

UNACCOUNTABLE MIDNIGHT RULEMAKING? A NORMATIVELY INFORMATIVE ASSESSMENT

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Under a common view, the administrative state inherits democratic legitimacy from the President, an individual who is envisioned both to control administrative agencies and to be electorally accountable. Presidents' administrations continue issuing rules, however, even after Presidents lose elections. Conventional wisdom holds that Presidents use the "midnight" period of their administrations—the period between the election and the inauguration of the next President—to issue unpopular and controversial rules. Many regard this midnight regulatory activity as democratically illegitimate. Yet we have scant evidence that presidential administrations in fact issue controversial or unpopular rules during the midnight period. In this Article, I examine the content of notice-and-comment rules issued between 1983 and 2010—roughly 20,000 rules—to assess whether midnight regulatory activity plausibly reflects a failure of political accountability. Consistent with a simple theory of political incentives, I find that the administrations of last-term Presidents issue considerably more controversial rules, as measured by the level of public commenting on rules, the level of dissent associated with rules, and the size of rules. However, I depart from the conventional account in finding suggestive evidence that presidential administrations sometimes use the midnight period to "rise above" ordinary politics rather than exclusively to dole out regulatory favors to interest groups. Industry groups, for example, challenged President G.W. Bush's midnight rules in court at aberrational rates. I discuss the implications of these patterns for the unitary executive theory and the democratic legitimacy of the administrative state.

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INTRODUCTION

Under a common view, the administrative state inherits democratic legitimacy from the President, an individual who is envisioned both to control administrative agencies and to be electorally accountable.¹ It is thus not surprising to observe a great deal of concern about rules issued by a President's administration *after* he loses an election. Such so-called "midnight" rules disturb the elegant electoral solution to the administrative state's problem of democratic legitimacy.² Policymakers, though perhaps less concerned by the demands of normative theories than academics, also object to midnight regulations, often on grounds of political accountability.³

1. See *infra* Part V.

2. See *infra* Part I.A.

3. *Midnight Rulemaking: Shedding Some Light, Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Hearings*]. The Administrative Conference of the United States, likewise, recently commissioned a report on midnight rulemaking. See ADMIN. CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012-2: MID-

Spurring much concern over the midnight period, many observers have noted that rulemaking activity appears to increase during this short post-election window.⁴ For example, in the most comprehensive and detailed empirical study of the topic, Professor Anne Joseph O'Connell finds that "agencies complete more rulemaking actions in the final three months of a President's administration than in any other year's final quarter."⁵ Using different data, Professor Cochran and Professor Dudley support Professor O'Connell by finding that the number of pages published in the *Federal Register* dramatically increases in the final quarter of a President's administration relative to the same period in non-election years.⁶ By these measures, ample evidence suggests that Presidents tend to increase rulemaking activity as they exit office.

Yet the interpretation of this increase in rulemaking activity is unclear. Are the midnight rules qualitatively different than the rules that a President issues at other times in his administration? Centrally, does the midnight period of unaccountability allow the President to smuggle controversial or unpopular rules into law? A count of pages published in the *Federal Register* or of the number of final rules issued in a period may be informative about the volume of rulemaking. But this dominant counts-based methodology is not informative about the nature of the rulemakings in general, much less about any differ-

NIGHT RULES (2012), available at <http://www.acus.gov/sites/default/files/Final-Recommendation-2012-2-Midnight-Rules.pdf>.

4. Scholars have recently devoted considerable attention to the legal implications of political transitions. See, e.g., TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS (Austin Sarat ed., 2012); Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253 (2006); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003) [hereinafter Beermann, *Presidential Power*]; Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001).

5. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 957 (2008) [hereinafter O'Connell, *Political Cycles*]; see also Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471 (2011) [hereinafter O'Connell, *Political Transitions*] (examining rulemaking behavior around times of political transitions).

6. See Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters 1* (Mar. 8, 2001) (unpublished manuscript), available at [http://mercatus.org/sites/default/files/The_Cinderella_Constraint\(1\).pdf](http://mercatus.org/sites/default/files/The_Cinderella_Constraint(1).pdf); Susan E. Dudley, *Reversing Midnight Regulations*, REGULATION, Spring 2001, at 9, available at <http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf>; see also Veronique de Rugy & Anthony Davies, *Midnight Regulations and the Cinderella Effect*, 38 J. SOCIO-ECON. 886 (2009) (showing an increase in regulatory activity for Presidents who lose elections).

ence in the nature of midnight and non-midnight (daylight?) rulemakings. As such, counts of rules offer limited insight into the normative concerns associated with midnight rulemaking.

After all, the increase in rulemakings in the midnight period may be benign. Perhaps midnight regulations represent principally instances of agency procrastination. Or perhaps these regulations reflect, in the main, minor housekeeping matters. Or perhaps the end-of-term spikes in final rules simply reflect well-considered mid-term rulemaking initiations that have run their course. Professor O'Connell, for example, finds that Presidents tend to increase the number of Notice of Proposed Rulemakings (NPRMs) in the second and third years of their administrations.⁷ Newspaper accounts, of course, detail instances of controversial midnight rulemakings. Under President Clinton the Occupational Health and Safety Administration (OSHA) issued a rule in the midnight period imposing costly workplace ergonomics standards.⁸ The United Parcel Service estimated that compliance with the rule would cost the company \$20 billion; estimates of cost to the economy as a whole ran over \$100 billion.⁹ President George W. Bush, for his part, issued a rule in the midnight period that allowed surface coal mining within 100 feet of streams, enraging environmental groups.¹⁰

But these anecdotes cannot tell us whether midnight rules in fact represent the scourge to our democracy that many suggest. It is possible that the types of midnight rules identified by journalists as problematic occur throughout a President's administration. Perhaps Clinton issued rules similar to the ergonomics standard not just in the midnight period, but also earlier in his administration. Concern over the midnight rulemaking phenomenon, in other words, may be largely a product of the journalist news cycle: we notice controversial rulemakings toward the end of the administration because journalists

7. O'Connell, *Political Cycles*, *supra* note 5, at 943 (noting that the first year of a President's term is often associated with relatively few NPRMs).

8. Ergonomics Rule, 65 Fed. Reg. 68,262 (Nov. 14, 2000).

9. See Steven Greenhouse, *Battle Lines Drawn Over Ergonomics Rules; Business Pitted Against Washington*, N.Y. TIMES, Nov. 18, 2000, <http://www.nytimes.com/2000/11/18/business/battle-lines-drawn-over-ergonomic-rules-business-pitted-against-washington.html>. Of course, companies have an incentive to overstate compliance costs, but the fact that Congress later overturned the rule—in a rare exercise of the Congressional Review Act—suggests that the regulation was a reach for the administration. See Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 (2001) (“Congress disapproves the rule submitted by the Department of Labor relating to ergonomics (published at 65 Fed. Reg. 68261 [sic] (2000)), and such rule shall have no force or effect.”).

10. See 30 C.F.R. 780.35 (2013); 30 C.F.R. 784.19 (2013); 30 C.F.R. 816.71–816.74 (2013); 30 C.F.R. 817.71–817.74 (2013). For an environmental group's reaction see, e.g., *Hearings*, *supra* note 3, at 8 (statement of Earth Justice).

seek out stories about the transition in administrations in this period, even as the profile of midnight rules does not differ qualitatively from rules issued in earlier periods. If so, midnight regulations, as such, hardly seem to “represent a growing threat to the rule of law and the rights of individuals,” as some scholars and journalists suggest.¹¹

Of course, it is also possible that journalists and legal observers have it right—that Presidents systematically use the midnight period of unaccountability to issue controversial rules that have little popular support.¹² Certainly, we have anecdotal evidence that presidential administrations exploit the period for this purpose. And the evidence on the volume of rulemakings is consistent with this view. But, as suggested above, the interpretation of these two sources of evidence is unclear: the anecdotes may be misleading and the volume of rulemakings may increase for a variety of reasons.

In this Article, I consider the *content* of midnight rules. To do so, I examine a new source of data: the text of notice-and-comment rules finalized between 1983 and 2009—a total of roughly 20,000 rules.¹³ I use the text of rules and their preambles, published in the *Federal Register*, to develop measures of the degree to which a rule is politically controversial.¹⁴ For example, the number of references to public comments in the rules’ preambles provides an indication of the level of public interest in the rule, which likely correlates with the extent to which a rule is controversial.¹⁵

Such metrics promise to inform our assessment of midnight rules. For instance, if midnight rules have unusually high levels of adverse comments, as revealed in the rule preambles, this suggests that admin-

11. Andrew P. Morriss et al., *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 553 (2003).

12. See, e.g., Elizabeth Kolbert, *Midnight Hour*, NEW YORKER, NOV. 24, 2008, at 39, available at http://www.newyorker.com/talk/comment/2008/11/24/081124taco_talk_kolbert (“[J]ust about every midnight regulation being proposed is, evidently, a gift to a favored industry.”); Steven Greenhouse, *New Regulations for Federal Contractors Will Put an Emphasis on ‘Business Ethics,’* N.Y. TIMES, Dec. 20, 2000, <http://www.nytimes.com/2000/12/20/us/new-regulations-for-federal-contractors-will-put-an-emphasis-on-business-ethics.html> (noting that midnight rules during the Clinton Administration were “called a parting gift to organized labor” by “business groups”).

13. For an overview of the rulemaking process and the role of public commenting, see STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 501–743 (7th ed. 2011). As detailed below, I limit attention to the period between 1983 and 2009 due to data limitations.

14. Agencies use the preambles to final rules to respond to public comments submitted following the notice of proposed rulemaking. See *infra* Part II.A.

15. In this sense, the approach of this Article follows that of Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (finding normatively-relevant information in public commenting data).

istrations employ the midnight period to smuggle in controversial rules. If, on the other hand, the level of adverse comments is not higher for rules finalized in the midnight period, this indicates that the midnight regulations do not pose the grave threat to our democracy that many observers suggest. Similarly, the word length of rules is informative about the extent to which Presidents issue important, and therefore likely controversial, regulations in the midnight period. Is the midnight period a time in which Presidents issue landmark regulations or primarily minor housekeeping regulations?

The patterns, in short, that emerge from examination of these metrics suggest that midnight rules indeed reflect a failure of political accountability. I find that last-term Presidents, unlike continuing Presidents, issue considerably more controversial rules during the midnight period of their administrations. Moreover, this pattern is only evident in executive agencies. Independent agencies such as the Federal Trade Commission, over which the President has less complete control,¹⁶ do not exhibit unusual rulemaking behavior during the midnight term of exiting presidential administrations. This difference between continuing and last-term presidential administrations is consistent with a simple theory of political incentives: continuing Presidents remain interested in maintaining political support during the subsequent four years, whereas this midnight period represents the final opportunity, unchecked by further electoral disciplining, for last-term Presidents to influence public policy.

Even if these patterns indicate an accountability failure, it is unclear whether we should view this in positive or negative light. A fact that the debates over midnight rules often overlook is that we design many of our institutions precisely to dull incentives created by electoral accountability.¹⁷ This fact raises the question of whether we should view the accountability failure of the midnight period as a positive or negative feature of our constitutional system. I examine the identities of the parties who challenge midnight rules in court and find a mixed story. Belying a simple story, for example, six of the eight challenges to President G.W. Bush's midnight rules came from industry groups, which typically align with the Republican Party, rather than from labor or public interest groups. Thus, contrary to the conventional account, this pattern suggests, if only tentatively, that Presidents may

16. Control over the Federal Trade Commission was of course the subject of the landmark *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

17. The structure of the Senate, with long, staggered terms, provides perhaps the most prominent example of an accountability-thwarting institution. U.S. CONST. art. I, § 3, cl. 2. But many others exist, as I detail in Part IV, *infra*.

sometimes use the attenuated accountability of the period to “rise above” ordinary politics.

The midnight period offers broader lessons for administrative and constitutional law doctrines. Most centrally, the unitary executive theory is often premised on the notion that the President is politically accountable for agency decisions. Should it concern us that over 7% of regulatory activity occurs *after* a presidential election and *before* the inauguration of the next President—at a time when the President is not electorally accountable?¹⁸ Should it concern us that these midnight rules tend to be relatively controversial? Here, I conclude that the evidence from the midnight period offers qualified support for doctrines premised on the President’s electoral accountability. The fact that we observe sharply divergent regulatory behavior by Presidents on their way out the door suggests that elections discipline Presidents’ behavior for most of their terms. Presidential administrations, in other words, appear to behave *as if* elections constrain regulatory choices, an important premise undergirding much doctrine and normative theory.

I.

EMPIRICAL REGULARITIES AND NORMATIVE CONCERNS

A. *Empirical Regularities*

Playing off “midnight judges,”¹⁹ the term “midnight regulation” appears to have emerged in the early 1980s as a reference to the Carter Administration’s efforts to issue last-minute regulations ahead of President Reagan’s inauguration.²⁰ In fact, President Carter was neither the first nor the last President to increase rulemaking activity toward the end of his administration. Using the number of pages contained in the *Federal Register* as a measure of rulemaking activity, Professor Cochran finds a pattern of increased rulemaking in post-election quarters dating to 1948.²¹ Using counts of final rules as reported in the *Unified Agenda*,²² Professor O’Connell similarly finds a significant

18. This figure is for last-term Presidents. Between 1983 and 2010, last-term Presidents issued 936 rules during the midnight period; they issued a total of 12,361 rules.

19. See, e.g., Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961). These midnight appointments were at issue in the landmark case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

20. See Rugby & Davies, *supra* note 6, at 886 (noting the term “midnight regulation” emerged toward the close of the Carter Administration).

21. In particular, he finds a 17% increase in rulemaking in the quarter following an election relative to the same quarter in non-election years. Cochran, *supra* note 6, at 3.

22. The *Unified Agenda* is a semiannual publication that catalogues agencies’ regulatory activity. See *infra* Part II.B.

increase in rulemaking activity in post-election quarters from the Reagan Administration through the second Clinton Administration.²³ President G.W. Bush, likewise, appears to have increased the tempo of rulemaking toward the close of his administration, prompting a House judiciary committee hearing and inspiring countless news articles.²⁴

These patterns replicate in my dataset. In Figure 1, I display the number of rules finalized in each week from 1983 to 2009, partitioned by administration.²⁵ To provide a comprehensive picture, I display data for all administrations, regardless of whether the President is a last-term President or a continuing President. The *x*-axis in each figure shows the number of weeks since the administration started;²⁶ the *y*-axis represents the number of rules issued in a given week. I shade as grey the “midnight period,” which runs from the presidential election to the inauguration of the next administration. The lines running through the figures represent the locally weighted average of the week counts,²⁷ allowing us to see patterns in the data. Consistent with earlier research, the figures suggest a marked increase in rulemaking activity in the midnight period. The pattern, moreover, is most evident for Presidents in their final term in office, particularly if the successor President is of a different political party. The figures for Presidents G.H.W. Bush, Clinton, and G.W. Bush all show a dramatic increase in activity during the midnight period of their last term in office.

