

# SEEING BEYOND COURTS: THE POLITICAL CONTEXT OF THE NATIONWIDE INJUNCTION

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## INTRODUCTION

“Judge Blocks Trump . . . .”<sup>1</sup> This headline became a media staple when reporting on lawsuits challenging various Trump Administration policies—many of which sought injunctive relief on a nationwide scale. Two United States Attorneys General have challenged judges’ authority to issue these nationwide injunctions and called for “our judiciary to re-examine a practice that embitters the political life of the nation, flouts constitutional principles, and stultifies sound judicial administration.”<sup>2</sup>

In the popular and political mind, the nationwide injunction begins and ends in the courts. To jurists like Clarence Thomas, courts are central to eradicating the nationwide injunction through the exercise of greater self-restraint by lower-court judges, legislatively imposed constraints, or Supreme Court invalidation on constitutional grounds.<sup>3</sup> Legal scholars are not very different. Their engagement with the nationwide injunction in public-law litigation has focused nearly exclusively on courts.<sup>4</sup>

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1. Ted Hesson, *Judge Blocks Trump Move to Deny Green Card to Recipients of Government Benefits*, POLITICO (Oct. 11, 2019, 3:04 PM), <https://www.politico.com/news/2019/10/11/judge-blocks-trump-green-card-public-benefits-regulation-044666> [<https://perma.cc/N4LX-KF66>].

2. Memorandum from Jefferson B. Sessions III, Att’y Gen., to Heads of Civil Litigating Components U.S. Att’ys, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/B64W-EQHH>]; William P. Barr, *Opinion, End Nationwide Injunctions*, WALL ST. J. (Sept. 5, 2019, 6:37 PM), <https://www.wsj.com/articles/end-nationwide-injunctions-11567723072> [<https://perma.cc/JQ84-EPDN>].

3. Dep’t of Homeland Security v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (“[Nationwide injunctions] raise serious questions about the scope of courts’ equitable powers under Article III.”). *Trump v. Hawaii*, 138 S. Ct. 2392, 2425–26 (2018) (Thomas, J., concurring) (challenging the constitutionality of the nationwide injunction and calling for judicial resolution of the issue).

4. See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (arguing that the nationwide injunction does not conform to the dictates of Article III’s constraints on judicial authority); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018) (arguing in favor of nationwide injunction’s conformance with Article III); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and

They inquire about the possible sources of judicial authority to issue nationwide injunctions, the extent to which they are consistent with other mechanisms for organizing litigation, and the most appropriate response to either discipline or eradicate their use.

This Essay asserts that this “court-centered account” ignores lessons both about courts and, by extension, the nationwide injunction. Courts are embedded within a larger institutional ecosystem made up of Congress, the President, the bureaucracy, and the wider public.<sup>5</sup> How might we better understand the nationwide injunction if we add this ecosystem to the conversation?

A turn to the larger political context—what I call the “political-context account”—ought not to surprise anyone, as many nationwide injunctions involve the most contentious issues in American politics today, including immigration, transgender rights, the Affordable Care Act, and labor policy, to name a few.<sup>6</sup>

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*They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335 (2018) (arguing that the nationwide injunction does not conform to the dictates of Article III’s constraints on judicial authority). One of the few academic commentaries that addresses the issue of congressional gridlock is Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 62–63 (2017).

5. The concept of an “ecology” or “ecosystem” is not foreign to separation-of-powers frameworks. For example, Aziz Huq and John Michaels highlight what they suggest is an underappreciated dynamic that impacts separation of powers; specifically, they argue that intrabranch actors account for much of the dynamism of separation-of-powers values. Aziz Z. Huq & John D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 391 (2016). But I mean something more than this. By “ecology” I mean to highlight the wider institutional environment and context in which institutional interactions take place. Here, I am guided by James Q. Wilson’s classic study, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 3, 27 (1989) (explaining organizational behavior as a response to a critical environmental problem—i.e. “situations that the organization encounters”). This suggests that organizations are adaptive to environmental factors. It is this adaptive quality of institutions—specifically, the nationwide injunction as an institutional adaptation to the environmental problem of unilateral executive action—that this Essay seeks to highlight.

6. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017), *aff’d*, 888 F.3d 272 (7th Cir. 2018) (issuing a nationwide injunction against the Trump Administration’s policy on sanctuary cities); *State v. Trump*, 265 F. Supp. 3d 1140 (D. Haw. 2017), *rev’d in part*, 878 F.3d 662 (9th Cir. 2017), *rev’d by*, 138 S. Ct. 2392 (2018) (issuing a nationwide injunction on the Trump Administration’s travel restriction policy); *Texas v. United States*, 202 F. Supp. 3d 810 (N.D. Tex. 2016) (issuing a nationwide injunction against the Obama Administration’s policy requiring schools receiving federal funds not discriminate against transgender students by, among other things, allowing them to use the bathroom of their gender identity); *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (issuing nationwide injunction against regulations promulgated pursuant to the

To be sure, the controversial issues litigated using nationwide injunctions may explain why many scholars have resisted the temptation to understand these injunctions within a broader political context. Instead, these scholars couch their analyses in themes that appeal to partisans of all stripes—including the vindication of separation of powers, the minimization of forum shopping, and the disincentivization of courts as a “last resort” after political losses.<sup>7</sup> But as valuable as these analytical impulses may be, they may reinforce an inaccurate narrative of the judiciary as standing apart from politics. This risks failing to see the ways that courts are impacted by the actions (or inactions) of other institutions—specifically, Congress and the President. And while everything is surely not collapsible into politics, the power of our prescriptions must be informed by a willingness to honestly confront underlying problems.

Legal scholarship on nationwide injunctions remains quite young. Nevertheless, a rather sturdy academic consensus has developed in short order.<sup>8</sup> It is what I call a “court-centered account” of the nationwide injunction. Civil procedure, remedies doctrine, and the law of federal courts all dominate the court-centered account.<sup>9</sup> Though this is not at all surprising, as these

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Affordable Care Act’s nondiscrimination provision); *Nevada v. U.S. Dep’t. of Labor*, 218 F. Supp.3d 520 (E.D. Tex. 2016) (issuing nationwide injunction against the Obama Administration’s overtime rule).

7. This impulse is evidenced by the leading scholar on nationwide injunctions, Samuel Bray, during a congressional hearing on the subject. Bray described the nationwide injunction as an “obscure” judicial remedy with roots in the 1960s and 1970s that

was weaponized by Republican state attorneys general to stop major Obama administration programs. Now, turnabout is fair play. In other words, whether you are Democrat or a Republican, sometime in the last 3 years your ox has been gored by the national injunction. My hope is that this bipartisan pain offers an opportunity. We do not have to be distracted by the latest national injunction. We can take longer view. We can get the law right.

Regarding the political focus on courts, see *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the H. Subcomm. on Courts, Intellectual Prop., and the Internet, H. Judiciary Comm.*, 115th Cong. (2018) (statement of Samuel Bray, Professor of Law, UCLA School of Law), <https://www.govinfo.gov/content/pkg/CHRG-115hhrg32475/html/CHRG-115hhrg32475.htm> [<https://perma.cc/L3G3-BZRV>].

8. See *supra* note 4.

9. For other court-centered analyses, see Michael T. Morley, *Nationwide Injunctions, Rule 23 (B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017) [hereinafter Morley, *Nationwide Injunctions*]; Michael T. Morley, *De Facto Class Actions: Plaintiff- and Defendant-Oriented Injunctions in*

branches of law focus primarily on courts, the court-centered account risks isolating federal courts from a phenomenon that extends far beyond their institution. The search for analogous precedent in civil procedure, remedies doctrine, and the law of federal courts requires a further turn away from the political dimension of the issue of nationwide injunctions and demands an answer grounded in rigorous doctrinal engagement. Scholars ask, “Have courts ever been allowed to do this?” instead of “Why do courts do this?” This isolates courts from other institutional actors and avoids the question of why the nationwide injunction emerged during this political era. The answer to this question, this Essay contends, requires an interrogation of not only courts but of Congress and the President as well.

This Essay proceeds as follows. Part I will defend the proposition that moving beyond courts is necessary to better understand nationwide injunctions and the courts that issue them. Such a move allows an appreciation of the political context in which the nationwide injunction has emerged and is deployed. Part II will articulate and compare the court-centered and political-context accounts of the nationwide injunction. Part III will explore the dimensions of my political-context account by turning to a brief discussion of congressional gridlock through an examination of partisan polarization in Congress and the “insecure majorities” thesis that exacerbates polarization in today’s legislature. Part III will also examine unilateral presidential authority as an underlying factor in the surge of nationwide injunctions. This Essay will conclude with a brief discussion of how understanding nationwide injunctions through my political-context account may challenge allegations that nationwide injunctions are uncontrovertibly unconstitutional.

## I. SEEING COURTS, CONGRESS, AND THE PRESIDENCY IN THE NATIONWIDE INJUNCTION

The upsurge in the use of nationwide injunctions as a remedial tool by federal district courts rightly raises interest in federal courts.<sup>10</sup> Understanding the upsurge in the deployment of

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*Voting Rights, Election Law, and other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487 (2016) [hereinafter Morley, *De Facto Class Actions*].

10. See, e.g., Kate Benner, *Nationwide Injunctions Speak to Judiciary’s Growing Power, Barr Says*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com>

the nationwide injunction requires that we pay attention to those courts. The nationwide injunction represents the development of a particular type of judicial capacity.<sup>11</sup> At least in the context of public-law adjudication against policies enacted by democratically accountable actors, this development and deployment takes place in a political context.

Understanding the context in which courts issue nationwide injunctions requires understanding courts as institutions embedded in an ecosystem that includes more than simply “rogue” judges or judicial doctrine.<sup>12</sup> Courts are political institutions with their own agendas for building capacity to resolve societal challenges.<sup>13</sup> This dynamic forces us to consider the ways that courts exist as both competitors to and allies with other political institutions.<sup>14</sup> Competition and alliances with other institutions undermines attempts by the court to empower, isolate, insulate, constrain, dictate, and enhance the prestige, capacity, and autonomy of courts. One need only think about President Franklin Roosevelt’s “court-packing” reform, which was intended not only to enhance judicial efficiency and capacity but also to construct

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/2019/05/21/us/politics/barr-nationwide-injunctions.html [https://perma.cc/H9KU-RRFZ].

11. I understand judicial capacity to mean the ability of judicial institutions to undertake a particular task. Such capacity involves its jurisdictional authority, but also “structural organization of the judiciary” along with the norms held by judges. Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 *YALE L.J.* 422, 424 (2012). See also JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* xiv, 4 (2012) (ebook) (“[Judicial power] . . . more commonly and more foundationally derives from interaction with political elites, from empowering legislation, and from public, media, and interest group support.”).

12. Paul Frymer, *Acting When Elected Officials Won’t; Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–1985*, 97 *AM. POL. SCI. REV.* 483, 484 (2003) (arguing that courts’ ability to integrate labor unions was the result of “[e]lected officials [who] provided judges the power to determine civil rights law and establish remedies and encouraged private litigation by passing numerous statutes that made court strategies more affordable for civil rights groups”).

13. CROWE, *supra* note 11, at 199–212 (discussing the ways in which the judiciary, under the leadership of Chief Justice William Howard Taft, developed the organizational autonomy that allowed it to manage its role in dispute resolution, including, but not limited to diminishing the role of mandatory jurisdiction in shaping the Supreme Court’s docket).

14. See Howard Gillman, *How Political Parties Can Use Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *AM. POL. SCI. REV.* 511, 512–13 (2002) (describing how the expansion of national economic enterprise required “more reliable legal institutions to investors and producers who operated within a national market,” thereby making an empowered judiciary a part of the Republican Party’s agenda at the end of the nineteenth century).

a more Roosevelt-friendly court.<sup>15</sup> What follows in this Essay is premised upon a reading of federal courts as institutions whose development is embedded within a political context.

