

## Notre Dame Law School NDLScholarship

---

Journal Articles

Publications

---

2018

# Reconstructing an Administrative Republic

Jeffrey A. Pojanowski

*Notre Dame Law School*, [pojanowski@nd.edu](mailto:pojanowski@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)

 Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), and the [State and Local Government Law Commons](#)

---

### Recommended Citation

Jeffrey A. Pojanowski, *Reconstructing an Administrative Republic*, 116 Mich. L. Rev. 959 (2018).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/1330](https://scholarship.law.nd.edu/law_faculty_scholarship/1330)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# RECONSTRUCTING AN ADMINISTRATIVE REPUBLIC

Jeffrey A. Pojanowski\*

CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC. BY *Jon D. Michaels*. Cambridge and London: Harvard University Press. 2017. Pp. viii, 232. \$35.

## INTRODUCTION

Something is rotten in the state of administrative law. This sentiment is not uncommon in contemporary scholarship, though it usually arises from the political or jurisprudential right. Administrative law is “unlawful”;<sup>1</sup> the rise of the administrative state proliferates “quasi-law” and undermines our polity’s constitutional morality;<sup>2</sup> and “bureaucracy in America” betrays our Republic’s central governing principles.<sup>3</sup> More broadly, scholars express a looming sense of ill ease with the current dispensation, marked by a lamentation for what has been lost and a call for its restoration.

With the publication of *Constitutional Coup: Privatization’s Threat to the American Republic*, we can add Professor Jon D. Michaels<sup>4</sup> to the litany of the discontented, but with a twist. Michaels is not a libertarian seeking to roll back the administrative state, an avid federalist hoping to devolve governing function to states and local communities, or an originalist aspiring to restore the premodern constitutional regime. Yet he too seeks to undo a betrayal of our constitutional order. For Michaels, the lost regime is what he calls the *pax administrativa*, an era in which governing arrangements reconciled the administrative state with our core constitutional commitments to checks and balances and separation of powers (pp. 15–16). The usurper here is pervasive privatization within the administrative state.<sup>5</sup>

Michaels argues that privatization—whether through contracting out key government functions or “marketizing” the bureaucracy—upsets this delicate balance and is constitutionally illegitimate (pp. 54–57, 135). Today’s junta is not dressed in military fatigues and does not tote guns but rather

---

\* Professor of Law, Notre Dame Law School. I am grateful to Sam Bray, Emily Bremer, Paul Miller, and Adrian Vermeule for helpful comments. All errors are my own.

1. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).
2. BRUCE P. FROHNEN & GEORGE W. CAREY, *CONSTITUTIONAL MORALITY AND THE RISE OF QUASI-LAW* (2016).
3. JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* (2017).
4. Professor of Law, UCLA School of Law.
5. P. 57 (“[O]nly through understanding and appreciating *pax administrativa* as constitutionally grounded can we see privatization the way Hamlet came to see his uncle: as a false and illegitimate usurper.”).

arrives in a three-piece suit armed with a PowerPoint plan to run the government like a business. *Constitutional Coup* identifies the rise of the *pax administrativa*, diagnoses its downfall, and offers a plan to restore the constitutional order we lost.

*Constitutional Coup* offers a learned, lucid, and important argument about the relationship between privatization, constitutional structure, and public values. Defenders and critics of the contemporary administrative state alike will profit from engaging with Michaels's innovative work. This review will introduce readers to his argument and then will raise two kinds of questions about it. First, will Michaels's method of constitutional interpretation and doctrinal analysis accelerate the trend *toward* privatization and consolidation of power in agency heads, the very evils he seeks to avoid? Second, is Michaels's version of separated powers within the administrative state a worthy successor to the original, and more formal, three-branch version?

Neither set of questions admits of easy answers, and even those who disagree with Michaels's conclusions should readily accede that he clarifies and enriches our understanding of the normative choices and dilemmas the modern administrative state raises. Constitutional formalists, progressives, and libertarians alike should fear undifferentiated massing of power in the executive branch, a consolidation enabled by a force-multiplying phalanx of federal contractors. For those convinced of the gravity of this situation, the question remains how to address it, and Michaels offers a powerful opening shot.

#### I. RESTORING THE *PAX ADMINISTRATIVA*

*Constitutional Coup* proceeds in three steps. First, it catalogues the rise of the administrative state in America and identifies a period of time in which this regime was congruent with our country's constitutional commitments (pp. 21–77). Nothing gold can last, however, and this *pax administrativa* was not long for this world. In the second part of the book, Michaels traces its downfall and the concomitant rise of privatization in the administrative state (pp. 79–141). In the last part of the book, Michaels offers a suite of doctrinal and legislative proposals to restore the administrative republic vanquished by privatization (pp. 143–230).

The first part of *Constitutional Coup* lays down the book's historical foundation and erects its evaluative framework. Building on a rich literature on privatization, to which he is an important contributor,<sup>6</sup> Michaels presents a brisk overview of the role that private actors played in the federal government before the rise of the modern administrative state (pp. 24–27). Michaels offers this parade of privateers, tax ferrets, and Pinkertons not as precedent to justify contemporary privatization but rather to consign the lot

---

6. See, e.g., Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010); Jon D. Michaels, *All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901 (2008); Jon D. Michaels, *Running the Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152 (2015) (book review).

to a prehistory in which the federal government was small, unprofessional, and not particularly public spirited (pp. 27–31).

This passel of private operators grew obsolete, Michaels argues, with the rising demand in the twentieth century for “big, good, and distinctive government” at the federal level (pp. 31–33). By the middle of the century, the federal government boasted a “public workforce largely purged of its original sins of partisanship, privatization, and profit-seeking” (p. 33) and stood ready to tackle the many social and economic problems Americans wanted their federal government to solve.<sup>7</sup> The expanding federal government and the administrative state necessary to accomplish its tasks admittedly represented an “abrupt break” (p. 39) from the earlier constitutional regime and “was revolutionary in all respects” (p. 41). But Michaels is quick to insist this expansion was not, in fact, a coup.

Rather, he contends that the administrative state settled into an equilibrium that adapted America’s core constitutional principles and extended them to modern governance (p. 40). The critical new pillars of this new regime were (i) the Pendleton Act, which created a professionalized, tenure-protected bureaucracy staffed based on merit, not connections, and (ii) the 1946 Administrative Procedure Act (APA), which “rationalized and standardized” agency rulemaking and adjudication (pp. 46, 70–72). These two features, Michaels argues, are central to an “[a]dministrative [s]eparation of [p]owers” that works a “[c]onstitutional [r]edemption” of the modern administrative era (p. 57).

