Transactional Administration

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The Trump Administration has pursued policy through deals with the private sector—not as an extraordinary response to extraordinary events, but as part and parcel of the ordinary work of government. Jobs are being onshored through a series of deals with employers. Infrastructure will be built through joint ventures where private parties will own and operate assets like roads and airports after arranging for government financing assistance. The Administration has been staffed with dealmakers and the tone is one of transactional administration.

We evaluate how this transactional administrative state will work as a matter of law. Executive action done by deals, instead of rules or adjudications, exemplifies the presidentialism celebrated by Justice Elena Kagan, Adrian Vermeule, and Eric Posner, but we think it goes too far. Because presidential dealmaking risks dispensing with process and overly empowers the Executive, we identify ways that it can be controlled through principles of transparency, rules of statutory interpretation, and policymaking best practices such as waiting periods before deal execution and equivalent treatment of similarly situated private parties.

TABLE OF CONTENTS

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INTRODUCTION

What if deals, instead of rules, became a principal mechanism for the promulgation of government policy, overseen by an Executive who promises to be the dealmaker in chief?[1]

Rules have been disfavored by the current Administration, which has tried to impose strong constraints on the practice. In his first address to Congress, President Donald Trump announced that his Administration had "undertaken a

1. *See, e.g.*, Jackson Diehl, Opinion, *The Dealmaker in Chief in a Dangerous World*, WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/opinions/global-opinions/the-dealmaker-in-chief-in-a-dangerous-world/2017/01/22/ceddd232-de69-11e6-918c-99ede3c8cafa_story.html?utm_term=.6478fd9b2972 [https://perma.cc/ZH6E-G4QJ] ("Those seeking to extract meaning from Donald Trump's foreign policy declarations usually land on the idea that he's planning to make himself dealmaker in chief."); *Bart Chilton: Trump Is Now the Deal-Maker-in-Chief*, FOX BUS. (Dec. 7, 2016), http://www.foxbusiness.com/politics/2016/12/07/bart-chilton-trump-is-now-deal-maker-in-chief.html [https://perma.cc/3RFD-3RPD] (quoting former Commodity Futures Trading Commissioner Bart Chilton: "He [Trump] sort of did a metamorphosis. It was a monumental metamorphosis in my view. And he has appeared presidential. He's like deal maker-in-chief now." (alteration in original)).

historic effort to massively reduce job-crushing regulations."[2]

The federal government has tried to make policy through deals before. It responded to the 2008 financial crisis by using corporate mergers to solve regulatory problems to act quickly to stem financial calamity.[3] But that was an emergency. In this Article, we analyze dealmaking as an ordinary policymaking tool, discuss the problems created by the practice, identify how the current Administration nonetheless uses the tool, and identify some useful constraints on it.

With a dealmaking President in the White House—an entrepreneur who cowrote a book titled *The Art of the Deal*,[4] who uses the language of deals to describe his approach to policy, and who has identified a number of ways the private sector can be utilized to meet his goals—the state looks ready for a privatization of policymaking. In this Article, we characterize the approach as "transactional administration."

In particular, the new Administration has vowed to use deals with private companies to advance public policy.[5] Even before being inaugurated, President Trump concluded a series of bargains designed to cut deals with companies to keep jobs in the United States.[6] Since entering office, he continued that practice and has repeatedly promised to revitalize American infrastructure through public–private partnerships. He has also promoted and touted his willingness to deal on areas involving immigration reform, initiating his bargaining positions through executive orders on immigration and Deferred Action for Childhood Arrivals.

We can understand the use of deals in some circumstances. The financial crisis deals were a form of necessary regulatory arbitrage by the government, which is constrained by, among other things, notice-and-comment obligations, compensation requirements for takings, and principles of shareholder democracy that shield investors from public or private oppression.[7] One of the purposes of those deals

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2. President Donald J. Trump, Joint Address to Congress (Feb. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress [https://perma.cc/G7PJ-TSS5].

3. *See generally* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009) (detailing the various transactions the government arranged and structured among financial institutions during the financial crisis).

4. DONALD J. TRUMP WITH TONY SCHWARTZ, TRUMP: THE ART OF THE DEAL (1987).

5. This approach is a different modality than deals with foreign governments or with the American people. *See, e.g.*, Franklin Delano Roosevelt, *"I Pledge You—I Pledge Myself to a New Deal for the American People." The Governor Accepts the Nomination for the Presidency, Chicago, Ill. July 2, 1932*, *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 647 (1938).

6. *See* Margaret Hartmann, *Trump Takes Credit for Keeping Ford Factory in U.S.—But It Was Never Moving*, NEW YORK (Nov. 18, 2016, 4:57 AM), http://nymag.com/daily/intelligencer/2016/11/trump-claim-he-kept-ford-factory-in-u-s-it-wasnt-moving.html [https://perma.cc/W7UL-TEA8]; Nelson D. Schwartz, *Trump Sealed Carrier Deal with Mix of Threat and Incentive*, N.Y. TIMES (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/business/economy/trump-carrier-pence-jobs.html [https://nyti.ms/2l8mHEZ].

7. Regulatory arbitrage is usually associated with the private sector, but government actors can also make use of the strategy. As Victor Fleischer has explained, "Regulatory arbitrage exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage

was to bend the procedural requirements that usually accompany policymaking in the service of exigency.[8]

But deals present different concerns when used to implement the ordinary policy goals of an administration. Moreover, understanding that the Administration is making policy in a novel way offers a more complete picture of the current regime. Although some critics of the Administration have characterized it as lawlessly presidentialist, our account shows just how the Executive is realizing its policymaking goals. It also offers a corrective to those who see the Administration as only deregulatory; we think it is better characterized as partially deregulatory and partially transactional.

The Trump Administration has pursued transactional administration in three ways. The first is exemplified by its onshoring program. One of the first economic announcements made by then President-elect Trump was a deal made to keep an air conditioning firm from moving jobs to Mexico.[9] Local tax breaks were exchanged for a promise not to move the jobs overseas, and the effort was characterized in the press as "a deal . . . brokered to keep American jobs in the U.S."[10] Such dealmaking has also encompassed broader measures such as promises not to retaliate against certain companies in exchange for steps taken to keep or locate

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of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision." Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010); *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 70 (2008) (describing a "multiple-regulators problem and the regulatory arbitrage opportunity it creates"); Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 227 (1997) ("Regulatory arbitrage consists of those financial transactions designed specifically to reduce costs or capture profit opportunities created by differential regulations or laws."). Governmental regulatory arbitrage works in a similar way: The Government uses transactions to evade its own regulatory constraints and so reduces the cost of a preferred approach to policymaking.

8. *See* Davidoff & Zaring, *supra* note 3, at 466–77; *see also* Richard A. Epstein, *The Government Takeover of Fannie Mae and Freddie Mac: Upending Capital Markets with Lax Business and Constitutional Standards*, 10 N.Y.U. J. L. & BUS. 379, 408 (2014) (observing that "private shareholders of Fannie and Freddie get nothing in exchange for the cash flow that the government unilaterally took"); Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 58 (calling the Troubled Asset Relief Program (TARP) a "constitutional monstrosity" that violates the nondelegation doctrine and the Appointments Clause, among other problems); Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 430 (2015) (shareholders alleging Government violation of Takings Clause through its bailout of AIG); Alley's of Kingsport, Inc. v. United States, 103 Fed. Cl. 449, 451 (2012) (former automobile dealers alleging uncompensated taking of their property rights under Government's application of TARP requiring Chrysler to terminate dealerships); Complaint at 2, Rafter v. Dep't of Treasury, 118 F. Supp. 3d 8 (D.D.C. 2015) (No. 14-1404), 2014 WL 4059217 (shareholders alleging "unlawful and enormous government expropriation" in relation to Freddie Mac and Fannie Mae takeovers).

9. *See, e.g.*, Tony Romm, *Trump Again Threatens Businesses That Offshore Jobs, Factories*, POLITICO (Jan. 11, 2017, 12:37 PM), http://www.politico.com/story/2017/01/trump-presser-threatens-businesses-offshore-jobs-233484 [https://perma.cc/9QGL-LMXQ] ("Trump has been 'meeting with a lot of companies,' including international players like SoftBank, which owns Sprint, and Alibaba, a Chinese conglomerate . . . .").

10. Daniel Gross, *America Doesn't Need a Dealmaker in Chief*, SLATE (Dec. 1, 2016), http://www.slate.com/articles/business/moneybox/2016/12/america_doesn_t_need_donald_trump_to_be_dealmaker_in_chief.html [https://perma.cc/2PV7-GT5C].

jobs in the United States.[11]

Second, it has tried to develop projects through shared ownership arrangements with the private sector instead of through government programs.[12] The new President has indicated his support for this method of policymaking with his oft-delayed but oft-touted infrastructure initiative.[13] Under this approach, the government, to meet a public goal such as stimulating the economy, would act as a partner of private developers who pitch and ultimately win infrastructure projects that they then fund with access to government financing and private financing. In the end, the private investors receive an ownership stake in the asset. In the case of the Trump Administration, $200 billion in tax credits has been mooted that would be leveraged into $1 trillion of infrastructure spending, suggesting that the private ownership stake in the resulting projects will be large.[14]

This sort of public–private partnership creates institutions that provide public services but that are owned, operated, or both, by the private sector—a rare thing in the United States.[15] Airports might belong to a company who would make money by charging airlines for gate access, customers for the use of the airport, and vendors for the right to sell products to those customers while they wait for their flights.[16] Road-building programs might be reoriented away from freeways toward toll roads owned and operated by a private party and financed through toll revenues and the ancillary services provided on the tollway.[17] Other government services can be privatized in this way; public universities and Internet access

11. Critics such as Sarah Palin characterized it as "crony capitalism." *See* Sarah Palin, Opinion, *Sarah Palin: But... Wait... The Good Guys Won't Win with More Crony Capitalism*, YOUNG CONSERVATIVES (Dec. 2, 2016, 12:52 PM), http://www.youngcons.com/sarah-palin-but-wait-the-good-guys-won't-win-with-more-crony-capitalism [https://perma.cc/2PKD-VP7B].

12. Infrastructure projects have, in the past, been implemented by funding agencies to engage in public works. Such funding provided a means to build the works programs of the Great Depression. *See* Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 955 (2000) ("New Deal agencies included key employment agencies, such as the Works Progress Administration . . . ."). *See generally* NICK TAYLOR, AMERICAN-MADE: THE ENDURING LEGACY OF THE WPA: WHEN FDR PUT THE NATION TO WORK (2008) (detailing various construction and related projects of the Works Progress Administration in the midst of the Great Depression). Even more commonly, a public agency will preside over a bidding process in which companies can participate. For a discussion, see Bynum v. FMC Corp., 770 F.2d 556, 560 (5th Cir. 1985) (providing "a brief overview . . . of the [modern government contractor] defense's historic analogues and the reasons provided by federal and state courts for the adoption of the modern defense.").

13. The list of infrastructure projects being mulled by the President have been put on a list that notes whether they have the potential to be privatized. Lynn Horsley et al., *Exclusive: Trump Team Compiles Infrastructure Priority List,* MCCLATCHY DC BUREAU (Jan. 24, 2017, 4:57 PM), http://www.mcclatchydc.com/news/politics-government/white-house/article128492164.html [https://perma.cc/TF67-8EKH]. We discuss this *infra* Section II.C.

14. *See infra* notes 95–96 and accompanying text.

15. Public–private partnerships are not unprecedented, *see infra* Section II.B.2, but as we will see in Section II.C, the Trump Administration has embraced them in an unprecedented way.

16. Alternatively, the airport might be the subject of a long-term lease to a private sector operator.

17. *See infra* Section II.B.

programs already have looked to these partnerships to meet their missions.[18]

Third, transactional administration has become an ethos, where foreign policy, for example, is conceived as a set of deals—the "Iran Deal,"[19] the "China Deal,"[20] and a free trade deal with Mexico that the President has characterized as the "worst deal[] ever" and one that the Administration has started to renegotiate.[21] The government has been staffed with dealmakers, and dealmaking experience has been deemed a plus for agency leadership.[22] This ethos means that every policymaking problem might be addressed with a solution that involves a contract with the private sector. Most exotically, the President has mused about renegotiating the terms of the country's sovereign debt to resolve the country's deficit problems.[23] Such a negotiated workout with creditors would be a truly transformative deal, albeit one that could wreck the country's credit rating and tank its economic growth rate.

We see two implications for this sort of governance: one for administrative procedure and a second for the separation of powers.

Procedurally, dealmaking in the service of government policy is a way to get around the law's most onerous terms and process requirements without blatantly evading them.[24] It is a way to manage legality by enacting policy through

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18. *See* Rachel Lerman, *Public-Private Partnerships Are the Best Way to Expand Internet Access, Says Seattle Mayor*, GOV'T TECH. (Mar. 22, 2016), http://www.govtech.com/dc/articles/Public-Private-Partnerships-Expand-Internet-Access-Seattle-Mayor.html [https://perma.cc/N4LR-FQV7] (discussing public–private partnerships to expand Internet access in Seattle); *infra* note 115 and accompanying text (citing ways public–private partnerships can be utilized by educational institutions).

19. *See* Sarah Begley, *Read Donald Trump's Speech to AIPAC*, TIME (Mar. 21, 2016, 8:58 PM), http://time.com/4267058/donald-trump-aipac-speech-transcript [https://perma.cc/M8UZ-7CUF] ("My number-one priority is to dismantle the disastrous deal with Iran.").

20. *See* Stephen Collinson, *Trump and China on Collision Course*, CNN (Dec. 5, 2016, 9:05 PM), http://www.cnn.com/2016/12/05/politics/donald-trump-china-taiwan-clash [https://perma.cc/ZYC6-ABEX] ("He made clear that he's serious about his vows to wring a new deal from China on trade . . . .").

21. *See* Christian Gomez, *On Trump's Coattails,* NEW AM., Dec. 5, 2016, at 25, 28 (quoting Trump as characterizing NAFTA as "one of the worst deals ever made of any kind signed by anybody").

22. For example, President Trump has appointed experienced dealmakers like Steven Mnuchin as Treasury Secretary and Wilbur Ross as Commerce Secretary. *See* William D. Cohan, *America's New Dealmakers-in-Chief*, POLITICO (Dec. 15, 2016), http://www.politico.com/magazine/story/2016/12/steve-mnuchin-wilbur-ross-donald-trump-treasury-commerce-214529 [https://perma.cc/TL3C-4LE4].

23. *See infra* Section II.C.

24. *See* Davidoff & Zaring, *supra* note 3, at 466–68. In this sense, it is like guidance, which has long been criticized as an end run around the requirements of the Administrative Procedure Act. *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992) ("To use such nonlegislative documents to bind the public violates the Administrative Procedure Act (APA) and dishonors our system of limited government."); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 489 (1997) ("[B]y using policy statements to coerce compliance with a desired standard, an agency can circumvent the safeguards the three branches of government have developed to ensure that the agency's policy is legally, economically, and politically justified."); Robert A. Anthony & Michael Asimow, *The Court's Deferences – A Foolish Inconsistency*, 26 ADMIN. & REG. L. NEWS, Fall 2000, at 10, 11

unorthodox channels.[25] The implications of a widespread embrace of transactions as tools to make government policy will accordingly depend on one's attitude toward the administrative state as it currently exists. For those who believe that the administrative state has ossified the ability of the government to make policy, administration by deal is a remedy—a better alternative to notice-and-comment practice and a slow and protracted government contracting process.[26] As a matter of checks and balances, dealmaking privileges an executive model of governance. Congress cannot easily supervise the Executive's deals with the private sector, and the courts are unlikely to be able to review them, not least because of standing problems; for example, it is difficult to challenge the award of a contract to someone else without having been competing for the contract from the start.[27]

We approach transactional administration with some trepidation, although scholars of varying persuasions have argued that governance is either

(identifying "a powerful incentive for agencies to issue vague regulations, with the thought of creating the operative regulatory substance later through informal interpretations").

