

PRESIDENT TRUMP'S EXECUTIVE ORDERS AND THE RULE OF LAW

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In the first month of his presidency, Donald Trump promulgated twenty-four executive orders (counting documents labeled as executive orders or presidential memoranda).¹ Many of President Trump's executive orders proved controversial and attracted legal challenges.

Presidents have issued executive orders since the founding of the Republic.² Yet, executive orders bear an uncomfortable resemblance to the decrees that dictators use to rule non-democratic countries. Accordingly, promulgation of such orders sometimes raises anxiety about presidential usurpation of democratic norms.

The extensive discussion of many of these orders in the popular press and legal blogs focuses on each individual order's policy and legal merit.³ But treating each order as an individual event masks the most important constitutional question: should we understand President Trump's collection of executive orders and memoranda as a fundamental challenge to the rule of law, or instead as the more or less normal practice of a newly elected President shaping how the executive branch should make discretionary judgments under the law? In other words, does the evidence suggest that President Trump and Steven Bannon, his chief strategist (for several months), sought to enhance Trump's personal power to usurp law through these orders or do the orders instead suggest a change in policy direction within the established legal framework?

In order to get at this question, this article assesses the extent to which these orders seek to undermine existing constitutional norms, including the norms of pursuing goals established through legislation and complying with international treaties. And it places this analysis in the context of prior practice and our understanding of the rule of law, as well as accompanying actions like President Trump's cabinet appointments.

Part One discusses the rule of law in the United States. It emphasizes the role of legislative supremacy and the expansion of presidential power within a rule of law framework through delegation by Congress. This part also discusses the President's duty to "take Care that the Laws be faithfully executed," building on

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¹ I use the term "executive order" to include both because presidential memoranda and executive orders have the same legal effect. *See* *Am. Fed. of Gov't Emp. v. Carmen*, 669 F.2d 815, 820 (D.C. Cir. 1981) (authorizing judicial review of presidential checkmark on a position paper and indicating that nothing hinges on the form of a President's decision); Erica Newland, Note, *Executive Orders in Court*, 124 *YALE L. J.* 2026, 2045-46, 2099 nn. 64-65 (2015) (using the term executive orders in the title to refer to presidential executive orders, memoranda, and proclamations).

² *See* STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 129 (2018) (noting that George Washington issued eight executive orders).

³ *See, e.g.*, Michael Dorf, *Standing, Substantive Rights, and Structural Provisions in the Challenge to Travel Ban 2.0*, *DORF ON LAW* (Mar. 7, 2017), <http://www.dorfonlaw.org/2017/03/standing-substantive-rights-and.html> (analyzing the second travel ban); Richard Primus, *Is Trump's New Travel Ban Constitutional?*, *POLITICO* (Mar. 6, 2017), <http://www.politico.com/magazine/story/2017/03/is-trumps-new-travel-ban-constitutional-214881>.

my prior work showing that the Constitution's creators made the executive branch duty to faithfully execute law central to the constitutional design.⁴

Part Two reviews the executive orders promulgated in the first thirty days of Trump's presidency. Since a thorough review of each of the legal issues raised in these orders would require a book, this review has a more modest goal. It evaluates the extent to which the orders challenge key constitutional, statutory, and treaty commitments. It accomplishes this evaluation primarily by identifying what law these orders challenge, but it also canvasses judicial rulings on the orders and conducts preliminary analysis of some doctrinal issues.

The third part analyzes the results in part two in the context of the Trump administration's other actions and stated intentions. It argues that this context shows that we should understand the orders as challenging the rule of law. It also compares this set of executive orders to a comparable set of executive orders issued by President Obama in order to partially address the question of whether Trump's attack on the rule of law is unique. This analysis suggests that Trump's predecessors have sometimes transgressed legal norms, but that his collection of decrees poses an unprecedented challenge to our constitutional democracy as a system.

I. THE RULE OF LAW IN THE UNITED STATES

The Constitution seeks to establish a rule of law rather than of men.⁵ The Framers enacted it in response to arbitrary executive actions by English monarchs.⁶ Legal scholars embrace somewhat varied understandings of the rule of law.⁷ Different constitutional democracies share a rule of law, even though their legal practices vary. The rule of law established in the U.S. Constitution has certain widely understood features that merit explicit mention in an assessment of whether President Trump's executive orders attack the rule of law.

⁴ See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71 (2009); see also Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559 (2007).

⁵ See *Morrison v. Olson*, 487 U.S. 674, 697 (1988) (Scalia, J., dissenting) (identifying the rule of law with separation of powers).

⁶ See generally PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS DEMOCRACY* 6 (2009) (noting that the Constitution subjects the President to checks and balances so that we "do not have to worry about monarchy").

⁷ See PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 1-2 (2016) (suggesting a degree of agreement about basic principles of the rule of law, but none about details); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3 (2004) (stating that legal theorists hold "vague or sharply contrasting understandings of the rule of law"); see generally *THE RULE OF LAW AND THE SEPARATION OF POWERS* (Richard Bellamy ed. 2005) [hereinafter *SEPARATION OF POWERS*] (presenting varying conceptions of the rule of law).

A. The Principle of Legislative Supremacy

The U.S. Constitution establishes a principle of legislative supremacy. It provides for an elected Congress and empowers it to enact a broad set of laws and control the federal budget.⁸ The powers of Congress include the power to regulate interstate and international commerce, spend money to promote the general welfare, declare war, raise armies, and create the rules governing immigration and naturalization.⁹ The President may veto legislation he thinks unwise, but Congress may override this veto with a two-thirds vote.¹⁰ Thus, the Constitution envisions policy decisions through legislatively enacted statutes.¹¹

The Constitution requires the President to “take Care that the Laws be faithfully executed,” thereby obligating him to carry out policies adopted by Congress.¹² Since Congress may override a presidential veto of legislation, this Take Care Clause requires the President to implement policies that he may disagree with.¹³ The idea of *faithful* law execution suggests fidelity to the law’s goals and implies a sincere effort to serve them.

