civil society use administrative procedures to educate and hold agency leaders (and civil servants) accountable, limiting opportunities for those officials to proceed arbitrarily, capriciously, or abusively.¹⁴³

Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 97–103 (1994); Stewart, *supra* note 4, at 1682–87.

140. See Heclo, *supra* note 127, at 81–83 (emphasizing the “neutral competence” of civil servants); Maranto & Skelley, *supra* note 127, at 183–84.

141. See *supra* notes 121–124 and accompanying text.

142. See Joel D. Aberbach & Bert A. Rockman, *In the Web of Politics: Three Decades of the U.S. Federal Executive 168* (2000) (characterizing federal civil servants as generally ideologically to the left of political appointees of both major parties); Marissa Martino Golden, *What Motivates Bureaucrats?* 166–68 (2000) (noting the ideological divergence between agency leaders and rank-and-file civil servants); Richard P. Nathan, *The Administrative Presidency* 7–12 (1983) (same); see also Carpenter, *Bureaucratic Autonomy*, *supra* note 126, at 353–67 (noting a similar ideological divergence between agency leaders and career personnel in the early decades of the Administrative Era).

Note that robust administrative rivalries are likely to perdure even when there is significant ideological or political overlap between those in the Administration and those in the civil service. For example, an environmentally friendly, relatively liberal Democratic President and her similarly minded EPA Administrator are still likely to encounter considerable pushback from true-believer civil servants within the department. The President will often be required to support any number of other political, fiscal, or policy priorities over environmental ones—and her appointed agency head will have to accept the President's decision. (Indeed, as a member of the President's Cabinet and as a political heavyweight in his own right, that agency leader is likely to appreciate that the President has broader, sometimes conflicting responsibilities.) By contrast, EPA civil servants are not privy to (nor bound by) those broader strategic considerations. Thus they will generally insist on the central, overriding importance of their agency's mission irrespective of the competing demands that occupy the Administration's attention. This institutional tension exists notwithstanding the political and ideological overlap between civil servants and agency leaders and is, I posit, healthy and virtually inevitable. I thank UCLA Law student Damian Martin for pressing me on this point.

143. See Stewart, *supra* note 4, at 1711–13. Members of the public may also use administrative procedures to make administrative action slower and more expensive—a less noble aim but one that nevertheless further disciplines and constrains agency leaders.

Specifically, modern statutory and decisional law¹⁴⁴ enables individuals, organizations, businesses, and the like to demand access to agency information. They are also entitled to petition for new rules, to participate in the development of agency rules, and to receive a reasoned accounting of agency decisions (and sometimes agency nondecisions). Agencies that fail to consider, if not incorporate, public participants' material and persuasive input do so at their peril.¹⁴⁵ For these reasons, this broad, diverse, and inclusive community is understood to wield "hammers . . . to pound agencies."¹⁴⁶

First, under the Administrative Procedure Act (APA), the public must be given notice of potential changes in administrative policy.¹⁴⁷ Once notified, members of the public can marshal political, scientific, and legal resources to resist what they see as unfavorable change or to support steps in the right direction.¹⁴⁸ Though far from perfect, the formal, statutorily mandated open-comment period serves as a virtual deliberative forum for each agency. Written opinions, research studies, and exchanges among commentators contribute to what can be a robust

144. Prior to the passage of the Administrative Procedure Act, administrative procedural rights and protections were more limited. See, e.g., Jaffe, *supra* note 41, at 249–50; see also Mashaw, *Administrative Constitution*, *supra* note 1, at 6, 8 (documenting the reach of nineteenth-century administrative law).

145. See *Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (indicating that notice-and-comment allows critics of a proposed rule to “develop evidence in the [rulemaking] record to support their objections” upon judicial review); *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978) (stating that notice-and-comment ensures “that the agency maintains a flexible and open-minded attitude towards its own rules”); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252–53 (2d Cir. 1977) (requiring an agency’s “concise general statement” to respond to material comments); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973) (insisting agencies respond to material comments filed by members of the public).

146. Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 *Wake Forest L. Rev.* 681, 682–83 (2012); see also Shane, *supra* note 47, at 159–60 (describing administrative procedures as enabling the public to hold agencies accountable). See generally Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 *Colum. L. Rev.* 479, 508–10 (2010) [hereinafter Metzger, *Ordinary Administrative Law*] (suggesting that opening and improving pathways for public participation is in part motivated by “[c]onstitutional concerns with unchecked agency power,” political demands for greater public participation, and efforts to reinforce the commitment to reasoned, expert administration).

147. See 5 U.S.C. § 553(b)–(c) (2012); see also *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1102 (4th Cir. 1985) (emphasizing the importance of clear notice to alert the public to prospective policy changes and to help focus public comments on proposed rules).

148. See *Chocolate Mfrs.*, 755 F.2d at 1101 (describing interest groups' advocacy efforts).

debate that helps shape the agency's ultimate decision.¹⁴⁹ Moreover, empowering civil society in these ways limits opportunities for agency capture. Absent formal legal opportunities for broad participation, well-heeled insiders (representing regulated industries and special interests) would likely be the only ones with ready access to agency decisionmakers.

Second, members of the public may obtain a treasure trove of information regarding agency operations, deliberations, and determinations. They may demand to know who attended various agency meetings¹⁵⁰ and are advised of the economic and environmental consequences of agency actions.¹⁵¹ Perhaps most powerfully, the Freedom of Information Act (FOIA)¹⁵² grants the public access to just about any nonclassified, nonprivileged document in an agency's possession.¹⁵³ The very existence of FOIA constrains and disciplines agency leaders. Mindful of the so-called *Washington Post* test, these agency officials know full well that their records are a potential source of public consumption and agency embarrassment, if not litigation.¹⁵⁴

149. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (discussing the deliberative and democratic virtues of rulemaking); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 *Admin. L. Rev.* 411, 414–15, 459–63 (2005) (finding that public comments on proposed rules frequently influence the final drafting of those rules); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 *Yale L.J.* 1617, 1631–40 (1985) [hereinafter Reich, *Public Administration*] (characterizing public comments and deliberation as helping to clarify and improve agency rules); Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 *Yale L. & Pol'y Rev.* 553, 554 (1997) (discussing the significant role special-interest groups play in deliberative and administrative fora); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 *Harv. L. Rev.* 1511, 1563–64 (1992) [hereinafter Seidenfeld, *Civic Republican Justification*] (emphasizing the importance of public administrative deliberation); Shapiro et al., *supra* note 105, at 474 (asserting that the APA's open-comment requirement “promote[s] deliberation”).

150. See *Government in the Sunshine Act*, 5 U.S.C. § 552b; *Federal Advisory Committee Act*, Pub. L. No. 92-463, 86 Stat. 770 (1972).

151. See, e.g., *Regulatory Flexibility Act*, 5 U.S.C. §§ 601–612; *National Environmental Policy Act of 1969*, 42 U.S.C. § 4321 (2012).

152. 5 U.S.C. § 552.

153. *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (describing FOIA as embodying “a general philosophy of full agency disclosure” with limited exemptions (quoting S. Rep. No. 89-813, at 38 (1965)) (internal quotation mark omitted)).

154. See, e.g., Gilbert M. Gaul, *Bad Practices Net Hospitals More Money*, *Wash. Post* (July 24, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/23/AR2005072300382.html> (on file with the *Columbia Law Review*) (describing investigations of Medicare overspending based on documents first obtained through the FOIA process); Marc Kaufman, *Many FDA Scientists Had Drug Concerns, 2002 Survey Shows*, *Wash. Post* (Dec. 16, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A3135-2004Dec15.html> (on file with the *Columbia Law Review*) (describing a FOIA request bringing to light claims by FDA scientists that they were being pressured into recommending the approval of drugs, against their better judgment); R. Jeffrey Smith, *Texas Nonprofit Is Cleared After GOP-Prompted Audit*, *Wash. Post* (Feb. 27, 2006), <http://www.washingtonpost.com/wp>

Third, individuals and organizations may use the courts to challenge agency compliance with administrative procedures or the legality or reasonableness of agency actions. During the heyday of the Administrative Era, such opportunities to use the courts expanded considerably.¹⁵⁵ Standing was liberalized.¹⁵⁶ Private attorneys general were empowered to “vindicate the public interest.”¹⁵⁷ Ripeness was given a capacious interpretation.¹⁵⁸ And “new” property rights were recognized, paving the way for more robust administrative hearings to challenge arbitrary or abusive action.¹⁵⁹ Indeed, one cannot fully appreciate the powerful supporting role played by the courts in the Administrative Era without first acknowledging the critical, perhaps leading, part the general public plays in identifying and litigating questionable agency actions.

As the above discussion about the civil service makes clear, the professional, politically insulated, expert bureaucracy is a relatively new institution—a creature of modern administrative governance. Civil society, however, predates the U.S. constitutional system. And it of course played (and continues to play) an active, albeit outsider’s, role in the

dyn/content/article/2006/02/26/AR2006022601227.html (on file with the *Columbia Law Review*) (describing a FOIA request that revealed a retaliatory IRS audit of a nonprofit group); cf. Matt Richtel, U.S. Withheld Data on Risks of Distracted Driving, *N.Y. Times* (July 20, 2009), <http://www.nytimes.com/2009/07/21/technology/21distracted.html> (on file with the *Columbia Law Review*) (describing how a FOIA request revealed that a federal agency withheld damaging highway-safety data).

155. See Shapiro et al., *supra* note 105, at 475 (“The public interest movement turned to the courts to head off regulatory capture, and judges responded with the reformation, which empowered public interest groups to hold agencies accountable.”); Stewart, *supra* note 4, at 1750 (“[J]udges have greatly extended the machinery of the traditional model [of administrative law] to protect new classes of interests.”); see also Metzger, *Ordinary Administrative Law*, *supra* note 146, at 435 (“Intensified judicial scrutiny of administrative actions developed in response to the dramatic expansion in regulatory authority that accompanied enactment of major environmental, health and safety, and consumer protection statutes during the 1960s and 1970s.”). I emphasize the “heyday” because some of these protections have since been scaled back.

156. Compare *Ass’n of Data Processing Serv. Orgs. v. Camp (ADAPSO)*, 397 U.S. 150, 154–58 (1970) (allowing suits brought by parties arguably within the relevant statute’s zone of interest), with *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254–55 (1930) (prohibiting suits brought by those whose claims of injury were not based on an underlying, statutorily granted legal right). See generally Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 *N.Y.U. L. Rev.* 1239, 1283–84 (1989) (indicating that standing to challenge agency actions is a “critical determinant of a party’s ability to participate effectively in the agency’s decisionmaking process” and suggesting that agencies must take seriously the interests of those who “can challenge policy decisions in court” and “ignore with relative impunity arguments made by parties that lack that power”).

157. *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943).

158. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–56 (1967).

159. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262–68 (1970).

constitutional order well before the rise of administrative agencies. Convenience, if not necessity, largely motivated the shift from *outsider* in the constitutional scheme to administrative *insider*. Simply put, Congress effectively deputized civil society, converting it from the occasional adjunct of the legislature during premodern times¹⁶⁰ to the ubiquitous frontline agent of a legislature strained by the exponential growth and complexity of the twentieth-century welfare state.¹⁶¹

Again, this isn't to say civil society will invariably do its ostensible job in the tripartite scheme of administrative separation of powers. At times, participation is sure to be uneven, halfhearted, prohibitively expensive, or shortsighted. But, as was the case with the civil service, I am putting this rival's best foot forward, highlighting its capabilities and potential to serve as a reliable, engaged, and effective counterweight to agency heads (and, again, to the civil service as well).

B. *Administrative Checks and Balances as Legitimizing Administrative Governance*

The challenge of administrative governance is twofold. Administrative governance must safeguard against abuse, and it must show itself to be legitimate. Measures that prevent abuse and those that promote legitimacy often overlap and reinforce one another. But the two are not the same. Several rival warlords might be highly effective checks on one another, ensuring that no one gets too powerful or acts too abusively. These warlords would, however, remain illegitimate—so long as they rise to and maintain power through violence and fear rather than as a result of expertise, electoral success, or legal accountability.

The previous section showed how administrative separation of powers functions and how it helps guard against the abuse of state power (even in a world in which Congress cannot be relied upon to intervene directly, forcefully, and consistently and in which the courts are dependent upon civil society's initiation of lawsuits). This section shows how administrative separation of powers is also an affirmative source of administrative legitimacy. That is to say, administrative separation of powers does more than describe and explain a rivalrous, fragmented administrative terrain. It also validates that terrain, normatively, constitutionally, and in ways that (as will be discussed in Part III) help judges,

160. See, e.g., Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 *Yale L.J.* 142, 155–65 (1986) (stressing that public petitions had little effect on early Congresses); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 *Nw. U. L. Rev.* 739, 750–51 (1999) (emphasizing that the constitutional right to petition the government is a limited one).

161. See, e.g., McCubbins & Schwartz, *supra* note 41, at 165–67 (emphasizing congressional reliance on “fire alarms” pulled by members of the public).

policymakers, and scholars think through the challenges posed by privatization.

It is necessary, of course, to consider the legitimacy of any governance regime. But this imperative is especially pressing in the administrative domain, where the question of legitimacy has been nothing short of a legal and academic obsession, passed down from generation to generation more like an inescapable curse than a cherished heirloom. This section “confronts,” as Bruce Ackerman puts it, “the serious legitimization problems involved” in a constitutional system that relies heavily on administrative governance.¹⁶² It confronts those legitimization problems along three dimensions: values, characteristics, and doctrine. First, I explain how administrative separation of powers seemingly helps resolve intractable debates about the normative underpinnings of the American administrative state. Administrative separation of powers does so by harmonizing the leading, albeit conflicting, values associated with public administration and by enabling those who give meaning to those values to collectively inform administrative governance.

Second, I speak to administrative separation of powers’ institutional legitimacy. Unlike the abovementioned warlords whose authority stems from threats and acts of force, the three principal administrative rivals are, in important respects, apt stand-ins for the three great constitutional branches. These stand-ins channel and bring into the administrative domain certain dispositional characteristics of each branch: the pluralistic Congress’s popular, deliberative role; the partisan, unitary executive’s agenda-setting role; and the independent judiciary’s reason-giving and rule-of-law-promoting role. As such, it is this particular trio of administrative rivals that is crucial to preserving and carrying forward the constitutional commitment to separating and checking power among heterogeneous democratic and countermajoritarian counterweights.

Third, I gesture to administrative separation of powers’ doctrinal bona fides. Here I zero in on the Court’s implicit recognition of administrative separation of powers, examining cases that seemingly allow state power to flow to administrative actors on the condition that those actors are themselves subject to a meaningful array of checks and balances.

It bears mentioning that in the discussions to follow, I rely on conventional conceptions of normative legitimacy. It is not my aim to endorse, redefine, or critique these conceptions. Instead, I take it as a given that public lawyers associate a certain core set of values with administrative legitimacy; that there is broad agreement that the three great constitutional institutions are legitimate, either because the Founding generation ratified them or because subsequent generations

162. Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633, 696 (2000) [hereinafter Ackerman, *New Separation*].

have intrinsically prized the interplay of these particular democratic and counter-majoritarian actors; and that judicial endorsement is itself legitimacy conferring.

1. *Administrative Separation of Powers and Administrative Values.* — Scholars and jurists generally anchor administrative legitimacy in theories of process or substance. Specifically, they point to agency expertise,¹⁶³ nonarbitrariness,¹⁶⁴ rationality,¹⁶⁵ civic republicanism,¹⁶⁶ interest-group representation,¹⁶⁷ or political accountability.¹⁶⁸ These well-recognized values are indeed important. But they are also normatively contested, empirically disputed, and, above all, often at odds with one another.¹⁶⁹ Instead, I argue that what undergirds administrative legitimacy is not any one of these contested, conflicting values. It is a structural system of checks and balances that gives meaning and effect to all of them.¹⁷⁰

163. See, e.g., Landis, *supra* note 4, at 10–17 (emphasizing the importance of administrative expertise).

164. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. Rev.* 461 (2004) (asserting that the legitimacy of the administrative state rests largely on administrative actors promoting reasonable, nonarbitrary public administration).

165. Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 *Duke L.J.* 1811, 1820–23 (2012) (focusing on administrative rationality).