25. By relying on private channels to enact policymaking, deals avoid the administrative law requirements imposed on agencies. For the basics on this public–private distinction, see Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 576 (2000) ("[T]he Court has consistently narrowed or distinguished its own precedents in order to limit strictly the extension of constitutional constraints to private actors engaged in arguably public activities. The Court remains strongly committed to the public/private distinction on which the doctrine depends." (footnote omitted)); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369–70, 1373 (2003) ("A foundational premise of our constitutional order is that public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not. . . . The premise of the public-private divide in constitutional law is that the rules governing private actors should be politically rather than constitutionally determined.").

26. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992); *see also* David Freeman Engstrom, *Agencies As Litigation Gatekeepers*, 123 YALE L.J. 616, 672 n.180 (2013) (describing the "byzantine set of rules regarding government contracting"). Some of those byzantine rules have contemplated government oppression through contract, offering contractors a measure of relief in such cases. The leading case is *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976) (opining that relief may be had "when confronted by a course of Governmental conduct which was 'designedly oppressive'" (quoting Struck Constr. Co. v. United States, 96 Ct. Cl. 186, 222 (1942))).

27. *See* Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (noting standing to challenge government procurement decisions is based on "narrower standards" compared to standing under the Administrative Procedure Act); *see also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113 (1986) ("[I]n order to seek injunctive relief under § 16 [of the Clayton Act], a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 319 (1936) (permitting the plaintiffs' suit where they could "show the breach of trust or duty involved in the injurious and illegal action"). *See generally* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304–26 (1984) (discussing the history of doctrines of judicial deference toward government action in the United States). Governance by deal creates environments where competitors who are injured by government largesse directed at a peer and therefore have standing to sue under the competitive injury prong of standing doctrine might be unwilling to do so because they can seek their own sort of compensation through other deals.

normatively or descriptively best located in the hands of a powerful Executive. Justice Elena Kagan famously argued that administration centered in the presidency is attractive because of the coordinative powers and democratic legitimacy of the White House.[28] Adrian Vermeule and Eric Posner posited that unfettered presidential action was an inevitable consequence of emergencies and implicitly suggested that this was a good thing.[29] Governance by presidential deal is a logical endpoint of this sort of pro-presidentialist scholarship.[30]

In our view, it has always been better to ensure the importance of the institutional constraints imposed by the law, and we think policymaking through transactions should be viewed through a lens of authorization set forth in *Youngstown Sheet & Tube Co. v. Sawyer*.[31] As a matter of policy, using deals to routinely evade government processes affects core values and often lowers the quality of governance.[32] It threatens to unbalance the separation of powers because governance by deal allows the Executive to act decisively without broader participation, and hence with a higher chance that the policy incorrectly represents the popular will.[33] In most areas of domestic law outside of emergencies, we have traditionally accepted the higher transaction costs of implementing the public will, but transactional administration upsets this balance, especially when there is no emergency that could justify cutting corners.

Consequently, we worry about everyday transactional administration. Governance through dealmaking outside of a financial crisis ought to be conducted with specific constraints if it is to become an ordinary tool of policymaking rather than an extraordinary option. Deals should be publicly disclosed so the citizenry can scrutinize them. There should be a period of observation that follows the announcement of a deal to avoid some of the problems of overhasty deals that bedeviled the government's response to the financial crisis.

They should only be permitted when reasonable interpretations of governing law would permit them. And after the deal is done, due process, and perhaps the Takings Clause and Freedom of Information Act, requires that those adversely affected by the deal receive their day in court. Our analysis and recommendations are designed to address government by deal before it becomes an unconstrained *fait accompli*.

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28. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341 (2001).

29. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4–5 (2010).

30. *See* Daniel A. Farber, Presidential Administration Under Trump 3–4 (Aug. 9, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591 [https://perma.cc/4UJY-PE5R].

31. 343 U.S. 579 (1952).

32. *See infra* Section II.C.2.

33. *Cf.* JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009) (arguing that executive power in emergencies can allow for quick, decisive action as opposed to legislative action).

We contrast our account of administrative law in the Trump Administration with those that focus only on its deregulatory component,[34] which we briefly consider in section II.D.

In Part I, we define transactional administration, a form of governance by deal. The United States has purchased and sold critical assets as far back as the Louisiana Purchase, but the deals we analyze, and those the Administration has promoted, are ones that, unlike the Louisiana Purchase, rely on the Executive alone to act and are made with the private sector. In Part II, we take the lessons learned by this past experience and apply them to the new frontier of governance by dealmaking. We examine areas where government by deal may occur in the coming years, focusing on the use of deals to build infrastructure—a priority of the Trump Administration—and the use of deals with firms to meet some of its primary objectives, including keeping manufacturing jobs on shore. In Part III, we turn to the appropriate and possible parameters on government by deal to comport some fundamental principles of administrative law and the constitutional separation of powers. We then recommend some internal checks on Executive Branch decision making, along with requirements for disclosure. A brief conclusion follows.

I. DEFINING TRANSACTIONAL ADMINISTRATION

Can a contractual approach to administration work? In this Part, we recount some of the most salient examples of administration by dealmaking, including the Louisiana Purchase and the government's response to the 2008 financial crisis. One of the notable developments in administrative law scholarship has been the sense that locating policymaking priorities in the White House has been some combination of useful and inevitable. One way to understand transactional administration is to think of it as a way to realize this sort of executive primacy.

A. TRANSACTIONAL ADMINISTRATION IN PRACTICE

Presidents have been making deals since the early days of the Nation. One of Thomas Jefferson's most impressive achievements was a deal.[35] In 1803, President Jefferson signed an arrangement to purchase from France approximately 828,000 square miles, including the port of New Orleans, in what would

34. *See, e.g.*, Nadja Popovich & Livia Albeck-Ripka, *52 Environmental Rules on the Way Out Under Trump*, N.Y. TIMES (Oct. 6, 2017), https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html [https://nyti.ms/2xVTnW9].

35. Admittedly, the deal is distinct from the ones studied here because it was with a foreign government. An example of private dealmaking in foreign affairs is the deal between the Nixon Administration and foreign steel manufacturers to voluntarily limit their steel exports to the United States. *See* Michael William Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Laws*, 27 HARV. INT'L L.J. 99, 138 n.286 (1986). The restraint was challenged in the D.C. Circuit and upheld. *See* Consumers Union v. Kissinger, 506 F.2d 136, 138 (D.C. Cir. 1974). Another historical example of private dealmaking was when President John F. Kennedy arranged a deal to stop a national steel strike. *See generally* Note, *Quasi-Legislative Arbitration Agreements*, 64 COLUM. L. REV. 109, 126 (1964) ("The damage that would result from a nationwide strike in an essential industry . . . requires that a substitute for economic force be found.").

become the Louisiana Purchase.[36] The price was $15 million, negotiated up from the $2 million Jefferson first offered for New Orleans alone.[37] The purchase was made by treaty, and despite criticism that Jefferson lacked constitutional authority to negotiate it, the Senate ratified the treaty later that year.[38] The price was pennies on the acre,[39] and the purchase has been heralded as one of the greatest deals in history.[40]

The most prominent form of presidential dealmaking has been of the type exemplified by the Louisiana Purchase—U.S. interactions with foreign nations, in which presidents have always had wide discretion to strike deals.[41]

However, there are other types of presidential transactions. We focus on deals with the private sector, which used to be prompted by emergencies.[42] The rescue of Chrysler, the country's third-largest auto manufacturer, in 1979 was a deal arranged by the Executive Branch, designed to save a business that had been unable to keep up with foreign competitors.[43] That deal was ratified by Congress, but many of the ones that followed were not.[44]

During the 2008 financial crisis, the government cut deals to save individual financial institutions, sometimes taking the form of a government injection of funds in exchange for an ownership stake in the business.[45] Bear Stearns was saved in a negotiated deal to sell it to JP Morgan with $30 billion in U.S. government support.[46] AIG was rescued with a deal forcing shareholders to give up their interest in the corporation to the U.S. government.[47] The housing finance giants

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36. JEFFERSON NAT'L EXPANSION MEM'L, NAT'L PARK SERV., THE MUSEUM GAZETTE: THE LOUISIANA PURCHASE 2 (1991), https://www.nps.gov/jeff/learn/historyculture/ [https://perma.cc/58UE-FP8V].

37. *Id.*

38. *Id.*

39. *See id.*

40. Even at that time, the deal was acknowledged as a coup. General Horatio Gates reportedly told Thomas Jefferson, "For you have bought Louisiana for a song." Joseph A. Harriss, *How the Louisiana Purchase Changed the World*, SMITHSONIAN (Apr. 2003), https://www.smithsonianmag.com/history/how-the-louisiana-purchase-changed-the-world-79715124 [https://perma.cc/V6UF-FTCZ].

41. *See* Brandice Canes-Wrone et al., *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 J. POL. 1, 1 (2008) (finding that presidents exercise considerably greater influence over foreign policy compared to Congress).

42. *See* Davidoff & Zaring, *supra* note 3, at 474.

43. William H. Jones, *The Bottom-Line Details of the Chrysler Bailout*, WASH. POST (Nov. 4, 1979), https://www.washingtonpost.com/archive/business/1979/11/04/the-bottom-line-details-of-the-chrysler-bailout/a7175793-ac11-4b4f-bbce-3cfbf620f77c [https://perma.cc/828M-6MZD].

44. *See Examining Chrysler's 1979 Rescue*, NAT'L PUB. RADIO (Nov. 12, 2008, 4:00 PM), http://www.npr.org/templates/story/story.php?storyId=96922222 [https://perma.cc/W9HK-3PRA]; *see also* Davidoff & Zaring, *supra* note 3, at 484–512 (describing dealmaking by the Executive Branch, without ratification by Congress).

45. *See* Davidoff & Zaring, *supra* note 3, at 474–90 (reviewing several of these deals).

46. *See* Andrew Ross Sorkin, *In Sweeping Move, Fed Backs Buyout and Wall St. Loans*, N.Y. TIMES, Mar. 17, 2008, at A1; The Bear Stearns Companies Inc., Current Report (Form 8-K) (Mar. 16, 2008), http://www.sec.gov/Archives/edgar/data/777001/000091412108000249/be12284854-8k.txt [https://perma.cc/2P6N-48NR]. *See generally* WILLIAM D. COHAN, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET 47–53 (2009) (describing the Bear Stearns case).

47. *See* Davidoff & Zaring, *supra* note 3, at 495–96.

Fannie Mae and Freddie Mac were put into conservatorship, but their stockholders were allowed to retain a part of their stake.[48] The dealmaking extended throughout the financial crisis to include Wachovia, Citigroup, Bank of America, and, through a rescue package authorized by Congress, almost all financial institutions as well as automakers.[49]

These deals were for the most part bespoke. Terms were negotiated, and the government retained top counsel to document and, on occasion, renegotiate them.[50] In these deals, the government was acting like a combination of a lender of last resort and a private equity investor, or in some cases, an investment banker searching for a home for a failing firm. The goal was not to make money as an investor might but to address government goals of preserving the economy and fostering financial stability.[51]

Although the goal was worthy enough, and the investments made during the financial crisis were mostly sound, there are always significant due process issues with a dealmaking approach.[52] The Executive Branch made its financial crisis deals with little attention to the interests of shareholders and other beneficiaries of the protections offered by corporate and administrative law.

B. THE PRESIDENT'S TRANSACTIONS

One of the most vibrant trends in legal scholarship over the past twenty years has been the embrace of executive power in administrative law, the idea being that the Executive Branch has unique advantages when it comes to policymaking. But underlying the celebration of the Executive has been a concern that Congress and the courts will fail to recognize these unique advantages, and in such cases it may therefore be appropriate to evade the checks offered by these branches. Administration by deal represents the epitome of the effort to avoid curtailment by the other branches of government. In this section, we argue that the administrative law scholarship that favors this sort of Executive Branch priority is misguided, although prominent, if not preeminent, in administrative law scholarship.

Justice Elena Kagan argued that the law should make room for the centralization of administrative control in the White House and suggested that the courts should tolerate efforts by the White House to circumvent administrative process in a way that might be thought of as advanced *Chevron* deference when the President has been engaged.[53]

To Kagan, executive authority over administration in general is for the best. She approvingly concluded that a contemporary president should "treat[] the sphere of regulation as his own."[54] The basis for this treatment lies in the

48. *See id.* at 486 n.95, 488–89.

49. *See id.* at 528–31.

50. This was the case with AIG, Citigroup, Bank of America, and Fannie and Freddie. *See id.* at 468–69, 469 n.10.

51. *Id.* at 526, 529, 539.

52. *See id.* at 536.

53. *See* Kagan, *supra* note 28, at 2380.

54. *Id.* at 2281.

traditional arguments about the democratic accountability of the president, who could "convert[] administrative activity into an extension of his own policy and political agenda."[55] Presidentially led administration promises "enhanced government[]" through "executive . . . vigor."[56] The idea is that policy would be centralized in the White House, leading to coordinated action by agencies overseen by a politically accountable Executive.[57]

Others agree, with differing glosses. Steven Croley argues the White House is, and should be, a principle source of bureaucratic initiative.[58] Others argue that presidential power "inevitably expands" and that this is not necessarily a bad thing.[59] The idea is that deference is due to the President, even when acting unorthodoxly, because of the democratic legitimacy offered by the nationally elected Executive and perhaps because of the technocratic benefits of policy coordination through a wise White House.[60] Skeptics like Thomas Sargentich characterize this

55. *Id*. at 2282; *see also* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201–02 (emphasizing the benefits of decision making by high-level government officials rather than low-level bureaucrats).

56. Kagan, *supra* note 28, at 2342.

57. *See id*. at 2342–43.

58. *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003) ("[T]he White House clearly has used rulemaking review to put its own mark on particular agency rules increasingly often over the course of the past two decades, and at an accelerated pace during the Clinton administration."). As a descriptive matter, presidents tend to locate what they consider worthy enhancements of the President's role in the domestic administrative state in a series of executive orders. President Reagan's 1981 Executive Order on regulatory review, which required agencies within the Executive Branch to run their draft regulations by the White House's Office of Management and Budget (OMB) before promulgating them, was a sea-change in the structure of the federal bureaucracy and marked the beginning of ever greater amounts of presidential control over the administrative state. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981). The Clinton Administration's cognate executive order underscored the need for OMB to review significant regulatory action on a cost–benefit plan and adopted an annual regulatory planning process. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). President George W. Bush passed a subsequent executive order that mostly retained these elements of presidential supervision and brought even more agencies into the planning process. *See* Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007) (reaffirming most of Executive Order 12,866 and adding specific regulations on guidance documents and regulatory planning).

