

# RESPONSE

## COMPLEMENTARY SEPARATIONS OF POWER

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In response to

Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*  
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*This Essay responds to Jon Michaels's claim, insightfully developed in his recent Article, that the administrative realm functions as a self-regulating ecosystem. Michaels's claim rests on his description of a trio of administrative rivals that mirror the constitutional branches: The civil service manifests key rule-of-law qualities of the judiciary, agency heads mimic the partisan leadership of the presidency, and—of greatest interest here—civil society plays the “popular, deliberative” role of Congress. Michaels argues that this “administrative separation of powers” legitimates and appropriately constrains agency action. Further intervention by the constitutional branches, in his view, is generally unnecessary and destabilizing.*

*Michaels's intriguing comparison between civil society and Congress raises important questions about the oversight function of each institution. I argue that substituting civil society for Congress runs the risk of replicating—and likely exacerbating—pathologies of inequality and exclusion that undermine oversight's democratic value. Both Congress and civil society are prone to elitism and representational failures that fall short of constitutional ideals. Yet because their respective mandates, structures, and capacities differ, the two institutions are likely to perform better oversight in tandem than civil society could alone. Congressional oversight, I argue, may channel a different and somewhat more inclusive perspective than civil society alone. At the same time, civil society has advantages over Congress: It can give voice to political minorities, act more swiftly and decisively, and engage with agencies more consistently over time. Taking account of the flaws and attributes of each institution thus points toward a reorientation of Michaels's model. Rather than casting the administrative sphere as self-regulating in isolation, we should focus on the complementary nature of the administrative and constitutional rivals.*

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## INTRODUCTION

The trope of the “runaway agency” has long loomed large in administrative law. For some, the concerns are formal: Does the Constitution permit agencies to exercise legislative authority?<sup>1</sup> For others, the fears are more functional: Is government by unelected bureaucrats a threat to democracy, accountability, or good government?<sup>2</sup> These misgivings fuel an extensive literature exploring how constitutional actors—the President, the courts, and Congress—do and should control agency action.<sup>3</sup> In a recent article, Jon Michaels responds to this agenda with a provocative twist: The administrative process can control itself—and should generally be left alone to do so.<sup>4</sup>

This argument extends Michaels’s important prior work on what he calls the “administrative separation of powers.”<sup>5</sup> Michaels identifies the allocation of power among “rivalrous, heterogeneous institutional counterweights”<sup>6</sup> as part of our constitutional tradition—but, like others writing about new sources of executive constraint, he recognizes that the relevant rivalry is not just among the three constitutional branches.<sup>7</sup> Michaels’s vision is distinctive because, in his telling, the administrative sphere now contains a trio of rivals that mirror the constitutional branches. Specifically, the civil service takes on “the independent judiciary’s reason-

<sup>1</sup> See, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

<sup>2</sup> See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1573 & n.299 (1992) (discussing “runaway agencies”).

<sup>3</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253–55 (2001) (summarizing this literature).

<sup>4</sup> See Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 231 (2016) [hereinafter Michaels, *Custodians*].

<sup>5</sup> *Id.* at 229.

<sup>6</sup> *Id.* at 235.

<sup>7</sup> See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at xi–xii (2012) (describing the roles of a variety of public and private actors in checking presidential war powers); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (identifying bureaucracy as “[a] critical mechanism to promote internal separation of powers”); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425–26 (2009) [hereinafter Metzger, *Interdependent Relationship*] (exploring the interplay between internal and external checks on the Executive Branch).

giving and rule-of-law-promoting role”; civil society plays “the pluralistic Congress’s popular, deliberative role”; and agency leaders serve “the partisan, unitary executive’s agenda-setting role.”<sup>8</sup> By replicating key qualities of the constitutional branches, Michaels argues, this new set of administrative rivals achieves a balance of the many public law values associated with the exercise of government power, including “democracy, rationality, and the rule of law.”<sup>9</sup>

