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## ARTICLES

### OF CONSTITUTIONAL CUSTODIANS AND REGULATORY RIVALS: AN ACCOUNT OF THE OLD AND NEW SEPARATION OF POWERS

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*The theory and reality of “administrative separation of powers” requires revisions to the longstanding legal, normative, and positive accounts of bureaucratic control. Because these leading accounts are often insufficiently attentive to the fragmented nature of administrative power, they tend to overlook the fact that internal administrative rivals—perhaps as much as Congress, the President, and the courts—shape agency behavior. In short, these accounts do not connect what we might call the old and new separation of powers. They thus fail to capture the multidimensional nature of administrative control in which the constitutional branches (the old separation of powers) and the administrative rivals (the new separation of powers) all compete with one another to influence administrative governance.*

*This Article, the first to connect novel insights regarding administrative separation of powers to old—and seemingly settled—debates over the design and desirability of bureaucratic control, (1) characterizes the administrative sphere as a legitimate, largely self-regulating ecosystem, (2) recognizes the capacity of three rivals—politically appointed agency heads, politically insulated civil servants, and members of*

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*the public—to internally police the administrative process, and (3) recasts judges, presidents, and legislators as custodians of the administrative arena tasked with preserving a well-functioning, rivalrous administrative separation of powers.*

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INTRODUCTION

The study of American public administration often zeroes in on questions of control. Who should direct, guide, or check our vast and powerful administrative agencies—and in what ways? These questions have long been, and continue to be, pressing ones for practical, normative, and constitutional reasons.

In this Article, I contend that the theory and reality of a tripartite *administrative* separation of powers<sup>1</sup> requires revisions to the long-standing and seminal legal, normative, and positive accounts of agency control. These leading accounts focus primarily on top-down control by the constitutional branches and often overlook the fact that three administrative rivals—perhaps as much as Congress, the President, and the courts—shape agency behavior. Because these accounts are generally insufficiently attentive to the fragmented nature of administrative power,<sup>2</sup> they do not connect what we might call the *old* and *new* separation of powers. That is, they don't capture the multidimensional nature of administrative control in which the constitutional branches (*the old separation of powers*) and the administrative rivals (*the new separation of powers*) all compete with one another to influence administrative governance.

Specifically, administrative power is divided principally among three sets of rivalrous actors: the politically appointed agency leadership that establishes administrative priorities; the politically insulated career civil service charged with helping to shape, implement, and enforce agency initiatives; and a large and diverse civil society authorized to participate meaningfully and robustly in the design and development of administrative policies. A deeper, richer appreciation of the horizontal power dynamics between and among these administrative rivals (not unlike the horizontal power dynamics that famously exist between and among the constitutional branches) leads us to question and expand upon the prevailing positive and normative accounts.

First, many of the prevailing positive accounts of bureaucratic control focus on direct vertical interventions by the constitutional branches,<sup>3</sup> without the requisite sensitivity to the complications, challenges, and opportunities that exist because the administrative sphere is itself internally fragmented and thus subject to any number of intra-administrative horizontal checks as well. The existence of administra-

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<sup>1</sup> See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015) [hereinafter Michaels, *Enduring, Evolving*]; see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2010) [hereinafter Metzger, *The Interdependent Relationship*].

<sup>2</sup> Magill & Vermeule, *supra* note 1, at 1305–36 (explaining that the existing literature too readily treats agencies as unitary).

<sup>3</sup> See, e.g., Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765–69 (1984) [hereinafter Moe, *The New Economics*] (describing the competition between and among the constitutional branches to exercise control over what is characterized as a unitary “bureaucracy”); see also *infra* notes 7–9 and accompanying text.

tive separation of powers reveals opportunities for greater control by the constitutional actors (easier to influence, say, one of the administrative actors, which might then influence its rivals); for greater resistance by administrative actors (the “influenced” administrative actor might be emboldened or pressured by its administrative peers to rebuff such top-down pressure); and for greater self-regulation (the administrative rivals police themselves).

Second, the troubles with the prevailing positive accounts spill over into the normative. Those who think of agencies as undifferentiated and unitary rather than as fragmented might well conclude that such agencies are problematically imbalanced. A truly unitary agency is monolithic and internally hierarchical and thus apt to have a singular identity dictated by whichever stakeholder faction—be it presidential appointees (agency leaders), insulated mandarins (civil servants), or special interests (regulated parties or beneficiaries who capture the agency)—happens to be dominant. Such truly unitary agencies will no doubt please some.<sup>4</sup> But such agencies will generally be perceived as too political, too insulated, or too captured—and thus insufficiently responsive to the fuller range of democratic, technocratic, and rule-of-law values we expect to inform State power as exercised through administrative or any other set of actors.<sup>5</sup> It follows from that understanding of agencies as unitary that strong control by the constitutional branches is necessary to legitimize and broaden the perspective of these seemingly imbalanced, often inadequately (or simply asymmetrically) supervised administrative agencies.<sup>6</sup>

But any such imperative for strong constitutional control rests, again, on a questionable premise. The existence of an administrative separation of powers engenders the very balance often assumed to be lacking. Administrative power that is internally fragmented and rivalrous along the lines described in this Article necessarily accommodates the interplay of presidential, technocratic, legalistic, and broader public interests and agendas—in ways that make the adminis-

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<sup>4</sup> See *infra* notes 223–24 and accompanying text. Even those who, say, champion the Unitary Executive Theory would nonetheless take strong exception to a unitary *bureaucratic* administration.

<sup>5</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 553–56 (emphasizing the role administrative separation of powers plays in promoting and harmonizing an array of constitutionally resonant public values).

<sup>6</sup> See, e.g., THE PRESIDENT’S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 30 (1937). Principally the concern has been over insufficient presidential control. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) [hereinafter Strauss, *The Place of Agencies*]. But scholars have also emphasized the need for greater congressional control. See sources cited *infra* note 7.

trative process very much akin to the shared, rivalrous, and heterogeneous enterprise of constitutional governance. And just as we generally respect exercises of federal power that emerge from that (at times frustratingly) contentious domain known as constitutional separation of powers, so too should we respect those exercises of federal power that emerge from the similarly contentious domain I call administrative separation of powers.

Viewed in this light, many interventions by constitutional actors to influence or alter the outcome of administrative deliberations cannot be justified as a constitutional or normative imperative to balance or help legitimate otherwise imbalanced and problematically unitary administrative power. Instead such interventions need to be understood for what they are: threats to a largely self-regulating administrative ecosystem. It is an ecosystem capable of harmonizing presidential priorities, public concerns, legislative interests, expert opinions, and legal obligations. And it is an ecosystem whose claim of legitimacy rests in part on the existence of heterogeneous, rivalrous administrative stakeholders who individually and collectively channel many of the institutional, dispositional, and legal characteristics of the constitutional branches.

This project thus invites broader thinking regarding how constitutional actors exert control over the administrative domain, a recalibration of the normative claims regarding the legal and democratic imperative for the constitutional actors to exercise intensive administrative control, and a corresponding reorientation of administrative law and jurisprudence in which the constitutional branches act principally as custodians—rather than partisans—intervening primarily to maintain or restore a well-functioning system of administrative checks and balances. Furthermore, this more nuanced understanding of the horizontal and vertical dimensions of administrative control brings into relief (and, perhaps, newfound suspicion) those pockets of the administrative state where administrative separation of powers is largely disabled.

This Article proceeds as follows: Part I challenges and revises the prevailing positive accounts of agency design and agency power. Here I insist that agency power is in fact fragmented among three administrative rivals and explain how that administrative fragmentation complicates the ways in which constitutional actors exercise vertical control over the administrative state. Accordingly, Section A of Part I presents the theory and mechanics of administrative separation of powers, and Section B considers three discrete strategies that constitutional actors might employ to exploit (or nurture) administrative fragmentation.

Having recast the positive landscape in Part I, Part II turns to the normative. In Section A of Part II, I contend that the triangulation of administrative power among agency heads, civil servants, and members of the public helps legitimize the administrative sphere as a self-regulating, constitutionally sound ecosystem unto itself. And in Section B, I argue that the existence of such a self-regulating system helps “balance” the administrative state as a constitutional and operational matter—so much so as to lessen the need for the constitutional actors to exercise intensive administrative control in the first place. Here I draw an analogy between John Hart Ely’s reinforcing representative democracy and what I call reinforcing rivalrous administration—and suggest that constitutional involvement in the administrative sphere should be primarily custodial, limited to maintaining and nurturing a well-functioning administrative separation of powers (rather than seeking to exploit the administrative domain in furtherance of any one constitutional branch’s programmatic or institutional objectives). Section C maps out a pair of jurisprudential pathways we can take to give effect to this custodial approach to administrative governance.

In Part III, I identify challenging cases in which administrative separation of powers is subverted, bypassed, or disabled through statute—and consider how those cases (involving independent agencies, government contractors, national security agencies, and government corporations) fit within or require further amendment to my revised positive and normative accounts of bureaucratic control.

## I

### CONSTITUTIONAL CONTROL OVER ADMINISTRATIVE AGENCIES: CHALLENGING AND REVISING THE PREVAILING POSITIVE ACCOUNTS

The literature on bureaucratic control is extensive, if not overwhelming. Many of our leading political scientists, economists, and legal theorists have weighed in with important and lasting contributions.<sup>7</sup> These and other scholars have, by and large, assumed that

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<sup>7</sup> See, e.g., ANTHONY DOWNS, *INSIDE BUREAUCRACY* 1 (1967); RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* (1994); WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 15 (1971); GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* 17 (1965); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245 (2001); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 *J.L. ECON. & ORG.* 93, 93–94 (1992); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *VA. L. REV.* 431 (1989) [hereinafter McCubbins, Noll & Weingast, *Structure and Process*]; Mathew D.

bureaucratic control by constitutional actors is imperative.<sup>8</sup> And in the course of describing, modeling, or prescribing pathways of control, some of these scholars have treated administrative agencies as monolithic or unitary—that is, as undifferentiated, hierarchical organizations.<sup>9</sup> Though this is an exceedingly truncated and admittedly stylized summary of the voluminous and rich literature, my characterization of the general thrust of the scholarship is supported by the likes of Elizabeth Magill and Adrian Vermeule, who recently concluded that “[i]n all of the standard debates [about administrative power and control], . . . agencies are typically treated as unitary entities.”<sup>10</sup>

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McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins & Talbot Page, *The Congressional Foundations of Agency Performance*, 51 PUB. CHOICE 173 (1986); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Moe, *The New Economics*, *supra* note 3, at 765–69; Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 305 (1972); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147 (1984); James Q. Wilson, *The Bureaucracy Problem*, PUB. INT., Winter 1967, at 3.

<sup>8</sup> See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 154, 377–78 (2008) (emphasizing the President’s constitutional duty pursuant to the Take Care Clause to supervise and control administrative officials); Kagan, *supra* note 7 (stressing the need for presidential control over the administrative state). Many approach constitutional control of agencies through the lens of “principal-agent” problems. See, e.g., McCubbins & Schwartz, *supra* note 7, at 174–75; Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 208–09 (2005); Moe, *The New Economics*, *supra* note 3, at 765–69; Weingast, *supra* note 7; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 802–03 (1991).

<sup>9</sup> Though many accounts acknowledge different power centers within administrative agencies, they nevertheless often refer to the problem of “bureaucracy” and seemingly treat agencies as unselected, unaccountable bureaucracies. See, e.g., NISKANEN, *supra* note 7; Wilson, *supra* note 7. Or they assume a monolithic agency that the constitutional branches seek to control in toto. See, e.g., McCubbins & Schwartz, *supra* note 7; cf. Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1151–52 (2014) (characterizing the Court in *Chevron* as “treat[ing] the ‘agency’ interchangeably with the administrator of that agency”). And where scholars have taken a more nuanced approach to agencies, recognizing for example the differences between presidential appointees and career civil servants, some have nevertheless 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. Consider Terry Moe: “Bureaucratic superiors are principals, bureaucratic subordinates are their agents. The whole of politics is therefore structured by a chain of principal-agent relationships, from citizen to politician to bureaucratic superior to bureaucratic subordinate and on down the hierarchy of government to the lowest-level bureaucrats who actually deliver services directly to citizens.” Moe, *The New Economics*, *supra* note 3, at 765–66.

<sup>10</sup> Magill & Vermeule, *supra* note 1, at 1035.

This Part challenges what Magill and Vermeule call the typical treatment and puts forward alternative positive characterizations of administrative control more attuned to the interplay of constitutional and administrative rivals. In Section A, I explain that administrative power, far from being unitary, is in fact triangulated among three sets of rivals. Then, in Section B, I describe three approaches constitutional actors can employ in attempting to exert top-down control over an administrative domain itself divided horizontally among agency leaders, career civil servants, and members of the public. Combined, these two sections set the stage for what follows later in the Article: first a reconsideration (in fact, 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; and second, a corresponding articulation of a revised jurisprudence for administrative governance based on this more nuanced understanding of administrative power and the interactions between and among administrative and constitutional rivals.

### *A. The Theory and Mechanics of Administrative Separation of Powers*

Of late, the conventional treatment of administrative agencies (and power) as unitary is under implicit, and occasionally explicit, attack. Some contemporary scholars are calling for greater administrative fragmentation while others insist that administrative power is already far more fragmented than has generally been acknowledged.<sup>11</sup> These contemporary scholars rely on the existence or desirability of administrative fragmentation to advance any number of arguments, including claims about how administrative doctrine privileges certain administrative stakeholders over others,<sup>12</sup> about the virtues of such fragmentation as accountability-enhancing,<sup>13</sup> and, of greatest relevance to this project, about the use of intra-agency checks and balances to reinforce constitutional checks and balances.<sup>14</sup>

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<sup>11</sup> To be clear, the fragmentation being discussed is within any one administrative unit—not across agencies. *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011) (describing how courts recognize diversity among federal agencies); Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

<sup>12</sup> *See* Magill & Vermeule, *supra* note 1.

<sup>13</sup> *See* Katyal, *supra* note 1.

<sup>14</sup> Metzger, *The Interdependent Relationship*, *supra* note 1; *cf.* Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) (identifying “Offices of Goodness” positioned within federal agencies that broaden the perspective of agency leaders and encourage leaders to take seriously, among other



For my part, I have developed a theory of administrative separation of powers rooted in a tripartite scheme that anchors modern administrative governance firmly within the constitutional tradition of employing rivalrous, heterogeneous institutional counterweights to protect liberty, promote democratic accountability, and ensure compliance with the rule of law.<sup>15</sup> Specifically, administrative power is (already) divided and shared among three sets of rivals: the politically appointed agency leaders who set the administrative agendas, the politically insulated career civil servants who handle most of the agency's day-to-day responsibilities, and the broader public legally authorized to contribute to the development and implementation of administrative policies.<sup>16</sup>

Elsewhere I have explained in great detail how these three sets of actors are empowered to help advance, sharpen, enrich, modify, or thwart most exercises of administrative authority, why these actors are natural rivals of one another, how these three rivals are particularly important insofar as they channel many of the individual and collective attributes of the three great constitutional branches, and why this tripartite system helps legitimate the administrative state as a constitutional and normative matter.<sup>17</sup>

My purpose in this Article is to build on those insights, using administrative separation of powers to shed new light on some of the most central issues in the fields of constitutional and administrative law as well as public administration. In short, I intend to show how the reality (and desirability) of administrative separation of powers compels us to rethink the extant positive, normative, and legal accounts of constitutional actors exerting control over the administrative state. Though this is not the place to rehash or defend my theory or my mapping of administrative separation of powers, this project's reliance

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things, considerations of civil rights and civil liberties); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 102 (2013) (describing the role played by inspectors general in monitoring national security agencies from within). For older, foundational discussions of separation and divisions within agencies, see, for example, JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1981); Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 761–81 (1981); Strauss, *The Place of Agencies*, *supra* note 6, at 578.

<sup>15</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 529–70.

<sup>16</sup> See *id.* For an even more granular dissection of intra-agency dynamics and power centers (based on, among other things, occupation and task), see Magill & Vermeule, *supra* note 1.

<sup>17</sup> Michaels, *Enduring, Evolving*, *supra* note 1, at 529–70; see also Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152, 1159–67 (2015) (book review) [hereinafter Michaels, *Running Government*].

on that prior work nevertheless requires a brief review of the tripartite administrative scheme and how it functions.

**Agency Leaders.** Presidentially appointed agency heads and their top deputies are often the statutorily responsible agenda setters and decision makers. It is they who formally propose and promulgate rules and render many of the agency's final decisions. In most respects, these leaders are the administrative standard-bearers for the President. After all, the President tends to appoint officials who share her ideological and programmatic commitments.<sup>18</sup> And, once appointed, these officials can be expected to remain loyal, energetic, and partisan champions of the White House's agenda.<sup>19</sup> Those who fail to do so risk being marginalized or summarily fired.<sup>20</sup> (I will discuss the special circumstances surrounding independent agencies and the more politically insulated commissioners who lead them in Part III of this project.)

**Civil Servants.** Agency leaders cannot run agencies by themselves. Because an agency's responsibilities are sufficiently great, complex, and variegated, the relatively small and often inexperienced<sup>21</sup> group of appointed leaders must necessarily rely on lower-level government employees to help with the research, design, promulgation, implementation, and enforcement of administrative policies.<sup>22</sup>

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<sup>18</sup> See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* (2008); David Fontana, *The Second American Revolution in the Separation of Powers*, 87 *TEX. L. REV.* 1409, 1414 (2009) (noting "substantial partisan and ideological homogeneity" among agency leaders in any given presidential administration); see also BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 33 (2010) (stressing the White House's expectation that appointed agency leaders are loyal to the President's agenda).

<sup>19</sup> Michaels, *Enduring, Evolving, supra* note 1, at 538–40 (describing the strong connection between the White House and agency heads).

<sup>20</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 706–10 (1988) (Scalia, J., dissenting) (describing the constitutional imperative for strong presidential control over Executive personnel).

<sup>21</sup> For discussions of the relative competence of career government employees compared to agency leaders, see DAVID M. COHEN, *AMATEUR GOVERNMENT: WHEN POLITICAL APPOINTEES MANAGE THE FEDERAL BUREAUCRACY* 1–8 (Brookings Inst., Ctr. for Pub. Mgmt., Working Paper No. 96-1, 1996), <http://www.brookings.edu/~media/research/files/papers/1996/2/bureaucracy%20cohen/amateur.pdf>; LEWIS, *supra* note 18, at 195–97. For discussions of the short tenure of most politically appointed agency leaders, see Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *VAND. L. REV.* 599, 613–14 (2010); David Fontana, *Government in Opposition*, 119 *YALE L.J.* 548, 610–11 (2009); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 *S. CAL. L. REV.* 913, 919–20 (2009) [hereinafter O'Connell, *Vacant Offices*].