In order to further inculcate a norm of fidelity to the law, Article II requires the President to swear an oath to protect and defend the Constitution.¹⁴ The Constitution the President swears to protect and defend includes the Take Care Clause and numerous provisions empowering Congress to create the law that the President must faithfully execute.¹⁵ Thus, the Oath Clause, in effect, requires the President to swear to properly implement statutes and to protect constitutional rights when he promulgates executive orders.¹⁶

The Constitution also requires all other federal officials, including executive branch officials, to obey statutes and respect constitutional rights.¹⁷ It does this primarily by requiring federal officials to swear an oath to support the

⁸ See U.S. CONST. art. I.

⁹ See *id.* at § 8.

¹⁰ See *id.* at § 7, cl.2.

¹¹ See generally SEPARATION OF POWERS, *supra* note 7, at 253, 267-69 (characterizing the division of the legislature into two houses based on different systems of representation as the main safeguard against factionalism and despotism).

¹² U.S. CONST. art. II, § 3.

¹³ See Driesen, *supra* note 4, at 81 (noting that the president’s duty to faithfully execute law as applied to bills overriding his veto requires him to obey laws passed “over his dead body”); see generally TAMANAHA, *supra* note 7, at 115 (noting that the idea that government officials must comply with positive law until it is changed constitutes a fundamental component of the rule of law).

¹⁴ See U.S. CONST. art II, § 1, cl. 8.

¹⁵ See Driesen, *supra* note 4, at 85-86 (explaining that the Oath Clause reinforces the Take Care Clause and creates a duty, in combination with Article I, to properly implement statutes).

¹⁶ *Cf. id.* at 87 (noting that when others execute the law, the President’s duty is to seek proper legal execution, since he lacks complete control over others’ actions).

¹⁷ See *id.* at 84-86 (discussing the General Oath Clause’s creation of a duty to properly implement the law).

Constitution.¹⁸ This General Oath Clause embodies a departure from prior practice, for in England government officials swore an oath to obey the monarch.¹⁹ The General Oath Clause reflects a conscious decision to make federal officials faithful to the law, rather than loyal servants of the President.²⁰

In furtherance of the goal of executive branch fidelity to the rule of law, the Constitution denies the President the right to appoint federal officials on his own, as some had proposed during the constitutional convention.²¹ Instead, it authorizes the President to nominate “Officers of the United States,” but only allows them to take office if the Senate concurs.²² As Alexander Hamilton explained in the Federalist Papers, the Constitution “subjects the President to the control of a branch of the legislative body” because of fears of “abuse of executive authority regarding appointment.”²³ He describes the Senate’s power to reject presidential nominees as discouraging nomination of candidates “personally allied to” the President who might be inclined to obey him when the law requires them to disobey a presidential directive.²⁴ The Constitution also allows Congress to empower department heads or the courts to appoint inferior officers, rather than require that the President appoint all inferior officers.²⁵ Thus, those framing and enacting the Constitution sought to make the President a faithful agent of Congressional policy decisions, while allowing the President to check legislative excess through the veto power.

While the Constitution did give the President the “executive power,” the Constitution’s creators did not envision a leading domestic policy-making role for the President.²⁶ Indeed, the Federalist Papers often refer to the President rather modestly as the “Chief Magistrate.”²⁷ Historians have shown that the founders believed in a model of “disinterested leadership,” rather than a model of having a President’s partisan policy preferences distinctively shape execution of the law.²⁸ Indeed, the Founders designed the separation of powers in part to avoid the

¹⁸ See U.S. CONST. art. VI, cl. 3.

¹⁹ See Driesen, *supra* note 4, at 84-85 (explaining that requiring federal officials to swear fidelity to the law rather than the head of state constitutes a “break with the monarchical tradition”).

²⁰ See *id.* at 85 (pointing out that the General Oath Clause requires federal officials to disobey illegal presidential orders).

²¹ See *id.* at 98 (discussing the Framers’ rejection of a proposal to give the President sole control over executive branch appointments).

²² See *id.* at 87 (noting that the Appointments Clause authorizes the Senate to reject presidential nominations).

²³ THE FEDERALIST NO. 77, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁴ See THE FEDERALIST NO. 76, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the Appointments Clause prevents appointment of pliant candidates who would be “obsequious instruments” of presidential “pleasure”).

²⁵ See Driesen, *supra* note 4, at 88 (reviewing the Appointment Clause’s treatment of “inferior Officers”).

²⁶ See *id.* at 102-104 (explaining that the Constitution does not envision a “rule of presidential personality based on a particular set of personal policy preferences”).

²⁷ *Id.* at 102 (noting the constant reference to the President as the “Chief Magistrate” in the Federalist Papers).

²⁸ See GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 165 (2002).

creation of factions.²⁹ They sought to avoid a clash of competing preferences and guard against the influence of political parties by providing for a stable rule of law.³⁰ This disinterested leadership model had such great influence at the founding that George Washington refused to veto domestic legislation he disagreed with or propose legislation of his own, lest he interfere with Congressional prerogatives.³¹

The idea of legislative supremacy as implemented in the Constitution makes the law quite stable over time. The Constitution makes law difficult to enact, modify, or repeal, by requiring all bills to pass the House and Senate and be presented to the President.³² And the President, as mentioned earlier, may veto improvident legal changes unless two-thirds of the membership of both houses of Congress overrule him.³³

The Framers sought this sort of stability in how the law was executed as well.³⁴ The Constitution explicitly provides only a single mechanism for removing federal officers—impeachment.³⁵ And some of the Framers suggested to the people enacting the Constitution that this mechanism was exclusive. Alexander Hamilton, usually a strong proponent of presidential power, argued in the Federalist papers that removing an executive officer would require Senate approval.³⁶ He suggested that the constitutional design would prevent a new “Chief Magistrate” from making sweeping personnel changes upon assuming office.³⁷

Political parties, however, emerged shortly after George Washington left office.³⁸ And with them came a growth of presidential power and less stability in administration than the Founders may have hoped for.

²⁹ See SHANE, *supra* note 6, at 1-2 (discussing Madison’s understanding of faction and the centrality of its avoidance to the Constitution’s design).