59. *See* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 510, 517 (2008) ("The President's power is also enhanced by the vast military and intelligence capabilities under his command. In his roles as Commander-in-Chief and head of the Executive Branch, the President directly controls the most powerful military in the world and directs clandestine agencies such as the Central Intelligence Agency and National Security Agency. That control provides the President with immensely effective, non-transparent capabilities to further his political agenda . . . ." (footnote omitted)). *But see* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 70–76 (2006) (offering an empirical perspective qualifying and specifying the influence the White House has over Environmental Protection Agency policymaking).

60. Of course, that national election depends upon the electoral college, which means that, as was the case in the 2016 election, the President may win the election while losing the popular vote. *See* Duke Omara, *Explainer: How Hillary Won the Popular Vote but Lost the Election*, MEDILL REP. CHI. (Nov. 11, 2016), http://news.medill.northwestern.edu/chicago/how-hillary-won-the-vote-but-lost-the-election [https://perma.cc/E6JG-M7P2].

sort of support for presidentially-centered regulation as support for a "presidential mystique."[61]

A second basis for centralizing the role of the President in administrative law is rooted more in competence and the structure of the government than in legitimacy. Eric Posner and Adrian Vermeule argue that in times of crisis, Congress and the courts must defer to the President because the Executive is most capable of responding to crises.[62] Posner and Vermeule's examples of executive crisis management include the aftermath of 9/11 and of the 2008 financial crisis.[63] John Yoo posits that in crises, the best presidents push the limits of their constitutional authority and tend to succeed when they do so.[64]

These accounts discuss the Executive as the "man on horseback" of the modern administrative state—the one who can act, and therefore the one who will enjoy deference when acting.[65] The Posner and Vermeule story, however, only normalizes Executive Branch excess when it comes to crisis management. The Executive wins those fights because it can effectively respond to the emergency at hand. To be sure, Posner and Vermeule see executive power in the federal state to be on an upward trajectory, perhaps an unbreakable one.[66]

In this way, the transactional administration assessed in this Article represents a logical end point to the Kagan, Posner, and Vermeule presidentialist views. Deals are mechanisms of policymaking that only the President can execute, and these scholars have embraced presidential authority in the modern administrative state.

As we will discuss in Part III, we think realizing administrative priorities through deals exemplifies some of the risks of embracing executive authority to act as the President sees fit.

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61. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 4 (2007); *see also* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263 (2006) (arguing that presidential administration has led to an "unwarranted embrace of an unjustified antiregulatory mission"); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2348 (2006) (arguing for the return from an "extremely powerful executive branch . . . to a tradition of divided government that has served our country well").

62. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1679–80 (2009).

63. *See id.* at 1637.

64. *See generally* YOO, *supra* note 33 (describing numerous instances of American presidents throughout history exerting strong executive power).

65. The "man on horseback" trope traditionally involves the takeover of the government by a military leader, but, given that the President is the Commander-in-chief of the armed forces, perhaps the analogy may be stretched to fit. *See* Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1409 (2008) ("Therefore, democratic organizational theory has long held that civilian institutions and personnel must exercise ultimate authority over the military, lest a 'man on horseback' wrest control of the State from the citizenry.").

66. *See* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1014–15 (2008) ("The executive branch has become powerful through a large number of incremental steps stretching back two centuries.").

II. THE NEW TRANSACTIONAL PROCESS

The Trump Administration has tried to utilize deals to execute some of its most important policy priorities. It has used deals to keep jobs in the country and has promised to redevelop American infrastructure by incentivizing the private sector to provide public improvements. The ethos of the Administration is transactional—the paradigm transactional administration. In this Part, we show how a presidency can regulate by deal as an ordinary mechanism of administrative control, and we raise some of the problems with this approach to policymaking.

A. DEALMAKING BY EXAMPLE

In the Trump presidency, it appears that presidential power is being extended to customized one-off dealmaking in which each private actor is treated differently outside the normal administrative or legislative process. An example of this type of conduct is the "Carrier Deal," which President Trump personally negotiated. Before he became President, Trump used the presidential bully pulpit to negotiate a one-off deal with Carrier, a furnace and air conditioning manufacturer, to keep jobs in the United States.

Carrier is owned by the conglomerate United Technologies, and the dealmaking began when then-candidate Trump began to criticize Carrier for the planned move of 2,000 jobs to Mexico.[67] During the presidential campaign, Trump proposed a 35% tariff on all Carrier air conditioners imported into the United States from Mexico.[68] Once elected, President-elect Trump personally communicated a warning to United Technologies CEO Gregory Hayes not to move the 2,000 U.S. jobs located at Carrier's plants in Indiana to a new facility in Mexico.[69] He also tweeted about it, stating that he was "working hard, even on Thanksgiving" to cut a deal with Carrier to keep the jobs in Indiana.[70]

Carrier responded by entering into an agreement with the State of Indiana to preserve 800 jobs and invest $16 million in Indiana in exchange for $7 million in tax breaks, a deal which occurred after Mr. Hayes made a personal visit to Trump Tower.[71] *The Wall Street Journal* referred to it as a "deal"—one that was criticized by people on the right and left.[72] Trump tweeted: "Big day on Thursday

67. *See* Schwartz, *supra* note 6.

68. Bryce Covert, *Don't Be Fooled by Trump's Deal To Save Some Carrier Jobs*, THINK PROGRESS (Nov. 30, 2016, 4:55 PM), https://thinkprogress.org/trump-pence-carrier-deal-65e6bee054c9#.miba0ftja [https://perma.cc/3XAL-YD4X].

69. *See* Schwartz, *supra* note 6.

70. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 24, 2016, 7:11 AM), https://twitter.com/realDonaldTrump/status/801805564577808385 [https://perma.cc/2RP7-XRMY].

71. *See* Ted Mann, *Carrier Will Receive $7 Million in Tax Breaks To Keep Jobs in Indiana; Deal Emerges After United Tech CEO's Pilgrimage to Trump Tower*, WALL ST. J. (Dec. 2, 2016, 10:01 AM), https://www.wsj.com/articles/indiana-gives-7-million-in-tax-breaks-to-keep-carrier-jobs-1480608461 [https://perma.cc/UCY6-VHMU].

72. *See id*. Former Alaska governor Sarah Palin called the deal "crony capitalism." Palin, *supra* note 11. She continued, "[b]ut know that fundamentally, political intrusion using a stick or carrot to bribe or

for Indiana and the great workers of that wonderful state. We will keep our companies and jobs in the U.S. Thanks Carrier."[73] Carrier also celebrated, tweeting, "We are pleased to have reached a deal with President-elect Trump & VP-elect Pence to keep close to 1,000 jobs in Indy. More details soon."[74] Those details, however, remain vague to this day. Although Carrier's agreement with Indiana will be disclosed and fully vetted,[75] commentary in the press has discussed other behind-the-scenes deals, which, if true, have never been disclosed.

In truth, the deal was likely a good one for the government in terms of monetary expenditures for state job retention. States regularly enter into retention packages, and one think tank in New Jersey found that the average amount spent in that state to retain corporations was almost $48,000 per employee.[76] Carrier announced that it would lose savings of $65 million by forgoing the move.[77] The lower state payment was thus likely due to the terms of the deal negotiated by President-elect Trump and Indiana officials and simple bargaining power. United Technologies, after all, derives almost half its revenue from government contracts, and negotiating away this point in exchange for preserving its government relationship was likely the motivator for this deal.

After the Carrier negotiation, Trump attempted to bend companies for various other deals. On December 6, 2016, he called for Boeing to lower the price of Air Force One, tweeting, "Boeing is building a brand new 747 Air Force One for future presidents, but costs are out of control, more than $4 billion. Cancel order!"[78] Boeing immediately responded, stating that a contract for the planes

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force one individual business to do what politicians insist, versus establishing policy incentivizing our ENTIRE ethical economic engine to roar back to life, isn't the answer." *Id.* Senator Bernie Sanders wrote that "[i]nstead of a damn tax, the company will be rewarded with a damn tax *cut*. Wow! How's that for standing up to corporate greed? How's that for punishing corporations that shut down in the United States and move abroad?" Bernie Sanders, Opinion, *Bernie Sanders: Carrier Just Showed Corporations How to Beat Donald Trump*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/posteverything/wp/2016/12/01/bernie-sanders-carrier-just-showed-corporations-how-to-beat-donald-trump/?tid=sm_tw&utm_term=.1eba80157bb9 [https://perma.cc/PV37-CS73].

73. Donald J. Trump (@realDonaldTrump) TWITTER (Nov. 29, 2016, 7:50 PM), https://twitter.com/realdonaldtrump/status/803808454620094465?lang=en [https://perma.cc/XVJ8-MK97].

74. Carrier (@Carrier), TWITTER (Nov. 29, 2016, 4:54 PM), https://twitter.com/Carrier/status/803764047300722688?ref_src=twsrc%5Etfw [https://perma.cc/8PHU-ZUV6].

75. *See* Alana Semuels, *Why It's So Hard To Know What To Make of the Carrier Deal*, ATLANTIC (Nov. 30, 2016), https://www.theatlantic.com/business/archive/2016/11/carrier-deal/509201 [https://perma.cc/CMJ6-A4GR].

76. *See* Charles V. Bagli, *A Tug-of-War of Tax Breaks Tightens Across the Hudson*, N.Y. TIMES (June 11, 2014), https://www.nytimes.com/2014/06/12/nyregion/with-tax-incentives-new-york-and-new-jersey-fight-for-jobs.html [https://nyti.ms/2yXOGf0]; *see also* Reid Wilson, *Carrier Deal Part of Growing Trend of Corporate Tax Giveaways*, HILL (Dec. 1, 2016, 3:06 PM), http://origin-nyi.thehill.com/policy/finance/308349-carrier-deal-part-of-growing-trend-of-corporate-tax-giveaways [https://perma.cc/6MXD-RMDM] ("All told, the largest deals tend to cost a state thousands of dollars per job, according to the 2013 Good Jobs First study. The deal to keep Carrier in Indianapolis will cost less than the average mega-deal, about $8,750 per job.").

77. *See* Schwartz, *supra* note 6.

78. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 6, 2016, 5:52 AM), https://twitter.com/realDonaldTrump/status/806134244384899072?ref_src=twsrc%5Etfw [https://perma.cc/MLA6-F5N8].

had yet to be signed and that pricing was based on preliminary studies.[79]

This type of dealmaking through exertion and badgering extended to one of the biggest U.S. automakers. After a number of tweets by Trump, General Motors announced the retention or creation of jobs—as did Bayer, Alibaba, and Lockheed—though there was some dispute as to whether those job announcements were related to preexisting plans.[80]

In the case of the two automakers, no quid pro quo was explicitly announced, but presumably the impetus of the automakers was to avoid presidential scrutiny and to cooperate with the government to benefit from proposed trade and tax changes. Although it can be debated whether these are actually deals, they have the attributes of them. In any event, we believe this type of one-off bargaining, whether in pursuit of jobs or of other administrative goals like increasing U.S. exports, is likely to be a hallmark of the Trump Administration.

Notably, like regulation by deal during the financial crisis, there was little, if any, traditional administrative process to this dealmaking. Unlike government rulemaking, which typically applies to a broad array of parties, the subjects of Trump's dealmaking were picked individually. Moreover, the initial focus has been on industrial, prominent manufacturers. And so, when Trump met with the technology leaders, he did not mention their massive outsourcing, instead stating, "I'm here to help."[81] The Trump dealmaking thus seems arbitrary in its focus, devoted more towards political targets than actual effect. A number of commentators were also quick to express the view that Trump's dealmaking was unlikely to preserve jobs without broader action.[82] Given the job flows, jobs are destroyed as fast as, or faster than, they can be preserved, and there is reason to believe it

79. *See* Michael D. Shear & Christopher Drew, *'Cancel Order!' Donald Trump Attacks Plans for Upgraded Air Force One*, N.Y. TIMES (Dec. 6, 2016), https://www.nytimes.com/2016/12/06/us/politics/trump-air-force-one-boeing.html [https://nyti.ms/2jAC1Jb].

80. *See* Paul A. Eisenstein, *GM's $1B Investment Is Not Driven by Trump and Likely Dates Back to 2014*, NBC NEWS (Jan. 17, 2017, 7:50 AM), http://www.nbcnews.com/business/autos/gm-s-1b-investment-not-driven-trump-likely-dates-back-n707661 [https://perma.cc/G5F5-7VJH]; *see also* Chris Clayton, *Bayer-Monsanto Sweeten Deal*, DTN/PROGRESSIVE FARMER (Jan. 17, 2017, 2:38 PM), https://www.dtnpf.com/agriculture/web/ag/news/world-policy/article/2017/01/17/meeting-trump-bayer-commits-jobs-us [https://perma.cc/FR4V-W8ML]; Mark Hensch, *Lockheed Tells Trump It's Adding 1,800 Jobs*, HILL (Jan. 13, 2017, 2:49 PM), http://thehill.com/policy/defense/industry/314232-lockheed-ceo-to-trump-well-add-18k-jobs [https://perma.cc/TSD8-LFUP]; Sherisse Pham, *Alibaba's 1 Million American Job Promise Isn't Realistic*, CNN TECH (Jan. 11, 2017, 2:48 AM), http://money.cnn.com/2017/01/10/technology/jack-ma-trump-us-jobs-claim/index.html [https://perma.cc/PW5C-CFWJ].

81. *See* David Streitfeld, *'I'm Here to Help,' Trump Tells Tech Executives at Meeting*, N.Y. TIMES (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/technology/trump-tech-summit.html?_r=0 [https://nyti.ms/2jDT8qS].

82. *See, e.g.*, Ben Casselman, *Why Trump's Carrier Deal Isn't the Way To Save U.S. Jobs*, FIVETHIRTYEIGHT (Dec. 5, 2016, 5:00 AM), https://fivethirtyeight.com/features/why-trumps-carrier-deal-isnt-the-way-to-save-u-s-jobs [https://perma.cc/S9DR-EWT8]; Justin Wolfers, *Trump and Carrier: How a Modern Economy Is Like a Parking Garage*, N.Y. TIMES (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/upshot/trump-and-carrier-how-a-modern-economy-is-like-a-parking-garage.html [https://nyti.ms/2k59Cb9].

benefits the economy to allow this rate of destruction.[83]

If dealmaking by the President seemed arbitrary (or at least individualistic), it also lacked comment or notice, as well as transparency—hallmarks of the administrative state. In this regard, this type of bespoke dealmaking can be seen as the antithesis of the administrative state and the zenith of presidential power that some have advocated. It even goes beyond the financial crisis dealmaking because it is nonlegal—not looking for a legal hook on which to base presidential action. The government action is based on power rather than the law itself.

B. DEALMAKING IN LIEU OF ADMINISTRATION

Transactional administration not only has involved one-off, negotiated deals, designed to vindicate policies like job onshoring, but can also be used as a substitute for the administrative state. In this section, we explore the way that the Administration has promised to avoid ordinary administrative procedure by using private channels to meet a different policy goal: the redevelopment of American infrastructure. Infrastructure partnerships rely on deals to do what bureaucracy could otherwise do itself.

