MOOTING THE NIGHT AWAY: POSTINAUGURATION MIDNIGHT-RULE CHANGES AND VACATUR FOR MOOTNESS

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ABSTRACT

When a case decided by a lower court becomes moot pending appeal, the appellate court must decide whether to vacate that decision. This scenario may arise in litigation spurred by opposition to an outgoing presidential administration's midnight regulations—rules hurriedly promulgated during the president's last days in office. An incoming president may change an unfinished midnight rule pending appeal of a decision invalidating that rule, thereby mooting the case. Faced with this posture in a case against the United States Department of Agriculture (USDA), the Tenth Circuit vacated as moot the lower court's decision invalidating a Forest Service rule, despite unclear vacatur-for-mootness case law that questions whether vacatur is appropriate when a rule change causes mootness.

This Note argues that the Tenth Circuit's approach was correct and should be followed in midnight-regulation cases. Although this Note does not argue that rule changes per se warrant vacatur, midnight-regulation research shows that the motives surrounding the practice are not related to litigation, but rather to political differences between incoming and outgoing administrations. Moreover, the Supreme Court's decision in FCC v. Fox Television Stations, Inc. *hints that courts should not scrutinize government motives for rule changes and that political reasons are appropriate justifications for changing rules. Because motive is critical to vacatur analysis, cases involving midappeal midnight-rule-change mootness should be vacated.*

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INTRODUCTION

Presidential administrations often speedily promulgate several last rules before a new president—particularly one from a different political party—takes office. Administrative-law scholars and the media have termed this practice midnight regulation.[1] Midnight-regulation scholarship posits that the motives surrounding the practice are largely political,[2] and recent incoming presidents have confronted the practice by suspending unfinished midnight rules upon taking office for similar political reasons.[3] Controversial midnight regulations may also irk private parties, who often sue the outgoing administration in federal court over the validity of its midnight rules, even before the new president takes office.[4] When the president finally does take office, the new administration becomes the defendant in these lawsuits, though often in name only. That is, the incoming administration may find itself in court defending rules that it wants to change.[5]

Adding insult to injury, an incoming administration might face a separate legal challenge if it decides to change the rule and undo[6] its predecessor's midnight rulemaking.[7] Longstanding Supreme Court

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1. *See, e.g.*, Jerry Brito & Veronique de Rugy, *Midnight Regulations & Regulatory Review*, 61 ADMIN. L. REV. 163, 163–64 (2009) ("*[M]idnight regulation[]* describes the dramatic spike of new regulations promulgated at the end of presidential terms, especially during transitions to an administration of the opposite party."); John M. Broder, *A Legacy Bush Can Control*, N.Y. TIMES, Sept. 9, 2007, § 4 (Week in Review), at 1 ("Every president comes into office complaining about the . . . midnight regulations left on the White House doorstep by his predecessor."); *see also infra* Part III.

2. *See, e.g.*, Andrew P. Morriss, Roger E. Meiners & Andrew Dorchak, *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining*, 55 ADMIN. L. REV. 551, 588 (2003) ("Midnight regulations are an important political weapon."); *see also* Broder, *supra* note 1 (describing midnight regulation as "a way for an administration to have life after death" (quoting Philip Clapp, President, National Environmental Trust)); *infra* Part III.A.

3. *See infra* Part III.B.

4. *See infra* Part III.C.

5. *See, e.g.*, Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 624 (2003) ("After the State of Idaho had filed litigation challenging [a Clinton-era midnight] rule . . . the Bush administration indicated that it would not be defending the rule on the merits." (footnotes omitted)).

6. Changing or rescinding midnight rules posttransition is frequently described as "undoing" midnight regulations. *See, e.g.*, REECE RUSHING, RICK MELBERTH & MATT MADIA, CTR. FOR AM. PROGRESS & OMB WATCH, AFTER MIDNIGHT: THE BUSH LEGACY OF DEREGULATION AND WHAT OBAMA CAN DO 6 (2009), *available at* http://www.americanprogress.org/issues/2009/01/pdf/midnight_regulations.pdf (listing "[o]ptions for blocking and undoing midnight regulations").

7. *See infra* Part III.C.

administrative law doctrine made posttransition rule changes difficult to defend if challenged in court,[8] and at least one president avoided changing his predecessor's midnight rules for fear that he could not justify the modifications to a court's satisfaction.[9] In a recent decision, however, the Supreme Court relaxed scrutiny of the reasons that may legitimately support an agency's decision to change policy.[10] This decision supports postinauguration rule changes; incoming administrations will more readily change unfinished midnight rules upon taking office without fear of stiff judicial scrutiny of their motives.[11]

This development leaves an open question: procedurally, what should happen if a plaintiff successfully challenges a midnight rule in a district court but, pending appeal, a new administration changes the disputed rule, thus mooting the case?[12] In *Wyoming v. USDA* (*Wyoming II*),[13] a rare court of appeals decision presenting this situation,[14] the Tenth Circuit vacated as moot[15] the district court's

8. *See infra* Part III.C.2.

9. *See* Jason M. Loring & Liam R. Roth, Empirical Study, *After Midnight: The Durability of the "Midnight" Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441, 1441 (2005) (noting President George W. Bush's "reluctance to amend or repeal midnight regulations" because of rule-change doctrine).

10. The case, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), and the Court's position on agency policy change are discussed in Part III.C.2, *infra*.

11. For further discussion of incoming presidents' responses to unfinished midnight rules, see *infra* Part III.B, and for further discussion of judicial review of these responses, see *infra* Part III.C.

12. *Cf.* 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.10 (3d ed. 2008) ("Distinctive questions arise when a case becomes moot after decision by the trial court. . . . The proper course to follow after determining that the case is moot and must not be decided on the merits, however, is . . . complicated.").

13. Wyoming v. USDA (*Wyoming II*), 414 F.3d 1207 (10th Cir. 2005).

14. Although other courts have analyzed vacatur in cases involving mootness from rule changes, *e.g.*, Tafas v. Kappos 586 F.3d 1369 (Fed. Cir. 2009) (en banc), and policy changes, *e.g.*, 19 Solid Waste Dep't Mechs. v. City of Albuquerque, 76 F.3d 1142 (10th Cir. 1996), *Wyoming II* is one of (if not the) only court of appeals cases that addressed a change to a midnight rule.

15. *See, e.g.*, Elizabeth Rand, Recent Decision, *The D.C. Circuit Review, August 1996–July 1997—Civil Procedure: Diluting the Presumption Against Vacatur*, 66 GEO. WASH. L. REV. 789, 790–91 (1998) ("Once a court determines that a judgment is moot, it may not consider its merits, but may dispose of the case as justice may require. A court examines the nature and character of the conditions which have caused the case to become moot in deciding whether to vacate the lower court's decision." (footnotes and internal quotations omitted)). The Supreme Court has noted that vacatur is an "extraordinary remedy." U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994).

An appellate court may either vacate as moot directly or remand to the district court with instructions to consider whether vacatur is appropriate. *Bonner Mall*, 513 U.S. at 29. This

ruling striking down a U.S. Forest Service regulation banning forest road construction (*Wyoming I*).[16] It is unclear that such a course is proper: the Supreme Court has never confronted the problem, there exists little other precedent for the scenario, several courts of appeals have indicated that they might have decided the issue differently, and the Federal Circuit actually did so in another case involving mootness caused by a rule change.[17] This Note, however, argues that the Tenth Circuit's analysis was correct and should be applied in similar cases. Vacatur is the appropriate remedy for midnight-rulemaking cases mooted when an incoming administration changes a challenged regulation pending appeal.

Part I of this Note introduces the Tenth Circuit's decision to vacate as moot the lower court's decision on a midnight rule's validity. Part II discusses vacatur-for-mootness doctrine, including the debate over the vacatur remedy, Supreme Court precedent, and vacatur analysis in the lower courts. Part III introduces midnight rulemaking, laying out the controversy surrounding the practice, motives for regulating at midnight, and reasons that an incoming president would want to change his predecessor's unfinished midnight rules. Part III also explains the main tools used to respond to midnight rules—postinauguration rule suspensions and litigation—and discusses the standards courts apply when reviewing the undoing of midnight rules in such litigation. In particular, it discusses these standards in light of the Supreme Court's 2009 decision in *FCC v. Fox Television Stations, Inc.*[18] Finally, Part IV examines the Tenth Circuit's vacatur analysis in light of the ambiguous case law on the subject and the midnight-rulemaking observations made in Part III. This Note concludes that the Tenth Circuit's approach was correct, that it should be followed in similar cases, and that it might guide how scholars and courts view midnight rulemaking and rule-change mootness.

I. THE TENTH CIRCUIT AND THE ROADLESS RULE

The ongoing battle over the U.S. Forest Service's 2001 "roadless rule," which prohibited road development in large swaths of National

Note uses these options interchangeably.

16. *Wyoming II*, 414 F.3d at 1214, *vacating as moot* 277 F. Supp. 2d 1197 (D. Wyo. 2003); *see also infra* Part I.B.

17. *See infra* Part II.B.

18. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009).

Forest land,[19] exemplifies judicial involvement with midnight rulemaking. Promulgated during the Clinton administration's last days, the regulation spurred controversy that has spanned several presidential administrations and lingered in courts for nearly a decade.[20] Almost immediately, courts questioned the rule's controversial promulgation. Indeed, the district court judge in *Wyoming v. USDA* (*Wyoming I*)[21] noted that "the United States Forest Service drove through the administrative process in a vehicle smelling of political prestidigitation."[22] The roadless-rule litigation is particularly important because the Bush administration rescinded the roadless rule while the *Wyoming I* decision invalidating it was on appeal, thereby mooting the case.[23] This Part explains the roadless rule's controversial promulgation, discusses the effect of President Bush's postinauguration rule change on the litigation, and introduces the Tenth Circuit's vacatur decision in *Wyoming II*.

A. Roadless Rule Background

Although branded as a midnight regulation,[24] the roadless rule's history predates President Clinton's waning term in office.[25] When Congress created the Forest Service in 1897, it gave forest

19. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3272–73 (Jan. 12, 2001) (codified as amended at 36 C.F.R. pt. 294 (2009)); *see also* Mendelson, *supra* note 5, at 619–20 (explaining the roadless rule's novelty and interest). *See generally* Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 696–714 (2004) (providing a history of the roadless rule).

20. CURTIS W. COPELAND, CONG. RESEARCH SERV., R40777, "MIDNIGHT RULES" ISSUED NEAR THE END OF THE BUSH ADMINISTRATION: A STATUS REPORT 27 (2009).

21. Wyoming v. USDA (*Wyoming I*), 277 F. Supp. 2d 1197 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

22. *Id.* at 1203.

23. *See* Wyoming v. USDA (*Wyoming II*), 414 F.3d 1207, 1211 (10th Cir. 2005) ("Oral argument was held on May 4, 2005, and the next day the Forest Service announced the adoption of a final rule replacing the Roadless Rule. . . . [T]he new [State Petitions for Inventoried Roadless Area Management] rule moots this case . . . ."); *see also* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 905 n.50 (2008) ("The [Tenth Circuit] case was mooted when the USDA, under President Bush, rescinded the [roadless] rule.").

24. *E.g.*, Susan E. Dudley, *The Bush Administration Regulatory Record*, REGULATION, Winter 2004–2005, at 4, 5, *available at* http://www.cato.org/pubs/regulation/regv27n4/v27n4-mercreport.pdf (calling the roadless rule a "prominent Clinton midnight regulation"); Ben Lieberman, Opinion, *Midnight Madness—Washington Style*, SAN DIEGO UNION-TRIB., Jan. 10, 2001, at B7 (listing the roadless rule among midnight regulations).

25. *See* Mendelson, *supra* note 5, at 619–27 (providing a history of the roadless rule); Nie, *supra* note 19, at 696–714 (same).

administrators the power to protect public forests from environmental damage.[26] In 1924, the Forest Service created the first of several "wilderness preserves"—"primitive" areas undisturbed by roads and similar improvements.[27] Congress later codified this process, directing the Forest Service to analyze federal lands that could qualify as roadless wilderness areas under the Wilderness Act.[28] Between 1977 and 1979, the Forest Service flagged approximately 62 million National Forest acres as potential roadless wilderness.[29]

Although the Forest Service abandoned its land-analysis programs after unfavorable court rulings, the Clinton administration resurrected Forest Service wilderness area identification.[30] In 1999 the Forest Service suspended road construction activities in inventoried roadless areas while it developed a new road management policy.[31] An "Interim Roadless Rule" took effect on March 1, 1999, imposing an eighteen-month road-construction moratorium in inventoried roadless areas.[32] In October 1999, President Clinton directed the Forest Service to issue a final rule no later than the fall of 2000.[33] This directive's timing was problematic:

> The Forest Service recognized that if it were to issue the final rule by December 2000, it would have to require a very short timeframe . . . for the public to respond to [the Notice of Intent]. As a result, the Roadless Rule [Notice of Intent] provided for a sixty-day comment period, which expired on December 20, 1999.[34]

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26. Act of June 4, 1897, ch. 2, 30 Stat. 11, 35 (codified as amended at 16 U.S.C. §§ 473–478, 479–482, 551 (2006)) ("The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . .").