³⁰ See GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 81 (1993) (stating that the idea of partisan political preferences would appear “nonsensical to George Washington” because he believed in a single “public interest” that all “virtuous men” would subscribe to).

³¹ See *id.* at 139-42, 150-54 (describing Washington’s approach to legislation and vetoes); see also LEVITSKY & ZIBLATT, *supra* note 2, at 129 (quoting Washington as stating that “respect for the legislature” caused him to sign “many bills” he disagreed with).

³² *INS v. Chadha*, 462 U.S. 919, 951 (1983) (stating that the requirements of bicameralism and presentment protect “people from improvident laws” by only allowing legislation after “opportunity for full study and debate in separate settings”).

³³ See *id.* (stating that the presidential veto protects “the whole people from improvident laws” while the override provisions precludes one person from taking “final arbitrary action”).

³⁴ See Driesen, *supra* note 4, at 102 (discussing Hamilton’s endorsement of stability in administration of the law).

³⁵ See *id.* at 89 (explaining that the Constitution nowhere authorizes presidential removal of officers).

³⁶ THE FEDERALIST NO. 77, *supra* note 23, at 459.

³⁷ See *id.* (explaining that a “change in the Chief Magistrate would . . . not occasion . . . so general a revolution in the officers of the government as might be expected if he were the sole dispenser of offices”).

³⁸ See LEVITSKY & ZIBLATT, *supra* note 2, at 40 (noting the “rise of parties in the early 1800s”).

From the time of the founding, Congress found it necessary to delegate power to the President.³⁹ As time wore on, the power of the Presidency grew, based in part on delegated power. In addition, the courts and Congress increased presidential power by allowing him to dismiss cabinet members without Senate approval.⁴⁰

By the late nineteenth century, the economy had changed enormously, because of new technologies and the rise of corporations. These changes only accelerated during the twentieth century.

These changes posed new challenges for the legislative supremacy model. A modern complex economy generated wonderful advances, but also produced oppressive monopolies, unsafe food and drugs, periodic economic collapse, and environmental challenges. Addressing these problems appropriately required a great deal of expertise and a more detailed set of decisions than Congress could provide on its own. Accordingly, Congressional delegation of authority to the executive branch of government to address the complex problems of the industrial age increased in scope. Congress began in the late nineteenth century to establish administrative agencies to make and enforce detailed decisions about how to implement Congressional policies.⁴¹ This trend accelerated during the New Deal in response to a major depression and again in the 1970s in response to severe environmental problems.⁴² While some of the statutes delegating power to the executive branch gave very detailed instructions about how to exercise this authority, others announced only very vague general policies.⁴³ The broader delegations gave the executive branch of government a great deal of control over policy.

Yet, the ideal of legislative supremacy remained an integral part of the Constitution, even while the practice under it evolved in ways the Framers could not have anticipated. Executive branch actions pursuant to delegated authority generally remains subject to judicial review aimed at vindicating the legislative

³⁹ See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 681-694 (1891) (discussing delegations of power to the President going back to 1794).

⁴⁰ See, e.g., *Myers v. United States*, 272 U.S. 52, 176 (1926) (striking down a provision authorizing the Senate to remove the postmaster general); cf. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010) (acknowledging that since *Myers* the Court has countenanced some restrictions on presidential removal authority).

⁴¹ See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189-90 (1986) (noting that Congress established the Interstate Commerce Commission in the late nineteenth century to provide “wide-ranging regulatory controls over. . . the railroads”).

⁴² See *id.* at 1243-1253, 1278-1295 (discussing regulatory expansion during the New Deal and the “public interest era”); see, e.g., *Am. Trucking Ass’ns v. Whitman*, 531 U.S. 457, 472 (2001) (upholding delegation of power to protect air quality to EPA under the Clean Air Act, first enacted in modern form in 1970); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 405-10 (1935) (describing the National Industrial Recovery Act (NIRA) and some of the actions it authorized).

⁴³ Compare *U.S. Steel Corp. v. EPA*, 444 U.S. 1035 (1980) (Rehnquist, J., dissenting from denial of certiorari) (describing the Clean Air Act as a “very complex statute” that “virtually swim[s] before one’s eyes” rather than “making the EPA administrator a virtual czar”) with *Panama*, 293 U.S. at 405-10 (describing the NIRA as very general).

supremacy principle. The Administrative Procedure Act and many substantive statutes authorize courts to set aside executive branch actions conflicting with the statutes delegating authority, exercising discretion arbitrarily, or offending constitutional norms.⁴⁴ The courts have also reviewed executive orders for conformity to the law since *Marbury v. Madison*.⁴⁵ Congressional oversight authority also can play a role in making the executive branch adhere to statutory norms.⁴⁶

Congress sought to preserve a stable rule of law in some cases by delegating authority to expert independent agencies deliberately insulated, to some degree, from political control.⁴⁷ Congress, however, subjected even independent agencies to judicial oversight in order to subject them to the rule of law, in keeping with the constitutional principle of legislative supremacy.⁴⁸

In spite of these efforts to preserve a stable rule of law, the growth of presidential power and political polarization greatly weakened the rule of law before President Trump took office.⁴⁹ For a variety of reasons, presidents had become ever more powerful and important political actors since the founding. As polarization increased, legal administration became increasingly unstable, as elected presidents sought to bend discretionary decisions to match their own policy preferences, sometimes in opposition to preferences embodied in laws enacted by Congress and approved by previous presidents.⁵⁰ Yet, the ideal of a rule of law constraining a President through a principle of legislative supremacy remained an important part of the Constitution and the actual practice of the executive branch of government.

B. The Principle of Complying with International Law

The Constitution also incorporates international law into the rule of law.⁵¹ It authorizes the President to negotiate treaties with the consent of two-thirds of

⁴⁴ See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41 (1982) (explaining that APA and statutory constraints govern judicial review of safety standards for vehicles).

⁴⁵ See Jonathan Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1613 (1997) (noting that nonstatutory review of presidential action has existed “since the founding of the Republic”).