<sup>22</sup> See DAVID E. LEWIS & JENNIFER L. SELIN, *ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* 68–69 (2012), [http://permanent.access.gpo.gov/gpo37402/Sourcebook-2012-Final\\_12-Dec\\_Online.pdf](http://permanent.access.gpo.gov/gpo37402/Sourcebook-2012-Final_12-Dec_Online.pdf) (emphasizing the small number of appointed agency leaders relative to the large number of permanent agency employees); Cary Coglianese, *The Internet and Citizen Participation in*

An extremely high percentage of those lower-level government employees are career civil servants, insulated by law and custom from political influence and pressure. At the civil service's mid-twentieth century height, more than 90% of the federal civilian workforce was so classified.<sup>23</sup> Even today, amid sustained and often successful campaigns to undermine the civil service from within<sup>24</sup> and without,<sup>25</sup> the rank-and-file are still largely tenured—meaning that they cannot be fired, demoted, or promoted based on political considerations.<sup>26</sup> These insulated and integral civil servants thus have the opportunity and authority to help shape administrative policy.<sup>27</sup>

Institutionally speaking, one way they help shape that policy is by exercising discretion when implementing and administering programs on the ground. They do so in the course of, among other things, conducting inspections, exercising prosecutorial discretion, awarding grants,<sup>28</sup> and rendering benefits-eligibility determinations.<sup>29</sup> Another

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*Rulemaking*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 33, 36 (2005); Strauss, *The Place of Agencies*, *supra* note 6, at 586 (“The President and a few hundred political appointees are at the apex of an enormous bureaucracy . . .”).

<sup>23</sup> Harry S. Truman, Address at the 70th Anniversary Meeting of the National Civil Service League (May 2, 1952), [http://www.trumanlibrary.org/publicpapers/index.php?pid=1284&st=&st1](http://www.trumanlibrary.org/publicpapers/index.php?pid=1284&st=&st1;); see also LEWIS & SELIN, *supra* note 22, at 69 fig.1.

<sup>24</sup> See Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1042–50 (2013) [hereinafter Michaels, *Privatization's Progeny*] (describing the “marketization of the bureaucracy”).

<sup>25</sup> See Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 745–50 (2010) [hereinafter Michaels, *Privatization's Pretensions*] (characterizing the contracting out of government service responsibilities as having the effect of sidelining civil servants).

<sup>26</sup> Additionally, civil servants are expressly prohibited from engaging in partisan political activities. Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified at 5 U.S.C. §§ 7321–26 (2012)). This statutory prohibition on politicking further reduces pressure on civil servants to “perform political chores in order to curry favor with their superiors” and promotes “the impartial execution of laws.” U.S. Civil Serv. Comm'n v. Ass'n of Letter Carriers, 413 U.S. 548, 565–66 (1973).

<sup>27</sup> By emphasizing the importance of administrative records and factual findings (much of which civil servants necessarily develop) in the course of judicial review, the courts have effectively further elevated the role played by civil servants. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 47–57 (1983) (holding that an agency acted arbitrarily and capriciously when it failed to consider reasonable alternatives to the position the agency adopted); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) (requiring a more stringent review of the Transportation Secretary's decision “based on the full administrative record that was before the Secretary at the time he made his decision”); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977) (insisting on the existence of an “adequate [administrative] record” to ensure “meaningful [judicial] review”); see also Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (illuminating Supreme Court decisions that “override executive positions that [the Justices] found untrustworthy, in the sense that executive expertise had been subordinated to politics”).

<sup>28</sup> See Sanford C. Gordon, *Politicizing Agency Spending Authority: Lessons from a Bush-Era Scandal*, 105 AM. POL. SCI. REV. 717, 718–22 (2011) (describing the traditional locus of grant-awarding decisions).

way they help shape policy is by resisting efforts by political leaders to implement unreasonable or simply hyperpartisan agendas.<sup>30</sup> By and large civil servants see themselves as professional public servants. That is, they see themselves as engineers, economists, chemists, biologists, attorneys, social workers, accountants, etc.—and, as David Lewis puts it, “often feel bound by legal, moral, or professional norms to certain courses of action and these courses of action may be at variance with the president’s agenda.”<sup>31</sup> Harold Bruff concurs. Bruff explains that “[b]y training and inclination, bureaucrats seek legal authority for their actions. Accordingly, they constitute an often unappreciated bulwark to the rule of law in its everyday application to the citizens.”<sup>32</sup> Moreover, as unelected personnel insulated from White House and voter control, these civil servants lack the democratic bona fides that legislators and even politically appointed agency officials enjoy. As such, they—*not unlike judges*—are apt to prove themselves through their commitment to professional norms and to the rule of law and by emphasizing reason-giving to explain and justify their (at times countermajoritarian) interventions.<sup>33</sup>

For these reasons, it should not be surprising that the politically responsive agency leaders and politically insulated civil servants are potentially rivalrous administrative actors with competing interests,

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<sup>29</sup> See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1130 (2000) (“It is difficult to conceive of an area in which the distance between grand policy decisions and ground-level implementation is as vast as in the welfare system . . . . Policies are implemented through the aggregate actions of literally thousands of officials who take actions with respect to individual cases.”); David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 838–40 (2004) (describing the ways in which rank-and-file government officials can influence welfare policy on the ground).

<sup>30</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 556–57, 582 (describing legal, institutional, and professional reasons why civil servants are well positioned to resist unsound directives); Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 622–24, 630 (2013) (identifying opportunities and incentives for government personnel to resist legal and policy directives); Alex Hemmer, Note, *Civil Servant Suits*, 124 YALE L.J. 758, 762 (2014) (describing civil servants as using the courts to challenge the legality of assignments or directives given by agency heads).

<sup>31</sup> LEWIS, *supra* note 18, at 30; *see also* Metzger, *The Interdependent Relationship*, *supra* note 1, at 445; Strauss, *The Place of Agencies*, *supra* note 6; *cf.* CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY* 89 (1983) (emphasizing findings that career government workers embrace their professional and legal duties).

<sup>32</sup> HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 408 (2006).

<sup>33</sup> For treatments of bureaucratic professionalism, *see*, for example, GOODSSELL, *supra* note 31, at 89; LEWIS, *supra* note 18, at 28–30; Michaels, *Enduring, Evolving*, *supra* note 1, at 556–58.

commitments, and sources of accountability.<sup>34</sup> The civil servants, though technically below the appointed leadership on agency “org charts,” are not true subordinates.<sup>35</sup> That is, they are not agents of the Administration so much as they are servants of the State—and thus, as Peter Strauss contends, savvy agency heads recognize that the civil service’s “cooperation must be won to achieve any desired outcome.”<sup>36</sup>

**Civil Society.** Members of the public are empowered to participate directly, broadly, and meaningfully in most facets of administrative governance. Through statutes, regulations, and decisional law, individuals, special interest groups, regulated parties, and the like are given the tools and legal authority to, among other things, demand access to agency information,<sup>37</sup> petition for a new rule or for a change in an existing rule,<sup>38</sup> and comment on a pending rule.<sup>39</sup> Additionally, members of the public may be formally commissioned to participate via congressionally created advisory committees. And, lastly, they may challenge agency officials for giving insufficient attention to public requests<sup>40</sup> or comments<sup>41</sup> or for generally acting in a procedurally impoverished fashion.<sup>42</sup>

Scholars taking note of civil society’s role in the administrative process liken members of the public to hammers that “pound agen-

<sup>34</sup> This understanding is different from some seminal accounts, which characterize career agency personnel as agents of the appointed leaders. See *supra* note 9. To view the career civil service merely as agents of agency principals is to gloss over civil servants’ legal independence and to minimize their professional and cultural commitments. Indeed, if anything, civil servants may be better understood as agents of the State writ large.

<sup>35</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 716–17 (1988) (Scalia, J., dissenting) (contending that a hierarchical relationship between a superior and subordinate is one in which the former can summarily remove the latter).

<sup>36</sup> Strauss, *The Place of Agencies*, *supra* note 6, at 586 (“[T]he bureaucracy constitutes an independent force . . . and its cooperation must be won to achieve any desired outcome.”); Magill & Vermeule, *supra* note 1, at 1037–38 (“The conflicts between political appointees and the ‘bureaucracy’—usually taken to refer to well-insulated-from-termination members of the professional civil service—are legion.”).

<sup>37</sup> See Freedom of Information Act, 5 U.S.C. § 552 (2012).

<sup>38</sup> See Administrative Procedure Act, 5 U.S.C. § 553(e) (2012).

<sup>39</sup> See 5 U.S.C. § 553(c).

<sup>40</sup> See 5 U.S.C. § 702 (2012); *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007) (obligating the EPA to more fully consider a public petition requesting the agency promulgate a rule limiting greenhouse gas emissions).

<sup>41</sup> See 5 U.S.C. § 702; *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (rejecting an agency rule in part because the agency failed to respond to material comments).

<sup>42</sup> See 5 U.S.C. § 706(2)(A), (D); *Mathews v. Eldridge*, 424 U.S. 319, 323–26 (1976) (formalizing a three-part test for assessing the constitutionality of administrative adjudicatory procedures); *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1107 (4th Cir. 1985) (invalidating an agency rule on the ground that the final rule did not represent a “logical outgrowth” of the proposed rule that the public was invited to comment on).

cies.”<sup>43</sup> While that comparison is certainly true, it is also somewhat incomplete. It ignores the constructive, collaborative, and participatory role that the public plays in helping set the administrative agenda by lobbying agency officials, drawing media attention to pressing concerns, proposing new rules, and helping to shape already proposed ones. After all, agency heads and civil servants that fail to consider petitions for rules or the comments filed in response to already proposed rules risk judicial sanction.<sup>44</sup> Regardless whether agency personnel care about the reputational effects of such judicial repudiation, neither agency leaders nor rank-and-file government employees relish the prospect of a court forcing them to, in effect, start over—that is, to redo a rulemaking initiative or readjudicate a claim from scratch.<sup>45</sup>

The incentive for civil society to challenge both agency leaders and civil servants ought to be apparent. Invariably some segment of the vast and diverse public will be adversely affected by any change (or non-change) in administrative policy—and thus will use formal, legal channels and any available political conduits to constrain, prod, or reorient agency officials.

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<sup>43</sup> Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 683 (2012); see also PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 159–60 (2009) (characterizing administrative procedures as empowering the public to hold agencies accountable).

<sup>44</sup> See, e.g., *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (emphasizing that notice and comment allows members of the public to “develop evidence in the record to support their objections” upon judicial review); *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978) (“[Notice and comment ensures] that the agency maintains a flexible and open mind about its own rules.”); *Nova Scotia Food Prods. Corp.*, 568 F.2d at 252–53 (requiring agency officials to respond to material comments in their concise general statement that accompanies publication of final agency rules); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973) (requiring agency officials to respond to material comments filed by members of the public).

<sup>45</sup> STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE REGULATION* 33–51 (1993) (underscoring the challenges agencies encounter when complying with burdensome administrative procedures); Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443, 443 (1990) (characterizing judicial review as “burden[ing], dislocat[ing], and ultimately paralyz[ing] agency] rule making efforts.”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) (describing the rulemaking process as “heavily laden with additional procedures, analytical requirements, and external review mechanisms”); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7, 8 (1991) (contending that rigorous judicial review is leading to “policy paralysis in many regulatory contexts”); see also *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 770–72 (1969) (Black, J., concurring) (recognizing the hardships experienced by agencies compelled to redo an administrative initiative).

Above I intimated some linkages between, first, agency leaders and the President and, second, between civil servants and judges. One could further draw a connection between civil society and members of Congress. After all, the broadly inclusive, diverse, and cacophonous public can be analogized to a popular, diverse, deliberative body not altogether unlike Congress, which is itself comprised of different, competing interests and is engaged in debate, policy creation and obstruction, and administrative oversight.<sup>46</sup> Of course, special interests can at times dominate (and distort) civil society's role on the administrative stage.<sup>47</sup> But even in this respect the analogy to Congress holds, as both the House and Senate can likewise fall prey to powerful, often moneyed, interests.<sup>48</sup>

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Two notes bear mentioning. First, my depiction of the three administrative rivals is an admittedly rosy and stylized one. There is no guarantee that each of the rivals will serve as an engaged participant in the administrative process or act sufficiently rivalrous. (That's true, of course, of the constitutional branches too. Congress, the President, and the courts sometimes fail to assert their authority and to challenge their rivals.) Nevertheless it is important to highlight the ways in which administrative stakeholders are empowered and encouraged to act forcefully and rivalrously even if there is some slippage in practice.<sup>49</sup>

Second, I recognize that the roster of administrative rivals could always be lengthened beyond the trio identified above. Other actors participate in administrative governance and their involvement no doubt further complicates the interactions between and among consti-

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<sup>46</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 558–59 (drawing comparisons between civil society in the administrative arena and Congress on the constitutional stage).

<sup>47</sup> Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012) (characterizing civil society as often dominated by powerful interest groups that seek to influence public opinion and administrative actors); Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 477–78 (2012) (focusing on the outsized role played by regulated parties in administrative proceedings).

<sup>48</sup> See, e.g., LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

<sup>49</sup> In addition, I recognize that certain legal protocols and frameworks that I emphasize as central to a well-functioning administrative separation of powers are not always adhered to in practice. See Farber & O'Connell, *supra* note 9, at 1138–40 (emphasizing the gap between administrative law on the books and administrative law in practice); Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65 (2015) (showing that agencies avoid some of the statutorily prescribed steps when promulgating rules).

tutional and administrative rivals occupying what Aziz Huq and I call the “thick political surround.”<sup>50</sup> For example, officials from international organizations, from foreign governments, from other federal line agencies, from the Office of Management and Budget, from state governments, and from municipalities can each push and pull on any one agency’s appointed leaders, civil servants, and public participants.<sup>51</sup>

Surely, we could identify and likely chart concentric circles or tiers of rivalries—and thus more formally and explicitly acknowledge and take into account these additional actors. But the more we go down the path of charting each and every potential player (many of whom fit, in fact, within the civil society rubric), the more we risk overburdening a project in ways that do not necessarily enrich or deepen our understanding of the interplay of horizontal and vertical rivalries. After all, even assuming the next tier of entities capable of influencing the administrative domain cannot be folded into the capacious civil society category, those actors still aren’t as powerful or as ever present as are the immediate, constant administrative trinity (agency leaders, civil servants, and civil society) who operate within and across practically all of the domestic administrative sectors.<sup>52</sup> Additionally, any such second tier of actors operates just as forcefully on the constitutional principals—and yet we have little difficulty in cabining their involvement when we talk about a tripartite constitutional separation of powers.<sup>53</sup>

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<sup>50</sup> See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* (forthcoming 2016) (manuscript at 30–38) (on file with the New York University Law Review), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2758219](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758219).

<sup>51</sup> For states’ role, see Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 *COLUM. L. REV.* 459, 486–98 (2012); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 *VA. L. REV.* 953 (2014). For federal agencies’ role, see Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 *SUP. CT. REV.* 201, 211–12, 214, and Jason Marisam, *Duplicative Delegations*, 63 *ADMIN. L. REV.* 181, 231–36 (2011). For political parties, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2329–30 (2006). And, for other rivalrous actors within federal agencies, see PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 2–8 (1993).

<sup>52</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 537–38 (distinguishing tripartite administrative separation of powers from other renditions, including simply administrative pluralism).

<sup>53</sup> For discussions of the apparent salience of trinitarian divisions of government, see Bruce Ackerman, *Good-bye, Montesquieu*, in *COMPARATIVE ADMINISTRATIVE LAW* 128, 128 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010). For that structure’s importance in the administrative arena, see Michaels, *Enduring, Evolving*, *supra* note 1.



B. *Rethinking Bureaucratic Control in Light of  
Administrative Separation of Powers*

The insights gleaned from prying open the black box of administrative agencies compel us to reexamine the relationship between and among constitutional and administrative actors and to pay special attention to both the vertical and horizontal dimensions of bureaucratic control. Whereas many of the leading studies have focused primarily on the constitutional branches exercising vertical control over relatively monolithic and static agencies,<sup>54</sup> the revised treatment I propose gives due weight to the often-overlooked horizontal, intra-administrative components of bureaucratic control as well.<sup>55</sup> That is to say, my revised treatment places special emphasis on the three constitutional branches working with, and against, three administrative rivals—which are simultaneously engaged in their own exercises of horizontal checking, balancing, and collaborating. This two-dimensional understanding of vertical and horizontal engagement illuminates a far more complicated set of connections, alliances, and conflicts. Specifically, the existence of a tripartite system of separated and checked administrative power opens, forecloses, strengthens, and alters opportunities for constitutional actors to intervene. (As I'll argue later, the existence of vertical and horizontal checks also changes the longstanding imperative for constitutional actors to intervene.)

In what follows, I sketch the broad contours of three approaches to administrative control. These three approaches are not meant to be exhaustive. Nor are they intended to take the place of formal, rigorous modeling. Rather they serve a more modest but still foundational purpose: to highlight the constitutional actors' ambitions and incentives and to consider how those actors might exert influence over the fragmented, rivalrous administrative domain. Accordingly, the three approaches—with labels lifted from the international relations lexicon—track constitutional actors' preferences for control along three key dimensions: whether the constitutional actors are capable of exercising strong forms of control, whether they prioritize short-term or long-term control, and whether they exercise control primarily for self-interested or custodial purposes.

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<sup>54</sup> See *supra* notes 7–10 and accompanying text.

<sup>55</sup> I credit Gillian Metzger's recent symposium essay, which emphasizes the importance of thinking about administrative and constitutional checks as reinforcing one another. See Metzger, *The Interdependent Relationship*, *supra* note 1; cf. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 688–90 (2000) [hereinafter Ackerman, *The New Separation*] (noting the relevance of separation of powers at the administrative level of government).

The first such approach, dubbed the *proxy-war* approach, reflects a strategy in which each of the constitutional branches enters into long-term alliances with an administrative partner. The constitutional branches use these administrative partners as proxies—that is, as vehicles through which to exert greater control over administrative governance decisions. The second strategy, called the *realpolitik* approach, envisions shifting, rather than static alliances, with the different constitutional branches selectively partnering with any and all of the administrative rivals as opportunities arise, circumstances change, and allegiances wax and wane. And the third, named the *balance-of-power* approach, characterizes constitutional behavior as largely custodial. Rather than acting as self-interested partisans seeking to exploit or create imbalances in the administrative separation of powers (to further their institutional, programmatic, or partisan interests), the constitutional branches serve instead as custodians, promoting a well-functioning administrative separation of powers, even at the expense of advancing their own, branch-specific parochial objectives.