As Jody Freeman has observed, private participation in government programs, if defined broadly, is not uncommon.[84] In governance today, "public and private actors negotiate over policymaking, implementation, and enforcement" and may be "linked by implicit or explicit agreements."[85]

What would be new, however, would be the delivery of government programs and services by private actors under a contractual arrangement concluded by the Executive Branch.

Public–private partnerships use private investors to finance public improvements in return for an ownership stake in the asset, the ability to monetize the investment by charging user fees for making use of the public improvement, or both.[86] Although toll roads are the classic example, privately-run prisons and schools subsidized by the government also fit the bill, and the delegation of government functions to the private sector could extend even more broadly than these examples. The Department of Transportation defines these partnerships as a

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83. *See* Casselman, *supra* note 82; Wolfers, *supra* note 82. Eric Posner has told us that one possible way to categorize this government conduct is as a form of "bribery"—that is, the government is trying to push people to act a certain way and doing so with a form of compensation or other incentive rather than ordering them to act. This tactic is a product of lack of government authority as well as a way to evade the law, because standing rarely exists in the bribery setting. We find this an interesting argument that merits further examination, but we tend to see the government's conduct as deregulatory—acting outside of the law rather than looking to the law for authority.

84. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000).

85. *Id.* at 548.

86. *See, e.g.*, Davidoff & Zaring, *supra* note 3, at 474–90 (reviewing government deals with financial institutions resulting in ownership stakes); Josh Bivens & Hunter Blair, *Trump's Infrastructure Plan Is Not a Simple Public-Private Partnership Plan, and Won't Lead to Much New Investment*, ECON. POLICY INST. (Nov. 22, 2016, 12:38 PM), http://www.epi.org/blog/trumps-infrastructure-plan-is-not-a-simple-public-private-partnership-plan-and-wont-lead-to-much-new-investment [https://perma.cc/L3NP-BJR3].

"contractual agreement formed between public and private sector partners, which allows more private sector participation than is traditional."[87]

But traditions can always be changed. Public–private partnerships have not yet played an important role in infrastructure spending—less than 1% of spending on highways over the past quarter century is attributable to public–private partnerships, accounting for thirty-six projects, most of which were funded at least in part through tolls.[88]

The Trump Administration's more transactional approach would dramatically broaden the scope of private supervision of government projects.

1. The Trump Administration's Infrastructure Plan

The Trump Administration has suggested that it intends to double down on the use of private parties to develop public projects.

President Trump has promised to "revitaliz[e] U.S. roads, bridges and airports."[89] His campaign platform on infrastructure included "[l]everag[ing] new revenues and work[ing] with financing authorities, public–private partnerships, and other prudent funding opportunities."[90] As a candidate, he suggested that $137 billion in federal tax credits could be awarded to private investors for transportation projects and argued that the incentives could lead to $1 trillion worth of infrastructure investment over 10 years.[91]

Many commentators have noted that the details of Trump's infrastructure plans remain unclear,[92] and the way the plan is structured could "portend[] less actual infrastructure improvement and more private-sector profits."[93]

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87. U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., REPORT TO CONGRESS ON PUBLIC-PRIVATE PARTNERSHIPS viii (2004), https://www.fhwa.dot.gov/reports/pppdec2004/pppdec2004.pdf [https://perma.cc/6NVJ-UDUM].

88. *See* Scott Rodd, *Infrastructure Strategy Touted by Trump Has Produced Uneven Results*, PEW CHARITABLE TRUSTS (Dec. 14, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/12/14/infrastructure-strategy-touted-by-trump-has-produced-uneven-results [https://perma.cc/6LB3-67RT].

89. Melanie Zanona, *Trump's Infrastructure Plan: What We Know*, HILL (Jan. 13, 2017, 6:00 AM), http://thehill.com/policy/transportation/314095-trumps-infrastructure-plan-what-we-know [https://perma.cc/9XE7-G7KU].

90. *Infrastructure*, DONALD J. TRUMP FOR PRESIDENT, https://www.donaldjtrump.com/policies/an-americas-infrastructure-first-plan [https://perma.cc/95BW-CSB3].

91. Melanie Zanona, *Ryan Offers Picture of Public-Private Spending in Trump's Infrastructure Plan*, HILL (Jan. 19, 2017, 2:06 PM), http://thehill.com/policy/transportation/315110-ryan-offers-picture-of-private-public-spending-in-trumps-infrastructure [https://perma.cc/6C6P-SRD4].

92. *See, e.g.*, Melanie Zanona, *Chao Commits to Multiple Funding Tools for Trump's Infrastructure Plan*, HILL (Jan. 11, 2017, 2:26 PM), http://thehill.com/policy/transportation/313814-chao-commits-to-multiple-funding-tools-for-trumps-infrastructure-plan [https://perma.cc/PFW3-KQS8] (discussing Trump's Department of Transportation nominee Elaine Chao's failure to "provide specific details on the scope of Trump's infrastructure package or how it should be paid for"); Melanie Zanona, *Five Things To Know About Trump's Infrastructure Plan*, HILL (Nov. 20, 2016, 10:30 AM), http://thehill.com/policy/transportation/306847-five-things-to-know-about-trumps-infrastructure-plan [https://perma.cc/N5VW-AGDH] (noting that "the final details of Trump's plan are still in flux").

93. Cory Schouten, *A Potential Pothole in Trump's Infrastructure Plan*, CBS NEWS (Nov. 29, 2016, 3:51 AM), http://www.cbsnews.com/news/donald-trumps-infrastructure-plan-has-a-potential-pothole [https://perma.cc/RQS5-RJ93].

But the basic scheme is clear enough. Two top Executive Branch officials, Wilbur Ross, the Secretary of Commerce, and Peter Navarro, the chair of the White House National Trade Council, outlined the structure of Trump's proposed public–private partnerships in an October 2016 white paper.[94] In the paper, Ross and Navarro suggest that infrastructure programs could be funded through "tax credit[s] equal to 82% of the equity amount."[95] They state that "this tax credit-assisted program could help finance up to a trillion dollars' worth of projects over a ten-year period."[96] The President has assembled a team led by Richard LeFrak and Steven Roth, two New York real estate developers, to identify promising projects.[97]

The idea of using the private sector to build public works has percolated through the body politic, though it has never been applied broadly in the United States, perhaps because it is difficult to fund and is conditional on the politics of public investment.[98] Congressional Republicans have been willing to use tax breaks to spur private infrastructure investment but have rejected other forms of federal spending, or tax increases, to support it.[99] Senate Minority Leader Charles Schumer, a Democrat, has stated that the Democratic Party cannot accept "the tax credit mechanism Trump has proposed to fuel the rebuilding of roads, bridges, sewers, airports and other public works."[100]

2. Public–Private Partnerships Before Trump

Many see public–private partnerships as a solution to a real infrastructure problem. The Obama White House identified $3.6 trillion worth of investment it would like to see by 2020 in infrastructure, and it made supportive noises about

94. *See* WILBUR ROSS & PETER NAVARRO, TRUMP VERSUS CLINTON ON INFRASTRUCTURE (2016), http://peternavarro.com/sitebuildercontent/sitebuilderfiles/infrastructurereport.pdf [https://perma.cc/YET4-FEXE]

95. *Id.* at 4.

96. *Id.* at 6.

97. Zanona, *supra* note 91.

98. *See* Ed O'Keefe & Steven Mufson, *Senate Democrats Unveil a Trump-Size Infrastructure Plan*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/politics/democrats-set-to-unveil-a-trump-style-infrastructure-plan/2017/01/23/332be2dc-e1b3-11e6-a547-5fb9411d332c_story.html [https://perma.cc/MF8W-UM4E] ("A group of senior Senate Democrats on Tuesday unveiled their own $1 trillion plan to revamp the nation's airports, bridges, roads and seaports, urging President Trump to back their proposal, which they say would create 15 million jobs over 10 years.").

99. *See* Alexander Bolton, *Dems Unveil Infrastructure Plan, Reach Out to Trump*, HILL (Jan. 24, 2017, 12:54 PM), http://thehill.com/policy/finance/315871-dems-unveil-infrastructure-plan-reach-out-to-trump [https://perma.cc/7RSF-DRS5] ("Republicans in Congress have embraced the idea of creating tax breaks to spur private infrastructure investment and have warned against any plan that would require massive allocations of federal dollars.").

100. *Republicans, Democrats Bicker over Infrastructure Plans*, REUTERS (Jan. 24, 2017, 12:56 PM), http://www.reuters.com/article/us-usa-congress-infrastructure-idUSKBN1582G7 [https://perma.cc/6LFH-PF6U].

public–private partnerships.[101] The American Society of Civil Engineers gave the country's 2013 setup a D+ in its quadrennial report card.[102]

Under the Obama Administration, the Department of Transportation created the Build America Transportation Investment Center (BATIC).[103] BATIC was designed to cultivate public–private partnerships by identifying potential sources of federal credit for promoters.[104] The Center was also charged with helping promoters make sense of the sometimes elaborate federal procedural and permitting requirements.[105] The 2015 Fixing America's Surface Transportation Act (FAST Act), a bipartisan measure that passed with large majorities in the House and Senate, permitted states to use federal highway subsidies to open public–private partnership offices.[106] The statute also allowed them to offer compensation to unsuccessful project bidders, who frequently must spend substantial sums to develop proposals for infrastructure investments.[107] The Obama Treasury Department released a report encouraging these partnerships in 2015, characterizing the partnerships as a way to "reverse years of this underinvestment in infrastructure."[108]

Partnerships lie "somewhere between standard public provision and full privatization of infrastructure."[109] They take various forms and can be funded by tax breaks and the promise of future revenue streams, such as user fees or other means.[110] For example, "availability payment" agreements finance projects by

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101. *See* Marc Aidinoff, *Encouraging the Private Sector To Invest in America's Infrastructure*, OBAMA WHITE HOUSE ARCHIVE (Jan. 16, 2015, 6:08 PM), https://obamawhitehouse.archives.gov/blog/2015/01/16/encouraging-private-sector-invest-americas-infrastructure [https://perma.cc/F67A-Y3PN].

102. *See* AM. SOC'Y OF CIVIL ENG'RS, 2013 REPORT CARD FOR AMERICA'S INFRASTRUCTURE (2014), http://2013.infrastructurereportcard.org [https://perma.cc/5APU-HZAM] ("The 2013 Report Card grades show we have a significant backlog of overdue maintenance across our infrastructure systems, a pressing need for modernization, and an immense opportunity to create reliable, long-term funding, but they also show that we can improve the current condition of our nation's infrastructure—when investments are made and projects move forward, the grades rise.").

103. Stephanie Beasley, *DOT Opens 'One-Stop Shop' Transportation Loan Bureau*, BLOOMBERG BNA (Jul. 20, 2016), https://www.bna.com/dot-opens-onestop-b73014445082 [https://perma.cc/58UE-HAEK].

104. *See id.*; *About the Build America Bureau*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/buildamerica/about [https://perma.cc/VA3T-7QMA] (last updated June 29, 2017).

105. *About the Build America Bureau*, *supra* note 104 ("The Bureau addresses the procedural, permitting and financial barriers to increased infrastructure investment and development by . . . [a]ctively helping sponsors navigate and accelerate the often complex federal permitting and procedural requirements . . . .").

106. Pub. L. No. 114-94, § 1109(b)(14), 129 Stat. 1312, 1339 (2015) (to be codifed at 23 U.S.C. § 101 note (Supp. 2016).

107. *See* PRICEWATERHOUSECOOPERS, PUBLIC-PRIVATE PARTNERSHIPS IN THE US: THE STATE OF THE MARKET AND THE ROAD AHEAD 8 (2016), https://www.pwc.com/us/en/capital-projects-infrastructure/publications/assets/pwc-us-public-private-partnerships.pdf [https://perma.cc/84Q8-L88S].

108. OFFICE OF ECON. POLICY, U.S DEP'T OF THE TREASURY, EXPANDING OUR NATION'S INFRASTRUCTURE THROUGH INNOVATIVE FINANCING 3 (2014), https://www.treasury.gov/resource-center/economic-policy/Documents/3_Expanding%20our%20Nation's%20Infrastructure%20through%20Innovative%20Financing.pdf [https://perma.cc/GHG3-GAGZ].

109. Bivens & Blair, *supra* note 86.

110. *Id.* ("[T]he private entities also receive a revenue stream of some kind . . . . Often this is an explicit user fee, like a toll for using a road.").

finding a private investor to take on most of the debt for a project up front in return for a stream of payments from the government during its construction.[111] An infrastructure bank and corporate-tax reform have been mooted as potential ways to use private means to realize public ends.[112]

An example of public–private partnerships outside the context of highways and roads is the remodel of LaGuardia Airport, which is being funded by investors who will make money from airline and passenger fees.[113] Infrastructure built through these types of partnerships mostly has been, in the past, varieties of surface transportation, particularly toll roads.[114] But recently, other kinds of government institutions have explored the possibility of using these partnerships to build, for example, student housing and other campus amenities in state universities.[115] The City of Long Beach built a civic auditorium through such a partnership.[116] Miami-Dade County has used these partnerships to construct waste and water projects.[117]

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111. Rodd, *supra* note 88.

112. Paula Dwyer, *How a Trump Infrastructure Bank Could Soak Taxpayers*, BLOOMBERG (Nov. 23, 2016, 9:00 AM), https://www.bloomberg.com/view/articles/2016-11-23/how-a-trump-infrastructure-bank-could-soak-taxpayers [https://perma.cc/3HCQ-3JDV].

113. *See* Virginia Postrel, *How Trump Can Build the Best Airports and Roads*, BLOOMBERG (Dec. 16, 2016, 9:00 AM), https://www.bloomberg.com/view/articles/2016-12-16/how-trump-can-build-the-best-airports-and-roads [https://perma.cc/HYM7-FN9Z] ("Commercial partners will make money from fees charged to airlines and passengers—and from maximizing revenue from shops and restaurants.").

114. *See* Ronald A. Wirtz, *Public-Private Partnerships: For Whom the Road Tolls?*, FED. RES. BANK MINNEAPOLIS, June 2009, at 25, 28, https://www.minneapolisfed.org/publications/the-region/publicprivate-partnerships-for-whom-the-road-tolls [https://perma.cc/XU5F-78SR] ("Since 2005, long-term concession toll roads have been either proposed or closed on in at least 13 states, according to the FHWA."). Enthusiasm for public–private partnerships is not solely American. The World Bank has also encouraged public–private partnerships in developing countries, and countries like the United Kingdom have used private firms to take over and operate a broad array of formerly government-run infrastructure, including the British rail service. Jason S. Kelley, *Privatization of Transportation in Developed Nations*, 48 ADMIN. L. REV. 545, 548 (1996) (discussing the "current effort by the government in the United Kingdom to privatize British Rail (BR) serves as a useful example of the positive and negative aspects of selling off a state-owned and -operated railway"); *Public-Private Partnerships in Airports*, WORLD BANK GROUP, https://ppp.worldbank.org/public-private-partnership/sector/transportation/airports [https://perma.cc/3E78-X2KN].