As its title suggests, Michaels’s latest work explores the relationship between the old and new separation of powers. His core normative claim is that, in light of the administrative separation of powers, constitutional-branch interventions in agency decisionmaking are generally unnecessary.<sup>10</sup> Rather, they are “power grabs”<sup>11</sup> and “threats to a largely self-regulating administrative ecosystem.”<sup>12</sup> Unlike other scholars who find the civil service and civil society to be “second-best”<sup>13</sup> or supplementary<sup>14</sup> means of reining in executive power, Michaels deems the trio of administrative rivals sufficient and independently legitimate.<sup>15</sup>

Michaels’s ambitious work raises a host of interesting questions. This Essay engages Michaels’s central project of linking the administrative rivals to constitutional actors, focusing on his analogy between civil society and Congress. In Part I, I consider Michaels’s view that civil society—“the broadly inclusive, diverse, and cacophonous public”<sup>16</sup>—is “a popular, diverse, deliberative body”<sup>17</sup> that “channel[s] many of the institutional, dispositional, and legal characteristics”<sup>18</sup> of Congress. Michaels draws an intriguing parallel between the two institutions. Indeed, we can imagine civil society as an alternate form of representative democracy, with interest groups and their leaders playing the role of legislators in Congress.<sup>19</sup> But the switch from Congress to civil society runs the risk of replicating—and, I argue, exacerbating—pathologies of inequality and exclusion that undermine the democratic value of oversight. Questioning the internal

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<sup>8</sup> Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 552 (2015) [hereinafter Michaels, *Enduring*].

<sup>9</sup> Michaels, *Custodians*, *supra* note 4, at 265.

<sup>10</sup> *Id.* at 267–68.

<sup>11</sup> *Id.* at 268.

<sup>12</sup> *Id.* at 231.

<sup>13</sup> Katyal, *supra* note 7, at 2316.

<sup>14</sup> See Metzger, *Interdependent Relationship*, *supra* note 7, at 437 (noting the practical limits of “traditional external constraints”).

<sup>15</sup> See Michaels, *Custodians*, *supra* note 4, at 231.

<sup>16</sup> *Id.* at 241.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 231.

<sup>19</sup> Cf. JOHN R. COMMONS, REPRESENTATIVE DEMOCRACY 20–28 (1900) (arguing for a legislative body composed of interest group leaders—for a “representation of *interests*, not a representation of individual voters”).

composition of civil society (just as Michaels argues we must look inside agencies) reveals differences that matter: Civil society lacks any overarching structure, federalist or otherwise, and its interest group components are largely nonrepresentative and unaccountable. More fundamentally, civil society is an unfiltered cacophony of private interests, which Congress is designed to digest and filter to achieve a public interest.<sup>20</sup> While both institutions are subject to elitist (and other) pathologies, Congress's capacities, mandates, and oversight methods offer a modest optimism that its oversight will be more inclusive and public-minded—or, at least, will be inclusive and public-minded in different ways—than civil society acting alone.

The failings of both Congress and civil society raise questions for Michaels's depiction of the administrative sphere as a "legitimate, self-regulating ecosystem."<sup>21</sup> They may point instead to a different model, one in which a combination of imperfect overseers performs better than any trio in isolation.<sup>22</sup> For example, civil society may offer more nimble and constant oversight and can fill gaps in congressional attention, including by providing alternative voice to political minorities—but it may also overreach and under-include in ways that Congress, as well as the President and courts, can temper. Accordingly, Part II proposes reorienting Michaels's rich portrayal to focus on the complementary nature of the administrative and constitutional rivals. Michaels himself, despite preferring "peer pugnaciousness" to interventions by the "constitutional heavyweights," identifies numerous connections between the internal and external rivals.<sup>23</sup> Ultimately, rather than thriving in Biosphere-2-like isolation,<sup>24</sup> the ecosystem of administrative rivals may function symbiotically with the constitutional branches.<sup>25</sup>

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<sup>20</sup> See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1559–60 (1988).

<sup>21</sup> Michaels, *Custodians*, *supra* note 4, at 263.

<sup>22</sup> Cf. Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 31 (2009) (observing that "the interaction between two unrepresentative institutions can result in policies that are more representative, on average, than the policies that either institution in the system would produce taken separately").

<sup>23</sup> Michaels, *Custodians*, *supra* note 4, at 243–60.