27. H. Michael Anderson & Aliki Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 434 (1999).

28. Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131–1136 (2006)); *id.* § 3(b), 78 Stat. at 891 (codified as amended at 16 U.S.C. § 1132); *see also* Nie, *supra* note 19, at 698 ("The Wilderness Act included a congressional mandate that the FS [Forest Service] inventory its land for possible wilderness designation.").

29. Wyoming v. USDA (*Wyoming I*), 277 F. Supp. 2d 1197, 1205 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

30. *Id.*

31. *Id.*

32. *Id.* (citing Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7290, 7304–05 (Feb. 12, 1999) (codified at 36 C.F.R. § 212.13 (2000))).

33. *Id.* at 1206.

34. *Id.* (first and second alterations in original) (citations omitted) (internal quotation marks omitted).

After the Notice of Intent comment period expired, the Forest Service proceeded on an expedited timeframe despite calls from several states to extend it.[35] Although commenters decried the Forest Service's subsequent Environmental Impact Statement (EIS) comment procedure as a "sham" and "simply going through the . . . motions to reach a predetermined outcome," the Forest Service refused to extend the EIS comment period, which closed in July 2000.[36] The final roadless rule was published on January 12, 2001, and prohibited road construction in inventoried roadless areas.[37] As one court later noted, "this vast national forest acreage, for better or worse, was more committed to pristine wilderness, and less amenable to road development."[38]

Almost immediately after the roadless rule was finalized in January 2001, Wyoming challenged it in a Wyoming district court,[39] alleging numerous procedural violations in the rule's promulgation.[40] The district court agreed and issued a permanent injunction against its enforcement.[41] Although the government acquiesced in the decision, the defendant environmental groups that intervened in support of the rule appealed.[42]

But the Tenth Circuit never reviewed the appeal's merits. Just after taking office in 2001, President Bush suspended all rules that had not yet taken effect, including the roadless rule.[43] Citing

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35. *Id.* at 1207.

36. *Id.* at 1209.

37. *Id.* at 1210.

38. Kootenai Tribe of Idaho v. Veneman (*Kootenai Tribe II*), 313 F.3d 1094, 1106 (9th Cir. 2002).

39. Wyoming v. USDA (*Wyoming II*), 414 F.3d 1207, 1211 (10th Cir. 2005); *see also Wyoming I*, 277 F. Supp. 2d at 1203 (describing the Wyoming suit); Kootenai Tribe of Idaho v. Veneman (*Kootenai Tribe I*), No. CV01-10-N-EJL, 2001 WL 1141275, at *1 (D. Idaho May 10, 2001), *rev'd*, 313 F.3d 1094 (9th Cir. 2002) (describing a similar challenge to the rule in the District of Idaho).

40. *Wyoming I*, 277 F. Supp. 2d at 1203–04.

41. *Wyoming I*, 277 F. Supp. 2d at 1239.

42. *Wyoming II*, 414 F.3d at 1210. Interestingly, "[a] number of environmental organizations intervened on behalf of the federal defendants in defense of the Rule." *Id.*; *see also* Nie, *supra* note 19, at 706 ("[T]he new administration chose not to defend the rule in court . . . . [But] the Ninth Circuit granted intervenor status to several environmental groups.").

43. *Kootenai Tribe II*, 313 F.3d at 1106 ("On January 20, 2001, newly-inaugurated President George Walker Bush issued an order postponing by sixty days the effective date of all the prior administration's regulations and rules not yet implemented. The effective date of the Roadless Rule was thus postponed until May 12, 2001."); *see also* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001) (directing executive departments and agencies to temporarily postpone the effective dates

"concerns about the process through which the Rule was promulgated, the Forest Service [told the district court that it] planned to initiate an additional public process that [would] . . . examine possible modifications to the Rule."[44] In 2005, the reappraisal process ultimately yielded "a final rule replacing the Roadless Rule."[45] The Tenth Circuit held that this new rule mooted the dispute over the original roadless rule, and the court vacated as moot the district court's ruling in favor of Wyoming.[46]

B. The Tenth Circuit's Decision to Vacate as Moot

Before deciding whether to vacate the district court's decision, the *Wyoming II* court analyzed whether the dispute was actually moot. The court noted that its power under Article III of the Constitution to hear the appeal turned on whether there was an "actual, ongoing case[] or controvers[y]" in the dispute.[47] The court could not hear the case "if the issues presented [were] no longer live."[48] Because the Bush administration had replaced the roadless rule pending the appeal, the court held that the new rule "eliminat[ed] the issues" in the case and "rendered the appeal moot."[49] Not only did the challenged portions of the roadless rule "no longer exist" under the new rule, but the roadless rule's "alleged procedural deficiencies" were also "irrelevant because the replacement rule was promulgated in a new and separate rulemaking process."[50]

The appellants argued that the case was not moot because the roadless rule could later be reinstated or, alternatively, that the Forest

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of published regulations not yet implemented); William M. Jack, Comment, *Taking Care that Presidential Oversight of the Regulatory Process Is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1480 (2002) ("On January 20, 2001, Andrew H. Card, Jr., Assistant to the President and Chief of Staff, issued a memorandum . . . temporarily postpon[ing] the effective dates of published regulations not yet in effect.").

44. *Kootenai Tribe II*, 313 F.3d at 1106 (second alteration in original) (internal quotation marks omitted).

45. *Wyoming II*, 414 F.3d at 1211.

46. *Id.*

47. *Id.* (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990)).

48. *Id.* (quoting City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000)) (internal quotation marks omitted).

49. *Id.* at 1212.

50. *Id.*

Service had "strategically manipulated the courts."[51] The court, however, rejected these contentions, in part because the roadless rule's opponents could bring another suit if it were reinstated.[52] Contrary to the appellants' suggestion, the court also observed that the government changed its rule not because of the district court's judgment, but because the government believed that the roadless rule merited revision.[53] Holding that the appeal was moot, the court turned to whether the district court's judgment should be vacated.[54]

In its vacatur analysis,[55] the court focused on the reason for the mootness. The court observed that vacatur for mootness is appropriate "when mootness results from happenstance or the actions of the prevailing party."[56] The reason for this "general practice" of vacatur, the court noted, is that the appellant would otherwise unfairly lose his right to appeal an adverse judgment.[57] Vacatur, however, "is generally not appropriate when mootness is a result of a voluntary act of a nonprevailing party."[58]

As an equitable remedy, the court observed that "[v]acatur . . . is determined by the particular circumstances of each case."[59] The court first noted that the USDA had not appealed the ruling against the roadless rule:[60] "[B]ecause the party seeking appellate relief is not the party responsible for mooting the case, the orderly operation of the appellate system is not being frustrated."[61] That is, none of the facts indicated that the USDA had repealed the regulation to manipulate or "undermine the district court's ruling."[62] As the court observed, "the replacement of the Roadless Rule was not triggered by the

51. *Id.*

52. *Id.* ("If the Roadless Rule were to reappear in the future, there would be ample opportunity to challenge the rule before it ceased to exist.").

53. *Id.*

54. *Id.* at 1212–13.

55. For a discussion of the vacatur-for-mootness doctrine and the inquiry courts make in deciding whether to vacate, see *infra* Part II.

56. *Wyoming II*, 414 F.3d at 1213.

57. *Id.*

58. *Id.*

59. *Id.* at 1213 n.6.

60. *Id.* at 1213; *see also* Aaron S. Bayer, *Vacatur for Mootness*, NAT'L L.J., Mar. 20, 2006, at 15 ("The court reasoned that since the Forest Service was not appealing the adverse decision (intervening environmental groups had filed the appeal), there was no manipulation of the judicial process and vacatur was appropriate.").

61. *Wyoming II*, 414 F.3d at 1213.

62. *Id.* at 1213 n.6.

district court's judgment, but merely reflects the government's discontent with the rule itself."[63] The court analogized the circumstances of mootness in the roadless rule litigation to mootness caused by a legislature repealing a disputed statute.[64] Thus, the Tenth Circuit vacated the district court's judgment.

The *Wyoming II* court recognized the controversy of its holding, though. Although the court ultimately determined the roadless rule case was "more akin to one in which a controversy is mooted through 'circumstances unattributable to any of the parties,'"[65] the roadless rule's rescission was directly attributable to a litigant's action—the Forest Service's promulgation of a new rule.[66] Moreover, although the court compared the rule's rescission by an agency to a statute's repeal by a legislature, this analogy was ultimately based on analyzing the agency's motives for the rescission in this particular case rather than on evaluating agency rule changes generally.[67] In a footnote, the *Wyoming II* court noted that, in the very case to which it had analogized, the D.C. Circuit had indicated that it may not have vacated if the mootness had been caused by agency action.[68] Nevertheless, because the Forest Service had not attempted to "avoid or undermine the district court's ruling," the *Wyoming II* court determined that "[a]ny unfairness that may generally result from vacating a lower court's judgment when the losing party moots a case [was] not present."[69]

Although the roadless-rule litigation exemplifies only one option for when a postinauguration midnight-rule change moots a case midappeal, the rarity of such cases makes it an important example.[70] Because of its rarity, the Tenth Circuit's vacatur analysis could guide future decisions in similar cases. But the Tenth Circuit's approach should be avoided if that court reached the wrong conclusion—a valid

63. *Id.* at 1212.

64. *Id.* at 1213 (comparing the roadless rule's replacement to the mootness caused by legislative enactment in *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346 (D.C. Cir. 1997)).

65. *Id.* (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 23 (1994)).

66. *See supra* text accompanying notes 49–54.

67. *See Wyoming II*, 414 F.3d at 1213 ("This is . . . not a case in which a litigant is attempting to manipulate the courts . . . .").

68. *Id.* at 1213 n.6 (citing *Nat'l Black Police Ass'n*, 108 F.3d at 353).

69. *Id.*

70. *See supra* note 14 and accompanying text.

concern in light of unsettled case law on the subject.[71] Though this Note ultimately concludes that the Tenth Circuit's analysis was correct,[72] the following Part explores the broader doctrinal controversy surrounding vacatur for mootness.

II. VACATUR-FOR-MOOTNESS DOCTRINE AND MIDAPPEAL RULE CHANGES

In *Wyoming II*, the Tenth Circuit decided in favor of vacatur, but it acknowledged the legal uncertainty on the issue.[73] This Part examines the legal background of vacatur-for-mootness doctrine, discussing the controversy behind a court's decision to vacate, current Supreme Court case law, and vacatur analyses in the lower courts when law change has caused mootness.

A. An Introduction to Vacatur as a Remedy for Mootness

Determining whether to vacate a lower court decision for mootness starts from the fairly uncontroversial position that Article III of the Constitution requires an actual "case or controversy" through each litigation phase. Although a controversy may have existed when a district court issued an opinion, a change of circumstances may have resolved it. At that point, a case is moot, and an appellate court must dismiss the appeal.[74] But if it does, it must then decide what to do with the lower court opinion. Essentially, the opinion can either remain good law or be vacated.

This question bears significant consequences. If the appellate court vacates the decision, the decision will lose legal force[75] and precedential value.[76] This decision can affect the prevailing litigant in

71. *See infra* Part II.B–C.

72. *See infra* Part IV.

73. *Wyoming II*, 414 F.3d at 1213 & n.6.

74. *See, e.g.*, Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477–78 (1990) ("[Article III's] case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals."); *see also* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to . . . Cases . . . [and] Controversies . . . .").

75. *See generally* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 606–32 (1991) (detailing the effect of vacatur on judgments).

76. *See id.* at 630 ("Although a vacated decision may remain in the case reporters, its precedential value is extremely limited." (footnote omitted)). For more information on court rules against the citation of vacated, depublished, and unpublished opinions, see generally

the action below in other ways. For example, if the lower court's opinion is vacated, the litigant will be unable to recover legal fees to which he is entitled by statute as the prevailing party[77]—a party cannot prevail in a judgment that no longer exists.

Loss of a vacated judgment's precedential effect can also have repercussions beyond those involved in the initial litigation. When a lower court has decided an issue in one case, the nonmutual collateral estoppel doctrine gives that decision preclusive effect if another litigant sues on the same issue.[78] In other words, the court hearing the new litigation would dismiss the issue as having already been adjudicated.[79] If the lower court's judgment is vacated by an appellate court, however, future litigants lose the ability to assert nonmutual collateral estoppel, and the next court must decide the issue again.[80] This scenario affects mostly private parties, though, because litigants typically cannot assert nonmutual collateral estoppel against the government.[81]

Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473 (2003).

77. Certain statutes, like 42 U.S.C. § 1988, abrogate the common law and allow prevailing parties to recover attorneys' fees from party opponents:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . .

42 U.S.C. § 1988(b) (2006) (alterations in original). Vacatur for mootness pending appeal strips parties of prevailing party status for § 1988 purposes. *Lewis*, 494 U.S. at 480; *see also* Appellee Triantafyllos Tafas' Reply to Motion for Dismissal of Appeal & Request for Remand at 5–6, Tafas v. Kappos, 586 F.3d 1369 (Fed. Cir. 2009) (en banc) (No. 2008-1352) ("[E]ntitlement to . . . fees is dependent upon a threshold showing that Tafas is a prevailing party. Tafas should not be precluded by *vacatur* from recovering his attorneys fees despite prevailing at the district court . . . ." (footnote omitted) (citing 28 U.S.C. § 2412 (2006))).

78. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1311–12 (6th ed. 2009) (explaining nonmutual collateral estoppel).

79. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment . . . the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

80. *See, e.g.*, Gould v. Control Laser Corp., 866 F.2d 1391, 1395 n.6 (11th Cir. 1989) ("Vacating the consent judgment would preclude a collateral estoppel defense in a later case and decide the issue before it arises.").

81. *See, e.g.*, Standefer v. United States, 447 U.S. 10, 25 (1980) (denying preclusion under nonmutual collateral estoppel against the government in a criminal prosecution). A party who prevailed against the government may still oppose vacatur for other reasons, such as the desire

Precedential value and issue preclusion are public values of judgments. Vacating judgments thus bears a public cost.[82] Indeed, scholars often cite the loss of public value as a reason that courts should not vacate opinions.[83] Thus, when deciding to vacate a judgment, courts must weigh the equities of preserving the judgment's public value against the reasons supporting vacatur.[84]

Because vacatur carries such serious consequences, courts scrutinize the underlying reason for mootness, particularly when a party's action has rendered the decision moot. The main concern is that a litigant, faced with unfavorable precedent in a lower court's opinion, will attempt to moot the case on appeal to eliminate the judgment's effect.[85] The issue is particularly critical for parties who know they will routinely litigate the same issue in other courts in the future.[86] On the other hand, involuntarily forfeiting one's right to appeal, due to uncontrollable circumstances, would be inherently inequitable. This consideration tips the balance toward vacatur under such circumstances—it would be inequitable not to vacate.[87] Thus,

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to recover fees as the prevailing party. *See supra* note 77 and accompanying text.

That nonmutual collateral estoppel does not apply against the government ties in to the concept of agency nonacquiescence—an agency's refusal to follow precedent against it. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (discussing agency nonacquiescence). For present purposes, agencies may have even less incentive to avoid negative precedent by manipulatively changing rules to prompt vacatur because agencies can simply nonacquiesce in the judgments against them. *See infra* text accompanying notes 256–59.

82. *See, e.g.*, Fisch, *supra* note 75, at 641 (listing "forgoing the collateral estoppel and res judicata effects of the prior judgment," "the erasure of collateral consequences of an adverse judgment, the loss of precedential value for judicial decisions, and a diminished respect for the judicial process" among the "social costs" of vacatur); *see also* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1526–32 (1994) (surveying some of the oft-cited public values of judgments).

83. *See, e.g.*, Fisch, *supra* note 75, at 641–42 (arguing against vacatur in cases in which settlement moots the dispute because of the public cost of vacatur).

84. *See, e.g.*, Ringsby Truck Lines, Inc. v. W. Conf. of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982) (explaining that the decision to vacate "may be different in different cases as equities and hardships vary the balance between the competing values of right to relitigate and finality of judgment").

85. *See, e.g.*, FALLON ET AL., *supra* note 78, at 193 (identifying the concern that vacatur for mootness could "let[] repeat players 'buy up' judgments that they dislike by settling cases pending on appeal and seeking vacatur").

86. *Id.*; *see also* Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 335 (1994) ("[V]acatur seems like a type of precedential hide and seek . . . . Allowing *routine* vacatur also seems inconsistent with the broader structure of adjudicative lawmaking." (emphasis added) (internal quotation marks omitted)).

87. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 24–25 (1994) (stating

although vacatur is described as an "extraordinary" remedy[88] to be granted only when the "balance of the equities" favors vacatur,[89] the parties' motives and the reasons for mootness guide which weights a court selects for its scale.

B. Supreme Court Case Law on Vacatur for Mootness

The Supreme Court's vacatur-for-mootness jurisprudence is largely confined to two cases: *United States v. Munsingwear, Inc.*[90] and *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*.[91] These cases' central principle is that "[w]hen a case in a federal system becomes moot on appeal, the disposition depends on the nature of the events that mooted the dispute."[92]

The dispute in *Munsingwear* involved a regulatory price-fixing claim against Munsingwear. The United States unsuccessfully prosecuted the claim in district court and appealed the case. With the appeal pending, however, the commodity whose price Munsingwear had allegedly manipulated was deregulated.[93] Although the United States was a litigant, the Court considered the deregulation "happenstance" and suggested, in dicta, that vacatur was necessary to "clear[] the path for future relitigation of the issues between the parties."[94] Today, *Munsingwear*'s holding is considered to mean that

> [v]acatur is generally appropriate when a case becomes moot because of "happenstance" or developments unrelated to the litigation, or when the appellee's actions moot the case, on the theory that the winner below should not be able to manipulate the judicial process to insulate its victory from appellate review.[95]

Although the case did not address whether regulatory activity that causes mootness—such as deregulation—is generally an appropriate

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that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment" under the "equitable tradition of vacatur").

88. *Id.* at 26.

89. *E.g.*, Hyundai Merch. Marine Co. Ltd. v. Oceanic Petrol. Source PTE, 656 F. Supp. 2d 416, 420 (S.D.N.Y. 2009) ("[T]he Court finds that the balance of the equities weighs against vacatur."); *accord Bonner Mall*, 513 U.S. at 26.

90. United States v. Munsingwear, Inc., 340 U.S. 36 (1950).

91. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

92. FALLON ET AL., *supra* note 78, at 192.

93. *Munsingwear*, 340 U.S. at 37.

94. *Id.* at 39–40.

95. Bayer, *supra* note 60.

reason for vacatur, *Munsingwear* remains the leading case on federal vacatur in civil cases that have become moot on appeal.[96]

Unlike *Munsingwear*, the Supreme Court's 1994 *Bonner Mall* decision addressed vacatur when the parties intended to moot the case through settlement. The litigants in *Bonner Mall* settled the case, thereby mooting it, and requested vacatur as part of the settlement terms.[97] Because "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment," the *Bonner Mall* Court approved of *Munsingwear*'s "happenstance" dictum in favor of vacatur.[98] On the other hand, "[w]here mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur."[99] *Bonner Mall* instructs that the primary consideration in a vacatur decision "is whether the party seeking relief from the judgment below caused the mootness by voluntary action."[100] If so, then the judgment below should not be vacated unless the matter presents "extraordinary circumstances" that tip the equitable balance in favor of vacatur.[101] That is, the losing party is generally not entitled to vacatur if requested as a settlement condition.

Although it approved of *Munsingwear*'s holding, the *Bonner Mall* Court questioned, without deciding, whether the *Munsingwear* Court adhered to its own reasoning:

> The suit for injunctive relief in *Munsingwear* became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order. We express no view on *Munsingwear*'s implicit conclusion that repeal of administrative regulations cannot fairly be attributed to the Executive Branch when it litigates in the name of the United States.[102]

Thus, one reading of *Munsingwear* suggests that vacatur is appropriate when a case is mooted because the underlying regulation

96. FALLON ET AL., *supra* note 78, at 192.
97. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 20 (1994).
98. *Id.* at 25.
99. *Id.*
100. *Id.* at 24.
101. *Id.* at 29.
102. *Id.* at 25 n.3 (citation omitted).

in dispute was repealed.[103] As *Bonner Mall* points out, *Munsingwear* implies that the repeal of a regulation may be "happenstance"—within the permissible bounds of vacatur—even when the government is a litigant.[104] But *Bonner Mall* could be read as disapproving vacatur in *Munsingwear*-like scenarios, suggesting that repealing a regulation could count as a voluntary action that would preclude vacatur.[105] Ultimately, whether a rule rescission or change is a "vagary of circumstance"—vacatur proper—or the voluntary action of a litigant—vacatur improper—is a question not yet definitively answered by the Supreme Court.

C. Vacatur for Mootness, Law Changes, and the Lower Courts

The lower court decisions offered in this Section address vacatur when a law change moots the underlying dispute. These decisions necessarily encompass more than just changes to an outgoing administration's midnight rules, in part because appellate cases concerning midnight rules are uncommon.[106] In this latter category, *Wyoming II* stands out as a rare example. There, the Tenth Circuit vacated the lower court's ruling on the roadless rule because no facts indicated that the USDA had repealed the regulation to manipulate the district court's ruling.[107] Although the cases in this Section address changes that differ from the one at issue in *Wyoming II*, this Section shows that the same concerns underlie all vacatur-for-mootness analyses involving law changes.

In *Valero Terrestrial Co. v. Paige*,[108] the Fourth Circuit held that vacatur was proper when the mootness resulted from the West Virginia legislature's amendment of a statutory provision and when the equities weighed in favor of vacatur.[109] The Fourth Circuit noted that the defendants, who included state executives but not the

103. *See, e.g.*, Wyoming v. USDA (*Wyoming II*), 414 F.3d 1207, 1213 (10th Cir. 2005) ("This is not a case in which a litigant is attempting to manipulate the courts to obtain the relief it was not able to win in the judicial system.").

104. *Bonner Mall*, 513 U.S. at 25 n.3.

105. *See* Bayer, *supra* note 60 ("[W]here the government agency in the case moots the appeal by withdrawing its own contested policy or regulation, that action ordinarily will preclude vacatur." (citing Amoco Oil Co. v. U.S. EPA, 231 F.3d 694, 698–99 (10th Cir. 2000); 19 Solid Waste Dep't Mechs. v. City of Albuquerque, 76 F.3d 1142, 1145 (10th Cir. 1996))).

106. *See infra* note 182 and accompanying text.

107. *Wyoming II*, 414 F.3d at 1213 n.6.

108. Valero Terrestrial Co. v. Paige, 211 F.3d 112 (4th Cir. 2000).

109. *Id.* at 123.

governor, were not responsible for the legislative action that mooted the case.[110] "Therefore, defendant state executive officials are in a position akin to a party who finds its case mooted by happenstance, rather than events within its control. . . . As a result, the principal consideration under [*Bonner Mall*] counsels in favor of vacatur."[111]

In dictum, however, the Fourth Circuit explicitly acknowledged that mootness by regulation repeal may render vacatur improper and limited its holding accordingly:

> Because none of the changes in state law responsible for the mootness of this controversy were changes in administrative or executive regulations, we need not address ourselves to the question reserved by the Court in *Bancorp* of whether the "repeal of administrative regulations" can "fairly be attributed to the Executive Branch when it litigates in the name of the United States."[112]

The Third and D.C. Circuits have also held that *Bonner Mall*'s antivacatur presumption for voluntary actions does not apply when legislative action moots a government party's appeal.[113] Aside from the presumed legitimacy of legislative actions, the underlying reasoning is that "[t]he legislature may act out of reasons totally independent of the pending lawsuit, or because the lawsuit has convinced it that the existing law is flawed."[114]

Whether this deferential posture extends to administrative actions is unclear. For instance, the D.C. Circuit in *National Black Police Ass'n v. District of Columbia*[115] implied that it may not have vacated had the action been rendered moot by an administrative,

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110. *Id.* at 121.

111. *Id.*; *see also* NASD Dispute Resolution, Inc. v. Judicial Council, 488 F.3d 1065, 1069–70 (9th Cir. 2007) (holding that because the disputed regulations had been struck down by the courts, and not repealed by any party to the litigation, the judicial resolution of the controversy qualified as happenstance and vacatur was permissible).

112. *Valero*, 211 F.3d at 121 n.4 (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 n.3 (1994)).

113. Khodara Envtl., Inc. *ex rel.* Eagle Envtl. L.P. v. Beckman, 237 F.3d 186, 194–95 (3d Cir. 2001); Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 351–52 (D.C. Cir. 1997); *see also* Rand, *supra* note 15, at 791 ("The [*Bonner Mall*] Court established a general presumption against vacatur that could only be overcome by 'extraordinary circumstances' . . . ." (quoting *Bonner Mall*, 513 U.S. at 29)).

114. *Khodara*, 237 F.3d at 195; *see also* Chem. Producers & Distribs. Ass'n v. Helliker, 463 F.3d 871, 879 (9th Cir. 2006) ("Lobbying Congress or a state legislature cannot be viewed as 'causing' subsequent legislation for purposes of the vacatur inquiry.").

115. Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346 (D.C. Cir. 1997).

rather than a legislative, action.[116] In *Cammermeyer v. Perry*,[117] the Ninth Circuit denied vacatur when the government reworked the offending regulation and reinstated Cammermeyer's military commission during the course of the appeal, thus rendering the action moot.[118] Following *Bonner Mall*, the court determined that the Army's voluntary actions weighed against vacatur because "it was defendants who rendered this case moot by conceding that Cammermeyer should be reinstated and by replacing the challenged regulation."[119]

Perhaps the strongest argument against rule-change vacatur for mootness came from the Federal Circuit in 2009. In *Tafas v. Kappos*,[120] the court denied vacatur of the district court's judgment because the rescission of a U.S. Patent and Trademark Office (USPTO) rule mooted the dispute between the litigants.[121] Citing *Bonner Mall*'s antivacatur language for cases mooted by the losing party's actions, the court held that vacatur was "inappropriate under the circumstances."[122] By rescinding its rule pending appeal, the USPTO "acted unilaterally to render the case moot."[123] Although the USPTO and the other parties joining in its vacatur motion argued that vacatur was appropriate because mootness caused by a rule change was like mootness caused by legislative action—a scenario typically considered beyond the parties' control and favoring vacatur[124]—the court found the analogy inapposite:

> This is not a case in which the regulations have been overridden by a statutory change; instead, it is a case in which the agency itself has voluntarily withdrawn the regulations and thus set the stage for a

116. *See id.* at 353 ("[T]he *Bancorp* presumption against vacatur might apply if the case has been rendered moot on appeal by enactment or repeal of a regulation, even though the courts accord the executive branch the same presumption of legitimate motive as is given the legislative branch.").

117. Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996).

118. *Id.* at 1239. In this case, the district court ruled that both Cammermeyer's discharge from the military on the grounds of her sexual orientation and the Army's homosexuality regulations were unconstitutional. *Id.* at 1237. Before the Ninth Circuit heard Cammermeyer's appeal, she was reinstated and the Army implemented its "Don't Ask, Don't Tell" policy. *Id.*

119. *Id.* at 1239.

120. Tafas v. Kappos, 586 F.3d 1369 (Fed. Cir. 2009) (en banc).

121. *Id.* at 1371.

122. *Id.*

123. *Id.*

124. *Id.*

> declaration of mootness. . . . The agency does not control Congress; but it does control the decision to rescind the regulations.[125]

As the losing party in the district court below, the USPTO had "procure[d] the conditions" through its rule change. The court thus refused the USPTO's request to vacate the adverse judgment.[126]

In sum, even when government entities are litigants, appellate courts have generally held that a legislative act or a judicial decision that occurs pending appeal and renders the appeal moot does not constitute voluntary action that weighs against vacatur.[127] But when a government party changes or revokes a regulation midappeal, thus rendering the case moot, vacatur turns on whether the regulator appears to have been trying to manipulate the appellate process. For example, the Tenth Circuit in *Wyoming II* readily vacated the district court's decision because the USDA lost below but changed its regulation to render the case moot.[128] On the other hand, the Ninth Circuit in *Cammermeyer* refused to vacate the district court's ruling that the Army's sexual-orientation regulations were unconstitutional when the Army enacted its "Don't Ask, Don't Tell" policy during the appeal.[129] The Federal Circuit reached the same conclusion when the USPTO mooted a case by changing its rule.[130] These cases suggest that the nature of the regulation's revocation is an important factor in a court's decision to vacate as moot, but that the courts of appeals have not settled on which motives for changing rules are legitimate and thus support vacatur. The remainder of this Note examines where mootness caused by postelection changes to unfinished midnight rules fits within this analysis.

III. MIDNIGHT REGULATION: MOTIVES AND RESPONSES

As Part II demonstrated, determining a party's motive for mooting a dispute is central to the vacatur analysis. This Part examines a new administration's possible motives for mooting

125. *Id.*

126. *Id.*

127. *See supra* notes 108–14 and accompanying text.

128. *See supra* Part I.B; *see also* Rio Grande Silvery Minnow v. Keys, 355 F.3d 1215, 1220 (10th Cir. 2004) ("When the government undertakes remedial measures that do not result in manipulation of the judicial process and eliminate the underlying cause of an injunction, vacatur will be granted.").

129. *See supra* notes 117–19 and accompanying text.

130. *See supra* text accompanying notes 120–26.

litigation over an outgoing administration's unfinished midnight rules. The discussion explains that postinauguration changes to midnight rules are largely responses to an outgoing administration's last acts in office. This part also surveys executive-branch tactics for countering midnight regulations and judicial review of posttransition rules changes.

A. The Controversy and Motives Surrounding Midnight Regulation

The upswing in regulatory activity that takes place when a new president is elected has been well documented.[131] This activity has garnered rapt media attention[132] and has generated a wealth of academic interest in the outgoing president's power during the transition period.[133] Observers scrutinize primarily the legitimacy of increased regulatory activity in the last days of an administration—particularly when the incoming administration is of a different political party.[134]

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131. *See, e.g.*, William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 550 (2005) (demonstrating empirically that presidents exercise their power up to the last moment); *see also* Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1262 (2006) ("The certainty of the deadline [marking the end of the outgoing president's term] and the lengthy period between the election and the inauguration of the new president provide conditions for a great deal of late-term activity by an outgoing administration."); Howell & Mayer, *supra*, at 550 ("[P]residents squeeze the[] last moments in office for all they are worth, issuing all sorts of rules and directives, many of which cannot be changed without exacting a significant political price . . . . While legislative processes may lay dormant at the end of a presidential term, the production of unilateral directives kicks into high gear.").

132. *See, e.g.*, Tim Dickinson, *Bush's Final F.U.*, ROLLING STONE, Dec. 25, 2008, at 57 (chronicling the Bush administration's last-minute regulations); Elizabeth Kolbert, Comment, *Midnight Hour*, NEW YORKER, Nov. 24, 2008, at 39, 39 (describing midnight regulation generally and commenting on the Bush administration specifically); Cindy Skrzycki, *Democrats Eye Bush Midnight Regulations*, WASH. POST, Nov. 11, 2008, at E1 (discussing the Obama administration's potential response to Bush's last-minute regulations).

133. *See, e.g.*, Beermann & Marshall, *supra* note 131 (evaluating how the Constitution and midnight regulation might interact); Howell & Mayer, *supra* note 131 (discussing how the outgoing administration might tie the hands of its successor); O'Connell, *supra* note 23 (conducting an empirical analysis of regulatory action, focusing in part on political transitions).

134. *See, e.g.*, Beermann & Marshall, *supra* note 131, at 1266–67 ("The output of the outgoing administration, including presidential and agency action of various types, tends to increase substantially, especially when the outgoing administration is of the Democratic Party and the incoming President is a Republican."); O'Connell, *supra* note 23, at 913 n.76 (collecting much of the negative commentary on midnight rulemaking). The main charges leveled against midnight rulemaking are that it undermines presidential and administrative accountability, promotes inefficiency, and is just wrong in principle. *See, e.g.*, Brito & de Rugy, *supra* note 1, at 173–77 (citing William S. Morrow, Jr., *Midnight Regulations: Natural Order or Disorderly Governance*, ADMIN. & REG. L. NEWS, Spring 2001, at 3, 18). *But see* Jack M. Beermann,

Though scholars have long studied and documented midnight regulation, the presidential motive for the practice is an open question.[135] One possible reason for midnight regulations might be "the natural human tendency to work to deadline, which has been referred to in the literature as the 'Cinderella constraint.'"[136] As Professor Jack Beermann points out, however, this explanation does not fully account for the "unseeml[iness]" of midnight rulemaking.[137] Instead, evidence suggests that outgoing presidents regulate at midnight for strategic reasons.[138] Professor Beermann, for example, attributes the practice to three additional causes, two of which are political: "[h]urrying" to "project [a] substantive agenda as far into the future as possible," "[w]aiting" to regulate at a moment that "avoid[s] political consequences that might have been costly earlier in the term," and being "delayed by some external force."[139] Or, these rules could be the result of strategic political "timing."[140] Because of these other reasons, midnight regulation has been described as "an important political weapon."[141] For the most part, outgoing presidents use midnight regulation to "burrow" policy before leaving office.[142]

Presidential Power in Transitions, 83 B.U. L. REV. 948, 952 (2003) (arguing that even if presidents have sinister motives behind midnight regulations, "[e]fforts to embarrass or hamstring the incoming administration are all part of the political process," and "the outgoing administration should be free to advance its political agenda until the end of its term").

135. *See, e.g.*, Jack M. Beermann, *Combating Midnight Regulation*, 103 NW. U. L. REV. COLLOQUY 352, 352 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/9/LRColl2009n9Beermann.pdf ("While midnight regulation provokes an instinctively negative reaction, it is not completely clear what is wrong with it.").

136. *Id.* (quoting Jay Cochran, III, The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters (Mar. 8, 2001) (unpublished manuscript), *available at* http://mercatus.org/sites/default/files/publication/The_Cinderella_Constraint(1).pdf).

137. Beermann, *supra* note 134, at 948.

138. *See* Beermann, *supra* note 135, at 352 (explaining the predominantly strategic uses of midnight regulation); *see also* Brito & de Rugy, *supra* note 1, at 172 ("[P]assing midnight regulations is a winning strategy for an outgoing president who wishes to project his influence into the future.").

139. Beermann, *supra* note 134, at 956.

140. Beermann, *supra* note 135, at 352 ("Timing is a form of waiting, not based on potential negative consequences, but rather . . . in order to help either one's own reelection bid or the election prospects of the incumbent party.").

141. Morriss et al., *supra* note 2, at 588.

142. Mendelson, *supra* note 5, at 559–63. Granted, not all late-term regulations are issued strategically or politically. *See* RUSHING ET AL., *supra* note 6, at 3 ("Most administrations pump out a stream of new regulations at the end of a president's term. . . . But not all midnight regulations are created equal."). This issue raises a characterization problem as "the line between permissible late-term action and undesirable 'midnight regulation' is unlikely to be

Research suggests that midnight regulation is an effective political strategy because an outgoing president can "tie a new President's hands" by regulating at midnight.[143]

Conversely, the incoming president might want to undo his predecessor's midnight regulations. The incoming president's motives may be political, such as when a new president wants to rescind a rule that contradicts his own platform[144] or when the regulation offends the new administration's beliefs about the proper role of regulation.[145] The new president might also suspect the regulatory procedures that the old administration used before leaving office were deficient and thus might want to redo the rulemaking process to get wider input and better information.[146] Finally, the new president might decide that the rule is bad policy.[147]

For present purposes, however, a fine distinction between politics and policy is unnecessary. Even assuming that a neutral observer like a court could discern political motive from policy motive, it could not do so without difficulty. For example, a new president might offer a policy-based reason for changing a rule, even if the true motive for doing so is that keeping the rule would cost him politically among his supporters. Indeed, the Supreme Court has indicated the difficulty of discerning political motive and has accordingly set a low bar for determining whether justifications for agency position changes are legitimate.[148] Thus, for any given change to an unfinished midnight rule, the motive could arguably be

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particularly clear and is largely in the eye of the beholder." Beermann & Marshall, *supra* note 131, at 1287.

143. Beermann, *supra* note 134, at 984.

144. *See* Mendelson, *supra* note 5, at 599–602 (explaining the political consequences of midnight regulations for incoming presidents and arguing that "from the President-elect's standpoint, late-term policy entrenchment by the outgoing President is undeniably costly"); *see also* Morriss et al., *supra* note 2, at 553, 557–59 (describing the "politicization" surrounding midnight rulemaking).

145. *See, e.g.*, Loring & Roth, *supra* note 9, at 1457 (explaining that President George W. Bush desired to rescind many Clinton midnight regulations because of President Bush's "anti-regulatory leaning," but that the Bush administration did not do so because "deregulation may . . . prove more difficult to justify").

146. *See* Morriss et al., *supra* note 2, at 558 (explaining midnight rulemaking's "significant defects," including "sloppiness"); *cf.* Jack, *supra* note 43, at 1482 (explaining that the Bush administration argued that "withdrawals and delays were necessary given the 'haphazard' and 'last-minute' nature of regulations issued under the Clinton Administration").

147. For a discussion of a classic example of this pattern, see *infra* notes 195–201, 205–07 and accompanying text.

148. *See infra* text accompanying notes 216–17.

attributed to politics or policy. Ultimately, just as outgoing presidents likely have political motives for midnight regulation, incoming presidents likely have political motives for wanting to undo these rules.

Whether politically motivated midnight rulemaking is problematic ties into larger legitimacy concerns. As Professor Beermann phrased it, pinpointing the problem with midnight rulemaking is difficult:

> [T]here seems to be a general perception that something has gone wrong when an outgoing administration takes important action while the incoming administration is waiting to take over. Most late-term action is subject to the obvious question of why, if the regulation was deemed so important, the administration failed to act during the previous three or seven and three-quarters years.[149]

Fundamentally, whether one perceives midnight rulemaking as problematic rests upon what one perceives as regulation's proper role in the administrative state.[150] Under one model of the administrative state, agencies are technocratic experts, constantly promulgating new regulations in the search for the optimal balance of health, safety, cost, and other factors.[151] If this model embodies the proper role of agencies, then midnight rulemaking seems deeply troubling because it introduces politics and a risk of procedural deficiency into the rulemaking calculus.[152] Midnight rulemaking seems similarly problematic under another administrative paradigm that views agencies as the direct agents of Congress, executing only legislative intent through regulation.[153]

Another model of the administrative state, however, views agencies as democratically accountable agents of the president.[154]

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149. Beermann, *supra* note 135, at 353.

150. For deep background on the modern administrative state, see generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

151. This model is commonly known as the "expertise" model. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 464 (2003) (noting that the "'expertise' model" posits that agencies "merely execute technocratic judgments"); Stewart, *supra* note 150, at 1678 (discussing the expertise model).

152. *See supra* notes 138–43 and accompanying text.

153. For a discussion of this "transmission belt" model, see Stewart, *supra* note 150, at 1675–76.

154. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that agencies are accountable to the president).