115. *See, e.g.*, Daniel I. Bernstein, *Public-Private Partnerships: It's the Right Time*, NAT'L ASS'N C. & U. BUS. OFFICERS, https://web.archive.org/web/20171012174650/http://www.nacubo.org/Business_Officer_Magazine/Business_Officer_Plus/Bonus_Material/Public-Private_Partnerships_It%E2%80%99s_the_Right_Time.html [https://perma.cc/F2BW-RUCA] (describing ways that educational institutions could make use of public–private partnerships in guidance for National Association of College and University Business Officers); Ronda Kaysen, *Public College, Private Dorm*, N.Y. TIMES (Jan. 24, 2012), http://www.nytimes.com/2012/01/25/realestate/commercial/public-college-private-dorm.html [https://nyti.ms/2lo699n] (discussing a variety of public–private partnerships designed to increase the supply of student housing).

116. *See* Keeley Webster, *Long Beach Using P3 for New City Hall, Library*, BOND BUYER (Jan. 14, 2016, 11:14 AM), http://www.bondbuyer.com/news/regionalnews/long-beach-using-p3-for-new-city-hall-library-1093988-1.html [https://perma.cc/A45J-SWXC].

117. *See* PRICEWATERHOUSECOOPERS, *supra* note 107, at 2 (discussing Miami public–private partnerships); *Other Capital Improvement Projects*, MIAMI-DADE CTY., http://www.miamidade.gov/water/other-capital-improvement-projects.asp [https://perma.cc/2UNR-R5NF] (listing various water and sewer improvement projects that might be appropriate for a public–private partnership); *Public-Private Partnerships (P3s)*, MIAMI-DADE CTY., http://www.miamidade.gov/water/public-private-

3. Public–Private Partnerships as Problems

Privatizing administrative law through transactions includes all of the usual risks of privatization of government services. A government that relies on deals with the private sector is a government that has abandoned some of its delegated responsibilities.

When agencies operate or oversee the project, they must comply with the basics of administrative procedure and with rules that may serve some other goals, such as affirmative action requirements.[118] Corporate overseers may not make room for those more publicly minded initiatives.

Moreover, governance by deal reflects a trend away from supposedly ossified government projects towards putatively more efficient, privately run projects.[119] If regulation by deal during the financial crisis meant the use of transactions as a mechanism for skirting legal requirements and moving quickly when slow government action was thought to be ineffective, using deals to build out public infrastructure reflects something even deeper. It suggests a lack of faith that the public sector can accomplish necessary goals even when it has the time and resources to finish the job.

The turn to the private sector is not without controversy. Some critics worry that the government does not always get value for the assets that it privatizes.[120] The Public Interest Research Group has speculated that it can mean a loss of control over policy—in transportation

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partnerships.asp [https://perma.cc/XA6W-YBDU] ("The Miami-Dade Water and Sewer Department is currently in the process of implementing a comprehensive Capital Improvement Plan (CIP) for numerous water and wastewater infrastructure projects.").

118. Affirmative action broadly features in infrastructure programs, though they are policed by the courts. *See generally* Charles Fried, Foreword, *Revolutions?*, 109 HARV. L. REV. 13, 46 (1995) (noting "any racial classification by *any* level of government must meet strict scrutiny (that is, be narrowly tailored to a compelling government interest)").

119. This ossification thesis is associated with Thomas McGarity, who worried that procedural burdens on agencies prevent them from implementing the rules necessary to vindicate their substantive responsibilities. *See* McGarity, *supra* note 26, at 1386 ("The informal rulemaking process of the 1990s is so heavily laden with additional procedures, analytical requirements, and external review mechanisms that its superiority to case-by-case adjudication is not as apparent now as it was before it came into heavy use."); *see also* William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 400–02 (2000) (expressing concern about the burdens of judicial review on informal rulemaking); Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 64–65 (1995) (proposing legislative solutions to ossification). *But see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1481 (2012) (concluding that the evidence in favor of ossification is lacking). *See generally* Paul R. Verkuil, Comment, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995) (suggesting a way around ossification, written by the head of the Administrative Conference of the United States).

120. Some toll roads, including the Indiana toll road, Texas State Highway 130, and the South Bay Expressway in San Diego, have experienced financial strain because demand for them was lower than projected. *See* WILLIAM J. MALLET, CONG. RESEARCH SERV. INSIGHTS, IN10156, INDIANA TOLL ROAD BANKRUPTCY CHILLS CLIMATE FOR PUBLIC-PRIVATE PARTNERSHIPS (2014), http://www.ncppp.org/wp-content/uploads/2013/02/CRS-Insights-Indiana-Toll-Road-Bankruptcy-Chills-fClimate-or-P3s.pdf [https://perma.cc/H6AN-TZZB].

> [p]rivate road concessions in particular result in a more fragmented road network, less ability to prevent toll traffic from being diverted into local communities, and often the requirement to compensate private operators for actions that reduce traffic on the road, such as constructing or upgrading a nearby competing transportation facility.[121]

Financing these projects through private mechanisms is not obviously necessary. Interest rates are currently close to the lowest they have ever been, making the financing of projects through debt an attractive option.[122] It is not clear that governments need to appeal to the private sector to make cost-effective improvements, especially now.

There are other concerns. It is difficult for the public to monitor the contracting involved in privatization projects, including make-whole provisions that require the state to reimburse private contractors for lost anticipated revenues in the event of compensation events, noncompetition provisions, and adverse action or stabilization clauses.[123] Contracting with private parties to provide government services thus limits transparency in two ways. First, Administrative Procedure Act (APA) rules do not apply, or, at minimum, they do not apply to much of the work the private owner does on the project.[124] Second, it is difficult for the public to monitor complicated deals between the government and private parties.

Private partnerships do not have a strong track record of efficiency. Ron Daniels and Michael Trebilcock note that the advantages of private sector participation "can easily be offset by losses that derive from faulty design of both the selection process and the contractual arrangements used for implementation."[125] Moreover, these problems of contracting are not only matters of inexperienced government dealmakers being exploited by the private sector. Partnerships

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121. PHINEAS BAXANDALL ET AL., U.S. PUB. INTEREST RESEARCH GRP. EDUC. FUND, PRIVATE ROADS, PUBLIC COSTS: THE FACTS ABOUT TOLL ROAD PRIVATIZATION AND HOW TO PROTECT THE PUBLIC 2–3 (2009), http://www.uspirg.org/sites/pirg/files/reports/Private-Roads-Public-Costs-Updated_1.pdf [https://perma.cc/B9M7-3NHT].

122. *See* Giovanni Russonello, *How the Fed's Interest Rate Increase Can Affect You*, N.Y. TIMES (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/business/economy/how-the-feds-interest-rate-increase-can-affect-you.html [https://nyti.ms/2jGRx6f] (describing a likely future of "what will be a slow, upward climb for what's known as the federal funds rate. . . . Because the rate has been close to zero since 2008, as part of the Fed's strategy to bring the nation out of a recession, there's hardly anywhere for it to go but up."). It is even more attractive the further down you go in the federal pyramid. States and municipalities also finance projects by issuing tax-exempt bonds that are cheap to offer and still somewhat attractive to investors interested in their tax-advantaged status. *See* Nicole S. Dandridge & André B. Dandridge, *Community Economic Development Conspectus Valuable Tool for Advocates, Lawyers, and Policymakers*, 21 J. AFFORDABLE HOUS. & CMTY. DEV. L. 167, 173 (2012) ("Tax-exempt bonds usually have a fixed interest rate and longer terms than conventional financing; an added attraction for some investors is that interest payments are generally exempt from federal taxes.").

123. *See* Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J. L. & SOC. POL'Y 47, 57–58 (2011).

124. Most APA rules are directed at agency conduct. *See, e.g.*, 5 U.S.C. § 553 (2012) (explaining "the agency shall give interested persons an opportunity to participate in the rule making").

125. Ronald J. Daniels & Michael J. Trebilcock, *Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier*, 46 U. TORONTO L.J. 375, 378 (1996).

present risks for private capital as much as they do for government investment. As Daniels and Trebilcock observe, "governments can abrogate contractual undertakings without having to compensate parties for the loss of their expectation profits," which "places understandable limits on the willingness of private sector developers to invest risk capital."[126]

Public–private partnerships, in short, have consequences that affect the ordinary administration of the state. They operate differently, and with less transparency and process, than ordinary administrative law. Not subject to the APA, private firms that take over public functions do so under none of the constraints that agencies face. They can pay their administrators less, develop unreviewable business plans, and pursue short-term profits over long-term development.[127]

4. The Troubling Precedent of Fannie Mae and Freddie Mac

The issues of opacity and due process in the public–private model can be delineated by further examining the government's dealmaking with Fannie Mae and Freddie Mac during and after the financial crisis. The government, after saving the institutions, chose to hold a controlling ownership stake in a putatively private pair of businesses designed to serve a policy goal: to stabilize and subsidize the housing market.[128] This stake has richly, but controversially, rewarded the government.

Fannie and Freddie are currently the country's largest public–private partnerships, and the partnership has not been a happy one—the public investors who still hold Fannie and Freddie stock have repeatedly sued the government over its treatment of them.[129] Although some have expressed an interest in ending the government's involvement with the firms, the government has failed to realize any exit strategy.[130] This demonstrates that quickly executed transactions can lead to problematic contractual relations in the future, that government and private investors often do not get along, even when investing in the same enterprise,

126. *Id.*

127. *See, e.g.*, Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1306 (2003) (expressing some tolerance for privatized administrative functions and noting that "[t]he bulk of privatization also remains beyond the reach of the subconstitutional discretion-constraining and accountability-forcing mechanisms of administrative law").

128. Economists often criticize this role, but it is an indisputably popular one politically. *See, e.g.*, John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63, S73 (2014) (arguing that "Fannie Mae and Freddie Mac, which went under in summer 2008, were hardly creations of the free market"); John A. Allison IV et al., *The Financial Crisis and the Free Market Cure: A Conversation with John A. Allison*, 14 ENGAGE: J. FEDERALIST SOC'Y PRAC. GRPS. 43, 44 (2013) ("Freddie and Fannie would never exist in the free market. They only existed because their debt was guaranteed by the U.S. government, and they were leveraged 1,000:1.").

129. *See* Steven Davidoff Solomon & David Zaring, *After the Deal: Fannie, Freddie, and the Financial Crisis Aftermath*, 95 B.U. L. REV. 371, 385–87 (2015) (discussing lawsuits against the government regarding Fannie Mae and Freddie Mac).

130. *See* Joe Light, *Fannie-Freddie Keep Giving Profits to U.S. Amid Talks on Changes*, BLOOMBERG (Sept. 29, 2017, 2:40 PM), https://www.bloomberg.com/news/articles/2017-09-29/fannie-freddie-keep-giving-profits-to-u-s-amid-talks-on-changes [https://perma.cc/44B9-SL88].

and that courts can usefully help untangle public–private partnerships that come a cropper, provided they have jurisdiction over the dispute.

Fannie and Freddie became public–private partnerships when the Treasury took control of the enterprises on September 7, 2008, acting under the authority given to the agency under the Housing and Economic Recovery Act of 2008 (HERA).[131]

In connection with the seizure, each of the GSEs issued to the Treasury a warrant to purchase 79.9% of the outstanding common stock of both Fannie and Freddie.[132]

The partial ownership of Fannie Mae and Freddie Mac was only a tentative matter—the government twice reworked its deals to take over the two GSEs as circumstances changed.[133] In August 2012, Treasury and FHFA entered into a third amendment to the stock purchase agreements, putting into place a net worth sweep where the Treasury would receive a dividend equal to the total assets of each company less total liabilities, so long as that amount was more than zero.[134] At the time, Michael Stegman, Counselor to the Secretary of the Treasury for Housing Finance Policy, stated that Treasury was "taking the next step toward responsibly winding down Fannie Mae and Freddie Mac, while continuing to support the necessary process of repair and recovery in the housing market."[135]

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131. Pub. L. No. 110-289, 122 Stat. 2654 (2008) (to be codified at 42 U.S.C. § 4501 note (2012)); *see* Gretchen Morgenson & Charles Duhigg, *Mortgage Giant Overstated Size of Capital Base*, N.Y. TIMES, Sept. 7, 2008, at A26.

132. Fed. Home Loan Mortgage Corp., Current Report (Form 8-K) (Sept. 11, 2008), http://www.sec.gov/Archives/edgar/data/1026214/000102621408000030/f67154e8vk.htm [https://perma.cc/Q4UW-NNXQ]. The warrant was exercisable for twenty years and had an exercise price of $0.00001 per share, which significantly diluted the holders of these securities and reduced their value. *Id.*

133. *See* Second Amendment To Amended And Restated Senior Preferred Stock Purchase Agreement (2009), https://www.fhfa.gov/conservatorship/documents/senior-preferred-stock-agree/2009-12-24_spspa_fanniemae_amendment2_508.pdf [https://perma.cc/HJ7C-VJ4P] (Fannie Mae); Second Amendment To Amended And Restated Senior Preferred Stock Purchase Agreement (2009), https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-12-24_SPSPA_FreddieMac_Amendment2_N508.pdf [https://perma.cc/T6HW-UW24] (Freddie Mac); Amendment To Amended And Restated Senior Preferred Stock Purchase Agreement (2009), https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-5-6_SPSPA_FannieMae_Amendment_508.pdf [https://perma.cc/22SD-Q2D2] (Fannie Mae); Amendment To Amended And Restated Senior Preferred Stock Purchase Agreement (2009), https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-5-6_SPSPA_FreddieMac_Amendment_508.pdf [https://perma.cc/VHT6-JYYL] (Freddie Mac).

134. *See* Third Amendment To Amended and Restated Senior Preferred Stock Purchase Agreement (2012), https://www.treasury.gov/press-center/press-releases/Documents/Fannie.Mae.Amendement.pdf [https://perma.cc/QU2C-VM5V] (Fannie Mae); Third Amendment To Amended and Restated Senior Preferred Stock Purchase Agreement (2012), https://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2012-8-17_SPSPA_FreddieMac_Amendment3_N508.pdf [https://perma.cc/2R6P-UXS8] (Freddie Mac); Press Release, U.S. Dep't of Treasury, Treasury Department Announces Further Steps to Expedite Wind Down of Fannie Mae and Freddie Mac (Aug. 17, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1684.aspx [https://perma.cc/VCQ4-Q3NT] (announcing the Third Amendment as a step to "help expedite the wind down of Fannie Mae and Freddie Mac, make sure that every dollar of earnings each firm generates is used to benefit taxpayers, and support the continued flow of mortgage credit during a responsible transition to a reformed housing finance market").

135. Press Release, U.S. Dep't of Treasury, *supra* note 134; *see also* Press Release, Fed. Hous. Fin. Agency, Changes to Fannie Mae and Freddie Mac Preferred Stock Purchase Agreements (Aug. 17,

By the Third Amendment, the housing markets had stabilized, and the GSEs had become profitable.[136] In the second quarter of 2012, the net worth sweep dividends soon exceeded the 10% dividend contemplated by the terms of the original takeover, leaving plenty of profits that under the initial stock purchase agreements could have been paid to Fannie and Freddie shareholders who had retained their stakes in the seized firms.[137] The firms have paid the Treasury $182.4 billion in net worth sweep dividends since the Third Amendment, an amount almost equal to the capital commitment provided by the Treasury.[138]

For this reason, multiple complaints against both the Treasury and Federal Housing Finance Agency (FHFA) have been filed in the U.S. District Court for the District of Columbia and the Court of Federal Claims by both junior preferred stockholders and common stockholders over the actions of the government in connection with the Third Amendment.[139] The idea is that the net worth sweep discriminates against minority shareholders and favors the Treasury Department. As Judge Janice Rogers Brown put it, "even in a time of exigency, a nation governed by the rule of law cannot transfer broad and unreviewable power to a government entity to do whatsoever it wishes with the assets" of privately held companies.[140]

The complaints consist of claims under the APA and the Constitution, and they are brought by both hedge funds who purchased preferred or common shares on the open market subsequent to the conservatorship of Fannie and Freddie and shareholders at the time of the Third Amendment on behalf of all preferred and common shareholders.[141] Many of these same plaintiffs have also brought claims in the Court of Federal Claims asserting that the Treasury's actions amount to a "taking" under the Fifth Amendment.[142]

2012), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Acting-Director-Edward-J-DeMarco-on-Changes-to-Fannie-Mae-and-Freddie-Mac-Preferred-Stock-Purchas.aspx [https://perma.cc/P3E9-Q8MP].

