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## BOOK REVIEW

### RECONSTRUCTING THE ADMINISTRATIVE STATE IN AN ERA OF ECONOMIC AND DEMOCRATIC CRISIS

CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE  
AMERICAN REPUBLIC. By Jon D. Michaels. Cambridge, Mass.:  
Harvard University Press. 2017. Pp. 312. \$35.00.

*Reviewed by K. Sabeel Rahman\**

Speaking at Yale Law School in 1938, Dean James Landis offered a powerful defense of President Franklin Roosevelt's New Deal, and in particular its innovation of new federal administrative agencies. "The administrative process," declared Landis, "is, in essence, our generation's answer to the inadequacy of the judicial and the legislative process."<sup>1</sup> Unlike generalist legislatures or formalist judges, administrative agencies could address the complexities of the modern economy and industrial society by harnessing their expertise, professionalism, and independence to serve the public interest. Not everyone shared Landis's celebration of this new era of American state building. The eminent Dean Roscoe Pound, then chair of an American Bar Association special committee evaluating the rise of the New Deal administrative state, saw the mixing of legislative, executive, and adjudicatory functions in agencies like the Securities and Exchange Commission (SEC) — which Landis himself designed and later chaired — as tantamount to "administrative absolutism."<sup>2</sup>

The debate between Landis and the New Dealers on the one hand, and the old guard of legal scholars like Pound on the other, is by now a familiar story in the origins of the modern administrative state.<sup>3</sup> By the time of Pound's report, the Supreme Court had already begun its reconciliation with Roosevelt's New Deal following the 1937 "switch in

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\* Assistant Professor of Law, Brooklyn Law School. I am grateful to Michael Myones and Ian Eppler for excellent research assistance. Thanks to Jon Michaels for writing such a provocative, important, and stimulating book. Thanks as well to the editors of the *Harvard Law Review* for inviting this Review and for providing extremely helpful comments and editorial support.

<sup>1</sup> JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 46 (1938).

<sup>2</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 238 (1992) (describing the debate between Pound and New Deal supporters over the fear of "administrative absolutism"); see, e.g., *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331 (1938).

<sup>3</sup> For a classic account of this debate, see, for example, HORWITZ, *supra* note 2, at 217-40 (recounting the debate between Landis and Pound and the emergence of the New Deal administrative state).

time.”<sup>4</sup> Over the ensuing decades, administrative law developed through an ongoing series of debates and efforts aimed at legitimating administrative authority, whether through the formalization of procedures in the Administrative Procedure Act (APA) of 1946, the emphasis on norms of agency expertise, or the rise of presidential oversight.<sup>5</sup>

Today, we are in the midst of another moment challenging the legitimacy and viability of the modern administrative state, what Professor Gillian Metzger recently termed in these pages as “anti-administrativism,” encompassing political and rhetorical attacks on the legitimacy of administrative agencies, proposed legislation to restrict agency rulemaking authorities, and growing constitutional skepticism among some jurists about the scope of agency authority.<sup>6</sup> This administrative skepticism, though, is not just a matter of deregulation; rather, it manifests in two seemingly opposing but related trends. First, it manifests in the efforts to privatize and dismantle the administrative state. Several of the Trump Administration’s most vocal supporters have vociferously called for the “deconstruction” of the administrative state. The new Administration has in its first year made good on attempts to gut the budget and staff of key agencies and implement regulations that would privatize and undo many regulatory initiatives.<sup>7</sup> Nor is this work limited to the Trump Administration, or even to conservative policy-makers. Rather, waves of privatization and deregulation have gradually

<sup>4</sup> See, e.g., Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?* 2 J. LEGAL ANALYSIS 69 (2010).

<sup>5</sup> See, e.g., DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014); HORWITZ, *supra* note 2; Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007); Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court’s Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565 (2011). For a recent overview of the different types of administrative-legitimizing theories — particularly, by appeal to expertise, procedure, and presidential control — see, for example, Adrian Vermeule, *Essay, Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017).

<sup>6</sup> Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); *id.* at 4.

<sup>7</sup> See, e.g., Max Bergmann, *Present at the Destruction: How Rex Tillerson Is Wrecking the State Department*, POLITICO MAG. (June 29, 2017), <https://www.politico.com/magazine/story/2017/06/29/how-rex-tillerson-destroying-state-department-215319> [<https://perma.cc/54H8-ANC3>] (providing an account of Secretary Rex Tillerson’s dismantling of the State Department and career civil service); Talia Buford, *What It’s Like Inside the Trump Administration’s Regulatory Rollback at the EPA*, PROPUBLICA (Dec. 18, 2017, 12:17 PM), <https://www.propublica.org/article/inside-trump-regulatory-rollback-epa> [<https://perma.cc/A9XX-ETAL>] (describing Administrator Scott Pruitt’s overturning of several major EPA programs and divisions); Gregory Krieg, *What the “Deconstruction of the Administrative” State Really Looks Like*, CNN (Mar. 30, 2017, 9:47 AM), <http://www.cnn.com/2017/03/30/politics/trump-bannon-administrative-state/index.html> [<https://perma.cc/DVR3-BBEZ>]; Alec MacGillis, *Is Anybody Home at HUD?*, PROPUBLICA (Aug. 22, 2017, 8:00 AM), <https://www.propublica.org/article/is-anybody-home-at-hud-secretary-ben-carson> [<https://perma.cc/KQD5-BCQ9>] (describing budget cuts and reductions to major Department of Housing and Urban Development programs).

dismantled Landis's administrative state over the past several decades, spanning not only the more brazen efforts of the current Administration, but running through the attempts of Democratic and Republican administrations in recent decades to make bureaucracy leaner, smarter, and more market-friendly.<sup>8</sup>

Second, this regulatory skepticism has also animated a parallel, and inverse, effort to centralize greater governmental control in the hands of the President. This too is largely a bipartisan trend. Executives from both parties — from Presidents Clinton to Bush to Obama to Trump — have centralized presidential oversight of regulatory agencies. And legal scholars and Justices from across the political spectrum have appealed to presidential control as a key mode of legitimizing and holding accountable agency action.<sup>9</sup> This concentration of control has similarly sparked opposition. In the latter years of the Obama Administration, critics challenged the expansive use of regulatory powers to advance economic, environmental, and social policy goals, from workers' rights to climate change to immigration reform.<sup>10</sup> The young Trump Administration has provoked even more extreme forms of these concerns about expansive use of executive regulatory discretion. Its irregular assertions of executive power in areas like immigration and national security seem to override informal conventions of internal processes of expert consultation, civil service independence, and internal checks and balances. The result has been the generation of significant concern about the violation of internal norms and practices of reasoned executive judgment,<sup>11</sup> and which in turn has generated bureaucratic "resistance from below."<sup>12</sup>

In his new book, *Constitutional Coup: Privatization's Threat to the American Republic*, UCLA School of Law Professor Jon Michaels takes on both of these challenges. This book represents the culmination of a series of important articles, developed well before the current

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<sup>8</sup> See *infra* Part I, pp. 1676–81.

<sup>9</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); see also *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495–96 (2010) (writing for the court, Chief Justice Roberts described the importance of presidential oversight of administrative agencies).

<sup>10</sup> See, e.g., Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), <https://nyti.ms/2jAytGL> [<https://perma.cc/YVY6-9BNP>] (describing the Obama Administration's use of regulatory authority to enact major social policies).

<sup>11</sup> For an excellent discussion of the informal norms shaping executive judgment, see Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. (forthcoming 2018).

<sup>12</sup> For a recent exploration of this concept in context of the controversies of the Trump Administration, see, for example, Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 16, 2016), <http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/> [<https://perma.cc/Q49Q-5YR2>] (describing tactics that bureaucrats can employ in resisting presidential directives).

Administration.<sup>13</sup> Michaels explores the rise of the administrative state and its constitutional and legal structure balancing expertise, participation, and presidential oversight. He traces the ways in which the effort to eliminate its purported failures and frictions drives the efforts to privatize, dismantle, and marketize bureaucracy on the one hand, or to centralize it in a unitary Executive on the other. Michaels's book is not so much a celebration of the administrative state as it is an impassioned *defense* of administration as a central pillar of our modern constitutional structure that is increasingly under threat. For Michaels, the administrative state is not the bogeyman of "big government"; nor is it the specter of inefficiency and gridlock that privatization's proponents make it out to be. Rather, it is the modern instantiation of the central principles of our constitutional order. Like the classic republican constitutional design that saw the separation of powers as a key to securing individual liberty and assuring effective and capable government, the modern-day institutions of administrative agencies and administrative law, for Michaels, secure those foundational values for the modern era.<sup>14</sup> Michaels's book follows in the tradition of Landis — and in some ways, even Pound — to not only defend the idea of the administrative state and its importance to modern government, but also to help reimagine the ways in which our core commitment to constitutional separation of powers and checks and balances can be maintained and even deepened into the twenty-first century. Thus, even as he defuses the critiques of regulation fueling the push to privatize or centralize, Michaels offers a way forward for a third type of regulatory critique: accepting the need for greater procedural checks and balances around regulatory authority, engaging that critique, and offering a constructive way forward by re-inventing the regulatory process itself.

Michaels has written a wide-ranging and in many ways prescient book that anticipates today's central debates: about the scope of administrative and executive power in a constitutional republic; the tensions between public and private, state and market, in an era of economic inequality and upheaval; and the dangers of overriding the procedures, norms, and softer conventions governing administrative action. Michaels rightly argues that dismantling the administrative state risks creating *more* aggrandized and unchecked executive power, not less. But the stakes are even larger than Michaels's already expansive formulation. For it is also true that without an administrative state, other forms of social and economic power would similarly find themselves

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<sup>13</sup> See, e.g., Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013).

<sup>14</sup> For a classic, well-known example of this republican constitutionalism seeking restrained but effective government secured through the constitutional separation of powers, see THE FEDERALIST NO. 51 (James Madison).

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unrestrained. In a world without labor regulation, restraints on corporate concentration, or consumer protections, economic inequalities are magnified; without nondiscrimination regimes enforced and adapted by regulation, gender and racial hierarchies are harder to contest. Despite its neutral trappings in legal doctrine and thought, the administrative state is not ultimately a neutral institutional structure. Its origins are rooted in the attempt to grapple with the upheavals and inequalities of the industrializing economy. Similarly, its dismantling reflects not just legalistic and political critique, but also a systematic effort to shift the balance of social, political, and economic power.

The attacks on the administrative state that Michaels diagnoses — and the solutions he proposes — must be read in context of the *purposes* to which regulation is deployed as well as the purposes that animate attempts to dismantle regulation. It is these substantive implications of administrative power that raise the stakes of the debates about administrative law and agency authority — and which explain the increasingly scorched-earth politics and tactics undermining administrative legitimacy in recent years.<sup>15</sup> To the extent that critiques of administrative authority still gain purchase independent of these substantive disagreements about the purposes of regulation, there is a real concern that such administrative authority be subjected to checks and balances assuring accountability, legitimacy, and nonarbitrariness. Michaels shares much of this concern, but rather than addressing it by eliminating the modern regulatory state altogether, he rightly suggests we would be better served by expanding the internal checks and balances that legitimate, appropriately structure, and constrain the exercise of regulatory authority. These checks and balances are thus important not only in their own right to make good on core constitutional principles of checking governmental power; they are also important to preserving the deeper mission of regulation, addressing substantive challenges of systemic economic and social inequality and exclusion. To put it another way, given the substantive stakes and wide-ranging authority of modern regulatory agencies, the existing processes and institutional structures (for example, of conventional notice-and-comment procedures) are simply unable to bear the moral justificatory and legitimizing weight of the modern regulatory state. But rather than abandoning the regulatory state, Michaels offers us a way forward that would reconstruct the administrative process for the modern era.