23. O’Connell, *Political Cycles*, *supra* note 5, at 954; O’Connell, *Political Transitions*, *supra* note 5, at 503.

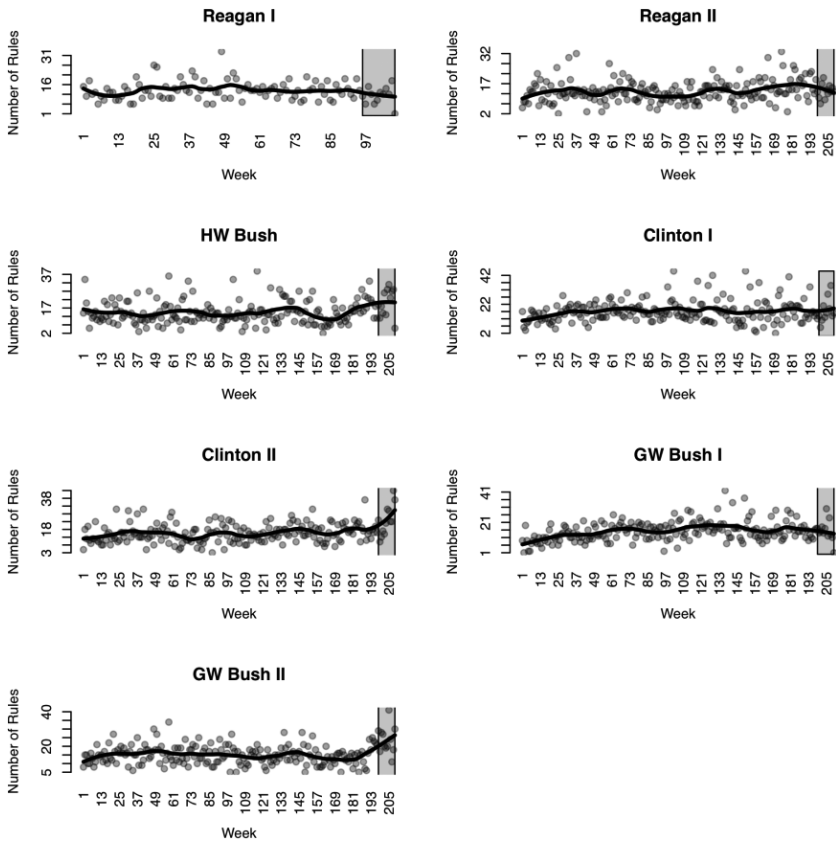
24. See, e.g., Holly Rosenkrantz & Mark Drajem, *Bush Pushes ‘Midnight Rules’ to Support Companies as Term Ends*, BLOOMBERG, Jan. 8, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6ZOEavtptv0>; John M. Broder, *A Legacy Bush Can Control*, N.Y. TIMES, Sept. 9, 2007, <http://www.nytimes.com/2007/09/09/weekinreview/09broder.html>. For responses to President Clinton’s midnight rules, see, e.g., Jay Cochran, Op-Ed., *Clinton’s ‘Cinderellas’ Face Regulatory Midnight*, USA TODAY, Dec. 13, 2000, at 17A; Murray Weidenbaum, Op-Ed., *Hold Those Midnight Rules*, CHRISTIAN SCI. MONITOR, Jan. 17, 2001, at 11.

25. For a detailed discussion of the source of the data, see *infra* Part II.B.

26. Notice that, for President Reagan’s first term, we have only two years of data (1983–84). As a result, the index of weeks begins in 1983, rather than in 1981. The index for all other administrations begins with the inaugural date.

27. See QI LI & JEFFREY SCOTT RACINE, *NONPARAMETRIC ECONOMETRICS: THEORY AND PRACTICE* 57–108 (2007) (explaining nonparametric regression).

FIGURE 1. RULEMAKING ACTIVITY: 1983-2009



In fact, relative to the comparable period in nonelection years, almost all administrations increased rulemaking activity—as measured by counts of finalized rules—in the midnight period of election years.²⁸ The increase in activity, moreover, tends to be largest for last-term Presidents: G.H.W. Bush, as mentioned, increased rulemaking by 62%, but Clinton also increased rulemaking activity by about 54% in his second term, and G.W. Bush increased rulemaking activity by about 41%. Only in the first Clinton administration did rulemaking

28. I follow the convention in the literature of defining the “midnight period” as the time between November 1 of an election year and January 20 of the following year. The comparison period is this same interval—from November 1 to January 20—of non-election years. I also follow the literature by referring to this interval as the “fourth quarter” of the year. See O’Connell, *Political Cycles*, *supra* note 5, at 947. As I explain in Part III.A, *infra*, presidential administrations do not face a homogeneous set of incentives within the midnight period—exiting administrations, particularly when facing an incoming President of the opposing party, experience the sharpest incentives to engage in divergent behavior during the midnight period.

decline during the midnight period, and only modestly so: the administration finalized 198 rules in the midnight period and 207 rules, on average, in the same period of the preceding three years.

B. Normative Concerns

This increase in activity unsettles many observers.²⁹ Although scholars and pundits almost universally adopt a dim view of midnight rules, it is difficult to identify precisely their motivating concern. Midnight regulations, after all, must still conform to the strictures of the relevant enabling statutes, of the Administrative Procedures Act (“APA”), and of the Constitution; they represent lawful policymaking actions. And the President who issues the rules continues to operate within his lawful term in office. Acknowledging the difficulty of identifying the normative basis of concern, Professor Beermann remarks that “the arguments of principle [regarding midnight rulemaking] are somewhat difficult to grasp” and that both he and previous observers “have found it difficult to articulate exactly what is wrong” with midnight regulations.³⁰

Scholars have proposed various reasons to disapprove of midnight rules. In his pioneering study, Professor Beermann, for example, writes that the outgoing President “should not order significant regulatory actions that the new President or his newly appointed officials are likely to oppose.”³¹ This position plausibly reflects a sense that the outgoing President has lost a measure of democratic legitimacy during the midnight period. He also suggests a more pragmatic explanation: “The new administration should not be forced to spend its first several months in office digging out from under a large pile of activity that occurred immediately before the transition.”³² Thus, midnight rules may throw sand into the gears of the new administration, hindering its effort to carry out the program of policies most recently endorsed by the electorate. Professor Mendelson, likewise, regards midnight regulations as “unseemly” and notes that “the agency’s choice in the last few weeks to proceed regardless of the new President’s views sug-

29. This subpart and Part V of this Article draw on many of the same cases and observations that I discuss in another Article, the central point in both articles being that political accountability plays an important role in theorizing about the administrative state and in the development of judicial doctrines. See Edward H. Stiglitz, *Unitary Innovations and Political Accountability*, Cornell L. Rev. (forthcoming 2014).

30. Beermann, *Presidential Power*, *supra* note 4, at 951, 952 n.8.

31. *Id.* at 948.

32. *Id.*

gests an unsatisfied craving for power.”³³ Other scholars worry that agencies, fearing the impending midnight deadline, hastily craft ill-considered rules.³⁴ Still others focus on the possibility that last-minute regulatory actions short-circuit public participation, an important normative consideration for advocates of deliberative democracy.³⁵

Although many of these rationales appeal to commonly held normative intuitions and rest on plausible empirical grounds, my focus in this Article is on a different normative concern: democratic accountability. Since the inception of the modern administrative state, observers have worried about the fact that unelected bureaucrats, and not elected representatives, create many of the rules that carry the force of law in our society.³⁶ These concerns surface in the now-muted debates over the nondelegation doctrine,³⁷ and continue to play a role in debates over separation of powers doctrine and the extent to which courts should defer to administrative agencies’ interpretations of statutes.³⁸

This focus reflects the fact that the dominant response to the problem of bureaucratic legitimacy involves the political accountabil-

33. Mendelson, *supra* note 4, at 564; *see also* Cochran, *supra* note 24, at 17A (“[A] midnight deluge undermines our abilities as ordinary citizens to understand and follow the law. Respect for law erodes when it changes for no other apparent reason than the fact that an administration’s drop-dead date draws near.”).

34. *See* Jerry Brito & Patrick McLaughlin, *OIRA at Midnight*, 31 REGULATION 11 (2008); *Hearings*, *supra* note 3, at 198 (testimony of Lynn Rhinehart, Associate General Counsel, AFL-CIO).

35. *See, e.g.*, *Hearings*, *supra* note 3, at 200 (statement of Lynn Rhinehart, Associate General Counsel, AFL-CIO); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (articulating out a normative foundation for the importance of public participation in rulemaking). *But see infra* note 51 and accompanying text (indicating that, on average, midnight rules move through agencies slower than non-midnight rules).

36. *See* Cynthia R. Farina, *Against Simple Rules for a Complex World*, 72 CHI-KENT L. REV. 987, 987 (1997) (referring to the problem of bureaucratic legitimacy as “an intriguing but awkward family heirloom” that “is handed down from generation to generation”).

37. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1748 (2002). The nondelegation doctrine maintains that branches of government—particularly the legislative branch—should not delegate its prerogatives and responsibilities to other entities. One commonly cited rationale for the nondelegation doctrine is that denying delegation clarifies the relationship between decision maker and policy outcome, thus enhancing political accountability. For an innovative assessment of the nondelegation doctrine, *see* Justin Fox & Stuart V. Jordan, *Delegation and Accountability*, 73 J. POL. 831 (2011) (analyzing the conditions under which delegation harms and enhances political accountability).

38. *See, e.g.*, Thomas O. Merrill & Kristen E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 861(2001). For a more general discussion of these points, *see infra* Part V.

ity of the President.³⁹ Responding to concerns about the broad delegation of authority to administrative agencies, Professor Mashaw, for example, writes that “[a]ll we need do is not forget there are . . . presidential elections and that, as the Supreme Court reminds us in *Chevron*, Presidents are heads of administrations.”⁴⁰ Thus, for some scholars, the tonic of presidential accountability cures many of the problems associated with the delegation of lawmaking authority to bureaucrats. Then-Professor Kagan, likewise, advocated for a presidential control model. Acknowledging that no system of bureaucratic control eliminates all costs of delegation, “presidential control,” she writes, “possesses advantages over any alternative control device in advancing . . . core democratic values,” such as “responsiveness and transparency.”⁴¹

Much of the concern about midnight rules, thus, derives from the fact that the President is less accountable during the midnight period.⁴² During the period between the election and the inauguration, a President who has lost the election is not accountable to the electorate and its preferences plausibly no longer discipline his behavior. Unchecked by elections, the President is free to pursue a policy agenda that is unresponsive to usual demands of politics. In this way, the lynchpin of the bureaucracy’s democratic legitimacy is loosened during the midnight period.

39. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469 (2003) (arguing that administrative law should shift focus to the dominant accountability approach from an approach that emphasizes arbitrariness); Cynthia R. Farina, *The ‘Chief Executive’ and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179 (1997); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 841–57 (1996) (discussing the growth of presidential influence, including over the federal bureaucracy); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2254 (2001). It is worth noting that in this literature “accountability” refers to electoral accountability, and not to other potential sources of accountability, such as legal accountability. For a taxonomy of different meanings of the term, see Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY 115 (Michael W. Dowdle ed., 2006).

40. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

41. Kagan, *supra* note 39, at 2332; see also RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 1 (1983); RICHARD W. WATERMAN, *PRESIDENTIAL INFLUENCE AND THE ADMINISTRATIVE STATE* 1 (1989).

42. See Nina Mendelson, *Midnight Rulemaking and Congress*, in TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS, *supra* note 4, at 54, 58 (“A central part of the legitimacy assessment depends on the extent to which an agency decision—a decision rendered by unelected officials—can be characterized not only as compliant with the law and non-arbitrary, but as democratically responsive.”).

This approach also explains our sharply discontinuous concern over regulations issued before and after an adverse election. Before an election, the President is disciplined by the upcoming election, constrained by the possibility of electoral retribution, and the rules his administration issues raise limited concerns about democratic legitimacy. The President may, of course, disregard the electorate's preferences before an election, but the electorate then enjoys the capacity to punish the President for his behavior. This is the fundamental bargain that motivates the relationship between the electorate and representatives.⁴³ After an adverse election, however, the electorate's ability to respond to presidential misbehavior is curtailed; this permits the President to pursue policies without regard to the public's views.

In addition to these abstract normative concerns about democratic legitimacy, observers also worry about the direct policy consequences of rules issued during a period with little political accountability. The President may, for example, use the accountability failure to issue rules as favors to special interest groups. At the close of President G.W. Bush's second term, for instance, one news outlet remarked that the President "is using the waning days of his presidency to implement a raft of pro-business regulations," and that "[t]he effort is supported by the U.S. Chamber of Commerce and trade groups representing companies including Royal Dutch Shell PLC and Dow Chemical Company."⁴⁴ Thus, the underlying problem of democratic accountability arguably manifests in adverse policy outcomes.

Testimony during a recent House hearing on midnight rulemaking often focused on the policy implications of political accountability. Subcommittee Chairman Cohen, for example, opened the proceeding by noting that "this midnight regulation period is a time without political accountability, where controversial actions will not cost the Administration's party votes."⁴⁵ Representative Nadler, similarly, stressed the notion of accountability: "lack of accountability in its waning weeks enabled the [G.W. Bush] Administration to adopt highly controversial rules on family planning, endangered species and global warming, that may not have passed muster in the more public debate. But since there was no more public accountability, no election to look forward to, they could do what they wanted . . ."⁴⁶ Another

43. For influential works on this point, see, e.g., Robert Barro, *The Control of Politicians: An Economic Model*, 14 PUB. CHOICE 19 (1973); John A. Ferejohn, *Incumbent Performance and Electoral Control*, 50 PUB. CHOICE 5 (1986).

44. Rosenkrantz & Drajem, *supra* note 24.

45. *Hearings*, *supra* note 3, at 1 (opening statement of Representative Cohen).

46. *Id.* at 23 (testimony of Representative Nadler).

witness, Veronique de Rugy of the Mercatus Center, echoed this sentiment: “[the] lack of accountability frees the president and his administration to enact regulations that previously had been politically impossible.”⁴⁷ David Mason, of the Heritage Foundation, noted that “there is a danger that an [outgoing] administration . . . might make politically unpopular decisions which it was reluctant to make before the election.”⁴⁸

Following these observers, I also focus on political accountability, and electoral accountability in particular. Terminologically, when I refer to “accountability,” I refer to electoral accountability rather than to, say, legal or moral accountability. Even so refined, two issues call for attention: accountability of whom and with respect to whom. On the first issue, one might imagine a strict legal perspective, under which we observe that no second term President is electorally accountable. I adopt a less rigid approach. I focus on the incentives that elections generate, even indirectly, for the sitting president. For instance, a second term president may be accountable, in the relevant sense, by virtue of his desire to be followed by a co-partisan. On the second issue, one might argue that the only relevant normative consideration is the relationship between regulatory policy and the preferences of the median voter. This may be so as a normative matter; at the very least, a plausible case can be made. However, as I emphasize below, electoral accountability has complex effects, inducing accountability, in part, to actors other than the median voter (such as special interest groups), and potentially providing elected officials with incentives to engage in various forms of pernicious behavior. Thus, as on the first issue, I focus on elections, recognizing that as a positive matter there is more than one actor to whom the President is electorally accountable, a fact that may inform our normative views of the midnight period, and in a limited way of electoral accountability itself, as discussed below.

