

ARTICLE

Special Issue: Legal Infrastructures

Breakdowns at the Border: Legal Infrastructures and Political Polarization

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(Received 09 December 2024; accepted 10 December 2024)

Abstract

This Article examines the role of political polarization in contributing to acute infrastructural dysfunction. It begins by applying an infrastructural lens to the study of law, identifying the synergies and tensions inherent in that conversation. The second section investigates the components of a functional border legal infrastructure from a range of perspectives, seeking to understand the performative role of the border. The Article next presents three case studies of politically polarized border legal infrastructures, highlighting material, relational, and distributional elements. Drawing from those examples, the Article then unpacks the role of law as border infrastructure, highlighting the contribution that a legal perspective can offer to the infrastructures literature. This section examines the layers of law involved in border infrastructures, including international, regional, and bilateral; the regulatory role of national law in constructing and governing infrastructures; and the jurisdictional functions of law in allocating the political and financial authority that are essential to the effective operation of infrastructures. This analysis highlights the role of discretion and opacity, as well as political polarization, in setting the stage for infrastructural breakdown. The Article ends by reflecting on the recursive relationship between politics and law in border infrastructures, examining how that dynamic creates and manifests failures, dysfunction, and acute breakdown.

Keywords: Migration law; infrastructures; political polarization

A. Introduction

All legal infrastructures are to some extent dysfunctional. An infrastructures lens contemplates the motivations of a range of actors and mechanisms involved in a particular enterprise, foregrounding the underlying structures of power and contests of meaning and purpose.¹ Those dynamics can stymie effective state control of outcomes and present formidable obstacles to access for the less powerful. It is hardly novel to say that legal infrastructures are not seamlessly achieving clearly specified goals, delivering us along a linear path to modernity.² Breakdown can even be understood as a necessary precondition to the emergence of new infrastructure.³ In some cases, however, infrastructural failure can be so severe as to stymie course correction and produce further conflict and instability. Using the case study of border legal infrastructures in the

¹Soumhya Venkatesan, Laura Bear & AbdouMaliq Simone, *Attention to Infrastructure Offers a Welcome Reconfiguration of Anthropological Approaches to the Political*, 38 CRIT. ANTHROPOL. 3, 11, 22 (2016).

²Brian Larkin, *The Politics and Poetics of Infrastructure*, 42 ANN. REV. ANTHRO. 327, 332 (2013).

³*Id.* at 334 (describing the breakdown of infrastructure as a common condition that leads to the emergence of new infrastructure).

southwestern United States, this Article examines the role of political polarization in contributing to acute infrastructural dysfunction.

The Article begins by exploring the relationship between the infrastructures literature, which has largely resided in the social sciences, and legal scholarship. An infrastructures lens offers useful inquiries into the hypervisibility and invisibility, structural violence, and social imaginaries that inform and arrange laws and policies governing human mobility more generally and borders specifically. Yet it also sits in tension with the normativity of legal scholarship, particularly when analyzing acute infrastructural dysfunction. The next section dives into this tension, offering three different perspectives on the underlying purpose of a functional border legal infrastructure. These competing visions offer a baseline against which the severe infrastructural breakdowns at the southwestern border of the United States can be assessed. Though the infrastructures literature identifies “breakdown and invisibility” as “ubiquitous and particularly noticeable in cities of the Global South,”⁴ this Article seeks to render visible the ample legal dysfunction in border legal infrastructures in the Global North that exacerbates structural violence against migrants, largely from the Global South. This epistemological gap is an important oversight in the literature.

The Article applies an infrastructural lens to case studies of the border legal infrastructure, examining in turn its material, relational, and distributional dimensions.⁵ The southwest US border also offers fertile ground to explore the relationship between political polarization and acute infrastructural dysfunction.⁶ The Article first explores the material aspects of the border legal infrastructure, beginning with the Rio Grande floating barrier, a physical infrastructure that deploys violence to impede cross-border human mobility. Though the legal authority to erect this material barrier lies with the federal government, state officials leveraged and amplified political polarization around border enforcement policies by flouting federal law and taking matters into their own hands. The Article then turns to the relational component of the border legal infrastructure, focusing on the federal policy that closed the border to undocumented migrants during the Covid-19 public health emergency. Although legal challenges to executive policies are part and parcel of a healthy democracy, the Title 42 policy provides an example of the destabilizing effect of supercharged litigation in a politically polarized climate, in the form of two competing court orders prohibiting and requiring implementation of the same border closure policy. Finally, the Article examines the distributional element of border legal infrastructures. Federal regulations have required that undocumented migrants seeking asylum at the southern border make an appointment via the CBP One smartphone app. This key piece of technology, which is used by the hypermobile to cross borders seamlessly, fails less politically powerful groups, who are often racialized, in a range of ways. Legal infrastructures that could enable safe, lawful, and efficient border crossing are politically controversial and accordingly underfunded. These examples demonstrate the ways in which political polarization can propel infrastructural failings towards acute breakdown rather than reform: Via extralegal and even illegal construction of material

⁴*Id.*

⁵This Article focuses on these three elements as they offer “common threads” across the interdisciplinary literature on infrastructures. See William Hamilton Byrne, Thomas Gammeltoft-Hansen & Nora Stappert, *Legal Infrastructures: Towards a Conceptual Framework*, 25 *German L.J.* 1229 (2024).

⁶See Drew Desilver, *The Polarization in Today's Congress Has Roots That go Back Decades*, PEW RES. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> (making the case that Political polarization is at its highest level in fifty years in the United States); Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, CARNEGIE ENDOWMENT INT'L PEACE (Jan. 18, 2022), <https://carnegieendowment.org/research/2022/01/what-happens-when-democracies-become-perniciously-polarize-d?lang=en> (noting that no established democracy other than the United States has faced such a high level of polarization for such a long period of time since at least 1950). *But see generally* John T. Jost, Delia Baldassarri & James N. Druckman, *Cognitive–Motivational Mechanisms of Political Polarization in Social-Communicative Contexts*, 1 *NATURE REV. PSYCH.* 560 (2022) (questioning whether levels of political polarization can be measured in a meaningful and reliable way).

infrastructure; by overwhelming the judicial system with a cacophony of competing actors; and through consistent, and arguably intentional, resource failings.

In addition to the ways in which political polarization contributes to acute breakdown, these case studies highlight the multifaceted role of law in border infrastructures. International, transnational, regional, and bilateral law, through their commands and gaps, lay out the playing field for border infrastructures. National law then allocates authority for their establishment and reform. These systemic and structural functions of law are important components of infrastructure that are often overlooked in the literature. Moreover, although law is commonly conceived as formal, structured, and transparent, the border infrastructures in the case studies are regulated through informal, discretionary, and opaque lawmaking and enforcement. These traits threaten the legitimacy of border legal infrastructures, in part because they both further and are furthered by political polarization. The law is also used to challenge and shape border legal infrastructures. Contestation is of course an inherent characteristic of law, but law seeks to constrain disputes within the boundaries of specified processes. In the case studies, law's authority is threatened by political maneuvers that evade legally prescribed routes to resolve disagreements over border policies and enforcement, litigation strategies that amplify the contentious nature of these disputes, and resource shortfalls resulting from political brinksmanship. These infrastructural breakdowns threaten the very foundations of the laws that structure and regulate border crossings.

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B. An Infrastructures Lens on the Law

This special issue is devoted to the study of legal infrastructures, a relatively undertheorized topic.⁷ This section offers a brief introduction to the robust interdisciplinary literature on infrastructures, identifying aspects of that literature that are particularly relevant to the study of law in general and migration law in particular. It explains briefly the value that legal scholarship can add to the infrastructures literature and sets out the inherent tensions between the infrastructures literature and the normative thrust of legal scholarship. This section ends by highlighting synergies in the study of law and infrastructures.

Infrastructures have been defined in a range of ways in a variety of literatures; indeed, the concept has been critiqued as both too specific and too vague.⁸ As explored in more detail in the case studies below, the organizers of this special issue suggest that the literature presents at least three “common threads” when it comes to the salient dimensions of infrastructures: Material;

⁷Byrne, Gammeltoft-Hansen & Stappert, *supra* note 5, at 5.