This Review engages Michaels's important work, situating it in context of these wider economic and social battles to sketch a broader claim. The defense of the administrative state, this Review argues, is not just about assuring checks and balances; it is about preserving *democracy* —

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<sup>15</sup> For a discussion of these growing controversies over the administrative state, see, for example, Metzger, *supra* note 6. For examples of how the administrative state is in the frontlines of the policy fights of the Trump era, see sources cited *supra* note 7.

the idea that, through political institutions, we the people expand our capabilities and capacities to remake social and economic systems that are otherwise beyond the scope of individuals, associations, or ordinary common law. It is also about democracy in its substantive connotation: through the administrative state, we make possible the realization of substantive democratic values of equality and inclusion. Landis was right in a sense: administration *is* a response to the failures of ordinary judicial or legislative policymaking, but the value of administration lies not in its insulated expertise but rather in the degree to which it succeeds in creating the tools and processes for democratic contestation of background social and economic inequalities.<sup>16</sup>

The rest of this Review proceeds as follows. Part I provides a summary of Michaels's main contributions in *Constitutional Coup*. Part II situates Michaels's critique in context of broader substantive implications of both the privatization and the centralization challenges to the administrative process. Part III then turns to the question of democratic accountability. The importance of — and pitched political battles around — the substantive purposes of the administrative state underscore how critical it is to defend and reinvent a set of institutional structures and procedures through which such regulatory authority, and disagreements over it, can be exercised. Indeed, much of the critique of expansive regulatory authority stems from a concern about the accountability and responsiveness of administration. Michaels shares some of this concern (as do I). But rather than addressing this concern through either privatization or centralization, Michaels rightly points us in a different direction: the need to more thoroughly democratize administrative authority. Part IV concludes by connecting the stakes of these debates over administrative authority to broader concerns about democracy and inequality.

#### I. THE ADMINISTRATIVE SEPARATION OF POWERS AND THE DANGERS OF ADMINISTRATIVE DECONSTRUCTION

Michaels's work is admirably expansive, resting on a deep conceptual core that generates a number of implications for debates in legal scholarship and for incredibly timely legal and policy questions about the future of administrative governance in an era marked by the puzzling combination of deregulation and expansive executive overreach. Michaels's argument involves several central elements.

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<sup>16</sup> For a normative defense of administration as a democratic forum, see my other works, particularly K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 86–96, 142–46 (2017); and K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. (forthcoming 2018) (manuscript at 10–28), <https://ssrn.com/abstract=3039733> [<https://perma.cc/L77A-LZ5C>].

First, though privatization as a term appears in the subtitle of the book, it is somewhat misleading, for Michaels develops a broad understanding of privatization itself. The contemporary battles over the administrative state, in Michaels's telling, are the predictable outcomes of the decades-long loss of faith in the vision of the Rooseveltian New Deal state, giving way to President Reagan's conservative revolution in the 1980s and the larger pattern of privatization, deregulation, and the dismantling of the core practices and institutional dynamics that define administrative institutions. Privatization involves more than simply contracting out public services to private providers. It includes "government reliance on private actors to carry out State responsibilities; government utilization of private tools or pathways to carry out State responsibilities; or government 'marketization' of the bureaucracy, converting civil servants into effectively privatized, commercialized versions of their former selves and relying on them to carry out State responsibilities" (p. 106). Practices of "deep service contracting" like the outsourcing of military functions to private security forces or the private operation of prisons remain as the most visible and well-known examples of privatization and its threat to norms of transparency, accountability, and public oversight (pp. 111–14). But for Michaels, privatization as an ethos extends further, including everything from the displacement of public policymaking by private standard setting; to the conversion of independent, meritocratic civil service officers into at-will employees like any other commercial enterprise; to the greater reliance on crowdsourcing, philanthropy, and venture capital to drive public projects (pp. 106–11). Privatization is not just a policy regime but rather a broad ethos that has "expanded, and even mutated in ways that defy ready identification, analysis, and synthesis" (p. 106). This push to privatization has been furthered not only by Reaganites but also by liberals in the Clinton Administration and beyond who have championed "the wholesale privatization and commercialization of many key government services and functions" (p. 102). The task of Michaels's book is to offer a "philosophically ambitious and constitutionally resonant" vision of government capable of responding to this powerful privatization ethos (p. 106).

This broad view of privatization as ethos drives the second key insight in Michaels's critique. Privatization is not a tale of a weak bureaucracy giving way to greedy contractors profiting off the public fisc; rather the dangers are more pernicious, often involving a *clever* state that is *aggrandizing* its power by operating outside of the institutionalized checks and balances of the administrative process and, as a result, concentrating power and immunizing itself from democratic contestation. As Michaels argues:

[T]his commingling of government and market forces enables the accretion of State power at the expense of the private sector, *threatening to destabilize*

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*the liberal democratic order.* Further, this commingling enables the accretion of political executive power at the expense of Congress and the civil service, *threatening the constitutional and administrative separations of powers.* (p. 126)

Indeed, this is where Michaels's passion and urgency shine through. The real villain in Michaels's story is not a particular policy regime or a specific system of outsourcing. Rather, it is the larger loss of faith in the idea of government itself and the peddling of the fiction that the privatization ethos perpetuates: that we can have both limited and privatized government on the one hand and constitutional government marked by checks and balances on the other. The promise that public goods and services can be provided privately and on the cheap is "simultaneously indulging and deceiving the American public by disassociating government goods and services from the government" (p. 2), simply *transferring* rather than reducing governmental imperatives into an even less scrutable, accountable, and effective system of private provision. This transference of authority and responsibility represents a normative challenge to constitutional values because, for Michaels, "the project of twentieth-century administrative governance [i]s a normatively and constitutionally virtuous one" (p. 4).

The loss of checks and balances that accompanies the privatization ethos is cast into sharp relief by Michaels's third central argument: that the often-frustrating frictions and clashes of the administrative process are in fact features and not bugs of the system — and more importantly, they are features that embody our most foundational constitutional tenets of the separation of powers, checks and balances, and the diffusion and accountability of concentrated power. This is what Michaels brands as the *pax administrativa*, the development of a modern legal and institutional regime of administration that synthesized values of expertise, political accountability, and participation (pp. 41–50).

Michaels recovers a prehistory of administration, noting that before the rise of the New Deal state, administration and regulation were very much still present, but riven by problems of corruption and illegitimacy spawned by the state's reliance on private actors. Privateers, bounty hunters, and the spoils system of patronage marked this early administrative era (pp. 24–29). But the rise of modern administrative law changed this. Several late nineteenth-century statutes provided greater independence, accountability, and structure to the administrative process. The Anti-Pinkerton Act created protections against corruption by barring some private organizations from being deputized to serve administrative and regulatory functions. The "salary revolution"<sup>17</sup> established professional and secure pay for civil servants (pp. 32–33). The Pendleton Act combined with subsequent statutory revisions

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<sup>17</sup> See generally NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).



provided for meritocratic hiring, promotion, and tenure. These measures helped establish not only the legal regime for an autonomous and expert civil service, but also a culture of public service and professionalism (pp. 70–72). This formalization of the administrative process took another major step with the passage of the APA in 1946, providing uniform procedures for agency rulemaking and adjudication, participatory mechanisms such as notice and comment, and routinized judicial review of agency action. These are “superstatutes” (p. 70), with quasi-constitutional import<sup>18</sup> — not because they are objectively agreed upon and entrenched (indeed Michaels’s book is suffused with concern that these systems are being actively dismantled) but because they have normative value in providing constitution-like checks and balances.<sup>19</sup>

This tripartite system of presidential appointment, independent civil service, and civil society participation through notice-and-comment procedures comprises what Michaels defines as an “administrative separation of powers” (p. 59). Like the foundational constitutional separation of powers, these three institutions provide “tools to guard against tyranny” and “promote and enable democra[cy]” (p. 147). Furthermore, they replicate the division of executive, legislative, and judicial functions within the administrative state: appointed agency heads stand in for the Executive; an independent civil service plays the role of neutral and impartial adjudicator of agency actions; and civil society participation provides input from the public akin to the democratic legislature (pp. 59–62).

Precisely because of the importance of these internal checks and balances within the administrative state as a “last line of defense” against state tyranny (p. 156), they have persisted despite the dominance of party politics (p. 152). As Michaels notes, the clashes between appointed agency heads, civil servants, and external civil society aren’t “efficient or orderly,” but that is the point: they are “democratic, pluralistic, inclusive, and deliberative” (p. 6), and represent a modern-day manifestation of the classic separation of powers principles. This administrative separation of powers, and its importance to preventing arbitrary authority and securing liberty, are why privatization is so deceptive and pernicious. As Michaels argues:

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<sup>18</sup> For a classic discussion of superstatutes, see William N. Eskridge, Jr. & John Ferejohn, Essay, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

<sup>19</sup> For a useful critique of the superstatute concept, see Adrian Vermeule, *Superstatutes*, NEW REPUBLIC (Oct. 26, 2010), <https://newrepublic.com/article/78604/superstatutes> [<https://perma.cc/6MNB-BYMQ>]. Professor Adrian Vermeule notes that it is unclear how to identify a superstatute in objective terms and that entrenchment in popular support or daily operations can lead such diagnoses astray. *Id.* Michaels takes a more compelling, normatively driven approach, identifying those statutes that are central on his read to assuring constitutional values of checks and balances in the administrative state and as a result identifies a different set of essential statutes than Professors William Eskridge and John Ferejohn in their discussion (pp. 70–71) (distinguishing his approach from that of Eskridge and Ferejohn).

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[G]overnment cannot and ought not be run like a business in any meaningful sense of the term. . . . [W]e must remember that government and businesses have very different powers and responsibilities; that government and businesses answer to very different constituencies; and that these differences in powers, responsibilities, and constituencies make good, practical sense, are normatively desirable, and are mutually reinforcing. . . .

Until that message is heard, until government's intrinsic, albeit idiosyncratic, worth is recognized on its own terms, American public administration will continue to look inadequate . . . . (p. 231)

Fourth, Michaels's concept of the administrative separation of powers generates several implications for legal scholarship and current debates. Within administrative law scholarship, the concept of an administrative separation of powers continues a growing trend among scholars to look inside the "black box" of administrative agencies and unpack the internal dynamics of agency action.<sup>20</sup> It also provides a way to reconcile ongoing debates about the nature and legitimacy of the administrative state. In Michaels's account, the point of administrative law is not to choose between presidential oversight, participation, or expertise, but rather to assure the tripartite checks and balances between all three of these approaches (p. 65). This concept of the administrative separation of powers fuses several different theories of administrative legitimacy; rather than continuing debates between, say, presidentialist, technocratic, or participatory theories of administration, Michaels engages all three in his model of administrative institutions, incorporating a "pluralism of values" to appropriately constrain and channel the exercise of administrative authority.<sup>21</sup> Indeed, this internal system of checks and balances provides Michaels with a rejoinder to calls for a more unitary, presidentialist executive branch.<sup>22</sup>

As a legal and policy matter, this commitment to an administrative separation of powers suggests a need to "insource" more governmental functions back into public institutions that can operate with such checks and balances in place (p. 13). It also suggests a very different approach to judicial and legislative oversight of the administrative state. For Michaels, judicial review should shift to a kind of process-based theory aimed at reinforcing these internal administrative checks and balances (p. 184). The legislature must help rebuild an independent, salaried, and well-trained civil service by, for example, expanding salaries and supporting leadership development and training within agencies (pp. 213–14). Civil society must also have greater ability to participate through more effective notice-and-comment systems (pp. 218–19).

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<sup>20</sup> See, e.g., Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

<sup>21</sup> See Vermeule, *supra* note 5, at 2464 (emphasis omitted) (noting the pluralism of values animating three major "camps" of administrative law theory, from presidential administration, to expertise, to proceduralism, *id.* at 2463–64).

<sup>22</sup> See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* (2010).

These arguments open up a wide range of broader implications, which the following Parts of this Review will explore. First, if privatization is best understood as an attempt to bypass the institutional checks and balances of the administrative state, as Michaels suggests, then the dangers of privatization manifest not just in terms of the violence it does to the procedural values of constitutional checks and balances. In bypassing or dismantling the administrative state, the privatization ethos has distinctive *substantive* valence as well, magnifying structural disparities of economic inequality, political power, and social, racial, and gender subordination. Second, Michaels's account anticipates much of the conflagrations of the Trump era. Michaels rightly views the Trump Administration as the "apotheosis" of the ethos of "politicized business" (pp. 13–14),<sup>23</sup> seeking to dismantle and bypass the administrative separation of powers through privatization and deregulation on the one hand, and overbearing politicized control from above on the other. But the realities of our larger political structures at this point suggest that the problems Michaels diagnoses are likely to persist even beyond the Trump era, particularly given the configuration of interest-group politics animating the current attacks on the administrative state. Third, given the substantive implications of anti-administrativism, and given the likelihood of exacerbating pressures on the administrative process, what are the prospects for rescuing and reconstructing the modern administrative state? Following Michaels, I argue here that administration can be reworked to better encourage the kinds of internal checks and balances that can legitimate and appropriately restrain and guide the exercise of administrative authority. But I suspect that we will need a more far-ranging structural reformation of democratic checks and balances, both in the administrative process and in our larger democratic infrastructure.