⁴⁶ *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1992) (claiming that Congressional oversight can deter presidential abuses).

⁴⁷ See, e.g., Aulana L. Peters, *Independent Agencies: Government's Scourge or Salvation*, 1988 DUKE L. J. 286, 286-87 (explaining how the Securities and Exchange Act of 1934 seeks to establish the independence of the Securities and Exchange Commission (SEC)).

⁴⁸ See, e.g., *id.* at 293 (explaining that judicial review applies to SEC actions).

⁴⁹ See Peter Shane, *The Rule of Law and the Inevitability of Discretion*, 36 HARV. J.L. & PUB. POL'Y 21, 28 (2013) (suggesting that polarization undermines the rule of law).

⁵⁰ See, e.g., Michael Mehling, *A New Direction in US Climate Policy: Assessing the First 100 Days of Donald Trump's Presidency*, 11 CARBON & CLIMATE L. REV. 3, 23-24 (2017) (describing the cycling between regulation and deregulation because of changes in the presidency in recent decades).

⁵¹ See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825

the Senate and it authorizes the federal courts to adjudicate cases arising under those treaties.⁵² Although scholars have debated the extent to which the Constitution makes treaties binding upon private parties without implementing legislation, international law generally binds government officials.⁵³ Thus, the framers sought a stable rule of law as a substitute for the arbitrary executive authority they saw in monarchy.

C. The Principle of Constitutional Rights

The people who ratified the Constitution, however, imposed important restraints on the principle of legislative supremacy. They demanded and enacted a bill of rights to limit the power of the federal government as a whole.

Thus, the American rule of law ideal also includes a concept of individual rights.⁵⁴ Since then, respect for a core set of individual rights has become characteristic of the rule of law in liberal democracies throughout the world, even though the precise set of rights vary.⁵⁵ The Oath Clause and the Take Care Clause require the President to avoid violating individual rights found in the Bill of Rights. Illustrating individual rights with examples implicated by President Trump's orders and other actions will help set the stage for the subsequent analysis. The First Amendment forbids Congress from enacting laws "respecting an establishment of religion or prohibiting the free exercise thereof."⁵⁶ It also prohibits laws "abridging . . . freedom of speech."⁵⁷ The Fifth Amendment prohibits the federal government from depriving "any person . . . of life, liberty, or property without due process of law."⁵⁸ The willingness of all government officials to refrain from policies attacking these constitutional rights constitutes an important part of the rule of law.

The Bill of Rights, like the practice of legislative supremacy, has evolved over time. After the Civil War, Congress and the states amended the Constitution in response to the war and the freeing of slaves that followed it. The Fourteenth Amendment, enacted in 1868, requires the states to provide "equal protection of the laws" to "any person within its jurisdiction."⁵⁹ The Supreme Court has made the constitutional right to equal protection of the laws applicable to the federal

(1988) (discussing the Framers's intent to federalize international law in order to cure the lack of implementation of international law under the Articles of Confederation).

⁵² See U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 2, cl. 1.

⁵³ See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 399-403 (2000) (noting that ratified treaties bind the United States internationally and describing a debate about whether they are self-executing—binding upon private parties without implementing legislation).

⁵⁴ See TAMANAHA, *supra* note 7, at 115 (characterizing the notion that civil and human rights limit the law-making power as a fundamental part of the modern rule of law).

⁵⁵ See GOWDER, *supra* note 7, at 3 (finding the consensus that the rule of law promotes liberty "odd" in light of the many competing conceptions of liberty).

⁵⁶ U.S. CONST. amend. I.

⁵⁷ *Id.*

⁵⁸ U.S. CONST. amend. V.

⁵⁹ U.S. CONST. amend. XIV.

government as a matter of Fifth Amendment due process.⁶⁰ Respect for individual rights then remains a key component of our Constitution's conception of the rule of law.

D. Federalism

International legal scholarship does not consider federalism an essential feature of the rule of law generally, as both unitary and federalist countries have a rule of law. But the American constitutional tradition makes federalism a fundamental part of our constitutional order. The Constitution provides for a federal government with broad but limited powers, and its Tenth Amendment preserves states' rights.⁶¹

II. EXECUTIVE ORDERS AND MEMORANDA

The analysis below assesses the breadth of the challenge that Trump's early executive orders pose to the rule of law. It begins by identifying the constitutional norms that these orders challenge. It then moves to a discussion of undermining of treaty commitments. Finally, it analyzes the challenges Trump's orders pose to statutes.

A. Challenges to Constitutional Norms

President Trump's orders directly challenge constitutional protection of religious freedom, equal protection, due process, federalism and Congressional control of the purse. We consider each of these challenges in turn.

1. Religious Discrimination

During the presidential campaign, Trump promised to ban Muslims from entering the United States.⁶² In response, a number of critics pointed out that religious discrimination violates the Constitution.⁶³

⁶⁰ *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

⁶¹ *See* *United States v. Lopez*, 514 U.S. 549, 552 (1995) (declaring the doctrine of limited "enumerated" federal power a first principle of American government); *New York v. United States*, 505 U.S. 144, 157 (1992) (finding that the Tenth Amendment requires some limits on federal power).

⁶² *Aziz v. Trump*, 234 F. Supp. 3d 724, 730 (E.D. Va. 2017) (discussing Trump's call for a "total and complete shutdown of Muslims entering the United States" during his presidential campaign); *Int'l Refugee Assistance Project (IRAP) v. Trump*, 241 F. Supp. 3d 539, 558 (D. Md. 2017) (quoting the same language).

⁶³ *See, e.g., Aziz*, 234 F. Supp. 3d at 730 (quoting a journalist's question based in vice-presidential candidate Michael Pence's characterization of a ban on Muslim immigration as "unconstitutional").