Michaels offers a reconstruction in which separation-of-powers principles deep within our constitutional DNA reexpress themselves in the apparatus of the administrative state.<sup>8</sup> Agency leaders who answer to the president are—literally—the administrative standard-bearers for the head of the executive branch.<sup>9</sup> Standing in for the judicial branch, in an admittedly more metaphorical fashion, are civil servants who enjoy tenured employment and are insulated from politics as they go about their reasoned, steady application of expertise to their legal mandate (pp. 66–67). Finally, civil society, empowered through the APA’s notice-and-comment rulemaking proceedings, plays the role of Congress, as its input helps shape the rules forged in the interaction between presidential appointees and civil servants (pp. 62, 68). The APA’s promotion of civil society through legislative rulemaking and the Pendleton Act’s promotion of the civil service would combine as counterweights to the agency leaders whose authority derives from the President.

While conceding that his analogies are imperfect, Michaels identifies a “system of administrative powers to . . . channel and roughly reproduce the constitutional rivalries” (p. 65) between the branches of government in our

---

7. P. 41. It is no coincidence that social trust in elites peaked just at this time.

8. P. 58 (citing Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw. U. L. Rev.* 549, 560 (2009)).

9. P. 59; *see also* p. 66 (same).

Constitution,<sup>10</sup> each reproducing the parallel tendencies toward executive “efficiency, technocratic expertise, or civic republicanism” (p. 74). Rather than enabling the tyrannical, regulatory steamrolling that haunts the fever dreams of the administrative state’s critics, this new separation of powers accommodates and balances plural interests and impulses (pp. 74–76).

Under this approach of “separation of powers all the way forward,”<sup>11</sup> our constitutional order is not dead; it just has developed in a fashion that is congruent with its original form but also is stronger, suppler, and thus better adapted to the demands of modern governance. Ernst Haeckel’s theories of organism development may be on the outs in biology, but here in the ecosystem of administrative law, constitutional ontogeny recapitulates phylogeny.

But the *pax administrativa* was not fated to last. By Michaels’s account, that era ranged roughly from the passage of the APA in 1946 until the widespread loss of trust in government in the late 1970s.<sup>12</sup> Michaels argues that “the marriage of the American people to big government foundered” after Vietnam, stagflation, public frustration with government inefficiency, and the advocacy work of big business and law-and-economics scholars (pp. 85–91). But this disenchantment did not lead to the reduction in federal government the Reagan Revolutionaries desired (p. 97). It turns out the American people liked government programs, even if they did not like the bureaucrats administering them.<sup>13</sup>

Enter privatization. Rather than trimming government services, successive administrations sought to trim the number of government workers providing those services—and make the remaining bureaucrats leaner and meaner. The federal footprint expanded starting with the Reagan Administration, and it grew with the Clinton Administration’s movement to “reinvent government”<sup>14</sup> and close the books on the “era of big government,”<sup>15</sup> even as the federal government outsourced more of its work to contractors who, the theory goes, are more responsive to market discipline. Michaels catalogues in an exhaustive, but not exhausting, fashion the number of federal tasks contracted out, including the setting of federal safety standards and the interrogation of prisoners and enemy combatants abroad

10. The relationship between this system of administrative separation of powers and the (original?) (actual?) Constitution is a question I will explore below.

11. P. 75 (emphasis omitted) (citing, by analogy, Heather K. Gerken, *Foreward: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010)).

12. See pp. 70–72 (identifying the 1946 APA and the 1883 Pendleton Act as “superstatutes” crucial to the *pax administrativa*); p. 84 (discussing the trust of “big, public government” pervasive in the decades between the 1930s and 1960s).

13. Pp. 97, 99 (noting how Reagan was “[s]tymied by the American people’s refusal to give up their government goodies”).

14. P. 98 (quoting AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 6 (1993)).

15. P. 11 (quoting President William Jefferson Clinton, State of the Union Address (Jan. 23, 1996), <https://clintonwhitehouse2.archives.gov/WH/New/other/sotu.html> [<https://perma.cc/WFN9-8DZS>]); see also pp. 101–02.

(pp. 111–13). He also describes how the logic of the market crept into the remaining bureaucracy with the reclassification of civil servants as at-will employees and the introduction of other market-mimicking mechanisms into administration (pp. 115–16), such as the CIA’s own venture capital outfit (p. 109).

The result here is not the Deep State, though many contractors work for it. Rather it is what we might call the Wide State—an expanded and expanding federal government interpenetrated with, and partly concealed by, its connections with the private sector.<sup>16</sup> Michaels’s case against privatization does not turn on its economizing benefits being oversold, though he is happy to point you to literature arguing that.<sup>17</sup> Rather, his complaint is that expansive privatization undermines the precarious set of checks and balances we lucked into with the *pax administrativa*.<sup>18</sup> Echoing formalist critics of the administrative state, Michaels admonishes that a particular governing mechanism’s efficiency does not assure its constitutionality.<sup>19</sup>

What are the constitutional problems with this neoliberal Leviathan? The privatized para-state helps “consolidate, homogenize, and aggrandize that which has been disaggregated, diversified, and hamstrung” (p. 128). The biggest beneficiary of this disruption is the president. Agency heads and the president to whom they answer do not have to allow tenured, bureaucratic sticks-in-the-mud to slow down their policy agenda when they can hire “‘yes’ men and women” who go along so they can get along with the next contract (pp. 128–29). Similarly, contracting “marginalizes public participation in the administrative process,” as agency heads hire private contractors who are more lightly regulated and harder for the public to monitor and hold to account (p. 131). Privatization undermines two of the three pillars of the *pax administrativa*,<sup>20</sup> leaving the agency heads standing alone amid a coterie of compliant contractors.<sup>21</sup>

Michaels dedicates the bulk of the book’s final part to restoring the administrative balance of powers, where it falls to the courts to play the role of Metternich.<sup>22</sup> Taking a page from John Hart Ely, Michaels contends that courts should focus on “reinforcing rivalrous administration.”<sup>23</sup> If the court is confident that agency action flows from an “administrative process” that is

---

16. See pp. 123–25 (describing how privatization can enable government growth).

17. See pp. 121 & 273 n.2.

18. E.g., p. 111.

19. P. 122 (citing *INS v. Chadha*, 462 U.S. 919, 944 (1983) (Burger, C.J.)) (noting that such arguments “fail to reconcile this celebration of efficiency with an underlying constitutional culture that is decidedly skeptical of efficiency arguments”); see also p. 122 (“[S]eparation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting))).