Under this presidential-control model, midnight rulemaking is an expected and legitimate extension of presidential power.[155] But if regulating at midnight is a legitimate part of presidential power, then it follows logically that incoming presidents would come to office seeking to undo the unfinished midnight regulations left by their predecessors. Undoing midnight regulations becomes just as much a part of presidential control as midnight regulation itself.

None of these models paints a complete picture of the administrative state. Though the presidential-control model has become the predominant theory[156] and has even found support in the Supreme Court's *Fox* decision,[157] it does not fully explain how agencies operate.[158] Even looking at agencies through the lens of presidential-control theory does not solve the puzzle of whether midnight rulemaking is proper, but merely shifts focus to the balance of power between outgoing and incoming presidents in the issuance and undoing of midnight regulations.[159] Although this Note does not address which model is proper, the unresolved debate between proponents of the predominant regulatory models may help explain why midnight rulemaking remains controversial.

B. Action in Response to Midnight Regulation

Although midnight rulemaking's underlying propriety is debatable, the practice evokes an inflammatory response.[160] Also concerned by the practice, Congress, the president, and agencies have established various mechanisms for dealing with midnight

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155. *See id.* at 2331–39 (describing agency accountability under the presidential-control model).

156. Bressman, *supra* note 151, at 470.

157. *See infra* discussion accompanying notes 233–35. For a discussion of *Fox* and the legitimacy of political motives for agency position changes, see *infra* Part III.C.2–3.

158. *See* Bressman, *supra* note 151, at 463 n.3 (collecting sources that critique the presidential-control model as incomplete).

159. Indeed, the larger debate over the balance of power between outgoing and incoming presidents already exists. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 98–101 (2006) (arguing that the time lapse between election day and inauguration day hurts political accountability); Nina A. Mendelson, *Quick off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464, 464–66 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/19/LRColl2009n19Mendelson.pdf (suggesting that more should be done to give an incoming president some political control during the transition).

160. *See, e.g.*, Mendelson, *supra* note 5, at 625 ("Newspapers with national circulation, such [as] the *New York Times*, the *Wall Street Journal*, the *Los Angeles Times*, and the *Washington Post* reported on the details of [a Clinton midnight] rule and the Bush administration's response to it, the progress of lawsuits against the rule, and public reaction.").

regulations.[161] In practice, however, the main responses to midnight rulemaking have been executive suspensions of the effective dates of midnight rules[162] and judicial challenges to controversial regulations.[163] Although Congress also exercises limited control over midnight rulemaking,[164] this Section focuses on executive responses to the phenomenon.

Cleaning up after midnight takes a new administration a lot of time and effort.[165] With respect to the incoming administration, "it has become a tradition for the incoming Chief of Staff to issue a memo on inauguration day halting the publication of any remaining regulatory actions and pulling back recent regulations not yet effective."[166]

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161. *See generally* Brito & de Rugy, *supra* note 1, at 177–90 (giving a history and overview of regulatory review systems as well as their relation to midnight regulatory review).

162. *See* Jack, *supra* note 43, at 1482 ("[A]n incoming administration's withdrawal and suspension of [midnight] rules has become a familiar, if not inevitable, post-election phenomenon.").

163. *See, e.g.*, Morriss et al., *supra* note 2, at 589–94 (noting that President Clinton's late-term mining rules were "immediately" challenged in court); *see also* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1039–43 (2001) (explaining that an incoming administration could handle the barrage of lawsuits over its predecessor's midnight rules by settling those cases).

164. For example, a midnight rule could be rescinded by Congress under the Congressional Review Act of 1996 (CRA), 5 U.S.C. § 802 (2006), a "blunt tool . . . [that] has only been used once" to overturn a midnight rule, Susan E. Dudley, *Regulatory Activity in the Bush Administration at the Stroke of Midnight*, ENGAGE, July 2009, at 27, 29. "From its enactment in 1996 through March 2008, agencies have submitted 731 major rules to Congress, and only one, the Clinton ergonomics rule, has been repealed under the CRA." Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2169 (2009). The Obama administration did not use it to undo any midnight regulations left by the Bush administration. COPELAND, *supra* note 20, at 1. For a more in-depth analysis of the CRA review mechanisms, see generally Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997).

Although not discussed here, there have been other suggestions for Congressional oversight of midnight regulations, including Representative Nadler's proposed Midnight Rule Act, H.R. 34, 111th Cong. (2009). *But see* Beermann, *supra* note 135, at 359–69 (critiquing the Midnight Rule Act).

165. *See* Beermann, *supra* note 134, at 986 ("[R]eviewing late-term actions by the Clinton administration occupied a great deal of agency officials' time and energy in the early days of the administration.").

166. Dudley, *supra* note 164, at 29. *But see* B.J. Sanford, Note, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782, 784 (2003) (arguing that these suspension memoranda are illegal and should be struck down by the courts). There have been other suggestions for executive control. *See, e.g.*, Brito & de Rugy, *supra* note 1, at 191–96 (proposing a limit on the number of rules that can be reviewed by the Office of Information and Regulatory Affairs within a prescribed period before a transition).

> Since Reagan, every president taking over from a president of the opposing political party has ordered a similar regulatory moratorium. For example, two days after taking office, President Clinton issued a directive to all agencies ordering them to "withdraw . . . all regulations that have not yet been published in the Federal Register." George W. Bush issued a similar directive the day he took office, ordering agencies to halt rules from being published in the Federal Register and "temporarily postpone the effective date of the [published] regulations for 60 days." President Barack Obama's Chief of Staff Rahm Emanuel also issued a memo withdrawing rules not yet published in the Federal Register.[167]

Executive memoranda issued by both incoming and outgoing administrations have become the predominant strategies for counteracting midnight regulation.[168] Although limited to the most last-minute of unfinished midnight rules,[169] these memoranda have effectively enabled incoming presidents to change course quickly from their predecessors.[170] Moreover, these suspension and withdrawal memoranda are frequently suggested to new presidents as one of the most effective means for handling midnight regulations.[171] Although these suspensions do not stand to end midnight rulemaking, their enduring use after future presidential transitions seems inevitable.[172]

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167. Brito & de Rugy, *supra* note 1, at 189 (alteration in original) (footnotes omitted); *see also* Beermann, *supra* note 135, at 360 ("[O]n his first day in office President Obama directed his administration not to issue any new rules until his appointees had a chance to review them, to withdraw from publication any proposed or final rules that had been sent to the Federal Register but not yet published, and to consider extending the effective date of published rules that had not yet gone into effect . . . .").

168. *See* Beermann, *supra* note 135, at 360 ("Presidents may already have sufficient tools to deal with midnight regulation, as demonstrated by action taken by the administrations of Presidents Ronald Reagan, Bill Clinton, George W. Bush, and Barack Obama to combat the midnight regulatory activity of their respective predecessors.").

169. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34747, MIDNIGHT RULEMAKING: CONSIDERATIONS FOR CONGRESS AND A NEW ADMINISTRATION 7 (2008) ("[F]or rules that have already been published in the *Federal Register*, the only way for the departments or agencies to eliminate or change the rules is by going back through the rulemaking process.").

170. *See supra* note 168.

171. *E.g.*, COPELAND, *supra* note 169, at 7–9 (suggesting such memoranda and giving a history of their use); RUSHING ET AL., *supra* note 6, at 6 (suggesting using memoranda that "suspend effective dates" of unfinished midnight rules).

172. *See* COPELAND, *supra* note 20, at 3 ("The [Obama administration's] Emanuel and Orszag memoranda were only the latest in a long history of incoming presidential administrations imposing a moratorium on new regulations . . . .").

C. *Judicial Review of Postinauguration Changes to an Outgoing Administration's Midnight Regulations*

Presidents may take office faced with litigation arising from their predecessors' midnight regulations. For instance, courts handed the Bush administration several prominent setbacks in its attempts to undo the Clinton administration's last regulations, including the Department of Energy's energy-efficiency standards for air conditioners[173] and a National Park Service rule banning snowmobiles in Yellowstone.[174] Similarly, President Bush's midnight hours-of-service rule for truckers has faced legal opposition from the early days of the Obama administration.[175]

Incoming administrations have faced the difficulty of explaining why a rule promulgated by the previous administration—albeit hurriedly—is no longer valid and should be modified or rescinded.[176] Although the reasons for these reconsiderations may be political,[177] the government has had trouble defending its responses to midnight rules on this ground because of the Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*[178] That case set a high bar for an agency's justification

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173. Energy Conservation Program for Consumer Products: Energy Conservation Standards for Central Air Conditioners and Heat Pumps, 66 Fed. Reg. 7170 (Jan. 22, 2001) (codified at 10 C.F.R. pt. 430); *see also* Natural Res. Def. Council v. Abraham, 355 F.3d 179, 202–03 (2d Cir. 2004) (holding that the rule was final and could not be reopened for comment).

174. Special Regulations, Areas of the National Park System, 66 Fed. Reg. 7260 (Jan. 22, 2001) (codified at 36 C.F.R. pt. 7); *see also* Fund for Animals v. Norton, 294 F. Supp. 2d 92, 105–08 (D.D.C. 2003) (invalidating the Bush administration's modification of the Clinton administration's rule).

175. Hours of Service of Drivers, 73 Fed. Reg. 69,567 (Nov. 19, 2008) (codified at 49 C.F.R. pts. 385, 395); *see also* Petition for Review at 1, Pub. Citizen v. Fed. Motor Carrier Safety Admin., No. 09-1094 (D.C. Cir. Mar. 09, 2009), *available at* http://www.citizen.org/documents/PetitionforReview1.pdf (challenging the driver-service-hour rule). Currently, the case is in abeyance, as the Obama administration settled to start a new rulemaking. Joint Motion of Petitioners and Respondent to Hold Case in Abeyance Pending the Issuance of a New Notice of Proposed Rulemaking at 2, Pub. Citizen v. Fed. Motor Carrier Safety Admin., No. 09-1094 (D.C. Cir. Oct. 26, 2009).

176. *See, e.g.*, David H. Becker, *Changing Direction in Administrative Agency Rulemaking: "Reasoned Analysis," The Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS ENVTL. L. & POL'Y J. 65, 70 n.21 (2006) ("[The] explanations for withdrawing a proposed regulation, a 'change in agency priorities,' was . . . 'not informative in the least; it is merely a reiteration of the decision to withdraw the proposed rule . . . .'" (quoting United Mine Workers v. U.S. Dep't of Labor, 358 F.3d 40, 44 (D.C. Cir. 2004))); *see also infra* notes 202–08 and accompanying text.

177. *See supra* Part III.A.

178. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

for a rule rescission, requiring a more extensive rationale than for regulating in the first place.[179] As Professor Beermann put it, "The Supreme Court's application of the arbitrary and capricious standard to rescission and revision of rules has created some of the difficulties that incoming administrations encounter when trying to undo midnight rules."[180]

Authoritative judicial pronouncements are conspicuously absent on the scope of regulatory power surrounding the transition period.[181] For midnight regulations, at least, the lack of judicial precedent may be traceable to the fact that a new administration may moot a controversy by rescinding the midnight regulation, thus precluding further judicial review.[182] Primarily, this Section explains the issues of judicial review of midnight-rule procedure and examines the Supreme Court's recent *FCC v. Fox* decision, which may signal a lessening of

179. *See id.* at 42 ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); Marianne Koral Smythe, *Judicial Review of Rule Rescissions*, 84 COLUM. L. REV. 1928, 1934 (1984) ("The . . . statement in the *State Farm* opinion that may be a source of trouble stems from language to the effect that there is an implicit congressional endorsement of the regulatory status quo. Pursuant to this rationale, the only legitimate basis for rule rescissions would be a change in circumstances, not a change in policy . . . ."); Jack, *supra* note 43, at 1502 ("[T]he [*State Farm*] Court established a presumption in favor of the validity of a prior rule and 'against changes in current policy that are not justified by the rulemaking record.'" (quoting *State Farm*, 463 U.S. at 42)); *see also* Loring & Roth, *supra* note 9, at 1441–42 ("As a result of *State Farm*, it is possible that an incoming anti-regulatory administration faces more obstacles in repealing or amending midnight regulations that affect public health and safety than a pro-regulatory administration.").

180. Beermann, *supra* note 135, at 361.

181. *See* Beermann & Marshall, *supra* note 131, at 1270 ("There are no cases addressing presidential duties and obligations with respect to transition . . . .").

182. *See* O'Connell, *supra* note 23, at 905 ("If a midnight regulation is rescinded or modified, any challenge to the original regulation's timing is mooted."); *see also* Beermann & Marshall, *supra* note 131, at 1270 n.72 (explaining that any issue of the president's power in the transition period will likely escape review because the "transition period is so short that the issue might be moot by the time it is ready for legal resolution"). *But cf.* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 992–96 (1994) (arguing that when a President refuses to execute a law as unconstitutional, he should ensure that the question is subjected to judicial review).

This Note does not discuss whether rule changes might evade mootness under the voluntary cessation doctrine. *See* FALLON ET AL., *supra* note 78, at 189–90 ("[A]n action . . . does not become moot merely because the conduct immediately complained of has terminated, if there is a sufficient possibility of a recurrence that would be barred by a proper decree."). Rather, this Note assumes, as do the scholars cited above, that the posttransition regulatory process does not count as a voluntary cessation that would preclude mootness.