⁸Venkatesan, et al., *supra* note 1, at 4.

relational and governing; and distributional.⁹ Venkatesan, Bear, and Simone offer a particularly useful definition of the study of infrastructure: Namely, how “specific material transformations shape social worlds, and create new environments.”¹⁰ For legal scholars, an infrastructures perspective helps to identify the ways in which identity is politically constructed and deployed towards exclusionary ends. Infrastructural thinking can also offer a reminder of the contingencies of contemporary legal structures and consequent social arrangements. The infrastructures literature invites a thick understanding of the complexities and contradictions of legal frameworks, and a careful assessment of the new opportunities and new risks they create.¹¹

Of particular salience to a study of border legal infrastructures, Larkin defines infrastructures as “matter that enable the movement of other matter.”¹² Infrastructures are a representation of state power,¹³ which means that law, which can be defined as the exercise of state power,¹⁴ is a particularly relevant topic in the study of infrastructures. The infrastructures literature reminds the reader that power renders certain infrastructures visible, namely those designated by authorities such as the state, and invisibilizes others involving less dominant actors.¹⁵ Larkin explains that a construction site might be visible and the workers at that site invisible; in the United States, many of those workers would be undocumented migrants, humans who were not able to obtain legal authorization to cross a border. In other words, the constitutive power of infrastructure serves some populations and excludes others.¹⁶ Relying on a narrative of “fixing otherwise unstable material and social environments,” infrastructures act as an exercise of state power that impacts and perhaps creates disparate realities.¹⁷ Thinking infrastructurally can be a useful exercise in order to identify master narratives as well as “others” constructed through those tropes and norms, and to foreground invisible work.¹⁸ Border legal infrastructures seem almost too obvious a site of inquiry on state power, invisibility, and exclusion.

As demonstrated in more detail below, a legal lens on infrastructural thinking can offer a more robust and nuanced understanding of the layers and operation of law. The infrastructures literature often references law as “regulation.”¹⁹ Legal scholars can provide substantially more richness and detail in describing the role of law in setting the background conditions for the operation of infrastructures; the different forms that laws can take, from statutes to executive orders; the relative authority of different legal pronouncements and how laws interact with each other; the different processes through which laws are created, challenged, and interpreted; as well as the range of actors involved in lawmaking and enforcement. This perspective can enable a more thorough and fine-tuned appreciation of the operation of law within and through infrastructures as well as the processes through which law and infrastructures interact and produce normative change.

That said, the conversation between legal scholarship and the infrastructures literature faces a core tension around normativity. A central tenet of infrastructural thinking is the idea that “nobody is really in charge of infrastructure.”²⁰ Although infrastructures might have had an original purpose at some point, numerous contingencies and interventions along the way ensure the dispersion of power and purpose. The law is goal oriented and legal scholarship is accordingly

⁹Byrne, Gammeltoft-Hansen & Stappert, *supra* note 5, at 5.

¹⁰Venkatesan, et al., *supra* note 1, at 5.

¹¹Byrne, Gammeltoft-Hansen & Stappert, *supra* note 5, at 5.

¹²Larkin, *supra* note 2, at 329.

¹³*Id.* at 334.

¹⁴Law can of course be defined far more broadly, as legal pluralists have done. See e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 U.S.C. L. REV. 1155, 1157-59 (2007); see generally, *THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM* (Paul Schiff Berman ed., 2020).

¹⁵Larkin, *supra* note 2, at 334.

¹⁶Penny Harvey & Hannah Knox, *The Enchantments of Infrastructure*, 7 MOBILITIES 521, 523 (2012).

¹⁷*Id.*

¹⁸Susan Leigh Star, *The Ethnography of Infrastructure*, 43 AM. BEHAV’L SCIENTIST 377, 384-85 (1999).

¹⁹Biao Xiang & Johan Lindquist, *Migration Infrastructure*, 48 INT’L MIG. REV. 122, 124 (2014).

²⁰Star, *supra* note 18, at 382.

normative in orientation. Although the richness of infrastructural thinking can provide nuance to legal analysis, legal scholarship is focused on identifying who is responsible for a given problem and outlining key reforms to solve that problem according to a given set of goals.

To oversimplify, the law is a goal-oriented enterprise; law seeks to solve concrete problems in a particular way. Although there are many actors and competing intentions underlying any law, once the law is codified, it represents an explicit, even expressive, function. Contests around that function are resolved through the jurispathic exercise of adjudication, which kills off alternate interpretations of law.²¹ To conceive of law as infrastructure invites us back into a world of multiple interpretations and meanings, of thick description of a range of actors with differing normative visions that influence the operation of law. Once inside this thicket, it becomes difficult to identify the goal of the legal infrastructure with any certainty or confidence. That complexity is the value that a legal infrastructure lens adds to the study of law; once power and politics are surfaced, the intended function becomes much murkier.

To make that point more clearly, a legal analysis would begin with the goals of a given law, set out by legislatures, executives, and/or courts, and determine whether the relevant law enforcement apparatus is achieving those goals. If not, solutions that might more effectively achieve that goal would be offered. An analysis of law as infrastructure would render a much more complex and complicated picture. Identifying the broad range of goals and interests does not lead to a tidy assessment of whether they have been achieved.

Importantly for the study of border legal infrastructures, both infrastructures and law create social imaginaries.²² There is a fantasy dimension to infrastructures, which are imagined to have a transformative capacity²³ that can bring about spectacular progress leading to freedom.²⁴ This “infrastructural fetishism”²⁵ relies on social understandings of what it means to be modern. Infrastructures offer a sticky form of fantasy, in that they “retain a generic social promise, even in the face of specific circumstances in which they are acknowledged as having failed to deliver.”²⁶ This Article interrogates border legal infrastructures as symbols of modernity.²⁷ The fantasy here is one of border control and power, of the “desire for infrastructural forms to contain unruly forces.”²⁸ The story that border legal infrastructure tells about itself is a story of linear progress towards modernity, or perhaps a future that resembles an imagined past.²⁹ Moreover, the infrastructures literature often critiques the physical infrastructure of the Global South as tilting towards modernity but failing to achieve it.³⁰ This Article seeks to provide an alternate epistemological starting point, namely that, in the Global North, structural violence is the point of border legal infrastructures, which legitimate themselves through rhetorics of migrant illegality and national security.³¹

²¹Robert Cover, *Foreword to The Supreme Court Term 1982*, 97 HARV. L. REV. 4, 40–44 (1983).

²²Nauja Kleist & Jesper Bjarnesen, *Migration Infrastructures in West Africa and Beyond* 17 (Merian Inst. for Advanced Stud. Afr., Working Paper No. 2019(3), 2019) (discussing the social imaginary of migration); Jaya Ramji-Nogales, *The Imaginary of Mass Influx: Responses to Large-scale Movements in US Law and Policy*, REFUGEE L. INITIATIVE (May 8, 2017), <https://rli.blogs.sas.ac.uk/2017/05/08/the-imaginary-of-mass-influx-responses-to-large-scale-movements-in-us-law-and-policy/>; Miriam Ticktin, *Building Borders and “No Borders”: Infrastructural Politics as Imagination*, 117 AJIL UNBOUND 11, 12 (2023).

²³Harvey & Knox, *supra* note 16, at 523.

²⁴Larkin, *supra* note 2, at 332.

²⁵Dimitris Dalakoglou, *The Road: An Ethnography of the Albanian–Greek Cross-border Motorway*, 37 AMER. ETHNOLOGIST 132, 132 (2010).

²⁶Harvey & Knox, *supra* note 16, at 523.

²⁷Nikhil Anand, *After Breakdown: Invisibility and the Labour of Infrastructure Maintenance*, 55 ECON. & POL. WKLY. 52, 52 (Dec. 2020).

²⁸Harvey & Knox, *supra* note 16, at 534.

²⁹Larkin, *supra* note 2, at 332.

³⁰Kleist & Bjarnesen, *supra* note 22, at 17 (discussing the social imaginary of migration).

³¹Jaya Ramji-Nogales, *This Border Called My Skin*, in RACE AND NATIONAL SECURITY 109, 123 (Matiangai Sirleaf ed., 2023).

