Constitutional Coup

Privatization's Threat to the American Republic

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Harvard University Press
Cambridge, Massachusetts & London, England
2017

Printed in the United States of America

First printing

Library of Congress Cataloging-in-Publication Data
Names: Michaels, Jon D., author.
Title: Constitutional coup : privatization's threat to the American republic/Jon D. Michaels.
Description: Cambridge, Massachusetts : Harvard University Press, 2017. |
Includes bibliographical references and index.
Identifiers: LCCN 2017015512 | ISBN 9780674737730
Subjects: LCSH: Privatization—United States—History. | Welfare state—United States—History. | Constitutional law—United States. | United States—Politics and government.
Classification: LCC HD3850 .M53 2017 | DDC 338.973/05—dc23
LC record available at https://lccn.loc.gov/2017015512

Introduction

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.
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> —James Madison, *The Federalist 51* (1788)

> The administrative process is . . . our generation's answer to the inadequacy of the judicial and the legislative processes. . . . The creation of administrative power . . . though it may seem in theoretic violation of the doctrine of the separation of power . . . [is] the means for the preservation of the content of that doctrine.
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> —James M. Landis, *The Administrative Process* (1938)

> I'm going to get good contractors and push the hell out of them.
>
> —Donald J. Trump, *New York Times* (1986)

In 1986, President Ronald Reagan proclaimed that "the nine most terrifying words in the English language are: 'I'm from the Government, and I'm here to help.'"[1] We as a nation had come a long way from the fireside chats of the Great Depression. Back then, Franklin Roosevelt regularly took to the airwaves, assuring a downtrodden people that Washington was the answer to America's economic and social maladies. We had even come a long way from the heady days of the 1960s, Camelot, and the Great Society. Taking government's virtue for granted, a newly inaugurated John F. Kennedy famously called upon us to do more: to "ask not what your

country can do for you—ask what you can do for your country."[2] Many answered that call. A new generation of whiz kids entered government service, determined to combat poverty, end discrimination, extend the franchise, export democracy, and send a man to the Moon.

But soon enough the tide turned. We labored through the 1970s, a decade marked by civil unrest, Vietnam, Watergate, forced busing, oil embargoes, stagflation, and the Iranian hostage crisis. *Malaise,* to use Jimmy Carter's term, set in as a string of perceived failures, some rightly and others unfairly ascribed to Washington, made it easy for critics to depict government as a fading Midas; suddenly, everything the feds touched turned to ruin. Indeed, in his "terrifying words" speech, Reagan attributed all of America's problems to government—effectively pitting a torpid, bumbling bureaucracy against a just, dynamic, rational, and above all free market.

By the 1980s, the pitchforks were out in force. Pundits, legislators, and newly politicized business and religious leaders joined Reagan in railing against the American version of what Margaret Thatcher derisively called the Nanny State. For supporters of the expansive welfare state of FDR and LBJ—and, yes, Eisenhower and Nixon, too—the end seemed nigh.

But a funny thing happened on the way to the gallows. The mob got cold feet. The torch and pitchfork crowd realized they really, really liked government programs—*at least the ones that benefited them directly.* They liked their pensions, tax credits, health care, subsidies, licenses, and housing and education loans. They liked their clean air and water. They liked their safe workplaces. And they liked the fact that they could trust the food, drugs, consumer products, and financial services and instruments they purchased. What they really disliked, they decided, was the government itself—its people, its procedures, and its institutional and organizational architecture.

And so, over the past thirty-odd years, elected officials across the political spectrum have acted accordingly, simultaneously indulging and deceiving the American public by disassociating government goods and services from the government, at least as it has been traditionally conceived and staffed. Though these efforts have been framed, quite pointedly, in terms of decreasing the size, reach, and power of government, what's really happening is that the government is being transformed. There is no denying that the State today is bigger and more potent than ever before. It just happens to look very different—a consequence of it being privatized, marketized, and generally reconfigured along decidedly businesslike lines. In short, Reagan didn't, and couldn't, kill the Nanny State. But he did

replace our old familiar nanny with a commercial upstart, a nanny corporation as it were.

Mary Poppins, Inc.

Consider just some of the ways the privatized, businesslike State comports itself today. Private contractors now number in the millions. These contractors have taken leading roles in fighting our wars in Afghanistan and Iraq; running prisons and immigration detention facilities; facilitating domestic surveillance and counterterrorism operations; drafting major rules; shaping energy, transportation, health care, and environmental policy; rendering public benefits decisions; collecting taxes; and monitoring and enforcing regulatory compliance across the vast administrative expanse. The stated justification for such privatization is, very often, that contractors are more efficient than their government counterparts—driven, we're told, by market competition to provide higher-quality and lower-cost services.[3]

At the same time, government agencies are privatizing from within, radically overhauling their in-house employment practices to better match what we generally find in the private sector. Among other things, hundreds of thousands of tenured civil servants have been reclassified as at-will employees, subject to summary termination just as they would be if they were working for McDonald's. The Trump administration is pushing further still, promising to strip the rest of the career federal workforce of its legal protections. The stated justification for this overhaul—this *marketization of the bureaucracy*—is substantially the same: to make government workers internalize the pressures, demands, and incentives of the competitive private labor market.

