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Presidential Polarization

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Abstract

Political polarization is a great political problem of our time. While it has many sources, one important cause is the deformation of our governmental structure. That structure once required consensus to enact important policy changes. Now the President can adopt such changes unilaterally.

Because the President represents the median of his or her party, not of the nation, the decisions of the President normally are more extreme than what would emerge from Congress, particularly when, as is usually the case, the houses of Congress and the President are divided among the parties. Domestically, Congress's delegation of policy decisions to the executive branch allows the President's administration to create the most important regulations of our economic and social life. The result is relatively extreme regulations that can shift radically between administrations of different parties, creating polarization and frustrating the search for political consensus. In the arena of foreign affairs as well, presidential power to engage in military interventions and to strike substantial international agreements on the President's own authority avoids the need to compromise to achieve political consensus.

Understanding the institutional roots of polarization provides a roadmap to changing the law to restore a constitution of compromise. Excessive delegation should be curbed, forcing Congress to make key decisions. The President's initiation of hostilities and executive agreements should be limited by requiring prior congressional authorization or swift congressional ratification after the fact. None of these reforms require us to begin the world anew, but instead to return to tried and tested constitutional structures. In a politics where compromise is routinely required, citizens would become less polarized, seeing each other less as targets or threats and more as partners in a common civic enterprise.

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Commentators regularly decry the polarization of American politics.[1] The vital center seems to have disappeared to be replaced by policies that lurch to ideological extremes. Reasoned debate has given way to constant outrage and insult. This sea change is attributed to many causes. Some blame the greater ideological homogeneity of the political parties.[2] Others focus on the polarizing effect of social media, where partisans retreat to reinforcing echo chambers.[3] Still others point the finger at the recent norm-breaking President.[4]

But an important and previously undiscussed factor has been the deformation of our governmental structure. This legal deformation has occurred in both domestic and foreign affairs. Congress's delegation of policymaking to the executive branch polarizes the all- important issue of government regulation. Presidential unilateralism in war making and foreign affairs polarizes issues of war and peace. [5]

Delegation by Congress probably has the most pervasive polarizing effects. Much of our domestic policy is today made not in Congress, but in administrative agencies, controlled by the party of the elected President.[6] As a result, regulations do not emerge from a process encouraging compromise among legislators of different parties and different factions within parties. Instead, the President's agency heads make federal law. Since the President represents the middle of his or her party, not the middle

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[1] Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 275 n. 2 (collecting a wide variety of sources that observe how polarized the United States has become).

[2] Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693 (2015) (discussing evidence that this has been happening in Congress since the 1970s)

[3] Fabian Bauman et al, *Modeling Echo Chambers and Polarization Dynamics in Social Networks,* PHYSICS.SOC-PH, Submitted June 28, 2019, arxiv.org/1906.12325v1 (discussing how social media creates echo chambers and how that leads to polarization).

[4] Ed Kilgore, *Trump is Achieving Peak Polarization*, INTELLIGENCER (July 23, 2019), http://nymag.com/intelligencer/2019/07/trump-is-achieving-peak-polarization.html.

[5] We recognize that polarization and extremism are different concepts. But as political phenomena they are related. It is well-established that polarized groups tend to extreme views. 75-76 (2000). *See* Cass Sunstein, *Deliberative Trouble Why Groups Go to Extremes,* 110 YALE L. J. 71, 73-74 (2000). Extremism leads to polarization as well. *Id.* at 77.

[6] *See, e.g.*, Mark Seidenfeld*, A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512 (1992) ("Over the past century, the powers and responsibilities of administrative agencies have grown to an extent that calls into question the constitutional legitimacy of the modern federal bureaucracy.").

of the nation, these rules will often seem extreme to many people. And when a President of the opposite party enters office, newly empowered agency heads can often change the rules 180 degrees.[7]

We saw this cycle play out between the Obama and Trump administrations in policies ranging from the environment to telecommunications to immigration. We are likely to witness it again as President Joseph Biden reverses Trump administration policies that have been instituted by executive fiats. Not surprisingly, each set of partisan rulemakings angers members of the other party, making them more likely to take an even more extreme path when their party wins the presidency and gains control of the administrative state.[8]

The imperial administrative presidency also raises the stakes of any presidential election, making each side fear that the other will enjoy largely unchecked and substantial power in many areas of policy.[9] The decline of a politics of legislative compromise is itself a cause of polarization and division.[10] Compromises may leave people unsatisfied, but the imposition of extreme policies with which they disagree makes them angry,[11] further

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[7] David A. Dana & Michael Barsa, *Judicial Review in an Age of Hyper-Polarization and Alternative Facts*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 231, 241 (2018).

[8] Kenneth S. Lowande & Sidney M. Milkis, *"We Can't Wait": Barack Obama, Partisan Polarization and the Administrative Presidency*, 12 FORUM 3, 23 (2014).

[9] *Id.* at 23; *see also* Sidney M. Milkis & John Warren York, *Barack Obama, Organizing for Action, and Executive-Centered Partisanship*, 31 STUD. AM. POLIT. DEVELOPMENT 1, 3, 12 (2017) (discussing "the increased reliance upon the president to set the nation's programmatic agenda" amidst growing partisan conflict").

[10] *See* Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 PERSPECTIVES POL. 1125, 1126 (2010) ("A compromising mindset can mitigate the effects of polarization . . ., while an uncompromising mindset can exacerbate those effects.").

[11] *See* Eran Halperin et al., *Anger, Hatred, and the Quest for Peace: Anger Can Be Constructive in the Absence of Hatred*, 55 J. CONFLICT RESOLUTION 274, 275 (2011) ("[A]nger is elicited when the out-group's actions are perceived as unjust and as deviating from acceptable norms. . . . [P]eople who feel angry believe that urgent action is needed to correct the perceived wrongdoing and may believe that their group is capable of initiating such corrective action. This often leads to a tendency to confront, hit, kill, or attack the anger-evoking target." (citations omitted)). For examples of partisan anger over policies viewed as extreme, see Norm Ornstein, *The Real Story of Obamacare's Birth*, THE ATLANTIC (July 6, 2015), https://www.theatlantic.com/politics/archive/2015/07/the-real-story-of-obamacares-birth/397742/ ("The narrative of Obama steamrollering over Republicans and enacting an unconstitutional [healthcare] bill that brought America much closer to socialism worked like a charm to stimulate conservative and Republican anger."), and Russell Berman, *How Progressives are Forcing Senate Democrats Into Action*, THE ATLANTIC (Feb. 1, 2017), https://www.theatlantic.com/politics/archive/2017/02/senate-democrats-trump-cabinet-progressive-base/515286/ (discussing "the furor over Trump's executive orders" banning travel from majority-Muslim countries and the low chance for

alienating them from their wholly victorious opponents.[12] The result is both a more acrimonious presidential contest and a perpetual campaign, as the losing side gears up immediately to win the all-important contest next time.[13]

Presidents have also seized unilateral authority in war making and foreign affairs. Since World War II, Presidents have conducted offensive military action without congressional authorization, like President George H.W. Bush's invasion of Panama. More recently, President Barack Obama entered into a major international agreement, the Paris Accord on Climate Change, without securing two-thirds of the Senate or getting majority support in Congress, eschewing not only the mechanism of treaty ratification but also the alternative of a congressional/executive agreement.[14] President Trump then withdraw from the agreement and President Biden has reentered it, all on their own authority.[15]

These actions contribute to polarization as well. The unilateral authority of the President allows important military action or international agreements to be undertaken with no consensus, which makes it likely that they will be politically controversial. Moreover, when the President takes a unilateral action, it is easier for members of Congress to criticize it than it would if they had voted to approve it. By contrast, when Congress approves a military action, it becomes harder for its members to find fault with the action at the first sign of difficulty. Thus, it makes it less likely that a military action will become an opportunity for partisan attacks. The military action can then receive the support of the union rather than being a source of national division. Similarly, executive agreements made without congressional authorization are unstable and objection of partisan whiplash.

The concern about such presidential unilateralism is not itself new. In 1973 Arthur Schlesinger wrote his classic, *The Imperial Presidency*, decrying the growth of presidential power beyond constitutional limits.[16]

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bipartisan collaboration).

[12] *See* Jennifer McCoy et al., *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities*, 62 AM. BEHAVIORAL SCI. 16, 24-25 (2018) ("The more people hear . . . that they have zero-sum interests, where if "they" win, "we" lose, the less they seek joint collective actions and have shared experiences," leading to greater alienation).

[13] *Id*. *See also* Robert Reich, *The Permanent Election*, THE AMERICAN PROSPECT, Aug. 27, 2003, https://prospect.org/features/permanent-election/

[14] *See infra* notes xx and accompanying text.

[15] See *infra notes* xx and accompanying text.

[16] ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973)

His analysis has been updated to include reviews of subsequent Presidencies and amplified to describe new modes of aggrandizement in the decades since.[17] But the concern about the imperial presidency has mostly focused on foreign policy and counted its costs, as principally those of excessive secrecy and tendency to get the United States into expensive wars.[18] This article makes two additional contributions to the analysis of the imperial presidency. First, it views the rise of the administrative state and the exercise of discretion by Presidents and their appointees as an essential, likely more important, part of the story of the rise of the imperial presidency.[19] Second, it describes another large of cost of such relatively unconstrained unilateral political power—its contribution to polarization and political disunion.

Most importantly, our warped structure of government creates a shrill debate where people do not need to listen to or to compromise with their fellow citizens to secure their objectives. It rewards ideological entrepreneurs, like Bernie Sanders and Ted Cruz, rather than dealmakers, like Joe Manchin or Mitt Romney. Yet, a politics that lurches to extremes does not deliver permanent victories to either side but instead succeeds in making them, and the many people in the middle, unhappy and insecure most of the time.[20] In contrast, compromise in legislatures that dealmakers facilitate leave a greater number of people satisfied.[21]

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[17] *See, e.g.*, JON HERBERT, REVISITING ARTHUR SCHLESINGER'S *IMPERIAL PRESIDENCY*, RICHARD NIXON, GEORGE W. BUSH AND EXECUTIVE POWER (2012): Charlie Savage, Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy (2008); Kevin M. Kruse & Julian E. Zelizer,*Have We Had Enough of the Imperial Presidency Yet?*, N.Y. TIMES (Jan. 9, 2019), https://www.nytimes.com/2019/01/09/opinion/president-trump-border-wall-weak.html.

[18] *See, e.g.*, SCHLESINGER, *supra* note x, at 299, 354.

[19] Others have worried about the aggrandizement of presidential power emanating from the rise of the administrative state. *See, e.g.,* Abner S. Greene*, Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124-28, 153-54 (1994); Peter M. Shane, *Independent Policymaking and Presidential Power*, 57 GEO. WASH. L. REV. 596, 621-622 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581 (1984). But they have not drawn the connection between that concern and the greater foreign policy focus traditionally associated with critics of the imperial presidency.

[20] Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1716 (2015) ("substantially more people say they prefer elected officials who make compromises to those 'who stick to their positions'")

[21] *See* Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 492 (1996)

Without institutional reform, both sides are locked into a prisoner's dilemma: while both parties would benefit from a regime of greater moderation, neither side can moderate for fear that the other side will just continue to use the existing structure to pursue its own extreme policies.[22] Indeed, the rational response to the prospect of other side's extreme policy may be to "go nuclear" first.[23] In other words, the danger that the party out of power may eliminate moderate structures when it takes over encourages the party in power to eliminate those structures now.[24]

This article contains both a descriptive thesis about the relation of our law to our politics and a normative thesis for reforming law and thereby changing our politics. Our descriptive thesis is that changes in government structure have substantially contributed to polarization. Our normative thesis is that reversing these changes would decrease polarization and would be desirable. While it is possible to agree with our descriptive thesis without accepting our normative thesis, we argue for both. The theses are also closely related in that the description of which institutional deformations contribute to polarization provides a clear roadmap of reform to temper our current age of partisan discontent.

For instance, various legal and doctrinal routes exist to curb the excessive delegation that leads to extremism by forcing Congress, rather than agencies, to become primarily responsible for enacting the rules that govern us and thereby making compromise more likely. Congress could make itself responsible for voting on important regulations or the Court could prompt more such votes by cutting back on the lenient delegation doctrine and other legal rules that give interpretative authority over the scope of the administrative state to the President's agents rather than the courts. Also, Congress can make the War Powers Resolution more effective and can pass legislation that prevents major international agreements from having the force of law unless passed through a treaty that requires ratification by two-thirds of the Senate or a congressional/executive agreement that requires approval by a majority of both houses.

Such reforms do not require us to begin the world anew, but to return to the tested institutional structure that governed America for much

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[22] Kenneth S. Lowande & Sidney M. Milkis, *supra* note x at 23.

[23] *Id.*

[24] See, e. g, Matthew Rosza, *Harry Reid Urges Repeal of Filibuster*. SALON, Aug. 13, 2019, https://www.salon.com/2019/08/13/harry-reid-urges-repeal-of-the-filibuster-calling-the-senate-an-unworkable-legislative-graveyard/ (Currently Democrats want to get rid of the filibuster)

of its history.[25] The original Constitution was the product of compromise that induced a politics of compromise. The result of following that Constitution should be not only less extreme policies, but also a less strident politics where people of differing perspectives are induced to work together to determine the common good.

This essay proceeds in four parts. Part I describes the concept of polarization and assesses it costs. Part II describes the rise of administrative agency governance, its contribution to polarization, and possible reforms of this deformation of our governmental structure. Part III describes the President's usurpation of unilateral power in military and foreign affairs, its contribution to polarization, and suggestions for reform.

Finally, Part IV confronts some possible objections to our descriptive and normative claims. First, we refute the objection to our descriptive thesis that polarization is only the cause rather than also the consequence of the change in government we describe, while acknowledging that legal structure is just one cause among many of the complex phenomenon of polarization. Second, we respond to the argument against our normative thesis that these governmental changes have virtues—greater accountability, easier change from the status quo, more principled policymaking, or structures for better decision making—that outweigh their costs in terms of polarization. Even if polarization has such benefits, which we show in many cases are negligible or overstated, they are outweighed by the costs of political division.

I. Understanding Polarization

In this Part, we consider the concept of political polarization, showing how it relates to our arguments. Polarization is a concept deployed by political scientists as well as law professors.[26] At its simplest, it

[25] For a discussion of the government structure that precluded the large administrative state of the form we have today, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1234, 2235-136 (1994); For a discussion of the structure that precluded unilateral presidential offensive military action, see Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1643 (2002) (under the Constitution, President does not have power to initiate war without congressional declaration, although he or she does have some power to take military action, like defending the nation or its citizens even if that might lead to war).

[26] *See, e.g.*, Nolan McCarty et al., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 4 (2016); Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 273 ("[T]he major

measures the distance in the policy space between people on political issues.[27] A legislature becomes more polarized in a two-party system as the distance in policy preferences between the median legislators of the two parties grows.[28] Substantial evidence exists that such polarization has been growing in Congress.[29]

Polarization may also include the development of an "uncompromising mindset," in which each side distrusts the other and comes to distrust compromise itself.[30] This state of affairs moves beyond substantive policy disagreements into identity politics or tribalism, in which an "us versus them" mentality flourishes and each side views the other as an existential threat to be destroyed rather than engaged with.[31]

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cause of the extreme polarization of our era is the historical transformation of American democracy and America's political parties set into motion by the 1965 Voting Rights Act."); Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, (2015) ("It has thus become impossible to think about the place of agencies in contemporary American government without first coming to terms with the political polarization . . . ."); Gillian E. Metzger, *Agencies, Polarization, and the States*, 155 COLUM. L. REV. 1739, 1742 (2015) ("Administrative government, and particularly regulatory government, fundamentally transforms the polarization equation.").

