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THE YALE LAW JOURNAL

STEVEN G. CALABRESI AND JAMES LINDGREN[†]

The President: Lightning Rod or King?

I. THE POWERS OF A KING?

There is an idea current in the land today that presidential power has grown to the point where it is a threat to democracy. The *New York Times* editorial page writers and leading Democrats regularly accuse President George W. Bush of acting like a king or seeking kingly powers.¹ In the academic community, Professor Bruce Ackerman has written powerfully about what he sees as the danger that presidential power poses to democracy itself.² In this Symposium Issue, Professors Bill Marshall³ and Jenny Martinez⁴ argue that the presidency has become too powerful. Marshall goes so far as to argue for reducing presidential power by separately electing the Attorney General.

In this Commentary, we suggest that when political power is examined more broadly, Presidents and their parties generally have less power in the

[†] Professors of Law, Northwestern University. We would like to extend a special thanks to Daniel Lev who was our research assistant on this piece and who did a spectacular job, including preparing and collecting data for the first drafts of Figures 3 and 4. For helpful suggestions, we would also like to thank Andrew Koppelman, Lee Epstein, Gary Lawson, John McGinnis, Jide Nzelibe, and participants at a Northwestern University School of Law faculty workshop. We thank the Julius Rosenthal Fund for financial support.

1. See, e.g., Maureen Dowd, Op-Ed., *A Plague of Toadies*, N.Y. TIMES, Nov. 18, 2004, at A31; David D. Kirkpatrick, *On Party Lines, Panel Approves Alito for Court*, N.Y. TIMES, Jan. 25, 2006, at A1; Matthew Rothschild, *King George*, PROGRESSIVE, Feb. 2006, at 8.
2. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000). For a response, see Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong To Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001).
3. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).
4. Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480 (2006).

United States than commentators recognize. We believe the President today is less of a king than a lightning rod. Indeed, the constitutional and practical weakness of the presidency is, if not a threat to American democracy, at least a worrisome limitation on it.

The reason for this is that midterm and off-year elections show a strong backlash against members of the President's party. Political scientists have put forward two theories to explain midterm elections, both of which underestimate this backlash. The first theory of surge and decline holds that presidential midterm losses are explained mostly by the absence in those years of presidential coattails.⁵ The second theory of midterm elections is that they are mostly a referendum on how well the President and the economy are doing.⁶ These approaches tend to look too narrowly at federal elections when much of the reaction to winning the White House occurs in the states.

Our backlash theory holds that midterm elections almost always punish the President's party so that it actually loses as much or more power in state and federal elections as the party gained by winning the White House. In essence, this pattern is one step forward in presidential election years and several steps back over the succeeding three years. In midterm elections, it is not merely that, without the President at the top of the ticket, his party loses some of its gains from the presidential election years (the surge and decline theory). Nor are the losses confined to the federal government or to years with unpopular Presidents or poor economies, as the referendum theory might imply. Indeed, when a party wins the White House, it gains on average only one governor's seat, while over the next three years the President's party loses on average four governorships, leaving it worse off than *before* it won the presidency. Winning the White House leads to losing a lot of important statehouses, which in turn are key to influencing domestic policy. Given this pattern, recent fears about growing presidential power with respect to domestic affairs may be overblown.

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5. Angus Campbell, *Surge and Decline: A Study of Electoral Change*, 24 PUB. OPINION Q. 397 (1960). For a modern, more sophisticated variant, see JAMES E. CAMPBELL, *THE PRESIDENTIAL PULSE OF CONGRESSIONAL ELECTIONS* (1993); and James E. Campbell, *The Presidential Surge and Its Midterm Decline in Congressional Elections, 1868-1988*, 53 J. POL. 477 (1991).
 6. Alan Abramowitz et al., *The President's Party in Midterm Elections: Going from Bad to Worse*, 30 AM. J. POL. SCI. 562 (1986); Edward R. Tufte, *Determinants of the Outcomes of Midterm Congressional Elections*, 69 AM. POL. SCI. REV. 812 (1975).