Government contracting and marketizing the bureaucracy represent the biggest, most consequential manifestations of the contemporary businesslike government movement. But those seeking to remake the State have experimented further. They've created an array of intra-governmental venture capital and IT firms; transformed essential bureaucratic offices into for-profit revenue centers; converted our storied space program into something akin to a galactic Uber; established charitable trusts, allowing wealthy individuals and powerful corporations to finance and effectively direct State programs and initiatives; and created VIP prisons, posh accommodations for those able and willing to pay a hefty price to buy their way out of gen pop.[4]

This is, for better or worse, the moment we find ourselves in. Americans are still (grudging) enthusiasts of government goods and services, still deeply allergic to government instruments and instrumentalities, and still very much captivated by the lures of the Market. This book is a meditation on this moment, its ironies, paradoxes, wonders, and shortcomings. But it is also a far more expansive effort to understand how we got here and where we should be going.

Specifically, this book takes us back in time to explore the project of twentieth-century administrative governance as a normatively and constitutionally virtuous one. It describes the almost evangelical denunciation of that project, as evidenced by what is now a multigenerational campaign to refashion public governance in the image of a Fortune 500 company, if not now something straight out of the new gig economy. And it explains how dangerous, distorting, and destructive this campaign has been—and why the operational challenges and democratic imperatives of the twenty-first century compel us to redeem that original, and long beleaguered, administrative project.

Needless to say, mine is hardly the first account of contemporary businesslike government and its transformative effects. Others have looked at particular aspects of businesslike government or confronted this businesslike turn from economic, political, and even sociological and philosophical perspectives. But this is the first account to take in the entirety of businesslike government and understand it as a constitutional phenomenon—weighty in its own right and rendered all the more meaningful and fraught once mapped onto a legally, normatively, and historically textured set of landscapes from 1787 onward.

My argument, in brief, is that the State cannot be separated from its people, practices, and infrastructure without doing considerable violence to our constitutional order. For it is these very (and very distinctive) people, practices, and infrastructure—and the interplay among them—that legitimate the State and validate State exercises of sovereign, coercive, and moral force. And it is these distinctive actors, procedures, and institutions that infuse liberal democratic governance with the necessary admixture of normative politics, civic engagement, professional expertise, financial disinterest, and fidelity to the rule of law. Indeed, a State shorn of these constitutive people, practices, and infrastructure is perhaps better described as part gated community, part corporate conglomerate.

To be sure, gated communities and corporate conglomerates have their charms. And so does businesslike government. It promises to be faster, more innovative, cheaper, and more "customer" friendly—and that no doubt sounds appealing to any number of us who have endured long lines

at the DMV or who have otherwise experienced wasteful, sclerotic, or simply apathetic government. But even assuming that those promises can be kept (*a big if*), there is good reason not to embrace privatized, commercialized government.

Government's force, and ultimately its favor, turns on it being decidedly unlike IBM or Walmart or Facebook. This book explains why government is—and very much ought to remain—a fundamentally different enterprise. Businesslike government is all about embracing the logic and discipline of the Market. But the Market, at least in its pure, idealized state, is not democratic, deliberative, or juridical. Nor need it be. It is the world of Schumpeter and Coase, not Montesquieu or Madison.

We can tolerate, even admire, corporate hierarchy, leanness, and efficiency. We can do so because those organizations have (or are presumed to have) a single, objective mission: to maximize shareholder value. We can tolerate, even admire, the unforgiving laws of capitalism. We can do so because only in the rarest of circumstances does the single-mindedness of individual businesses endanger our economic or national security. And we can tolerate, even admire, the rising cult of all-powerful CEOs. We can do so because, generally speaking, their word is not law, their fiefdoms are bounded, and rarely can they exert real coercive force.

This isn't to say, of course, that all firms invariably act in the single-minded manner just described. But the businesslike government crowd is eyeing a particular type of firm: blue chip, publicly traded companies understood to have little time, interest, or discretion to do anything other than maximize profits.

None of the seemingly celebrated market norms, practices, or fiduciary and legal duties translates well into the liberal democratic arena, and certainly not into our constitutional realm. For starters, there is no such thing as a single public goal or truth to pursue. We have no magic commonweal formula, certainly none that's the political equivalent to the maximization of shareholder value. Some of us surely prize national economic growth above all else, and those who do might be the closest approximation of corporate shareholders. But many do not. Instead, we privilege the plight of the poor and disenfranchised. We prioritize social justice or environmental causes or consider the best government to be as unobtrusive as possible. Interests in military hegemony, reproductive rights, and religious freedom throw yet more, often incommensurable, variables into the mix. As such, we cannot readily reduce the goal of government to a single, undifferentiated objective; nor can we readily aggregate or harmonize our interests and channel them through one political leader, an inside-the-Beltway version of a Steve Jobs or Henry Ford. Rather, we need

multiple voices, amplified by multiple platforms, constantly speaking to a multiplicity of decisionmakers scattered across multiple branches of government. This isn't efficient or orderly. But it is democratic, pluralistic, inclusive, and deliberative.