Understanding the political context in which the nationwide injunction emerges and is deployed requires paying attention to the institutions that make up that larger political ecosystem. For example, focusing on *Marbury v. Madison*<sup>16</sup>—likely the most significant institutional development in the history of the federal courts—as merely an articulation of doctrine or a mere interpretation of the Constitution alongside the debates of the drafting and ratification periods misses a large part of the story.<sup>17</sup> *Marbury* surely is not capable of fully explaining why, after having assumed the authority to review congressional action, the Court refused to exercise that authority in the case before it.<sup>18</sup> Moreover, *Marbury* does not explain why other institutions ally with the Court to enhance its authority.<sup>19</sup> Finally, *Marbury* does not tell us why a practice might be deployed at one time as against another.<sup>20</sup> These are all

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15. On Roosevelt’s “court-packing plan,” see, for example, WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 133–34 (1995) (highlighting Roosevelt’s emphasis on overcrowded dockets as, in part, a result of “aged or infirm” judges, whose advanced age might “[lead them] to avoid an examination of complicated and changed conditions”).

16. 5 U.S. 137 (1803).

17. For a rejection of the court-centered narrative of judicial review, see KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 1, 9 (2007) (“The judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate.”).

18. Though the Court clearly concluded that *Marbury* had a right to delivery of the commission at issue in the dispute, the Court held that it was without jurisdiction to decide the dispute because the Judiciary Act of 1789 unconstitutionally gave it jurisdiction. Commentators have argued that Marshall was motivated to act in this way because of his fear that the Court—and he—was institutionally vulnerable. For a discussion, see Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC’Y REV. 87, 98 (1996) (“[T]he Federalists believed Jefferson was out to destroy the judiciary by removing all Federalist judges.”) (internal quotations and citations omitted).

19. See Gillman, *supra* note 14, at 512 (“[T]he expansion of federal judicial power in the late nineteenth century is best understood as the sort of familiar partisan or programmatic entrenchment.”).

20. On the importance of time in institutional evolution, see PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* 1, 2 (2004) (“[S]ystematically situating particular moments (including the present) in a

questions that are as applicable to the emergence and deployment of the nationwide injunction (or other judicial tools) as they are to the practice of judicial review more generally.

Delivering a detailed historical account of the politics leading to the nationwide injunction is somewhat beyond the scope of this Essay. But this Essay hypothesizes that a key component of the recent increase in nationwide injunction deployment likely was increased partisan polarization in Congress that led to increasingly gridlocked legislative processes, which in turn led to increased presidential unilateral action.<sup>21</sup> One response to my hypothesis might reasonably be that prior polarization did not lead to nationwide injunctions in the past.<sup>22</sup> Another response is that presidential authority increased for most of the twentieth century without the nationwide injunction becoming a commonplace tool in the judicial remedial toolkit.<sup>23</sup>

These responses may be true, but the consequences of polarization would be different in an era of a less institutionally powerful presidency. Partisan polarization's impact on contemporary American politics is not limited to the fact of its occurrence but rather by the *timing* of its occurrence and the *sequence* of other events unfolding alongside it.<sup>24</sup> Apprehended in this way, partisan polarization and congressional gridlock mean something decidedly different after the growth of the administrative state, the rise of the national security state, and other augmentations of executive branch authority. The nationwide injunction is an adaptive response by the judiciary to a system under pressure by the imbalances created by an increasingly powerful presidency set further free from effective congressional oversight because of gridlock.

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temporal sequence of events and processes stretching over extended periods . . . can greatly enrich our understanding of complex social dynamics.”).

21. See discussion accompanying notes *infra* 69–143.

22. See, e.g., David W. Brady & Hahrie Han, *Our Politics May Be Polarized. But That's Nothing New.*, WASH. POST (Jan. 16, 2014, 5:30 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/16/our-politics-may-be-polarized-but-thats-nothing-new/> [<https://perma.cc/D8HN-LTPS>].

23. See, e.g., Mark Byrnes, *The Presidency and Domestic Policy*, 11 OAH MAGAZINE HISTORY 21 (1997) (identifying Theodore Roosevelt and Woodrow Wilson as twentieth-century expanders of presidential power).

24. See Paul Pierson, *Not Just What, but When: Timing and Sequence in Political Processes*, 14 STUD. AM. POL. GOV'T 72, 76 (2000) (“[P]reviously viable options may be foreclosed in the aftermath of a sustained period of positive feedback, and [] cumulative commitments on the existing path will often make change difficult and will condition the form in which new branchings will occur.”).



As Pierson put it, these path-dependent processes impact tools that institutions develop—that is, the nationwide injunction—and the timing of their deployment—the current era.<sup>25</sup> For example, how do Congress’s decisions to delegate authority bolster the President’s role as Congress’s policymaking competitor, thereby making it tougher for subsequent Congresses to challenge the President on those delegated areas?<sup>26</sup> How do these accretions of advantage over time allow the executive to act differently under conditions that develop later in time—like the emergence (or reemergence) of polarized legislative institutions?

The variable—a polarized Congress—behaves differently and produces different outcomes in this new institutional environment than it likely would have at other periods. The same applies to unilateral executive action. While unilateral presidential action may have been present for a significant proportion of the Republic, this “snapshot” view of political development suggests to some that unilateral executive action ought to produce the same results in all political contexts.<sup>27</sup> This Essay’s focus on factors that may long predate the nationwide injunction rejects that assumption.

Nothing above should be read to suggest that the judiciary is irrelevant in this narrative. A judiciary without the capacity to see itself as a central actor in the resolution of societal challenges might not have been capable of responding with remedial creativity had it not flexed those muscles earlier in settings like school integration after *Brown v. Board of Education*<sup>28</sup> or during the prison reform litigation of the 1970s.<sup>29</sup> Indeed, even with the

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25. *Id.* at 79–84.

26. For example, the President’s development of budgetary expertise in the Office of Management and Budget gives the President advantages in domestic policy that earlier Presidents did not possess. These transform the President’s dependence on bargaining with Congress because unilateral action may yield policies that are relatively less bad and, potentially, decidedly better when Congress is unable to act. See Gleason Judd, *Showing Off: Promise and Peril in Unilateral Policymaking*, 12 Q. J. POL. SCI. 241 (2017) (addressing the President’s calculus for unilateral action); see also Aaron Wildavsky, *The Two Presidencies*, 4 TRANSACTION 162 (1966) (discussing the differences in presidential bargaining positions in the domestic and foreign policy domain, arguing that the President has greater bargaining advantages in the foreign policy domain).

27. Pierson, *supra* note 20.

28. 347 U.S. 483 (1954).

29. For a discussion of the federal courts’ exercise of remedial creativity, see PHILLIP J. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* (1988) (focusing on complex remedial decrees by

possession of both doctrinal and institutional capacity to deploy innovative remedial devices like the nationwide injunction, courts might not deploy such capacity for many different reasons, including political reasons. As such, the deployment must be understood as involving a calculation of whether the risk of using the nationwide injunction outweighs the benefits.<sup>30</sup> This is not the only way of thinking about the nationwide-injunction phenomenon. But thinking about the nationwide injunction against the backdrop of Congress and the President allows us to appreciate the significance of how those institutions might impact a judge's decision that issuing a nationwide injunction is rational.

## II. COMPETING ACCOUNTS OF THE NATIONWIDE INJUNCTION

The dominant account of the emergence and deployment of the nationwide injunction is the court-centered account. This account has been the basis of the normative critique of the nationwide injunction. Against this court-centered account, this Part introduces the political-context account of the nationwide injunction and explains its congruity with the theoretical framework articulated above.

The dominant, court-centered account is found in the media, politics, and academic literature.<sup>31</sup> The court-centered account trains its eye on courts as the source of the "problem" of the nationwide injunction. Seeing courts as the source constrains the focus of the inquiry on doctrines, or other tools, that empower, discipline, and constrain judicial exercises of authority. As such, the court-centered account has primarily focused on the nationwide injunction as a distortion of the role of the judiciary, a

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federal district courts in school desegregation, prison, and mental health disputes, among others).

30. On courts as strategic actors, see Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625 (2000).

31. See, e.g., Max Bloom, *American District Courts Wield Too Much Power*, NAT'L REV. (July 7, 2017, 6:45 PM), <https://www.nationalreview.com/2017/07/us-district-courts-too-powerful-nationwide-injunctions-hurt-legal-system/> [<https://perma.cc/RUV8-YWFG>]; Kerry Eleveld, *How Conservative Federal Judges in Texas Are Putting a Stranglehold on President Obama's Policies*, DAILY KOS (Oct. 27, 2016, 11:16 AM), <https://www.dailykos.com/stories/2016/10/27/1587515/-How-conservative-federal-judges-in-Texas-are-putting-a-stranglehold-on-President-Obama-s-policies> [<https://perma.cc/TC5F-V9E6>]. Regarding the political focus on courts, see *supra* note 7; and on academic treatments, see *supra* note 4.

threat to separation of powers, and an incentive for forum shopping.<sup>32</sup>

By contrast, my political-context account asks what external factors might explain the judiciary's behavior with respect to the nationwide injunction. Unlike the court-centered account, my political-context account does not turn inward toward doctrine, but rather turns outward to the disputes that seem to have given rise to the deployment of the nationwide injunction—specifically the legitimacy of unilateral presidential action—and asks whether understanding that phenomenon might give us better insight into the nationwide injunction.

#### A. *The Court-Centered Account of the Nationwide Injunction*

The court-centered account is a common launchpad for critiques of the nationwide injunction. Scholars have criticized the use of nationwide injunctions as a brand of de facto class action that fails to follow the Federal Rules of Civil Procedure's processes for expanding the scope and remedial authority of courts tasked with adjudicating systemic disputes.<sup>33</sup> Other scholars have defended nationwide injunctions as consistent with the judiciary's equitable remedial authority and cite Article III's constraints on the judiciary as a mitigating factor.<sup>34</sup>

What unites these accounts of the nationwide injunction is their focus on courts alone. Under the court-centered account, courts are the only important institution for understanding, critiquing, and defending the nationwide injunction. The challenge begins with the nationwide injunction. The challenge is resolved with arguments for bringing courts back in line, or, conversely, justifying the precedents and rationales for these courts' behaviors.<sup>35</sup>

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32. See *supra* note 4. But see Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020) (deploying a court-centered account of the nationwide (universal) injunction to challenge accounts that it is inconsistent with Article III).

33. See Morley, *Nationwide Injunctions*, *supra* note 9; Morley, *De Facto Class Actions*, *supra* note 9.

34. See Frost, *supra* note 4.

35. For example, Frost's defense of the nationwide injunction relies on a broad reading of judicial power and expansive remedial authority. She writes, "No rule has ever barred courts from issuing injunctions controlling a defendant's conduct vis-à-vis nonparties." *Id.* at 1080. On the standing issue, she writes, "[U]nder some circumstances courts allow individuals who themselves have no injury to proceed

In the most ambitious attempt to provide a historical account of the nationwide injunction, Samuel Bray suggests that it is a child of the emergence of the administrative state, and he identifies its initial growth in cases involving agency action.<sup>36</sup> In his explanation of why the nationwide injunction emerged, however, Professor Bray asserts that there was a convergence of (1) the division of judicial authority that was once exercised by a single actor in the older English practice with (2) conceptual transformations that saw suits against the state as offensive tools rather than merely defensive tools, and a change in what it meant to successfully challenge state authority from non-application of a law in a particular context, to a broader invalidation of a law.<sup>37</sup>

Bray asserts that rise of a federal judiciary with multiple, coequal judicial decisionmakers—what he calls “multiple Chancellors”<sup>38</sup>—set the stage for the nationwide injunction, despite the fact that the divided federal judiciary emerged over 150 years prior to the nationwide injunction’s emergence.<sup>39</sup> He argues that the rise of multiple chancellors could not, by itself, explain the rise of the nationwide injunction.<sup>40</sup> To Bray, the necessary elements first included a change in the conception of litigation against the government as a suit against the government’s enforcement of an allegedly unconstitutional statute—a defensive suit—to a conception of such a challenge in more offensive terms, allowing for suits even where enforcement was

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with litigation, which further suggests that courts have the power to issue remedies that extend beyond the plaintiff’s actual injuries.” *Id.* at 1083. Even Frost’s larger separation-of-powers defense is aimed at justifying the judicial role in serving as a “check on the political branches.” *Id.* at 1088.

