

RESPONSE

TOWARD AN INTRA-AGENCY SEPARATION OF POWERS

BIJAL SHAH*

In response to

Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*
91 N.Y.U. Law Review 227 (2016)

This Essay responds to Jon Michaels's argument for a form of agency fragmentation called the new "administrative separation of powers," a structure consisting of three fundamental sets of actors: agency heads, civil society, and the civil service. According to Michaels, his thought-provoking idea has roots in the traditional separation of powers among the branches of government. Michaels also claims that these three intra-agency actors are able to maintain a "self-regulating ecosystem" that allows agencies to improve their functions similarly to the way that the constitutional checks and balances sharpen the operation of the political branches.

For Michaels's tripartite agency to be legitimately characterized as a form of separation of powers, however, there must be a meaningful connection between the two frameworks. As of now, the analogy is hindered by some essential aspects in which Michaels's agency players do not reflect the three branches of government. These include, for example, each administrative stakeholder's relative inability to protect its own jurisdiction from encroachment by the others and constraints on agencies' capacity to further rule of law values. These limitations render constitutional separation of powers principles less valuable to the development of Michaels's theory, because they reduce the extent to which the tripartite agency might, in fact, behave like the political branches.

In addition, both the use of Michaels's model for executive-checking purposes and the ultimate success of his theory's overall execution depend on the extent to which they are grounded in the concrete characteristics of agencies and the polity. Additional substantiation of Michaels's tripartite could be furthered by analysis of the diversity among agency heads and civil servants across the executive branch and of the weaknesses in civil society's ability to leverage its interests vis-à-vis government officials. Those seeking to realize the promise of Michaels's model should also consider the impact of differences in administrative, political and societal structures, orientations

* Copyright © 2017 by Bijal Shah, Associate Professor, Arizona State University, Sandra Day O'Connor College of Law. My sincere thanks to Jon Michaels for the invitation to respond to his thought-provoking article, and to Eric Berger, Fred Bloom, Josh Chafetz, David Fontana, Randy Kozel, David Pozen, Richard Re, and Jennifer Selin for their insightful comments. All errors are my own.

and incentives on Michaels's framework.

INTRODUCTION	2
I. THE "OLD" AND "NEW" SEPARATION OF POWERS	3
II. THE POWER AND COMPLEXITY OF THE FRAGMENTED AGENCY	11
CONCLUSION	17

INTRODUCTION

Heterogeneity among the roles and motivations of actors within agencies, while traditionally ignored by administrative law theorists,¹ has more recently become the focus of scholarly attention.² In *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, Professor Jon D. Michaels contributes innovatively to scholarship articulating a more textured description of the agency by advocating for a form of agency fragmentation called the "administrative separation of powers"³ that is "rooted in a tripartite scheme that anchors modern administrative governance firmly within the constitutional tradition"⁴ More specifically, Michaels posits that there are three fundamental sets of administrative actors (agency heads, civil society, and the civil service) with distinct roles within an agency, and asserts that a balanced relationship among these intra-agency actors would improve administrative

¹ 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, 229 n.2, 233 n.9 (2016) [hereinafter Michaels, *Of Constitutional Custodians*]. But see THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 61, 185–86 (1991) (describing examples of intra-agency conflict and institutional skeptics); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 105–07 (1989) (discussing the presence of multiple cultures in agencies).

² See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 255 ("[A]n agency bureaucracy is not a monolith. It is a congeries of components that have separate or even antagonistic missions and interests."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (putting forward a conception of governance that consists of a set of negotiated relationships between public and private actors); David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446 (2014) (examining the impact of design choices for the Consumer Financial Protection Bureau); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035 (2011) (pushing back against the characterization of agencies as "unitary entities" to examine how "administrative law allocates power within agencies" (emphasis omitted)).

³ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 229 n.1.

⁴ *Id.* at 235. Michaels's piece contributes to other work that draws connections between an "internal" administrative and "external" constitutional separation of powers. See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009); see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

functionality.⁵

Michaels also builds on his previous account of similarities between these administrative actors and the three constitutional branches⁶ to offer compelling hypotheses of how each administrative/constitutional pairing might impact the workings of the administrative state.⁷ Michaels ultimately argues that if agencies are allowed to function largely without involvement from the President, legislature, and judiciary, they will maintain a “largely self-regulating administrative ecosystem”⁸ that “informs and broadens administrative policy . . . in a manner similar to how our constitutional checks and balances are expected to sharpen” the functioning of each political branch.⁹

For Michaels’s argument to prove persuasive, however, there must be a salient connection between his tripartite agency and the traditional separation of powers framework. Further, for the implementation of Michaels’s model to be successful, it must be grounded in concrete characteristics of agencies. This Essay parses the extent to which Michaels’s tripartite agency may legitimately be characterized as a form of separation of powers in the first place, and highlights diversity among agency stakeholders that could weaken the execution of Michaels’s theory. Part I advocates for more precise identification of which constitutional “powers” and attendant responsibilities are associated with the three agency actors typified by Michaels’s theory. Part II suggests that while administrative fragmentation may serve as a bulwark against executive overreach, variations among agency actors must be identified and managed in order to realize both the functional aims and executive-checking potential of the tripartite agency.

I

THE “OLD” AND “NEW” SEPARATION OF POWERS

“Separation of powers” is more than a descriptive term for any potentially complementary, three-part division of an organizational unit. It also represents the idea that such a division of government was instituted to ensure the purity of federal judicial, legislative, and enforcement functions¹⁰

⁵ *Id.* at 265 (suggesting that his framework would increase “broad democratic, legalistic and expert input” into administrative activity).