What's more, even if we somehow could effectively aggregate, rank, or harmonize our interests and direct a single leader to implement the public's will, we still should resist the temptation to do so. We should resist for two reasons. First, absolute power corrupts, and a renegade sovereign that chooses to deviate from the public's charge poses infinitely greater danger than does a rogue or simply tone-deaf corporate CEO. Second, and more importantly, even if we could effectively aggregate the public's interests *and* ensure the selection of a faithful leader, there still is the very real possibility of tyranny by the majority. That is to say, a dominant faction, or cluster of factions, might settle on a course of action that stigmatizes or oppresses broad classes of minorities. In either case, we want, indeed need, a heterogeneous, overlapping, and cross-checking government to limit the possibility of myopic or abusive exercises of State power.

Sovereign power, unlike most (but of course not all) expressions of corporate power, is intentionally and necessarily morally inflected and coercive. As such, so long as men and women—*rather than angels*—govern, that sovereign power must be subject to checks and balances, even if such checks and balances are messy, time-consuming, and very much lend themselves to what market actors consider waste and obstinacy.

It is for this reason that the United States is founded in large part upon a simple structural commitment: the separation of powers. Separation prevents tyranny, promotes liberty, and helps enrich public policy. Separation gives voice and venue to any number of important but conflicting values and provides procedures and pathways for those values to collectively inform American public law and governance.

This simple structural commitment, and all that it enables, animated the framers' constitutional architecture. But it didn't stop there. This commitment carried forward into the twentieth century, ultimately structuring (and legitimating) our modern welfare state. Now, however, that dynamic commitment—a commitment to separation of powers *all the way forward*—is very much threatened by the instant movement to render the American government more like a business—and a politicized one at that.

The Constitutional Era

Let's start at the beginning. The framers were revolutionaries, but cautious ones at that. Understanding the concentration of sovereign power as "the very definition of tyranny," those convening in Philadelphia's Independence Hall divided a proposed federal government among legislative, executive, and judicial branches. For James Madison, the Constitution's leading architect, "the great security against a gradual concentration of the several powers in the same department consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[5] Accordingly, no one branch, on its own, could monopolize federal power.

Of course, the framers didn't just divide State power among any three groups. Each of these groups was specially chosen for its distinctive dispositional and institutional characteristics. The president, members of the House and Senate, and federal judges were each made answerable to different constituencies and subject to different temporal and occupational demands. These differences ensured that the branches would regularly clash. And such clashing was good. It was good for the prevention of tyranny and for the corresponding promotion of liberty. It was good, too, for the refinement and enlargement of public policy. After all, actions undertaken by this new national government required broad buy-in from the very differently situated and naturally rivalrous president, House, Senate, and, at least implicitly, judiciary.

Madison and his fellow framers disaggregated government power along other dimensions, too—most notably between the feds and the several states. Though further testament to the constitutional commitment to separating, checking, and balancing, federalism must necessarily be treated only parenthetically so as not to distract us from our central and overriding inquiry into the ongoing formulation, expression, and (normative) legitimation of *federal* power.[6]

The Administrative Era

In time, however, the framers' initial architecture came to be seen as outdated. A regime that relied on several hundred legislators and a single, unitary executive was simply not up to the twentieth-century task of nourishing and housing the poor, protecting workers and consumers, busting trusts, steering monetary policy, regulating the financial sector, stabilizing

a volatile economy, and readying a nation for war. Indeed, the social, economic, and geostrategic dislocations associated with modernity called out for a more capacious and interventionist federal government. Congress responded principally by creating a phalanx of agencies, equipping those agencies with legislative, executive, and judicial powers, and directing them to design and administer immensely important programs. In short order, the power and reach of the federal government expanded exponentially, with agency administrators—*bureaucrats!*—supplanting legislators, presidents, and federal judges as the dominant figures directing and overseeing the modern American welfare state.

For many, the rise of administrative agencies signaled the death knell of the constitutional separation of powers. Suddenly these agencies were making rules that carried with them the force of law, enforcing those rules, and ultimately adjudicating alleged violations of those rules. Justice Robert Jackson, a New Deal loyalist, was just one in a long line of jurists, policymakers, and scholars who sounded the alarm over a Leviathan-like administrative state that, in his words, "deranged" our constitutional system.[7]

Concerns over the concentration of legislative, executive, and judicial power—powers the framers took great pains to disaggregate—perdure. Contemporary scholars, even those, like Justice Jackson, generally friendly to progressive government regulation, continue to underscore how much "we have struggled to describe our regulatory government as the legitimate child of constitutional democracy."[8] Other, less sympathetic commentators are even less sparing. They declare agencies "unlawful"[9] and "unconstitutional,"[10] and go so far as to characterize the rise of the Administrative Era as "a bloodless constitutional revolution."[11]

To be sure, most of us have made our peace with administrative agencies.[12] But it remains an uneasy, awkward peace, particularly for those troubled by the fact that the separation of powers—what Chief Justice Warren Burger called our "finely wrought" system—seemingly fell by the wayside.[13]

By my reckoning, the price of such peace isn't nearly so dear. Through a variety of measures and a good bit of serendipity, the nascent administrative architecture of the 1930s and 1940s was refashioned and made to resemble the framers' tripartite scheme. In quick order and with the help of a pair of "superstatutes," initially concentrated administrative power was itself divided, triangulated among presidentially appointed agency heads, career civil servants insulated from political pressures, and the public writ large authorized to engage meaningfully and directly in most administrative matters. Under this newly reconfigured system of *administrative separation of powers,* it was as if James Madison and Franklin Roosevelt had joined forces: we combined modern architecture, sturdy

and sophisticated enough to confront twentieth-century socioeconomic challenges, with an interior design styled to make the tyranny-fearing framers feel very much at home.

