

PRIVATIZATION: BOON TO EFFICIENCY OR SLOW MOTION REVOLUTION?

by Ted Hirt

A Review of: Constitutional Coup: Privatization’s Threat to the American Republic, by Jon D. Michaels

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Note from the Editor:

The reviewer discusses a new book’s critique of various forms of privatization in the federal government, then presents his own critiques of some of the book’s premises and proposed solutions.

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- Symposium on ‘Constitutional Coup’ by Jon Michaels, TAKE CARE (Jan. 14, 2018), https://takecareblog.com/blog/symposium-on-constitutional-coup-by-jon-michaels (links to several reviews of the book from a wide variety of perspectives).
• Symposium on Jon D. Michaels’ ‘Constitutional Coup,’ NOTICE & COMMENT, http://yalejreg.com/nc/category/symposia/symposium-on-jon-d-michaels-constitutional-coup/ (links to several reviews of the book from a wide variety of perspectives).
• Joshua Alvarez, The Pitfalls of Privatization, WASH. MONTHLY (Oct. 26, 2017), https://washingtonmonthly.com/2017/10/26/the-pitfalls-of-privatization/.
• Jeffrey A. Pojanowski, Reconstructing an Administrative Republic, MICH L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3122484.

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Should our federal government be operated like a business? In Constitutional Coup: Privatization’s Threat to the American Republic, Jon D. Michaels, Professor of Law at the UCLA School of Law, contends that citizen demands that the federal government “be run like a business” are not only ill-founded, but dangerous to our democracy. He also sounds the alarm about the government contracting out key government functions to unaccountable private actors. Ultimately, however, his principal proposed solutions to the problems he identifies simply offer more of the same: an expansive and too often ineffective and inefficient federal government.

Constitutional Coup is a detailed critique of “the almost evangelical denunciation” of the twentieth century administrative state, which Professor Michaels describes as a “multigenerational campaign to refashion public government in the image of a Fortune 500 company, if not now something straight out of the new gig economy.” Michaels defines privatization as “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.”

Michaels is addressing a substantial issue. In 2009, for instance, the federal government contracted for over \$500 billion in goods and services. But this field is already subject to some regulation. For example, in September 2011, the Office of Federal Procurement Policy of the Office of Management and Budget provided a description of “inherently governmental functions” that should not be outsourced, specifically those which “involve the exercise of sovereign powers of the United States,” or, in some cases, that commit the government to a course of action. Clearly this book addresses an important topic, but not one that has been ignored; Michaels adds his voice to a chorus of critiques and proposed solutions.

I. THE HISTORY OF PRIVATIZATION

Professor Michaels begins by describing our country’s historical experience with the privatization enterprise. In the early republic, the federal government relied on private actors to perform governmental functions, in part out of necessity, and also because the American people had a cultural legacy of distrust of government as a result of colonial experiences under the British

1 JON D. MICHAELS, CONSTITUTIONAL COUP, PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 3-6, 17 (Harvard University Press, 2017) (hereinafter Michaels).
2 Id. at 4.
3 Id. at 106.
4 Thomas J. Laubacher, Simplifying Inherently Governmental Functions: Creating a Principled Approach from its Ad Hoc Beginnings, 46 PUB. CONT. L. J. 791, 799 (2017).
5 Id. at 794 (citing Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 2011)).
6 Michaels, supra note 1, at 24-27.

monarchy.<sup>7</sup> The new country relied on privateers to augment its naval forces, and private bounty hunters supplemented sometimes weak public law enforcement.<sup>8</sup> Private contractors—ranging from the Pinkerton detective agency to private company-operated police forces—aided the public sector in providing security and conducting criminal investigations.<sup>9</sup> The Postal Service relied extensively on private carriers.<sup>10</sup> In an era of limited government functions, with no public welfare or worker protection systems in place, the citizenry did not demand much from its government.<sup>11</sup> Furthermore, that government was staffed by party loyalists, not professionals or technocrats.<sup>12</sup>