II. A WEAK OFFICE UNDER THE CONSTITUTION

Every four years Americans focus intently for ten months on the nation's presidential race. That race formally begins in late January with the Iowa caucuses and the New Hampshire primary, and it continues nonstop until November with a torrent of primaries, nominating conventions, presidential and vice presidential debates, and opinion polls. The unmistakable message sent to the voters is that this is it: The selection of a new President will determine which direction we go in as a society for the next four years. Electing the President is the democratic decision that really counts.

The problem with this idea is that it is not true. The President's formal powers under the Constitution are far too narrow to justify the hoopla that surrounds presidential elections. Under the Constitution, for example, Presidents have very limited power over domestic policy. Anyone who doubts this should consider the fate of President Bush's recent proposals to reform social security and the tax code⁷ or President Clinton's attempt to introduce national health care.⁸

The main levers that the Constitution gives the President over domestic policy are the veto power and the power to appoint principal officers in the executive and judicial branches subject to senatorial advice and consent. But the allegedly imperial George W. Bush has vetoed only one piece of congressional legislation.⁹ And it is easy to make too much of even the President's significant power over appointments. It is hard to induce most federal agencies to change directions (the NLRB is a notable exception), as is suggested by the successful thwarting of George Bush's recent attempts to reform the culture at the CIA. One must remember that federal departments and agencies are called bureaucracies for a reason. Even the significant effects of Bush's judicial appointments will be felt mainly in the period after he leaves office.

A skeptic might say that the President has the dominant voice in foreign policy. Perhaps it is this formidable presidential power that justifies our quadrennial year-long presidential selection spectacle? Consider, however, just how little power a President really has even in this realm. Presidents can start

7. See Edmund L. Andrews, *Tax Reform Looks for a Passing Lane*, N.Y. TIMES, Feb. 13, 2005, at C27.

8. See Derek Bok, *The Great Health Care Debate of 1993-94*, 2 PUB. TALK (1998), <http://www.upenn.edu/pnc/ptbok.html>.

9. See Sheryl Gay Stolberg, *First Bush Veto Maintains Limits on Stem Cell Use*, N.Y. TIMES, July 20, 2006, at A1.

military actions, but those military actions can be waged successfully only to the extent that Congress is willing to pay for them. Presidents can offer foreign aid, but again only to the extent that Congress is willing to foot the bill. Presidents can propose free trade zones, but only if Congress is willing by a vote of both Houses to go along. Presidents can negotiate treaties, but they become law only if two-thirds of the Senate approves.¹⁰ In short, while the President is the dominant player in foreign policy, there is almost nothing vital that the President can do even in this realm without some help from Congress. On its face, the power that voters grant to a President every four years is less than is generally supposed.

III. OF COATTAILS, MIDTERM BACKLASHES, AND LIGHTNING RODS

A. Losses in Midterm Congressional Elections

In a broader political sense, elections convey even less power to Presidents and their parties than we have just described. First, as the substantial political science literature on midterm elections documents,¹¹ it is an iron law of politics that the President's party almost always loses seats in Congress during the biennial midterm elections¹² and especially during the second midterm election of an eight-year presidency.¹³ The data are consistent with the anecdotal evidence that the party holding the presidency six years into an eight-year tenure becomes a lightning rod for voter discontent.

Recently it is not just the second midterm election that has been a disaster for most Presidents: Often it is the first midterm election as well. Midterm losses in a President's first term can lead to his party's losing control of both Houses of Congress, as happened to Bill Clinton in 1994, or simply to losing

10. Cf. Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380 (2006) (pointing out the power over foreign policy exercised by state and local governments).

11. See, e.g., sources cited *supra* notes 5-6.

12. The only significant exceptions to this law in the last century occurred in the midterm elections of 2002 and 1934, both of which may have taken place in times of partisan realignment.