Specifically, within the administrative arena, agency leaders stood in for the president, taking on the president's political, agenda-setting role; the tenured, expert civil service acted the part of our independent and largely apolitical federal judiciary, insisting on reasoned explanations and an intra-agency commitment to the rule of law; and the public writ large (what I call civil society) re-created Congress's populist, pluralistic, and cacophonic deliberative role, bringing new and diverse opinions and sentiments into the administrative polis.

We of course know that federal legislative action is rendered constitutional by the meaningful interplay of the three great branches. That is the essence of our democratic republic. The same became true with respect to federal administrative action once that realm cobbled together its own system of separated and checked powers. Indeed, if we were to classify the architecture of administrative tripartitism, we would undoubtedly call it *constitutional revivalism,* with civil servants, presidential deputies, and members of civil society well positioned to approximate the rivalrous, contentious, and competitive engagement we associate with the (framers') three great branches. Yet to this day, constitutional revivalism—that is, this inventive and constitutionally validating administrative design—has remained overlooked, underappreciated, and misunderstood.

This misunderstanding matters. It matters for three reasons. First, there is a resurgent conservative legal movement whose adherents are increasingly hostile to the administrative state on constitutional grounds. As D.C. Circuit Judge Douglas Ginsburg puts it, it was the New Deal era when the constitutional "wheels began to come off,"[14] and the Constitution went into "exile."[15] To the extent that the conservative concern is rooted in principles of checks and balances (and not just rote constitutional formalism),[16] the realization of an administrative separation of powers should be welcome news—underscoring, as it does, the disaggregation and fragmentation of State power in ways that reprise and redeem the original tripartite scheme.

Second, there are those who assume that the advent of administrative agencies problematically displaced the framers' separation of powers but nonetheless accept the new world order of American administrative governance. For many years, this sizable group of scholars, lawyers, and jurists didn't need a theory of administrative separation of powers. But now they do.

They need a theory now to respond to the recently emboldened constitutional conservatives. And they need a theory now to distinguish

administrative governance from the new upstart: privatized governance. Simply stated, so long as many scholars, lawyers, and jurists remain troubled by what they see as the administrative state's ignoble origin story, they cannot rightly object—at least not on constitutional grounds—to further reconstructions and reformulations of State power similarly disconnected from Madison's intentionally triangulated scheme. The constitutional transgression happened, so their thinking goes, with Franklin Roosevelt and the New Deal Congresses, not Ronald Reagan and others who later took up the privatization mantle. Mindful of the "glass houses" adage, if the New Dealers first crossed the constitutional Rubicon, the subsequent, instant (and quite disconcerting) jump from administrative agencies to privatized and marketized entities cannot provoke much constitutional controversy.

Here is where the theory of administrative separation of powers does a good deal of its work. The truth of the matter is that, for the reasons this book describes, the existence of an administrative separation of powers belies any claim that the administrative state is a constitutional glass house—and we thus can and should be willing to throw a few stones when sufficiently provoked, as we are today by businesslike government. Otherwise, we cede too much legal and moral ground and risk leaving the fate of twenty-first century constitutional government in the hands of dickering pundits and policy analysts who debate whether privatization is efficient and cost-effective.

Third, this misunderstanding skews such punditry and policy analysis. Those who correctly see administrative agencies as internally divided and contentious—*but assign no constitutional significance to those divisions*—are apt to be especially welcoming of a cleaner, seemingly more efficient businesslike alternative. In short, if the inner workings of fractured, fragmented administrative agencies are seen, as they almost invariably are, as nothing more than misguided and wasteful, if not organizationally pathological, then it only follows that we should quickly and warmly embrace the logic and discipline of markets. We should, that is, privatize, corporatize, and commercialize as much as we can. After all, those who deem the administrative state's tripartite architecture a clumsy mess have little reason to do anything but bulldoze over it.

The Privatized Era

And bulldoze they have. Today's administrative state is being reconfigured along businesslike lines. To date, few have grasped the depth, breadth, and texture of businesslike government in its variegated forms. (Even a

seemingly straightforward exercise like a simple head count of the number of federal service contractors has proven alarmingly elusive.) And even fewer appreciate what's actually going on.

