

AN ENDURING, EVOLVING SEPARATION OF POWERS

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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 checking and balancing unrivaled state power in whatever form that power happens to take.

That commitment to an evolving, enduring separation of powers helps identify recurring patterns across three centuries, countless policy domains, and multiple governing platforms. Specifically, fears at the time of the Founding about an overbearing legislature mirror in important respects the fears in the 1930s and 1940s about the Executive-driven administrative juggernaut of the New Deal,¹ which now mirror the fears many consider pressing in 2014—namely, the rampant commingling and consolidation of state and corporate power.² The common thread that connects these three pivotal

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¹ Throughout, when discussing the rise of the administrative state, I will focus primarily on the New Deal agencies rather than those that came into existence earlier, see JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* (2012). 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 tethered to the President. *E.g.*, LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY 170* (2002) (describing the New Deal agencies as marking a dramatic uptick in administrative action and power); STEPHEN SKOWRONEK, *BUILDING A NEW ADMINISTRATIVE STATE* 290 (1982) (characterizing the New Deal administrative state as a “giant”); Mariano-Florentino Cuellar, *Securing the Nation*, 76 U. CHI. L. REV. 587 (2009).

² For discussions of contemporary privatization and the fusing of political and commercial power, see Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1022 (2013); Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717 (2010); Jon D. Michaels, *All the President’s Spies*, 96 CAL. L. REV. 901 (2008); Jon D. Michaels, *The (Willingly) Fettered Executive*, 97 VA. L. REV. 801 (2011); Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1415 (2010); Jon D. Michaels, *The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U.L.Q. 1001 (2004); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393 (2008); PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY* (2007); Martha Minow, *Outsourcing Power*, 46 B.C. L. REV. 989 (2005); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L.

moments is the emergence of a potentially abusive or corrupt wielder of consolidated sovereign authority. For those troubled by unencumbered, concentrated sovereign power, 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 provide an answer to 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 come into full bloom. Upstart agencies dotted rather than blanketed the federal terrain. And, courts signaled considerable degrees of constitutional hostility.³ Yet despite the uncertainty surrounding whether administrative governance would, in fact, take hold, important work was done anticipating, challenging, and most significantly starting to constrain (*and legitimate*) 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 extend and aggrandize their authority by circumventing laws, sidelining institutional rivals, and advancing hyper-partisan goals.⁵ Given contemporary privatization's remarkable, perhaps inexorable, ascent,⁶ the time is likewise right to anticipate, challenge, and again most significantly start to constrain (*and perhaps legitimate*) these 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.

REV. 543 (2000); Matthew Diller, *The Revolution in Welfare Administration*, 75 N.Y.U. L. REV. 1121 (2000); Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization*, 11 INT'L J. CONST. L. 162 (2013); Benjamin Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 ADMIN. L. REV. 1127, 1185 (2010); Kevin R. Kosar, *The Quasi-Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics*, CONG. RES. SERV., Jun. 22, 2011; Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1749 (2001); see also DANIEL GUTTMAN & BARRY WILLNER, *THE SHADOW GOVERNMENT* (1976); Marcel Kahan & Edward B. Rock, *When the Government is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1304 (2011).

³ E.g. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Crowell v. Benson*, 285 U.S. 22 (1932); *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*) (requiring the administrative decisionmaker to be personally and materially involved in the deliberative process: "The one who decides must hear").

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 M. SHORT, *THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES* 24, 26 (1923); W.F. WILLOUGHBY, *AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES* 385-86 (1919) (noting the rise of administrative agencies, raising concerns that those agencies will be overly politicized, and arguing that "[m]uch... still remains to be done if these evils 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 Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

⁵ See Michaels, *Pretensions*, *supra* note 2.

⁶ See *infra* Section III.A.

In tracing this multi-generational 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, sub-constitutional separation of powers that triangulates administrative power among politically appointed agency leaders, an independent civil service, and a vibrant civil society. This novel reframing helps resolve seemingly intractable normative and doctrinal struggles that have gripped generations of scholars and jurists.⁷ This reframing also provides a more seamless connection to the past. Notwithstanding administrative governance's revolutionary toppling of the tripartite constitutional regime,⁸ the (eventual) instantiation of 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.⁹

Second, this project's insistence that the privatized state be likewise understood through the same separation-of-powers lens illuminates the twenty-first century landscape, both public and private. The lessons of an enduring, evolving commitment to separating and checking power¹⁰ reveal that privatization is anything but a *sui generis* phenomenon. Instead, it is simply the latest threat to that normative and constitutional commitment. In this new, largely uncharted era populated by contractors who fight wars,¹¹ police communities,¹² run prisons,¹³ draft rules,¹⁴ render public-benefits decisions,¹⁵ and monitor and enforce regulatory compliance,¹⁶ actions and actors blur the

⁷ See *infra* Subsection II.B.1.

⁸ See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, dissenting) (claiming 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”).

⁹ See Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1988).

¹⁰ Separation of powers and checks and balances have distinct meanings. See, e.g., Heather Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 34 (2010) (describing the distinction between the independence of separation of powers and the interdependence of checks and balances). Nevertheless, I often 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 v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[W]hile 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 enables checking, and checking often depends upon the existence of separation.

¹¹ See, e.g., P.W. SINGER, *CORPORATE WARRIORS* (2003); Michaels, *Privatizing War*, *supra* note 2; Minow, *supra* note 2.

¹² See David Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1183–87 (1999).

¹³ See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

¹⁴ William Rodgers, 4 ENVIRONMENTAL LAW § 8.9 & 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”); Office of Technology Assessment, *Assessing Contractor Use in Superfund*, OTA-BP-ITE-51, 2 (Jan. 1989) (discussing government contractors’ “major role in conceiving, analyzing, and structuring the policies and tasks which make up the Superfund program”).

¹⁵ See Diller, *supra* note 2, at 1166–72, 1182–83.

private-public divide. But the underlying challenge is the same one we've encountered before: to marshal the grammar, devices, and doctrines related to constitutional separation of powers; to justify their continued relevance amid dynamic regime change; and, to conjure up new institutional counterweights that reestablish limited, rational government notwithstanding the turn to 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 an enduring and evolving normative and legal commitment to encumbered government through institutional counterweights. This Part first describes the Framers' system of tripartite checks and balances—a system that constrained and thus legitimated the exercise of newly expanded federal authority. It then explains how the constitutional tripartite system worked, ostensibly, too well, preventing later generations from responding to social and economic dislocations associated with modernity. Stymied but undaunted, government reformers created administrative agencies and equipped 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 in the 1930s and 1940s facilitated the exercise of concentrated, unrivaled Executive authority. It then introduces the novel: through Congress and the courts, these concerned administrative lawyers erected a system of sub-constitutional 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 administrative power, they equipped civil servants and nongovernmental participants with the tools and opportunities to resist—and improve upon—agency leaders' efforts to cut legal corners or implement hyper-politicized policies. Here I explain the concept of administrative separation of powers, connect it 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 sub-constitutional 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 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 teaming up with one of its institutional rivals and sidelining the other. Nongovernmental participants were supposed to be a foil, checking agency leaders and adding distinctive, often adversarial, voices to the administrative process. Now, they are facilitators, championing rather than checking and broadening 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 employ their expertise. I therefore argue that (as

¹⁶ See Miriam Seifter, *Rent-A-Regulator*, 33 *ECOL. L.Q.* 1091 (2006).

was the case in the Administrative Era) instantiating yet another—a *tertiary*—system of rivalrous checks and balances is a normatively and constitutionally necessary precondition to legitimizing these currently 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 unrivaled state power was renewed in the Administrative Era, wherein the construction of sub-constitutional checks and balances effectively legitimized and safeguarded administrative governance. And, my account provides the legal precedent, corrective blueprint, and normative imperative for subsequent generations (including ours) to reaffirm that commitment whenever a threat to limited 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. In Section A, I describe 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.

Section B addresses 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 equipped with legislative, executive, and judicial powers. In effect, the constitutional system of separation of powers buckled under the weight of its own inefficiencies, creating space for an alternative, initially unchecked administrative scheme to take center stage.¹⁷

¹⁷ Center stage is the operative phrase because, 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 MASHAW, *supra* note 1; NICHOLAS PARRILLO, *AGAINST THE PROFIT MOTIVE* (2013). Likewise, during the Administrative Era, constitutional and privatized practices perdure. 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 (2000); JACOB HACKER, *THE DIVIDED WELFARE STATE* 279-80, 292 (2002). 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 particular, dominant mode of governance and the corresponding marginalization of the others.

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

Having achieved independence from the British crown, the United States's first foray into collective self-governance proved short-lived. Within a few years, it became apparent that the Articles of Confederation foreclosed the ready exercise of even the most basic national powers.¹⁸ This power deficit drove America's leading statesmen back to the drawing board. Convening in Philadelphia, these statesmen fashioned a new governing blueprint. The Constitution they unveiled authorized considerably more federal power.¹⁹

These Framers were, however, cautious republicans. Describing the concentration of sovereign power as “the very definition of tyranny,”²⁰ they divided authority among a legislative, an executive, and a judicial branch.²¹ 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.”²² Thus, no branch, on its own, could dominate.²³

The Framers did more than divide power among three groups. They gave different incentives and characteristics to each group:²⁴ each is answerable to a different set of constituents, and each is subject to different temporal demands.²⁵ Because of these differing bases of accountability and different time horizons within which to work, the branches often harbor conflicting agendas. Such conflicting agendas sharpen institutional

¹⁸ See Fed. Nos. 15-22; PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-88, at 11-19 (2010) (describing consideration of the Articles' fundamental weaknesses).

¹⁹ William P. Rogers, *Congress, the President, and War Powers*, 59 CAL. L. REV. 1194, 1195 (1971).

²⁰ Fed. No. 46.

²¹ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (describing separation of powers as “the absolutely central guarantee of a just government.”).

²² Fed. No. 51, at 321-22. See generally Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 771 (2012) (describing the conflict-enabling virtues of separation of powers).

²³ Peter Strauss, *The Place of Agencies in Government*, 84 COLUM. L. REV. 573, 577 (1984) (“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 Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 142-53 (1994) (discussing the Framers' instantiation of checks and balances).

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

²⁴ Fed. No. 51, at 322 (“[T]hose who administer each department [possess] the necessary constitutional means and personal motives to resist encroachments of the others.”).

²⁵ Fed. No. 51, 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 and their common dependence on the society will admit”).

rivalries, enlarge and improve federal decisionmaking, and, of course, impede the consolidation of federal power for potentially tyrannical ends.²⁶

*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 to administrative agencies, working around rather than within the system of constitutional tripartism.²⁷ The modern administrative state really took off in the 1930s and 1940s. 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.”²⁸ Mini-governments unto themselves, these administrative agencies combined legislative, executive, and judicial functions in a way that effectively marginalized tripartite, constitutional government.²⁹

These new agencies of the New Deal and beyond could—and did—promulgate rules³⁰ with greater precision and fewer hassles; unlike congressional leaders, agency heads engaging in rulemaking did not have to secure the support of hundreds of cantankerous representatives across two legislative bodies.³¹ These agencies could enforce the rules they promulgated.³² And, they could resolve conflicts and make even

²⁶ Lloyd Cutler, *Some Reflections About Divided Government*, 18 PRES. STUD. Q. 485, 486 (1988) (stating that under the Framers’ tripartite regime, “one wonders how they ever got anything done”); Jonathan 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 successfully passing laws by lowering the probability of success).

²⁷ 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”).

²⁸ William O. Douglas, *Administrative Government in Action*, Speech to the Lotos Club, New York, Nov. 1938, http://www.sechistorical.org/collection/papers/1930/1938_1100_Douglas_AdmGov.pdf.

²⁹ *Id.*; *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, CJ, dissenting). Again, this depiction of New Deal agencies stands in some contrast with the earlier, generally less potent and less numerous agencies of the late nineteenth and early twentieth centuries. See *supra* note 1.

³⁰ See Strauss, *supra* note 23, at 76 (describing agencies engaging in rulemaking as “acting legislatively” and characterizing agency rules as “identical to statutes in their impact on all relevant legal actors”).

³¹ *E.g.*, 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.”); 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. INST. & THEORETICAL ECON. 676 (1989) (describing the high costs of securing and sustaining legislative majorities for any one vote).

³² *E.g.*, *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973); Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 879 (1989).

more law through swift, in-house adjudications.³³ Additionally, unlike Article III courts, administrative agencies could effectively create their own cases, selecting optimal enforcement vehicles through which to establish agency policy.³⁴

Not surprisingly, these modern administrative agencies advanced federal power to a heretofore-unmatched degree.³⁵ After all, these agencies were numerous, their powers broad, and their efficiencies unprecedented. These agencies could respond quickly, effectively, and powerfully even if—and perhaps especially when—two or all three constitutional branches were at loggerheads.³⁶

It also signaled the rise of the Presidency. Scholars and jurists are right to point out that agencies are creatures of all three constitutional branches.³⁷ Congress, the Judiciary, and the President each continues to wield considerable power over agencies.³⁸ But, at least with respect to Executive agencies,³⁹ the President is clearly in the driver's seat. The President controls the administrative agenda through a variety of formal and informal mechanisms,⁴⁰ including through Appointment and Removal powers.⁴¹ These powers allow the President to choose agency heads who share her ideological and policy affinities, and to fire or otherwise sanction those whose efforts prove unsatisfactory.⁴²

³³ See Mark Grunewald, *The NLRB's First Rulemaking*, 41 DUKE L.J. 274, 275 (1991) (describing the NLRB's largely unwavering "commitment to adjudication as its single method of policy formulation" as well as its first foray into rulemaking).

³⁴ See Strauss, *supra* note 23; see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* (1969).

³⁵ See FRIEDMAN, *supra* note 1; SKOWRONEK, *supra* note 1.

³⁶ WILLIAM HOWELL, *THE POLITICS OF DIRECT PRESIDENTIAL ACTION* (2003); Gillian Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1322-23 (2012) (describing legislative gridlock as resulting in the delegation of broader policymaking authority to administrative agencies); Neal Devens & David 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, 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).

³⁷ Strauss, *supra* note 23; *Mistretta v. United States*, 488 U.S. 361, 380-411 (1989) (describing and affirming the role Congress, the President, and the courts all play vis-à-vis administrative agencies).

³⁸ Barry Weingast & Mark Moran, *The Myth of the Runaway Bureaucracy*, REGULATION, May/June 1982, at 33, 34; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Firealarms*, 2 AM. J. POL. SCI. 165 (1984); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 103 (2006).

³⁹ I discuss the special case of independent agencies below. See *infra* notes 42, 73, and 87-88 and accompanying text.

⁴⁰ Kagan, *supra* note 36.

⁴¹ U.S. Const. art. II, sec. 2.

⁴² *Morrison v. Olson*, 487 U.S. 654, 706-10 (1988) (Scalia, J., dissenting). 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 show, the "independence" of independent agencies is often exaggerated. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies*, 98 CORNELL L. REV. 769 (2013); Devins & Lewis, *supra* note 36; Aziz Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 26-32 (2013) (contending that removal power is only one of many powers that presidents can use to control agencies); *Free Ent. Fund v. PCAOB*, 130 S. Ct. 3138, 3170-73 (2010) (Breyer, J., dissenting) (suggesting informal mechanisms enabling the President to exercise meaningful control over ostensibly independent agencies).