⁶ Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 556–59 (2015) (arguing that agency heads, civil society, and the civil service have clear cognates in the political branches—the President, Congress, and Supreme Court, respectively).

⁷ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 243–60.

⁸ *Id.* at 231.

⁹ *Id.* at 264.

¹⁰ See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1504 (1987) (“The structure of separation of powers thus protects constitutional values by providing three

and to uphold rule of law standards in spite of its potentially negative impact on efficiency, expertise, and other functional values.¹¹ For this reason, the value of Michaels's characterization of intra-agency dynamics as either a form of separation of powers or a reproduction of its values¹² is determined somewhat by whether it is rooted in the formal, constitutional tenets of this concept, or whether it describes a structure with a primarily functional role. In other words, confronting these dimensions of the constitutional separation of powers concept is arguably fundamental to drawing a fully-wrought analogy, particularly given that the tension between formalism and functionalism¹³ has long permeated conversations about,¹⁴ and continues to ground,¹⁵ the application of this principle.

separate, overlapping, and mutually reinforcing remedies—legislative, executive, and judicial—against unconstitutional federal conduct.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984) [hereinafter Strauss, *Place of Agencies*] (“‘[S]eparation of powers,’ supposes that what government does can be characterized in terms of the kind of act performed—legislating, enforcing, and determining the particular application of law—and that for the safety of the citizenry from tyrannous government these three functions must be kept in distinct places.”).

¹¹ See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–04 (1989) (discussing how “Justice Brandeis’s oft-quoted version of separation of powers elevated the counterefficiency argument to the status of dominating principle when he said that the purpose of separation of powers was ‘not to promote efficiency but to preclude the exercise of arbitrary power.’”).

¹² See Cristina M. Rodríguez, *Complexity as Constraint*, 115 COLUM. L. REV. SIDEBAR 179, 185 (2015) (“Like many separation-of-powers scholars, Michaels appears less interested in defining separation’s overarching purposes . . . than in maintaining the commitment to separation itself.”).

¹³ The formalist conception of the traditional separation of powers framework emphasizes the need to maintain three distinct branches of government on the principle that only this can keep government “within the constraints of law,” while the functionalist approach argues for pragmatic flexibility to respond to modern government. Strauss, *Place of Agencies*, *supra* note 10, at 577–78 (suggesting, in addition, that functionalists assert that procedural flourishes can allow agencies to engage in all three types of activities without furthering governmental tyranny); see also Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 229–35 (advocating for a theory of minimal conception while rejecting formalism and functionalism); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434–35 (1987) (discussing tension between separation and independence); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) [hereinafter Strauss, *Formal and Functional*] (noting that the Supreme Court has vacillated between these approaches).

¹⁴ See, e.g., Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 689 (1997); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–59 (2000) (noting consensus among both formalists and functionalists).

¹⁵ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945–46 (2011) (discussing flaws with both theories and proposing reconsideration); see also Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1605 (2014) (“In the first line of analysis, legal scholars and jurists have suggested that the choice between formalist and functionalist approaches to these structural constitutional problems provides a central organizing principle for thinking about structural constitutionalism. But [neither approach] is capable of generating stable, coherent solutions to structural constitutional problems.”).

Michaels seeks to find a middle ground between formalism and functionalism.¹⁶ However, Michaels's use of the separation of powers label would benefit from grounding in constitutional tenets that frame and justify the formal qualities of the description as applied to intra-agency dynamics.¹⁷ Indeed, even if Michaels employs the descriptor for a primarily functional purpose, his work requires further clarification as to how his model resembles the tripartite structure set up in the U.S. Constitution beyond its utility as shorthand for a three-part administrative structure.

For instance, Michaels argues that there are distinct roles played by each emphasized agency stakeholder (agency heads, civil servants, and civil society), as well as similarities between the motivations of these actors and the constitutional branches that Michaels assigns as their cognates (the President, judiciary, and legislature, respectively).¹⁸ However, *Of Constitutional Custodians* does not clearly assign each administrative player its own set of discrete tasks in a way that reflects the distinct, albeit idealized, roles of the constitutional branches (which, as is well known, correspond at least roughly to enforcement, adjudication, and formation of the law).¹⁹ Further, the three parts of Michaels's tripartite agency may not be different enough from one another to be considered "separate" in the first instance.²⁰ In addition, each player in the administrative tripartite may have

¹⁶ While Michaels acknowledges that neither separation of powers functionalists nor formalists are likely to be satisfied by his proposition, he nonetheless does not confront their likely critiques or provide context for his characterization of the tripartite agency as "chart[ing] a middle course" between the two. See Michaels, *Of Constitutional Custodians*, *supra* note 1, at 266.

¹⁷ Arguably, formalism provides a more substantive foundation for the separation of powers framework than does functionalism. See Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1377 n.1 (1994) (discussing the import of the vesting clauses to a prevalent understanding of separation of powers doctrine); Linda D. Jellum, "Which Is to Be Master," *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 873 (2009) (suggesting that finding a formal separation of powers encroachment is necessary, but not sufficient, for the establishment of a violation on functionalist grounds); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493 (1987) ("The last few years have seen a sharp rise of constitutional 'formalism' in cases involving the separation of powers."). See generally Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) (arguing for more vigorous enforcement through a flexible, responsive formalist approach to separation of powers inquiries).

¹⁸ *Id.* at 245.