### 1. *Control as a Proxy War*

Under this first approach to bureaucratic control, each of the constitutional branches enters into a de facto long-term partnership with one of the three administrative stakeholders. That administrative actor would then be relied upon to help advance its constitutional partner's programmatic and institutional interests in the administrative arena. That administrative actor would also be well positioned to help thwart opposing or countervailing initiatives championed by rival constitutional-administrative duos. Because this approach envisions the constitutional branches as effectively vying to assert control, if not dominance, over administrative matters—and doing so by bolstering or pressuring and then directing an administrative “proxy”—one could readily draw parallels between this approach and a geostrategic practice commonly associated with the Cold War, when the global superpowers engaged in lower-stakes skirmishes through their client states or through like-minded rebel groups.<sup>56</sup>

There are natural affinities between constitutional and administrative stakeholders, and thus no shortage of opportunities to forge

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<sup>56</sup> See, e.g., RONALD E. POWASKI, *THE COLD WAR: THE UNITED STATES AND THE SOVIET UNION, 1917–1991*, at 87, 90 (1998) (describing indirect U.S.-Soviet military engagement through proxies). Of course, the practice perdures. See, e.g., Mohamad Bazzi, *Lebanon and the Start of Iran and Saudi Arabia's Proxy War*, *NEW YORKER* (May 26, 2015), <http://www.newyorker.com/news/news-desk/lebanon-and-the-start-of-iran-and-saudi-arabias-proxy-war>.

durable alliances. As I mentioned above (and explained and defended more fully elsewhere<sup>57</sup>), each of the administrative rivals bears dispositional resemblances to a corresponding constitutional actor. Civil society takes on, in important respects, the pluralistic Congress's popular, deliberative role; politically appointed agency leaders do the same with respect to the partisan President's agenda-setting role; and the tenured civil service substantially reprises the judiciary's role, namely that of a politically insulated institution whose members are generally committed to impartial, reasoned analysis and engagement.<sup>58</sup>

***President-Agency Heads.*** One might assume that the strongest natural alliance is between the President and the leaders of Executive agencies.<sup>59</sup> Appointed by the President, and then serving at her pleasure, agency heads are already expected to (and largely do) champion the White House's agenda.<sup>60</sup>

The President, for her part, arguably cares more than Congress or the courts about controlling the administrative agenda.<sup>61</sup> She is not only constitutionally authorized<sup>62</sup> (and required<sup>63</sup>) to take care that the laws are faithfully executed, but is also expected to make good on her campaign promises and to carry out her programmatic commitments. In an era, such as ours, when government responsibilities are largely channeled through administrative agencies (in part because of

<sup>57</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 556–60.

<sup>58</sup> See *id.*

<sup>59</sup> Again, I discuss the special case of independent agencies, *infra* Section III.C.

<sup>60</sup> See *supra* notes 18–19 and accompanying text (describing the close alignment between the President and top agency appointees).

<sup>61</sup> See Joel D. Aberbach & Bert A. Rockman, *Mandates or Mandarins? Control and Discretion in the Modern Administrative State*, 48 PUB. ADMIN. REV. 606, 606 (1988) (characterizing presidential administrations as driven to advance their administrative agendas); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008) (explaining how presidents want to remake agencies in their own images); Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 235, 246 (John E. Chubb & Paul E. Peterson eds., 1985) (discussing how the President uses appointments to shape her administrative agenda); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 18–19 (1994) (describing various forms of presidential control over agencies).

<sup>62</sup> CALABRESI & YOO, *supra* note 8, at 377–78 (emphasizing the President's Article II take care responsibilities); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992) (similar).

<sup>63</sup> Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015) (underscoring the responsibilities and not just the prerogatives associated with the Take Care Clause).

congressional obstinacy<sup>64</sup>), it is quite apparent that the President could and does profit considerably by exercising tight control over the administrative process.<sup>65</sup> Moreover, the agency heads are likely the most powerful of the administrative rivals—and thus the most attractive to partner with. They’re the ones, after all, who take the lead in establishing the agency’s priorities and who make many of the final decisions regarding agency actions.<sup>66</sup>

Under this proxy-war approach, the President influences administrative policy by leaning on, or enticing, the appointed leaders to advance the White House’s agenda.<sup>67</sup> The President might go further. She might increase the likelihood that her agenda carries the day by making the political leadership atop agencies especially strong vis-à-vis *its* coordinate rivals, namely the civil service and civil society. Indeed, Presidents can skew and even subvert the administrative separation of powers in favor of their administrative proxies.<sup>68</sup> They can do so by, among other things, extending the reach of the political leadership deeper into the agency,<sup>69</sup> what Paul Light calls political layering.<sup>70</sup> They can promote privatization,<sup>71</sup> which has the effect of

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<sup>64</sup> See Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1149–59 (describing present-day congressional gridlock).

<sup>65</sup> See Kagan, *supra* note 7, at 2248 (emphasizing the importance to the President of administrative policymaking, particularly in times of divided, obstructionist government); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1322–23 (2012) (stressing that Presidents rely even more heavily on administrative policymaking during congressional impasses).

<sup>66</sup> See, e.g., RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 86 (6th ed. 2011) (describing differences between officers of the United States and regular federal employees).

<sup>67</sup> Barron, *supra* note 61, at 1096 (commenting on Presidents’ “novel and aggressive use of their powers of appointment to remake agencies in their own image”); Kagan, *supra* note 7, at 2282–318 (describing various ways in which the President directs and influences administrative agency officials); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (characterizing White House influence of administrative agencies).

<sup>68</sup> I make no strong claim that Presidents have been attuned to the explicit architecture of the administrative separation of powers, but am instead suggesting that Presidents have acted in a manner consistent with an implicit recognition that administrative agencies are comprised of rivalrous power centers.

<sup>69</sup> See, e.g., LEWIS, *supra* note 18, at 30–38 (describing political layering on top of agencies).

<sup>70</sup> See PAUL C. LIGHT, A GOVERNMENT ILL-EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT 57, 65, 177–81 (2008).

<sup>71</sup> For broad-ranging discussions of the privatization or contracting out of government service responsibilities, see, for example, KEVIN R. KOSAR, CONG. RES. SERV., RL33777, PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION (2006); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007) [hereinafter VERKUIL, OUTSOURCING SOVEREIGNTY]; David A. Super, *Privatization*,

sidelining an administrative rival, namely the civil service.<sup>72</sup> And they can marketize the bureaucracy.<sup>73</sup> The marketization of the bureaucracy involves, among other things, the reclassification of civil servants as at-will employees. It thus has the effect of defanging an otherwise independent agency workforce and rendering those rank-and-file employees less rivalrous and more dependent on the agency leaders' favor.<sup>74</sup>

Neither direct pressure exerted on agency heads nor weakening those agency heads' administrative rivals guarantees perfect presidential control. (Likewise, arming a client state or rebel group does not necessarily redound to the benefit of the patron superpower.) Agency leaders could try to insulate themselves from White House scrutiny and pressure.<sup>75</sup> Or they could, as some presidential aides fear, "go native"<sup>76</sup>—that is, be co-opted by civil servants. (Any co-option of that sort would seemingly reflect horizontal, intra-administrative influences exerting greater force than vertical ones.) But in most cases, the President can expect a decent alignment of interests between the White House and the appointed agency heads. Furthermore, the President can tighten that alignment through the use of Executive Orders directing and constraining agency leaders<sup>77</sup> as well as by assigning White House personnel<sup>78</sup> and officials in the Office of Management and Budget to closely oversee agency work.<sup>79</sup>

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*Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393 (2008) [hereinafter *Super, Privatization, Policy Paralysis, and the Poor*].

<sup>72</sup> See Michaels, *Privatization's Pretensions*, *supra* note 25, at 745–50 (explaining how compliant contractors highly responsive to the agency leaders stand in for more independent, tenured civil servants).

<sup>73</sup> See Michaels, *Privatization's Progeny*, *supra* note 24, at 1049–50 (identifying and explaining the "marketization of the bureaucracy").

<sup>74</sup> See *id.*

<sup>75</sup> See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

<sup>76</sup> STEVEN F. HAYWARD, *THE AGE OF REAGAN: THE FALL OF THE OLD LIBERAL ORDER, 1964–1980*, at 363 (2001); see also RICHARD P. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY 39–41* (1975) (describing White House fears that appointed agency officials will be disloyal to the President); Scott C. James, *The Evolution of the Presidency: Between the Promise and the Fear*, in *THE EXECUTIVE BRANCH 3*, 28 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

<sup>77</sup> See Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 462–63 (1999) (emphasizing the importance of executive orders in directing and constraining administrative officials).

<sup>78</sup> See, e.g., Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577–83 (2011) (describing the President's appointment of White House "czars" to help oversee the work of federal agencies).

<sup>79</sup> See Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081–82 (1986) (emphasizing OMB's role in ensuring agency actions are consistent with White House priorities). For those who stress OMB's role in conducting cost-benefit analyses, involvement of that sort might well empower

To be sure, there are also less obvious but still quite significant affinities between civil society and Congress as well as between the civil service and the judiciary. These affinities could form the bases of sustainable and mutually beneficial proxy alliances. And even if such alliances would not be considered ideal partnerships,<sup>80</sup> they are nonetheless more likely to come together in response to the President and the agency heads already teaming up.

***Congress-Civil Society.*** Congress, for its part (and, again, either organically or in response to the formation of a formidable alliance between the President and agency leaders), might focus its attention on a partnership with civil society. Congress might do so to promote pluralistic, democratic interests within the administrative arena. This is, after all, one of Congress's principal roles on the constitutional stage. Or Congress might do so simply to frustrate overreaching by presidential proxies who represent, quite possibly, only the discrete demographic and geographic constituencies that propelled the President into office.

Congress can solidify its partnership with civil society by requiring extensive agency disclosures to the public, by commissioning public advisory committees, and by creating and expanding rights for the public to participate in administrative proceedings, petition for new rules, comment on already proposed rules, and challenge agency actions in court.<sup>81</sup> After all, as is true with 535 members of Congress poised to challenge the President, some segment of civil society will be positioned and motivated to question or prod agency leaders on practically every matter of consequence.<sup>82</sup>

Some of these features of a congressional-civil society alliance might seem familiar to those steeped in what I have been calling the

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agency technocrats—presumably members of the career civil service—at the expense of agency heads. See Magill & Vermeule, *supra* note 1, at 1058 (describing power bases within agencies and explaining how various practices, requirements, and customs affect the relative influence of such agency professionals as lawyers, economists, and scientists).

<sup>80</sup> See *infra* notes 88, 113–15 and accompanying text (describing the challenges associated with a long-term Congress-civil society alliance).

<sup>81</sup> See *supra* notes 37–42 and accompanying text (detailing statutory provisions authorizing various forms of public participation). It is no doubt likely that these procedures were prescribed for reasons entirely unrelated to constitutional-administrative proxy wars. Nevertheless, they now serve as tools that facilitate various proxy relationships.

<sup>82</sup> In fact, it is seemingly far more likely that civil society will serve as a vigilant check on its administrative rivals than Congress will check its constitutional rivals, especially during periods of unified government. Party politics, party discipline, and organizational hierarchy are much more salient in Congress than in the more amorphous and anarchic civil society space. See Michaels, *Enduring, Evolving*, *supra* note 1, at 559–60.

conventional story surrounding bureaucratic control.<sup>83</sup> In particular, measures that empower civil society seem consistent with the seminal “fire alarm” model developed by McCubbins and Schwartz.<sup>84</sup> But there are important differences. The measures I mention here aren’t focused on helping Congress swoop in to remedy some administrative misdeed through the exercise of vertical, top-down control. That’s essentially what McCubbins and Schwartz envision.<sup>85</sup> Rather, the measures that I highlight involve a commingling of vertical and horizontal forms of control with Congress empowering civil society to do most of the heavy lifting as that proxy dukes it out with agency heads and civil servants. By proposing new rules, helping to shape already proposed rules, seeking agency records, and using the courts to challenge agency practices and procedures as unreasonable or unlawful, members of the public are not just alerting Congress. They’re also directly contesting the actions contemplated or rendered by presidential appointees and civil servants alike.

This deputization of the public—in truth, more *fire brigade* than *fire alarm*—is consistent with the general understanding that Congress created the sprawling and powerful administrative state in large part because its members couldn’t, or simply didn’t want to, direct the entire modern welfare state.<sup>86</sup> Given that understanding of an overburdened, technically unsophisticated, or politically indecisive Congress, it is quite natural to doubt Congress’s appetite for closely overseeing and participating in the day-to-day operations of administrative governance—particularly when Congress can instead delegate that charge, too, to someone or something else more willing or able.<sup>87</sup>

Even more so than in the case of the President-agency heads proxy relationship, there is no guarantee that an empowered civil society will work *for* Congress. (Indeed that very formulation is problematic: Congress works for the People.) Congress doesn’t usually hand pick those it empowers to participate meaningfully in adminis-

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<sup>83</sup> See MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 46–47 (1989).

<sup>84</sup> McCubbins & Schwartz, *supra* note 7, at 165–67.

<sup>85</sup> See *id.*

<sup>86</sup> DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 12–13 (1995).

<sup>87</sup> See also Katyal, *supra* note 1, at 2322, 2342 (asserting that congressional oversight of Executive agencies is robust usually only in periods of divided government); Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 AM. J. POL. SCI. 387, 389–90 (2014) (showing that Congress has trouble keeping tabs on its own oversight responsibilities); Eric Posner, *Imbalance of Power*, ERIC POSNER (Feb. 7, 2014), <http://ericposner.com/imbalance-of-power> (describing how Congress lacks the personnel and resources to fully monitor the far more expansive Executive Branch).

trative governance. And it has few tools to discipline those members of civil society who use their administrative powers in ways that frustrate congressional interests.<sup>88</sup> While it is of course true that Congress can, over the long-term, expand or scale back participatory rights—punishing or rewarding specific segments of the public—that means of discipline is a blunt and reactive one, likely to have little effect on many of the scattered groups of individuals and organizations that constitute civil society. Thus because Congress might be able to rely on civil society only to broaden the administrative agenda and to challenge decisions by agency leaders and civil servants—but not necessarily to champion Congress’s substantive and institutional interests (to the extent they exist<sup>89</sup>)—legislators might be less enthusiastic about administrative proxy wars than the President would be. That’s why, as I explain in the next subsection, Congress seems a more natural practitioner of administrative realpolitik.

**Judiciary-Civil Service.** Lastly, the judiciary could forge a proxy relationship with what I posit is its closest administrative ally, the civil service. Civil servants are, again, like federal judges in interesting and important ways. To be sure, their actual powers are quite different from those of judges. But the two groups nevertheless share important character traits and institutional affinities. Both are purposefully insulated from political pressures through the assurance of continued employment during good behavior.<sup>90</sup> And because both lack democratic footing and a popular mandate, judges and civil servants tend to emphasize impartial, reasoned decision making, justifying themselves and their insights and actions as rational, legal, and consistent with best practices.<sup>91</sup>

Obviously this link is tightest when it comes to agency lawyers who, similar to judges, provide legal analysis and work specifically to promote the rule of law. But the connection runs deeper, sweeping in, among others, scientists, accountants, and social workers. Though these civil servants are not directly engaged in the interpretation or application of the law, they nevertheless are expected to serve as rational, apolitical actors who promote and follow best professional practices and stand as a bulwark to resist unsound political or popular impulses.

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<sup>88</sup> If anything, a Congress that fails to provide such participatory tools might be disciplined by civil society. That is, the public might vote their representatives out of office.

<sup>89</sup> See *infra* note 111.

<sup>90</sup> Of course, judicial tenure is constitutionally assured, whereas the protections afforded to civil servants are primarily statutory.

<sup>91</sup> See *supra* notes 31–33 and accompanying text.



Given the analogous roles judges and civil servants play in their respective spheres, judges might think that their institutional interests in advancing and upholding the rule of law, in promoting reasoned, professional decision making, and in resisting hyperpartisan overreaching are best served in the administrative arena through a robust civil service. Judges can (and do) bolster the position of civil servants vis-à-vis their administrative rivals by using various administrative tools and doctrines to protect civil servants' independence,<sup>92</sup> to encourage and endorse well reasoned agency actions appropriately influenced by career staffers, and to more aggressively scrutinize (if not categorically reject) agency actions undertaken without much expert input or procedural rigor.<sup>93</sup> Scholars have read recent landmark administrative law cases such as *Massachusetts v. EPA*<sup>94</sup> and *United States v. Mead Corp.*<sup>95</sup> as suggestive of a jurisprudence that favors agency expertise<sup>96</sup> and agency fidelity to more formal, thorough administrative procedures,<sup>97</sup> respectively. Greater showing of agency expertise and greater compliance with administrative procedures invariably requires considerable participation by civil servants. To the extent agency leaders want to receive greater judicial deference, they'll be likely to eschew unilateral decision making.<sup>98</sup>

Of course, there is no guarantee that civil servants will advance the interests of the judiciary to a tee. Courts can rarely discipline civil servants, and some civil servants will surely fall short of the ideal of a

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<sup>92</sup> See, e.g., *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015) (interpreting federal employee whistleblower protections broadly); *Rutan v. Republican Party*, 497 U.S. 62, 72–79 (1990) (prohibiting the hiring, firing, transferring, or promoting of low-level public employees based on party affiliation and support); *Bush v. Lucas*, 462 U.S. 367, 381–84 & 382 n.18 (1983) (emphasizing the importance of federal laws protecting civil servants from being assigned highly politicized work responsibilities).

<sup>93</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (insisting that the EPA undertake more intensive consideration of the scientific and technical evidence surrounding greenhouse gases and climate change); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 34 (1983). In addition, there has been a recent judicial effort to liberalize standing for civil servants, enabling them to bring lawsuits of their own against agency heads. See Hemmer, Note, *supra* note 30, at 776–77 (2014). And, also recently, the Supreme Court has treated whistleblower protections that safeguard federal employees quite broadly. See *MacLean*, 135 S. Ct. at 913.

<sup>94</sup> 549 U.S. 497 (2007).

<sup>95</sup> 533 U.S. 218 (2001).

<sup>96</sup> See Freeman & Vermeule, *supra* note 27, at 64–92.

<sup>97</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 224–29.