<sup>24</sup> See Elizabeth Kolbert, *The Darkening Sea: What Carbon Emissions Are Doing to the Ocean*, NEW YORKER, Nov. 20, 2006, at 66, 70–71 (describing the flawed project in which participants attempted to live self-sufficiently in a sealed dome).

<sup>25</sup> Gillian Metzger has persuasively argued that internal agency constraints, including personnel measures, procedures, and internal watchdogs, exist in a "mutually reinforcing relationship" with external checks, including "Congress and the courts," as well as "state and foreign governments, international bodies, the media, and civil society organizations." Metzger, *Interdependent Relationship*, *supra* note 7, at 425–26. Michaels's analysis distinguishes between administrative and constitutional rivals rather than internal and external actors, see Michaels, *Enduring*, *supra* note 8, at 536, but Metzger's basic insight is relevant here.

## I

## CONGRESS AND CIVIL SOCIETY AS IMPERFECT OVERSEERS

On its own terms, Michaels's argument hinges on the fit he asserts between the administrative rivals and their constitutional counterparts. In casting "modern American public administration . . . as constitutional revivalism,"<sup>26</sup> he stresses that the Constitution did not just select "any old . . . rivals";<sup>27</sup> it selected ones with distinctive "institutional" and "dispositional" traits.<sup>28</sup> The question, as relevant here, is whether civil society tracks Congress—or, more to the point, the constitutional ideals *underlying* Congress—in respects that matter.

The paragraphs that follow imagine Congress and civil society as two options for representative democracy—one in which individuals are represented by elected members of Congress, and one in which individuals are represented by the interest groups that form civil society. Both systems are flawed. Still, there are reasons to believe that congressional oversight is likely to channel a different and somewhat more inclusive perspective than civil society acting alone.

One note at the outset: Celebrating the virtues of Congress may have an air of the bizarre at a time when Congress is widely regarded as dysfunctional and in need of reform.<sup>29</sup> The claim here is not that Congress is likely to achieve the ideals associated with a representative body. Rather, the claim is that, for all its dysfunctions, Congress's oversight does less harm to those ideals than civil society acting alone, and that civil society and Congress are better understood as complements than substitutes.

*A. Ideals and Realities*

Consider first an idealized account of Congress and civil society, respectively.<sup>30</sup> Congress's purpose and function is to represent the entire public.<sup>31</sup> As the Supreme Court has explained, the "theory of the Constitution" is one of political inclusion: Every person is entitled to representation, even persons who cannot vote.<sup>32</sup> And voting itself is a core political right, with the expansion of suffrage viewed as a proud narrative of progress. The different constituencies and terms of office of the House of Representatives and the Senate are meant to motivate different (and

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<sup>26</sup> Michaels, *Custodians*, *supra* note 4, at 265.

<sup>27</sup> Michaels, *Enduring*, *supra* note 8, at 559.

<sup>28</sup> Michaels, *Custodians*, *supra* note 4, at 231.

<sup>29</sup> See, e.g., Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. (forthcoming 2016).

<sup>30</sup> See Michaels, *Custodians*, *supra* note 4, at 241 (calling his characterization "admittedly rosy and stylized").

<sup>31</sup> See, e.g., THE FEDERALIST NOS. 52, 57 (James Madison).

<sup>32</sup> *Evenwel v. Abbott*, 136 S. Ct. 1120, 1128 (2016).

ultimately more complete) responsiveness among legislators.<sup>33</sup> Within Congress, notwithstanding differences in seniority, each legislator gets one vote on matters of legislation. Oversight after legislation's passage exists to ensure that implementing agencies remain faithful to the law. Perhaps most importantly, in carrying out its representative mission, Congress does not directly enact constituent preferences; rather, it acts as a filter for the many sources of input it receives—that is, for civil society<sup>34</sup>—so that it may “refine and enlarge the public views” in pursuit of a broader “public good.”<sup>35</sup>

In an idealized civil society, in contrast, fluid groups of shared interests channel and amplify public discourse.<sup>36</sup> This scheme also involves representation, though it is less strictly bound to inclusion and less directly tied to public-interested decisionmaking. Interest groups need not include all members of the public at any given time, but the presumption is that groups will form as needed and a variety of groups will have their day.<sup>37</sup> In turn, these groups serve as a crucial input into a republican government that can refine a public good from the chorus of private voices. On this view, although civil society itself provides no mechanism for translating the many group voices into a national one, it empowers a wide range of individuals to participate in what Robert Post calls “discursive democracy”—the ongoing formation of public opinion that indirectly binds government.<sup>38</sup>

Relaxing the idealized view reveals considerable divergence from these accounts. As empirical and theoretical works have shown,<sup>39</sup> civil society and Congress are each plagued by representational failures, and both cater to the elite.