State Farm's impediments to incoming presidents who want to undo midnight rules.[183]

1. *Legal Background: Administrative Procedure,* State Farm*, and Midnight Regulations*. Agency rulemaking procedure is dictated largely by the Administrative Procedure Act (APA).[184] Today, most rulemaking proceeds under the APA's provisions for informal rulemaking—also known as notice-and-comment rulemaking.[185] Under notice-and-comment rulemaking, an agency must publish a notice of intent in the Federal Register regarding the proposed rule, solicit public comments for a specified period, and, if it decides to issue the final rule, provide a "concise general statement of [its] basis and purpose" that addresses all material comments no fewer than thirty days before the rule's effective date.[186] A rule takes over three years on average to promulgate under notice-and-comment rulemaking procedures.[187] Thus, the APA leaves little time for an outgoing administration's last-minute rulemaking.[188] As agencies rush to issue final regulations before the president leaves office, these rules run a high risk of procedural deficiency.[189] Many midnight rules have

183. For an overview of judicial review of administrative procedure in the midnight regulation context, see O'Connell, *supra* note 23, at 905–08.

184. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006); *see also* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 545–49 (1978) (holding that courts cannot require agencies to follow rulemaking procedures beyond those that the APA or another statute requires).

185. 5 U.S.C. § 553; *see also* O'Connell, *supra* note 23, at 901 ("[T]he magic words 'on the record after opportunity for [a] . . . hearing' were typically sufficient to require agencies to undertake formal rulemaking procedures. . . . Because so few statutes contain the phrase, agencies generally do not conduct formal rulemakings when promulgating legally binding regulations." (second alteration in original) (quoting United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 236–38 (1973))).

186. 5 U.S.C. § 553(b)–(d). Though Section 553 mentions a "concise" statement, modern administrative law doctrine prompts agencies to produce extensive records, explanations, and responses to comments. *See, e.g.*, Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 899 (2007) (explaining that to avoid procedural deficiency, agencies "overproceduralize rulemaking by issuing . . . highly detailed proposed rules with voluminous supporting material, and by conducting additional comment periods whenever a significant change is warranted by the comments").

187. STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & ADRIAN VERMEULE, ADMINISTRATIVE LAW AND REGULATORY POLICY 566 (6th ed. 2006).

188. *Cf.* Wyoming v. USDA (*Wyoming I*), 277 F. Supp. 2d 1197, 1206 (D. Wyo. 2003), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005) (observing that an agency had to follow "a very short timeframe" to promulgate a rule before President Clinton left office).

189. *See* Morriss et al., *supra* note 2, at 558 & nn.33–34 (suggesting that procedural "sloppiness" is characteristic of midnight rulemaking).

been struck down by courts for failing to meet either the APA or another statute's procedural requirements because they are rushed through the prescribed process.[190]

Courts reviewing an agency's rule promulgated under notice-and-comment rulemaking apply the APA's "arbitrary and capricious" standard of judicial review.[191] For rule rescissions, the *State Farm* Court interpreted the arbitrary-and-capricious standard to mean that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[192]

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is . . . a presumption that those policies will be carried out best if the settled rule is adhered to."[193]

Thus, the Court "reject[ed] outright the government's contention that rule rescissions should be narrowly reviewed and in essence treated like agency decisions not to act."[194]

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190. *E.g.*, *Wyoming I*, 277 F. Supp. 2d at 1239 (stating that a rule's promulgation was "driven by political haste," "violated the [procedural requirements of the] National Environmental Policy Act and the Wilderness Act," and was therefore arbitrary and capricious under the APA); *see also* COPELAND, *supra* note 20, at 7–24 (describing twenty-five Bush administration midnight rules whose procedural validity has been challenged successfully).

191. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

192. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). Over time, courts have broadened the scope of this holding beyond rule rescissions to cover all sorts of agency position changes. *See* Becker, *supra* note 176, at 66 & nn.3–6 (explaining the expanded scope of the *State Farm* doctrine and collecting cases). Observers have seen this development as part of a body of administrative law that demands agencies act consistently and with reason. *See id.* at 66 n.1 (explaining that the reason-and-consistency requirement is a "settled principle of administrative law" and providing its background).

193. *State Farm*, 463 U.S. at 41–42 (quoting Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807–08 (1973)).

194. Smythe, *supra* note 179, at 1933–34; *see also State Farm*, 463 U.S. at 57 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . [which] the agency has failed to supply . . . ." (footnote omitted in original) (quoting Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (1970)) (internal quotation marks omitted)); Beermann, *supra* note 134, at 984 ("[T]he Court took the regulatory status quo as the baseline and reviewed whether the new administration had articulated a sufficient justification for

Also at issue in *State Farm* were the seemingly political motives for the underlying rule rescission.[195] The contested rule, which required that new automobiles be sold with passive restraints like airbags, had been promulgated under President Carter but was promptly rescinded once President Reagan took office.[196] The government argued, in part, that this political change supported the National Highway Transportation Safety Administration's (NHTSA) decision to reevaluate the regulatory record and rescind the passive restraint rule.[197] The majority implicitly rejected the government's argument, holding instead that the reasons the government gave for the rescission were inadequate.[198] The majority viewed the political explanation as tantamount to ignoring the rule's supporting evidence and thus held that the rescission was arbitrary and capricious.[199]

Justice Rehnquist, however, agreed with the government's reasoning: "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of . . . its programs and regulations."[200] Justice Rehnquist reasoned that the agency should give a "rational explanation" for rescinding the rule, but believed that the political factors at play sufficiently explained the rescission of the passive restraint rule such that NHTSA's decision was not arbitrary or capricious.[201]

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making a change.").

195. *See State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party."); *see also* Kagan, *supra* note 154, at 2382 ("President Reagan took office with a clear (de)regulatory philosophy.").

196. *See State Farm*, 463 U.S. at 35–40 (providing the passive-restraint rule's history).

197. *See* Smythe, *supra* note 179, at 1933–34 ("The decision to rescind was thus a political decision, made because the new administration had pronounced policy differences from the old. The decision to rescind also represented . . . a policy reversal. [Thus,] the government[] conten[ded] that rule rescissions should be narrowly reviewed and . . . treated like agency decisions not to act.").

198. *State Farm*, 463 U.S. at 55–57.

199. *See id.* at 56 ("[T]he agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard."); *see also* Smythe, *supra* note 179, at 1934–35 (arguing that the *State Farm* majority viewed the political reasons for the rescission as not "justified by the rulemaking record" but not inherently unacceptable (quoting *State Farm*, 463 U.S. at 42)).

200. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) (footnote omitted).

201. *Id.* at 58.

Although the Supreme Court did not directly address midnight regulation in *State Farm*, the case has long been viewed as an obstacle for incoming presidents wishing to undo the midnight regulations left by their predecessors. First, *State Farm* could be interpreted as requiring an agency to provide a more extensive rationale to justify rescinding a rule than was required to support the decision to regulate initially.[202] Under this standard, the outgoing administration would enjoy the ability to regulate at midnight based on a less extensive justification than its successor would need to rescind the rule.[203]

State Farm also foreclosed an important explanation underlying a new president's desire to undo midnight regulations—politics.[204] In *State Farm*, politics were an important reason behind the NHTSA's decision to rescind the passive-restraints rule. President Reagan had successfully campaigned for office on a deregulatory platform and saw the passive-restraint rule as a Carter-administration vestige.[205] Other presidential transitions have followed a similar pattern.[206] Yet *State Farm* deemed a political explanation for rescinding a rule left by an outgoing president an insufficient justification. Although Justice Rehnquist believed that a new president should have the power to reconsider his predecessor's rules by virtue of having been elected to office, this view failed to garner majority support.[207] Because the Court appeared to mandate a heightened standard for rule rescissions, *State Farm* became the leading case on what was required

202. *See, e.g.*, Smythe, *supra* note 179, at 1934 ("[*State Farm*] can be viewed as requiring agencies seeking to rescind regulations to meet a more stringent evidentiary burden than would be required if the agency were promulgating a rule in the first instance."); *see also* Becker, *supra* note 176, at 80–83 (surveying federal appellate cases that invalidated rule changes under this heightened burden).

203. *See* Beermann, *supra* note 134, at 984 ("[P]rior administrative action can tie a new President's hands more than if the President had to worry only about whether administrative action complies with applicable statutes.").

204. *See* Kagan, *supra* note 154, at 2380 (arguing that the *State Farm* Court "implicitly rejected" a justification for agency position changes "centered on the political leadership and accountability provided by the President"); *see also* Mendelson, *supra* note 5, at 601–02 (explaining that a new president will take office wanting to change midnight rules that conflict with his "policy agenda").

205. Kagan, *supra* note 154, at 2382.

206. For example, President Bush tried undoing the Clinton administration's last rules. Beerman & Marshall, *supra* note 131, at 1267 n.64. President Obama attempted the same for the Bush administration's midnight rules. *See* COPELAND, *supra* note 20, at 3–24 (cataloguing the Obama administration's efforts to undo the Bush administration's midnight regulations); Cindy Skrzycki, *Obama Team Tracks Bush's 'Midnight' Rules Rush*, BLOOMBERG (Nov. 11, 2008, 00:00 EST), http://www.bloomberg.com/apps/news?pid=20670001&sid=aq8Q2ZkT1fsw (same).

207. *See supra* notes 195–201 and accompanying text.

to support any agency rule change, including those made to midnight rules after a new administration had taken office.[208]

2. *Reevaluating* State Farm *in* FCC v. Fox. In 2009, the Supreme Court decided *FCC v. Fox*, a case that dealt with expletives aired on national television during high-viewership periods.[209] At issue was the Federal Communication Commission's (FCC) fleeting expletive standard, a policy that had been in place for decades but was eliminated in response to pressure from the Bush administration and its supporters in Congress.[210] Several broadcasters, fined heavily by the FCC for airing the expletives, argued that the FCC lacked an adequate basis for departing from its earlier standard and asked the Supreme Court to hold that the FCC's new policy was arbitrary and capricious.[211] The petitioners based their argument on *State Farm*, stressing that the Court in that case required a reasoned analysis for rescinding a rule promulgated under a previous administration and that the FCC had not done so for its policy change in the case at hand.[212]

The Court rejected this argument, holding that the FCC's departure from the established fleeting expletive policy was procedurally adequate.[213] Writing for the majority, Justice Scalia interpreted the *State Farm* standard narrowly:

> [There is] no basis . . . for a requirement that all agency change be

208. *See* Becker, *supra* note 176, at 73 ("Although *State Farm* is the leading case on agency change of direction in rulemaking, the Court has analyzed regulatory revisions in several other cases without conclusively stating how persuasive an agency's explanation of a change of course must be to survive judicial review.").

209. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1809–10 (2009). Although not a midnight rulemaking case, the Supreme Court's recent interpretation of the *State Farm* arbitrary-and-capricious standard, *id.* at 1810–11, may signal a shift regarding what counts as a valid justification for changed agency positions.

210. *Id.* at 1810; *see also id.* at 1815–16 (plurality opinion) ("[T]he precise policy change at issue here was spurred by significant political pressure from Congress."). Since 1975, the FCC's policy had been that nonrepeated, or fleeting, expletives did not violate federal law banning the broadcast of indecent language. But in 2004, the FCC changed its policy so that even a single aired expletive could be actionably indecent. *Id.* at 1805, 1807 (majority opinion). For a discussion of how the FCC's decision was the culmination of the Bush administration's efforts to change aired indecency policy, see Albert W. Vanderlaan, Note, *Sending a Message to the Other Branches: Why the Second and Third Circuits Properly Used the APA to Rule on Fleeting Expletives and How the New FCC Can Undo the Damage*, 34 VT. L. REV. 447, 459–63 (2009).

211. *Fox*, 129 S. Ct. at 1807–08.

212. *Id.* at 1810.

213. *Id.* at 1819.

> subjected to more searching review. The Act mentions no such heightened standard. . . . [*State Farm*] . . . said only that such action requires "a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance."[214]

Most importantly, the Court stressed that there is no difference in the scope of review "between initial agency action and subsequent agency action undoing or revising that action."[215] Under the Court's reasoning, the burden on agencies to support a policy change is low, as an agency need only "display awareness that it *is* changing position" and "show that there are good reasons for the new policy."[216] The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one."[217] Holding that "the Commission forthrightly acknowledged that its recent actions have broken new ground," the Court determined that the FCC's actions satisfied the threshold consciousness-of-change inquiry.[218] The FCC also satisfied the second "good reason" prong because "[i]t is surely rational . . . to believe that a safe harbor for single words would likely lead to more widespread use of the offensive language."[219] Thus, the Court held that the FCC's policy satisfied its reinterpreted *State Farm* arbitrary-and-capricious standard.[220]

3. *Implications for Midnight Rules*. Before *Fox*, scholars agreed that, under *State Farm*, an incoming president could not justify rescinding his predecessor's midnight rules by citing differences in their respective policy platforms.[221] Indeed, the notion that *State Farm* could burden a new president wishing to ratchet back the midnight regulations of his predecessor supported some of the earliest post–*State Farm* commentary.[222] Commentators also noted that, if

214. *Id.* at 1810 (quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (emphasis added in original)).