Upon becoming President, Trump asked his advisors to make his proposed travel ban legal.⁶⁴ He did not involve immigration law specialists in reviewing the order and did not obtain a complete legal review from the Department of Justice's Office of Legal Counsel ("OLC").⁶⁵ Presidents honoring the rule of law have traditionally asked for a full opinion from the OLC and usually consult with legal specialists in the government that have expertise on the matters addressed in a proposed executive order.⁶⁶ Given the complexity of modern law, a President committed to faithfully executing the law must subject proposed actions to thorough vetting by qualified lawyers with some tradition of independence from White House politics.⁶⁷

President Trump signed an executive order entitled "Protecting the Nation from Foreign Terrorist Entry in the United States,"⁶⁸ usually referred to as the Travel Ban, without substantial vetting.⁶⁹ The Travel Ban prohibited travel from seven Muslim countries for ninety days.⁷⁰ The Travel Ban also suspended admission of refugees for 120 days and admission of Syrian refugees indefinitely.⁷¹ It directed the Secretary of State to prioritize admission of victims of "religious based-based persecution, provided that the religion of the individual is a minority

⁶⁴ See *id.* at 731 (reporting former New York Mayor Rudolph Guiliani's statement that President Trump asked him to put together a commission to make his Muslim ban legal by expressing it as a territorial ban).

⁶⁵ Shawn Fields, *From Guantanamo to Syria: The Extraterritorial Rights of Immigrants in the Age of Extreme Vetting*, 39 CARDOZO L. REV. 1123, 1142 (2018) (noting that President Trump provided a draft of the order to the OLC "only hours" before signing it and that the OLC was instructed not to take into account statements from the administration bearing on the order's purpose); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG. 549, 569 (2018) (noting that "a small White House team led by Steve Bannon" drafted the Travel Ban and that DOJ did not substantively approve it); Statement by Acting Att'y General Sally Yates (Jan. 30, 2017) (available at http://www.clearinghouse.net/chDocs/resources/776_ActingAttorneyGeneralSallyYates_1485981163.pdf) (indicating that the OLC only reviewed the rule for *facial* validity); *cf.* Memorandum from Curtis Gannon, Acting Assistant Att'y General, Re: Proposed Executive Order Entitled, "Protecting the Nation from Foreign Terrorist Entry into the United States" (Jan. 27, 2017) (available at <http://assets.documentcloud.org/documents/3442746/EO-Foreign-Terrorist-Entry.pdf>) (approving the order without discussing the scope of OLC's review or any legal issue).

⁶⁶ See Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 14-16 (1982) (describing the normal process of writing an executive order as involving multiple reviews by executive branch lawyers).

⁶⁷ See generally Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 80-81 (2017) (identifying vetting policy decisions with executive branch lawyers as a check on "political abuse of administrative power").

⁶⁸ Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) [hereinafter Travel Ban].

⁶⁹ See OFFICE OF THE INSPECTOR GENERAL, OIG-18-37, DHS IMPLEMENTATION OF EXEC. ORDER NO. 13769 "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES," at 5 (2018), <http://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-37-Redacted-Jan18.pdf> [hereinafter OIG REPORT] (redacted by Department of Homeland Security) (stating that the Department of Homeland Security had no opportunity to provide expert input into the drafting of the Travel Ban).

⁷⁰ Travel Ban, *supra* note 68, § 3(c).

⁷¹ *Id.* § 5.

religion in the individual's country of origin" once admission of refugees resumes.⁷² Trump's statements indicate that this provision exempts Christians from the Travel Ban.⁷³

The Travel Ban led to the detention of people with valid visas upon arrival in U.S. airports and protests at airports around the country.⁷⁴ It also led to lawsuits in a number of jurisdictions challenging the ban's constitutionality, producing a nationwide injunction against the ban's enforcement.⁷⁵

The Travel Ban challenges a constitutional norm prohibiting discrimination based on religion. The First Amendment to the Constitution prohibits interfering with the free exercise of religion or promoting the establishment of state religion.⁷⁶ These religion clauses prohibit the government from acting out of religious animus.⁷⁷ Several courts granted preliminary injunctions in response to claims that the Travel Ban violated the constitutional prohibition of religious discrimination.⁷⁸

President Trump responded by revising the travel ban twice long after his first thirty days in office.⁷⁹ Several federal courts, however, enjoined the revised travel bans as well, based in part on Establishment Clause concerns.⁸⁰ But the Supreme Court reversed a preliminary injunction against the third travel ban in a

⁷² See *id.* § 5(b).

⁷³ *IRAP v. Trump*, 857 F.3d 554, 576 (4th Cir. 2017) (en banc), *vacated as moot*, 138 S. Ct. 353 (2017) (discussing Trump's statements on the Christian Broadcasting News stating that the first executive order gives "preference to Christian refugees").

⁷⁴ *Washington v. Trump*, 847 F.3d 1151, 1157 (9th Cir. 2017) (noting that the Travel Ban's "widespread" impact included detention of travelers); Erik K. Yamamoto et al., *Loaded Weapon Revisited: The Trump Era Import of Justice Jackson's Warning in Korematsu*, 24 *ASIAN AM. L. J.* 5, 20 (2017) (mentioning "widespread protests" in airports).

⁷⁵ See *Washington v. Trump*, No. C17-0141JRL, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017) (granting a temporary restraining order enjoining implementation of the Travel Ban); see also *Aziz v. Trump*, 234 F. Supp. 3d 724, 739 (E.D. Va. 2017) (enjoining enforcement of the Travel Ban against Virginia residents).

⁷⁶ U.S. CONST. amend. I.

⁷⁷ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (stating that the Free Exercise Clause prohibits discrimination on the basis of religion).

⁷⁸ See *Aziz*, 234 F. Supp. 3d at 736 (holding that the Travel Ban likely violates the Establishment Clause by discriminating on the basis of religion); *Washington*, 847 F.3d at 1167 (discussing the Establishment Clause claim whilst approving a preliminary injunction).

⁷⁹ *Hawaii v. Trump*, 878 F.3d 662, 673-74 (9th Cir. 2017) (discussing the three travel bans to date).