For its part, the interest group universe tends to leave out large swaths of the public. As a starting point, Mancur Olson's seminal work illustrated how free-rider problems impede the formation of large groups of people

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<sup>33</sup> See Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1123–24 (2011) (reviewing ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010)).

<sup>34</sup> See Sunstein, *supra* note 21, at 1590 (describing “the Madisonian ideal” as “representative processes operating to filter particular points of view”).

<sup>35</sup> THE FEDERALIST NO. 10, at 76–77 (James Madison) (Clinton Rossiter ed., 2003).

<sup>36</sup> See Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism 1945–1970*, 53 VAND. L. REV. 1389, 1399 (2000).

<sup>37</sup> See generally, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 130–31 (1956) (explaining how groups representing “small but . . . active minorities” determine policy); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 511–16 (1951) (discussing the limited inclusion of organized interest groups and the role of unorganized “potential interest groups”).

<sup>38</sup> ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 36 (2014).

<sup>39</sup> See *infra* notes 43–52 and accompanying text.

(for example, groups that would include all environmentalists) more so than small groups (like trade associations for a particular industry).<sup>40</sup> Many scholars have refined and limited Olson's thesis,<sup>41</sup> but the reality remains that not everyone who is aggrieved has the information, resources, and incentives to organize.<sup>42</sup>

Looking beyond Olsonian obstacles to group formation, there is inequality among groups that do form. It may well be true that there is *an* interest group out there for almost every person or issue. But some groups have superior numbers, resources, access, and influence. Groups addressing poverty, for example, make up less than 1% of organizations active in Washington, while more than half represent business-related interests,<sup>43</sup> and the different interests have widely disparate war chests and political access.<sup>44</sup> Business groups, more so than other groups and far more than individuals, influence federal agencies<sup>45</sup> and meet with the Office of Information and Regulatory Affairs (OIRA).<sup>46</sup> If we liken interest groups to legislators in Michaels's analogy, they lack not only an overarching organization like the geographically correspondent scheme of the Senate and House, but also equal voting power on legislation.

At the same time, despite its structural advantages, Congress fails significantly at its representative task. A deep political science literature traces legislators' responsiveness to a host of constituencies other than the median voter.<sup>47</sup> One prominent finding in recent years has been domination by economic elites: Congress enacts the agenda of the wealthiest Americans, and advances majority preferences only when they happen to align with those of elites.<sup>48</sup> Political theorists differ over exactly how much

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<sup>40</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 35, 165–67 (19th ed. 2001).

<sup>41</sup> See *generally* FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE* 67–80 (1998) (summarizing post-Olson literature on group mobilization).

<sup>42</sup> See KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 265–66 (2012) (describing “organized interest politics” as a realm that is unlikely “to represent all citizens equally” and in which “the economically advantaged speak especially loudly and clearly”).

<sup>43</sup> *Id.* at 321–22.

<sup>44</sup> *Id.* at 409, 441.

<sup>45</sup> See Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business?: Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 *J. POL.* 128, 129 (2006) (presenting “statistical evidence that business interests enjoy disproportionate influence over rulemaking”).

<sup>46</sup> Cf. Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 *UCLA L. REV.* 1300, 1314 (2016).

<sup>47</sup> The list includes donors, primary voters, in-party constituents, and more. For a recent literature review, see Jonathan P. Kastellec et al., *Polarizing the Electoral Connection: Partisan Representation in Supreme Court Confirmation Politics*, 77 *J. POL.* 787, 788–89 (2015).

<sup>48</sup> See MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of*

alignment between constituents and representatives is desirable, but most agree that gross inequities and strong elitist tendencies constitute failures of representation.<sup>49</sup> Moreover, much oversight is done through measures short of legislation, undermining legislators' formal parity and their need to speak for the general public.