[27] *See* James E. Campbell, POLARIZED: MAKING SENSE OF A DIVIDED AMERICA 17 (2016) ("[P]olitics would be completely polarized when two sides of equal size were as far apart as possible in their perspectives."); *see also* Nolan McCarty et al., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 4 (2016) ("Briefly, polarization refers to a separation of politics into liberal and conservative camps.").

[28] *See* Nolan McCarty et al., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 25 (2016) ("The positions of the average Democrat and average Republican member of Congress have become more widely separated. That is, the difference in the party means has increased over time."); *see also* James E. Campbell, POLARIZED: MAKING SENSE OF A DIVIDED AMERICA 21 (2016) (discussing the McCloskey study, which found that "ideological and issue differences are greater between the parties' leaders than between their followers").

[29] B. Dan Wood & Soren Jordan, PARTY POLARIZATION IN AMERICA: THE WAR OVER TWO SOCIAL CONTRACTS 263-64 (2017) (citing multiple studies documenting increased congressional polarization since the 1980s).

[30] *See* Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 Perspectives Pol. 1125, 1125, 1132 (2010) (defining the "uncompromising mindset" and discussing "motive cynicism," in which one side mistrusts the other's motives and may come to mistrust the process of compromise itself).

[31] McCoy et al., *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities*, 62 AM. BEHAVIORAL SCI. 16, 18-19, 23 (2018) ("[E]ach camp questions the moral legitimacy of the others, viewing the opposing camp and its policies as an existential threat . . . to be vanquished. . . . [The] distance between groups moves beyond principled issue-based differences to a social identity. . . . Severely polarized democracies, then, exhibit the tribal nature of intergroup dynamics, in which members become fiercely loyal to their 'team,' wanting it to win at all costs, and strongly biased or prejudiced against the other group." (citations omitted)).

Uncompromising partisans may use past cleavages to polarize new issues, expanding the "us versus them" mentality into new policy areas.[32] Thus, it is particularly important to reform the structures that lead to political polarization to prevent tribalism from enveloping society.

Political scientists distinguish between elite and mass polarization. Elite polarization is polarization among the society's social leaders, legislators, administrators, judges, and opinion leaders.[33] Mass polarization is the polarization of ordinary citizens.[34] These kinds of polarization reinforce one another.[35] In particular, it is thought that elite polarization tends to generate mass polarization, as elites vilify one another before a mass audience.[36] Given that our focus in this article is how a change in government structure can increase polarization, we mostly discuss elite polarization. But our proposals to temper elite polarization will also likely help arrest mass polarization because of the relation between the two.

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[32] *See* Wood, PARTY POLARIZATION IN AMERICA, at 265 ("Scholars have also theorized that the political parties engage in conflict extension, rather than conflict displacement, through time. . . . [E]lites have an incentive to polarize iteratively on new issues while retaining partisan cleavages on past issues. Thus, conflict extension theory would suggest that elites maintained the older partisan cleavage over economic issues, while subsequently adding cultural issues to bolster their base).

[33] *See* Nolan McCarty, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 13 (2019).

[34] *Id.*

[35] *See* Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA 26 (eds. Jon R. Bond & Richard Fleisher, 2000) ("[T]he relationship between mass and elite partisan consistency is inherently interactive. Between the 1970s and the 1990s, changes in electoral and congressional politics reinforced one another . . . ."); *see also* B. DAN WOOD & SOREN JORDAN, PARTY POLARIZATION IN AMERICA: THE WAR OVER TWO SOCIAL CONTRACTS 298 (2017) (discussing evidence that suggests that mass and elite polarization have "a mutually reinforcing relationship" but elite polarization is dominant).

[36] B. Dan Wood & Soren Jordan, PARTY POLARIZATION IN AMERICA: THE WAR OVER TWO SOCIAL CONTRACTS 265 (2017) (discussing scholarship that "showed that changing issue positions among elites transmits signals to the masses by increasing the clarity of party stances"); *see also* Joshua N. Zingher and Michael E. Flynn, *From on High: The Effect of Elite Polarization on Mass Attitudes and Behaviors, 1972–2012*, 48 BRITISH J. POLIT. SCI. 23, 23 (2018) ("[A]s party elites have become more polarized, individuals have become better able to identify the party that best matches their own ideological positions, thereby contributing to polarization at the mass level."); Marc C. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POLIT. SCI. R. 619, 619 (2001) ("Greater partisan polarization in Congress has clarified the parties' ideological positions for ordinary Americans, which in turn has increased party importance and salience on the mass level."). *But see* Nolan McCarty, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 13 ("While most people assume that elite and mass polarization are closely related, that is often not the case.").

Political scientists also distinguish between benign and pernicious polarization.[37] Benign polarization aids the political system by making it possible to form political parties.[38] Without a certain degree of polarization, politicians and voters would not establish the stable association of political positions and parties that are necessary for parties to exist.[39] Pernicious polarization, however, harms democracy by undermining the ability of citizens of different views to reach compromises and by fracturing the civil society that provides a stable foundation for politics.[40] In Part IV, we explain that a decline in unilateralism in our system would still allow for benign polarization. We already have strong political parties and free media for clarifying issues. It is extremely unlikely that a return to political structures that promote compromise would eliminate benign polarization. Political parties existed through long periods of American history under these structures.

In this article, we use the term polarization in its broad sense to

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[37] *See, e.g.*, Yannis Stavrakakis, *Paradoxes of Polarization: Democracy's Inherent Division and the (Anti-) Populist Challenge*, 61 AM. BEHAVIORAL SCI. 43, 49-50 (2018) ("[P]olarization can then acquire legitimate and illegitimate, benign and pernicious forms."); *see also* Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, 681 ANNALS AM. ACAD. POLIT. & SOC. SCI. 234, 235 (2019) ("[P]olitical polarization is associated with both democratic strengthening and democratic erosion.").

[38] *See* Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, 681 ANNALS AM. ACAD. POLIT. & SOC. SCI. 234, 235 (2019) ("Polarization can help to strengthen political parties and institutionalize party systems because it enables them to mobilize voters around identifiable differences.").

[39] Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, 681 ANNALS AM. ACAD. POLIT. & SOC. SCI. 234, 235 (2019) ("Offering voters clear choices and serving as heuristic cues can be helpful to democracy."); *see also* B. Dan Wood & Soren Jordan, PARTY POLARIZATION IN AMERICA: THE WAR OVER TWO SOCIAL CONTRACTS 265 (2017) (discussing scholarship that "showed that changing issue positions among elites transmits signals to the masses by increasing the clarity of party stances").

[40] *See* Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies: Comparative Evidence and Possible Remedies*, 681 ANNALS AM. ACAD. POLIT. & SOC. SCI. 234, 235-36 (2019) (describing how pernicious polarization can create an "us vs. them" mentality, leading to a breakdown in social interaction); Jennifer McCoy et al., *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Polities*, 62 AM. BEHAVIORAL SCIENTIST 16, 18-19 (2018) ("[Pernicious polarization] make[s] compromise, consensus, interaction, and tolerance increasingly costly and tenuous for individuals and political actors . . . . Situations of deep polarization create problems of governance as communication and trust break down and the two camps prove unwilling and unable to negotiate and compromise.").

include not only sharp division on policy issues but also the "us versus them" mentality. And we view these two different aspects of polarization as reinforcing one another.

Our analysis begins with the sharp division on policy issues. But this sharp division is reinforced by other considerations. In recent years, there is little overlap between the two political parties. In Congress no Democrats are more conservative than any Republicans and no Republicans more liberal than any Democrat. And there are few legislators in the middle.[41] This lack of overlap and centrist legislators makes it harder to effect compromises.[42] Moreover, the distance between the parties and the lack of compromise leads to a strong rational fear of losing elections, since the other party is likely to take so many actions that one's party views as destructive.

The sharp division, lack of compromise, and rational fear also affect the political psychology of legislators and citizens alike. Together these feature cause people to view the opposite party not merely as political opponents, but as a threats to the country. In such a climate, this psychology reinforces the policy division between the parties, making it even harder to compromise with the other side. Instead, the fear of the threat from the other party incentivizes constant outrage and insult between parties. The fact that the news media rewards this rancorous language only exacerbates the problem.

II. Delegation versus Legislation

A. The Problem of Delegation and Polarization

[41] Drew Desilver, The Polarized Congress of Today Has Its Roots in the 1970s, Pew Res. Ctr., (June 12, 2014), https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/ (finding no overlap between Democrats and Republicans when ordering them from most liberal to most conservative). Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America, 99 Calif. L. Rev. 273, 277 ("Even in the Senate, the most conservative Democrat is now more liberal than the most liberal Republican.").

[42] Section 4: Political Compromise and Divisive Policy Debates, Pew Res. Ctr. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/section-4-political-compromise-and-divisive-policy-debates/ ("those at opposite ends of the ideological spectrum see less benefit in meeting the other side halfway.").

Delegation is a legislative act by which Congress permits administrative agencies to act with the force of law.[43] There are over 100 administrative agencies in Washington, from the Federal Communication Commission to the Environmental Protection Agency to the Securities and Exchange Commission.[44] Collectively, they use delegated authority to issue thousands of rules each year that are contained in tens of thousands of pages of the Federal Register.[45] Agencies write more rules that govern the public than does Congress.[46] Modern government in the United States has become administrative government.

Much debate has occurred about the exact constitutional requirements for congressional delegation. One common view is that Chief Justice Marshall captured an important distinction when he suggested that Congress must at least legislate on important subjects, while permitting the executive to fill in "the details."[47] The leading textbook on administrative law has noted that the underlying purpose of requiring Congress to legislate and not broadly delegate is to advance the

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[43] With the rise of formalism, the Court now resists the argument that Congress is actually transferring its Article I, section & powers *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001) ("Article I, section 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation"). But as commentators have noted, this claim seems to be largely a fiction, since the Court does not invalidate even very broad delegations of regulatory authority. *See* Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2105 (2004).

[44] There is disagreement over how many federal agencies exist, but the Administrative conference puts the number at 115. *See* Clyde Wayne Crews, Competitive Enterprise Institute, (August 26 2015). https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist

[45] *See* Clyde Wayne Crews, Competitive Enterprise Institute, (Dec. 29, 2017 https://cei.org/blog/trump-regulations-federal-register-page-count-lowest-quarter-century (showing that in last quarter century the number of rules promulgated annually has ranged from a low of approximately 3,000 pages to a high of approximately 4,000 pages and the number pages of the Federal Register has ranged from a low of approximately 50,000 pages to a high of approximately 90,000 pages.

[46] The highest number of laws enacted by Congress in a year in last quarter of century is 603. https://www.govtrack.us/congress/bills/statistics

[47] *See* Wayman v. Southard, 23 U.S. 1 (1825) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details"). For a version of the nondelegation doctrine that would apply a stricter version than Chief Justice Marshall's test as to the regulation of private rights, see Michael B. Rappaport, A Two Tiered and Categorical Approach to the Nondelegation Doctrine (forthcoming 2021 in American Enterprise Institute).

> particular constitutional goal of ensuring a deliberative democracy, one that involves not only accountability but also reflection and compromise. The vesting of lawmaking power in Congress is designed to ensure the combination of deliberation and accountability that comes from saying that government power cannot be brought to bear on individuals unless diverse representatives, from diverse places, have managed to agree."[48]

This deliberative process involving diverse views helps protect against polarization and extreme policies.[49]

But with its broadest delegations, Congress fails to fulfill the requirement of even setting the core objectives of legislation, telling agencies instead to make rules in "the public interest" without further defining that term.[50] Or Congress directs an agency to pursue an objective stated at a high level of generality, such as promoting the public health, without indicating how much harm is consistent with protecting the public health.[51]

The large number of vague delegations to the executive branch aggrandizes the power of the President.[52] It is his or her appointees who

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[48] *See* STEPHEN G. BREYER, ET AL. ADMINISTRATIVE LAW AND REGULATORY POLICY 56 (2017)

[49] *See* Sunstein, *supra* note x, at 75.

[50] For instance, the FCC has authority to regulate wireless communications in the "public interest" or "public convenience, interest, or necessity" in Title III of the 1934 Communications Act. *See, e.g.,* 47 U.S.C. 301-303, 307(a), 309(a), 310(d), 311(b)-(c)(3), 315(a), 319(c) (1994 & Supp. IV 1998).

[51] *See* Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1420 (2004) (noting that many delegations are broad enough to allow agencies to reach a wide range of results depending on the tradeoffs they make). For instance, the Clean Air Act requires EPA to promulgate national ambient air quality standards ("NAAQS") for each air pollutant identified by the agency as meeting certain statutory criteria. See Clean Air Act §§ 108-09, 42 U.S.C. §§ 7408-09. For each pollutant, EPA sets a "primary standard"--a concentration level "requisite to protect the public health" with an "adequate margin of safety"--and a "secondary standard"--a level "requisite to protect the public welfare." *Id*. § 7409(b).

[52] Ernest A. Young, *Federalism As A Check on Executive Authority: State Public Litigation, Executive Authority, and Political Polarization*, 22 TEX. REV. L. & POL. 305, 310 (2018) (delegation aggrandizes the power of the President at the expense of the States and legislature)

will determine what constitutes the public interest or the public health.[53] This empowerment of the President leads to more extreme political outcomes than would be reached if the decision were made in legislation.[54]

When federal rules are enacted by Congress, they tend to be relatively moderate. Legislative policy is moderated most dramatically when the federal government is divided—that is, when more than one party controls the House, the Senate, and the Presidency.[55] Legislation will then only be enacted through cross-party compromise. And divided government is the ordinary state of affairs, existing nearly three quarters of the time for the last forty years.[56]

But even when government is not divided, it is difficult for the majority to get its way without compromise between the majority and minority. One reason is the constitutional requirement of bicameralism. As the political scientists James Curry and Frances Lee observe, "[t]he two chambers' different methods of apportionment, election, and internal procedure often frustrate bicameral agreement."[57] Second, members of Congress often have electoral incentives to maintain a distance from their party as a kind of insurance policy.[58] Creating an independent reputation gives them a basis for voter support other than party.[59] Finally, the Senate filibuster also contributes to the need for compromise even when government is not formally divided between the parties by making sixty votes necessary for most legislation.[60] It is very rare for a party to control sixty Senate seats (having occurred only for two of the last forty years).[61]

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[53] The President may exercise directive power over delegations through his or her supervisory powers at least unless Congress has forbidden that exercise. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 22245, 2288 (2001) (describing and defending such a practice).

[54] William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 511, 519 (2008) (describing how presidential power inevitable expands as precedents build and how polarization leaves that power unchecked)

[55] *Id.* at 519.

[56] Divided government existed for twenty-nine of the last forty years.

[57] JAMES M. CURRY & FRANCES E. LEE, THE LIMITS OF PARTY: CONGRESS AND LAWMAKING IN A POLARIZED ERA 12 (2020).

[58] *Id.*

[59] *Id.*at 13.

[60] *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181,182 (1997) (sixty votes necessary to pass most legislation in the Senate.

[61] *See* Party Division, https://www.senate.gov/history/partydiv.htm (showing party division in the Senate). The Democrats had a sixty-vote supermajority for a little more than one year until Scott Brown was elected in a special election to replace Edward Kennedy who had died. David M. Herszenhorn & Robert Pear, *Democrats May Seek to Push Health*

Consider, for instance, the balance of power that confronts President Biden in the 117th Congress. The Senate is evenly divided and the Democrats must rely on the Vice-President's vote to wield majority power. Even with this slight advantage, they have reached a power sharing agreement with the Republicans that requires committees with equal numbers of Democratic and Republican members, limitations on the majority leader's power, and extra rights for the minority leader.[62] Moreover, the pivotal vote on legislation would be that of Joe Manchin, a moderate Senator who must face reelection in the conservative state of West Virginia.[63]

While the House of Representatives will be controlled by the Democratic Party, here the margin is the very narrow, with 222 Democrats to 213 Republicans.[64] That close division empowers both Democratic and Republican moderates in the House, because they will be often needed to assemble majorities. Moreover, after an election in which the House majority lost a substantial number of seats, factional fighting has emerged between the party's left and more moderate wings.[65] This development is also likely to moderate policy, since moderate Democrats will want to be seen as having a substantial effect on policy. Moreover, the Democratic

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Bill Through House, N.Y. TIMES, Jan. 18, 2010. http://www.nytimes.com/2010/01/19/health /policy/19health.html.