<sup>98</sup> See *Mead*, 533 U.S. at 246 (Scalia, J., dissenting) (explaining that agency officials are likely to take advantage of the preferential judicial treatment accorded to agency actions that are inclusive and deliberative—and thus employ thick administrative procedures); *infra* note 176 and accompanying text. Whether agency officials are so motivated is the subject of considerable empirical study.

neutral, apolitical agent of the State.<sup>99</sup> That said, a general rebuke to an agency regarding a defective rule or order is likely to mean much more to the career employees who worked most closely on the matter in question and who generally pride themselves on their professional competence<sup>100</sup> than to the agency heads who are directing a far greater number of regulatory initiatives<sup>101</sup> and whose validation comes more through political than professional or bureaucratic channels. More broadly, though there will always be some deviations, it is likely that the civil servants' approach to public administration will align with the judiciary's better than the approach taken either by agency heads or by the public writ large.<sup>102</sup>

## 2. *Control as Realpolitik*

The proxy approach is the most straightforward. It is also the most simplistic and least dynamic. A second strategy for exercising bureaucratic control is a far more fluid one, characterized by temporary, shifting alliances of convenience and mutual benefit. Instead of doggedly committing to its closest dispositional ally, constitutional actors play the field, choosing to influence and reward various administrative actors as a matter of need or opportunity. Here the geostra-

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<sup>99</sup> See, e.g., Ronald N. Johnson & Gary D. Libecap, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 ARIZ. L. REV. 791, 820–21 (1995) (remarking that “career bureaucrats . . . may also be motivated by partisan objectives”).

<sup>100</sup> SHANE, *supra* note 43, at 170 (2009) (“[Career civil servants are rewarded for] the quality of their work and their conformity to the ethical norms that prevail in the professional bureaucracy.”); Hugh Hecl, *OMB and the Presidency—the Problem of “Neutral Competence,”* PUB. INT., Winter 1975, at 80, 81–83, 93 (1975); Robert Maranto & B. Douglas Skelley, *Neutrality: An Enduring Principle of the Federal Service*, 22 AM. REV. PUB. ADMIN. 173, 183–84 (1992).

<sup>101</sup> See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (contrasting on-the-ground trial examiners “who [have] lived with the case” and the high-ranking agency commissioners who are tasked with reviewing a far greater volume of adjudicatory orders); *United States v. Morgan (Morgan IV)*, 313 U.S. 409, 422 (1941) (recognizing that agency heads may delegate some responsibilities to other agency personnel).

<sup>102</sup> See BRUFF, *supra* note 32, at 408 (characterizing civil servants as a “bulwark to the rule of law”); LEWIS, *supra* note 18, at 30 (stressing the civil servants’ commitment to “legal, moral, or professional norms”). William Landes and Richard Posner emphasize that courts are entrusted to enforce the original congressional “deal” regarding administrative delegations and should not be unduly influenced by changing political conditions. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877–79 (1975). Extending the Landes-Posner formulation, civil servants are especially apt judicial analogs, far more likely to enforce the deal struck and abide by the laws as written than are either presidentially appointed agency leaders very much attuned to the politics of the moment, or the public writ large who engenders the politics of the moment.

tegic analogy would be to *realpolitik*.<sup>103</sup> Such an approach might be especially prized in situations where a constitutional branch does not speak with one voice<sup>104</sup> or where institutional affinities are less salient than, say, party affiliations<sup>105</sup> or substantive programmatic commitments. In such instances, allegiances are likely to shift over time or across policy domains.

For example, a President finding herself at odds with a politically powerful or simply well-entrenched agency head<sup>106</sup> might decide not to rely on that presumptive ally.<sup>107</sup> Instead, she might attempt to drum up support from within the civil service or from friendly segments of civil society. Additionally, in contexts where civil servants are particularly influential—such as the awarding of grants—a strategic president might be especially interested in cultivating strong relationships with those civil servants.<sup>108</sup> Likewise, were Congress to experience pushback from civil society organizations (or simply find them to be apathetic), elected representatives might seek out a sympathetic agency head or bureaucratic coterie more receptive (at least on a particular issue) to congressional patronage. And if courts are finding that civil servants aren't doing enough to promote the rule of law and to resist political overreaching, they might expand civil society partici-

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<sup>103</sup> See HENRY KISSINGER, *DIPLOMACY* 137 (1994) (characterizing *realpolitik* as involving “the major players of an international system [being] free to adjust their relations in accordance with changing circumstances”).

<sup>104</sup> See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

<sup>105</sup> See Levinson & Pildes, *supra* note 51.

<sup>106</sup> Some agency heads are, as a practical matter, unlikely to be removed, principally because those leaders have an independent political base that the President does not want to offend. Hillary Clinton and Colin Powell are perhaps illustrative examples of principal officers who were highly unlikely to be fired by the Presidents who appointed them. In addition, by custom some removable officials are essentially treated as independent. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1174–80 (2013). More generally, whenever the cost of terminating an agency head is particularly high—for instance, because the Senate is unlikely to readily confirm a new appointee—that agency head is less likely to fear summary removal.

<sup>107</sup> The President at times can work around an entire agency, see Jason Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821, 823 (2013), including perhaps when the agency head isn't viewed as supportive of the President's agenda. See BARTON GELLMAN, *THE ANGLER: THE CHENEY VICE PRESIDENCY* 166 (2008) (describing how the Bush White House excluded key State Department officials, including the Secretary of State, from participating in decisions regarding the establishment of military commissions).

<sup>108</sup> For discussions of political power and the issuance of grants, see, for example, Gordon, *supra* note 28, at 718. See also JOHN HUDAK, *PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS* (2014); Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783 (2010).

pation<sup>109</sup> or interpret administrative procedures very stringently<sup>110</sup> to keep agency leaders *and civil servants* honest.

Above I posited that the most willing (and likely most successful) practitioner of proxy wars would be the President. When it comes to realpolitik, Congress would likely lead the charge. Congress certainly shares a dispositional connection to civil society. But in some ways the closeness of that connection complicates the forging of a durable alliance. We must remember that Congress, like civil society, is made up of many different interests.<sup>111</sup> Thus what we really have is different factions within Congress that are each apt to feel strong ideological ties to select (but not all) segments of the public writ large. We must also remember that, as mentioned above, congressional control over the public is quite limited. Congress cannot easily or forcefully discipline civil society members, at least not nearly to the same extent as the President can pressure and fire agency leaders.<sup>112</sup>

Given the highly pluralistic nature of Congress, the shifting political fortunes of different interests within Congress, and the dynamic and heterogeneous nature of civil society, Congress as an institution might well prefer to wheel and deal among administrative rivals rather than invest fully in a civil society that is just as divisive, unpredictable, and unruly as Congress itself is. Consider, for example, the possibility that civil society were to become dominated by moneyed interests (not an improbable point of conjecture). One might well imagine certain factions in Congress being most pleased and others being quite disappointed. If the former factions were in leadership positions on

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<sup>109</sup> See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 554 (2003) (describing judicial efforts to “open[] the administrative process to all affected parties with the aim of creating an idealized legislative process”); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1417 (2000) (remarking on the Court’s role as “the guardian of participatory administration, democratizing the administrative process, [and] ensuring that it served the public good”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975) (noting the Court’s efforts to expand participatory rights “to ensure the fair representation of a wide range of affected interests in the process of administrative decision”).

<sup>110</sup> See, e.g., *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1102 (4th Cir. 1985); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d Cir. 1977).

<sup>111</sup> Congress is, of course, the original “they, not an it.” See Shepsle, *supra* note 104; see also Magill & Vermeule, *supra* note 1, at 1036 (borrowing that phrasing and employing it to refer to agencies).

<sup>112</sup> See *supra* note 88 and accompanying text. Indeed, because it can hold hearings, issue subpoenas, withhold confirmation votes, and tinker with appropriations, Congress might have greater disciplinary control over agency leaders than over members of civil society. (Needless to add, such legislative control over agency leaders is likely not nearly as great or as constant as what the President can exert.)

Capitol Hill, they might support and seek to bolster this slice of the public in the strongest manner possible.<sup>113</sup> But presumably that would all change if and when the latter congressional factions ascended to power. That new leadership group might find little reason to partner with a civil society dominated by economic elites. Instead, this latter congressional faction might look to forge alliances with the civil service<sup>114</sup> or even, perhaps, the President's deputies running the agencies<sup>115</sup>—doing so either to ensure that the moneyed interests are kept in check or because this new leadership group happens to identify stronger ideological or programmatic affinities with civil servants or agency heads, at least on particular policy matters.

This realpolitik approach seems to be consistent with actual congressional behavior. To be sure, during periods when congressional leaders viewed civil society as sharing its interests and commitments, participatory rights in administrative governance expanded quite profoundly. Liberal Congresses passed, among other things, the Freedom of Information Act, the Government in Sunshine Act, and the Federal Advisory Committee Act<sup>116</sup>—each of which broadly empowered civil society. But more conservative Congresses have sought to limit public participation or skew participatory rights in favor of business interests.<sup>117</sup>

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<sup>113</sup> Of course, even that specific congressional faction might worry about investing too strongly in civil society. Just as the prospects of particular groups within Congress rise and fall over time, so does the relative strength of nongovernmental organizations. Even if moneyed interests are especially potent today, it isn't necessarily true that they will continue to dominate for years to come. Thus, there might be reason for members of Congress to hedge their support—an assumption that those who study bureaucratic control make with respect to Congress itself. See Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 273 (John E. Chubb & Paul E. Peterson eds., 1989). Moe recognizes that congressional majorities do not expect to stay in power forever. They thus constrain agencies structurally and procedurally, thereby limiting the ability of future congressional majorities (drawn from what's currently the minority party) to easily redirect those agencies.

<sup>114</sup> See, e.g., LEWIS, *supra* note 18, at 30–32 (describing close relationships between senior civil servants and members of Congress).

<sup>115</sup> See Levinson & Pildes, *supra* note 51 (contending that cross-branch party affinities can be stronger than cross-branch institutional rivalries).

<sup>116</sup> They were enacted in 1967, 1972, and 1976, respectively—when both the Senate and House had clear Democratic majorities. For Senate data, see *Party Division in the Senate, 1789–Present*, U.S. SENATE, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Mar. 28, 2016). And for House data, see *Party Divisions of the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Mar. 10, 2016).

<sup>117</sup> See, e.g., MARC ALLEN EISNER ET AL., *CONTEMPORARY REGULATORY POLICY* 51–55 (2000). This realpolitik approach practiced by Congress also seems to help explain relatively weak or poor showings by American civil society on the administrative stage.

### 3. *Control as Balance of Power*

A third and very different approach to bureaucratic control would involve the constitutional actors serving collectively as custodians of the administrative sphere. Instead of building administrative fiefdoms through which to advance their own institutional and programmatic commitments, the constitutional actors would work together to maintain and nurture a well-functioning, rivalrous, and largely self-regulating tripartite regime. If the analogies drawn above were to proxy wars by global superpowers and to the cold pragmatism of *realpolitik*, the analogy here would be to a balance-of-power arrangement<sup>118</sup> in which constitutional principals pledge to keep the peace (or rough parity)—even at the expense, occasionally if not regularly, of the individual constitutional branches' self-interests.

The instability of such arrangements on the geopolitical stage might well suggest the practical limitations of this approach and the propensity for the constitutional actors to defect opportunistically. After all, this approach seemingly departs most significantly from rational-choice assumptions as well as from current practices. Nevertheless, cultivating and safeguarding robust administrative rivalries contributes strongly to a legitimate administrative sphere—one that promotes and helps harmonize a range of widely embraced (but otherwise conflicting) administrative values, such as expertise, political accountability, and civic republicanism.<sup>119</sup> And, perhaps just as importantly, it enables the constitutional actors to abandon taxing and often self-defeating proxy wars or costly and seemingly fraught adventures in administrative *realpolitik*.

How might this balance-of-power system operate? The goal of the constitutional actors would be to maintain a well-functioning administrative separation of powers that does the work of checking, balancing, and enriching administrative governance. As such, the President or Congress might be called upon to more fully defend the role played by the civil service—even if doing so requires taking affirmative steps to bolster the civil service while simultaneously reining in agency leaders and elements of civil society, respectively. The judiciary, in turn, might be called upon to give deference to the decisions of political leaders running agencies (provided those deci-

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That is, weak showings might well be a function of civil society lacking a true and unwavering constitutional champion.

<sup>118</sup> See PAUL SHARP, *DIPLOMATIC THEORY OF INTERNATIONAL RELATIONS* 179 (2009).

<sup>119</sup> Michaels, *Enduring, Evolving*, *supra* note 1, at 553–56 (explaining how administrative separation of powers facilitates the harmonization of leading, but conflicting, public law values).

sions were duly informed by civil servants and members of the public)<sup>120</sup> and to expand opportunities for public participation.

Just as the President would likely prefer proxy wars, and the pluralistic Congress, perhaps, *realpolitik*, courts would presumably embrace this approach. Unlike the President and members of Congress who can realize tangible political and programmatic gains from long-term or temporary administrative alliances, courts have comparatively fewer incentives to control the substantive administrative agenda.<sup>121</sup> Thus they have little reason to create or further exploit an *imbalanced* administrative state in the same way that both the President and Congress might well like to skew the administrative playing field in a manner that enables their proxies and deputies to dominate administrative proceedings.

Instead, left to their own devices, judges would likely hew to the custodial approach. After all, the more work administrative separation of powers does, the less intensive scrutiny the courts need to apply when reviewing the reasonableness of agency actions.<sup>122</sup> This is because, as I'll discuss more fully in the next Part, the proper functioning of administrative checks and balances goes a long way in ensuring that agencies comply with congressional mandates, do not abuse their discretion, and develop sound, well-reasoned policies. Courts can therefore be more comfortable deferring to agencies (or perhaps eschewing substantive review altogether), knowing that agency actions have already been carefully scrutinized, challenged, and advanced by civil servants, political leaders, and members of the public.

Additionally, the judiciary is an entity generally institutionally committed to the rule of law—a commitment likely to trump any interest in bolstering dispositional allies or forging temporary alliances among administrative principals to secure some short-term advantage. As such, we might expect the courts would be willing to endorse a custodial approach that helps maintain a self-governing (and self-constraining) system of checks and balances very much reminiscent of

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<sup>120</sup> Metzger, *The Interdependent Relationship*, *supra* note 1, at 425 (“[P]residential insistence on a policy position over internal resistance may not actually be an example of internal constraint failure.”).

<sup>121</sup> *But see, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 394–95 (2015) (suggesting that members of the D.C. Circuit “made a concerted effort to push administrative law in a [pro-environmental, pro-consumer] direction”).

<sup>122</sup> The administrative law canon is filled with opinions explaining or justifying some intervention on the ground that an agency’s failure to do “X” impeded the court’s ability to conduct meaningful judicial review. *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419–21 (1971).

what we find at the constitutional level. It is therefore quite possible that the courts, just as they do with the constitutional separation of powers, police as much as participate in the proper workings of administrative separation of powers.

Lastly, in many instances promoting a well-functioning administrative sphere will require propping up civil servants, who are often marginalized in any number of ways by agency leaders and the public writ large.<sup>123</sup> Thus embracing the custodial approach won't require courts to deviate too far from what I presume to be their own parochial interests insofar as the civil service, because of its political insulation and its seeming commitments to reason-giving and to the rule of law, is a natural judicial ally.

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To summarize the above discussions, the President is the most likely practitioner of proxy wars, apt to use agency heads because those officials are generally powerful, easy to direct (and punish), and already sympathetic to the Administration's interests. As a result, there are relatively few reasons for the President to play the field as it were or to disavow self-interested control in favor of a custodial approach.<sup>124</sup>

Congress is apt to play the realpolitik game. Because Congress and its closest administrative analog are both internally fragmented and, moreover, because Congress has at best weak control over civil society, it is likely to seek out strategic partnerships in a more ad hoc fashion. And, as was the case with the President, Congress as an institution is unlikely to be particularly drawn to a balance of power (unless it sees such balance as the best means of counteracting an overreaching President).<sup>125</sup>

Finally, given their commitment to the rule of law and their responsibilities for reviewing administrative actions, the courts will seemingly be the biggest proponents of a custodial strategy.

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<sup>123</sup> See Michaels, *Privatization's Progeny*, *supra* note 24, at 1042–50 (describing efforts that have the effect of weakening and demoralizing the civil service); Michaels, *Privatization's Pretensions*, *supra* note 25, at 745–50 (explaining efforts to contract around the civil service).

<sup>124</sup> Reasons do, of course, exist. Presumably the President could benefit from signaling her commitment to noninterference. See Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007).

<sup>125</sup> Reasons for doing so would include that the President and her proxy are so strong that it would be in Congress's best interests to advocate that everyone disavows self-interested strategies.



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One can think, too, about how administrative rivals might behave given the realities of horizontal and vertical forms of control. We might find administrative rivals adopting strategies similar to those championed by the constitutional branches. That is to say, they might seek to forge long-term or temporary vertical alliances in a manner that roughly mirrors what I described above.<sup>126</sup> For example, an agency head having trouble with her horizontal, administrative rivals might appeal to the President or to sympathetic members of Congress for reinforcement.

We might also find interesting horizontal alliances, such as temporary bonds forged between civil servants and civil society to push a particular agenda<sup>127</sup> or to better resist the powerful agency heads (backed by the President). But to the extent horizontal administrative partnerships become more durable in response to a formidable vertical (constitutional-administrative) alliance, such horizontal partnerships might threaten the integrity and well-functioning of a tripartite, rivalrous scheme<sup>128</sup>—thus revealing second-order or downstream complications and dangers associated with aggressive and asymmetric interventions by constitutional actors. In short, forceful presidential interference might subvert administrative separation of powers in one of two ways. First, and more directly, such interference might destabilize administrative separation of powers by disproportionately strengthening agency heads or by undercutting agency leaders' administrative rivals. And second, and indirectly, an aggressive presidential intervention might prompt civil servants and civil society to join forces to better constrain agency leaders. Even if that civil service-civil

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<sup>126</sup> For scholarship on administrative agencies (often treated as an undifferentiated whole) strategically partnering with one of the constitutional branches, see, for example, Clinton, Lewis & Selin, *supra* note 87 (describing congressional-agency partnerships and their varying degrees of success); Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119 (1996) (describing jockeying between Congress and the President to partner with agencies); McCubbins, Noll & Weingast, *Structure and Process*, *supra* note 7 (characterizing statutorily imposed administrative procedures as efforts to constrain *ex post* alliances between agencies and various political actors).