13. In 1938, the Democratic Party lost seventy-one seats in the House and six in the Senate. In 1958, the Republican Party lost forty-seven House seats and thirteen Senate seats. In 1966, the Democratic Party lost forty-seven seats in the House and four seats in the Senate to Republicans. In 1974, the Republican Party lost forty-eight seats in the House and five seats in the Senate. In 1986, although the Republican Party lost only five seats in the House (many fewer than usual), it lost eight in the Senate, thereby losing its Senate majority. HAROLD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS 2005-2006*, at 38-39 (2006).

enough seats that the President can no longer push his agenda, as happened to Ronald Reagan in 1982. From 1982 to 1988, the only major Reaganite initiative to pass Congress was the Democratically supported 1986 Tax Reform Act.¹⁴ The 1982 midterm election essentially ended the Reagan Revolution in domestic policy after only two years. The 1994 midterm election was an even more decisive disaster for President Clinton than the 1982 midterms had been for President Reagan.¹⁵ For the first time since the 1950s, the Republicans swept to majorities in both Houses of Congress. Clintonian experiments with national health care, gun control, and gays in the military came to an end after two years. The only important domestic legislation to pass in the next six years was a Republican welfare reform plan.

The effect of midterm elections on the congressional fortunes of incumbent Presidents has lessened somewhat with the rise of "safe seats." From 1870 through 1898, Presidents lost a mean of fifty-five House seats in each midterm election. Since 1934, the average loss has been twenty-six seats, with an average loss of only seventeen seats between 1970 and 2002.¹⁶ In terms of unified or divided government, since 1789 the relative odds that one party will have unified control of the White House, the Senate, and the House of Representatives after a presidential election are about twice as high as that one party will have unified control after a midterm election. Presidential elections have led to unified government thirty-nine out of fifty-five times (71%). Midterm elections, on the other hand, have led to unified government in only twenty-seven out of fifty-four elections (50%).¹⁷

B. Losses in State Elections

Strikingly, this midterm backlash is not just confined to federal elections. As James Campbell nicely documents, there is a backlash against the President's party in the midterm elections for seats in state legislatures.¹⁸ Campbell shows that in state legislative races in presidential election years, the

14. Pub. L. No. 99-514, 100 Stat. 2085.

15. In 1994 the Republican Party gained fifty-four seats in the House, ten seats in the Senate, and nine governorships, in the largest nonpresidential power shift in modern American history. STANLEY & NIEMI, *supra* note 13, at 38-39.

16. *See id.*

17. The relative odds described in the text are thirty-nine to sixteen (2.44/1), divided by twenty-seven to twenty-seven (1/1), or 2.44 to 1. These data were compiled by Daniel Lev and are on file with the authors.

18. James E. Campbell, *Presidential Coattails and Midterm Losses in State Legislative Elections*, 80 AM. POL. SCI. REV. 45 (1986).

winning President's party benefits from his coattails, but in midterm elections the President's party suffers losses in state legislative races that approximately cancel out the gains from his coattails. Further, in an article published thirty-five years ago,¹⁹ Stephen Turett analyzed incumbent governors' races in 1900-1969, noticing that incumbent governors were more likely to be reelected in midterm elections if the President was of the opposing party. Turett limited his analysis of this midterm effect to incumbent governors running for re-election and interpreted it as merely offsetting the coattail effect in presidential election years.

When one adds all gubernatorial races to the analysis, as we do in Figures 1 and 2,²⁰ backlash against the President's party in state races during a President's term is actually *stronger* overall than the coattail effect in the presidential election year. To be more specific, we find that four years after a party wins a presidential election, it holds on average three *fewer* statehouses than it had *before it won* the presidential election. Perversely, winning the presidency seems to lead very shortly to losing power in the states. Since 1932 there have been eight changes of party control of the White House (1933, 1953, 1961, 1969, 1977, 1981, 1993, and 2001). In every instance but one, the party that seized the White House held more governorships in the year before it took office than in the subsequent year it lost the presidential election.²¹ The only exception is that in 1980, Republicans held four fewer governorships than they held in 1992, immediately before the Republicans were voted out of the White House. Similarly, of the eleven Presidents since 1933, every one except two, Kennedy and Reagan, left office with fewer governorships than his party had before he took office, and Kennedy served less than three years. Figure 1 shows this pattern.