166. See, e.g., Seidenfeld, *Civic Republican Justification*, *supra* note 149, at 1514 (stressing civic-republican participation in administrative governance).

167. See Stewart, *supra* note 4, at 1670 (“Increasingly, the function of administrative law is . . . the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.”).

168. See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81, 91–95 (1985) [hereinafter Mashaw, *Prodelegation*] (considering the importance of agencies being held politically accountable “through their connection with the chief executive”).

169. See Aberbach & Rockman, *Mandates or Mandarins*, *supra* note 89, at 606 (“Notwithstanding the desirability of each set of [public administrative] values, the means for meshing them in an optimal mix are hardly obvious.”); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *Harv. L. Rev.* 1276, 1282–86 (1984) (acknowledging the tensions and conflicts among the leading normative accounts of public administration); Magill & Vermeule, *supra* note 7, at 1053, 1078 (suggesting that a commitment to political accountability in the administrative state is at odds with a commitment to administrative expertise); Reich, *Public Administration*, *supra* note 149, at 1624 (“[T]he hybridization of . . . two procedural visions often has thwarted the effectiveness of both.”); Stewart, *supra* note 4, at 1669 (acknowledging the competing understandings of administrative legitimacy).

170. See Aberbach & Rockman, *Mandates or Mandarins*, *supra* note 89, at 608. Aberbach and Rockman focus on two values—political accountability and expert administration—but draw substantially the same conclusion as I do. For them, as for me, “The problem for government and . . . the public interest is not to have one of these values completely dominate the other, but to provide a creative dialogue or synthesis between the two.” *Id.*

Administrative separation of powers ensures that none of these competing values becomes dominant to the point of crowding out the others. It is here where the tripartite system's checking and legitimizing functions reinforce one another. Absent a vibrant system of administrative separation of powers, one of the three administrative counterweights might well go unrivaled. For example, if the civil service (whose stock-in-trade is apolitical expertise) reigned supreme, administrative action would be an arid technocratic endeavor, largely insulated from presidential mandates and public concerns. If the politically appointed agency leaders lorded over administrative proceedings, agencies would effectuate the President's agenda, likely at the expense of apolitical expertise and public input from those outside of the President's electoral base.¹⁷¹ And if civil society called the shots, administrative governance would reflect the interests and concerns of public participants, leaving little room for apolitical expertise or presidential leadership to inform agency policy. In short, if any of these specific institutional actors were to operate outside of a system of checks and balances, it would not only run roughshod over its administrative rivals. It would also run roughshod over the values most closely associated with those vanquished rivals. That is to say, state power would be concentrated (in agency leaders, civil servants, or civil society), impoverishing administrative governance by suppressing a range of highly prized administrative values.

Instead, administrative separation of powers allows multiple values to coexist—and come together in any number of combinations. At any given time, several different, seemingly contradictory¹⁷² substantive values are ascendant in various pockets of the administrative state. Hence the contemporary administrative canon accommodates cases such as *Lujan v. Defenders of Wildlife* (which privileges political accountability and thus agency leaders),¹⁷³ *Massachusetts v. EPA* (which privileges expertise and

171. One might assume that a political-accountability model of administrative governance contemplates a joint leadership role for agency heads and civil society. That assumption, however intuitive, does not seem to track the conventional understanding of political accountability and the administrative state (where political accountability is often thought of as accountability *through the President*). See, e.g., Kagan, *supra* note 39, at 2231–38; Mashaw, *Prodelegation*, *supra* note 168, at 91–94. Nor does that assumption seem to inform the cases that embrace this conventional understanding of political accountability—cases that leave relatively little room for members of the public to maneuver in the administrative sphere. Thus it is difficult to see political accountability, again as the term is generally used, privileging any administrative actors other than presidentially appointed agency heads.

172. See *supra* note 169 and accompanying text.

173. 504 U.S. 555, 575–78 (1992); see also *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985); *Sierra Club v. Costle*, 657 F.2d 298, 405–06 (D.C. Cir. 1981).

thus the civil service),¹⁷⁴ and *ADAPSO* (which privileges civic republicanism or interest-group representation and thus civil society).¹⁷⁵ Critically, in none of these cases are the other, nonascendant values completely suppressed. Indeed, they cannot be suppressed so long as their institutional champions—namely, the administrative rivals—remain in the game.

Administrative separation of powers' accommodation of multiple values has more than just explanatory force, reconciling, as it were, the coexistence of conflicting doctrines. It also has normative purchase. The rivalrous competition among agency leaders, independent civil servants, and members of civil society gives meaning and effect to all of these values, allowing them to "cycle" through in such ways that no one administrative value consistently trumps or is trumped. Instead, each has its day in the sun.¹⁷⁶ Such cycling, a concept that Guido Calabresi and Philip Bobbitt advance, is particularly useful in settings such as this one, where public lawyers prize a certain set of conflicting or incompatible normative values but cannot or do not want to choose among them.¹⁷⁷ As Heather Gerken argues, "[C]ycling thus signals a reluctance to indulge in absolutes, a recognition of the variety of normative commitments that undergird any democratic system, and an acknowledgment that our identities are multiple and complex."¹⁷⁸

In all, administrative separation of powers' accommodation of these central but conflicting values helps validate the American administrative state and mark it as a worthy successor to the Framers' scheme—a scheme that itself seeks to harmonize the seemingly conflicting commit-

174. 549 U.S. 497, 533–34 (2007) (insisting agencies offer reasoned justifications for rejecting rulemaking petitions); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–51 (1983) (demanding agencies rigorously consider the various implications of and justifications for a change in agency policy); Freeman & Vermeule, *supra* note 133, at 52 (describing cases rejecting agency positions that seemingly prioritize political considerations over technocratic expertise).

175. 397 U.S. 150, 153–54 (1970) (allowing a broad swath of "arguably" protected parties to seek judicial review of agency actions).

176. Josh Chafetz proffers a theory of multiplicity in constitutional separation of powers that holds "that there is (sometimes) affirmative value in promoting the means for interbranch tension and conflict without any sort of superior body that can articulate a global, principled, final, and binding decision on the matter." Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 *Yale L.J.* 1084, 1112–13 (2011) (book review) (footnote omitted). Administrative separation of powers often allows conflicts over substantive values—and over the rivals' relative standing and influence—to play out in a similarly indeterminate, contestable, and sometimes politically charged fashion.

177. See Guido Calabresi & Philip Bobbitt, *Tragic Choices* 41–44, 195–96 (1978).

178. Heather K. Gerken, *Second-Order Diversity*, 118 *Harv. L. Rev.* 1099, 1174 (2005).

ments to majoritarianism, federalism, limited government, and the rule of law.¹⁷⁹

2. *Administrative Separation of Powers and Constitutional Isomorphism.* — The above section described the legitimacy of administrative separation of powers in terms of values. This section addresses another dimension of legitimacy: legitimacy qua institutional composition. The administrative reproduction of a scheme of separation of powers is a faithful one with respect both to form and content. As to form, administrative lawyers effectively (if, again, somewhat haphazardly) reproduced a substantially similar triangulated system of institutional counterweights. And, as to content, these particular administrative counterweights resemble in relevant ways mini-legislatures, mini-presidents, and mini-courts.

The fact that administrative governance's three principal rivals channel some important dispositional characteristics of the three great constitutional branches is more than a neat coincidence. It is also a source of normative validation. There is little doubt that the Framers' special brew of a popular, heterogeneous deliberative body, a unitary executive body operating pursuant to a national mandate, and a counter-majoritarian body that is dedicated to promoting the rule of law is particularly prized. Administrative separation of powers ought to invite comparable respect. This is because the administrative trinity plays substantially similar roles to those Congress, the President, and the courts act out on the constitutional stage.¹⁸⁰

a. *Agency Leaders as the Administrative State's "Presidency."* — Most simply—and intuitively—the political leadership atop agencies is the administrative stand-in for the President. Like practically all other agents in principal-agent relationships, the appointed leaders cannot be expected to be perfectly faithful to their White House principal. But as appointed (and readily removable) presidential deputies, they can generally be relied upon to promote the President's agenda, a politically accountable agenda ostensibly endorsed through competitive, national elections.

b. *Civil Servants as the Administrative State's "Judiciary."* — Next, and less obvious, the civil service acts the part of the federal judiciary. The analogy is of course a limited and stylized one. The two institutions perform very different tasks. And the two institutions are polar opposites as a matter of comparative expertise; federal judges are famously generalists, whereas expertise is the civil servants' calling card. But I am emphasizing dispositional linkages, and, as a dispositional matter, the civil service

179. See *infra* note 195 and accompanying text.

180. Abner Greene posits a not-dissimilar structural argument that separation of powers ought to carry over into a post-New Deal era dominated by powerful executive agencies. His solution, however, is to embolden Congress to serve as a more effective check on these executive agencies. See Greene, *supra* note 25, at 153–58.

serves as the administrative separation of powers' countermajoritarian "bulwark,"¹⁸¹ positioned to resist political overreaching, promote the rule of law, advance reasoned approaches to decisionmaking, and provide intergenerational stability¹⁸² in ways not unlike what the federal judiciary does vis-à-vis Congress and the President.¹⁸³

Specifically, both federal judges and civil servants are committed to upholding and promoting the rule of law.¹⁸⁴ Both groups have institutional cultures that esteem professionalism and frown upon politicking.¹⁸⁵ Both groups traffic in interpretation and reason giving to justify their conclusions (and their *raison d'être*).¹⁸⁶ And, importantly, both groups are tenured and need not fear for their jobs.¹⁸⁷ Additionally, there are very few promotions that the President could offer by way of influencing sitting judges; likewise, there are few promotions that agency heads can make to co-opt civil servants. Thus, while both judges and civil servants usually abide by what the President or the agency head wants and does, they can shape policies in crucial ways and intervene more emphatically when what the President or agency heads wants or does is lawless or unreasonable.¹⁸⁸

It is worth noting too that even when civil servants let politics or ideology influence their work, they do so in ways quite similar to federal judges. In reality, no judge or career government worker can fully

181. See Bruff, *Balance of Forces*, *supra* note 119, at 408.

182. See *supra* Part II.A.2. There are those in the civil service who undoubtedly think of themselves as biologists or engineers first—and civil servants second. But even if their motivations differ from those government workers who think of themselves primarily as servants of the State, they'd presumably still serve as strong champions of reasoned decisionmaking.

183. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875, 877–79 (1975).

184. See *supra* note 128 and accompanying text.

185. That said, neither group is entirely immune from politics. Compare *supra* note 142 and accompanying text (acknowledging the possibility of partisan civil servants), with Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *Yale L.J.* 2155, 2158–59, 2173–75 (1998) (discussing politically and ideologically influenced judges).

186. See, e.g., Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 956, 979 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922) (“[A] system of rationally debatable ‘reasons’ stands behind every act of bureaucratic administration . . .”).

187. See U.S. Const. art. III, § 1 (granting federal judges life tenure); *supra* notes 106–110 and accompanying text (describing modern civil servants' legal protections against politically motivated employment actions).

188. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952) (invalidating an executive order directing the Commerce Secretary to seize and operate the nation's steel mills); see also *supra* note 131 and accompanying text (characterizing civil servants as able and willing to challenge agency leaders' directives or conclusions).

suppress all of her political instincts or commitments. The hope, however, is that the diffusion of responsibility among the manifold federal judges—just like the diffusion of responsibility among the manifold civil servants¹⁸⁹—dilutes the impact of any one individual's politicized actions or decisions.¹⁹⁰

c. *Civil Society as the Administrative State's "Congress."* — Whereas the civil service in the Administrative Era takes on some of the dispositional, and oppositional, trappings of the judiciary, civil society plays a role somewhat similar to Congress.

There are of course striking differences between Congress's sweeping constitutional powers and the far more limited administrative powers that civil society enjoys. Most notably, unlike civil society, Congress has actual lawmaking and investigatory powers. As a matter of disposition, however, the comparison is more apt and apparent. In its ideal state, the institutionalization of public participation embodies the norms of the "public sphere," namely, rational deliberation and criticism, inclusivity, and "conversational equality" among those who constitute civil society.¹⁹¹ (Congress in its ideal state roughly approximates this democratic forum on a more manageable, orderly scale.) Specifically, civil society represents diverse views, gives voice to various popular and unpopular sentiments, balances local concerns with national priorities, and commingles self-interest with civic regard—all in the name of expressing the people's, or at least some people's, will on matters of administrative governance. This is, in essence, what members of Congress are expected to do on the constitutional stage. In practice, of course, public participation might deviate sharply from both majoritarian and deliberative ideals, with moneyed interests wielding disproportionate influence.¹⁹² But so too might

189. See *supra* note 142 and accompanying text.

190. See Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 *Notre Dame L. Rev.* 1021, 1027, 1050 (2014).

191. See Jürgen Habermas, *Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* 36–37 (Thomas Burger trans., MIT Press 1991) (1962). One might go so far as to say that the rise of organized interest groups helps, as Madison put it with respect to Congress, "refine and enlarge the public views." *The Federalist* No. 10, *supra* note 10, at 82 (James Madison). One might further suggest that the rulemaking process aspires to foster a universal, deliberative moment, an opportunity for the public writ large to debate and help shape agency policy that will carry with it the force of law. Indeed, many champions of rulemaking view the comment process in exactly those strong terms. See *supra* note 149 and accompanying text.

192. See Habermas, *supra* note 191, at 175–79 (noting the decline of the public sphere in the twentieth century); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 *Duke L.J.* 1671, 1693–96 (2012) (describing civil society as being dominated by powerful interest groups that seek to influence public opinion and administrative actors); Shapiro et al., *supra* note 105, at 463–64, 477–78 (stressing the outsized role played by regulated parties).

Congress, given the structural inequalities within our polity and the current state of campaign-finance law.¹⁹³

Combined, therefore, agency leaders, the civil service, and civil society operate as more than just any old trio of rivals.¹⁹⁴ It is the interplay of these three particular rivals—which share the democratic and counter-majoritarian characteristics and the dispositional attributes of the three constitutional branches—that specially helps legitimate American administrative governance.¹⁹⁵

* * *

It bears mentioning that this administrative regime doesn't seem especially vulnerable to "separation of parties" overwhelming and thus undermining administrative separation of powers. In advancing their influential "separation of parties" thesis, Daryl Levinson and Richard Pildes argue that party rivalries (not institutional ones) define the terms of competition among the constitutional branches.¹⁹⁶ Assuming that

193. See *Citizens United v. FEC*, 130 S. Ct. 876, 930 (2010) (Stevens, J., dissenting) (recognizing that unregulated campaign contributions pose a challenge to truly representative democracy); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It* 142–66 (2011) (emphasizing the ways in which money distorts and undermines democracy). Congress might fall far short of the deliberative ideal even absent the clear taint of money. See, e.g., *INS v. Chadha*, 462 U.S. 919, 927 n.3 (1983) (recounting a congressional colloquy in which seemingly neither speaker understood the terms or the effect of a pending House vote under discussion).

194. That said, perhaps we shouldn't be too quick to discount the value American legal and political culture places on tripartism itself. See Bruce Ackerman, *Good-bye, Montesquieu*, in *Comparative Administrative Law* 128, 128 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (recognizing and criticizing the fact that "we mindlessly follow [Montesquieu] in supposing that all [government] complexity is best captured by a trinitarian separation of powers").

195. Cf. William N. Eskridge, Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* (2010). This is, of course, hardly the place to grapple with, let alone harmonize, the various tensions implicit in any system that promotes both political and legal forms of accountability and privileges both majoritarian and counter-majoritarian institutions. See, e.g., Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 168 (2001) ("Constitutional law's so-called counter-majoritarian difficulty . . . is not that judges may occasionally depart from majority will (as legislators or presidents may also do). The difficulty is that constitutional law is *designed* to 'thwart' the outcomes of representative, majoritarian politics."). These are some of the enduring challenges of constitutional theory. See 1 Bruce Ackerman, *We the People: Foundations* 60–61, 290 (1991) [hereinafter Ackerman, *We the People*]; Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–17 (1962); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 149–50 (1996). Instead, for present purposes it suffices to note these particular counterweights' indelible, albeit complicated, print on the constitutional landscape and their (perhaps necessary) transplantation onto the administrative arena.