[62] *See* Katherine, Tully McManus & Chris Cioffi, *Democrats Claim Gavel as Senate Adopts Organizing Resolution*, https://www.rollcall.com/2021/02/03/democrats-claim-gavels-as-senate-adopts-organizing-resolution/ (detailing unusual structure for the Senate in the 117th Congress, including equal number of Republicans and Democrats on committees, equal funding for majority and minority staffs, and restrictions on the majority leader's ability to limit the amendments Senators can offer to legislation).

[63] *See* Walter Shapiro, *Moderate Democrats Rule*, NEW REPUBLIC, (Jan. 6, 2021) (describing how Joe Manchin and other moderates, like Jon Tester, control the balance of power in the Senate).

[64] As of this writing, the margin is 221 to 211. But there are three vacancies in the House, two from Louisiana, where one is a safe Democratic seat and one is a safe Republican seat. *See* Stephanie, Atkin*, Louisiana special elections draw crowds seeking Richmond and Letlow seats*, ROLL CALL (Jan. 22, 2021) eight https://www.rollcall.com/2021/01/22/lousiana-special-elections-draw-crowds-seeking-richmond-and-letlow-seats/ The other vacancy is in New York where certification has not yet taken place but the Republican is leading and very likely to win. *See* Steve Howe, *Judge Orders Hold on Certify Results, Tenney Continues to Lead*, Observor-Dispatch (Feb. 2, 200)

[65] *See* Luke Broadwater & Nicholas Fandos, *Amid Tears and Anger, Democrats Promise 'Deep Dive' into Election Losses,* N.Y.TIMES, (Nov. 7, 2020)(recounting angry divisions between Democratic party's left and more moderate wings).

leadership will be likely attentive to their concerns, since moderates tend to hail from swing districts that will be closely contested at the next election.

In contrast, President Biden, like the Presidents before him, will likely promulgate more extreme policies than those that would be produced by legislative compromises.[66] A President must be nominated by a primary electorate that is composed largely of members of his or her own party. Moreover, primary voters tend be more ideologically extreme than voters in the general electorate.[67] Consequently, rather than reflecting the views of the median voter of the electorate, Presidents are more likely to reflect the views of the median voter of their party, and because of the primary electorate, could possibly reflect the views of even more extreme voters.[68] While presidential candidates do attempt to reach out to the median voter during the general election, they remain concerned to turn out their base and thus often make commitments that do not reflect majoritarian sentiment.[69] Consequently, the last nine elected Presidents appear to have reflected the median views of their party more than the median views of the electorate.[70]

In the past, it might have been argued that the relative extremism of the President compared to the legislative process would make little difference to the decision making of the administrative state, because administrative outputs were largely dictated by science. The idea that public administration can be separated from politics is a trope that goes back to the beginning of the progressive era. In 1887 Woodrow Wilson,

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[66] *See* Michael A. Bailey, *Comparable Preference Estimates across Time and Institutions for the Court, Congress, and Presidency*, 51 AM. J. POL. SCI. 433 (2007) (finding substantial divergence between the preferences of presidents and median legislators.).

[67] Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1021 (2011)

[68] Political scientist David King of Harvard University has well described the factors that have led to this situation. See David C. King, *Who's Partying, USA Today* (Aug 4, 2000)

[69] The so-called "securing the base strategy" has received much attention both in the press, *see, e.g.,* David Brownstein, Bush Aims to Solidify His Base, Los Angeles Times (Aug 24, 2004), and in academic commentary, *see, e.g.,* Morris Fiorina, What Ever Happened to the Median Voter, https://www.semanticscholar.org/paper/WHATEVER-HAPPENED-TO-THE-MEDIAN-VOTER-*-Fiorina/4117eac69bc654d454d11f6e87f74d65ea10456b

[70] *See* Larry Bartels, *Failure to Converge, Presidential Candidates, Core Partisans and the Missing Middle in American Politics*, 667 ANNALS, APPS 143 (2016) (showing that presidential candidates between 1980 and 2016 have been as ideologically extreme as their party's base and sometimes more so). *See also* Matthew C. Stephenson, *The Optimal Political Control of the Bureaucracy*, 87 MICH. L. REV. 53, 83 (2008) ("The Republican Party and Republican presidents are notably more conservative than the median voter, while the Democratic Party and Democratic presidents are notably more liberal").

then a professor of political science at Bryn Mawr, wrote a famous paper arguing that administration could be cabined from the vicissitudes of electoral politics because it could follow a scientific logic rather than ideology or interest.[71] Within administration, experts would deliver regulations for the public good from the conveyor belt of science.[72] But this scientific model of administration has been largely abandoned. Experts do not always agree on the science.[73] Moreover, the data are often not clear enough themselves to dictate policy.[74] Value judgment are central to choosing policies, particularly when administrative agencies enjoy substantial delegated power.[75] Agency discretion is also influenced by the interest groups of the President's party. [76]

Thus, it is no surprise that in the modern era administrative rules change dramatically from one administration to the next.[77] The Obama administration's FCC imposed strong net neutrality rules. The Trump administration's FCC repealed them.[78] The Obama administration imposed strict fuel economy limits on vehicles. The Trump administration tried to

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[71] See Woodrow Wilson, *The Study of Administration*, 2 POLITICAL SCIENCE QUARTERLY 1197 (1887)

[72] This "scientists model of administrative law in fact suggested that that there needed to be fewer constitutional restraints on administrative agencies than on the legislature, because administrative agencies were constrained by science

[73] Emily Hammond Mazell, *Super Deference, The Science Obsession, And Judicial Review as Translation Of Agency Science*, 109 MICH. L. REV. 733, 745 (2011) (experts can disagree even given the same data).

[74] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) ("It is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion.") See David L. Faigman, *Legal Alchemy: The Use and Misuse of Science in the Law* 181, 182 (1999) (arguing that science alone cannot draw the lines).

[75] *See* Harold J. Bruff, *Legislative Formality, Administrative Rationality*., 63 TEX. L. REV. 207, 249 (1984) understanding value choices as often central to the exercise of administrative discretion).

[76] *See, e.g.,* Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 341 (1990) ("The exercise of administrative discretion is heavily influenced by organized economic and ideological interest groups … .").

[77] *See* Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda To Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 7 (arguing that "Clinton, Bush, Obama and Trump were Fiat Presidents using executive orders and policy directives to dictate policy".) https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2569292

[78] Courtney Loyack, *Warning! Tiered Internet Ahead: Expect Delays*, 94 NOTRE DAME L. REV. ONLINE 147, 155-162 (2019) (A long discussion of the history of Net Neutrality through a legal lens)

roll these back.[79] The Obama administration claimed discretion under the immigration laws to give work permits to those who came to the United States without legal permission.[80] The Trump administration not only sought to reverse this decision but claimed discretion under the immigrations laws to bar immigrants from a group of mainly Muslim-majority nations.[81] The Obama Administration sent a Dear Colleague letter to universities, with suggestions backed by the threat of losing federal funds, of how to implement rules against sexual misconduct.[82] The Trump administration revoked the letter and after notice and comment promulgated rules contrary to core suggestions of the Obama administration, as, for instance, on cross-examination of complainants.[83]

While the dichotomy between the Obama and Trump administrations on such regulations is the starkest in the modern era, it is not unprecedented. The Reagan and Bush administrations imposed restrictions on abortion counseling on entities that received family planning funds. The Clinton administration revoked them.[84] The Trump administration reinstated them.[85]

Moreover, Trump exercised executive authority to take many polarizing actions in new areas beyond reversing Obama's actions. For instance, he withdrew from the World Health organization.[86]

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[79] Brad Plumer, *How Big a Deal is Trump's Fuel Economy Rollback? For the Climate Maybe the Biggest Yet*, NEW YORK TIMES, Aug. 3, 2018, https://www.nytimes.com/2018/08/03/climate/trump-climate-emissions-rollback.html

[80] *Trump: 'DACA is dead because the Democrats didn't care or act'*, 2018 WL 1571068

[81] Trump v. Hawaii, 138 S. Ct. 2392, 2399 (2018)

[82] Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault.

[83] Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (Nay 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

[84] Nikita Biryukov et al., *Trump Reinstates, Broadens Reagan-Era Anti-Abortion Policy*, NBC NEWS (updated Jan. 24, 2017, 2:36 PM), https://www.nbcnews.com/news/us-news/trump-reinstates-reagan-era-anti-abortion-policy-n710081; *see also* Robert Roberts, *The Judicial Response to the Presidential Polarization of the Administrative State*, 49 AM. REV. PUB. ADMIN. 3, 10 (2019) ("In 1989, the administration of President George H. W. Bush issued new regulations prohibiting any organization receiving Title IX family planning funds from providing clients information about abortions. . . . The abortion 'gag rule' became a political football with the Democratic administrations repealing the rule and Republican administration putting the rule back into effect.").

[85] *Id.*

[86] Katie Rogers & Apoori, Mandavalli, *Trump Administration Signals Formal*

Domestically, he declared a national emergency so as to reprogram funds for building his border wall.[87] He required every agency under his control to repeal two regulations for every new regulation that the agency issued.[88]

Moreover, the unilateral use of presidential power is very likely to continue in a Biden administration on the very same issues that divided Presidents Obama and Trump. President-elect Biden will likely use the FTC to restore the Obama net neutrality rules. [89] Similarly, he will likely re-impose fuel economy standards of the kind the Trump revoked and undertake many other far reaching executive actions on the environment.[90] Biden has promised to reinstate the Obama administration program for children who came to the United States in violation of immigration laws and were protected by the Obama orders.[91] He has vowed to revoke the Trump administration order under Title IX that gave more due process rights to those accused of campus sexual assault.[92] There is even talk among his supporters of forgiving student loans by executive order.[93]

This administrative process of presidentially directed unilateral action effectively transforms the original separation of powers. In the original system, it was Congress who wrote the rules and then the President

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Withdraw from W.H.O., N.Y. Times (July 7, 2020) https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html

[87] Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 15, 2017) *See also* Peter Baker, *Trump Declares a National Emergency and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html [https://perma.cc/L877-2UMP] (quoting Trump as remarking, "We're going to confront the national security crisis on our southern border, and we're going to do it one way or the other . . . It's an invasion . . . We have an invasion of drugs and criminals coming into our country.").

[88] Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017).

[89] *Bringing Back Net-Neutrality Rules is High on the Biden's Tech Agenda.* MARKETPLACE TECH *(Nov. 10, 2020)*

[90] Ben Foldy, *In Biden, Detroit Gets a Car Guy with Electrical Vehicles on His Mind*, WALL STREET JOURNAL (Nov. 9, 2020) https://www.wsj.com/articles/in-biden-detroit-gets-a-car-guy-with-electric-vehicles-on-his-mind-11604923200

[91] Katelyn Burns, *Biden Plans on Swiftly Rolling Back Some Trump Policies with Executive Orders*, VOX (Nov. 8, 2020) https://www.vox.com/policy-and-politics/2020/11/8/21555185/biden-plans-roll-back-trump-policies-president-early-executive-orders

[92] Jeremy Bauer-Wolf, *Biden Says He Wants to Undo DeVos' Title IX Rule: How Would He Replace It,* EDUCATION DIVE (Oct. 28, 2020) https://www.educationdive.com/news/biden-said-he-wants-to-undo-devos-title-ix-rule-how-would-he-replace-it/587853/

[93] Kerry Murakami, *Groups Call on Biden to Cancel Student Debt*, Higher Education (November 19, 2020).https://www.insidehighered.com/news/2020/11/19/biden-urged-cancel-student-debt

who had an opportunity to veto them. But now unilateralism reverses the relation between the branches, because the President and his agents can enact their rules into law, *unless* Congress passes legislation blocking the action.[94] Moreover, under unilateralism, the President enjoys tremendous power to protect his regulations from being overturned by congressional action, because the President can veto such congressional action. The President can veto any such legislation that seeks to overturn his rules. Because overriding the veto takes a two-third majority, the President can generally win simply by relying on the most stalwart and extreme members of his party. Eight of nine bills vetoed by President Trump, none of which were overridden, represented unsuccessful efforts by congressional majorities to reverse actions he took under broad delegations.[95] Such congressional impotence in the face of unilateralism shows how polarized and extreme policies result from a disempowered Congress.

Significantly, this unilateral structure for making binding rules has the problematic feature of polarizing another institution – the judiciary. Because Congress has no effective power to prevent the executive's rules from going into effect, the focus naturally shifts to blocking power of the judiciary, because courts can still enjoin the rules on statutory or constitutional grounds.. As a result, Presidents have more incentive to place their partisans on the courts both so that the President's rules are more likely to survive challenge and so that a future administration of the opposing party will have more difficulty putting its rules into effect.[96]

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[94] *See* Saikrishnah Bangalore Prakash, *The Age of Winning Executive: The Case of Donald J. Trump*, 134 HARV. L. REV. FORUM 141, 162 (2020) ("To speak of executive discretion with respect to the enforcement of congressional laws is to unduly minimize the latitude that Presidents currently enjoy. Instead it is best to regard the modern Executive as enjoying a parallel lawmaking authority to supplement, and in some cases supersede, congressional laws. This authority arises from outright delegations of legislative power, for the power to create rules is in many instances a power to legislate").

[95] *Id*.at 163. At the time Prakash wrote the President had vetoed only eight bills. Subsequently, he also vetoed the Defense Authorization Bill, which was not principally an effort to reverse unilateral actions. *See* Kristna Peterson et. al., *Trump Vetoes Defense Bill, Covid Aid in Limbo,* WSJ (Dec. 23, 2020) https://www.wsj.com/articles/covid-19-aid-package-in-limbo-after-trumps-surprise-demand-to-boost-direct-payments-11608739678?mod=hp_lead_pos1

[96] We do not disagree that the President always has some interest in putting jurists of his ideological ilk on the Courts. But the President generally has many considerations to balance as well: such as pleasing Senators in the relevant states, rewarding supporters, including those are not the most ideologically aggressive, and considering various demographic factors, like race, ethnicity and gender. *See, e.g.*, John Yoo, *Review,* 98 MICH. L. REV. 1436 (2000) (reviewing DAVID ALISTAIR YALOF, PRESIDENTIAL POLITICS AND THE PURSUIT OF SUPREME COURT NOMINEES (1999) and describing such ideological factors in Supreme Court nominations of the past.

Indeed, the President may well be concerned that a future President of the opposing party may repeal his or her rules. Thus the rules the President saves by polarizing judicial appointments may well be his or her own.

This power of presidential unilateralism to cause judicial polarization illustrates how presidential unilateralism can transform the entire structure of government. Indeed, this tendency toward judicial polarization begets a further spiral of polarization that additionally erodes institutional constraints. First, given their increased importance, judicial nominees became subject to unprecedented filibusters.[97] Then filibusters over judicial confirmations of lower court justices were eliminated.[98] Not surprisingly, the main impetus for removing them from lower court nominations was to make is easier for President (Barak Obama) to get his nominees appointed to the District of Columbia Circuit, the most important lower court for assessing the legality of an administration's rules.[99] Next, a Supreme Court nominee was not given a hearing or a vote by Senate of the opposing party to the President..[100] Then the filibuster over Supreme Court nominees was eliminated to assure the President and the Senate could get their preferred nominee confirmed.[101] More recently, presidential candidates have called for enlarging the Court and packing it with members of their own party.[102]

Besides contributing to the polarization of the judiciary, the often largely unbounded delegation of power to administrative agencies strongly contributes to extreme policies that then become an object of anger and

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[97] CHARLES TIEFER & KATHLEEN CLARK, DELIBERATION'S *DEMISE: THE RISE OF ONE-PARTY RULE IN THE SENATE*, 24 ROGER WILLIAMS U. L. REV. 46,67 (2019)

[98] William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 673 (2016).

