6-2019

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87 UMKC Law Review 653 (2019)

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Candidates for U.S. president—like those for any elected office or leadership position—make promises about what they will do if they are elected to office. If we take time to think through what must be done to fulfill those promises, however, we may find that the action or forbearance of Congress, the federal courts, or others is required to achieve the pledged objectives. Nevertheless, we expect the president to make good on those campaign commitments—and more.

Among the promises made by Donald J. Trump during his campaign was the promise to decrease regulation—indeed, to effectively shrink the U.S. regulatory state.[1] Soon after he took office as president of the United States in January 2017, he took action to implement this promise by signing an Executive Order on Reducing Regulation and Controlling Regulatory Costs.[2] The order uses budgeting powers to limit the authority of executive branch agencies and dictate elements of their regulatory processes.[3] Specifically, the order requires the elimination of two existing regulations for each new regulation adopted and mandates that "the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero."[4] The Office of Management and Budget's Office of Information and Regulatory Affairs issued a related guidance memorandum in early February 2017[5] and a further guidance

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[1] *See*, *e.g.*, Sarah E. Crippen et al., *What L&E Attorneys Need to Know About the Trump Administration*, FED. LAW., July 2017, at 46-47 ("On the campaign trail, Trump identified specific regulations to cut. For instance, Trump went on the record that he was interested in exempting small businesses from the Fair Labor Standards Act's (FLSA) requirements of paying a minimum wage, paying overtime wages, and keeping records of employee's work time and wages."); Chris Kaufman, *Republican Trump Says 70 Percent of Federal Regulations 'Can Go,'* REUTERS, Oct. 6, 2016, http://reut.rs/2dOEQjV (Speaking to a "crowd at a town hall event in New Hampshire," Trump said "[w]e are cutting the regulation at a tremendous clip. I would say 70 percent of regulations can go."); John W. Miller, *Donald Trump Promises Deregulation of Energy Production*, WALL ST. J. (Sept. 22, 2016), http://www.wsj.com/articles/donald-trump-promises-deregulation-of-energy-production-1474566335 ("Speaking on Thursday to a conference of 1,500 gas-industry executives . . . . [Trump] promised to end 'all unnecessary regulation, and a temporary moratorium on new regulations not compelled by Congress or public safety.'").

[2] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[3] *Id.*

[4] *Id.*

[5] Memorandum from Dominic Mancini, Acting Admin. Office of Inform. & Regulatory Affairs, Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Regulatory Costs" (Feb. 2, 2017).

memorandum in April 2017.[6] The president also signed an executive order Enforcing the Regulatory Reform Agenda in February 2017, in which he states that "[I]t is the policy of the United States to alleviate unnecessary regulatory burdens placed on the American people" and sets forth processes for implementing that policy objective.[7] Through these and other ongoing executive branch initiatives, the president has assumed a particular directive role in deregulation. The ultimate outcome of these efforts, of course, remains to be seen. This president is not the only president to have promised or suggested deregulation.[8]

This essay interrogates the role of the president in deregulation at the federal level. I have two principle goals in conducting this examination. First, I desire to identify and explain the president's role in the deregulatory process from a legal and practical perspective. Second, with the knowledge gained in better understanding the nature of the president's optimal role in deregulating, I hope to provide a valuable perspective and practical advice for use by a president in constructing and implementing a deregulatory agenda.

To accomplish these objectives, the essay first describes the president's regulatory power and authority, then defines the concept of deregulation and identifies ways in which the president may engage with deregulation, and finally, before concluding, conceptualizes two aspirational roles for the president as a deregulator. It may be important to note that my interest in this subject is in deregulation as it affects commercial and other business matters—business law being my overall area of concern as a scholar—rather than deregulatory efforts in a purely individual, personal setting or in the context of more general, public-facing areas of legal concern (for instance, international relations or overall national security). As a result, I offer observations and analysis primarily from the vantage point of business deregulation.

I. HOW THE PRESIDENT REGULATES AND DEREGULATES

Any assessment of the president's role in particular situations must begin with a review of presidential powers under the U.S. Constitution. As a general matter, the Constitution provides that "[t]he executive Power shall be vested in a president of the United States of America."[9] The president takes an oath of office directed at preserving, protecting, and defending the U.S. Constitution.[10] The qualifications for the job are quite simple and relatively non-substantive—

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[6] Memorandum from Dominic Mancini, Acting Admin. Office of Inform. & Regulatory Affairs, Guidance Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs" (Apr. 5, 2017).

[7] Exec. Order 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017).

[8] *See*, *e.g.*, *infra* note 52 and accompanying text; sources cited *infra* note 85.

[9] U.S. CONST. art. II, § 1, cl. 1.

[10] *Id.* art. II, § 1, cl. 8 (the full oath reading as follows: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.").

citizenship (U.S.), age (at least thirty-five years), and residency (at least fourteen years).[11]

Few specific presidential duties or obligations are set forth in the Constitution. Most know that the president can veto acts of Congress,[12] is Commander in Chief of the U.S. military,[13] and has the power to pardon those who have committed crimes against the United States.[14] The president also has the power to: make treaties and appointments (e.g., of ambassadors, U.S. Supreme Court justices, and other federal officials), with the advice and consent of the U.S. Senate and subject to other constraints;[15] make recess appointments to fill vacancies;[16] and convene and adjourn Congress in extraordinary circumstances.[17] Few may know or remember, however, that the president also may ask for a written opinion from the principal officer of any executive department on matters within the purview of that department as authorized under the Constitution's "opinions clause."[18] The president must deliver a State of the Union message and otherwise

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[11] *Id.* art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

[12] *Id.* art. I, § 7, cl. 2. The most relevant portion of the clause provides that:

> [e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

Id.

[13] *Id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States").

[14] U.S. CONST. art. II, § 2, cl. 1. ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

[15] *Id.* art. II, § 2, cl. 2. The clause reads in full as follows:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Id.

[16] *Id.* art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

[17] *Id.* art. II, § 3 ("[H]e may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper").

[18] *Id.* art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .").

reach out to Congress to suggest needed and salutary rule making,[19] receive ambassadors and other public ministers,[20] and commission U.S. officers.[21] Finally, the president must be attentive to the faithful execution of law under the Constitution's "take care clause," a relatively broad and non-obvious component of the president's constitutional obligations.[22]

It does not take much creativity to see how many of these constitutional mandates and authorizations can be used in the regulatory sphere. In particular, it is easy to see how the president's powers to veto legislation, make federal appointments, and communicate with the public may be used to accomplish or foster regulatory and deregulatory aims. Moreover, the president's constitutional commitment to execute the law faithfully seems well related to federal regulation and deregulation. Part III offers specific examples of the deregulatory use of presidential powers and obligations.

Yet, when many think of regulation and deregulation, they often think of actions taken by the U.S. Congress, not the president. It is Congress that has the constitutional power to regulate through the adoption, amendment, and repeal of statutory law.[23] More specifically, Congress also can (among other things): levy taxes, provide for national defense and welfare, and pay debts;[24] borrow money;[25] regulate interstate commerce;[26] coin money;[27] provide patent and copyright protection;[28] and make laws to implement these and other objectives of the federal government.[29]

> Congress is theoretically the body that can create new regulatory histories and new beginnings by passing new laws or repealing old ones. It can, if it chooses, radically alter the status quo and wipe clean the

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[19] *Id.* art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient").
[20] U.S. CONST. art. II, § 3. ("[H]e shall receive Ambassadors and other public Ministers").
[21] *Id.* ("[H]e . . . shall Commission all the Officers of the United States").
[22] *Id.* art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed").
[23] *Id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").
[24] *Id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States").
[25] *Id.* art. I, § 8, cl. 2 ("The Congress shall have Power . . . To borrow Money on the credit of the United States").
[26] *Id.* art. I, § 8, cl. 3. ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").
[27] *Id.* art. I, § 8, cl. 5 ("The Congress shall have Power . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures").
[28] *Id.* art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").
[29] *Id.* art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

> statutory slate, leaving only the market in its place. It can substitute a relatively new regulatory regime for an old one or it can signal the demise of a regulatory structure.[30]

Under the Constitution, the congressional power to regulate conduct is therefore quite direct (even if not always perfectly clear)—more direct than the corresponding power granted to the president.

It also should be noted that the federal judiciary has the capacity to play a national regulatory and deregulatory role. It is the constitutional obligation of the federal courts to adjudicate specified cases and controversies, including those under the Constitution and U.S. federal law.[31] Judicial opinions on regulatory questions—including the judicial review of executive orders and agency rulemaking or rescission—may bless regulatory or deregulatory initiatives or otherwise have a regulatory or deregulatory effect.[32] In particular, judicial review can frustrate deregulation.[33]

Nevertheless, the president is and, in certain respects must be, a regulator within our system of government.[34] As earlier noted, within the president's constitutional powers are a number of explicit and implicit regulatory tools. These include some ways of asserting influence through the president's general power as

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[30] Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1237–38 (1988).

[31] U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").

[32] *See*, *e.g.*, Aman, *supra* note 30, at 1164 ("When deregulation is presented as a form of public interest regulation which uses the market as a regulatory tool to achieve goals the agency has set, the likelihood of judicial deference to agency deregulation is greatly increased."); Linda R. Hirshman, *Trends in the Law: Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 688 (1988) (claiming the impetus for deregulation in the telephone industry was a result of "heavy pressure on the agency from the D.C. Circuit and from advancing technological developments."); Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 937 (2018) (confirming the judicial responsibility to review and reject the cost-benefit analyses of regulations issued by government agencies and invalidate regulations on that basis).