C. Existing Evidence

The evidence scholars have assembled regarding midnight rulemaking interfaces only loosely with the relevant normative concerns. Most quantitative studies of midnight rulemaking examine the counts of either the number of rules or of the number of pages in the *Federal Register*. These counts demonstrate an increase in rulemaking during the midnight period—as above, substantiating the midnight

47. *Id.* at 209 (testimony of Veronique de Rugy).

48. *Id.* at 269 (testimony of David Mason).

regularity—but they contain little information about the content of the regulations.

Yet rulemaking activity may increase during the midnight period for a variety of reasons unrelated to the normative concerns above.⁴⁹ Most clearly, the increase in activity at the end of Presidents' administrations may reflect little more than procrastination, a seemingly universal behavioral pattern, with agency officials waiting to complete assignments until the last possible moment. Similarly, Presidents may enforce a regulatory "quiet period" leading up to the election, hoping to focus public attention on campaign themes; this backlog of regulations is then released following the election.⁵⁰ Many of the midnight rules may, in fact, be little more than housekeeping measures, tidying up before the next administration takes office. The media naturally focus on the most controversial regulations during the midnight period, but they often do not scrutinize other periods of an administration for controversial regulations. As such, the prevalence of controversial regulations may, plausibly, be lower during the midnight period than outside of it.

Recently, scholars have begun to examine whether the nature of midnight rules differs from other rules. For instance, scholars have attempted to quantify the "quality" of regulations using two metrics: the length of time a rule is under consideration, and the durability of a rule.⁵¹ A rule that is under consideration for only a short period, in this view, is more likely to be hastily and poorly crafted. This metric provides mixed evidence about the quality of midnight rules. On average, rules issued during the midnight period have been under consideration longer than rules issued in other times during an administration. How-

49. See Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 *LAW & CONTEMP. PROBS.*, no. 2, 1994, at 185, 196 ("[T]he gross data from the Federal Register are not interpretable.").

50. President Reagan, for example, may have delayed administrative actions ahead of G.H.W. Bush's election. See Judith Havemann, *Popular Policies Bloom as Election Approaches; Less Palatable Initiatives Appear Dormant*, *WASH. POST*, Oct. 28, 1988, at A6. Similarly, see Juliet Eilperin, *White House Delayed Enacting Rules Ahead of 2012 Election to Avoid Controversy*, *WASH. POST*, Dec. 14, 2013, http://www.washingtonpost.com/politics/white-house-delayed-enacting-rules-ahead-of-2012-election-to-avoid-controversy/2013/12/14/7885a494-561a-11e3-ba82-16ed03681809_story.html. Notice, however, that this approach does not provide a sharp explanation for differences in behavior among continuing and last-term presidents, and for that reason is not a natural fit with the results in this Article.

51. See Jack M. Beermann, *Midnight Rules: A Reform Agenda* 43 (Mar. 13, 2012), available at <http://www.acus.gov/sites/default/files/Revised-Draft-Midnight-Rules-Report-3-13-12.pdf> (draft report to the Administrative Conference of the United States).

ever, the number of rules issued after being considered by the agency for less than 180 days is greater during the midnight period.⁵² More to the point, however, this metric does not engage cleanly with the central motivating normative concern of democratic accountability. The length of time that a rule is under consideration provides limited information about whether a President is using the midnight period to issue rules that would not be politically viable at other times of an administration. A shorter period between the notice and finalization of a rule, for instance, might reflect pre-notice procrastination rather than an effort to short-circuit accountability in rulemaking. Perhaps even more troubling for this metric, a shorter period between notice and finalization may, in fact, reflect amplified pre-notice diligence, plausibly suggesting greater agency attentiveness to the concerns of public interest groups and regulated parties.⁵³

The story is much the same with respect to the durability of rules. A low-quality rule, runs the idea, is more likely to be revised by the subsequent administration—that is, it is less likely to be “durable.”⁵⁴ Hence, under this view, a rule with low durability is likely also a low quality rule.⁵⁵ The evidence with respect to rule durability is mixed. Professors Loring and Roth study two presidential transitions: from President G.H.W. Bush to President Clinton, and from President Clinton to President G.W. Bush. They find that President Clinton left untouched 43% of President G.H.W. Bush’s midnight rules, a relatively low percentage. However, President Bush left untouched 82% of President Clinton’s midnight rules, a fairly high percentage.⁵⁶ And as with other existing metrics, rule durability is a product of many factors, and provides only a hazy view of the relationship between midnight rules and democratic accountability. For example, newly inaugurated Presidents may be more inclined to revise recently issued rules, *regardless of their quality*, for the simple reason that the regulatory area is topical

52. *Id.* at 43–45.

53. See Wendy Wagner et al, Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards, 63 ADMIN. L. REV. 99, 110 (2011) (noting that administrative law doctrines “push[] a great deal of the policymaking and true regulatory work earlier in the process, during the rule development stage.”). A shorter period between notice and finalization, thus, may reflect the agency substituting pre- and post-notice diligence, and this fact makes it challenging to make inferences on the basis of the length of the period between notice and finalization (absent some credible measure of the extent of pre-notice diligence).

54. See *id.* at 43.

55. See generally *id.* at 45; Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1452 (2005).

56. Loring & Roth, *supra* note 55, at 1456.

and the new administration has divergent policy views from the old administration. If so, the durability of a rule provides questionable information about the degree to which Presidents exploit the accountability failure of the midnight period.

Overall, therefore, the existing metrics yield inconsistent results regarding the “quality” of midnight rules and, more importantly, provide, at best, attenuated evidence regarding whether midnight rules represent the product of a failure of political accountability.

The purpose of this Article is to provide an assessment of midnight rules that is normatively informative. I ask, in particular: does the President employ the midnight period of unaccountability to issue controversial regulations? A contention to this effect motivates much—though, admittedly, not all—of the concern over midnight rules. Yet we have virtually no evidence that presidential administrations, in fact, use the midnight period for this purpose. My objective is to assess this question using a new data source: the text of the rules (and preambles) themselves.

II.

NORMATIVELY INFORMATIVE METRICS AND DATA

A. *Normatively Informative Metrics*

The objective is to develop normatively informative measures of rule properties. This is challenging in two ways. First, it is not clear what we want to measure, that is, what measurable quantity bears meaningfully on the problem of presidential accountability. Second, even if we knew what we were hoping to measure, it is not clear how to put the measure into operation.

My basic approach follows the testimony of critics during the recent House hearing on midnight rulemaking. There, witnesses testified that the President uses the midnight period to issue “controversial” regulations that would ordinarily impose some political cost on the President’s administration.⁵⁷ The rules may be controversial because they exhibit ideological stridency. Or the rules may be controversial because they impose enormous costs on regulated parties, as with Clinton’s ergonomics standards. Or they may be controversial because the rules fail to acknowledge important yet difficult to measure environmental or health costs, as arguably with G.W. Bush’s surface mining regulations. Or, perhaps counter-intuitively, the rules may

57. *Hearings*, *supra* note 3, at 1, 23 (testimony of Representatives Cohen and Nadler).

be controversial because they operate to the disadvantage of special interest groups aligned with the President.⁵⁸

The degree to which a rule is controversial is normatively informative about the extent to which the President skirts the usual democratic constraints. If we find that the administration loads controversial regulations into the midnight period, this would suggest that the President is exploiting the lack of accountability following an election. By contrast, if we find that regulations inside the midnight period exhibit no more controversy than other regulations, this would suggest that much of the concern over midnight regulations is overstated—that, perhaps, journalists cherry pick troubling rules. Contrast this with the measures of rule properties used in previous research: the length of time a rule is under consideration and the durability of rules. These other measures may be informative regarding some normative concerns, possibly such as whether a rule is hastily crafted, but as indicated above they do not interface with democratic accountability in a straightforward way.

I adopt three basic metrics of the degree to which a rule is controversial. All three metrics derive from the text of the rules and accompanying preambles—roughly 20,000 rules in total. The first indicator is rule *size*; the second is the number of comments submitted by parties in response to the Notice of Proposed Rulemaking (NPRM), a measure of the level of *public participation* for the rule; the third is the level of *discord* exhibited in the rule preamble. Consider the relevance of each metric in turn.

It is reasonable to assume that, all else being equal, more controversy surrounds larger rules. Such rules generally impose greater costs, and generally promise greater benefits, and therefore tend to create many winners and many losers. I measure the size of the rule using the number of words contained in the preamble and rule, as published in the *Federal Register*.

High levels of public participation, similarly, suggest a high level of controversy. I measure the level of public interest in a rule by examining the rule preamble for the number of references to public commenters. As glossed by the courts, the APA requires agencies to respond to all materially significant comments in the preamble to a final rule. Failing to respond to commenters may lead a court to set

58. See, e.g., Beermann, *Presidential Power*, *supra* note 4, at 952–53 (“Late in the President’s term, and especially during the period between the end-of-term election and the inauguration of a new President, the President’s need for ongoing interest group support may be reduced so that the President can act with a much greater focus on the overall public interest.”).

aside the rule as arbitrary and capricious.⁵⁹ The number of references to commenters in the preamble to the final rule, therefore, is a reasonable proxy for the level of public interest in the rule. I make no claim that the population of commenters is representative of the nation as a whole—only that, within agencies’ jurisdictions, more controversial regulations tend to attract more public comments. I have, moreover, collected data on the number of comments for one agency in particular, the Occupational Safety and Health Administration (OSHA). Below, I validate my approach by examining the relationship between the number of comments that the public submitted to OSHA notices and the number of references to comments in OSHA rules.

It is also possible to approximate the level of disagreement that a rule generates by examining the preamble. The level of discord generated by a rule, both between the agency and commenters and among commenters themselves, is plausibly positively correlated with the degree to which a rule is controversial. To measure discord, I again examine the rule preamble, searching for words and phrases indicating disagreement: “disagree,” “do not agree,” and so on.⁶⁰

Each of these measures is informative about the behavior of Presidents during the midnight period of unaccountability. Each of these metrics, however, is also incomplete, and afflicted with measurement error. The level of commenting on a proposed rule, for instance, may be driven, in part, by factors unrelated to the level of controversy surrounding a rule. Two key considerations, however, attenuate concern about such factors. First, for these other factors to confound our analysis, they must be correlated with the midnight period, a consideration I attend to below.⁶¹ Second, even if each of these measures is individually imperfect, if they converge to reveal the same account of midnight rulemaking behavior, we have strong evidence of the account, notwithstanding the imperfection of any of the individual measures. The conclusions of this Article rest on a body of results rather than on any single result.

59. For an early case setting forth this requirement, see *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393–94 (D.C. Cir. 1973) (vacating EPA regulation for failing to respond to public comments “significant enough to step over a threshold requirement of materiality”). See also *Reyblatt v. Nuclear Regulatory Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997) (holding that an agency “need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”).

60. The full set of terms I search for is: “disagree,” “do not agree,” “unreasonable,” “unnecessary,” “excessive,” “not necessary.”

61. That is, if these other factors occurred at random, they would not pose a threat to inferences about behavior during the midnight period.

B. Data

The *Unified Agenda* (UA) is the backbone of this analysis.⁶² The UA is published on a semiannual basis in the *Federal Register* and contains the most comprehensive view available of an agency's rulemaking activities. The UA reports when an agency issues a NPRM, when it finalizes a rule, and when an agency withdraws a proposed rule. The UA includes both independent and executive agencies. I have assembled UA reports from 1983 through 2010.⁶³ In total, the UA reports indicate that agencies initiated over 20,000 notice-and-comment rules between 1983 and 2010.⁶⁴ The IRS is the most prolific agency over the series, initiating over 1,400 rules, or roughly one rule per week for the last 27 years; a number of less active agencies, such as the Federal Council on the Arts and the Humanities, part of the National Endowment for the Arts, initiated only one rule over the series.

I supplement the UA data with the text of the rules and accompanying preambles. For each of the approximately 20,000 notice-and-comment rules listed in the UA, I identify and collect the rule, as published in the *Federal Register*.⁶⁵ I use the text of the rules and preambles, as noted, to derive measures of rule properties: the size of the rule, the level of public interest in the rule, and the level of discord associated with the rule. If administrations use the midnight period to issue rules that would not be viable during other times, we would ex-

62. For an excellent explanation of the *Unified Agenda* data, see O'Connell, *Political Cycles*, *supra* note 5, at 924–29.

63. In particular, I obtained XML files of the *Unified Agenda* from the Regulatory Information Service Center (RISC), a division of the Government Accountability Office. Although the UA has existed since 1978, RISC did not have XML files for years before 1983.

64. Thus, I exclude from the analysis interim final rules and direct final rules. This choice is required given that I am interested, in part, in public commenting behavior, and these forms of rulemaking do not feature a NPRM before the final rule is issued. The precise number of notice-and-comment rules in the dataset is 20,392.

65. I collect the text of the final rules from Lexis. I use the *Federal Register* cites, included in the *Unified Agenda* data, to search Lexis's *Federal Register* database for the text of the final rule. After locating the rule in the database, I download the rule and extract the text of the rule and preamble. Note that I am unable to locate the rule listed in the UA citation for approximately 1,500 of the 20,000 rules. Fortunately, these missing observations appear to occur essentially at random and most likely reflect clerical errors in transcribing the *Federal Register* citation to the *Unified Agenda* database. For example, over the series, the proportion of missing rules is fairly evenly distributed over month of finalization; the month with the fewest missing rules is May, with 6.3% missing; the month with the most rules missing is October, with 9.4% missing. Notice that I rely on the Lexis archives rather than the official *Federal Register* due to data availability; XML files for the *Federal Register* only start in 2000, and I wish to build a longer series.

pect to find evidence of this behavior in these measures. In particular, we would expect the rules to be larger in size, to attract more public interest, and to be associated with higher levels of discord.

C. *Summary Statistics*

Of the roughly 20,000 notice-and-comment rules issued between 1983 and 2010, agencies issued just over 1,400 in the period between a presidential election and the inauguration of the next presidential administration.⁶⁶ By comparison, agencies issued only about 1,200 rules during the average non-election year fourth quarter.⁶⁷ Thus, pooling all administrations between 1983 and 2010, agencies increased rulemaking activity by about 17% during the midnight period, relative to the analogous period in non-election years.