[99] *See* Brad Plummer, *The D.C. Circuit is the Court at the Center of the Filibuster Fight: Here's Why It Matters,* WASHINGTON POST (Nov. 21, 2013). https://www.washingtonpost.com/news/wonk/wp/2013/11/21/the-d-c-circuit-court-was-at-the-center-of-the-filibuster-fight-heres-why-it-matters/

[100] *See* Carl Tobias, *Confirming Supreme Court Justices In a Presidential Election Yea*r, 94 WASH. U. L. REV. 1089 (2017) (recounting the inability of Merrick Garland, the nominee of President Barack Obama, to obtain a Senate vote).

[101] Matt Flagenheimer, *Senate Republicans Deploy Nuclear Option to Clear Path for Gorsuch,* N.Y. Times (April 6. 2017).https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html

[102] Burgess Everett & Marianne Levine, *2020 Dems Warm to Packing the Supreme Court*, POLITICO, Mar. 18, 2019, https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625

polarization.[103] Sadly, there is no reason to expect that the practice of delegation will easily end, because members of Congress often benefit from giving up their own power to pass regulations.[104] Through broad delegations, they can take credit for providing benefits to the people and, when necessary, avoid blame by criticizing the rules that agencies made.[105]

Unfortunately, the Supreme Court has let members of Congress engage in this accountability avoidance game. It has not enforced the Constitution's requirement that only Congress exercise legislative power, but has permitted the power to be delegated to executive branch agencies.[106] To be sure, the Court has held that these delegations must contain an "intelligible principle," but it has defined this test so leniently that the Court has not struck down a delegation since the New Deal.[107] It regularly upholds the kind of permissive delegations that allow the promulgation of radically different regulations depending on an administration's ideology.[108]

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[103] It is true that the Presidents have less formal control over independent agencies, like the Federal Communications Commission, than executive agencies whose heads they can fire at will. But the President has many mechanisms other than removal to encourage those agencies to follow his or her policies, such as his appointments, the prospect of higher office for his appointees, executive orders, and budget requests on behalf of the agency. Lisa Schulz Bressman & Robert B. Thomson, 63 VAND. L. REV. 599, 632-648 (2010) (discussing such mechanisms in the context of financial agencies). *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 469-77 (2008) (demonstrating empirically that the President influences agencies through appointments). Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative* 1988 DUKE L.J. 238, 243-46 (describing mechanisms of influence). *See also* Kirti Datla & Richard Revesz, *Deconstructing Independent (and Executive Agencies)*, 98 CORNELL L. REV. 769, 773 (2013 (the difference between executive agencies and independent agencies is not a dichotomy but a continuum). As a result, the policies of independent agencies are not much less reflective of the President's preferences than those of the executive agencies. Susan Barlett Foote*, Independent Agencies Under Attack: A Skeptical View of the Importance of the Debate*, 1988 DUKE L.J. 223. They are likely to be closer to the median voter of the political party of the President than the median voter.

[104] *See* Peter H. Aranson et. al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 64 (1982) (How Congress can shift blame from themselves for unpopular policies).

[105] *Id.*

[106] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676–77 (1975)

[107] Gabriel Clark, *The Weak Nondelegation Doctrine and American Trucking Associations v. EPA*, 2000 B.Y.U. L. REV. 627, 638 (2000) (providing a history of the non-delegation doctrine used by the Supreme Court since the New Deal).

[108] *See* BREYER*, supra* note x, at 71 (2017) (No statute has been invalidated on non-delegation grounds since Schecter Poultry Corp. V. United States, 295 495 (1935)).

Moreover, the Court has exacerbated the problem with doctrines of its own creation. In the famous *Chevron* case, it ruled that courts should often defer to an agency's interpretation of its own statute.[109] Unless "Congress has directly spoken to the precise question at issue," the Court defers to the agency's statutory interpretation.[110] Its interpretation will then be upheld so long as it is "reasonable."[111] *Chevron* is one of the most cited cases of all time and has been used regularly to uphold agency action.[112] The judiciary thus has in effect delegated some of its core power of legal interpretation to agencies, which further increases the authority of the President to reach extreme results.[113] Since *Chevron* also empowers agencies to switch interpretations when administrations change,[114] further reign is given to polarized outcomes.

Similar considerations apply to the *Auer* doctrine, in which the Court required the judiciary to defer to an agency's interpretation of its own regulations. In *Auer v. Robbins*, the Court rule that agencies enjoyed strong deference when interpreting their own regulations in even more circumstances than agencies enjoy as to Chevron deference.[115] Moreover, *Auer* allows agencies from one administration to the next to change the meaning of rules by unilateral interpretation. While the Court recently cut back on *Auer* in *Kisor v. Wilkie*, the *Auer-Kisor* doctrine still confers significant deference on agencies.[116]

B. *Congressional Solutions*

One possible solution to extremism and polarization is structural change initiated by the legislature. Congress should take back power from the agencies by rewriting statutes so that delegations are narrower. Congress is not limited to enacting this reform through a laborious statute

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[109] Chevron U.S. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[110] Id. at 843.

[111] Id. at 866

[112] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI.L. REV. 823, 823 (2006) (labeling *Chevron* most cited case in "modern public law").

[113] *Id.* at 825–26.; Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008)

[114] Indeed, the regulation at issue in Chevron itself was an example of such a change. Moreover, the Court has said that agency can change its interpretation from one reached by a Court so long as the judicial interpretation was not clearly compelled by the statute. *See* National Cable and Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 981 (2005).

[115] 519 U.S. 452, 461 (1997).

[116] 139 S. Ct. 2400 (2019).

by statute process. Congress could instead pass legislation that retrieves its authority across the board to make the final decisions on major rules, like net neutrality or clean air standards that may divide the polity.

Congress could model such legislation on an act currently before it, the Regulations from the Executive in Need of Scrutiny (REINS) Act.[117] Under the REINS Act, agencies would recommend "major" rules to Congress but the rules would not take effect unless they were enacted on a vote by both Houses and signed by the President.[118] Standing procedures of both Houses would force up-down votes on major rules, under specified timelines and without a Senate filibuster.[119] A rule is defined in the Act as major if it would likely result "in an annual effect on the economy of $100 million or more, major increases in costs or prices, or significant adverse effects on competition, employment, or other specified economic matters."[120] In most recent years, the Congressional Research Service has estimated that fifty to seventy rules would be classified as major.[121]

The Act would change administrative law, substantially flipping the roles of Congress and the executive so that the executive would recommend major regulations and Congress would enact them.[122] Congress would thus reclaim some of the broad power it has delegated to agencies. As a result, regulations would become more moderate because they would have to obtain the support of legislators from both parties under divided government (and even under undivided government, from legislators in the middle of the ideological spectrum).[123] They would also be less likely to

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[117] Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Congress (2017). Our purpose here is not to endorse every detail of the act, which could be substantially improved. See Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, in THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT 105, 123-129 (M. Todd Henderson ed., 2018).

[118] *Id.* § 3 (proposing to amend 5 U.S.C. § 801(b)(1) to state that a "major rule shall not take effect unless the Congress enacts a joint resolution of approval … .").

[119] See Jonathan Siegel, The Reins Act and the Struggle to Control Agency Rulemaking,

16 N.Y.U. J. 131, 143-144 (2013) (describing procedural changes).

[120] *Id.* § 804

[121] *REINS Act: Number and Types of Rules in "Major Rules" in Recent Years*, CONGRESSIONAL RESEARCH SERVICE (Dec. 2, 2011).

[122] Seigel, *supra* note, x at 150 (see the REINS Act as restoring powers that Congress delegated).

[123] There is some prospect of passing a cross cutting act, like the Reins Act. By analogy, Congress has enacted the Congressional Review Act (CRA), 5 U..S.C. 801-808, which allows Congress under fast track procedures to disapprove important regulations of the executive passed within sixty legislative days. But the CRA has limited scope because it requires, as constitutionally it must for congressional disapproval to be enacted into law,

make a 180-degree turn between administrations, as major changes would need congressional approval.

To be sure, even a proposal modeled on the REINS act would be only a second-best solution to the problems created by broad delegation. The regulation voted upon would not be forged in a congressional give-and-take but instead formulated by an agency. That difference would limit the opportunity for compromise and buy-in from many legislative factions that congressional drafting promotes. Still, an agency would likely consider the spectrum of congressional opinion and draft the regulation in light of that opinion to assure passage.[124]

Another congressional reform would involve eliminating *Chevron* and *Auer* deference by statute. *Chevron* is a statutory interpretation doctrine and Congress has substantial control over the legal rules by which statutes are interpreted.[125] *Auer* is a doctrine for interpreting agency

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either Presidential approval or an override of a Presidential veto. *See* BREYER ET. AL., *supra* note x, at 95. But the regulation to be voted on is generally issued by the President's Administration. Thus, the President will normally veto the disapproval, which must then get a 2/3 majority in each house to be enacted. *Id.* It is not therefore a surprise that the CRA has been successfully employed only on regulations issued at the end of a Presidency that is followed by a Presidency of the opposite party.

[124] In part, because of these limitations, we do not a endorse a recent recommendation by the distinguished political scientists William Howell and Terry Moe that would give the President the ability to propose legislation and get and up or down vote of both the House and Senate on it. *See* WILLIAM G. HOWELL & TERRY M. MOE, PRESIDENTS, POPULISM AND THE CRISIS OF DEMOCRACY 175-181 (2020). That legal regime would be equivalent to providing authority equivalent to what agencies would have under proposals covered by the REINS act, but for *any* proposal, regardless of whether an executive branch agency had been given rulemaking authority in the area. And that authority would be in addition to the authority that agencies under presidential control enjoy to promulgate rules under broad delegations of administrative power.

This proposal would represent a vast increase in the authority of the President and thus the ability of the President to get relatively extreme proposals through Congress. This effect would be most pronounced when government is not divided because the elimination of the filibuster would make less opportunity for bipartisan compromise. The proposal is also not limited to areas where administrative expertise is particularly useful. It would likely not dampen polarization but increase it, as the Presidency would become an even more powerful political prize. It would also make for less stable laws, as one President with unified party control could more easily entirely undo the work of the last party with unified control.

[125] Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2140 (2004) (noting that there is no general objection to statutes that mandate interpretive forms, only objections that stem from specific constitutional provisions or principles). *See also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515-16 ("The separation-of-powers

regulations and Congress similarly has control over the doctrines by which agency regulations should be interpreted.[126]

C. Judicial Solutions

But even if Congress did not act to eliminate the *Chevron* and *Auer* doctrines, the Court could also encourage moderation by doing so on its own authority. Here it could build on some of the steps that the Court and the federal judiciary are already taking to cabin these doctrines.

In the recent case of *King v. Burwell*, Chief Justice John Roberts's opinion for the Court clarified that *Chevron* deference would not apply to major questions—that is, questions of "deep 'economic and political significance' that [are] central to this statutory scheme."[127] While Roberts suggested that Congress would not want *Chevron* to apply to such major questions, another reason for the major questions doctrine is that it construes statutes to avoid constitutionally problematic delegations.[128] Applied to major questions, *Chevron*, as originally decided, sustains a huge delegation of legislative power to the agency, permitting the agency to interpret the essential questions about the scope of the delegation itself.[129] Thus, if the Court applies the major questions doctrine vigorously, it will also help reduce polarization. It will take away power from an administrative agency, which is likely to be relatively politically extreme. It will also reduce the opportunity for agencies to switch interpretations depending on the results of a presidential election.

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justification [for the Chevron doctrine] can be rejected even more painlessly by asking one simple question: If, in the statute at issue in Chevron, Congress had specified that in all suits involving interpretation or application of the Clean Air Act the courts were to give no deference to the agency's views, but were to determine the issue de novo, would the Supreme Court nonetheless have acquiesced in the agency's views? I think the answer is clearly no, which means that it is not any constitutional impediment to "policy-making' that explains Chevron").

[126] Even the plurality in Kisor recognizes that Congress can overrule Auer. 139 S.Ct. at 1412. Bills have been introduced to do so. See H.R. 4768, 114th Cong. § 2(c) (2016) (proposing to amend the Administrative Procedure Act to provide that courts should "decide de novo all relevant questions of law, including the interpretation of … rules made by agencies").

[127] King v. Burwell, 135 S. Ct. 2480, 2489 (2015). The major question in that case was whether Affordable Care Act tax credits should be provided to those purchasing insurance under federal as well as state exchanges. *Id.*

[128] *Id.*

[129] *See* Charles J. Cooper, *The Flaws of Chevron Deference*, 21 TEX. REV. L. & PUB. POL. 307, 312 (2016) (viewing King v. Burwell as a partial de facto revival of non-delegation doctrine)

In *Kisor v. Wilkie*, the majority significantly cut back on the scope of *Auer* deference.[130] First, the Court made clear that deference to an agency's own interpretation of regulations should be reserved only for cases of genuine ambiguity—that which remains after all the tools of traditional interpretation have been applied.[131] Second, the *Kisor* opinion stated that before deferring to an agency interpretation, a court must make "an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[132] Thus, an agency's interpretation is entitled to deference only if it is "authoritative" rather than "ad hoc."[133] Such an interpretation must also "implicate the agency's expertise" and reflect its "fair and considered judgment" rather than be simply a "post hoc rationalization" or create "unfair surprise."[134] If the lower courts enforce these limitations, *Kisor* will narrow agencies' ability to reinterpret their regulations at will and make it more difficult for them to change their interpretations following a presidential election.

The biggest judicial blow for moderation would be to revive the nondelegation doctrine itself, forcing Congress to make more of the major policy decisions and thus empowering moderate legislators to craft compromises. There is renewed interest on the Court in revisiting that doctrine. In *Gundy v. United States*, the Supreme Court narrowly upheld the provision in the Sex Offender Registration and Notification Act that delegated to the Attorney General the discretion to decide whether and to what extent to require the registration of sex offenders who have been convicted before the date of the Act's enactment.[135] But the controlling opinion represented only a plurality.[136] Three Justices dissented, arguing for a strict version of the nondelegation doctrine. Justice Samuel Alito voted with the plurality to uphold the statute, but indicated that he would join the dissenters in reconsidering the lenient nondelegation doctrine if a majority of the Court were to do so. Justice Brett Kavanagh did not participate in the case but later formally stated that he was also open to tightening the standard for delegation.[137] Delegation's promotion of polarization is yet another argument for that reconsideration.

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[130] Kisor v. Wilkie, 139 S. Ct. 1, 2408-24 (2019)
[131] *Id*. at 2415.
[132] *Id.*
[133] *Id*. at 2416.
[134] *Id*. at 2417.
[135] 139 S. Ct. 2116 (2019).
[136] *Id.* at 1210
[137] 140 S. Ct. 342 (2019).