[33] *See*, *e.g.*, Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 377 (1999) ("The heightened judicial review of deregulation has been used in a series of cases to frustrate deregulatory efforts." (footnote omitted)); James T. O'Reilly, *Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts*, 37 VAND. L. REV. 509, 518 (1984). Specifically, James O'Reilly states:

> As the mood of Congress or the President shifts against a particular regulatory system, the agency may feel significant pressures to lessen or eliminate a set of rules. The courts, however, are capable of nullifying the policy change by means of fact-specific enforcement commands, injunction, and consent orders, if the court finds that deregulatory action was arbitrary, capricious, an abuse of discretion, or contrary to law.

O'Reilly, *supra*, at 518 (footnotes omitted).

[34] *See*, *e.g.,* James C. Miller III, *The Administration's Role in Deregulation*, 55 ANTITRUST L.J. 199 (1986) ("Congress and the courts may regulate, but it takes the cooperation and support of the President to deregulate.").

the executive.[35] But they also include the Constitution's more specific presidential powers to veto, make treaties, seek opinions from federal officials, comment on the state of the union, and consignment to ensuring faithful legal compliance. These powers have been used at various times for a variety of purposes, including for the purpose of deregulation. To better understand how these presidential deregulatory actions are accomplished, however, we must first define the concept of deregulation.

II. DEFINING DEREGULATION

Deregulation may be an elusive term and concept.[36] On the surface, it conveys the opposite of regulation—taking rules off the books, lessening their impact, or unwinding the process of regulation in some fashion.[37]

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[35] *See id.* at 200-02 (identifying and providing examples of a number of ways in which the president's executive powers can be and have been used to promote deregulation); Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1550-53 (2018) (describing three ways in which presidents may deregulate).

[36] *See, e.g.*, Aman, *supra* note 30, at 1154 ("The political rhetoric that surrounds deregulation often implies that deregulation is clearly defined."); Stanley M. Gorinson, *Deregulation in Telecommunications: Competition or Confusion?*, FED. LAW., Mar. 2000, at 24 ("Government regulators are promoting 'deregulation', but the meaning of that term is often confusing."); Barak Orbach, *Financial Regulation and Comparative Governance: A State of Inaction: Regulatory Preferences, Rent, and Income Inequality*, 16 THEORETICAL INQUIRIES L. 45, 63 (2015) ("The meaning of deregulation as a reform process is typically misunderstood or, worse, misused." (footnote omitted)).

[37] *See, e.g.*, Peter C. Carstensen, *Evaluating 'Deregulation' of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 119 (1989) ("As an alternative state, [deregulation] simply implies a condition of not being regulated. Yet no one uses that definition in anything approaching an absolute sense . . . . In reality, deregulation implies the elimination or the alteration of some public control(s) over private decisionmaking."); Kenneth W. Clarkson & Timothy J. Muris, *Constraining the Federal Trade Commission: The Case of Occupational Regulation*, 35 U. MIAMI L. REV. 77, 79 n.2 (1980) ("[W]e define 'deregulation' as the elimination of existing legal requirements and 'regulation' as the imposition of new legal requirements."); Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 424 n.17 (2005) ("Deregulation is defined as reducing or eliminating the public regulation of private actors."); Shubha Ghosh, *Exclusivity-the Roadblock to Democracy?*, 50 ST. LOUIS U. L.J. 799, 807 (2006) ("Deregulation . . . is a mechanism for relaxing governmental controls over business activities. The assumption is that relaxing governmental controls will unleash private economic activity and more efficient use of resources." (footnote omitted)); Gorinson, *supra* note 36, at 25 ("Policymakers who advocate 'deregulation' often mean a transfer of regulatory oversight from one agency to another—in essence, regulatory reform rather than a complete removal of regulation." (footnote omitted)); Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 180–81 (1995) ("Deregulation, simply defined, is the removal of regulation; and regulation, in turn, is the alteration of persons' behavior by the government."); Orbach, *supra* note 36, at 63 ("Technically, 'deregulation' refers to the repeal or relaxation of regulatory policies, but historically, the U.S. deregulation movement constituted a complex transformation of the regulatory system . . . ." (footnotes omitted)).

> Taken on its own terms, deregulation is the antithesis of regulation. Among those favoring deregulation, regulation stands for the heavy, inefficient, all-too visible hand of the federal government, while deregulation represents individual liberty and a free marketplace. Those advocating deregulation often approach reform as if regulation and deregulation were opposites and as if the debate were truly dialectical.[38]

Perhaps this is too facile. Among other things, in relying on this definition, one must first understand *regulation* to understand this conception of *deregulation*. Regulation itself is hard to define precisely, given that it may have one or more of a number of objectives.[39]

Consistent with the common understanding of the general opposite-of-regulation definition, deregulation signifies to many less government intrusion in business or personal decision-making or action.[40] In truth, the denotation and connotation of deregulation, like the meaning of beauty or pornography or religion, may be in the eye of the beholder.

> 'Deregulation' is a term that has approximately the same content as 'obscenity.' Humpty Dumpty might have had either word in mind when he observed, 'When I use a word, it means just what I choose it to mean—neither more nor less.' When people discuss deregulation, they frequently have not the faintest idea whether any two of them are discussing the same phenomenon.
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> Deregulation is also like obscenity in that, as commonly employed, these terms apparently are meant to describe a very wide variety of conduct traditionally considered sinful.[41]

The author of this humorously accurate depiction goes on to define deregulation as "the avowed policy of substituting marketplace discipline for close bureaucratic supervision or dictation of business decisions . . . ."[42] This is a reasonable definition of deregulation in a business context, the focus of this essay. A broader definition would need to be employed to govern other public or private deregulation.

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[38] Aman, *supra* note 30, at 1154.
[39] *See* Cass R. Sunstein, *Deregulation and the Courts*, 5 J. POL'Y ANALYSIS & MGMT. 517, 518 (1986) (identifying six basic categories of deregulatory goals).
[40] *See, e.g.*, Orbach, *supra* note 36, at 63 ("For most people, 'deregulation' means a reform intended to reduce government action."); Sunstein, *supra* note 39, at 518–520 ("Deregulation usually results from a corresponding critique of one or another of the basic justifications for regulation. . . . For some, regulation does not protect rights but instead violates them.").
[41] Thomas G. Krattenmaker, *Deregulation and Expanding Antitrust Liability: A New Battleground for Private Antitrust Litigants: Implications of Deregulation for Antitrust Policy*, 53 ANTITRUST L.J. 211, 211 (1984).
[42] *Id.* at 212.

However, presidential deregulation initiatives relating to business do not always fit neatly into a regulation-versus-market definition of deregulation.[43] They may fit more precisely into a definition that relies on a decrease in the aggregate type, quantity, or quality of government mandates on business decisions and activities. A definition of this type takes into account the broad variety of catalysts and objectives of presidential deregulation initiatives.[44] Accordingly, as used in this essay, deregulation in the business context simply means a reduction in the number or nature of federal mandates applicable in a business decision-making or operational setting.[45]

In a nation led by a Republican president and a Republican Congress (as was the case at the outset of the Trump administration), deregulation may seem to be solely the province of conservative leaders. Yet, because government regulation and the market play distinct situational roles in debates on many different important public policies and rulemaking initiatives, deregulation is advocated by and occurs in governments and governmental branches controlled or led by both liberals and conservatives.

> One of the truly remarkable things about deregulation is its strong appeal to both the Right and the Left. There may be some observers in the center who do not wildly applaud deregulation, but nothing is heard from them as the plaudits come in from both ends of the political spectrum. Conservatives love deregulation because it gets rid of the government. Liberals seem to love it because it spells the end of hated monopolies. Deregulation legislation is often sponsored by a vociferous liberal in partnership with a doughty conservative.[46]

The bipartisan nature of deregulation should not obscure the fact that politics may play a significant role in deregulation, especially in presidential efforts to deregulate. As the following part of this essay reveals, much of the president's constitutional authority for substantive deregulatory activity relies on broad interpretations of the presidential veto power, the "take care" clause, and the president's power to appoint agency officials and determine or influence agency activities—interpretations that may bless presidential action in the absence of clear

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[43] *E,g.*, Aman, *supra* note 30, at 1158 ("The President can advocate deregulatory change for philosophical and theoretical reasons.").

[44] *See id.* at 1154–55 (1988) ("Deregulation is not simply the antithesis of regulation. Rather, deregulation can and does implement a variety of policy goals and aspirations. It is not a monolithic concept. Deregulation may be advocated for theoretical, normative, or pragmatic reasons, or for combinations of all of these kinds of reasons.")

[45] *See, e.g.*, Carstensen, *supra* note 37 (offering a similar definition); Cossman, *supra* note 37 (same); Ghosh, *supra* note 37 (same).