## II. THE SUBSTANTIVE VALENCE OF ANTI-ADMINISTRATIVISM

Michaels pulls no punches in his rebuttal to the privatization ethos and in emphasizing the importance of rescuing the administrative state from corrosion. But even so, there is a way in which Michaels's articulation of the problem of privatization and the value of public administration understates both. Michaels centers the "clunkiness" (p. 77) of the administrative separation of powers as the reason administrative agencies are attacked both by those fearing "big government" and by those frustrated by governmental inefficiency:

On the one hand, the administrative state is attacked by those who do not look past the initial and admittedly disconcerting consolidation of administrative power. And, on the other hand, the administrative state is crit-

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<sup>23</sup> Emphasis has been omitted.

icized by privatization hawks who seemingly recognize latter-day administrative fragmentation and bristle at the inefficiencies associated with a disaggregated architecture to which they assign no constitutional significance. (p. 58)

But even if we appreciate the constitutional importance of the administrative separation of powers, that still doesn't answer the prior question of *why* we need the regulatory state in the first place. The regulatory state's origins and value are inextricably tied to substantive debates, not just procedural ones, about economic inequality and social exclusion. Many defenses of administration have long noted the importance of regulation to producing greater social welfare, efficiency, and equality, despite the centrality of procedural and institutional concerns in administrative law discourse.<sup>24</sup> Michaels references the recurring problem of economic crisis and inequality as spurring regulation (p. 31). Thus, administrative checks and balances ensure that the powers of the regulatory state are deployed in ways consistent with values of liberty and democracy, but these substantive ambitions for equality and inclusion are fundamentally why we need a powerful central regulatory apparatus in the first place.

Bringing these substantive dimensions of administration to the fore in turn helps clarify why the *politics* of anti-administrativism (as distinct from the intellectual and scholarly manifestations of long-running debates over administrative power) can often be so brazen — and why critiques of administration seem to persist despite good-faith efforts of many regulatory reforms to defuse those criticisms by seeking ever more streamlined and efficient regulatory processes. Privatization and centralization, the two threats to the administrative process that Michaels identifies, are not just driven by an inability to appreciate the value of checks and balances and their accompanying inefficiencies. These threats are also driven by deep substantive disagreements with the core purposes of administration — and a conviction that by dismantling (or centralizing control over) administrative agencies, we might even preclude certain kinds of substantive debates from arising.<sup>25</sup>

*A. Privatization and the Challenge  
of Contesting Economic and Social Structure*

The regulatory state did not simply come into being because of the complexity of modern governance; rather, in its key moments of institutional innovation and development, the rise of modern administration has always been closely tied to substantive aspirations to counteract inequalities, hierarchies, and disparities of power generated by a changing

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<sup>24</sup> See, e.g., JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 9 (2012).

<sup>25</sup> See *infra* section II.C, pp. 1691–97.

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social and economic order. As Michaels writes, the socioeconomic upheavals of industrialization led an “increasingly inclusive and mobilized public” to demand “greater protection from the vagaries, deceptions, and dangers of the marketplace” (p. 41). As a result, a “State newly tasked with these weighty and extensive responsibilities (and newly attuned to the disciplining effects of a more demanding, empowered, and diverse electorate) could no longer get away with being small or amateurish” (p. 41). The outcome of these demands was a burst of institutional innovation and state formation that created the explosion of new administrative bodies, commissions, and bureaucrats in the Progressive Era, accelerating with President Roosevelt’s New Deal. While Michaels is certainly right to highlight the ways in which the professionalization and proceduralization of these new administrative powers were central to their legitimation, the rise of the modern regulatory state — and its political and normative valence — has to be understood in context of these substantive aspirations and concerns arising from the industrial economy.

The upheavals of industrialization generated more than simple economic dislocation; they provoked a deep political crisis.<sup>26</sup> Late nineteenth-century thinkers, lawyers, and reformers saw industrial capitalism as a fundamental threat to existing institutions and political ideals. Industrialization produced widespread immiseration, dislocation, and precarity.<sup>27</sup> But it also produced very clear and threatening new forms of economic power: the power of managers over workers and the rise of new corporate titans like J.P. Morgan, the Vanderbilts, and the Rockefellers, whose corporate control over finance, rail, oil, and other foundational goods and services placed whole towns and business sectors at their mercy.<sup>28</sup> At the same time, political institutions themselves were already viewed as captured, corrupt, or otherwise incapable of meeting these challenges: legislative corruption was a widespread concern, and a conservative judiciary posed a threat to basic state police powers aimed at protecting workers, health, and safety — and curbing these new forms of corporate power.<sup>29</sup> This context generated social movements across the country, from the Farmers’ Alliance (which would become the widespread Populist movement), to the largely urban, middle-class Progressive movement, to the growing organized labor movement.<sup>30</sup>

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<sup>26</sup> For a longer version of this interpretation of late nineteenth-century reform and its links to the origins of the modern regulatory state, see, for example, RAHMAN, *supra* note 16, at 54–96.

<sup>27</sup> *See id.* at 55–56.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 79.

<sup>30</sup> *See id.* at 57–58.

While these movements were themselves highly diverse and heterogeneous in their members and demands, they shared a common set of ideas: that the industrial economy was a highly unequal one shaped by new forms of domination and power, and that for economic and political liberty to survive industrialization, new institutions would have to be created to empower the public and check the excesses of industrialization. First, the problem of industrial capitalism was not just one of income inequality or maldistribution. More critically, it was a problem of *economic power*.<sup>31</sup> For antitrusters and crusaders like Louis Brandeis, a key problem was that a variety of private actors, from monopolies and trusts, to finance, to corporations more broadly, had accumulated a degree of quasi-sovereign control over the economic vitality and well-being of individuals and communities — yet were not subject to the kinds of checks and balances and norms of public justification that would have accompanied equivalent exercises of *public power*.<sup>32</sup> This problem of economic power also appeared in Progressive Era critiques of the market system itself. On this view, as thinkers like Robert Hale and John Dewey suggested, what might appear as impersonal “market forces” that, for example, drove wages down or prices up, were in fact the cumulative result of thousands of microscale transactions and bargains, each of which took place under (legally determined) disparities of power. Law constructed markets — and thus shaped market forces themselves.<sup>33</sup>

Second, if the problem of capitalism was really a problem of power, then the remedy required the construction of new forms of civic capacity empowered to contest such private and market power. Thus, for Progressive Era reformers, a key challenge was the challenge of *actionability*.<sup>34</sup> As Dewey put it in his influential book, *The Public and Its Problems*, the problem of the modern public was that it was too scattered, diffuse, and disorganized, incapable of asserting its interests in the face of the pressures of the industrial economy.<sup>35</sup> By its very nature, economic inequality in an industrializing economy could not be counteracted at an individual level; the background disparities of power were systemic and could be altered only by equally systemic changes to the background rules of the marketplace itself. Indeed, this was one of the central insights of legal realist scholars and progressive economists like John Commons, Robert Hale, Richard Ely, and others, who saw the

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<sup>31</sup> See *id.* at 66.

<sup>32</sup> See *id.* at 65 n.52, 77.

<sup>33</sup> See *id.* at 66.

<sup>34</sup> See *id.* at 86–88.

<sup>35</sup> JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 126–27, 129–42 (Swallow Press 1954) (1927).

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prospects for economic equity as requiring expansive efforts to restructure the background rules of the market itself.<sup>36</sup> By creating new institutions like regulatory bodies, reformers made it more possible to act on these seemingly powerful and diffuse forces; by situating these bodies in a larger context of public-oriented, democratic politics, these agencies could fairly be seen as agents of the public good. Thus, private power would be made contestable and governable by democracy.<sup>37</sup>

These are the kinds of aspirations that fueled the experimentation with the expansion of the administrative state: starting at the state and local level with the efforts by cities to municipalize private utility companies and by state governments to create railroad oversight commissions and agencies to address labor, poverty, and public health, and then reaching the federal level as the Progressive Era Administrations of Presidents Theodore Roosevelt and Woodrow Wilson began to experiment with antitrust and economic regulatory oversight.<sup>38</sup> As Professor William Novak has convincingly argued, this proliferation of state and local regulatory experiments shaped a generation of legal scholars and policymakers, giving rise to the modern techniques of administrative governance and making the later New Deal creation of the modern administrative state possible.<sup>39</sup> The rise of administration, then, was inextricably related to the rise of *democracy*, in two related senses: first, the building of state regulatory capacity provided the democratic public as a whole with new tools through which to make a vision of socioeconomic order possible; second, these tools were at the outset oriented, at least in part, toward a substantive vision of democratic accountability and equality, not just of governmental actors, but perhaps even more importantly, of *private* economic actors whose unchecked private and market power posed a threat to democratic opportunity.

This relationship between democratic political agency and capacity, substantive ideals of democratic equality, and the administrative state also animated important episodes of regulatory institutional development and innovation in the mid- and late twentieth century. As the growing literature on “administrative constitutionalism” suggests, the frontline battles for economic, racial, and gender equality often involved the building and deploying of bureaucratic capacity, and internal battles

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<sup>36</sup> See RAHMAN, *supra* note 16, at 83–86.

<sup>37</sup> See *id.* at 70–75.

<sup>38</sup> See *id.*

<sup>39</sup> William Novak’s work in recovering the historical public utility tradition is of central importance here. See, e.g., WILLIAM J. NOVAK, *A NEW DEMOCRACY: LAW AND THE CREATION OF THE MODERN STATE* (forthcoming); William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 139 (Nomi R. Lamoreaux & William J. Novak eds., 2017); William J. Novak, *Law and the Social Control of American Capitalism*, 60 *EMORY L.J.* 377 (2010).

between social movements and bureaucrats.<sup>40</sup> It was through the creation of regulatory institutions that labor rights, nondiscrimination protections, and access to federal welfare programs from Medicare to poverty assistance were made possible. Furthermore, it was through the pressures exerted on these bureaucracies by social movements that these regulatory tools were gradually repurposed toward enforcing and implementing equity- and inclusion-enhancing programs.

Consider, for example, Professor Karen Tani's recent work on the administration of welfare rights. As Tani documents, the development of a modern welfare rights regime involved a hard-fought shift away from a view of welfare as charitable support for the needy to welfare as a right that was an entitlement owed to members of the polity.<sup>41</sup> This shift had to be negotiated and was driven in large part by bureaucrats within the Social Security Administration, who asserted their specific vision of welfare as entitlement over the resistance of local welfare system administrators. To make the idea of welfare rights a reality, these bureaucrats experimented with implementing greater process protections for claimants.<sup>42</sup> These federal officers also developed new approaches to training and hiring bureaucrats, socializing them into a way of doing their day-to-day work that took as an axiom this more robust commitment to welfare as entitlement.<sup>43</sup> The success or failure of this effort turned not so much on the role of judicial interpretations of constitutional doctrine or presidential directives, but rather on more bureaucratic concerns: jurisdictional turf battles between local and state administrators more hostile to expanded welfare benefits and federal agencies seeking to expand access, difficulties of sourcing enough trained personnel who shared this larger mission, and the like.<sup>44</sup>

A similar story can be told about the construction of equal access to Medicare. As Professor David Smith details in his historical account, it was the politics of regulation that constructed the reality of equal access

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<sup>40</sup> See, e.g., Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010) (describing different agencies' varying interpretations and implementations of equal protection); Metzger, *supra* note 20 (defining the term "administrative constitutionalism," *id.* at 1897–98, and reviewing the emerging historical literature documenting the ways in which agencies interpret constitutional terms in their internal policymaking deliberations, *id.* at 1903–09); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314 (2012) (tracing the use of rights language in implementation of public benefits programs to the New Deal era and noting the use of administration to drive economic equality).

<sup>41</sup> Tani, *supra* note 40.

<sup>42</sup> *Id.* at 343–44.

<sup>43</sup> *Id.* at 356–68.