136. *See* Cheyenne Hopkins & Clea Benson, *U.S. Revises Payment Terms for Fannie Mae, Freddie Mac*, BLOOMBERG (Aug. 17, 2012, 5:28 PM), http://www.bloomberg.com/news/2012-08-17/treasury-accelerates-withdrawal-of-fannie-freddie-backing.html [https://perma.cc/VR6C-4XE9] (noting that at the time of the Third Amendment, Fannie Mae and Freddie Mac had both reported profits for the quarter sufficient to pay the 10% dividend to Treasury without further drawing on the capital commitment).

137. *See* Kevin M. Coleman, *Are the Feds Forcing Fannie and Freddie into Early Retirement?*, 19 FORDHAM J. CORP. & FIN. L. 489, 509 (2014).

138. In 2013 alone, the two firms paid Treasury $132.4 billion in net worth sweep dividends. *See* Freddie Mac, Annual Report (Form 10-K), at 1, 226 (Feb. 27, 2014); Fannie Mae, Annual Report (Form 10-K), at 10–11 (Feb. 27, 2014); *see also* Press Release, Fannie Mae Reports Comprehensive Income of $84.8 Billion for 2013 and $6.6 Billion for Fourth Quarter 2013 (Feb. 21, 2014), http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/q42013_release.pdf [https://perma.cc/J7Q2-8JD8].

139. *See* Solomon & Zaring, *supra* note 129, at 372 & n.2.

140. Perry Capital LLC v. Mnuchin, 848 F.3d 1072, 1115 (D.C. Cir. 2017) (Brown, J., dissenting).

141. *See* Consolidated Amended Class Action and Derivative Complaint at ¶¶ 21, 30–38, *In re* Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigs., No. 13-mc-1288 (D.D.C. Dec. 3, 2013).

142. *See, e.g.*, Complaint at 6, Fairholme Funds, Inc. v. United States, 117 Fed. Cl. 365 (2014) (No. 13-465).

The Court of Federal Claims has allowed the complaints brought before it to proceed to discovery. On September 30, 2014, however, the district court in Washington, D.C. dismissed the complaints consolidated before it.[143] The plaintiffs appealed the dismissal to the U.S. Court of Appeals for the D.C. Circuit.[144] On February 21, 2017, the D.C. Circuit affirmed the dismissal of most of the shareholders' claims, concluding that the takeover of Fannie and Freddie gave the government unfettered discretion to decide what to do with the revenues of both firms, over a fiery dissent protesting that the treatment of investors that "might serve in a banana republic will not do in a constitutional one."[145] The appellate court did, however, permit the shareholders to continue to press a variety of state law claims, ensuring that the disputes between government and investors will continue.[146]

One thing that these disputes have revealed is that Fannie and Freddie have become public–private partnerships rife with disputes. As we have shown, a key reason for these problems is that the government took over the firms on the quick and without much reflection. This led, in turn, to a governance arrangement that the government surely now wishes it had never been burdened with and that it has had to try to resolve in the courts.

C. THE FRONTIERS OF TRANSACTIONAL ADMINISTRATION

We conclude by considering some frontiers of transactional administration, which the Trump Administration has looked ready to explore. Governance by deal can become a way of life.

In this Article, we have defined governance through deal narrowly to include agreements with firms to implement policy. It is, however, worth noting that deal-making can amount to more than this—it can affect how leaders think about government programs. Robert Litan observes that "Mr. Trump makes a virtue out of his deal making."[147] The frontiers of governance by deal can be employed beyond private sector deals to include matters of diplomacy and personnel management. This strategy can also be used to restructure the most fundamental relationship any government has with investors: the relationship between the payer on and the holders of government debt.

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143. Perry Capital LLC v. Lew, 70 F. Supp. 3d 208, 214 (D.D.C. 2014) (holding the government's seizure of Fannie and Freddie's profits not to violate the APA or the Constitution).

144. Notice of Appeal, Perry Capital LLC v. Mnuchin, 848 F.3d 1072 (D.C. Cir. 2017) (No. 13-cv-1025), *appeal filed sub nom.* Perry Capital LLC v. Lew, 70 F. Supp. 3d 208 (D.D.C. 2014).

145. *Perry Capital LLC*, 848 F.3d at 1128 (Brown, J., dissenting).

146. *Id.* at 1080 (remanding "contract-based claims regarding liquidation preferences and dividend rights" to the district court for further proceedings).

147. Robert Litan, *In Clinton vs. Trump, Americans Play Let's Make a Deal*, WALL ST. J. (Feb. 23, 2016, 3:00 PM), https://blogs.wsj.com/washwire/2016/02/23/in-clinton-vs-trump-americans-play-lets-make-a-deal [https://perma.cc/MHL4-RXCH]. One observer has suggested that he can imagine a "scenario for the Trump presidency, based on extrapolating his deal-making background." Tyler Cowen, *Expect the Unexpected from Trump the Deal Maker*, BLOOMBERG (Dec. 12, 2016, 11:06 AM), https://www.bloomberg.com/view/articles/2016-12-12/expect-the-unexpected-from-trump-the-deal-maker [https://perma.cc/DL9X-R9C6].

President Trump has suggested that he will hire government employees, conduct foreign relations, and even take on the country's debt burden through a dealmaking lens. In fact, the President appears to want to make dealmaking a governing philosophy, whereby the governing agenda is "the agenda of a dealmaker, one who seems inclined to take a transactional, ad hoc approach to economic policy—offering some help to this company, perhaps directing a warning to others."[148] Dealmaking experience could be used as a factor in making personnel decisions. James Oliphant and Emily Stevenson note that "Donald Trump's cabinet appears much like the president-elect himself: mostly older, white males, many of them wealthy, who see themselves as risk-takers and deal-makers and prize action over deliberation."[149]

Dealmaking can also be a way of conducting foreign policy. The President has frequently couched interactions with foreign sovereigns as a set of deals to be renegotiated. He has said, "I could give you the names of ten to twenty of the greatest deal-makers in the world who live in this country. These great negotiators could go up against China or Iran and work out a fabulous deal for the United States."[150] He has explained, "[W]e're going to negotiate and renegotiate trade deals, military deals, many other deals that's going to get the cost down for running our country very significantly."[151]

The idea is that dealmaking experts are more likely to deliver better policy outcomes than would those versed more in other subjects.[152] An ethos of dealmaking would take the government further away from rulemaking and towards the informality offered by deals. Because deals have particular reference points, there would be less governance by rules of general applicability and more governance by particularized arrangement. In administrative law, there is often a distinction drawn between rulemaking and adjudication; a state given over to deals avoids rulemaking and substitutes deals for individualized adjudications.

More generally, we might predict a transactional approach to politics as well as to policy. The era of logrolling and pork barrel politics might come back into vogue as fixed goals and values fall out of fashion.

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148. Josh Boak, *For Now, Trump Bears Signs of a Dealmaker, Not a Policymaker*, ASSOCIATED PRESS (Dec. 4, 2016), http://bigstory.ap.org/article/c111cd6a43c04db7b2a16699544c5e69/now-trump-bears-signs-dealmaker-not-policymaker [https://perma.cc/Z7N9-896E].

149. James Oliphant & Emily Stephenson, *Trump Builds Team of Bosses To Shake Up Washington*, REUTERS (Dec. 16, 2016, 4:13 PM), http://www.reuters.com/article/us-usa-trump-bosses-analysis-idUSKBN1452PX [https://perma.cc/4T7G-BDHM].

150. *Donald Trump on Foreign Policy*, ONTHEISSUES, http://www.ontheissues.org/2016/Donald_Trump_Foreign_Policy.htm [https://perma.cc/GJ88-APJ7].

151. David Francis, *Trump Says He'll Upend These Two Cornerstones of U.S. Foreign Policy*, FOREIGN POL'Y (Sept. 28, 2015, 5:29 PM), http://foreignpolicy.com/2015/09/28/trump-says-hell-upend-these-two-cornerstones-of-u-s-foreign-policy [https://perma.cc/CM7U-PFA6].

152. For example, Trump expressed his distaste for the Obama administration's support of the Trans-Pacific Partnership (TPP). *See* Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 5, 2015, 1:46 PM), https://twitter.com/realdonaldtrump/status/651136309029834752 [https://perma.cc/2F5C-NNTV] ("TPP is a terrible deal."). For a further discussion of the TPP, see *United States and Eleven Other Nations Conclude Trans-Pacific Partnership*, 110 AM. J. INT'L L. 384, 385 (2016).

The ultimate example of governance by deal would be to put dealmaking in the service of monetary policy. Here, too, the Administration has made noises about doing precisely that. President Trump said during the campaign that he would look at the possibility of renegotiating the terms on which the Treasury Department has issued sovereign debt, explaining, "I could see renegotiations where we borrow at long term at very low rates," and observing that he often renegotiated debt terms while in business.[153] "I would borrow, knowing that if the economy crashed, you could make a deal."[154]

Such a renegotiation would be unprecedented for the United States, which famously has never missed an interest payment in all its history, but sovereign debt renegotiations are common among other countries, particularly those in the developing world.[155]

The idea behind the deal is that creditors of the United States could be pushed to take write-downs on their holdings of sovereign debt, possibly by simply forgiving some of the debt or by agreeing to extended payment terms on already issued debt.[156] To be quite clear, this renegotiation would count as a default on the debt and would therefore be unprecedented. Any change in the payment terms of bond obligations would ordinarily be interpreted by investors in such a way.

All of this, for now, lies in the realm of conjecture. It has never been cheaper to borrow,[157] making a renegotiation of borrowing terms seem unnecessary. Sovereign debt default carries great consequences—at a minimum, it would likely increase the cost of borrowing in the future, and that would, in turn, make it harder not just for the government to manage its finances but for businesses to obtain the capital they need in the debt markets.[158] The incumbent Treasury Secretary has not indicated an appetite for a sovereign debt renegotiation, perhaps for these reasons.[159] But because a sovereign debt restructuring would constitute the epitome of governance by deal—a threatened, unprecedented default put in

153. Ronald Day, *Trump Floats U.S. Debt Renegotiation If Economy Sours*, BLOOMBERG (May 5, 2016, 9:29 AM), https://www.bloomberg.com/news/articles/2016-05-05/trump-floats-u-s-debt-renegotiation-if-economy-sours [https://perma.cc/9K86-RMST].

154. Liz Capo McCormick, *Trump's Comments on U.S. Debt Seen as Non-Starter by Bond Market*, BLOOMBERG (May 6, 2016, 3:06 PM), https://www.bloomberg.com/news/articles/2016-05-06/trump-s-comments-on-u-s-debt-seen-as-non-starter-by-bond-market [https://perma.cc/G9RN-UE8D].

155. *See generally* ODETTE LIENAU, RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE (2014) (reviewing the history of some of these defaults).

156. *See* McCormick, *supra* note 154.

157. Elena Holodny, *The 5,000-Year History of Interest Rates Shows Just How Historically Low U.S. Rates Still Are Right Now*, BUS. INSIDER (Sept. 20, 2017, 2:58 PM), http://www.businessinsider.com/interest-rates-5000-year-history-2017-9 [https://perma.cc/AQR5-QWAV].

158. *See* Steven L. Schwarcz, *Sovereign Debt Restructuring Options: An Analytical Comparison*, 2 HARV. BUS. L. REV. 95, 97–98 (2012) ("The problem of sovereign debt constantly reoccurs[,] . . . sometimes with devastating consequences for the defaulting nation and sometimes for the world." (internal footnotes omitted)).

159. As finance chair of the Trump campaign, the current Treasury Secretary, Steven Mnuchin, responded to the prospect of a debt renegotiation by stating, "Obviously, the government has to honor its debts." Tierney Sneed, *Trump's Nutso Idea on U.S. Debt Walked Back by His Finance Chair*, TALKING POINTS MEMO (May 6, 2016, 4:43 PM), http://talkingpointsmemo.com/livewire/trump-finance-chair-debt-idea [https://perma.cc/7P3V-HFHX].

the service of forcing investors to offer more generous repayment terms—and because the President has considered it, it might mark the final stage of governance by deal.

D. DEREGULATION: THE COMPLEMENT TO TRANSACTION

Many observers have characterized the prevailing ethos of the Trump Administration as deregulatory, but although there is a strong deregulatory component to what the Administration is doing, in our view, this view is incomplete.

The Trump Administration's three-pronged administrative approach to deregulation is new and worth fitting into the transactional context that we think characterizes much of its positive agenda. The Executive can both reduce existing regulations, promulgated under the conventional auspices of the administrative state, and pursue its positive agenda through unconventional means. We would argue, however, that the Administration's approach to deregulation complements its positive transactional approach in at least two ways.

The first prong of the Administration's deregulatory approach has been idiosyncratic. At the earliest stages of the Administration, the Executive worked with Congress to utilize the Congressional Review Act (CRA),[160] a previously moribund statute designed to facilitate congressional reversals of administrative regulations.[161] That statute permits Congress to undo a regulation through a fast-track joint resolution disavowal.[162] However, it only applies to rules adopted within the last sixty days that Congress was in session, which meant that only rules passed during the final six months of the Obama Administration were eligible for review.[163]

During the first four months of the Trump Administration, CRA resolutions of disapproval were passed fifteen times,[164] undoing an array of rules ranging from the Interior Department's antipollution stream protection rule[165] to the Securities and Exchange Commission's resource extraction rule, which required mineral companies to report payments made to foreign governments.[166] The Administration also rolled back rules related to Internet privacy, drug testing for unemployment compensation, and other areas.[167] The turn to the CRA was unprecedented; the statute had only been utilized once before, when the Bush Administration undid a late Clinton Administration rule on ergonomics in the

160. 5 U.S.C. §§ 801–808 (2012).

161. *See* Michael D. Shear, *Trump Discards Obama Legacy, One Rule at a Time*, N.Y. TIMES (May 1, 2017), https://www.nytimes.com/2017/05/01/us/politics/trump-overturning-regulations.html [https://nyti.ms/2pmipuY].

162. *See* 5 U.S.C. § 801(a)(3)(B).

163. *See id.* § 801(a)(3).

164. *See CRA Resolutions*, RULES AT RISK, http://rulesatrisk.org/resolutions [https://perma.cc/G3DW-2MNT].

165. Pub. L. No. 115-5, 131 Stat. 10 (2017).

166. *See* Pub. L. No. 115-4, 131 Stat. 9 (2017).