Our analysis of the Supreme Court's appropriate role in bringing about these changes can be understood as complementing and expanding John Hart Ely's democracy reinforcing rationale for judicial review in the new circumstances of our time. In his book, *Democracy and Distrust*, Ely saw democracy as the animating purpose of the Constitution and the key to unlocking its sound interpretation.[138] The book was most famous for justifying many of the Warren Court's decision about constitutional rights as contributing to perfecting deliberative democracy.[139] But even forty years ago, Ely worried that the decline of the nondelegation doctrine undermined deliberative democracy.[140] Ely observed that the concern with delegation "is not that such faceless bureaucrats' necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are."[141]

To this general concern about the administrative state's reduction of deliberate democracy we here add and highlight the more concrete danger of the increasing polarization that delegation poses for democracy. Excessive delegation thus not only blocks the opportunity for deliberation but diminishes the culture of political give and take and that makes such deliberation fruitful. This focus also updates the support for Ely's democracy reinforcing jurisprudence, because pernicious polarization is a contemporary threat to democracy that goes beyond the failure of deliberation.[142]

D. Objections

One possible objection to our argument is that a requirement of congressional enactment to pass regulations (or take military action or to make international agreements) would be too constraining. In our strongly polarized world, the different political parties in Congress would be unwilling and unable to reach compromises. Instead, the party in opposition to the President refuses to compromise in order to deny the President accomplishments that might enhance his or her prospects of becoming reelected. Thus, it is a perpetual campaign in that both parties are focused on winning the next election rather than governing by passing necessary legislation desired by the nation. In such a world, it might seem

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[138] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4-7 (1980)

[139] *Id*. at 75-105.

[140] *Id.* at 131

[141] *Id.*

[142] *See infra* notes xx and accompanying text.

pointless to forbid government actions that cannot be taken without compromise. Instead, it would be a recipe for gridlock and inaction.

But this picture of our politics makes a fundamental mistake. It assumes that the world we live in – which has been greatly influenced by unilateralism – would continue once unilateralism has been restrained. But the same forces that cause polarization would lead to less polarization if they were eliminated.[143]

It is often difficult to imagine how dramatically a change in incentives can change behavior. We can illustrate such dramatic changes with the familiar story of a young adult who has been funded by his parents for several years. The child does not save, does not work hard, and overall is not financially responsible. When the parents are counseled to stop funding their child, they object: "He cannot take care of himself with our money. How will he be able to survive without it?"

The mistake that the parents make, of course, is to assume that the child will necessarily continue to behave irresponsibly without the funding. If the generous funding was the cause of the irresponsibility, then eliminating the funding is likely to eliminate it. Such dramatic transformations are a familiar part of our experience.

A similar result is easily imaginable if unilateraism is an important cause of polarization. In a world where no new regulations or deregulations can be enacted without congressional enactment, members of Congress and the President would face different incentives than they do now. At present, the President's party has little incentive to make compromises that will leave it worse off than it can obtain by exercising the broad delegated authority to enact rules. Why compromise if you can promulgate the regulation you desire unilaterally? But under a regime without unilateral regulatory authority, the President's party would not be able to enact any new rules on its own. This regime would provide them with a much stronger incentive to compromise than they have now.

If members of Congress could not enact new regulations or deregulations without compromising, strongly polarized behavior would

[143] This would seem to hold if unilaterlaism causes polarization. If it contributes to 60 percent of our polarization, then eliminating it suggests that it will eliminate 60 percent. If it only contributes to 20 percent of our polarization, then eliminating it will be less important. So if we are right that polarization is an important cause, then it will be an important reform.

impose significant costs on those members. First, members who seek to make an impact and to improve the world would soon discover that they could not have any significant effect. Second, the public, including influential interest groups, would bear costs as changes in circumstances and values require that new regulations be enacted. These costs will only increase as time passes.

These incentives are likely to cause Congress to behave differently with the existing members of Congress and under existing institutions. But these incentives might also lead Congress to change its practices if that would promote compromise. Not all legislative leaders are equally talented at partisan attacks and at compromise. Thus, as compromise becomes more important, partisan leaders may be replaced by compromisers.

Rules and norms that inhibit compromise might also be changed. For example, the Hastert rule, which prohibits the scheduling of a vote on a bill that is not supported by a majority of the majority party in the House, might be eliminated. Finally if Congress required more information in order to decide how and whether to enact a compromise in an area, then it would make sense for Congress to establish institutions that could aid it, such as a Congressional Regulatory Office patterned on the Congressional Budget Office.

Other evidence also suggests that compromise is possible even in our current world. The political scientists James Curry and Frances Lee just this year published a study of major legislation passed by Congress since 1985.[144] They find that most important legislation has been bipartisan, involving compromise with the minority party to gain passage.[145] Curry and Lee demonstrate that parties have incentives to compromise because without bipartisanship, every faction within the majority gains enormous leverage, risking unpopular legislation.[146] They also find that even with polarization majority parties are no more successful at enacting their priorities. To the contrary, as polarization has increased, majorities find bipartisanship both necessary and possible to get legislation through Congress.[147] Curry and Lee thus show that compromise continues to be possible. Reducing the degree of presidential unilateralism will make compromise even more common.[148]

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[144] CURRY & LEE, supra note x, at 20 (describing their data sources).
[145] *Id.* at 16-17
[146] *Id.* at 71. Sometimes individual members of parties do as well.
[147] *Id.* at 50.
[148] One characteristic fear of greater congressional power is less pressing in our era. It

Some commentators have suggested that American politics is asymmetrically polarized with the Republican party having moved farther to the right than the Democratic party has moved to the left.[149] But regardless of whether this claim is accurate,[150] our analysis of the dangers of presidential unilateralism as well as our proposed fixes still hold. Even if the Republican party has become more extreme than the Democrat party, that difference does not change the fact that members of both parties still regard the other party's views as very far from their own. The cause of the present situation does not change how it functions. Moreover, a structure of government that promotes compromise and moves policy more to the middle will address this polarization irrespective of its cause. Thus, asymmetric polarization provides no argument against our either our description of the problem of presidential polarization or our normative

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is often said that members of Congress are too parochial and beholden to particular constituents to focus on the good of the nation. *See, e.,g* , Howell & Moe, *supra* note x, at 161. (suggesting in the traditional view that legislators are interested in "flaunting the goodies they are able to bring back home, the protections they can provide to local business and industries, [and] the local jobs and income created through their faithful efforts").

But elections are now fought on a more national basis. Rick Pildes, *Political Polarization and the Nationalization for Congressional Elections*, Balkinization (Nov. 4, 2010, 7:51 AM), (providing evidence for nationalization of elections). http://balkin.blogspot.com/2010/11/political-polarization-and.html. It also made the judgments of voters in primaries more ideological, making them less likely to vote for incumbents simply on the basis of local issues. *Political Engagement and Activism*, PEW RESEARCH CTR., http://www.people-press.org/2014/06/12/section-5-political-engagement-and-activism/ [http://perma.cc/TE65-DALN] (last visited Oct. 26, 2015) (concluding based on the same data that the most polarized voters are the most politically active in primaries). BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA? WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT 160-161 (2020) (describing importance of ideology in primaries). Thus, there is less reason to be concerned that legislation will be blocked for parochial reasons as opposed to disagreement on the merits. Congress can play its generally moderating role either through divided government or through bicameralism and the filibuster without much distorting of policy outputs for purely localist reasons.

[149] *See, e.g.,* Michael J. Klarman, *The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 159 (2020).

[150] The claim that the Republican Party has become more extreme than the Democratic party is disputable. *See Political Polarization in the American Public*, Pew Research Center (June 12, 2014) https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ (38 percent of Democrats are consistently liberal whereas 33 percent of Republicans are consistently liberal). *See also* David A. Graham, *Symmetric Polarization*, *Trump is Radicalizing the Democratic Party* (Oct. 27, 2017) (arguing that in the Trump era parties have become symmetrically polarized). https://www.theatlantic.com/politics/archive/2017/10/symmetric-polarization/544059/ We need not resolve this factual dispute, because our arguments hold regardless of whether polarization is symmetric or asymmetric.

solutions. And even if the Republican party is more extreme now, it is impossible to predict which party will be more extreme in the future.

One argument against reducing delegation to the President and providing greater power to Congress might rest on the proposition that the Senate is unrepresentative, because it awards two Senators to every state of whatever size rather than apportioning representation by population.[151] In particular, it is often alleged that the structure of the Senate favors the Republican party.[152] Thus, the argument would run under given the structure of the Senate, it is better to give power to the President who is more democratically representative than Congress.

But it does not appear the Senate actually substantially skews representation ideologically or favors Republicans. Of the twelve smallest states (those with either one or two representatives in Congress), six are blue states and six are red states.[153] Of the ten largest states, five generally vote red and five generally vote blue.[154] In the last generation (since 1990), Democrats have performed slightly better in the Senate than in the House, controlling the Senate 15 and half years out of 32 while controlling the House for 12 years out of 32.[155] The similar ideological composition of the House and the Senate is also suggested by the ideological proximity of their median members when a party controls both houses. [156]

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[151] Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats*: *Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV., 1125, 133 (2011) (calling the Senate "arguably the most malapportioned legislative chamber in the world)

[152] Klarman, *supra* note x, at 232 (malapportionment in the Senate gives "massive advantage to the Republican Party).

[153] *See* U.S. States ranked by population, https://worldpopulationreview.com/states

[154] *Id*. In the last two elections for President, Georgia and Pennsylvania defected from their usual stances.

[155] United States Senate: Party Division, https://www.senate.gov/history/partydiv.htmParty Division in the House of Representatives, 1789 to Present, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ To be sure, control over the last two years depends on the Vice-President's vote to break a 50-50 tie, but even if we except those years from numerator and denominator, Democrats have controlled the Senate for a slightly greater period than they have controlled the House.

[156] For instance, in the 111th Congress, the last one in which Democrats controlled both houses, the median ideology score in the House was -.180 and the median in the Senate was -.213 where -1 is farthest left and 1 is farthest right. Timothy Nokken & Keith T. Poole, Rank Ordering of all Houses and Senates, https://legacy.voteview.com/rank_orders_all_congresses.htm. In the last Congress in which Republicans controlled both Houses and data is available, the median House member was at .239 and the median Senate member was at .192. *Id.*

Moreover, the Senate also has features that permits its members to act independently of party more frequently than members of the House, making the Senate a better reflection of the unfiltered popular will than the House and the Presidency. It is well known that the majority party has greater power to work its will in the House, but that Senators have more ability to act independently.[157] This greater power of the majority party in the House to work its will means that the House is likely to reflect the median of the majority party more than the Senate does. But it is precisely this characteristic of the Presidency that has caused significant polarization and has led to a less accurate reflection of voter preferences. Thus, because of the relative independence of its members, the Senate does a better job than the House at counteracting that presidential tendency.

III. Unilateral Presidential Authority Abroad

Presidentialism in war making and foreign affairs has also increased ideological polarization. Presidents of both parties have claimed the authority to conduct military actions without congressional approval. These actions, at the time and for many years later, become grist for political polarization.

International agreements made by the President alone without legislative consensus also can be a source of polarization. Recently, President Obama committed the United States to a major international agreement, the Paris Accord on climate change, without seeking even legislative support from Congress, let alone the greater consensus required by the mandate for two-thirds of the Senate to ratify a treaty. [158] This controversial action started a process of political polarization, which continued with President Trump's withdrawal from the Accord. President

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[157] Neal Devins & Tara Leigh Grove, *Congress' Limited Power to Represent Itself in Court*, 99 CORNELL. L. REV. 571, 604 (604). The reasons are various, including that the rules of House give more power to the majority party, *Id.* (describing how various rules of the House reinforce the power of the majority party), and Senators receive more press coverage and thus have more opportunity to gain a reputation distinct from their party. *See* Matthew D. McCubbins et. al., *Administrative Arrangements and Political Control of Agencies*, 75 Va. L. Rev. 431, 455 (1989) (discussing effects of greater media attention that Senators receive).

[158] Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, THE WHITE HOUSE: LATEST NEWS (September 3, 2016 at 10:41 AM), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement.

Biden has recommitted to the Paris Accord on his first day in office. [159]

It is not surprising that President Trump did not make any similar executive agreements himself. He has been described as a sovereigntist who wants to avoid agreements with other nations.[160] But some Republican Presidents in the past have been internationalists and are likely to be so again.[161] Thus, such a substantial, binding international agreement undertaken by the Presidents on their own may well presage a new mechanism of polarization that Presidents of both parties will employ.

A. Military Action

The concern that the President will use the opportunity for war to increase his power goes back to the Framing. James Madison stated that "war is in fact the true nurse of executive aggrandizement. . . . The strongest passions, and most dangerous weaknesses of the human breast; … the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace"[162] In this section we show that unilateral war making can not only aggrandize the presidency, but increase polarization as well.

Due to the fear of a Presidential war power, the Framers subjected the President's military authority to a strong congressional check. The general consensus among scholars is that Congress, pursuant to its authority to declare war, must authorize at least any offensive military action against a foreign power.[163] Within that consensus, there is room for debate about what exactly constitutes both "military action" and "offensive."

But Presidents now regularly claim the authority to take offensive interventions against other nations without Congress's agreement in

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[159] *Paris Climate Agreement*, Statement of President Joseph Biden (Jan. 20, 2021),https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/

[160] Donald J. Trump, Remarks to the United Nations General Assembly in New York City, 2017 DAILY COM. PRES. DOC, at 2 (Sept. 19, 2017) https://perma.cc/S59M-FFVC (mentioning the word sovereignty twenty one times).

[161] *See, e. g.*, Harold Honkju Koh, *President Trump and International Law*, 56 WASHBURN L. REV. 413, 420 (2017) (recalling that Richard Nixon and George W. Bush were strong internationalists);

[162] 15 James Madison, *"Helvidius" No. 4*, in THE PAPERS OF JAMES MADISON 106, 108 (Thomas A. Mason, Robert A. Rutland & Jeanne K. Sisson eds.1985).

[163] U.S. CONST. ART. I, SEC.11. On the scholarly consensus, see Michael Ramsey, *Textualism and War Powers,* 69 U. CHI. L. REV. 1543, 1549 (2002).

circumstances clearly beyond the Constitution's original meaning. An Office of Legal Counsel opinion justifying the military intervention in Libya is characteristic. It concludes that congressional authorization is required only for prolonged war making:

> In our view, determining whether a particular planned engagement constitutes a "war" for constitutional purposes instead requires a fact-specific assessment of the "anticipated nature, scope, and duration" of the planned military operations. This standard generally will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.[164]

While this particular opinion was a justification of an intervention by Obama, the opinion draws support from other unilateral military interventions, including those in Somalia and Panama by George H.W. Bush and in Haiti and Bosnia and Kosovo by Bill Clinton.[165] As one political scientist has noted: "As precedent built on precedent, executives became increasingly audacious in their claims."[166]

Once again, bypassing Congress increases partisanship and

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[164] Authority to Use Military Force in Libya, 35 OP. O.L.C. 1, 8 (2011) (citations omitted), *available at* https://www.justice.gov/olc/opiniondocs/authority-military-use-in-libya.pdf This opinion, however, was not aggressive enough for the Obama administration. Harold Koh, the State Department's legal advisor provided an opinion stating the operations in Libya did not even rise to the level of hostilities that trigged the Wars Power Act. Testimony by Legal Adviser Harold Koh before the United States Senate Foreign Relation Committee, (June 29, 2011), https://2009-2017.state.gov/documents/organization/167452.pdf. These non-hostilities included bombing. *See* Burns, *supr*a note x, at 226.

[165] *See, e.,g*, *Authority to Use United States Military Forces in Somalia*, 16 OP. O.L.C. 6, (1992); *Deployment of United States Armed Forces into Haiti*, 18 OP. O.L.C. 173 (1994*); Proposed Deployment of United States Armed Forces into Bosnia,* 19 Op. O.L.C. 327, 330-31 (1995) While the Obama opinion mentioned the interventions in Panama and Kosovo, it did not reference that OLC had also approved of these interventions. *See Authorization for Continuing Legal Hostilities in Kosovo*, 24 OP. O.L.C. 327 (2000). William P. Barr, Attorney General Remarks, Cardozo School of Law, 15 CARDOZO L. REV. 31, 34 (1993). See also Louis B. Fisher, *Unchecked Wars*, 148 U. PA. L. REV. 1637, 1638 (2002) (recounting executive branch's undeclared wars).