196. Levinson & Pildes, *supra* note 25, at 2329–30.

Levinson and Pildes are correct with respect to what happens on the constitutional stage, their claim nevertheless appears to have less force in the administrative arena. First, civil servants have strong institutional ties to their agencies and their colleagues and are, in any event, at best politically neutral and otherwise ideologically diverse (amongst themselves) or contrarian vis-à-vis agency leaders and segments of civil society.¹⁹⁷ Thus they are unlikely to align perfectly with agency leaders or with the public writ large.

Second, civil society is itself ideologically diverse and far less hierarchical than Congress is. Compared to Congress, the general public is subject to fewer and weaker party-disciplining mechanisms of the sort that leaders in the House and Senate use to silence or marginalize dissenters.¹⁹⁸ It is therefore safe to assume that some segment of the broad-ranging public has an interest in opposing (and, importantly, has license and authority *to oppose*) practically every action agency leaders or civil servants take. For these reasons, it is difficult to see party politics supplanting administrative rivalries as they sometimes appear to do on the constitutional stage.

3. *Administrative Separation of Powers and Constitutional Doctrine.* — The judiciary's seemingly tacit endorsement of an administrative separation of powers over a range of cases suggests a third basis for administrative legitimacy. Generally speaking, the courts have shown little tolerance for institutional subordination, bullying, or power ceding between or among Congress, the President, and the judiciary when such jockeying threatens separation of powers. That is why we see judges regularly policing minor, even seemingly innocuous,¹⁹⁹ interbranch transgressions.

Where the courts *do* permit interbranch subordination, bullying, or power ceding, it appears to be often against the backdrop of what I'm calling administrative separation of powers. Indeed, the courts countenance congressional delegations of vast powers to executive agencies seemingly on the implicit condition that our now-familiar administrative counterweights are in place to check the presidential deputies who lead such agencies and to help guide the ultimate exercise of those powers.

To appreciate the subtle importance of administrative separation of powers (even compared to other, more explicit doctrinal lodestars), one

197. See *supra* Part II.A.2. Obviously, in the exceptional circumstance in which the civil service is substantially in sync with the agency leadership, but see *supra* note 142, administrative separation of powers will be less rivalrous.

198. For a discussion of party loyalty and organizational discipline within Congress, see Levinson & Pildes, *supra* note 25, at 2335–38.

199. See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276–77 (1991) (striking down what the Court acknowledged was a seemingly “innocuous” congressional delegation of decisionmaking authority).

need only contrast the Court's permissiveness with respect to delegations to administrative agencies subject to administrative separation of powers²⁰⁰ with its far less lenient treatment of other kinds of interbranch jockeying that results in power being exercised outside of a thick framework of rivalrous checks and balances.²⁰¹ This is not to say the pattern I trace is perfectly delineated. After all, the jurisprudential commitment to administrative separation of powers seems to be only implicit, suggestive, and undertheorized. But the pattern does help explain when, where, and, I argue, *why* the Court allows (and ought to allow) constitutional separation of powers to give way to administrative governance.²⁰² This pattern also provides a blueprint for the Court to follow today, when confronting what I consider to be privatization's analogous threat to administrative separation of powers.²⁰³

a. *Constitutional Rivals Unduly Interfering with One Another.* — Consider *Boumediene v. Bush*.²⁰⁴ In *Boumediene*, the Court invalidated provisions of the 2006 Military Commissions Act (MCA) that purported to strip the federal courts of jurisdiction to hear Guantánamo detainees' habeas claims.²⁰⁵ The Court explained that “the political branches [were asserting] the power to switch the Constitution on or off,” and that habeas corpus “must not be subject to manipulation by those whose power it is designed to restrain.”²⁰⁶

Boumediene is often understood primarily as a federal-jurisdiction case about judicial prerogatives.²⁰⁷ But, by its own terms, *Boumediene* is

200. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (recounting broad congressional delegations to domestic administrative agencies).

201. Of course, some might suggest a less principled, coherent, or defensible division between cases in which the Court permits constitutional-branch meddling and the cases in which it disallows such meddling. See Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1517 (1991) (“[The] Supreme Court’s treatment of the constitutional separation of powers is an incoherent muddle.”); Magill, Beyond Powers, supra note 85, at 608–09 (remarking on the Supreme Court’s varied and somewhat unpredictable approach to separation-of-powers cases); M. Elizabeth Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127, 1132–38, 1148–49 (2000) (similar).

202. Here I am employing structuralist reasoning to advance my claims about separation of powers. This is a conventional approach, see, e.g., Charles Black, Structure and Relationship in Constitutional Law 7 (1969) [hereinafter Black, Structure and Relationship], but by no means the only one, cf. John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1971–2005 (2011) (arguing against “freestanding principles of separation of powers” in constitutional interpretation).

203. See infra Part III.B.

204. 553 U.S. 723 (2008).

205. Id. at 732–33.

206. Id. at 765–66.

207. See, e.g., Gerald L. Neuman, The Habeas Corpus Suspension Clause After *Boumediene v. Bush*, 110 Colum. L. Rev. 537, 547 (2010) (“Adequacy of administrative

very much about the need to cultivate meaningful administrative structures even in matters of foreign affairs.²⁰⁸ Critically, the Court would have countenanced Congress's interference with the federal courts (and thus accepted the effective collapsing of constitutional separation of powers) had the MCA also prescribed a robust administrative alternative to Article III habeas. Such an administrative alternative would have had to be procedurally rigorous and involve participation by politically insulated actors, a seemingly necessary condition to validate and legitimize the exercise of what otherwise would be categorically political decisions to detain alleged unlawful combatants.²⁰⁹ Specifically, the Court worried that the MCA's "executive review procedures"²¹⁰ did not empower sufficiently independent administrative actors who (like judges or tenured civil servants) would be "disinterested in the outcome and committed to procedures designed to ensure [their] independence."²¹¹

Despite the outcome in *Boumediene*, the Court's stated willingness to permit such interbranch interference among constitutional actors—but,

procedure is no substitute for the independent authority of the judiciary to resolve legal issues concerning the Executive's authority to detain.").

208. See Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between "Legitimate" and "Illegitimate" Lawmaking*, 107 Nw. U. L. Rev. 847, 875 n.151 (2013) (understanding *Boumediene* as insisting that the courts retain habeas jurisdiction unless a "constitutionally adequate substitute" is otherwise provided for); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 Sup. Ct. Rev. 1, 4–5, 58–59 (highlighting the Court's interest in assessing whether the extant administrative procedures were constitutionally adequate). See generally Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2051–52, 2092 (2011) (viewing *Boumediene* through the lens of administrative law); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 Harv. L. Rev. (forthcoming May 2015).

209. Metzger, *Internal and External Separation of Powers*, *supra* note 47, at 450; Metzger, *Ordinary Administrative Law*, *supra* note 146, at 498; see also Berger, *supra* note 208, at 2051–52 ("In exploring the Suspension Clause's reach, the [*Boumediene*] Court emphasized that 'the procedural protections afforded to the detainees . . . [were very] limited, and . . . [thus fell] well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.'"). See generally *Luna v. Holder*, 637 F.3d 85, 97 (2d Cir. 2011) (understanding *Boumediene* as "provid[ing] guideposts that help us determine . . . [whether] an adequate and effective" administrative alternative to Article III adjudication exists).

210. *Boumediene*, 553 U.S. at 783.

211. *Id.*; see also *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (interpreting narrowly a statute that sought to eliminate habeas review of removal decisions in light of the fact that Congress did not also provide a constitutionally adequate administrative alternative to habeas); Berger, *supra* note 208, at 2051 ("In *Boumediene*, 'the sum total of procedural protections afforded to the detainee at all stages, direct and collateral' was collectively inadequate, so the Court concluded that the existing procedures did not offer sufficient procedural protections to warrant the withdrawal of habeas." (quoting *Boumediene*, 553 U.S. at 783)).

again, only on the condition that an internally rivalrous administrative alternative exists—is itself suggestive of the fact that the federal constitutional system insists upon assurances of encumbered, limited government, but is willing to allow subconstitutional actors to furnish those encumbrances. Indeed, this understanding is in keeping with a concern that Justice Kennedy, the principal author of *Boumediene*, also raised in *FCC v. Fox*, a far more traditional administrative law case. In *Fox*, Kennedy noted that “[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers.”²¹²

b. *Constitutional Rivals Ceding Power to Another*. — Consider next the short-lived Line Item Veto Act. The line-item veto represented an effort by a profligate Congress to impose external fiscal discipline on itself. The Act authorized the President to cancel specific provisions from duly enacted spending and tax bills. *Clinton v. City of New York* invalidated the Act.²¹³ The Court understood the President’s power to void statutory provisions as tantamount to the power to unilaterally amend acts of Congress or to rescind parts of such acts—either one of which would represent an unconstitutional fusion of executive and legislative authority.²¹⁴

Dissenting, Justice Scalia insisted that the line-item veto was nothing more than a run-of-the-mill delegation by Congress to the Executive.²¹⁵ As a practical matter, Scalia has a point. Most delegations to agencies authorize the effective fusion of executive and legislative power.²¹⁶ Moreover, an “intelligible principle” accompanied the authorization of the line-item veto. Congress charged the President with exercising the veto only when doing so would “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.”²¹⁷ The existence of such an intelligible principle is often the very touchstone courts purport to look to when deciding whether a congressional delegation to an executive agency is constitutionally permissible.²¹⁸ Yet principles far less “intelligible” than that contained in the Line Item Veto Act have passed constitutional muster.²¹⁹

212. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

213. 524 U.S. 417, 421, 438 (1998).

214. See *id.* at 438.

215. *Id.* at 464–65 (Scalia, J., dissenting).

216. *Id.* (contending that the Constitution “no more categorically prohibits the Executive *reduction* of congressional dispositions in the course of implementing statutes that authorize such reduction, than it categorically prohibits . . . substantive rulemaking”).

217. *Id.* at 436 (majority opinion).

218. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle’” (quoting J.W. Hampton, Jr.,

How then should *Clinton* be understood? As a matter of black-letter law, the Court stressed the formal and, for it, dispositive distinction between Congress authorizing the President to effectively cancel or change an already-enacted statute and Congress delegating to the President discretion to make rules that further the goals of an already-enacted statute. Deeper down, however, the opinions seem to implicitly recognize that delegations to administrative agencies are constitutionally safer than delegations to the President.²²⁰ They are safer precisely because agency officials (unlike the unencumbered President wielding the line-item veto) generally operate within thick webs of subconstitutional checks and balances that constrain and enrich exercises of delegated authority. Indeed, Justice Breyer concedes as much in his separate dissent. He acknowledges that the delegation of the line-item veto to the President is different from similar delegations to agency heads. Unlike the President (who would be “lawmaking” alone²²¹), agency heads would be obligated to promulgate rules, presumably with the help of civil servants. These rules would be subject, first, to notice-and-comment by the public and, later, to judicial challenge.²²² Again, going beyond the Court’s formalistic approach, one might read parts of the majority opinion and of the Scalia and Breyer dissents together as suggesting the following precept:

& Co. v. United States, 276 U.S. 394, 409 (1928)). But see Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 993–98 (2007) (emphasizing that the Court implicitly demands more than just an intelligible principle to satisfy the nondelegation doctrine and suggesting that the Court cares too about an agency’s political accountability and its commitment to the rule of law).

219. *Am. Trucking*, 531 U.S. at 474–75 (recounting delegations that the Court upheld notwithstanding the fact that Congress supplied little by way of meaningful guidance to direct the agencies).

220. See, e.g., Lawson, *supra* note 9, at 1245 n.77 (contending that the courts would likely never have validated broad delegations “directly to the President”).

221. See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (finding the President not to be subject to the APA).

222. See *Clinton*, 524 U.S. at 489–90 (Breyer, J., dissenting) (explaining that, unlike administrative agencies, “[t]he President has not so narrowed his discretionary power through rule, nor is his implementation subject to judicial review under the terms of the Administrative Procedure Act”); see also Matthew Thomas Kline, *The Line Item Veto Case and the Separation of Powers*, 88 Calif. L. Rev. 181, 223–24 (2000) (suggesting that, because agencies are subject to many more forms of control than is the President, expansive delegations to agencies are far less dangerous than similar delegations to the President). It bears noting that though Justice Breyer explains that a delegation to a (constrained) agency “diminishes the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation,” *Clinton*, 524 U.S. at 489, he also acknowledges that the President’s own political accountability and constitutional standing cut in favor of the Court being more permissive of delegations to the President than of delegations to agencies. *Id.* at 490.

Granting the President effectively legislative power²²³—without assurances that those powers would be subject to rivalrous encumbrances and shaped by a multiplicity of perspectives—represents too great of a consolidation of unchecked power.²²⁴

* * *

The seminal *Chevron* and *Mead* cases can themselves be explained through the lens of an enduring, evolving separation-of-powers jurisprudence. Though not constitutional cases per se, both deal with constitutional actors ceding power to a rival. Specifically, they consider the propriety of transferring interpretive authority over statutes to the Executive. The holding of *Chevron*—that courts give considerable deference to agencies on questions of law—is understood primarily in terms of political accountability.²²⁵ Yet despite corroborating language gleaned from *Chevron* itself,²²⁶ the conventional political-accountability story remains an unsatisfying one.

It is unsatisfying, first, because *Chevron* does not differentiate between executive agencies, which have a direct connection to the politically accountable President, and independent agencies, which are less politically accountable. Were *Chevron* really about political accountability, surely courts would be more deferential to the Department of Labor and the EPA than they would be to the FTC and SEC.

It is unsatisfying, second, because *Mead* insists that less deference (so-called *Skidmore* as opposed to *Chevron* deference) be accorded to agency interpretations that are *not* the product of agency rulemaking or formal adjudicatory proceedings.²²⁷ As Justice Scalia says in his dissent in

223. Cf. *Am. Trucking*, 531 U.S. at 488 (Stevens, J., concurring) (indicating that the Court regularly allows Congress to delegate legislative responsibilities to the Executive Branch).

224. Note too how careful the *Clinton* majority is in discussing other naked delegations to the President. See 524 U.S. at 443–44 (emphasizing that the 1890 Tariff Act delegated nondiscretionary, limited, and foreign affairs–related power to the President).

225. See, e.g., Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.3, at 143–44 (4th ed. 2002) (explaining *Chevron* in terms of political accountability); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *Colum. L. Rev.* 1749, 1763–65 (2009) [hereinafter Bressman, *Procedures as Politics*] (contending that “*Chevron*, more than any other case, is responsible for anchoring the presidential control model” and indicating that *Chevron* “recognized that politics is a permissible basis for agency policymaking”).

226. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch . . . to make . . . policy choices.”).

227. *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001). The landscape is, of course, more complicated and variegated than the binary divide between *Chevron* and *Skidmore*/*Mead* might suggest. See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations*

Mead, there is no reason to give greater deference to the interpretations of middling administrative law judges presiding over agency adjudications than to the unilateral decisions of highly politically accountable cabinet secretaries.²²⁸ Scalia is right, provided *Chevron* stands for the proposition that courts defer to politically accountable agency heads. But he is wrong if instead the courts cede interpretive supremacy to the Executive on the condition that the Executive's decisions are forged in the crucible of administrative separation of powers. That is to say, unilateral interpretations by a cabinet secretary (just like presidential exercises of the line-item veto) are quite plausibly politically accountable. But such interpretations are nonetheless largely unchecked exercises of administrative power. They can be made without expert, apolitical input from civil servants and without a diverse array of comments from civil society.²²⁹ Thus broad (*Chevron*) deference to the interpretations of agency heads *acting alone* would represent a dangerous transfer of constitutional powers to the (unitary) Executive. By contrast, similarly broad (*Chevron*) deference to agency interpretations that instead arise through the rulemaking process or through formal adjudications raises far fewer concerns. Though there is the same transfer of constitutional powers to the Executive, the Executive in those latter situations is anything but unitary. When it comes to rulemaking and adjudication, administrative power is necessarily fragmented, triangulated among agency leaders, civil servants, and members of civil society.

c. *Constitutional Rivals Hoarding Power*. — Lastly, consider *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.* In that case, the Supreme Court rejected congressional efforts to unilaterally oversee the major airports around Washington, D.C. Pursuant to an interstate compact, Congress empowered a joint Virginia–Maryland authority to administer those airports. As part of this compact, Congress reserved for nine of its own members the power to veto any of that newly constituted airport authority's decisions. The Court reasoned that Congress—through these nine members—would be either acting in

from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083 (2008) (contending that the Court employs a broad range of deference doctrines vis-à-vis agency statutory interpretation).