167. To see the full collection of rules, see *CRA Resolutions*, *supra* note 164.

workplace.[168]

This deregulatory strategy is purely deregulatory, but it is worth emphasizing how unique it is. It suggests that innovation in policymaking has a transactional theme consistent with a more general sense of administration novelty.

The second way the Trump Administration has deregulated, or at least tried to, is through executive orders, which we think make room for transactional administration—indeed, they almost require it for any positive policymaking agenda. Many of these orders, seven of which were issued during the first two weeks of the Administration, direct the Executive Branch to conduct reviews of regulations or identify priorities.[169] An example is the February 3, 2017 order outlining "Core Principles for Regulating the United States Financial System."[170] It directs financial regulators to be sure that regulation is "efficient, effective, and appropriately tailored"—values with ambiguous application to the current set of regulations.[171]

However, Executive Order 13,771, "Reducing Regulation and Controlling Regulatory Costs,"[172] issued on January 30, 2017, could have large effects. The order requires executive departments and agencies to eliminate two regulations for every new one proposed.[173] It also required that costs imposed by regulations during fiscal year 2017 not exceed zero dollars.[174] The order initially appeared to preclude agencies from issuing regulations that would impose any costs, regardless of the benefits conferred by the regulation. The Office of Information and Regulatory Affairs (OIRA) later clarified that benefits could be subtracted from the costs of administering the regulation, but the total sum of costs could not exceed zero dollars.[175] OIRA's memo also clarified that cost savings could be "banked" to deal with potentially costly future regulations.[176]

By the same token, the requirement in Executive Order 13,777 also represents a regulatory strategy enacted through an executive order that could contribute to

168. For further discussion, see Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 638 (2003) ("[A]fter the Clinton administration issued its ergonomics rule, which would have instituted workplace safety standards, it was the 'losers' under the rule—a broad array of large and small businesses—that organized to effect a repeal."); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2172 (2009) ("[T]he ergonomics rule was probably unpopular enough with Republicans to ensure its rescission with or without the CRA.").

169. *See 2017 Donald Trump Executive Orders*, FED. REG., https://www.federalregister.gov/executive-orders/donald-trump/2017 [https://perma.cc/8GHJ-QTW4].

170. Exec. Order No. 13,772, 82 Fed. Reg. 9,965 (Feb. 3, 2017).

171. *Id.* at 9,965.

172. Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017).

173. *Id.* at 9,339. The order does not, however, apply to independent agencies, though those agencies often try to comply with some executive orders. *See* Memorandum from Dominic J. Mancini, Acting Adm'r, Office of Info. & Regulatory Affairs, to Regulatory Policy Officers at Exec. Dep'ts & Agencies & Managing & Exec. Dirs. Of Certain Agencies & Comm'ns (Apr. 5, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf [https://perma.cc/YYC3-B9KS].

174. 82 Fed. Reg. at 9,339.

175. Memorandum from Dominic J. Mancini, *supra* note 173.

176. *Id.*

deregulation.[177] The order, entitled "Enforcing the Regulatory Reform Agenda," requires each department and agency to designate an official as a Regulatory Reform Officer who is tasked with reviewing current regulations with an eye toward modifying or removing them.[178]

These zero-cost, regulatory, look-back executive orders make proceeding through rulemaking onerous. In particular, the cost measures invite agencies to delegate policymaking costs (and benefits) to the private sector in those areas where it wants to get things done. In our view, the executive orders prong of the deregulatory strategy all but requires executive agencies to act through transactions or other novel channels of policymaking.

The third way the Trump Administration has pursued deregulation has been to stay rules that it has deemed burdensome. The strategy, however, has varied in effectiveness. The Department of Labor has suggested that it is inclined to undo a rule imposing fiduciary obligations on investment advisers, but it also concluded that it could not prevent the rule from going into effect.[179] The Environmental Protection Agency's ninety-day stay on its 2016 Methane Rule was undone by the D.C. Circuit, which reminded the agency that a rule duly passed through notice and comment had to be undone in the same way and concluded that the bases for a stay of a rule without notice and comment were narrowly circumscribed.[180] This stay effort does not particularly require deals to move the President's agenda forward, but it does demonstrate that the Administration is interested in pushing ordinary procedure to its limits and finding workarounds where possible. The Weltanschauung, we would argue, is consistent with the envelope-pushing transactional approach. In this way, the Trump Administration efforts are more than deregulatory. Instead, the Administration adopts transactional administration as its *modus operandi*.

III. THE DESIRABLE LIMITATIONS OF TRANSACTIONAL ADMINISTRATION

The inevitability of regulation by deal in a Trump Administration and likely future presidencies raises two questions: First, can transactional administration be limited even if it cannot be eliminated, and second, if so, is it desirable to do so? The latter question dictates, in part, the answer to the first. To the extent that transactional administration is desirable, it should not be limited. The question then becomes, when can transactional administration be good for net social welfare?

177. Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

178. *Id.* at 12,285.

179. Alexander Acosta, *Deregulators Must Follow the Law, so Regulators Will Too*, WALL ST. J., May 23, 2017, at A19.

180. Clean Air Council v. Pruitt, 862 F.3d 1, 9 (D.C. Cir. 2017) (per curiam) ("Under CAA section 307(d)(7)(B), then, the stay EPA imposed is lawful only if reconsideration was mandatory.").

A. THE FINANCIAL CRISIS PARADIGM

The recent financial crisis gives us one paradigm for examining the desirability of regulation by deal and answering these questions. During the financial crisis, regulation by deal reigned.[181] The government's losses from its investments, at one time estimated at over a trillion dollars, ultimately have been slim; indeed, the deals may have been profitable.[182] Similarly, although the economy is not fully recovered, it has recovered more than other jurisdictions such as Europe.[183] The hangover at Fannie and Freddie has been nasty,[184] but in other cases, the government has been able to exit its investments.

In that case, regulation by deal—a form of transactional administration—worked, but it worked perhaps because it was used in the financial crisis when the government had maximum latitude to stretch the law.[185] And even to the extent that the strategy "worked," as the financial crisis receded, the government was left with hastily struck arrangements that sometimes did not function as expected.[186] This occurred in the context of Fannie and Freddie and the government's continued renegotiations of its bail-out arrangements, culminating in the Third Amendment.[187] Although shareholders have not sued on the initial Fannie and Freddie bail-outs due to their firm statutory firmament, the post-bail-out has been the subject of litigation, mainly because of the government's continued pursuit of a regulation-by-deal approach.[188] Other stakeholders have complained—and even sued—over their treatment by the government in financial crisis deals.[189]

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181. *See supra* Section I.A.

182. *See* Wayne Duggan, *Financial Crisis Bailouts Have Earned Taxpayers Billions*, U.S. NEWS (Jan. 19, 2017, 9:15 AM), http://money.usnews.com/investing/articles/2017-01-19/financial-crisis-bailouts-have-earned-taxpayers-billions ("In total, $623 billion in taxpayer money was dispersed via bailouts and roughly $698 billion has come back via dividend revenue, interest, fees and asset sales. It doesn't take a math genius to see the bailouts ultimately earned taxpayers more than $75 billion in profit, and that number is still growing."); *Bailout Recipients*, PROPUBLICA, http://projects.propublica.org/bailout/list [https://perma.cc/29MD-VDPL] (reviewing various government investments in 2012, as of January 30, 2017, estimating a return of $75.8 billion). However, it is by no means clear that the deals were profitable on a risk-weighted basis—that is, accounting for the possibility that the investments would fail.

183. *See U.S. vs. Europe: There's a Clear Economic Winner*, CNNMONEY (OCT. 21, 2014), http://money.cnn.com/infographic/news/economy/us-versus-europe-economy [https://perma.cc/SQ6C-8R2H] (showing that the United States, among other things, had stronger gross domestic product growth and lower employment than Europe in 2014).

184. *See supra* Section II.B.4.

185. *See supra* notes 42–55 and accompanying text.

186. *See supra* notes 42–55 and accompanying text.

187. *See supra* notes 134–38 and accompanying text.

188. *See supra* notes 136–46 and accompanying text.

189. *See* David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1408–09, 1409 n.11 (2014). Most notably, these deals have occasioned suits and protests by stakeholders in the automobile industry and shareholders of the nationalized insurer AIG. *See id.*

This jibes with the "thaumatrope" of judicial law.[190] During the financial crisis, judicial authority was at its weakest as courts refused to intervene to question the legality of the government's regulation by deal. Both Delaware and New York courts, for example, refused to intervene when the government arranged the sale of the failing investment bank Bear Stearns to JPMorgan.[191] But once a crisis fades, the rule of law again becomes stronger and courts become more willing to intervene. Because of the flexibility in law that occurs in a financial crisis, the desirability of regulation by deal and more generally transactional administration is best suited during the financial crisis when it is also most beneficial. As time is restored and urgency fades, the usual dictates of legislation, administrative process, and judicial oversight should reapply. This leads to a secondary conclusion, which is that any deal negotiated during a crisis should provide flexibility to the government to encompass changing circumstances post-financial crisis when it will become harder to renegotiate these transactions without the strictures of administrative law and due process.[192]

We are accordingly willing to contemplate free transactional administration during the midst of a financial crisis. During this time, the rule of law will be relaxed (though not broken) as courts hesitate to interfere and the Executive Branch acts decisively. It is simply impossible to know what will be the form and remedy for the next financial crisis beyond vague notions that a liquidity provider will be required.[193] Because of this, limiting dealmaking will be impossible and channeling its efforts, as Dodd–Frank attempts to do, merely results in undue restraint on the government or leads the government to more extremes to justify its legal position.[194] Transactional administration and regulation by deal is inevitable in a financial crisis, and limiting it substantially seems, to us, impossible.

Moreover, dealmaking during a financial crisis can be placed into a transaction cost paradigm. Typically, the costs of legislative or administrative action are

190. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 7 (2005) ("Good faith, I argue, is simply the application of the thaumatrope to the duties of care and loyalty. Spinning the two together, the composite image—of a poor decisionmaking process mixed with hints of conflicting interest—may trigger liability under something the judiciary now calls 'good faith.'").

191. *See In re* Bear Stearns Cos. S'holder Litig., C.A. No. 3643-VCP, 2008 WL 959992, at *8 (Del. Ch. Apr. 9, 2008) (dismissing Delaware litigation by Bear Stearns shareholders aggrieved by government seizure and sale of the firm to JPMorgan); *In re* Bear Stearns Litig., 870 N.Y.S.2d 709, 741 (N.Y. Sup. Ct. 2008) (same for New York litigants).

192. *See* Steven M. Davidoff, *Uncomfortable Embrace: Federal Corporate Ownership in the Midst of the Financial Crisis,* 95 MINN. L. REV. 1733, 1736 (2011) (observing that "the practical reality that future government ownership is likely to adopt similarly heterogeneous patterns as each crisis is its own unique entity shaped by political, market, and legal realities").

193. *See* David Zaring, *The Legal Response to the Next Financial Crisis*, 24 GEO. MASON L. REV. 533, 546 (2017); *see also* Frederic S. Mishkin, Governor, Fed. Reserve, Speech at the Tenth Annual International Banking Conference, Fed. Reserve Bank of Chi., Chi., Ill.: Systemic Risk and the International Lender of Last Resort (Sept. 28, 2007).

194. Dodd–Frank Act §§ 1104–1105, 12 U.S.C. §§ 5611–5612 (2012) (limiting ability of the Federal Reserve to serve as a lender of last resort to failing financial institutions and other businesses).

high.[195] The requirements of the legislative or administrative process must be observed, imposing limitations on time and the ability to achieve a result. Transactional administration eliminates these costs, which is a particularly valuable outcome during a financial crisis when speed and authority are paramount.

But there are costs to such dealmaking. The democratic process is subverted as are principles of notice and comment and due process. There are also costs in terms of input from the Legislative Branch and administrative agencies. These subvert the democratic principles that undergird our society. Dealmaking also has idiosyncratic costs. Transactional administration during crisis times can create rigid arrangements, and haste can mean that these arrangements are less than appropriate as circumstances change. In times of financial crisis, though, the benefits of quick and decisive action often outweigh the costs.

B. EVERYDAY TRANSACTIONAL ADMINISTRATION

Everyday transactional administration raises more acute issues and a different set of challenges. It moves regulation by deal from an emergency tool used to respond to crises to a central role in governance. Rather than pursuing government programs through notice and comment or through broad regulation applied across an entire industry with the same standards for all, governance by deal looks to particular transactions to effectuate government policy. These transactions will not involve notice, comments, or the due process standards that we ordinarily expect from public administration.

1. The Inefficiencies of Transactional Administration

To some degree, dealmaking might look appealing to those who think that the regulatory state has been calcified by bureaucracy. Many proponents of the so-called ossification thesis have argued that the onerousness of judicial review, preceded by lengthy paper requirements, has made it difficult for government policy to be made.[196] These observers might welcome a dealmaking approach to policymaking.

In our view, creating government obligations for private businesses could result in an equally inefficient private sector regulated by contract or burdened by permanent intertwinement with the government. The example of Fannie Mae and Freddie Mac is again instructive.[197] The process of nationalizing the two privately held firms during the Crisis was probably necessary, even if it was done without much attention to corporate form or administrative nuance. But the rapid nature

195. Moreover, "[t]he problem with high process costs as a passive barrier is that they are themselves likely to expend much of the surplus they create." Jonathan S. Masur, *Costly Screens and Patent Examination*, 2 J. LEGAL ANALYSIS 687, 724 (2010).

196. *See, e.g.*, Jerry L. Mashaw, *Conclusion: The Inside Out Perspective: A First-Person Account*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 501, 508 (Nicolas R. Parrillo ed., 2017) ("A judicial demand that the agency demonstrate that the new safety designs and technologies required by its rules were technologically feasible and economically sensible based on real world experience made the agency's mission begin to seem like 'mission impossible.' The agency lost over half of its early judicial review proceedings.").

197. *See supra* Section II.B.4.

of the transaction caused the government to make mistakes, and the continued problems created for Fannie and Freddie stakeholders have been significant; the government's investment in the firm has proven to be impossible to exit or to reform through legislation.[198]

Providing government services through public–private partnerships or extracting deals to onshore foreign workers might look like a slimming-down of the public sector through reliance on private businesses to carry out policy objectives. However, it would also intertwine the public and private in a way that could be both burdensome for business and neglectful of the public values that we associate with ordinary public governance. The deregulatory component of transactional administration is that the deals evade judicial review in a way that ordinary regulatory law would not. Deals struck with companies will also avoid the notice-and-comment and open governance requirements of the APA.[199]

The private sector nonetheless may feel quite burdened by the resulting corporate-regulatory set of contracts imposing onshoring and other requirements on the firms that assist the government in its policy goals. Permanently relying on deals to make government policy seems neither effective nor consistent with a vision of task specialization—a goal that leaves responsibilities in the government's hands when public rights and values are at stake and in the private sector's when they are not. Moreover, the prospect of reprisal may make it difficult for these institutions to sue.[200]

2. The Legality of Transactional Administration

Transactional administration during the financial crisis was not open government, and it rejected some of the usual values of administrative law, such as predecision notice to affected parties and opportunity for public comment. The government, for example, did not divulge the deals it was doing until those deals

198. *See* Joe Light, *Fannie and Freddie Should Exit Government Grip, Mnuchin Says*, BLOOMBERG (Nov. 30, 2016, 9:45 AM), https://www.bloomberg.com/news/articles/2016-11-30/fannie-and-freddie-should-exit-government-s-grip-mnuchin-says [https://perma.cc/325E-JUQB] ("The Obama administration for the past eight years has said that Congress should pass legislation to reform the housing-finance system. The last big push for legislation was in 2014 and failed to reach the Senate floor.").