Over time—particularly during the early and mid-twentieth century—the federal government expanded the scope of its powers and increasingly relied on government employees rather than contractors to perform government functions.<sup>13</sup> At the same time, this growing government workforce became more professionalized and nonpartisan.<sup>14</sup> These changes enabled the modern administrative state to provide a wide range of social services and support a large military.<sup>15</sup> Congress in turn delegated much of its lawmaking power to the growing administrative agencies, and some private sector systems like industry self-regulation and community charities were displaced.<sup>16</sup>

Michaels defends the constitutionality of the modern administrative state against modern detractors by looking back to the nation's founding.<sup>17</sup> He explains that the “constitutional separation of powers was deliberated and generally celebrated,” and designed to preclude a concentration of power.<sup>18</sup> James Madison prescribed a “rivalrous separation in which ambition would counter ambition.”<sup>19</sup> Throughout the eighteenth and nineteenth centuries, there was a very small administrative state, with limited powers.<sup>20</sup> But in the 1930's, the New Deal empowered an array of agencies to expand their powers into the economy, with the Supreme Court's eventual acquiescence.<sup>21</sup> With the advent of these new agencies, some of the functions that

were previously contracted out to private parties were conducted in-house.

The modern administrative state's power “has long been divided” among “three sets of rivals”—presidentially appointed agency heads, “politically insulated” civil servants, and the general public insofar as it is empowered to participate in the development and implementation of agency policies.<sup>22</sup> Within that structure, the agency leaders try to achieve presidential policies, even at the expense of “rational, legalistic, inclusive, or procedurally robust public administration.”<sup>23</sup> In contrast, the career civil servants “are legally, culturally, and practically independent” like federal judges, and they can resist those policies.<sup>24</sup> Members of the general public, through public comments under the Administrative Procedure Act, lawsuits under the Freedom of Information Act, and other kinds of litigation, can be “constructive participants” in the operations of the administrative state; these efforts are analogous to their separate influence on Congress, although without the corresponding power to recall officials through elections.<sup>25</sup>

Michaels' thesis is that disagreement or friction among these three factions creates an “administrative separation of powers” that “roughly reproduce[s]” the constitutional rivalries among the legislative, executive, and judicial branches.<sup>26</sup> Michaels contends that these internal conflicts legitimize the administrative state because they restrain the “initially unfettered administrative juggernaut.”<sup>27</sup>

## II. PRIVATIZATION AS A THREAT TO THE ADMINISTRATIVE STATE

Michaels recognizes a “growing disenchantment” with the “pax administrativa” among libertarian scholars who criticize the bureaucracy as inefficient, business interests that prefer the rationality of markets, and even elements of the New Deal coalition who have abandoned some of their faith in government.<sup>28</sup> He also detects a confluence of events that facilitated the development of privatization initiatives, ranging from the anti-government rhetoric of Reagan presidency to the distrust of government that is a legacy of the Watergate scandal and the Vietnam War.<sup>29</sup> Privatization also “grew into a mainstream, bipartisan, and avowedly nonideological movement,” a trend that was promoted by some scholars and ultimately by the Clinton-Gore White House, which touted privatization as a “technocratic endeavor.”<sup>30</sup>

Privatization extends beyond the contracting out of government services; it includes private standard setting, private accreditation and administration, the marketization of the bureaucracy (e.g. transforming career civil servants into at-will

7 *Id.* at 24-25.

8 *Id.* at 25.

9 *Id.* at 25-27.

10 *Id.* at 27.

11 *Id.* at 27-28.

12 *Id.* at 29-30.

13 *Id.* at 41-43.

14 *Id.* at 43-45.

15 *Id.* at 31, 12, 33.

16 *Id.* at 47-49.

17 *Id.* at 54.

18 *Id.*

19 *Id.* (citing THE FEDERALIST, No. 51 (James Madison)).

20 *Id.* at 55.

21 *Id.*

22 *Id.* at 59.

23 *Id.* at 59-60.

24 *Id.* at 60-61.

25 *Id.* at 62, 68.

26 *Id.* at 65.

27 *Id.* at 69, 75.

28 *Id.* at 79-80.

29 *Id.* at 87-89.