36. Bray, *supra* note 4.

37. *Id.* at 445.

38. The rise of several federal district courts with identical equitable authority rather than the concentration of such authority in a single actor created the structural possibility for variation and conflict.

39. *Id.* at 445–48. Here, Bray means that the federal judiciary abandoned the “one-chancellor” structure that unified the equitable authority within a single institutional actor. By creating multiple chancellors and endowing them with equitable authority in the late eighteenth century, the United States made “every judge . . . a Chancellor,” capable of delivering equitable relief. *Id.* Under such a structure, the nationwide injunction could raise problems not seen in a system of a single Chancellor. But Bray himself does not identify the initial nationwide injunction as emerging until at least after World War II. *See id.* at 445.

40. *Id.* at 449 (“With enough judicial restraint or certain ideological views about courts and law, the vulnerabilities of the multiple-chancellor structure would not have been exposed.”).

not threatened.<sup>41</sup> Bray suggests that the Declaratory Judgment Act may have been the source of change in this way of thinking about suits against the government.<sup>42</sup> The necessary elements also included a change in the way judges thought about the task of adjudicating a constitutional challenge to a law.<sup>43</sup> The judiciary once saw invalidation of a law as refusing to apply it to the specific parties to the dispute. Bray argues that this narrow conception gave way to a broader conception of invalidation of the statute, which had more general applicability.<sup>44</sup> This transformation seemingly expanded the consequences of a judicial invalidation, including the court's subsequent remedial authority.<sup>45</sup> Thus, Bray's framing and historical accounts of the rise of the nationwide injunction tell a story about the development of the rules of civil procedure, remedial authority, the scope of Article III, constitutional litigation, and how judges invalidate laws.

But this court-centered account does not tell us much else. Nationwide injunctions impact controversies that have made their way to not only courts but also the front pages of websites and newspapers. Nonetheless, court-centered accounts seem divorced from an understanding of courts as institutions embedded within a larger political ecology.<sup>46</sup> Ignoring the political environment may also obscure critical dimensions of nationwide injunctions that we ought not to miss. Court-centered accounts see the emergence of the nationwide injunction as the consequence of changing ideological and conceptual capacities of courts, without much explanation of why these capacities have been deployed recently.<sup>47</sup> Again, what circumstances provide for the convergence of these institutional ingredients—including multiple judicial actors, expansive conception of judicial role,

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41. *Id.* at 449–52.

42. *Id.* at 450.

43. *Id.* at 451–52.

44. *Id.* at 451.

45. While Bray mentions other factors that this Essay suggests are likely to offer better explanations about the timing of the surge in nationwide injunctions, including the increase in agency rulemaking, these appear to be less central factors in his analysis. *Id.* at 452–53. *See also* Wasserman, *supra* note 4, at 336 (asserting that nationwide injunctions find their roots in a transformation in the conception of constitutional litigation, which now entails such litigation as giving a court the authority to invalidate the law at issue rather than an older conception of constitutional litigation that understood invalidity as merely a decision not to apply a particular law to a particular party).

46. *See* discussion *supra* note 5.

47. *See* sources cited *supra* note 4.

and expansive conception of litigation against the government—to give rise to the nationwide injunction?

Bray identifies the Supreme Court's 1954 *Brown* decision as the basis for expanded conceptions of the judicial role when resolving public disputes, and traces the emergence of nationwide injunctions accordingly.<sup>48</sup> Under these accounts, *Brown* is depicted as based, at least in part, on changing conceptions of the Court's responsibility to African Americans during the Jim Crow era.<sup>49</sup> What these accounts seem to ignore is the larger institutional context in which the Court decided *Brown*.<sup>50</sup> The Court rendered its decision in a context that included some public support—at least in the North—and significant backing within the executive branch, which submitted a brief in favor of the plaintiffs' petition.<sup>51</sup>

This is not to say that ideological or conceptual transformations within the Court did not assist in bringing about its de-

48. Bray, *supra* note 4, at 455 (“The moral rightness of the desegregation cases seemingly reshaped federal judges’ self-conception of their remedial role. After the *Brown* era, judges became more willing to give commands to federal and state officers.”).

49. For a discussion of increased judicial solicitude for minority rights protection, see Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1316 (1982) (“The critical importance of *Brown v. Board of Education* was that it removed any doubt about the Court’s commitment to [rewrite the Constitution]—whatever its implications.”).

50. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980):

I contend that the decision in *Brown* to break with the Court’s long-held position on these issues cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government.

See also, MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2011).

51. See, e.g., KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN 4* (2004) (arguing that *Brown* is a “byproduct[] of an institutional mission . . . that was significantly shaped by . . . the ‘judicial policy’ of the Roosevelt administration, a policy that was itself a consequence of FDR’s management of divisions within the Democratic Party and his construction of the modern presidency”). See also GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 106 (1993) (arguing that *Brown* advanced “the political preferences of the durable majority whose interests were represented on the *Brown* Supreme Court”).

cision. But the Court clearly was attuned to how its decision would be received by other American institutions. This point is supported by the Court's refusal to entertain an appeal from the Virginia Supreme Court challenging the state's ban on interracial marriage in the wake of *Brown*. In *Naim v. Naim*, the Court squarely faced a constitutional challenge to Virginia's anti-miscegenation law.<sup>52</sup> Despite the fact that the case seemed to fall within the Court's mandatory jurisdiction,<sup>53</sup> the Court maneuvered to delay, and ultimately deny, exercising jurisdiction over the dispute.<sup>54</sup> Accounts of the Court's treatment of the appeal suggest that the Court feared a reaction by whites—both in and out of the South—so soon after its decision in *Brown*. It is reported that Justice Clark supported the Court's refusal to exercise jurisdiction saying, “[O]ne bombshell at a time is enough.”<sup>55</sup> That “bombshell,” of course, was *Brown*.

The *Brown* decision was not merely a decision that involved the Court's evolution on the question of its role in protecting minority rights, or its conclusion that it had the capacity and authority to undertake such a task. *Brown* also involved a calculus about how the Court's decision would impact the wider institutional environment.<sup>56</sup> Similarly, ideological and conceptual ex-

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52. 87 S.E.2d 749 (Va. 1955), *vacated*, 350 U.S. 891 (1955).

53. The Court's mandatory jurisdiction at the time required the Court to entertain appeals from state courts where the state court had ruled against a federal right. In *Naim*, the Virginia court upheld a state law against a federal constitutional challenge. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 22–23 (Rachel E. Barkow et al. eds., 7th ed. 2017).

54. The Court initially vacated the state's decision upholding the anti-miscegenation statute on the ground that the record was inadequate. *Naim v. Naim*, 350 U.S. 891 (1955). On remand, Virginia's highest court essentially ignored the Court's voiding of its initial decision and upheld the anti-miscegenation statute again. *Naim v. Naim*, 90 S.E.2d 849 (Va. 1956). In the Supreme Court a second time, the Court held that the Virginia decision “leaves the case devoid of a properly presented federal question.” *Naim v. Naim*, 350 U.S. 985 (1956). Commentators have described the Court's decision as a strategic dodge of a conflict with the post-*Brown* south. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 323 (2004) (“A majority of the justices apparently preferred to be humiliated at the hands of truculent state jurists rather than to stoke further the fires of racial controversy.”).

55. Richard Delgado, *Naim v. Naim*, 12 NEVADA L.J. 525, 526 (2012) (citing to LUCAS POWE, JR., *ELEMENTS OF JUDICIAL STRATEGY* 193 (1964)).

56. See generally ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 276 (1992) (describing the Warren Court's awareness that majoritarian institutions had not resolved the question of *de jure* racial segregation and its determination that the federal judiciary—primarily, federal district courts—might serve a role in advancing an “institutional means for inducing the racial antagonists to engage in reasoned inquiry”).

planations are insufficient to explain the emergence of the nationwide injunction. To the extent that such injunctions are expenditures of institutional capital, an important question must be: Under what conditions is the issuance of nationwide injunctions an institutionally rational choice? The circumstances under which resort to the nationwide injunction might be institutionally rational for the judicial actor likely are not determined by doctrinal niceties, but by political contexts.

This Essay invites us to confront the prospect that the nationwide injunction is a rational institutional response to increasing assertions of unilateral presidential authority, which are incentivized and immunized by increased legislative gridlock. The court-centered account obscures this analysis; my political-context account brings it into focus.

And partisans may indeed find political (and principled) reasons to support nationwide injunctions. During congressional hearings on nationwide injunctions at which three of the leading scholars on the nationwide injunction were called to testify, there was clearly a partisan divide.<sup>57</sup> For example, Representative Jerrold Nadler, the then-ranking member of the House Judiciary Committee, pressed Professor Amanda Frost to declare that the Supreme Court had “in effect upheld the constitutionality of nationwide injunctions”<sup>58</sup> in contrast with Bray’s assertion that those injunctions lacked the justices’ approval. Nadler then pressed Bray on whether the Court had implicitly upheld the nationwide injunction in *Trump v. Hawaii*<sup>59</sup> when it decided to stay the injunction on the travel ban.<sup>60</sup>

Representative Goodlatte, also revealing his partisan leanings, challenged Frost’s assertion that Deferred Action for Parents of Americans (DAPA) was invalidated by a nationwide injunction.<sup>61</sup> He declared, “[I]n the DAPA case what the court actually found was a violation of the APA. That was something that was not asserted in the lawsuits against the travel orders. And there is a difference there.”<sup>62</sup>

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57. Samuel Bray, Amanda Frost, and Michael Morley were invited to testify in a congressional hearing. See *The Role and Impact of Nationwide Injunctions by District Courts Before the Subcomm. on Courts, Intellectual Prop. and the Internet of the H. Comm. on the Judiciary*, 115th Cong. (2017).

58. *Id.*

59. 138 S. Ct. 2392 (2018).

60. *Id.*

61. *Id.*

62. *Id.*



To the extent that Republican members sought to defend specific nationwide injunctions, they endeavored to distinguish them from other nationwide injunctions in ways that would have legitimized the issuance of injunctions against the Obama Administration, while still calling into question the legitimacy of injunctions issued against the Trump Administration.<sup>63</sup> And Nadler, whose party was in the minority in the House and Senate and was out of the White House, seemed willing to accept the legitimacy of the nationwide injunction.<sup>64</sup>

That Nadler is willing to accept these judicial tools, at least while a Republican is in the White House, should not be ignored when we are thinking about the decision of federal judges to issue nationwide injunctions. In fact, it proves my political-context account is the more valuable lens for analyzing nationwide injunctions.

### *B. The Political-Context Account of the Nationwide Injunction*

There is much to admire about the court-centered account of the emergence of the nationwide injunction. It provides us with an account of institutional capacity—both conceptual and legal—that empowers courts to see themselves as endowed with the authority to issue nationwide injunctions. And the court-centered account contributes to answering the question of how institutions accrete new forms of power, which is an enduring question in institutional analysis.

That said, the court-centered account does not appear sufficient to answer the question of *why* a court might choose to deploy a nationwide injunction at a particular point in time. Institutional persistence is inconsistent with an institution recklessly deploying institutional capital. The court-centered account's explanation appears to assume that the judiciary—with its doctrines designed to preserve institutional resources<sup>65</sup>—

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63. *Id.*

64. Suzanne Monyak, *House Panel Advances Bill to Bar Nationwide Injunctions*, LAW360 (Sept. 13, 2018), <https://www.law360.com/articles/1082785/house-panel-advances-bill-to-bar-nationwide-injunctions> (last visited Nov. 12, 2019) [<https://perma.cc/MYK8-RVPB>] (highlighting that Nadler criticized the legislation on the ground that it would “inject confusion and needless barriers to relief into the legal system”).