Thus, whereas the Framers considered Congress the most dangerous branch,⁴³ the emergence of modern administrative agencies answerable to the President signaled that the Executive was now the constitutional institution to reckon with.⁴⁴

II. THE ADMINISTRATIVE ERA

This Part explores a similar struggle between power and constraint—this time on an administrative rather than constitutional stage. Part I began with the constitutional framers coming to terms with the revolution that they fought hard to realize—and then struggled to contain. Part II begins at the dawn of the modern Administrative Era. Just like the constitutional framers, the progenitors of the modern administrative state—admittedly, a multi-generational undertaking—had to come to terms with this supercharged (and thus potentially abusive) state apparatus that they spawned. In some respects, these administrative lawyers had a more difficult task: to not only constrain but also to legitimate the exercise of power that lacks the imprimatur of formal constitutional ratification (and to do so after the administrative leviathan was already loose).

Section A captures administrative lawyers' concern that the emergence of the modern administrative state concentrated too much state power in the hands of the political leadership running government agencies. It is my contention that these lawyers, working through legislative and judicial channels, fashioned a system of sub-constitutional checks and balances. In effect, they fashioned a new separation of powers, furnishing civil servants and nongovernmental participants with the tools and opportunities to resist agency leaders' efforts to cut legal corners or implement hyper-politicized policies.⁴⁵

Section B then shows how the separating and checking of administrative powers is more than simply about preventing abuse. Administrative separation of powers has an affirmative component as well: the legitimization of administrative power. This Section

⁴³ Fed. No. 48 (“The Legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.”); Fed. No. 49 (“[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.”); Michael 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.”).

⁴⁴ BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010); PETER SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 3 (2009); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 50 EMORY L.J. 423, 428-30 (2009); 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 23, at 125 (suggesting that with the advent of the administrative state, “the framers’ factual assumptions [about 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*, 116 YALE L.J. 2416, 2418 (2006); *see also* Posner, *supra* note 27, at 960 (“[A]dministrative agencies are under far greater control by the President than by Congress.”).

⁴⁵ For ease of narrative, I refer 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 sub-constitutional level. This is a stylized presentation. In truth, different groups, working across several decades, pieced together an edifice of constraint. With the benefit of hindsight and a 30,000-foot perch, that patchwork edifice looks and works remarkably like the Framers’ ingenious (and intentional) scheme.

explains the legitimating function of the tripartite structure along three dimensions: fidelity to the normative values widely associated with public administration; fidelity to the institutional design and the dispositional characteristics of the three great constitutional branches; and, fidelity to constitutional doctrine, as evidenced by the Court's apparent, albeit 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 in whatever form that power happens to take.

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, of course, their displeasure was little more than sour grapes. They opposed what the agencies were doing—namely, aggressively regulating the American political economy in ways that generally interfered with extant business practices.⁴⁶ These opponents of the administrative state prized the languidness of the tripartite constitutional system; they did so not necessarily because they were devotees of “the finely wrought procedure that the Framers designed”⁴⁷ but because a relatively inert constitutional government furthered their own interests.⁴⁸

Others expressed more principled reservations.⁴⁹ Even if trying to govern across the three constitutional branches was stultifying, powerful administrative agencies presented the converse problem.⁵⁰ Regardless what these critics thought of the policies agencies promoted, they feared an unconstrained vehicle of government intervention,⁵¹ procedurally unencumbered and potentially politically intemperate—capable of unabashedly championing the interests of the incumbent Administration.⁵² The combined

⁴⁶ KENNETH FINEGOLD & THEDA SKOCPOL, *STATE AND PARTY IN AMERICA'S NEW DEAL* 138 (1995).

⁴⁷ See *Clinton v. City of New York*, 524 U.S. 417, 440 (1998) (describing the constitutional legislative framework predicated on bicameralism and presentment).

⁴⁸ KIM PHILLIPS-FEIN, *THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL* (2010).

⁴⁹ *E.g.*, Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 *NYU J. L. & LIBERTY* 491 (2008); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).

⁵⁰ 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.”).

⁵¹ See 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) (“Brownlow Committee”); Lawson, *supra* note 49; 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”); see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

⁵² MASHAW, *supra* note 1, at 288 (noting that “agencies' combination of legislative, executive, and judicial functions struck many as dangerously aggrandizing executive power and creating the potential for bias and prejudgment in administrative determinations”). See generally Stewart, *supra* note 4, at 1671–88, 1712–13 (understanding the need for greater representation and broader participation in administrative practice). *But see infra* note 66 and accompanying text (focusing concern and attention on powerful bureaucrats rather than agency heads).

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 leaders 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.⁵³ 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 architects of the modern administrative state left it to future generations to cobble together clusters of constraints that, only over time and somewhat serendipitously,⁵⁴ began to function in much the same way as did the Framers' tripartite scheme. (Perhaps, too, this is why this structural framework has been underappreciated for so long.)

* * *

Most scholars focus on how the three constitutional branches directly intervene in the activities of administrative agencies.⁵⁵ They do so for good reason. Congress prescribes the procedural and substantive requirements for administrative agencies,⁵⁶ disburses or withholds funds,⁵⁷ confirms or rejects presidential appointees,⁵⁸ and exercises oversight via hearings and investigations.⁵⁹ And, of course, the judiciary determines agency compliance with constitutional and statutory requirements.⁶⁰ One might think of these interventions from “above”—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 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. Of course, Congress hasn't completely abandoned its direct oversight responsibilities. Nevertheless, because day-to-day congressional management takes considerable effort,⁶¹ focuses principally on highly salient matters, and is often realistic

⁵³ This is true even in the pre-modern era of administrative governance. See MASHAW, *supra* note 1, at 6, 8.

⁵⁴ See *supra* note 45.

⁵⁵ Greene, *supra* note 23; Strauss, *supra* note 23, at 640, 648-52 (characterizing administrative agencies as “subordinate bodies subject to the controls of all three” constitutional branches); McNollGast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434, 481(1989) (explaining how congressionally imposed procedural constraints help control bureaucratic agents); McCubbins & Schwartz, *supra* note 38; Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992).

⁵⁶ See *infra* note 79.

⁵⁷ See Kate Stith, *Congress' Power of the Purse*, 97. YALE L.J. 1343, 1350-51 (1988).

⁵⁸ U.S. Const. art. II, §2.

⁵⁹ See Beerman, *supra* note 38.

⁶⁰ *E.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); Strauss, *supra* note 23.

⁶¹ 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. As a matter of sheer numbers, members of Congress and their staffs are increasingly hard-pressed to keep up with the myriad of Executive personnel and

only in periods of divided government,⁶² the most durable, consistent checks on agency heads do not necessarily come from “above.”⁶³ Instead, the durable, consistent checks operate on the ground. Spawned, nurtured, and sustained by Congress and the Judiciary,⁶⁴ these sub-constitutional, 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 sub-constitutional 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 fair government that undergirds it.⁶⁵

This Section begins by explaining, briefly, why agency leaders need to be constrained. 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 the tools those workers could wield in checking a political leadership potentially indifferent, if not hostile, to statutory directives and apt to prioritize hyper-partisan interests. Next, this Section shows how Congress and the courts also deputized the nongovernmental sector, empowering members of the general public to hold ambitious agency heads 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.)

Three notes before proceeding. First, this Section generally depicts agency leaders as dangerously political, civil servants as upstanding, capable professionals, and

responsibilities. Cf. Eric Posner, *Imbalance of Power*, Feb. 7, 2014, <http://ericposner.com/imbalance-of-power/> (showing that over time “the ratio of federal (civilian, non-post office) employees to legislative employees (Congress and its staff)” has increased from approximately 10:1 in the early years of the New Deal to nearly 44:1 in 2010).

⁶² See Neal Kumar Katyal, *Internal Separation of Powers*, 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 23.

⁶³ Metzger, *supra* note 44, at 437-40 (2009); Dawn Johnson, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1539, 1562 (2007) (advocating intra-Executive legal constraints in light of the “inherent inadequacies of the courts and Congress as external checks on the President”); see also Terry M. Moe, *The Politics of Bureaucratic Structure*, CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson, eds. 1989) (recognizing that contemporary congressional majorities do not expect to stay in power forever and thus constrain agencies in ways that would not be necessary were those majorities confident that they could influence agency action going forward); Macey, *supra* note 44, at 2419 (explaining that Congress and the courts “have taken on merely supporting roles” in administrative governance).

⁶⁴ See Metzger, *supra* note 44, at 442-44 (describing the interconnectedness of internal constraints on the Executive and external constraints imposed by the coordinate, constitutional branches).

⁶⁵ See also Kaytal, *supra* note 62; Metzger, *supra* note 44.

nongovernmental participants as vigilant. Of course, these actors will not always act in the ways here characterized. But I aim to capture a persistent fear and an enduring hope: a fear of Executive abuse and a hope of bureaucratic and nongovernmental 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 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.

Second, and related, some identify the unelected bureaucracy as the most dangerous component of administrative governance.⁶⁶ Others, fearing administrative capture, zero in on the undue influence wielded by particular segments of civil society. Those worried chiefly about the civil service or nongovernmental sector will no doubt take umbrage at my presentation, which focuses on the threat agency leaders pose. 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 nongovernmental actors 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 Neal Katyal⁶⁷ and Gillian Metzger,⁶⁸ 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, his framing does not do much to incorporate core principles of administrative law or the broader universe of nongovernmental participants.⁶⁹ Generally speaking, contributors to this literature typically emphasize either the disaggregation of

⁶⁶ *E.g.*, STEVEN CALABRESI & CHRISTOPHER YOO, *THE UNITARY EXECUTIVE THEORY, FROM WASHINGTON TO BUSH* (2008); THEODORE J. LOWI, *THE END OF LIBERALISM* (1969); *see also* Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL'Y 219, 224 (1998) (raising concerns that the New Deal's instantiation of administrative governance coincided with a "repudiat[ion] of the unitary executive" and the "larger specter of a headless fourth branch of government").

⁶⁷ Katyal, *supra* note 62.

⁶⁸ Metzger, *supra* note 44.

⁶⁹ In national-security and foreign-affairs agencies, unlike domestic agencies, administrative law isn't especially robust, *see* Oona Hathaway, *Presidential Power over International Law*, 119 YALE L.J. 140, 221-24 (2009). Thus, Katyal focuses on alternative sources of intra-Executive checks. Katyal, *supra* note 62, at 2324-27. Also, because national-security agencies are largely closed off from the public, Katyal doesn't emphasize the role civil society plays. *But see* Jack Goldsmith, *A Reply to Professor Katyal*, 126 HARV. L. REV. F. 188, 191 (2013) ("The real distinguishing feature of the modern separation of powers is ... the gargantuan array of eyeballs gazing at the presidency, in secret and in public.").

power within administrative agencies⁷⁰ or the power of civil society to check and enlighten monolithic, unitary agencies.⁷¹ My formulation of administrative separation of powers does both. It thus captures, as a descriptive matter, the internal and external dimensions of administrative design⁷² and—as I’ll discuss in the following section—confers normative and jurisprudential legitimacy on the administrative state.

1. The Unchecked Agency Leadership

The President appoints agency leaders.⁷³ Appointees usually share the President’s ideological and programmatic commitments and can generally be relied on to promote the White House’s substantive agenda.⁷⁴ Appointees can also be expected to internalize the time pressures felt by a driven, term-limited President⁷⁵ to enact her policy

⁷⁰ See also Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Strauss, *supra* note 23; Michael Asimow, *When the Curtain Falls: Separation of Functions in Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761-77, 779-81 (1981).

⁷¹ See also JACK GOLDSMITH, *POWER AND CONSTRAINT* 209-10 (2012) (characterizing the “synopticon”); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992) (describing a tripartism that triangulates power among agencies, firms, and public-interest groups).

⁷² There are, of course, additional measures capable of helping protect liberty, diffuse state power, and inhibit government abuse. Such measures include federalism, Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012); cooperative federalism, Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); political parties, Levinson & Pildes, *supra* note 23; leaks, David. Pozen, *Leaky Leviathan*, 127 HARV. L. REV. 512 (2013); duplicative or overlapping delegations, Jacob Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201; and, inspectors general, PAUL LIGHT, *INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993). My project is by no means hostile to these supplemental measures. Nevertheless, I do not focus on them for the same reason I do not rely on existing formulations of internal administrative checks and balances: they simply aren’t as universally available or broad-reaching as is administrative separation of powers. Nor—as will be addressed more squarely in the following Section—are these measures as central to the legitimization and constitutionalization of the administrative state.

⁷³ The President has more limited appointment power vis-à-vis commissioners of independent agencies. See Huq, *supra* note 42, at 28.

⁷⁴ See David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409, 1414 (2009) (describing the “substantial partisan and ideological homogeneity” among Executive Branch leaders); see also ACKERMAN, *supra* note 44, at 33 (emphasizing the President’s reliance on the loyalty of her appointed agency heads). But even where views between the White House and agency heads differ in the first instance, the President might still compel the agency heads to follow her lead. See, e.g., Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992).

⁷⁵ See Joel Aberbach & Bert Rockman, *Mandates or Mandarins? Control and Discretion in the Modern Administrative State*, 48 PUB. ADMIN. REV. 606, 606 (1988) (characterizing presidential administrations as driven to advance their administrative agenda); David Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); Terry Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 246 (John Chubb & Paul Peterson, eds. 1985).

priorities quickly and efficiently.⁷⁶ Agency leaders who stray or fail to act expeditiously run the risk of being politically marginalized,⁷⁷ if not summarily fired.⁷⁸

Given these pressures from the White House, Executive agency heads have reason, occasionally if not regularly, to give short shrift to congressionally imposed directives⁷⁹ and to marginalize those employees who seek to enforce those directives (or who otherwise challenge the President's programmatic agenda).⁸⁰ After all, compliance with procedural and substantive requirements takes time.⁸¹ It provides would-be detractors with notice, information, and access.⁸² It restricts programmatic discretion.⁸³ And, it requires the expenditure of resources that could otherwise be put to more "productive" use elsewhere. In addition, agency heads often have cause to be highly partisan actors. That is to say, they are apt to promote their boss's (and their own) pet initiatives and cater to the political constituencies that sustain them in office,⁸⁴ even at the expense, perhaps, of reasoned, rational public administration.⁸⁵

⁷⁶ See Anne Joseph O'Connell, *Cleaning Up and Looking Ahead*, CENTER AM. PROGRESS, Jan. 2009, at 6-8; Kevin Stack, *The President's Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263 (2006). The expansion of the Office of Management and Budget and the instantiation of a cadre of White House czars further help the President direct, monitor, and sanction agency leaders.

⁷⁷ Kagan, *supra* note 36.

⁷⁸ Again, this is not true with respect to agency leaders protected against at-will termination. See note 42.