C. Border Legal Infrastructures

A border legal infrastructure is an assemblage of material, relational, and distributional elements that construct the territorial boundary between two nations. The case study of the southwestern US border presents an example of a highly politically polarized legal infrastructure that has tipped into severe dysfunction. The introductory section drew a distinction between infrastructural breakdown that is a precursor to reform and acute infrastructural dysfunction that threatens the constitutive legal authority and evades prescribed processes for dispute resolution. Presumably both legal scholars and infrastructural thinkers would find that level of breakdown problematic. Yet the paths they take to arrive at that conclusion would not only differ but might be at odds with each other.

Although the infrastructures literature would direct us to a thick description of the myriad contestations between these actors,³² a legal scholar would begin by surfacing assumptions about purpose. In order to understand whether it is suffering from acute breakdown, we must first determine what outcomes a border legal infrastructure *should* be achieving. The infrastructures literature reminds us that, particularly in a politically polarized climate, there are many actors with many different goals for the border legal infrastructures. Recognizing the value in that insight and the futility of attempting to elucidate a set of goals that would satisfy all actors, this Article identifies three different visions of a what a border legal infrastructure might seek to do. We might think of this approach as identifying what outcomes a border legal infrastructure *could* be achieving, offering a more complex description than typical legal scholarship, but still maintaining a level of normativity that would be uncommon for an infrastructural thinker.

It is important to note that this Article is focused on infrastructures for the undocumented.³³ Border legal infrastructures work nearly seamlessly for the hypermobile—think about how frictionless the process was the last time you crossed a border. These are of course two sides of the same infrastructure, and the infrastructures literature reminds us that this duality is inherent to infrastructure, which often serves the powerful to the detriment of the powerless.³⁴

In one vision, the border legal infrastructure would control the movement of people, sorting between humans with a lawful means to enter and excluding migrants who were unable to obtain legal authorization before crossing the border. If law is violence on paper, the border is where that violence is enacted on a daily basis.³⁵ This interpretation of the border legal infrastructure comports with the understanding that infrastructures are an “instrumental medium” for “structural violence.”³⁶ Violent by design, border legal infrastructures can be understood as a form of active infrastructural violence.³⁷ Rodgers & O’Neill have defined active infrastructural violence as the “appropriation and deployment of infrastructure by elite bodies to police vulnerable populations [...] [and the] conscious use of infrastructure to regulate normative social and territorial relations.”³⁸ In other words, harm is inherent to the workings of infrastructure,³⁹ which relies on the “materials of modernity” to act as “instruments of slow violence.”⁴⁰ Perhaps this is one measure by which border infrastructures, despite their many failings, are tragically functional:

³²See e.g., HUUB DIJSTELBLOEM, *BORDERS AS INFRASTRUCTURE: THE TECHNOLITICS OF BORDER CONTROL* (2021).

³³See generally Loren Landau, *A Chronotope of Containment Development: Europe’s Migrant Crisis and Africa’s Reterritorialization*, 51 *ANTIPODE* 169 (2018); Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, 20 *EUR. J. MIG. & L.* 452 (2018).

³⁴Spijkerboer, *supra* note 33, at 455–67.

³⁵Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

³⁶Dennis Rodgers & Bruce O’Neill, *Infrastructural Violence: Introduction to the Special Issue*, 13 *ETHNOGRAPHY* 401, 404 (2012).

³⁷*Id.* at 406.

³⁸*Id.*

³⁹Yannis Kallianos, Alexander Dunlap & Dimitris Dalakoglou, *Introducing Infrastructural Harm: Rethinking Moral Entanglements, Spatio-temporal Dynamics, and Resistance(s)*, 20 *GLOBALIZATIONS* 829, 830 (2023).

⁴⁰*Id.*

Their ability to perpetrate violence against migrants. That said, if the goal is to police migrants, preventing the undocumented from crossing the border, the legal infrastructures at the southwestern border are consistently defeated by the ingenuity and tenacity of migrants seeking to enter the United States. In other words, the performance of violence through border legal infrastructures appears to be relatively ineffective at controlling human mobility.

In addition to the violent exclusionary dimension, border legal infrastructures play a performative role. If infrastructures in the Global South rely on a fantasy of modernity, border legal infrastructures in the Global North rely on a fantasy of control and strength undergirded by racialized understandings of who should have access to modernity. Border legal infrastructures feed the social imaginary that they are keeping out the “barbarians at the gate.”⁴¹ This in turn serves to expand the political power of populist nationalist politicians who describe themselves as the only one who can “solve” the “problem of the border.” From a similar perspective, a border legal infrastructure might be conceived of as serving an affective and moral function, persuading voters to align with specific political candidates and parties. In these ways, a functional border legal infrastructure could be conceived as one that sends a political message to specific domestic constituencies. On that measure, the current system can be rated as a highly effective political tool that offers a sticky social imaginary that can be leveraged to win elections, though, as discussed in later sections of this Article, its reliance on and amplification of political polarization may be sowing the seeds of its own demise.

Alternatively, a functional border legal infrastructure might be measured in terms of its speed and accuracy in processing migrants who seek to enter the United States, as well as its ability to uphold the dignity of those migrants. It is possible to imagine a border legal infrastructure that permits entry to non-citizens who need protection from a range of harms in their home country, as well as those who seek to be reunified with family members, and workers who are able to fill labor market needs. Applicants for entry might be vetted along all of these dimensions as well as security grounds, rapidly and fairly. This vision of a functional infrastructure, although far from the current reality for undocumented migrants, aligns with the experience of the hypermobile. A more humanitarian approach to the border that prioritizes human dignity is also part of the existing border legal infrastructure, to be found in the work of a range of non-profit organizations with the mission of welcoming migrants.⁴² This vision of the border legal infrastructure is increasingly unpopular, demonstrating the power of the affective approach. In short, violent exclusion, affective politics, and humanitarian efficiency exemplify a range of goals held by border actors; an infrastructures perspective reminds the legal scholar to keep an eye on all of these competing aims and the tensions and synergies between them while assessing the functionality of an infrastructure.

D. Breakdowns at the Border

Although contestation and inefficiencies are inherent and even productive features of any legal infrastructure, extreme battles for control can lead to severe structural failures. The border legal infrastructure at the southern border of the United States, long ineffective, has become profoundly unstable as it has become a central site of political contestation. This section offers three case studies to map some of these manifestations of dysfunction. The first examines the material element of the border legal infrastructure, highlighting the role of political polarization in providing a justification to enable subnational actors, in this case state governments, to take physical border infrastructures into their own hands—an extralegal response that in turn amplifies political polarization. The second investigates the relational component, studying the

⁴¹Ramji-Nogales, *supra* note 22.

⁴²Jaya Ramji-Nogales, *Towards a Feminist Border*, in REIMAGINING THE MIGRATION PROTECTION SYSTEM: CRITICAL REFLECTIONS FROM THE BORDER 45, 47 (Gabriella Sanchez ed., 2024).

interplay between litigation, political polarization, and infrastructural breakdown when recursive interactions are taken to an extreme, creating contestation so severe that it overwhelms the judicial system's ability to moderate disputes. Again, border legal infrastructures both reflect and further political polarization. The third explores the distributional aspect of the border legal infrastructure, namely resource failures—materializations of structural violence—that manifest along racial and economic lines, the result of political polarization over border enforcement policies.

Although there is a substantial literature discussing political polarization, few attempts have been made to define the concept comprehensively.⁴³ Sociologists describe polarization as a “phenomenon of opinion radicalization [as well] as a process of ideological division and preference alignment.”⁴⁴ They explain that as Americans have become increasingly partisan on various axes, including civil rights, economics, and moral issues, political parties have become increasingly polarized.⁴⁵ The sociology literature also identifies at least three types of polarization: Ideological or issue-based polarization, affective or emotional polarization, and partisan alignment or increasing party identification.⁴⁶ The political science literature offers a useful distinction between normal levels of political disagreement and the corrosive rivalry that constitutes polarization: When “ideological and affective distance between political camps [...] give rise to political intolerance, that is, when political contenders turn from rule-bound agonism among adversaries to unbound antagonism among enemies.”⁴⁷ Political polarization leads to accusations that opponents are not sufficiently committed to democratic values and “the concomitant destruction of basic democratic trust.”⁴⁸ This Article explores the relationship between political polarization and legal infrastructures, unearthing in particular the ways in which polarization can exacerbate infrastructural breakdown, transforming it from a productive friction to a destructive force.