65. The judicial conservation of resources is exemplified most prominently in the prudential standing and political question doctrines, to name two. *See* *Rucho v.*

would spend capital in ways that do not conform to some sense of rational preservation. This makes it important to understand why deployment of the national injunction would make sense for an institution committed to preserving its capital. The literature's attempt to explain this by reference to *Brown's* impact on judicial institutions is likely inadequate in at least one important respect. If we accept the impact that the *Brown* era had on the conceptualization of the role of courts, why does today's era, which appears to have abandoned other core *Brown*-era tenets,<sup>66</sup> continue to be under this case's sway? What makes a practice, the rise of which is explained as being at least partially rooted in *Brown*, emerge with such increased use today?

For a partial answer, I return to those factors that seemed to have been moved to the margins (noted as "Other Changes" by Bray), especially the rise of the administrative state and increased administrative lawmaking.<sup>67</sup> Judicial precedent appears to confirm that a successful challenge to agency action can enjoin the agency's application of the regulation even against nonparties.<sup>68</sup>

*Make the Road New York v. McAleenan*<sup>69</sup> is such an example. In this 2019 district court decision setting aside the Trump Administration's expedited removal regulation,<sup>70</sup> the judge issued a nationwide injunction over the objections of the Depart-

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Common Cause, 139 S. Ct. 2484 (2019) (refusing to exercise jurisdiction over claims of partisan gerrymandering as political questions); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (refusing to exercise jurisdiction over disputes involving "generalized grievances").

66. For examples of departures from the *Brown* era, see *Shelby County v. Holder*, 570 U.S. 529 (2013) (invalidating section 4 of the Voting Rights Act as violative of federalism principles); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (overruling the district court, which mandated busing to remedy de facto segregated schools). Indeed, even so-called liberal judges who people the judiciary likely do not see *Brown* as the paradigmatic example of judging. See Neil A. Lewis, *In Picking Judges, Clinton Has Not Tried to Reverse Republicans*, N.Y. TIMES (Aug. 1, 1996), <https://www.nytimes.com/1996/08/01/us/in-selecting-federal-judges-clinton-has-not-tried-to-reverse-republicans.html> [<https://perma.cc/TE5D-E6AK>] ("[W]hat may be most notable about Mr. Clinton's judicial appointments may be reluctance to fill the courts with liberal judges.").

67. Bray, *supra* note 4, at 452.

68. See, e.g., *Nat'l Mining Ass'n. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (vacating rule as universally applicable, not simply applicable to individual petitioners) (referencing *Harmon v. Thornburgh*, 878 F.2d 484, 496 (D.C. Cir. 1989)).

69. 405 F. Supp. 3d 1 (D.D.C. 2019).

70. Designating Aliens for Expedited Removal, 82 Fed. Reg. 35,409 (July 23, 2019).

ment of Homeland Security (DHS), in part on the ground that DHS's objection to the issuance of a nationwide injunction would "simultaneously enlarge[] agency power and undercut[] judicial authority . . . ."71 The justification by the district court in *Make the Road* also suggests that while the court is specifically addressing a question of agency promulgation of immigration policy without undertaking notice-and-comment rulemaking—a paradigmatic form of unilateral executive action—the court seems to also see itself as maintaining a system-wide balance of power.

Thus, justification of the nationwide injunction sounds in two registers, namely: (1) the ordinary register of precedent regarding judicial invalidation of unlawful agency action; and (2) the "higher" register regarding the judiciary's role in checking the executive's use (or abuse) of authority. In *Make the Road*, the district court clearly had a conception of what it meant to invalidate a federal agency action that came close to a court-centered account. But the district court made explicit that which appears to be implicit in Wasserman and Bray's account—namely that the conception is grounded in a concern about an overreaching executive branch—saying that:

[B]ecause our constitutional system clearly contemplates that the judiciary will have the power to check the conduct of executive branch officials who violate the law, [the assertion] that the agency should be deemed to have the unfettered ability to carry on with respect to pronounced unlawful behavior . . . is quite troubling.<sup>72</sup>

This seems different, at least in degree, from an undifferentiated concern about litigation against the government. Here, the district court emphasized actions by the executive branch that are a key component to our understanding of the recent upsurge in nationwide injunctions.

Though "judicial activism" of the sort engaged in by the *Brown*-era courts may no longer be in fashion, judicial activism to preserve federalism or separation-of-powers values defines to-

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71. *Make the Road New York v. Kevin McAleenan*, No. 19-cv-2369 (KBJ), 2019 U.S. Dist. LEXIS 166944, at \*166 (D.D.C. Sept. 27, 2019).

72. *Id.* at \*167.

day's jurisprudential era.<sup>73</sup> But what makes this era one in which federalism or separation-of-powers values are threatened? The following Part argues that the rise in unilateral presidential power in response to a gridlocked Congress might be the threat underwriting judicial resort to the nationwide injunction.

### III. EXPLORING THE POLITICAL-CONTEXT ACCOUNT: AN IMPOTENT CONGRESS AND AN EMPOWERED EXECUTIVE

The political-context account of the surge and transformation of the nationwide injunction into a tool of partisan warfare requires us to think about the larger political landscape in which resort to such a tool becomes possible. Situating nationwide injunctions in a larger ecology decenters the injunction as a singularly aberrant practice.

The political-context account avoids an exclusive focus on what a single district court does in its responsive capacity. Rather, it focuses on the how the injunction fits within a larger set of pathologies in the American political landscape. Critics of the nationwide injunction dwell on the risks that it poses for American democracy.<sup>74</sup> One advantage of my political-context account is that those risks are capable of being assessed alongside the risks that are posed by unchecked unilateral presidential action, thereby avoiding a truncated decision-making process where the nationwide injunction is viewed in isolation. Therefore, the political context is congressional gridlock underwritten by partisan polarization and fragile control in Congress, along with unilateral presidential actions responding to congressional inaction.

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73. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (invalidating the Affordable Care Act's Medicaid Expansion and Individual Mandate provisions on federalism grounds); *Free Enter. Fund v. Pub. Co. Oversight Accounting Bd.*, 561 U.S. 477 (2010) (invalidating the removal provisions of the Sarbanes-Oxley Act for encroaching on presidential removal authority).

74. Critics of the nationwide injunction contend that its use politicizes the judiciary, undermines constitutional constraints on the judiciary, and undermines incentives for political compromise. See Ronald A. Cass, *Nationwide Injunctions' Governance Problems* 28–38 (unpublished manuscript) (on file with the University of Colorado Law Review); see also Barr, *supra* note 2.

### A. *Partisan Polarization in Congress*

The existence and scope of partisan polarization in Congress has become one of the most studied issues in American politics.<sup>75</sup> It is described as the source of the gridlock in government and of the distrust and apathy about government that shapes the current political era.<sup>76</sup> The contemporary polarization of the political parties is often described as having its roots in the 1970s when the Republican and Democratic parties began to move further apart on the ideological continuum.<sup>77</sup> Statistical studies of Congress demonstrate that from the 1970s, the parties began to diverge as the Democratic Party became more liberal and the Republican Party became more conservative.<sup>78</sup>

Measures of increasing partisan polarization in Congress are present in both the House of Representatives and the Senate. From about 1985 to the present, the ideological divergence of the parties in the House of Representatives resulted from leftward drift within the Democratic Party's membership and, more significantly, from a substantial rightward shift in the Republican Party's membership.<sup>79</sup>

Ideological position scores are illustrative.<sup>80</sup> For example, the average Democratic member of the House of Representatives

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75. In the last several years, a number of books have been published examining the phenomenon. *See, e.g.*, SAM ROSENFELD, *THE POLARIZERS: THE POSTWAR ARCHITECTS OF OUR PARTISAN ERA* (2017); SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008); DANIELLE THOMSEN, *OPTING OUT OF CONGRESS: PARTISAN POLARIZATION AND THE DECLINE OF MODERATE CANDIDATES* (2018).

76. David R. Jones, *Declining Trust in Congress: Effects of Polarization and Consequences for Democracy*, 13 *FORUM* 375, 383–88 (2015) (finding that congressional polarization, and its attendant effects on Congress's capacity to respond to problems, has negatively affected the level of public trust).

77. Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 *POLITY* 411, 415 (2014).

78. *Id.*

79. Keith T. Poole, *The Roots of Polarization of Modern U.S. Politics* 32 (September 8, 2008) (unpublished paper) (on file with the University of Colorado Law Review) ("Republicans have moved steadily to the right on the liberal-conservative dimension with conservatives replacing moderate and conservative Democrats in the South.")

80. Ideological position scores are constructed on the basis of actual votes taken in Congress. Using a method called DW-NOMINATE (Dynamic Weighted NOMINAL Three-step Estimation), which is a scaling procedure developed in the 1980s by political science professors Keith Poole and Howard Rosenthal, legislators are "mapped" based on their voting history and placed in proximity to one another on the basis of such votes. The map understands ideological variation based on distance on the map arranged according to a liberal-conservative axis and another

in 1959 had an ideological position score of -0.245.<sup>81</sup> By way of context, the Democratic score is measured between 0 and -1, with -1 being the most liberal.<sup>82</sup> In 2015, the same score was -0.384, likely the most liberal score recorded since at least 1947.<sup>83</sup> By contrast, the average Republican member of the House in 1959 had an ideological position score of 0.221, with the Republican score measured between 0 and 1, with 1 being the most conservative ideological position.<sup>84</sup> In 2015 that same score was 0.693, the second most conservative score since at least 1947.<sup>85</sup>

Similar shifts can be seen in the Senate. In 1959, the average Democratic senator's ideological position was -0.229, while the average Republican position was 0.24.<sup>86</sup> In 2015, the average ideological position of a Democratic senator was -0.388, while the corresponding score for an average Republican Senator was 0.551.<sup>87</sup> In short, both houses of Congress became far more polarized.

Explanations of the increase in political polarization during the latter half of the twentieth century have been varied. Hare and Poole argue that the migration of white southerners from the Democratic Party to the Republican Party, after the Civil Rights Movement of the 1960s, resulted in a "more homogeneously liberal" Democratic Party and a more conservative Republican Party.<sup>88</sup> Poole measures the current partisan landscape by examining the 108th House of Representatives (2003–05) as two ideologically distinct clusters made up of largely Democrats (regardless of region) and Republicans.<sup>89</sup> He reports that there is virtually no overlap between Democrats and Republicans from an ideological perspective, as compared to earlier periods.<sup>90</sup>

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axis on significant political issues in American history, including slavery, currency, nativism, civil rights, and lifestyle issues. See *About the Project*, VOTEVIEW.COM, <https://voteview.com/about> (last visited Jan. 30, 2020) [<https://perma.cc/6XVG-BH99>].

81. THE BROOKINGS INST., VITAL STATISTICS ON CONGRESS: DATA ON THE U.S. CONGRESS, 18 (2019), [https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats\\_ch8\\_full.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch8_full.pdf) [<https://perma.cc/TNX4-4CNM>].

82. *Id.* at 39.

83. *Id.* at 40.

84. *Id.* at 37–38.

85. *Id.* at 38.

86. *Id.* at 40.

87. *Id.* at 40.

88. Hare & Poole, *supra* note 77, at 416.

89. Poole, *supra* note 79, at 33.

90. *Id.* at 38.