<sup>44</sup> *Id.* at 354–55.



to Medicare as a universal entitlement.<sup>45</sup> This outcome was neither obvious, nor predetermined. Rather, it was the contingent result of a complex interplay of bureaucratic innovation, social movement pressure, and regulatory policymaking. As Smith argues, in the early days of Medicare, there was a very real threat that the program would be administered in racially discriminatory and exclusionary ways.<sup>46</sup> The health system emerging in the mid-twentieth century reflected the legacy of racial exclusion and hierarchy in the Jim Crow South, marked by segregated and geographically concentrated hospital systems, and driving vastly divergent health outcomes and mortality rates between whites and African Americans.<sup>47</sup> Civil rights movement groups like the NAACP, Southern Christian Leadership Conference, Student Nonviolent Coordinating Committee, and Congress of Racial Equality, made the integration of hospitals and the healthcare system a key focal point — taking the lead from African American health professionals who drove these campaigns.<sup>48</sup> Pressure from civil rights leaders led to a major shift in Department of Health, Education, and Welfare leadership and culture. By December 1965, the agency issued a new internal memo that declared its mission to include the compliance with and enforcement of civil rights goals, through the administering of Medicare funding for hospital systems.<sup>49</sup> The agency created an Office of Equal Health Opportunity in February 1966 to enforce Title VI compliance for any hospital receiving Medicare payments.<sup>50</sup> This new office in turn hired teams of investigators, coordinating with civil rights groups to train them and to identify hospitals that might be violating civil rights requirements.<sup>51</sup>

The rise of the administrative state was thus not a politically neutral endeavor. The checks and balances that legitimate administrative authority in essence make possible (but do not guarantee) the contestation of deep forms of economic and social inequality, subordination, or hierarchy. This is not to say that administrative authority is always equality

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<sup>45</sup> See DAVID BARTON SMITH, *THE POWER TO HEAL: CIVIL RIGHTS, MEDICARE, AND THE STRUGGLE TO TRANSFORM AMERICA'S HEALTH CARE SYSTEM* (2016); see also Vann R. Newkirk II, *The Fight for Health Care Has Always Been About Civil Rights*, *THE ATLANTIC* (June 27, 2017), <https://www.theatlantic.com/politics/archive/2017/06/the-fight-for-health-care-is-really-all-about-civil-rights/531855/> [<https://perma.cc/YFQ3-2RQC>].

<sup>46</sup> See SMITH, *supra* note 45, at 84–86, 128.

<sup>47</sup> See *id.* at 18–23.

<sup>48</sup> See *id.* at 25–29 (“If Medicare was the gift of the civil rights movement, it was in an exchange for the critical gift a few unusual health professionals provided the civil rights movement: backbone.” *Id.* at 29.)

<sup>49</sup> *Id.* at 98.

<sup>50</sup> *Id.* at 109.

<sup>51</sup> *Id.* at 105–10, 118.

or inclusion promoting — hardly.<sup>52</sup> But in a reality where background economic, social, and historical conditions already encode structural disparities of wealth, opportunity, power, and influence, eliminating regulatory agencies and tools that are potentially capable of addressing these disparities (even if they are not always deployed in these ways) precludes much of equality- or inclusion-promoting public policy from getting off the ground in the first place. The dismantling of administrative institutions, then, is similarly nonneutral. Scholars of the administrative process have long warned of the dangers of special interest capture of regulatory agencies, which would cause administrative authority to be redirected to serve some interests over others.<sup>53</sup> But agencies can also be captured and neutered through *inaction* — through what political scientists call “drift,” where highly resourced and sophisticated players are able to produce substantive policy change simply by holding existing rules in place in the face of changing external conditions.<sup>54</sup> Dismantling agencies altogether would be an even more extreme form of opposition to these potential uses: rather than trying to capture or simply neuter the agency, more radical efforts to deconstruct regulatory institutions cut off the very possibility by eliminating the regulatory capacity itself, a kind of complete and total capture through deconstruction.

This substantive valence of administrative power and its potential deconstruction adds an important layer to Michaels’s critique of privatization. Michaels alludes to the ways in which privatization risks permanently dismantling institutional tools and capacities that are difficult to rebuild. As Michaels warns, under privatization, “we will have hollowed out the government sector to such an extent that we may well lack the capacity, infrastructure, and know-how to reclaim that which has increasingly been outsourced or marketized” (p. 12). He rightly notes that privatization emerged as a “pivot[.]” strategy in the Reagan era, a “second-best” to dismantling regulatory bodies themselves (p. 97). This is a problem in particular because “the Market, at least in its pure, idealized state, is not democratic, deliberative, or juridical. . . . It is the

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<sup>52</sup> See *infra* section II.B, pp. 1689–91 (discussing exclusionary exercises of administrative power); see also, e.g., Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. (forthcoming 2018) (documenting how federal education officials after *Brown v. Board of Education* but before the 1964 Civil Rights Act continued to interpret their constitutional obligations after *Brown* narrowly, continuing to fund segregated school systems). As Tani and Smith note in their studies, the deployment of administrative tools to advance equality and racial inclusion depended on a combination of outside movement pressure, internal bureaucratic entrepreneurship, and cultural or personnel change within the agency. See Tani, *supra* note 40; SMITH, *supra* note 45.

<sup>53</sup> See RAHMAN, *supra* note 16, at 40–43. For a classic account of regulatory capture theory, see George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For a more recent reassessment of regulatory capture theory and its implications and limits, see PREVENTING REGULATORY CAPTURE 365, 389–91 (Daniel Carpenter & David A. Moss eds., 2014).

<sup>54</sup> See, e.g., Jacob S. Hacker, Paul Pierson & Kathleen Thelen, *Drift and Conversion: Hidden Faces of Institutional Change* (Am. Political Sci. Ass’n Meeting Paper, Aug. 2013), <https://ssrn.com/abstract=2303593> [<https://perma.cc/EKS9-PZ97>].

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world of Schumpeter and Coase, not Montesquieu or Madison” (p. 5). Private corporate governance, meanwhile, cannot replicate the kinds of checks and balances that the separation of powers principles require (p. 164).

Dismantling administration and returning to private ordering is therefore troubling for democracy in three senses. First, given prior background structural patterns of exclusion and disparities of wealth, power, and opportunity, a return to private economic and social ordering is by definition a return to economic inequality, social hierarchy, and exclusion. Second, the dynamics of market competition or of corporate governance cannot replicate or replace public institutions of democracy or of checks and balances. They operate fundamentally differently and are not substitutes. Third, a dismantling of regulatory institutions removes some of the most vital and effective mechanisms through which we as a democratic public seek to contest and reshape these background structural inequities and exclusions: without tools of general administrative policymaking and enforcement, these structural inequities are harder to overcome and reshape.

*B. Centralization and the Problem of Administrative Exclusion*

Though privatization occupies top billing as the villain in Michaels’s book, his framework also highlights the problem of centralized control of the administrative state in a “unitary executive” as an inverse to the privatization ethos — another approach to bypassing the clunkiness of the administrative process. Citing a well-developed literature in administrative law scholarship,<sup>55</sup> Michaels warns that the unitary executive approach concentrates too much power in the President and bypasses the very moral and institutional value of the administrative separation of powers and its institutions of internal checks and balances within the executive branch (pp. 153–57). Here too Michaels’s argument implies a much broader critique of administration and its opponents. The unitary executive is not just a theory of administrative legitimation. The problem of relatively consolidated, discretionary bureaucratic power is one that *already exists* in several different domains, such as national security and surveillance (p. 154). It also arguably describes other forms of bureaucratic domination and exclusion, from poverty law to the overly powerful and unchecked discretion of the criminal justice system. These domains of state power reflect Michaels’s second fear: the centralization of executive authority in ways that bypass the kinds of checks and balances offered by the administrative separation of powers.

Michaels first takes issue with unitary executive theories of administrative law, which seek to streamline agency decisionmaking by tethering regulatory bureaucrats more directly to the decisions of the elected

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<sup>55</sup> See, e.g., POSNER & VERMEULE, *supra* note 22; Kagan, *supra* note 9.

President. While presidential administration theories see this as promoting faster and more accountable decisions, for Michaels this approach raises concerns. Specifically, taken to its logical extreme, a presidential administration theory threatens to override other checks and balances in the administrative process, like an independent civil service and other structural constraints imposed by courts, or statutorily mandated procedures (p. 156). But Michaels also raises a concern not with the President *per se*, but rather with the danger of a “unitary agency” — an administrative body that might run roughshod over the need to engage stakeholders in participation, imbuing its responsibilities with overly political or ideological motivations, tainting the exercise of its authority (pp. 169–70). Michaels rightly sees this kind of unchecked agency authority as a real instance of special interest capture (p. 170). For Michaels, this kind of unchecked administrative authority is indeed a real problem — but it is a problem that arises from efforts to “ease or erase” the checks and balances of the administrative separation of powers (p. 154), not from the dangers of administration *per se*.

This is an important insight, which extends to a number of areas of contemporary state authority. Consider, for example, the critiques in poverty law scholarship about the problem of “bureaucratic disentanglement.”<sup>56</sup> For many individuals, even accessing entitlements like food stamps, unemployment insurance, and other safety net protections is fraught, requiring multiple trips to social services offices, extensive paperwork, and often demeaning and arbitrary interviews.<sup>57</sup> Some state welfare agencies instead combine privatization with selective exercise of administrative power to extract revenue rather than provide vital services.<sup>58</sup> This problem of arbitrary bureaucratic power stems arguably from a *lack* of the kind of administrative checks and balances that Michaels describes, prompting efforts to create more effective procedural protections, expertise, or democratic accountability of welfare bureaucracies.<sup>59</sup> The problem of arbitrary administrative power is even more pronounced in context of the carceral state, the criminal justice

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<sup>56</sup> For a classic statement of the problem, see Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984).

<sup>57</sup> See KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 2–3, 170–71 (2015).

<sup>58</sup> DANIEL L. HATCHER, THE POVERTY INDUSTRY (2016).

<sup>59</sup> See, e.g., Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. POVERTY L. & POL'Y 13 (2005) (discussing how the 1996 welfare reform law contributed to bureaucratic disentanglement, *id.* at 24–30, and assessing whether the pretermination hearings required by *Goldberg v. Kelly*, 397 U.S. 254 (1970), provide meaningful protection against bureaucratic disentanglement, Lens, *supra*, at 36–48).

system, the immigration system, and the post-9/11 surveillance apparatus.<sup>60</sup> In each of these areas too we see Michaels's perceptive warning of how abandoning administrative checks and balances can in fact aggrandize executive power in action: the welfare system, criminal justice system, immigration system, and surveillance state all involve toxic combinations of private contracting and outsourcing with centralized executive control, the result of which is an even more unchecked concentration of power.<sup>61</sup>

*C. Anti-Administrativism's High and Low Politics —  
And the Failures of Administrative Reform*

Michaels is thus not unsympathetic to critiques of regulation and the need for regulatory reform. But his account of the twin threats of privatization and centralization is important in part because it illuminates the ways in which reform efforts, from both right and left, so often miss the mark. The problem in the end is that the threats of unchecked agency authority, and the value of attempts at reform, do not fully grapple with the ways in which both privatization and centralization relate to one another, and how they can at times fuse with and build on deeper, and troubling, political motivations.

Much of our debate about "big government" continues to take place in terms of critiques of governmental inefficiency, its "clunkiness" as Michaels terms it (p. 77), and its purported threats to traditional concepts of the rule of law. Call this the "high politics" of anti-administrativism. It manifests in the renewed legal critiques of administrative authority and the attempts by judges and some members of Congress to rein in patterns of delegation and deference to administrative agencies.<sup>62</sup>

This high politics of anti-administrativism itself has historically emphasized the second of Michaels's concerns: the threat of unchecked administrative authority.<sup>63</sup> For some intellectual critics of administrative authority, the problem is a fundamentally substantive one: one might,

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<sup>60</sup> For a powerful example of the lawlessness that communities of color experience under the criminal justice system, see Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017).

<sup>61</sup> See generally GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 93–147 (Jody Freeman & Martha Minow eds., 2009) (describing and analyzing cases of privatization of security, prison, and other critical governmental functions); David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231 (1998) (describing the privatization of various aspects of the public benefit system and the difficulties of assuring due process rights in a privatized context).

<sup>62</sup> See, e.g., Metzger, *supra* note 6, at 8–51.