¹⁹ See Strauss, *Place of Agencies*, *supra* note 10, at 577 (according to the separation of powers theory, "Congress legislates, and it only legislates; the President sees to the faithful execution of those laws and, in the domestic context at least, that is all he does; the courts decide specific cases of law-application, and that is their sole function").

²⁰ See generally David Fontana, *The Administrative Difference of Powers?*, 116 COLUM. L. REV. SIDEBAR 81 (2016) (asking if stakeholders in the administrative state are different enough to generate separation); see also *infra* notes 71–75 and accompanying text.

responsibilities beyond their essential functions.²¹ Thus, it may be problematic to assign the one-dimensional roles assumed of each constitutional branch to three paradigm sets of administrative actors, even if one could isolate and designate these roles cleanly, since this assignment may undermine the administrative incorporation of and response to bureaucratic complexity.

Further, one key aspect of the constitutional tripartite is that each branch has both the incentive and ability to prevent the other two from encroaching on its own jurisdiction. While Michaels suggests that agency heads, civil servants, and civic society might benefit from the support of their constitutional cognates in order to expand, he leaves unexplored whether the three sectors are willing or powerful enough to prevent the concentration of power in any of the others. For instance, it is unclear how each constitutional branch might protect the jurisdiction of its administrative cognate, what specific tools each of the tripartite actors might wield in order to prevent the others from becoming too powerful, or whether Michaels's proposed design naturally promotes a system of administrative checks and balances.²²

Michaels also suggests affinities between each of the constitutional branches and their administrative proxies that may not bear out in practice. On the one hand, it stands to reason that the President may empower agency heads “vis-à-vis its coordinate rivals, namely the civil service and civil society”²³ in order to further her agenda.²⁴ On the other hand, while judges may “bolster the position of civil servants vis-à-vis their administrative rivals by using various administrative tools and doctrines to protect civil servants’ independence,”²⁵ they may also protect legislative interests or power, particularly with regard to agencies’ interpretation of constitutional issues.²⁶ In addition, it is not clear that civil society constitutes a willing and powerful enough fire brigade “to do most of the heavy lifting [to] duke[] it out with

²¹ See Strauss, *Place of Agencies*, *supra* note 10, at 577 (noting that, per separation of functions theory, judicial, legislative, and executive functions “are not kept separate” within agencies).

²² Email from Jennifer L. Selin, Assistant Professor of Political Science, University of Illinois at Urbana-Champaign, to author (Feb. 1, 2017) (on file with the New York University Law Review).

²³ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 246 (emphasis omitted).

²⁴ See Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) (arguing that the President has “enormous power” to persuade agency heads to adopt policies she favors).

²⁵ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 251.

²⁶ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1115–17 (2008) (discussing canons of “anti-deference,” in which courts decline to defer to agencies in criminal matters); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 506 (2010) (suggesting that “the Court is . . . reluctant to acknowledge the role played by constitutional concerns in the development of ordinary administrative law”).

agency heads and civil servants”²⁷ on behalf of Congress.²⁸

In any case, Michaels’s theory invites a set of stakeholders that hail from outside of the government into the conventionally government-centric separation of powers framework. This move, while credible,²⁹ would be strengthened by careful identification of the power exercised by the public, evaluation of whether and how this power may be isolated and differentiated in the administrative context, as opposed to the judicial and legislative settings, and consideration of how best to include (as well as the benefits of including) the polity in a constitutional dynamic customarily concerned with governmental actors.³⁰

Michaels also evocatively characterizes his normative theory of the tripartite agency as an espousal of “separation of powers *all the way forward*,”³¹ seemingly beyond agencies’ role as an internal check on the executive branch.³² Yet, while Michaels suggests that separation of powers should be carried forward into the administrative arena because of the well-known tenet that “agencies are called upon to exercise legislative, executive, and judicial powers,”³³ the actual division of roles he settles on is unsatisfying, given that neither this set of functions nor the values of

²⁷ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 249 (drawing from the work of Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984)).

²⁸ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2258 (2001). While there is quite a bit of work suggesting that congressional preferences matter greatly in agency behavior, this is not unequivocally the case. See *id.* at 2259 (“The empirical work of the public choice theorists, purporting to show that agencies routinely comply with legislative agendas, has come under sharp fire.”); see also Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance’*, 12 LEGIS. STUD. Q. 475, 477 (1987) (noting that while Congress has influence over bureaucracy, “presidents, the courts, interest groups—and, not least, the agencies themselves” do as well).

²⁹ See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1378–80 (1997) (discussing constitutional interpretation by “nonjudicial actors,” including citizens); Cory Ruth Brader, *Toward a Constitutional Chevron: Lessons from Rapanos*, 160 U. PA. L. REV. 1479, 1482–83 (2012) (“Recently, however, scholars and citizens alike have begun exploring to what extent, under what authority, and through what normative lens nonjudicial actors interpret the Constitution.”). See generally Josh Chafetz, *A Fourth Way?: Bringing Politics Back into Recess Appointments (and the Rest of the Separation of Powers, Too)*, 64 DUKE L.J. ONLINE 161 (2015) (advocating for the insertion of politics into the separation of powers framework).

³⁰ Cf. Strauss, *Formal and Functional*, *supra* note 13, at 520–22 (suggesting that separation of powers inquiries should focus on the relationship among only the three branches of government).

³¹ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 264.

³² See *infra* notes 66–67 and accompanying text.

³³ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 265; see also Strauss, *Place of Agencies*, *supra* note 10, at 577 (“[F]or agencies (as distinct from the constitutionally named heads of government) the same body often does exercise all three of the characteristic governmental powers, albeit in a web of other controls—judicial review and legislative and executive oversight.”).