Hare and Poole also argue that the Republican Party's shift to the right cannot be totally explained by an infusion of conservative Southern voters but by the move by conservative voters across the country into the Republican Party.<sup>91</sup> They contend that conservative activists and party-aligned interest groups also aided the Republican Party's rightward movement.<sup>92</sup>

While commentators seem to identify the effects of partisan polarization as having started in the 1970s, polarization is likely the effect of partisan sorting that slowly increased over time.<sup>93</sup> Despite the popular identification of the Civil Rights Movement as the impetus for realignment, the roots likely also lie in the New Deal era.<sup>94</sup> That period is important to our polarization narrative because it established a trajectory that sorted the political parties as more coherently liberal or conservative on social and economic issues.<sup>95</sup>

One of the most significant consequences of the New Deal's transformation of the American political system is the political alliance that developed between the Democratic Party and labor.<sup>96</sup> Political scientist Tracey Roof reports that the labor movement was not part of Franklin Roosevelt's original electoral coalition, despite Roosevelt's appeal to working class voters.<sup>97</sup> Historian Lizabeth Cohen reports that workers in the pre-New Deal era were largely disconnected from the state and saw their

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91. Hare & Poole, *supra* note 77, at 417.

92. *Id.*

93. Partisan sorting is the phenomenon by which the two major political parties have become increasingly ideologically pure. This has involved the disappearance of liberal Republicans and conservative Democrats from the parties' respective coalitions.

94. Hare & Poole, *supra* note 77, at 415 (arguing that while the modern roots of southern white secession from the Democratic Party are a result of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the ideological divergence of the two parties on economic and social issues trace back to the New Deal reconfiguration of the Democratic Party coalition).

95. See ERIC SCHICKLER, *RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965* (2016) (arguing that the incorporation of organized labor and blacks into the Democratic Party had the effect of making the Party a reliably liberal one on both economic and racial issues). The creation of more ideologically "pure" parties has been offered as an explanation for why partisan polarization today is different from other eras of polarization of political parties. See MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* (2009).

96. TRACY ROOF, *AMERICAN LABOR, CONGRESS, AND THE WELFARE STATE, 1935–2010*, at 22–23 (2011) (discussing the New Deal era's incorporation of the American labor movement into the Democratic Party coalition).

97. *Id.* at 22–25.

fates as dominated by the ties to their employers through “welfare capitalism.”<sup>98</sup> The New Deal’s inauguration of a social welfare state independent of private business (at least to some extent) transformed workers’ relationships to the state and their expectations of it.<sup>99</sup>

Cohen describes a largely unorganized working class at the dawn of the New Deal.<sup>100</sup> This would begin to change when the state moved into the employment relationship between workers and employers.<sup>101</sup> Beginning with the largely uneven efforts of the National Industrial Recovery Act, the national government attempted to regularize worker wages and hours by encouraging employers to voluntarily set minimum wages and maximum hours.<sup>102</sup> Despite the policy’s mixed results, Cohen argues that the National Industrial Recovery Act “probably did more to heighten worker awareness that government could, and should, intervene in the private sector” than it achieved in substantive economic benefits for workers.<sup>103</sup> Indeed, political scientist Eric Schickler argues that the coalition between labor and the Democratic Party helped to move the party leftward on civil rights and incorporate blacks into the Democratic Party, which also laid the foundation for events in the mid-1960s.<sup>104</sup>

Whatever the causes of increases in partisan polarization in Congress, there are significant consequences for that institution’s ability to address the challenges of American governance on a host of issues facing the country.<sup>105</sup> This ought to be under-

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98. LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939*, at 267 (2008). Welfare capitalism was a mix of employer and voluntary associations that provided limited support for workers’ needs. Cohen reports that the Great Depression had undermined these traditional bases of support, making the rise of the welfare state that much more important for workers in 1930s Chicago. *Id.*

99. *Id.*

100. *Id.* at 254–55. Cohen describes a “disinterest in government” (at least at the national level) by the working class of Chicago in the era leading to the Great Depression.

101. *Id.* at 277–78.

102. *Id.*

103. *Id.*

104. SCHICKLER, *supra* note 95, at 94–96 (describing the fight for fair employment practices legislation as bringing unions and blacks together in the fight for civil rights).

105. Sarah Binder, *How Political Polarization Creates Stalemate and Undermines Lawmaking*, WASH. POST (Jan. 13, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/13/how-political-polarization-creates-stalemate-and-undermines-lawmaking/?arc404=true> [https://perma.cc/W4LS-B6V5] (“[T]he frequency of legislative deadlock increases as the



standable to those familiar with the extant discussions of “vetogates,” or hurdles to legislative passage, in American politics.<sup>106</sup> The United States Constitution requires that legislation (1) be approved by at least a majority in both the House of Representatives and the Senate; and (2) approved by the President through his signing the legislation into law.<sup>107</sup> The Constitution allows an override of the President’s veto—or decision not to give his approval to enacted legislation—by empowering a two-thirds supermajority to override the President’s veto of enacted legislation.<sup>108</sup> Beyond the Constitution, the Senate’s procedural rules allow for the filibuster of legislation and, until recently, presidential appointments, thereby empowering Senate minorities to block legislative enactments.<sup>109</sup> When one also considers the authority of legislative committees within the House of Representatives and the Senate, and the authority with which party leaders in each chamber of Congress are endowed, the institutional hurdles to legislative enactment are even more complex.<sup>110</sup> The institutional environment in which legislation is enacted increases the value of building a “big tent” to achieve legislative

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parties polarize.”). See also SARAH BINDER, *STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK* 97 (2003) [hereinafter BINDER, *STALEMATE*] (finding that the greater the partisan polarization there was on an issue, the less likely it was to be enacted by the Senate, while partisan polarization had less impact on outcomes in the House of Representatives).

106. William N. Eskridge, *Vetogates and American Public Law*, 31 J. LAW, ECON., & ORG. 756, 757–61 (2015) (discussing the many points in the legislative process where legislation may be killed). Vetogates include: (1) legislative committees or subcommittees that may fail to report a bill to the full House or Senate; (2) the filibuster in the Senate, which can prevent a bill from obtaining an “up or down” vote; (3) an up or down vote in the full chamber; and (4) the presidential veto.

107. U.S. CONST., art. I, § 7, cl. 2.

108. *Id.* at cl. 3.

109. The Senate’s cloture rule cuts off debate, which is unlimited in the Senate. The present cloture rule requires sixty votes. COMMITTEE ON RULES AND ADMINISTRATION, 113th CONG., *STANDING RULES OF THE SENATE* NO. 113-18 15-16 (Comm. Prin. 2013).

110. For example, Sarah Binder explained that the control that the majority party has over the Rules Committee in the House of Representatives, which has a significant role in shaping whether, and under what circumstances, a bill will come up for a vote by the full House, impacts the sorts of legislation that are voted on. Party leaders in Congress often avoid bringing legislation up for a vote where there is not a majority of the party coalition in favor, even where there is sufficient bipartisan support to enact the legislation. Binder states that this often leads to more partisan legislation being voted on in the House, which will have a difficult time overcoming hurdles like the filibuster in the Senate. This leads to inaction on issues where there is partisan polarization. See BINDER, *STALEMATE*, *supra* note 105, at 97.

enactment. To the extent that partisan polarization makes it difficult to create the “big tent,” the less productive the legislative process will be.

Partisan polarization makes it more difficult for Congress to enact legislation because it exacerbates the institutional hurdles that make legislating so challenging. The inability of legislators to reach sufficient consensus on legislative priorities leaves a hole in our policy landscape. Given the incentives that drive presidential behavior—enacting policy priorities, building a record of policy achievement to satisfy constituents to enhance both the President’s reelection chances and his party’s political reputation, and building a legacy of accomplishment for posterity—Presidents faced with the burdens of legislative institutions are further incentivized to take unilateral action.<sup>111</sup> But polarization alone may not fully explain the underlying causes or scope of legislative paralysis or the legislative inability to respond to presidential attempts to fill the policy landscape. Alongside ideologically polarized parties are increasingly fragile majorities that also undermine congressional action.

*B. The Insecure Majority and Congressional Nongovernance*

Partisan polarization alone may not fully explain legislative gridlock. Political scientist Frances Lee highlights the role played by what she calls the “insecure majority” as an explanatory factor in legislative inefficacy.<sup>112</sup> To Lee, this means that when the two major political parties in Congress are in a competitive condition in which the next election cycle could change the party in control of the legislative branch, there is less incentive for the minority party to cooperate with the majority party.<sup>113</sup> She argues that under such conditions, political parties neglect the work of “legislating” in favor of “messaging” strate-

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111. Ed O’Keefe, *The House Has Voted 54 Times in Four Years on Obamacare. Here’s the Full List*, WASH. POST (Mar. 21, 2014, 8:06 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/> [https://perma.cc/89QV-TLLV].

112. FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 8–10 (2016).

113. *Id.* at 41 (“[I]ncreased competition for control of Congress fuels a more confrontational style of partisanship, as parties in their quest for power seek to define the stakes for voters.”).

gies that are intended to “draw clear contrasts with the opposition” for electoral gain.<sup>114</sup> Lee contends that partisan polarization combined with interparty competition for control of the Congress creates the conditions that lead to legislative gridlock.<sup>115</sup> Lee also asserts that since the 1980s, when Republicans ousted Democrats from the Senate majority, “the two parties compete for control of Congress at relative parity.”<sup>116</sup> The threat that either the majority party will lose control of the chamber or that the minority party will gain control of one or both chambers impacts the incentive structure within any session of Congress.

Lee compares this to an earlier period (1955–81) during which the Democrats possessed nearly insurmountable control over Congress.<sup>117</sup> For example, from the 87th Congress (1961–63) until they lost control of the Senate in 1981, the Democrats held no fewer than fifty-four seats in the Senate.<sup>118</sup> Over the same period, Democrats held no fewer than 243 seats in the House.<sup>119</sup> Indeed, even with the election and reelection of Ronald Reagan in 1980 and 1984, the Democrats held 243 and 254 seats, respectively.<sup>120</sup> The House that was elected along with George Bush Sr.’s defeat of Michael Dukakis saw the Democrats increase their control over the House of Representatives from 258 to 260 seats for the Congress starting in 1989.<sup>121</sup> And the era of Democratic Party dominance in the House of Representatives lasted from 1955 to 1994.<sup>122</sup>

But in the post-1980 period, control of the Senate changed seven times, while control of the House changed three times since the 1994 elections.<sup>123</sup> It is increasingly reasonable for

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114. *Id.* at 49.

115. *Id.* at 48–49 (“Drawing clear lines between the parties stands at odds with the conciliatory efforts that are typically necessary to legislate. . . . Bipartisanship participation in legislating, however, undercuts party messaging efforts.”).

116. *Id.* at 5.

117. *Id.* at 21.

118. *Party Division*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> [<https://perma.cc/TCV6-LGLQ>] [hereinafter *U.S. Senate Party Division*].

119. *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES – U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [<https://perma.cc/5SHS-PAPC>].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Majority Changes in the House of Representatives, 1856 to Present*, HIST. ART & ARCHIVES – U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Majority-Changes/Majority-Changes/> [<https://perma.cc/TKH4-H24>]. Control of the House of Representatives shifted between the parties in 2007, 2011,

members of the minority party to believe that their turn at control of the legislative chamber will come sooner rather than later. Under such circumstances, the willingness of political minorities to accept suboptimal policy solutions is tempered by a desire to simply control the chamber instead. Rather than participating in the project of legislating and governance, minority party actors are inclined to believe that the next election cycle carries the potential to regain the majority. And as stated above, the operating rules of the House and Senate place significant power in the hands of the majority party to control the legislative agenda through the control of House and Senate Committee chairmanships, among other powers.<sup>124</sup>

These structural incentives combine with increasingly insecure and unstable majority control to produce behaviors that undermine collaboration between the two major political parties, thereby exacerbating the polarized environment and furthering legislative gridlock. As stated above, this gridlock leaves holes in the policy landscape that might go unfilled or are increasingly likely to be filled by Presidents who refuse to countenance a threat to their capacity to achieve policy and electoral ambitions simply because Congress is unable to legislate.