[46] Richard D. Cudahy, *The Folklore of Deregulation (with Apologies to Thurman Arnold)*, 15 YALE J. ON REG. 427, 442 (1998); *see also* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1239 (2014) ("Liberal presidents generally desire a smaller federal role with respect to criminal law and social-moral issues. Conservative presidents usually prefer that the federal government pursue less economic regulation." (footnote omitted)).

congressional or judicial oversight. The greater the role of the president (as opposed to Congress or the federal courts) in the federal deregulatory process, the more likely it is that we may observe a "replacement of a legal discourse focusing primarily on the relationship of agency rationality to congressional goals by a more political discourse that justifies agency action in terms of presidential power and electoral accountability."[47]

III. METHODS OF PRESIDENTIAL DEREGULATION

The federal regulatory state, propagated in the late nineteenth century, has enjoyed rapid growth since the New Deal and has continued to expand significantly in the past fifty years.[48] The growth has resulted from many factors, including the congressional delegation of significant rulemaking authority to the executive branch and independent agencies and judicial deference to agency decision-making.[49] While, on the one hand, the exponential increase in the size and work load of the executive branch and independent agencies may be attractive to a power-hungry, self-aggrandizing chief executive, the overall appeal of "big government" to the populace and most academic and industry observers is limited. The immense federal bureaucracy, for all the value it may have, telegraphs unaccountability, inefficiency, disorganization, duplication, impersonality, and other unappealing attributes.[50] Its rulemaking far overtakes that of Congress

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[47] Aman, *supra* note 30, at 1191–92.

[48] *See, e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 125 (2016) ("The shift to social regulation in the 1970s reflected profound changes in American politics that were to propel the growth of the administrative state for decades to come."); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1957 (2015) ("The twentieth century witnessed the growth of the administrative state . . . . Administrative agencies became more numerous and were delegated large discretionary powers."); J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & POL. 239, 242 (2017) ("[T]he modern incarnation of the administrative state, with agency discretion as its hallmark, emerged during the New Deal in response to the devastation wrought by the Great Depression." (footnote omitted)); Jonathan Wood, *Standing Up to the Regulatory State: Is Standing's Redressability Requirement an Obstacle to Challenging Regulations in an Over-Regulated World?*, 86 UMKC L. REV. 147, 148 (2017) ("The familiar story of the administrative state begins with the progressive movement in the late 19th century and the New Deal era in the early 20th century."); John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 223 (2018) ("With the creation of the Interstate Commerce Commission in 1887, the American administrative state started to grow in earnest.").

[49] *See, e.g.*, Wilkinson, *supra* note 48, at 241 ("The remarkable thing . . . about the growth of the administrative state is that it filled a vacuum left when the legislative and judicial branches, for reasons of their own, ceded enormous authority to bureaucratic judgment."); Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J. L. & PUB. POL'Y. 362, 369-70 (2008) ("The administrative state has spiraled out of control. Over the last several decades, the executive branch has used agencies to expand its own powers, and Congress and the courts have one little to provide any sort of meaningful checks on this process.").

[50] *See, e.g.*, Wilkinson, *supra* note 48, at 242 ("The very size of the administrative state has also made it impenetrable and thus less accountable. We often use the word 'faceless' to express our frustration at this impersonal leviathan. The sheer mass of the administrative state makes it difficult to keep

(although that fact, taken alone, is not necessarily indicative of a cause for concern).[51]

As a result, "[e]very administration in recent history has attempted to reform the inevitable overlaps and redundancies that arise from an ever-growing federal bureaucracy."[52] Presidents have undertaken deregulation in many ways over the years. This deregulation has been direct and indirect in nature. For example, by vetoing legislation, helping to ensure faithful compliance with the law under the "take care clause," and including certain people in—or adopting certain policies or processes in the conduct of the business of—the executive branch, the president can directly forward deregulatory aims. However, the president also may articulate strong policy objectives that spur deregulation indirectly by putting pressure on Congress or federal agencies. That pressure may come from the president's direct deregulatory authority or from, for instance, executive orders or the president's annual comments on the state of the union. Each of these possible avenues for the pursuit of deregulation by the president is addressed briefly in the remainder of this part of the essay.

A. The Veto

The presidential veto power represents an obvious channel for fostering regulatory control, including deregulation.[53] That control may or may not be

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track of."); Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 948 (1994) ("All agencies will engage in imperialism in the form of 'turf-grabbing'; will succumb to 'capture' by special interest groups; will distort information flow to the public to serve their own interests; and will manufacture or fabricate crises.").

[51] *See, e.g.*, Jesse Panuccio, *Legislative Atrophy*, 11 FIU L. REV. 417, 420–21 (2016) ("[I]n 2013 and 2014, federal agencies promulgated 7,213 new regulations while Congress enacted only 296 new laws—twenty-four regulations for every law, and about ten new regulations per day."); *see generally* Jill E. Fisch, *Federal Securities Fraud Litigation As A Lawmaking Partnership*, 93 WASH. U.L. REV. 453, 454 (2015) ("[T]he growth of the administrative state has placed primary lawmaking authority for many substantive areas into the hands of unelected officials at administrative and independent agencies.").

[52] James C. Cooper, *The Costs of Regulatory Redundancy: Consumer Protection Oversight of Online Travel Agents and the Advantages of Sole FTC Jurisdiction*, 17 N.C. J. L. & TECH. 179, 181 (2015); *see also* Larry W. Thomas, *The Courts and Agency Deregulation: Limitations on the Presidential Control of Regulatory Policy*, 39 ADMIN. L. REV. 27 (1987) ("[B]eginning with Richard Nixon, every president since then has voiced his support for eliminating 'unnecessary and burdensome' regulation."); Yoo, *supra* note 48, at 233 ("American presidents . . . campaign against the burdensome regulations made possible by the New Deal.").

[53] *See* Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 88 (1976) (noting that the veto "makes the President a part of the legislative process"); Richard B. Graves III, *Globalization, Treaty Powers, and the Limits of the Intellectual Property Clause*, 50 J. COPYRIGHT SOC'Y U.S.A. 199, 252 (2003) ("[T]he veto power gives the President considerable leverage in shaping legislation"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2315 (2001) ("[T]he veto power gives the President substantial leverage.").

explicit. Use of the presidential veto power—and in some cases even a threat of its use—can both effectuate and catalyze deregulation.

For example, the president may veto legislation that increases regulation expressly or expands the authority of a regulatory body—including the authority of an independent federal agency.[54] A number of these independent federal agencies, including without limitation the U.S. Commodities Futures Regulatory Commission, Environmental Protection Agency, Federal Communication Commission, Federal Trade Commission, and Securities and Exchange Commission ("SEC"), regulate business governance, finance, and operations. These agencies engage in regulation directly and through self-regulatory and other organizations under their jurisdiction or control.[55] "If you have a 65 percent majority in each House strong for a consumer bill, say, and the President is dead set against it, then that consumer bill will not become law."[56]

Although the power of the veto enables the president to have direct regulatory control over Congress, it also can operate indirectly to curb Congressional regulatory efforts. Because Congress is cognizant of the president's veto power and understands the nature of the extent and effort required for a congressional override, the mere presence of veto power can have deregulatory impact.[57]

> [T]he President's veto power gives him immense leverage in congressional deliberations. This is because the veto power is asymmetrical: he can veto legislation, but the majorities in the Houses that sufficed to pass the legislation are insufficient to surmount that veto. Because of the high transaction costs involved merely in securing majorities in each House of a bicameral legislature—let alone two-thirds

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[54] *See*, *e.g.*, Black, *supra* note 53, at 94 (offering that, in the 93rd and 94th Congresses, "bills dealing with economic controls on oil, with strip mining, with air pollution, with emergency employment, with petroleum allocation, were successfully vetoed."); James D. Cox et al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421, 431 (2009) (describing President Clinton's veto of the Private Securities Litigation Reform Act of 1995 as a response to specific substantive concerns with over-regulation); Mariela Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and Dream Act Failure*, 55 HOW. L.J. 359, 375 (2012) (noting President George W. Bush's characterization of his 2007 vetoes of the Children's Health Insurance Program Reauthorization Act as deregulatory and fiscally responsible).

[55] *See, e.g.*, 15 U.S.C. § 78s (2018) (setting out the relationship between the SEC and various securities self-regulatory organizations); *see also*, *e.g.*, Robert B. Thompson, *The SEC After the Financial Meltdown: Social Control over Finance?*, 71 U. PITT. L. REV. 567, 575 (2010) ("[W]orking with a self-regulatory organization, an independent agency with a specific, defined focus may be better able to build a sense of professionalism than in a large government department."); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 614 (2010) ("From its inception, the SEC has provided regulatory oversight of private, self-regulatory organizations ('SROs'), which have increased in number across the decades.").

[56] Black, *supra* note 53, at 95.

[57] *See id.*

> supermajorities in each—the President's veto power enables him to wield enormous influence over the legislative process . . . .[58]

Thus, the president's simple signaling of a veto may refocus Congress in a deregulatory direction.[59]

However, one can envision use of the presidential veto even more indirectly as leverage in specific contexts. For example, a president may veto or threaten vetoing legislation that is beneficial to a constituency as a means of expressing or signaling disapproval with a regulatory or anti-deregulatory stance taken by the constituency or its legislative representatives or regulatory supporters.[60] "Presentment . . . gives the President an opportunity to speak, and that opportunity is matched with an obligation in Congress to listen . . . ."[61] The explicit or implicit threat of a veto in these circumstances may have the same indirect deregulatory effect as an actual veto. This conduct—the use of a veto or threat of a veto to politically punish or signal—is intended to put pressure on rule makers to accede to the president's related or unrelated deregulatory initiatives (as a matter of federal policy) in return for more favorable prospective treatment in much the same way that Congress can use the "power of the purse" to compel the executive branch to bend to its will.[62]

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[58] Robert J. Delahunty & John C. Yoo, *Thinking About Presidents*, 90 CORNELL L. REV. 1153, 1171 (2005) (reviewing PRESIDENTIAL LEADERSHIP: RATING THE BEST AND THE WORST IN THE WHITE HOUSE (James Taranto & Leonard Leo eds., 2004)) (footnotes omitted).