<sup>127</sup> See, e.g., CASS ET AL., *supra* note 66, at 11, 583 (6th ed. 2011) (describing instances in which career employees worked with segments of the public to advance policy reform); Seth F. Kremer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1037–45 (2008) (emphasizing collaborative efforts by career government workers and public interest groups to challenge the positions of agency leaders).

<sup>128</sup> Such horizontal alliances are, perhaps, similar to what Levinson and Pildes describe at the constitutional level in periods of unified government. See Levinson & Pildes, *supra* note 51, at 2329–47.

society horizontal tandem successfully thwarts an aggressive vertical intrusion by the President, it does so at the expense of a well-functioning administrative separation of powers. After all, a horizontal alliance of this sort blunts the important institutional rivalry that is generally expected to exist between the often-countermajoritarian, apolitical career agency staff and the general public authorized to participate meaningfully in administrative governance.

## II

### CONSTITUTIONAL CONTROL OVER ADMINISTRATIVE AGENCIES: CHALLENGING AND REVISING THE PREVAILING NORMATIVE AND CONSTITUTIONAL ACCOUNTS

The conventional treatment of agencies as relatively unitary and monolithic has implications beyond the descriptive. A unitary, monolithic agency is likely an *imbalanced* agency. It is an agency that is internally hierarchical and therefore lacks meaningful horizontal rivalries to moderate, constrain, and broaden the programmatic agenda of whatever group—politicized agency heads, myopic mandarins, or greedy special interests—happens to dominate the agency. And it is an agency of at least arguably questionable constitutional standing and normative legitimacy insofar as it represents an unchecked consolidation of what the Framers had taken pains to disaggregate, namely legislative, executive, and judicial power.<sup>129</sup> For these reasons, it would hardly be surprising for those who see agencies as unitary to also insist that the constitutional branches exert powerful, intensive control over such seemingly problematic entities.

Indeed, vigorous, vertical control can quite reasonably be viewed as necessary to check the unrivaled power and inherent parochialism of an imbalanced agency ruled by presidential appointees perhaps quick to defy congressional directives, a tenured bureaucratic workforce unaccountable to the electorate and at times indifferent, if not altogether hostile, to the President's popular mandate, or regulated entities or program beneficiaries who've captured the agency and care only about themselves. Indeed, some of the strongest and most persistent critiques of the modern American administrative state as pathological implicitly turn on claims that one of these three groups

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<sup>129</sup> See THE FEDERALIST NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001) (describing the concentration of State power as “the very definition of tyranny”); Strauss, *The Place of Agencies*, *supra* note 6, at 577 (noting that the legislative, executive, and judicial “powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law”); see also *infra* note 136 and accompanying text.

exercises too much influence over the administrative agenda.<sup>130</sup> Specifically, claims of industry capture,<sup>131</sup> runaway bureaucracy or empire building,<sup>132</sup> and, to a lesser extent, presidential domination<sup>133</sup> are invoked almost as if they were inescapably—and lamentably—part of the administrative infrastructure. Short of dismantling that administrative infrastructure (which some critics would no doubt prefer to do were it feasible<sup>134</sup>), it seemingly falls upon the constitutional branches to exercise great control. Such control would help ensure that administrative power is neither too potent (as a result of being concentrated rather than fragmented) nor overly skewed in favor of select interests.<sup>135</sup>

Relatedly, control by Congress, the President, or the courts might seem necessary in part because the federal administrative state has

<sup>130</sup> See Michaels, *Running Government*, *supra* note 17, at 1168–70 (describing some of the more trenchant critiques of administrative law as centering on concerns of agency capture and runaway bureaucracy).

<sup>131</sup> See, e.g., MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 79–94, 282–87 (1955) (describing agency capture); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 *YALE L.J.* 467, 481–502 (1952) (examining capture with respect to the Interstate Commerce Commission).

<sup>132</sup> See NISKANEN, *supra* note 7, at 24–42 (describing agency officials engaged in empire building and thus seeking to maximize their department’s budget and influence).

<sup>133</sup> See Barron, *supra* note 61, at 1099–133 (describing and questioning independent presidential control over agencies); Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696, 715–38 (2007) [hereinafter Strauss, *Overseer*] (similar). I say to a lesser extent because some scholars and jurists clearly endorse presidential control. See, e.g., CALABRESI & YOO, *supra* note 8 (championing a unitary executive framework in which the President has complete control over the Executive Branch); Kagan, *supra* note 7, at 2251–52 (endorsing broader presidential control over the administrative state); see also Morrison v. Olson, 487 U.S. 654, 706–10 (1988) (Scalia, J., dissenting) (emphasizing the unitary nature of the Executive Branch and the constitutional imperative for unrivaled presidential control).

<sup>134</sup> See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (characterizing the modern American administrative state as unlawful to the extent its rules and orders impose legal obligations on private parties); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1231–32 (1994) (labeling the modern administrative state unconstitutional).

<sup>135</sup> There is some possibility of second-order diversity across agencies. Such second-order diversity—involving different line agencies each singularly (but differently) dominated—might engender some aggregate balance within the administrative state writ large. Cf. Heather K. Gerken, *Second-Order Diversity*, 118 *HARV. L. REV.* 1099, 1102–03 (2005) (characterizing conditions under which there is diversity between and among rather than within organizations). For example, Health and Human Services might be effectively controlled by civil servants; Labor by special interests; and Education under the thumb of the political appointees. Were such second-order balance achieved—such that different substantive domains were dominated by different sets of stakeholders—there might be some lessening of the concerns over the existence of unitary agencies. That said, there would be no guarantee of heterogeneous, rivalrous input on any one particular decision or set of initiatives.

always been understood to be a constitutionally problematic innovation.<sup>136</sup> Agencies are the recipients of legislative, executive, and judicial powers—powers, again, purposefully disaggregated at the constitutional level. Given the broad delegation of all three sovereign powers to entities feared to be dominated by unelected technocrats, presidential appointees, or special interests, strict constitutional-branch control through not only clear, specific statutory directives<sup>137</sup> but also extensive and aggressive post-delegation interventions<sup>138</sup> might serve to allay some of these serious concerns.<sup>139</sup>

But this understanding of the normative and legal imperatives for constitutional intervention is, once again, predicated on a questionable premise—that is, that agencies are actually unitary and monolithic. Recognizing the fragmented, rivalrous nature of administrative power ought to affect the way we think about the administrative state, about that tripartite regime’s constitutionality, and about the role constitutional actors play in directing administrative actors and actions.

In fact, we need not worry nearly as much about the threat posed by unitary agencies. As explained above, the concerns stemming from traditional understandings of agencies as unitary are largely overstated, principally because of the twentieth-century development of administrative separation of powers. Administrative separation of powers, however haphazardly and serendipitously engendered,<sup>140</sup> anchors administrative governance firmly within the constitutional tradition of employing rivalrous institutional counterweights to limit State power and to promote good governance, pluralism, political accountability, and the rule of law. This tripartite system effectively helps “balance” the administrative state operationally and constitutionally—so much so as to lessen the imperative for the constitutional actors to exercise intensive administrative control in the first place.

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<sup>136</sup> See, e.g., Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 305 (2010) (contending that the administrative state “has long been an embarrassment for constitutional law”); Lawson, *supra* note 134, at 1231 (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).

<sup>137</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“[W]hen Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle’ . . .”) (emphasis and internal citations omitted).

<sup>138</sup> See generally sources cited *supra* notes 7–8 (characterizing efforts by the President and Congress to control administrative agencies); *INS v. Chadha*, 462 U.S. 919, 984–98 (1983) (White, J., dissenting) (claiming that legislative vetoes help ensure administrative balance insofar as Congress must countenance—by *not voting to veto*—the Attorney General’s suspension of deportation).

<sup>139</sup> See, e.g., *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 536 (2009) (Kennedy, J., concurring) (“If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.”).

<sup>140</sup> Michaels, *Enduring, Evolving*, *supra* note 1, at 532.

This Part proceeds as follows. Section A presents the case for a rivalrous, fragmented administrative sphere being a legitimate, self-regulating ecosystem unto itself—one capable of exercising the power Congress gives to it in a constitutionally and normatively sound fashion. Having established the administrative sphere’s internal legitimacy, I turn in Section B to question whether strong constitutional involvement in administrative governance is necessary or desirable. Here I argue that many constitutional branch interventions, especially when unilateral or asymmetric, are likely to be destabilizing. That is, they’re apt to disrupt the well-functioning regime of administrative separation of powers and to disturb the relatively balanced agency actions that result from the contentious interplay of agency heads, career civil servants, and public participants. Rather than encouraging strong forms of constitutional control, the reality of administrative separation of powers invites the constitutional branches to act as custodians (and not partisans), interfering principally to maintain a well-functioning administrative system of checks and balances. Section C then offers some preliminary thoughts about an administrative jurisprudence recalibrated to account for the administrative sphere having the potential to be a self-regulating, legitimate ecosystem.

### *A. Administrative Separation of Powers as a Self-Regulating Ecosystem*

Administrative separation of powers refashions and roughly recreates a checking-and-balancing scheme akin to the one that famously operates at the constitutional level. The rivalrous interplay of presidentially accountable agency heads, politically insulated expert civil servants, and members of the public authorized to participate in most facets of administrative governance—much like the rivalrous interplay of the three constitutional branches—suggests the possibility of a largely self-regulating ecosystem.

It is an ecosystem that, first, fragments, constrains, and limits administrative power in a manner quite similar to how constitutional separation of powers safeguards against arbitrary or abusive action, liberty infringements, and tyranny.<sup>141</sup> Such administrative safeguards are, again, seemingly absent from unitary, internally hierarchical agencies apt to be dominated by only one set of administrative actors.

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<sup>141</sup> See THE FEDERALIST NO. 47 (James Madison) (describing the virtues of constitutional separation of powers); THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”).

Whereas an unrivaled contingent of civil servants, agency heads, or regulated interests exercising administrative power would indeed require extensive external checking (by constitutional actors), it is not clear that such external interventions are nearly as necessary or helpful when agency actions are the product of internally rivalrous, heterogeneous deliberation, contestation, and collaboration.

Second, administrative separation of powers is an ecosystem that informs and broadens administrative policy, again in a manner similar to how our constitutional checks and balances are expected to sharpen legislation, improve treaties, and enrich the executive and judicial appointments process.<sup>142</sup> By contrast, those running truly unitary agencies would not be forced to consider, let alone accommodate, differing perspectives (voiced by presumably subordinated or marginalized stakeholders) nearly to the same extent as do those working within a meaningfully rivalrous institutional framework of horizontal checks and balances. Accordingly, we might have good reason to insist on great constitutional involvement when it comes to exercises of unitary (and thus likely imbalanced) administrative power<sup>143</sup> but correspondingly fewer reasons to do the same when it comes to administrative exercises subject to administrative checks and balances.

Underlying these two claims regarding the administrative sphere as a potentially self-regulating and legitimate ecosystem is a theory of constitutional governance that takes seriously the constitutional commitment to fragmented and balanced power and thus embraces and endorses expressions of State power that are the product of rivalrous, heterogeneous, and inclusive engagement by a combination of democratic and countermajoritarian actors. That is to say, it is a theory of separation of powers *all the way forward*, from the constitutional stage to the administrative arena and, perhaps, beyond.<sup>144</sup> While it is true that the administrative state was conceived in large part to break free from the conflicts and inefficiencies of constitutional separation of powers, what ultimately (and perhaps ironically) validated the otherwise menacingly potent administrative state was the reaffirmation and renewal of the Constitution's tripartite scheme and the substantive

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<sup>142</sup> See, e.g., Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 771–72 (2012) (emphasizing the positive, constructive effects of constitutional separation of powers).

<sup>143</sup> See *infra* Section III.C.

<sup>144</sup> Michaels, *Enduring, Evolving*, *supra* note 1, at 517 (explaining an enduring, evolving constitutional commitment “to separating, checking, and balancing state power in whatever form that power happens to take”); cf. Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 21–25 (2010) (advancing the concept of federalism “all the way down,” meaning down to the level of local government).

and procedural values that undergird it.<sup>145</sup> Simply stated, the architecture of modern American public administration is best characterized as constitutional revivalism.

As much as we still, rightly, aspire to greater efficiencies and as much as we as a nation now tell ourselves that the threats of tyranny are a thing of the past, it simply does not follow that the separation of powers should not carry forward into an administrative arena in which agencies are called upon to exercise legislative, executive, and judicial powers. Fewer nodes of internal separation and fewer opportunities for checking and balancing might well make public administration more expedient. But such expedience would come at the expense of broad democratic, legalistic, and expert input. And that's too dear a price to pay.

What's more, though the risk of tyranny via military dictatorship is thankfully now remote, more subtle and perhaps direct forms of government abuse can be perpetrated much more readily today than ever before—in no small part because of the rise of powerful federal agencies with broad powers and unprecedented technologies. Certainly many critics of the administrative state speak in precisely such terms.<sup>146</sup> But so do many of its champions, particularly when they worry about the State's influence over poor and vulnerable groups.<sup>147</sup> Here too the existence of rivalrous, fragmented public administration is a safeguard against such abuse.

Thus there is ample reason to see administrative separation of powers as balancing core (but conflicting) commitments to democracy, rationality, and the rule of law—and thus helping confer constitutional legitimacy on the administrative sphere. Executive, legislative, and judicial power is indeed delegated to administrative

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<sup>145</sup> For discussions regarding the reasons to continue embracing and extending tripartite separation of powers, see Michaels, *Enduring, Evolving*, *supra* note 1, at 667–70.

<sup>146</sup> *E.g.*, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (“The administrative state wields vast power and touches almost every aspect of daily life. The Framers could hardly have envisioned today’s vast and varied federal bureaucracy and the authority administrative agencies now hold . . .”) (internal quotations and citations omitted).

<sup>147</sup> *See, e.g.*, JARED P. COLE, CONG. RES. SERV., R43730, TERRORIST DATABASES AND THE NO FLY LIST: PROCEDURAL DUE PROCESS AND HURDLES TO LITIGATION (2015) (describing lawsuits alleging that the federal government’s process for assigning individuals to the “No Fly” list violates due process); David A. Super, *Against Flexibility*, 97 CORNELL L. REV. 1375 (2011) (decrying the dangers of administrative discretion especially as it affects vulnerable populations); Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550, 558 (2012) (describing those seeking welfare assistance as “vulnerab[le] to the discretionary judgment of caseworkers.”); Editorial, *Deported from the Middle of Nowhere*, N.Y. TIMES, Aug. 26, 2014, at A22 (criticizing as unreasonable the truncated process for would-be asylum seekers to demonstrate true need).

agencies in ways that pose a challenge to the constitutional order. But thanks to the development of administrative separation of powers, those agencies generally cannot act—*just like legislation cannot be enacted, enforced, and withstand judicial review*—without significant voluntary buy-in from rivalrous groups with competing political, cultural, and legal interests.

To be clear, celebrating such a clunky system that prizes resistance, compromise, and inevitably messiness might seem odd to those who instead venerate a Weberian administrative ideal, a unitary presidentialist model of administrative governance, or a business-like approach to public administration. But odd as it might seem and undesirable as it might appear in the abstract, our administrative separation of powers is entirely in keeping with a distinctively American constitutional vision that disavows unrivaled, unitary expressions of power in favor of ones that reflect rivalrous, contentious, and multipolar engagement.<sup>148</sup>

Such a celebration might seem odd, too, to both formalists and functionalists—neither of whom will likely be satisfied by this tripartite administrative system or my account of it. Formalists will say that my claims of constitutional-administrative isomorphism are far too imperfect. That is, the linkages between constitutional and administrative rivals are incomplete on any number of grounds, including those I fully admit. At the same time, functionalists will say that my tripartitism is unnecessarily rigid and does too little to acknowledge the full roster of administrative power players (including those I mention above but classify as peripheral or fold into the civil society category). The internal critiques that both formalists and functionalists can make are fair ones—and my project is indeed in some tension with both a formalist and a functionalist reading of administrative law and the separation of powers.

But there is good reason to work independently of both camps and to chart a middle course. After all, neither the formalist nor the functionalist approach can be readily squared with the most basic contours of the administrative state. For example, so-called functionalists seem to carry the day with respect to the main branch of the Nondelegation Doctrine.<sup>149</sup> And so-called formalists seem to carry the day

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<sup>148</sup> See Michaels, *Running Government*, *supra* note 17, at 1161–62 (describing American administrative governance as distinctive insofar as it refashions and redeems the structure and characteristics of the constitutional separation of powers).

<sup>149</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76 (2001) (offering what many characterize as a functionalist approach to determining whether a delegation is a constitutionally permissible one); *Clinton v. City of New York*, 524 U.S. 417, 468–69 (1998)



when it comes to line item and legislative vetoes.<sup>150</sup> What's more, there's something of an awkward impasse between the two camps with respect to constitutional questions regarding the removal of administrative officials.<sup>151</sup> Thus a scheme that incorporates the essential features of constitutional tripartitism but not to such an extreme as to reproduce the exact identities and powers of the three constitutional branches is a sort of formalist-functionalist synthesis, if not transcendence, that accommodates innovation and experimentation provided that innovation and experimentation is bounded and largely faithful to our constitutional commitments.<sup>152</sup>

### *B. The Implications of Administrative Separation of Powers for Constitutional Control*

Once we acknowledge the existence, utility, and legitimacy of this administrative system of horizontal checks and balances, our long-standing intuitions regarding the need for tight, vertical control by the constitutional branches ought to be recalibrated.

Specifically, in a world in which administrative separation of powers has been engendered (and seemingly, if implicitly, valorized) by the constitutional branches,<sup>153</sup> constitutional involvement or interference with day-to-day operations should be primarily custodial in nature, focused on ensuring the continued well functioning of the rivalrous administrative ecosystem. Doing more than that—or something different from that—is, at best, unnecessary and, more likely, disruptive and destabilizing.

It is unnecessary because federal administrative action is already generally the product of the contentious give-and-take of administrative rivals—rivals that, again, not only check and balance one another

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(Scalia, J., concurring in part and dissenting in part) (explaining that the Nondelegation Doctrine does not turn on “technicalities”).

<sup>150</sup> See *Clinton*, 524 U.S. at 436–38 (stressing the formal difference between delegations of lawmaking authority and delegations of authority to cancel duly enacted provisions of law); *INS v. Chadha*, 462 U.S. 919, 952–53 (1983) (framing the invalidity of the legislative veto in what many characterize as highly formalistic terms).