20. See p. 72.

21. See pp. 135–36 (“[M]arketization opens the door to a neo-patronage era.”).

22. P. 177 (“I view the courts as most inclined to adopt a balance-of-power approach.”).

23. P. 180 (emphasis omitted) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

“basically sound,” it should largely or even completely abstain from reviewing the merits (p. 180). On the other hand, if the court believes the agency process was insufficiently “rivalrous, heterogeneous, and inclusive,” it should reduce or eliminate deference on merits review (p. 181). Under this regime, agencies that want to avoid substantive second-guessing by the courts would restructure their policymaking procedures, a result that would uphold constitutional values while getting judges out of the business of making hard, substantive policy choices above their technical and political paygrade (pp. 182–87).

Michaels also proffers some stronger doctrinal medicine to revive the administrative separation of powers. For example, he suggests that courts might prohibit agencies from using contractors to exercise policymaking functions or drop the presumption of regularity when the government uses private deputies to project public power (p. 190). He also targets established institutions like the Office of Information and Regulatory Affairs (“OIRA”) and independent agencies as inconsistent with the administrative separation of powers (pp. 192–93). OIRA allows the White House to undo the delicate regulatory compromises the three administrative “branches” struck in the rulemaking process (pp. 192–93). Independent agencies, whose heads cannot be removed except for cause, are run by officers who “cannot claim an especially close connection or kinship to *any* of the constitutional branches” (p. 194). These agencies are both too distant from the president and too close to the bureaucracy, thus throwing the administrative separation of powers out of balance.<sup>24</sup>

Finally, Michaels has a list of tasks for Congress as well. In addition to a moratorium and claw back on contracting (pp. 207–09), Michaels borrows from the playbook of the U.S. military to bolster the civil service’s prestige and morale. He calls for an elite government service academy modeled on West Point, a midcareer leadership academy, better pay, and a media campaign to improve the repute of career civil servants (pp. 209–18). Michaels also asks Congress to help cultivate what he calls “Virtual Civil Society” (p. 219). He would make it easier for citizens to know about and participate in notice-and-comment rulemaking proceedings: think supplementing the Federal Register with banner ads about proceedings (pp. 220–21), providing Facebook links to agency comment pages (p. 228), and offering more in-person and online outreach by agency officials (pp. 219–29). These legislative measures, Michaels argues, would help strengthen a civil service and civil society that has atrophied while agency heads have flexed their muscles in recent decades (p. 211).

---

24. P. 195. Michaels notes, correctly, that his critique of independent agencies is different from that of unitary executive theorists who also challenge their constitutionality. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 723–24, 724 n.4 (1988) (Scalia, J., dissenting) (contending that the Constitution requires that the president have plenary power to remove principal officers). Michaels requires not a unitary executive but a balanced administrative branch. Pp. 195–96.

## II. THE NEW ADMINISTRATIVE CONSTITUTIONALISM

*Constitutional Coup* offers a number of important contributions to scholarship on the administrative state. I will focus on Michaels's arguments about constitutional law and administrative doctrine, but I do not wish to downplay how much the book aids our understanding about the extent and nature of privatization in contemporary governance. Michaels has written extensively on this score,<sup>25</sup> and *Constitutional Coup* synthesizes that work and the wider body of literature into a lucid and trenchant narrative that is essential reading for administrative law scholars. That contemporary picture, painted with a thoughtful mix of scholarly analysis and memorable examples, is worth the price of purchase alone.

But the book is more than an explication of how much, as a factual matter, the administrative state extends beyond the halls of the Pentagon and the great agency buildings lining the National Mall. Rather, it links these institutional developments with broader arguments about their legitimacy under our constitutional and administrative law. Privatization may or may not save the government money. Privatization may or may not be a bad thing as a matter of general political theory. These are important arguments, but Michaels is interested in how privatization measures up to our legal commitments, and here he finds it sorely wanting (pp. 4–6).

In doing so, Michaels takes an approach that departs from familiar functionalist and formalist constitutional arguments about the legitimacy of the administrative state. This constitutional theory cuts serious ice regarding contemporary doctrine and may even have more explanatory power than the book claims. This theoretical tool is twin-edged, however, and can be deployed against Michaels's vision of the administrative state. Michaels's application, moreover, is also harder to square with administrative doctrine than *Constitutional Coup* suggests. These objections are not necessarily fatal, but they help us understand and evaluate the book's normative commitments and tee up broader questions about our administrative state's constitutional pedigree.

A. *The Power of the Administrative Separation of Powers*

Michaels renews and revives an important strain of constitutional argument about the legitimacy of the administrative state. As he notes, formalist or libertarian critics of the administrative state have long developed originalist arguments against its legitimacy under our Constitution. While those constitutional arguments have not curtailed the “rise and rise of the administrative state,”<sup>26</sup> the “basis for this constitutional blessing was, and remains, somewhat vague and slippery,” even for the new era's champions (p. 55).

---

25. See *supra* note 6.

26. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).



Given Americans' reverence of the founders and fidelity to all things constitutional, merely pragmatic justifications of the administrative state cede the high ground to legalist critics (pp. 55–57).

Michaels seeks to reclaim that territory with appeals that are more principled than appeals to pragmatic necessity,<sup>27</sup> more robust than judicial minimalism,<sup>28</sup> and less radical than asserting that the New Deal amended the Constitution outside Article V.<sup>29</sup> In doing so, he offers a Jack Balkin–inspired defense of the administrative state that insists the fourth branch of government is reconcilable with the original Constitution's principled commitments to separation of powers and checks and balances.<sup>30</sup> In its application of separation-of-powers principles to entities within the fourth branch, moreover, Michaels's approach harkens to Heather Gerken's extension of federalism principles to substate and sublocality entities in her work on the New Nationalism.<sup>31</sup>

What we might call the Yale School of public law—which rejects formal constitutional originalism while applying what it understands as the Constitution's core set of its animating principles—is a serious and important vein of American constitutional law, even if one disagrees with it. *Constitutional Coup* is a significant, creative, and careful application of this strain of theorizing to administrative law.<sup>32</sup> His approach also has an important, if overlooked, antecedent in the work of James M. Landis, who saw an independent, professional bureaucracy as an important check against the president.<sup>33</sup>

Michaels's constitutional argument also offers important payoffs for administrative law doctrine beyond the reforms he presses in his book. Consider, for example, the courts' loose treatment of the APA. It's plausible, as

---

27. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938) (“[T]he administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems.”).