215. *Id.* at 1811.

216. *Id.*

217. *Id.* Moreover, "the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.*

218. *Id.* at 1812.

219. *Id.* at 1812–13.

220. *Id.* at 1813–14.

221. *See, e.g.*, Mendelson, *supra* note 5, at 593 (arguing that *State Farm* would significantly burden a new administration wishing to reverse policy from its predecessor, requiring "much more" in the record to justify policy changes after a transition).

222. *See, e.g.*, Smythe, *supra* note 179, at 1934 ("[*State Farm*] suggests that the regulatory

challenged in court, a rule modified or rescinded after a presidential transition would have to be backed by evidence supporting the change.[223] Lower court precedent on the issue was mixed,[224] and scholars disagreed over exactly how much of a justification would suffice for a posttransition modification or rescission to survive arbitrary-and-capricious review.[225] Still, *State Farm* stood in opposition to the political realities of modern presidential transitions—at least as far as midnight regulations were concerned.[226]

These difficulties brought calls for reform. Because of *State Farm*'s obstacles, commentators suggested reducing the scrutiny for repealing or modifying the midnight regulations of an outgoing administration.[227] These critics argued that the Supreme Court in *State Farm* misperceived presidential policy's role in midnight regulation.[228] Professor Beermann, for example, posited that "[t]he problem of 'midnight regulations' would be ameliorated if the standards for judicial review took greater account of pure political-type policy considerations."[229]

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status quo that includes the unrescinded regulation is presumptively in accord with congressional policy, making changes in that status quo presumptively ultra vires . . . .").

223. *See, e.g.*, Becker, *supra* note 176, at 70, 97 (commenting on the necessity of an agency providing an explanation for its decision).

224. *See id.* at 97 (summarizing the mixed bag of lower court holdings applying the *State Farm* standard).

225. *Compare* Loring & Roth, *supra* note 9, at 1441–42 (describing the *State Farm* standard as a steep evidentiary barrier), *with* Becker, *supra* note 176, at 98 ("*State Farm*'s 'reasoned analysis' standard places an apparently light burden on an agency to explain a change of course.").

226. *See* Beermann, *supra* note 135, at 361 (describing *State Farm*'s "difficulties" with respect to rescinding midnight regulations); Loring & Roth, *supra* note 9, at 1441–42 (arguing that *State Farm* prevents incoming presidents from acting upon midnight regulations); *see also* Kagan, *supra* note 154, at 2380–83 (arguing that *State Farm*'s arbitrary-and-capricious standard does not account for presidential political control of the regulatory process).

227. *See, e.g.*, Beermann, *supra* note 135, at 362 (suggesting reevaluation of *State Farm* arbitrary-and-capricious review in the midnight rulemaking context to allow incoming administrations to reverse the previous administration's late-term regulations); Loring & Roth, *supra* note 9, at 1460 ("[The Court should] either lower or eliminate the *State Farm* standard as it is applied to midnight regulations. This would make it easier for the incoming administration to repeal and amend an outgoing administration's midnight regulations, providing valuable oversight while avoiding the pitfall of bias.").

228. *See* Beermann, *supra* note 134, at 1011 ("[S]tandards of judicial review . . . [should] take better account of the role that policy plays in the administrative process. Perhaps the [*State Farm*] Court was wrong in its choice of the prior regulatory regime as the baseline for evaluating new rules.").

229. *Id.* at 1014. *See generally* Mendelson, *supra* note 5 (arguing that courts should acknowledge political motives).

Fox may have achieved this goal: even though *Fox* did not directly confront midnight regulation, its endorsement of a seemingly political motive for an agency reversing its position lends support to presidents wishing to undo midnight regulations. Whereas commentators thought *State Farm* meant that incoming presidents could not easily modify or rescind midnight regulations,[230] the *Fox* Court implicitly repudiated the language in *State Farm* that had been read to require a heightened standard of review of an administration's reasons for rescission or modification.[231] In fact, the Court insisted that agencies would not have to explain why a new, modified, or rescinded rule was better than its predecessor.[232] Although its full effect has not yet been realized, *Fox* apparently enables new presidents to undo midnight regulations left by their predecessors.

For midnight regulations, this development may have broader implications for how courts view an incoming administration's rule changes. First, courts will probably not scrutinize an incoming administration's motives for changing an outgoing administration's regulations that conflict with the new president's policies. Second, the Court has signaled that posttransition regulatory change is not meant to be difficult to justify. More broadly, these considerations speak to the legitimacy of law change, even when politics are responsible for an agency's change in position.[233] By recognizing the legitimacy of political motives, *Fox* thus reflects a presidential-control viewpoint of the administrative state.[234] As an exercise of presidential control, midnight rulemaking seems legitimate under *Fox*—as is undoing midnight rulemaking.[235] These concerns dovetail with the motive inquiry courts make when deciding a vacatur-for-mootness question, and the following Part illustrates why a vacatur question should be answered affirmatively for changes to midnight regulations.

230. *See supra* note 179 and accompanying text.

231. *See supra* text accompanying notes 213–17.

232. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).

233. *See id.* ("It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.").

234. *See supra* notes 154–55 and accompanying text; *see also supra* Part III.C.2.

235. For a discussion of incoming presidents' motives for changing unfinished midnight rules, see *supra* notes 144–48 and accompanying text.

IV. EVALUATING THE TENTH CIRCUIT'S APPROACH TO VACATUR AND MIDNIGHT REGULATIONS

The Tenth Circuit's vacatur analysis was correct, and courts should follow its approach in future cases when a contested midnight regulation is modified or rescinded pending appeal. Although the question is open under current Supreme Court precedent,[236] vacatur is the appropriate remedy when a new administration's rule moots a controversy over the outgoing administration's midnight regulations. This discussion also illuminates the broader issues of midnight rulemaking and rule-change mootness.

A. Analysis under Current Doctrine

Most importantly, a midnight rule's posttransition rescission can be squared with existing Supreme Court precedent supporting vacatur. Such rescissions or modifications fit *Munsingwear*'s happenstance notion because the underlying reason for the rule change—a presidential power shift—is not attributable to the party-agency even when that agency's actions voluntarily mooted the case.[237] Rather, agencies under new administrations change these unfinished rules midappeal, for example, because of policy differences or because they believe the midnight rules left for them are politically untenable.[238] Midnight-regulation rescissions are readily distinguishable from situations like *Cammermeyer* because incoming administrations do not rescind midnight rules in response to the outcome of litigation, but rather because of the new administration's beliefs about the rules themselves.[239] These particular rule changes are further distinguishable from cases like *Tafas* because, although the government is responsible for mooting the case by changing the disputed rule, the new administration is more akin to a new litigant, dissatisfied with the rule left by its predecessor.[240]

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236. *E.g.*, Khodara Envtl., Inc. *ex rel.* Eagle Envtl. L.P. v. Beckman, 237 F.3d 186, 194–95 (3d Cir. 2001) (noting that Supreme Court precedent has not established a categorical rule); *see also supra* Part II.B.

237. *Cf.* Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 353 (D.C. Cir. 1997) (noting that after a rule change moots a case, "the executive branch is in a position akin to a party who finds its case mooted on appeal by 'happenstance,' rather than events within its control").

238. *See supra* notes 144–47 and accompanying text.

239. *Cf.* Cammermeyer v. Perry, 97 F.3d 1235, 1239 (9th Cir. 1996) (denying vacatur because the government rescinded its rule after losing in court).

240. For a discussion of *Tafas*, see *supra* text accompanying notes 120–26.

These rule changes also dovetail with *Bonner Mall* because, although a new administration's rescission of a midnight rule might count as a voluntary action, the incoming administration does not rescind a rule as an alternative to pursuing an appeal.[241] A trickier question might arise when the president comes to power and settles with the litigants on the condition that the administration will begin a new rulemaking process.[242] Vacatur would still likely be proper in this situation, however, if the settlement terms moot the case. Though the new administration's response to the midnight regulation is technically a settlement and may thus appear to fall under *Bonner Mall*'s antivacatur presumption,[243] the settlement stems from a belief by both parties that the underlying rule is defective or otherwise undesirable.[244] That is, vacatur would be appropriate because the new administration would not be pursuing settlement to avoid appellate review.

Moreover, *Fox* might answer whether a rule rescission in such a scenario should affect the vacatur outcome.[245] Fundamentally, the doubts over whether to vacate turn on questioning the government's motive for changing its rule.[246] After *Fox*, though, the new administration needs only some justification for changing a rule, and the Court seems to acknowledge that politics can supply that reason.[247] It is unclear how a court deciding a vacatur-for-mootness issue could justify conducting a more searching review of a new

241. For a discussion of how recent incoming administrations have automatically suspended, reversed, and revised an outgoing administration's unfinished rules, see *supra* notes 166–67 and accompanying text.

242. *See, e.g.*, Joint Motion, *supra* note 175, at 2 (describing the midlitigation settlement between the Obama administration and plaintiffs contesting the Bush administration's trucker rules); *see also* RUSHING ET AL., *supra* note 6, at 6 (explaining that settlements can "effectively reverse" midnight rules); Rossi, *supra* note 163, at 1039–43 (discussing the implications of settlement for midnight rules).

243. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) ("[M]ootness by reason of settlement does not justify vacatur of a judgment under review.").

244. *See supra* notes 144–47, 165–72 and accompanying text; *see also Bonner Mall*, 513 U.S. at 29 (holding that although settlement generally bars vacatur, "[t]his is not to say that vacatur can never be granted when mootness is produced in that fashion").

245. *See, e.g.*, Khodara Envtl., Inc. *ex rel.* Eagle Envtl. L.P. v. Beckman, 237 F.3d 186, 194–95 (3d Cir. 2001) (analyzing the Supreme Court's decision in *Munsingwear* and its implications for a categorical rule); Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 353 (D.C. Cir. 1997) ("[T]he *Bancorp* presumption against vacatur might apply if the case has been rendered moot on appeal by enactment or repeal of a regulation . . . .").

246. *See, e.g.*, Wyoming v. USDA (*Wyoming II*), 414 F.3d 1207, 1213 (10th Cir. 2005) (analyzing the motive for repealing the roadless rule).

247. *See supra* Part III.C.2–3.

administration's decision to pull a disputed rule.[248] Such an inquiry would have fit well in the *State Farm* era, when political reasons for rescinding rules posttransition were seen as insufficient to support a rescission.[249] But that standard has fallen by the wayside.[250] That posttransition rule changes are simply part of American political practice[251] favors vacatur. Although this argument does not address whether vacatur is proper for all regulation changes resulting in mootness, it explains why changes to midnight rules should avoid scrutiny in the vacatur analysis.

Ultimately, confusion surrounding vacatur for mootness caused by rule change stems from lower courts missing the rationale underlying Supreme Court precedent. *Bonner Mall*'s focus on which *party* mooted the dispute and subsequently requested vacatur has misled the lower courts to focus similarly on the causal party in rule-change cases. For example, the *Wyoming II* court supported its decision to vacate by noting that although the USDA had lost in the district court and then changed its rule, interveners had appealed—not the USDA.[252] The *Tafas* court, however, denied vacatur because the USPTO was the party responsible for mooting the dispute.[253]

Courts can hardly be faulted for attempting to follow *Bonner Mall*'s instruction, but *Bonner Mall* seems to miss the mark for midnight-rule-change cases. One way to view posttransition rule change is that even though the litigating parties might stay nominally identical, when an incoming administration moots the dispute by changing a rule, the party responsible for the mootness really has changed. That is, incoming and outgoing administrations are different entities under a presidential-control model of agencies.[254] *Fox* supports this conceptualization, suggesting that presidential policy

248. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009) (holding that there is no "requirement that all agency change be subjected to more searching review"); *cf. Khodara*, 237 F.3d at 195 (refusing to question a legislature's motive for rescinding a rule that mooted the case).

249. *See, e.g.*, Beermann, *supra* note 135, at 361–66 (describing the "difficulties" that *State Farm* created for rule rescissions following political transitions).

250. *See supra* notes 213–17 and accompanying text.

251. Jack, *supra* note 43, at 1482 ("[A]n incoming administration's withdrawal and suspension of . . . [midnight] rules has become a familiar, if not inevitable, post-election phenomenon."); *see also* Dudley, *supra* note 164, at 29 ("[M]idnight regulation is inevitable.").