228. *Mead*, 533 U.S. at 244–45 (Scalia, J., dissenting) (“Is it conceivable that decisions specifically committed to [cabinet secretaries] are meant to be accorded no deference, while decisions by an administrative law judge left in place without further discretionary agency review are authoritative?”); see also David J. Barron & Elena Kagan, *Chevron's* Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 201–02 (arguing that greater deference should be accorded to the decisions of high-ranking agency officials).

229. See Bressman, *Procedures as Politics*, supra note 225, at 1791 (contending that *Mead* insists on more rigorous scrutiny of those agency decisions that do not afford the public notice in the way that notice-and-comment rulemaking and formal adjudication each does).

an executive role or legislating in the absence of bicameralism and presentment.²³⁰

Again, wholesale delegations of legislative authority outside of the constitutional strictures of bicameralism and presentment are legion. So are delegations of judicial authority to non-Article III tribunals.²³¹ But the delegation at issue in *Metropolitan Washington* is different in at least one important (and perhaps now familiar) respect. Unlike those officials involved in administrative rulemaking and administrative adjudication, this free-floating, nine-member body would be operating in the absence of institutional rivalries. That is to say, Congress empowered a subset of its members but failed to simultaneously engender counterweights capable of challenging and more broadly enriching the nine-member body's influence over airport policy.

Indeed, though the courts never say it explicitly, assurances of some alternative regime of separated and checked powers seem to be (and, in any event, ought to be) a necessary corollary to many efforts to weaken or circumvent constitutional separation of powers.²³² The question that remains—and that will be addressed in Part III—is whether there ought to be a similar set of assurances when, as is the case today, the seemingly constitutionally necessary scheme of administrative separation of powers is itself threatened.

C. *Administrative Separation of Powers and the Activist State*

Before taking up that question (and privatization more generally), a few issues surrounding administrative separation of powers warrant further consideration. First, notwithstanding my claims that administrative separation of powers is what describes and helps legitimate the administrative state, one might ask whether the very model of separation of powers is outdated and ought not be carried forward into the activist administrative state (let alone into the equally activist privatized state that will be discussed in Part III). Such an inquiry is, of course, a fair one. After all, it might be credibly argued that consolidated government today does not trigger the same fears of tyranny—that is, real, literal, dictatorial tyranny—that animated a Founding generation so new to republicanism and so scarred by monarchism. Furthermore, it might be credibly argued that the demands and expectations imposed on the modern American welfare state of the twentieth and twenty-first centuries are much more

230. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274–76 (1991).

231. See, e.g., *CFTC v. Schor*, 478 U.S. 833 (1986).

232. Cf. Metzger, *Ordinary Administrative Law*, supra note 146, at 509 (contending that “[c]onstitutional concerns with unchecked agency power” inform much of American administrative jurisprudence).

consistent with (and perhaps dependent upon) consolidated, concentrated powers than was the more languid, in some respects laissez-faire, federal government that the Framers envisaged.

But it does not follow that the need for separation of powers has therefore diminished. It does not follow precisely because state power is exponentially greater in modern times than it had ever been in the eighteenth and nineteenth centuries. Thus, though there is little threat of a military coup, there remains reason to worry about the everyday power of the State (and state apparatchiks) to act arbitrarily and abusively in countless ways, often at the touch of a button.²³³ With apologies to Hannah Arendt, the contemporary *banality of administrative tyranny*, which we run the risk of experiencing in both the Administrative and (again, as I will describe below) Privatized Eras, demands continued vigilance of the sort the Framers' checks and balances promote.

Second, one might ask whether this particular tripartite system works—and works well. For my purposes, administrative separation of powers functions well (or at least well enough) when all three rivals have legal opportunities and institutional incentives to participate meaningfully and vigorously in the administrative process. Conversely, administrative separation of powers fails when one or more of the institutional rivals is effectively disenfranchised.

To be sure, this understanding of what it means to be a well-functioning scheme is a capacious one. But it isn't necessarily any less precise than what we use to assess, among other things, whether constitutional separation of powers is working.²³⁴ Moreover, this capacious understanding of a well-functioning administrative separation of powers is practical. There are many possible, plausible ways to calibrate—and recalibrate—the relative balance of power among the administrative

233. See, e.g., Nina Bernstein, *Suit to Seek Food Stamps for Thousands Wrongly Denied Them*, N.Y. Times (Mar. 31, 2002), <http://www.nytimes.com/2002/03/31/nyregion/suit-to-see-food-stamps-for-thousands-wrongly-denied-them.html> (on file with the *Columbia Law Review*) (reporting on the wrongful denial of food stamps to thousands of eligible persons); Mike McIntire, *Ensnared by Error on Growing U.S. Watch List*, N.Y. Times (Apr. 6, 2010), <http://www.nytimes.com/2010/04/07/us/07watch.html> (on file with the *Columbia Law Review*) (“Every year, thousands of people find themselves caught up in the government’s terrorist screening process. Some are legitimate targets of concern, others are victims of errors in judgment or simple mistaken identity.”); Stephanie Condon, *22,000 File Appeals with Obamacare Site, Report Says*, CBS News (Feb. 3, 2014, 11:20 AM), <http://www.cbsnews.com/news/22000-waiting-for-obamacare-website-errors-to-be-fixed-report-says/> (on file with the *Columbia Law Review*) (reporting that tens of thousands of people were wrongfully denied federal health insurance coverage or were assigned to the wrong federal health insurance program).

234. See Magill, *Beyond Powers*, *supra* note 85, at 605 (“We have not come close to articulating a vision of what an ideal balance [among the constitutional branches] would look like.”).

rivals, and it is difficult and undoubtedly imprudent to prescribe a one-size-fits-all calibration for all agencies across all times. This capacious understanding is also descriptively accurate. After all, administrative rivals do vary in their relative positions of strength and weakness depending on the particularities of the law in specific policy domains, on whether bureaucratic culture is especially robust in these domains, and on whether the public is more or less engaged. Lastly, this capacious understanding is normatively attractive. Given the diversity of responsibilities entrusted to the many federal agencies, most observers would presumably recognize variance in the relative strengths and weaknesses of the administrative rivals as sensible, perhaps necessary.²³⁵ And even if they do not, permitting such play in the joints (rather than fixing an optimal allocation of power among the rivals) encourages experimentation²³⁶ as well as rigorous competition among the administrative principals to push their respective institutional agendas—a competition that promotes vigilance and produces the sort of healthy cycling described in Part II.B.1.

Third, one might ask about the conventions that undergird administrative separation of powers. In explaining the mechanics of administrative separation of powers, I have focused principally on the legal authorities each administrative rival possesses and on the political and institutional incentives that shape how the rivals exercise their respective powers. Operating somewhere between formal law and ordinary politics are conventions.²³⁷ Like they do elsewhere, these conventions are apt to play an important role in defining and helping to regulate the administrative separation of powers.²³⁸

235. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 236–37 (2001) (emphasizing the diversity of administrative designs, the range of statutory authorities, and the need for courts to “tailor deference to [this] variety”); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 *Tex. L. Rev.* 499, 571–80 (2011) (explaining that the courts sometimes establish agency-specific precedents that call into question the notion of a truly transsubstantive administrative law canon).

236. One might say that a system of separation of powers capable of allowing such “play in the joints” is a robust and durable one. By contrast, an inflexible system that prescribes and insists upon adherence to a fixed, “optimal” allocation of power is more likely to be scrapped or circumvented than one that can itself accommodate changing circumstances or the imperative to reform.

237. See Adrian Vermeule, *Conventions of Agency Independence*, 113 *Colum. L. Rev.* 1163, 1181–85 (2013) (defining conventions as “extrajudicial unwritten norms” that, unlike purely political practices, are “followed from a sense of obligation”).

238. Recent scholarship has emphasized the distinctive and important role conventions play in administrative law, see, e.g., *id.* at 1166, as well as in the domain of constitutional separation of powers, see, e.g., David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 8–9 (2014) (explaining that conventions serve to “organize relations and promote cooperation among” the branches of government).

Specifically, conventions constrain, moderate, and render more predictable the interplay of the administrative rivals. Absent conventions, agency heads, civil servants, and members of civil society relying solely on their legal authorities—and driven solely by ordinary political and institutional impulses—could and perhaps would engage in more destructive forms of competition. For example, civil servants can—but don't (and shouldn't)—reflexively resist *most* directives from the appointed leadership. Embracing such a consistently defiant stance would certainly weaken agency leaders, perhaps to the point of effectively incapacitating those administrative rivals. But any such victory would be a Pyrrhic one, damaging the reputation of the civil service and the overall legitimacy of the administrative arena. Likewise, agency heads can—but generally don't (and shouldn't)—interfere with the specific factual findings or policy judgments of those agency personnel understood to be politically insulated. Such interference might well be lawful and might advance the Administration's agenda (at least in the short term). But interference of this sort likewise comes at a great cost. It jeopardizes the integrity of the administrative process and exposes the leadership's policies as exercises of political force rather than politically informed reason. Though conventions are generally not legally enforceable, administrative rivals have reason to regularly abide by them out of a sense of obligation and because they undoubtedly recognize that violations will be punished through any number of political or reputational sanctions.²³⁹

III. THE PRIVATIZED ERA

The simple, elegant, and surprisingly familiar structure of administrative separation of powers undergirds administrative legitimacy, preserving the constitutional commitment to limited, rivalrous, and heterogeneous government amid dynamic regime change. The radical toppling of the Framers' tripartite system amounted to nothing short of constitutional apostasy. But the subsequent development of a secondary separation of powers was an act of restoration—signaling the new regime's constitutional fidelity.

Understanding administrative governance through a separation-of-powers framework helps better explain the American administrative state, its constitutional pedigree, and its various strengths and weaknesses. It also casts civil servants and members of civil society in a different light: as crucial, perhaps constitutionally necessary, participants in administrative governance.

Additionally, this revised understanding readies contemporary audiences for life in the post-administrative state—a life in which privatiza-

239. See Vermeule, *supra* note 237, at 1182–85 (describing sanctions).

tion's commingling and consolidation of political and commercial power endangers administrative separation of powers and, with it, the constitutional commitment to checking and balancing state power in whatever form that power happens to take.

This Part unfolds as follows. Part III.A captures the decline of administrative separation of powers. Here I show how today's agency leaders are disabling their institutional rivals. Specifically, these agency leaders are employing various privatization practices that have the effect of co-opting select public participants and defanging civil servants. Members of the public were empowered to be a foil to politically appointed agency heads and to add distinctive voices to the administrative process. Today, some are hired guns, dutifully advancing rather than encumbering or broadening the agency leaders' agenda. Likewise, civil servants were positioned to constrain agency leaders and add learned insights. Today, these rivals are either sidelined or stripped of the job security that emboldens them to enforce those constraints and assert their expertise.

Part III.B insists upon carrying the commitment to encumbered, rivalrous government beyond those institutions explicitly mentioned in the first three Articles of the Constitution.²⁴⁰ That is to say, this section claims that courts should approach subversions of administrative separation of powers with the same vigilance and skepticism they seem to apply when confronting subversions of constitutional separation of powers.²⁴¹ In addition, by contending that an enduring, evolving separation of powers ought to extend whenever and however state power morphs, as it did in the 1930s and 1940s and as it is again instantly doing, this section's constitutional treatment also lays the foundation for a more universal metric for addressing other iterations of government renewal and reinvention.

Part III.C offers some preliminary and tentative thoughts on the possibility of engendering a tertiary separation of powers. Some such pathways might require the blending of constitutional, administrative, and corporate law principles to conjure up new institutional counterweights capable, perhaps, of promoting political and legal accountability notwithstanding government's wholesale embrace of privatization.

240. Cf. Ackerman, *New Separation*, *supra* note 162, at 688–89 (emphasizing the overlooked relevance of separation of powers at the subconstitutional, bureaucratic level of governance); Greene, *supra* note 25, at 128–32 (asserting that constitutional law—and its commitment to checks and balances—must be translated onto the administrative stage); Magill, *Beyond Powers*, *supra* note 85, at 651 (“If diffused government authority is what we are after, we have it, in spades.”); Metzger, *Internal and External Separation of Powers*, *supra* note 47, at 426 (indicating a need to think about “internal constraints” through the lens of constitutional separation of powers).

241. See *supra* Part II.B.3.

To be clear, though this project readily embraces rivalrous, heterogeneous, encumbered government as a political, normative, and constitutional antidote to concentrated and possibly arbitrary or tyrannous state power, it should not be read as an endorsement of privatization, checked or otherwise. I am not convinced that there is particularly well-informed support for such a shift toward privatization, as there had been, during the 1930s and 1940s, in favor of the then-emerging modern administrative state.²⁴² Nor am I at all convinced that there is a strong moral or practical justification for such a shift toward privatization.²⁴³ For better or worse, efficiency is not considered a preeminent constitutional value,²⁴⁴ though it admittedly has greater purchase in the realm of administrative governance. And even if efficiency were a preeminent value, it is hardly clear that privatized state power is necessarily more efficient, let alone more effective.²⁴⁵

Nevertheless, this project doesn't discount privatization on those terms. Instead, it understands and critiques privatization using new and different tools. By situating privatization within the Article's broader account of (1) recurring battles between power and constraint and (2) an enduring commitment to separating and checking power across governing platforms, I hope to reveal the fundamental tensions between privatized and administrative governance and illuminate the foundational, perhaps insurmountable, normative and constitutional challenges that this fusion of state and commercial power poses.

A. *The Fall of Administrative Separation of Powers: Running Government like a Politicized Business*

Some believe the project of constructing what I'm describing as a secondary, administrative separation of powers has gone too far.²⁴⁶ They bemoan how constrained administrative agencies have become. Night-

242. Cf. Ackerman, *We the People*, supra note 195, at 34–57 (documenting the broad support and effective endorsement of administrative governance during the New Deal period); 2 Bruce Ackerman, *We the People: Transformations* 3–31 (1998) (similar).

243. See Michaels, *Running Government*, supra note 2, at 1154–55, 1171–74 (contending that privatization is normatively and in some respects constitutionally incompatible with American public law and public administration).

244. See, e.g., *INS v. Chadha*, 462 U.S. 919, 958–59 (1983) (“[I]t is crystal clear . . . that the Framers ranked other values higher than efficiency.”).

245. For reports documenting contractor waste and fraud, see Michaels, *Pretensions*, supra note 2, at 729 n.44; see also Verkuil, *Separation of Powers*, supra note 10, at 304 (contending that separation of powers generates efficiencies).

246. See Michaels, *Running Government*, supra note 2, at 1155 (describing considerable opposition to the modern administrative state along a number of dimensions).

mare accounts of sclerotic rulemaking,²⁴⁷ industry influence,²⁴⁸ bureaucratic obstinacy,²⁴⁹ and years and years of judicial entanglements²⁵⁰ have forced the leadership atop many agencies to retreat from bold policymaking and vigorous prosecution of wrongdoing.²⁵¹

Cost overruns too are seen as hampering administrative action. It is expensive to comply with extensive administrative procedures. Overseeing lengthy notice-and-comment proceedings and responding to a veritable tsunami of FOIA requests require considerable expenditures of resources; so do subsequent court battles initiated—and prolonged—by litigious members of civil society.²⁵² Other oft-lamented costs come in the form of purportedly above-market salaries and benefits paid to civil servants.²⁵³ Additionally, the effective conferral of tenure on civil servants means that, inevitably, some of these employees will be insufficiently motivated to work efficiently.²⁵⁴ For all of these reasons, agency leaders

247. See, e.g., McGarity, *Deossifying Rulemaking*, supra note 94, at 1385–86 (“[T]he rulemaking process has become increasingly rigid and burdensome.”).