28. Cf. ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016) (describing how, in area after area, courts cede ground to administrative agencies out of a recognition of limited judicial competence).

29. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 281–331 (1998).

30. See JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011); Balkin, *supra* note 8, at 550 (describing “framework originalism,” which “views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction”).

31. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 *YALE L.J.* 1889 (2014); Gerken, *supra* note 11, at 8 (“[R]ecasting federalism as minority rule without sovereignty would push federalism all the way down, turning our attention to the institutions neglected by federalists and their localist counterparts.” (emphasis omitted)).

32. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314, 2318 (2016) (proposing “a set of mechanisms that create checks and balances within the executive branch”).

33. LANDIS, *supra* note 27, at 46 (explaining how “administrative power” can offset “executive power”). For an explication of this facet of Landis's thought, see Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe and Kagan on the Administrative State*, 130 *HARV. L. REV.* 2463 (2017).

an original matter, that arbitrary-and-capricious review of policy decisions<sup>34</sup> was supposed to resemble rational basis scrutiny; that the notice<sup>35</sup> and the statement-of-basis-and-purpose<sup>36</sup> requirements in informal rulemaking did not in fact require much explication by agencies; or that courts were supposed to give little deference to agency interpretations of law,<sup>37</sup> but review findings of fact<sup>38</sup> under the deferential jury standard.<sup>39</sup> Anyone who has taken a basic course in administrative law knows that this is not how the doctrine has played out—and not because the courts think that the APA means something different. In fact, the courts seem only intermittently interested in the APA as an ordinary statute.<sup>40</sup>

Michaels's argument from constitutional structure could provide a justification for this overlay of administrative common law.<sup>41</sup> If, as Michaels argues, the APA is in fact a quasi-constitutional "superstatute" that both instantiates and protects the administrative separation of powers (pp. 71–72), we should not be surprised or vexed when courts treat it as a source of inspiration for doctrinal development, rather than a formal instruction manual for running the bureaucracy. After all, for Michaels, that is how we ought to interpret the original Constitution as well.

---

34. 5 U.S.C. § 706(2)(A) (2012).

35. *Id.* § 553(b)(1)–(3); see *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 246 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part and dissenting in part) (stating that the D.C. Circuit's doctrine imposing rigorous notice requirements "cannot be squared with the text of § 553 of the APA").

36. 5 U.S.C. § 553(c).

37. *Id.* § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret all constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action."). See generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L.J.* 908 (2017) (arguing that the APA incorporated a presumption of de novo review).

38. 5 U.S.C. § 706(2)(E).

39. See *Allentown Mack Sales and Serv., Inc. v. NLRB*, 522 U.S. 359, 366–67 (1998) (Scalia, J.) (attempting to equate the standard of review for agency fact finding with the jury standard).

40. *But see* *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207, 1209–10 (2015) (rejecting heightened requirements for amendment of interpretive rules); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524–25 (1978) (same regarding rulemaking notice).

41. Cf. Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 *FLA. L. REV.* 1215, 1265 (2014) ("The unwritten [administrative] constitution theory thus clarifies that administrative law ought to be governed by uniform principles created by federal sovereign authorities, including federal courts."); Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 *GEO. WASH. L. REV.* 1293, 1296 (2012) ("Administrative common law serves an important function in our separation of powers system, a system that makes it difficult for Congress or the [p]resident to oust the courts as developers of administrative law."). *But see* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 *TEX. L. REV.* 113 (1998) (arguing that the APA should displace administrative common law).

Thus, the D.C. Circuit's imposition of heightened, nonstatutory obligations on agencies in notice-and-comment rulemaking<sup>42</sup> has constitutional warrant, for it protects the participation of civil society in the administrative process. Similarly, rather than blindly accepting de novo judicial review of legal questions because that is what the APA requires,<sup>43</sup> we can calibrate standards of review to ensure a proper balance of administrative powers.<sup>44</sup> And, while one might object that "hard look" review of agency policy decisions<sup>45</sup> would surprise the drafters of the APA, it may be justified as a bulwark in the administrative separation of powers: requiring an agency to offer a reasoned, cogent explanation for its decisions ensures that the participation of civil society in the administrative process is meaningful and makes it harder for politicized agency heads to bypass inconvenient truths offered by expert civil servants.<sup>46</sup> These positions may or may not be good administrative policy, but under Michaels's framework, what matters most is that they are the outputs of good constitutional law.<sup>47</sup>

---

42. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2267 (2001) (discussing the "paper hearing" that includes "extensive and often repeated notice to affected groups of a proposed rule, provision to them of the factual and analytical material supporting it, and detailed responses to any group's adverse comment or alternative proposal"). This justification would be in addition to the standard explanation that a robust notice and reasoned explanation requirement makes judicial review possible. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (noting that the reasoned explanation requirement of arbitrary-and-capricious review facilitates APA review, rather than adding extrastatutory requirements).

43. See Duffy, *supra* note 41, at 192 (challenging deference on the grounds that "*Chevron* is actually an aggressive fashioning of judge-made law by the Court").

44. See chapter 9 (proposing that deference be adjusted based on whether the agency process respected separation of powers).

45. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) ("If satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings . . .").

46. See p. 182 (noting instances where the Court displaced decisions based on the "concern that agency leaders were making decisions not clearly supported by the best scientific evidence (but instead seemed motivated largely by political considerations)").

47. In this respect, the unceremonious death the Supreme Court dealt to formal rulemaking in *Florida East Coast Railway* may be unremarkable, even if the decision reflected a misunderstanding of the original understanding of the APA. See *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 242–46 (1973); Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 8–10 (2017), <http://www.gwlr.org/wp-content/uploads/2017/02/85-Geo.-Wash.-L.-Rev.-Arguendo-1.pdf> [<https://perma.cc/FJF9-HHGC>] (explaining how the Court's gutting of formal rulemaking reflected unfamiliarity with the legal conventions at the time of the APA). As Barnett notes, "[f]ormal rulemaking is the platypus of administrative law" that combines oral hearings and adjudication with rulemaking. *Id.* at 5. Importantly for our purposes, it does not include as wide a swath of civil society as notice-and-comment rulemaking. Thus, its demise would do little to upset Michaels's administrative separation of powers. In fact, informal rulemaking's inclusiveness would be preferable.

B. *Administrative Separation of Powers—Another View of the Cathedral*

Even if we take Michaels's approach to constitutional interpretation for granted, his method could lead to reconstructions of constitutional law which suggest broad privatization is well within our legal tradition. I sketch these alternatives not because they are normatively superior or knockdown interpretations of the facts, but rather to highlight some of the challenges of Michaels's method and to burrow down to the normative core of his argument.