[166] See Sarah Burns, The Politics of War Powers: The Theory and History of Presidential Unilateralism 15 (2020)

polarization. Many of these interventions touched off partisan squabbles and became fodder for angry accusations by politicians of the opposing party in the next Presidential election cycle.[167] Importantly, presidential unilateralism allows for divisive military actions that do not enjoy consensus support. Such actions prevent members of Congress from reaching compromises that would command a majority and create broader support. These compromises could include requiring more diplomacy before taking military action, requiring allies to join before the country takes military action, limiting the duration of the military action, or setting a limit on the amount of money to be expended in the military action.

A failure of Congress to vote on military action also makes the war more politically divisive. If members of Congress have authorized a war, they are less able to criticize that war. Broadening responsibility for the momentous decision to go to war is particularly important. Wars have uncertain outcomes. A successful war bolsters a President's popularity as compared to his or her political detractors. An unsuccessful war becomes a point of attack for the President's opponents.

Under our existing rules, even congressional approval for military action is less beneficial because Presidents retain a claimed authority to act unilaterally.[168] That threat was explicit in the run-up to the 1993 Iraq war when President George H. W. Bush stated that he did not believe he needed express congressional authorization.[169] As a result of the unilateral option lurking in the background, congressional authorization might not reflect genuine consent because members may feel they have to go along with a fait accompli at the risk of seeming disloyal to their party or the nation. And when Congress authorized the action, President Bush appended a signing statement to his approval, noting that he had not needed the legislation to undertake the engagement against Iraq.[170] This statement was

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[167] See, e.g., Sarah Parnass, *In War Powers Act Debate, Obama and Boehner Throw Past Quotes at One Another Revealing Inconsistencies*, ABC NEWS (June 16, 2011), http://abcnews.go.com/blogs/politics/2011/06/in-war-powers-act-debate-obama-and-boehner-throw-past-quotes-at-one-another-revealing-inconsistencie/ (discussing Republican complaints of Obama's Libya intervention). *See also* Cass Sunstein & Eric Posner, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 497 (2016) (describing how Republicans objected to unilateral military interventions by a Democratic President and vice versa).

[168] *See supra* notes xx and accompanying text.

[169] *See* Stuart Taylor, Jr. *An Invasion of Iraq Requires Approval of Congress,* ATLANTIC (September 1, 2002) (observing that as a matter of law Bush claims that he "is free to initiate a major war all by himself").

[170] George H. W. Bush, *Statement on Signing the Resolution, Authorizing the Use of Military Force Against Iraq* Oct. 16, 2002), American Presidency Project,

expressly designed to preserve the unilateral options of his successors against which Congress must weigh its actions.[171]

Congress has also created unilateral foreign affairs authority in the same manner as in domestic affairs—by providing open-ended authorizations that Presidents can exploit to take military action and thus avoid the strictures of the War Powers Act.[172] The statutory authorization for presidents to use force against any actor connected to the 9-11 atrocities is an example. [173]

While Congress attempted to curb the President's authority through the framework legislation of the War Powers Act in the 1970s, the Act has proved a dismal failure.[174] The core of the Act requires the President to report when he or she sends the armed forces into "hostilities."[175] That report triggers a sixty-day clock that requires the President to get congressional approval or remove the troops from hostilities.[176] Presidents of both parties have refused to acquiesce in the War Powers Act, sending notices consistent with the Act while declining to accept that they are obliged to follow the Act..[177]

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https://www.presidency.ucsb.edu/documents/statement-signing-the-authorization-for-use-military-force-against-iraq-resolution-2002 ("[M]y signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution").

[171] Burns, *supra* note x, at 185 (noting how the statement freed the executive "to exercise the Lockean prerogative developed over the previous forty years).

[172] *See* David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV. 685, 713-19, 722 (2014) (discussing Congress's funding of armed conflicts since the Vietnam War, and stating that "most of the major U.S. military operations since World War II have been preceded by congressional authorization").

[173] The 2001 Authorization for Use of Military Force (AUMF) allows the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . . ." Pub. L. 107-40, 115 Stat. 224, 50 U.S.C. § 1541 note. For a discussion of how Congress tried to cabin presidential power in the AUMF but "still passed a resolution that was unusual in its lack of limits," see Shoon Kathleen Murray, *Stretching the 2001 AUMF: A History of Two Presidencies*, 45 PRES. STUDIES Q. 175, 175-78 (2015).

[174] HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 123 (1990)

[175] *See* War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

[176] *Id.*

[177] *See* Frank Easterbrook, *Presidential Review*, CASE WESTERN. L. REV. 905, 923 (1990).

There are several reasons for the failure. First, the Act includes an unconstitutional legislative veto,[178] allowing Presidents to impugn the act with a general claim of unconstitutionality even though the legislative veto is only one part of the statute.[179] Second, presidents have used the sixty-day period as a justification for beginning unilateral conflicts without congressional approval, even though it is best read as solely a limitation on conflicts that exceed sixty days.[180] Third, the meaning of "hostilities," which starts the sixty-day clock, is undefined and unclear.[181] Fourth, Presidents have argued that the requirement to report hostilities does not necessarily start the sixty-day clock.[182] The problem is that the Act requires three different reports that might also be about hostilities, but only one of these reports sets the clock moving.[183] Beyond these legal problems, claims by Presidents that the Act grants a license to commit military forces for an extended period permits them to create facts on the ground that make it hard for Congress to exercise its judgment for fear of being criticized for not supporting the troops.

It is true that Congress has other methods for controlling the waging of war. It can cut off funds for military operations.[184] Committees can hold hearings that place the military action in an unfavorable light.[185] Individual members can mount publicity campaigns in opposition and use the media to their advantage.[186] But none of these actions is as effective a constraint as requiring a vote on initiating a war. After all, the President can veto bills with restrictions on military funding.[187] Presidents have in the past continued to wage wars that were unpopular with Congress and the public.[188] Moreover, once the war has begun, partisan lines may well

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[178] Resolution, § 5(c).

[179] Legislative vetoes were held unconstitutional in INS v. Chadha, 462 U.S. 919 (1983).

[180] Burns, *supra* note x, at 187

[181] *See* Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law.* 78 A. J. I. L. 571, 580 (1984)

[182] *Id.* at 572.

[183] *Id.*

[184] *See* WILLIAM G. HOWELL & JON C. PEVEHOUSE, WHILE DANGERS GATHER, WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON CONGRESSIONAL WAR POWERS, 10, 14, 16-17 (2007) (discussing appropriations as a congressional check).

[185] *Id.* at 23 n. 68.

[186] *Id.* at 23. To

[187] To be sure, he or she must veto the entire bill, not just the restriction. *See* Michael B. Rappaport, *The President's Veto and the Constitution*, 87 N.W. L. REV. 736 (1992).

[188] Nate Williams, *Comparative Analysis of Ending a War against the Will of the Executive in the United States and United Kingdom*, 16 TRANSNATIONAL L. & CONTEMP.

harden. Ex post constraints are simply not as effective as ex ante authorizations, both in assuring that wars reflect consensus rather than extreme views and in reducing the likelihood of cycles of polarization.

Thus, improving the War Powers Resolution is necessary if the President's exercise of military power is not to exacerbate polarization. First, except for designated exceptions, such as rescuing American citizens, the sixty-day period permitted for committing troops to hostilities without congressional authorization should be shortened. Second, hostilities should be defined to include *any* offensive military action of the government. With these changes, it should be clear that the President is required to remove troops within the new time period unless the hostilities receive congressional approval.

To be sure, these are substantial reforms that require a change in our war making culture.[189] But many members of Congress have introduced bills to reform and revise the War Powers Resolution to make it more effective.[190] Some bills also attempt to terminate open-ended delegations of Wars Powers, such as those passed after the 9-11 attacks.[191] While Al-

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PROBS. 401, 411 92006) (discussing the difficulty of denying re-nomination to Presidents who pursue unpopular wars).

[189] For a criticism of recent U.S. war-making, see Edwin B. Firmage, *The War Power of Congress and Revision of the War Powers Resolution*, 17 J. CONTEMP. L. 237, 265 (1991) ("[O]ur forty-five year 'habit' with overt and covert warfare must not be allowed to distort and destroy our natural inclination toward peace and our constitutional commitment of the war power to Congress.").

[190] For an overview of congressional attempts to reform the War Powers Resolution, see Matthew C. Weed, *The War Powers Resolution: Concepts and Practice*, CONGRESSIONAL RESEARCH SERVICE, 63-67 (2019), https://crsreports.congress.gov/product/pdf/R/R42699/16. Some proposed reforms have sought to strengthen congressional oversight. *E.g.*, the War Powers Reform Act (H.R. 560, 114th Congress) (limiting the use of military funds where there has been no declaration of war); War Powers Amendments of 1995 (H.J.Res. 95, 104th Congress), (allowing members of Congress to sue the president for violating the WPR).

[191] Open-ended delegations of war powers include the 2001 Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224, 50 U.S.C. § 1541 note, and the 2002 Authorization for Use of Military Force Against Iraq (2002 AUMF Against Iraq), Pub. L. 107-243, 116 Stat. 1498, 50 U.S.C. § 1541 note. The 2001 AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," and lacks a sunset clause. Members of Congress have introduced bills to sunset the 2001 AUMF and repeal the 2002 AUMF Against Iraq. *See, e.g.*, S. 526 (114th Congress, Feb. 12, 2015) (terminating the 2001 AUMF by a specific date); H.R. 2740 Sec. 9025 (116th Congress, 2019-2020) (repealing the 2001 AUMF as part of an appropriations package); H.R. 2456 (116th Congress, introduced May 1, 2019) (repealing the 2002 AUMF Against Iraq).

Qaeda no longer represents as imminent a threat as it once did, both Presidents Obama and Trump have used that 9-11 authorization as justification for the use of military force in the Middle East.[192] Thus, there is evidence of bipartisan legislative discomfort with unilateral presidential authority that is likely to be a continuing impetus for reform.[193]

Such significant changes could possibly be enacted after a failed military intervention turns much of the public against presidential unilateral action in military affairs. For instance, the War Powers Act itself was passed after the disastrous Vietnam War.[194] The analysis offered here shows that such a reform will, by reducing polarization, improve decisions to fight wars and the unity of the nation during those wars.

B. Agreements with Foreign Nations

Another source of polarization is the claimed presidential authority to enter into controversial binding agreements with foreign nations without having them ratified as treaties or even consented to by Congress as congressional executive agreements.[195] This form of unilateralism may be

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[192] *See* REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 15-18 (Dec. 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf (using the 2001 AUMF to justify the Obama Administration's military strikes in Iraq, Syria, Yemen, Somalia, and Libya); NOTICE ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY, https://foreignaffairs.house.gov/_cache/files/4/3/4362ca46-3a7d-43e8-a3ec-be0245705722/6E1A0F30F9204E380A7AD0C84EC572EC.doc148.pdf (using the 2002 AUMF Against Iraq to justify the Trump Administration's airstrike that killed Iranian general Qassem Soleimani). In response, Congress has tried to invoke the WPR to cabin these unilateral actions. *See, e.g.*, S.J. Res. 68 (introduced Jan. 9, 2020 and failing to override presidential veto) (directing President Trump "to terminate the use of United States Armed Forces for hostilities against the Islamic Republic of Iran"); H. Con. Res. 51 (May 23, 2011) (directing President Obama "pursuant to section 5(c) of the War Powers Resolution, to remove United States Armed Forces from Libya").

[193] The most recent response from Congress, the Senate Joint Resolution terminating military activity against Iran (S.J. Res. 68, 116th Congress), passed the Senate and House before being vetoed, so it did have bipartisan support. See https://www.congress.gov/bill/116th-congress/senate-joint-resolution/68/actions?KWICView=false

[194] Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931,963-67 (1999).

[195] This issue should be distinguished from executive international agreements that the President makes pursuant to broad delegations from Congress—so-called "ex ante international agreements." *See* Oona A. Hathaway, *Presidential Power over International*

becoming more acute. And while President Trump did not, as noted above, engage in this kind of unilateralism because of his specific ideology,[196] one can expect that any new precedent for executive agreements will be seized by Presidents of both parties to advance their foreign affairs objectives, especially because international agreements can have important domestic implications.

For instance, the Paris Climate Accord, signed by President Obama, seems to go beyond past executive agreements, because in one important and binding respect—its requirement that the United States participate in a process for climate change reduction—it is not authorized by any enacted law or the inherent power of the President.[197] President Trump then withdrew from the Accord.[198] This dramatic U-turn both reflects and accentuates the cycle of political polarization that arises when Presidents act unilaterally.

In this subsection, we first outline the constitutional rules for international agreements, emphasizing how treaties and even congressional executive agreements require substantial consensus and militate against polarization. Under the original Constitution, binding executive agreements on important matters were limited either to appropriate statutory delegations or a few areas of inherent presidential powers, thus limiting presidential unilateralism.

Second, we discuss the rise of executive agreements in the modern era. Some are made pursuant to delegations by treaty or statute. These delegations can raise similar problems of polarization as delegations to administrative agencies in the domestic sphere that we discussed in Part I. An additional concern is that such delegations are sometimes found by implication rather than requiring express decisions by Congress. And more recently, international law theorists and the State Department's Legal Advisor under the Obama administration have suggested an even broader power to conclude agreements on any subject so long as it is consistent with congressional legislation. Another troubling development expands the notion of what is a nonbinding executive agreement to include agreements

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Law: Restoring the Balance, 119 YALE L. J. 141, 145 (2009). This kind of agreement is very frequent. Id. at 155-167. These agreements raise much the same polarizing problems as domestic delegations because they effectively permit unilateral executive action.

[196] See i*nfra* notes xx and accompanying text.

[197] *See supra* notes xx and accompanying text.

[198] Lisa Friedman, *Trump Serves Notice to Quite Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html

that lock in subsequent administrations to a political process. We conclude by recommending that Congress pass framework legislation to restrict the power of Presidents to conclude binding agreements outside of the relatively few areas authorized by their inherent powers.

1. The Constitution and International Agreements. The Constitution provides an express mechanism for entering into substantial binding agreements with foreign powers: The President and two-thirds of the Senate are required to make a treaty.[199] The reasons for the two-thirds requirement are several. First, the treaty ratification process does not require the House's consent. But the higher qualified majority in the Senate more than compensates for its absence in requiring consensus.[200] Second, treaties can be made on subjects outside of the enumerated powers.[201] But the supermajority requirement provides a substitute check on national power. Third, violating or terminating an international treaty may have costs to the nation's reputation.[202] But a supermajority consensus makes such instability less likely. This last reason closely tracks concerns about polarization. Agreements that depend on political views that are not widely shared are more likely to be upended and the two-thirds requirement for treaty ratification almost invariably requires substantial bipartisan support.

It is true that the President and Congress have long purported to make law out of what are called congressional-executive agreements, which are executive agreements enacted as legislation by a majority of both houses of Congress.[203] Such congressional-executive agreements pose a reduced risk of polarization, because they require congressional ratification and thus majority approval by both houses, albeit not supermajority approval in the Senate. They have much the same advantage in tamping down on polarization as does congressional approval of agency regulations. Requiring such majority support from both houses allows only agreements that command some degree of popular consensus, even if they do not require as much consensus as a two-thirds vote of the Senate. In divided government congressional-executive agreements also require some measure

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[199] U.S. CONST. art. II, § 2, cl. 2 (stating that the President "shall have Power, by and with the Advice of the Senate, to make Treaties, provided two thirds of the Senators present concur").

[200] *See* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 760 (2002)

[201] *Id.* at 761.

[202] *Id*. at 763.