[59] *See generally* Black, *supra* note 53, at 95-96 (explaining the effect of the presidential veto on congressional action when the president's views on regulation are known to Congress, using consumer regulation in the Nixon administration as an example); Michael D. Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 359 (2014) ("[T]he mere threat of a veto may encourage Congress to modify legislation before it reaches the President's desk."); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 261 (2012) ("As social scientists have observed, even the threat of a veto can be a powerful tool, one that frequently leads Congress to modify or even forego proposals before they reach the President's desk.").

[60] *Cf.* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1910 (2008) (noting this potential as a response to a Senate failure to confirm a nominee to the Supreme Court).

[61] Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 763 (1997).

[62] *See*, *e.g.*, Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 367 (2018) ("Congress's power of the purse remains a vital mechanism of accountability for the executive branch."); *id.* at 387 ("Congress today routinely declines to fund initiatives and agencies at levels presidents request . . . ."); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1352 (1988) ("Congress retains significant constitutional power to constrain the President through appropriations limitations as long as these constraints do not prevent the Executive from fulfilling indispensable constitutional duties."). *See also* Burton Raffel, *Presidential Removal Power: The Role of the Supreme Court*, 13 U. MIAMI L. REV., 69, 80 (1958) ("The President does not function in isolation; the power of the purse alone would be enough to make Congress' watchful scrutiny a far stronger check and more powerful threat of reprisal than anything the Court might accomplish."). Yet even the congressional power of the purse is impacted by presidential power, as evidenced by the federal government shutdown that took place in December 2018 and January 2019. *See* TAXPAYERS FOR COMMON SENSE, THE WALL, AN EMERGENCY, AND CONGRESS' POWER OF THE PURSE, Jan. 10, 2019,

B. The "Take Care Clause"

The president's obligation to exercise care in faithfully executing the law under the "take care clause" also may be used in a deregulatory manner. The president can exercise discretion within the bounds of that clause—taking care—as to whether, when, and how to address violations and other matters of or under operative federal law.[63] As a result, the president can withhold authority to enforce, implement, or defend particular federal legal or regulatory mandates.[64]

When the president instructs the Department of Justice not to enforce a congressional enactment because the president has determined that the law is unconstitutional,[65] for example, that action effectively represents a nullification of the legislative branch's regulatory accomplishments. This type of deregulation often, but not always, results from "a president's determination on policy grounds that a specific law should no longer be enforced."[66] One scholar refers to the effect of this executive branch inaction as an "extra-legislative veto."

> The extra-legislative veto comprises a variety of practices used by presidents to check or weaken statutory mandates outside the legislative process. It includes decisions not to enforce the law, decisions not to implement the law, and decisions not to defend the law. It may be

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https://www.taxpayer.net/budget-appropriations-tax/the-wall-an-emergency-and-congress-power-of-the-purse.

[63] *See* Grove, *supra* note 59, at 261 ("[O]nce a bill is enacted into law, the President is in charge of the enforcement and execution of that law."); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343 (1994) ("The President may exercise a power of legal review over the determinations of the judiciary and over acts of Congress and refuse to give them effect insofar as his constitutional authority is concerned.").

[64] *See* Paulsen, *supra* note 63, at 277 ("The duty to "Take Care" that the laws be faithfully executed requires the President to give precedence to *his* settled conclusion as to the law's meaning and constitutionality, not to pledge obeisance to the preferences of other branches.").

[65] *See*, *e.g.*, Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 587 (2008) ("[T]he President and executive agencies will refuse to follow or enforce a statute if they believe that it violates the Constitution."); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 126 (2004) ("[O]nly in extremely rare instances have Presidents claimed authority to decline to enforce a constitutionally objectionable statute, and their Departments of Justice typically defend acts of Congress that in their view are unconstitutional, as long as a reasonable argument can made in support of the law."); Paulsen, *supra* note 63, at 267 ("The Constitution is paramount law; the President of necessity must interpret the law in the course of performing his constitutional duties to "take care" that the laws be "faithfully executed"; therefore, where, in the performance of his duties, the President finds a statute contrary to the Constitution as paramount law, he must follow the Constitution and refuse to give effect to the statute.").

[66] Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1212 (2014) (footnote omitted); *see also* Velikonja, *supra* note 35, at 1552 ("In recent decades, Presidents have often resorted to nonenforcement as the preferred method to deregulate in lieu of legislative or regulatory processes.").

> motivated by the President's constitutional views, his policy agenda, or simple electoral politics.[67]

Another scholar notes, for example, the "selective enforcement of certain statutory provisions such as those in the Affordable Care Act and the Immigration and Nationality Act"[68] during the Obama administration. There are many other examples that could be cited.

A president also may suppress, limit, or delay the enforcement, implementation, or defense of federal agency regulations and judicially imposed rules.[69] Business and environmental lawyers may recall, for example, President George W. Bush's obstruction of the Environmental Protection Agency's regulation of new-car greenhouse-gas emissions under the Clean Air Act.[70] Impediments to enforcement can be simply achieved through the exercise of enforcement discretion.

A president's constitutional review or use of enforcement discretion in acting under the "take care clause" may constitute deregulation that is either consistent with the faithful execution of U.S. law or calls the faithful execution of that law into question. It is clear that "the executive does not have the authority to either 'prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons.'"[71] Nevertheless, a palpable tension exists between presidential failures to enforce, implement, or defend legal mandates as a means of fostering legal compliance and those intended to frustrate legal compliance, resulting in a lack of clarity about the extent to which a president can disregard law or regulation.[72]

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[67] Sant'Ambrogio, *supra* note 59, at 354.

[68] William P. Marshall, *Warning!: Self-Help and the Presidency*, 124 YALE L.J.F. 95, 96 (2014).

[69] *See, e.g.*, Deepak Gupta & Lina Khan, *Arbitration As Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 502 (2017) (noting that "the Trump Administration may roll back regulations implemented by agencies under President Obama or fail to implement regulations that would have been promulgated."); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 104 (2001) ("The president can refuse or delay enforcement of judicial orders"); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 514 (2017) ("Unchecked, a president could use purported prosecutorial discretion authority to unilaterally halt or substantially undermine agency enforcement actions across a broad range of subject areas."); Richard Murphy, *The Brand X Constitution*, 2007 B.Y.U. L. REV. 1247, 1266 (2007) ("According to the more aggressive versions of departmentalism, if, for instance, a President deems a judicial order unconstitutional, then the President, in obedience to his oath to uphold the Constitution, should refuse to enforce the order." (footnote omitted)); Paulsen, *supra* note 63, at 276 ("[T]he President has independent constitutional power to decline to enforce judgments that rest on an incorrect interpretation of constitutional, statutory, or treaty law.").

[70] *See* Sant'Ambrogio, *supra* note 59, at 355.

[71] Velikonja, *supra* note 35, at 1553 (footnote omitted).

[72] *See id.* at 1553-54; *see also* Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 845 (1999) ("The clearest cases for a President to refuse to enforce a statute, disregard judicial doctrine, or even defy a ruling involve instances where he can claim in good faith the executive domain is involved.").

> Thus, while the Take Care Clause is generally understood as a source of prosecutorial discretion power, the text, jurisprudence, and framing history do little to define the boundaries of that power. It is clear that the Clause empowers the President to exercise enforcement discretion, but it also imposes an obligation to see that laws, as a general matter, are executed consistent with Congress's dictates. Given these considerations, an appropriate constitutional limiting principle must take full account of both the enforcement discretion authority the Clause bestows on the President, and the limit the Clause imposes on the President to prevent usurpation of the legislative function.[73]

The core constitutional tension generated by the use of the "take care clause" in deregulation is, as yet, not fully resolved and is likely to be settled only through judicial action in specific cases.

C. Appointment, Removal, Management, and Communication

Some deregulation occurs through the president's executive power to appoint (in some cases, with the advice and consent of the Senate) and remove high-level government officials, including cabinet members.[74]

> Cabinet members are the president's men and have been ever since the days of Washington. America's first president leaned on his cabinet because he had hand-picked this team, according to the Constitution's explicit appointment rules, and because these powerful lieutenants answered directly to him under the Article II opinions clause, which encouraged presidents to require reports from the principal officers, elsewhere described as the head of each executive department.[75]

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[73] Markowitz, *supra* note 69, at 518–19.

[74] *See* Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 527 (2016) ("The President appoints agency heads with the advice and consent of the Senate and, with the exception of independent agencies, can remove them at will."); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 229–30 (1987) ("[T]he Constitution provides safeguards for their independent execution by requiring that at least the 'heads' of executive 'departments' be appointed by the president and that the power of removing executive branch appointees remain with the president or the president's subordinates." (footnotes omitted)).