Political polarization can manifest through battles over material infrastructure that challenge longstanding legal authority. In the United States, the power to regulate immigration and enforce the border has rested squarely in the hands of the federal government since the nation's founding. Although state governments have played minor roles in implementing immigration law, they have generally cooperated with or at least deferred to the federal government. In recent years, however, states have begun to evade the established legal authority, taking control of physical border infrastructures into their own hands.

In one notorious example, in July 2023, at the behest of Governor Greg Abbott and without the authorization of the federal government, the state of Texas began installing a floating barrier intended to be 1,000 feet long in the Rio Grande River.⁴⁹ Two weeks later, the federal government

⁴³Andreas Schedler, *Rethinking Political Polarization*, 138 POL. SCI. Q. 335, 335 (2023).

⁴⁴Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOCIO. 408, 439 (2008).

⁴⁵*Id.* at 440, 443.

⁴⁶John T. Jost, Delia Baldassarri & James N. Druckman, *Cognitive-motivational Mechanisms of Political Polarization in Social-Communicative Contexts*, 1 NATURE REV. PSYCH. 560, 561–62 (2022).

⁴⁷Schedler, *supra* note 43, at 358.

⁴⁸*Id.*

⁴⁹Lest one think that buoys would make it easier for undocumented migrants to cross the Rio Grande, the Federal District Court provides this description:

[F]loating barrier comprised of about 1,000 feet of large four-foot spherical orange buoys fastened together with heavy metal cables and anchored in place with ‘heavy concrete blocks placed systematically on the bed of the Rio Grande River.’ [...] The buoys are surrounded by 68 anchors of about 3,000 lb. each, and 75 anchors of about 1,000 lb. each. Attached to the bottom of about 500 feet of the floating barrier is an ‘anti-dive net’ made of stainless-steel mesh extending two feet down into the water.

U.S. v. Abbott, 690 F. Supp. 3d 708, 715 (W.D. Tex. 2023), *aff'd*, 87 F.4th 616 (5th Cir. 2023), *reh'g en banc granted opinion vacated*, 90 F.4th 870 (5th Cir. 2024), *reh'g en banc*, 110 F.4th 700 (5th Cir. 2024), *rev'd and remanded to* 110 F.4th 700 (5th Cir. 2024).

sued Governor Abbott and the state of Texas, invoking federal law to assert that any structure erected in a river required the authorization of the Army Corps of Engineers and any obstruction to the navigable capacity of a waterway required congressional authorization.⁵⁰ Texas argued in response that the Constitution authorizes states to engage in warfare if the federal government fails to protect them from invasion.⁵¹ In August, the International Boundary and Water Commission found that 787 of the 995 feet of barrier were located on the Mexican side of the river,⁵² prompting a diplomatic outcry from Mexico.⁵³ On September 6, 2023, the Federal District Court prohibited Texas from adding new structures to the Rio Grande and required Texas to move the floating barrier to the riverbank pending the outcome of the litigation.⁵⁴ A day later, the Federal Court of Appeals for the Fifth Circuit stayed that injunction, enabling Texas to keep its buoys in the Rio Grande.⁵⁵ A three-judge panel of that court affirmed the trial court's decision,⁵⁶ only to have their opinion vacated in January 2024 and re-decided by the entire court *en banc*,⁵⁷ which overturned the injunction in July 2024.⁵⁸ Abbott's extralegal infrastructural publicity stunt resituated the material infrastructure of the border as a battleground between the state and federal government.

This is just one of several skirmishes over material infrastructure that Texas governor Greg Abbott has instigated in recent years. In one example, state actors again took extralegal action. In January 2024, the Texas National Guard seized control of a small park that federal officials had been using to process immigrants, denying access to Customs and Border Protection agents.⁵⁹ Texas has also weaponized the law in a fracas over material infrastructure. In October 2023, the state filed a lawsuit in federal court to prevent federal Customs and Border Protection agents from cutting barbed wire fencing to protect migrants and officers.⁶⁰ In addition to battling over the physical infrastructure from within and outside of the law, Texas has moved the border itself

⁵⁰*See id.*

⁵¹*See id.* at 717.

⁵²*See* Decl. of Jennifer T. Pena as Amicus Curiae Supporting Plaintiffs, *U.S. v. Abbott*, 690 F. Supp. 3d 708, 715 (W.D. Tex. 2023) (No. 1:23-cv-853).

⁵³*See* Press Release, Gobierno de México, SRE informa que hallan cuerpo sin vida en el río Bravo en la zona de boyas de Eagle Pass (Aug. 2, 2023), <https://www.gob.mx/sre/prensa/sre-informa-que-hallan-cuerpo-sin-vida-en-el-río-bravo-en-la-zona-de-boyas-de-eagle-pass?idiom=es>:

We reiterate the position of the Government of Mexico that the placement of wire buoys by the Texas authorities violates our sovereignty. We express concern about the impact on of these state policies on the human rights and personal safety of migrants, undermining the close collaboration between our country and the federal government of the United States.

Id.

⁵⁴*U.S. v. Abbott*, 690 F. Supp. 3d at 715.

⁵⁵*See generally* *U.S. v. Abbott*, 87 F.4th 616 (5th Cir. 2023), *reh'g en banc granted, opinion vacated*, 90 F.4th 870 (5th Cir. 2024), *and on reh'g en banc*, 110 F.4th 700 (5th Cir. 2024).

⁵⁶*See U.S. v. Abbott*, 90 F.4th 870, 870 (5th Cir. 2024).

⁵⁷*See generally* *U.S. v. Abbott*, 110 F.4th 700, 725–40 (5th Cir. 2024) (Ho, J., concurring) (In an astonishing concurrence, Judge Ho found that Texas need not move the barriers even if the federal statute required because the federal Constitution authorizes states to “engage in War” if “actually invaded,” “without the Consent of Congress.”)

⁵⁸Andrew Schneider, *Legality of Texas' Floating Barrier on Rio Grande Goes Before Full 5th Circuit Appeals Court*, HOUSTON PUB. MEDIA (May 16, 2024), <https://www.houstonpublicmedia.org/articles/news/border/2024/05/16/487698/legality-of-texas-floating-barrier-on-the-río-grande-goes-before-full-u-s-5th-circuit/>.

⁵⁹Muzaffar Chishti & Julia Gelatt, *Standoff at Eagle Pass: A High-Stakes U.S. Border Enforcement Showdown Comes to a Small Texas Park*, MIGRATION INFO. SOURCE (Feb. 28, 2024), <https://www.migrationpolicy.org/article/standoff-eagle-pass>.

⁶⁰Nate Raymond, *Texas Sues to Block Biden Administration From Cutting Wire Border Fencing*, REUTERS (Oct. 25, 2023), <https://www.reuters.com/legal/government/texas-sues-block-biden-administration-cutting-wire-border-fencing-2023-10-24/>.

The United States District Court for the Western District of Texas denied the injunction in November 2023; Federal Court of Appeals for the Fifth Circuit overturned the District Court decision and granted the injunction in December 2023; and the United States Supreme Court vacated the injunction in January 2024. *See Tex. v. Dep't Homeland Sec.*, No. DR-23-CV-00055-AM, 2023 WL 8285223, at *x, x (W.D. Tex. Nov. 29, 2023); *Tex. v. Dep't Homeland Sec.*, 88 F.4th 1127, xx (5th Cir. 2023), *vacated sub nom. Dep't Homeland Sec. v. Tex.*, 144 U.S. 715, xx (2024).

northwards by bussing over 100,000 migrants to majority-Democratic cities between April 2022 and January 2024.⁶¹ Moreover, the Texas legislature has tried to wrest control of the legal infrastructure of border enforcement from the federal government. In November 2023, it passed a law that makes undocumented entry a state crime; that law is currently enjoined as a legal challenge to it winds its way through the courts.⁶² Though Texas's attempts to control the physical, geographic, and legal infrastructure of border enforcement are not always successful at keeping migrants out, they have been extremely effective political theater.