[203] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1990) (stating that interchangeability of congressional-executive agreements is the prevailing view).

of bipartisan consensus. Thus, congressional executive agreements are superior to sole executive agreements in terms of reducing polarization. Unfortunately, it is not at all clear congressional executive agreements comport with the Constitution's original meaning.[204] Moreover, despite

[204] It is not at all clear that this practice of so-called interchangeability comports with the Constitution's original meaning. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249-78 (1995) (arguing that using statutes instead of statutes for major international agreements comports with neither the text nor structure of the Constitution). The constitutional problems of complete interchangeability are substantial. For instance, the Treaty Clause is the only provision of the Constitution permitting ratification of international agreements. U.S. Const. Art II. Sec. 2 (He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur"). *See* John Yoo, *Laws as Treaties, The Constitutionality of Congressional—Executive Agreements*, 99 MICH. L. REV. 757, 789 (2000). Permitting statutes to be interchangeable with treaties makes the clause effectively irrelevant, because in almost all cases it easier to obtain a majority of both House of Congress than two thirds of the Senate. Moreover, a congressional-executive agreement takes away a power of the President who even after the Senate has consented to a treaty, has plenary power to refuse to ratify it. Tribe, *supra* note x, at 1252 -1257 (explaining how the President makes a treaty subject to the Senate's consent).

To be sure, Professors Bruce Ackerman and David Golove have suggested that the completely interchangeability has been created by effective ratification of this practice by the American people. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional*, 108 HARV. L. REV. 799 (1995). But their argument is dependent on accepting the "constitutional moments" theory of Professor Ackerman's by which the Constitution can be amended outside of Article V if these changes have been effectively ratified by approval of the American people in several elections. For elaboration of the "constitutional moments" theory, see 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). The theory is very controversial. *See* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 768 (1992) (criticizing Ackerman's theory for failing to afford courts a clear rule of recognition); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 89 TEX. L. REV. 703 (2002) ("The uncertainty deprives the constitutional-moment theory of the deliberativeness, seriousness, and consciousness of purpose that Ackerman himself believes are required to amend the Constitution intelligently. This uncertainty will also make it more difficult for judges to determine the meaning of the Constitution, rendering constitutional law even more uncertain and contested"). Moreover, it has been persuasively argued that complete interchangeability does not meet the criteria set down for the "constitutional moments" theory, namely that the constitutional change become politically salient enough to be contested and approved in a series of federal elections. See Yoo, *supra* note x, at 783-85 (showing that there is little evidence that question of interchangeability was presented to voters and thus received the deliberation that Ackerman's own theory requires). In any event, complete interchangeability is not yet accepted outside of the area of international trade agreements. For instance, the Senate objected strenuously when President Jimmy Carter attempted to pass the Strategic Arms Limitation Talks II (SALT II) as a congressional-executive agreement. See Phillip R. Trimble & Jack S. Weiss, *The Role of the President, the Senate and Congress with Respect*

their existence, the executive still frequently employs sole executive agreements.

Executive agreements often raise more constitutional problems and create problems of unilateralism because they are international agreements struck by the President alone. Executive international agreements of are of two primary kinds—sole executive agreements that the President undertakes without any legal authorization than the Constitution and executive agreements authorized by statute or treaty.[205]

The established scope for sole executive agreements that do not rely on delegation from either a statute or treaty is narrow and thus is unlikely to lead to polarization. The leading law review article on executive agreements has stated that important sole executive agreements upheld by the Supreme Court have been tied to an independent and inherent presidential power.[206] For instance, the President may well have an inherent power to recognize foreign government and many sole executive agreements concerns his ability to settle claims at the time of recognition. But even here the Supreme Court has emphasized that the power to settle claims is "narrow and strictly limited."[207] The President also enjoys some power to enter into sole executive agreements that are minor or nonbinding, and thus are also unlikely to be polarizing.[208]

The President also can enter into executive agreements pursuant to delegations by statutes or treaties.[209] If these delegations are broad, they may create similar problems of unilateralism in some cases to those we considered in the domestic sphere in Part I. But in some respects the problem is more acute, because courts have often upheld not only explicit delegations in foreign affairs, but also implicit ones. [210] Implicit delegations

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to Arms Control Treaties Concluded by the United States, 67 CHI-KENT L. REV. 645, 662 (1991).

[205] For a survey of the types of executive agreements, see Curtis A. Bradley, Jack L. Goldmsith & Oona A. Hathaway, *The Failed Transparency Regime For Executive Agreements: An Empirical Analysis and Normative Analysis*, 134 HARV. L. REV. 629, 638-645 (2020)

[206] *Id.* at 640.

[207] Medellin v. Texas, U.S. 491, 532 (2008). We put aside the question whether agreements that are made at the same time that the President recognizes another government are in accord with the original meaning.

[208] Michael D. Ramsey, *Evading the Treaty Power?:The Constitutionality of Nonbinding* Agreements, FIU L. REV. 371, 375 (2016)

[209] Bradley et al, *supra* note x, at 641-645.

[210] *Id*. at 642 ("A complication actor here is that congressional authorization can be *implied* rather than express") (emphasis in the original.

are delegations where Congress has not deliberated on or specifically addressed the existence and contours of the delegation. Thus, the opportunity for compromise and consensus is frustrated even at the stage of delegation, let alone at the stage when the President strikes the agreement.

2. The Growth of Unilateralism in Executive Agreements. While the Constitution establishes treaties as the essential mechanism for making international agreements, a recent study indicates that 90 percent of international agreements since the 1930s have been made by executive agreements.[211] This development has been part of a growth of presidential unilateralism in making international law generally.[212] While most of these agreements have been made based on some claim of legislative authorization, "many of these authorizations are quite general and were conferred decades ago when the domestic and international consequences of the authorizations were different and much less significant."[213] Moreover as noted above, some are implicit rather than explicit.[214]

But beyond this general problem of unilateralism in the last seventy years, a period that roughly coincides with the rise of administrative discretion, we may be witnessing further expansion in the last decade, both in executive agreements made under delegations and sole executive agreements.

The best concrete example of the use of more aggressive theories of delegation to give the President unilateral power is The Anti-Counterfeiting Trade Agreement, a multilateral agreement to protect international property.[215] The Legal Advisor in the Obama administration defended it as an executive agreement, despite the absence of a delegation from Congress.[216] He justified the agreement by noting that in the case of intellectual property, members of Congress had called for the executive to "work with other countries to establish such protections."[217] More

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[211] Bradley et al., *supra*, at 630.

[212] Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV.1201 (2018)

[213] *Id.* at 1205.

[214] *See infra* notes xx and accompanying text.

[215] Oct. 1, 2011, 50 I.L.M. 243

[216] Bradley et al., *supra* note x, at 643. The Bradley article outlines the facts and provided the quotations from the official record which we discuss here. *Id*.at 643-644.

[217] Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to Ron Wyden, U.S. Sen. (Mar. 6, 2012) Response-to-Wyden-on-ACTA.pdf [https://perma.cc/9BF8-LA2P]; Letter from Ron Wyden, U.S. Sen., to Harold Koh, Legal Adviser, U.S. Dep't of State (July 25, 2012),

generally, he said the executive should be able to conclude international agreements on its own so long as it "determine[s] that the negotiated agreement fit[s] within the fabric of existing law, [is] fully consistent with existing law, and [does] not require any further legislation to implement."[218] The Legal Advisor's view reflected a new theory of executive agreements that holds that an executive agreement is permissible when it "complements" or is "consistent" with congressional statutes.[219] Thus, whenever Congress acts, it will be deemed to empower the executive to deal through executive agreement with the international aspects of the problem that Congress has addressed.

This new approach would vastly increase the scope for executive agreements, greatly reducing the need for treaties and congressional executive agreements. It would invert the basic structure of the separation of powers, where outside of the limited inherent power of the President, Congress must delegate power before the President is authorized to act. It even goes beyond the notion of implicit delegation by making it unnecessary to infer such a delegation from specific evidence and instead finds the delegation of power to make relevant executive agreements a ready inference from every congressional statute.

This new theory for finding delegations of executive agreement will greatly exacerbate polarization. Opponents of the Presidents would feel alienated by a broad presidential power to advance presidential priorities by international agreements in areas of the statutory landscape of the President's choosing.

Another way that the President's power to enter major executive agreements has been expanded is through the claim they are nonbinding. Here the concrete example is the Paris Accord, which on balance seems to include a substantial and binding agreement. The substantial and binding part is that which commits the US to be part of an emission reduction process – that is, to participate in emissions reduction talks.[220] Thus, the United States cannot simply walk away and say that reductions are not

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[218] *Id*. (as quoted in Bradley et al., , *supra* note x, at 644),.

[219] Daniel Bodansky & Peter Spiro, *Executive Agreements+,* 49 VAND. J. TRANSNATION'L L. 885, 887 (2016).

[220] Ramsey, *supra* note x, at 384. For example, Article 4.2 of the Paris Agreement states that "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures with the aim of achieving the objectives of such contributions." As Ramsey notes, this provision of the Accord uses the verb "shall" which implies a binding obligation in international law. I*d.* at 383.

going to part of its international agenda. As Professor Michael Ramsey observes, "If a future President or Congress decides the target goals process is not worthwhile, the process cannot be discontinued without violating a binding obligation (and the United States must remain a party to the Agreement for at least three years)."[221] Thus, the binding aspect of the agreement realistically boxes the United States in.[222]

The recent moves to make it easier to find a delegation authorizing executive agreements and to conclude that they are nonbinding are similar in that both create more unilateral presidential power to use international relations to create obligations that have large domestic effects. They increase polarization by expanding the power to use the international sphere to obtain controversial policies that the President could not secure through the more demanding requirements needed to pass domestic legislation, treaties, or congressional executive agreements.

Here, Congress can prevent polarization by enacting a statute to limit the President's unilateral power. First, framework legislation should provide generally that no executive agreements, that impose substantial international law obligations on the United States, have binding domestic legal force.[223] The definition of binding should include any action that creates rights, duties or obligations on any person, including the President's successors. It should except from this legislation executive agreements undertaken in the limited areas of the President's inherent powers, such as the recognition power, as well as those undertaken under genuine delegations that meet the constitutional standard for appropriate delegation. If needed, Congress could provide a fast-track procedure for congressional approval of the latter kind of agreements rather than providing a general exception. This statute would halt the expansion of another polarizing aspect of presidential unilateral powers.

V. Responses to Counterarguments

[221] Ramsey, *supra* note x, at 384.

[222] Bradley and Goldsmith argue that the Paris Accord are permissible, because parts are done pursuant to a delegation by treaty and the rest is nonbinding. Bradley & Goldsmith, *supra* note x, at 1250-1251. In particular, they emphasize that developed countries take absolute and specific target reductions are nonbinding. *Id*. at 1251. But they do not discuss the argument made here and by Michael Ramsey that the commitment to be part of a process on emission reductions is binding and substantial. Despite our arguments, we acknowledge that the question is a close one.

[223]Substantial could be defined as agreements that impose potential financial obligations of a certain amount or purport to bind future administrations.

This Part addresses counterarguments to our descriptive and normative theses. First, one might dispute our descriptive claim that unilateralism leads to polarization. Instead it might be argued that growing polarization leads to unilateralism. According to this argument, increasingly extreme policy agendas are the cause of unilateralism. In a polarized politics, those with extreme policies do not want institutional pressures to compromise. Thus, they seek to change government structures to allow policy change to be made unilaterally. We argue in response that the history of polarization and government structure does not support this objection. Moreover, we do not necessarily deny that polarization causes unilateralism. Our main claim is that unilateralism causes polarization, not that unilateralism is not produced by other causes.

Second, one might dispute our normative claim that less unilateralism will be beneficial even if it leads to less polarization. The argument here is that even if changes in government structure have led to increased polarization, these changes have compensating virtues that justify them. For example, some commentators argue that making the President the sole master of policy decisions through delegation promotes accountability. Other commentators contend that delegation also makes it easier to change the status quo by reducing the number of veto points for policy change as compared to getting legislation through both houses of Congress. Still other observers might argue that reducing compromise generates more principled or simply better decisions. This Part rebuts these arguments, maintaining that even if unilateralism has some benefits, these benefits are outweighed by the costs of polarization.

A. Polarization Leads to Unilateralism

It is certainly possible that polarization can lead to presidential unilateralism. But we believe that it is unilateralism that more often and more powerfully leads to polarization. Our claim is supported by the timing of the changes in our polity. The unilateralism of the administrative state has grown even in relatively bipartisan times in which there was greater social consensus, such as the periods from the 1940s to the early 1960s and in the 1990s.[224] Similarly, Presidents have claimed unilateral war making

[224] *See* Robert A. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1326 (1986) (describing how the administrative system of government has grown by "leaps and bounds" since the New Deal, including tendency for government intervention)

authority for decades, even when the country was enjoying periods of relative consensus.[225] Thus, history suggests that unilateralism has been more responsible for polarization than the other way around.

This objection also misunderstands the contribution of this essay. We do not argue that *only* presidential unilateralism contributes to polarization. Like other complex social phenomena, polarization has many causes. Nor, of course, is polarization the only force that may contribute to changes in government structure. Rather, it is our argument that changes in governmental structure that we catalogue are an important and previously unrecognized cause of polarization.

The power of our contribution is made clear when we contrast it with the very modest support for the legal structure that is popularly cited as most responsible for polarization—gerrymandering of the House of Representatives.[226] The data, however, undermine this claim. Political scientists have found little evidence for such a connection.[227] For instance, Republicans and Democrats have become more polarized even when they represent the same districts. Moreover, when political scientists simulated elections between Democrats and Republicans under non-gerrymandered districts, the results did not substantially reduce polarization.[228] Finally, polarization has increased in the Senate, although Senators are elected from states with fixed boundaries that cannot be gerrymandered, rather than ones established by contemporary politicians.[229] The evidence we present in this article suggests that presidential unilateralism likely has more effect on polarization than gerrymandering, even though the latter has been much discussed to the exclusion of the former.

B. Accountability

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[225] *See infra* notes xx and accompanying text.

[226] *See* Arnold Schwarzenegger, *Ban Partisan Gerrymandering and Enact Open Primaries Nationwide*, POLITICO (2019) https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/polarization/ban-partisan-gerrymandering-enact-open-primaries-nationwide/*See, e.g*, Samuel Marcosson, *Fixing Congress*, 33 BYU J. PUB. L. 227, 252 (2019) (ending gerrymandering if the only hope of ending partisan polarization in the House).

[227] Nolan McCarty, et al., *Does Gerrymandering Cause Polarization*, 53 AM. J. POL. SCI. 666, 678 (2013) ("Polarization is mainly the consequence of the different ways Democrats and Republicans would represent the same districts).

[228] *Id.* at 679.

[229] *See J*oseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519, 528-29 (2010)

It might be argued that compromises forced by a governmental structure that requires legislative approval will reduce accountability because voters will not be able to hold a single actor accountable for its ideological choices. But to the contrary, we maintain that governmental structures that put more responsibility for decisions in state and federal legislatures will lead to greater accountability, not less accountability.

Currently, delegation to administrative agencies, unilateral executive agreements, and unilateral military action allow legislators to avoid accountability.[230] Legislators do not have to vote on key issues facing the polity. So whatever accountability is gained for the President is lost in accountability for legislators. Under this view, reducing delegation and unilateralism would result in a net wash for accountability, because Congress would become accountable for the actions for which the President is currently accountable.

But reducing unilateralism and delegation would likely lead towards greater accountability. , Political scientists suggest that he President is held mostly responsible for a few fundamental issues, such as war and peace and the state of the economy.[231] Thus, the President may bear little relatively little accountability for regulations issued by executive branch agencies that his or her administration controls. But if delegation were reduced, members of Congress would be held responsible for votes on specific regulations. Indeed, many observers believe that one of the prime motivations for legislative delegation is that it permits members of Congress to avoid accountability for unpopular regulations.[232]

C. Privileging the Status Quo

Another possible argument against the reforms outlined here is that they privilege the status quo and thus favor citizens who want stasis over

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[230] DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 103-111 (1993) (providing examples of congressional avoidance of accountability through delegation): John O. McGinnis, *Constitutional Review by The Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 306 (1993)(describing members of Congress in the war powers area as a" ululating . . . chorus" which complains about the executive's decisions without being the deciders themselves).