19. J. Stephen Turett, *The Vulnerability of American Governors, 1900-1969*, 15 *MIDWEST J. POL. SCI.* 108 (1971).

20. All Figures in this Commentary, and the accompanying textual discussions, are based on the authors' data and calculations, which are on file with the authors.

21. Here, and in subsequent analyses, we treat the second George Bush as if he were to leave office in 2006 (in 2006, Democrats hold four more governorships than they did in 2000).

THE PRESIDENT: LIGHTNING ROD OR KING?

Figure 1.

THE NUMBER OF DEMOCRATIC GOVERNORS BY YEAR AND PARTY OF PRESIDENT

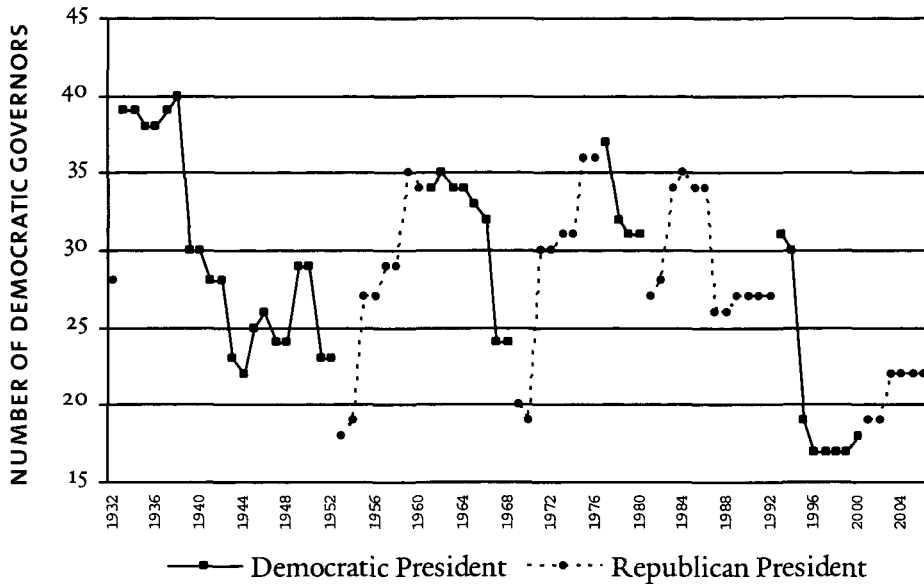
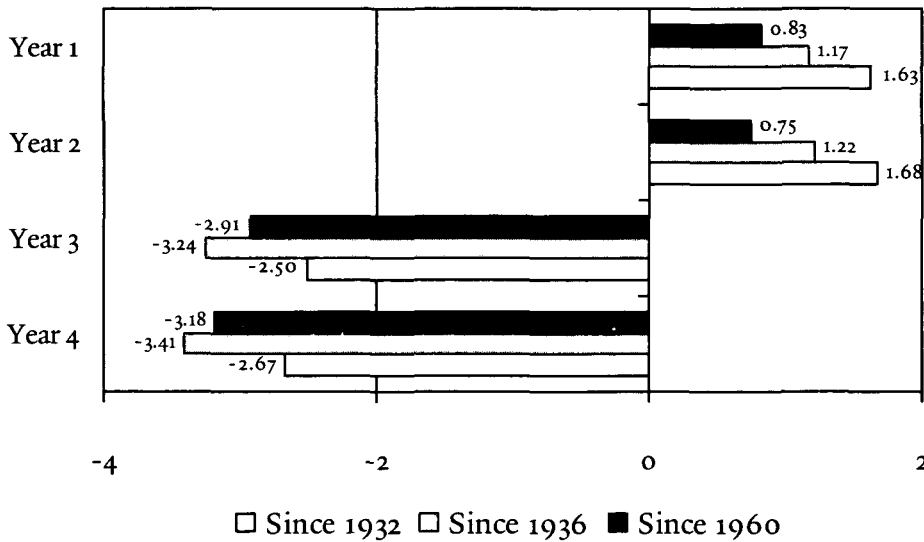