[75] Akhil Reed Amar, *The President, the Cabinet, and Independent Agencies*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 36, 43 (2010); *see also id.* at 47 ("[C]abinet officers answer to the President, not vice versa. He can choose to consult them, but the buck stops with him."); *see also* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008) ("Presidents . . . have been making novel and aggressive use of their powers of appointment to remake agencies in their own image.").

A president who has deregulatory objectives is likely to appoint federal officials in and outside the White House that will be faithful to his or her deregulatory aims.[76]

The number of federal officials that can be appointed by the president has grown substantially over the course of recent administrations, widening the potential group of political adherents to the policy goals of the chief executive.[77] Among other things, a president's choice of or failure to make executive branch appointments may forestall regulatory initiatives or enforcement or otherwise serve deregulatory aims. To many observers, the Trump administration's initial cabinet nominees, some of whom opposed major aspects of the very regulatory regimes they were being appointed to manage and enforce, telegraphed the intent to follow through on campaign promises to deregulate.[78]

Having said that, delayed appointments and frequent cabinet member turnovers have characterized the first two years of the Trump administration.[79] While a president's ability to unilaterally fire cabinet officials is not well grounded

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[76] *See*, *e.g.*, Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 411 (2009) ("Presidents have used their appointments power to ensure agency loyalty to the President's agenda."); Michael A. Fitts, *The Paradox of Power in the Modern State: Why A Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 902 n.78 (1996) ("The critical points for the president are to appoint subordinates faithful to his goals and interests and to ensure the receipt of reliable information about their activities that are contrary to these interests."); Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1664 (2016) ("Presidents act strategically in making appointments. The appeals of party allegiance and patronage remain strong for ensuring loyalty and rewarding support.").

[77] *See* Barron, *supra* note 75, at 1123 ("[T]he most thorough studies find that since World War II, there has been a significant expansion in the number of political appointees within agencies . . . ."); *id.* at 1129 ("[A]t least since 1980, Presidents have begun to assert an unprecedented degree of direct control over the selection process, exercising it in a manner that places a premium on loyalty and ideological affinity.").

[78] *See* Nick Timiraos & Andrew Tangel, *Donald Trump's Cabinet Selections Signal Deregulation Moves Are Coming*, WALL ST. J. (Dec. 8, 2016), http://www.wsj.com/articles/donald-trump-cabinet-picks-signal-deregulation-moves-are-coming-1481243006.

[79] *See* Charles S. Clark, *Vacancy Rate for Top Agency Jobs Continues to Set Records*, GOV'T EXEC. (Aug. 1, 2018), http://www.govexec.com/management/2018/08/vacancy-rate-top-agency-jobs-continues-set-records/150224/; John Fritze, *Trump Claims Democrats 'Obstruct' His Nominees, But It's Much More Nuanced Than That*, USA TODAY (May 20, 2018), http://usat.ly/2GysPgg; Maggie Haberman & Ron Nixon, *Trump Considers Staff Shake-Up in White House and Homeland Security*, N.Y. TIMES (Nov. 13, 2018), http://nyti.ms/2z8rWu6; Zeke Miller & Ted Bridis, *The Trump White House Is Setting Staff Turnover Records*, BUSINESS INSIDER (July 20, 2018), http://www.businessinsider.com/trump-white-house-staff-turnover-records-2018-7. Websites track current information on both appointments and turnover. *See*, *e.g.*, Kathryn Dunn Tenpas et al., *Tracking Turnover in the Trump Administration*, BROOKINGS INST. (Nov. 7, 2018), http://brook.gs/2FKYknT; *Tracking How Many Key Positions Trump has Filled So Far*, http://wapo.st/appointee-tracker?tid=ss_tw (last visited Dec. 18, 2018). The current presidential administration is certainly not the first to have suffered cabinet strife that led to reshuffling. George Washington, the first U.S. president, dismissed a cabinet member. "In 1795, within days of receiving intelligence, raising grave doubts about the fitness of his second Secretary of State, Edmund Randolph, whom he had appointed to replace Jefferson, Washington muscled Randolph out of office." Amar, *supra* note 75, at 43.

in the Constitution, it now is well accepted.[80] Unstable leadership means little regulation may be adopted or enforced; but a lack of stable cabinet leadership also may mean that less formal deregulation may take place.

Nevertheless, changes in executive department heads in the cabinet may have the purpose or effect of fostering deregulatory purposes. A cabinet official or other advisor who serves at the pleasure of the president may, for example, be fired if she fails to hew to the White House deregulatory agenda. In any event, the president's control over these officials is relatively complete, and he or she can use presidential power to appoint and remove them to serve deregulatory and other political purposes.

The president also has the power to appoint the commissioners of independent federal agencies, with the advice and consent of the U.S. Senate.[81] While this appointment power is not absolute and the president typically has limited power to remove these federal officials,[82] the allegiance to the president of independent agency officials coming from the president's political party is somewhat expected. Commentators have observed that the chief executive may exercise at least some sway over independent agencies.[83]

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[80] *Id.* at 43-44.

[81] U.S. CONST. art. II, § 2, cl. 2 (giving the president "Power, by and with the Advice and Consent of the Senate, to . . . nominate, and by and with the Advice and Consent of the Senate, . . . appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ."); *see also* Margaret H. Lemos, *The Solicitor General As Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 195 ("The President appoints independent agency heads with the advice and consent of the Senate, but he has only limited power to remove them."); Hilary J. Allen, *Putting the "Financial Stability" in Financial Stability Oversight Council*, 76 OHIO ST. L.J. 1087, 1144 (2015) ("[M]ulti-member commissions of independent agencies are appointed with 'the advice and consent of the Senate.'" (footnote omitted)).

[82] *See*, *e.g.*, Jarrod Shobe, *Agencies As Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 GEO. WASH. L. REV. 451, 513-14 (2017) ("Most independent agencies . . . are required to have commissioners from both political parties who are appointed on a rolling basis and can generally only be removed by the President in extraordinary circumstances."(footnote omitted)); Paul R. Verkuil, *Jawboning Administrative Agencies:* Ex Parte *Contacts by the White House*, 80 COLUM. L. REV. 943, 955–56 (1980) ("[S]ome statutes establishing independent agencies authorize the President to appoint the chairman and place no restrictions on his power to remove that person as chairman. This power is limited in that all the President can do is return the particular chairman to the status of commissioner until his or her term expires."). *See generally* Raffel, *supra* note 62 (detailing the history the Supreme Court's interpretation of the Constitution's limits on the President's removal power).

[83] *See*, *e.g.*, Barron, *supra* note 75, at 1101 ("[I]t is well known that even nominally independent agencies are hardly immune from White House influence."); Shobe, *supra* note 82, at 513 ("Independent agencies are not entirely outside of the President's influence because their commissioners are appointed by the President and the President has other means of influence."); Verkuil, *supra* note 82, at 956 ("[T]he power suggests an ability to control agency policy by the use of removal or by the threat of it. This is one of the few techniques available to the President for increasing the accountability of independent agencies that does not brook confrontation with Congress.").

Some presidential deregulation is more direct and process-oriented, focusing on the adoption or repeal of regulations within the federal agencies.[84] Executive orders like the ones referenced in the beginning of this essay—calling for regulatory restraint or review—represent classic examples of this kind of president-led command-and-control deregulatory initiative in the contemporary administrative state. They have been especially popular since the 1970s.[85] Consistent with this trend, starting in the 1980s, federal agency rule making increasingly became subject to cost-benefit analysis as a means of assuring regulatory efficiency.[86] An additional emphasis on comparative risk assessment—or CRA—followed.[87] By placing specific constraints on the regulatory process, the president (as well as Congress) can accomplish deregulatory objectives.

Finally, some presidential deregulatory initiatives are more precatory or hortatory in nature. For example, a president may recommend to Congress that it engage in deregulation or may exhort governmental or industry leaders to voluntarily adopt or live by deregulatory rules or follow deregulatory rubrics. The State of the Union message is a popular vehicle for the promotion of deregulation.[88]

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[84] *See*, *e.g.*, Barron, *supra* note 75, at 1095–96 (referencing "White House efforts to countermand federal administrative agency judgments—whether by rejecting proposed actions or mandating new ones."); Jonathan B. Wiener & Daniel L. Ribeiro, *Environmental Regulation Going Retro: Learning Foresight from Hindsight*, 32 J. LAND USE & ENVTL. L. 1, 2 (2016) ("Regulatory Impact Assessment (RIA)—required by every United States (U.S.) President of the past four decades, and increasingly adopted in other countries—has emphasized prospective ex ante assessment of the future impacts of proposed new rules or rule revisions."). *See generally* Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

[85] *See* Bressman & Thompson, *supra* note 55, at 619-23 (describing deregulatory executive orders published by a number of presidents); Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 139, 141-42 (1996) (highlighting regulatory review executive orders issued by Presidents Carter and Clinton); Michele Estrin Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103, 1152 (2007) (describing regulatory review executive orders from President Nixon to President George W. Bush); Jerry L. Mashaw, *The Structure of Government Accountability: Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 409 (1996) ("By executive order, President Clinton directed all agencies to jettison at least fifty percent of their internal 'red tape.'" (footnote omitted)); Wiener & Ribeiro, *supra* note 84, at 17-18, 22-25 (cataloguing executive orders involving regulatory review from the Carter administration through the Obama administration).