<sup>63</sup> See, e.g., RAHMAN, *supra* note 16, at 58–64 (describing the elements of Lochnerian laissez-faire thought, including its particular concern with capture and special interest influence on regulation).

for example, take a thick view of negative liberty, opposed to governmental regulation of most kinds. This background conception of freedom understood in narrow negative liberty terms as freedom from state interference and as the positive freedom to contract on the open market echoes more closely a direct challenge to the substantive purposes of much of modern regulation, especially on those matters concerning economic and social inequality. But for many contemporary critics of regulation, the emphasis is instead on the second set of concerns Michaels raises. First, there is this skepticism of governmental authority as likely to be captured, corrupt, fallible, or inefficient.<sup>64</sup> Second, there is a corresponding background defense of markets as self-regulating, efficient, and incorruptible.<sup>65</sup> The impersonal system of the market provides aggregate price signals that coordinate efficient economic behavior, and is more efficient at allocating social product than fallible humans and corruptible public policy. Taken together, these comparative institutional critiques suggest that the best, safest response to the threat of unchecked administrative authority is to prophylactically limit its scope, deferring instead to the more responsive and self-correcting nature of the market itself. These elements animated the high politics of anti-administrativism in the *Lochner* era, where progressive legislation was struck down as a violation of freedom of contract and as an example of self-interested “class legislation,” the original form of “capture theory.”<sup>66</sup>

Late twentieth-century critics of regulation echo these same *Lochner*ian moves.<sup>67</sup> Public choice theory pioneered by social scientists like James Buchanan and Gordon Tullock advanced the proposition that regulation would most likely be captured by organized special interests, who would hijack these levers of state power for private gain, and thus suggested that deregulation would be more likely to advance the public welfare.<sup>68</sup> At the same time, new academic accounts of the market system suggested that markets were perfectly capable of regulating themselves, whether through the efficient aggregation of information in price mechanisms or through the shareholder revolution in corporate governance enabling investors to direct — and implicitly, to hold accountable — the powers of private firms toward the most economically beneficial activities.<sup>69</sup> These critiques accompanied the revival of libertarian conceptions of freedom and skepticism of the state

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<sup>64</sup> *Id.* at 40–43 (summarizing the intellectual critiques of the regulatory state in the mid- and late twentieth century).

<sup>65</sup> *Id.*

<sup>66</sup> On the class legislation interpretation of *Lochner*, see, for example, HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 86–101 (1993).

<sup>67</sup> See, e.g., RAHMAN, *supra* note 16, at 39–43 (on the late twentieth-century attack on the New Deal).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

popularized by thinkers and public intellectuals like Milton Friedman.<sup>70</sup> In so doing, late twentieth-century critics of regulation effectively rebutted the foundational arguments that Progressive- and New Deal-era reformers used to justify and motivate the rise of regulation: if economic power was already checked by market forces, and if regulation was more likely to be perverse in its effects, then what reason would there be in the first place for risking the expansion of state regulatory power?

On its own, this critique of administration, foregrounding the problems of capture, accountability, and inefficiency, can be addressed to some degree by reforms to administrative processes and institutions themselves, seeking to make them more responsive, rational, deliberative, or accountable. Indeed, this is where many defenders of the modern administrative state have concentrated their scholarly and policy efforts. Michaels's own work suggests some important ways forward in this regard, as discussed below.<sup>71</sup>

But this critique of administrative accountability (or lack thereof) is not the whole story, for accompanying (and arguably *driving*) these high politics is a very different “vernacular politics” of anti-administrativism. This is the domain of organized business interests, of the “Southern strategy” deploying subtextual racialized critiques of “big government” increasingly associated with governmental support for racial minorities, women, and other challenges to existing economic and social hierarchies.<sup>72</sup> These appeals motivated the push to privatize government programs, as well as to impose more punitive (and arbitrary) forms of bureaucratic disenfranchisement. Indeed, for much of the history of the welfare state, policymakers have resorted to the trope of the “undeserving poor” to justify the imposition of eligibility requirements and screening measures that limit access to safety net programs.<sup>73</sup> Such racially charged attacks on beneficiaries as lazy or undeserving have been codified through state and local conditions on benefits. These political appeals and movements have provided a critical reservoir of support for the attack on modern administration.

The role of organized interests in driving the attack on the administrative state is critical and cannot be understated. As Michaels notes briefly, these intellectual critiques were initially unconvincing until the 1970s, when wider distrust of government expanded during the economic downturn and the post-Watergate era (pp. 86–87). Around the same time, business interests shifted their strategy from one of working

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<sup>70</sup> *Id.*

<sup>71</sup> See *infra* Part III, pp. 1697–709.

<sup>72</sup> See, e.g., EDIN & SHAEFER, *supra* note 57, at 14–17.

<sup>73</sup> See, e.g., MICHAEL B. KATZ, *THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY* (2013).

within the regulatory architecture of the New Deal to actively dismantling and attacking it (pp. 89–91), backed by the influx of ideologically driven funders like the Koch brothers, and incubating these ideas in think tanks like the American Enterprise Institute and the Heritage Foundation. This change within the business lobby writ large is key — organized interests weaponized these intellectual critiques as part of a larger campaign to dismantle the New Deal regulatory state.<sup>74</sup>

Importantly, a similar fusion of the high politics of intellectual and legal anti-administrativism with organized political interests took place not just on matters of economic and business regulation, but also on dimensions of race, particularly in the aftermath of the civil rights movement. Much of the privatization ethos that Michaels describes — the move away from public oversight toward favoring market-friendly solutions, an emphasis on decentralization, and a greater skepticism about the welfare state — was in part motivated by a racialized distrust of government increasingly seen not only as a threat to big business, but also as a vehicle for racial equity and desegregation. The fusion of often implicit resegregationist backlash and antigovernment rhetoric is apparent in President Reagan’s vilification of “welfare queens” and the increasingly bipartisan efforts to impose tighter requirements on welfare recipients and smaller budgets for safety net programs,<sup>75</sup> as well as in the pattern of localities seceding from larger (and racially diverse) metro regions as an alternative to desegregation.<sup>76</sup> This synergy between the high politics of anti-administrativism and organized attacks from business interests on the one hand, and tapping into racial backlash on the other, continued and indeed worsened in the decades since the Reagan Administration. Recent studies of the deregulatory right highlight exactly these alliances between business interests, racial resentment, and antigovernment conservatism.<sup>77</sup>

This substantive valence of anti-administrativism raises the stakes of Michaels’s critique. The power that is aggrandized by privatization and centralization is not just that of executive branch officials seeking to bypass administrative procedures. The bigger moral problem here is how this combination of privatization and unchecked administrative power together furthers the background disparities of economic, social,

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<sup>74</sup> There has been a burst of new historical scholarship tracing the rise of the business lobby and its critique of the New Deal. *See, e.g.*, ANGUS BURGIN, *THE GREAT PERSUASION* (2012); JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA* (2016); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* (2010); KIM PHILLIPS-FEIN, *INVISIBLE HANDS* (2009).

<sup>75</sup> KATZ, *supra* note 73, at 194–202.

<sup>76</sup> GERALD E. FRUG, *CITY MAKING* 170–217 (1999).

<sup>77</sup> *See, e.g.*, THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* (2012).



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and political power between different constituencies in American politics. This results in a disproportionate impact that is racialized, gendered, and falls particularly hard on marginalized communities.

This is not to reduce the intellectual critiques of privatizers, libertarians, or public choice theorists into mere cloaks for interest group politics. The high politics of normative and legalistic critique of regulation will continue to play out in terms of concepts like the rule of law, efficiency, capture, democratic theory, and the like. And as suggested above and addressed in greater detail below,<sup>78</sup> there are very real concerns that need to be addressed about the accountability and responsiveness of modern administrative authority. But this alliance between high and vernacular politics of anti-administrativism is critical to understanding patterns in contemporary American politics.

First, this alliance explains the ways in which anti-administrativism's political rhetoric is often selectively applied. Indeed, it is notable how in the history of attacks on the administrative state, it is often groups like workers (in *Lochner* and more recent attacks on unions) or racialized and gendered minorities (the welfare queen again) that are singled out as evidence of capture, while more subtle forms of business influence on regulatory policy, ideas, culture, and personnel persist. It also explains why both threats of privatization and expanded bureaucratic power to exclude or coerce might coexist in the same political coalition. Viewed philosophically, these are opposing techniques, one libertarian, and the other statist. At the level of the high politics of anti-administrativism, Michaels places privatization and centralization in the same frame as two seemingly opposite policy regimes that share a dislike of the frictions and frustrations of administrative checks and balances. Viewed from the standpoint of the vernacular politics and the substantive implications of anti-administrativism, privatization and centralization are complementary tools for advancing a shared purpose: preventing the deploying of state power to dismantle structural economic and social inequities.

The Trump Administration is arguably a prime example of the way in which anti-administrativism is deployed selectively and irregularly to further a substantive agenda hostile to social and economic inclusion. Thus, the "deconstruction of the administrative state"<sup>79</sup> has progressed rapidly in agencies like the Department of Housing and Urban Development, which predominantly focuses on goals of racial and economic inclusion through its administering of urban development programs,<sup>80</sup> while agencies like Immigration and Customs Enforcement —

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<sup>78</sup> See *infra* Part III, pp. 1697–709.

<sup>79</sup> Krieg, *supra* note 7.

<sup>80</sup> See, e.g., MacGillis, *supra* note 7.

notorious for its overzealous harassment of immigrant communities<sup>81</sup> — have benefited from Trump Administration proposals to aggressively expand their budgets, personnel, and authority.<sup>82</sup> We see here exactly the strategic use of privatization on the one hand and expanded executive power on the other, around a common agenda that has a distinctively racialized, exclusionary ethos.

The fusion of high and low politics of anti-administrativism is important for a second critical reason: it is crucial to understanding exactly why the attempts by modern-day defenders of regulation to defuse the privatization critique have fallen so woefully short. Indeed, Michaels rightly castigates the failed attempts by liberal administrations from Clinton to Obama to address the privatization critiques by absorbing the critique of big, clunky, inefficient government and seeking “smarter or leaner” government to make regulation more transparent, efficient, and market-friendly (p. 126). This liberal accommodation of anti-administrativism rests on a tragic misdiagnosis of the nature of the attack on administration itself. To the extent that anti-administrativism is shaped by the high politics of the anticapture concern, these “good governance” measures are plausible responses that seek to slim down the footprint of government and streamline and rationalize regulatory processes. But to the extent that anti-administrativism draws its *political* potency from its fusion with business interests and racial backlash rooted in a fundamental rejection of the *substantive* aspirations of economic and social equality achieved through administrative tools and regimes, such good governance reforms are entirely beside the point. There are of course substantive values that good governance reforms might advert to: improvements to social welfare, mitigation of risk, and the like.<sup>83</sup> But, as I have suggested elsewhere,<sup>84</sup> as an attempt to re-legitimize regulatory authority, this approach falls short: not only does it not fully defuse the fears of capture and unchecked regulatory authority,

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<sup>81</sup> See, e.g., Janelle Bouie, *ICE Unbound*, SLATE (Jan. 29, 2018, 7:19 PM), <https://slate.com/news-and-politics/2018/01/ice-is-out-of-control.html> [<https://perma.cc/J9S8-Z2LX>].

<sup>82</sup> See, e.g., Julián Aguilar, *Trump Administration Directs Border Patrol, ICE to Expand Deportations*, TEX. TRIB. (Feb. 21, 2017, 11:00 AM), <https://www.texastribune.org/2017/02/21/dhs-directs-border-patrol-ice-immediately-expand-deportation-efforts/> [<https://perma.cc/8856-7LSV>]; Alan Gomez, *Trump Budget Wants Billions More for Border Wall, Immigration Agents and Judges*, USA TODAY (Feb. 13, 2018, 7:25 AM), <https://www.usatoday.com/story/news/politics/2018/02/12/trump-budget-wants-billions-more-border-wall-immigration-agents-and-judges/329766002/> [<https://perma.cc/Y6E8-TBQV>]; Greg Moran, *ICE Looks to Private Sector to Help Hire Nearly 6600 Workers to Support the 10,000 New Agents Trump Wants*, SAN DIEGO UNION-TRIB. (Feb. 1, 2018, 5:00 AM), <http://www.sandiegouniontribune.com/news/watchdog/sd-me-ice-hires-20180201-story.html> [<https://perma.cc/LLK9-4BAL>].

<sup>83</sup> See, e.g., CASS R. SUNSTEIN, SIMPLER (2013) (describing how more streamlined “nudge” regulations can improve welfare while minimizing governmental costs and the risk of excess regulatory intervention); Vermeule, *supra* note 5, at 2464 (noting the pluralism of values animating three major camps of administrative law theory, from presidential administration, to expertise, to proceduralism).

<sup>84</sup> See RAHMAN, *supra* note 16, at 31–53.

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it also distances itself from more thickly moral appeals to the substantive purposes of regulation — not just in enhancing welfare, but rather in contesting fundamental problems of power, inequality, and exclusion.