This material infrastructure performance for a political audience highlights the role that polarization plays in creating dysfunction. Incentives to compromise or even play by the rules have been diminished as political actors jockey for attention on the political stage. The physicality of border infrastructures makes for powerful visual media opportunities and political messages. The material infrastructure itself is at issue in a battle for control between the federal government, which ostensibly holds legal authority, and the state government, which may have the upper hand in political messaging though its control over outcomes seems equally tenuous. These contests of authority between the state and federal government over border legal infrastructures move quickly to litigation that is marked by unpredictability.

This litigation is one of numerous examples of the impact of political polarization on relational aspects of border legal infrastructures, manifesting as recursiveness run amok. Perhaps the most extreme case study is the litigation resulting from the Title 42 border closure policy which resulted in two competing court orders against the Biden administration, one requiring and the other prohibiting enforcement of the policy. This border enforcement infrastructure was created by the Trump administration in March 2020, leveraging the Covid-19 pandemic to prevent asylum seekers from crossing the southern border.⁶³ Perhaps unsurprisingly given that it violated the federal immigration statute, the UN Refugee Convention, and the UN Convention Against Torture, and was not justified on public health grounds, Title 42 was soon challenged in federal court. In September 2021, the federal trial court in Washington D.C. enjoined the federal government from closing the border to families with minor children.⁶⁴ Two weeks later, the appellate court stayed that injunction, meaning that the government was authorized to close the border while it decided the case.⁶⁵ In March 2022, the appellate court affirmed the trial court in its decision that the government could not close the border to families.⁶⁶ The Biden administration announced the following month that it would end the Title 42 policy.⁶⁷

Two months later, in May 2022, in response to a lawsuit by twenty-four “red” states, a Federal District Court in Louisiana mandated that the Biden administration maintain the Title 42 border closures until it followed an official notice and comment process.⁶⁸ Six months later, in November

⁶¹Texas Transports Over 100,000 Migrants to Sanctuary Cities, OFF. TEX. GOVERNOR (Jan. 12, 2024), <https://gov.texas.gov/news/post/texas-transport-over-100000-migrants-to-sanctuary-cities>.

⁶²See *U.S. v. Tex.*, 97 F.4th 268, 295–97 (5th Cir. 2024); *U.S. v. Tex.*, 144 U.S. 797, 798–800 (2024).

⁶³Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors*, JUST SEC. (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>; Jaya Ramji-Nogales, *How an Internal State Department Memo Exposes “Title 42” Expulsions of Refugees as Violations of Law*, JUST SEC. (Oct. 5, 2021), <https://www.justsecurity.org/78476/how-an-internal-state-department-memo-exposes-title-42-expulsions-of-refugees-as-violations-of-law/>.

⁶⁴See *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 176 (D.D.C. 2021), *aff'd in part, rev'd in part and remanded*, 27 F.4th 718 (D.C. Cir. 2022).

⁶⁵See *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 735 (D.C. Cir. 2022).

⁶⁶*Id.*

⁶⁷DHS Continues to Prepare for End of Title 42; Announces New Border Enforcement Measures and Additional Safe and Orderly Processes, DEP'T HOMELAND SEC. (Jan. 5, 2023), <https://www.dhs.gov/news/2023/01/05/dhs-continues-prepare-end-title-42-announces-new-border-enforcement-measures-and>.

⁶⁸*La. v. Ctrs. Disease Control & Prevention*, 603 F. Supp. 3d 406, 412 (W.D. La. 2022).

2022, the Federal District Court for the District of Columbia vacated the Title 42 policy, prohibiting the government from enforcing it.⁶⁹ In other words, the federal government faced two opposing court orders, one requiring it to close the border and the other prohibiting it from closing the border.⁷⁰

This case study offers an example of border enforcement infrastructure gone haywire; political polarization impelled the courtroom from a site of dispute resolution into intractable dysfunction.⁷¹ A legal challenge to an executive branch policy might be viewed as a quotidian infrastructural failing; this litigation might gum up the works or force the government to approach the regulated issue differently. But two opposing court orders is an example of acute infrastructural breakdown; the federal government could face court-ordered sanctions for refusing to implement the policy and also for implementing the same policy. A functional judicial response to these competing lawsuits would have been to hold the later-filed suit in abeyance while the first suit was decided. Rather than providing judicial solutions to political battles, the courts themselves have become so deeply polarized that litigants seek to try their cases in different courts in order to obtain different outcomes. These tactics, effective though they are, not only serve to deepen political polarization but also threaten to undermine the legitimacy of the court system.

Another manifestation of political polarization in border legal infrastructures is distributional. Resource failures in immigration and border enforcement systems in the Global North represent political choices that reflect and construct powerlessness in racialized populations, as well as the use of racial scapegoating and xenophobia as political tools. Arguably strategic and intentional, these decisions are obscured by the thicket of legal infrastructure, concealing legal and political responsibility for border violence. Digital border infrastructures in particular can exacerbate this opacity. The CBP One smartphone app offers an example of the harms that can be incurred by an underfunded and poorly designed digital border legal infrastructure.

In May 2023, as the pandemic-era border closure regime came to an end, the Biden administration implemented a new regulation to control migration at the southern border. That rule required asylum seekers to schedule an appointment through CBP One before entering the United States through its southern land border.⁷² Though the May 2023 rule is currently enjoined, President Biden issued a new regulation in June 2024 that contains the same requirement: Asylum

⁶⁹See *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1, 28 (D.D.C. 2022), cert. and stay granted sub nom *Ariz. v. Mayorkas*, 143 U.S. 478, 214 L. Ed. 2d 312 (2022), and vacated, D.C. Cir. No. 22-5325, 2023 WL 5921335 (D.C. Cir. Sept. 7, 2023).

⁷⁰See e.g., Bert Huang, *Coordinating Injunctions*, 98 TEX. L. REV. 1331, 1334 (2020) (describing this situation in which two courts issue conflicting injunctions on the same issue as a “disaster”).

⁷¹JOANNA R. LAMPE, CONG. RSCH. SERV., R46902, NATIONWIDE INJUNCTIONS: LAW, HISTORY, AND PROPOSALS FOR REFORM 26 (2021) (discussing the literature on politicization and nationwide injunctions).

⁷²Circumvention of Lawful Pathways Final Rule, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 1003, 1208). The rule is not applicable to Mexican nationals or unaccompanied minors. The very narrow exceptions to the presumption of ineligibility for asylum include exceptionally compelling circumstances—such as acute medical emergency; “imminent threat of rape, kidnapping, torture, or murder”; or being a victim of a severe form of trafficking in persons—and severe challenges with the use of the app, which requires asylum seekers to demonstrate by a preponderance of the evidence that it was not possible to access or use CBP One due to “language barriers, illiteracy, significant technical failure, or other ongoing and serious obstacles.” These do not include inability to speak one of the three languages—English, Haitian Creole, Spanish—or insufficient technological literacy. The other two exceptions are, first, obtaining advance parole, which is available for 30,000 Cuban, Haitian, Nicaraguan, and Venezuelan nationals per month as well as an unspecified number of Ukrainians per month. See *Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/CHNV>; *Uniting for Ukraine*, DEP’T HOMELAND SEC., <https://www.dhs.gov/ukraine>. Recipients of advance parole receive travel documents that enable them to enter the United States by air, so they do not need to present at a land port of entry. In addition, migrants who sought and were denied asylum in a transit country do not face the presumption of ineligibility. See *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023) (challenging 88 Fed. Reg. 31314), appeal held in abeyance, 93 F.4th 1130 (9th Cir. 2024); and by the state of Texas in *Tex. v. Mayorkas*, No. 2:23-CV-00024-AM, 2024 WL 3679380 (W.D. Tex. Aug. 5, 2024).

seekers who present themselves at the border without having completed the CBP One process face a presumption of ineligibility for asylum.⁷³

The well-documented shortcomings of the app are predictably and disturbingly racist and classist.⁷⁴ The app works better with newer phones and stronger internet access.⁷⁵ Users are required to take a live selfie through the app to schedule an appointment; this function has repeatedly failed to recognize as human app users with darker skin tones.⁷⁶ The app is available only in three languages: English, Haitian Creole, and Spanish; many in-app messages appear only in English.⁷⁷ And of course, the appointments are scarce; CBP currently offers approximately 40,000 interviews per month across the eight southern ports of entry, while migrants have requested just under 5 million appointments per month.⁷⁸ It is important to note the converse use of this digital border legal infrastructure as an optional tool of convenience for the hypermobile.⁷⁹ Using the same app, U.S. citizens can check their “Trusted Traveler” status, which enables them to bypass lengthy security lines at air and land ports of entry and zip onto their destination with ease. The CBP One app is a symptom of political polarization, namely the federal government’s failure to allocate appropriate resources to ensure basic functionality. In digital form, it highlights the distributional nature of border legal infrastructures: The inadequacy of infrastructure for less politically powerful groups who are often racialized. These infrastructural failings amplify the violence of the border and undermine the legitimacy of the border infrastructure in the eyes of migrants and immigrants’ rights advocates as well as anti-immigrant actors.