[86] *See* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 575 (2015) ("Since 1981, federal agencies have been required to conduct BCA [benefit-cost analysis] as part of a regulatory impact analysis for all significant regulatory actions pursuant to executive order."); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 43-45 (1995) (assessing in summary fashion the modern history of cost-benefit analysis in U.S. regulatory review, later described in more detail).

[87] *See* Pildes & Sunstein, *supra* note 86, at 43 ("The goal of CRA is to ensure better priority setting by ranking risks in terms of their seriousness. CRA is concerned with ensuring that the most serious risks are addressed first, rather than with the more controversial determination of whether the benefits of any particular regulation exceed its costs.").

[88] *See*, *e.g.*, Bradley C. Bobertz & Robert L. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L. REV. 371, 392 n.113 (1993) (mentioning deregulation catalyzed by President George H.W. Bush during his 1992 State of the Union address); Cooper, *supra* note 52,

Moreover, "[w]here a statute vests an agency with decision-making discretion, it is entirely appropriate for the President to try to prod the agency in his favored direction although the agency must ultimately provide factual support for its rules."[89] This prodding may take a regulatory or deregulatory tack. It also seems important to note that "[t]he President . . . typically has great access to the media in efforts to influence political opinion."[90] This influence can be used to galvanize public support and impetus for deregulation.

D. Net Effects

The many formal powers of the president may operate in tandem with the informal procedural and expressive aspects of presidential governance to achieve deregulation through federal agency action and inaction, including through marked changes in agency policy and practice.

> Through a variety of means—including appointment and removal of agency personnel and presidential oversight—the President can alter agency policy dramatically. Particularly when ideological shifts occur in presidential elections, groups can expect to see important changes in agency choices and priorities . . . . Delegation and presidential control of the executive—under the influence of ideology—means winning groups can quickly turn into losing groups.[91]

In sum, in light of the substantial congressional delegation of rule-making authority to federal agencies and judicial deference to agency processes and determinations, the combined formal and informal sources of presidential authority over deregulation may facilitate the accomplishment of relatively large—and in some cases, sudden—politically infused changes from one presidential administration to another and during the course of individual administrations, as needed or desired.

Given the prospect of wide-ranging and swift deregulatory change through presidential action, commentators have undertaken the task of critiquing the president's role in governance from the standpoint of administrative or constitutional law. The work of many of these commentators is cited in this essay. These legal responses are essential but provide incomplete answers.

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at 181–82 (describing and excerpting from President Obama's 2011 State of the Union address in which he proposed the reduction of regulatory inefficiencies); Eisner & Kaleta, *supra* note 85, at 142 (referencing President George H.W. Bush's State of the Union emphasis on deregulation in 1992); Christopher Sands, *Restoring Respect for the Law in Canada-U.S. Commerce: The Regulatory Cooperation Council So Far*, 37 CAN.-U.S. L.J. 319, 325 (2012) (noting regulatory reform messages in State of the Union addresses made by Presidents Clinton and Obama).

[89] Gilman, *supra* note 85, at 1158.

[90] Vicki C. Jackson, *Honoring Dan Meltzer-Congressional Standing and the Institutional Framework of Article III: A Comparative Perspective*, 91 NOTRE DAME L. REV. 1783, 1796 (2016).

[91] Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 328–29 (1993).

Accordingly, this essay instead undertakes in Part IV to identify, describe, and characterize two core functions the president may optimally serve in promoting and achieving deregulatory objectives. The identified roles are in some ways archetypal. Yet, they also are ambitious and challenging. The observations provided in Part IV are intended to provide a novel assessment of the president's role in deregulation that offers useful counsel to a president with deregulatory goals and intentions.

IV. ASPIRATIONAL ROLES OF THE PRESIDENT AS A DEREGULATOR

The president's potential methods of engaging in deregulation cut across a number of categories of presidential roles and responsibilities. In deregulatory activities, the president may act as the nation's chief legislative critic (in using the veto power), chief law enforcement officer (in acting under the "take care clause"), chief executive (in appointing and removing federal officials, directing rule-making processes and activities of federal agencies, and suggesting legislation to Congress), chief administrator (in managing the activities of the executive branch), and chief communications officer (in engaging in internal and external messaging).[92] These job descriptions constitute simple labels for particular roles the president might serve in specific deregulatory contexts. A president may need to wear some or all of these hats in carrying out a deregulatory agenda that has a long-term prospect of success. Questions remain about if, when, and how the president should wear these role-defining hats. (In other words, it remains unclear if, when, and how a president should engage in any or all of these deregulatory functions.)

The complexity of the president's potential deregulatory position in our federal government offers the opportunity for creative conjecture. What, if any, common meta-themes might differentiate or unite these functional categories of activity in the successful execution of a deregulatory plan, especially as it may affect business interests?[93] What general aspects of the president's job in deregulating best capture and synthesize the many tools the president can use to effectuate successful deregulation? What contextual precepts outside the scope of administrative and constitutional law might guide the use by the president of his various deregulatory tools? I submit that two key aspirational presidential roles emerge to help answer these questions: the president as change leader and the president as fiduciary.

These two presidential roles transcend the bureaucratic, technocratic, rote pursuit of deregulatory change through the president's many available means for

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[92] Some of the labels I use here are customary or have at least been used informally by others in their work; some are *sui generis* to this essay.

[93] For these purposes, I benchmark the success of a deregulatory plan on evidence of long-term, sustained reduction in the number or nature of federal mandates applicable in a business decision-making or operational setting. Short-term reputational or political gains do not, for purposes of this essay, count as success.

achieving that change. I briefly explain, describe, and apply each in the remainder of this part of the essay. My objective in this endeavor is merely to encourage understanding of how a president's attentiveness to these roles may contribute to deregulatory efforts and to catalyze further thought on the president's place in the deregulatory process.

A. The President as Change Leader

In deregulating, the president is occupying the role of a change leader. A number of years ago, I had the opportunity to study and comment on change leadership in assessing reform efforts at the SEC.[94] This work, together with leadership training I have participated in, has taught me much about the impetus for and effects of change and what it means to lead change.

The process of change—and it is a process[95]—has been studied and theorized, in particular, by management and behavioral experts from academia and the professions with backgrounds in various disciplines. It also has been frequently and repeatedly operationalized, allowing for frequent observation. The inherent transformations are emotional as well as practical.[96] Change is uncomfortable for all, even if it generates net positive effects.[97] Change itself comes with a sense of loss for what was,[98] and the nature of a particular change almost always results in both winners and losers.[99]

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[94] Joan MacLeod Heminway, *Reframing and Reforming the Securities and Exchange Commission: Lessons from Literature on Change Leadership*, 55 VILLANOVA L. REV. 627 (2010) (hereinafter Heminway, *Reframing*); *see also* Joan MacLeod Heminway, *Sustaining Reform Efforts at the SEC: A Progress Report*, 30 BANKING & FIN. SVCS. POL'Y REPORT 1 (2011).

[95] *See generally* JOHN P. KOTTER & DAN S. COHEN, THE HEART OF CHANGE 3-7 (2002) (describing the flow and stages of change).

[96] *See*, *e.g.*, FRED A. MANSKE JR., SECRETS OF EFFECTIVE LEADERSHIP 85 (1987) (noting that the discomfort and uncertainty of change lead to "tension and stress."); *see also* Robert H. Lauer, *Rate of Change and Stress: A Test of the "Future Shoch" Thesis*, 52 SOCIAL FORCES 510, 510 (1974) (concluding that both the rate and kind of change that occurs plays a large part in whether change leads to stress).

[97] *See*, *e.g.*, MANSKE, *supra* note 96 ("[M]ost of us prefer the established routine. We are all creatures of comfort. We like the familiar because we can count on it. Surprises are uncomfortable, and change creates uncertainty."); *see also* Albert O. Hirschman, *Underdevelopment, Obstacles to the Perception of Change, and Leadership*, 97 DAEDALUS 925, 926 (1968) ("At all stages of development, men are loath to abandon the old clichés and stereotypes that have served them so well, for they make the world around the intelligible, comfortable, and meaningful . . . .").

[98] *See* Rosabeth Moss Kanter, *Ten Reasons People Resist Change*, HARV. BUS. REV. (Sept. 25, 2012), http://hbr.org/2012/09/ten-reasons-people-resist-chang ("Change interferes with autonomy and can make people feel that they've lost control over their territory. ").

[99] *See* John J. Chung, *From Feudal Land Contracts to Financial Derivatives: The Treatment of Status Through Specific Relief*, 29 REV. BANKING & FIN. L. 107, 151 (2009) ("[C]hange produces winners and losers"); H. James Dallas, *4 Must-Have Skills for Leaders to Manage Change*, FORTUNE (Oct. 22, 2015), http://fortune.com/2015/10/22/change-leaders-managers/ ("Every change is political because there will always be winners and losers. "); Michael Doran, *Legislative Compromise and Tax Transition Policy*, 74 U. CHI. L. REV. 545 (2007) ("[L]egal transitions produce winners and losers."); Michael C. Dorf & Charles F. Sabel, *A Constitution of*

Leadership, like deregulation, has many definitions and aspects.[100] I offer two similarly focused definitions here—one of leadership and one of a leader. Leadership is "the reciprocal process of mobilizing by persons with certain motives and values, various economic, political, and other resources in a context of competition and conflict, in order to realize goals independently or mutually held by both leaders and followers."[101] A leader has similarly been described as "a visionary who energizes others."[102] A 2012 book assesses the leadership of five modern presidents and identifies four positive leadership characteristics: compelling vision, the ability to implement that vision, an appropriately narrow focus, and an understanding of decision-making processes and effects.[103]

Leadership has context, and leaders can be categorized in numerous ways, including as change leaders. What makes a good change leader?