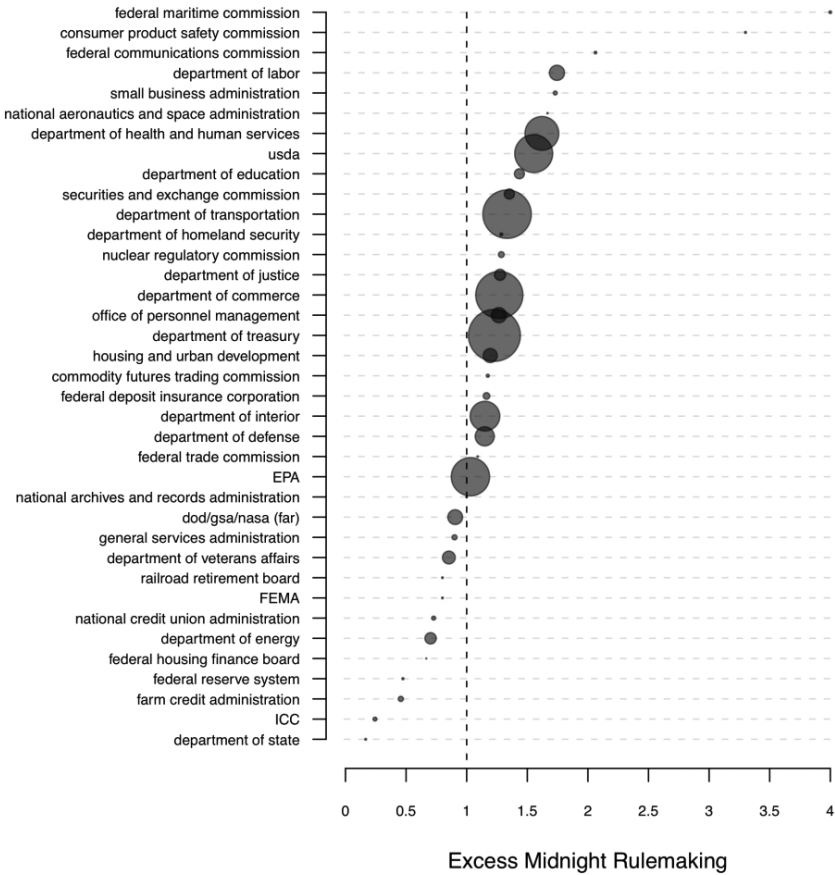
This average of 17%, however, obscures considerable heterogeneity at the agency level. Some agencies increased activity in the midnight period by much more than 17%; others, in fact, tended to decrease activity during the midnight period. In Figure 2, I plot the “Excess Midnight Rulemaking,” defined as the number of midnight rules divided by the average number of non-election year fourth quarter rules, for a core set of administrative agencies.⁶⁸ Thus, a result of “2,” for instance, indicates that the agency is twice as active during the midnight period as during a comparable period during non-election years; a figure of “1” indicates that the agency is neither more nor less active during the midnight period than in comparable periods. The size of the point is proportional to the number of fourth quarter rules issued by the agency between 1983 and 2010, including both election and non-election years. Note that for the purposes of the figure, I pool all data between 1983 and 2010. In this way, the figure provides a sense of the general activity of agencies in the midnight period.

66. This figure includes both last-term and continuing Presidents.

67. The “fourth quarter” refers, again, to the interval between November 1 and January 20 of the following year. This partition of the year is designed to correspond to the electoral calendar.

68. For this figure, I drop any agency that (a) issued fewer than 10 fourth-quarter rules over the period between 1983 and 2010; or (b) issued no rules during the midnight period between 1983 and 2010.

FIGURE 2. MIDNIGHT REGULARITY AT THE AGENCY LEVEL



By this measure, the most active midnight rulemakers include the Federal Maritime Commission and the Consumer Product Safety Commission. These two agencies issue three to four times as many rules during the midnight period than in non-election year fourth quarters. However, as indicated by the size of the points representing these agencies, these regulators issue relatively few rules.⁶⁹ A number of agencies, though, issue a large number of rules and also markedly increase rulemaking activity during the midnight period. The Departments of Labor, Health and Human Services, and Agriculture, for example, all increase rulemaking activity by about 50% during the midnight period; they also issue a large number of rules overall in the

69. The Federal Maritime Commission issued a total of 28 fourth-quarter rules in the series; the corresponding figure for the Consumer Product Safety Commission is 21.

fourth quarter of the year.⁷⁰ Other agencies increase rulemaking in the midnight period by between 15 and 20%: these include the Treasury and Commerce Departments. This group of agencies, thus, falls at about the overall average of a 17% increase in activity. Finally, a number of agencies actually decrease activity during the midnight period. The Departments of Energy, State, and Veterans Affairs, for instance, all decrease activity during the midnight period. This considerable agency-level heterogeneity in midnight rulemaking activity indicates that it is important to account for agency characteristics in the subsequent analysis.

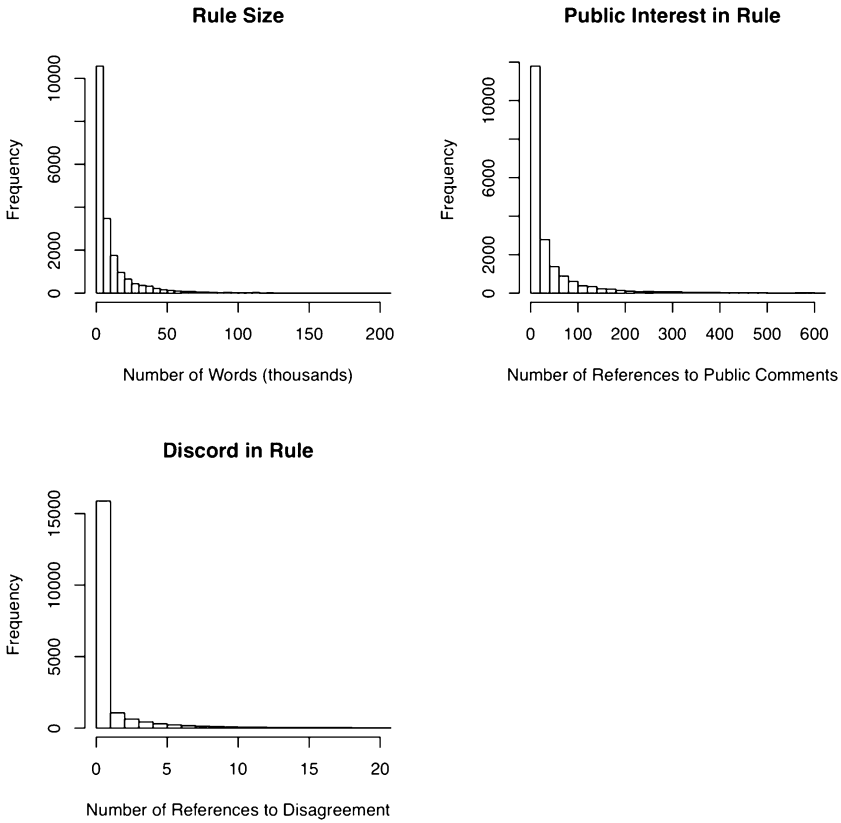
Consider now the metrics related to democratic accountability. As depicted in the top-left panel of Figure 3, the distribution of the size of the rule, as measured by the number of words in the text of the rule, is highly skewed. The average rule contains about 10,500 words. The longest rule in the dataset, the 2005 Medicare Prescription Drug Benefit rule,⁷¹ contained a staggering 400,000 words; enough text to fill about 1,000 law review pages. On the other hand, one-quarter of rules in the dataset contain fewer than 1,500 words; about four pages of double-spaced material. Notice that these figures represent the total number of words for both the text of the final rule as well as the text of the rule's preamble.

This same skewed pattern travels to the measures of the level of public interest in the rule and the level of discord associated with the rule, as depicted in the top-right and bottom-left panels of Figure 3, respectively. The average rule contains 45 references to comments. At the extreme, one rule contains over 3,700 references to commenters; yet fully one-quarter of rules contain fewer than 3 references to commenters. Likewise, the average rule references disagreement between the agency and commenters, or between commenters themselves, about 1.5 times in the rule preamble. One rule contains 225 references to disagreement, and, at the other end of the scale, more than one-quarter of the rules exhibit no signs of disagreement.

70. On average, these agencies issued over 225 fourth-quarter rules during the series, well over ten times the number of rules produced by the Consumer Product Safety Commission during the period.

71. Medicare Program; Medicare Prescription Drug Benefit, 70 Fed. Reg. 4194 (Jan. 28, 2005) (implementing the prescription drug benefits provided by the Medicare Prescription Drug, Improvement and Modernization Act of 2003).

FIGURE 3. ACCOUNTABILITY METRICS



Consider now two validation exercises. An obvious question is whether the number of references to comments correlates with the actual number of comments that the public submits during the comment period. Unfortunately, it is not presently feasible to determine directly the number of comments submitted to each rulemaking effort for all agencies for the entire series. To validate my measures, however, I have determined the number of comments that the public submitted to one agency, OSHA, in the period between 1983 and 2010.⁷² Although

72. I collected this information from regulations.gov. Although many agencies post their proposed rules and comments on the regulations.gov website, most have only done so since the mid-2000s. Fortunately, OSHA posted archived comments to the website, so we can examine commenting behavior for this agency over a long series. I focus on the 1983–2010 series to correspond with the UA dataset. Aside from data availability, a central challenge to using data derived from regulations.gov is that the website does not uniformly index comments to regulation identification numbers. Instead, regulations.gov reports the docket associated with the comment. A single rule may be associated with multiple docket numbers, and generating a mapping from

OSHA is only one agency, it is an important one and has a history of midnight rulemaking.⁷³ The question is whether the number of comments actually submitted correlates with the number of references to comments in the final rule.

As it happens, the two variables correlate fairly strongly, at about 0.5. Calculating the elasticity of agency responses to comments reveals that a 1% increase in public commenting behavior produces a 0.33% increase in the number of references to comments in the final rule. The fact that the elasticity is less than one is not surprising, as many comments will repeat the same basic sets of points. In their responses, agencies tend to group these comments together, perhaps providing only a single reference to all comments in the relevant group. The number of comments submitted for a rule also correlates with the level of discord exhibited in the final rule (correlation of 0.48), and the size of the rule (correlation of 0.62). All of this suggests that the metrics discussed above—references to comments, discord in the rule, and the size of the rule—provide a valid indication of controversy surrounding a rule.

We can also probe the validity of the measures by examining the priority codes assigned to rules in the *Unified Agenda* database. Since 1995, the *Unified Agenda* has reported whether a rule is “significant,” defined under Executive Order 12,866 as a rule that may have an annual impact on the economy of at least \$100 million, or which may “adversely affect in a material way the economy.”⁷⁴ A natural question is whether the text-based metrics of this Article correlate with the priority codes in the *Unified Agenda* database.⁷⁵

docket numbers to rules is time consuming. An earlier version of this paper focused solely on comments submitted in relation to OSHA’s regulatory activity; this version represents an improvement over the earlier version as I now consider all Federal agencies.

73. OSHA issued the highly controversial ergonomics rule, for instance, during the midnight period of President Clinton’s second term. This rule is one of the few for which Congress exercised the Congressional Review Act. Ergonomics Rule, 65 Fed. Reg. 68,262 (Nov. 14, 2000).

74. Exec. Order No. 12,866, 58 Fed. Reg. 59,159 (Nov. 8, 1993). The \$100 million threshold is the most commonly cited aspect of the definition of “significance” in this context. However, the definition includes three further prongs: “(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.” *Id.*

75. Notice that this priority code is, itself, not an ideal metric of the extent to which a rule is controversial for the simple reason that the series is limited to post-1995 rules. For research employing these codes in the context of midnight rules, see Patrick A. McLaughlin, *Empirical Tests for Midnight Regulations and Their Effect on OIRA*

It turns out that the text-based metrics correlate strongly with the UA priority codes. Consider the following differences in means: the average significant rule preamble contains 124 references to comments, whereas the average non-significant rule preamble contains 33.6 references to comments; the average significant rule preamble contains 7.8 references to discord, and the corresponding figure for non-significant rules is 2.4; finally, the average significant rule (and preamble) contains 23,077 words, and the average non-significant rule (and preamble) contains a mere 9,302 words. Each of these differences in means is statistically significant at any conventional level. These patterns, again, provide confidence in the validity of the metrics.

With these statistics in hand, we can now consider the motivating questions of this Article: do midnight rules differ in normatively meaningful ways from rules issued at other times in an administration? Are midnight rules more controversial? Do they receive more public comments? Do the rule preambles exhibit greater signs of discord in the comments? Are the rules important regulatory actions? Affirmative responses to these questions would suggest that the President uses the midnight period to evade political accountability for his regulatory actions.

III.

POLITICAL INCENTIVES AND EMPIRICAL ANALYSIS

A. *A Simple Theory of Political Incentives*

Notice at the outset that not all Presidents face the same incentives during the midnight period. In particular, Presidents who win reelection remain accountable to the electorate, at least in the limited sense that any second-term President remains accountable for his actions. We thus do not necessarily expect sharp post-election departures in rulemaking behavior for continuing presidential administrations. By contrast, following the election, last-term Presidents have few reasons to align the rulemaking activity of their administrations to public preferences. This may be the final opportunity for such Presidents to influence public policy; and the voters and interest groups have few cards to play against a President who is on the way out already. We expect last-term administrations, therefore, to exhibit relatively sharp departures in behavior during the midnight period.

Review Time, Mercatus Center Working Paper (Sept. 2008) (“focus[ing] on testing whether the regulatory review process could be hampered because OIRA becomes overloaded with rules to review during the midnight periods.”).

Of the four last-term administrations in the dataset, all but one represent second term presidencies. A natural question is why a second term President, who knows from the first day of his re-election that he will never face another election, reserves controversial rules until the last days of the term. The entirety of the second term arguably escapes electoral pressures. The most direct consideration bearing on the continuing accountability of second term Presidents, providing a rationale for storing controversial rules until after the election, is that second-term Presidents generally want to be succeeded by a co-partisan—a President who will continue rather than dismantle the policy work of their two terms in office. This consideration introduces at least the possibility of a form of accountability—indirect electoral accountability—during most of the second term.

Some evidence supports the notion that second term Presidents, in fact, remain disciplined by the public for most of their terms. The last-minute timing of controversial presidential pardons,⁷⁶ for instance, strongly suggests that even second-term Presidents remain disciplined by public opinion.⁷⁷ A reasonable conjecture, therefore, is that, as with pardons, last-term Presidents face incentives to load controversial regulations in the period following the presidential election. Indeed, we have anecdotal evidence, for instance, that President Reagan adjusted his regulatory agenda to assist then-Vice President Bush's election efforts.⁷⁸

The outcome of the election also plausibly influences regulatory incentives. In the event a candidate from the opposing party wins the election, the sitting President has particularly strong incentives to cement his policy agenda by finalizing last-minute regulatory actions, perhaps ones that have been sitting on the shelf ready to deploy for some time.⁷⁹ If a co-partisan wins the election, by contrast, the Presi-

76. The President is granted authority to issue pardons in the Constitution. U.S. CONST. art. II, § 2, cl. 1.

77. See Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 17 (2002) (noting electoral incentives and the timing of pardons); L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 8 (2008) (“[P]residents have historically granted petitions for clemency at a higher rate in the closing months of their administrations.”).