First, we might question whether, under Michaels's approach to constitutional construction, privatization is an unlawful interloper. Anticipating this objection, Michaels is careful to explore the long period of the government's deputation of public functions to private actors.<sup>48</sup> Having done so, however, he dismisses it as part of the republic's Neanderthal phase in which the federal government was not particularly large or particularly public.<sup>49</sup> Nevertheless, it is not so easy not to draw a neat line between constitutional prehistory and the post-New Deal *pax administrativa*. Michaels's story about checks and balances within the administrative state is plausible, but it's not the only one we could extract from the data.

Consider an alternative along Michaels's methodological lines. Prior to the twentieth century, the federal government, ever solicitous to the liberty-enhancing benefits of private ordering, was careful to ensure that even its few, critical tasks, such as law enforcement touching on interstate matters (Pinkertons), national security (privateers), and revenue collection (tax ferrets), were outsourced to private actors (pp. 29–32). This represents a principle in favor of making government as private as possible, one we could carry forward to today. Yes, we want the federal government to do much more than be the night watchman state it offered in 1789, but the precise means of doing so are underdetermined. The best reconciliation of the desire for a more activist government with our constitutional tradition of limited federal power could be creating a government sphere that looks as much as possible like the market that it would otherwise displace or correct. Widespread private contracting and market-mimicking devices within the bureaucracy carry the separation of the private sector and the federal government “all the way forward,” so to speak (p. 24).

To be sure, the argument continues, unelected, tenured civil servants played a larger role between the 1930s and 1970s. It may also be true that in pre-twentieth century government the “public sphere was not very public, and the private sphere was not nearly as private” (p. 35). Perhaps, but the move to privatization—using market-based solutions and actors to achieve public ends while also endowing ostensibly private actors with public tasks and values—may simply be a return to form that happens to be less public

---

48. See chapter 1.

49. See p. 39 (“[T]he bounty hunters of the Wild West and the swashbuckling privateers of the high seas must have seemed as remote to, say, the New Deal brain trust and Kennedy–Johnson whiz kids as cavemen were to the Greeks and Romans of antiquity.”).

spirited than Michaels would like. But if we are looking for patterns in the 229 years of constitutional data, it is the heretofore unidentified and now-lapsing *pax administrativa* that is the forty-year exception that needs explaining. Today's age of privatization may just be, like Michaels's own theory of the administrative separation of powers, an extension and adaption of earlier, core constitutional commitments to a new setting and new tasks.<sup>50</sup>

Alternatively, one could construct a constitutional justification for wider privatization based on effectiveness, not limited federal power. Against limited government originalists, advocates of the administrative state like James Landis argued that a small, divided, hamstrung, and hesitant federal government could not grapple with the large, consolidated, nimble, and decisive businesses that wielded great social power in America.<sup>51</sup> Formalist proponents of limited federal government lost the argument because, as Michaels explains, people simply wanted the federal government to do more, which was impracticable to accomplish under the old separation of powers (p. 2).

Streamlined governance delegated into the hands of focused, politically accountable executives is simply just the next step down the road in the logic of effectiveness that gave rise to the administrative state. Just as Landis thought our old, limited, tripartite federal government had to contend with powerful businesses with one hand tied behind its back, the contemporary privatization advocate could argue that today's regulated entities are even more nimble and dynamic than those of yesteryear. The policy problems agencies seek to solve today are also more complex and fluid than ever. Forcing the government to march through the reticulated procedures Michaels demands (pp. 219–30) is like asking a 1950s middle management team at IBM to design the next killer app. No wonder the administrative state has concluded that a more networked, cooperative matrix of private contractors and politically responsive agency heads is a better way to accomplish policy goals than running decisions through a veto gate patrolled by stiff-necked civil servants.

This more flexible stance also squares with existing doctrine that is harder to fit with Michaels's approach. He recognizes that some of his proposals are in tension with *Vermont Yankee*, which holds that courts are not free to supplement the requirements of the APA.<sup>52</sup> We could add to that list. The constitutional valence he gives to notice-and-comment rulemaking (pp. 220–24) is in tension with the wide discretion agencies have to choose between adjudication, which engages a smaller swath of the public, and

---

50. Cf. pp. 57–58 (describing an interregnum period where “administrative powers . . . started off so dangerously consolidated and unchecked” only to “become disaggregated,” thus restoring the “framers’ checks and balances”).

51. See LANDIS, *supra* note 27, at 10–12 (“If in private life we were to organize a unit for the operation of an industry, it would scarcely follow Montesquieu’s lines. . . . [I]t is only intelligent realism for it to follow the industrial rather than the political analogue.”).

52. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978).

rulemaking.<sup>53</sup> It is in similar tension with the discretion most courts give agencies to opt for informal adjudication,<sup>54</sup> which requires fewer procedures and leaves decisionmakers less insulated from political control than formal adjudication.<sup>55</sup> In fact, notice-and-comment rulemaking, so central to Michaels's vision of ideal administrative constitutionalism, did not even begin in earnest until the 1960s and did not reach its apogee until the 1970s.<sup>56</sup> If the late sixties and early seventies were the beginning of the end of Michaels's *pax administrativa*, his golden age was very brief indeed.

To justify this new arrangement, one can adopt the forgiving, well-established functionalism that finds Congress's arrangements of powers constitutional so long as there is a tolerable overall balance of powers among the branches.<sup>57</sup> This kind of functionalism, which focuses on the actual branches in the Constitution—rather than those branch's avatars in Michaels's administrative constitution (pp. 111–12)—is slow to question concentrations of power in the hands of the executive, so long as they are the product of Congressional delegation, as opposed to aggrandizement.<sup>58</sup> Congress can always choose to delegate less, require less privatization, or strengthen procedures. It has chosen not to, and so long as the ultimate legislative power resides in Congress and a politically accountable executive blesses privatization, the current state Michaels bemoans is no less constitutional than the broad delegations to the more bureaucratic *pax administrativa*.

---

53. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947). Michaels contends that the Supreme Court decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), incentivizes agencies to engage in notice-and-comment rulemaking because it links deferential judicial review to procedural formality. See pp. 183–84. If *Mead* has such effects, it would bring Michaels's broader argument in closer line with existing practice, though the empirical data is unclear on this point. Michaels cites a 2017 study showing agencies are more likely to win under deferential review. See *id.* at 183 (citing Kent H. Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017)). It is unclear how much the trend that recent study identifies has pressed agencies toward rulemaking on the margin, where they trade off increased likelihood of success before the courts against the burdens of rulemaking. Were the incentive very powerful, Michaels would have had less need to write his book.