What then is a defender of equality- and inclusion-enhancing regulation to do? If this account of the limits of good governance reforms is right, then it suggests two avenues. First, it suggests that the problem of regulatory legitimacy is not so much one of battles over regulatory process as it is a stand-in for substantive moral debates about equality, inclusion, and the purposes of government itself. These are controversies that need to be engaged directly and explicitly through democratic debate and contestation over the substantive moral and political goals of public policy. Smarter regulation may well generate desirable policy fixes but by itself cannot substitute for a direct public debate over, and legitimation of, the thick moral goals of equality and inclusion. Second, this account suggests that to the extent that we have real concerns about the accountability and responsiveness of government regulators, we need to do more than assure good governance; we need to invest in more robust checks and balances within the administrative system itself, as Michaels himself suggests. Indeed, perhaps paradoxically, the very substantive stakes of debates over regulatory power underscore the need for an even more robust institutional structure to modern administrative agencies that can address these types of concerns about agency authority and legitimacy. Here, Michaels offers us a way forward and a language that can help engage both critics and defenders of the modern administrative state.

### III. DEMOCRATIZING ADMINISTRATIVE POWER

Michaels argues that part of the value of the administrative process is that it provides a procedure and a structure through which to manage conflicts over substantive values (p. 74). But as the previous Part suggests, the substantive implications of privatization and centralization efforts raise the stakes of these procedural and structural aspects of the administrative system. The unfortunate reality is that the substantive stakes of administrative policymaking are only likely to *increase* in the future, placing the administrative process under ever-greater strain. The result is that a defense of the administrative state will necessarily require a thorough reimagining of the administrative process itself — and the ways in which the administrative process relates to the larger institutional ecology of our democracy. Administrative agencies, using only conventional procedures, cannot bear the normative weight of the political and policy demands increasingly placed upon them. In this, Michaels shares some sympathy with contemporary critics of administrative authority (as do I). But rather than seeing this problem of agency authority as a reason to eliminate or dismantle agencies altogether,

Michaels suggests a range of interventions that would preserve the ability of agencies to meet their substantive purposes, while defusing the real concerns about agency authority. Michaels's suggestions are valuable on this score, but the scale of the crisis of administration — and of democracy — suggests the need for an even more far-reaching democratic institutional reconstruction.

*A. Polarization, Gridlock, and the Growing Crisis  
of Administrative Legitimacy*

As a number of administrative law scholars have argued in recent years, the realities of contemporary American politics are likely only to increase the incentive for the Executive to exercise ever-greater policy-making initiative through regulatory agencies. The accumulations of decades of broad statutory delegations from Congress, combined with growing party polarization, congressional gridlock, and public blowback generated by legislation all create an environment where Presidents are likely to continue to push the boundaries of substantive policymaking through regulation.<sup>85</sup> This is particularly true in context of divided government where one party controls the White House and another controls Congress. But executive regulatory expansion is also likely in context of unified party control of both legislature and Executive: under unified government, Congress is even less likely to exercise its oversight function over regulatory agencies, and the difficulties of party coordination and legislative action make policymaking by regulation still less costly. This shift to making more expansive public policy through regulation within existing statutes, absent new, direct statutory authorization, raises questions about the politicization of administration, and thus the legitimacy of the modern regulatory state, incentivizing regulators to engage in more *realpolitik* rather than deliberation in making administrative policies.<sup>86</sup>

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<sup>85</sup> See, e.g., Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1701 (2017) (noting the broad accumulation of regulatory authority, further expanded by features like regulatory waivers and accreted de facto delegation from overlapping statutory authorizations). On the role of agencies as primary policymakers in conditions of divided government and congressional gridlock, see, for example, Cynthia R. Farina & Gillian E. Metzger, Essay, *Introduction: The Place of Agencies in Polarized Government*, 115 COLUM. L. REV. 1683 (2015); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012); and Gillian E. Metzger, Essay, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739 (2015).

<sup>86</sup> See, e.g., Aaron L. Nielson, *Confessions of an "Anti-Administrativist,"* 131 HARV. L. REV. F. 1, 8, 10 (2017); Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 969 (2016).

The recent battles over executive power under both the waning years of the Obama Administration and the first year of the Trump Administration highlight these concerns in both contexts of divided and unified government. As Republicans gained control of Congress and effectively blocked further legislative initiatives in the later years of the Obama Presidency, the Obama Administration pursued a number of major initiatives through executive branch regulation, from the Clean Power Plan aiming to address climate change through EPA regulations of carbon dioxide,<sup>87</sup> to the significant expansion of overtime pay through a Department of Labor (DOL) rulemaking,<sup>88</sup> to the controversial “deferred action” program granting immigration enforcement relief to undocumented immigrant children and their parents.<sup>89</sup> Each of these initiatives represented a substantive attempt to address structural social and economic challenges or to expand economic equality and social inclusion. Each of these initiatives arose largely in context of the failure of Congress to consider and advance draft legislation.<sup>90</sup> Some of these Obama Administration regulatory initiatives arguably represented a valuable institutional experiment, deploying regulatory agencies’ ability to fuse expertise and participation to address more structural and complex drivers of economic and social inequality — for example, by addressing urban segregation and housing inequality through affirmative “equality directives” promoting fair housing.<sup>91</sup> But each of these initia-

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<sup>87</sup> See Power Sector Carbon Pollution Standards, Memorandum for the Administrator of the Environmental Protection Agency, 78 Fed. Reg. 39,535 (June 25, 2013) (Presidential Memorandum calling for updating of Clean Air Act standards to address carbon dioxide emissions from power plants); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

<sup>88</sup> See Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737 (Apr. 3, 2014) (Presidential Memorandum ordering DOL to “modernize and streamline the existing overtime regulations”); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 29 C.F.R. § 541 (2017).

<sup>89</sup> See Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/sr-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/S8BK-WZQS>].

<sup>90</sup> See sources cited *supra* note 85 (especially Freeman & Spence, Farina & Metzger, McGarity, and Metzger); see also Brad Plumer, *Why Has Climate Legislation Failed? An Interview with Theda Skocpol*, WASH. POST (Jan. 16, 2013), [http://wapo.st/VKb977?tid=ss\\_tw&utm\\_term=.d8a740e306a7](http://wapo.st/VKb977?tid=ss_tw&utm_term=.d8a740e306a7) [<https://perma.cc/TK4S-Y38H>]; Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES (July 7, 2013), <https://nyti.ms/2k9GKOF> [<https://perma.cc/WJ4K-6FVR>].

<sup>91</sup> See Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1387–92 (2012) (describing the equality-promoting effects and institutional benefits of HUD’s Affirmatively Furthering Fair Housing (AFFH) rule); Olatunde C.A. Johnson, *Overreach and Innovation in Equality Regulation*, 66 DUKE L.J. 1771, 1794–802

tives provoked stiff legal resistance — brought by ideological and partisan opponents of these measures, but gaining sympathetic hearings from courts skeptical about the apparent substitution of regulatory authority for legislation.<sup>92</sup>

The incoming Trump Administration quickly reversed each of these regulatory initiatives.<sup>93</sup> For Michaels, this reversibility “is a testament to the robustness of the administrative separation of powers and to the pitfalls of proceeding without administrative consensus” (p. 150). But as Michaels argues, the tendency to make major substantive policies through the administrative apparatus in the face of legislative gridlock is precisely why we need to redouble our commitment to the administrative separation of powers: “[D]uring legislative impasses, more — and more serious — federal responsibilities are routed through administrative agencies” (p. 150). Michaels continues:

Where a president attempts to bypass a hostile, lumbering, or simply indecisive Congress, the existence of an administrative separation of powers stands as an especially prized safeguard — a check against unfettered presidential power and another means of preserving and promoting multipolar and contentious policy formulation and implementation. Simply stated, the administrative separation of powers ensures that when the president channels legislative-like responsibilities into the administrative domain, inclusive, rivalrous, and heterogeneous governance perdures — and checks and balances are preserved notwithstanding the apparent circumvention of the constitutional separation of powers. This is true regardless whether the president wants to ramp up or scale down federal regulatory power. (p. 150)<sup>94</sup>

The “pathological” legislative gridlock, for Michaels, is a result of a larger “cultural malady, a desire on the part of elected officials to no longer work for the public good but instead to subvert the process of governing” (p. 149). That being the case, for Michaels, the solution “lies not in scrapping” the checks and balances of the administrative process, but rather in “reinvigorat[ing]” them (p. 149).

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(2017) (suggesting that rules like HUD’s AFFH represent a novel way to address structural inequalities in a more nuanced, expert, and democratically participatory manner).

<sup>92</sup> See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.) (granting stay against the Clean Power Plan); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (granting preliminary injunction against the deferred action programs), *aff’d by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.); *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016) (granting preliminary injunction against the DOL overtime rule).

<sup>93</sup> See Zack Colman, *Trump Administration Is Repealing Obama’s Clean Power Plan*, SCI. AM. (Oct. 10, 2017), <https://www.scientificamerican.com/article/trump-administration-is-repealing-obamas-clean-power-plan/> [<https://perma.cc/F7K3-P4TQ>]; Sean Higgins, *Trump Administration Won’t Save Obama-Era Overtime Rule*, WASH. EXAMINER (Sept. 5, 2017, 1:24 PM), <http://washex.am/2wEzMYc> [<https://perma.cc/8T9P-ULNG>]; Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://nyti.ms/2xLAapv> [<https://perma.cc/TTJ6-2ZTC>].

<sup>94</sup> A footnote has been omitted.

*B. Spreading and Deepening the Administrative Separation of Powers*

The use of administrative agencies to implement major new policy initiatives is thus likely only to increase. By reinvesting in an internal administrative separation of powers, we can help defuse these political controversies, providing a more robust process for contestation and debate within administrative agencies themselves. Furthermore, as noted above,<sup>95</sup> there are major domains of regulatory authority that do not comport with the checks and balances that Michaels describes, from the welfare system to the criminal justice system. There are also major gaps at the state and local levels in approximating similar administrative checks and balances. This suggests the value of extending the administrative separation of powers more widely within administrative and executive bodies.

How then can the administrative separation of powers be expanded and deepened? First, Michaels argues that the political branches should act in a “custodial” capacity with respect to the administrative separation of powers (p. 168), pursuing politics that “best . . . reflect[] our distinctive admixture of populism, legalism, establishment politics (mediated through the president), and bureaucratic expertise” (p. 176). Judges are particularly important on Michaels’s account as the most likely to act custodially (p. 178). Michaels suggests that administrative law doctrine shift to a focus on “reinforcing rivalrous administration” (p. 180), offering a kind of reinvented process theory for judicial review of agency action. Judges, on this read, should review agency decisions to ensure they are arrived at by a sufficiently contested process that involves adequate checks and balances between politically appointed agency heads, expert agency staff, and engagement with civil society through the notice-and-comment process (pp. 181–83).

Second, Michaels proposes institutional reforms to shore up in particular the independent, expert civil service on the one hand, and the capacities of civil society to engage in the rulemaking process on the other (p. 204). Michaels rightly worries that the independent civil service, one of the three prongs of the administrative separation of powers, has been “demoralized and battered” by decades of attack, villainization, and disinvestment (p. 200). To counter this trend, Michaels’s calls for investing in personnel, salaries, and retention (pp. 205–06, 214), including a proposal for a public service academy (pp. 209–12) and leadership development programs (pp. 213–14), are admirable. These investments would expand the independent expertise of “rivalrous administration.” At the same time, Michaels calls for greater popular participation in regulation through reforms to the notice-and-comment process. In particular, he suggests reforms to make notice and comment itself more ef-

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<sup>95</sup> See *supra* section II.B, pp.1689–91.

fective, for example by expanding media outreach (pp. 220–22), providing rule summaries in plain English (pp. 224–25), and allowing for more iterative dialogue and feedback between civil society groups and regulators (pp. 226–29).