248. See, e.g., Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. Kan. L. Rev. 689, 693 (2000); cf. George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3, 10–11 (1971) (emphasizing concerns with industry capture).

249. See, e.g., Kagan, supra note 39, at 2263 (describing administrative “inertia and torpor”); James Q. Wilson, *The Rise of the Bureaucratic State*, 41 Pub. Int. 77, 78–79 (1975) (highlighting administrative pathologies).

250. See, e.g., Mashaw & Harfst, supra note 94, at 443 (“[J]udicial review . . . burdened, dislocated, and ultimately paralyzed [NHTSA’s] rule making efforts.”); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 Admin. L. Rev. 7, 8 (1991) (“[J]udicial review of agency rulemaking is leading to policy paralysis in many regulatory contexts.”).

251. See infra note 255 and accompanying text.

252. See Wagner, supra note 95, at 1325 (describing public participation as often overwhelming “overstretched agency staff”); Juliet Eilperin, *It’s Official: EPA Delays Climate Rule for New Power Plant*, Wash. Post (Apr. 12, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/12/its-official-epa-delays-climate-rule-for-new-power-plants/> (on file with the *Columbia Law Review*) (attributing the EPA’s delay in promulgating greenhouse gas regulations in part to the fact that the “agency was still reviewing more than 2 million comments on its proposal”).

253. I say “purportedly” because, contrary to public perception, the evidence regarding a public–private pay differential is not altogether clear. See, e.g., Jeffrey H. Keefe, Econ. Policy Inst., *Debunking the Myth of the Overcompensated Public Employee: The Evidence 10* (2010), available at <http://s2.epi.org/files/2013/Debunking-the-myth-of-the-over-compensated-public-employee-1.pdf> (on file with the *Columbia Law Review*) (disputing claims that government compensation outstrips private-sector compensation).

254. See Kevin R. Kosar, Cong. Research Serv., *RL33777, Privatization and the Federal Government: An Introduction 20–21* (2006) [hereinafter Kosar, *Privatization*], available at <http://www.fas.org/sgp/crs/misc/RL33777.pdf> (on file with the *Columbia Law Review*) (explaining that privatization’s proponents often view government workers as insufficiently

might not have the inclination or resources to intervene as eagerly, robustly, or effectively as they would were administrative governance subject to far fewer rivalrous encumbrances.²⁵⁵

As was the case nearly a century ago with the weakening of the tripartite system of constitutional checks and balances, today the tripartite system of administrative checks and balances is on the verge of buckling in important places. Yet again there is a consolidation of power—a consolidation that has the effect, if not aim, of marginalizing institutional counterweights. In this iteration, however, agency leaders are commingling state and commercial power, teaming up with some of their administrative rivals and sidelining others. Disabling these secondary, administrative checks and balances heralds the rise of a new governing paradigm:²⁵⁶ an increasingly privatized state.

Contrary to many conventional accounts, this emerging privatized state should not be understood as smaller or less intrusive. As I have shown elsewhere and will summarize below, the emerging privatized state is capable of wielding (*and does wield*) unprecedented sovereign power—in no small part because it rejects public procedures, personnel, and norms.²⁵⁷

motivated); E.S. Savas, *Privatization: The Key to Better Government* 4–6, 119–230 (1997) [hereinafter Savas, *Key to Better Government*] (contending that civil servants lack the financial incentives to be diligent, efficient employees).

255. See Stephen Breyer, *Breaking the Vicious Circle* 33–51 (1993) (emphasizing the challenges agencies encounter when complying with administrative procedures); Jerry L. Mashaw et al., *Administrative Law: The American Public Law System* 623–28 (5th ed. 2003) (describing administrative procedures as burdensome and explaining why agencies have reason to avoid the onerous rulemaking process); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 *Yale L.J.* 276, 283–84 (2010) (“In recent decades . . . Congress, the President, and the courts have all taken steps that have made the notice-and-comment rulemaking process increasingly cumbersome and unwieldy.”); McGarity, *Deossifying Rulemaking*, *supra* note 94, at 1386 (describing the rulemaking process as “heavily laden with additional procedures, analytical requirements, and external review mechanisms”); Connor N. Raso, *Note, Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 *Yale L.J.* 782, 798–801 (2010) (characterizing administrative agencies as interested in circumventing the lengthy rulemaking process); cf. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 *Wake Forest L. Rev.* 745, 772–77 (1996) (arguing for a broader menu of policymaking options than what the APA rulemaking paradigm prescribes and doing so in part because notice-and-comment rulemaking is viewed as onerous).

256. Again, this isn’t to say that administrative governance will be completely supplanted or subsumed. But the rise of privatized governance invariably will marginalize elements of administrative governance, just as the rise of the administrative state marginalized elements of constitutional governance. See *supra* note 19.

257. The transition from the Administrative to this nascent Privatized Era is, of course, a complicated story. Some believe privatization helps unshackle state power from many of the legal strictures placed on government agencies, thus enabling government officials to expand their reach and quicken their pace. Others, however, understand privatization as

1. *Privatization Writ Large.* — I conceive of privatization broadly.²⁵⁸ There are, after all, many practices that commingle state and commercial power. Recently, the Treasury Department effectively went into business with America's failing investment banks, insurance giants, and carmakers. Treasury leveraged the government's equity shares (taken as partial compensation for the federal bailout) to dictate corporate policies—and did so without having to engage in the normal rulemaking process that would necessarily involve considerable participation by civil servants and members of the public.²⁵⁹ The National Park Service, among other federal entities, has established a private trust through which corporations and individuals can donate funds.²⁶⁰ The Service can use those funds to develop new programs, improve existing ones, and generally lessen reliance on congressional appropriations and on its own civil servants. Practically every agency encourages and endorses private standard setting

helping to shrink the size and scope of the State. E.g., E.S. Savas, *Privatization and Public-Private Partnerships* (2000). Truth be told, this latter, smaller-government account is the more politically salient one. See, e.g., John D. Donahue, *The Privatization Decision* (1989) [hereinafter Donahue, *Privatization Decision*]. Yet as my work and that of others have shown, government can be extremely powerful and expansive when funneling responsibility through private channels. See sources cited *supra* note 2 and accompanying text.

It also bears remembering that those championing the administrative state and, before it, the federal, constitutional state had varied motives for doing so. It was not just progressive reformers who rallied behind the administrative state. So too did some titans of industry, who envisioned robust regulation as likely to drive up the cost of entry, thus staving off would-be competitors. Likewise, self-interested bankers, merchants, and manufacturers perhaps indifferent to many of the Constitution's stirring promises of liberty nevertheless lined up alongside any number of noble patriots in state ratifying conventions. Thus, even in its motivational and aspirational complexity, the apparent transition from administrative to privatized governance bears parallels to prior ones between the Articles of Confederation and the Constitutional Era and then again between the Constitutional and Administrative Eras. This isn't to say, however, that the earlier shift to administrative governance and the apparent shift now to privatized government are equally meritorious moves. See *supra* notes 242–245 and accompanying text.

258. For far more comprehensive treatments of privatization, see sources cited *supra* note 2; *infra* note 266.

259. See Michaels, *Running Government*, *supra* note 2, at 1178–79 (discussing the federal government's use of corporate governance tools to regulate the business practices of AIG and the U.S. automakers). For more detailed accounts of the government's equity ownership of bailed-out firms and how the government used its status as equity owner to influence corporate behavior, see, for example, Andrew Ross Sorkin, *Too Big to Fail* 392–408 (2010); Templin, *supra* note 2, at 1185–86; J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 *Yale J. on Reg.* 283, 303–05 (2010); and Louise Story & Gretchen Morgenson, *In U.S. Bailout of AIG, Extra Forgiveness for Big Banks*, *N.Y. Times* (June 29, 2010), <http://www.nytimes.com/2010/06/30/business/30aig.html> (on file with the *Columbia Law Review*).

260. Kosar, *Quasi-Government*, *supra* note 2, at 14–15, 18–19.

as a substitute for notice-and-comment agency rulemaking²⁶¹—so much so that federal administrative agencies have incorporated close to 10,000 such private standards.²⁶² Furthermore, many agencies partner with private accreditation organizations, which devise and administer nominally federal policies.²⁶³ And some agencies are even creating their own venture-capital outfits to promote and shepherd the development of technologies that are both useful to the government and commercially profitable.²⁶⁴ Lastly, federal officials have horse-traded with TV networks. They have secretly relieved broadcasters of their formal regulatory responsibilities on the condition that those broadcasters incorporate government-approved, antidrug themes into their shows' storylines.²⁶⁵

This is a big and eclectic list, one that reflects just a few of the many forms and patterns privatization takes.²⁶⁶ For these purposes, I am not concerned with definitional precision. Rather, I am interested in any and all privatization initiatives that (1) rely on the voluntary participation of private actors to carry out public policymaking or policy-implementing responsibilities, (2) vest discretionary authority in private actors at the expense of civil servants, and (3) shift the physical locus of state power out of government corridors such that it is logistically and legally more

261. Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 *Wm. & Mary Bill Rts. J.* 497, 502 (2013) (“Increasingly, American governments—federal, state, and local—have been adopting part or all of some [privately set] standards . . . as regulatory requirements.”); see also Stacy Baird, *The Government at the Standards Bazaar*, 18 *Stan. L. & Pol’y Rev.* 35, 55 (2007) (noting federal agencies’ “preference [for] rely[ing] on private sector-developed standards”).

262. Mary F. Donaldson & Nathalie Rioux, *Nat’l Inst. of Standards & Tech., U.S. Dep’t of Commerce, Fifteenth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment I* (2012), available at https://standards.gov/nttaa/resources/nttaa_ar_2011.pdf (on file with the *Columbia Law Review*).

263. See, e.g., Timothy Stoltzfus Jost, *Medicare and the Joint Commission on Accreditation of Healthcare Organizations: A Healthy Relationship?*, *Law & Contemp. Probs.*, Autumn 1994, at 15, 15–17.

264. See, e.g., Michaels, (Willingly) Fettered, *supra* note 2, at 812–16 & n.50; see also Peter Eisler, *Government Challenges Firms to Build Better Batteries*, *USA Today* (Apr. 16, 2009), http://usatoday30.usatoday.com/tech/news/techinnovations/2009-04-15-batteries_N.htm (on file with the *Columbia Law Review*); Marc Kaufman, *NASA Invests in Its Future with Venture Capital Firm*, *Wash. Post* (Oct. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/30/AR2006103001069.html> (on file with the *Columbia Law Review*); Matt Richtel, *Tech Investors Cull Start-Ups for Pentagon*, *N.Y. Times* (May 7, 2007), <http://www.nytimes.com/2007/05/07/technology/07venture.html> (on file with the *Columbia Law Review*).

265. Daniel Forbes, *Propaganda for Dollars*, *Salon* (Jan. 14, 2000, 12:00 PM), <http://www.salon.com/2000/01/14/payola> (on file with the *Columbia Law Review*).

266. For work categorizing and mapping privatization, see Daphne Barak-Erez, *Three Questions of Privatization*, in *Comparative Administrative Law* 493, 494–97 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 *Marq. L. Rev.* 449 (1988).

difficult for the rest of civil society to participate meaningfully in policy development and execution. Nevertheless, for simplicity's sake, I focus on only two such practices. Both stand out for their durability, popularity, and transsubstantive reach across agencies and responsibilities. In what follows, I show how these two practices—government service contracting and the marketization of the bureaucracy (in which civil servants are made to resemble private-sector employees)—enable the evasion of legal and political administrative checks across a wide range of federal policy domains.²⁶⁷

This showing is in keeping with the counternarrative I have been developing over a series of projects.²⁶⁸ Conventional accounts of privatization typically focus on the abdication of government power and highlight the dangers associated with corrupt or wayward contractors. Those problems surely exist and will be touched upon below.²⁶⁹ But from a constitutional, rule-of-law perspective, the more pressing issue is the converse one: privatization as a way to extend, expand, and unshackle the power of the State.²⁷⁰ Among other things, privatization enables agency leaders to maximize their share of administrative power relative to other governmental and even private stakeholders.²⁷¹ Building on my previous work on privatization, the additional move this project makes is in mapping those power grabs onto a legally, normatively, and historically textured set of landscapes from 1787 onward. That is to say, here I explain how

267. Though I focus primarily on how these practices aggrandize executive power, it is no less true that the consolidation of political-commercial power could—and sometimes does—instead redound mainly to the benefit of the commercial partner in the form of sweetheart deals and broad discretionary authority. See *infra* notes 345–347 and accompanying text; cf. *supra* notes 70–71 and accompanying text (suggesting the dangers posed by a domineering bureaucracy or by special interests that capture an agency). Needless to add, some such political-commercial partnerships are not, and cannot be, used in a state- or executive-aggrandizing fashion. One would be hard pressed to show, for instance, how political-commercial arrangements that do not involve the exercise of policymaking or policy-implementing discretion threaten administrative separation of powers.

268. See sources cited *infra* note 271; see also Gillian E. Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1377 (2003) [hereinafter Metzger, *Privatization as Delegation*] (“[P]rivatization often goes hand in hand with expansion rather than contraction in public responsibilities.”).

269. See *infra* notes 296–302, 345–347 and accompanying text.

270. Elsewhere I explain that government officials already possess the legal tools and institutional incentives to deter and punish wayward contractors. See Michaels, *Pretensions*, *supra* note 2, at 765–67.

271. See *id.* at 722–24, 726–29 (“[Privatization enables] the Executive to gain greater control over government objectives, at the expense of coordinate branches, future administrations, the civil service, and the electorate.”); Michaels, *Progeny*, *supra* note 2, at 1036–38 (explaining that privatization “sideline[s] independent-minded civil servants” otherwise capable of challenging presidentially appointed agency leaders).

privatization is not a sui generis phenomenon. Instead, by systematically weakening administrative separation of powers, privatization operates as simply the latest threat to what I argue is an enduring, evolving commitment to separating and checking state power in whatever form that state power happens to take.

2. *Government Service Contracting.* — The outsourcing of government responsibilities to private service contractors has become a ubiquitous practice across all agencies.²⁷² We are told that contracting is “the government’s reflexive answer to almost every problem”;²⁷³ that “enlisting private competence has been enthroned as managerial orthodoxy”;²⁷⁴ that “governments at all levels (federal, state and local) today are making increased use of service contracting”;²⁷⁵ and that contracting “seems likely only to expand further in the near future, fueled by increasing belief in market-based solutions to public problems.”²⁷⁶ All told, federal contractors now outnumber federal civilian employees,²⁷⁷ with some estimates suggesting that the number of such contractors doubled in the last decade alone.²⁷⁸

Though there aren’t reliable data on exactly how many of these contractors actually help make policy or exercise considerable policy discretion at the implementation or enforcement stage, anecdotal evidence of service contractors carrying out sensitive, discretionary responsibilities

272. See Kosar, *Privatization*, supra note 254, at 3, 16 (capturing the sharp rise in federal service contracting and noting the pervasive use of contractors across the administrative state); Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155, 161 (2000) (“[T]he federal government, along with state and local governments, has increasingly depended on private contractors . . .”). This Article uses the term “service contractors” to distinguish contractors who carry out government policy responsibilities from those who make or maintain goods or hardware for the government. Of course, there are similar or parallel outsourcing trends throughout the broader American political economy. See, e.g., Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 Harv. L. Rev. 78, 104–33 (2011) (describing the outsourcing of judicial decisionmaking to private adjudicatory bodies).

273. Scott Shane & Ron Nixon, *In Washington, Contractors Take On Biggest Role Ever*, N.Y. Times (Feb. 4, 2007), <http://www.nytimes.com/2007/02/04/washington/04contract.html> (on file with the *Columbia Law Review*).

274. John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in *Government by Contract*, supra note 19, at 60.

275. Lawrence L. Martin, *Performance-Based Contracting for Human Services: Lessons for Public Procurement?*, 2 J. Pub. Procurement 55, 55 (2002).

276. Metzger, *Privatization as Delegation*, supra note 268, at 1379.

277. Curtis W. Copeland, Cong. Research Serv., RL34685, *The Federal Workforce: Characteristics and Trends 3–4 tbls.2 & 3* (2011) (on file with the *Columbia Law Review*); Paul C. Light, *A Government Ill-Executed: The Depletion of the Federal Civil Service*, 68 Pub. Admin. Rev. 413, 417–18 (2008).