⁷⁹ See generally Kagan, *supra* note 36, at 2349 ("Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes."); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1743-44 (2009) (suggesting that a unitary executive model of governance is often at odds with a commitment to open, deliberative public administration); Katyal, *supra* note 62, at 2317 ("Executives of all stripes offer the same rationale for forgoing bureaucracy—executive energy and dispatch."); Thomas O. McGarity, *Administrative Law as Blood Sport*, 61 DUKE L.J. 1671, 1732 (2012) ("A single private meeting with the head of an agency or the head of OIRA may have a greater impact on the outcome of a rulemaking exercise than ten thousand pages of technical data and analysis."); 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 Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009) (noting occasions where the President and agency heads impose constraints on themselves).

⁸⁰ See Aberbach & Rockman, *supra* note 75, at 606-08 (asserting that political leaders look to maximize their own control by centralizing and politicizing administrative power).

⁸¹ See Jerry Mashaw & David Harfst, *Inside the NHTSA: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990); Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1410-26 (1992).

⁸² See Wendy EWagner, *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 "[n]o administrator in Washington [actually] turns to full scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties" and indicating that agency heads would instead use quicker, more informal means of outreach).

⁸³ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁸⁴ DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* (2008).

⁸⁵ Cf. ACKERMAN, *supra* note 44, 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"); Richard P. Nathan,

Undoubtedly, such unilateral action by the political leadership raises the specter of abuse and corruption, spurring Congress and the courts to more fully empower two administrative counterweights, which (as will be discussed in Subsection II.B.2) they fashioned to a considerable extent in their own, respective images.

* * *

My account focuses principally on Executive agencies, whose leaders serve at the pleasure of a powerful, and power-aggrandizing, President. In these respects, my account draws upon the work of Bruce Ackerman, David Barron, and Elena Kagan, among others, who capture presidential efforts to more fully control the administrative state.⁸⁶ 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,⁸⁷ they still have any number of incentives to abuse their own (potentially unchecked) authority. Thus, a sub-constitutional regime of institutional counterweights is necessary in that sphere, too.⁸⁸

2. The Civil Service

The first administrative counterweight is the professional civil service.⁸⁹ Civil servants are politically insulated. They often spend their entire careers in government employment. And, they exercise their power through interpretation and reason-giving. These civil servants are positioned to push back on the agency leadership's tendency to skirt laws and promote partisan interests. They therefore help check arbitrary or abusive administrative power.

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 reprisal.⁹⁰ Unlike those laboring under the old, pre-modern Spoils System—a system that often required government workers to internalize the political agenda and short-term thinking of their patrons⁹¹—civil servants enjoy categorical protections against politically

Institutional Change under Reagan, in PERSPECTIVES OF THE REAGAN YEARS 121, 130-33 (John Palmer, ed. 1986) (contending that it is rational for presidents to seek to politicize the bureaucracy).

⁸⁶ ACKERMAN, *supra* note 44; Barron, *supra* note 75, at 1128; Kagan, *supra* note 36. To be clear, there are differences of opinion among these scholars regarding the virtues of greater presidential control.

⁸⁷ See, e.g., Dalti & Revesz, *supra* note 42 and accompanying text (discussing the ways in which commissioners atop independent agencies are responsive to the President).

⁸⁸ E.g., *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F. 2d 583 (D.C. Cir. 1970); Matea Gold, *FEC Engulfed in Power Struggle over Staff Independence*, WASH. POST, Jul. 13, 2013.

⁸⁹ For discussions of the civil service as a bulwark against the Executive, see Katyal, *supra* note 62; Metzger, *supra* note 44; 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 politically insulated. See Kevin Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2398-99 (2011).

⁹⁰ Civil service laws are “designed to protect career employments against improper political influences or personal favoritism” or from reprisal for “speak[ing] out about government wrongdoing.” Kaytal, *supra* note 62, at 2331 (quoting legislative histories).

⁹¹ ARI ARTHUR HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-83* (1968); Carl Joachim Friedrich, *The Rise and Decline of the Spoils Tradition*, 189 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 10 (1937); S. Rep. No. 47-576, at iv. (explaining

motivated employment actions.⁹² These insulated, effectively tenured government workers⁹³ can, if they so choose,⁹⁴ help insist that the political leadership act fairly and abide by congressionally and judicially imposed legal and anti-partisan constraints.

Second, agency heads must take civil servants seriously. Political leaders in all federal domestic agencies necessarily rely on civil servants to help develop and carry out the Administration's agenda.⁹⁵ On their own, agency leaders simply are not numerous enough or, in many cases, experienced or sophisticated enough to conduct research or promulgate rules.⁹⁶ That is why agency heads delegate, among other things, "the drafting, analysis, and policy design to career civil servants."⁹⁷ Nor can the leadership actually administer programs on the ground, where, once again, heavily relied-upon civil servants have some say in how policy is actually implemented and enforced.⁹⁸

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

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").

⁹² 5 U.S.C. §2301(8)(A) (2006) ("Employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes."); *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 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.").

⁹³ *Richardson v. McKnight*, 521 U.S. 399, 421 (1997) (Scalia dissenting) (describing tenured civil servants).

⁹⁴ See *infra* notes 103-113 and accompanying text (characterizing the civil service's general commitment to nonpartisan professionalism).

⁹⁵ See Magill & Vermeule, *supra* note 70, at 1037-38 (emphasizing the "significant role" civil servants play in rulemaking and adjudicatory proceedings); Jeffrey Rachlinski & Cynthia 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).

⁹⁶ Strauss, *supra* note 23, 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*, BROOKINGS INSTITUTION, 1996, at 4-8, <http://www.brookings.edu/~media/research/files/papers/1996/2/bureaucracy%20cohen/amateur.pdf>; David E. Lewis & Jennifer L. Selin, *Sourcebook of United States Executive Agencies*, ADMIN. CONF. OF THE UNITED STATES, Dec. 2012, at 68-69 (documenting the steady rise in the percentage of civil servants within administrative agencies between the 1880s and 1950s).

⁹⁷ Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 J.L. & POL'Y FOR INFO. SOC'Y 33, 36 (2005).

⁹⁸ See, e.g., Charles A. Reich, *Individual Rights and Social Welfare*, 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."); Tersh Boasberg & Laurence Hewes, *The Washington Beat: Federal Grants and Due Process*, 6 Urb. L. 399, 404 (1974) ("The discretion of administrative officials is practically boundless to select among the mass of potential grantees.").

10% of the federal workforce.⁹⁹ (And, even this 10% didn't enjoy job security.)¹⁰⁰ By the end of the Truman presidency—at which point the administrative state was in full bloom—civil servants exceeded 93% of the overall workforce. And, all of these civil servants were protected against at-will termination.¹⁰¹

Third, the independent and much relied-upon civil service¹⁰² has institutional, cultural, and legal incentives to insist that agency leaders follow the law and refrain from partisan excesses. Thus, they regularly have reason to “choose” to hold agency leaders accountable. They do so because they see themselves as professionals.¹⁰³ Unlike the political leadership, obligated to advance the President's agenda quickly and with minimal resistance,¹⁰⁴ these career civil servants watch presidential administrations come and go.¹⁰⁵

Buttressing the expansion of civil-service protections are whistleblower laws that allow agency employees to report misdeeds directly to Congress¹⁰⁶ and anti-partisan laws such as the 1939 Hatch Act. The Hatch Act insists that federal employees refrain from partisan political activities.¹⁰⁷ This prohibition on politicking further ensures that “employment and advancement in the Government service [does] not depend on political performance.”¹⁰⁸ It also reduces pressure to “perform political chores in order to curry favor with their superiors.”¹⁰⁹ In short, the bar on civil servants' partisan activities furthers “the impartial execution of laws.”¹¹⁰

⁹⁹ Lewis & Selin, *supra* note 96, at 66-67. The Pendleton Act, though groundbreaking in its turn away from the patronage system, initiated only modest reforms, Jerry Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1390-91(2010); SKOWRONEK, *supra* note 1. Perhaps this is because the administrative state at that time was still quite inchoate and because the Act's sponsors prioritized other aims over professionalizing the government workforce, *id.*, at 47-84; RONALD JOHNSON & GARY LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 35-38 (1994); Sean Theriault, *Patronage, The Pendleton Act, and the Power of the People*, 65 J. POL. 50, 60-65 (2003).

¹⁰⁰ See JOHNSON & LIBECAP, *supra* note 99, at 51, 68.

¹⁰¹ Harry S. Truman, Address at the 70th Anniversary Meeting of the National Civil Service League, May 2, 1952, <http://www.trumanlibrary.org/publicpapers/index.php?pid=1284&st=&st1=>; see also Lewis & Selin, *supra* note , at 69 fig. 1.

¹⁰² Strauss, *supra* note 23, at 586 (“[T]he bureaucracy constitutes an independent force... and its cooperation must be won to achieve any desired outcome.”)

¹⁰³ Metzger, *supra* note 44, at 445 (“[Civil servants] are committed to enforcing the governing statutory regime that sets out the parameters of their authority and regulatory responsibilities”); HAROLD BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 408 (2006) (considering civil servants' respect for legal constraints as bolstering “the rule of law”); see also *infra* notes 111-113.

¹⁰⁴ See *supra* Subsection II.A.1.

¹⁰⁵ See Strauss, *supra* note 23, at 586 (“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.”); see also Katyal, *supra* note 62, at 2331 (emphasizing that the State Department's “entrenched bureaucracy takes a long-term view”).

¹⁰⁶ See MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, THE WHISTLEBLOWERS (1989); Louis Fisher, *National Security Whistleblowers*, CONG. RES. SERV., Dec. 30, 2005, at CRS-4-12 (describing whistleblower laws covering employees of federal agencies).

¹⁰⁷ Pub. L. 76-252, 53 Stat. 1147 (codified in scattered sections of chapter 5 of the U.S. Code).

¹⁰⁸ Civil Service Comm'n v. Letter Carriers, 413 U.S. 548, 566 (1973).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, at 565.

Accordingly, civil servants have broad responsibilities and the legal authority and institutional inclination to resist and redirect a political administration intent on shortchanging procedures, ignoring or changing congressional directives, and championing unvarnished partisan causes. Civil servants' loyalties generally lie with their professional commitments (as trained biologists, lawyers, engineers, etc.), the programs they advance, and the organizations they serve.¹¹¹ This view 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 courses of action may be at variance with the president's agenda."¹¹² After all, civil servants' means of advancement and validation come largely from within the civil service itself, where it is viewed as unprofessional to cheerlead for the current political leaders.¹¹³

Given these three factors, if a president's preferred rule lacks scientific support or sound policy justifications, civil servants preparing the administrative record ought not be easily pressured to gloss over contradictory findings.¹¹⁴ The courts, which helped create and then nurture administrative separation of powers, generally make sure that the civil servants' resistance is given its due. Indeed, as Gillian Metzger observes, "[e]vidence that decisions were made over the objections of career staff and agency professionals often triggers more rigorous [judicial] review."¹¹⁵ Various canonical administrative law doctrines emphasize the importance of administrative records¹¹⁶ and factual findings¹¹⁷—much of which civil servants compile.¹¹⁸ Thus, the judicial review process often reinforces the role civil servants play vis-à-vis the political leadership.¹¹⁹

¹¹¹ See, e.g., DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (2011); DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2001); James Perry, *Toward a Theory of Public Service Motivation*, 10 J. PUB. ADMIN. RES. & THEORY 181 (2000); Donald Moynihan & S.K. Pandey, *The Role of Organizations in Fostering Public Service Motivation*, 67 PUB. ADMIN. REV. 40 (2007).

¹¹² LEWIS, *supra* note 84, at 30. Cf. CHARLES T. GOODSSELL, THE CASE FOR BUREAUCRACY 89 (1983) (cataloging reports finding that career government workers embrace their professional and legal duties).

¹¹³ 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 44, 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").

¹¹⁴ Magill & Vermeule, *supra* note 70, 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, at A11 (chronicling careerists' resistance to the politically appointed EPA Administrator after he "acted against the advice of his legal and scientific advisors" regarding global warming).

¹¹⁵ Metzger, *supra* note 44, at 445.

¹¹⁶ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *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").

¹¹⁷ See, e.g., *Motor Veh. Manu. Ass'n v. State Farm*, 463 U.S. 29 (1983). 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 [the Court] found untrustworthy, in the sense that executive expertise had been subordinated to politics").

¹¹⁸ See *supra* note 95 and accompanying text.

¹¹⁹ See also Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility*,

Similarly, if the political administration is intent on ignoring or selectively following agency rules or congressional legislation, that intent might well be frustrated by civil servants on the ground. Civil servants might do so in the context of public-benefits determinations as well as when they are tasked with enforcing regulatory policies. Again, unlike the political leadership beholden to a particular presidential agenda, the civil servants are careerists—generally 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 with “red tape.” They might be captured. Or, they might seek to advance their own ideological interests.¹²⁰ But, given the civil service’s internal norms discouraging partisanship,¹²¹ the federal statutory prohibitions on civil servants’ participation in political activities,¹²² and the fact that even a politicized bureaucracy is unlikely to march in lock-step with the agendas of most presidential administrations (Republican and Democratic alike),¹²³ this fear should not obscure the potentially effective, if imperfect, role these tenured government workers play in constraining and guiding Executive action and thus helping to preserve encumbered government at the sub-constitutional level.

3. Civil Society

The second institutional check on the agency leadership comes from the diverse universe of nongovernmental actors. These empowered and often highly motivated members of civil society use the formal channels of administrative procedure to hold agency leaders accountable, limiting opportunities for those leaders to proceed arbitrarily, capriciously, or abusively.¹²⁴

Specifically, statutory and decisional law enables nongovernmental actors to demand access to agency information, a reasoned accounting of agency decisions (and

Procedural Formality, and Judicial Review of Agency Statutory Interpretations, 120 HARV. L. REV. 528 (2006). 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. Rather, they should be understood as attempts to adjust and recalibrate the relative strength of the administrative rivals. See *infra* Subsection II.B.1; *infra* note 224.

¹²⁰ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 97-103 (1994); Stewart, *supra* note 4, at 1682-87; Sean Gilmard & 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 that those with a “stake” in the policy are most likely to invest in developing expertise); Ronald Johnson & Gary Libecap, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 ARIZ. L. REV. 791, 820-81 (1995) (acknowledging that “[h]ighly protected career bureaucrats. . . may also be motivated by partisan objectives, and these objectives can be inconsistent with the goals of elected officials.”); Lewis, *supra* note 84, at 30, 31 (recognizing that career employees might hold and express strong opinions in matters of policy or politics).

¹²¹ Hechlo, *supra* note 113; Maranto & Skelley, *supra* note 113.

¹²² See *supra* notes 107-110 and accompanying text.

¹²³ See JOEL ABERBACH & BERT ROCKMAN, IN THE WEB OF POLITICS 168 (2000) (characterizing federal civil servants as generally ideologically to the left of political appointees of *both* major parties); MARISSA GOLDEN, WHAT MOTIVATES BUREAUCRATS? (2000) (noting the ideological divergence between agency leaders and rank-and-file civil servants); RICHARD NATHAN, THE ADMINISTRATIVE PRESIDENCY 7-12 (1983) (same); see also CARPENTER, BUREAUCRATIC AUTONOMY, *supra* note 111 (noting a similar ideological divergence in the early decades of the Administrative Era).