252. Wyoming v. USDA (*Wyoming II*), 414 F.3d 1207, 1213 (10th Cir. 2005).

253. Tafas v. Kappos, 586 F.3d 1369, 1371 (Fed. Cir. 2009) (en banc).

254. For a discussion of the presidential-control model, see *supra* notes 154–55 and accompanying text.

change can supply a nearly sufficient ground for agency position change.[255]

A better approach to these vacatur decisions, however, might acknowledge that *Bonner Mall* represents a different category of case. *Bonner Mall* led to focus on which party caused the mootness for fear that losing parties would settle repeatedly to avoid bad precedent.[256] Though at least one court has expressed concern that agencies might change rules in response to unfavorable lower court decisions,[257] the fear that agencies would routinely redeem from the *Federal Supplement* judgments against midnight rules seems misplaced under current doctrine. For example, civil litigants typically cannot assert nonmutual collateral estoppel against the government. and agencies can nonacquiesce in courts' judgments.[258] Agencies thus have less to lose through bad precedent than litigants generally. Regardless of what specific scenarios the Court has addressed in its vacatur opinions, the ultimate question in the vacatur analysis is whether the values served by vacatur outweigh those served by letting the judgment stand.[259] *Bonner Mall* simply protects a different set of values than the ones at stake in litigation over an agency's regulations.

Indeed, vacatur for mootness caused by changes to midnight rules reflects an entirely different public value of judgments than does *Bonner Mall*: the public value of law change. Vacatur cases do not explicitly recognize this value, but support for it appears in the appellate decisions recognizing the appropriateness of vacatur when a legislative change moots the case.[260] *Khodara Environmental, Inc. ex rel. Eagle Environmental L.P. v. Beckman*,[261] for example, suggested

255. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009) (requiring only that the agency be "aware[]" that it has changed position and give "good reasons" for doing so).

256. See *supra* text accompanying notes 97–101.

257. Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 353 (D.C. Cir. 1997) ("[In] *19 Solid Waste Department Mechanics [v. City of Albuquerque*, 76 F.3d 1132 (10th Cir. 1996),] . . . Albuquerque admitted that it had adopted the new policy in response to the district court's decision enjoining the existing policy as unconstitutional . . . .").

258. *See supra* note 81 and accompanying text.

259. *See, e.g.*, Cammermeyer v. Perry, 97 F.3d 1235, 1239 (9th Cir. 1996) ("[T]he decision to vacate is not to be made mechanically, but should be based on equitable considerations." (citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 24–25 (1994))).

260. *See, e.g.*, *Nat'l Black Police Ass'n*, 108 F.3d at 351–54 (stating that vacatur should only be granted when it serves the public interest and acknowledging the presumed legitimacy of law change by legislative action).

261. Khodara Envtl., Inc. *ex rel.* Eagle Envtl., L.P. v. Beckman, 237 F.3d 186 (3d Cir. 2001).

the legislative change that had mooted the case was not manipulative, but instead represented "responsible lawmaking" that "could . . . be viewed as a commendable effort 'to repair what may have been a constitutionally defective statute.'"[262] The *National Black Police Ass'n* court similarly noted that "legislative actions are presumptively legitimate" and refused to impute a vacatur-precluding manipulative motive to the legislature responsible for the mootness in that case.[263] These concepts track the historical notion that the legislature is the supreme source of lawmaking power and cannot be prevented from changing the law.[264] An analogous example of the reluctance to bind the government is the bar on using nonmutual collateral estoppel against the government.[265] By allowing vacatur, courts have implicitly accepted the legitimacy of legislative change—even though those courts do so by analogizing the legislative action to happenstance so as to fit within *Munsingwear*'s vacatur paradigm.[266]

Regulatory changes should be treated similarly. The public benefits from enabling agencies to change rules that those agencies no longer believe are in the public interest and from according agencies the same leeway as courts provide legislatures. The rub is that agencies, unlike legislatures, find themselves parties to cases invalidating rules. They are thus subject to *Bonner Mall*'s instruction against vacatur when the voluntary action of a party causes mootness.[267] But courts presume the underlying action—a change in

262. *Id.* at 195 (quoting Am. Library Ass'n v. Barr, 956 F.2d 1178, 1187 (D.C. Cir. 1992)).

263. *Nat'l Black Police Ass'n*, 108 F.3d at 352.

264. *See* United States v. Winstar Corp., 518 U.S. 839, 872–73 (1996) (plurality opinion) (explaining the concept of legislative sovereignty and its English roots). *But see id.* at 873 ("[A]lthough we have recognized that 'a general law . . . may be repealed, amended or disregarded by the legislature which enacted it,' and 'is not binding upon any subsequent legislature,' on this side of the Atlantic the principle has always lived in some tension with the constitutionally created potential for a legislature, under certain circumstances, to place effective limits on its successors, or to authorize executive action resulting in such a limitation." (second alteration in original) (footnote omitted) (citation omitted) (quoting Manigault v. Springs, 199 U.S. 473, 487 (1905))).

265. S*ee supra* note 81 and accompanying text.

266. *See, e.g.*, *Nat'l Black Police Ass'n*, 108 F.3d at 353 (suggesting that when legislative action moots a case, "the executive branch is in a position akin to a party who finds its case mooted on appeal by 'happenstance,' rather than events within its control").

267. *See, e.g.*, Tafas v. Kappos, 586 F.3d 1369, 1371 (Fed. Cir. 2009) (en banc) ("[I]t was the USPTO (the losing party in the district court action) that acted unilaterally to render the case moot, and *vacatur* is not appropriate."); *see also* Cammermeyer v. Perry, 97 F.3d 1235, 1239 (9th Cir. 1996) ("'The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 24 (1994))).

the law—legitimate.[268] *Fox* lends further support to the legitimacy of law change by agency action in suggesting that even a political reevaluation of the existing legal standard is a valid ground for agency position change.[269] If this sort of agency change is legitimate, then rule changes that cause mootness merit the same presumption given to legislative changes. The focus of vacatur doctrine is equitable balance, and courts have acknowledged that the interest in encouraging legislative law change outweighs the value of preserving precedent. Courts should apply *Munsingwear* and *Bonner Mall* less mechanically and do the same for regulatory law change—regardless of whether a party-agency mooted the dispute.

B. Broader Implications

Although midnight-rule-change mootness warrants vacatur under current doctrine, several questions remain unanswered. First, does the decision to vacate shed any light on the normative debate surrounding midnight regulation? Second, are midnight rules special, or does the propriety of vacatur for midnight-rule-change mootness inform how courts should consider vacatur for all rule changes? This Note does not answer these questions but introduces a framework for thinking about them.

The first question implicates the ongoing dispute over whether midnight rulemaking—and undoing midnight rulemaking—is a legitimate exercise of presidential power.[270] But questions concerning the propriety of midnight rulemaking are not part of vacatur doctrine. Although courts are aware of midnight rulemaking,[271] vacatur doctrine directs courts to analyze the reason for mootness.[272] An incoming administration changes a rule because it thinks its predecessor's unfinished midnight rule is either procedurally invalid or at odds with its own policies.[273] For the vacatur inquiry, either purpose suffices as a legitimate reason for changing rules.

Whether to vacate when a midnight-rule dispute has been mooted is thus a question of what the incoming administration thinks

268. *See, e.g.*, *supra* text accompanying note 263.

269. *See supra* text accompanying notes 233–35.

270. For a brief introduction to this debate, see *supra* notes 149–55 and accompanying text.

271. *See supra* notes 173–80 and accompanying text.

272. *See supra* text accompanying note 92. For an overview of cases addressing the vacatur for mootness doctrine, see *supra* Part II.B–C.

273. *See supra* notes 144–47 and accompanying text.

about midnight regulation. If midnight rulemaking were truly in the public's best interest, a presumption against vacatur for mootness caused by postinauguration changes might be appropriate. Courts might discourage incoming administrations from changing unfinished midnight rules by denying vacatur, but that approach would contradict fifty years of vacatur-for-mootness doctrine.[274] For example, courts routinely vacate when statutory changes moot litigation.[275] Moreover, whether midnight regulation is objectively desirable is a *State Farm*–era question for courts to ask.[276] Instead, what matters in the vacatur-for-mootness analysis is whether the incoming administration thinks midnight rulemaking is undesirable.

On a broader level, midnight rulemaking is an accepted part of the contemporary political landscape. The public will likely expect the incoming president to attempt to undo midnight rules left by the outgoing administration. If unfinished rules conflict with the new president's policies, the attempt to change the rules is not an improper purpose for the vacatur analysis. Whether midnight regulation is normatively desirable is a question for political scientists, not courts. Although observers often criticize midnight rulemaking as an illegitimate exercise of presidential power, this question does not matter in the vacatur-for-mootness analysis. Vacatur for mootness only requires courts to ask why the case became moot, and for postinauguration changes to midnight rules, that question has been answered.

But the way courts analyze vacatur in midnight-rule-change cases might inform how observers should view midnight rulemaking generally. If a court acknowledges that an incoming president is changing an unfinished midnight rule because it was defectively promulgated, that court implicitly recognizes the rulemaking was not a legitimate exercise of administrative authority. A defectively promulgated rule is never legitimate. If, however, the court believes that a postinauguration change is legitimate and warrants vacatur, then the court implicitly acknowledges the rule change was a legitimate exercise of executive power—at least to the extent that the executive branch had no manipulative motive for changing the rule.

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274. For an overview of the Supreme Court's vacatur-for-mootness jurisprudence, see *supra* Part II.A–B.

275. *See, e.g.*, *supra* notes 260–64 and accompanying text.

276. For further discussion of the shift in the justification for agency position change from *State Farm* scrutiny to *Fox*'s relaxed standard, see *supra* Part III.C.

But if it is legitimate for an incoming administration to change a midnight rule, it must also be legitimate for an outgoing administration to promulgate that rule. Indeed, this view accords with the model the Supreme Court seems to have adopted for evaluating the procedural legitimacy of agency position changes.[277] Viewed through this lens, midnight rulemaking is a normal part of presidential transitions rather than a sinister political practice.

The second question essentially asks why the vacatur calculus should focus on midnight rulemaking specifically. Indeed, courts have indicated the uncertainty in vacatur doctrine about rule-change mootness generally.[278] Changes to midnight rules that moot disputes are an admittedly narrow subsection of these cases. Although this Note's insights are not necessarily limited to vacatur for midnight-rule changes, there are several reasons to focus attention on them.

Overall, the main focus in the vacatur analysis is the cause of the mootness. For rule changes, that inquiry turns on the legitimacy of the rule change: was it in response to a belief that the rule was inadequate or was it in response to unfavorable litigation?[279] Surely more rule changes than those in response to unfinished midnight rules would fall into this first category. But midnight-rule changes have additional attributes that make them even less likely to be perceived as illegitimate. Midnight rules are characteristically rushed and susceptible to procedural defect,[280] and today's incoming presidents routinely change or at least suspend the midnight rules left by their predecessors.[281] Both factors make midnight-rule changes that cause mootness more likely to warrant vacatur across the board.

But if recognizing and protecting the public value of law change is vacatur's core,[282] differentiating midnight-rule changes from other rule changes is less important. Under this theory, courts would afford rule changes the same presumption of legitimacy as legislative changes,[283] and courts would allow vacatur even when a party agency

277. *See supra* note 255 and accompanying text.

278. For discussion of the confusion among lower courts about the application of vacatur doctrine to rule-change mootness, see *supra* Part II.C.

279. *See supra* text accompanying notes 128–30; *see also supra* text accompanying note 92.

280. *See supra* note 190 and accompanying text.

281. For a discussion of action taken by incoming presidents in response to unfinished midnight regulations, see *supra* Part III.B.

282. *See supra* text accompanying notes 260–66.

283. *See, e.g.*, Nat'l Black Police Ass'n v. District of Columbia, 108 F.3d 346, 352 (D.C. Cir. 1997) ("[L]egislative actions are presumptively legitimate . . . .").

changed its rule after an unfavorable ruling or agreed to issue a new rule as part of a settlement. This approach has not yet found much favor with courts,[284] but this Note's argument that rule changes serve a broader public interest than these courts suppose might guide future vacatur decisions.

CONCLUSION

Midnight rulemaking is an established attribute of modern presidential transitions. Outgoing administrations may rush to issue midnight rules largely for political reasons. The incoming administration has similar political motives for wanting to undo these midnight regulations. Indeed, every recent president has suspended his predecessor's midnight regulations that had not gone into effect by inauguration day. Private litigants, though, are unlikely to wait for inauguration to challenge midnight regulations in court. This scenario raises the possibility of litigation being interrupted by a rule change that moots the case midappeal—the situation in *Wyoming II*. Case law on this question is ambiguous, however, and some precedent hints that vacatur is an improper remedy when an agency's voluntary rule rescission or settlement moots the case pending appeal.

The Tenth Circuit reached the correct result, though. Not only can mootness caused by changes to unfinished midnight rules be squared with existing vacatur doctrine, but broader public values support vacatur in ways that courts have yet to examine. Moreover, courts' approaches to vacatur for changed midnight rules illuminate the broader discussion about the legitimacy of midnight rulemaking within the administrative state. Although these insights extend beyond *midnight* rulemaking, they at least favor reaching the same conclusion as the *Wyoming II* court.

284. *See, e.g.*, Cammermeyer v. Perry, 97 F.3d 1235, 1239 (9th Cir. 1996) (noting that the fact that the defendant agency "rendered this case moot by conceding that Cammermeyer should be reinstated and by replacing the challenged regulation" counseled against vacatur); 19 Solid Waste Dep't Mechs. v. City of Albuquerque, 76 F.3d 1142, 1244 (10th Cir. 1996) (denying vacatur because the defendant City of Albuquerque changed its rule in response to losing in the district court).