For starters, many are quick to equate privatized government with cost savings and greater efficiencies. They emphasize outsourcing and other forms of businesslike government as apolitical, technocratic tools used to promote smarter, sounder government. That's certainly what drives the "make or buy" decision in the private sector, as explained long ago in Ronald Coase's *The Nature of the Firm.*[17] Here, however, we're talking about *The Nature of the State*—a market-oriented State, but a State nonetheless. And, within a State, political power remains the coin of the realm. We thus need to assess privatization as a political phenomenon, and a particularly beguiling one at that.

Many are, furthermore, quick to equate privatized government with smaller government. This quite popular gloss gives false comfort to libertarians and conservatives who believe, with Bill Clinton, that the "era of big government is over."[18] And this gloss—conceit, really—throws red herrings in the air for those distraught, unreconstructed New Deal and Great Society types, who took Bill Clinton's businesslike proclamation at face value, all the while obscuring the constitutional calamity staring them—*and us*—in the face.

This constitutional calamity is privatization's evisceration of the administrative separation of powers—again, the often overlooked but nevertheless undeniable architecture that effectively constitutionalized twentieth-century administrative governance, restoring and renewing the framers' commitment to separating and checking power through a mixture of democratic and juridical actors. In brief, today's fusion of market and political power—this running government like a *politicized* business—has the effect of sidelining or defanging otherwise independent, expert, and truly mandarin civil servants and marginalizing the populist contributions of an otherwise empowered and diverse civil society. The fusion also has the effect, quite often, of funneling government responsibilities through private or essentially privatized corridors, far away from public scrutiny and legal constraints. All told, sovereign power is being concentrated in the hands of presidentially appointed agency heads and the private actors paid to do their bidding. The end result is an unprecedentedly potent and potentially abusive State, led by a largely unfettered executive capable of wielding concentrated sovereign power in a hyperpartisan or crassly commercialized fashion.

For those distressed by this recent turn of events, the framers' commitment to checks and balances provided, and still provides, an answer.

It provided an answer to constrain not only the First Congress but also the alphabet agencies arising out of the New Deal and World War II. That same commitment needs to be renewed today, to address the State-aggrandizing, power-concentrating challenges posed by twenty-first-century privatization.

Today is the operative word. One is reminded of the hopeful yet chilly words of Benjamin Franklin, when asked by an inquisitive Philadelphian what form of government the framers concocted: "A republic, if you can keep it." Generations past have done their best to *keep it.* Now that it is our turn, the instant challenge is privatization. If we wait much longer, we're certain to reach a tipping point, at which time reversing the privatization trend will prove next to impossible. This is true on legal, pragmatic, and even psychological levels.

Legally, the more privatization is allowed to continue apace without muscular constitutional pushback, the harder it will be for the courts to take late-arriving challenges seriously. Even if those challenges prove compelling, the courts' hands may very well be tied as the federal landscape continues to be drastically and possibly inexorably altered by the forces of privatization and as a host of sticky cultural norms, instances of congressional acquiescence, and years of historical gloss render the privatized State constitutional by default.

Pragmatically, 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. Indeed, there is seemingly no other explanation for the State Department's recent practice of renewing contracts with the notorious Blackwater firm after the Obama administration sanctioned Blackwater for illicit arms smuggling, after federal prosecutors brought murder charges against Blackwater employees, and after the American-backed governments in Baghdad and Kabul designated Blackwater employees as personae non gratae. Apparently, the United States had no viable in-house alternative.[19]

And, psychologically, we will have done such a good job disassociating the public services we like from the government itself—and will have been doing that job for so long—that we'll risk altogether forgetting the State's sovereign, democratic mission.[20] Indeed, the more we indulge the fiction of governmentless government, and the longer we enable those who demonize government workers, the harder it becomes to generate support, or even respect, for the actual public sphere and its role in the political economy.

Consider, for example, President Barack Obama's now-infamous "you didn't build that" speech. In a 2012 campaign stop in Roanoke, Virginia, Obama chided his audience, urging them not to forget how much the government has done to facilitate economic growth and entrepreneurial

opportunities. Seemingly innocently enough, Obama mentioned government's role in educating the nation's youth, building roads and bridges, awarding student scholarships, and investing in the arts and sciences. These public contributions, the president insisted, were critical to the success of America's businessmen and women.[21] Yet the public outcry was deafening—*how dare the president say I didn't build my business!*[22] And even though Obama could have doubled down, reminding his critics of further government support in the form of limited corporate liability, liberal bankruptcy laws, unemployment insurance, workers' compensation, domestic policing, and national defense, the president blinked. Within days, he started to backpedal, placating an unjustifiably offended public by insisting his words were misconstrued.[23]

Our evidently growing distance from this simple, irrefutable truth may make it increasingly challenging to conceive of the State as anything other than transactional, if not entirely parasitic. Many today would no doubt insist that they built their businesses *notwithstanding* the burdens of government taxes and regulations. As this impression—what Jacob Hacker and Paul Pierson call "American Amnesia"[24]—hardens into gospel, even if we could repudiate privatization at some later date and resurrect the administrative separation of powers, it would be a Pyrrhic victory. We'd have the right structure, but the spirit of liberal democratic, contentious, redistributive, and, yes, business-facilitating government would be all but extinguished. So too would any passion for public service.