¹²⁴ See Stewart, *supra* note 4, at 1711-13. They also use administrative procedures to make administrative action slower and more expensive—a less noble aim but one that nevertheless further disciplines agency leaders.

sometimes agency non-decisions), and an opportunity to participate in agency policymaking processes. Agencies that fail to consider, if not incorporate, nongovernmental participants' material and persuasive input do so at their peril.¹²⁵ In short, in the Administrative Era, citizens, firms, and any number of interest groups wield “hammer[s]... to pound agencies.”¹²⁶

First, the public must be given fair notice of potential changes in administrative policy.¹²⁷ Once notified, the public can marshal political, scientific, and legal resources to resist what they see as unfavorable change or to strengthen what they see as steps in the right direction.¹²⁸ The public may weigh in through informal lobbying channels¹²⁹ as well as through the formal, statutorily mandated open comment period.¹³⁰ Though far from perfect, the comment period serves as a virtual deliberative forum for each agency. Written opinions, research studies, and exchanges among commentators contribute to what is potentially a robust debate that will help shape the agency's ultimate decision.¹³¹ Moreover, empowering the general public in these ways limits opportunities for agency capture. Absent formal opportunities for broad participation, only well-heeled insiders (representing regulated industry and special interests) would get a seat at the table. Now agencies have to accommodate everyone.

¹²⁵ See *Nat'l Tour Brokers Ass'n v. United States*, 591 U.S. 896, 902 (D.C. Cir. 1978) (stating that notice and comment ensures “that the agency maintains a flexible and open mind about its own rules”); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (indicating that the notice-and-comment period allows critics of a proposed rule to “develop evidence in the [rulemaking] record to support their objections” upon judicial review); *Portland Cement v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973) (insisting agencies respond to material comments filed by interested parties); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252-53 (2d Cir. 1977) (requiring agencies' concise-and-general statement to respond to material comments).

¹²⁶ Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 682 (2012); see also SHANE, *supra* note 44, 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, 509-10 (2010) (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).

¹²⁷ 5 U.S.C. 553(c); *Chocolate Manu. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985).

¹²⁸ *Chocolate Manu.*, 755 F.2d at 1101 (describing interest groups' advocacy efforts).

¹²⁹ *HBO v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (“[W]e recognize that informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration.”); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

¹³⁰ 5 U.S.C. 553(c).

¹³¹ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (discussing the deliberative virtues of rulemaking); Peter Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 554 (1997); Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414-17 (2005); Shapiro, et al., *supra* note 89, at 474 (suggesting the APA's open comment requirement “promote[s] deliberation”); Robert Reich, *Public Administration and Public Deliberation*, 94 YALE L.J. 1617, 1631 (1985); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1563-64 (1992).

Second, nongovernmental actors may demand a treasure trove of information. They may demand to know who attended various agency meetings¹³² and are advised of the economic and environmental consequences of agency actions.¹³³ Perhaps most powerfully, they may invoke the Freedom of Information Act (FOIA),¹³⁴ which gives members of the public access to just about any non-classified, non-privileged document in an agency's possession.¹³⁵ The very existence of FOIA constrains 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.¹³⁶

Third, private parties 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.¹³⁷ Standing was liberalized.¹³⁸ Private attorneys general were empowered to promote "the public interest."¹³⁹ Ripeness was given a capacious interpretation.¹⁴⁰ And, "new" property rights were recognized, paving the way for more robust administrative hearings to challenge arbitrary or abusive action.¹⁴¹ Indeed, one cannot fully appreciate the powerful, supporting role played by the courts in the Administrative Era without first acknowledging the critical role played by the nongovernmental sector in identifying and litigating questionable agency actions.

In the above discussion about the civil service, it is clear that the professional, politically insulated, expert bureaucracy is a relatively new player—a creature of administrative governance. Civil society, however, predates the U.S. constitutional system. And, it of course played an active, albeit outsider's role in the constitutional order. Convenience, if not necessity, largely motivated the shift from *outsider* in the constitutional scheme to administrative *insider*. Simply put, Congress specially transformed civil society, converting it from the occasional adjunct of the legislature

¹³² Federal Advisory Committee Act, P.L. 92-463, (5 U.S.C. App.); Government in Sunshine Act, P.L. 94-409, 90 Stat. 1241 (codified at 5 U.S.C. 552b).

¹³³ See, e.g., National Environmental Policy Act, 42 U.S.C. 4321 et seq.; Regulatory Flexibility Act, 5 U.S.C. § 601-12.

¹³⁴ Pub.L. 89-554, 80 Stat. 3785 (codified at 5 U.S.C. 552).

¹³⁵ *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).

¹³⁶ E.g., Marc Kaufman, *Many FDA Scientists Had Drug Concerns, 2002 Survey Shows*, WASH. POST, Dec. 16, 2004, at A1 (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); Gilbert M. Gaul, *Inefficient Spending Plagues Medicare*, WASH. POST, Jul. 24, 2005, at A1; R. Jeffrey Smith, *Texas Nonprofit Is Cleared After GOP-Prompted Audit*, WASH. POST, Feb. 27, 2006, at A3; Matt Richtel, *Transportation Department Withheld Data over Risks of Multi-tasking while Driving*, N.Y. TIMES, Jul. 21, 2009, at A1.

¹³⁷ Stewart, *supra* note 4; Shapiro, et al., *supra* note 89, at 475. I emphasize the "heyday" because some of these protections have since been scaled back.

¹³⁸ *Compare ADAPSO v. Camp*, 397 U.S. 150 (1970) with *Alexander Sprunt & Son v. United States*, 281 U.S. 249 (1930). 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").

¹³⁹ *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

¹⁴⁰ See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

¹⁴¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

(during pre-modern times)¹⁴² to the indispensable, ubiquitous frontline agent of a legislature itself strained by the exponential growth and complexity of the modern welfare state.¹⁴³

Again, this isn't to say civil society will invariably work well. Participation might be uneven, expensive, and 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, in truth, to the civil service as well).

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

The challenge of administrative governance is, in fact, two-fold. It 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 thing. Several rival warlords might be highly effective checks on one another, ensuring that no one acts too abusively. These warlords would, however, remain illegitimate—so long as they rise to and maintain power through violence and fear rather than by bearing the mantle of expertise, electoral victory, or legal accountability.

In the previous Section, I showed how administrative separation of powers 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 private lawsuits). In this Section, I show 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 the administrative terrain. It also validates it, normatively, constitutionally, and in ways that (as will be discussed in Part III) help judges and policymakers 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 administrative legitimacy has been nothing short of a legal and scholarly obsession, passed down from generation to generation more like an inescapable curse than a cherished heirloom. This Section “confronts,” as Bruce Ackerman put it, “the serious legitimization problems involved” in a constitutional system that relies heavily on administrative governance.¹⁴⁴ It confronts it along three dimensions: values, structures, 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 values collectively to inform administrative governance.

Second, I speak to administrative separation of powers' institutional legitimacy. Unlike the above-mentioned warlords whose authority stems from threats and acts of

¹⁴² 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); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739 (1999) (emphasizing that the constitutional right to petition the government is a limited one).

¹⁴³ McCubbins & Schwartz, *supra* note 38 (emphasizing congressional reliance on “fire alarms” pulled by the public).

¹⁴⁴ See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 696 (2000).

force, the three principal administrative rivals are the standard-bearers of the three great constitutional branches. They thus derive their institutional legitimacy by channeling and bringing into the administrative domain certain dispositional characteristics of each branch: Congress's popular, deliberative role; the partisan Executive's agenda-setting role; and, the Judiciary's role as a countermajoritarian body engaged in reason-giving and committed to intergenerational continuity and stability.

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 power to flow to administrative actors on the condition that those actors are themselves subject to a meaningful array of checks and balances.

I conclude this Section with a brief note about separation of powers' durability amid the twentieth-century turn to a more activist, welfare state.

Throughout this Section, I rely on conventional conceptions of normative legitimacy. It is not my aim to endorse, re-define, 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 (but not universal¹⁴⁵) agreement that the three great constitutional institutions are legitimate, either because the Founding generation ratified them or because subsequent generations intrinsically prize the interplay of these particular majoritarian and countermajoritarian actors; and, that judicial endorsement confers legal legitimacy.

1. Administrative Separation of Powers and Administrative Values

Scholars and jurists anchor administrative legitimacy in theories of process or substance. They explain administrative legitimacy as a function of expertise,¹⁴⁶ non-arbitrariness,¹⁴⁷ rationality,¹⁴⁸ civic republicanism,¹⁴⁹ interest-group representation,¹⁵⁰ or political accountability.¹⁵¹ These well-recognized values are indeed important. But they are also normatively contested, empirically disputed, and, above all, often at odds with one another.¹⁵² Instead, I argue that what undergirds administrative legitimacy is not any one of these contested theories. It is a structural system of checks and balances that gives meaning and effect to all of them.¹⁵³

¹⁴⁵ *E.g.*, SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

¹⁴⁶ *See, e.g.*, LANDIS, *supra* note 4, at 10-17, 46-47.

¹⁴⁷ *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 the role of administrative actors in promoting reasonable, non-arbitrary public administration).

¹⁴⁸ Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1820-23 (2011).

¹⁴⁹ *See, e.g.*, Seidenfeld, *supra* note 131.

¹⁵⁰ *See* Stewart, *supra* note 4, at 1670.

¹⁵¹ *See, e.g.*, Jerry Mashaw, *Pro-Delegation*, 1 J.L. ECON. & ORG. 81 (1985).

¹⁵² *Cf.* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Aberbach & Rockman, *supra* note 75, at 606; Reich, *supra* note 131, at 1624; Stewart, *supra* note 4, at 1669.

¹⁵³ *See* Aberbach & Rockman, *supra* note 75, at 608. Aberbach and Rockman focus on just two values—political accountability and expert administration—but draw substantially the same conclusion. For them, as for me, “[t]he 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 silencing 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 in all agencies would be an arid technocratic endeavor, largely insulated from presidential mandates and public participation. If the politically appointed agency leaders lorded over administrative proceedings, agencies would effectuate the President's mandate, likely at the expense of apolitical expertise and public input from those outside of the President's electoral base. And, if civil society called the shots, administrative governance would reflect the concerns of narrowly focused interest groups, leaving little room for such values as apolitical expertise or presidential accountability to steer or shape agency policy. In short, if any of these specific institutional actors were to operate outside of a system of checks and balances, it would run roughshod not only 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 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, contradictory¹⁵⁴ 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),¹⁵⁵ *Massachusetts v. EPA* (which privileges expertise and thus the civil service),¹⁵⁶ and *ADAPSO v. Camp* (which privileges civic republicanism or interest-group representation and thus the nongovernmental sector).¹⁵⁷ Critically, in none of these cases are the other, non-ascendant values completely silent. Indeed, they cannot be silent 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. Administrative separation of powers gives meaning and effect to all of these values, allowing them to “cycle” through in such ways that no one administrative value or institutional rival is a consistent big winner or big

¹⁵⁴ See Frug, *supra* note 152; Magill & Vermeule, *supra* note 70, at 1053, 1078 (suggesting that a commitment to political accountability in the administrative state is at odds with a commitment to administrative expertise).

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

¹⁵⁶ 549 U.S. 497, 533-34 (2007) (insisting agencies provide reasoned justifications when rejecting proposed rulemaking petitions); *Motor Vehicle Mfrs. Ass'n v. State Farm*, 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 117, at 52 (describing cases rejecting agency positions that prioritize political considerations over technocratic expertise).

¹⁵⁷ 397 U.S. 150, 153-54 (1970) (allowing a broad swath of “arguably” protected parties to seek judicial review of agency actions).

loser. Instead, each has its day in the sun.¹⁵⁸ 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 do not want to choose among them.¹⁵⁹ As Heather Gerken argues, “cycling 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.”¹⁶⁰

In all, this structure’s guarantee helps promote widespread support for the administrative state as a worthy successor to the Framers’ scheme—a scheme which itself seeks to harmonize the seemingly conflicting commitments to majoritarianism, federalism, limited government, and the rule of law.¹⁶¹

2. Administrative Separation of Powers and Constitutional Isomorphism

Above I described the legitimacy of administrative separation of powers in terms of values. Here I draw upon another possible 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 reproduced a substantially similar triangulated system of institutional counterweights. And, as to content, they cast these counterweights to resemble in relevant ways mini-legislatures, mini-presidents, and mini-courts, directing this administrative trinity to play substantially similar roles to those Congress, the President, and the Judiciary play on the constitutional stage.

The fact that administrative governance’s three principal rivals channel some of the dispositional characteristics of the three great constitutional branches is more than a neat coincidence. It is also a source of normative validation. To the extent the public embraces the Framers’ special brew of a popular, deliberative body, a unitary executive body operating pursuant to a partisan, national mandate, and a countermajoritarian body whose currency is reason-giving, it need not fear the shift to administrative governance. This is because administrative lawyers have effectively followed the recipe, fashioning the administrative rivals roughly in the image of their constitutional antecedents.¹⁶²

Agency Leaders as the Administrative State’s Presidency. Most simply—and obviously—the political leadership atop agencies is the administrative embodiment of the President. Like all agents, the appointed leaders are not perfectly faithful to the White House. But as political allies (and subordinates) of the President and the increasingly powerful White House staff, they can generally be relied upon to promote and effectuate

¹⁵⁸ Cf. Chafetz, *supra* note 23, at 1112-13 (proffering 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”). Administrative separation of powers often allows those conflicts over substantive values—and over which set of rivals to privilege—to play out in a similarly indeterminate, contestable, and sometimes politically charged fashion.

¹⁵⁹ GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 41, 195-96 (1978).

¹⁶⁰ Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1174 (2005).

¹⁶¹ See *infra* note 174.

¹⁶² 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 23, at 153-58.

the President's agenda, a politically accountable agenda ostensibly endorsed through competitive, national elections.¹⁶³

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 formally very different tasks. And, the two institutions are exact opposites on the question of comparative expertise; federal judges are famously generalists, whereas expertise is the civil servant's calling card. But I am emphasizing dispositional linkages and, as a dispositional matter, the civil service has evolved into administrative separation of powers' countermajoritarian bulwark, resisting political overreaching, promoting the rule of law, advancing reasoned approaches to decisionmaking, and providing intergenerational stability in ways not unlike what the federal judiciary does vis-à-vis Congress and the President.¹⁶⁴

Specifically, federal judges and civil servants generally are committed to upholding and promoting the rule of law.¹⁶⁵ Both groups have institutional cultures that prize professionalism and frown upon politicking.¹⁶⁶ Both groups traffic in interpretation and reason-giving to justify their conclusions (and their *raison d'être*).¹⁶⁷ And, importantly, both groups are tenured and need not fear for their jobs.¹⁶⁸ 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 civil servants. Thus, while both judges and civil servants generally abide by what the President wants and does, they can shape policies in crucial ways and intervene more emphatically when what the President wants or does is lawless or unreasonable.¹⁶⁹

It is worth noting too that even when civil servants act politically, they do so in ways quite similar to federal judges. In reality, no judge or career government worker can fully 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 servants—dilutes the impact of any one individual's politicized actions or decisions.