Relaxing Michaels's charitable view of each institution thus reveals that the search for a populist, inclusive check on agency action is a choice between two highly imperfect alternatives.<sup>50</sup> In this sense, Michaels is right in his passing comment that "the analogy . . . holds" because both civil society and Congress may "fall prey to powerful, often moneyed, interests."<sup>51</sup> Yet if exclusion and elitism are problems, it is unclear why civil society is preferable to Congress, or why isolating the administrative realm is a sound response.

### B. *The Capacity of Congressional Oversight*

To the contrary, there are several reasons for modest optimism that Congress is more capable of public-minded oversight than is civil society, and that the two are better together than alone. These differences are rooted in Congress's role as private filter and public representative, and in its distinctive oversight mechanisms and resources. Whereas civil society checks agencies primarily by participating in agency decisionmaking, rallying the media, and suing agencies for bad results,<sup>52</sup> Congress has at least ten different oversight tools, ranging from formal investigations to committee hearings to constituent casework, each backed with the government's imprimatur and resources.<sup>53</sup>

First, Congress's government role affects its perspective on which issues warrant oversight and its capacity to resolve them. Congress, more so than civil society, has reason to intervene where the government is arguably the victim—to address an agency's waste, inefficiency, or misuse of public funds.<sup>54</sup> These sorts of conduct thwart important administrative law values regarding agency performance, but they cause diffuse public

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*American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016) (surveying literature).

<sup>49</sup> See Andrew Sabl, *The Two Cultures of Democratic Theory: Responsiveness, Democratic Quality, and the Empirical-Normative Divide*, 13 PERSP. ON POL. 345, 354 (2015) (describing agreement among theorists).

<sup>50</sup> Cf. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

<sup>51</sup> Michaels, *Custodians*, *supra* note 4, at 241.

<sup>52</sup> *Id.* at 239–40.

<sup>53</sup> ALISSA M. DOLAN ET AL., CONG. RESEARCH SERV., RL 30240, *CONGRESSIONAL OVERSIGHT MANUAL* 23, 71–91 (2014).

<sup>54</sup> *Id.* at 1–2.



harms that seldom motivate interest-group action.<sup>55</sup> And Congress has substantial resources, including the Government Accountability Office, the Congressional Research Service, and the Congressional Budget Office, with which to accomplish such oversight. Congress may also be a more faithful and knowledgeable defender of legislative intent than is civil society—at least, its firsthand knowledge confers natural advantages in doing so, especially on issues of low partisan salience.

The role in congressional oversight of “casework,” or responding to constituent concerns, creates another difference: Congress, through individual members, is more likely than interest groups to press agencies on issues of state, local, or regional concern.<sup>56</sup> Is a new regulation likely to put a particular factory out of business? Is a neighborhood suffering after a natural disaster but not receiving aid? Legislators’ casework routinely involves them in this sort of constituent-driven agency oversight. National interest groups, even if open to member input, are less likely to prioritize local concerns, while state and local interest groups that attend to such concerns are generally less active and effective before federal agencies.<sup>57</sup> In this way, Congress, more so than civil society alone, can be a key player in administrative federalism.<sup>58</sup>

A further difference arises from legislators’ status as generalists, compared to the specialist nature of interest groups. Interest groups’ narrow missions saddle their oversight with the double-edged sword of expertise and tunnel vision. They may be oblivious or apathetic to a given policy’s effects on other sectors, stakeholders, or agencies. A generalist legislator, even if self-interested, may convey such concerns; so too will a generalist Congress see the big picture more readily than a series of siloed interest groups. Even at the congressional committee level, where political scientists have described an “iron triangle”<sup>59</sup> in which committees are just as factional and biased as the interest groups they allegedly serve, Congress

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<sup>55</sup> See OLSON, *supra* note 43 (explaining why “large or latent groups have no tendency voluntarily to act to further their common interests”).

<sup>56</sup> Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, in CONGRESS: STRUCTURE AND POLICY 426, 434 (Mathew D. McCubbins & Terry Sullivan eds., 1987).