“democracy, rationality, and the rule of law”³⁴ map clearly onto civil society, agency heads, and the civil service.³⁵ A tripartite agency might better further a broader, constitutional aim, if the isolated agency actors were policymakers, enforcement officials, and administrative law judges, or some set of roles more clearly associated with the chief functions of each branch of government.

Additionally, although they may affirmatively choose to do so,³⁶ agencies are not necessarily charged with the core responsibility of acting as vehicles for holistic democratic governance³⁷ to justify their “constitutionally and normatively privileged role as a central participant in administrative governance.”³⁸ Indeed, if agencies are overly burdened by a constitutional mandate, this may reduce their ability to act as efficiently, effectively, and expertly³⁹ as possible in their implementation and enforcement of the law.⁴⁰ Thus, limiting the formalist expectations of the separation of powers to the branches of government may be sufficient to further constitutional principles without forcing agencies to sacrifice administrative functionality to promote those norms themselves.⁴¹ In any case, Michaels’s intensification of agencies’ constitutional role may also be premature, given that it has not yet been established whether and how a balanced administrative separation of powers will renew and reaffirm “the enduring, evolving constitutional

³⁴ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 265.

³⁵ For instance, agency leadership and civil service both appear to embody, of the choices offered, democracy, while an idealized civil service alone furthers values of rationality and the rule of law. *See id.*

³⁶ *See generally* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013) (noting the role of agencies in constitutional development).

³⁷ *See* Brader, *supra* note 29, at 1485 (noting “practical reality of on-the-ground agency constitutional interpretation is at odds with the traditional judge-centric vision of constitutional definition”); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 741 (2005) (“Agency personnel, who often are the only ones with the practical experience ‘on the ground’ to perceive constitutional problems and appreciate ways they could be ameliorated, do not ordinarily view doing so as part of their jobs.”).

³⁸ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 281–82.

³⁹ *See, e.g.*, Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974) (discussing environmental protection efforts relying on technical expertise).

⁴⁰ *See* Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1174–75 (2014) (suggesting that increased administrative focus on democratic legitimacy might include costs such as “loss of transparency . . . ; greater difficulty of congressional oversight; more politicization of the rulemaking process . . . ; decreasing influence of the agency’s unique expertise and knowledge of the record; and blurring or undermining delegation as the agency’s statutory mandate is diluted by other policy and political goals”).

⁴¹ *See generally* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683 (2013) (arguing against the privileging of constitutional law over administrative law values); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 17 (1936) (characterizing “agencies as efficient working implements of government” and the constitutional branches as those primarily establishing rule of law values).

commitment to separation of powers.”⁴² Michaels’s earlier discussion of how the political branches might align with administrative rivals for partisan interests also leaves open the question of which rivals would be best served by the constitutional branches, as well as which constitutional branch would best support each rival, for the purposes of fostering separation of powers values.

By suggesting that the intervention of the constitutional branches in agency activity interferes with the homeostasis engendered by a balanced set of internal agency powers,⁴³ *Of Constitutional Custodians* also invites questions about another primary function of the “old separation of powers,” which is to constrain the power of the executive branch, including of agencies themselves. For instance, one of Michaels’s fundamental claims is that while the legislature and judiciary may impact the dynamic among the three main administrative rivals for self-interested reasons, the “administrative sphere [is otherwise] a legitimate, largely self-regulating ecosystem.”⁴⁴ This argument suggests that the efforts of the constitutional branches to check the administrative state should be minimal and may even be unnecessary or harmful, and that “meaningful constraint can arise from an administrative separation of powers irrespective of any external sources of oversight, [perhaps in particular] within a pluralistic legal and political culture.”⁴⁵ However, Michaels’s framework leaves unclear whether and when, balanced ecosystem or not, the agency as a whole and comprised of all three administrative rivals might become too powerful and require outside constraint (especially if agency actors are also imbued with the power to advance constitutional norms⁴⁶).⁴⁷

After all, unlike the constitutional tripartite on which it is modeled, Michaels’s three primary administrative actors neither are separated clearly

⁴² Michaels, *Of Constitutional Custodians*, *supra* note 1, at 268.

⁴³ *Id.* at 234. In keeping with this, the article also argues for a “near-reversal[] of the normative claims regarding the legal and democratic imperative for the constitutional actors to intervene regularly and forcefully in matters of administrative policy making, implementation, and enforcement . . .” *Id.*

⁴⁴ *Id.* at 227.

⁴⁵ Email from Randy J. Kozel, Professor of Law, Notre Dame Law Sch., to author (Dec. 20, 2016) (on file with the New York University Law Review).

⁴⁶ See Metzger, *supra* note 35, at 1901 (considering “[w]hat justifies administrative efforts to move the nation beyond recognized constitutional requirements to develop new constitutional understandings, especially if doing so means pushing at the limits of agencies’ delegated authority”).

⁴⁷ Conversely, Michaels’s criticism of the manipulation of agency actors by the constitutional branches is difficult to square as well with his characterization of a horizontal alliance of agency actors as potentially “threaten[ing to] the integrity and well-functioning of a tripartite, rivalrous [agency] scheme,” Michaels, *Of Constitutional Custodians*, *supra* note 1, at 259, given that such intra-agency coalitions may allow agencies to circumvent undue influence on any one of the tripartite from on high.

by jurisdiction nor have unique constituencies that serve to shape their incentives and behavior. For instance, if the three branches of government blur their distinct judicial, legislative, and enforcement functions, periodic congressional and presidential elections would serve to dilute problematic accumulations of power. Presumably, the parallel form of constraint on the administrative state is the ability of Congress and the President to exert control (for example, over agency budgets, personnel, and policy).⁴⁸ Yet, divorcing the administrative state from its democratically elected principals eliminates this check and imbues agency heads, civil servants, and civil society with the perhaps unrealistic obligation to promote responsible governance all by themselves.