⁸⁰ *IRAP v. Trump*, 883 F.3d 233, 269-70 (4th Cir. 2018) (finding that the third travel ban likely violates the Establishment Clause because motivated by religious animosity); *IRAP v. Trump*, 857 F.3d 554, 601, 604-06 (4th Cir. 2017) (affirming an injunction against executive branch officials enforcing the second travel ban based on likely Establishment Clause violations); *Hawaii v. Trump*, 859 F.3d 741, 761 (9th Cir. 2017) (noting that the district court enjoined the second travel ban based on a likely Establishment Clause Violation, but affirming based on a statutory claim in order to avoid resolving a constitutional issue); *Hawaii*, 878 F.3d at 702 (affirming and narrowing an injunction of the third travel ban primarily on statutory grounds); cf. *Sarsour v. Trump*, 245 F. Supp. 3d 724, 738 (E.D. Va. 2017) (finding the plaintiffs unlikely to succeed in winning an Establishment Clause claim against the second travel ban).

5-4 decision.⁸¹ This decision does not undercut the argument that Trump's failure to even consult with the DOJ in promulgating the first travel ban shows disregard for the rule of law.⁸² Nor does it necessarily establish the constitutionality of the first Travel Ban.⁸³ Indeed, it does even fully vindicate the third travel ban. Instead, the Court declined to check Trump's religious discrimination in order to preserve future President's freedom to protect national security free from effective judicial scrutiny in immigration cases.⁸⁴

2. Equal Protection

The Travel Ban challenges constitutional rights to equal protection of the laws.⁸⁵ Equal protection norms prohibit discrimination based on religion and may limit discrimination based on national origin.⁸⁶ Immigration case law, however, indicates some question about whether foreigners living outside our borders have

⁸¹ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

⁸² See *id.* at 2421 (crediting the government's claim that the third travel ban serves a legitimate national security purpose because it, unlike the first travel ban, reflects the results of an interagency review process).

⁸³ See Benjamin Wittes, *Reflection on the Travel Ban Case and the Constitutional Status of Pretext*, LAWFARE (July 6, 2018, 8:18 AM), <http://www.lawfareblog.com/reflections-travel-ban-case-and-constitutional-status-pretext> (stating that the first two travel bans would not have passed muster under the Court's decision upholding the third travel ban).

⁸⁴ The Court held that it must apply highly deferential rational basis review to evaluation of religious discrimination claims when the government claims a national security justification, at least in the immigration context. See *Trump*, 138 S. Ct. at 2419-20 (endorsing "narrow" rational basis review because of the "overlap" of "national security" and immigration in this case). The Court chose this standard of review in part because of the "authority of the Presidency itself" in the area of national security. See *id.* at 2418 (stating that the Court must consider not just Trump's statements but the "authority of the Presidency itself" in formulating a standard of review). It saw "highly constrained" judicial review as essential to preserving presidential flexibility to "respond to changing world conditions" in light of judicial incompetence in evaluating national security claims. See *id.* at 2419-20. The Court recognized that this approach potentially allowed Trump to use a national security pretext to violate religious liberty. See *id.* at 2424 (Kennedy J., concurring) (suggesting that this was an example of cases where government actions are immune from judicial scrutiny); *id.* at 2429-34 (Breyer, J., dissenting) (suggesting that the failure to properly implement the third travel ban's exemptions shows that the ban violates the Constitution); *id.* at 2428 (Sotomayor, J., dissenting) (characterizing the majority opinion as abdicating judicial responsibility to vindicate the Constitution); David M. Driesen, *Travel Ban has Slippery Slope to Giving the President Too Much Power*, THE HILL (May 4, 2018), <http://thehill.com/opinion/judiciary/386257-travel-ban-has-slippery-slope-to-giving-president-too-much-power> (showing that concern about constraining future presidents played a large role in oral argument); Wittes, *supra* note 83 (showing that all nine Justices recognized that religious animus rather than genuine national security concerns probably motivated the President's executive order).

⁸⁵ See *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (discussing the equal protection claim).

⁸⁶ See Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context that Matters*, 82 WASH. L. REV. 897 (2007) (noting that nationality-based restrictions are generally subject to strict scrutiny).

a right to equal protection of the laws.⁸⁷ While the first Travel Ban applied to people within our borders who clearly enjoyed equal protection rights, the subsequent travel bans applied to fewer people with clear entitlements to equal protection.⁸⁸

3. Due Process

The Travel Ban also does not provide for procedural due process in terminating fundamental rights, such as the right to travel.⁸⁹ The first Travel Ban as drafted, however, applied to green card holders and others within our borders who possess rights to due process of law.⁹⁰ The first Travel Ban did not provide any sort of procedural due process to protect pre-existing rights. The subsequent travel bans also do not provide procedures to ensure against unlawful deprivation of rights but apply to fewer people with clear rights.⁹¹

The travel bans attack norms of substantive due process as well. The Supreme Court has long required government to act rationally.⁹² This has become an underenforced constitutional norm because of concerns about potential judicial overreaching. During the *Lochner* era, courts reviewing government actions for rationality tended to find policies that the judges disapproved of irrational, thereby inappropriately interfering with democratic processes.⁹³ The Supreme Court

⁸⁷ See generally Fields, *supra* note 65 (characterizing the question of whether those living outside our borders can assert constitutional protections against discriminatory laws as a key question in the travel ban cases).

⁸⁸ See *Sarsour v. Trump*, 245 F. Supp. 3d 724, 740 (E.D. Va. 2017) (finding an Equal Protection Clause challenge unlikely to succeed against the narrower second travel ban); *cf.* *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1134-38 (D. Hawaii 2017) (temporarily restraining the second travel ban as likely violating the Establishment Clause); Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 248 (2010) (suggesting that the Chinese Exclusion Cases may establish immigration law as “extraconstitutional”); Dorf, *supra* note 3 (noting that the second travel ban does not apply to current visa holders and Iraqi nationals, exempt minority religions, or indefinitely suspend admission of Syrians); Primus, *supra* note 3 (arguing that the new travel ban is unconstitutional because anti-Muslim animus motivated it).

⁸⁹ See *Washington*, 847 F.3d at 1164 (holding that the Travel Ban fails to provide notice and an opportunity to be heard and therefore likely violates procedural due process constraints).