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, the nongovernmental sector plays a role somewhat similar to Congress. (As noted above, because of the demands visited upon Congress amid the exponential growth and complexity of the modern administrative state, civil society assumes a central,

¹⁶³ See *supra* Subsection II.A.1.

¹⁶⁴ See, e.g., William Landes & Richard Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975) (finding that judicial review of agency actions serves as a mechanism of contract enforcement, with the courts serving as guarantors of the original deal struck by the Congress that enacted the relevant authorizing legislation).

¹⁶⁵ See *supra* note 112 and accompanying text.

¹⁶⁶ That said, neither group is entirely immune from politics. Compare *supra* note 123 (acknowledging some partisanship among civil servants) with Frank Cross & Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine*, 107 YALE L.J. 2155 (1998) (discussing politically and ideologically influenced judges).

¹⁶⁷ See, e.g., Max Weber, *Bureaucracy*, WEBER'S POLITICAL SOCIOLOGY 163, 194 (AK. Thapur, ed.) (“[A] system of rationally debatable ‘reasons’ stands behind every act of bureaucratic Administration....”).

¹⁶⁸ See U.S. Const. art. III; *supra* notes 90-94 and accompanying text.

¹⁶⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); see *supra* note 114 and accompanying text.

insider's role in administrative governance.¹⁷⁰) Functionally, there are of course striking differences. Sometimes civil society does engage in legislative-like activity—exposing abusive or arbitrary agency actions, lobbying, drafting rules, and debating the merits of proposed policies. But, as suggested, quite often it acts as an agent of the courts, insisting on agency reasonableness and conformity with the rule of law.

As a matter of disposition, however, the comparison is more apparent. In its ideal state, the institutionalization of nongovernmental participation embodies the norms of the “public sphere,” namely, rational deliberation and criticism, inclusivity and “conversational equality” among those who constitute civil society.¹⁷¹ (Congress in its ideal state roughly approximates this democratic forum on a more manageable, orderly scale.) The nongovernmental sector channels 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. In practice, of course, the nongovernmental sector might deviate sharply from both majoritarian and deliberative ideals, with moneyed, corporate interests wielding disproportionate influence.¹⁷² But so too might Congress, given the structural inequalities within our polity and the current state of campaign-finance law.¹⁷³

Combined, therefore, agency leaders, the civil service, and civil society operate as more than just any old trio of rivals. Indeed, the legitimacy of the administrative state rests not only on the reaffirmation of the Framers’ commitment to checking unencumbered state power and on administrative separation of powers’ providing a platform for the prized but conflicting normative values associated with public administration to coexist. It further rests on the rough re-creation of the Framers’ popular and countermajoritarian counterweights to meet the special challenges of governance in an administrative republic.¹⁷⁴

¹⁷⁰ See *supra* Subsection II.A.3.

¹⁷¹ See JÜRGEN HABERMAS, *STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Thomas Burger, trans., 1991). One might go so far as to say that the rise of organized interest groups in the nongovernmental sector helps, as Madison put it vis-à-vis Congress, “refine and enlarge the public views.” See Fed. 10.

One also might 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 terms. See *supra* note 131 and accompanying text. In reality, rulemaking often falls far short of that ideal. See Shapiro, et al., *supra* note 89, at 463-64, 477-78. But, of course, so do congressional deliberations. See, e.g., *INS v. Chadha*, 462 U.S. 919, 927 n.3 (1983) (recounting congressional colloquy in which seemingly neither speaker understood the impact of the pending House vote under discussion).

¹⁷² HABERMAS, *supra* note 171, at 141-81 (noting the decline of the public sphere in the twentieth century).

¹⁷³ *Citizens United v. FEC*, 558 U.S. 310 (2010) (Stevens, J., dissenting); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

¹⁷⁴ Cf. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES* (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 countermajoritarian institutions. See, e.g., JED RUBENFELD, *FREEDOM AND TIME* 168 (2001) (“Constitutional law’s so-called countermajoritarian 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 ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 60, 290

Despite the incompleteness of this re-creation, it bears noting that this administrative regime seems less vulnerable to “separation of parties” overwhelming and thus undermining administrative separation of powers, a thesis Daryl Levinson and Richard Pildes apply to the Framers’ tripartite scheme.¹⁷⁵ Levinson and Pildes argue that party rivalries (not institutional ones) define the terms of political competition among the constitutional branches. Assuming that they are right with respect to the constitutional branches, their claim appears to have less force at the administrative level. First, civil servants have strong institutional ties to their agencies and are, in any event, at best politically neutral and at worst ideologically diverse or contrarian vis-à-vis agency leaders.¹⁷⁶ Second, civil society is ideologically diverse and less hierarchical. Unlike Congress, there are fewer and weaker party-disciplining mechanisms exerting control over the universe of nongovernmental actors and silencing or disenfranchising dissenters.¹⁷⁷ Agency decisions rarely please everybody. Thus it is safe to assume that some segment of the broad-ranging nongovernmental sector is likely to oppose most, if not every, action agency leaders take—ensuring that agency leaders will regularly be held accountable. 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 the Constitutional Doctrine

The Court’s tacit endorsement of administrative separation of powers over a range of cases provides a third form of administrative legitimacy. Such a tacit endorsement is important for four reasons. First, the suggestion of an independent constitutional warrant for administrative separation of powers helps validate the tripartite structure in a way that transcends empirical arguments about the relative utility of administrative separation of powers and certain normative ones that question why I might advocate doubling-down on what critics see as the Framers’ flawed scheme. Second, the doctrinal resonance of administrative separation of powers helps establish a constitutional precedent for an enduring, evolving understanding of separation of powers that extends beyond the Framers’ tripartite scheme—in a way that responds not only to the rise of the administrative state but also, as will be discussed in Part III, to the rise of the privatized state (and whatever else may follow). Third, the Court’s specific treatment of the various challenges to constitutional separation of powers helps flag as constitutionally problematic what I argue are the analytically analogous challenges privatization now poses to administrative separation of powers. (These too will be discussed in Part III.) And, fourth, because the Court seems to be only tacitly embracing administrative separation of powers—and because there is only a limited body of case law from which to draw—the discussion that follows could help spur greater judicial and scholarly interest in more firmly cementing a jurisprudential foundation for the important and constitutionally faithful work this tripartite scheme performs. That is to say, the constitutional commitment to encumbered, rivalrous government ought to be a

(1991); RONALD DWORIN, *FREEDOM’S LAW* 153-55 (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 into the administrative arena.

¹⁷⁵ Levinson & Pildes, *supra* note 23.

¹⁷⁶ See *supra* Subsection II.A.2.

¹⁷⁷ For a discussion of party loyalty and organizational discipline within Congress, see Levinson & Pildes, *supra* note 23, at 2335-38.

transcendent one, extending whenever and however state power morphs or evolves, as it did in the 1930s and 1940s—and as it is doing today through privatization.

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 vigilantly policing minor,¹⁷⁸ even seemingly salutary,¹⁷⁹ inter-branch transgressions.

Where the courts *do* permit inter-branch subordination, bullying, or power-ceding, it is often against the backdrop of 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 political leadership atop such agencies and to help guide the ultimate exercise of those powers. Such broad delegations invariably involve one or more of the constitutional branches subordinating, bullying, or ceding power to a rival branch. Yet because of a robust fallback system of administrative checks and balances, the courts are comfortable taking “a relaxed view of” otherwise-suspect inter-branch maneuverings.¹⁸⁰

To appreciate the constitutional centrality of administrative separation of powers (even compared to other, more explicit doctrinal loadstars), one need only contrast the permissive Non-Delegation doctrine¹⁸¹ with the Court’s far-less-lenient treatment of some kinds of inter-branch jockeying.¹⁸² Again, 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 and suggestive. 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.¹⁸³ This pattern also provides a blueprint for the Court to follow today, when confronting privatization’s analogous threat to administrative separation of powers.

Constitutional Rivals Unduly Interfering with One Another. Consider *Boumediene v. Bush*. In *Boumediene*, the Court invalidated provisions of the 2006 Military Commissions Act (MCA) that purported to strip the federal courts of jurisdiction to hear Guantanamo detainees’ habeas claims.¹⁸⁴ The Court explained that “the political

¹⁷⁸ *E.g.*, *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

¹⁷⁹ *E.g.*, *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹⁸⁰ *Lujan v. DOW*, 504 U.S. 555, 605 (1992) (Blackmun, J., dissenting) (suggesting the Court “justifie[s] a relaxed view of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review”).

¹⁸¹ *See, e.g.*, *Whitman v. Am. Trucking*, 531 U.S. 457, 474-75 (recounting broad delegations to administratively constrained administrative agencies).

¹⁸² Of course, some might suggest a less principled, coherent, or defensible division between cases in which the Court intervenes and cases in which the Court permits constitutional-branch meddling. *See* Rebecca 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.”); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1132-38, 1148-49 (2000); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 609 (2001),

¹⁸³ This discussion employs structuralist reasoning to interpret constitutional separation of powers. This is a conventional approach, see, for example, CHARLES BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969), but by no means the only one. *Cf.* John Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

¹⁸⁴ 553 U.S. 723 (2008).

branches [were asserting] the power to switch the Constitution on and off,” and that habeas corpus “must not be subject to manipulation by those whose power it is designed to restrain.”¹⁸⁵

Boumediene is often understood primarily as a federal jurisdiction case about judicial prerogatives;¹⁸⁶ or, it is relegated and marginalized because of the special circumstances surrounding post-9/11 detention at Guantanamo. But, by its own terms, it is also very much about the need to cultivate meaningful administrative structures even in matters of foreign affairs.¹⁸⁷ Critically, the *Boumediene* Court would have accepted an administrative alternative to Article III habeas. It would have done so provided the administrative alternative was procedurally rigorous and involved participation by countermajoritarian actors, a seemingly necessary condition to validate and legitimize the exercise of what otherwise would be categorically political decisions to detain alleged unlawful combatants.¹⁸⁸ Indeed, the Court worried that the extant administrative alternative lacked meaningfully rivalrous engagement. Specifically, the MCA’s “executive review procedures”¹⁸⁹ did not empower sufficiently independent administrative actors who (like judges) would be “disinterested in the outcome and committed to procedures designed to ensure [their] independence.”¹⁹⁰

Despite the outcome in *Boumediene*, the Court’s stated willingness to allow such inter-branch interference among constitutional actors—but, again, only on the condition that a robust 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 sub-constitutional actors to furnish those encumbrances.¹⁹¹

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

¹⁸⁵ 553 U.S. at 765, 785-86, 792.

¹⁸⁶ See, e.g., Gerald Neuman, *The Habeas Corpus Suspension Clause after Boumediene v. Bush*, 110 COLUM. L. REV. 537, 547 (2010) (“Adequacy of administrative procedure is no substitute for the independent authority of the judiciary to resolve legal issues concerning the executive’s authority to detain.”).

¹⁸⁷ See Richard Fallon, *Why Abstention Is Not Illegitimate*, 107 NW. U. L. REV. 847, 875 n.151 (2013) (understanding *Boumediene* as insisting that the Court retain habeas jurisdiction unless a “constitutionally adequate substitute” were instantiated); Daniel Metzger, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 4-5, 58-59 (emphasizing the Court’s interest in 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).

¹⁸⁸ Metzger, *supra* note 44, at 450; Metzger, *supra* note 126, at 498; see also Berger, *supra* note 187, 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).

¹⁸⁹ 533 U.S. at 783.

¹⁹⁰ *Id.*; Berger, *supra* note 187, at 2052 (“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.”).

¹⁹¹ See Metzger, *supra* note 44, at 450.

impose external fiscal discipline on itself. The Act authorized the President to cancel items from duly enacted spending and tax bills. *Clinton v. City of New York*¹⁹² invalidated the Act. 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.¹⁹³

Dissenting, Justice Scalia insisted that the line item veto was nothing more than a run-of-the-mill delegation by Congress to the Executive.¹⁹⁴ As a matter of form, Scalia has a point.¹⁹⁵ 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.”¹⁹⁶ The existence of an intelligible principle is often the very touchstone courts look to when deciding whether a congressional delegation to an Executive agency is constitutionally permissible.¹⁹⁷ Yet principles far less “intelligible” than that contained in the Act have passed constitutional muster.¹⁹⁸

How, then, should *Clinton* be understood? Though the Court does not frame the opinion in such terms, implicit in its holding is a recognition that delegations to administrative agencies are constitutionally safer than delegations to the President. They are safer precisely because agency officials (unlike the unencumbered President wielding the line item veto) generally operate within thick webs of sub-constitutional checks and balances that constrain and enrich exercises of delegated authority.¹⁹⁹ 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” alone), agency heads would be obligated to promulgate rules subject to notice-and-comment by the public, would be bound to follow those rules, and would have to submit to judicial review.²⁰⁰ One might read the majority opinion and the Scalia and Breyer dissents together as suggesting the following precept: granting the President effectively legislative power²⁰¹—without assurances that those

¹⁹² 524 U.S. 417 (1998).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 464-65 (Scalia, J., dissenting).

¹⁹⁵ *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”).

¹⁹⁶ *Id.* at 436.

¹⁹⁷ *Whitman v. American Trucking*, 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.’”) (internal citation omitted); *But see* Kevin 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 Non-Delegation Doctrine).

¹⁹⁸ *American Trucking*, 531 U.S. at 474-75 (recounting broad delegations that the Court upheld notwithstanding relatively vague intelligible principles).

¹⁹⁹ *See Franklin v. Massachusetts*, 505 U.S. 788 (1992) (finding the President not subject to the APA).

²⁰⁰ *City of New York*, 524 U.S. at 489-90 (Breyer, J., dissenting).

²⁰¹ *Cf. American Trucking*, 531 U.S. at 488 (Stevens, J., concurring) (indicating that the Court regularly allows Congress to delegate legislative responsibilities to the Executive Branch).

powers would be subject to rivalrous encumbrances and shaped by a multiplicity of perspectives—represents too great of a consolidation of unchecked power.²⁰²

* * *

Chevron and *Mead* can themselves be explained through the lens of an enduring, evolving separation of powers jurisprudence. Though not constitutional cases per se, both deal with one constitutional actor ceding power to a rival. Specifically, they deal with the transfer of judicial interpretative authority from the courts to the Executive. The holding of *Chevron*—that courts give considerable deference to agencies on questions of law—is generally understood in terms of political accountability.²⁰³ Yet despite corroborating language gleaned from *Chevron* itself,²⁰⁴ 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.²⁰⁵

It is unsatisfying, second, because *Mead* suggests that less deference (*Skidmore* as opposed to *Chevron* deference) be accorded to agency interpretations that are *not* the product of agency rulemaking or adjudicatory proceedings.²⁰⁶ As Justice Scalia says in his dissent in *Mead*, there is no reason to give greater deference to the interpretations of middling administrative law judges than to the informal, ad hoc decisions of highly accountable Cabinet Secretaries.²⁰⁷ Scalia is right, provided *Chevron* stands for the proposition that courts defer to politically accountable agency heads. But he is wrong—as he must be, given *Chevron*'s equal treatment of Executive and independent agencies—if instead the courts cede interpretive supremacy to the Executive on the condition that agency decisions are forged in the crucible of administrative separation of powers. That is to say, ad hoc interpretations by the Cabinet Secretary are quite plausibly politically accountable. But they raise the specter of unchecked presidential power. Such informal decisions can be made without expert, apolitical input from civil servants and without deliberative, dissenting contributions from civil society.²⁰⁸ Thus broad (*Chevron*)

²⁰² Note too how careful the *Clinton* majority is in discussing other naked delegations to the President. See 524 U.S. at 443-44 (emphasizing the non-discretionary, limited power the 1890 Tariff Act delegates to the President).