<sup>151</sup> *Compare* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (seemingly announcing a bright-line prohibition on the insulation of two layers of agency officials from presidential control) *with* *Morrison v. Olson*, 487 U.S. 654, 685–93 (1998) (employing highly functionalist standards to determine the constitutionality of congressionally imposed restrictions on the President's ability to summarily fire agency officials).

<sup>152</sup> Huq & Michaels, *supra* note 50 (manuscript at 6–7) (challenging the usefulness of the labels formalism and functionalism and explaining how separation-of-powers jurisprudence can better be reconstructed as a form of cycling between rules and standards that accommodates administrative flexibility and experimentation within limits).

<sup>153</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 560–67 (discussing the courts' tacit endorsement of administrative separation of powers).

but that also individually and collectively channel many of the institutional, dispositional, and legal characteristics of the constitutional branches.

Interventions by constitutional actors are, moreover, likely disruptive and destabilizing insofar as they're quite likely to be asymmetric—with one constitutional branch asserting itself in a manner that essentially disturbs whatever (already roughly balanced) outcome is reached or will be reached among the democratic and countermajoritarian administrative rivals.<sup>154</sup>

Of course, constitutional actors might nevertheless remain tempted to intervene aggressively or opportunistically, along the proxy war or realpolitik lines discussed above. Indeed, they might conclude, quite rationally, that the more asymmetric and disruptive their interventions are, the more likely they'll succeed in reshaping administrative governance. But assuming a well-functioning administrative separation of powers, such efforts by constitutional actors cannot be justified in neutral, remedial, or corrective terms. That is, these actors cannot say they're helping to legitimize otherwise illegitimate administrative governance. Instead such interventions must be seen for what they are: attempted power grabs likely to undermine—rather than further—the enduring, evolving constitutional commitment to separation of powers as it has been renewed and reaffirmed through the construction of an administrative separation of powers.

Accordingly, what should be privileged is a theory of administrative control that effectively tracks the balance-of-power approach described above: a commitment to maintaining the well-functioning administrative separation of powers. Once authority is delegated, the constitutional actors ought to limit their role as partisans and embrace their underlying custodial responsibilities. They may support the administrative process and make their views and preferences on a particular question or matter known through general and largely indirect means: appointments, removal, congressional hearings, meetings, etc. But they should resist the urge to intervene directly and ostensibly dispositively in a manner that disables (rather than simply sharpens) administrative rivalries or that subverts or renders meaningless opportunities for horizontal checking and balancing.<sup>155</sup>

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<sup>154</sup> Ackerman, *The New Separation*, *supra* note 55, at 689, 700, 703 (suggesting that when American politicians interfere in administrative affairs, they often complicate or frustrate the work of bureaucracy).

<sup>155</sup> I appreciate that my vision of separation of powers *all the way forward* is a constrained one. Others might well endorse or even insist upon a heartier approach, one that allows for greater cross-domain contestation, including aggressive constitutional interventions into the administrative realm. See Chafetz, *supra* note 142, at 772 (proffering

My privileging of peer pugnaciousness—that is, grappling among horizontal rivals in the same weight class—and corresponding concern with top-down influence by constitutional heavyweights is especially important when it comes to the special composition of administrative power that comprises legislative, executive, and judicial authority all at once. Consider that aggressive horizontal rivalries within the constitutional domain can go only so far. A domineering president still cannot prescribe the outcome of cases before the federal courts. Nor can an imperial judiciary, however outsized its role, send troops into battle. But that isn't necessarily true when it comes to vertical, asymmetric influences on the administrative realm, where aggressive congressional interventions could, for example, dictate prosecutorial enforcement decisions in ways that horizontal, administrative rivals, by themselves, likely could not.

Thus, as a general, if rough, starting point, we might think about explicit and express subversions of tripartite administrative governance. Consider, for example, presidential efforts to direct a particular agency result,<sup>156</sup> or to reclassify civil servants as at-will employees.<sup>157</sup> Consider, too, congressional efforts to likewise dictate agency outcomes,<sup>158</sup> or to completely insulate agency heads from presidential control.<sup>159</sup> Such interventions are not indirect influences on the administrative sphere. Nor are they simply sharpening existing rivalries. Rather they directly weaken the administrative separation of powers.

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Courts are, as suggested above, likely best positioned to embrace, promote, and demand that the political branches adhere to this custodial approach. After all, courts have less to gain from influencing the substance of federal regulatory policy than do elected officials in the White House and on Capitol Hill. They have considerable control

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a “multiplicity-based view of the separation of powers”). Nevertheless, my approach is one that respects the basic workings of each realm and is sensitive to the way outsiders—particularly more powerful outsiders—can destabilize those realms in ways that seemingly undermine the legitimacy and authority of those realms. As such, I posit that we should encourage internal, horizontal rivalries while limiting and regulating the terms of vertical interference.

<sup>156</sup> See, e.g., Strauss, *Overseer*, *supra* note 133, at 715–38 (characterizing as problematic presidential efforts to dictate agency decisions and actions).

<sup>157</sup> See *infra* notes 168–69, 206–09 and accompanying text.

<sup>158</sup> See *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1245–49 (D.C. Cir. 1971) (invalidating an agency action that reflected the apparent undue influence of a member of Congress).

<sup>159</sup> See *infra* Section III.C.

over administrative proceedings, at least *ex post*, when such proceedings are almost invariably the subject of heated litigation and when courts already engage in a good deal of constitutional scrutiny of administrative actions.<sup>160</sup> They have reason to gravitate to civil servants (likely the rivals that will be in need of the most bolstering). And, as I've described elsewhere, they've already shown themselves to at least implicitly support a *well-functioning* administrative separation of powers.<sup>161</sup>

It therefore makes sense to focus principally on the courts as leading the custodial charge—and perhaps going so far as to adopt an administrative jurisprudence that bespeaks something akin to what public law scholars term reinforcing representative democracy.<sup>162</sup> In brief, reinforcing representative democracy obligates courts to intervene in matters involving congressional legislation only to the extent judges determine that the political process has broken down or been compromised.<sup>163</sup> John Hart Ely, reinforcing representative democracy's chief proponent, draws analogies between the role of judges in reinforcing representative democracy and those of antitrust regulators and sports referees. Both antitrust regulators and referees ensure that competition is fair and open, but they do not otherwise evaluate or correct substantive outcomes either in the marketplace or on the playing fields.<sup>164</sup>

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<sup>160</sup> Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 508–10 (2010) (characterizing much of everyday administrative law and jurisprudence as in part motivated by “[c]onstitutional concerns with unchecked agency power”).

<sup>161</sup> What is a well-functioning administrative separation of powers and how to promote and preserve such a healthy system are, of course, difficult questions to answer with any precision. (Similar difficulties, to be sure, surround what, or how much, administrative procedure satisfies due process or how “laboratory-like” conditions must be in order for the NLRB to certify the results of a union vote. They also surround our understanding of what constitutes a vibrant constitutional separation of powers.) For present purposes, a well-functioning administrative separation of powers enables and empowers all three rivals to participate freely, fully, and meaningfully in matters of administrative governance. I provide a more comprehensive account in Jon D. Michaels, *Unmaking the American State* (Mar. 24, 2016) (unpublished book manuscript) (on file with the New York University Law Review).

<sup>162</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>163</sup> See *id.* at 102–03 (arguing that courts should invalidate laws only when there has been a systematic “malfunctioning” in process, making that process “undeserving of trust”).

<sup>164</sup> *Id.* This is obviously a different conception of refereeing from the one voiced by Chief Justice Roberts in his confirmation hearing. There, then-Judge Roberts likened the role of a judge to that of a baseball umpire calling balls and strikes. See *Confirmation Hearings on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr.).

Extending and exporting that approach to the administrative sphere—what I here term *reinforcing rivalrous administration*<sup>165</sup>—courts would be tasked principally with determining whether the administrative process has been disabled or unduly interfered with by constitutional meddlers (or anyone else) in a manner that precluded or limited meaningful participation by all three administrative rivals.<sup>166</sup> If the administrative process is basically sound—and the emerging rule, order, or program reflects the input of agency leaders, civil servants, and members of civil society—then courts ought to look quite skeptically at claims attacking the substantive merits of agency actions or legal interpretations. After all, those actions or interpretations were forged in the crucible of contentious, rivalrous, and multipolar administrative engagement—and thus have already been carefully scrutinized, challenged, and advanced by civil servants, presidential deputies, and the public at large.<sup>167</sup> But, again, if the process is compromised by what appears to be the systematic or effective exclusion of one or more of the rivals through, among other things, heavy-handed or simply asymmetric interference by one of the constitutional branches, then the courts would be expected to intercede.

Of course, there might be some, perhaps considerable, dispute or confusion regarding what is a *well-functioning* administrative separation of powers and where to draw the line between a constitutional actor supporting an administrative stakeholder and that constitutional actor undermining administrative separation of powers. Surely there will be close, and seemingly subjective, calls—as there are at the constitutional level at the margins between a constitutional branch acting zealously to promote its own institutional interests and that same con-

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<sup>165</sup> My reinforcing rivalrous administration may be viewed as a somewhat surprising extension of Ely's reinforcing representative democracy if only because Ely himself seemed skeptical of the legitimacy of administrative governance—a skepticism fueled, perhaps, by what he saw as the tension between administration and democracy. Ely stressed policing process not as an end unto itself, but because policing process protects representative democracy. See, e.g., Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 435 (1987) (characterizing reinforcing representative democracy as in some conflict with an administrative state that privileges values other than democracy). Still, the basic framework and intuition informing a system of judicial review that esteems procedurally robust lawmaking has independent purchase outside of traditional legislative contexts in which democratic fairness and inclusiveness are the lodestars.

<sup>166</sup> See, e.g., Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 1–2 (2009) (describing “second-generation representation reinforcement . . . scholars” as policing process to “ameliorate fundamental representational inequalities in the legislative process”).

<sup>167</sup> Cf. BREYER, *supra* note 45, at 72 (1993) (suggesting that an interdisciplinary group of administrators reviewing agency actions might be “better equipped to investigate general, science-related facts than a court” and might “supplant[ ] . . . review by a court”).

stitutional branch crossing the line and compromising a (similarly vague) well-functioning constitutional separation of powers. But in many instances, the difference between well-functioning and dysfunctional administrative engagement ought to be clear: It is fine, for example, for the President to appoint her allies to run agencies, to direct those agency heads to champion the White House's agenda, and to fire those that fail to do so. It is not okay, however, for the President to disable an administrative rivalry by, say, directing the agency head to hire private contractors (who are financially dependent on agency heads<sup>168</sup>) to take the place of independent civil servants.<sup>169</sup>

Like Ely's reinforcing representative democracy, my reinforcing rivalrous administration might be open to the further criticism that process and substance cannot be separated, and that courts might look to the merits of what an agency decided to help them determine whether there was a process violation.<sup>170</sup> But reinforcing rivalrous administration does not claim to be agnostic vis-à-vis substance. (The same might well be true of reinforcing representative democracy, which has been described as "a process-perfecting theory that perfects process by virtue of its substantive basis in a political theory of representative democracy."<sup>171</sup>) Underlying reinforcing rivalrous administration is a thick substantive commitment to constitutionally legitimate public administration. And that substantive commitment is best, or at least ably, expressed through the robust and meaningful contestation of administrative stakeholders who, like the great constitutional branches, collectively embody important democratic and countermajoritarian qualities and embrace and give expression to central but conflicting values such as democratic deliberation and reasoned expertise.

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<sup>168</sup> Michaels, *Privatization's Pretensions*, *supra* note 25, at 749 (characterizing government service contractors as "yes" men and women with financial incentives to do the agency leadership's bidding).

<sup>169</sup> See Michaels, *Enduring, Evolving*, *supra* note 1, at 578–83 (describing the threat to administrative separation of powers posed by contractors who replace civil servants).

<sup>170</sup> See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1063–70 (1980) (claiming that process-based approaches to constitutional theory require some grounding in substantive rights or values).

<sup>171</sup> See JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY* 26–27 (2006) (emphasis omitted) (defending reinforcing representative democracy against "[t]he mistaken charge that Ely flees substantive political theory"). To be clear, I use reinforcing representative democracy as an illustrative and familiar analogy and thus it is of little matter whether Fleming or Ely's critics are right.

### C. *A Jurisprudence for Reinforcing Rivalrous Administration*

To carry out this custodial responsibility, courts can draw principally upon their existing tools and doctrines. Alternatively, they might consider altogether revamping their administrative jurisprudence. Indeed, given the existence of administrative separation of powers and given judges' corresponding responsibilities as primary custodians of that largely self-regulating ecosystem, there is an opportunity to revisit administrative law's own pivotal turn away from process-based review. In what follows, I first offer some concrete, off-the-shelf approaches consistent with today's administrative jurisprudence that courts may use (and in fact already are using) to encourage greater fidelity to rivalrous, inclusive administrative governance. Second, I consider a broader, more ambitious approach, one that is in some tension with current administrative law doctrines but that might more directly target and address impediments to a well-functioning system of separated and checked administrative powers.

#### ***Reinforcing Rivalrous Administration Through Merits Review.***

Courts can increase or decrease the deference accorded to agency actions or interpretations depending on the degree to which those actions or interpretations were arrived at through a truly rivalrous, heterogeneous, and inclusive administrative process. For example, if courts think that civil servants are not given their due in administrative proceedings, judges may apply a particularly stringent version of arbitrary and capricious review, effectively insisting that agencies delve deeper into, say, the science of a given rule. Because, as mentioned above, expert civil servants are almost invariably the actors most qualified and best positioned to delve deeper in this fashion,<sup>172</sup> the courts would be increasing the likelihood that career staffers play a larger role in the rulemaking process.<sup>173</sup> This is, in essence, what the Court appeared to be doing in *Massachusetts v. EPA* and in the *State Farm* case.<sup>174</sup> Similarly, following *Mead*, courts are apt to accord less deference to unilaterally arrived-at agency interpretations than to those interpretations that reflect the robust participation of agency leaders, civil servants, and members of the public.<sup>175</sup> *Mead* too thus

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<sup>172</sup> See *supra* note 30 and accompanying text.

<sup>173</sup> See Freeman & Vermeule, *supra* note 27 (explaining Supreme Court decisions that seemingly place greater emphasis on administrative expertise than on the political reasoning of agency leaders); Magill & Vermeule, *supra* note 1 (describing how changes in doctrines empower or marginalize different groups within government agencies).

<sup>174</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

<sup>175</sup> See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (accord[ing] less deference to agencies' informally arrived at statutory interpretations than to those interpretations rendered through the process of rulemaking or formal adjudication); Michaels, *Enduring*,

creates an incentive for those with final decisionmaking power to engage more broadly with their administrative rivals.<sup>176</sup>

By the same token, if the courts think that agency heads are too stymied by a civil service unwilling to respect the President's political mandate, they might choose to give greater deference to the political reasoning underlying changes in administrative policy.<sup>177</sup>

Lastly, if the courts have reason to believe that agency leaders and civil servants are inattentive to public comments and concerns, are too quick to circumvent notice-and-comment rulemaking,<sup>178</sup> or are manipulative in terms of what segments of the public are kept abreast of administrative undertakings,<sup>179</sup> they can liberalize and broaden standing, making it easier for voices seemingly underserved by the ostensibly internally inclusive process to bring ex post *external* substantive, merits-based challenges.<sup>180</sup>

***Reviving and Extending a Process-Perfecting Jurisprudence to Reinforce Rivalrous Administration.*** For decades, courts have focused primarily on reviewing the substantive merits of agency actions.<sup>181</sup> This is so notwithstanding the fact that judges are often understood to be well equipped to assess the adequacy of proce-

*Evolving*, *supra* note 1, at 565–66 (characterizing *Mead* as a case that encourages exercises of agency power that reflect the formal participation of agency leaders, civil servants, and members of the public).

<sup>176</sup> See *Mead*, 533 U.S. at 244–45 (Scalia, J., dissenting) (predicting that agencies will accept the Court's nudge and engage in more robust, inclusive forms of agency decision making in order to ensure that their decisions and interpretations receive greater judicial deference); see also *supra* note 98.

<sup>177</sup> Cf. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (“A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 189 (2000) (Breyer, J., dissenting) (expressing agreement with then-Justice Rehnquist’s *State Farm* concurrence); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2 (2009).

<sup>178</sup> See Farber & O’Connell, *supra* note 9, at 1161 (“Agencies are forgoing prior notice and comment in particularly important rulemakings.”).

<sup>179</sup> See Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 *U. CHI. L. REV.* 1157, 1162–63 (2009) (emphasizing that though agency officials are not—and by law cannot be—nearly as manipulative with regard to the transparency of their actions as critics conventionally contend, those officials can nevertheless use the timing of their decisions “to change the cost structure of the public and private interest groups who are in the business of monitoring them”).

<sup>180</sup> See *supra* note 109 and accompanying text.

<sup>181</sup> See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978); Ronald J. Krotoszynski, Jr., “History Belongs to the Winners”: *The Bazelton-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 *ADMIN. L. REV.* 995, 996 (2006) (“Vermont Yankee . . . definitively rejected process-based review of agency action in favor of substantive ‘hard look’ review.”).



dures<sup>182</sup> and are often out of their element when it comes to evaluating agency findings regarding, say, pollution standards or the safety of a nuclear power facility.<sup>183</sup> Given what is regularly seen as the courts' comparative and absolute advantages in policing procedure, such a judicial focus on the merits has, at least for some (including those on the losing side of the old Leventhal-Bazelon debate<sup>184</sup>), seemed somewhat incongruous.<sup>185</sup> Now, once we start thinking about administrative separation of powers as a self-regulating ecosystem capable of reaching rational, reasonable outcomes that reflect a balancing of presidential priorities, broader public concerns, technical imperatives, and legal obligations, continued judicial focus on the merits seems even more problematic.

Mindful of their institutional strengths and perhaps now more sensitive to the existence and utility of administrative separation of powers, courts might consider deemphasizing merits-based review. Instead of tinkering with degrees of deference on questions of law and policy (e.g., requiring *really* hard-look review<sup>186</sup> or according *Skidmore*<sup>187</sup> deference instead of the even more permissive

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<sup>182</sup> See ELY, *supra* note 162, at 102.