> Change leadership literature tells us that we should be looking for "wartime leaders"—"people who embrace major change because they see far more opportunity than threat in turbulence"—and "problem-finders"—individuals who "not only exhibit a curious mindset, but . . . also embrace systemic thinking."[104]

Yet, a president will not necessarily have those attributes.

Regardless, a change leader must recognize the dynamics and effects of change and must understand that merely *managing* a change process, while essential, is typically insufficient in making lasting change.[105] Effective change leadership requires knowledge of the progression of change. John Kotter, perhaps the best-known author on change leadership, identifies eight stages of successful organizational change: (1) "establishing a sense of urgency;" (2) "creating the guiding coalition;" (3) "developing a vision and strategy;" (4) "communicating the change vision;" (5) "empowering broad-based action;" (6) "generating short-term wins;" (7) "consolidating gains and producing more change;" and (8) "anchoring

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Democratic Experimentalism, 98 COLUM. L. REV. 267, 310 (1998) ("The first correction concerns the costs of shifting from the old world to the new. The shift . . . like any large change, produces winners and losers.").

[100] *See*, *e.g.*, John S. Burns, *Defining Leadership: Can We See the Forest for the Trees?*, 3 J. LEADERSHIP STUDIES 148, 149-50 (1996) (describing different approaches to defining leadership).

[101] JAMES MACGREGOR BURNS, LEADERSHIP 425 (1978); *see also* Alberto Silva, *What is Leadership?*, 8 J. BUS. STUD. Q. 1, 1 (quoting R.M STOGDILL, HANDBOOK OF LEADERSHIP: A SURVEY OF THEORY AND RESEARCH 7 (1974) ("[T]here are almost as many different definitions of leadership as there are persons who have attempted to define the concept.")).

[102] MANSKE, *supra* note 96, at 3; *see also* Judith M. Bardwick, *Peacetime Management and Wartime Leadership*, *in* THE LEADER OF THE FUTURE 131, 138-39 (Frances Hesselbein et al. eds., 1996).

[103] *See* MICHAEL E. SIEGEL, THE PRESIDENT AS LEADER (2012).

[104] Heminway, *Reframing*, *supra* note 93, at 637.

[105] *See* JOHN P. KOTTER, LEADING CHANGE 30 (1996) ("Managing change is important . . .. But for most organizations, the much bigger challenge is leading change. Only leadership can blast through the many sources of . . . inertia. Only leadership can motivate the actions needed to alter behavior in any significant way. Only leadership can get change to stick . . .").

new approaches in the culture."[106] Kotter notes that the task of changing human behavior is "the most fundamental problem of all the stages."[107]

Federal deregulation represents change, but it is not organizational change. Rather, it is a change in rules that guide the conduct of an entire nation. Nevertheless, if we analogize the United States to a business organization, the teachings of Kotter's eight-stage change process reveal its potential relevance to the deregulatory change process. An appreciation for the stages and their sequencing can serve as a guide to the president in establishing, articulating, and consummating a plan for achieving deregulatory objectives.

Specifically, Kotter's stages involve the following activities that may provide useful guidance in executing on a president's deregulatory agenda:

- Getting the constituents ready for—and even excited about—change;
- Assembling appropriately skilled teams to accomplish the necessary work;
- Planning, communicating, and facilitating the change;
- Ensuring some early successes;
- Consolidating gains from and building on those victories; and
- Culturally rooting and embedding the change.

This ordered set of undertakings offers a way for a president to create, harness, and moor change-momentum using the many available deregulatory methods set forth in Part III. Collectively, this description of the principal phases of change also provides information that enables the president to establish and exercise leadership, rather than merely use and enhance managerial prowess.[108]

It is important to realize that change leadership under Kotter's model encourages lasting change within an institution. This objective may be significant in president-led regulation and deregulation as a means of avoiding a disruptive regulatory revolving door—a situation in which successive new presidential administrations introduce divergent, even contradictory, regulatory frameworks or

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[106] *Id.* at 21.

[107] KOTTER & COHEN, *supra* note 95, at 6.

[108] A purely managerial focus in the presidency has been the focus of some criticism. *See*, *e.g.*, K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 32-33, 117-18 (2016) (offering critiques of managerialism in U.S. federal government); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 407–08 (1996) ("Without a tedious recounting of the linked history of presidential administrative initiatives against the backdrop of ever-changing American managerial enthusiasms, it is safe to say that none of our 'Chief Executives,' or their COOs, have been immune to the management fraternities' panaceas dujour."); Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1533 (2015) ("[P]ublic administration's turn towards greater managerialism, relying on general management and organizational principles drawn from fields of business and private organizations, makes efforts to inject the distinctly public accountability concerns of administrative law appear anachronistic.").

rules.[109] In business regulation, wide pendulum swings in rules, even if accomplished in stages, affect and can dislocate markets.[110]

B. The President as Fiduciary

The president, as a change agent and leader, also acts as a fiduciary in deregulating. Fiduciaries exercise their discretion for the benefit of others, not for themselves.[111] Because of the danger that they will stray from that mission and

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[109] *See*, *e.g.*, William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1081 (2017) ("[D]uring 2017 the Trump administration overtly declared the goal of dismantling the CPP and started down that path; it also commenced efforts to reverse other climate regulatory initiatives."); David H. Getches, *The Legacy of the Bush II Administration in Natural Resources: A Work in Progress*, 32 ECOLOGY L.Q. 235, 245 (2005) (describing changes in natural resources regulation from administration to administration and observing that "[i]t is relatively easy for a new administration to reverse administrative regulations."); G. Emlen Hall, *The Forest Service and Western Water Rights: An Intimate Portrait of* United States v. New Mexico, 45 NAT. RESOURCES J. 979, 981 (2005) (noting, with respect to forestry regulation, that "[d]ifferent administrations have entered the breach with contradictory rules."); Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 231 (2005) ("A change in administration can interrupt and even reverse regulations that are in an agency's regulatory pipeline on the way to becoming final."). In some cases, outgoing presidential administrations will engage in midnight regulation, adopting last-minute rules that are likely to be withdrawn by the subsequent administration. *See* Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 286 (2013) ("The phenomenon of late-term regulatory activity has been called 'midnight regulation,' based on a comparison to the Cinderella story in which the magic wears off at the stroke of midnight."); Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 163–64 (2009) ("The term midnight regulations describes the dramatic spike of new regulations promulgated at the end of presidential terms, especially during transitions to an administration of the opposite party.") This process is an example of poor (or perhaps nonexistent) change leadership.

[110] *See* Jay Clayton, Chairman, U.S. Sec's & Exch. Comm., Remarks at the Economic Club of New York (July 12, 2017), http://www.sec.gov/news/speech/remarks-economic-club-new-york ("Incremental regulatory changes may not seem individually significant, but, in the aggregate, they can dramatically affect the markets."); Cecilia C. Lee, *Reframing Complexity: Hedge Fund Policy Paradigm for the Way Forward*, 9 BROOK. J. CORP. FIN. & COM. L. 478, 494 (2015) ("Safeguards against the inevitable ebb of support for regulation are . . . needed to withstand shifts in political economy."); George J. Papaioannou & Adrian Gauci, *Deregulation and Competition in Underwriting: Review of the Evidence and New Findings*, 5 J. INT'L BUS. & L. 47, 57 (2006) (noting that the findings of a study on underwriting deregulation "provide evidence for the pro-competitive effect of the deregulation.").

[111] *See*, *e.g.*, Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 128 (2006) ("The fiduciary concept presumes that fiduciaries will manifest altruism (or, at very least, honesty) in the exercise of their entrusted authority. Fiduciary relations stand or fall on 'the fiduciary's commitment to abandon self-interest and promote her beneficiary's welfare instead of her own.'" (footnotes omitted)); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 908 (1988) (averring that common characteristics of a fiduciary include "the fiduciary's commitment to exercise discretion in a fashion that affects the interests of the beneficiary and the fiduciary's obligation to exercise that discretion on the beneficiary's behalf."); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1825 (2016) ("A fiduciary relationship traditionally emerges in contexts where one person (the fiduciary) has discretionary power over the assets or legal interests of another (the beneficiary).");

pursue self-interest or otherwise shirk from performing, legal and economic principles dictate that they owe special duties to those for whom they act—duties of loyalty and often also related duties of care.[112] In essence, fiduciaries are afforded discretion to act within the scope of their delegated authority, but they are held accountable for their conduct in doing so.