Of course, each case study provides examples of the material, relational, and distributional aspects of border legal infrastructure. In addition to allocating infrastructural benefits in ways that reify existing power relations, the CBP One app is itself a material object, a self-enforcing border that migrants carry with them. It also offers a study in the relational dimensions of border legal infrastructure in the form of contests over legal reform so severe that they destabilize the legal system, recursiveness run amok. In this case, however, civil society and red state governments both sought to prevent the federal government from pursuing its chosen policy. The very same day that the rule requiring the use of CBP One was scheduled to take effect, immigrants’ rights organizations challenged it, reviving an injunction that had blocked a similar rule promulgated by the Trump administration.⁸⁰ Less than two weeks after the rule became law, the state of Texas also challenged it, arguing that the Biden administration was “encouraging” undocumented migrants to cross the border by providing them with appointments.⁸¹ In late July 2023, the Federal District Court in San Francisco vacated the new rule;⁸² just over a week later, the Federal Court of Appeals

⁷³Securing the Border Final Rule, 89 Fed. Reg. 48710 (June 7, 2024) (to be codified in 8 C.F.R. pts. 208, 235, 1208).

⁷⁴See Amended & Supplemental Complaint for Declaratory & Injunctive Relief at 26–28, *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023) (available at: <https://www.aclu.org/documents/complaint-east-bay-sanctuary-covenant-v-biden>).

⁷⁵Hilary Beaumont, ‘It doesn’t work’: Migrants struggle with US immigration app, AL JAZEERA (May 15, 2023), <https://www.aljazeera.com/news/2023/5/15/it-doesnt-work-migrants-struggle-with-us-immigration-app>.

⁷⁶“We Couldn’t Wait”: Digital Metering at the US-Mexico Border, HUM. RTS. WATCH (May 2024), https://www.hrw.org/sites/default/files/media_2024/04/us_mexico0524%20web.pdf; Austin Kocher, *Glitches in the Digitization of Asylum: How CBP One Turns Migrants’ Smartphones into Mobile Borders*, 13 Soc’ys 149, 157 (2023).

⁷⁷See Amended & Supplemental Complaint for Declaratory & Injunctive Relief at 31, *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025 (N.D. Cal. 2023).

⁷⁸CBP Releases March 2024 Monthly Update, U.S. CUSTOMS & BORDER PROT. (Apr. 12, 2024), <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-march-2024-monthly-update>; Camilo Montoya-Galvez, *Migrants in Mexico Have Used CBP One app 64 million Times to Request Entry into U.S.*, CBS NEWS (Feb. 12, 2024), <https://www.cbsnews.com/news/immigration-cbp-one-app-migrants-mexico-64-million/>.

⁷⁹Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*, 20 EUR. J. MIG. & L. 452, 462–63 (2018).

⁸⁰*E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d at 1053.

⁸¹See Complaint at 8, *Tex. v. Mayorkas*, No. 2:23-cv-00024, 2024 WL 3679380 (W.D. Tex., Aug. 5, 2024).

⁸²See *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d at 1053.

for the Ninth Circuit stayed the vacatur pending appeal.⁸³ In the meantime, five “red” states sought to intervene in the lawsuit; the court denied that effort.⁸⁴ In between the two rulings, a group of immigrants’ rights non-profits filed a class action lawsuit in federal court in Los Angeles challenging the use of the CBP One app, seeking to enjoin the rule.⁸⁵

Legal challenges to federal regulations are a normal part of the lawmaking process, temporary failings that enable systemic reform. Yet in the case of the CBP One app, a trio of lawsuits engaging multiple actors created abnormal and unproductive instability in the border legal infrastructure. This multiplex of litigiousness made it difficult for actors to understand what the law required on any given day, let alone predict what the law would be in the future. Predictability is a key component in ensuring that actors comply with the pronouncements of a legal infrastructure, and one that is undermined by the intensified recursive engagements between society and the courts in these politically polarized cases. An infrastructural lens sheds light on the multifaceted relations between border laws and policies and state, federal, and civil society actors, as well as the material and distributional dimensions of the border enforcement complex.

E. A Legal Lens on Infrastructure

The case studies offer insights into the material, relational, and distributional aspects of border legal infrastructure and the relationship between political polarization and acute infrastructural breakdown. They also provide fertile ground for unpacking the role of law as infrastructure, introducing a jurisdictional understanding of legal infrastructure and an appreciation of regulation as containing many layers. Law creates the playing field for border infrastructures and sets out the framework through which they are governed. Moreover, the law of the border infrastructure is not the formal, structured, and transparent creature that it is often imagined to be; it is instead marked by informality, discretion and opacity, rendering it both a tool of and a manifestation of political polarization.

The border legal infrastructure can be situated within a much larger legal ecosystem, including international, regional, and bilateral law, that sets the conditions for border enforcement. In the context of the United States, supranational law is marked by its gaps and oversights with respect to border legal infrastructures, compounded by the “American exceptionalism” that justifies national political decisions to simply ignore international and regional obligations.⁸⁶ International treaty obligations carry weight only insofar as they have been incorporated into domestic law, and even then they can be overridden by later promulgated federal statutes. In short, the supranational legal infrastructure of the United States ensures substantial discretion in the hands of national officials.

The international law of migration has been described as “substance without architecture;”⁸⁷ lacking a coherent direction, it is characterized by gaps in scope and profound governance failures.⁸⁸ It constructs a narrow infrastructure of protection around the Refugee Convention and the Convention Against Torture, provisions of which have been incorporated into U.S. law and are therefore actionable by migrants seeking entry at the southern border.⁸⁹ The most heavily subscribed components of international migration law relevant to the border legal infrastructure are those that criminalize the commercial infrastructure of undocumented migration—the

⁸³See *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2023 WL 11662094, at *1 (9th Cir. Aug. 3, 2023). The rule is currently in abeyance as the parties engage in settlement talks, See *E. Bay Sanctuary Covenant v. Biden*, 93 F.4th 1130, 1131 (9th Cir. 2024) (describing that the rule is currently in abeyance as the parties engages in settlement talks).

⁸⁴See *E. Bay Sanctuary Covenant v. Biden*, 102 F.4th 996, 1000–03 (9th Cir. 2024).

⁸⁵See Class Action Complaint at 48–49, *Al Otro Lado v. Mayorkas*, No. 3:23-cv-01367-AGS-BLM (S.D. Cal. July 27, 2023).

⁸⁶See NATSU TAYLOR SAITO, *MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW* 229–52 (2010).

⁸⁷T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance without Architecture*, in *INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES* 467, 467 (Ryszard Cholewinski, Euan Macdonald & Richard Perruchoud eds., 2007).

⁸⁸Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 612 (2017).