<sup>57</sup> See generally Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213–15 (1977) (describing why environmental groups are more likely to organize and have influence at the national level and to prefer federal environmental regulation).

<sup>58</sup> See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008).

<sup>59</sup> The “iron triangle” arrangement describes policymaking, pessimistically, as a “private world[]” of interactions between the operative agency, a regulated interest group, and the relevant congressional committee. See, e.g., A. Grant Jordan, *Iron Triangles, Woolly Corporatism and Elastic Nets: Images of the Policy Process*, 1 J. PUB. POL’Y 95, 96, 99–103 (1981).

arguably has differences that matter.<sup>60</sup> Committee members have many principals: They must navigate internal party divisions, report to party leadership and the floor majority, appease an electoral constituency, and share turf with other committees with different focuses (some of which are not specialists at all).<sup>61</sup> All of this can give committees, collectively if not individually, a somewhat more generalist, public-minded outlook.<sup>62</sup>

Finally, flaws in Congress and its oversight are more susceptible than those in civil society to correction through accountability mechanisms. Voters who do not like their lawmakers can, we say, vote them out. The right to vote is a defining feature of our constitutional democracy, and one that takes on increasing importance for otherwise marginalized groups.<sup>63</sup> Gerrymandering and voting restrictions seriously undermine voting's promise, but those are bugs, not features, and are part of an ongoing reform agenda.<sup>64</sup> And because the contours of legislative representation are legally determined and determinable, this agenda—while undoubtedly impeded by politics—involves articulable and tractable avenues for reform.<sup>65</sup>

Civil society is different in this respect. Most of the organizations active in politics—over two-thirds, according to 2001 data—have no members at all.<sup>66</sup> Even in groups with an identifiable membership, members generally enjoy no right to select their leaders; the groups that lobby agencies are commonly nonprofit entities run by self-perpetuating boards.<sup>67</sup> Nor is exit a reliable alternative to voice in this context,<sup>68</sup> as there are many reasons besides policy agreement that a person may not quit a group—for example, because quitting is meaningless or unnoticeable, or

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<sup>60</sup> See, e.g., Kagan, *supra* note 3, at 2260 n.41 (collecting scholarship casting doubt on the iron-triangle account).

<sup>61</sup> See FORREST MALTZMAN, *COMPETING PRINCIPALS: COMMITTEES, PARTIES, AND THE ORGANIZATION OF CONGRESS* 2 (1997) (“Faced with demands from the chamber, party caucuses, and individuals outside the institution, committee members attempt to please all of their potentially competing principals.”). Maltzman’s study also theorizes committees’ varying responsiveness over time to different principals. See *id.* at 3.

<sup>62</sup> See Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1692 (2006) (discussing benefits of redundancy in oversight committees).

<sup>63</sup> See, e.g., Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1353 (2011).

<sup>64</sup> See Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. (forthcoming 2017) (describing litigation).

<sup>65</sup> See generally SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (5th ed. 2016).

<sup>66</sup> SCHLOZMAN ET AL., *supra* note 45, at 319. This counts groups with institutional members as membership groups; the groups who lack a membership of *individual persons* is even greater—around 88%. *Id.*

<sup>67</sup> Seifter, *supra* note 49, at 1339–41.

<sup>68</sup> See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 3–5 (1970).

because membership in the group provides benefits unrelated to membership (a sense of community, useful information, a cool tote bag).<sup>69</sup> And because interest groups are often not transparent about their memberships, funding structures, and internal governance, it can be difficult for individuals, agencies, and reviewing courts to detect or correct overclaiming, bias, or drift.<sup>70</sup>

Moreover, macro-level changes to civil society—trying to promote greater inclusion and accessibility to more people—are difficult to engender through legal rather than social solutions. Any attempt to regulate the inner workings of civil society collides with longstanding conceptions of interest groups as a private sphere.<sup>71</sup> Given the difficulty of reforming civil society from within, the rise of civil society as an agency overseer necessitates dialogue about how to regulate interest group interactions with agencies.<sup>72</sup> But the limits and incipient nature of that dialogue suggest, again, that civil society alone cannot fulfill the task of overseeing agencies.