*C. A Partisan, Polarized, and Impotent Congress in a System of Separated Powers*

In Federalist 51, James Madison assumed that the legislative branch would be the dominant branch in governance and that it would be the branch of government most likely to encroach upon other branches.<sup>125</sup> But under the conditions discussed above, Congress has seemingly relinquished its role as the dominant force in American governance.

Congress's failure to legislate leaves a policy vacuum that puts the President at risk of not achieving important policy agenda items for his electoral coalition—thereby increasing the

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and 2019. *U.S. Senate Party Division*, *supra* note 118. Control of the United States Senate shifted in 1995, four times between 2001 and 2002, 2007, and 2015. *Id.*

124. *See, e.g.*, GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 21 (2005) (“Key to our approach was the assumption that majority status confers substantial benefits. In particular, advancement to committee chairs and other key posts in the House is possible only if one’s party gains a majority, and advancement of one’s legislative projects is greatly facilitated by majority status.”).

125. *Id.* at 350.

likelihood that the executive will undertake unilateral action.<sup>126</sup> Evidence of the decline of legislative activity in Congress abounds. A recent study by ProPublica and the Washington Post found that “as recently as 2005 and 2006,” House Committees met 449 times regarding legislation and Senate Committees met 252 times. A decade later, those numbers had fallen to 254 and 69, respectively.<sup>127</sup> Since the 100th Congress (1987–89), Congress enacted fewer than 100 substantive laws on eight occasions.<sup>128</sup> Six of those eight periods of inactivity fell during the last six Congresses (2007–present).<sup>129</sup>

The 112th (2011–13) and 113th (2013–15) Congresses set records over this period for legislative futility, enacting sixty-three and sixty-one substantive pieces of legislation, respectively.<sup>130</sup> Congress’s legislative inefficacy, which reached historic levels in the Obama Administration, is likely related to Obama’s increased use of unilateral action. Although statistics demonstrate that Obama did not employ executive orders any more than his immediate predecessors—Obama issued 295 executive orders compared to George W. Bush’s 294 and Bill Clinton’s 290—Obama appears to have relied on other unilateral policy devices far more aggressively than previous Presidents had.<sup>131</sup> These primarily included executive memoranda, which

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126. Gregory Korte, *For Obama, Fewer Bill-Signing Ceremonies Reflect Years of Gridlock*, USA TODAY, <https://www.usatoday.com/story/news/politics/2016/12/13/president-obama-fewer-bill-signing-ceremonies-gridlock/95352806> (last updated Dec. 13, 2016, 3:57 PM) [<https://perma.cc/R6B9-RBUD>] (highlighting that at 60 bill-signing ceremonies, Obama had fewer than his three predecessors who served two terms—Reagan (61), Clinton (91), and Bush (95)—and instead increased the use of presidential memoranda).

127. Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA (Nov. 5, 2018, 10:00 AM), <https://www.propublica.org/article/how-congress-stopped-working> [<https://perma.cc/QJ7N-8NLY>].

128. The Pew Research Center defines “substantive” laws to mean those laws that result in a change in federal law or authorizes an expenditure of taxpayer dollars. They are contrasted with ceremonial legislation, which include laws that rename buildings, award medals, or memorialize historic events. *Share of Substantive Laws Passed by Congress Has Varied Over Time*, PEW RESEARCH CTR. (Jan. 25, 2019), [https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/ft\\_19-01-23\\_congressproductivity\\_line/](https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/ft_19-01-23_congressproductivity_line/) [<https://perma.cc/4WGE-ZUE6>].

129. *Three Decades of Congressional Productivity, 1987–2017*, PEW RESEARCH CTR. (Jan. 11, 2019), [https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/ft\\_18-01-09\\_congressproductivity/](https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/ft_18-01-09_congressproductivity/) [<https://perma.cc/L5D2-77RD>].

130. *Id.*

131. Gregory Korte, *Obama Issues ‘Executive Orders by Another Name’*, USA TODAY (Dec. 16, 2014), <https://www.usatoday.com/story/news/politics/2014/12/16>

directed agencies how to carry out policy.<sup>132</sup> For example, in 2014, Obama issued a memorandum titled, “Updating and Modernizing Overtime Regulations,” which called for expanding coverage of the Fair Labor Standards Act’s overtime requirements to include “white collar” workers.<sup>133</sup> This was subsequently promulgated in a rulemaking by the Department of Labor.<sup>134</sup>

In an era of insecure majorities and partisan polarization, Congress’s ability to protect its institutional interests against usurpation often takes a back seat. Frances Lee highlights the behavior of minority parties in Congress when the President is a member of their political party.<sup>135</sup> While Lee asserts that those minority parties will work harder to produce policy results as compared to when the presidency is held by the opposition party, the minority party’s efforts are primarily aimed at “supporting the president’s initiatives.”<sup>136</sup> But this incentive is not shared by the majority party in a divided government. The congressional majority faced with a President of the opposing party is more likely to try to establish points of contrast with the sitting President of the other party, rather than seek legislative outputs.<sup>137</sup> Under these circumstances, even efforts to protect the institutional interests of Congress against executive usurpation are likely to be seen as driven by partisanship, rather than by genuine concern about the institution’s prerogatives if

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/obama-presidential-memoranda-executive-orders/20191805/ [https://perma.cc/N2QZ-5LBG] (arguing that Obama had used more presidential memoranda than previous Presidents, even as the number of executive orders was in line with other Presidents).

132. *Id.*

133. Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 15,211 (Mar. 13, 2014). It should be noted that in remarks accompanying his signing of the memorandum, President Obama referenced Congress’s inaction on worker pay, saying, “[W]hile Congress decides what it’s going to do—whether it’s going to do anything about this issue—and I hope that it does, and I know Democrats are pushing hard to get minimum wage legislation passed—I’m going to do what I can on my own to raise wages for more hardworking Americans.” *Remarks by the President on Overtime Pay*, WHITE HOUSE PRESIDENT BARACK OBAMA (Mar. 13, 2014, 2:27 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/03/13/remarks-president-overtime-pay#> [https://perma.cc/R6DS-UE4C].

134. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016). The rule was invalidated in *Nevada v. U.S. Dep’t. of Labor*, 218 F. Supp. 3d 520 (E.D. Texas 2016) (issuing nationwide injunction against Obama Administration’s overtime rule).

135. LEE, *supra* note 112, at 61.

136. *Id.*

137. *Id.* at 61–62.

at least some members of the minority party do not raise their voices against the alleged encroachment by the President. The cross-party coalition necessary to effectively check the executive is significantly less likely under conditions that appear to undermine the electoral objectives of political parties.<sup>138</sup>

All of this creates a partisan, polarized, and impotent Congress in a system of separated powers. And the resulting vacuum is irresistible for a President wishing to act unilaterally.

#### *D. Unilateral Presidential Action*

Having briefly described the circumstances that undermine Congress's capacity to legislate or respond to another branch's first move, we now turn to a discussion of unilateral executive action, which is often the trigger for the nationwide injunction.

Traditional conceptions of presidential power suggest that the President is a relatively weak player in the American policy-making landscape.<sup>139</sup> This traditional conception of the presidency and its power suggests that the President is endowed largely with the power to persuade other institutional actors to carry out his policymaking vision; he must rely on the Senate to confirm his most important agents, and he is limited to vetoing the legislative enactments coming from Congress.<sup>140</sup> Indeed, under this conception the President is a uniquely vulnerable actor in the American political landscape, as he is held accountable for an increasing number of things that are simply outside of his

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138. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) (arguing that "competition between the legislative and executive branches var[ies] significantly and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party").

139. See, e.g., THE FEDERALIST NO. 51, at 350 (James Madison) (Jacob E. Cooke ed., 1961). Compare Federalist 51's depiction of the executive to its depiction of the legislature. James Madison wrote, "It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.* See also Kenneth R. Mayer, *Executive Orders and Presidential Power*, 61 J. POL. 445, 445 (1999) ("The standard conception of the presidency is that the office is constrained by the separation of powers and general weakness of the chief executive's formal powers.").

140. For the classic discussion predicated on the limited formal power of the presidency, see RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29–49 (1990).

unilateral control.<sup>141</sup> This account of the presidency's powers describes the President's central activity as bargaining with other actors to achieve policy outcomes.<sup>142</sup> Contemporary accounts suggest that the presidency's capacity to bargain has been remarkably enhanced in the modern era.<sup>143</sup> Increases in the strength and scope of the institutionalized presidency provide the modern President the ability to ensure certain advantages when dealing with other actors.<sup>144</sup>

Other contemporary accounts of presidential power reject the notion that the President is limited to bargaining with legislative or bureaucratic actors. Instead, they contend the modern presidency is endowed with significant ability to exercise power beyond bargaining through the exercise of unilateral action.<sup>145</sup> Political scientist William Howell has described this phenomenon, saying:

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141. Arguments for protection of unilateral executive authority rest on claims of the President's unique vulnerability. *See e.g.*, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (invalidating a double for-cause removal restriction on the members of the PCAOB, arguing that it made the President unable to control actors for whose actions he would be held accountable by the public).

142. NEUSTADT, *supra* note 140, at 32 (describing that the President's power to command is limited and that what remains is the power to bargain with other institutional actors who have their own interests and preferences).

143. *See* Aaron Wildavsky, *supra* note 26, at 162–73 (discussing the differences in presidential bargaining position in the domestic and foreign policy domain, arguing that the President has greater bargaining advantages in the foreign policy domain).

144. The conception that the presidency had differential bargaining power across the landscape of American policymaking underwrote the “two presidencies” thesis of the 1960s, which argued that the President's bargaining capacity in foreign affairs gave him the ability to achieve greater success against Congress than he was able to achieve in domestic affairs. One of the explanations for the presidential advantage in this domain was the rise of the executive-controlled national security state, which exacerbated the information asymmetries between Congress and the President from an institutional perspective. *See id.*; *see also* IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL ORIGIN OF OUR TIME* 373–79, 444–54 (2013) (describing how the President's acquisition of authority over the budget and national security greatly enhances his policy-making ability).

145. *See, e.g.*, WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 14 (2003) (“[M]odern presidents often exert power by setting public policy on their own and preventing Congress and the courts—and anyone else for that matter—from doing much about it.”). Howell emphasizes the President's ability to act unilaterally in policy domains, but others argue that the presidency is more powerful than we once thought by virtue of the growth of the presidency as an institution.



Because of his unique position within a system of separated powers, the president has numerous opportunities to take independent action, with or without expressed consent of either Congress or the courts. . . . The number of these unilateral actions has literally skyrocketed during the modern era. . . . [W]hile the growth of the presidency as an institution . . . augments presidential power, it is the ability to set policy unilaterally that deserves our immediate and sustained attention.<sup>146</sup>

Some commentators who have paid attention to the aggrandizement of the modern American presidency do not like what they see. For example, Peter Shane argues that the modern presidency, especially its increasing capacity to act unilaterally, represents “Madison’s nightmare.”<sup>147</sup> Shane argues that the President increasingly has the capacity to initiate policy without either much prior, public ventilation or the obligation to engage other institutional actors.<sup>148</sup> He asserts that “our constitution does not support our *extreme contemporary presidentialism*,” which poses risks to democratic governance.<sup>149</sup>

A focus on the increased capacity of the modern presidency to undertake unilateral policy action reveals the structural dimension of the litigation of which the nationwide injunction has been a consequence. This is further enhanced when, as above, we take into account the declining capacity of Congress to shape the policy landscape. Congressional gridlock might not have led to an increase in the kinds of disputes that have resulted in the issuance of nationwide injunctions were it not for a presidency with a larger toolkit with which to intervene in policy.

Many of the most recent deployments of the nationwide injunction by federal district courts have been in cases involving unilateral presidential action, yet this dynamic has not figured prominently in discussions about the courts’ role. Rather than focusing on the nationwide injunction, the following subsections

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146. *Id.* at 13.

147. PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009).

148. *Id.* at 20–21.