Finally, Michaels's suggestion that judicial review could ensure "greater fidelity to rivalrous, inclusive administrative governance"⁴⁹ runs the risk of encouraging encroachment on the executive's powers. For one, the insulation of civil servants from the President and emphasis on stakeholder interests⁵⁰ may encourage problematic agency capture.⁵¹ In addition, favoring judicial oversight of agency functionality could deteriorate the President's check on the nonadministrative branches by reducing presidential power overall. The emphasis on judicial review also reduces consideration of the potential impact of and constraint by the legislature on the tripartite agency, including as a result of Congress's role as the initial delegator of agencies' authority and its ongoing appropriation of funding to facilitate the implementation of administrative policy,⁵² particularly in those instances in which judicial review is not available.⁵³

The standards that courts would employ to evaluate intra-agency dynamics per Michaels's framework are also unclear. Michaels does not specify a test for determining whether "agency actions are the product of internally rivalrous, heterogeneous deliberation, contestation, and collaboration"⁵⁴—in other words, whether the process implemented by an agency merits deference. Michaels does suggest that deference doctrine be

⁴⁸ Selin, *supra* note 22.

⁴⁹ See Michaels, *Of Constitutional Custodians*, *supra* note 1, at 273–79.

⁵⁰ See *id.* at 260–61, 261 n.131.

⁵¹ See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000) (noting that "agencies captured by interest groups often generate regulations that are neither efficient nor the product of real democratic consensus").

⁵² See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669 (1975) ("The traditional model of American administrative law has been centrally concerned with restricting administrative actions to those authorized by legislative directives.").

⁵³ See, e.g., Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1130 (2016) (noting that "[m]ost aspects of agency enforcement policy generally escape judicial review").

⁵⁴ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 264.

recalibrated in order to focus courts' attention onto administrative process.⁵⁵ However, even if courts could be convinced to move towards a more process-centered approach, they would require standards for whether civil servants have been "given their due" or have unduly "stymied" agency heads,⁵⁶ how to meaningfully police civic involvement, and for balancing any other elements required to establish "fair [and] meaningful . . . administrative engagement."⁵⁷ Given the lack of a clear judicial standard, it is difficult to know how the courts might be directed to "act principally as custodians—rather than partisans—intervening primarily to maintain or restore a well-functioning system of administrative checks and balances."⁵⁸

II

THE POWER AND COMPLEXITY OF THE FRAGMENTED AGENCY

In *Of Constitutional Custodians*, Michaels claims that each role in his agency tripartite is autonomous, which implies that these administrative players are insulated from the President in various ways. He also suggests, further, that intra-agency homeostasis is conditioned on a lack of hierarchy.⁵⁹ While presidential oversight is not the focus of Michaels's piece, his views combine to challenge the unitary executive model and thus open up avenues for engaging with elements of its underlying theory.⁶⁰ One such element is

⁵⁵ See *id.* at 274–76 (suggesting that courts shift their focus from merits-based review to administrative process review); see also Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2074–77 (2011) (arguing that courts should focus on administrative processes much more closely when making deference determinations).

⁵⁶ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 273–74.

⁵⁷ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 277–78 (discussing how administrative "stakeholders would seemingly be well served by agreeing ex ante to some clear indicia of fair, meaningful, and rivalrous administrative engagement").

⁵⁸ *Id.* at 231.

⁵⁹ See *id.* at 260 (proposing that "[a] unitary, monolithic agency is likely an *imbalanced* agency").

⁶⁰ Unitary executive theorists hold, simply put, that "all federal officers exercising executive power must be subject to the direct control of the President." Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992); see also STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 4* (2008) (arguing that "all of our nation's presidents have believed in the theory of the unitary executive" and that this is important because consistent practice influences "what the law is on the books"); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732 (1996) ("The dominant unitarian position conceives of the executive branch as a separate entity ordinarily accountable to the President alone."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994) (arguing that the vesting clause "creates a *unitary executive*"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 8–9 (1994) (contrasting the views of "modern unitarians," who "contend[] that the President has plenary or unlimited power over the execution of administrative functions," and "original unitarian[s]," who

the tension between those advocating at least minimal presidential oversight of agencies and those (including Michaels) favoring agency insulation from presidential influence. Those interested in preserving some form of executive hierarchy⁶¹ might question the value of agency fragmentation if it diminishes presidential power. This camp might suggest that the President, the White House, or some other overseer within the executive branch—and not the judiciary, as Michaels prescribes⁶²—should primarily oversee the tripartite. This view is bolstered if the benefits of the tripartite are mostly functional⁶³ and thus not based in formal expectations of the Constitution⁶⁴ (although the latter is not necessarily a disqualifying factor⁶⁵).

argue that executive functions “are not coextensive with all the functions . . . exercised by the President”).

⁶¹ See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1277–78 (1984) (discussing how corporate and administrative law justify large-scale bureaucracy and arguing that hierarchy serves as an adequate restraint).

⁶² See *supra* notes 47–56 and accompanying text (discussing Michaels’s emphasis on judicial oversight).