30 *Id.* at 99, 103.

employees), the deputization of private actors for government intelligence or law enforcement, and equity investing and “back door” regulation (e.g. the bailouts that occurred in the aftermath of the 2008 financial crisis).<sup>31</sup> Michaels is particularly concerned about the contracting out of policy administration and the military’s reliance on contractors.<sup>32</sup> Other commentators have likewise questioned the military’s use of contractors in conjunction with the operation of the Abu Ghraib prison in Iraq and in the Iraq War more generally.<sup>33</sup>

Michaels’ objection to privatization transcends the ongoing debate over whether privatization is more economically efficient than relying on government personnel to deliver services, or whether privatization ultimately produces a leaner government.<sup>34</sup> Instead, Michaels contends that privatization permits the government to expand its powers “at the expense of the private sector,” destabilizing the “liberal democratic order.”<sup>35</sup> How might that happen? Michaels argues that, where political leaders can accomplish their goals through contractors without the input or resistance of the civil service, the check that would otherwise be provided by civil servants in the administrative separation of powers is bypassed, and the balance provided by that scheme is thereby tilted in favor of political appointees.<sup>36</sup> Contractors are also more likely to disregard procedural or other constraints on their conduct that would apply to government employees carrying out the same tasks, and they are financially motivated to carry out their responsibilities more quickly (for good or ill).<sup>37</sup> In addition, contracting “marginalizes public participation in the administrative process” because the public cannot effectively monitor contractors in the way it can monitor agency employees.<sup>38</sup>

Michaels rejects the notion that “gridlock” in government is necessarily bad, acknowledging that the nation’s inability to resolve difficult issues may reflect the absence of a consensus or our culture’s “cautious approach to governing and . . . reluctance to regulate or legislate unless and until broad-based buy-in is secured.”<sup>39</sup> Efficient or not, Michaels views the administrative separation of powers he posits as a bulwark against authoritarianism.<sup>40</sup>

### III. PUSHING BACK AGAINST PRIVATIZATION

Michaels wants the various power centers within the administrative state to remain dispersed. He opposes delegations of congressional authority directly to the President, which he

describes as a “naked delegation” of power.<sup>41</sup> In contrast, Michaels characterizes delegations to agencies as less problematic insofar as the agencies contain their own sources of power and disagreement and, in turn, must work out differences with members of civil society.<sup>42</sup>

Judicial review under the Administrative Procedure Act (APA) permits federal judges to invalidate agency action that is, among other things, “contrary to constitutional right, power, privilege, or immunity,” that violates a statute or statutory procedures, or that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>43</sup> In contrast to the current dual review of both procedural and substantive (“arbitrary and capricious”) decisions, Michaels wants judicial review to focus on the processes by which rules and other agency decisions are reached.<sup>44</sup> Michaels believes that courts can support the administrative separation of powers by scrutinizing the extent to which agency actions were reached “through a truly rivalrous, heterogeneous, and inclusive administrative process.”<sup>45</sup> He reasons that courts “are more adept at identifying shoddy procedures than they are at assessing suspect substantive policy decisions, particularly in cases involving heavy reliance on sophisticated scientific, sociological, or economic analysis.”<sup>46</sup> Michaels basically rejects the need for judicial review of the merits of agency decisions if the process is legitimate and if no statute has been violated.<sup>47</sup>

But Michaels urges more expansive judicial review for situations in which, according to his view, the “spirit” of the administrative separation of powers has been violated, even where there has not been a violation of specific statutes or judicial orders.<sup>48</sup> For him, this spirit is violated whenever an agency makes a move toward privatization. He does not spell it out, but perhaps he would want the APA amended to empower the courts to review and reject, for example, the outsourcing of rule-drafting, decisions on whether individuals are eligible for government benefits, or granting interest groups special roles in the formulation of government policies.<sup>49</sup>

Finally, Michaels identifies a separate category of what he considers to be “hard cases” to which judicial review could be

31 *Id.* at 106-11.

32 *Id.* at 112-14.

33 See Amitai Etzioni, *Reining in Private Agents*, 101 MINN. L. REV. HEADNOTES 279, 306-22 (2016).

34 Michaels, *supra* note 1, at 120-23.

35 *Id.* at 126.