⁸⁹*E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766 (9th Cir. 2018).

transnational criminal treaties prohibiting human trafficking and migrant smuggling.⁹⁰ Although the nonconsensual trafficking of human beings into exploitative situations is a serious concern, these treaties criminalize with a broad brush many types of facilitation of human movement, rendering the relevant infrastructures illicit and pushing them underground.⁹¹ This carceral approach has been eagerly incorporated into border legal infrastructures, enabling further demarcation of migrants as criminals and ensuring that undocumented journeys become more dangerous and more expensive. In other words, international law does shape the border legal infrastructure in the United States, but not in a functional direction. It leaves most authority in the hands of national actors and falls short of regulating the mobility of migrants let alone protecting them from harm.

Although regional law plays an important role in border legal infrastructures in some parts of the world, including the African Union, the European Union and Latin America, the United States government simply chooses to ignore pronouncements of the Inter-American human rights institutions that seek to restrain or reform its border infrastructures. In extending its border legal infrastructures throughout the region, the U.S. relies more heavily on bilateral arrangements that externalize its southern border, such as *Programa Frontera Sur*,⁹² or enable the transfer of asylum seekers to points south, such as the Trump administration's Asylum Cooperative Agreements with Guatemala, El Salvador, and Honduras.⁹³ The regional border legal infrastructures are largely reflective of the preferences of the executive branch, rendering them more susceptible to political polarization in policymaking.

In the United States, national law plays an outsize role in border legal infrastructures; it is the level at which the primary actors are located and nearly all decisions are made. State and local actors have historically played little role in border legal infrastructures in the United States. They contribute to the border legal infrastructure at the margins, and often by filing lawsuits against the federal government—only to be reminded that the power in this infrastructure rests at the national level. As the case studies demonstrate, as the issue of migration has become increasingly politically polarized, that deference to federal authority has waned, with states and localities playing leading roles in contesting federal control of migration infrastructures through litigation and other means. This development can result in acute infrastructural breakdown, undermining the legitimacy of the border legal infrastructure itself.

National law plays numerous roles in constructing and governing infrastructures; even the creation of law as infrastructure is a process performed through an infrastructure. Moreover, law sets the scope of authority, political and financial, over the establishment and reform of legal infrastructures. Although legal infrastructures are often equated with regulation, that term encompasses a broad array of authorities and processes that range from formal, structured, and transparent to informal, discretionary, and opaque. Litigation adds another layer; the rules set out and implemented by state actors can be challenged by private actors, altering legal infrastructures temporarily or permanently. As the case studies demonstrate, in the United States, intractable political battles have resulted in a border legal infrastructure characterized by instability.

Law plays a foundational role in setting the scope of authority, both political and financial, over the construction and maintenance of infrastructures. Law determines who has the power to promulgate regulations that create infrastructures and who has the authority to alter those infrastructures. In the context of border legal infrastructures, the U.S. Constitution as interpreted

⁹⁰See generally, ANNE T. GALLAGHER & FIONA DAVID, *THE INTERNATIONAL LAW OF MIGRANT SMUGGLING* (2014); ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010); Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 614 (2014).

⁹¹GABRIELLA SANCHEZ, *HUMAN SMUGGLING AND BORDER CROSSINGS* 124–27 (2014).

⁹²See generally A. Castillo, *The Mexican government's Frontera Sur program: An Inconsistent Immigration Policy*, COUNCIL ON HEMISPHERIC AFFS. (2016), <http://www.coha.org/wp-content/uploads/2016/10/The-Mexican-Government%E2%80%99s-Frontera-Sur-Program-An-Inconsistent-Immigration-Policy.pdf>.

⁹³ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, *THE END OF ASYLUM* 171–75 (2021).

by the federal judiciary delineates the federal government as the supreme authority in questions of border enforcement and awards Congress plenary power to determine immigration processes; Congress in turn delegates substantial authority to the executive branch to govern immigration. Law allocates authority to create and alter infrastructures; these decisions have profound impacts on the form infrastructures take and how they are experienced by individuals regulated by them. Had more authority been placed in the hands of state rather than federal government, or had Congress allocated more power to the judiciary to determine immigration questions, the border legal infrastructure would have been constructed differently, perhaps unrecognizably so. The constitution of the border legal infrastructure has profound consequences for its functionality; the federal legislature has repeatedly failed to enact reform in this politically polarized arena, setting the stage for acute infrastructural dysfunction through outdated policies and insufficient resource allocation.

Law, of course, determines the scope of financial authority; decisions about which infrastructures to fund and how much funding to provide rests primarily with the legislative branch, though the executive branch has some leeway to allocate financial resources it receives from Congress in the way that it chooses. Decades of consistent failures to fund the immigration adjudication system adequately has rendered the border legal infrastructure susceptible to acute breakdown. On the adjudication side, decisionmakers within the executive branch are subject to lax hiring standards, receive insufficient training, and face an overwhelming workload with inadequate support. On the enforcement side, as discussed further below, authority and discretion are delegated to actors who are minimally qualified and who work within highly resourced institutions with deeply militarized cultural identities. Decades of neglect in Congress, due at least in part to political polarization, have constructed a lopsided infrastructure, primed for dysfunction.

Legal infrastructures can be generated through a range of different authorities; “regulation” takes a variety of different forms. Legislation is the most formal type of regulation; constituted through a clearly defined process which could also be viewed as a legal infrastructure, statutory law is written, publicly accessible, and binding over a clearly specified jurisdiction. In the case studies, federal statutes were the basis for the federal government’s challenge to the border buoys. Texas responded by invoking the federal Constitution, declaring the state’s ability to engage in warfare, which we might think of as the “nuclear option” when it comes to political polarization of the border legal infrastructure.⁹⁴ The pandemic border closure policy named Title 42 was challenged as a politically motivated misapplication of a federal quarantine statute that did not confer immigration removal authority.⁹⁵ These examples demonstrate that deploying the federal Constitution and statutes in service of political polarization risks undermining the legitimacy of even the most authoritative sources of law.

Regulations and rules promulgated by the executive branch are more easily modified than statutory law but similarly formal in that they must be created through a specified process. Legal infrastructures can also be constituted through less formal legal mechanisms such as executive orders that can be issued with very little process. The important point is that the formality of regulations varies widely. Legal infrastructures can be constructed or altered through executive policies that are written or unwritten; disseminated throughout an executive agency or specific to a local office of that agency; publicly available or secreted away within the executive branch. Under the Trump administration, a new border admissions process was created through a press release issued by the Secretary of Homeland Security,⁹⁶ and the infamous family separation policy was set into motion through an internal memo from the Attorney General directed at federal prosecutors

⁹⁴See generally *United States v. Abbott*, 110 F.4th 700 (5th Cir. 2024).

⁹⁵Guttentag, *supra* note 63.

⁹⁶See Complaint at 4, *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150 (N.D. Cal. Feb. 14, 2019) (noting the “Migrant Protection Protocols” forced asylum seekers who had entered the United States to return to Mexico to await their asylum

along the southwest border.⁹⁷ These rather informal regulatory vehicles created brutally violent border legal infrastructures.

The law on the books must of course be enforced on the ground. That enforcement function is delegated to agencies—at the border, primarily U.S. Customs and Border Protection (CBP)—that operate according to a deeply militarized culture. Officers are trained to “keep the nation safe” from “criminal aliens and terrorists” and are ill-prepared to perform humanitarian functions.⁹⁸ CBP agents are predominantly male, and half are people of color, with many coming from immigrant communities.⁹⁹ These are key actors in the border legal infrastructure as they wield substantial power through their exercise of discretion in each encounter with an undocumented migrant. Among other tasks, CBP agents determine the extent of physical violence exercised towards migrants at the border and decide whether to allow migrants to access the asylum process at the border based on their expression of fear of return to their home country. Moreover, CBP receives ample federal funding to perform their work; in fiscal year 2024, Congress appropriated over \$17 billion to the agency.¹⁰⁰ These law enforcement actors lend yet another layer of complexity to the border legal infrastructure, reflecting and furthering political polarization on the issue of border enforcement.

Even once infrastructures have been funded and authorized politically, they can of course be challenged and reshaped through litigation, as the case studies above demonstrate. The court system provides private actors the ability to alter and even dismantle border infrastructures, multiplying both their complexity and the number of players involved. The stalemate in Congress has meant that vehement and vocal political disagreements about border policy between the federal government and state and/or private actors are often played out in court. As described in more detail above, political polarization creates instability and uncertainty in the border legal infrastructure, which in turn constructs and fuels political divides.