⁶³ “By some accounts, executive leadership is in the best position to implement certain agency-checking mechanisms”—in particular, those that seek primarily to improve administrative function.” Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. (forthcoming 2017) (manuscript at 59–60) [hereinafter Shah, *Interagency Transfers*] (on file with the New York University Law Review); see also Kagan, *supra* note 28, at 2339 (suggesting that “enhanced presidential control of administration serves democratic norms . . . [and] regulatory effectiveness”); Jennifer Nou, *Agency Coordinators Outside the Executive Branch*, 128 HARV. L. REV. F. 64, 65 (2015) (“The executive branch . . . has a singular figurehead who can be held accountable and represents the national interest; it possesses a wide range of expertise; it is relatively expedient and wields a number of formal and informal sticks that can help to encourage compliance.”); Rodríguez, *supra* note 12, at 193 (suggesting that White House oversight “facilitate[s] agencies’ constraints over one another”); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 854–56 (2015) (arguing that various benefits may stem from executive oversight of agency adjudication).

⁶⁴ Arguably, it is primarily the judiciary’s responsibility to preserve the proper constitutional separation of powers, even as impacted by agencies. See Catherine M. Sharkey, State Farm “*With Teeth*”: *Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1591 n.1 (2014) (citing Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1367–69 (2013) and Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 440); see also Richard A. Nagareda, Comment, *Ex Parte Contracts and Institutional Roles: Lessons from the OMB Experience*, 55 U. CHI. L. REV. 591, 627 (1988) (“Pursuant to separation of powers principles, courts can safeguard the prerogatives of other institutions to engage in experimentation within the bounds of law.”); Shah, *Interagency Transfers*, *supra* note 63, at 61–74 (noting that judicial oversight of agency adjudication could impact the constitutional separation of powers). For instance, both expanded arbitrary and capricious determinations and hard look review are rooted in traditional separation of powers concerns. See Metzger, *supra* note 25, at 491 (“Part of the explanation for th[e] expansion of substantive judicial scrutiny of agency decisionmaking lies in constitutional concerns with broad delegations of power to agencies and the attendant risk of unaccountable and arbitrary exercises of administrative power.”).

⁶⁵ See Metzger, *supra* note 4, at 425 (suggesting a role for presidential oversight within a system of complementary administrative and constitutional checks and balances).

Conversely, those (like Michaels) that share the view that agency fragmentation is a tool for mitigating executive control⁶⁶ might utilize Michaels's framework for president-checking purposes, for instance, by advocating for the creation of diffuse power centers that can "be coopted, captured, [or] aligned" by or with various actors that are not the President (including, perhaps, the constitutional branches).⁶⁷ However, this contingent must engage with practical inquiries regarding which forms of intra-agency activity, agency structures and political circumstances will, in fact, allow the administrative tripartite to act more independently, ameliorate undue pressure from the constitutional branches and reduce presidential scrutiny of agencies.

And yet, while *Of Constitutional Custodians* argues that tripartite internal agency organization increases administrative functionality and implies that it amplifies agencies' power, it offers only a simplified picture of agencies in which all bureaucratic stakeholders have been divided into the archetypes of agency heads, civil servants, and members of the public.⁶⁸ This may be so that Michaels can avoid potentially confusing complexity in order to present his framework at a higher level of abstraction.⁶⁹ That having been said, Michaels's characterization of his three favored sets of actors as the most important participants in the administrative state rests on assumptions about the uniformity of those actors both within and among agencies and the expectation that each actor has a fundamental, exclusive and easily distinguishable nature (arguably, as is presumed of each branch of government in the constitutional separation of powers framework⁷⁰). In

⁶⁶ See Metzger, *supra* note 4, at 428–29 (“[I]nternal separation of powers is most often equated with measures that check or constrain the Executive Branch, particularly presidential power.”); see also Katyal, *supra* note 4, at 2314 (proposing “a set of mechanisms that can create checks and balances within the executive branch in the foreign affairs area”); Chafetz, *supra* note 29, at 161–63 (arguing that the level of control agency actors exercise depends on political climate); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1765–71 (2009) (discussing, in part, the problems that a unitary conception of the executive branch poses for accountability). See generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1194–1203 (2013) (arguing that agencies with semi-independent leadership have norms that diffuse the power political actors have to remove their leaders).

⁶⁷ Email from Josh Chafetz, Professor of Law, Cornell Law Sch., to author (Dec. 26, 2016) (on file with the New York University Law Review).

⁶⁸ There has been some brief critique of Michaels's work in this vein. See Rodríguez, *supra* note 12, at 180, 191–96 (critiquing Michaels's argument that a mix of agency powers is necessary to check the President by suggesting that the “complexity of government” provides a simpler form of executive constraint); Further, Michaels himself notes the same. Michaels, *Of Constitutional Custodians*, *supra* note 1, at 241 (“[M]y depiction of the three administrative rivals is an admittedly rosy and stylized one.”); *id.* (“I recognize that the roster of administrative rivals could always be lengthened beyond the trio identified above.”).

⁶⁹ See Michaels, *Of Constitutional Custodians*, *supra* note 1, at 241 (“[M]y depiction of the three administrative rivals is an admittedly rosy and stylized one.”).

⁷⁰ See *supra* note 10 and accompanying text (discussing the separation of powers framework).

reality, the salient qualities of these actors depend on the distinct structures of any given agency,⁷¹ differences in agencies' substantive and ideological orientations, the "thick political surround" in which they operate,⁷² and the diversity of incentives that drive administrators themselves (which do not necessarily reflect the goals of the agencies in which they are housed).