78. See Havemann, *supra* note 50, at A6.

79. The time required for Notice and Comment procedures make it difficult for agencies to start new rules after they know the outcome of the election. However, agencies can quickly finalize rules that have been started earlier in the administration, perhaps temporarily shelved due to political thorns. On this possibility, consider that midnight rules tend to have been under consideration for a relatively long period of time before agencies finalize them. Beer mann, *supra* note 51, at 43–45.

dent may feel that many of the items on his policy agenda will continue to have life in the subsequent administration.

This straightforward set of incentives, also acknowledged in earlier research,⁸⁰ frames our expectations for the analysis below. In particular, to the extent the midnight period represents a serious failure in accountability, we first expect to see more pronounced evidence of this failure among last-term Presidents. Last-term Presidents, theory suggests, face lower costs in taking advantage of the midnight period. Second, we expect to see more pronounced evidence of the accountability failure during cross-partisan transitions: when a Democratic President is clearing the way for a Republican President or the reverse. In this case, theory suggests, the President enjoys greater benefits to finalizing controversial regulations—policy items that, if left undone, would likely never become law. Unfortunately, all but one of the transitions in the series, from President Reagan to President H.W. Bush, represent both cross-partisan transitions and, by definition, the presence of a last-term President. It is thus difficult to identify the independent consequences of having a last term President and of having a cross-partisan transition; in most cases, the two conditions coincide. Indeed, prior to 1989, the last same-party transition in Presidents not due to resignation or death occurred in 1929, when President Hoover succeeded President Coolidge. Below, I focus on the relationship between last term Presidents and regulatory activity, with the recognition that some of the observed pattern may owe to the effect of cross-partisan transitions.

B. *Initial Results*

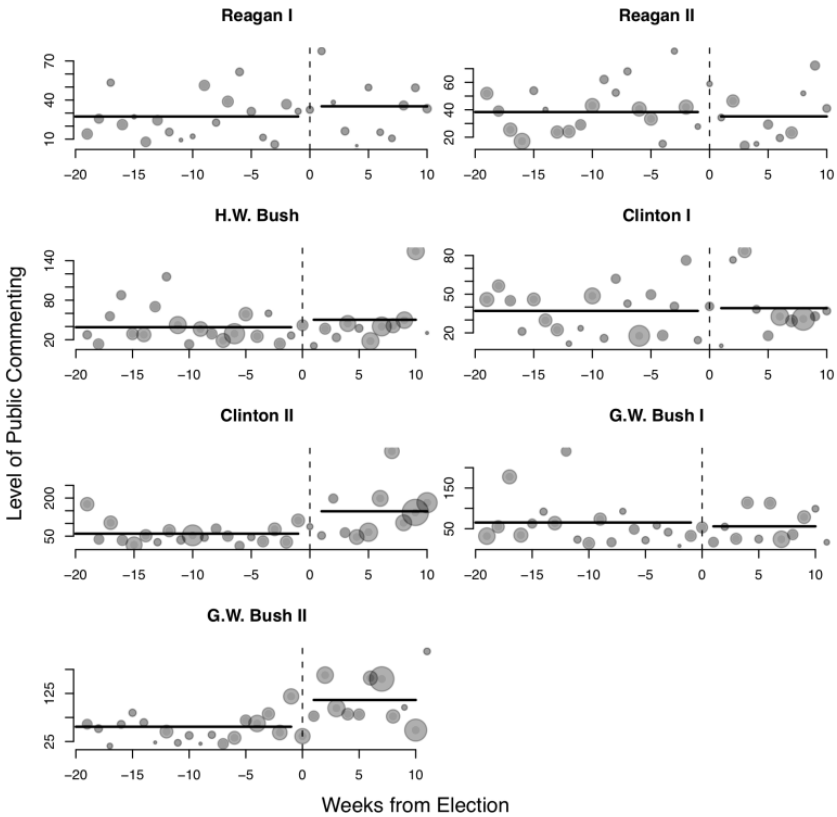
Consider first a series of initial results presented graphically. Here, we question whether the rules issued shortly after the election differ in nature from those issued shortly before the election. Thus, we zoom in on the period immediately surrounding the election.⁸¹ Figure 4 plots the average number of references to comments in rules, on a weekly basis, for each of the seven administrations in the dataset.

80. See, e.g., William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 *PRESIDENTIAL STUD. Q.* 533 (2009) (explaining, for example, how a President who has lost an election “has every reason to hurry through last-minute public policies . . .”); O’Connell, *Political Cycles*, *supra* note 5, at 919 (hypothesizing that “presidential administrations try to complete rulemakings before leaving office”).

81. Effectively, the comparison group for these initial results is the short period before the election. In subsequent regression analysis, below, I examine midnight regulations relative to other comparison groups. For example, some specifications include month-fixed effects, which effectively means we examine variation within months across election and non-election years.

Each panel in the figure starts twenty weeks before the election and runs through the midnight period following the election. The size of the point, as above, reflects the number of rules issued in the week. The dashed vertical line indicates the week of the election. Finally, the solid horizontal lines represent the average number of comment references in the pre- and post-election periods.⁸²

FIGURE 4. LEVEL OF PUBLIC COMMENTING IN THE MIDNIGHT PERIOD



To the extent that the rules issued in the midnight period represent particularly controversial regulatory actions, we should observe higher levels of commenting for rules issued in the midnight period. The figures only partially support this expectation. For most administrations, the difference in regulatory behavior—as measured by references to public comments—between the pre-election and post-election period is modest. In fact, only two administrations behave differently before and after the election: the second-term administra-

82. Note that I weight the means by the number of rules issued in each week.

tions of President Clinton and President G.W. Bush. In both cases, we observe a marked increase in controversial regulations following the elections: the number of references to comments increases dramatically for rules issued after the election, indicating that the administrations waited until after the election to issue some of the more controversial regulations.⁸³ Of the remaining administrations, only the G.H.W. Bush administration registers anything close to a significant difference in pre- and post-election behavior. There, the average number of references to comments increases by about ten following the election, but the difference is not statistically significant.

This pattern is largely consistent with the incentives laid out above. Continuing Presidents appear to behave roughly the same before and after the election. Although the rate of rulemaking increases during the midnight period for continuing Presidents, the qualitative features of the rules, this initial exercise suggests, differ little from the rules issued at other times in an administration. Continuing Presidents appear not to issue unusually controversial regulations during the midnight period. Last-term Presidents, however, often behave quite differently after the election. These Presidents, on their way out the door, both increase the rate of rulemaking and issue relatively controversial regulations during the midnight period. This behavior is pronounced in the cases of President Clinton and President G.W. Bush's second terms, and it is evident in traces at the end of President G.H.W. Bush's term. President Reagan did not issue relatively controversial regulations during the midnight period. But this, too, is consistent with expectations, as a co-partisan followed him in office.

This fundamental pattern continues to the other accountability-relevant metrics of agency behavior. As demonstrated in Figures 5 and 6, we observe the same pattern, respectively, in terms of (a) the level of discord reflected in the rule, and (b) the size of the rule. For each outcome of interest, rules issued before and after the election generally differ little. The second terms of Presidents Clinton and G.W. Bush, however, represent exceptions to this pattern. During the midnight period of these two administrations, the level of discord and the size of the rule both increase dramatically in the midnight period. The post-election rulemaking behavior of agencies during the G.H.W. Bush administration, likewise, shows traces of similar behavior. Again, however, the pre- and post-election behavior is not statistically different for this administration.

83. In both cases, the difference in the mean number of references to comments is statistically significant at any conventional level.

FIGURE 5. LEVEL OF DISCORD IN THE MIDNIGHT PERIOD

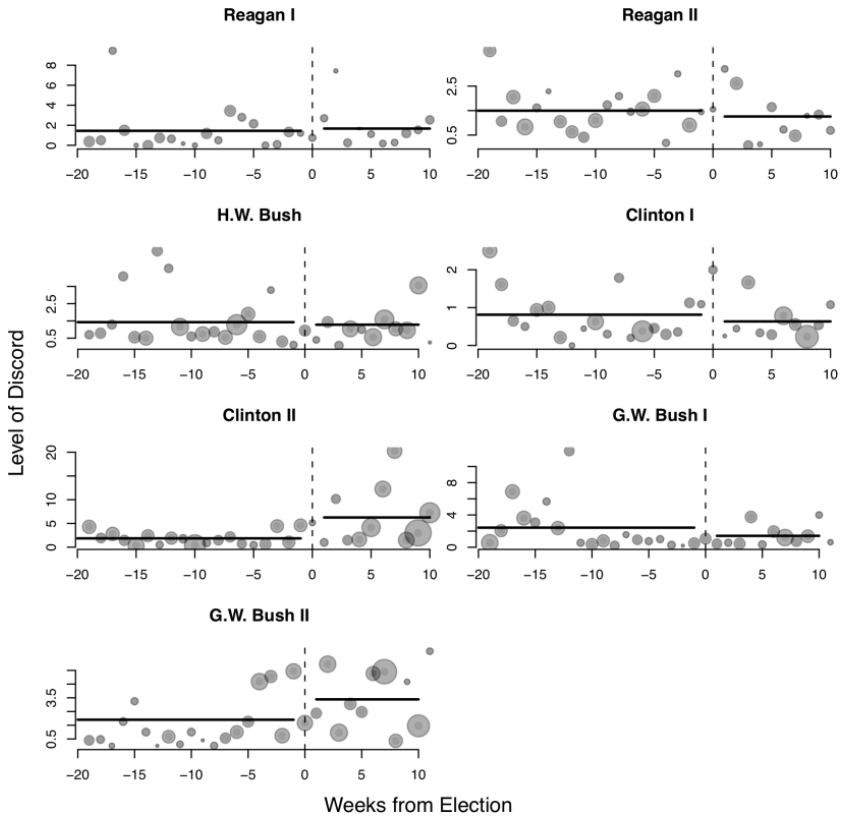
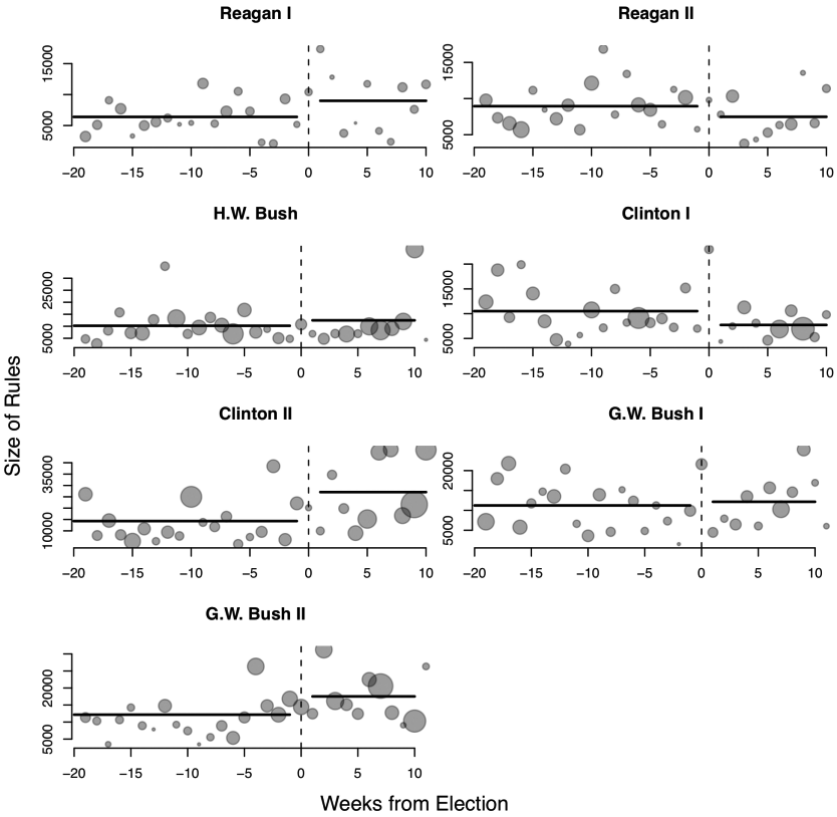


FIGURE 6. SIZE OF RULES IN THE MIDNIGHT PERIOD



C. Accounting for Heterogeneous Agencies

It is possible that differences in the timing of regulatory actions among agencies account for much of the pattern above. For instance, it is possible that the EPA, for idiosyncratic cultural or bureaucratic reasons, tends to procrastinate and publish rules only at the end of the year. The EPA, as it happens, also tends to issue relatively large and controversial regulations. The conjunction of these two features produces the “midnight effect” for the EPA, with relatively controversial regulations appearing at the close of a President’s administration. Yet this pattern may simply be a result of an agency-level correlation between procrastination and the size of rules. Although this pattern of late-administration actions might worry us, it would be more worrisome still to observe a midnight effect within agencies, finding that agencies issue more controversial regulations during the midnight period *after* we control for an agency-level tendency to procrastinate. Such a pattern would indicate that the agency, or its political over-

seers, is responding to the gap in political accountability supplied by the midnight period.

To examine this possibility, I estimate a fixed effects model in which I control for all time-invariant agency-level characteristics.⁸⁴ Here, I regress the outcomes of interest against the relevant political variables, including controls for each agency in the dataset. The question is whether, after we control for agency characteristics such as agency culture, we observe the midnight regularity in accountability-relevant metrics. In particular, do we observe the same pattern reported in the initial results, above?

The outcomes of interest represent two types of data. First, we have count data: the number of references to comments and the number of times the text of the final rule exhibits signs of disagreement. Such outcomes should be modeled using count models, which account for the unique features of count data, such as non-negativity and skewedness in outcomes. Below, I use a Poisson model to study these two outcomes.⁸⁵ Second, we have data that approximates a continuous variable: the number of words in the rules. In this context, after logging the dependent variable, we can use standard OLS to estimate the relevant coefficients.⁸⁶

I proceed by starting with the simplest possible specification, and then progressively add controls. The first series of models contains no controls for agency characteristics. That is, I simply examine the relevant outcomes during the midnight period of continuing and last-term presidential administrations. The results, reported in columns 1–3 of Table 1, corroborate the figures from the previous section. In particular, nothing of note happens during the midnight period of continuing Presidents: for each dependent variable, the coefficient on the midnight period for continuing Presidents is not statistically significant. However, as in the figures, interacting the midnight period with an indicator for whether the President is in his last term reveals that last-term Presidents adjust their behavior dramatically during the midnight period. In particular, during the midnight periods of their last terms, presidential administrations issue rules that (a) attract more comments, (b) exhibit greater discord in the rulemaking record, and (c) contain more words.

84. A fixed effects model controls for time-invariant, observable and unobservable agency-level characteristics. See JEFFREY M. WOOLDRIDGE, *ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA* 300–15 (2010).

85. For details of the model, see *id.* at 762–64 (explaining the properties of fixed effects Poisson estimation).

86. See *id.* at 51–88 (explaining the properties of OLS regression).

The magnitude of the coefficients is striking. For instance, the model in column (1) indicates that the average number of references to comments for continuing Presidents outside the midnight period is 46.⁸⁷ This figure remains unchanged during the midnight period for continuing Presidents. The number of references to comments declines slightly for last-term Presidents outside the midnight period, to about 45 references. During the midnight period of last-term Presidents, however, the number of references increases dramatically, more than doubling, to 104. Thus, the average number of references to comments more than doubles during the midnight period of last-term Presidents.