<sup>183</sup> This position is perhaps most closely associated with former Chief Judge David Bazelon of the D.C. Circuit. See, e.g., *Nat. Res. Def. Council, Inc., v. U.S. Nuclear Regulatory Comm'n*, 547 F.2d 633, 657 (D.C. Cir. 1977), *rev'd sub nom. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (Bazelon, C.J., concurring) (“[I]n highly technical areas, where judges are institutionally incompetent to weigh evidence for themselves, a focus on agency procedures will prove less intrusive, and more likely to improve the quality of decision making, than judges ‘steeping’ themselves in technical matters to determine whether the agency has exercised a reasoned discretion.”) (internal citations omitted); *Ethyl Corp. v. EPA*, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J., concurring) (“Because substantive review of mathematical or scientific evidence by technically illiterate judges is dangerously unreliable, I continue to believe we will do more to improve administrative decision making by concentrating our efforts on strengthening administrative procedures.”); Krotoszynski, *supra* note 181, at 999–1002; *cf.* *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2120 (2014) (Scalia, J., concurring) (“I join the judgment of the Court, and all of its opinion except Part I-A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief.”).

<sup>184</sup> This was a debate principally between two D.C. Circuit judges regarding whether to conduct process-based or merits-based review of agency actions. See Krotoszynski, *supra* note 181 (describing the so-called Leventhal-Bazelon debate).

<sup>185</sup> See, e.g., Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1819 (1978) (criticizing the Court’s focus on substantive over procedural review and explaining that “the courts’ role in procedural innovation ha[d] been on the whole helpful and constructive”).

<sup>186</sup> *Cf.* Catherine M. Sharkey, *State Farm With Teeth: Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589 (2014).

<sup>187</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (providing a moderate degree of deference to an agency’s statutory interpretation).

*Chevron*<sup>188</sup> approach), judges might more directly police the administrative process. Specifically, they might scrutinize whether administrative checks and balances were operational. They'd then summarily affirm agency actions shown to reflect the meaningful participation of all three administrative rivals and reject those actions that came about through a compromised administrative framework. Were courts to reorient themselves in this fashion, judicial power wouldn't be aggrandized or diminished, just re-routed through perhaps more productive pathways. After all, courts would be focusing more on administrative procedure and, presumably, far, far less on the underlying merits of administrative policy—a tradeoff possibly agreeable to many of the parties involved.

The benefits of this reorientation in favor of process-perfecting review are threefold. First, the courts would be addressing the problem I've identified. Today courts often use the promise of more or less merits-based deference seemingly to encourage agency officials to adopt more robust administrative procedures.<sup>189</sup> But it isn't necessarily clear that agency officials are so readily nudged. And if they aren't so readily nudged, agency officials acting unilaterally—and thus subject to heightened court scrutiny—might still find their decisions affirmed. After all, an agency action might withstand even ratcheted-up merits scrutiny and yet still be a relatively impoverished (if not technically unreasonable) one, precisely because it was not the product of a truly rivalrous, inclusive process. Active and meaningful participation by all three administrative rivals helps ensure that agency actions are constitutionally legitimate—and, again, not just technically reasonable.

Second, as indicated above, this reorientation plays to what many see as the judiciary's strengths: Courts are better positioned to smoke out sham procedures than they are adept at assessing sham substantive policy decisions, particularly when it comes to esoteric or highly technical administrative matters.<sup>190</sup>

Third, and critically, this reorientation minimizes unnecessary and potentially destructive forms of judicial interference. There is good reason to believe that administrative policies that arise from robust, rivalrous administrative proceedings ought not be held up in

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<sup>188</sup> *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (deferring to agencies' statutory interpretations provided those interpretations aren't unreasonable).

<sup>189</sup> See, e.g., Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 558–64 (2006) (emphasizing how courts encourage agencies to adopt more rigorous procedures).

<sup>190</sup> See *supra* notes 182–85 and accompanying text.

the courts. Provided the agency can readily show that administrative separation of powers was well functioning, which I suspect will often be the case, the courts can quickly dispense with merits challenges by those whose positions did not prevail in the inclusive, contentious administrative arena (and who now want a second bite of the apple).

No doubt those less enamored with the procedural virtues of administrative separation of powers (and perhaps even some of those who are) might worry that courts won't be able to correct clear substantive errors that are apt to arise from time to time notwithstanding the hearty participation of all three administrative rivals. For them and others, the existence of a judicial backstop is a source of considerable comfort. But it isn't clear that the administrative triumvirate is collectively any less sensitive to the legal, technocratic, and democratic imperatives of administrative governance than are judges, who might themselves introduce substantive errors (because they're in over their heads or because they've fallen prey to their own political biases).<sup>191</sup>

Indeed, to the extent this shift away from merits-based review is particularly unnerving, there is benefit in recalling Justice Jackson's claim in *Brown v. Allen*.<sup>192</sup> Jackson admonished us not to rely too heavily on the accuracy or wisdom of judges—something we're apt to do, he surmised, simply because courts usually enjoy the final say: "We are not final because we are infallible, but we are infallible only because we are final."<sup>193</sup> There is benefit too in recalling a remark often attributed to Jerry Mashaw. According to Mashaw, "[j]udicial review controls administrative action in the same way that tornadoes control the rice crop in Arkansas: they appear unpredictably, wreak havoc, and then depart."<sup>194</sup>

Relatedly and perhaps more critically, agency officials might worry that whatever process they employ and however solicitous they are of civil servants and members of the public writ large it still won't be enough. This uncertainty might spark an exhausting race-to-the-top of the sort then-Justice Rehnquist feared was happening in the 1960s and 1970s in light of the D.C. Circuit's demanding (pre-*Vermont Yankee*) brand of process-based review of agency actions.<sup>195</sup> To avoid

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<sup>191</sup> See *Ethyl Corp. v. EPA*, 541 F.2d 1, 67 (1976) (Bazelon, C.J., concurring). Justice Breyer has himself suggested that more rigorous administrative review might serve as an adequate stand-in for traditional judicial review. See BREYER, *supra* note 45, at 71–72.

<sup>192</sup> 344 U.S. 443 (1953).

<sup>193</sup> *Id.* at 540 (Jackson, J., concurring).

<sup>194</sup> Charles W. Tyler & E. Donald Elliot, *Administrative Severability Clauses*, 124 *YALE L.J.* 2286, 2288 (2015) (attributing sentiment to Jerry Mashaw).

<sup>195</sup> See *supra* notes 181–84 and accompanying text. Note that a process-perfecting approach of the sort I'm suggesting would not be in direct tension with the holding in

an extreme and burdensome race-to-the-top in which agency heads go overboard in their efforts to ensure robust tripartite engagement, all stakeholders would seemingly be well served by agreeing ex ante to some clear indicia of fair, meaningful, and rivalrous administrative engagement. These indicia might take the form of affidavits signed by the various stakeholders, certification of participation, limited judicial discovery of administrative proceedings, etc. Again, there is no easy and simple fix, and I admit that measuring process is difficult and that agency officials might view judicial scrutiny of this sort as offensive. Those officials are, after all, accustomed to being the beneficiaries of the modern presumption of administrative regularity that dates at least as far back as the last of the landmark *Morgan*<sup>196</sup> cases in the 1940s. But even though this Article cannot fully (or even satisfactorily) map out exactly how a process-perfecting model of review might look and work, and even if any such model proves difficult to implement, it is nevertheless important for us to entertain the possibility of alternative approaches to the current pattern of judicial review, particularly when those alternative approaches may better encourage healthy, contentious administrative engagement.

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Even leaving aside the operational difficulties with process-focused review, any turn in that direction cannot be a complete one. Some agency responsibilities don't lend themselves to the rivalrous interplay of all three administrative stakeholders. 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. In those cases, the advantages of courts continuing to use their existing tools (and to continue focusing on merits-based review) seem more apparent. Indeed, if anything, merits-based review should be quite exacting given the absence of administrative checks and balances. Still, perhaps any such emphasis on merits review ought to be considered the exception rather than, as it is today, the rule, used only

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*Vermont Yankee*. *Vermont Yankee* is a case interpreting the scope and meaning of the Administrative Procedure Act. The process-perfecting custodial approach described in this Article has a constitutional basis. It is grounded in theories of constitutional structure and on an understanding of ordinary administrative law as a form of constitutional law. Cf. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, *supra* note 160 (suggesting that much of what we think of as administrative law has a constitutional basis).

<sup>196</sup> *United States v. Morgan (Morgan IV)*, 313 U.S. 409, 422 (1941) (emphasizing that the courts should respect “the integrity of the administrative process” and accord agencies a presumption of regularity).

in those select contexts where administrative separation of powers (and judicial policing of the administrative process) is seen as impractical by courts and agency officials alike.

### III

#### REINFORCING RIVALROUS ADMINISTRATION

#### WHERE ADMINISTRATIVE SEPARATION OF POWERS IS DISABLED

One of the virtues of administrative separation of powers as an explanatory and normative phenomenon is its broad, transsubstantive reach. Across most federal domestic administrative domains, we are apt to find politically accountable agency leaders, a sizable contingent of civil servants, and a wide array of empowered public participants. This tripartite system applies widely but not universally—and it is of course susceptible to being thwarted in a number of ways. The system can be expressly flouted. It can be quietly or even unwittingly circumvented. Or it can be effectively cabined through legally authorized carve-outs. Where administrative separation of powers still isn't (or never was) operational, it might well make sense to warrant and encourage greater, more aggressive constitutional control over the likely internally *imbalanced* administrative domain.

In this Part, I identify several situations in which administrative separation of powers appears to be disabled. First, I address what I classify as easy cases in which the letter of the law is violated in ways that compromise a well-functioning administrative separation of powers. Second, I confront moderately difficult cases involving technically lawful practices that have the effect of compromising a well-functioning administrative separation of powers. Lastly, I examine what seem to be the hardest cases, those in which the constitutional branches legally and collectively subvert administrative separation of powers. In the course of discussing easy, moderate, and difficult cases, I consider whether and with what force courts should intervene to introduce or reinforce rivalrous administration.

#### A. *Easy Cases: Violations of the Letter of the Law (of Administrative Separation of Powers)*

Easy cases present themselves when the *letter of the law* is violated. That is, some component of administrative separation of powers is supposed to apply in full, as a matter of positive law, but doesn't because of unauthorized acts, omissions, or indulgences by administrative or constitutional actors. For example, an agency chief orders the promulgation of a rule without first providing notice or opportu-

nity for interested parties to comment;<sup>197</sup> a civil servant renders a final decision that is statutorily entrusted to the head of the agency;<sup>198</sup> or a regulated party engages in ex parte contact with agency adjudicators during the course of a formal hearing.<sup>199</sup>

In each of these instances, the constitutional branches have not collectively decided to limit the reach of administrative separation of powers. To the contrary, the presumption, however implicit, is the converse one: that heterogeneous, rivalrous administrative governance is, in effect, intended and expected to operate in those spaces.

The remedy in such instances should be a fairly intuitive one: judicial rejection of whatever substantive action is arrived at through the impoverished, imbalanced, and statutorily deficient administrative process. One of the reasons this remedy is intuitive and, I suspect, uncontroversial is because courts already typically invalidate agency actions in instances involving administrative actors blatantly defying statutory law. Indeed, an analogy might be drawn here between this type of defiance and the third category of practices Justice Jackson refers to in the *Youngstown* case: those where “the President takes measures incompatible with the expressed or implied will of Congress.”<sup>200</sup> Courts therefore demand compliance with prescribed procedures and do so regardless whether they see those procedures as an essential part of the scaffolding that supports administrative separation of powers.

*B. Moderately Difficult Cases: Violations of the Spirit of the Law  
(of Administrative Separation of Powers)*

More challenging cases arise when the *spirit* of what amounts to administrative separation of powers is violated—that is, when constitutional or administrative actors do not expressly violate specific statutory or decisional laws but nevertheless act in ways that have the effect of undermining what I contend is a heterogeneous, rivalrous tripartite scheme that legitimates the exercise of administrative power.

For example, agency officials provide notice of a proposed rule and an opportunity for comment—but nevertheless also entertain ex

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<sup>197</sup> See 5 U.S.C. § 553 (2012) (obligating agencies engaged in rulemaking to provide the public with notice and an opportunity to comment).

<sup>198</sup> See, e.g., Endangered Species Act, 16 U.S.C. § 1533(a)(3)(A) (2012) (authorizing the Secretary of Interior to designate and protect habitat critical to endangered species).

<sup>199</sup> See 5 U.S.C. § 554(d) (2012) (prohibiting ex parte communication in the course of formal administrative proceedings).

<sup>200</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

parte correspondence and meetings.<sup>201</sup> Or an agency head hires private service contractors to draft rules<sup>202</sup> or render benefits-eligibility determinations for those seeking disability or welfare payments.<sup>203</sup> In both cases, no specific law is violated. Nevertheless, both instances suggest the very real possibility that the administrative separation of powers is effectively compromised.

Regarding the first example, the agency officials followed the statutory protocols required for informal rulemaking and did not run afoul of any express prohibitions.<sup>204</sup> The statutory ban on ex parte contacts seemingly applies only in the context of formal adjudication (or in the exceptionally rare instance of so-called formal, trial-like rulemaking). Nevertheless, there might be reason to be concerned about ex parte contacts in run-of-the-mill rulemaking proceedings—at least when viewed through the lens of administrative separation of powers. Such ex parte contacts call into question whether the official, publicized, and inclusive venue for public participation—namely the APA-mandated open comment period—was really meaningful, given that there were also opportunities to use back channels to sway agency decisionmakers.<sup>205</sup> Any additional or alternative ex parte venue—accessible perhaps only to civil society’s well-heeled VIPs—is problematic for the following reason: it compromises the integrity, legitimacy, and possibly the effectiveness of one of the administrative rivals. That is to say, by virtue of the existence and importance of this ex parte venue, civil society is rendered less democratic and less inclusive. Skewed public participation limits civil society’s ability to fully check and educate agency heads and civil servants, to channel the complete array of public views into the administrative process, and to justify its constitutionally and normatively privileged role as a central

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<sup>201</sup> See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51–59 (D.C. Cir. 1977) (considering whether the FCC acted improperly in permitting and entertaining ex parte contacts during and after an informal rulemaking proceeding).

<sup>202</sup> See VERKUIL, *OUTSOURCING SOVEREIGNTY*, *supra* note 71 (describing the practice of using contractors to perform essential policymaking responsibilities); see also 4 WILLIAM RODGERS, *ENVIRONMENTAL LAW* § 8.9, at 619 & n.139 (2009) (identifying EPA contractors as “prepar[ing] options, draft[ing] rules, review[ing] public comments, prepar[ing] the final drafts . . . and provid[ing] interpretive guidance”).

<sup>203</sup> For discussions of the contracting out of benefits-eligibility determinations, see Matthew Diller, *supra* note 29, at 1182–83 (2000); Super, *Privatization, Policy Paralysis, and the Poor*, *supra* note 71, at 395–96.

<sup>204</sup> See CASS ET AL., *supra* note 66, at 447 (“[E]very court . . . has rejected the idea of banning ex parte contacts during the pendency of a rulemaking absent a statutory requirement to do so.”).

<sup>205</sup> See *Home Box Office, Inc.*, 597 F.2d at 54 (expressing concerns about ex parte communications apart from the normal notice-and-comment process and stating that “[e]ven the possibility that there is here one administrative record for the public and this court and another for the [FCC] and those ‘in the know’ is intolerable”).

participant in administrative governance. And to the extent that one rival is compromised in this fashion, the entire, delicately balanced system of administration of separation of powers is likewise compromised.

As for the second example, private service contracting often has the effect (if not also the intent) of directly sidelining civil servants.<sup>206</sup> Contractors take the place of civil servants. But these replacements are anything but perfect substitutes. As I have explained elsewhere, contractors lack the legal protections, the guaranteed salaries, and often the cultural and professional commitments that make civil servants such well-positioned counterweights to agency leaders. Contractors are far more likely to serve as “yes” men and women, dutifully following the directives of the agency leadership. Not coincidentally, that leadership decides whether the contractors’ work orders are to be terminated, renewed, or extended.<sup>207</sup> To be sure, contracting is hardly illegal—indeed it is a ubiquitous practice encouraged by presidential administrations of all political stripes<sup>208</sup>—but it undeniably weakens the administrative separation of powers.<sup>209</sup>

How should courts respond when they encounter administrative actions that result from such questionable but not prohibited practices? Perhaps Justice Jackson’s second category of cases from *Youngstown* provides a useful analogy. Jackson describes a “zone of twilight” where “the President acts in absence of either a congressional grant or denial of authority.”<sup>210</sup> To be sure, a case could be made that *ex parte* contacts during rulemaking and liberal contracting practices reflect congressional acquiescence, if not tacit endorsement. Yet any such sign of congressional support must be weighed against the wholesale, if again somewhat haphazard, construction of a regime

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<sup>206</sup> See Michaels, *Privatization’s Pretensions*, *supra* note 25, at 745–50.

<sup>207</sup> *Id.*; Michaels, *Enduring, Evolving*, *supra* note 1, at 583.

<sup>208</sup> For discussions of the breadth, depth, and bipartisan popularity of government service contracting, see, for example, CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34685, THE FEDERAL WORKFORCE: CHARACTERISTICS AND TRENDS 3–4 tbls.2 & 3 (2011); Paul C. Light, *A Government Ill Executed: The Depletion of the Federal Civil Service*, 68 PUB. ADMIN. REV. 413, 417–18 (2008); Lawrence L. Martin, *Performance-Based Contracting for Human Services: Lessons for Public Procurement?*, 2 J. PUB. PROCUREMENT 55, 55 (2002); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1379 (2003); Michaels, *Privatization’s Progeny*, *supra* note 24, at 1039.

<sup>209</sup> To be clear, even if there isn’t the coziness between contractors and agency leaders that I suggest, the private actors who replace civil servants are still not necessarily as legitimate. To the extent they lack the civil servants’ professional norms and commitments (and the job protection to give voice to those commitments), it is questionable whether contractors are meaningful contributors to a rivalrous administrative sphere and whether they can claim a kinship to any of the constitutional branches.

<sup>210</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).



of administrative separation of powers that helped legitimize the administrative realm. For this reason, courts can—and I’d argue should—endeavor to restore a well-functioning administrative separation of powers. Those courts committed to existing tools and doctrines can give agencies a choice: accept a judicial nudge in favor of reinforcing rivalrous administration or disregard that nudge and face more aggressive (less deferential) merits review of agency actions arising out of compromised procedures.<sup>211</sup> That is to say, courts encourage greater procedural rigor but do not insist upon it.