²⁰³ RICHARD PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.3, at 143-44 (4th ed. 2002) (explaining *Chevron* in terms of political accountability).

²⁰⁴ *Chevron, U.S.A., Inc. v. NRDC*, 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.”).

²⁰⁵ See *infra* note 211.

²⁰⁶ *United States v. Mead*, 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 William Eskridge, & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

²⁰⁷ *Mead*, 533 U.S. at 244-45 (Scalia, 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 Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP CT. REV. 201, 201-02 (2001).

²⁰⁸ See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L.

deference to the interpretations of agency heads *acting alone* represents a dangerous transfer of constitutional powers from the Judiciary to the (unitary) Executive. Such deference to agency interpretations that instead arise through the rulemaking process or through adjudications raises far fewer concerns. Though there is the same transfer of constitutional powers from the Judiciary to the Executive in the latter cases, the Executive in those situations is anything but unitary. Rather, Cabinet secretaries and other political appointees are vigorously checked by civil servants as well as by members of civil society who participate in both rulemaking and adjudicatory undertakings.

* * *

Constitutional Rivals Hoarding Power. Lastly, consider *Metropolitan Washington Airports Auth. 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, DC. 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 authority's decisions. The Supreme Court rejected this reserved congressional role. It reasoned that Congress—through these nine members—would be either acting in an Executive role or legislating in the absence of bicameralism and presentment.²⁰⁹

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.²¹⁰ Additionally, courts permit delegations of executive, even prosecutorial, authority to entities ostensibly independent of the President.²¹¹ What is different about the arrangement at issue in *Metropolitan Washington* is that—unlike those involved in administrative rulemaking, administrative adjudication, and administrative enforcement—this free-floating, nine-member body would be operating in the absence of institutional rivalries. That is to say, Congress failed to empower counterweights capable of challenging and more broadly enriching the nine-member body's exercise of its power over airport policy.

Though the courts never say it explicitly, assurances of some alternative regime of separated and checked powers seem to be a necessary corollary to many efforts to weaken or circumvent constitutional separation of powers. The question that remains 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.

4. Administrative Separation of Powers and the Activist State

Notwithstanding my claims that administrative separation of powers *is* what describes and legitimates the administrative state, there is the residual question whether

REV. 1749, 1791 (2009) (suggesting *Mead* insists on more rigorous scrutiny of agency decisions that do not afford the public notice in the way that rulemaking and adjudication each does).

²⁰⁹ *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

²¹⁰ *E.g.*, *CFTC v. Schor*, 478 U.S. 833 (1986).

²¹¹ For cases acknowledging the independence of the SEC and FTC, respectively, see *Free Enter. Fund. v. PCAOB*, 130 S. Ct. 3138 (2010); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

separation of powers *ought to* carry forward into the activist administrative state (and into the equally activist privatized state that will be discussed in Part III).

After all, it might be credibly argued that consolidated government today doesn't trigger the same fears of tyranny—that is, real, literal, dictatorial tyranny—that animated the Framers whose contemporaries were so new to republicanism and so steeped in 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 is much more consistent with (and perhaps dependent upon) consolidated, concentrated powers than was the more languid 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 infinitely 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 thousands of ways, often at the touch of a button. With apologies to Hannah Arendt, the contemporary *banality of tyranny*, which we find in both the administrative and (again, as I will describe below) privatized eras, demands continued vigilance of the sort that the Framers' checks and balances promotes.

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, republican 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.

This reframing of administrative legitimacy helps better explain the administrative state, its constitutional pedigree, and its various strengths and weaknesses. It also casts civil servants and nongovernmental actors in a different light: as necessary, perhaps quasi-constitutional, participants in administrative governance.

Additionally, this reframing readies contemporary audiences for life in the post-administrative state—a life in which privatization's commingling (and concentration) of political and commercial power endangers administrative separation of powers and, with it, the constitutional project of limited government.

This Part unfolds as follows. Section A tells the story of the decline of administrative separation of powers. Here I show how today's agency leaders seeking²¹² greater political control, responding to perceived administrative gridlock, or motivated by any number of other complaints or opportunities disable their institutional rivals. Specifically, these agency leaders employ various privatization practices that have the effect of co-opting select nongovernmental participants and defanging civil servants. Nongovernmental participants were empowered to be a foil to politically appointed

²¹² As discussed, *supra* Subsection II.A.1, agency leaders might well be obligated by the White House to "seek" greater political control.

agency heads and to add distinctive, often adversarial, voices to the administrative process. Today, some are cheerleaders, 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 very means to enforce those constraints and marshal their expertise.

Section B insists upon encumbered, rivalrous government not just in reference to institutions explicitly mentioned in the Constitution but also in reference to general functional properties.²¹³ 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 considering subversions of constitutional separation of powers (which I discussed in Subsection II.B.3). By contending that an enduring, evolving separation of powers ought to extend whenever and however state power morphs, as it is instantly doing, this Section's constitutional treatment also suggests the existence of a more universal metric for addressing even-further-into-the-future (*post-privatization?*) iterations of government renewal and reinvention.

Section C offers some initial thoughts on engendering a tertiary, privatized 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 the shift to privatization.

To be clear, this Part should not be read as an endorsement of privatization. I am not convinced that there is particularly well-informed support for such a shift away from administrative governance.²¹⁴ Nor am I convinced that there is a strong moral or practical justification for such a shift. For better or worse, efficiency is not considered a preeminent constitutional value,²¹⁵ 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 unshackled, privatized state power is necessarily more efficient, let alone more effective.²¹⁶ Regardless, this project is about structural normativity. Though this project readily embraces rivalrous, encumbered government as the constitutional antidote to concentrated and possibly arbitrary, corrupt, or tyrannous state power, it does not consider the wisdom of creating a strong national legislature, a robust administrative state, or a business-like, privatized one.

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

²¹³ Cf. Ackerman, *supra* note 144, at 688-89 (emphasizing the overlooked relevance of separation of powers at the sub-constitutional, bureaucratic level of governance); Greene, *supra* note 23, at 129 (suggesting that constitutional law—and its commitment to checks and balances—must be translated onto the administrative stage); Magill, *Beyond*, *supra* note 182, at 651 (“If diffused government authority is what we are after, we have it, in spades.”); Metzger, *supra* note 44 (suggesting a need to think about “internal constraints” through the lens of constitutional separation of powers).

²¹⁴ Cf. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (explaining the constitutional moment legitimizing the administrative state); 1 ACKERMAN, *supra* note, 174, at 34-57.

²¹⁵ 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.”).

²¹⁶ See *supra* note 267; see also Verkuil, *supra* note 9 (contending that separation of powers generates efficiencies).

Some believe the project of constructing a secondary, administrative separation of powers has gone too far. They bemoan how constrained administrative agencies have become. Nightmare accounts of sclerotic rulemaking,²¹⁷ industry capture,²¹⁸ bureaucratic obstinacy,²¹⁹ and years and years of judicial entanglements²²⁰ have forced the leadership atop many agencies to retreat from bold policymaking and vigorous prosecution of wrongdoing.

Cost overruns too are seen as hampering administrative action. It is expensive to comply with extensive administrative procedures. Overseeing lengthy notice-and-comment periods and responding to a veritable tsunami of FOIA requests require considerable expenditures of resources; so do subsequent court battles initiated—and prolonged—by aggressive private parties.²²¹ Other oft-lamented costs come in the form of purportedly above-market salaries and benefits paid to civil servants. (I say purportedly because, contrary to public perception, the evidence is not altogether clear.²²²) Additionally, the effective conferral of tenure on civil servants means that, inevitably, some employees will be insufficiently motivated to work efficiently.²²³ For all of these reasons, agencies might not be intervening as eagerly, robustly, or effectively.²²⁴

²¹⁷ McGarrity, *supra* note 81, at 1386.

²¹⁸ George Stigler, *The Economic Theory of Regulation*, 2 BELL J. ECON. 3 (1971); Sidney Shapiro, *Administrative Law After the Counter-Reformation*, 48 U. KAN. L. REV. 689, 693 (2000) (describing concerns that regulated parties capture administrative agencies).

²¹⁹ Kagan, *supra* note 36, at 2263 (describing bureaucratic inertia and torpor); James Q. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INT. 77 (1975).

²²⁰ Mashaw & Harfst, *supra* note 81, at 443 (concluding that “judicial review . . . burdened, dislocated, and ultimately paralyzed [NHTSA’s] rule making efforts”); *see also* Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules*, 43 ADMIN. L. REV. 7 (1991).

²²¹ *See* Wagner, *supra* note 82, at 1325 (describing public input 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/?hpid=z9> (attributing the EPA’s delay in promulgating a greenhouse gas regulation in part to the fact that the “agency was still reviewing more than 2 million comments on its proposal”).

²²² Compare 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) with JOHN D. DONAHUE, *THE WARPING OF GOVERNMENT WORK* 35-50 (2008) (discussing the complications associated with definitive pronouncement of private-public pay disparities); Jeffrey Keefe, Econ. Pol’y Inst., Br. Paper No. 276, *Debunking the Myth of the Overcompensated Public Employee: The Evidence* 10 (2010) (disputing evidence that government pay outstrips private-sector pay).

²²³ E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 4-6, 119-230 (1997); Kevin R. Kosar, *Privatization and the Federal Government: An Introduction*, CONG. RESEARCH SERV., DEC. 28, 2006, at 4, <http://www.fas.org/sgp/crs/misc/RL33777.pdf> 4.

²²⁴ JERRY L. MASHAW, ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 623-28 (5th ed. 2003); CASS, et al., *supra* note 57, at 141; Connor Raso, Note, *Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010); McGarrity, *supra* note 81, at 1386; STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993). *Cf.* Peter Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745 (1996) (arguing for a broader menu of policymaking options than what the APA rulemaking paradigm prescribes).

Assuming *arguendo* that these claims of administrative incapacitation are valid and properly attributed, the failure of administrative separation of powers to allow for micro-recalibrations (that would curtail *excessive* encumbering) could well be viewed as a weakness of the tripartite scheme and, perhaps, as that which triggers the privatization movement. That said,

As was the case approximately 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 designed to marginalize institutional counterweights. In this iteration, however, agency leaders are commingling state and commercial power, teaming up with some of their rivals and sidelining others. Overcoming these secondary, administrative checks and balances heralds the rise of a new governing paradigm:²²⁵ an increasingly privatized state.

Contrary to many conventional accounts, this emerging privatized state should not be understood as smaller, less intrusive government. 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.

1. Privatization Writ Large

I conceive of privatization broadly.²²⁶ There are, after all, many practices that commingle state and commercial power in ways that disarm administrative (and by extension constitutional) rivals.²²⁷ 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 rulemaking.²²⁸ The National Parks Service, among others, has established a private trust, through which corporations and individuals can donate funds. The Service uses those

recent judicial efforts curtailing standing and private rights of action and Congress's authorization of additional layers of political appointees atop administrative agencies all suggest some (though perhaps not enough) flexibility within the administrative separation of powers. *See supra* note 119.

²²⁵ 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 17.

²²⁶ For far more comprehensive treatments of privatization, see *supra* note 2; *infra* note 234.

²²⁷ Agency leaders' systematic partnering with select nongovernmental actors and their sidelining of civil servants undermines Congress and the courts as well. As discussed, these two primary, constitutional counterweights to the President rely on nongovernmental actors and civil servants to maintain encumbered, limited government once public policymaking is displaced onto the administrative stage. They also rely on these administrative rivals to provide facts and sound alarms. Thus, because the administrative counterweights both replace and extend the reach of their constitutional progenitors, any weakening of secondary separation of powers also weakens much of what remains of primary separation of powers. I thank David Super for raising this point.

That said, 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.

²²⁸ *See* AARON ROSS SORKIN, *TOO BIG TO FAIL* (2010); Templin, *supra* note 2, at 1186; J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 *YALE J. ON REG.* 283, 303-05 (2010); Louise Story & Gretchen Morgenson, *Inside US Bailout of AIG, Extra Forgiveness for Big Banks*, *N.Y. TIMES*, Jun. 30, 2010, at A1.

funds to develop new programs, improve existing ones, and generally lessen reliance on congressional appropriations and the civil service.²²⁹ Practically every agency encourages and endorses private standard setting²³⁰—so much so that federal administrative agencies have incorporated close to 10,000 such private standards.²³¹ Furthermore, many agencies partner with accreditation organizations, which devise and administer nominally federal responsibilities. 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.²³² In addition, 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, anti-drug themes into their shows' storylines on the sly.²³³

This is a big and eclectic list, befitting a practice that takes many different forms and patterns.²³⁴ 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 state 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 power out of government corridors such that it is logistically and legally more difficult for the rest of civil society to participate meaningfully in policy development and execution. Also, for these purposes, two practices stand out for their durability and trans-substantive 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)—systematically enable the evasion of legal and political administrative checks across a wide range of federal policy domains.

This showing is in keeping with the counter-narrative I have been developing over a series of projects.²³⁵ Conventional accounts of privatization typically focus on the abdication of government power and highlight the dangers associated with corrupt or

²²⁹ Kosar, *supra* note 2, at 14-15, 18-19.

²³⁰ Peter Strauss, *Private Standard Organizations and Public Law* SSRN, Dec 27, 2012 (“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).

²³¹ Mary F. Donaldson & Nathalie Rioux, *Fifteenth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment*, U.S. Dep’t of Commerce, June 2012, https://standards.gov/ntaa/resources/ntaa_ar_2011.pdf.

²³² Michaels, *(Willing) Fettered*, *supra* note 2 at 812-16 & n.50; *see also* Peter Eisler, *Government Funds Power Research*, USA TODAY, Apr. 16, 2009, at 8A; Marc Kaufman, *NASA Invests in Its Future with Venture Capital Firm*, WASH. POST, Oct. 31, 2006, at A19; Matt Richtel, *Tech Investors Cull Start-Ups for Pentagon*, N.Y. TIMES, May 7, 2007, at C1.

²³³ Daniel Forbes, *When the White House and the TV Networks Got Together To Put Anti-Drug Messages in Prime-Time Television, Were They Breaking the Law?*, SALON.COM, Jan. 14, 2000.

²³⁴ For work categorizing and mapping privatization, *see* Daphne Barak-Erez, *Three Questions of Privatization*, in *COMPARATIVE ADMINISTRATIVE LAW* 493, 495–97 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449 (1988).