54. See, e.g., *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17–18 (1st Cir. 2006) (joining the majority of circuits that give agencies such a choice).

55. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1391 & nn.18–19 (2004) (identifying the procedural differences between informal and formal adjudication).

56. See Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145–49 (2001) (cataloging the dominance of adjudicative policymaking until the 1960s and the subsequent rise of rulemaking).

57. See, e.g., Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 518 (1987); see also Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1255 (1988) (“The functionalists . . . generally ask whether the exercise of the contested function by one branch impermissibly intrudes into the *core* function or domain of the other branch.”).

58. See *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (delegation constitutional in part because it does not involve aggrandizing powers); cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986) (finding no separation-of-powers problem in significant part because “this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch”).

Against such functionalism, traditional formalists object that you can have separation-of-powers problems even without aggrandizement; it's just as bad for Congress to give away legislative power as it is to usurp the executive's.<sup>59</sup> But such an objection is rooted in a (nonliving) originalism and formalism that these more permissive functionalists reject<sup>60</sup> and that Michaels does not embrace. It is all well and good to cite, as Michaels does, the Federalist Papers and Supreme Court decisions extolling the impractical virtues of separated powers as a check on tyranny.<sup>61</sup> But one wonders why such appeals do not apply with equal force, if not more, with respect to the original, impractical constitutional regime we scuttled nearly one hundred years ago. If you already deposed the king, why tolerate the rule of his similarly ineffectual heir?

Michaels would because he, like other more formalist critics of administrative expediency, sees the impracticality of separated powers as a feature, not a bug (p. 57). Although he eschews the restrictions of formalist originalism, he seeks to carry through our founding commitments to separated powers as faithfully as possible (p. 163). Furthermore, he sees independent value in the separation of powers, which encourage deliberative, careful, and consensual governance in a large, pluralistic republic (p. 64). These commitments help us understand and assess Michaels's rejections of alternative constructions of our Constitution. Even if other narratives find a foothold in our constitutional history, Michaels's argument turns on separation-of-powers principles offering a normatively superior fit compared to theories that celebrate private ordering or efficient policymaking. Michaels could be justified in pressing separation-of-powers principles forward *if* they bore superior moral weight to the alternatives. But do they?

### III. THE CONTINUING VALUE OF SEPARATED POWERS

The central question is whether Michaels's modern iteration of separated powers offers a "Goldilocks solution" to modern governance or the worst of both worlds. If the former, it can explain "how *pax administrativa* is neither too unfettered nor too hamstrung—but rather just right" (p. 52). If the latter, we get much of Tocqueville's nightmare<sup>62</sup>—expanded, centralized

59. Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 580 (1987) (denying that "an acquiescence in an unconstitutional exercise of power by another branch establish that power in the other branch").

60. See Strauss, *supra* note 57, at 493 ("If in 1787 such a merger of function was unthinkable, in 1987 it is unavoidable given Congress's need to delegate at some level the making of policy for a complex and interdependent economy, and the equal incapacity (and undesirability) of the courts to resolve all matters appropriately characterized as involving 'adjudication.' A formal theory of separation of powers that says these functions cannot be joined is unworkable.").

61. See, e.g., pp. 7, 122.

62. DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014); see 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1862) (predicting that if centralized administration came to the United States "in such a republic a more

power that destroys republican forms and spirit—and lose the efficiencies that made the gambit worth considering in the first place.

To answer that, we should consider more closely the analogues Michaels has stand in for the original branches in his administrative constitution. Michaels does not seek a perfect translation between the original Constitution and his separation of powers. Rather he seeks to reconstruct the “kinds of legal, democratic, and professional interests, commitments, and approaches that Madison and his colleagues pitted against one another in the constitutional arena” (pp. 65–66). No analogy is perfect, but the question is whether the dissimilarities concern essential or accidental features of the original.

Consider his argument that agency heads stand in for the president. The claim that such readily removable officers are a proxy for the president is straightforward. What’s more contestable is his understanding of what the presidency is for. For Michaels, agency heads set the policy agenda, albeit filtered, checked, and informed by the civil servants and civil society. This reflects the standard arrangements today in which the president is the national head of a party and directs the legislative agenda of a quiescent, divided, or dithering Congress. But let us not confuse our modern understanding with that of the framers, who rejected a king and envisioned Congress setting the nation’s policy agenda.<sup>63</sup> There are normative arguments in favor of a strong presidency—only the president has a national mandate, only the president can forge the coherent policy proposals active national government requires, etc.—but they are the arguments of those who constructed the administrative state and rejected the framers’ understanding of our constitutional structure.<sup>64</sup> They are also the very types of pragmatic arguments that open the door to privatization as an effective way to get the nation’s work done.

Michaels embraces the framers’ belief that principal officers should be responsible to the president, but accepts a far broader understanding of the president’s role in domestic policy. He seeks to tame that tiger by checking its agents within the administrative state, primarily through limiting privatization, which strengthens the agency heads to the detriment of the other

---

insufferable despotism would prevail than in any of the absolute monarchies of Europe”), *quoted in ERNST, supra* at 1.

63. See, e.g., THE FEDERALIST NO. 51, at 322 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”).

64. See FROHNEN & CAREY, *supra* note 2, at 118 (noting that with the rise of progressive era administrative thought “another principle . . . emerged and soon came to be regarded as axiomatic, namely, that democratic accountability requires centralization of authority”); *id.* at 129 (characterizing Woodrow Wilson as rejecting “the Framers’ vision of separation of powers and the very idea of overlapping jurisdictions in favor of a top-down, monarchical system of public administration”).



pillars of the administrative constitution: the bureaucracy and civil society.<sup>65</sup> It is unclear, however, whether his administrative iterations of Congress and the judiciary can counter the agents of the actual, supercharged president.

Consider the role of civil society, which for Michaels stands in for Congress and will limit the authority of agency leadership (p. 68). Even if, as Michaels contends, public comment has a substantial effect on policy formation (p. 62), we again recapitulate the inversion of the framers' vision in which Congress was supposed to set the agenda, subject only to presidential approval. For the most part, civil society responds to rulemaking notices or enforcement orders, rather than present proposals or "override" the administration's veto of their concerns. Unlike Congress, which is able to engage in self-protection, civil society's influence depends on litigants' ability to convince a court that an agency decision did not give adequate consideration of their beef and thus is arbitrary and capricious under the APA (p. 182).