The extensions of the administrative separation of powers Michaels describes are tailored for the traditional suite of administrative agencies. But they also suggest a way forward for emerging debates about the norms and processes shaping executive discretion as well. Indeed, we might interpret the explosive judicial blowback against the Trump Administration’s most provocative assertions of unilateral executive power in part as a recognition of the importance of internal administrative checks and balances, particularly where potentially discriminatory conduct is at issue. From the travel ban to the ban on transgender individuals serving in the armed forces, the Trump Administration has been slapped with swift injunctions blocking exercises of what might otherwise be seen as purely discretionary executive power.<sup>96</sup> For many critics of the Administration, these actions represent a clash between Fourteenth Amendment prohibitions on governmental “animus” and Article II executive discretion.<sup>97</sup> But arguably these judicial counters are reacting as much to the apparent violations of internal administrative checks and balances — evidenced by the irregularities of President Trump’s seeming lack of consultation with agency experts and bypassing of ordinary executive norms of policymaking<sup>98</sup> — as they are to the substance of the executive decisions themselves. Of course, the judicialization of internal procedures for executive policymaking might itself be an encroachment on the Article II discretion of the Executive, unduly constraining future Presidents and creating an opening for overinvasive and subjective judicial interventionism. These dual concerns suggest a spiraling crisis of administrative legitimacy: we distrust an expansive executive power aggrandized through the bypassing of regular administrative order and through the use of privatization-as-workaround, but

<sup>96</sup> See, e.g., *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017) (granting preliminary injunction against ban on transgender individuals serving in the military); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (granting temporary restraining order against travel ban).

<sup>97</sup> See, e.g., Brief of Constitutional Law Scholars as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance at 14–17, *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351); see also Joshua Matz et al., *A Different View of Why the Muslim Ban Violates the Establishment Clause*, TAKE CARE (Apr. 20, 2017), <https://takecareblog.com/blog/a-different-view-of-why-the-muslim-ban-violates-the-establishment-clause> [<https://perma.cc/JVX3-HARG>] (summarizing Brief of Constitutional Law Scholars as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance, *supra*).

<sup>98</sup> See Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, THE ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> [<https://perma.cc/Y25Y-WSFT>] (describing the first travel ban as “sloppily written, barely vetted inside the executive branch, legally overbroad, and incompetently rolled out”).



we also worry about the desirability and capacity of courts to check these patterns. This is exactly the danger that Michaels's argument is built to address. For Michaels, it is only through a robust administrative separation of powers that we can create the kinds of internal checks and balances that legitimate the exercise of administrative power — particularly in the face of deep substantive disagreements about policy goals and outcomes (pp. 19–20). It is notable that the expansion of unitary executive authority in the foreign service and, until recently, in the national security realm, had been marked by the informal development of intra-executive procedures that, while perhaps still too deferential to executive discretion, do echo some of the administrative checks and balances celebrated by Michaels.<sup>99</sup> A number of legal scholars are beginning to grapple with the need to better institutionalize these process norms and structures within zones of traditionally discretionary executive action, including in contexts of surveillance, national security, and more recent concerns about threats to democratic norms themselves.<sup>100</sup> We might think of these debates as echoing (and perhaps even extending) Michaels's concept of the administrative separation of powers deeper into the executive branch.

### C. *Deepening Contestation Within the Administrative Process*

But the scale of our current democratic dysfunction seems to require a more thoroughgoing transformation of the regulatory process — and of our broader democratic institutional contexts — than Michaels suggests. This goal of assuring accountable yet effective government in the modern era need not take the form of the separation of powers, in its constitutional or administrative variants. But it might well require other institutional innovations that can achieve sufficient checks and balances to better direct and hold accountable administrative authority. At times, Michaels seems to hew too closely to the “constitutional isomorphism” (p. 75) of translating the tripartite constitutional separation of powers into a similar tripartite administrative system of political appointees, civil service experts, and civil society participation. Leveraging the administrative state as a way to expand democratic capacity to

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<sup>99</sup> See, e.g., Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328–31 (2006) (describing internal separation of powers within the foreign service); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1083–84, 1117–18 (2016) (describing the approximation of administrative law models of accountability and expertise in shaping the exercise of otherwise unitary surveillance powers of the President).

<sup>100</sup> See, e.g., Renan, *supra* note 11; Goldsmith, *supra* note 98 (arguing that the biggest damage the Trump Administration has done to democracy and the executive branch has been in bypassing norms, including intra-executive norms related to deliberation, process, and policymaking).

contest structural inequalities and to enable checks and balances requires a broader, and more flexible, approach to *institutionalizing effective contestation*.

For institutional checks and balances to have real force, there must be political actors — organized civil society interests — that lie *behind* those institutions and are motivated to make full use of those institutions.<sup>101</sup> This dynamic relationship between institutional structures on the one hand, and the capacities and reach of civil society groups, social movements, and grassroots constituencies on the other has long been a central insight of social science studies of political contestation: policy-making institutions are responsive not to the general public but rather to the balance of power among organized interest groups. Indeed, much of our concern about inequality today — and about the dangers of regulatory capture and unresponsiveness noted in Part II above — stems from disparities of political power and influence between more sophisticated and well-resourced interest groups, and other affected constituencies who lack the same degree of organization and influence. Meanwhile, the capacity for civil society groups, social movements, and constituencies on the ground to influence policymaking institutions depends crucially on the ways in which these groups are able to target and participate effectively in political institutions.<sup>102</sup>

We cannot expect the administrative process to by itself do all the moral and political work of catalyzing, sustaining, channeling, and ultimately legitimizing political contestation and policy outcomes. At some point, we have to look to our broader democratic ecosystem to address and defuse the kinds of pitched substantive battles and power disparities afflicting the administrative state today. Put another way, at some point, we will have to address the larger crisis of democratic dysfunction in twenty-first-century American politics for the administrative process — even a radically democratized and rivalrous one — to work.

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<sup>101</sup> This is a key argument advanced recently by Professor Daryl Levinson, pointing out that the checks and balances sought by constitutional designs such as the separation of powers and federalism rest on a relationship between institutions and configurations of power among social groups. See Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 36, 40, 84 (2016).

<sup>102</sup> Professor Kate Andrias makes a similar critique in her response to Levinson's article. See Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 5–6 (2016); see also Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015). For examples of social science's focus on organized interests and the interactions between movements and institutions, see generally HACKER & PIERSON, *WINNER-TAKE-ALL POLITICS*, *supra* note 74; SIDNEY TARROW, *POWER IN MOVEMENT* (1994); and CHARLES TILLY & SIDNEY TARROW, *CONTENTIOUS POLITICS* (2d ed. 2009). For a larger discussion of this problem of power, participation, and administrative institutional design, see, for example, RAHMAN, *supra* note 16, at 139–65; and Rahman, *supra* note 16.

Viewed in this broader context of democratic reconstruction, the administrative process itself might need to undergo an even more radical transformation.

*I. Expanding Civic Power Through Democratic, Participatory Regulation.* — Michaels acknowledges the importance of the ecosystems of civil society actors, from NGOs to advocacy groups to regulated industries — what he terms the “thick political surround” (p. 161).<sup>103</sup> But Michaels is somewhat skeptical of such efforts to expand interest group representation and pluralism within the administrative process as potentially “too chaotic to serve as a framework for governing” (p. 162). Michaels warns that it will be difficult to determine which groups should be represented, and these efforts invite a “free-for-all” that might threaten the rule of law itself (p. 162). While these concerns are well taken, it is not clear that the challenges of designing and implementing a broadly inclusive form of stakeholder representation within the regulatory state are any more or less difficult than the kind of contestatory process review that Michaels (rightly) seeks to promote. Furthermore, the escalation of political conflict around the administrative state noted above suggests that as the focus on the stakes of regulation grows, bureaucratic politics are already succumbing to exactly these dangers of corrosive conflict, and that creating institutions that engage but structure such political conflict would help defuse and regularize it. Indeed, this is precisely the Madisonian move, to recognize yet channel political conflict through institutional design.

The kinds of balanced participation and influence needed to have robust checks and balances flowing through the administrative (and constitutional) separation of powers depend on a background context of effective civil society and grassroots organizing. But organizing individuals into communities capable of political engagement is costly. It takes financial resources, organizing strategy, and the long-term cultivation of membership and grassroots leaders.<sup>104</sup> The erosion of organized labor is only one aspect of the much broader decades-long decline of mass member community organizing groups.<sup>105</sup> Without a revitalization of this kind of civil society, it is hard to see how the disparities of political

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<sup>103</sup> See also Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 391–407 (2016) (describing the “thick political surround of actors both external and internal to the three branches,” *id.* at 391).

<sup>104</sup> See generally HAHRIE HAN, HOW ORGANIZATIONS DEVELOP ACTIVISTS (2014) (cataloguing various forms and models of activism and assessing their ability to inspire political action); THEDA SKOCPOL, DIMINISHED DEMOCRACY (2003) (describing the changing nature of civic engagement in the United States and the rise of professional advocacy organizations); TARROW, *supra* note 102.

<sup>105</sup> See generally SKOCPOL, *supra* note 104.

power and influence can be remedied — or how our substantive conflicts and disagreements in a polarized climate can be addressed.<sup>106</sup>

Such civil society organizing is itself made more effective and likely in context of institutional reforms that provide “hooks and levers” for stakeholder groups to plug in and to advocate for their views in a structured manner.<sup>107</sup> This kind of contestation requires more than notice and comment. Two avenues for reform in particular stand out.

First, we could imagine more direct forms of inclusive representation within administrative bodies. Despite Michaels’s concerns on this score, there are a wide range of on-the-ground experiments in such systems at both the federal and local levels that suggest some routes forward.<sup>108</sup> At the local level, cities and states are experimenting with wage boards that oversee labor protections and that are composed of representatives from labor as well as business.<sup>109</sup> Local economic development oversight commissions formed in Oakland and spreading elsewhere empower community representatives alongside developers to assure the implementation of city development projects.<sup>110</sup> There is already widespread use of advisory groups and stakeholder representatives throughout the federal regulatory state.<sup>111</sup> Scholars have often proposed regulatory bodies that institutionalize “proxy advocacy”<sup>112</sup> or “regulatory public defenders”<sup>113</sup> or “Offices of Goodness”<sup>114</sup> to make this kind of countervailing power more possible and influential.<sup>115</sup>

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<sup>106</sup> On the importance of association in democratic life, see, for example, NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS* (1998).

<sup>107</sup> For a sketch of this broader argument on the relationship between community organizing and institutional structures and design, see, for example, HOLLIE RUSSON GILMAN & K. SABEEL RAHMAN, *BUILDING CIVIC CAPACITY IN AN ERA OF DEMOCRATIC CRISIS* 3, 8–17 (2017), [https://na-production.s3.amazonaws.com/documents/Building\\_Civic\\_Capacity\\_in\\_an\\_Era\\_of\\_Democratic\\_Crisis.pdf](https://na-production.s3.amazonaws.com/documents/Building_Civic_Capacity_in_an_Era_of_Democratic_Crisis.pdf) [<https://perma.cc/S9X4-FB6E>].

<sup>108</sup> For an expanded discussion of this point, see Rahman, *supra* note 16. Indeed, state and local administrative regimes are often overlooked as spaces for institutional innovation.

<sup>109</sup> See, e.g., Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 66, 85–87 (2016).

<sup>110</sup> See Rahman, *supra* note 16 (manuscript at 35–36).

<sup>111</sup> See K. Sabeel Rahman, Note, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 *HARV. J. ON LEGIS.* 555, 574–80 (2011) (describing examples of federal regulatory interest representation through advisory committees, codified in Dodd-Frank and proposed in other statutes).

<sup>112</sup> Daniel Schwarz, *Preventing Capture Through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 53, at 365, 389–91 (examining case studies of how proxy advocacy and tripartism have helped mitigate the risk of capture in state-level insurance regulation).

<sup>113</sup> Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 *ADMIN. L. REV.* 411, 491 (2005).

<sup>114</sup> Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 *CARDOZO L. REV.* 53, 60–62 (2014).

<sup>115</sup> For a classic articulation of the value — but also challenges — of greater interest representation in the administrative state, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667 (1975). In the 1990s, scholars suggested a modified approach of

Second, policy design can also create more footholds for affected constituencies to engage more directly, sharing in the exercise of regulatory power and providing more direct checks and balances through the monitoring and enforcement process itself. Where regulatory agencies set substantive standards, participatory and grassroots monitoring can help hold both regulators and private actors accountable, providing a valuable form of leverage for civil society groups. This approach of “citizen audits” shaped the enforcement of the federal Community Reinvestment Act rules to promote greater lending in minority neighborhoods, and it has been deployed in a variety of other urban and global contexts.<sup>116</sup> These kinds of experiments suggest the potential for more involved institutional reforms that do more than simply optimize notice and comment; instead, these measures are valuable insofar as they actively foster and encourage greater countervailing power, especially among those constituencies that are otherwise marginalized or displaced from exercising political influence relative to more sophisticated and well-resourced advocacy interests.