Further, Michaels's model excludes potentially influential bureaucrats that do not fit neatly into the categories of agency, civil service and civil society. For example, there are some mid-level civil servants whose motivations and goals may be less technically-oriented than would generally be expected, and more political. These may include general counsel and other experts that are hired by and beholden to politically-appointed agency directors. In addition, some government officials on the "front lines," like those in immigration and drug enforcement, interact closely with the public and may even take on their interests—including those of state and local law enforcement. Federal enforcement agents may also seek to implement upper-level political directives (as opposed, again, to more technically-sound initiatives). These assorted civil servants thus display characteristics that traverse the presumed distinctions between the agency actors that feature in Michaels's typology.

In addition, by assuming and advocating for horizontal power dynamics within his tripartite government structure, Michaels discounts the realities and benefits of administrative hierarchy in those instances.⁷³ For instance, the identities of and authority wielded by agency leaders can vary. Agency heads are often placed in the de facto position of agency leader and delegator to other agency actors, given that they are generally awarded the statutory authority to implement the law⁷⁴; furthermore, this power may be delegable in flexible terms⁷⁵ and used to further the agency heads' own interests.⁷⁶ In

⁷¹ See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013) (arguing for greater granularity of analysis in regard to independent agencies).

⁷² Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 352, 391–407 (2016) (observing that the three branches of government operate within a "thick political surround" of "institutional, organizational, and individual actors within as well as outside of government").

⁷³ See generally Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (arguing for a revitalization of the centralized review of agencies). Michaels himself cites, but does not confront, work in which scholars have "considered the relationship between appointees and civil servants in terms of hierarchy, not unlike the way they see the relationship between the President and agency leaders." Michaels, *Of Constitutional Custodians*, *supra* note 1, at 233 n.9, 239 n.34 (citing Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765–69 (1984)).

⁷⁴ See Shah, *Interagency Transfers*, *supra* note 63, at 42.

⁷⁵ See generally Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2015) (discussing agency heads' discretion to internally structure agencies).

⁷⁶ See *id.* at 423 (describing controls within agencies and how agency heads "impose mechanisms to further their own interests").

addition, the potential advantages of insulation (for instance, in administrative adjudication⁷⁷) may be reduced by the requirement that agencies have “significant voluntary buy-in from rivalrous groups with competing political, cultural, and legal interests” before acting.⁷⁸ More broadly, it is unclear whether Michaels’s form of fragmented public administration would, indeed, promote the interests of the “poor and vulnerable”⁷⁹ or whether the aims of this wide-ranging community would be better served by the accountability, efficiency, and expertise ascribed to a stronger administrative hierarchy.⁸⁰

The description of agency heads, civil servants, and the public as naturally rivalrous⁸¹ also glosses over their potential interdependence⁸² (as well as that of the constitutional branches to which they are analogized).⁸³ For example, the motivations of politically-appointed agency leadership may be impacted by civil society (for instance, as represented by Congress, the voting public, and those involved in lobbying and advocacy before executive and legislative bodies). Further, a seemingly impartial⁸⁴ civil service may be shaped by policies that originate in politics,⁸⁵ in particular when their roles

⁷⁷ See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989) (noting that “[f]undamental fairness” might require that an adjudicator whose decision could result in sanctions be insulated from political pressure).

⁷⁸ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 265–66.

⁷⁹ *Id.* at 265.

⁸⁰ See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1836, 1842 (2015) (arguing for the inclusion of “systemic administration [in] constitutional law,” particularly in “structural and individual rights contexts”); see also Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1090–94 (2013) (highlighting the accountability of the President in defending political appointees’ control over enforcement judgments); Strauss, *Place of Agencies*, *supra* note 10, at 600 (noting that the Constitutional Convention “was clear in its choice of a single executive—and its associated beliefs that such a person might bear focused political accountability for the work of law-execution”). See generally Kagan, *supra* note 28 (largely defending presidential control over agency administration against legal and policy objections).

⁸¹ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 235.

⁸² See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 2 (1997) (proposing “a model of collaborative governance as an alternative to the model of interest representation” and discussing the existence of this dynamic in the Environmental Protection Agency).

⁸³ See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 33–36 (1994) (discussing how “institutional actors act in light of the knowledge that they are *interdependent*”).

⁸⁴ See Michaels, *Of Constitutional Custodians*, *supra* note 1, at 237 (characterizing civil servants as “insulated by law and custom from political influence and pressure”).

⁸⁵ See Rodríguez, *supra* note 12, at 188 (“[D]epending on regulatory context, [civil servants] may skew in one partisan direction or another, even if their political biases only manifest themselves subconsciously.”); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513 (1992) (referencing the “political nature of agency decisions”).

constitute a blend of responsibilities that include both responsiveness to higher-ups and constituents, and the application of expertise. Examples of this may include administrators that are tasked with both policymaking and adjudicatory tasks.⁸⁶ Civil servants may also fail to live up to the apolitical ideal that they be “rational, legal, and consistent with best practices”⁸⁷ by falling prey (or being relegated by political appointees) to inefficiency, mediocrity, or rote activity.⁸⁸ Civil servants may also behave in unanticipated and problematic ways because of the extent to which their motivations differ from those of their agency “principal.”⁸⁹

Finally, as noted earlier,⁹⁰ the influence of civil society on the tripartite agency may not be adequate, due in part to the limitations of the mechanisms for participation and information-gathering available to the public. For instance, while the notice-and-comment process and Freedom of Information Act (FOIA) requests are important safeguards against administrative abuse, these tools are only as consistent and influential as allowed by political, technical, and enforcement-minded gatekeepers within the agency.⁹¹ Further, many citizens may have access to only partial information regarding

⁸⁶ See Farina, *supra* note 75, at 452–53 (1989) (grappling with the administrative exercise of both judicial and technocratic functions); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 594 (1985) (suggesting that “an agency empowered to adjudicate disputes over a statute’s application should be accorded policymaking status”); see also LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546–94 (1965) (noting that “[t]he administrative is the sole fact finder” but “the administrative and the judiciary share the role of law pronouncing and law making”); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 140–53 (1938) (discussing judicial review of agency adjudication and administrative “law-making by regulation”); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 49 (1985) (observing that agency actions include promulgating interpretive rules, policy statements, and adjudicating).