Furthermore, there is a world of difference between representative, republican government and the flash mob of Facebook "likes" and emails Michaels sees standing in for Congress in modern government (pp. 68, 219–20). The task of forging those cacophonous comments into concrete policy proposals falls not to a pluralistic, representative legislative body, but rather to the unitary president's agency heads and politically unaccountable civil servants. One is as much a supplicant as a citizen. And, while we despair of the farces we see on C-SPAN, equating the role of representative government to posting in the administrative state's comments section hardly feels like self-governance. At best, it is a town hall of world historic proportions, where voices are heard only when many yell in unison.<sup>66</sup>

In this light, privatization's hollowing of the administrative public sphere does not seem so great a loss. In fact, Michaels's take on public participation eerily resembles the mass market mechanisms that drive privatization. Given our *Bowling Alone* political culture,<sup>67</sup> civil society's participation in governance in Michaels's administrative separation of powers will likely consist of a mass of individuals—alone together, or loosely affiliated at best—trying to convince a large, consolidated decisionmaking entity to cater to their tastes. We settle for Silicon Valley's vision of governance, in which the public agenda and Twitter's "Trends for You" merge into an alienated, late capitalist simulacrum of the agora.

Michaels's translation between the judiciary and civil service is equally fraught. He rightly picks up on the independence, professionalism, and dedication to craft that characterizes the ideal types within both institutions (pp. 66–67). But, as Michaels notes, things get a little tricky after that. The framers' view of the judiciary turned on a vision that can look embarrassingly idealistic to postrealist eyes. Publius famously claimed that courts "must declare the sense of the law; and if they should be disposed to exercise

---

65. See pp. 202–03.

66. See p. 73. *But see* p. 162 (invoking the New England town hall meeting).

67. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001).

WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”<sup>68</sup> Some have even argued that this combination of tenure protection, electoral insulation, and prioritization of judgment over will entails a principle of strict adherence to institutional precedent.<sup>69</sup>

Strict adherence to institutional precedent is not something that Michaels thinks civil servants can or even should do. They have “broad discretion” to make enforcement decisions, have “considerable leeway” when administering benefit programs, and even can push back against the policies of an administration, as evidenced by selective leaks and rogue tweeting by the bureaucratic #resistance to an administration (p. 61). If civil servants use these powers to be “potentially formidable counterweights, quite capable of shaping administrative policy” (p. 61), we are much closer to the realm of will rather than legal judgment. Nor will this counterweight be without bias. If, as Michaels accedes (pp. 61–62), civil servants as a class are more inclined to support an activist government and an expanded regulatory mission, an emboldened bureaucracy will be a turbo booster for some administrations and a drag for others.<sup>70</sup> In this light, privatization does not seem so bad: contractors may be sellouts to the president, but at least the president answers to the electorate, while the bureaucratic policymakers answer to nobody.

One way for Michaels’s analogy to work more tightly would be to accept the early Progressives’ long-discarded belief that policy formulation and implementation are neatly separable. Rather than that, Michaels drops the Federalist’s faith in the declaratory theory of law and explains that judges and bureaucrats alike must “wade into countless political thickets” and neither can stand aloof “calling balls and strikes” (p. 67). Though both groups’ political commitments shape the way they do their jobs, they share a “commitment to rationality, employing reason-giving processes to explain and legitimate their at times countermajoritarian interventions” (p. 67). In short, we have made Publius palatable for a Legal Process world.<sup>71</sup>

Yet Hart and Sachs still might balk. The analogy works best for administrative adjudication by tenure-protected officials, which is but a slice of all adjudication (and subject to review by agency heads). But civil servants are more than judges who happen to have particularized technical expertise in a field. Beyond the adjudicators who also have part-time policymaking roles,

---

68. THE FEDERALIST, *supra* note 63, No. 78 (Alexander Hamilton). See generally PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

69. See Randy J. Kozel, *Precedent and Constitutional Design*, 112 Nw. U. L. Rev. (forthcoming 2018) (on file with author).

70. Private contractors also favor a large regulatory footprint, p. 45, but they are also easier to get rid of than tenured civil servants, see *Morgan v. Fletcher*, 518 F.2d 236, 239 n.3 (5th Cir. 1975) (“Probationary employees are not afforded the greater procedural advantages available to tenured federal employees.”).

71. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

other civil servants' full-time jobs are serving as policy shop planners or regulatory prosecutors.<sup>72</sup> In this respect, their role is far closer to executive or legislative will than legal judgment.

This point is not merely a formal one. Rather, even a Legal Process thinker amenable to softening the lines between law and policy would admit that adjudication is different than other forms of legal ordering, such as legislating, negotiating, or enforcing the law.<sup>73</sup> These different forms require different "kinds of legal, democratic, and professional interests, commitments, and approaches" (p. 65) than even nonidealized adjudication, and civil servants play a hand in all of these functions. Michaels's treatment of the bureaucracy suggests a check against agency heads by a group whose mission and politics have of a technocratic, mandarin orientation. If this is an analogy to the judiciary, it is a controversial one that keeps the protections of judicial duty while assigning its bearers very different and more expansive duties.

Even were the civil service an apt analogue, it too depends on the actual judiciary for its continuing force. As Michaels explains, the civil service has withered as both Congress and the president have sidelined politically unpopular bureaucrats, most significantly through privatization of decision-making. For this reason, Michaels seeks judicial protection of the bureaucracy through the carrots and sticks of standards of review. Here, the vulnerable state of the bureaucracy under his administrative constitution recalls the posture of the judiciary in our original Constitution: only constitutional culture and the courts' prestige kept the other branches from ignoring their orders. The roots of that constitutional culture, however, tapped into the notion that judicial duty flowed from legal judgment, not political will. If that legitimating source of independence is precarious in a postrealist age, it is all the more endangered for civil servants who roam the fields of policymaking without any rhetorical camouflage. Hence the double challenge of Michaels asking unelected, tenured judges to protect unelected, tenured policymakers against contractors who often serve at the pleasure of the president.

Michaels must therefore reconsolidate power within the hands of the actual judicial branch. With the administrative state causing congressional atrophy, we are left with two branches jostling for power, with an ascendant president pointing to a political mandate and the judiciary relying on ambitious and novel constitutional arguments to justify its ongoing interventions. This might not end well.<sup>74</sup> In fact, given that Landis also envisioned the

---

72. Cf. p. 199 (describing the varied roles played by the SEC and other independent agencies).

73. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978).