Figure 2.

THE NET NUMBER OF STATE GOVERNORS OF THE PRESIDENT'S PARTY SERVING IN EACH YEAR OF A PRESIDENTIAL ELECTION CYCLE, 1932-2006 (ELECTION YEAR=0)



The four-year pattern of a federal election cycle is shown in Figure 2. If one looks at the pattern since 1960, in his first year in office, a President's party controls only one more governorship than the party had in the election year. Once he is in office, there is a backlash against the sitting President's party. On average, since 1960, by the third and fourth years of a four-year presidential administration, the President has lost four seats from his first year, thus losing not only that one "coattail effect" seat, but three more governorships as well. One sees a similar, but slightly stronger, pattern since 1936. If one looks at just two-term administrations since the 1950s, by the seventh year of the administration, the party winning the White House has nearly eight (7.6) fewer governorships on average than it had before it won the White House.

C. *Why We See a Lightning Rod Effect*

What is driving the backlash we are documenting here? First, and most obviously, Presidents become lightning rods for everything that goes wrong.²² Most Presidents leave office less popular than when they entered, with Ronald Reagan and Bill Clinton being the only exceptions since at least Dwight Eisenhower.²³ Even the exceptions (Reagan and Clinton) suffered major congressional losses in their first midterm elections, at times when their job approval ratings were down substantially.²⁴ Thus, the response of voters is to blame the President for whatever goes wrong and, probably as a result, to punish that President's party in midterm and off-year elections.

In Figure 3, we show that in all but three of the eighteen federal elections since 1970 (1992, 2002, and 2004), the party controlling the White House at the time of the election lost some of its proportion of the electorate for the House, compared with its proportion of the House vote in the prior presidential election.

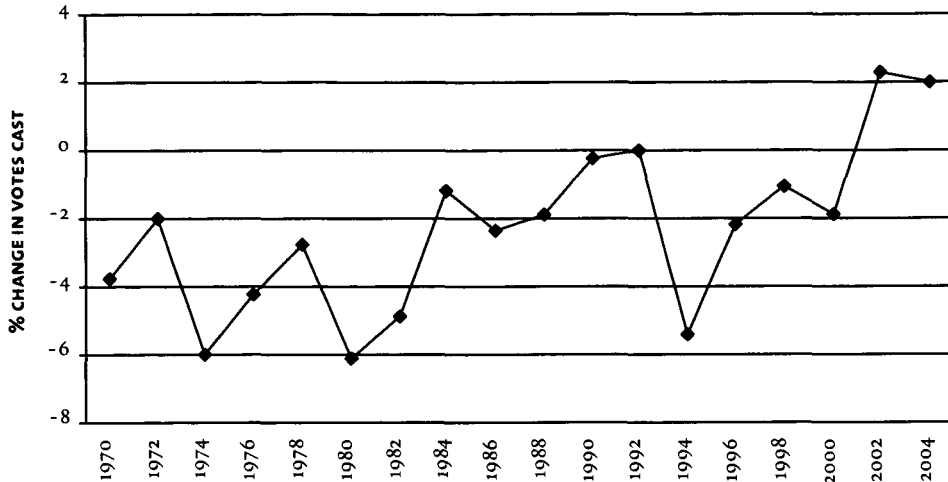
22. See Tufte, *supra* note 6 (describing what he calls a referendum effect).