149. *Id.* at 25 (emphasis added). It is not altogether clear that Shane separates genuine unilateral presidential action from the sorts of things that Howell might understand as giving the President bargaining advantages. But it is not difficult to conclude that Shane’s criticism of unilateral presidential actions would likely be at least as strong as it is against the idea of a unilateral executive.

focus on the steps taken by Presidents Obama and Trump to advance their policy objectives across different domains. The longer narrative of the nationwide injunction comes into view when we turn our attention to both unilateral presidential actions, and the often-preceding congressional inaction, to which it is often a response. This narrative moves us beyond a focus on the federal courts.

### 1. Obama, Unilateral Action, and the Rhetoric of Congressional Impotence

Obama's unilateral actions—described below—demonstrate his attempts to justify his actions as responses to congressional inaction. Obama often invoked partisan delay as the basis for his actions. What follows are descriptions of Obama's unilateral activity related to immigration and the rights of lesbian, gay, bisexual, and transgender (LGBT) persons.

#### *a. Unilateral Action on Immigration*

On June 15, 2012, President Obama gave a speech from the Rose Garden on immigration in which he announced the Deferred Action on Childhood Arrivals (“DACA”) program.<sup>150</sup> There, he made the substantive case for not deporting “talented young people” who were assets to the country.<sup>151</sup> But he also justified his action as a response to Congress's failure to enact the DREAM Act.<sup>152</sup> “I have said time and time again to Congress that, send me the DREAM Act, put it on my desk, and I will sign

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150. *Remarks by the President on Immigration*, WHITE HOUSE PRESIDENT BARACK OBAMA (June 15, 2012, 2:09 PM), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [hereinafter *2012 Remarks on Immigration*] [<https://perma.cc/W2UU-8NFU>].

151. *Id.*

152. The Development, Relief, and Education for Alien Minors (DREAM) Act of 2001 was originally introduced by Senator Orrin Hatch. The original legislation would have authorized the Attorney General to cancel the deportation of a person age twenty-one or younger, who: (1) had earned a high school or equivalent diploma; (2) had been physically present for at least five years immediately preceding the date of enactment of the statute; and (3) was not otherwise inadmissible or deportable for certain criminal convictions or on security grounds. DREAM Act of 2001, S. 1291, 107th Cong. § 3 (2d Sess. 2001). In his speech introducing the legislation, Senator Hatch declared, “The purpose of the DREAM Act is to ensure that we leave no child behind, regardless of his or her legal status in the United States or their parents' illegal status.” 145 CONG. REC. S8581 (daily ed. Aug. 1, 2001), (statement of Sen. Hatch).

it right away,” declared Obama.<sup>153</sup> “Democrats passed the DREAM Act in the House, but Republicans walked away from it.”<sup>154</sup>

Later in the speech Obama implored Congress to act, saying, “Precisely because [DACA] is temporary, Congress needs to act. There is still time for Congress to pass the DREAM Act this year . . . .”<sup>155</sup> Obama recalled earlier bipartisanship on this immigration policy, saying that Democrats and Republicans had both written and sponsored versions of the DREAM Act and that he had joined Republicans in voting for earlier DREAM Act legislation when he had been in the Senate.<sup>156</sup> Obama was clearly blaming what he took to be the breakdown of bipartisanship in Congress—presumably the fault of the Republicans—for the institution’s failure to act on this immigration reform.<sup>157</sup> Obama framed DACA as a refinement of the executive’s enforcement discretion, which allowed it to prioritize certain individuals for removal as against others.<sup>158</sup>

On November 20, 2014, President Obama addressed the nation in a nighttime speech in which he announced additional policy efforts to fix this broken immigration system.<sup>159</sup> Though he defended the legality of his unilateral action, Obama emphasized the context in which that action came about—namely, what he described as Congress’s unwillingness to act.<sup>160</sup> He applauded the fact that “68 Democrats, Republicans, and independents came together to pass a bipartisan bill in the Senate.”<sup>161</sup> He specifically criticized the Republican-controlled House of Representatives, stating:

Had the House of Representatives allowed that kind of bill a simple yes-or-no vote, it would have passed with support from both parties, and today it would be the law. . . .

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153. *2012 Remarks on Immigration*, *supra* note 150.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE PRESIDENT BARACK OBAMA (Nov. 20, 2014, 8:01 PM), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/F96V-27LP>].

160. *Id.*

161. *Id.*

Now, I continue to believe that the best way to solve this problem is by working together to pass [comprehensive immigration reform legislation]. But until that happens, there are actions I have the legal authority to take as President . . . .<sup>162</sup>

Among those actions were “steps to deal responsibly with the millions of undocumented immigrants who already live in our country.”<sup>163</sup> Obama described those steps, saying:

Now here’s the thing: We expect people who live in this country to play by the rules. We expect that those who cut the line will not be unfairly rewarded. So we’re going to offer the following deal: If you’ve been in America for more than five years; if you have children who are American citizens or legal residents; if you register, pass a criminal background check, and you’re willing to pay your fair share of taxes—you’ll be able to apply to stay in this country temporarily without fear of deportation. You can come out of the shadows and get right with the law. That’s what this deal is.<sup>164</sup>

Obama defended the legitimacy of his moves as consistent with “the kinds of actions taken by every single Republican President and every single Democratic President for the past half century.” Focusing again on Congress, he declared, “And to those in Congress who question my authority to make our immigration system work better . . . where Congress has failed, I have one answer: Pass a bill.”<sup>165</sup>

Obama asserted that he was motivated to act unilaterally because of congressional inaction on immigration, seemingly despite substantive support for the policy reform at issue. This Essay has argued that the President is emboldened to move unilaterally because he is likely aware that he will not be successfully confronted by Congress for the same reason. Indeed, even where Democrats in Congress might have institutional concerns about presidential overreach, the partisan divides in Congress incentivize congressmembers to emphasize their partisan identities over protecting congressional prerogatives, making confronta-

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

tion even less likely. And a similar issue arose with respect to the LGBT community—and particularly transgender students in America’s schools.

*b. Unilateral Action on LGBT Rights*

On May 13, 2016, the Justice Department’s Civil Rights Division and the Department of Education’s Office of Civil Rights in the issued a “Dear Colleague” letter (“the Letter”) to school districts across the country. Justice and Education framed this letter as a response to “an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students.”<sup>166</sup>

The Letter further explained that, in their implementation of Title IX of the Education Amendments of 1972 (“Title IX”), which prohibits sex discrimination by recipients of Federal funds, gender identity would be treated as sex.<sup>167</sup> The Letter explained that the two Departments’ understanding of Title IX prohibited schools receiving federal funds from treating “a transgender student differently from the way it treats other students of the same gender identity.”<sup>168</sup> The Letter provided further guidance regarding the treatment of transgender students in different venues and opportunities—including restrooms, locker rooms, and athletics.<sup>169</sup> Specifically, the Letter stated that schools could not, consistent with Title IX, prohibit “transgender students access to . . . facilities consistent with their gender identity.”<sup>170</sup> Nor could a school require a transgender student to use a single-occupant restroom if other students could use multi-occupant restrooms.<sup>171</sup> While the Letter did not articulate a specific policy on the treatment of transgender athletes, the Letter prohibited what it called reliance “on overly broad generalizations or stereotypes about the

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166. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS 1 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/AH43-Q62J>].

167. The Letter defined gender identity as “an individual’s internal sense of gender.” It noted that gender identity “may be different from or the same as the person’s sex assigned at birth.” *Id.* at 1.

168. *Id.* at 2.

169. *Id.* at 3.

170. *Id.*

171. *Id.*

differences between transgender students and other students of the same [gender identity].”<sup>172</sup>

The “Dear Colleague” Letter did not invoke congressional inaction as the basis of its administrative action, but the Letter came against the backdrop of Congress’s failure to add key protections for LGBT persons to the nation’s civil rights canon, especially with respect to employment discrimination.<sup>173</sup> Nearly two years before the Justice Department waded into the controversy over North Carolina’s legislation requiring sex-segregated public restrooms to be used only by persons whose birth sex match the bathroom’s sex assignment, President Obama acted unilaterally to issue protections guarding against LGBT discrimination by federal contractors. In a July 21, 2016, speech accompanying the signing of Executive Order 13672, President Obama declared:

Congress has spent 40 years—four decades—considering legislation that would help solve the problem [of discrimination against LGBT persons]. That’s a long time. And yet they still haven’t gotten it done. . . . But I’m going to do what I can with the authority I have to act. The rest of you, of course, need to keep putting pressure on Congress to pass federal legislation that resolves this problem once and for all.<sup>174</sup>

Obama referenced Congress’s inability to enact civil rights protections for LGBT persons in the workplace.<sup>175</sup> As Obama

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172. *Id.*

173. *Id.*

174. Barack Obama, President of the United States, Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014).

175. The Employment Non-Discrimination Act (ENDA) was originally introduced in 1994. In 2007, ENDA was introduced for the first time with protections against discrimination on the basis of gender identity, but the provision was removed before passage in the House of Representatives, the first time the legislation passed in either house of Congress. In 2013, a bill that included protections for transgender persons was passed in the Senate but did not receive a vote in the House of Representatives. See Leigh Ann Caldwell, *Senate Passes LGBT Anti-Discrimination Bill*, CNN (Nov. 8, 2013), <https://www.cnn.com/2013/11/07/politics/senate-lgbt-workplace-discrimination/index.html> [<https://perma.cc/DAV3-8X2S>]; Lauren Smith, *ENDA Has Been Waiting 2 Decades for Passage*, ROLL CALL (July 10, 2013), [https://www.rollcall.com/news/enda\\_has\\_been\\_waiting\\_2\\_decades\\_for\\_passage-226257-1.html](https://www.rollcall.com/news/enda_has_been_waiting_2_decades_for_passage-226257-1.html) [<https://perma.cc/AW38-Q5BB>]; Deirdre Walsh, *LGBT Anti-Discrimination Bill Going Nowhere in the House*, CNN (Nov. 7, 2013), <https://www.cnn.com/2013/11/07/politics/lgbt-workplace-discrimination-house-outlook/index.html> [<https://perma.cc/39ZW-N8FA>].

stated, the issue of workplace discrimination against LGBT workers had been stalled in Congress for several years.<sup>176</sup> Obama sought to draw attention to Congress's failure to enact protective legislation as the basis for his having taken unilateral action to eliminate discrimination in the sector of the economy over which he could exercise authority.

## 2. Trump, Unilateral Action, and the Delivery of Wins for His Electoral Coalition

While less explicit in justifying his action as a confrontation with an ineffectual Congress, perhaps because his party controlled both houses when he assumed the presidency, President Trump also intimated that he acts unilaterally either to spur congressional action or in the absence of congressional action.

Less than a week after taking office, President Trump issued Executive Order (EO) 13769, which was entitled "Protecting the Nation from Foreign Terrorist Entry into the United States," known as the "travel ban."<sup>177</sup> Executive Order 13769, though superseded by subsequent executive orders, initially halted the issuance of visas to citizens of seven majority-Muslim countries: Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen.<sup>178</sup> The Order also made significant changes to U.S. refugee policy, including suspending the acceptance of new refugees into the United States for four months.<sup>179</sup> The Order also reduced the number of refugee visas from 110,000 (set by the Obama Administration) to 50,000.<sup>180</sup> More specifically, the Order announced the suspension of issuing visas to Syrian refugees altogether.<sup>181</sup> Commentators on Trump's action noted that it was consistent with his statements on the campaign trail, which called for a ban on allowing Muslim travelers into the United States.<sup>182</sup> Others noted that Trump's use of the Executive Order

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176. Smith, *supra* note 175.

177. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Executive Order 13,769 was superseded by Exec. Order 13,780, 82 Fed. Reg. 13209 (March 6, 2017).

178. Exec. Order 13,769 at 8978.

179. *Id.* at 8979.