278. Lewis & Selin, supra note 112, at 79.

across all domestic agencies continues to mount.²⁷⁹ For purposes of this project, I simply refer to my and others' works documenting the breadth, depth, and apparent trajectory of federal service contracting²⁸⁰ and focus instead on how the contracting out of policymaking and policy-implementing responsibilities (the "brains" of administrative governance) actually weakens administrative separation of powers, enabling agency leaders to more freely—and unilaterally—advance their programmatic agenda.

a. *Eluding Legal Constraints.* — Federal service contracting responds in part to the ever-growing chorus of complaints leveled against bureaucracy (and bureaucrats) for being slow, expensive, unmotivated, unimaginative, and undisciplined.²⁸¹ After all, the potential for efficiency gains²⁸² or cost savings²⁸³ numbers among the reasons most often cited for contracting out. Because contractors (unlike effectively tenured civil servants) are motivated by the promise of profits and disciplined by the threat of ouster—that is, of being readily replaced by a more responsive, more responsible, or cheaper competitor—they are expected to provide higher-quality, lower-cost services.²⁸⁴

Not surprisingly, service contracting quite often sidelines civil servants.²⁸⁵ The contractors who replace civil servants are more likely to help

279. See Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 417 (2007), available at http://www.acquisition.gov/comp/aap/24102_GSA.pdf (on file with the *Columbia Law Review*); Verkuil, Outsourcing Sovereignty, *supra* note 2, at 43; Guttman, *supra* note 19; sources cited *supra* notes 12–17 and accompanying text.

280. See sources cited *supra* note 2 and accompanying text.

281. See Savas, Key to Better Government, *supra* note 254, at 5 tbl.1.1; Richard Box, Running Government like a Business, 29 *Am. Rev. Pub. Admin.* 19, 19 (1999); Cass, *supra* note 266, at 466–69; James P. Pfiffner, The First MBA President: George W. Bush as Public Administrator, 67 *Pub. Admin. Rev.* 6 (2007).

282. See Kosar, Privatization, *supra* note 254, at 6–7, 17 (noting that private firms are often assumed to be more efficient because “competition and the profit-motive . . . goad [them] to better produce products and services than government”); Mark H. Moore, Introduction to Symposium: Public Values in an Era of Privatization, 116 *Harv. L. Rev.* 1212, 1218 (2003) (“Much of the appeal of privatization is based on claims that some form of privatization will increase the efficiency and effectiveness of government.”).

283. Contractors are often prized because they are believed to cost less. See Kosar, Privatization, *supra* note 254, at 15–16; see also *supra* note 253. For this reason, governments might hire contractors to exploit a perceived wage differential—what they see as a backdoor means of fiscal savings. See Donahue, Privatization Decision, *supra* note 257, at 143–44.

284. See, e.g., Michaels, Progeny, *supra* note 2, at 1030–32.

285. See Michaels, Pretensions, *supra* note 2, at 745–50.

the political leadership evade legal constraints.²⁸⁶ They are apt to do so for several reasons.

First, some legal requirements apply only to government workers and agencies. To the extent contractors are replacing government workers, they are relatively free to disregard government-specific mandates. Jack Beermann notes

the records of a [contracting] company administering a social welfare program might not be available to the public under FOIA because they would not be considered records of [a federal government] agency, and the directors of the private company would be able to meet in private, without regard to Sunshine Act requirements. Private companies developing rules of thumb for dealing with claims or other matters affecting the public might not have to publish those rules under the APA, and the lack of public access to their records and meetings might make it difficult for the public to even know of such rules' existence.²⁸⁷

As Beermann suggests, contractors' avoidance of these otherwise-applicable requirements marginalizes public participation, too. Once state power is channeled through private conduits, it becomes much harder for the rest of civil society to monitor, let alone directly challenge, the agency leaders using those conduits.²⁸⁸ Thus, service contracting squarely sidelines civil servants, and it also—at least partially—disenfranchises civil society. Were governing responsibilities handled in house, both civil servants and the general public could keep closer tabs on agency leaders.²⁸⁹

286. Recall that contractors today draft rules for agencies, determine the eligibility of would-be program beneficiaries, conduct research, run prisons, and monitor and enforce industry compliance with rules and orders. See *supra* notes 12–17 and accompanying text.

287. Jack M. Beermann, *Privatization and Political Accountability*, 28 *Fordham Urb. L.J.* 1507, 1554 (2001) (footnote omitted); see also Guttman, *supra* note 19, at 895 (echoing concerns about contractors' relative freedom from FOIA). To be clear, contractors must submit to FOIA requests if they are preparing or maintaining records for an agency, but not if their records relate to their own handling of government responsibilities. See 5 U.S.C. § 552b(c)(2), (f) (2012).

288. Specifically, governmental partnerships with some members of the public effectively foreclose opportunities for the rest of civil society to bring the full array of legal challenges that could be brought were responsibilities carried out exclusively by government actors in public spaces.

289. Of course, it is also possible for contracts to be drawn in ways that require contractors to abide by public law understandings of administrative governance. See Nina Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in *Government by Contract*, *supra* note 19, at 241, 244–53 (explaining that government contracts can themselves impose any number of restrictions, constraints, and public-regarding

Second, even where procedural requirements and substantive mandates apply equally to service contractors and federal employees, contractors are more likely than their tenured government counterparts to shortchange externally imposed constraints. Recall my claim that civil servants resemble judges in a dispositional sense. They are independent and professional, and have strong institutional and cultural reasons for insisting agency leaders comply with statutory directives and best scientific practices.²⁹⁰ They also have no financial and few, if any, persistent political incentives that cut in the opposite direction.²⁹¹

By contrast, service contractors often have monetary incentives to do any given job more quickly, or more superficially. Shortchanging statutorily prescribed procedures helps contractors lower their operating costs—and thus increase profits.²⁹² For these reasons (and in this respect²⁹³), contractors' own interests align more closely with those of agency leaders eager to cut through red tape and run their departments with as few hassles, challenges, and externally imposed obligations as possible.²⁹⁴

Third, even assuming a service contractor's pay did not turn on how fast or effortlessly the work is done, the contractor is nevertheless more susceptible to being pressured into cutting corners than a tenured civil servant would be. Absent long-term or sticky contracts,²⁹⁵ contractors

obligations on contracting firms). When and where such public law—regarding contracts exist, at least some of the concerns raised in this Article might well be lessened.

That said, we rarely see such contracts. Among other things, drafting contracts in such a manner is quite difficult; contractors so burdened would demand higher payments; and often agency leaders employ contractors precisely because private actors are not subject to expensive and onerous public law constraints.

290. See *supra* Part II.A.2.

291. Diller, *Revolution*, *supra* note 2, at 1186–1202 (noting the lack of professionalism among government service contractors compared to civil servants).

292. See Ralph Nash et al., *The Government Contracts Reference Book* 525 (2d. ed. 1998) (describing flat-fee government contracts that allow contractors to keep whatever part of the fee they don't spend); Dru Stevenson, *Privatization of State Administrative Services*, 68 *La. L. Rev.* 1285, 1290 (2008) (contending that government contractors have “perverse financial motivations . . . to spend as little time as possible” on given tasks “in order to collect higher profits for fewer labor-hours” or to focus only on “the easiest cases,” to the neglect of more difficult, resource-demanding ones).

293. I say “in this respect” because contractors might well try to overcharge the agency or cut corners in ways that frustrate or embarrass agency heads. See, e.g., Erik Eckholm, *Auditors Testify About Waste in Iraq Contracts*, *N.Y. Times* (June 16, 2004), <http://www.nytimes.com/2004/06/16/politics/16rebu.html> (on file with the *Columbia Law Review*) (noting that contractors working on cost-plus contracts care very little about keeping expenses in check).

294. See *supra* Part II.A.1.

295. See, e.g., *Super*, *supra* note 2, at 414–44 (describing how government officials lose control over private actors operating under long-term contracts or under

serve as agents of the incumbent Administration and the political appointees running administrative agencies.²⁹⁶ Like those hired and fired under the old Spoils System (but unlike politically insulated civil servants), these contractors can be readily fired and replaced.²⁹⁷ As a result, they have strong incentives to support, rather than challenge, the agency leaders.

For these three reasons (and, again, because agency leaders need to rely on *somebody* to help develop, administer, and enforce agency policies²⁹⁸), the turn to contracting helps consolidate the leaders' control. This effective fusion of political and commercial power weakens the administrative rivalries that otherwise enrich agency decisions, guard against government abuse, and promote compliance with the rule of law.²⁹⁹

b. *Eluding Political Constraints.* — The same story about contractors being more likely than civil servants to cut legal corners holds with respect to matters of politics. Because contractors want to be hired, retained, and paid to take on additional responsibilities, they have good reason to embrace the agency chiefs' political priorities. That is, they have good reason to be "yes" men and women.³⁰⁰ By contrast, civil servants are insulated from politically motivated hiring and firing decisions. They are accorded that protection notwithstanding some of the inefficiencies job tenure invariably breeds precisely so that they are able to assert their expertise, resist partisan overreaching, and further the

circumstances where it is highly unlikely for government officials to replace the incumbents); *infra* note 345 and accompanying text.

296. See, e.g., Guttman & Willner, *supra* note 2 (characterizing contractors as quite willing to champion agency leaders' programmatic and ideological interests).

297. See Guttman, *supra* note 19, at 917 (explaining that it is easier to dismiss government service contractors than government employees); Michaels, Progeny, *supra* note 2, at 1049 (similar); cf. Katherine V.W. Stone, Revisiting the At-Will Employment Doctrine, 36 *Indus. L.J.* 84, 84 (2007) ("In the United States, the dominant form of [private] employment contract is at-will.").

298. See *supra* notes 111–113 and accompanying text (describing agency leaders' dependence on a large workforce to devise and carry out agency initiatives).

299. See *supra* Part II.A.1. Note the reinforcing effect of agency compliance with procedures. Once an agency is committed to, say, full-fledged informal rulemaking, the notice-and-comment process itself substantively empowers public participants. It also empowers the permanent agency staff. The complexity and labor-intensive features of the rulemaking process mean that agency leaders will have to rely to a greater extent on the civil servants in the trenches. Thus, the shortchanging of procedures has a multilayered effect on administrative rivalries.

300. See Michaels, *Pretensions*, *supra* note 2, at 748–50; see also Paul R. Verkuil, Public Law Limitations on Privatization of Government Functions, 84 *N.C. L. Rev.* 397, 465 (2006) [hereinafter Verkuil, *Public Law Limitations*] ("Government officials often feel that they have more control over private contractors than they do over their own employees due to restrictions on hiring or firing permanent employees.").

interests of the agency (and not necessarily those of the incumbent Administration).³⁰¹ Civil servants' ability and willingness to challenge the leadership diffuses administrative power, thereby limiting the realization of hyperpartisan programmatic agendas.³⁰² Thus, here too, contractors provide a double boon to agency leaders interested in maximizing their authority and discretion. Solicitous contractors directly replace independent, potentially adversarial civil servants. And by virtue of their carrying out public responsibilities in what are effectively private corridors, these contractors also have the indirect effect of narrowing the role large segments of civil society can play in challenging agency leaders.

* * *

It bears mentioning that some civil servants remain involved in the day-to-day management of government contracts. But their involvement and effectiveness should not be overstated. This is so for two reasons. First, it is agency leaders who often have the authority (and incentive) to initiate the push to privatize and to devise the broad guidelines for contractors to follow. Second, those civil servants engaged in the day-to-day management of government contractors are generally procurement personnel.³⁰³ They are contract managers and auditors, not especially well versed in the substantive policy and legal domains within which the contractors are working.³⁰⁴ These civil servants make sure the contractors are not being wasteful or fraudulent.³⁰⁵ But they are not well positioned to identify, let alone confront, contractors who seek (or are encouraged) to cut legal corners or who help advance an especially partisan agenda.

3. *Marketization of the Bureaucracy.* — Much of the enthusiasm for service contracting turns on various forms of labor arbitrage. It is widely believed that civil servants receive higher levels of compensation than do their private-sector counterparts.³⁰⁶ Many civil servants enjoy stronger collective-bargaining protections than those commonly found in the pri-

301. See *supra* Part II.A.2.

302. See Michaels, Progeny, *supra* note 2, at 1036–37 (explaining civil servants are able to “provide expert, unfiltered advice without fear of being fired for doing so”). See generally Matthew C. Stephenson, Optimal Political Control of the Bureaucracy, 107 *Mich. L. Rev.* 53, 93–95 (2008) (contending that forcing politically appointed leaders to share administrative responsibility with the politically insulated bureaucracy is accountability enhancing).

303. See Steven L. Schooner, Fear of Oversight: The Fundamental Failure of Businesslike Government, 50 *Am. U. L. Rev.* 627, 631–71 (2001) (describing agency procurement officers and their role in overseeing government contracts and service contractors).

304. See *id.*

305. See *supra* note 270.

306. See *supra* note 283 and accompanying text.

vate sector.³⁰⁷ And, unlike most private-sector workers, they generally cannot be fired absent cause.³⁰⁸

Over the past few decades, those frustrated with what they see as an expensive, unresponsive, and insufficiently motivated government workforce have championed government service contracting.³⁰⁹ It was, after all, easier for them to contract around government labor policy than to dismantle the then-still-entrenched civil service.³¹⁰

Now, however, the civil service finds itself on the proverbial hot seat. As I have shown elsewhere, elected officials at every level of government (and representing interests across the political spectrum) are reducing civil servants' salaries, cutting benefits, renegotiating pensions, and scaling back collective-bargaining rights.³¹¹ They're also reclassifying civil servants as at-will employees.³¹² In effect, these officials are "marketizing" the government workforce—refashioning it in the private sector's image.

To date, the marketization trend is substantially more pronounced at the state and local levels. But marketization is nevertheless a growing reality for hundreds of thousands of federal civil servants, too, including those whose responsibilities entail exercising judgment and discretion at the policymaking and implementation stages.³¹³ Moreover, federal

307. See Richard Michael Fischl, *Running the Government like a Business: Wisconsin and the Assault on Workplace Democracy*, 121 *Yale L.J. Online* 39, 49–50 (2011) <http://www.yalelawjournal.org/forum/running-the-government-like-a-business-wisconsin-and-the-assault-on-workplace-democracy>; Donald S. Wasserman, *Collective Bargaining Rights in the Public Sector*, *in* *Justice on the Job* 62–63 (Richard N. Block et al. eds., 2006).

308. See *supra* note 297 and accompanying text.

309. See Savas, *Key to Better Government*, *supra* note 254, at 4–11; Michaels, *Running Government*, *supra* note 2, at 1152, 1154–55.

310. Michaels, *Progeny*, *supra* note 2, at 1026.

311. *Id.* at 1042–49.

312. *Id.* at 1049–50. It is worth noting that this instant and direct challenge to the civil service comes on the heels of other efforts that chip away at the civil service. Such efforts include the creation of the Senior Executive Service and the expansion of so-called Schedule C appointees. See Lewis & Selin, *supra* note 112, at 84–86. Senior executives and Schedule C appointees handle high-level agency responsibilities that would otherwise be entrusted to civil servants. *Id.* at 84–85. Both senior executives and Schedule C appointees lack the full panoply of legal protections that insulate civil servants from the partisan pressures of agency leaders. See *id.* at 84 n.227, 85 n.229.