This pattern repeats for the other variables of interest. During the midnight period of last-term Presidents, the average number of disagreements exhibited in rules increases to 3.6 from 1.6 earlier in the President's term. The level of discord exhibited in final rules thus more than doubles during the midnight period of last-term Presidents. Similarly, the coefficient on the interaction term in model (3) reveals that the length of rules increases by 36% in the midnight period of last-term Presidents relative to the length of rules earlier in the President's term.⁸⁸ Following the pattern of the other accountability metrics, the rules of continuing Presidents do not become longer during the midnight period. This initial set of results, then, largely corroborates the figures in the previous section.

87. To arrive at this expected value, exponentiate the sum of the relevant coefficients: for this example, the only coefficient is the constant. Generally, I do not report the constants or values of the fixed effects to conserve space and focus attention on the midnight variables. The full set of results is available from the author.

88. For models (3), (6), and (9) in Table 1, the dependent variable is logged and the coefficients can be interpreted as the percent increase in rule length associated with the variable or interaction in question.

Table 1. Midnight Rulemaking Behavior

	(1) Comments	(2) Discord	(3) Size	(4) Comments	(5) Discord	(6) Size	(7) Comments	(8) Discord	(9) Size
Midnight Period	0 (0.11)	0 (0.1)	0.01 (0.07)	0.1 (0.07)	0.11 (0.12)	0.06 (0.09)	0 (0.06)	0.06 (0.12)	0.02 (0.1)
Last Term	-0.01 (0.04)	0.04 (0.04)	0.01 (0.02)	0.01 (0.03)	0.07 (0.05)	0.04 (0.03)	0.01 (0.03)	0.07 (0.05)	0.04 (0.03)
Midnight Period * Last Term	0.86 (0.15)	0.8 (0.16)	0.36 (0.09)	0.63 (0.13)	0.59 (0.18)	0.22 (0.1)	0.63 (0.13)	0.59 (0.18)	0.22 (0.1)
Agency Fixed Effects	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Month Fixed Effects	No	No	No	No	No	No	Yes	Yes	Yes
N	18713	18713	18713	18713	18713	18713	18713	18713	18713

Note: standard errors clustered at the agency level and reported in parentheses. The dependent variables in models (1), (4), and (7) are the counts of references to comments; in models (2), (5), and (8) and counts of words indicating disagreement in the final rule; in models (3), (6), and (9) the logged number of words in the final rule. Models (1), (2), (4), (5), (7), (8) estimated with a Poisson model; models (3), (6), (9) estimated with OLS.

The question is whether this pattern survives after we account for unobservable agency characteristics such as agency culture. In columns (4)–(6) of Table 1, I report the results of regressions in which I include agency fixed effects, thus accounting for unobserved agency characteristics. Consistent with the view that the midnight effects described above may result in part from idiosyncratic agency features—such as a tendency to procrastinate—the marginal changes in rulemaking behavior during the midnight period diminish once we include agency fixed effects. The size of the coefficient on references to comments, for example, decreases from 0.86 in column (1) to 0.63 in column (4). This is a substantial decrease accounting, for example, for a drop in the expected number of references to comments from about 104 to about 83.⁸⁹ The same story travels to the other outcomes of interest: the coefficient for rule discord drops from 0.80 to 0.59; the coefficient on the size of rules drops from 0.36 to 0.22.⁹⁰

Despite the reduced magnitude of the coefficients, the fundamental pattern of agencies issuing more controversial rules during the midnight period persists. The fact that we observe this pattern, even after accounting for fixed agency characteristics, suggests that the pattern is not due to idiosyncratic agency-level differences. Instead, the rules that agencies issue during the midnight period of last-term Presidents represent controversial regulatory actions, even for the agency in question. Agencies tend to issue relatively controversial rules—relative to the average rule issued by the agencies—during the midnight period of last-term Presidents. This pattern strongly suggests that agencies may be responding to political incentives created by the accountability failure of the midnight period.

D. Robustness: Annual Cycles and Endogenous Commenting

Consider now two further potential complications to the conclusions above. First, one might worry that the midnight pattern results from annual cycles in rulemaking behavior rather than from electoral incentives. For example, fourth-quarter rulemakings, in general, might be more controversial for budgetary reasons, or because of other bu-

89. If the coefficient on the interaction term in model (1) were 0.61 instead of 0.85, the predicted number of references during the midnight period of last-term Presidents would be 83 instead of 104.

90. In all regressions, the coefficient on the interaction term is significant at the conventional 5% level. This can be noted by dividing the coefficient by the standard error, and observing that the resulting quantity is greater than 1.96.

reaucratic performance incentives based on the calendar year.⁹¹ Thus, if we compare midnight activity to activity in other fourth quarters, the midnight period may not be so exceptional. Second, one might worry that the degree to which a rule is controversial is endogenous. For example, people may submit more comments during an election cycle: plausibly, people become politically “activated” during the election season, and they therefore tend to participate in all manner of public forums, including notice-and-comment rulemakings.⁹² If so, the rules issued in the midnight period might not be any more controversial than rules issued at other times in a President’s administration, even if they provoke greater levels of public commenting.

I address the possibility of annual cycles in activity by estimating models with month fixed effects. These fixed effects will account for the possibility that November or December, in general, tend to be a time in which agencies issue controversial rules. I report the results from these regressions in columns (7)–(9) of Table 1. The relevant coefficients do not differ in any material way from those reported in columns (4)–(6). This suggests that the pattern reported above is not a product of annual cycles in rulemaking behavior driven, for example, by budget pressures. Instead, the pattern appears attributable to incentives created by the electoral calendar.

Table 2. Accounting for Election-Period Comments

	(1) Comments	(2) Discord	(3) Size	(4) Comments	(5) Discord	(6) Size
Midnight Period	0 (0.06)	0.06 (0.12)	0.02 (0.1)	0 (0.06)	0.06 (0.12)	0.02 (0.1)
Last Term	0.01 (0.03)	0.07 (0.05)	0.04 (0.03)	0.01 (0.03)	0.07 (0.05)	0.04 (0.03)
Election Comments	-0.57 (0.12)	-0.51 (0.12)	-0.25 (0.07)	—	—	—
Midnight Period * Last Term	0.64 (0.13)	0.59 (0.18)	0.22 (0.1)	0.64 (0.12)	0.59 (0.19)	0.22 (0.1)
Agency Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Month Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
N	18721	18721	18721	18264	18264	18264

Note: standard errors clustered at the agency level and reported in parentheses. The dependent variables in models (1), and (4) are the counts of references to comments; in models (2) and (5) and counts of words indicating disagreement in the final rule; in models (3) and (6) the logged number of words in the final rule. Models (1), (2), (4), (5) estimated with a Poisson model; models (3), (6) estimated with OLS. Models (4)–(6) drop all rules with NPRM dates within six months of a presidential election.

91. December 31 marks the end of the first quarter of the government fiscal year; the fiscal year begins on October 1. Thus, the midnight period occurs at the end of the calendar year, and close to the start of the fiscal year.

92. See Samuel J. Best et al., *Americans’ Interest and Enthusiasm in Election Campaigns*, 76 PUB. OPINION Q. 783, 793 (noting a sharp increase in attention to presidential elections around the nominating conventions).

I approach the problem of endogenous commenting in two ways. First, I introduce a variable in the analysis designed to capture the effects of having a comment period during the electoral season. In particular, I create an indicator for whether the agency proposed the rule within 180 days of the next presidential election—roughly, between May and November of an election year. Rules satisfying this condition tend to have their comment periods during an interval of heightened political awareness induced by the election. The choice of 180 days, in fact, is a conservative choice: evidence suggests that even highly politically active citizens do not pay the election much attention until the nomination conventions in late summer.⁹³ This indicator, therefore, will capture the effects of having a comment period during the election season, reducing concerns related to endogenous commenting behavior. The second approach is crude but complete: I simply remove any rules from the analysis proposed within 180 days of the next presidential election. If the pattern in midnight rulemaking persists in this second exercise, we can be fairly certain that endogenous commenting is not driving the results.

The results from these two exercises strongly suggest that the midnight patterns cannot be attributed to electorally induced commenting behavior. Consider first columns (1)–(3) of Table 2, in which I include an indicator for whether the rule's comment period falls in the election season. The relevant coefficients remain nearly unchanged. Even after controlling for whether a rule's comment period falls in the election season, the midnight rules of last-term Presidents (a) attract more comments, (b) exhibit greater signs of discord, and (c) contain many more words. Indeed, the coefficient on the election-season variable is negative, indicating that rules with comment periods just before the election attract less, not more, public attention and dissent.⁹⁴ Moreover, the coefficients remain virtually unperturbed if we simply remove all rules from the dataset with comment periods during the six months preceding a presidential election, as reported in columns (4)–(6) of Table 2. The fact that commenting behavior may be endogenous to the timing of the NPRM—a plausible suggestion—does not appear to upset the fundamental regularities in midnight rulemaking behavior identified earlier.

93. *Conventions Still Draw Sizable Audience, Boost Campaign Interest*, PEW RESEARCH CTR. (Aug. 22, 2012), <http://www.people-press.org/2012/08/22/conventions-still-draw-sizable-audience-boost-campaign-interest> (noting a surge in citizens' interest in presidential campaigns following the nominating conventions).

94. This negative coefficient is consistent with the idea that Presidents propose relatively modest rules ahead of the election, perhaps hoping to minimize distractions during the campaigning season.

E. Extension: Executive and Independent Agencies

To this point, I have pooled executive and independent agencies. However, the President has greater control over executive agencies, such as the Department of Labor, than over independent agencies, such as the FCC. For example, the President only has for-cause removal powers in the context of independent agencies;⁹⁵ likewise, OIRA review generally does not apply to independent agencies.⁹⁶ It is therefore of interest to assess whether the midnight rules of executive agencies differ from those of independent agencies. In particular, we might expect to observe a less pronounced midnight pattern for independent agencies. The fact that the President enjoys less control over independent agencies suggests that they may be relatively insulated from the political incentives laid out above.

I investigate this possibility by running the regressions reported in Table 1 separately for executive and independent agencies. The results from this exercise support the conjecture that executive agencies exhibit greater responsiveness to the midnight incentives. Table 3 reports the relevant results, replicating Table 1 in format, and locating executive agencies' results in the top panel, and independent agencies' results in the bottom panel.

Focus first on the results for executive agencies, in the top panel. Here, we see that the pattern in the coefficients is nearly identical to the pattern observed in the main results of Table 1. The behavior of last term administrations during the midnight period is quite distinct from behavior outside the midnight period; it is also distinct from behavior of continuing administrations during the midnight period. During the midnight period, last term administrations tend to issue rules exhibiting signs of high levels of public interest, discord, and importance. In fact, the coefficients reported in the top panel of Table 3 are all larger in magnitude, if only modestly, than the coefficients reported in Table 1.

The pattern for independent agencies, reported in the bottom panel of Table 3, is a study in contrasts. There, we see that the behavior of independent agencies is essentially unaffected by the midnight period, for either continuing or last term presidential administrations. The coefficient on the interaction term of primary interest, that is, attenuates toward zero in all cases relative to the corresponding coeffi-

95. *See, e.g.*, *Humphrey's Executor v. United States*, 295 U.S. 602, 626–32 (1935).

96. *See, e.g.*, Exec. Order No. 12,866, 58 Fed. Reg. 59,159 (Nov. 8, 1993) (noting that executive review applies to agencies “other than those considered to be independent regulatory agencies”).

cient for executive agencies. And in no model is the coefficient statistically significant. This suggests that, for independent agencies, the midnight period of last term administrations holds no special place. Moreover, as indicated by the main coefficients on the midnight period, independent agency behavior is unremarkable during the midnight period of continuing administrations.⁹⁷

All of this indicates that the main results reported in Table 1 pertain predominately to *executive* agencies. Independent agencies, it appears, treat the midnight period more or less the same as any other time during an administration. The agencies that exhibit the greatest sensitivity to electoral incentives are also the agencies over which the President has the greatest control. Where the President has less control, we tend to see unremarkable midnight rules. This finding tends to weigh against explanations of the midnight regularity based on forces common to all agencies, such as procrastination, or the general tendency for complex rules to take longer to finalize, and toward explanations premised on the political incentives that elections generate.

97. The one modest exception to this statement regards the results for discord in column 2 of Table 3, which might suggest that independent agencies issue more controversial rules during the midnight period of both continuing and last term administrations. However, this result is not robust to month or agency fixed effects, as reported in columns 5 and 8.

Table 3. Midnight Rulemaking Behavior in Executive and Independent Agencies

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
	Comments	Discord	Size	Comments	Discord	Size	Comments	Discord	Size
	Executive Agencies								
Midnight Period	0 (0.12)	-0.07 (0.11)	0.01 (0.07)	0.09 (0.08)	0.04 (0.1)	0.06 (0.1)	-0.02 (0.06)	-0.02 (0.11)	0.02 (0.1)
Last Term	0.01 (0.04)	0.04 (0.04)	-0.01 (0.02)	0.02 (0.04)	0.06 (0.05)	0.02 (0.03)	0.02 (0.04)	0.06 (0.05)	0.02 (0.03)
Midnight Period * Last Term	0.87 (0.16)	0.91 (0.18)	0.37 (0.1)	0.66 (0.12)	0.7 (0.17)	0.24 (0.11)	0.66 (0.12)	0.7 (0.17)	0.24 (0.11)
Agency Fixed Effects	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Month Fixed Effects	No	No	No	No	No	No	Yes	Yes	Yes
N	16204	16204	16204	16204	16204	16204	16204	16204	16204
	Independent Agencies								
Midnight Period	0.06 (0.24)	0.43 (0.22)	0.06 (0.21)	0.16 (0.24)	0.5 (0.37)	0.08 (0.32)	0.07 (0.25)	0.49 (0.36)	0.02 (0.33)
Last Term	-0.15 (0.09)	0.08 (0.1)	0.14 (0.06)	-0.08 (0.07)	0.15 (0.09)	0.17 (0.15)	-0.08 (0.06)	0.14 (0.08)	0.17 (0.15)
Midnight Period * Last Term	0.46 (0.32)	-0.03 (0.34)	0.25 (0.26)	0.18 (0.29)	-0.29 (0.48)	0.07 (0.32)	0.22 (0.28)	-0.28 (0.48)	0.06 (0.32)
Agency Fixed Effects	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Month Fixed Effects	No	No	No	No	No	No	Yes	Yes	Yes
N	2509	2509	2509	2509	2509	2509	2509	2509	2509

Note: standard errors clustered at the agency level and reported in parentheses. The dependent variables in models (1), (4), and (7) are the counts of references to comments; in models (2), (5), and (8) and counts of words indicating disagreement in the final rule; in models (3), (6), and (9) the logged number of words in the final rule. Models (1), (2), (4), (5), (7), (8) estimated with a poisson model; models (3), (6), (9) estimated with OLS.