Law is everywhere in border infrastructures. Supranational sets the playing field for border enforcement; in the case of the southwestern border of the U.S., this structure delegates most authority to the national government. National law, from the Constitution to federal statutes to congressional choices, sets the scope of authority over the construction and maintenance of border legal infrastructures. Even the “regulation” that the infrastructures literature often references as law is multifaceted, ranging from formal, structured, and transparent to informal, discretionary, and opaque. Law is then enforced in border legal infrastructures by federal officials subject to a specific institutional culture and challenged and reshaped through litigation. Border legal infrastructures offer a fruitful example of the value that a legal lens can bring to infrastructural thinking, unpacking the many layers and consequences of the law.

hearings) (available at: <https://www.aclu.org/cases/innovation-law-lab-v-wolf?document=innovation-law-lab-v-nielsen-declaration-bianca-doe>).

⁹⁷Jefferson Sessions, *Memorandum for Federal Prosecutors Along the Southwest Border*, U.S. DEP’T JUST. (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/dl?inline>.

⁹⁸DEPARTMENT OF HOMELAND SECURITY: OFFICE OF THE INSPECTOR GENERAL, INTENSIFYING CONDITIONS AT THE SOUTHWEST BORDER ARE NEGATIVELY IMPACTING CBP AND ICE EMPLOYEES’ HEALTH AND MORALE 16 (May 3, 2023), <https://www.oig.dhs.gov/sites/default/files/assets/2023-05/OIG-23-24-May23.pdf>.

⁹⁹DEPARTMENT OF JUSTICE: BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2020 – STATISTICAL TABLES 9 (Sept. 29, 2023), <https://bjs.ojp.gov/document/fleo20st.pdf>.

¹⁰⁰DEPARTMENT OF HOMELAND SECURITY: U.S. CUSTOMS AND BORDER PROTECTION, BUDGET OVERVIEW FISCAL YEAR 2025 CONGRESSIONAL JUSTIFICATION 9, https://www.dhs.gov/sites/default/files/2024-04/2024_0314_us_customs_and_border_protection.pdf. By way of comparison, the immigration courts received \$860 million in FY 2024. UNITED STATES DEPARTMENT OF JUSTICE: EXECUTIVE OFFICE OF IMMIGRATION, FY 2025 BUDGET REQUEST AT A GLANCE 1, https://www.justice.gov/d9/2024-03/bs_section_ii_chapter_-_eoir_03.01.24_final_1.pdf

F. Understanding Infrastructure Breakdown

This Article begins to untangle the complex set of relationships between border legal infrastructures and political polarization, the border and legal infrastructures, and the law and infrastructures. It begins with an infrastructural lens on the law, describing how infrastructural thinking can inform legal scholars' understanding of the border regime, in particular its emphasis on visibility and invisibility, sticky fantasies, and the structural violence of border legal infrastructures in the Global North. Engaging the tension between normative legal scholarship and infrastructural thinking, the Article proceeds to examine the idea of a functional border legal infrastructure, offering three competing visions: The border as violent control of human mobility, as sticky social imaginary, and as effective humanitarian process. It then explores three case studies of border legal infrastructures, highlighting the material, relational, and distributional aspects of infrastructures and their relationship with political polarization, which the Article defines as levels of division in society that lead to the erosion of democratic trust. The border buoys scuffle, the litigation over the Title 42 policy, and the CBP One app present examples of the material, relational, and distributional aspects of border legal infrastructures; although the Article uses each case study to highlight one facet of infrastructures, each demonstrates all three of these components. Moreover, these case studies provide fertile ground to explore the relationship between political polarization and border legal infrastructures, demonstrating in particular the trajectory from dysfunction to acute failure. Drawing from those case studies, the Article offers a legal lens on infrastructures, elucidating the many roles that law can play as and in infrastructures. Legal scholarship can unpack the multiple layers of the law involved in infrastructures, from international to regional to bilateral to national. It also recognizes the role of law in setting the ground rules for infrastructure construction and funding. A legal lens identifies the full range of legal regulation, from the more obvious formal, structured, and transparent forms of lawmaking to the more obscure informal, discretionary, and opaque laws and policies.

Infrastructures reflect power and have distributional consequences. Through the case studies, this Article highlights the difference between quotidian infrastructural failings and breakdown or dysfunction, and the role of political polarization in constructing and reflecting that distinction. When infrastructures fail to perform their promised function for certain groups, that failing might be understood as an intentional or at least predictable outcome of a political decision about where to allocate resources in a given infrastructure, like the CBP One app. This might be conceived as a distributional failure, exacerbated by and contributing further to political polarization. Intentional or predictable breakdown might be distinguished from legal infrastructures that face aggressive challenges from public and private actors who disagree with each other over a legal policy implemented by a government actor. These actors pursue a game of political brinksmanship: They manipulate a politically polarized court system to seek an outcome favorable to their camp despite the damage inflicted on judicial legitimacy. The flurry of conflicting court decisions destabilizes legal infrastructures as they lose predictability—ostensibly a key benefit of the law. The relational aspect of these infrastructures has run amok, with an excess of participation and recursiveness creating instability. We might think of these as legal infrastructures that turn on themselves, as actors intended to be part of or at least acting in accordance with the infrastructure instead seek to upend it, drawing on and furthering political polarization in the process. Finally, there are explicit challenges to infrastructural authority assigned by law through competing infrastructures that are unauthorized by law. Those competing infrastructures are most likely to be effective when they are created by a government entity, though enterprising private actors might also get in on this game and could even be effective if they wield sufficient political power. The example of the border buoys demonstrates the impact of political polarization on material infrastructure, and the battles that ensue.

This Article has attempted to limn a productive tension between the infrastructures literature and the law. Infrastructural thinking encourages engagement with the complexity of the material,

relational, and distributional contexts in which the law is deployed, as well as an appreciation of the role of politics and power in shaping the law's implementation on the ground. It also reminds the legal scholar of the fantasy dimension of the law as it operates in and through infrastructures. Border legal infrastructures offer a social promise of control, leveraged by Republicans and Democrats alike. The former construct physical infrastructure to demonstrate their political power, inflicting violence on brown migrants from the Global South in order to win public political contests and potentially votes. The latter build digital border infrastructures to exhibit their ability to manage border crossings safely and efficiently—again in order to win political battles and elections. These border legal infrastructures meet with limited success in managing border crossings; their key impact is in the political message that they illustrate and convey. One of the key insights of the infrastructures literature is of course that failure to attain the intended or pronounced purpose is a normal attribute of infrastructures. The multiplex of competing interests involved in infrastructures make for a meandering path forward, and breakdowns are an expected phenomenon that can be useful in enabling infrastructural reform. Although the literature largely focuses on infrastructural breakdown in the Global South, the border legal infrastructure demonstrates the severe dysfunction that can characterize Global North infrastructure that attempts to manage the movement of humans from the Global South. The dysfunction of the border legal infrastructures is extreme; these breakdowns refuse to be cabined within existing channels for dispute resolution, compromise, and course correction. From extralegal actions to destabilizing litigation to intentional under resourcing, all fed by and continuing to feed political polarization, these failures result in the delegitimization of the authority that underlies border legal infrastructures. The acute breakdown that emerges is most coherently described by combining the tools of law and infrastructural thinking: The border legal infrastructure contains many actors with many goals, but violence against migrants and political theater are the only clear products. The vitriol of contests between these actors both reflect and further political polarization and appear to be achieving a deeply damaging outcome: Undermining the legitimacy of the border legal infrastructure itself.

Acknowledgements. Many thanks to Thomas Gammeltoft-Hansen, Nora Stappert, and participants at the MOBILE Workshop on Legal Infrastructures for Human Mobility and Beyond, and to Alexandra Huneeus and participants in the Dean's Office Speaker Series at the University of Wisconsin at Madison School of Law for helpful comments.

Competing Interests. The author declares none.

Funding Statement. This Article was completed following a workshop held at the MOBILE Center of Excellence for Global Mobility and financially supported by the Danish National Research Foundation, grant no. DNRF169.