313. See Luther F. Carter & Kenneth D. Kitts, *Managing Public Personnel: A Turn-of-the-Century Perspective*, *in* *Handbook of Public Administration* 381, 396 (Jack Rabin et al. eds., 3d ed. 2007); Katal, *supra* note 67, at 2333 (describing legislation that weakened the civil-service protections of 170,000 federal workers); Donald P. Moynihan, *Homeland Security and the U.S. Public Management Policy Agenda*, 18 *Governance* 171, 172 (2005); Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 *U. Pa. J. Lab. & Emp. L.* 295, 297, 316 (2004); Wasserman, *supra* note 307, at 60. For examples of marketization spilling over into matters relating to government speech, see Pauline T. Kim, *Constitutional Rights at*

marketization is poised to accelerate greatly in light of continued efforts to chip away at civil-service protections.³¹⁴ Notable among those efforts is a pending rule, the effect of which would be, as some see it, to do away with civil-service protections for a large number of federal employees.³¹⁵ Specifically, the rule would allow White House officials to convert into at-will employees any and all current federal civil servants whose responsibilities touch upon national or homeland security, pertain to critical physical or electronic infrastructure, or have some connection to the safeguarding, maintenance, or disposition of key hazardous materials or natural resources.³¹⁶ Needless to say, many of these responsibilities reach well beyond the national-security agencies that have always stood somewhat outside of the strictures of administrative law (and thus do not occupy my attention here). Indeed, the proposed rule seemingly affects broad swaths of employees in such core domestic outfits as the EPA, the FCC, and the Departments of Health and Human Services, Energy, Treasury, Interior, and Transportation.

a. *Eluding Legal Constraints.* — By stripping government workers of their civil-service tenure protections, marketization has the effect of weakening one of the chief counterweights in administrative law's system of subconstitutional checks and balances. As was the case with government service contractors replacing civil servants, politically vulnerable, marketized government workers will be more likely to skirt procedural obligations than would traditional civil servants explicitly and intentionally insulated from an incumbent Administration's rewards and retributions.³¹⁷

Work: Speech and Privacy 9–14 (unpublished manuscript) (on file with the *Columbia Law Review*).

314. See, e.g., Philip Bump, *How Federal Workers Became the New Welfare Queens*, Atlantic Wire (Mar. 20, 2013, 4:47 PM), <http://www.thewire.com/politics/2013/03/how-federal-workers-became-new-welfare-queens/63359> (on file with the *Columbia Law Review*).

315. See Press Release, Gov't Accountability Project, *Proposed Rule Could Void Civil Service System for Most Federal Employees* (May 28, 2013), available at <http://www.whistleblower.org/press/proposed-rule-could-void-civil-service-system-for-most-federal-employees> (on file with the *Columbia Law Review*).

316. *Designation of National Security Positions in the Competitive Service, and Related Matters*, 78 Fed. Reg. 31,847, 31,849 (proposed May 28, 2013) (to be codified at 5 C.F.R. pt. 1400). If promulgated, this rule would open the door to agency heads having virtually unreviewable authority over how to classify large segments of the federal workforce.

317. Marketization also entails a greater emphasis on performance-based pay for government workers. See Michaels, Progeny, *supra* note 2, at 1048–49. To the extent that agency leaders determine those bonuses, the incentive for newly marketized employees to follow the Administration's lead is that much greater. For a historical account of government compensation keyed to bounties and facilitative payments, see generally Parrillo, *supra* note 19.

These marketized workers might be obligated to do so by the agency's appointed leaders. But even without explicit pressure from the agency heads, marketized government workers shorn of civil-service protections are essentially temporary workers.³¹⁸ Over time, they as a class are also more likely to be lower-quality employees with lower morale. Indeed, already the relatively modest reductions in pay and job tenure are contributing to a civil-service "brain drain."³¹⁹ For these reasons, the remaining and any newly hired marketized employees are less likely to buy into the once-prevailing ethos of bureaucratic professionalism.³²⁰ Simply stated, in a norm-driven community like the bureaucracy, demoralized, devalued, and vulnerable government workers are less likely to serve as motivated, reliable, and capable counterweights to the agency leaders.³²¹

b. *Eluding Political Constraints.* — With respect to the civil service's traditional role in moderating the political excesses of the agency leadership,³²² marketization weakens this otherwise-potent constraint, too. At

318. See Sergio Fernandez et al., *Employment, Privatization, and Managerial Choice: Does Contracting Out Reduce Public Sector Employment?*, 26 *J. Pol'y Analysis & Mgmt.* 57, 60, 67 (2007) (connecting the rise in part-time government employment to greater government reliance on privatization and marketization initiatives); Steven W. Hays & Jessica E. Sowa, *A Broader Look at the "Accountability" Movement: Some Grim Realities in State Civil Service Systems*, 26 *Rev. Pub. Personnel Admin.* 102, 103–04 (2006) ("[D]eregulation of public personnel has led . . . to an increase in the number of part-time employees . . ."); Michaels, *Progeny*, supra note 2, at 1047 (describing the "casualization" of marketized government workers).

319. Joe Davidson, *Report Shows Federal Workers Are Increasingly Dreary About Their Jobs*, *Wash. Post* (Nov. 16, 2011), http://www.washingtonpost.com/politics/report-shows-federal-workers-are-increasingly-dreary-about-their-jobs/2011/11/16/gIQAJaIXSN_story.html (on file with the *Columbia Law Review*) (quoting a government official arguing that federal "[p]ay freezes and reductions in benefits will only exacerbate the coming brain drain" and that reductions in pay and benefits will discourage "the best and brightest [from] public service"); see also Hays & Sowa, supra note 318, at 114–15; Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice*, *Wash. Post* (Nov. 13, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/12/AR2005111201200.html> (on file with the *Columbia Law Review*) (emphasizing how the politicization of the Justice Department undermined worker morale and prompted a large exodus of career staffers).

320. See Lewis, supra note 98, at 30; Metzger, *Internal and External Separation of Powers*, supra note 47, at 430.

321. Immediately above, I described marketized government employees as easily dominated by the agency leaders and suggested how that domination diminishes an important administrative rivalry. Even if marketized workers are not pressured by agency heads, they are nonetheless vulnerable to industry influence. For the reasons just discussed, marketized workers are far less likely to be career, professional government servants and thus are more susceptible to the lures of possible opportunities in the private sector. If so, the tripartite scheme of administrative separation of powers might still be compromised—only in this case it would be select members of the public teaming up with the marketized government workforce.

322. See supra Part II.A.2.

will employees are, as indicated above, vulnerable employees. Without job security, marketized government workers share perhaps more in common with those hired under the old Spoils System we associate with Andrew Jackson and Tammany Hall than they do with the professional, politically insulated civil servants of the Administrative Era.³²³ Where marketization takes root, administrative power is once again concentrated. Marketized workers are apt to serve, however reluctantly, as party enthusiasts, supporting their patron's causes if only because their jobs might very well depend on it.³²⁴ No longer consistently or forcefully checked by professional civil servants, agency leaders enjoy greater discretion to prioritize their partisan aims.

B. *The Constitutionality of the Privatized State*

Privatization's vanquishing of administrative rivalries invites abuse and calls into question the legitimacy of state power funneled through private (or marketized) conduits. The burgeoning privatized state might have initially crept up on us. But it is hardly a secret today. It stares us in the face whenever we consider economic and environmental regulation, public-benefits programs, and transportation and energy policy—all of which are already heavily privatized.³²⁵ Yet despite serious academic, political, and judicial consideration of privatization in recent years, there has been relatively little headway in developing a comprehensive, constitutionally grounded theory to make sense of privatized governance.

First, answers to the currently dominant questions in the field, such as what constitute inherently governmental functions and what are the essential qualities of the State, remain elusive and divisive. One commentator grappling with the legal definition of inherently governmental functions compares his struggles with “trying to nail Jell-O to the wall; only nailing Jell-O is easier.”³²⁶ President Obama is more lit-

323. Stephen E. Condrey & R. Paul Battalio, Jr., *A Return to Spoils? Revisiting Radical Civil Service Reform in the United States*, 67 *Pub. Admin. Rev.* 424, 431 (2007) (describing the “blurring of public and private sector employment”). See generally Hoogenboom, *supra* note 107; Mashaw, *Administrative Constitution*, *supra* note 1, at 178 (“In a spoils system both expertise and objectivity are suppressed by the demands of party loyalty and rewards for partisan political service.”).

324. Mashaw, *Administrative Constitution*, *supra* note 1, at 177 (“[T]oday we view the insertion of partisan politics into the routine administrative operations of government as a formula for inefficiency, administrative favoritism, and, possibly, lawlessness . . .”).

325. See *supra* notes 272–279 and accompanying text.

326. David Isenberg, *To Be, or Not to Be, Inherent: That Is the Question*, *Cato Inst.* (Apr. 15, 2010), <http://www.cato.org/publications/commentary/be-or-not-be-inherent-is-question> (on file with the *Columbia Law Review*); see Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 *Cornell L. Rev.* 749, 772 (2011) (“[T]he term ‘inherently governmental function’ remains vague, and many federal agencies use different definitions and interpretations . . .”); see

eral, if not more confident: “[T]he line between inherently governmental activities . . . and commercial activities . . . has been blurred and inadequately defined.”³²⁷ Attempting to capture the essence of the State has a similarly Sisyphean quality to it.³²⁸ Even assuming we could agree on “where the boundaries of government power as opposed to private power lie,”³²⁹ many critics of privatization would, I presume, view an entirely marketized (but not actually privatized) government workforce as nevertheless emblematic of an impoverished State, hollowed out from within rather than chipped away at by external forces.

Second, litigants have had limited success in tethering privatization to specific constitutional or statutory prohibitions, the narrowness of which often cannot be stretched to cover twenty-first-century political-commercial initiatives. As Paul Verkuil notes, “The only reference in the Constitution arguably relevant to delegation to private parties is the Marque and Reprisal Clause.”³³⁰

What public lawyers have not done—and what this Article urges them to do—is to understand privatized governance as the latest challenge to the constitutional project of separated and checked power. This reframing takes the onus off privatization per se and places it instead on unchecked, concentrated state power that just happens to be advanced through private channels.³³¹ In doing so, this reframing frees lawyers

also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 540–47 (1985) (recognizing the difficulties associated with defining or identifying traditional government functions, uniquely governmental functions, and essential government functions); Verkuil, *Public Law Limitations*, supra note 300, at 401–02, 457 (suggesting “[i]nherent government functions . . . are elusive concepts” and indicating that the “pro-privatization environment erodes whatever limits [the inherently governmental functions] phrase implies”).

327. Presidential Memorandum of March 4, 2009: Government Contracting, 74 Fed. Reg. 9755–56 (Mar. 6, 2009). Subsequent efforts to improve the federal definition have not done much to advance the cause, as differences among legislative, administrative, and presidential definitions perdure. See Kate M. Manuel et al., Cong. Research Serv., R42039, *Performance of Inherently Governmental and Critical Functions: The Obama Administration’s Final Policy Letter 10–17* (2011).

328. Cf. Metzger, *Privatization as Delegation*, supra note 268, at 1396 (“Identifying what constitutes government power is a notoriously hazardous enterprise.”).

329. *Id.* at 1396–97.

330. Verkuil, *Outsourcing Sovereignty*, supra note 2, at 103. Verkuil does, however, attempt to locate other, less explicit, textual grounds. See *id.* at 103–06 (suggesting possible claims under the Appointments Clause while acknowledging their practical limitation as an effective check on overzealous privatization); *id.* at 123 (indicating the possible relevance of the Subdelegation Act); see also Alfred C. Aman, Jr., *The Democracy Deficit: Taming Globalization Through Law Reform 136–37* (2004) (proffering possible statutory challenges to privatization initiatives).

331. See Metzger, *Privatization as Delegation*, supra note 268, at 1401 (“Adequately guarding against abuse of public power requires application of constitutional protections to every exercise of state authority, regardless of the formal public or private status of the actor involved.”). Some constitutional regimes have shown themselves more receptive to

from having to rely on often-reedy legal text (or on confused and usually unavailing doctrines such as “state action”³³²)—allowing them instead to invoke thicker, more resonant structural constitutional principles in efforts to regulate *or simply invalidate* privatization initiatives.³³³

Indeed, as noted above, the concerns raised today over the commingling of state and commercial power parallel those raised in the 1930s and 1940s vis-à-vis powerful agency heads, as well as those raised in the 1780s with respect to a potent national legislature. The concerns in each

challenges to privatization qua privatization. See, e.g., Corte Suprema [C.S.] [Supreme Court], 17 octobre 2012, Daniel Arturo Sibrian Bueso, Dec. 769-11 (Hond.) (invalidating as unconstitutional an initiative authorizing part of Honduras to be governed by a special private regime); Nandini Sundar v. State of Chattisgarh, (2011) 8 S.C.R. 1028, 1081–85 (India) (declaring unconstitutional a statute authorizing the widespread deputization of private actors to serve as police officers); HCJ 2605/05 Academic Ctr. of Law and Bus. v. Minister of Fin. [2009] (Isr.), English translation available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf (on file with the *Columbia Law Review*) (finding privatized prisons unconstitutional under the Israeli constitution).

American constitutional law has, for the most part, shifted in the opposite direction. See Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 *Fordham L. Rev.* 2425, 2429–31 (2011) (“No delegation to private parties after . . . *Schechter* . . . has been invalidated . . . [Subsequent decisions] suggest a wide ambit for the private exercise of delegated authority.”). But see *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) (“It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”); see also *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) (“Government can regulate without accountability . . . by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress ‘sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government.’” (quoting *Lebron*, 513 U.S. at 390) (alterations in *Ass’n of Am. R.Rs.*)); *id.* at 1237 (insisting that delegations of regulatory authority to private parties are unconstitutional).

The U.S. Supreme Court has not, however, addressed the challenge this Article considers the more central, resonant one: whether exercises of commingled political-commercial power specially endanger constitutional separation of powers. See *infra* note 338 and accompanying text (describing the challenges and problems associated with government regulators who must juggle seemingly conflicting sovereign and commercial interests and responsibilities).

332. See *infra* note 344 (describing the state-action doctrine and its application to private actors advancing public aims).

333. Again, the approach I’m employing is a structuralist one, see Black, *Structure and Relationship*, *supra* note 202, at 11 (“[T]he logic of national structure, as distinguished from the topic of particular textual exegesis, has broad validity.”), and thus runs counter to approaches that interpret separation of powers with reference to specific constitutional clauses. Compare Manning, *supra* note 202, at 1971–2005 (questioning the validity of “freestanding separation of powers” principles), with Gillian Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 *Harv. L. Rev. F.* 98, 103–05 (2009), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/Forum_Vol_122_metzger.pdf (“Even decisions that do appear more uniclausal . . . are fundamentally animated by general visions of the meaning of constitutional separation of powers.”).

of these eras sound in the potentially abusive exercise of unencumbered, concentrated sovereign power. For those troubled by unencumbered, concentrated sovereign power, the Framers' commitment to checks and balances provided—and continues to provide—an answer. It provided an answer not only at the dawn of the Republic but also during the rise of administrative governance. Once public lawyers fully appreciate the transcendent reach of that constitutional commitment, they can reaffirm (and justify) that commitment again today, employing the grammar and doctrinal imperatives of constitutional separation of powers to insist that privatization's proponents take on the responsibility for reestablishing limited, accountable governance amid the dynamic turn to the market—or else abandon the enterprise altogether.

With this in mind, I pause here briefly to show how privatization's attacks on administrative separation of powers are analytically quite similar to the attacks on constitutional separation of powers discussed in Part II.B.3. An enduring, evolving separation of powers permits the administrative state to supplant the constitutional state as the dominant mode of governance, but seemingly only on the implicit condition that the architects of administrative governance reaffirm and refashion at the subconstitutional level the checks-and-balances rubric central to the Founding document. Under this theory, the same needs to hold true when federal officials embrace forms of privatization that effectively collapse administrative separation of powers. That is to say, a necessary corollary to administrative governance morphing into privatized governance ought to be an assurance that those political-commercial vehicles will likewise be robustly checked.

Yet to date courts have treated jockeying among administrative rivals much more leniently than similar maneuverings among constitutional rivals. This differential treatment is problematic for the following reason: It preserves encumbered, heterogeneous government within constitutional and administrative domains while enabling—and perhaps encouraging—unencumbered, concentrated exercises of privatized governance. The balance of this section offers examples of administrative rivals interfering with the others, ceding power to one another, and hoarding power for themselves in ways that seemingly should raise judicial hackles.