36 *Id.* at 128-29.

37 *Id.* at 132.

38 *Id.* at 131.

39 *Id.* at 147-48.

40 *Id.* at 150.

41 *Id.* at 176.

42 *Id.*

43 5 U.S.C. § 706(2).

44 Michaels, *supra* note 1, at 177.

45 *Id.* at 181. In that context, Michaels cites *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), in which the Court withheld so-called *Chevron* deference (articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-43 (1984)), from an agency decision, according to Michaels, “on the ground that career agency personnel formulated their own legal interpretations outside of the democratically inclusive and rigorous rulemaking process—and without apparent input from agency leaders or the public writ large.” Michaels, *supra* note 1, at 183.

46 *Id.* at 185.

47 *Id.* at 185, 180.

48 *Id.* at 189.

49 *Id.* at 189-90.

more difficult to apply. These hard cases include federal efforts to marketize the bureaucracy, to create independent agencies, and to exempt national security agencies and government corporations from many of administrative law's routine procedural and personnel safeguards.<sup>50</sup> Michaels indicates that, despite the difficulty, judicial review should apply to all of the activities in this category except national security agency activities.<sup>51</sup>

Michaels advocates other reforms to reverse privatization.<sup>52</sup> He proposes a "comprehensive civil service reclamation project" that would focus on "renationalization, reinstatement, recruitment, retention, and reputation building."<sup>53</sup> He wants Congress and the President to reverse outsourcing, at least where contractors or other entities have a substantial role in making or implementing policy.<sup>54</sup> Michaels also urges the creation of a national government service academy analogous to the military's professional academies and public campaigns to support such career choices.<sup>55</sup>

Finally, Michaels wants to see civil society strengthened so that it can have an effective stake and voice in the administrative state.<sup>56</sup> He would supplement the "public notice" of government activities prescribed in the Federal Register through both mainstream media and internet links, with enhanced use of "plain English" and better support for "lay comprehension" of agency documents, and increased agency use of social media.<sup>57</sup> Agency officials also would engage in more frequent community outreach and expanded civics programs.<sup>58</sup>

#### IV. CRITIQUE

Although Michaels' defense of the administrative state and critique of privatization is both articulate and well-argued, I have several concerns about both the accuracy of his premises and the wisdom and practicality of his proposed solutions.

Michaels proceeds from the premise that an administrative separation of powers exists under which the civil service bureaucracy, presidential power, and public participation check each other.<sup>59</sup> But Michaels does not provide enough evidence to support the notion that there is an inherent balance of power among the three factions, and there are reasons to think there is not. The interests of the civil service bureaucracy are constant, while the interests of the political leadership of agencies change depending on who is elected president; the interests of the two factions are sometimes opposed—thus checking each other—but they are sometimes aligned. Recent data indicates that federal civil

servants overwhelmingly vote for and donate to Democrats,<sup>60</sup> and they tend to be interested in maintaining their own jobs and expanding the scope of their influence. While an administration seeking to shrink government might be effectively checked by reluctant civil servants, an administration committed to maintaining or expanding social welfare or regulatory programs will likely find supporters within the bureaucracy, whose ideological and personal interests support those objectives. Where the interests of these two factions are aligned, there is no reason to conclude that bureaucratic views will "check" administration initiatives.

Second, Michaels' cry of alarm about the extent of harmful privatization is not sufficiently substantiated. Michaels has not demonstrated that private entities have destabilized our government structure by systematically undermining public policy or frequently acting without public agency oversight.<sup>61</sup> There is no doubt that some abuses of authority have occurred; the military contractors' operation of the Abu Ghraib prison is a prominent example.<sup>62</sup> But Michaels has not established that privatization initiatives have substantially undermined governmental accountability. In order to do so, Michaels would have to show that the private actors have systematically engaged in activities they were not legally empowered to conduct (either by law or by the terms of their contracts), or that they regularly pursued lawful goal in unlawful ways.