²³⁵ *See infra* note 237.

wayward contractors. Those problems surely exist and will be touched upon below.²³⁶ But, from a rule-of-law perspective, the bigger issue is the converse one: privatization as a way of extending and expanding the reach of the State. Specifically, privatization can maximize or aggrandize Executive/presidential power at the expense of other governmental (and even private) stakeholders.²³⁷ 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 privatization systematically weakens the administrative separation of powers and, with it, threatens what I argue is an enduring, evolving commitment to separated and checked state power (in whatever form that state power happens to take).

2. Government Service Contracting

The outsourcing of government responsibilities to private service contractors²³⁸ has become a ubiquitous practice across all agencies. We are told that contracting is “the government’s reflexive answer to almost every problem,”²³⁹ that “enlisting private competence has been enthroned as managerial orthodoxy,”²⁴⁰ that “governments at all levels (federal, state and local) today are making increased use of service contracting,”²⁴¹ and, that contracting “seems likely only to expand in the near future, fueled by increasing belief in market-based solutions to public problems.”²⁴² All told, federal contractors now outnumber federal civilian employees,²⁴³ with some estimates suggesting that the number of such contractors doubled in the last decade alone.²⁴⁴

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 exercising sensitive, discretionary power across all domestic agencies continues to mount.²⁴⁵ (Here I am, again, zeroing in on that subset of contractors whose work responsibilities threaten administrative separation of powers.) For purposes of this

²³⁶ See *infra* notes 257, 267, 304-305 and accompanying text.

²³⁷ See Michaels, *Pretensions*, *supra* note 2; Michaels, *Progeny*, *supra* note 2; Michaels, *Deputizing*, *supra* note 2; Michaels, *Privatizing War*, *supra* note 2.

²³⁸ See Kosar, *Privatization*, *supra* note 223, at 3; Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 161 (2000). I use 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.

²³⁹ Scott Shane, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES, Feb. 4, 2007, at A1.

²⁴⁰ John Donahue, *The Transformation of Government Work*, in GOVERNMENT BY CONTRACT 60 (Jody Freeman & Martha Minow, eds. 2009).

²⁴¹ Lawrence L. Martin, *Performance Based Contracting for Human Services*, 2 J. PUB. PROCUREMENT 55, 55 (2002).

²⁴² Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1379 (2003).

²⁴³ Paul Light, *A Government Ill-Executed: The Depletion of the Federal Civil Service*, 68 PUB. ADMIN. REV. 413, 417-18 (May/June 2008); Curtis W. Copeland, *The Federal Workforce: Characteristics and Trends*, CONG. RES. SERV., Ap. 19, 2011, at Summary, 3-4;

²⁴⁴ Lewis & Selin, *supra* note 96, at 79.

²⁴⁵ Rep’t of the Acquisition Advisory Panel to the Office of Fed. Procurement Pol’y and the U.S. Congress, Jan. 2007, at 417; VERKUIL, *supra* note 2; Guttman, *supra* note 17.

project, I simply refer to my and others' works documenting the breadth, depth, and apparent trajectory of federal service contracting²⁴⁶ and turn instead to explain how the contracting out of policymaking and policy implementing responsibilities (the “brains” of administrative government) undermines the administrative separation of powers, thus enabling agency leaders to avoid legal constraints and to more freely advance partisan aims.

a. Eluding Legal Constraints

Federal service contracting responds in part to the ever-growing chorus of complaints, criticizing bureaucracy (and bureaucrats) for being slow, expensive, unmotivated, unimaginative, and undisciplined.²⁴⁷ After all, the potential for efficiency gains²⁴⁸ or cost savings²⁴⁹ 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 greater threat of ouster—that is, of being readily replaced by a more responsive, responsible, or cheaper competitor—they are expected to provide higher-quality, lower-cost services.²⁵⁰

Not surprisingly, service contracting quite often sidelines civil servants.²⁵¹ The contractors who replace civil servants are more likely to help the political leadership evade legal constraints. (Recall that contractors draft agency rules, determine the eligibility of would-be beneficiaries, conduct research, run prisons, and monitor and enforce industry compliance with rules and orders.²⁵²) 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, those protocols need not be followed. Jack Beerman 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.

²⁴⁶ See *supra* note 2 and accompanying text.

²⁴⁷ SAVAS, *supra* note 223; Cass, *supra* note 234; Richard Box, *Running Government Like a Business*, 29 AM. REV. PUB. ADMIN. 19 (1999); James Pfiffner, *The First MBA President: George W. Bush as Public Administrator*, PUB. ADMIN. REV. 6 (2007).

²⁴⁸ See Kosar, *supra* note 223, at 4 (noting that private firms are often assumed to be more efficient because they operate in competitive, profit-driven contexts that reward success and penalize failure more harshly than is typically true within government bureaucracies); Mark Moore, *Introduction, 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.”).

²⁴⁹ Contractors are often prized because they are believed to cost less, *supra* note 222. Thus governments might hire contractors to exploit a perceived wage differential—what they see as a backdoor means of fiscal savings. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* 144 (1989).

²⁵⁰ *E.g.*, Michaels, *Progeny*, *supra* note 2, at 1030-32.

²⁵¹ See Michaels, *Pretensions*, *supra* note 2, at 745-50.

²⁵² See *supra* notes 11-16 and accompanying text.

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.²⁵³

As Beerman suggests, contractors' avoidance of these otherwise-applicable requirements marginalizes nongovernmental participants too. Once state power is channeled through private conduits, it becomes much harder for other nongovernmental actors to monitor, let alone directly challenge, the agency leaders using those conduits. 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 full range of nongovernmental participants could keep closer tabs on the agency leadership.

Second, even where procedural requirements and substantive proscriptions apply equally to service contractors and federal employees alike, contractors are more likely to shortchange externally imposed constraints. Recall my claim that civil servants resemble judges in a dispositional sense. They are independent, professional, and have strong institutional and cultural reasons for insisting agency leaders comply with statutory directives.²⁵⁴ They also have no financial and few, if any, persistent political incentives that cut in the opposite direction.²⁵⁵

By contrast, service contractors often have monetary incentives to do any given job more quickly, or more superficially. Under many contractual agreements, cutting legal corners and shortchanging statutorily prescribed procedures help lower operating costs—and thus increase profits.²⁵⁶ For these reasons (and in this respect²⁵⁷), 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 external demands as possible.²⁵⁸

Third, even assuming a service contractor's pay did not turn directly or indirectly on how fast or effortlessly the work is done, the contractor is nevertheless more

²⁵³ Jack M. Beerman, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1554 (2001); *see also* Guttman, *supra* note 17, at 895 (echoing concerns about contractors' relative freedom from FOIA). That said, contractors must submit to FOIA requests if they are preparing or maintaining records for an agency, *see* Pub. L. No. 110-175, § 9, but not if their records relate to their own handling of government responsibilities.

²⁵⁴ *See supra* Subsection II.A.2.

²⁵⁵ Diller, *supra* note 2 (noting the comparative lack of professionalism among government service contractors compared to civil servants).

²⁵⁶ RALPH NASH, *THE GOVERNMENT CONTRACTS REFERENCE BOOK* 525 (2d. ed. 1998); *see* Freeman, *supra* note 238, at 170 (describing contractors' financial incentives to cut corners); Dru Stevenson, *Privatization of State Administrative Services*, 68 *LA. L. REV.* 114, 119 (2008) (suggesting government contractors have "perverse financial motivations... to spend as little as 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).

²⁵⁷ I say "in this respect" because contractors might well try to overcharge the agency or cut corners in ways that infuriate agency heads. But even in such instances when agency-contractor interests diverge, they do so in ways unlikely to promote checks and balances. (That is to say, it is unlikely that contractors' high costs are a function of their insistence on compliance with external procedural protocols.) Instead, the agency-contractor interest divergence only contributes further to a culture of abuse and state corruption—albeit with the contractors, rather than agency heads, as the chief transgressor and beneficiary.

²⁵⁸ *See supra* Subsection II.A.1.

susceptible to being pressured into cutting corners than tenured civil servants would be. Contractors can be readily fired and replaced if they are out of step with the interests of the political leadership.²⁵⁹ Absent long-term or sticky contracts,²⁶⁰ contractors are agents of the incumbent Administration and the political appointees running administrative agencies.²⁶¹ Like those hired and fired under the old Spoils System (but unlike politically insulated civil servants), these short-term contractors will internalize the agency leadership's preferences and, as a result, help consolidate the leadership's control.

For all three of these reasons (and, again, because the political leadership needs to rely on *somebody* to help develop, administer, and enforce agency policies²⁶²), the turn to contracting weakens the administrative rivalries that help guard against government abuse and ensure compliance with the rule of law.²⁶³

b. Eluding Anti-Partisan 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.²⁶⁴ By contrast, civil servants are insulated from politically motivated hiring and firing decisions. They are accorded that job protection notwithstanding some of the inefficiencies job tenure invariably breeds precisely so that they are able to voice their expertise, resist partisan overreaching, and further the interests of the agency (and not necessarily the incumbent Administration). Civil servants' ability and willingness to challenge the leadership diffuses administrative power, thus limiting the realization of hyper-partisan programmatic agendas.²⁶⁵

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²⁵⁹ See Michaels, *Progeny*, *supra* note 2, at 1049; Guttman, *supra* note 17, at 917 (indicating that it is easier to dismiss government service contractors than government workers); Katherine 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.”).

²⁶⁰ See, e.g., Super, *supra* note 2; *infra* notes 304-305 and accompanying text.

²⁶¹ E.g. GUTTMAN & WILLNER, *supra* note 2.

²⁶² See *supra* notes 95-97 and accompanying text (describing the political leadership's dependence on a large agency workforce to devise and carry out agency initiatives).

²⁶³ See *supra* Subsection 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 the bureaucracy. The complexity and labor-intensive features of the rulemaking process mean the political leadership will have to rely to a greater extent on the civil servants in the trenches. Thus, the shortchanging of procedures has a two-tiered effect on checking the leadership.

²⁶⁴ 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) (“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”).

²⁶⁵ See Michaels, *Progeny*, *supra* note 2, at 1036-37. See generally Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 *MICH. L. REV.* 53 (2008) (contending that forcing politically appointed and responsive leaders to share administrative responsibility with the politically insulated bureaucracy is accountability-enhancing).

It bears mentioning that some civil servants remain involved in the day-to-day management of government contractors. But their involvement and effectiveness should not be overstated. This is so for two reasons. Often it is political appointees who initiate the push to privatize and devise the broad guidelines for contractors to follow. Moreover, the civil servants engaged in day-to-day management are generally procurement experts. They are contract managers and auditors, not especially well-versed in the substantive policy domains within which the contractors are working.²⁶⁶ These civil servants make sure the contractors are not being wasteful or fraudulent. But they are not well-positioned to identify, let alone confront, contractors who seek (or are encouraged) to cut legal corners or push a hyper-partisan agenda.

In short, irrespective of its other virtues and problems,²⁶⁷ government service contracting enables the political leadership to team up with commercial interests in a manner that sidelines the civil service and disenfranchises segments of the nongovernmental sector. It thus weakens these otherwise-potent, sub-constitutional rivals to a political leadership potentially inclined to evade external legal and anti-partisan constraints.

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.²⁶⁸ Many enjoy stronger collective-bargaining protections than those commonly found in the private sector.²⁶⁹ And, unlike private-sector workers, they are protected against politicized employment decisions pertaining to hiring, firing, and promotions.²⁷⁰

Over the past few decades, those frustrated with what they see as expensive, potentially unresponsive, and insufficiently motivated government workers have championed government service contracting. It was, after all, easier for them to contract around government labor policy than to tear apart the then-still-entrenched civil service.²⁷¹

Now, however, the bureaucracy is facing considerable scrutiny. 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. Most importantly, these officials are even reclassifying civil servants as at-will employees.²⁷² In short, these officials are "marketizing" the government workforce—making it more like the private sector.

²⁶⁶ See Steven Schooner, *Fear of Oversight: The Fundamental Failure of Business-like Government*, 50 Am. U.L. Rev. 627 (2001).

²⁶⁷ For sources documenting contractor fraud, waste, and abuse, see Michaels, *Pretensions*, *supra* note 2, at 729 n.44.

²⁶⁸ See *supra* note 249 and accompanying text.

²⁶⁹ Donald Wasserman, *Collective Bargaining Rights in the Public Sector*, in JUSTICE ON THE JOB 62-63 (Richard Block, ed. 2006)

²⁷⁰ See *supra* note 259 and accompanying text.

²⁷¹ Michaels, *Progeny*, *supra* note 2, at 1026.

²⁷² See *id.*

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.²⁷³ Moreover, federal marketization is poised to accelerate greatly in light of continued challenges to the civil service.²⁷⁴ Notable among them is a pending rule, the effect of which would, as some see it, “void [the] civil service system for most federal employees.”²⁷⁵ 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.²⁷⁶ Needless to say, many of these responsibilities reach well beyond the national-security agencies that 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 weakens one of the chief counterweights in administrative law’s system of sub-constitutional 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 corners than would traditional civil servants explicitly and intentionally insulated from rewards and retributions visited upon them by the incumbent Administration.²⁷⁷

²⁷³ Donald 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 269, at 60; Luther Carter & Kenneth Kitts, *Managing Public Personnel: A Turn-of-the-Century Perspective*, in HANDBOOK OF PUBLIC ADMINISTRATION (Jack Rabin ed. 2007); Katyal, *supra* note 62, at 2333 (describing legislation that weakened the civil-service protections of 170,000 federal workers).

²⁷⁴ Philip Bump, *How Federal Workers Became the New Welfare Queens*, ATLANTIC WIRE, Mar. 20, 2013.

²⁷⁵ Government Accountability Project, *Proposed Rule Could Void Civil Service System for Most Federal Employees*, May 28, 2013, <http://www.whistleblower.org/press/press-release-archive/2013/2707-proposed-rule-could-void-civil-service-system-for-most-federal-employees>.

²⁷⁶ Designation of National Security Positions in the Competitive Service, and Related Matters, A Proposed Rule by the Personal Management Office and the Office of National Intelligence, May 28, 2013, <https://www.federalregister.gov/articles/2013/05/28/2013-12556/designation-of-national-security-positions-in-the-competitive-service-and-related-matters#sec-1400-301>. If promulgated, this rule opens the door to the political leadership having virtually unreviewable authority over how to classify large segments of the federal workforce.

²⁷⁷ 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 the political leadership determines 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 PARRILLO, *supra* note 17.

These marketized workers might be obligated to do so by the agency's political leadership.²⁷⁸ But even without explicit pressure from the agency leadership, marketized government workers shorn of civil-service protections are essentially temporary workers.²⁷⁹ Over time, they as a class are also more likely to be lower-quality employees with lower morale. Indeed, already the decreased or stagnant pay and the weakened job security associated with nascent federal marketization is contributing to a civil-service "brain drain."²⁸⁰ For these reasons, the remaining marketized employees are less likely to buy into the prevailing ethos of bureaucratic professionalism.²⁸¹ Simply stated, in a norm-driven community like the bureaucracy, demoralized, devalued, and vulnerable government workers are less likely to serve as a motivated, reliable, or capable counterweight to the agency leaders.

b. Eluding Anti-Partisan Constraints

With respect to the civil service's traditional role in moderating the political excesses of the agency leadership,²⁸² marketization weakens this otherwise-potent constraint, too. At-will employees are, as suggested, 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 politically well-insulated civil servants of the Administrative Era.²⁸³ Where marketization takes root, administrative power is once again concentrated. Marketized workers are apt to serve as party enthusiasts, championing their patron's causes if only because their jobs might very well depend on it.²⁸⁴ No longer consistently or forcefully checked by professional civil servants, the leadership enjoys greater discretion to prioritize partisan aims.