It is therefore imperative to reverse course now: to "insource" State responsibilities that have long been privatized, to redeem the constitutionally legitimating project of the administrative separation of powers, and to make clear that government's legality and efficacy turn on it being a manifestly unbusinesslike institution. This is how we carry the commitment to separation of powers all the way forward.

The timing of a book of this sort appears particularly propitious. Nothing epitomizes today's constitutional zeitgeist better than the Donald Trump presidency. Leaving aside (as best one can) the new president's alarming mendacity and crass nativism, Trump represents the apotheosis of the businesslike government movement. He pays no fealty to the State. Quite the opposite: he promises to "drain the swamp," meaning the Washington bureaucracy—and to govern the United States like he ran his real estate and entertainment empire.

Trump celebrates his lack of government experience. Half-Barnum, half-Bourbon, Trump insists he'll deal with officials from the Mexican government like he dealt with cranky building-trade vendors: sticking them with

the bill for his infamous border wall. He insists he'll deal with civil servants like he dealt with strong-willed contestants on TV's *The Apprentice:* dismissing them with his signature "you're fired!" And he insists that there is no conflict in his retaining his vast business holdings while serving his term as leader of the free world. The corporate mogul turned populist president is, in short, our CEO *Rex.*

Bear in mind that, as I said above, the businesslike government movement has been a long time in the works. We'd be continuing to lurch, if not flat-out race, in this direction regardless whether Donald Trump won or lost. For decades, the two most powerful trends in administrative governance have been the rise of what Elena Kagan calls presidential administration and the pivot to privatization. And, over that span of time, these two trends have been converging, even fusing—hence running the government like a *politicized* business.

Still, President Trump deserves special attention. He deserves special attention not just because he's our sitting president but also because he promises to be a transformative president, one way or the other. Will he be a Joshua to Reagan's Moses, completing the anti-government constitutional moment that the Gipper started? Or will he be the last (and least) of the Reaganites, on whose unsteady watch businesslike government finally jumps the shark?

Our generation's challenge—our turn, that is, as guardians of Dr. Franklin's precarious republic—is to tip the scales. This book, clearly, favors repudiation of the Privatization Revolution. This book rejects businesslike government as antithetical to a dynamic separation of powers—and to the values which give that enduring, evolving structural commitment its meaning and purpose. And this book prescribes a redemptive path forward, allowing us to proudly reclaim and improve upon the virtuous features of twentieth-century public administration while lancing the various warts and malignancies that afflicted and ultimately doomed the first go-around.

This book proceeds as follows. Chapter 1 addresses the history of privatized and businesslike government. By commencing our inquiry here, I am able to furnish necessary background. The early American Republic boasted fleets of naval privateers, private jailers, Pinkerton detectives, and zealous tax farmers. It was against this colorful and, by contemporary lights, highly irregular backdrop that modern administrative governance emerged.

That said, I have a secondary reason for starting with this quick jaunt through the eighteenth and nineteenth centuries. One of the more resonant claims about today's turn to the Market is that such a turn is hardly

new—and that greater sensitivity to privatization's long, rich history should serve to allay contemporary agita over businesslike government.

Not so, I argue. While it is true that private and commercialized actors carrying out State responsibilities have been around since before the Founding, any comparison between those folks and the ones we encounter today is entirely inapt. The comparison is inapt because back then there was not much of a difference between public and privatized government, if only because public administrators of the eighteenth and nineteenth centuries were themselves not very democratically or legally accountable. In short, the choice between public and private administrators wasn't a very momentous one.

Now, of course, the political and legal gap between public and private actors has widened considerably. Thus the choice is a tremendously consequential one today. In the twentieth century, voting rights extended to previously disenfranchised women, people of color, and those who could not afford to pay a poll tax. As a result, the modern electorate is more inclusive, more diverse, and more fully empowered—and thus far better positioned to hold public officials (but still not private contractors) politically accountable. At the same time, legal remedies proliferated, equipping modern-day Americans with more and better opportunities to sue state actors (but, again, not private contractors) deemed arbitrary or abusive.

In all, it is my contention that appeals to history by privatization's proponents actually backfire. Revisiting early privatization and examining such practices against the rather impoverished public law backdrop of eighteenth- and nineteenth-century America serves only to underscore how far the State has come as a democratic, deliberative, and professional institution—and thus makes plain why we should be so especially alarmed by the resurgence of privatized practices against the far richer public law backdrop of today.

Chapter 2 endeavors to document the twentieth-century development of that far richer public law backdrop. It is here where I explain that the architects of the modern administrative state made a decisive turn away from the often shabby administrative practices of the eighteenth and nineteenth centuries, practices employed by government and private actors alike. These architects banished many of the private actors, phased out the politicized and hackish government workers who were a product of the old spoils system, and established a merit-based civil service in its stead. These efforts took some time, of course, but ultimately produced a professional, deliberative, and legally accountable public bureaucracy.

And, as if the personnel overhaul wasn't sufficiently momentous, these architects also broadened the government's regulatory powers,

substantially increased opportunities for public participation, and fleshed out what we today know of as administrative law to handle the new challenges and new material, legal, and dignitarian demands of modernity. I refer to this period as *pax administrativa*—so labeled to connote the remarkable growth, stability, rigor, and broad public and legal acceptance of this twentieth-century American administrative achievement.