199. *See* Freedom of Information Act, 5 U.S.C. § 552(a) (2012) (requiring transparency through full or partial disclosure to ensure open governance); Administrative Procedure Act, 5 U.S.C. § 553(b) (requiring notice-and-comment rulemaking).

200. *See* Del Stiltner Dameron & Robert J. Sherry, *Son of* Scanwell*: Antitrust Challenges to Government Contract Awards and Related Actions*, 92 DICK. L. REV. 281, 281, 311 (1988) (noting that although "[u]nsuccessful bidders and offerors for government contracts traditionally have had a number of available forums to challenge the award, or proposed award, of a particular contract to another party," only a "relatively small number of challenges . . . have been brought in this manner"); Sanford A. Church, Note, *A Defense of the "Zone of Interests" Standing Test*, 1983 DUKE L.J. 447, 455 n.39 (1983) ("Moreover, the courts do not always apply the [zone of interests] test in competitor suits. For example, at least five of the federal courts of appeals have limited their inquiry to injury in fact in cases brought by unsuccessful bidders for government contracts.").

were concluded, meaning there was no opportunity for ex ante objection.[201] Transactional administration does away with the ability of the public to comment on an action and perhaps induce a change of course by the government, because deals are not published as proposals in the *Federal Register* or accompanied by a ventilation by the public interested in the government action.[202]

This defies a current tenor of administrative law scholarship, which argues that government actions should be transparent and subject to public notice and inspection. Indeed, Cass Sunstein led OIRA in the wake of the financial crisis with a push for a more thorough regulatory approach to administration.[203] Pursuing government policy through deals evades these values. The deals are negotiated confidentially by lawyers acting in the current government's interest.[204] The resulting programs are implemented by parties who are not subject to judicial or administrative review, let alone OIRA. The action is done quickly and without court oversight. Instead, it is completed as a singular deal—a legal arrangement negotiated by sophisticated, outside lawyers designed to meet the problem with a transactional approach. Dealmaking is difficult to square with oversight, at least as it is currently done.

That is regrettable, at least when the practice is a central component of policymaking. But these threats to some standards of good governance do not mean that transactional administration is illegal under the APA or other procedural statutes. The *sine qua non* of transactional administration is finding a legal hook that does not require an administrative notice and comment.

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201. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983) (holding that an agency rescinding a rule must follow the same informal rulemaking procedure under the APA as required to promulgate a rule).

202. *See* 5 U.S.C. § 553(b), (c) (setting forth requirements for notice-and-comment rulemaking). The ability to monitor government programs is one of the fundamental values of administrative law. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1161–62 (2009) ("[A]dministrative agencies in the United States are some of the most extensively monitored government actors in the world. Almost all policy decisions an agency makes must be published in the Federal Register for all to see. Even informal policies that are not legally binding are publicly available. Most legally binding agency rules require notice and an opportunity for public comment by any affected interests—comments to which the agency must adequately respond. With some notable exceptions, final policy decisions by federal agencies in the United States are stunningly visible, even if the internal decisionmaking process of agencies is not entirely transparent."); *see also* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027–28 (D.C. Cir. 1978) ("Our reliance on careful procedural review, moreover, derives from an expectation that . . . the Agency, in carrying out its 'essentially legislative task,' has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA . . . .").

203. *See* Brad Plumer, *Cass Sunstein on How Government Regulations Could Be a Lot Simpler*, WASH. POST (June 12, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/06/12/cass-sunstein-on-how-government-regulations-could-be-a-lot-simpler/?utm_term=.fb50576cfcbd [https://perma.cc/82TR-2G72].

204. Jonathan Lipson has shown that the current President has often sacrificed the interests of stakeholders in his own unsuccessful bankruptcy workouts. *See* Jonathan C. Lipson, *Making America Worse: Jobs and Money at Trump Casinos, 1997–2010* (Temple Univ. Legal Studies Research Paper Series, Working Paper No. 2016-47, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845554 [https://perma.cc/Z6PJ-G7X9].

A final feature of transactional administration is that it is animated by a lack of faith in governing institutions. Observers like John Yoo have worried that the President could be "viewing the government as the enemy," using deals for policymaking to get around the bureaucracy, the courts, and Congress—a trifecta when it comes to matters of the separation of powers.[205] Deals are, in this sense, a rejection of potential public law.

3. Separation of Powers

Transactional administration is consistent with Eric Posner and Adrian Vermeule's view of the world.[206] They theorize that power flows to the Executive Branch during a crisis by necessity, without regard to law.[207] Neither the Judiciary nor Congress is capable of dealing with the situation effectively, in large part due to the bureaucratic nature of such solutions. In a previous article, we agreed with Posner and Vermeule's assessment but also noted the statutory basis the government repeatedly cites for its actions.[208] To us, it was better to say that the government looked for statutory hooks for its actions that defied the usual dictates of administrative law.[209] The government wanted to show that it was acting legally, even if it was doing so neither in a traditional administrative law sense nor with public input.[210]

Yet, outside a crisis, there appears to be less of a legal hook. Instead, one-off dealmaking is more about back-door terms, forceful results, and unequal application of standards, to the extent standards exist at all. The legal hook is often an ex post facto justification based on the terms reached rather than on the action itself.

We also believe there are serious legal concerns about bedrock principles of presidential constitutional power with regards to the way the Trump Administration may seek to govern by deal. The case of the nationalization of the steel industry is illustrative. In 1952, Truman ordered his Secretary of Commerce to nationalize and operate most of the nation's steel mills to effectively end a strike by the United Steelworkers of America.[211] The owners of the mills sued, and the Supreme Court

205. *See* John Yoo, Opinion, *Executive Power Run Amok*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/opinion/executive-power-run-amok.html [https://nyti.ms/2kEbU4Z] (arguing that the President "should share Hamilton's vision of an energetic president leading the executive branch in a unified direction" and that Trump "should realize that the Constitution channels the president toward . . . cooperating with Congress on matters at home").

206. *See* Posner & Vermeule, *supra* note 62, at 1614 ("In the modern administrative state, it is practically inevitable that legislators, judges, and the public will entrust the executive branch with sweeping power to manage serious crises of this sort.").

207. *See id.* ("Political conditions and constraints, including demands for swift action by an aroused public, massive uncertainty, and awareness of their own ignorance leave rational legislators and judges no real choice but to hand the reins to the executive and hope for the best.").

208. *See* Davidoff & Zaring, *supra* note 3, at 493, 537–38 ("[W]e are not persuaded that the government's response marks the irrelevance of legal constraint in a crisis.").

209. *See id.* at 495–96, 499, 506–08.

210. *See id.* at 468 ("Government by deal is not open government, and it rejects some of the usual values of administrative law, such as predecision notice to affected parties and the public; measured, unhasty action; and comment-ventilated policymaking.").

211. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952).

held the seizure unconstitutional and upheld a preliminary injunction blocking the seizure.[212]

The grounds were spelled out in six concurring opinions. In the main opinion, Justice Black held that the seizure was illegal under a strict construction that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here."[213] This theme ran through all the concurring opinions, though some, like Justice Jackson, found Truman's actions directly contradictory to the law.[214] *Youngstown* thus stands not only for judicial review of presidential action but also for limitations on presidential conduct where there is no congressional or constitutional authorization.

Although *Youngstown* stands for the limitation of presidential power when authority is absent, the recent Ninth Circuit opinion on the temporary restraining order against Trump's immigration order represents a more constitutionalist approach.[215] The opinion upheld the temporary restraining order on the ground that it deprived various constituencies of due process rights, even if its application of due process to immigrants was muddled.[216] More importantly, however, the Court took a broad view of standing, finding that the State of Washington had standing to sue because of the deprivation of immigrants to attend its universities.[217] This holding on standing matters for the future of judicial oversight during a dealmaking administration. Relaxed standing requirements would be a necessary precondition to any review of governance by deal, and the Supreme Court's caution about blanket injunctions does not change this calculus.[218]

Outside an emergency like a financial crisis, the cost–benefit calculus of regulation by deal changes. Whereas in an emergency, the benefits of quick and decisive action often outweigh the costs (which, as we have shown, are often substantial), in the case of non-financial-crisis decision making, this may not be the case. In such instances, the purpose of transactional administration is not quick action but avoidance. Its goal is to sidestep the legislative and administrative process to reach deals that may not be achievable within the regulatory state.

Because of the deregulatory nature of a presidency devoted to dealmaking as a norm, we are less sanguine about the benefits outweighing the costs. Instead, in these circumstances, presidential power will subvert democratic norms and the careful regulatory state that has been built up. Although the benefits of such

212. *Id.* at 580, 583, 589.

213. *Id.* at 585.

214. *See id.* at 646 (Jackson, J., concurring).

215. *See* Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017).

216. *See id.* at 1166–67.

217. *See id.* at 1160 ("Thus, as the operators of state universities, the States may assert not only their own rights to the extent affected by the Executive Order but may also assert the rights of their students and faculty members.").

218. *See* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (stating that an injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs").

conduct in individual circumstances may warrant dealmaking, in other cases it may lead to an erosion of constitutional power in the Judicial and Legislative Branches, as well as in basic bedrock rights under the Constitution.

4. Regulating Transactional Administration

We approach the enshrinement of dealmaking in ordinary American governance with some skepticism, but if it is the path the Administration will take, four tools might constrain some excesses.

First, there must be a public disclosure component to transactional administration and governance by deal. The contracts should be publicly available for the discerning evaluation of anyone interested, thereby ensuring a form of public review—if not participation—in the dealmaking process that it struck.

Second, the government, if it wishes to act by deal, should take it slow. That is, dealmaking done in a hurry has, as the financial crisis revealed, resulted in mixed consequences. If deals are to be a principle mechanism for government policymaking in nonemergency times, then the government should take care to think through these deals before rushing into them.

Third, privatization should at least have some explicit legality and presidential authority consistent with *Youngstown*.[219] For example, in the Carrier deal, the subsidies provided to Carrier were from the State of Indiana.[220] The right approach to the level of legality required should be through the *Chevron* doctrine.[221] An interpretation of a governing statute that concluded that it permits the government to act through deal rather than some other form of regulation should reasonably be entitled to deference in court.

Fourth, there should be equivalency. We characterize this as a light form of due process providing that there should usually be equal treatment of similarly situated actors.

We recognize that these are soft principles, actions that may not be required of the Executive by a court, though Congress could probably enact most of them. However, these principles are consistent with the goals of the legal system to balance the President's authority to act with other democratic values and to provide a basis for presidential comportment.

If these principles are not followed in a non-financial-crisis situation, then courts should be prepared to do what they can, which means taking the likely due process and takings claims seriously. We believe that there is a sound basis in due process for such an action. The problem is not hard to discern. Because policymaking through deal affects the property interests of American firms and citizens,

219. 343 U.S. 579 (1952).

220. *See Indiana Set To Endorse $7M Carrier Deal Brokered by Trump*, INDYSTAR (Mar. 28, 2017, 8:47 AM), https://www.indystar.com/story/money/2017/03/28/indiana-set-endorse-carrier-deal-brokered-trump/99722320 [https://perma.cc/RNF5-D3Z8].

221. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (providing that reasonable agency interpretations of statutory terms are entitled to judicial deference).

those parties might expect to have a predeprivation notice of the scheme and some sort of hearing or compensation for their losses.[222]

Determining the kind of process due in these cases usually requires a look at the oft-invoked three-factor test of *Mathews v. Eldridge*.[223]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[224]

The value of additional process in deals that cost some of the affected parties property is one of the reasons for a slower deal process. It is not clear, however, whether companies and other private actors would bring suit to complain. Resisting the full force of the government may be difficult, and companies may simply prefer to cope rather than fight any government action in court.

To address this point, we also believe that the Freedom of Information Act (FOIA) could be applied to presidentially directed deals. Currently, the White House is mostly immune from this statute.[225] This is a result of actions by the Obama Administration to remove the Office of Administration from the purview of the Act.[226] The remainder of the White House is mostly exempt, but some parts of the Executive Office of the President are bound to comply with the open

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222. The predeprivation notice and hearing requirements are usually traced to *Goldberg v. Kelly*. *See* 397 U.S. 254, 266–70 (1970) (dealing with the deprivation of government welfare benefits). As Henry Friendly discussed:

> Since [the *Goldberg* decision] we have witnessed a due process explosion in which the Court has carried the hearing requirement from one new area of government action to another, an explosion which gives rise to many questions of major importance to our society. Should the executive be placed in a position where it can take no action affecting a citizen without a hearing? When a hearing is required, what kind of hearing must it be? Specifically, how closely must it conform to the judicial model?

Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1268 (1975).

223. 424 U.S. 319 (1976).

224. *Id*. at 335 (citing *Goldberg*, 397 U.S. at 263–71).

225. The Supreme Court has held that the APA, including FOIA, does not apply to presidential decision making. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992). Nonetheless, various offices within the Executive Office of the President are subject to the open records law, including the Council on Environmental Quality, Office of Administration, Office of Management and Budget (OMB), Office of National Drug Control Policy, Office of Science and Technology Policy, and the Office of the United States Trade Representative. For a discussion of the APA's application to these offices, see Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 753 n.236 (2007).

226. *See* Citizens for Responsibility & Ethics in Wash. v. Office of Admin., 566 F.3d 219, 226 (D.C. Cir. 2009) (holding that the Office of Administration is not subject to FOIA absent White House consent); Megan R. Wilson, *White House Formally Exempts Office from FOIA Regs*, HILL (Mar. 16, 2015, 10:12 PM), http://thehill.com/homenews/administration/235900-white-house-exempts-office-from-foia-regs [https://perma.cc/G4FL-3JG5] (describing a rule to "exempt the Office of Administration" from FOIA).

records law.[227] A crafted approach, internally placing presidentially directed deals through the Office of Administration or OMB, might allow a FOIA request for any action directed specifically at an individual entity and might be sufficient to preserve a measure of transparency on these transactions.

In this regard, the trend towards regulation by deal, particularly in the Trump Administration, is an inevitable result of the powerful Executive, the rise of the administrative state, and the need to avoid its structures at times. Without some basic procedures and, at a minimum, transparency, regulation by deal in a noncrisis context will lack a social welfare-increasing component—the *sine qua non* of regulation by deal's appropriateness. Instead, it will simply provide randomness and uncertainty.

CONCLUSION

Transactional administration may be a way to circumvent an ossified administrative practice, but it raises serious issues of both transparency and due process. Even if it is a deregulatory tool, guiding principles and court oversight are necessary to ensure that it adheres to core principles of the modern administrative state. Governing through deals would attract any Executive but might especially attract a president from the private sector. This Article raises questions about the transactional approach to policymaking and provides tools that could rectify some of its problems, without eliminating it as a way to realize policymaking goals in the right circumstances.

227. *See* Strauss, *supra* note 225, at 753 n.236.