1. *Administrative Rivals Unduly Interfering with One Another.* — Above, I discussed *Boumediene*, in which Congress and the President attempted to strip the federal courts of their jurisdiction to hear habeas claims brought by Guantánamo detainees.³³⁴ There are jurisdiction-stripping analogs in administrative governance. For instance, agency leaders can and do act in ways that bypass or defang civil servants. As discussed, the contracting out of government responsibilities concentrates administra-

334. See *supra* Part II.B.3.a.

tive power by sidelining independent, often-countermajoritarian civil servants and using leadership-friendly, financially dependent contractors in their stead.³³⁵ Likewise, the “marketization of the bureaucracy” diminishes the civil service. Most directly, marketization’s reclassification of civil servants as at-will employees risks converting government workers from forceful independent counterweights to compliant cogs. For all of the reasons already mentioned, government workers without tenure are far less likely to resist attempts by agency leaders to shortchange legal directives or advance hyperpartisan agendas.³³⁶

Interference among administrative rivals occurs too when the political leadership takes effective control over corporations. As part of the federal bailouts of the late 2000s, Treasury officials acquired controlling stakes in insurance and automotive companies. They used their equity shares to dictate those firms’ internal governance structures, litigation strategies, and business decisions.³³⁷ By acting as a private owner, rather than as a public sovereign, Treasury could effectively regulate firms and industries without having to promulgate rules subject to notice-and-comment and judicial review. Bypassing notice-and-comment rulemaking and foreclosing the possibility of judicial challenge greatly limits the avenues available to members of civil society to participate fully in these important policy determinations. What’s more, this consolidation and commingling of commercial and political power raises the question who regulates the (ostensible) regulator, when the government plays the dual role of industry regulator and equity-owning corporate director?³³⁸

335. See *supra* Part II.A.2.

336. See *supra* Part III.A.2.a. Even if agency heads succeed in substantially revising the civil servants’ first draft of a rule or order, having a nonpartisan first draft as part of the administrative record serves as deterrent against political overreaching by the appointed leadership. And, even if the agency leaders are not deterred from reframing or disregarding that first draft, members of the public who sue the agency could point to the existence of an “honest” first draft in the record as evidence that the agency leaders acted arbitrarily or unreasonably in fashioning the final rule or order.

337. See Barbara Black, *The U.S. as “Reluctant Shareholder”*: Government, Business and the Law, 5 *Entrepreneurial Bus. L.J.* 561, 569–72 (2010); Templin, *supra* note 2, at 1184–89; Story & Morgenson, *supra* note 259.

338. See Michaels, *Running Government*, *supra* note 2, at 1178–79 (describing the federal government’s conflicting responsibilities as a shareholder and as a sovereign); Verret, *supra* note 259, at 287 (suggesting that the leading corporate law theories do not account for the “propriety or effect” of a sovereign controlling shareholder). In *Ass’n of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), *rev’d sub nom. Dep’t of Transp. v. Ass’n of Am. R.R.s.*, 135 S. Ct. 1225 (2015), the D.C. Circuit invalidated Amtrak’s authority to promulgate rules (jointly with a federal agency) regarding Amtrak’s priority usage of shared railroad tracks. The D.C. Circuit did so in large part because it viewed Amtrak as a private, for-profit entity—and thus prohibited under the private delegation doctrine from exercising rulemaking authority. See *id.* at 671–74. Because the Supreme Court deemed Amtrak to be “a governmental entity, not a

Not unlike habeas stripping, these examples of interference threaten to concentrate too much power in the hands of one or two of the administrative rivals. Absent assurances of some tertiary framework of checks and balances, such interference ought to raise constitutional concerns. After all, an attack on administrative separation of powers is, in essence, an attack on constitutional separation of powers, insofar as the administrative scheme serves as a necessary stand-in for the “real” thing.³³⁹

2. *Administrative Rivals Ceding Power to Another.* — Constitutional branches are not alone in ceding power to their rivals. Administrative actors have been known to do the same. Consider the case of agency leaders delegating sovereign authority to private actors, particularly those who are less stringently regulated than are their governmental counterparts.³⁴⁰ As discussed above, because statutory and constitutional law at times treat government workers and private personnel differently, agency heads have an incentive to use less-regulated private actors in lieu of government employees. Agency heads have the further incentive to cede power to these less-regulated private actors because they know that these

private one,” it vacated the D.C. Circuit’s opinion. *Dep’t of Transp. v. Ass’n of Am. R.R.s.*, 135 S. Ct. at 1233. Nevertheless, the Court acknowledged other possible constitutional concerns with Amtrak’s rulemaking authority. Specifically, it suggested that Amtrak, as “a federally chartered, nominally private, for-profit corporation [with] regulatory authority over its own industry,” might run afoul of the Due Process Clause. *Id.* at 1234 (citation omitted) (identifying issues for the Court of Appeals to address on remand).

339. Agency leaders’ systematic partnering with members of civil society and their sidelining of civil servants undermines Congress and the courts as well. As discussed, these two primary, constitutional counterweights to the President might regularly rely on members of the public and on civil servants to maintain encumbered, limited government once public policymaking is displaced onto the administrative stage. See *supra* Part II.A.2–3. They also might rely on these administrative rivals to provide facts and sound alarms. Thus, because the administrative counterweights can stand in for and extend the reach of their constitutional progenitors, any weakening of secondary, administrative separation of powers also runs the risk of weakening much of what remains of primary, constitutional separation of powers. I thank David Super for raising this point. See also Metzger, *Internal and External Separation of Powers*, *supra* note 47, at 442–43 (emphasizing the connections between intra-agency and constitutional constraints).

It should be noted that, just as Congress and the courts were complicit in their own institutional disarming—as they empowered and legitimized executive-dominated administrative agencies that took on legislative and judicial powers—Congress and the courts have at times also enabled, through their support or tolerance of privatization initiatives, the weakening of secondary separation of powers.

340. See Michaels, *Pretensions*, *supra* note 2, at 735–39 (describing instances in which private actors are not subject to many of the constitutional and statutory restrictions and limitations that are placed on government officials); *supra* notes 287–289 and accompanying text (remarking on administrative procedural requirements that apply to government officials but not necessarily to private actors carrying out government responsibilities).

actors can (and likely often will) more fully do the leadership's bidding.³⁴¹

An analogy can be made here to the line-item veto. Congress attempted to delegate a seemingly legislative power to the President precisely because the President is unitary and relatively unencumbered. That is to say, Congress understood the President to be in a better position to eliminate wasteful spending provisions. The President is in this better position largely because she can operate outside of the procedural constraints and heterogeneous political and parliamentary pressures that "plague" (or, of course, enrich and legitimate) the constitutionally prescribed legislative process.³⁴² But just as the line-item veto problematically consolidated legislative and executive power (and did so absent a backdrop of secondary checks and balances), the delegation of authority to private actors troublingly concentrates and expands administrative power. As mentioned above, though nominally a delegation *away* from agency leaders and seemingly a diffusion of state power, such delegations to politically and financially dependent personnel are likely to result in the effective consolidation of managerial and bureaucratic administrative power. What's more, because such delegations empower private actors to carry out government responsibilities (but often do not impose on those private actors the same substantive and procedural limitations placed on government personnel), this transfer results in an overall expansion of state power.³⁴³ Less-regulated private deputies can usually do more—e.g., reach further, more quickly, and with fewer interruptions—than their similarly situated government counterparts.³⁴⁴ This consolidation and

341. See Michaels, Pretensions, *supra* note 2, at 745–49.

342. See *Clinton v. City of New York*, 524 U.S. 417, 439–41, 447 (1998).

343. Note that a refusal by an official (or an agency) to act might itself be an expression of expanded state power, particularly if that official (or that agency) is drawing upon her (or its) broad discretionary authority when refusing to act. Thus a more powerful, less restrained state is not necessarily bigger or more interventionist.

344. See *supra* note 287 and accompanying text. To be sure, in some instances state-action doctrine sweeps in private actors, thus blunting some of the problematic elements of transfers and delegations that circumvent the civil service. But state action's reach is limited and unpredictable, see Sheila S. Kennedy, When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships, 11 *Geo. Mason U. C.R. L.J.* 203, 209–17 (2001), and promises to be more so as the line between public and private continues to blur. See Metzger, Privatization as Delegation, *supra* note 268, at 1410–37 (characterizing the state-action doctrine as misguided insofar as it is more likely to cover closely supervised private actors than those given broad discretion and autonomy). As the Court admits, "[O]ur cases deciding when private action might be deemed that of the state have not been a model of consistency." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (citation omitted).

Indeed, contractors today can often do what career government employees cannot, or will not, do. These private deputies have, among other things, infused social-service programs with religious instruction and engaged in data-mining activities deemed off

expansion of administrative power thus weakens administrative and, by extension, constitutional separation of powers. For these reasons, absent a backdrop system of tertiary checks and balances, such delegations between administrative rivals warrant very close scrutiny.

3. *Administrative Rivals Hoarding Power.* — An administrative rival hoarding power undermines separation of powers no less than a constitutional branch that does the same thing. This is an especially acute concern when agency leaders commit in deed or effect to long-term contracts, forgoing the ability to readily reassign or reclaim a contracted-out responsibility. As David Super has shown in the public-benefits arena, such arrangements leave select members of civil society (namely, incumbent service contractors) virtually unchecked in exercising state powers.³⁴⁵

Here, of course, the problems associated with long-term arrangements that limit the ability of government actors to reassert control (what I've elsewhere termed "sovereignty-abdicating" arrangements³⁴⁶) stand in some contrast with those pertaining to the use of private actors to aggrandize state or even just presidential power. Though this project is chiefly oriented around those latter considerations, it is nevertheless important to once again underscore (1) that any of the three administrative rivals (just like any of the constitutional rivals) is capable of trying to monopolize power and (2) that, consistent with an enduring, evolving commitment to separation of powers, attempts by any of the administrative rivals to monopolize power pose a fundamental threat to administrative legitimacy and thus constitutional governance as well.³⁴⁷

limits to government personnel. See Michaels, *Pretensions*, supra note 2, at 735–39 (discussing examples of privatized social-service provision and data-mining services). See generally Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 *Minn. L. Rev.* 1, 3–5, 7–9, 16–17 (2008) (emphasizing that much of the United States' national- and homeland-security "surveillance [programs] . . . will be conducted and analyzed by private parties," and noting the special dangers associated with public-private collaborations of this sort). Not surprisingly, when state action does not kick in, delegations to private actors strengthen agency leaders, consolidating their power and concomitantly weakening administrative and constitutional separation of powers.

345. See Super, supra note 2, at 419–21 (describing situations in which government agencies are effectively, if not legally, compelled to retain contractors and explaining how contracting firms that find themselves in those situations have considerable leverage in their dealings with agency officials); see also Michaels, *Pretensions*, supra note 2, at 739–44 (noting how limited agency officials are in their ability to reassert control over contractors operating pursuant to long-term or sticky contracts); Michaels, *Progeny*, supra note 2, at 1080–84 (similar); Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 *Minn. L. Rev.* 1965, 2012–15 (2011) (similar).

346. Michaels, *Progeny*, supra note 2, at 1083.

347. See supra notes 170–173 and accompanying text (acknowledging the threats posed by each of the three administrative rivals).

In short, these instances of administrative interference, power ceding, and hoarding (again, absent a fallback system of tertiary separation of powers) ought to be as constitutionally troublesome as analogous patterns of jockeying by Congress, the President, or the judiciary. Yet, as mentioned above, to date courts have done little, if anything, to limit or prevent privatization initiatives that undermine the administrative separation of powers.³⁴⁸

C. *Contemplating a Tertiary, Privatized Separation of Powers*

A richer understanding of the dynamic role separation of powers plays in the evolving constitutional order helps highlight the parallels between threats to constitutional separation of powers and threats to administrative separation of powers. No doubt, some privatization initiatives do not involve the outsourcing of discretionary responsibilities and thus cannot seriously endanger administrative separation of powers. And other initiatives that do involve the privatization of administrative “brainwork” are already fully enmeshed in a web of institutional constraints.³⁴⁹ But many are not. In those situations, a commitment to an enduring, evolving separation of powers might require judicial intervention, obligating courts to invalidate forms of privatization that compromise the constitutional project of encumbered, rivalrous government.

Such an appropriately strong judicial reaction might, in time, spur policy innovators to establish market-based pathways that attempt to check (and legitimate) the political–commercial partnerships. Though this is not the place for prescriptive blueprints or political prognosticating, a few words regarding the paths and obstacles that lie ahead might be in order. If state power is allowed to flow through private conduits, the enduring commitment to separation of powers might well warrant empowering new classes of private-sector counterweights³⁵⁰—a privatization “reformation” along the lines Richard Stewart identified as occurring within administrative law as that realm became more rivalrous and democratically inclusive.³⁵¹ That is to say, perhaps some institutionalized rivalry among corporate employees, consumers, townspeople, and firm

348. See *supra* Part III.B.

349. See Mendelson, Six Simple Steps to Increase Contractor Accountability, *in* Government by Contract, *supra* note 19, at 241, 244–53; Resnik, Globalization(s), *supra* note 2, at 164 (noting that privatization initiatives can be “law-drenched”).

350. Cf., e.g., Resnik, Globalization(s), *supra* note 2, at 170–71 (emphasizing that privatization endangers opportunities for self-governance); Gunther Teubner, After Privatization? The Many Autonomies of Private Law, 51 *Current Legal Probs.* 393, 394, 415–22 (1998).

351. See Stewart, *supra* note 4, at 1711–59 (discussing the reformation of American administrative law as involving the empowerment of civil society groups to check and enlarge the administrative process).

managers or directors could emerge as a constitutionally necessary, domain-specific corollary to privatized governance.

Even assuming that the engendering of private-sector rivalries would make sense from a constitutional, public law perspective, such a tertiary system of checks and balances would nevertheless appear to be out of step with orthodox understandings of corporate governance. These understandings privilege homogenous organizational control. Firms are understood to work well when—and because—there aren't rivalrous stakeholders.³⁵² Thus any proposal requiring the empowerment of, say, multiple classes of employees, consumers, and townspeople would likely be viewed as anathema.³⁵³

In essence, this conflict between public and private organizational theories is among the fundamental challenges of the emerging third era in which government is self-consciously (but problematically) run like a business.³⁵⁴ The heterogeneity of control that an enduring, evolving separation of powers demands seems incompatible with the prevailing private law notions of homogeneous corporate governance.

Perhaps a new, grand bargain, like the APA or the Constitution before it, will come about. Perhaps firms volunteering to directly advance state aims will simply accept the imposition of private, institutional counterweights as the cost of doing quite often lucrative business with the government. Such questions and concerns merit much more investigation and consideration than they can be given here. In a project principally focused on the normative and jurisprudential underpinnings of an enduring, evolving separation of powers, I can only hint at the challenges of imposing constitutionally necessary checks and balances onto a post-administrative, privatized terrain and invite further dialogue between the administrative and corporate governance worlds—a dialogue that might well be critical to framing, engineering, and calibrating (*or simply agreeing to dismantle*) a twenty-first-century legal regime that so regularly and nonchalantly commingles state and market power.

CONCLUSION

In tracing this constitutional commitment across two great eras—and bringing it to the doorstep of an apparent third—this Article covers a good deal of ground. It provides a new positive, normative, and

352. See, e.g., Henry Hansmann, *The Ownership of Enterprise* 39–44 (1996) (emphasizing the value of homogeneous corporate control and discussing the costs associated with collective, heterogeneous decisionmaking).

353. See *id.* at 44 (noting the “nearly complete absence of large firms in which ownership is shared among two or more different types of patrons, such as customers and suppliers or investors and workers”).

354. Michaels, *Running Government*, *supra* note 2, at 1154–55.

constitutional theory of administrative governance and offers a new way to think about privatization. But much work remains to be done. Regardless how or even whether reformers today go about constructing a tertiary system of separation of powers—and regardless how they go about striking the optimal balance between power and constraint—it is nevertheless incumbent on this generation of public law scholars first to recall the virtues of administrative governance (*because of, not in spite of, its very apparent inefficiencies that stem from the separating, checking, and balancing of administrative power*);³⁵⁵ and second to think about the burgeoning privatized state (or, really, any governance scheme promising efficiencies by way of institutional consolidation and streamlining) not as a *sui generis* phenomenon, but rather as the latest challenge to the enduring constitutional project of separated and checked state power.

355. See *id.* at 1176 (“[I]nefficiencies’ are not bugs in the American public law system. Rather, what businesses would see as inefficiencies are necessary elements of the constitutional and administrative design.”).