## II

### HANDS OFF, OR ALL HANDS ON DECK?

None of the foregoing is to deny that civil society may be a salutary contributor to the administrative constraint that Michaels seeks to foster. Quite the opposite: While civil society does not replicate the defining features of Congress in ways that make it a ready substitute, it crucially provides *additional and complementary* opportunities for public engagement. More broadly, recognizing the distinctive constituencies and capacities of each of the administrative and constitutional rivals offers a possible reorientation of Michaels's recommendations to limit "direct[] and ostensibly dispositive[]"<sup>73</sup> constitutional-branch interventions. If each rival offers a slightly different set of imperfections, there is a possibility that, taken together, they will serve public law values more robustly than either trio alone.<sup>74</sup> A complementary model respects each entity's different constituencies and capacities, and thus provides a more variegated buffer against government abuse.<sup>75</sup>

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<sup>69</sup> Seifter, *supra* note 49, at 1347–50.

<sup>70</sup> *See id.* at 1350–52.

<sup>71</sup> *See, e.g.,* Mark DeWolfe Howe, *The Supreme Court, 1952 Term—Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91–92 (1953) (describing comparison of private groups' legally protected liberties to individual liberties).

<sup>72</sup> Seifter, *supra* note 49, at 1352–53.

<sup>73</sup> Michaels, *Custodians*, *supra* note 4, at 268.

<sup>74</sup> *Cf.* Vermeule, *supra* note 23, at 31.

<sup>75</sup> For a conception of the constitutional branches focused on their connection to constituents, see Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 752 (1999).

Consider, first, how civil society can add to the oversight performed (or neglected) by Congress. As Cynthia Farina and others have argued, the Framers' representative structure can be understood as a deeper commitment to establishing "multiple opportunities for the people to 'speak' and be heard in the regulatory process."<sup>76</sup> Civil society can expand such opportunities by tempering partisanship and inertia, providing voice to those whose candidate is not elected, is inaccessible, or is unfamiliar with the agency in question. Civil society may also be able to act more swiftly or uninhibitedly than Congress, its committees, and even individual legislators. And civil society may be a more constant presence in an agency's operation than Congress, the courts, or the President. Its oversight role may be especially important during periods of unified government—the new status quo—when political incentives may blunt the intensity of congressional oversight.<sup>77</sup> All of this points to civil society being a ready complement, to Congress in administrative oversight.

But even at its best, civil society rarely acts alone. Its modus operandi is to invoke action, or the threat of action, by the constitutional branches (and others): by sounding fire alarms to Congress,<sup>78</sup> meeting with the President and her agents, alerting the media, invoking the clout of other agencies, and—perhaps foremost—by litigating.<sup>79</sup> Indeed, while Michaels's model focuses on linkages between courts and the civil service, there are of course operational connections between courts and civil society. As Michaels explains, the threat of "judicial sanction" motivates agency performance, because agencies do not want to have to "start over" when sued by civil society.<sup>80</sup> And civil society and the courts have often been characterized as partners in widening the net of interests that agencies must consider.<sup>81</sup>

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<sup>76</sup> Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 1019–20, 1020 n.137 (1997); see also Chafetz, *supra* note 34, at 1122–24; Peter M. Shane, *Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy*, 60 OHIO ST. L.J. 693, 696–97 (1999).

<sup>77</sup> Katyal, *supra* note 7, at 2321 (stating that unified government "generally preclude[s]" congressional checking of the President due to political "loyalty, discipline, and self-interest").

<sup>78</sup> McCubbins & Schwartz, *supra* note 59, at 427. In a system of "fire alarm" oversight, Congress establishes rules and practices that enable interested parties to monitor agencies, with Congress "occasionally . . . intervening in response to complaints." *Id.* Michaels distinguishes the fire alarm model, Michaels, *Custodians*, *supra* note 4, at 249, but arguably overstates civil society's ability to act alone.

<sup>79</sup> See, e.g., Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight?: Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1175–76 (2009) (describing litigation, pleas to Congress, and notification of the media as modes of reacting to adverse agency action).

<sup>80</sup> Michaels, *Custodians*, *supra* note 4, at 240.

<sup>81</sup> See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975) (describing judicial efforts to foster an administrative process allowing "fair representation for all affected interests").