Alternatively courts could flatly reject agency actions arising out of compromised procedures and insist on greater fidelity to administrative separation of powers. This process-focused approach would, for instance, require agencies to preserve the exclusivity of the open comment period during rulemaking and to eschew the use of contractors (or at least those not directly supervised by civil servants) to make or implement policy.<sup>212</sup>

### C. *Most Difficult Cases: Where Administrative Separation of Powers Is Legally Disabled*

At times, the constitutional branches have collectively and legally disabled what I’m calling administrative separation of powers—and done so through duly enacted legislation. Consider, for example, Congress’s creation of any number of independent agencies; its exempting defense and foreign affairs responsibilities from, among other things, both the APA’s rulemaking protocols<sup>213</sup> and from FOIA’s disclosure requirements;<sup>214</sup> and its creation of government corporations. All of these practices reflect authorized departures (whether wittingly or not) from what is in effect our system of administrative separation of powers.

***Independent Agencies.*** At first blush, independent agencies might appear to be a strange example. Their constitutional pedigree is long

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<sup>211</sup> Again, as discussed above, the Court seemed to be making exactly a move of this sort in *Mead* when it signaled it would accord greater deference to an agency’s statutory interpretations arising out of procedurally robust rulemaking (that involves the participation of all three administrative rivals) than it would to, among other things, decisions rendered unilaterally by agency heads or those made by career employees with little, if any, input from the public or the agency leaders. See *supra* notes 95, 98, 175–76 and accompanying text.

<sup>212</sup> Federal laws and regulations generally prohibit civil servants from directly supervising government service contractors. See, e.g., Michael K. Grimaldi, *Abolishing the Prohibition on Personal Service Contracts*, 38 J. LEGIS. 71, 74, 81–83 (2012).

<sup>213</sup> 5 U.S.C. § 553(a)(1) (2012).

<sup>214</sup> 5 U.S.C. § 552(b)(1) (2012).

and increasingly beyond question.<sup>215</sup> And as a structural matter, their power is clearly triangulated among appointed agency leaders, civil servants, and members of civil society in a manner that seems entirely consistent with administrative separation of powers.

But independent agency tripartism differs from Executive agency tripartism in two important ways. First, independent agency heads are not as closely tethered to the President as are their counterparts who sit atop Executive agencies. While Executive agency leaders serve at the pleasure of the President, those running independent agencies are protected against at-will termination.<sup>216</sup> Congress further limits presidential control by requiring the President to make bipartisan appointments to many of the independent agencies.<sup>217</sup> This means that a significant number of independent agency leaders are unlikely to share the President's ideological and programmatic commitments—and that none of the agency leaders may be summarily fired for deviating, even sharply, from the White House's agenda.<sup>218</sup> It also means that independent agency heads cannot claim as strong of a connection to any of the constitutional branches—a connection that Executive agency heads, civil servants, and members of civil society can each assert to underscore their own constitutional and administrative bona fides.<sup>219</sup>

Second, independent agency heads are not only seemingly too distant from the President but also, quite possibly, not distant enough

<sup>215</sup> See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483–84 (2010) (seemingly stipulating to the constitutionality of an independent SEC); *Morrison v. Olson*, 487 U.S. 654, 686–93 (1998) (applying a capacious test for assessing the constitutionality of independent agency officials).

<sup>216</sup> See, e.g., *Morrison*, 487 U.S. at 706–10 (Scalia, J., dissenting) (explaining how insulated independent agency officials are from presidential control).

<sup>217</sup> The FTC, SEC, NLRB, FCC, FEC, and CFTC, among many others, all have bipartisan commissions.

<sup>218</sup> For discussions suggesting that the President actually retains considerable influence over independent agency officials, see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772–73, 818–24 (2013); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491–92 (2008).

<sup>219</sup> Cf. *Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting) (questioning delegations to the U.S. Sentencing Commission because the Commission is too divorced from the three constitutional branches). Perhaps analysis along these lines should make us think differently about long-term vacancies at the top rungs of Executive agencies—and the effect of those vacancies on the constitutionality of administrative governance. See O'Connell, *Vacant Offices*, *supra* note 21, at 937–46, 974–78.

Note there has been some consideration whether courts should scrutinize the decisions of independent agencies more carefully than the decisions of executive agencies, for reasons not entirely distinct from the ones posited in this Article. See, e.g., Sharkey, *supra* note 186, at 1614–16 (addressing the possibility of heightened judicial scrutiny of independent agencies).

from the civil servants. This is because both independent agency heads and civil servants are protected against at-will termination and are generally expected to operate in a relatively nonpartisan, apolitical fashion.<sup>220</sup> I don't want to overstate this claim.<sup>221</sup> But to the extent the shared or overlapping traits of the independent agency heads and the tenured civil servants render them insufficiently rivalrous with one another, that feature of independent agencies likewise poses a challenge to the well-functioning administrative separation of powers.<sup>222</sup>

In short, independent agencies lack one of the isomorphic connections to the three great constitutional branches and, moreover, seemingly lack internal balance insofar as two of the rivals are primarily politically insulated experts (and none of the three directly channels the political interests and democratic accountability of the President).

It bears mentioning that my concerns with independent agencies are different from and broader than the more conventional and straightforward constitutional critiques, such as those that Unitary Executive Theorists usually make. Unitary Executive Theorists see independent agencies as constitutionally suspect for the sole and (for them) sufficient reason that the independent agency leaders are too disconnected from the President<sup>223</sup>—and thus interfere with the President's constitutional authority to take care that the laws are faithfully executed.<sup>224</sup> Where my position differs from theirs, however, is that I am just as worried about an overly presidentialist administrative agency too closely tied to the White House (perhaps as a result of civil servants and members of the public being marginalized) as I am

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<sup>220</sup> See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19–24 (2010) (describing expectations that independent agencies will operate apolitically); Bressman & Thompson, *supra* note 21, at 613–14 (2010).

<sup>221</sup> After all, Presidents do have some control over independent commissioners. See sources cited *supra* note 218. And the differences in responsibilities between rank-and-file employees and the commissioners themselves might well create distance between the two groups and engender some degree of rivalry.

<sup>222</sup> This concern about insufficiently rivalrous administrative stakeholders is similar to the one raised earlier in this Part regarding the use of government service contractors. When governments use such contractors instead of civil servants, they are preserving, at least nominally, a tripartite separation of powers. But there, as here, the important question is whether those nominal rivals are actually rivalrous given contractors' financial dependency on agency leaders and given independent agency officials' (*civil servant-like*) insulation from at-will termination.

<sup>223</sup> CALABRESI & YOO, *supra* note 8, at 3–4.

<sup>224</sup> See *Morrison v. Olson*, 487 U.S. 654, 699–711 (1988) (Scalia, J., dissenting) (emphasizing the constitutional and practical reasons for a unitary executive and expressing concern with congressional efforts to insulate high-ranking agency officials from direct and complete presidential control); *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (similar).

about an insufficiently presidentialist administrative agency too far removed from the President. Administrative separation of powers requires, instead, that there be a presidential standard bearer among the three administrative rivals and that such a standard bearer is neither too dominant nor too dominated. For this reason, to the extent that independent commissioners and career civil servants are themselves too similar and thus insufficiently rivalrous or heterogeneous, the danger of independent agencies is in fact that they are too unitary and imbalanced—albeit not unitary and imbalanced in ways Unitary Executive Theorists are apt to celebrate.

***National Security Exemptions.*** We usually think about the sprawling administrative state with regard to domestic regulatory and public-benefits programs. We should not think so narrowly. Defense, intelligence, international trade, diplomacy, homeland security, and foreign aid and investment policies are likewise regularly routed through administrative channels. Indeed, a good deal of the recent growth of the federal administrative state, public and private, can be attributed to the post-9/11 creation of new national security agencies and departments and the expansion of existing ones.<sup>225</sup>

These national security and foreign affairs agencies play just as vital a role in the creation, expression, and operationalization of American law, policy, and public values as do the traditional domestic agencies. Yet the two types of agencies are often quite different if for no other reason than Congress regularly exempts those involved in national security and foreign affairs from many of the requirements deemed central to American administrative law.<sup>226</sup> As mentioned above, agencies tasked with military or diplomatic responsibilities need not go through the rigors associated with public notice and comment. And FOIA's Exemption 1 permits agencies to withhold from the public information pertaining to the national defense.<sup>227</sup> Furthermore, some statutes allow agency heads to reclassify broad swaths of civil servants involved in national and homeland security as at-will employees<sup>228</sup>—effectively subordinating those workers to agency

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<sup>225</sup> See COPELAND, *supra* note 208 (documenting the increasing size, cost, and influence of those administrative agencies tasked with national security responsibilities).

<sup>226</sup> Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 221–24 (2009) (describing foreign affairs as a context in which many core administrative laws and rules are relaxed); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096–97, 1107–15, 1119–22 (2009) (contending that there are more black and gray legal holes in national security domains than in domestic regulatory ones).

<sup>227</sup> Freedom of Information Act, 5 U.S.C. § 552 (2012).

<sup>228</sup> See Katyal, *supra* note 1, at 2333 (describing national security legislation as “weaken[ing] civil-service protections for approximately 170,000 federal workers”).

leaders and rendering them far less rivalrous and far less countermajoritarian.<sup>229</sup> Lastly, the public's ability to bring lawsuits challenging administrative action of a national security variety is quite limited by statutory and decisional law.<sup>230</sup> As a result, much of what is conducted in the name of national security is done, perhaps problematically, outside of the framework of administrative separation of powers.<sup>231</sup>

**Government Corporations.** Congress regularly designates some seemingly administrative responsibilities to government corporations, which likewise tend to operate beyond the reach of ordinary federal domestic administrative law. Government corporations, such as Amtrak, the U.S. Postal Service, and In-Q-Tel, are led by officials relatively insulated from the President. Some of these corporations are staffed by personnel who are not part of the federal civil service. And these corporations are generally far less open than federal domestic agencies to the full range of opportunities for public participation. Needless to say, what amounts to administrative separation of powers is largely disabled in this space as well.<sup>232</sup>

How should courts respond to independent agencies, national security agencies, and government corporations? It is important to underscore that in all three contexts, the rules of the game aren't *violated* by one constitutional or administrative actor mid-match. That is to say, independent agencies, national security agencies, and government corporations are not the product of one administrative rival marginalizing the others; nor are they the product of one constitutional actor, on its own, intervening when and how it sees fit to exercise greater control. Rather, the rules of the game are changed *ex ante* and by consensus—in a manner that reflects a formal, procedurally sound, and collective, if still tacit, disavowal of a well-functioning sep-

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<sup>229</sup> Michaels, *Enduring, Evolving*, *supra* note 1, at 585–87 (describing a non-tenured government workforce as more fully under the control of the agency leadership).

<sup>230</sup> See, e.g., Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1260–63, 1297–98, 1314 (2007) (characterizing the difficulties associated with successfully challenging government action on matters of national security).

<sup>231</sup> *But see* Katyal, *supra* note 1, at 2323–24, 2331–35 (suggesting various forms of intra-agency constraints in national security domains).

<sup>232</sup> See KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW 10–11 (2011) (describing government corporations as largely exempt from many core administrative laws and regulations); Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 836–37 (2011) (noting one of the main justifications for creating government corporations is to free certain entities from the rules and requirements that government agencies must follow); *cf.* *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) (expressing concern that federal officials could “evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form”).

aration of powers by the constitutional actors. What we therefore have here is something not unlike the first category of cases Justice Jackson identifies in his *Youngstown* concurrence: “the President act[ing] pursuant to an express or implied authorization of Congress.”<sup>233</sup> In such instances, Jackson tells us, the President’s “authority is at its maximum.”<sup>234</sup>

In deciding how to respond to these entities, one question to ask is whether the limited application of administrative separation of powers tracks what we find—and accept—at the constitutional level. That is to say, perhaps these administrative arrangements correspond to constitutional responsibilities that we never thought were appropriately enmeshed within an inclusive and rivalrous constitutional separation of powers. For example, if independent agencies were tasked entirely with adjudicatory responsibilities, then we might be comfortable with administrative separation of powers being disabled. Because we don’t expect or permit the President to meddle with judicial decisions, it shouldn’t be surprising that we would likewise deny the President’s administrative deputies a role in administrative adjudications.<sup>235</sup> Similarly, at least some think that a robust constitutional separation of powers is properly disabled when it comes to matters of foreign affairs and national security—that is, that the courts and to a lesser extent Congress should largely yield to the President.<sup>236</sup> Under that logic, when it comes to the routing of national security responsibilities through administrative agencies perhaps it is only sensible for administrative separation of powers to similarly be disabled in favor of greater unilateral control by presidentially appointed agency heads. Lastly, to the extent that government corporations are carrying out commercial—rather than sovereign—functions, we might not be so troubled by the disabling of administrative separation of powers.<sup>237</sup>

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<sup>233</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

<sup>234</sup> *Id.*

<sup>235</sup> See *Wiener v. United States*, 357 U.S. 349, 355–56 (1958) (imposing a “for cause” limitation on the President’s power to remove members of the adjudicatory War Claims Commission); *Myers v. United States*, 272 U.S. 52, 135 (1926) (conceding that “there may be duties of a quasi-judicial character . . . the discharge of which the President can not in a particular case properly influence or control”).

<sup>236</sup> See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 10–22, 294–95 (2008) (emphasizing the primary role played by the Executive in matters of foreign affairs and national security); see also JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 122–26, 205–06 (2007) (ascribing such views to many of the leading officials in the George W. Bush Administration).

<sup>237</sup> *Cf. Mistretta v. United States*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting) (“Where no government power is at issue, there is no structural constitutional impediment to a ‘branchless’ agency.”).

After all, the Supreme Court has recognized broad “market-participant” exceptions to core principles of constitutional law. The Court has done so on the theory that such government bodies are not carrying out traditional or central government functions but rather engaging in primarily market-based or proprietary activities.<sup>238</sup>

Each of these claims suggesting that constitutional separation of powers might itself be disabled is of course highly contestable. Independent agencies do far more than simply adjudicate. They also promulgate rules that look and operate a lot like the statutes that Congress enacts. And they carry out executive responsibilities when investigating and prosecuting perceived wrongdoers.<sup>239</sup> Therefore independent agencies’ insulation from the President—at least if it is premised on the theory that constitutional separation of powers is properly disabled in adjudicatory contexts<sup>240</sup>—is far less defensible. Likewise, national security agencies handle responsibilities far broader than those that the Constitution clearly unilaterally vests in the President.<sup>241</sup> And government corporations do a good deal more than engage in market transactions or take on responsibilities entirely peripheral to public governance.<sup>242</sup>

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<sup>238</sup> Among other things, the Court has permitted states to engage in market transactions that are effectively regulatory and discriminatory (in favor of in-state interests) even though such discriminatory practices would violate the Dormant Commerce Clause if formally effectuated through the tax code or through administrative rulemaking. *See, e.g.,* *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–37 (1980) (upholding a state-owned cement plant’s policy of favoring in-state customers); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808–10 (1976) (upholding a requirement that places disproportionate administrative burdens on out-of-state scrap processors participating in a state-run program). And when it comes to such things as the election of officials to government-created water districts, the Court has relaxed the “strict demands of the one-person, one-vote principle” and allowed states to limit the franchise to landowners and to apportion voting power based on the amount of land a voter possesses. *See Ball v. James*, 451 U.S. 355, 357, 366, 370–71 (1981) (emphasizing the commercial nature of the enterprise as a reason for not strictly following the one-person, one-vote principle).

<sup>239</sup> *See Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) (explaining that independent agencies often carry out executive responsibilities); *Bowsher v. Synar*, 478 U.S. 714, 761 n.33 (1986) (White, J., dissenting) (similar); *see also* Mary Jo White, Chair, Sec. & Exch. Comm’n, Speech: All-Encompassing Enforcement: The Robust Use of Civil and Criminal Actions to Police the Markets (Mar. 31, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370541342996#.VPJ0oZXYmfQ> (describing broad enforcement and prosecutorial tools at the SEC’s disposal); *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FEDERAL TRADE COMMISSION (July 2008), <http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

<sup>240</sup> *See supra* note 235 and accompanying text.

<sup>241</sup> Indeed, many such responsibilities seem specifically keyed to powers the Constitution entrusts to Congress. *See* U.S. CONST. art. I, § 8, cls. 3, 11–16 (granting many military and foreign affairs powers to Congress).

<sup>242</sup> *See, e.g.,* *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1232–33 (2015) (characterizing Amtrak as a government entity with rulemaking authority). If we are indeed concerned about imbalanced agencies handling traditional, sovereign

For these reasons and bearing in mind both the legally sound processes that generated these administrative carve-outs and the problems these carve-outs pose, courts might consider applying a rebuttable presumption against the administrative exemptions that the constitutional branches carved out. It would be up to Congress and the President to explain why what amounts to administrative separation of powers is particularly injurious (or simply unnecessary) in these contexts.

But if no such reason exists, then courts might consider using their current tools and thus intensifying merits-based scrutiny to better police outcomes that do not reflect the internal balancing of rivalrous, heterogeneous interests that a well-functioning administrative separation of powers assures; adopting new, process-focused tools and thus insisting upon a decisionmaking protocol that is rivalrous, heterogeneous, and inclusive; or demanding that the coordinate constitutional branches exercise greater control over imbalanced agencies. (Given the lack of a well-functioning administrative separation of powers, such direct interference by the constitutional branches would likely not be as disruptive or destabilizing and might actually be necessary to help legitimate an otherwise imbalanced administrative domain.)

### CONCLUSION

The existence of a new (or at least *newer*) separation of powers—one that operates on the administrative stage—compels us to revisit and challenge some longstanding assumptions and understandings about the nature and legitimacy of administrative power and about the relationship between the constitutional and administrative spheres. This project, which connects contemporary insights regarding administrative separation of powers to old debates over bureaucratic control, characterizes the administrative sphere as a legitimate, largely self-regulating ecosystem. It is a characterization that is both a reality and an ideal—something that we can today tangibly identify and something we can (*and perhaps must*) strive to perfect. To that end,

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administrative responsibilities, ought we likewise be concerned about balanced administrative agencies carrying out commercial tasks? To the extent we think commercial functions are best handled by homogeneous, top-down entities, then at least on an operational level we might think that a balanced (internally rivalrous) agency is a poor vehicle for such undertakings. This question is beyond the scope of this project, but it is one I consider elsewhere. See Jon D. Michaels, *Government Market Participation as Conflicted Government*, in *AMERICAN ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY MASHAW* (Nicholas R. Parrillo ed., forthcoming 2016) (manuscript at 15–16) (on file with the New York University Law Review).



this Article's efforts to describe that ecosystem, to broaden the conventional positive and normative accounts of bureaucratic control, and to consider reorienting administrative jurisprudence to protect and promote a well-functioning administrative separation of powers represent important initial steps and—one hopes—serve as an invitation for others to carry the inquiry forward.