⁹⁰ See *id.* at 1164-66 (listing classes of persons affected who have due process rights mostly because they reside within U.S. borders).

⁹¹ *Cf.* Amy L. Moore, *Even When You Win, You Lose: Trump’s Executive Order and the Depressing State of Procedural Due Process in the Context of Immigration*, 26 WM. & MARY BILL OF RIGHTS J. 65, 66-68 (2017) (suggesting that the law is confused about whether aliens living abroad have due process rights); see also *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 536 (N.D. Cal. 2017) (holding that Trump’s sanctuary cities order denies local governments procedural due process).

⁹² See *Champion Lumber Co. v. Fisher*, 227 U.S. 445, 448-49 (1913) (stating that “arbitrary power resides nowhere in our system of government”) (citations omitted).

⁹³ See, e.g., *Adkins v. Children’s Hospital*, 261 U.S. 525, 555-62 (1923) (holding a minimum wage for women unreasonable and explaining the policy views supporting this decision); *Lochner v. New York*, 198 U.S. 45, 59-65 (1905) (holding restrictions on bakers’ hours unreasonable based on the Court’s view of sound policy); *Smyth v. Ames*, 169 U.S. 466, 528-39 (1898) (finding limitations on

during the New Deal addressed this problem by making rationality review deferential.⁹⁴

Trump's travel bans, however, attack fundamental rationality norms at the heart of our constitutional tradition, even if somewhat peripheral to judicial review. These norms demand that government restrictions aim at solving real problems and respond to facts.⁹⁵ Trump portrayed his orders as a necessary emergency measures to combat terrorist threats. But immigrants from the targeted countries have not killed anybody in the United States.⁹⁶ At the same time, the orders did not apply to many countries from which terrorists have come.⁹⁷

Some of the courts reviewing the travel bans have suggested that they do not meet due process rationality norms.⁹⁸ Whether the travel bans offend a judicially enforceable rationality test or not, they arguably undermine the fundamental norm of rational government that the Constitution sought to establish.⁹⁹

Thus, the Travel Ban undermines religious freedom, equal protection and due process. It challenges fundamental commitments to individual rights guaranteed by the Constitution.

4. States' Rights

Donald Trump promulgated an executive order attacking states' rights in an effort to prevent states from acting as "sanctuary cities"—cities that seek to

railroad rates unreasonable and explaining why it disagrees with the commission setting the rates).

⁹⁴ See *Ferguson v. Skrupa*, 372 U.S. 726, 730-33 (1962) (recognizing the Court's repudiation of intensive reasonableness review under *Lochner*); *Federal Power Comm'n v. Natural Gas Pipeline*, 315 U.S. 575, 586 (1942) (confining judicial review of rate setting to the question of whether the rate produces "an arbitrary result" and overruling *Smyth v. Ames* by rejecting judicial selection of rate-setting principles); *Carolene Products v. United States*, 304 U.S. 144, 152 (1937) (announcing it will uphold all legislation having a rational basis even absent specific facts justifying it).

⁹⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) (associating constitutional democracy with a "reign of reason" based on "knowledge"); see also David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B. U. L. REV. 1013 (2018) (arguing that the Constitution generally requires arbitrary and capricious review of executive orders).

⁹⁶ Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413, 423-24 (2017) (pointing out that none of the countries listed in the Travel Ban had produced a "terrorist who had killed anyone on U.S. soil," while other countries not on the list had).

⁹⁷ See *id.* (noting that countries from which terrorists killing U.S. citizens had come, such as Saudi Arabia, were not on the list).

⁹⁸ See, e.g., *Hawaii v. Trump*, 859 F.3d 741, 770-74 (9th Cir. 2017) (per curiam) (questioning the rationality of the conclusion that admitting nationals of the countries mentioned in Travel Ban 2.0 would be detrimental to U.S. interests); *Hawaii v. Trump*, 878 F.3d 662, 693-94 (9th Cir. 2017) (questioning the rationality of the conclusion that admitting nationals of the countries mentioned in Travel Ban 3.0 would be detrimental to the national interest).

⁹⁹ Cf. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (announcing that the deferential "rational basis" test applies to judicial review of the third travel ban); *id.* at 2424 (Kennedy, J., concurring) (raising the possibility that the travel ban's rationality may be examinable on remand).

protect immigrants in some fashion.¹⁰⁰ In particular, it attacks constitutional limitations on coercing states to carry out federal programs.

The Sanctuary Cities Order attacks constitutional limitations on coercive use of conditions on federal spending by threatening to deny sanctuary cities federal grants, “except as necessary for law enforcement purposes.”¹⁰¹ As a general matter, Congress has the authority to condition receipt of federal money on recipients’ compliance with reasonable federal policies.¹⁰² Yet, Congress may not use its power to spend money to “coerce” states into implementing a federal law.¹⁰³ In *National Federation of Independent Business (NFIB) v. Sebelius*, the Supreme Court held that withholding all federal Medicaid funding from states that decline to expand Medicaid under the Affordable Care Act crossed the line between offering states appropriate financial incentives to adopt federal policies and unconstitutionally coercing states to adopt federal policies that they oppose.¹⁰⁴ The Sanctuary Cities Order authorizes the withholding of substantially all federal funds bestowed on a state for non-law enforcement purposes to force state officials to enforce federal immigration law.¹⁰⁵ Thus, it plainly exercised more coercive force than the provisions held unconstitutional in *NFIB*. Furthermore, the Court has required a relationship between the purposes of a withheld grant and the conditions imposed on its receipt.¹⁰⁶ The Sanctuary Cities Order does the opposite of what the Constitution requires, preserving grant funds arguably related to the purposes of the immigration statute while getting rid of all unrelated federal grants.¹⁰⁷ The order takes the form of “threats to terminate . . . significant independent grants,” which the *NFIB* Court declared beyond Congressional power.¹⁰⁸ Since Congress, which has the power to spend money for the “General Welfare,” cannot use this power to coerce states, neither can the President.

¹⁰⁰ See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Sanctuary Cities Order].

¹⁰¹ *Id.* § 9(a).