Third, it is not clear that Michaels' proposed reforms to judicial review of agency decisions would ameliorate the privatization problem. As explained above, Michaels eschews broad judicial review of the merits of agency decisions *except* where they implicate private entities. Where private entities come into play, Michaels would expand judicial review beyond an evaluation of the legality of the agency's ultimate decision, which is ordinarily where judicial review begins and ends today.<sup>63</sup> Enhanced scrutiny of contracting decisions presumably would extend deeply into agencies' internal decision making processes. Such intrusion would be disruptive (if not demoralizing) to the functioning of the administrative state that he supports.<sup>64</sup> We also should be concerned about empowering judges to evaluate the legitimacy of outsourcing initiatives, for it is not clear what, if any, objective standards would guide their review of agency decisions.

50 *Id.* at 193-97.

51 *Id.* at 193-200.

52 *Id.* at 202-18.

53 *Id.* at 206.

54 *Id.* at 207.

55 *Id.* at 209-18.

56 *Id.* at 218.

57 *Id.* at 220-22, 224-26.

58 *Id.* at 222, 227.

59 *Id.* at 59-68.

60 See, e.g., Ralph R. Smith, *Tallying Political Donations from Federal Employees and Unions*, FED SMITH (Dec. 21, 2016), <https://www.fedsmith.com/2016/12/21/tallying-political-donations-from-federal-employees-and-unions/>; Jonathan Swan, *Government workers shun Trump, give big money to Clinton*, THE HILL (Oct. 26, 2016), <http://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign>.

61 Michaels, *supra* note 1, at 126.

62 See Etzioni, *supra* note 33, at 310-11.

63 5 U.S.C. § 706(2).

64 In that context, "exemption 5" of the Freedom of Information Act, 5 U.S.C. § 552(b)(5), protects from public disclosure the internal deliberations of government officials. See *New Hampshire Right to Life v. U.S. Dep't of Health & Human Services*, 778 F.3d 43, 52 (1st Cir. 2015) (Exemption 5 protects government agencies from being "forced to operate in a fishbowl.") (citations and internal quotation marks omitted).

Aside from substantive concerns about these proposals, it is not realistic to think that Congress would rewrite the APA to curtail arbitrary and capricious review of agency action, or substitute for it a broad review of agency decisions related to contracting.<sup>65</sup>

A final practical objection to Michaels' project: government employees currently do not have the expertise needed to engage in standard-setting, information technology services, or other similarly specialized tasks in our complex, technology-based society, so outsourcing such complex tasks is a practical necessity.<sup>66</sup> Absent a commitment by Congress to insource such complex functions through sweeping changes to the federal civil service appointment and compensation system, these functions will necessarily remain the province of private contractors.

Michaels' concern about whether "inherently governmental functions" should be delegated to private contractors, however, is a legitimate one.<sup>67</sup> Functions associated with sovereignty—such as national defense and intelligence-gathering—and policymaking must be kept in-house. Conservatives who are concerned about the unaccountable exercise of government powers should be sympathetic to increased scrutiny of such practices.<sup>68</sup> And to the extent the services of outside contractors are not sufficiently monitored, improvements should be made, including by expanding the number of contracting officers or auditors if necessary.<sup>69</sup> Michaels' proposed improvements to civil service functions and his ideas for enhancing public participation may also be worth trying. Michaels identifies some real concerns and proposes some promising policy shifts, but his larger vision is not a satisfactory response to the problems he identifies.

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65 See 5 U.S.C. § 706(2).

66 See Emily S. Bremer, *Private Complements to Public Governance*, 81 Mo. L. REV. 1115, 1121-22 (2016) (estimating that there may be 100,00 private technical standards in place); United States Government Accountability Office, *Information Technology, Agencies Need to Involve Chief Information Officers in Reviewing Billions of Dollars in Acquisitions* (January 2018) at 2 (reviewing aspects of IT contracts of over \$19 billion for fiscal year 2016).

67 See Laubacher, *supra* note 4, at 818; Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C.L.R. 397 (2006).

68 See *Department of Transportation v. Ass'n of American Railroads*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern.").

69 Richard J. Pierce, Jr., *Outsourcing is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1218, 1224 (2008) (noting concerns about insufficient monitoring of government contracts).