23. See ROBERT S. ERIKSON ET AL., *THE MACRO POLITY* 33 (2002).

24. See *id.*

Figure 3.

CHANGE IN VOTES FOR THE HOUSE OF REPRESENTATIVES FOR THE PARTY OF THE PRESIDENT COMPARED TO THAT PARTY'S VOTES IN THE LAST PRESIDENTIAL ELECTION, 1970-2004

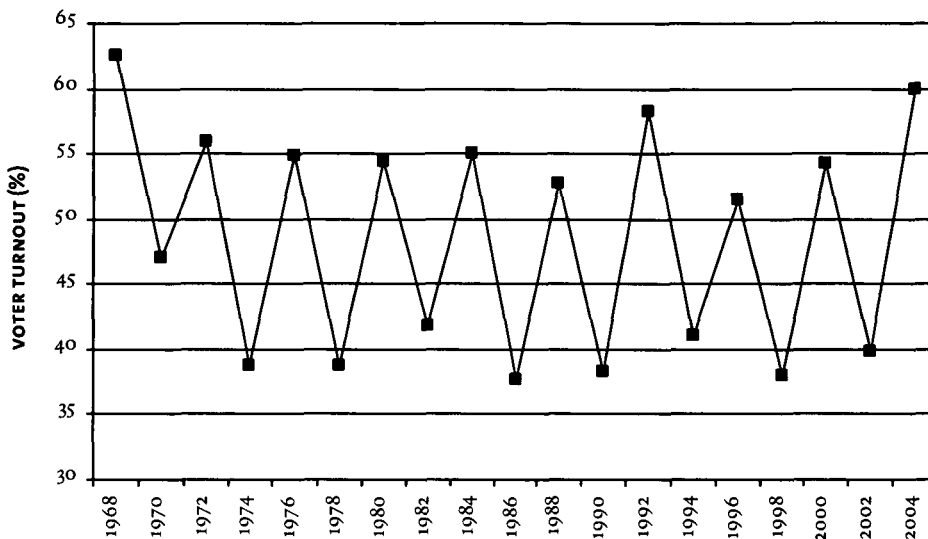


Second, as Figure 4 shows, not everyone votes in the midterm elections. Voter turnout is, in fact, significantly lower in midterm elections than it is during presidential years, and, as is well known, even American voter turnout in presidential years is low compared with the turnout in other Western democracies. Typically, turnout in a presidential year is about 55% of registered voters, and turnout in midterm elections hovers around 40% of registered voters (Figure 4). The reasons for this are not hard to find. Because Americans are taught to think that selecting a President is the most important decision made in their democracy, they accordingly focus on and vote in the presidential election. The midterm election is of interest only to political junkies and to those voters who are mad about the direction in which the nation is going when the midterm election is held. Those voters in 1982 were disproportionately Democrats who were hostile to Ronald Reagan's attempts to dismantle the safety net set up during the New Deal and Great Society years.²⁵ Conversely, in 1994 the angry voters were disproportionately

25. See, e.g., Robert Healy & Thomas Oliphant, *After the Election, a Tough Agenda*, BOSTON GLOBE, Nov. 7, 1982, at 1.

Republicans who were mad about everything from national health care to gun control to gay rights.²⁶

Figure 4.
TURNOUT IN FEDERAL ELECTIONS, 1968-2004



The effect therefore of successfully mobilizing to elect Ronald Reagan in 1980 or to elect Bill Clinton in 1992 was almost to guarantee the triumph of one's political opponents two years hence in an election in which the turnout was around 40% of all registered voters, so that a mere 21% of registered voters constituted a majority. This midterm election allocated nearly as much federal power as did the presidential election, and it allocated more power in the states. Yet this midterm election was one in which the sitting President's political opponents were much more likely to turn out and vote than his allies—a very strange form of democracy indeed. Moreover, the losses suffered in the 1982 or