⁸⁷ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 250.

⁸⁸ See Michaels, *An Enduring, Evolving Separation of Powers*, *supra* note 6, at 535, 546 (noting that civil servants may act unprofessionally due to frustration, capture, or a desire to advance their own ideological interests); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 99 (2000) (citing public choice literature “portraying agency bureaucrats as shirking, self-interested budget-maximizers who thwart the will of the people and good government”).

⁸⁹ See Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 889 (2014) (“Public employees might *shirk* and focus on leisure rather than work. They might *drift* and emphasize their own preferences rather than agency goals. Finally, they might get *captured* and execute the desires of a third party.” (emphasis omitted)).

⁹⁰ See *supra* notes 26–29 and accompanying text.

⁹¹ The impact of public comments on the substance of rulemaking and the ways in which the public may influence administrators as a result of information received from prolonged FOIA inquiries is, arguably, minimal and/or unclear at times. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (likening the public-input aspect of the notice-and-comment process to “Japanese Kabuki theater”); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 679–80 (1984) (arguing for “a sensible government-wide policy” to engender uniform disclosure under FOIA).

administrative activity, while lobbyists skew towards the representation of only a certain segment of society or class of citizen.⁹² The resulting emphasis on the vocal, majoritarian elements of civic participation may both reduce the general effectiveness of civil society and obscure the representation and furtherance of countermajoritarian values⁹³ like the preservation of due process. In sum, these issues may consign the civil society to a lower “weight class”⁹⁴ than agency heads and civil servants, thus eroding the presumed equilibrium of the tripartite.

The potential impact of these differences among each of Michaels’s three idealized agency roles requires a thicker account (that is beyond the scope of this Essay) of both the particular administrative structures and the specific political circumstances in which they operate. This would support the development of a universal form of the tripartite agency—one that is both functional on a widespread basis and able to serve as an effective check on the Executive. Otherwise, the variance in these criteria may deteriorate the viability of the tripartite structure, influence whether it leads to better outcomes in administrative activity, and dampen its expression of balanced government. Inquiries that could ground Michaels’s framework include whether it would affect or itself be altered by the exercise of agency discretion,⁹⁵ the extent to which distinctions among the framework’s three administrative roles might be blurred by intra-agency subdelegation,⁹⁶ and at what point insistence on a divided and rivalrous tripartite would “stymie or endanger administrative action altogether.”⁹⁷

CONCLUSION

In Of Constitutional Custodians and Regulatory Rivals, Michaels

⁹² Selin, *supra* note 22.

⁹³ See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 57 n.158 (1983) (noting that “administrative action may bear only an attenuated relation to majoritarian values”).

⁹⁴ Michaels, *Of Constitutional Custodians*, *supra* note 1, at 269.

⁹⁵ See generally Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1994–97 (2015) (considering the interaction of rule of law values with agency discretion).

⁹⁶ See *supra* notes 78–79. Michaels also references one way in which intra-agency delegation might weaken the administrative separation of powers. See Michaels, *Of Constitutional Custodians*, *supra* note 1, at 280 (suggesting that when “a civil servant renders a final decision that is statutorily entrusted to the head of the agency,” this is an easily identifiable instance where the administrative separation of powers has been violated).

⁹⁷ See Michaels, *Of Constitutional Custodians*, *supra* note 1, at 278 (“Decisions that are so numerous, so small-scale, so confidential, or so urgent might not be conducive to administrative separation of powers—and insisting otherwise would likely stymie or endanger administrative action altogether.”); *id.* at 286 (noting that “Congress regularly exempts those involved in national security and foreign affairs from many of the requirements deemed central to American administrative law”).

presents his framework for a new, tripartite agency as one that is similar to the traditional structure underlying the three branches of the federal government.⁹⁸ In keeping with this theory, Michaels holds that his particularized view of agency fragmentation has the potential to “preserv[e] the framers’ vision of a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny.”⁹⁹ This Essay suggests that the connection between Michaels’s administrative model and the constitutional separation of powers has not yet been adequately established and that further investigation into the actual qualities of agencies is required in order to implement Michaels’s framework.

Michaels’s project might be served better by limiting or eliminating the analogy in favor of descriptors related to principles of governmental or institutional design (for example, by focusing on the distinction of administrative interests instead of referencing a separation of administrative “powers”). In this way, Michaels could both deflect critique of his normative views by constitutional scholars and develop his promising agency model without having to force its parts into the roles and expectations associated with the federal branches. In any case, those seeking to build productively on Michaels’s work and to help realize his vision should flesh out demonstrable ways in which institutional design might replicate dynamics among the federal branches in order to benefit governmental function, rule of law values, and bureaucratic independence. With additional footing in the substance of administrative law, Michaels’s “administrative separation of powers” could succeed in living up to the possibilities implied by its constitutional namesake.

⁹⁸ See *id.* at 227 (noting that the article connects “the old and new separation of powers”).

⁹⁹ Strauss, *Place of Agencies*, *supra* note 10, at 639.