In Chapter 3, I build on the foundation laid in the previous two chapters and explain *pax administrativa* in explicitly constitutional terms. I show how the rise of a large and rangy administrative state initially posed a very real threat to the constitutional separation of powers. After all, the assignment of legislative, executive, and judicial powers to single agencies appeared to do great violence to Madison's unmistakably disaggregated federal scheme. Though many lamented and, to this day, continue to lament that apparent concentration of federal power, I argue that they have overlooked something quite important. They have overlooked the fact that mid-twentieth-century administrative lawyers redeemed that constitutional commitment to separating and checking State powers—and did so by triangulating administrative power among the presidentially appointed agency leaders, politically insulated civil servants, and the general public given the means to engage directly in most facets of administrative policy design and implementation.

The redemption operates on two levels. As a threshold matter, the simple, mechanical triangulation of administrative power does important work in limiting the potential for abusive, even tyrannous acts by an otherwise unfettered, monolithic bureaucracy—run either by the political agency heads or the mandarins themselves. More trenchantly, there is something special about these three administrative players in particular. Individually and collectively, they channel the dispositional characteristics and institutional obligations of the three great constitutional branches. Again, agency heads stand in for the president. Tenured, expert civil servants committed to reason-giving and fidelity to professional norms and to the rule of law are naturally, if not obviously, the jurists of the administrative domain. And the diverse, inclusive, and non-hierarchical public serves as a truly plenary legislative assembly, voicing varied opinions in an effort to shape administrative policy. All told, the rivalrous interplay of these three administrative actors helps ensure that a wide range of interests are fully incorporated into agency deliberations, thus enriching administrative policymaking, balancing arid expertise with passionate populism, and lowering the risk of abuse or overreach.

This chapter's characterization of an administrative separation of powers illuminates our past—and our future. Specifically, the administrative

separation of powers connects us to the framers' constitutional architecture. Though early twentieth-century administrative governance initially collapsed that original tripartite scheme, the eventual engendering of an administrative separation of powers was an act of constitutional restoration. The administrative separation of powers anchored otherwise unnervingly concentrated administrative agencies firmly within the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law. Again, it reconciled Madison with modernity and set the terms for twentieth-century constitutional administrative governance.

Additionally, the theory and reality of an administrative separation of powers exposes the true dangers of today's turn to privatized government. The lessons of an enduring, evolving commitment to separating and checking power that carried forward into the Administrative Era (and arena) teach us that privatization is anything but a *sui generis* phenomenon. Instead, privatization's fusion of State and commercial power represents simply the latest and perhaps greatest threat to that fundamental constitutional commitment. Specific instances of consolidated, privatized power may look quite novel or at least quite different. They are certainly treated as such. But the underlying challenges privatization poses are the same ones we have encountered before: to marshal the grammar, devices, and doctrines related to the constitutional separation of powers and insist upon the continued relevance of separating and checking State power in whatever form that power happens to take.

Before mastering and then implementing those lessons, however, much ground still needs to be covered. Among other things, we need to understand the late-twentieth-century decline of *pax administrativa* and the corresponding rise of our current, if still nascent, Privatized Era. That bridging work begins in Chapter 4. Here I capture burgeoning disenchantment with *pax administrativa*—specifically, the emergence and, in time, convergence of academic, legal, business, and political forces intent on dismantling the twentieth-century administrative state. Looping in neoliberal economists, big business lobbyists, and disillusioned lunchpail Reagan Democrats, I describe how these varied and sundry critics of the administrative state rallied around the Market, which they celebrated as a more rational, virtuous alternative to (what they saw as) a bloated, untrustworthy, and perhaps still constitutionally suspect public bureaucracy; and I show how these critics managed to spark what would become a full-fledged Privatization Revolution.

Chapter 5 follows that revolution's progression. Here I demonstrate how the momentum built during the Reagan presidency carried forward into the

Bush *père,* Clinton, and Bush *fils* years. If anything, the revolution picked up steam in the 1990s and 2000s. It was during these decades when privatization became at once more mainstream and more politically charged, redefining the State's relationship to the Market, reframing how we thought about and practiced American administrative law, and reconfiguring many agencies and programs along businesslike lines.

Among other things, privatization not only began to reach deeper into more sensitive policy areas (such as military and intelligence operations, prison management, and welfare administration), it also began to take many new, different, and hardly recognizable forms. What was initially largely a push to privatize via government contractors—and thus involved private sector workers hired to replace government civil servants—became infinitely more varied and, again, more political. This new millennial privatization included the crowdsourcing of public responsibilities; the offering of bounties to secure private assistance; the acquisition of "private" equity to regulate corporate behavior; the creation of in-house venture capital firms; the stripping of civil service tenure protections (thereby effectively privatizing the government workforce from within); and countless more creative and legally vexing combinations of sovereign and commercial power.