IV.

ACCOUNTABILITY FAILURE: AN ASSESSMENT

A. *The Equivocal Relationship of Accountability and Democracy*

The idea that elected representatives should be politically accountable for their actions is often regarded as close to a normative primitive.⁹⁸ Yet our institutions routinely impede or outright deny the goal of political accountability. This is so for good reason. Elections help to solve certain problems in a representative democracy, disciplining representatives once in office, effectively discouraging officials from slacking off after elected, or from following a course of policy inconsistent with voters' preferences.⁹⁹ But, as is widely recognized, elections also introduce incentives that potentially harm voters.

Consider just two examples of important types of perversities introduced by elections: those related to information asymmetries and those related to time-inconsistent preferences. Information asymmetries afflict the relationship between voters and elected officials. Relative to voters, elected officials tend to have much better information about their own abilities and policy preferences, and they tend to have better information about the state of the world. For example, in 2012, Mitt Romney knew much better than the average voter whether he supported or opposed universal healthcare.¹⁰⁰ Likewise, in 2008, Barack Obama knew much better than the average voter whether he was

98. See, e.g., Matthew C. Stephenson, *Optimal Control of the Bureaucracy*, 107 MICH. L. REV. 53, 58 (2009) ("For the mine-run of bureaucratic policy decisions . . . the conventional view is that giving maximum authority to the most politically responsive decision maker maximizes the responsiveness of policy to majoritarian preferences.").

99. In addition, aside from disciplining officials after the election, elections help us to put "good" people in office in the first place: people unlikely to slack off, and people unlikely to deviate from the voters' preferences. See, e.g., John A. Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131 (Adam Przeworski et al. eds., 1999) ("Electoral institutions are employed not only to choose good public officials, but as mechanisms to hold incumbents accountable to the public, and, in these ways, they may make policies more or less responsive to public wishes."). James Fearon showed the importance of considering this adverse selection dimension of elections, in addition to the moral hazard dimension of elections. See James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Types Versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131 (Adam Przeworski et al. eds., 1999).

100. Here, I refer to Mitt Romney's divergent policy positions on healthcare while governor of Massachusetts and then as Republican nominee for President. See, e.g., Trip Gabriel & Robert Pear, *Parsing Romney's Choices on Health Care*, N.Y. TIMES, June 29, 2012, at A13.

competent to be a world leader.¹⁰¹ Similarly, elected officials tend to have better information about the world than most voters: Presidents, for example, have access to classified information about events unfolding around the world. This asymmetry often leads elected officials to behave in unproductive ways.

Consider, for instance, the widely acknowledged tendency of politicians to pander.¹⁰² The official may choose the policy action that voters believe is the correct action, even if the official's private information indicates some other course of action is most appropriate. After a terrorist attack, for example, elected officials may immediately retaliate against the culprit, even if the intelligence reports indicate that the threat would be most effectively negated by waiting until the terrorist group revealed more of its hand. The immediate retaliation is a form of pandering driven by information asymmetries. If the voters knew that the best course of action involved waiting, or if they knew their leader were competent and strong, the voters would agree to bide their time. Unfortunately, voters do not possess this information, and may interpret the failure to retaliate as a sign of incompetence or weakness.¹⁰³ The leader, not wanting to appear weak or incompetent, retaliates immediately, against the counsel of the best available intelligence reports. Hence, in the context of information problems, elections sometimes induce politicians intentionally to adopt inferior policies.

Often in conjunction with issues of information, problems of dynamically inconsistent preferences pervade government decision-making. A problem of dynamic inconsistency arises when the preferred course of action at time t for time $t + 1$ is no longer optimal when time

101. Here, I refer to the effort during the 2008 primary season to portray Barack Obama as unprepared for office. The most prominent example of this effort was the "3 AM" ad, in which voters were asked to consider who they would want to answer the White House phone during a late-night emergency. See Katherine Q. Seelye, *New Clinton Ad Prompts Reply from Obama*, N.Y. TIMES, Feb. 29, 2008, <http://www.nytimes.com/2008/02/29/us/politics/29cnd-campaign.html>.

102. For a seminal article on presidential pandering, see Brandice Canes-Wrone et al., *Leadership and Pandering: A Theory of Executive Policymaking*, 45 AM. J. POL. SCI. 532 (2001). A flip side of pandering, in their model, is "posturing," whereby a politician takes a strong action in an effort to show that he or she is knowledgeable.

103. Note that this account relies on the premise that the President cannot communicate the fact that waiting is the best course of action to the voters. He may not be able to communicate this information due to problems of credibility, for example: the weak leader faces an incentive to lie to the voters, reporting that the best course of action is to wait even if the best course of action involves immediate retaliation; or the President may not be able to share the information due to security concerns.

$t + 1$ arrives.¹⁰⁴ A classic example of the time consistency problem, and one solution to it, is represented by Odysseus's decision to have himself bound to his ship as they passed the Sirens: he recognized that, if left unbound, he would succumb to the Sirens despite his restrained intentions prior to his contact with them; his solution was to commit himself to a course of action at t for $t + 1$ by binding himself to the mast. Electoral incentives are often thought to have Siren-like properties, tempting officials with short-term rewards and generating problems of time-inconsistency.¹⁰⁵

Our institutions recognize the perverse incentives of elections in numerous ways. The structure of the Senate, it is common to note, cuts against sharp political accountability: members have long and staggered terms. This feature of the Senate was even more pronounced at the founding, of course, as Senators were then not even directly elected.¹⁰⁶ One interpretation of this institutional arrangement is as a method of ameliorating the problem of time-inconstant preferences.¹⁰⁷ Even if one cohort of Senators faces pressure to change policy—to succumb to the Sirens—two other cohorts of Senators, facing elections several years in the future, may credibly endeavor to maintain the original policy. Our system of judicial review also arguably represents a mechanism designed to ameliorate pandering, bailing politicians out of electorally driven decisions.¹⁰⁸ Judicial review, in this sense, likewise dampens the negative policy consequences of political accountability.

104. See, e.g., ALLAN DRAZEN, *POLITICAL ECONOMY IN MACROECONOMICS* 99–130 (2000).

105. In the monetary policy context, an early example of such an argument is provided by William Nordhaus, *The Political Business Cycle*, *REV. ECON. STUD.* 169 (1975) (modeling opportunistic politicians who use monetary policy to reduce unemployment before elections, with consequent inflation occurring only after the election). Subsequent efforts modeled opportunistic policymaking in the context of fully rational voters (rather than “fooled” voters) facing information problems. See, e.g., Alberto Alesina, *Macroeconomics and Politics*, in *NBER MACROECONOMICS ANNUAL* (Oliver Blanchard & Stanley Fischer eds., 1988).

106. See U.S. CONST. art. I, § 3, cl. 1 (providing that Senators shall be “chosen by the legislature”).

107. James Madison, for example, argued that the long-visioned Senate must balance the House of Representatives, an institution populated by “men chosen for a short term” and “liable to temporary errors” that betray their “true interests.” ROGER FOSTER, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 469 (1937) (quoting James Madison’s speech of June 26, 1787, and observing that the Senate was designed to “protect the people against themselves”).

108. See Justin Fox & Matthew C. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 *AM. POL. SCI. REV.* 397 (2011).

It is not difficult to find other examples of institutions designed to reduce the accountability of public officials.¹⁰⁹ The dynamic inconsistency problem, for instance, famously afflicts monetary policy, making it hard for central banks to commit to a policy of low inflation.¹¹⁰ One institutional response to this problem is central bank independence, adopted by many countries, including the United States. Insulating central banks from political pressure, runs the theory, will remove the incentive to unexpectedly increase the inflation rate, thereby eliminating the time-inconsistency problem, and allowing the central bank to pursue a policy of low inflation.¹¹¹ Other prominent examples of similar institutional arrangements include the periodic base closing commissions,¹¹² and the Independent Payment Advisory Board, a creation of the Affordable Care Act designed to slow the growth of healthcare costs.¹¹³ Both of these cases represent efforts by elected officials to insulate themselves from electoral pressures, allowing them to optimize long-term policy (respectively, closing unneeded military bases, and reducing reimbursement rates for healthcare services).

Thus, even if we benefit from political accountability in the main, we also often want to soften the edge of elections. By design, many of our institutions recognize this fact. The results above indicate that the midnight period represents a period in which the teeth of electoral accountability have dulled. Presidents in their last term of office appear to behave quite differently in the period between the election and the inauguration of the next President. Should we view the midnight period of reduced political accountability as a positive quirk of our electoral system? Or as a negative feature?

109. For a recent and innovative assessment of independent agencies, which often serve to insulate policy decisions from political accountability, see Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010) (arguing that Presidents maintain some control over policymaking in independent agencies, and that political accountability is often best served by endowing Presidents with some, but not total, control over agency policymaking).

110. For a seminal article in this literature, see Finn E. Kydland & Edward C. Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977).

111. See, e.g., Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q. J. ECON. 1169 (1985); see also ALAN BLINDER, CENTRAL BANKING IN THEORY AND PRACTICE 57 (1998) (“[M]any governments wisely try to depoliticize monetary policy by, e.g., putting it in the hands of unelected technocrats with long terms of office and insulation from the hurly-burly of politics.”).

112. See, e.g., Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, 20 LEGIS. STUD. Q. 3 (1995).

113. See Timothy Stoltzfus Jost, *The Independent Medicare Advisory Board*, 11 YALE J. HEALTH POL’Y L. & ETHICS 21 (2011).

We might speculate, for instance, that the President uses this period of reduced accountability to issue rules that would not survive ordinary political pressures, yet which clearly operate to the long-term public interest.¹¹⁴ The midnight period may be a time in which Presidents short-circuit problems deriving, for example, either from information asymmetries or from time-inconsistent preferences. It may be a period in which the President is freed from pandering; in which he can pursue long-term interests to the exclusion of short-term ones. The midnight period may be one of the few times in which the President is able to override the preferences of aligned special interest groups. Republican Presidents might use the midnight period to issue rules adverse to important industry groups; Democratic Presidents might use the midnight period to issue rules adverse to labor groups or other special interests. Plausibly, the partial insulation afforded to agencies during the midnight period resembles the insulation afforded to independent agencies such as the Federal Reserve. Such insulation is antidemocratic, of course, but sometimes democracies benefit from being antidemocratic—much as Odysseus benefited from having his men bind him to the mast of his ship.¹¹⁵

Of course, the prevailing narrative concerning midnight rules runs in the opposite direction. The time of reduced accountability is a dark period for democracy, one in which Presidents issue giveaway rules that favor special interests.¹¹⁶ The rules cited in news accounts of the midnight period generally support this account. Recently, President G.W. Bush issued controversial environmental rules favorable to the mining industry during the midnight period.¹¹⁷ Similarly, Clinton's ergonomics standard represented the fruit of many years of lobbying by labor groups.¹¹⁸ Thus, the news accounts suggest that Presidents use the midnight period to advance controversial rules that favor aligned interest groups. Yet these anecdotes may be misleading.

114. It may not be an accident, for example, that the EPA tends to issue many midnight rules. Environmental regulations often call for short-term sacrifices and promise long-term benefits.

115. See generally JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENTS AND CONSTRAINTS* (2000).

116. See, e.g., Morriss et al., *supra* note 11, at 558 (“[B]y issuing regulations that complicate the life of the succeeding administration, outgoing regulators can earn political capital with their core constituencies.”).

117. See 30 C.F.R. 780.35 (2013); 30 C.F.R. 784.19 (2013); 30 C.F.R. 816.71–816.74 (2013); 30 C.F.R. 817.71–817.74 (2013).

118. Greenhouse, *supra* note 9.

B. Evaluating the Accountability Failure: Post-Midnight Litigation

One approach to resolving some of the uncertainty surrounding the normative valence of the midnight accountability failure involves examining court challenges to the regulations. In particular, we can examine the identities of parties challenging regulations in different periods of an administration. Do opposed or aligned interest groups tend to challenge midnight regulations in court? If the former, this casts some negative light on midnight rulemaking activity, as it suggests that Presidents use the period to hand out regulatory favors to aligned interest groups—favors sufficiently unpopular or controversial that they would be spiked during the ordinary political process. On the other hand, if aligned interest groups disproportionately challenge midnight rules, this suggests that Presidents may use the midnight period to “rise above” ordinary politics—plausibly focusing on long term interests that operate against members of the Presidents own political coalition. The rate at which classes of parties challenge regulations in court, in sum, is informative about whether the regulations favor those classes. The conventional story predicts Republicans favoring industry groups and Democrats favoring labor and public interest groups; on the other hand, theory suggests that government officials sometimes make better long-term decisions when less accountable, and so we might observe Republicans favoring public interest groups and Democrats favoring industry groups.

To facilitate this exercise, I collected U.S. Courts of Appeals cases involving challenges to an agency action as arbitrary and capricious or as a misapplication of statutory authority between 1983 and the present.¹¹⁹ By convention, courts cite the entry in the *Federal Register* of the challenged regulation. This convention allows me to connect the rules in the UA database with the set of challenged rules.¹²⁰ Focusing on claims involving the arbitrary and capricious standard or

119. For the leading Supreme Court case involving the arbitrary and capricious standard, see *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (clarifying the prevailing standard). For the leading case involving statutory interpretation, see *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (setting forth a reasonableness test for agency interpretations of statutes).

120. In identifying challenges involving statutory interpretation, I follow Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006). In identifying challenges involving the arbitrary and capricious standard, I follow Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008). After collecting the set of cases, I search the cases for references to *Federal Register* citations in the UA database. I limit attention to cases decided within two years from the time the agency issued the regulation. Doing so reduces the risk of including in the dataset challenges to subsequent revisions of the regulation in question. If the agency subse-

implicating improper agency interpretation of statutes should capture the heart of the challenges against agency actions. These two types of challenges, in any event, represent general types of challenges to agency action in administrative rulemaking, thus cutting across the substantive domains of agencies.¹²¹

I focus on the fates of fourth quarter regulations during the second terms of Presidents G.W. Bush and Clinton. These two administrations, the results above indicate, exhibited particularly divergent regulatory behavior during the midnight period (i.e., the fourth quarter of the presidential election year). These two administrations thus provide the clearest window into the potential consequences of the midnight period accountability failure. After focusing on this subset of rules, and weeding out cases that mention the rule but do not question its validity, I find a total of 11 challenged rules from the Clinton administration and 19 from the G.W. Bush administration. I read these cases and classify them according to (a) the identity of the challenger, and (b) the outcome of the case.¹²² These classifications allow us insight into the nature of rules issued during the midnight period, even if the small number of challenged rules precludes firm conclusions.