74. Perhaps Congress would have a greater appetite for strengthening the civil service as Michaels recommends in his tenth chapter, though he admits that his measures are "likely to be unpopular, expensive, and at odds with their own self-interests." P. 202.

bureaucracy checking a politically powerful president, we might have already seen this movie.<sup>75</sup>

It's worth noting that the Pax Romana, which inspires the name of Michaels's *pax administrativa*, only occurred *after* the fall of the Roman Republic and the rise of the Roman Empire, which maintained the rhetoric and institutional labels of the old regime while expanding under centralized power.<sup>76</sup> An originalist could argue that the framers recognized, in part from the lesson of Rome, that the republic-preserving play of ambition against ambition only works when each contender has self-sustaining power to bring into balance. Within the fourth branch, nice abstractions and pleas to the judiciary or an uninterested legislature only go so far, especially once we have accepted the logic of centralized effectiveness that led to the abandonment of our original, limited, and designedly clumsy framework of government. Once we give up that frame, the empire of expediency reigns supreme, leading to the privatization and marketization Michaels dreads without institutional checks robust enough to halt its march.

#### CONCLUSION

Michaels's administrative separation of powers may not sufficiently instantiate the values that led the framers to prefer divided government over consolidation in the first place. If we want separation of powers, we might be better off going with Constitution Classic rather than Michaels's version of the New Coke.<sup>77</sup> Many functionalists or those who otherwise think our original, limited constitutional order is worth discarding would be little troubled by the objections just voiced above. And surely the measure of a book is not whether it satisfies the criteria of a methodology it does not claim. Having offered both functionalist<sup>78</sup> and formalist<sup>79</sup> critiques of Michaels's theory, it is worth concluding with an appreciation of what his argument offers even to those wary of his constitutional theory.

Michaels's work should give pause to the standard administrative law constitutional functionalist. He offers powerful reasons why aggrandizement of power within the executive is troublesome, even if Congress consents. While, like Hamburger and Lawson, Michaels laments a lost golden age of administrative law, he does not ground his arguments on strictly originalist, formalist premises, nor does he sound a libertarian elegy for the night

---

75. Vermeule, *supra* note 33, at 2467–70 (discussing Landis's theory of separation of powers).

76. See KLAUS BRINGMANN, A HISTORY OF THE ROMAN REPUBLIC 308 (W.J. Smyth trans., Polity Press 2007) (2002) (“[T]he names of the Republican offices had remained the same, but the essence of their functions had passed to Augustus.”); *id.* (“The official justification of the extraordinary legal position held by Augustus was the unusual challenges which could not be solved by means of the regular magistracies of the Republic . . .”).

77. Cf. Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41.

78. See *supra* Section II.B.

79. See *supra* Part III.

watchman state. To the contrary, he argues that the received wisdom of living constitutionalism is insufficiently progressive.

Michaels indicates that the functionalism that reigns supreme over mainstream administrative constitutionalism, which is among other things a justification of the modern federal regulatory state, is insufficiently nuanced in attending to the separation-of-powers values it ostensibly seeks to defend. And he changes the game by contending that more detailed attention to separation of powers is not the sole preserve of bow-tied Federalist Paper fanboys. He contends that smart, responsive, big government demands a more sophisticated functionalism that looks under the hood of the executive branch, for consolidation there abets the colonization of the executive branch by a market ideology that undermines public values. In other words, a subtler accounting of separation of powers within the administrative state will ensure a non-originalist interpretation does not aid and abet the neoliberal takeover of progressive administrative constitutionalism.

Originalists will not be satisfied with Michaels's prescriptions, but that does not mean they should ignore them, either. The first reason is a matter of principle: however imperfect his take on separation of powers, he takes them seriously—and more seriously than most defenders of the modern administrative state. Even if the originalist critic is to dismiss Michaels's argument, she has to up her game to do so. It is too easy for originalists, like myself, to consider non-originalist alternatives as a constitutional match of tennis with the net down, in which most anything is in bounds unless it goes over the fence.<sup>80</sup> Michaels challenges that facile construal, deriving from his constitutional theory real and often demanding limits on administrative doctrine.

The second reason is practical: Michaels is likely right that Americans are unwilling to give up the benefits offered by a centralized federal government. For better or worse, the Republic's constitution—in the classical sense of disposition or inclination—has largely departed from a Tocquevillian faith that social problems are best tended to at the direction of civil society or local or state government.<sup>81</sup> For that reason, Congress is unlikely to dismantle the present dispensation, and today's polity would probably view radical judicial surgery on the administrative state as constitutional malpractice.

If there is little appetite for a return to the old regime, the question for originalists remains whether meaningful separation of powers is possible in our polity today. Perhaps, and most radically, they could draw on the negative lessons of the EU and conclude that the United States is simply too large a polity to provide both self-government *and* the regulation and services people demand of the state. If so, originalists might seek solidarity and subsidiarity through a far more radical federalism or even a new constitutional convention. Or the age's dissenters could be more incrementalist, asking that constitutional law's accommodation of the administrative state go this far

---

80. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

81. See FROHNEN & CAREY, *supra* note 2, at 88–89.

and no further, while trying to start discussions and win arguments about the scope and division of public authority.

Those in the incrementalist resistance might consider pursuing some of Michaels's policies against privatizing even if, or especially if, the results are less efficient. If, for now, we must have a powerful, centralized administrative state, we could at least make it slow and internally conflicted.<sup>82</sup> The days of horse-and-buggy federal government are gone, the originalist concedes, but at least Michaels wants to run the new juggernaut with an old transmission. As policy aspirations stall in the administrative process, we might even find Congress deciding to make more decisions on its own, or states and local communities engaging in their own experiments.

To shift metaphors from the automotive to the monstrous, one could think that even if Michaels's Leviathan is too large and too unaccountable, it is more public and transparent than the present alternative and its shadowy, privatized appendages. We can at least "count his teeth and claws, and see just what is his strength."<sup>83</sup> Whether we want to "kill" the beast or "tame him and make him a useful animal,"<sup>84</sup> a good first step is taking that inventory free of the false accounting the quasi-private administrative state enables. That, at least, could be a start.

Altogether, *Constitutional Coup* offers a fresh take on the important public question of privatization and does so in a way that departs from the usual grooves of argument between originalist critics and functionalist defenders of the administrative state. Not bad for 297 pages of clear, lively prose. I recommend reading them.

---

82. Cf. Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1083–85 (2016) ("If you cannot 'starve the beast,' you can at least make it run uphill.").

83. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

84. *Id.*