Chapter 6 takes stock of this new millennial privatization and zeros in on its constitutional implications. Here I challenge the dominant contemporary understandings of privatization as incomplete, if not inapposite. Most treatments of modern privatization focus on questions of economic efficiency to the exclusion of political expediency—that is, using the levers of businesslike government to concentrate political power. They do so even though most agency heads are apt to prize political expediency over (the possibility of) marginal cost savings. Furthermore, most treatments of modern privatization assume that the turn to businesslike government entails the abdication, not aggrandizement, of sovereign power. They do so even though any measure of the government's true size and scope must include both the exclusively public sector and the rangy, varied hybrid quasi-public, quasi-private sector that is increasingly carrying out State functions, big and small alike.

These dominant contemporary understandings of privatization have led us astray, distracting us—and thus keeping us—from exploring privatization's effects on constitutional governance—specifically, on the administrative separation of powers. Simply put, privatization in its various forms tends to supplant or defang the federal civil service and marginalize or co-opt members of civil society otherwise authorized to participate in most administrative matters. As a result, State power is *aggrandized* at the

expense of private autonomy and private social and economic ordering. And State power is *concentrated* in the hands of federal agency heads—the president's proxies—at the expense of civil servants and the public writ large. This commercially inflected and politically and legally unrivaled federal executive is apt to wield its aggrandized and concentrated power in hyperpartisan, parochial, and potentially abusive ways.

Chapter 6 therefore recasts privatization as posing an existential threat to the American constitutional system, one remade and redeemed by the instantiation of an administrative separation of powers.

The chapters that follow seek a path forward, a way to rededicate ourselves to a new and improved, second *pax administrativa*. In some respects, the original *pax administrativa* never got a fair chance. Its logic, architecture, and legal bona fides were never truly appreciated—and thus these chapters serve as much as a first, if long overdue, defense as they do as a surreply.

Chapter 7 begins by explaining the continuing importance of the separation of powers. In recent years, the framers' separation of powers has often been derided as antiquated, unnecessary, or ineffectual. There has been, during this time, a certain wistfulness for a more unitary, parliamentary system of government. What's more, pressures to collapse various other constitutionally relevant lines of separation—for example, federal-state, church-State, civilian-military—now abound. I devote this initial reconstructive chapter to doubling down as it were on the separation of powers. It is my contention here that, if anything, the separation of powers (broadly conceived) matters more today than ever before—and thus there is good reason to insist upon a recommitment to the vintage framework popularized by the likes of Montesquieu and Madison and redeemed by the twentieth-century engineers of administrative law. And it is my further contention that a separation of powers *within the administrative arena* is in many respects even more important than is a separation of powers within the traditional constitutional arena.

Chapters 8–10 do the heavy lifting of reconstructing a government once again committed to an administrative separation of powers—and to a second *pax administrativa*. All too often during the mid-twentieth-century golden age of modern administrative governance, Congress and the president destabilized the administrative separation of powers. At times, such destabilizing interventions were intentional: the political branches sought to dominate administrative proceedings in service of some programmatic, partisan, or institutional end. At other times, such destabilizing interventions were unwitting and inadvertent, reflecting a lack of appreciation for the constitutional significance of this triangulated administrative scheme.

Still, it isn't clear that the political branches would have acted differently had they been advised of the legitimating aspects of administrative tripartitism. Thus for a new, twenty-first-century administrative separation of powers to truly work, to merit greater and more explicit popular, normative, and legal respect, and to prove more resilient, all three constitutional branches need to act as custodians, nurturing and protecting (rather than exploiting) a well-functioning system of administrative rivalries. Chapter 8 explains the conceptual reorientation necessary for the constitutional branches to recognize and, ideally, embrace this custodial role.

Chapter 9 concentrates on judicial custodialism, underscoring how courts (the branch least inclined to act exploitatively) can use their existing tools and cultivate new doctrines to promote a well-functioning administrative separation of powers—and compel the likely more reluctant political branches to do the same. Here I advance a jurisprudential theory called *reinforcing rivalrous administration.* A takeoff on John Hart Ely's famed "reinforcing representative democracy," reinforcing rivalrous administration obligates judges to ensure that agency actions are forged in the crucible of competition, as evidenced by the rivalrous interplay of agency heads, civil servants, and civil society. Under this theory, courts would be expected to invalidate agency actions that fall short of those participatory and deliberative goals, leaving it to the political branches (whether they like it or not) to address identified shortcomings and prescribe corrections that promote a well-functioning administrative separation of powers.

Chapter 10 turns to legislative custodialism, exploring ways in which Congress can meet its custodial constitutional obligations and likewise promote a well-functioning administrative separation of powers. Among other things, Congress needs to provide considerably more support for the currently beleaguered and oft-marginalized civil service; increase the level and quality of public participation in administrative proceedings; and minimize bad-faith obstructionism by any and all of the administrative rivals. The combined effect of these legislative solutions would be to enrich administrative actors, sharpen administrative rivalries, and, again, help usher in a second *pax administrativa* that is not only more in keeping with our constitutional commitments but also far more capable of parrying political critiques and fending off programmatic attacks.

I conclude by way of a brief Epilogue that celebrates government's rivalrous, clunky contentiousness as constitutionally necessary and appropriate given the special—and, quite often, sacred—obligations under which the State operates.