It may be useful to understand the role of a fiduciary by conceptualizing the relationship in which the fiduciary operates. It is a relationship "of power and dependence."[113] Professor Tamar Frankel, an acknowledged international expert in the law of fiduciary relationships, offers that fiduciary relationships have four principal attributes: the offering of services, entrustment of property or power, the risk of malfeasance, and a paucity of otherwise available bargained-for, market-based, or cost-effective protections for the entrustor of the property or power.[114] "In such situations," she notes, "it is likely that the parties will not interact unless the law intervenes to protect the interests of society in the provision of these services by meeting the needs of both parties . . . ."[115]

It is not customary for us to think of elected officials as fiduciaries. We more commonly classify classic private actors and relationships—trustees of property, corporate officers and directors, and legal agents like lawyers and securities brokers—as fiduciaries.[116] But fiduciary relationships continue to be identified and explored in other contexts, including in government.[117]

Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 516 (2015) ("Fiduciary mandates typically involve one person administering the affairs or property of another. Fiduciary mandates of this sort implicate a conventional fiduciary relationship to which the fiduciary and beneficiary are parties."); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002) ("[F]iduciary relationships form when one party (the 'fiduciary') acts on behalf of another party (the 'beneficiary') while exercising discretion with respect to a critical resource belonging to the beneficiary.").

[112] *See* Criddle, *supra* note 111, at 130 ("As an ethical and legal imperative, fiduciaries are to act 'primarily for the benefit of [their beneficiaries] in matters connected with [the] undertaking,' performing their designated roles with due diligence and unqualified fidelity. In traditional legal parlance, these responsibilities are grouped under two general headings: the 'duty of loyalty' and the 'duty of care.'" (footnotes omitted)); Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 975-79 (2013) (describing and labeling fiduciary duties, including loyalty and care); Smith, *supra* note 111, at 1409 (noting the distinctiveness of the duty of loyalty in fiduciary relationships, but also discussing the potential for a duty of care).

[113] Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1146 (2014).

[114] TAMAR FRANKEL, FIDUCIARY LAW 6 (2011).

[115] *Id.*

[116] *E.g.*, Leib & Galoob, *supra* note 111, at 1825-26 ("Standard private-law examples of fiduciary relationships include attorney-client, trustee-beneficiary, corporate officeholder-shareholder, and guardian-ward."); Miller & Gold, *supra* note 111, at 516 ("Several important legal relationships—the parent-child relationship, the lawyer-client relationship, and the doctor-patient relationship—have been elaborated from a fiduciary perspective.").

[117] *See*, *e.g.*, FRANKEL, *supra* note 114, at 279-87 (exploring the connection between private and public fiduciary law); Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 994 (2017) ("[A]side from a handful of well-established fiduciary relationships such as trustee-beneficiary, guardian-ward, and attorney-client, there is considerable uncertainty about just how broadly the duty of loyalty extends."); Sung Hui Kim, *The Last Temptation of*

Indeed, the scope of responsibility and activities of the president and other elected government officials is characterized by service to the nation's populace emanating from the entrustment of power (and, in some cases, funding or property) by that populace, and the exercise of that responsibility and engagement in these activities pose a risk that the official will act in a disloyal or careless manner. One scholar concludes that a general purpose of the Constitution "was to erect a government in which public officials would be bound by fiduciary duties to honor the law, exercise reasonable care, remain loyal to the public interest, exercise their power in a reasonably impartial fashion, and account for violations of these duties."[118] Described in that way, the president is caught in the classical discretion/ accountability struggle that characterizes fiduciary relationships. Although the precise contours of the president's role as a fiduciary have not yet been fully explored, it is enough here to note the existence of the relationship as a basis for analysis.[119]

As applied to the president's deregulatory conduct (and without engaging in debate about the extent to which constraints on presidential behavior are enforceable or punishable by Congress, the judiciary, or the voting public in particular contexts), the president as fiduciary is guided in planning and executing a deregulatory agenda by the notion that the project of deregulation should benefit others (in this case, the governed public electorate as a whole—not merely those in the majority or in the president's political party[120]) rather than serving the financial, reputational, or political interests of the president or his family, affiliates, or associates, or others beholden to him.[121] The presumptive resulting duties of

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Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption, 98 CORNELL L. REV. 845, 852 (2013) (arguing "that the majority view—that judges could not recognize legislators as fiduciaries under federal insider trading law—has been and continues to be wrong."); Donna M. Nagy, *Insider Trading, Congressional Officials, and Duties of Entrustment*, 91 B.U. L. REV. 1105, 1138 (2011) ("Members of Congress are public fiduciaries who owe duties of trust and confidence to a host of parties including the citizen-investors whom they serve, as well as the federal government, fellow members of Congress, and other government officials who rely on their loyalty and integrity.").

[118] Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1178 (2004).

[119] Commentators note that the existence of a fiduciary relationship is a mere first step in any applied problem-solving because fiduciary relations are highly contextual. *See*, *e.g.*, DeMott, *supra* note 111, at 908 ("The scope of the fiduciary's obligation, as well as the obligation's precise formulation, necessarily varies with the context of the relationship."); Miller, *supra* note 112, at 971 ("The mandates under which fiduciaries act differ widely across categories of fiduciary relationship.").

[120] *Cf.* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 448 (2010) ("[T]he notion that presidents act as proxies for majoritarian preferences does not furnish a credible account of popular representation in agency rulemaking."). Yet, "the will of the people is an inscrutable, Delphic guide. Rarely does public opinion crystallize into a clear national consensus on questions of federal regulation." *Id.* at 503 (footnote omitted). A fiduciary serving beneficiaries with diverse—even divergent—interests on specific questions must undertake the difficult task of determining the collective best interests of the whole.

[121] This observation is consistent with notions of public law. *See* Criddle, *supra* note 116, at 997 ("[R]epublicans argue that public law safeguards liberty by ensuring that public officials wield their entrusted powers as a 'public trust'—i.e., subject to fiduciary norms of loyalty and care.");

loyalty and care also would help direct the president in leading and managing the process of deregulation (and, in the event of a breach, ostensibly would provide a basis for appropriate action to those with enforcement or punitive authority). In these aspects, the fiduciary role of the president in deregulation is consistent with the paradigm of the president as change leader, with both roles steering a more conscious engagement with the change process that deregulation represents. Both roles involve attentiveness to the regulated as well as the regulators.

V. CONCLUSION

As national governance in the United States has focused increasingly on the executive branch (and the administrative state more generally), the president's role has become progressively more central and significant. The U.S. presidency is characterized by promises and expectations.

> The American public harbors high and rising expectations about what a President should be able to accomplish. The unity and "personality" of the presidential office long has made it the dominant focus of public attention devoted to the political world . . . . More than any other player in the political system, the President is in practice, even if not in constitutional theory, responsible for governance.[122]

As a result of campaign promises, the expectations for the Trump administration are lofty. They include unconcealed anticipation that federal regulatory burdens will be lessened.

In light of the current and continuing interest in deregulation, this essay is designed to illuminate the nature of the president's position in the federal deregulatory process. The president may engage with federal deregulation in a variety of ways: through the veto power, the "take care clause," and general administrative functions (including through the appointment, removal, and direction of federal officials), as well as through less formal administrative and public communications. This cataloguing of deregulatory methods is intrinsically useful. It documents the array of approaches available to the president in pursuing deregulation.

Yet, especially in light of the complex matrix of deregulatory options at the president's disposal, it seems important to theorize how the president might

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Natelson, *supra* note 118, at 1083 (noting, in addressing the Equal Protection Clause of the Constitution, that "the underlying standard—that government agents have an obligation of impartiality to those they serve—was part of a fiduciary ideal of government service that was omnipresent years earlier, when the Constitution was drafted, debated, and ratified."). Frankel observes: "The United States Constitution is the fiduciary law of public power, just as fiduciary law is the constitution of private power." FRANKEL, *supra* note 114, at 279. Agency and contract theory also have been used to support the existence of fiduciary relationships in federal government. *See* D. Theodore Rave, *Politicians As Fiduciaries*, 126 HARV. L. REV. 671, 711 (2013) (summarizing theoretical justifications for politicians' fiduciary duties).

[122] Kagan, *supra* note 53, at 2310 (footnote omitted).

use these tools in successful deregulatory efforts. This essay suggests that the president assume the roles of change leader and fiduciary in meeting deregulatory promises and expectations. The role of change leader focuses the president on processes geared to foster lasting change; the role of fiduciary focuses the president on trustworthy conduct in a relationship with the public that allows for discretion yet demands accountability. The two roles are not mutually exclusive. They have the capacity to work together as complements.

The theoretical observations made in this essay are intended both to illuminate the president's place in the deregulatory process and to provide useful context and counsel for a president's pursuit of a deregulatory mission. In sum, a president can engage the deregulatory task in many ways, but the success of the deregulatory venture may depend on a thoughtful approach that combines leadership with trust. The overall recommendation? A president may be well advised to undertake deregulation as a change leader and fiduciary.

Of course, as with many theoretical conceptions, actual results may vary. The devil's in the details.[123] The efficacious practical application of any or all of the contributions made by this essay remains to be seen. Implementation logically would be customized to specific deregulatory initiatives, plans, and contexts. Given current and ongoing demands for loosening the strictures of federal regulation, perhaps one or more of the ideas shared here will be tested.

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[123] As to the derivation of this oft used expression, one writer offers:

> As it turns out, the original phrase was "God is in the details." The phrase has been attributed to Flaubert, but of course he would have written it in French as "Le bon Dieu est dans le détail." The phrase has also been attributed to artist Michelangelo and to architect Ludwig Mies van der Rohe.

Suzanne E. Rowe, *Mea Culpa: Mistakes of A Writing Column Writer*, OR. ST. B. BULL., Aug. 2008, at 13.