[231] *See, e.g.,* Jill L. Curry & Irwin L. Morris, *The Contemporary Presidency Explaining Presidential Greatness: The Role of Peace and Prosperity?* 40 PRESIDENTIAL STUD. Q. 515, 528-29 (2010).

[232] *See* Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation,* 68 CORNELL L. REV. 8, 64 (1982)

those who advocate for change. In particular, it might be argued that the administrative process effects more regulatory change than the more laborious process of enacting legislation, because a single decision maker can determine the shape of rules. The difficulty with this argument is that citizens may indeed want regulatory change, but often in opposite directions. Some citizens desire more deregulation, while others prefer more regulation. Thus, requiring the legislature to act before major regulations and deregulations are enacted does not privilege either side in the enduring tug of war in the regulatory state.[233] Moreover, preventing unilateralism in war-making preserves the status quo of peace. Many on the left who are less enamored about preserving the status quo in domestic affairs favor preserving this status quo in geopolitical affairs, thus suggesting the relative ideological neutrality of reducing unilateralism to advance democratic stability and check polarization.

The argument from the status quo against greater congressional control over offensive military actions or major international agreements is even weaker. Peace is a sensible status quo to be defended as the baseline state of affairs. That status quo is implicit in the Constitution's requirement to put the power of declaring war in Congress. Similarly, the Constitution requires a supermajority consensus in the Senate for treaties. That requirement reflects the view that allowing substantial obligations to foreign nations to shape our destiny requires a significant consensus within the polity.[234] Moreover, because dispensing with or violating treaties has significant costs,[235] they should be entered into with the caution that a requirement of consensus enforces.[236]

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[233] Even one prominent opponent of the REINS Act, for instance, concedes that it would apply to major deregulation as well as regulation. *See* Ronald Levin, *The Reins Act: An Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1460 (2015).

[234] *See Our Supermajoritarian Constitution*, *supra* note x, at 763.

[235] *Id.*

[236] Nor is the argument that the Constitution as whole unduly privileges the status quo persuasive, even though the document limits delegation and requires supermajoritarian ratification of treaties. Since the current generation can change the Constitution under largely the same rules as past generations, each generation has an equal power to enact constitutional provisions. The original Constitution was enacted under similar supermajority rules as the amendment process requires. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 98 (2013). And the current Constitution can be amended under the same procedures that governed prior amendments. *Id*. at 98. While it is sometimes argued that the Constitution is simply too hard to amend *see, e.g*., Eric Posner, *The U.S. Constitution is Impossible to Amend*, Slate (May 5, 2014, 4:22 PM), https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html, that argument is ahistorical. Many of the most important provisions, such as the Thirteenth, Fourteenth, Fifteenth, Sixteenth,

D. Principled Decision Making

Another argument for administrative delegations and executive agreements is that they allow for more principled decisions. In a sense, this is just the flip side of the argument for consensus. Consensus frequently requires messy compromises that may not allow one to achieve a full moral victory.

But this argument also embraces a far too simplistic and unattractive view of principled decision making. First, one's principles might well include compromising with others. That is a sensible principle in a democratic society with people of diverse views.[237] Second, principles themselves are not always simple. They are sometimes limited in their scope and subject to countervailing considerations—considerations that are often captured in legal doctrine, as in requirements that provisions, such as free speech, must yield to compelling interests.[238] A world governed by simple absolutes unhedged by contrary considerations can be very unattractive.

Moreover, a dynamic view of politics allows principles to function and grow even within compromises. Compromises frequently change over time as some principle becomes more popular and compelling.[239] Thus,

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Seventeenth, and Nineteenth Amendments, were added by the amendment process. U.S. Const. am. XIII (outlawing slavery), am. XIV (guaranteeing equal protection and due process as against states), am. XV (protecting the right to vote irrespective of race), am. XVI (allowing Congress to levy an income tax), am. XVII (popular election of senators), am. XIX (protecting the right to vote irrespective of sex). The latter three amendments were added when the United States had forty-eight of the fifty states it has today. The Sixteenth and Seventeenth Amendments were added in 1913, and the Nineteenth Amendment in 1920. Mark V. Tushnet, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS xvi (2009). Alaska and Hawaii did not become states until 1959. Fred A. Seaton, *Alaska's Struggle for Statehood*, 39 NEB. L. REV. 253, 253, 261-62 (1960).

Moreover the consensus requirement generates desirable provisions such as the separation of powers, federalism, checks and balances, and the protection of individual rights. *See Originalism and the Good Constitution, supra,* at 98-99. That constitutional framework is our status quo but is likely a valuable one until changed by another consensus. Indeed, many of these provisions promote deliberation and prevent unilateralism.

[237] *See, e.g,* Hans Kelsen, GENERAL THEORY OF LAW AND STATE 288 (1961) ("compromise is part of democracy's very nature").

[238] *See, e.g*., Richard Fallon, Jr., *Forward: Implementing the Constitution*, 111 HARV. L. REV. 54, 102 (1997) (discussing how balancing tests represent compromise).

[239] Amy Gutmann & Dennis Thompson, THE SPIRIT OF COMPROMISE: WHY

legislation may initially represent a compromise because the principle is applied with a more limited scope than its advocates would wish. But the operation of the principle even within its narrower ambit may then contribute to its popularity and smooth the way for its expansion. For instance, as a result of compromise the 1964 Civil Rights Act only applied to businesses.[240] But as the nondiscrimination principle gained popularity, Congress extended the principle in the 1972 Civil Rights Act to education.[241]

In other words, principles are often the regulative ideals that drive compromises. They do not disappear once a compromise is reached. Instead, they continue to exert force behind the scenes. Indeed, the debate over the contours of the compromise provides publicity to principles and may provide an impetus for their future extension.

And it is not clear that the alternative—positions that are starkly principled under some view of abstract principles—will result in policies that most people consider principled, particularly if the principles change from administration to administration, as they often do under unilateralism. Indeed, that kind of instability may alienate citizens from politics altogether. It may also have other bad effects, such as inhibiting economic growth by making it harder for individuals and businesses to plan.

E. Advantages for Good Decision Making

Another possible criticism is that both presidential unilateralism provide benefits for decision making that their alternatives do not. In particular, it might be argued that they provide expertise, take less time, and can more quickly respond to emergencies. We doubt these asserted advantages are substantial. But even if they were more substantial than we believe they are, they would still be outweighed by the serious cost of increased polarization.

1. Delegation and the Administrative State

GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT 84-85 (2012) ("The process of mutual reason-giving in deliberative democracy asks citizens and leaders to treat their principles as open to change. . . . This openness to change over time . . . helps to constrain the uncompromising mindset and promote desirable compromise.").

[240] Pub. L. 88-352, 78 Stat. 241 (1964).

[241] Pub. L. No. 92-261, 86 Stat. 103 (1972); Douglas P. Ruth, *Title VII & Title IX = ?: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 2 CORNELL J. L. & PUB. POL'Y 185, 185 (1996).

a. Expertise—Expertise is one of the prime rationales offered for the administrative state. According to this argument, agencies employ experts who make more informed and thoughtful decisions about regulatory matters, particularly those with a technical component. We do not disagree that expertise provides some advantages, but the administrative state creates offsetting disadvantages. Moreover, there are ways to utilize expertise that are consistent with less delegation.

First, while agencies have expertise, they also have incentives that may prevent that expertise from reaching correct decisions. For instance, agencies have an interest in growing bigger and thus are likely to favor rules that increase their power and budgets.[242] Agencies also frequently combine rule making, prosecuting rule violations, and adjudicating those alleged violations.[243] This agglomeration of powers is in tension with the separation of powers, which separates these functions in no small part to avoid creating bad incentives.[244] For instance, an institution that decides to prosecute a rule violation is unlikely to be an impartial judge of the claimed violation.[245] Finally, as it happens, the federal bureaucracy leans distinctly to the left of the population.[246] Thus, ideology is likely to distort expertise, especially as compared to a world where the ideology of experts was more balanced.[247]

Second, many mechanisms exist which allow Congress to employ expertise without delegation. For instance, the REINS Act would force

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[242] WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 38 (1971); *see also* William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. Rev. 293, 293-94 (1968) (discussing maximizing bureaucratic utility).

[243] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994)

[244] *See* Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, in THE CAMBRIDGE CLASSICAL LIBERAL HANDBOOK 112-114 (Todd Henderson, ed., 2019)

[245] *Id.*

[246] Jonathan Swain, *Government workers shun Trump and Give Big Money to Clinton Campaign*, THE HILL (Oct. 26, 2016) https://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign (noting evidence that government workers are more liberal than the population). In 2016 ninety-five percent of those making campaign donations at 14 large government agencies contributed to Hillary Clinton. *Id.*

[247] That is one reason that the suggestion that empowering the civil service, *see* Emerson & Michaels, *supra* note x, at 8, is not a full solution to the problem of polarization. It may lead to the sense of Republicans that they are permanently excluded from government power. In a sense, this bug may be feature of their essay, because it is written from an explicitly progressive viewpoint. *Id* at 1-2.

Congress to vote on major rules, but the rules would be the product of agency deliberations and thus benefit from their expertise. Moreover, Congress could create legislative expertise, such as by establishing a Congressional Regulatory Office modelled on the Congressional Budget Office.

b. Time—Another argument for delegation is that Congress would not have time to pass all the needed regulations. But reducing polarization does not require that Congress pass all regulations, only the most consequential ones. Legislation like the REINS Act is targeted at such major regulations and would not clutter up floor time with minor regulations.[248] Moreover, it is an error to think that Congress lacks time to consider important regulations. It takes substantial breaks throughout the year.[249] It spends time on matters that are politically advantageous to it, such as naming post offices, enacting non-binding resolutions, and conducting oversight hearings. Time redirected to considering important regulations would return Congress to its essential function—determining the rules by which its fellow citizens must live.

c. Emergency—It might be argued that sometimes agencies need to issue emergency regulations to protect health and safety. But framework legislation could be passed that would allow major regulations to go into effect for a temporary period on an emergency basis without prior congressional approval. Judicial review could be available to prevent abuse of this emergency exception. Congress would then be required to vote on the proposed regulation within a specified period.

2. Presidential Unilateralism in Military and Foreign Affairs

a. Expertise—It might be argued, again, that the President has expertise that Congress lacks in military and foreign affairs. For instance, the President has access to intelligence information that members of Congress do not possess.[250] But the problem again is that incentives may

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[248] The Reins Act would require Congress to enact "major rules" and a rule would be deemed major if the Office of Information and Regulatory Affairs concludes is likely to have an annual effect on the economy of $ 100 million or more or otherwise have significant effect on consumer prices or the economy. *See* H.R. 10, 112th Cong. § 3 (to amend 5 U.S.C. § 804(2)).

[249] Tom Murse, *How Many Days Congress Works*, THOUGHTCO. (June 20, 2019), https://www.thoughtco.com/average-number-of-legislative-days-3368250 (Each House of Congress is in session about a third of the days in a year).

[250] Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1660-1663 (2006).

distort judgment. The Framers required Congress to declare war in no small part because they feared that executives had too great a tendency to go to war. Wars would aggrandize the executive branch and offer the prospect of lasting fame to chief executives.[251] While such presidential incentives may not be quite as problematic for international agreements, they remain present. International agreements based on executive power allow the President to preen on the world stage.

And it is hardly clear that unilateral Presidential decisions to commit American forces to war have been a success. The intervention in Libya, for instance, has been strongly criticized as a humanitarian disaster.[252]

b. Time—We doubt that a serious argument exists that Congress lacks the time to deliberate on offensive military action—the most serious kind of issue a nation can face. Although international agreements may be less momentous, they are obviously the kind of important matter that is deserving of Congress's consideration.

c. Emergency—Since the Constitution allows the President to respond to sudden attacks without congressional authorization, the Constitution avoids the most pressing concerns about military emergencies.

Conclusion: A World of Contending Extremes or a World of Cooperation and Compromise

Structures that encourage extreme outcomes and political polarization inevitably lead to an angry and divisive politics.[253] Because unilateralism allows the President and the Supreme Court to impose policies that do not have the support of moderates, extreme voices gain power within parties as they influence the party to pursue extreme outcomes. Masters of soundbites that reinforce party prejudices, like Alexandra Ocasio-Cortez and Jim Jordan, become important spokespeople, even if

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[251] DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS, 3-36 (1974); *see also* William Michael Treanor, *Fame, The Founding, and The Power to Declare War,* 82 CORNELL L. REV. 695, 729-40 (1997)

[252] *See* Alan. J. Kuperman, *'NATO's Intervention in Libya: A Humanitarian Success*?', in A. Hehir and R. Murray LIBYA, THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION 191-221 (2013).

[253] Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 299 (2011) (On how structural and historical factors have led to hyperpolarization)

they have never proven themselves at the business of enacting bills that can gain consensus support.[254]

These effects also resonate outside the halls of Congress.[255] In a world where those at the extreme can get what they want without compromise, there is less reason to listen to the citizens in the vast middle of the political spectrum.[256] Political discourse becomes more strident and the resulting angry cacophony creates an atmosphere conducive to even more extremism and dismissal of reasonable objections to policy.[257]

But in a world where greater consensus is needed to enact regulations and to purse military and foreign objectives, different kinds of politicians come to the fore, dealmakers rather than ideologues. The media would then pay more attention to people like Senators Chris Coons and Richard Shelby because congressional consensus would be required to make policy. With the return to a politics in which Congress enacts more of the law, the President will become less important. This will help smooth our turbulent politics by decreasing both the sycophancy that comes from presidential supporters investing their hopes in a single person and the contempt that comes from presidential opponents concentrating their fears in that same person. In a less polarized world, citizens will not feel they must defend the President of their party, even if he or she does something they dislike, or criticize the President of the opposing party, even if he or she does something they support.

A political structure that requires wider agreement necessarily leads to a legislative agenda that appeals to a broader range of citizens. The search for this agenda encourages citizens and politicians to ponder the

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[254] Melanie Zenona, *Centrist lawmakers eye growing power in 2019*, THE HILL, Mar. 27, 2018,
https://thehill.com/homenews/house/380565-centrist-lawmakers-eye-growing-power-in-2019 (Both moderate Republicans and Democrats have lost seats in the House since 2010).

[255] Alan Abramowitz and Steven Webster, *Negative Partisanship Explains Everything*, POLITICO, Sept.-Oct., 2017,
https://WWW.POLITICO.COM/magazine/story/2017/09/05/negative-partisanship-explains-everything-215534

[256] Alan Abramowitz and Steven Webster, *Negative Partisanship Explains Everything*, POLITICO, Sept.-Oct., 2017,
https://www.politico.com/magazine/story/2017/09/05/negative-partisanship-explains-everything-215534

[257] Jonathan Rauch, *How Activists Choose Our Politicians Long Before We Vote*, BROOKINGS INSTITUTE, (Dec. 12, 2017),
https://www.brookings.edu/blog/fixgov/2017/12/07/how-activists-choose-our-politicians-long-before-we-vote/

aspirations and needs they have in common and to listen to one another with respect to secure the support needed to get things done. The result would be compromises that have wider support.

Such a political process would unite rather than divide the citizenry because, in a world with consensus requirements, citizens are more likely to identify with the polity as a whole rather than see themselves as part of an embattled minority waiting for its turn to rule. Indeed, a consensus politics ultimately has the capacity to improve citizens' views of one another. With less delegation and unilateral action and more compromise, we would less often see each other as targets or threats and more as partners in a common civic enterprise. A political structure that rewards extremes produces demonization, but consensus structures can bring forth the better angels of our nature.