180. *Id.*

181. *Id.*

182. See Jenna Johnson & Abigail Hauslohner, *I Think Islam Hates Us: A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/> [<https://perma.cc/RJL2-5LKF>].

was intended to deliver an early victory on a contentious issue to his political base.<sup>183</sup>

Just two days before issuing the travel ban order, Trump issued Executive Order 13,768, “Enhancing Public Safety in the Interior of the United States,”<sup>184</sup> which was premised on the Administration’s assertion that interior enforcement of the immigration laws had been abdicated by the Federal Government and required restoration. According to the EO, abdication of the Federal government’s “sovereign responsibility” was evidenced by the “exempt[ion] of classes or categories of removable aliens from potential enforcement”<sup>185</sup> and by the flouting of federal law by so-called sanctuary jurisdictions.<sup>186</sup> While the Administration’s response to the former act of abdication had been addressed in then-Attorney General Jeff Sessions’ letter rescinding DACA because of its “constitutional defects,”<sup>187</sup> the EO delegated authority to the Attorney General and the Secretary of Homeland Security to withhold federal grants from places found to be sanctuary jurisdictions or areas offering safe havens from certain federal immigration laws.<sup>188</sup>

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183. It must be made clear that although I highlight the unilateral action of Presidents Obama and Trump, there are important distinctions in their policies. Specifically, Obama’s issuance of an executive order on the immigrant parents of American-born children is likely a policy that would have passed in both Houses of Congress had it been allowed to come to a vote. The fact that a comprehensive immigration-reform bill, which was co-sponsored by Republicans, passed in the Senate and was never brought to the floor by the Republican House majority, suggests that Obama’s unilateral action was less an attempt to make policy that likely would have failed in the legislative branch than an attempt to enact policy that would not have passed any chamber of Congress. By contrast, it is almost certain that Trump’s travel ban—likely in all of its iterations—was not going to pass Congress. However, both Trump and Obama were clearly influenced by the political calculus in making their announcements of unilateral policy change in the broad area of immigration policy. For a discussion of the electoral considerations of presidential unilateral policymaking, see Judd, *supra* note 26.

184. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

185. *Id.*

186. *Id.*; see, e.g., Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-Sanctuary Movements*, 52 U.C. DAVIS L. REV. 549, 553–54 (2018) (defining sanctuary jurisdictions as those “declining to participate in federal immigration enforcement”).

187. Letter from Jefferson Sessions, Attorney General, to Elaine Duke, Acting Secretary of the Department of Homeland Security (Sept. 5, 2017). In a tweet, dated September 5th, President Trump called on Congress to enact legislation legalizing DACA and threatened that “[if Congress] can’t, I will revisit this issue!” Donald Trump (@realDonaldTrump), TWITTER, (Sept. 5, 2017, 6:38AM), <https://twitter.com/realDonaldTrump/status/905228667336499200> [<https://perma.cc/U9WK-PDK7>].

188. Exec. Order No. 13,768, at 8801.



Trump's order gave the Attorney General and Secretary of Homeland Security the authority to designate a place as a sanctuary jurisdiction, whether or not it had formally designated itself as such.<sup>189</sup> The EO also attempted to expose jurisdictions to political pressure by making public reports about criminal activity by persons whom a jurisdiction decided not to detain in order to release into federal custody.<sup>190</sup> The EO further established an office within the U.S. Immigration and Customs Enforcement bureau (ICE) devoted to "provid[ing] proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens."<sup>191</sup> The office would also produce "quarterly reports studying the effects of the victimization by criminal aliens present in the United States."<sup>192</sup>

More recently, the Trump Administration turned toward deploying agency lawmaking as the mechanism for making immigration policy. On July 23, 2019, the Department of Homeland Security (DHS) promulgated a rule—without undertaking notice and comment—that eliminated restrictions on the expedited removal of undocumented immigrants.<sup>193</sup> The policy eradicated geographic limitations and significantly expanded the time period during which undocumented immigrants are subject to expedited removal procedures.<sup>194</sup> Specifically, while the previous policy applied the expedited removal process to those persons found within one hundred miles of a land border within fourteen days of their arrival in the United States, the new policy eliminated the one-hundred-mile restriction and expanded the time period during which expedited removal procedures could be used to two years.<sup>195</sup>

DHS justified its policy change as necessary in the light of the "ongoing crisis at the southern border," its assertion that a large number of undocumented immigrants were found beyond one hundred air miles of a land border, and the strain on immigration courts' resources.<sup>196</sup> Further, DHS asserted that overcrowding in detention centers supported the change in agency

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189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. Designating Aliens for Expedited Removal, 82 Fed. Reg. 35,409 (July 23, 2019).

194. *Id.* at 35,412.

195. *Id.*

196. *Id.* at 35,411.

policy.<sup>197</sup> But at the end of the day, an inactive Congress left the space for Trump's unilateral action.

### 3. The Threat of Unilateral Presidential Authority and Responses

Trump's immigration orders are but a few examples of the Administration's attempts to act unilaterally to change immigration and travel policy. Like the Obama Administration and its policies discussed above, the Trump Administration determined that its policy preferences could best be achieved by "going it alone." These decisions involved matters of policy that might be hotly contested issues, but unlike those described above, Trump also acted unilaterally in an area—national security as broadly understood—over which the President has institutional advantages when bargaining with Congress.

Nevertheless, Presidents Obama and Trump forwent the challenge of attempting to convince opponents on policy issues that were important for various reasons. The concerns articulated in this Essay are not that the President has no authority to act unilaterally. The history and practice of presidential authority stands in clear opposition to such an absolutist position. Rather, the concern is aimed at how exercises of unilateral executive authority in an age of expanded presidential capacity

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197. Some might contest my categorization of the agency's attempt to make rules outside of the notice-and-comment process as unilateral action. Specifically, the rulemaking involved the Department of Homeland Security, which is somewhat removed from the President, at least when compared to the issuance of an executive order. The process for forgoing notice-and-comment rulemaking is also a process recognized by the Administrative Procedure Act and is sanctioned as a mechanism for policymaking. The response to each of these arguments—which apply no less to criticisms of the Obama Administration's actions regarding deferred action and transgender rights, both of which were mediated through executive agencies—is that these were executive agencies, rather than independent agencies. The President's control over these institutions is unquestioned if the President's authority to remove cabinet officials is a factor in assessing control. In fact, the unceremonious practice with which President Trump has terminated more than a few cabinet officials evidences the wide swath of control that the President has over these bureaucratic officials. See Elias Groll, Robbie Gramer, & Lara Seligman, *Trump Axes Bolton Via Twitter*, FOREIGN POL'Y (Sept. 20, 2019), <https://foreignpolicy.com/2019/09/10/bolton-trump-fires-national-security-advisor-via-twitter/> [<https://perma.cc/N3A5-QD4Q>]; Dan Mangan, *Rex Tillerson Found Out He Was Fired as Secretary of State from President Donald Trump's Tweet*, CNBC (Mar. 13, 2018), <https://www.cnbc.com/2018/03/13/tillerson-learned-he-was-fired-from-trumps-tweet.html> [<https://perma.cc/MX7V-3F4F>].

threaten to undermine the system of separation of powers inherent to our national political structure.

At this juncture in American political life, we are faced with a Congress whose capacity to resolve significant challenges facing our democracy appears to be near an ebb.<sup>198</sup> This not only incentivizes Presidents to unilaterally claim some victory for their electoral objectives or their historical reputations but also makes it less likely that Congress can check a President's assertion of unilateral policymaking authority. The slim margins with which either party has recently controlled the legislative chamber has made it difficult for legislators to overcome the inevitable hurdles involved in checking the President, as electoral competitiveness reinforces resort to partisan identification. Invigorated partisan identities further incentivize the choice to ride a successful President's coattails, rather than confront him and risk undermining his policy effectiveness.<sup>199</sup> The result is an ever-increasing accretion of authority to the executive in the name of effective governance or partisan advantage, which establishes the presidency as an increasingly powerful actor in the American domestic policy landscape. This is inconsistent with the vision of our government bequeathed to us by the Framers.

To be sure, there are leading scholars who unabashedly demand that we overcome our Madisonian predisposition for an executive hemmed in by systemic checks. Where Peter Shane sees a nightmare, Eric Posner and Adrian Vermeule see Madison's error.<sup>200</sup> They assert that the modern state requires a President whose capacities are equal to the challenges he faces—from global terrorism to financial catastrophe.<sup>201</sup> They argue that the historic and contemporary obsession with imposing legal constraints on the presidency assumes that without such constraints the President's actions cannot be constrained at

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198. See *supra* notes 127–134 and accompanying text.

199. LEE, *supra* note 112, at 61–63 (discussing the ways that legislators are impacted by having the presidency held by a member of their party).

200. See ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

201. *Id.* at 41–45 (arguing that before a crisis, Congress is not equipped to address long-standing problems, and during a crisis, Congress's very structure disables it from acting decisively in the face of a crisis). Posner and Vermeule assert that Congress is disabled during pre-crisis periods because they are “mired in partisan conflict.” *Id.* at 42. Here they conclude the necessity of expanded presidential authority.

all.<sup>202</sup> They reject the Madisonian vision of a hemmed-in presidency as blind to the reality that Presidents are constrained by “politics and public opinion” anyway.<sup>203</sup> The reality of running for office, they argue, exposes any candidate to tremendous scrutiny and intrusions commensurate with the awesome rewards to be acquired if successful.<sup>204</sup> In other words, election and reelection impose their own constraints.<sup>205</sup>

Posner and Vermeule’s optimistic view suggests two points. First, our consternation about constraints misperceives the task of the presidency in the modern world. To Posner and Vermeule, we fail to understand the ways that, even as the rise of the administrative state has empowered the President, it has simultaneously constrained and further exposed him.

Second, the rise of simultaneous constraints on executive authority suggests the adaptability of political institutions capable of rebalancing a system that appears out of balance. Enduring values—that is, checks and balances and anti-concentration of authority—in an evolving polity are protected by the evolutionary capacity of its institutions. Judges, no less than other institutional actors, have a role to play in this adaptation. This is not to declare that the nationwide injunction is the best adaptation for the period in which we find ourselves. But it is to stress that it might be helpful to see it as an adaptation to a broader environment that includes other actors. To the extent that the nationwide injunction—which may be understood as an institutional adaptation—is understood to be problematic, the appropriate first response may not be to “cut it out,” but rather to understand how and why the system—or parts of the system—found it to be useful. Confronting that question directly may force our polity to address underlying causes of dysfunction, rather than merely cursing the symptom. This Essay is not intended to answer whether we should or should not defend the nationwide injunction; rather, it has focused on asserting that before we can answer that question, we ought to ask the right questions about our institutions and our politics.

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202. *Id.* at 12 (“Liberal legalists equate the absence of effective *legal* constraints on the executive with the absence of *any* constraints, yet even an imperial president is constrained by politics and public opinion.”).

203. *Id.*

204. *Id.* at 12–13.

205. *Id.*

## CONCLUSION

Whether the nationwide injunction poses as serious a threat to our institutions as some suggest is unknowable until we stop isolating the phenomenon from the larger political context that likely explains at least some of its emergence at this time in our nation's history. This Essay has attempted to reframe how we see the nationwide injunction by stepping back from our focus on courts so that we might get a better picture of the other actors in the landscape. Seeing the rise of unilateral presidential action that goes unchecked because of the deficiencies within the legislative branch as a separation-of-powers problem arguably places the nationwide injunction in a different light.

The capacity of a single actor, even one as uniquely accountable and representative as the President, to act unilaterally and achieve policy priorities threatens harm to the norms of American governance. When this capacity is unchecked because of congressional gridlock, and results in the deportation of immigrants without due process protections or the banning of groups from entering the United States, the consequences become all the more troubling. And resort to the nationwide injunction appears less deserving of the condemnation that it has received in some quarters. We must balance these harms against the harms inflicted on our institutions by federal district judges issuing nationwide injunctions to challenge what is often an unchecked exercise of authority. Whatever conclusion we reach, the correct path cannot be based on isolating federal courts and ignoring the political context in which they operate.