26. See, e.g., Jon Sawyer, *GOP Saw Election as a Referendum, and So Did Voters*, ST. LOUIS POST-DISPATCH, Nov. 13, 1994, at 4B ("Election-day exit polls and surveys since show that Republicans far outstripped the Democrats, not just in energizing their own voters and the big pool of independents but drawing heavily from the rapidly growing ranks of Christian evangelicals."); Ben Wattenberg, *Tuesday Landslide Shows That It's the Values, Stupid*, ROCKY MOUNTAIN NEWS, Nov. 10, 1994, at 77A ("A Washington Post-ABC poll showed 68% of the public regarded 'social issues' as 'the most important problem,' while only 13% said it was 'economic issues.' . . . [F]amily values was the No. 1 issue.").

1994 midterm elections were of such a nature that they were unlikely to be undone until the other party again held the lightning rod office of the presidency.

The third reason for the strength of the perverse lightning rod effect is that in the mid-twentieth century, some states moved their governors' races to off-years in part to minimize the President's coattail effect and thus the effects of the presidential election cycle on state politics.²⁷ Now only eleven states elect their governors on the same day that they vote for the President, while thirty-six states elect their governors during the year of a presidential midterm.²⁸ Five other states, Kentucky, Louisiana, Mississippi, New Jersey, and Virginia, elect their governors during an odd-numbered, nonpresidential election year.²⁹ All of the most populous (and thus politically powerful) states elect their governors during the midterm year, including California, Florida, Georgia, Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, and Texas. In a presidential year, the presidency, one-third of the Senate, the entire House of Representatives, and eleven governorships are up for election. In the midterm year, one-third of the Senate, the entire House of Representatives, and thirty-six governorships, including all the most important ones, are up for election, with another five governorships up in odd-numbered years. The huge number of governorships that are open in midterm and odd-numbered years makes the midterm elections of central importance to government in the United States.

In Reagan's second year, 1982, Republicans went from holding twenty-two governorships to holding sixteen, a reduction of 27%. In Clinton's second year, 1994, Republicans went from holding twenty governorships to holding thirty, an increase of 50%. The same pattern occurred in the 1960s and 1970s. In 1968, at the end of the Kennedy-Johnson years, Republicans held twenty-six governorships. In 1976, at the end of the Nixon-Ford years, Republicans held only thirteen governorships.³⁰

27. Some southern states may have also moved to midterm or off-year elections to depress African-American voter turnout.

28. Delaware, Indiana, Missouri, Montana, North Carolina, North Dakota, Utah, Washington, and West Virginia elect their governors to four-year terms in the same year as presidential elections. New Hampshire and Vermont are the only remaining states with two-year terms for governors. 2 CQ PRESS, GUIDE TO U.S. ELECTIONS 1440 (5th ed. 2005).

29. The reason these numbers add up to fifty-two is that two states, New Hampshire and Vermont, elect their governors for two-year terms and thus appear here twice.

30. Calculations by authors.

CONCLUSION

The American political landscape changes not just every four years, but every two years as well. What has not been adequately recognized in the scholarly literature is that the changes in control in the gubernatorial off-year elections are indeed larger than any coattail effect in the presidential election year, largely because only eleven small states elect their governors at the same time as they vote for President. The net effect is that by the time a President is up for reelection, his party controls fewer governorships than before he won the election. Winning the presidency seems to lead very shortly to losing power, not only in Congress, but in state governorships as well. When one adds this perverse effect to the constitutional weakness of the presidency, the extraordinary emphasis on the presidential election every four years seems misplaced.

No American President has ever seriously threatened our democratic system of government, but democracy may be undermined when people regularly mobilize for and participate in a presidential election that is likely to produce on balance the exact opposite policy consequences from those for which the people have voted. Rather than worrying about imaginary threats of dictatorship, we ought to be worried today about an electoral system that may regularly be frustrating the popular will.