Consider first the Clinton administration fourth quarter rules. Of the 11 fourth quarter rules challenged during this term, Clinton issued 5 during the midnight period. The proportion of challenged midnight rules is low in absolute terms (5 of 277 midnight rules), but high relative to litigation rate for other fourth quarter rules (6 of 541 non-election year fourth quarter rules).¹²³ Thus, the overall litigation rate increased modestly during the midnight period of Clinton's second term.¹²⁴

quently revises regulation, and this revision is challenged, the court may cite the original regulation as well as the revision.

121. I do not labor to draw a distinction between the two standards of review. See RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 3.6, at 219 (5th ed. 2010) (observing that “[i]t seems apparent that step two of *Chevron* is *State Farm*”).

122. This classification exercise is, for the most part, not difficult. However, several types of litigants do not fall easily in any of the three categories. Difficult litigants included nonprofit hospitals and state and local government entities. I place nonprofit hospitals in the industry class; I place government entities in the nonprofit class.

123. This difference in litigation rates is not statistically significant. As above, the most appropriate way to view the discussion in this section is as a case study of the midnight periods in these two administrations.

124. The increase in litigation rates, however, is matched by a decrease in the success of the challenges. Outside of the midnight period, courts granted petitioners relief, in whole or part, in 3 of the 6 cases; courts uniformly rejected challenges to rules issued in the midnight period. This suggests that parties may be somewhat more willing to challenge midnight rules. For instance, regulated parties may litigate outgoing President's rules more aggressively because outgoing Presidents cannot retaliate.

The profiles of challengers provide mixed evidence about the nature of President Clinton's midnight rules. Three of the 5 challenges to midnight rules came from industry groups. By comparison, 2 of the 6 challenges to non-election-year fourth quarter rules came from corporate groups. However, the data belie the easy story that the midnight period is used exclusively for ideological ends. In *Sierra Club v. EPA*, for example, an environmental group challenged an EPA midnight rule exempting certain wastewater from listing as a hazardous substance under the Resource Conservation and Recovery Act (RCRA).¹²⁵ The Sierra Club argued that the EPA did not have the discretion to create this exemption under RCRA, even if it is indicated on a cost-benefit basis. Here we see President Clinton turning against environmental groups, and focusing instead on whether an exemption is cost-justified. This regulation, therefore, plausibly stands as an example of the President using the reduced accountability of the midnight period to overcome otherwise powerful interests in his coalition.

Now consider the second G.W. Bush administration. Parties challenged a total of 19 of President G.W. Bush's fourth quarter rules. Agencies issued 8 of these 19 rules during the midnight period. This, again, is a low challenge rate in absolute terms (8 of 266 midnight rules), and a modestly higher rate than observed for non-election year fourth quarter rules (11 of 534 rules).

The profiles of the challengers, likewise, suggest a mixed story, though here we observe a more marked turn against coalitional partners during the midnight period. Industry groups were responsible for the majority of challenges to G.W. Bush's midnight rules: 6 of 8 challenges. For instance, a coalition of battery recyclers challenged President Bush's midnight revision to the National Ambient Air Quality Standards for Lead,¹²⁶ claiming that the new rule was "overprotective" and should be set aside as arbitrary and capricious.¹²⁷ By comparison, industry groups were responsible for only 2 of the 11 challenges to non-election year fourth quarter rules. This pattern, again, does not support the conventional story of Presidents using the midnight period exclusively to issue controversial, giveaway regulations to favored interest groups.

125. 292 F.3d 895 (D.C. Cir. 2002). For the text of the rule, see Chlorinated Aliphatics Rule, 65 Fed. Reg. 67,068 (Nov. 8, 2000).

126. National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964 (Nov. 12, 2008).

127. Coalition of Battery Recyclers Ass'n v. EPA, 604 F.3d 613, 617 (D.C. Cir. 2010).

These litigation rates provide some information about the nature of midnight rules. But they are not dispositive. For instance, the simple account above cannot control for the possibility that litigation rates themselves may be endogenous to the midnight period. Aligned interest groups may pursue more aggressive litigation strategies for late-term rules. Such a shift in behavior may derive from the inability of the exiting regime to punish industry for the aggressive litigation; or, similarly, aligned groups may increase litigation because channels of political influence constrict in the new administration, increasing the attractiveness of pursuing judicial channels of influence.¹²⁸ The conclusions of this section, therefore, necessarily remain tentative. At the very least, though, I did not find much support for the conventional story of midnight rulemaking, that Presidents dole out regulatory favors to aligned interest groups during the midnight period of unaccountability. The midnight period appears characterized by a mix of regulations, only some of which favor aligned interest groups.

V.

BROADER LESSONS: ACCOUNTABILITY AND THE LEGITIMACY OF THE ADMINISTRATIVE STATE

A. *Accountability and the Legitimacy of the Administrative State*

The democratic legitimacy of the administrative state has long concerned observers.¹²⁹ Over the years, students of administrative law have cycled through various responses to the problem of administrative legitimacy.¹³⁰ At first, scholars justified administration action by appealing to the notion that bureaucratic policymaking represents little more than the application of expertise to matters of technocratic policy.¹³¹ During the sixties, during the rise of the “public interest era,” scholars instead focused on the notion that the actions of administra-

128. See also Jacob E. Gersen & Anne Joseph O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1201–02 (2009) (noting that courts may also consider the timing of a regulation when making a determination about its validity and that, to the extent the courts become “tougher” on midnight regulations more carefully, this may also encourage differential litigation rates for midnight regulations).

129. See Farina, *supra* note 36, at 987.

130. For an excellent account of this development, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470–92 (2003) (chronicling the development of models of the administrative state, and arguing that the presidential model of bureaucratic control is insufficient to endow the administrative state with legitimacy).

131. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675 (1975) (referring to the “traditional model” as a “mere transmission belt for implementing legislative directives”).

tive agencies might reflect the somewhat mechanical processing of pressures from interest groups, with the groups themselves more or less representing the citizenry at large.¹³² More recently, the dominant approach to legitimizing agency actions involves a connection between the electoral accountability of the President and the President's control over administrative agencies.¹³³ Thus, in this view, administrative actions have legitimacy because the executive controls agencies, and the executive is himself accountable to the electorate.

This form of imputed legitimacy plays an important role in administrative law doctrine. Perhaps most famously, the Supreme Court relied on the President's electoral accountability to justify deferring to administrative agencies in the seminal *Chevron U.S.A. v. NRDC*.¹³⁴ There, the Court stated: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."¹³⁵ Similarly, in *FDA v. Brown & Williamson Tobacco Corp.*, Justice Breyer argued that "the President and Vice President are the *only* public officials whom the entire Nation elects,"¹³⁶ and that therefore it is appropriate for courts to defer to agency interpretations of statutes. Thus, courts justify granting deference to administrative agencies, in part, on the basis of the President's political accountability.

The presumed political accountability of the President also informs constitutional doctrine related to the appointment and removal powers. A common reading of the appointments clause rests on the President's accountability. As Justice Blackmun summarizes, "the Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political

132. See, e.g., Bressman, *supra* note 130, at 475.

133. See, e.g., Mashaw, *supra* note 40, at 95; Kagan, *supra* note 39, at 2252 ("[N]ew presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism"). A notable modern alternative to the presidential control model focuses on the ability of administrative procedure to promote deliberative decisionmaking. See Seidenfeld, *supra* note 35, at 1515 ("[H]aving administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity.").

134. 467 U.S. 837 (1984).

135. *Id.* at 866–67.

136. 529 U.S. 120, 191–92 (2000).

force and the will of the people.”¹³⁷ Similarly, the Supreme Court invalidated restrictions on the President’s removal powers using similar reasoning in the recent case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*.¹³⁸ Criticizing the inability of the President to remove members of the Board, the Court maintained that “such diffusion of power carries with it a diffusion of accountability; without a clear and effective chain of command, the public cannot determine where the blame for a pernicious measure should fall. The Act’s restrictions are therefore incompatible with the Constitution’s separation of powers.”¹³⁹ More generally, the theory of the unitary executive derives from the belief that concentrating power in the hands of the executive increases the political accountability for government policy decisions.¹⁴⁰

Thus, a variety of administrative and constitutional law doctrines are founded on the notion that the President is accountable for bureaucratic decisions. A large part of the reason courts defer to agencies is that the President is accountable for his actions; a large part of the reason that courts defend the President’s appointment and removal powers is to clear the lines of responsibility for bureaucratic policymaking. Despite the important connection between presidential accountability and these doctrinal positions, however, we have little evidence that the President is, in fact, held accountable for bureaucratic decisions.

Even as advocates of the unitary executive whittle away at bureaucratic autonomy and congressional controls,¹⁴¹ the lines of accountability between bureaucratic decisions and the President arguably remain incomplete and obscure to the electorate.¹⁴² The obscured lines of accountability may allow the President’s administra-

137. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 884 (1991).

138. 130 S. Ct. 3138 (2010).

139. *Id.* at 3144.

140. *See, e.g.*, Steven G. Calbresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42 (1995) (noting with approval Alexander Hamilton’s statement that “[O]ne of the weightiest objections to a plurality in the executive, is that it tends to conceal faults, and destroy responsibility.”).

141. Other examples of judicial decisions that concentrate discretion in the hands of the executive involve standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (tightening the standard for “injury in fact,” and thereby reducing the potency of citizen suit provisions), and enforcement discretion, *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding as unreviewable decisions by the executive not to enforce regulatory or statutory provisions).

142. *See, e.g.*, Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2079 (2005); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 50 (2006).

tion to issue regulations essentially unencumbered by the threat of electoral discipline. If so, this questions the foundation of the prevailing *Chevron* deference regime, and of the unitary executive theory more generally. It calls for a revisiting of central doctrines in administrative and constitutional law.

B. *Lessons from the Midnight Period*

The President's behavior during the midnight period informs these debates. The period of unaccountability supplies an experiment of sorts for how the President might behave if he did not worry about elections.¹⁴³ And just as behavior in the midnight period informs us about how the President behaves without elections, behavior outside the midnight period informs us about how the President's behavior may be conditioned by elections.

Suppose that we observe no difference in regulatory behavior during the midnight period. This pattern is subject to two interpretations. One might interpret the continuity in behavior after the election as evidence that elections never seriously disciplined the President. In terms of regulatory behavior, the President did not care about the electorate before the election, just as he did not care about the electorate following the election.¹⁴⁴ The President is unaccountable not just during the midnight period but also before the midnight period. This behavior might result, as suggested above, from the obscured lines of control between bureaucratic decision and the President. A second interpretation, of course, is that no serious accountability failure occurs during the midnight period. The President's behavior is subject to several constraints. Beyond elections, the President may be constrained by concerns about his "legacy," or perhaps the democratic legitimacy of his actions following an adverse election. This second interpretation suggests that the President is even more accountable to the public (through non-electoral channels) than is commonly acknowledged. Of course, these two interpretations have divergent implications for judicial doctrine: the first undermines the notion that the President is politically accountable for regulatory actions and questions the validity of the suite of unitary executive decisions; the second points to multiple

143. For a pioneering study exploiting the similar logic, see John R. Lott, Jr., *Political Cheating*, 57 *PUB. CHOICE* 169 (1987).

144. See generally Cynthia Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 *U. PA. J. CONST. L.* 357 (2010); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 *UCLA L. REV.* 1217 (2006).

modes of presidential accountability, broadly understood, for regulatory decisions and tends to support those same decisions.

But now suppose that we observe a difference in regulatory behavior during the midnight period. Unlike the scenario above, the most plausible interpretation of this pattern is that the President faces a different set of incentives in the midnight period than he does throughout most of his administration. In particular, the fact that we observe the President behaving quite differently during the midnight period would support the idea that, for most of the term, the President is disciplined by elections. The President behaves as though he is accountable for most of his administration; it is only at the end, after the election, that he is no longer accountable.

The pattern we observe in the data supports the latter scenario. In terms of the level of public interest in the rules, the apparent level of disagreement generated by the rules, and the length of the rules, rules issued in the midnight period of an outgoing President's term differ dramatically from rules issued earlier in the term. The evidence reported in this Article corroborates the long-held notion that midnight rules differ in material ways from other types of rules. This suggests that the attenuated electoral accountability following an election induces the President to alter the regulatory behavior of his administration. In turn, this pattern suggests that President's rulemaking behavior is constrained by elections for almost all of his term. The President behaves as though elections matter: he saves much of the controversial regulating for after the election.

In this way, the findings in this Article provide mixed support for the critical premise of presidential accountability. On the one hand, the regulatory behavior of Presidents appears to change quite dramatically following an adverse election: they appear to issue larger, more controversial rules during the midnight period. The fact that periods exist in which the President is not electorally accountable, and that he appears to take advantage of this window of unaccountability, undercuts the stated motivation for concentrating ever-greater powers in the hands of the executive. At the same time, the very fact that the President changes his behavior in the midnight period indicates that, for most of the term, his administration's regulatory behavior is at least partially constrained by elections. This feature of the results, which notably holds even for second-term Presidents, supports the critical premise of presidential accountability.

Of course, the fact that elections constrain regulatory behavior does not necessarily imply that electoral accountability induces regulatory behavior that is fully responsive to the public's wishes. Even

outside the midnight period, elections fail to fully align regulatory behavior with public preferences. Indeed, the fact that regulatory behavior changes a great deal between Democratic and Republican administrations, while aggregate public preferences change only modestly between administrations, suggests that elections do not produce regulatory policy that is flush with the central tendency of public preferences.

Further study of how midnight regulations differ from other types of regulations is necessary before we can reach a firmer normative assessment of the period. For instance, the results in Part IV indicate that the President may turn against allies during the midnight period. If this interpretation survives further scrutiny, we may laud rather than lament the period of unaccountability. The finding suggests that Presidents may use the midnight period to follow long-term rather than short-term interests. However, if the finding fails under further scrutiny, we might consider methods of amplifying alternative, nonelectoral sources of accountability.

CONCLUSION

The midnight period is a quirk that permits us to examine the relationship between regulatory behavior and elections. The common view is that Presidents use the midnight period to issue highly controversial regulations that largely represent giveaways to favored interest groups. The findings in this Article partially support this view. The regulatory behavior of last term Presidents during the midnight period, indeed, differs dramatically from the regulatory behavior earlier in their terms, at least in the context of executive agencies. Last term Presidents appear to use the midnight period to issue controversial regulations. However, based on subsequent litigation, these regulations do not appear to be uniformly giveaways to favored industry. Both Presidents Clinton and G.W. Bush issued midnight rules that apparently operated to the detriment of favored industry groups. In fact, most of the legal challenges to President G.W. Bush's midnight regulations came from industry groups, not labor or public interest groups.

These findings inform on-going debates about the unitary executive theory, a constitutional position that is often premised on the notion that the President is politically accountable for his regulatory actions. On the one hand, we have striking evidence that the President behaves differently when he is not worried about elections. On the other hand, we have striking evidence that the President behaves differently when he is not worried about elections. The fact that over 7% of last-term Presidents' regulatory activity occurs during the midnight

period is concerning, as is the fact that these regulations tend to be relatively controversial. Yet the very fact that we observe differences in behavior after elections suggests that, most of the time, elections discipline regulatory behavior, as posited in the unitary executive theory.