B. The Constitutionality of the Privatized State

²⁷⁸ See *supra* Subsection II.A.1.

²⁷⁹ 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 (2006); Stephen W. Hays & Jessica E. Sowa, *A Broader Look at the "Accountability" Movement*, 26 REV. PUB. PERSONNEL ADMIN. 102, 103-04 (2006); Michaels, *Progeny*, *supra* note 2, at 1047 (describing the "casualization" of marketized government workers).

²⁸⁰ See Joe Davidson, *Report Shows Fed Workers Have the Pay Blues*, WASH. POST, Nov. 17, 2011, at B4 (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"); Hays & Sowa, *supra* note 279, at 115; Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice*, WASH. POST, Nov. 13, 2005, at A1 (.

²⁸¹ LEWIS, *supra* note 84, at 30; Metzger, *supra* note 44, at 445.

²⁸² See *supra* Subsection II.A.2.

²⁸³ Stephen Condrey & Paul Battalio, *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 91; MASHAW, *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.").

²⁸⁴ MASHAW, *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.").

Privatization's vanquishing of administrative rivals invites abuse and calls into question the legitimacy of state power funneled through private 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.²⁸⁵ Yet despite serious academic, political, and judicial consideration in recent years, there has been 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 constitutes 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.”²⁸⁶ President Obama is more literal, if not more confident: “the line between inherently governmental activities... and commercial activities... has been blurred and inadequately defined.”²⁸⁷ Attempting to capture the essence of the State has a similarly Sisyphean quality to it. After all, many critics of privatization would view an entirely marketized—*but not outsourced*—government workforce as emblematic of an impoverished State, hardly worth trying to preserve.

Second, litigants have had limited success in tethering privatization initiatives to specific constitutional or statutory provisions, the thinness of which simply cannot be stretched to cover these largely unanticipated, twenty-first century political-commercial initiatives. As Paul Verkuil notes, “[t]he only reference in the Constitution arguably relevant to the delegation to private parties is the Marque and Reprisal Clause.”²⁸⁸

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

²⁸⁵ See *supra* notes 238-245 and accompanying text.

²⁸⁶ See, e.g., David Isenberg, *Commentary To Be, or Not To Be, Inherent: That is the Question*, Cato Institute, <http://www.cato.org/publications/commentary/be-or-not-be-inherent-is-question>; see also Alon Harel & Ariel Porat, *Commensurability and Agency*, 96 CORNELL L. REV. 749, 772 (2011) (“[T]he term ‘inherently governmental function’ remains vague, and many federal agencies use different definitions and interpretations....”). Cf. Verkuil, *supra* note 264, at 401-02, 457 (suggesting that “[i]nherent government functions are elusive concepts” and indicating that “the pro-privatization environment erodes whatever limits the phrase [inherently governmental functions] implies.”); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 540-47 (1985) (denying the capacity to identify traditional government functions, uniquely governmental functions, or essential government functions).

²⁸⁷ Presidential Memorandum of March 4, 2009: Government Contracting, 74 Fed. Reg. 9,755, 9,755-56 (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 endure. See Kate M. Manuel, et al., *Performance of Inherently Governmental and Critical Functions*, Cong. Res. Serv., Oct. 5, 2011, at 10-17.

²⁸⁸ VERKUIL, *supra* note 2 at 103. Verkuil does, however, seek to find other, less explicit, textual hooks. 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 (describing the possible relevance of the Subdelegation Act); see also ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 136-37 (suggesting a FOIA hook).

private channels.²⁸⁹ In doing so, this reframing frees lawyers from having to rely on often-reedy legal text (or on confused and usually unavailing, *privatization-focused* doctrines such as “state action”²⁹⁰)—allowing them instead to invoke thicker, more resonant structural constitutional principles in efforts to regulate privatization.²⁹¹

Indeed, 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. That is to say, the concerns in each of these eras sound in the potentially abusive and corrupt wielding of unencumbered, concentrated sovereign power. For those troubled by unencumbered, concentrated sovereign power, the Framers’ deep-seated 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, institutional correctives, and doctrinal imperatives of constitutional separation of powers to help reestablish limited, accountable governance amid the dynamic turn to privatization.

With this in mind, I pause here briefly to take a closer look at how privatization’s patterns of compromising administrative separation of powers resemble the patterns identified in Subsection II.B.3 with respect to administrative governance and the Framers’ tripartite scheme. Specifically, privatization enables administrative rivals to unduly interfere with one another, to cede power to one another, and to hoard power for themselves. Analytically speaking, these are the same types of moves that, when perpetrated by constitutional actors, provoke rigorous judicial scrutiny.

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 it reaffirms and refashions at the sub-constitutional level the checks-and-balances rubric central to the Founding document. Under this theory, the same needs to hold true as 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 checked.

²⁸⁹ A few constitutional regimes have shown themselves more receptive to challenges to privatization qua privatization. See, e.g., *Academic Center of Law and Business v. Minister of Finance*, Supreme Court of Israel, No. HJC 2605/05 (2009); *Nandini Sundar v. State of Chattisgarh*, 7 S.C.C. 547 (Sup. Ct. India 2011); *Private Cities Case*, Dec. 769-11 (Sup. Ct. Honduras 2012).

American constitutional law has 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 (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 Ass’n of Am. Railroads v. U.S. Dep’t of Trans.*, No. 12-5204 (D.C. Cir. Jul. 2, 2013) (discussed *infra* note 295).

The Court has not, however, addressed the challenge this Article considers the more central, resonant one: that particular exercises of political-commercial power endanger constitutional separation of powers.

²⁹⁰ See *infra* notes 300-303 and accompanying text.

²⁹¹ Again, this approach is a structuralist one, see BLACK, *supra* note 183, at 7, and thus runs counter to approaches that interpret separation of powers with reference to specific constitutional clauses. Compare Manning, *supra* note 183 with Gillian Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 *HARV. L. REV. F.* 98, 103-05 (2009).

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 government within constitutional and administrative domains while enabling—and perhaps encouraging—unencumbered privatized governance.

Administrative Rivals Unduly Interfering with One Another. Above, I discussed the case of Congress and the President attempting to strip the federal courts of their jurisdiction to hear habeas claims brought by Guantanamo detainees. There is a jurisdiction-stripping analog in administrative governance: agency leaders teaming up with select nongovernmental participants to sideline or defang civil servants. The contracting out of government responsibilities limits the role civil servants can play—and thus eliminates in the process a key institutional check on agency leaders.²⁹² 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 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 hyper-partisan agendas.²⁹³

Interference among administrative rivals occurs too when the political leadership takes effective control over corporations—and then directs corporate policies. As part of the federal bailouts of the late 2000s, Treasury officials used the federal government’s equity shares in insurance and automotive companies to dictate those firms’ internal governance structures, their litigation strategies, and their business decisions²⁹⁴ (and did so without necessarily having to promulgate rules subject to notice-and-comment and judicial review). Who regulates the (ostensible) regulator, when the government plays the dual role of industry regulator and corporate director?²⁹⁵

Like 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 truth, an attack on constitutional separation of powers, insofar as the administrative scheme serves as a necessary stand-in for the real thing.

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

²⁹² See *supra* Subsection II.A.2.

²⁹³ See *supra* Subsection II.A.3.

²⁹⁴ See Templin, *supra* note 2; Barbara Black, *The U.S. As “Reluctant Shareholder”:* *Government, Business and the Law*, 5 ENTREPRENEURIAL BUS. L.J. 561, 573 (2010); Story & Morgenson, *supra* note 228.

²⁹⁵ See Verrett, *supra* note 228. In *Ass’n of Am. Railroads v. U.S. Dep’t of Trans.*, No. 12-5204 Jul. 2, 2013), the D.C. Circuit invalidated Amtrak’s authority to promulgate rules specifying how and when commercial railroads must give priority to Amtrak trains on shared tracks. The court did so because it viewed Amtrak as a private, for-profit entity—notwithstanding Amtrak’s classification as a government agency for other purposes, see *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995)—with a pecuniary interest in how those rules are shaped.

counterparts.²⁹⁶ As discussed above, because statutory and constitutional law at times treats government workers and private personnel differently, political administrations have an incentive to use less-regulated private actors in lieu of government employees. They have this incentive because they know that less-regulated private actors can (and will) more fully do the leadership's bidding.²⁹⁷

The analogy here is to the line item veto. Congress attempted to delegate lawmaking power to the President precisely because the President is unitary and unencumbered, and thus capable of making the necessary budget cuts without the procedural constraints and heterogeneous pressures that “plague” (or, of course, enrich and legitimate) the constitutionally prescribed legislative process.²⁹⁸ The danger of concentrated power—and self-dealing—is, in truth, much greater in this administrative sphere: the President is not beholden to Congress in the way financially dependent private actors are beholden to agency heads.²⁹⁹

To be sure, in some instances state-action doctrine sweeps in private actors, thus blunting some of the problematic elements of these delegations that circumvent the civil service. But state action's reach is limited and unpredictable,³⁰⁰ and promises to be more so as the line between public and private is increasingly blurred.³⁰¹ As the Court admits, “our cases deciding when private action might be deemed that of the state have not been a model of consistency.”³⁰² As a result, contractors today can often do what career government employees cannot, or will not, do. At the behest of agency leaders, these proxies have, among other things, infused social-service programs with religious instruction and engaged in data-mining activities deemed off-limits to government personnel.³⁰³ Not surprisingly, when state action does not kick in—that is, when private actors are not enveloped in a web of public-law constraints—delegations of this sort only strengthen agency leaders, consolidating their power and concomitantly weakening administrative *and constitutional* separation of powers. Thus, absent a backup system of

²⁹⁶ See *supra* notes 253-**Error! Bookmark not defined.** and accompanying text; Michaels, *Pretensions*, *supra* note 2, at 735-39.

²⁹⁷ See Michaels, *Pretensions*, *supra* note 2.

²⁹⁸ See *City of New York*, 524 U.S. at 439-41 (describing Congress's preference to delegate budgetary power to an unencumbered President).

²⁹⁹ See *supra* Section III.A.

³⁰⁰ See Shelia 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 (2001).

³⁰¹ For discussions of the state-action doctrine and less conventional forms of government privatization, see Michaels, *Progeny*, *supra* note 2, at 1086-87; Michaels, *Deputizing*, note 2, at 1465.

³⁰² *Lebron*, 513 U.S. at 378 (internal citation omitted). Seemingly similar cases arrive at difficult conclusions vis-à-vis state action and private actors. *Compare* *West v. Atkins*, 487 U.S. 42, 53-57 (1988) *with* *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *see also* *Ass'n of Am. Railroads* (DC Cir slip op., *supra*) (finding Amtrak to be a private actor with respect to constitutional delegations notwithstanding *Lebron's* determination that Amtrak was a state actor for First Amendment purposes).

³⁰³ 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, 7-8, 16-17 (2008) (emphasizing wide-scale government surveillance, data collection, and data mining to enhance or refine domestic as well as national-security programs, underscoring that much of this “surveillance... will be conducted and analyzed by private parties,” and noting the special dangers associated with private-public collaborations of this sort).

checks and balances, these delegations between administrative rivals warrant close scrutiny.

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 the political leadership commits in deed or effect to long-term contracts, forgoing the ability to readily reassign or reclaim a contracted-out responsibility.³⁰⁴ Such arrangements leave select members of the nongovernmental sector (namely, incumbent service contractors) virtually unchecked in exercising state powers.

Here, of course, the fear isn't the aggrandizement of Executive or presidential power. Though this project is oriented around such concerns, it is nevertheless important to recognize (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 do so pose a fundamental threat to administrative legitimacy and thus constitutional governance.³⁰⁵

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 salient as analogous patterns of jockeying by Congress, the President, or the Judiciary.

C. *Anticipating 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 do not 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.³⁰⁶ But many are not. There, a commitment to an enduring, evolving separation of powers might warrant judicial intervention, obligating courts to invalidate forms of privatization that compromise the constitutional project of encumbered, rivalrous government.

That same commitment might likewise prompt a legislative reaction, spurring Congress to establish market-based pathways in an effort to check and legitimate the political-commercial partnerships. Though this is not the place for prescriptive blueprints or political prognosticating, it is still worth considering the paths and obstacles that lie ahead. If state power is allowed to flow through private conduits, the enduring commitment to separation of powers might well warrant empowering new classes of

³⁰⁴ Super, *supra* note 2 *see also* Julie Roin, *Privatization and the Sale of Tax Revenues*, 95 MINN. L. REV. 1965, 2009 (2011).

³⁰⁵ *See supra* note 66 (acknowledging the threats posed by each of the three administrative rivals).

³⁰⁶ *See* Nina Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT, *supra* note 240; Resnik, *supra* note 2, at 164 (noting that privatization initiatives can be “law-drenched”).

private-sector counterweights³⁰⁷—a privatization “reformation” along the lines Richard Stewart understood to be taking place in administrative law, which made that realm more rivalrous and democratically inclusive.³⁰⁸ That is to say, perhaps, some institutionalized rivalry among corporate employees, consumers, townspeople, and firm managers or directors—organized around voting shares—would become the constitutionally necessary, domain-specific corollary to privatized governance.

However much it might make sense from a constitutional, public-law perspective, the instantiation of private-sector rivalries is out of step with orthodox understandings of corporate governance. Such understandings privilege homogenous organizational control. Firms are understood to work well when—and because—there aren’t rivalrous stakeholders.³⁰⁹ Thus any proposal requiring the empowerment of, say, multiple classes of employees, consumers, and townspeople would likely be viewed as anathema.³¹⁰

In essence, this conflict between public and private organizational theories is the fundamental challenge of the emerging third era in which government is self-consciously (but possibly unconstitutionally) run like a business. 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 governmental aims will simply accept the imposition of private, institutional counterweights as the cost of doing quite-often lucrative business with administrative agencies. Such questions and concerns merit much more investigation 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 what such an enduring, evolving separation of powers might look like in a post-administrative, Privatized Era and invite a dialogue between the administrative and corporate governance worlds, a dialogue that might well be critical to framing, engineering, and calibrating a twenty-first century legal regime that so regularly and nonchalantly commingles state and corporate power.

IV. 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. 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 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.

³⁰⁷ *Cf., e.g.,* Gunther Teubner, *After Privatization?*, 51 CURRENT L. PROBS. 393 (1998); Resnik, *supra* note 2, at 170 (emphasizing that privatization endangers opportunities for self-governance).

³⁰⁸ Stewart, *supra* note 4 (discussing the reformation of American administrative law as involving the empowerment of interest groups to check and enlarge the administrative process).

³⁰⁹ *See, e.g.,* HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996).

³¹⁰ *Id.*