Michaels's proposal that courts should conduct review only to ensure the meaningful participation of all rivals seems an uneasy fit with this picture of dependence.<sup>82</sup> Interest groups able to invoke only procedural review would have a far weaker arrow in their quiver than those who can argue that an agency reached the wrong answer on the merits. As long as the public was allowed to participate—say, through notice-and-comment rulemaking—the court would “summarily affirm” the agency's decision.<sup>83</sup> Civil society would be less of a bulwark against harmful or arbitrary administration.

Michaels's “custodial” ideal for the constitutional branches may also undermine the important reciprocal role that the constitutional branches play in limiting and refining civil society's concerns. As noted above, Congress is tasked with translating civil society's inputs into a broader public interest. The President, too, can translate popular input into an agenda for a national constituency. And, perhaps most importantly given Michaels's focus on restraining judicial intervention, courts (while not immune from elite bias) can rein in both majority and minority faction.<sup>84</sup> In Michaels's account, these sorts of countermajoritarian values are served by the professional, apolitical civil service.<sup>85</sup> Yet for many of the same reasons that civil society and Congress have different capacities, there is reason to suspect that the civil service will not fully replicate judges' functions and perspective.<sup>86</sup>

This vision resonates with other scholarship emphasizing the promise of a multitude of sources of constraint on executive power.<sup>87</sup> Jack Goldsmith has explained how, in the wake of 9/11, an array of watchdog groups, media entities, and lawyers in and out of government instigated and enabled Congress and the courts to constrain executive power.<sup>88</sup> Widening the lens beyond this Essay's focus on civil society, Gillian Metzger has described ways in which “[i]nternal and external checks reinforce and operate in conjunction with one another”<sup>89</sup>: Internal constraints may gain

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<sup>82</sup> Michaels, *Custodians*, *supra* note 4, at 276. Michaels alternatively proposes a more modest judicial strategy of decreasing deference in the face of failures in the administrative rivalry. *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Cf.* Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 188 (1998) (describing Supreme Court decisionmaking as “marginally countermajoritarian” as well as “culturally elite”).

<sup>85</sup> Michaels, *Custodians*, *supra* note 4, at 238.

<sup>86</sup> *Cf. supra* Section I.B (identifying ways in which Congress's public role and institutional resources confer a different set of perspectives and oversight incentives).

<sup>87</sup> For an account highlighting the virtues of “multiple, overlapping claims of authority by different institutions,” see Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 772 & n.313 (2012).

<sup>88</sup> GOLDSMITH, *supra* note 7, at xi–xvi, 207–08.

<sup>89</sup> Metzger, *Interdependent Relationship*, *supra* note 7, at 444.

strength through external reinforcement, and internal checks may facilitate external oversight.<sup>90</sup> These accounts are consistent with Michaels's description of potential alliances between external and internal rivals,<sup>91</sup> but they point to a different takeaway, one that is less hands-off and more all-hands-on-deck.

To be sure, allowing a multiplicity of agency overseers may come with costs. Overseers might produce inefficiencies, work at cross-purposes, collude, or free-ride, and these consequences are hard to assess in the abstract.<sup>92</sup> Still, in pursuing the public-law values that Michaels identifies, and especially the objective of widening the circle of public engagement, allowing more (flawed) institutions into the fold seems preferable than artificially limiting rivalry to a particular trio.

#### CONCLUSION

Michaels's tripartite framework provides an illuminating and generative ideal. But rather than providing new purchase on a healthy, self-regulating realm that needs little external checking, I believe the primary service of Michaels's powerful framework lies in highlighting ways in which agency practice requires oversight from actors both inside and outside the administrative sphere. Civil society, acting alone, cannot replicate Congress along relevant dimensions, but it can complement Congress and further ideals of inclusion and public engagement. It may be the energetic involvement of all of the players, inside and out, that does the work of checking and balancing in the modern administrative state.

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<sup>90</sup> See *id.* at 442–46.

<sup>91</sup> Michaels, *Custodians*, *supra* note 4, at 244.

<sup>92</sup> Cf. O'Connell, *supra* note 65, at 1683 (describing the challenge of determining the costs and benefits of institutional redundancy and the need for context-specific evaluation).