2. *Greater Contestation Through Revived Traditional Democratic Institutions.* — There is real debate over how much Michaels’s rivalrous administration can do to legitimate the regulatory state and bear the load of substantive political disputes taking place in context of an increasingly unequal and tainted electoral and legislative process. The democratization of administration thus cannot be pursued in isolation from a broader attempt at democratic institutional revival. By expanding the capacities of core democratic institutions, from Congress to states and cities, we could better enable our political process to directly engage in substantive debate and to assert checks and balances through political institutions, rather than funneling these debates through the administrative process.

First, even in a world of expanded administrative power and robust rivalrous administrative processes, the legitimacy and efficacy of regulation depends in part on the background existence of a well-functioning legislature that can authorize and oversee regulatory agencies, bearing political responsibility for more controversial and high-stakes substantive policy developments. To some degree this concern about legislative

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“collaborative governance” that would enhance stakeholder participation and representation while also assuring effective and streamlined governance. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 324–25 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 27–28 (1997). I am sympathetic to these collaborative governance accounts, but have suggested that they need to take greater account of disparities of power that can undermine efforts at engaging a wider range of stakeholders. See RAHMAN, *supra* note 16, at 97–115.

<sup>116</sup> Rahman, *supra* note 16 (manuscript at 55–57); see also K. Sabeel Rahman, *From Civic Tech to Civic Capacity: The Case of Citizen Audits*, POL. SCI. & POL. 751, 755–56 (2017).

oversight has laced throughout critiques of the regulatory state, stretching from the early days of the nondelegation doctrine and *A.L.A. Schechter Poultry Corp. v. United States*,<sup>117</sup> to more contemporary calls for Congress to reassert its primacy as the central seat of democratic sovereignty and legislative authority, particularly in its oversight capacities with respect to the regulatory state.<sup>118</sup> Crucially, achieving a better division of labor between legislature and administration requires more than exhortations to Congress; it also requires a very real restoration of investment in Congress's core competencies and capacities, from policy analysis to legislative staff to oversight hearings.<sup>119</sup>

Second, administrative legitimacy also rests on a background presumption of a well-functioning electoral democracy. But in an era of growing concerns over voter suppression and gerrymandered districts, electoral responsiveness is limited, contributing to the decline of congressional responsiveness as well.<sup>120</sup> Campaign finance reforms, fair districting, and the restoration of broad access to the franchise are thus essential for restoring the electoral system's ability to channel and address substantive political conflict. If these core legislative and electoral systems are themselves tainted or blocked, the realities of substantive conflict over economic and social issues fall increasingly on regulatory agencies, which cannot bear the normative and political weight of resolving these disputes on their own.

Third, while Michaels adapts the Madisonian separation of powers for the administrative context, one might imagine a similar adapting of the other structure for checks and balances in the Madisonian system:

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<sup>117</sup> 295 U.S. 495 (1935).

<sup>118</sup> For a classic account of this concern, see generally, for example, DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993). More recently, several scholars have offered powerful arguments to revisit the foundational powers of Congress in overseeing and managing the modern administrative state and the executive branch more generally. See generally, e.g., JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017); Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. (forthcoming 2018) (reviewing Chafetz's book and summarizing the argument for expanded legislative oversight of regulation).

<sup>119</sup> On the problem of Congress's declining capacity, see Lee Drutman, *Congress Should Do Its Job. But the Job Members Can Do Depends on the Resources They Have.*, VOX: POLYARCHY (Feb. 15, 2017, 11:40 AM), <https://www.vox.com/polyarchy/2017/2/15/14623588/congress-underresourced> [<https://perma.cc/KNK4-482J>]; Lee Drutman, *If Congress Is Truly Going to Check Executive Power, It Needs to Allocate More Money for Staff*, VOX: POLYARCHY (Dec. 15, 2016, 12:50 PM), <https://www.vox.com/polyarchy/2016/12/15/13971320/congress-executive-power-check> [<https://perma.cc/8MMD-NGSB>]; and Lee Drutman, *These Frightening New Survey Results Describe a Congress in Crisis*, VOX: POLYARCHY (Aug. 8, 2017, 12:10 PM), <https://www.vox.com/polyarchy/2017/8/8/16112574/cmf-congress-survey-crisis> [<https://perma.cc/T9B8-YNVH>]. On proposals for how Congress can assert greater authority and oversight, see, for example, CHAFETZ, *supra* note 118.

<sup>120</sup> See, e.g., Kim Soffen, *How Racial Gerrymandering Deprives Black People of Political Power*, WASH. POST: WONKBLOG (June 9, 2016), <http://wapo.st/1sxqpYE> [<https://perma.cc/X4UW-UWNS>].

the vertical, rather than horizontal, division of labor through federalism and decentralization. Indeed, scholars of federalism and localism have often suggested the value of decentralization in facilitating greater voice, participation, representation, and ultimately accountability.<sup>121</sup> Decentralization not only diffuses governmental power; it also makes possible more direct forms of participation by stakeholders and constituencies more capable of engaging effectively at a local rather than national level. The practice of “dissenting by deciding” provides a more active and productive form of dissent and contestation.<sup>122</sup> It enables constituencies to actually claim a share of governmental power and forces them to develop and implement actual policies, rather than simply asserting opposition.<sup>123</sup> Furthermore, as a number of scholars have recently suggested, the interaction between federalism and decentralization on the one hand and the dynamics of regulatory policymaking and enforcement on the other has often been a central dynamic of the modern administrative state, allowing for experimentation and the ability of social movements to engage and pressure regulators.<sup>124</sup> This regulatory federalism is not without its risks (particularly in permitting local resistance to regulatory initiatives), but it suggests the tantalizing possibility of a parallel argument to that of Michaels: the institutionalization of Madisonian *federalism* all the way forward just as Michaels calls for the extension of the Madisonian *separation of powers* “all the way forward” (p. 159).

#### IV. THE CRISIS OF ADMINISTRATION AS A CRISIS OF DEMOCRACY

Michaels’s book is titled *Constitutional Coup*, and the title evokes the deep constitutional stakes of Michaels’s argument. The book largely centers the *structural* constitution, adapting the separation of powers concepts to argue for the importance of checks and balances in the administrative state. This approach allows Michaels to put in the same frame the seemingly opposite but very much related threats of privatization on the one hand and centralization on the other, analyzing both as sharing a common danger of bypassing institutional checks and balances and effectively aggrandizing unchecked arbitrary power. It is a great virtue of Michaels’s account that it can address both of these inverse and related problems of privatization and centralization, showing

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<sup>121</sup> See, e.g., FRUG, *supra* note 76, at 8–13; RICHARD SCHRAGGER, CITY POWER 255–58 (2016); David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 HARV. L. & POL’Y REV. 1, 1–2 (2009).

<sup>122</sup> See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1750–51 (2005).

<sup>123</sup> *Id.*

<sup>124</sup> See KAREN M. TANI, STATES OF DEPENDENCY 12–14 (2016); Yishai Blank & Issi Rosen-Zvi, *Reviving Federal Regions*, 70 STAN. L. REV. (forthcoming 2018) (manuscript at 16–17), <https://ssrn.com/abstract=2934481> [<https://perma.cc/EE32-8N43>].

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why a single-minded focus on executive efficiency and a dislike of procedural frictions is misguided. This framing also allows Michaels to place the stakes of regulatory reform at an appropriately weighty level: the goal is not merely better governance, but rather the most central constitutional values of effective yet nonarbitrary government.

But the stakes are much higher even than this. Viewed in light of its substantive valence, the problem of anti-administrativism and the affirmative defense of administration takes on a different light. Structural checks and balances matter not just to legitimize the exercise of governmental authority, but to make it possible for administrative authority to address substantive challenges of economic and social inequity. The administrative state, then, becomes a central catalyst for democracy in both of these senses: providing the policy tools and spaces through which we the people can collectively address problems of structural economic inequalities or social exclusions, and providing a process through which we can design and implement these policies through democratic participation and checks and balances. Michaels's account, I would argue, conveys more than a defense of the administrative process. It is, at its heart, a defense of the idea of democracy itself, in both its procedural and substantive dimensions.

Indeed, Michaels uses the language of "public" and "private" throughout, but the import of these terms is greater than might be readily apparent. By "public," Michaels connotes something more than just "that which is done by the state." Indeed, the concept of the "public" in Michaels's work operates as a *normative* concept, connoting a sense of democratic accountability. "Private," by contrast, is troubling for Michaels not just because it is the province of business, of markets, and of profit motives, but more broadly because these features of "the private" make it a very different system of collective decisionmaking that lacks the normative values and features of democracy — and of constitutionalism (p. 4). By invoking the idea of the "public," Michaels seems to be deploying two distinct but related arguments: First, that substantive disagreements and battles over social and economic issues need to be brought into the realm of public debate, public politics, and public policy — they cannot be addressed and defused solely by market mechanisms or private ordering. Second, the way in which we address these public political debates requires a form of structured contestation: true to the Madisonian core of the separation of powers, we design public institutions both to *catalyze and draw in* substantive debates and to *structure* those debates productively so as to limit concentration of arbitrary authority and enable some degree of collective problem-solving. At issue, then, is not just the principle of effective but limited government; the survival of the administrative state is also central to even making possible the tools through which we counteract background structures and systems of economic and social inequality and exclusion. The processes structuring administrative governance help assure us that



these coercive tools of the state are in fact deployed toward publicly legitimate — and contestable, and nonarbitrary — ends.

Now for some readers, this emphasis on the substantive import of the administrative state may seem maddeningly counterproductive: by bypassing a procedurally neutral defense of administration, the arguments above might well give away the most valuable source of administrative legitimacy. Perhaps. But to say this is, I think, to misunderstand the politics of the current moment. The administrative state is *not* neutral, either in its origins or in how it is viewed in today's political environment. If it *were* seen as neutral, it wouldn't be facing this kind of existential threat from its critics — and that threat would not be so selectively applied to dismantle some agencies while expanding the authority of others. Rather, administration is necessarily mission and purpose driven. And crucially, these purposes need not map on to partisan differences. Environmental protection, for example, has for much of the history of the EPA until recently been seen as a value for both conservatives and liberals, with meaningful policy disagreements worked out through different applications of EPA authority.<sup>125</sup> But once a faction of organized interests shifts to reject the core purpose of regulation itself, then dismantling, rather than simply redirecting, administrative authority and administrative checks and balances becomes preferred as a policy agenda. Indeed, the high politics of anti-administrativism represent a real and legitimate critique of administrative authority — and one that can be debated in good faith. But on its own, these high politics of anti-administrativism are simply not politically powerful enough to explain the extremes of today's political realities. The politics of organized economic elites and racial resentment, however, are. And these are political forces that are much more difficult to debate and overcome.

This existential challenge to the modern state is not new. Arguably, the blowback against Reconstruction took a similar form, as Southern "Redemption" sought, violently, to reclaim the apparatus of state power and dismantle the aspirations and institutional tools of Radical Reconstruction.<sup>126</sup> The business lobby opposing the New Deal similarly sought to dismantle its foundational institutions.<sup>127</sup> If we are in the midst of a "Third Reconstruction" seeking to finally make good on the aspirations for economic, racial, and gender inclusion after the ups and downs of the twentieth century, the administrative state will be a critical

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<sup>125</sup> See, e.g., Christopher Sellers, *How Republicans Came to Embrace Anti-Environmentalism*, VOX (June 7, 2017, 8:19 AM), <https://www.vox.com/2017/4/22/15377964/republicans-environmentalism> [<https://perma.cc/HNM9-2BNL>] (noting that President Nixon "created the Environmental Protection Agency and signed many foundational laws").

<sup>126</sup> See, e.g., CHARLES POSTEL, *THE POPULIST VISION 173–203* (2007); James Gray Pope, *Why Is There No Socialism in the United States? Law and the Racial Divide in the American Working Class, 1676–1964*, 94 TEX. L. REV. 1555, 1568–89 (2016).

<sup>127</sup> HACKER & PIERSON, *AMERICAN AMNESIA*, *supra* note 74, at 180–237; PHILLIPS-FEIN, *supra* note 74, at 19–23.

institutional source of power and policymaking. The “constitutional coup” that privatization and centralization alike pose, then, is to more than the structural values that Michaels emphasizes; it is also a threat to the *substantive* aspirations to redeem our highest constitutional values of equality, liberty, and democracy. Realizing both the substantive and procedural dimensions of our constitutional values and aspirations thus requires not the deconstruction, but rather the *reconstruction* of the administrative state, providing a more robust process of checks and balances through which these substantive debates can be engaged — while preserving the instrumentalities of regulation through which we tackle deeper systemic inequalities and exclusions.