¹⁰² See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205, 208-09 (1987) (upholding a statutory directive to withhold some highway funds from states permitting those under the age of twenty-one to drink); *Oklahoma v. Civil Service Comm’n*, 330 U.S. 127 (1947) (upholding conditioning federal grants on state enactment of civil service systems that limit the political activities of state employees).

¹⁰³ See *Nat’l Fed’n of Indep. Business (NFIB) v. Sebelius*, 567 U.S. 519, 577-580 (2012) (holding that the Constitution does not permit indirect coercion of states through threats to withhold federal grants).

¹⁰⁴ See *id.* at 579-80 (agreeing that threatening to withhold all Medicaid funding from noncomplying states constitutes coercion).

¹⁰⁵ See Sanctuary Cities Order, *supra* note 100, at § 9(a) (declaring “sanctuary jurisdictions” ineligible to receive “[f]ederal grants” except for law enforcement purposes).

¹⁰⁶ *Dole*, 483 U.S. at 207-08 (stating that “conditions on federal grants might be illegitimate if . . . unrelated to the federal interest in particular national projects or programs”).

¹⁰⁷ See *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533 (N.D. Cal. 2017) (holding that the Sanctuary Cities Order “inverts the nexus requirement”).

¹⁰⁸ *NFIB*, 567 U.S. at 580.

The Sanctuary Cities Order also undermines a constitutional prohibition on “commandeering” state officials to carry out a federal program.¹⁰⁹ The Supreme Court has read this anti-commandeering principle into the Tenth Amendment in order to preserve the accountability of public officials.¹¹⁰ The Sanctuary Cities Order authorizes enforcement actions against state or local governments that fail to enforce federal immigration law.¹¹¹ It thus commandeers them into administering a federal law in violation of the Constitution.

Taken together, the threat of withdrawal of almost all federal funding coupled with the restriction on state and local political supervision of state and local police forces constitutes an extraordinarily broad assault on state sovereignty. The Order constitutes a thinly veiled effort to secure the services of individual sympathetic state and local policemen regardless of whether a local jurisdiction’s political authority wants to cooperate with federal officials, thereby defeating state political control over its own executive branch.¹¹² It does this by requiring states to allow their officials to cooperate with federal officials and then directing federal officials to solicit active cooperation with local officials.¹¹³ It not only constitutes a plain violation on constitutional restrictions on commandeering, it also undermines political accountability to a much greater extent than laws struck down by the Court in the past as violative of the anti-commandeering principle.

Accordingly, a federal district court promptly enjoined operation of the Sanctuary Cities Order.¹¹⁴ The Sanctuary Cities Order was so obviously unconstitutional that the Justice Department did not seek to defend its merits,

¹⁰⁹ See *New York v. United States*, 505 U.S. 144, 161 (1992) (stating that Congress may not simply “commandeer a state by directing it to enact and enforce a federal regulatory program”).

¹¹⁰ See *id.* at 188 (holding that “the Federal Government may not compel states to administer . . . a federal program”); *Printz v. United States*, 521 U.S. 898, 935 (1997) (same).

¹¹¹ Sanctuary Cities Order, *supra* note 100, at § 9(a); *Santa Clara*, 250 F. Supp. 3d at 533-34 (explaining why the orders’ prohibition on hindering federal enforcement of immigration law in effect compels state and local jurisdictions to actively cooperate with immigration enforcement).

¹¹² *Cf.* *City of Chicago v. Sessions*, 888 F.3d 272, 278, 287 (7th Cir. 2018) (holding that the executive branch probably cannot condition receipt of the principle law enforcement grants on compliance with requirements to give immigration authorities access to prisons and notice of the release date of aliens); *New York v. Dep’t of Justice*, 2018 WL 6257693 (S.D.N.Y. Nov. 30, 2018) (executive branch may not condition grant funding for law enforcement on state and local governments notifying DHS of release of aliens from prison, providing access to local correctional facilities, and not restricting official communication with immigration officials); *City & Cty. of San Francisco v. Sessions*, No. 17-cv-046242-WHO, 2018 WL 4859528 (N.D. Cal. Oct. 5, 2018) (same); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 949 (N.D. Ill. 2017) (reading 8 U.S.C. § 1373 as requiring that “local officials” have the freedom to decide “whether to assist in enforcement of federal immigration priorities” and thereby thwarting local policymakers wishing to decline to cooperate).

¹¹³ Sanctuary Cities Executive Order, *supra* note 100, at §§ 8-9.

¹¹⁴ *Santa Clara*, 250 F. Supp. 3d at 540 (granting a preliminary injunction against the Sanctuary Cities Order); *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1201 (N.D. Cal. 2017) (making the injunction permanent); *cf.* *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 659 (E.D. Penn. 2017) (enjoining denial of law enforcement grant funding to Philadelphia for failure to aid federal immigration enforcement); *Chicago*, 888 F.3d at 287 (upholding a preliminary injunction against requirements to provide immigration officials with notice of immigrants’ release from prison and access to them enforced by denial of law enforcement grants).

instead arguing against federal jurisdiction and trying to deny that the order meant what it said.¹¹⁵ The Justice Department, apparently realizing that it could not defend this order, did not directly appeal. Instead, it issued interpretive guidance designed to change its meaning and moved for reconsideration, to no avail.¹¹⁶

5. Congressional Control Over the Purse

Trump's orders also attack Congressional power of the purse, a key constitutional restraint on presidential power. The Constitution gives Congress, not the President, the power to appropriate funds.¹¹⁷ Both the Sanctuary Cities Order and Trump's executive order on building a wall along the border with Mexico¹¹⁸ (the Wall Order) attack Congressional control over spending.

The Sanctuary Cities Order attacks Congressional power of the purse by asserting a presidential power to withhold federal funds appropriated by Congress based on the President's own policy preferences.¹¹⁹ In numerous statutes, Congress has conditioned federal funding upon state compliance with certain conditions, thereby authorizing the executive to withhold grant funding if the conditions are not met.¹²⁰ No statute, however, authorizes the President to withhold all federal funding not related to law enforcement when a state declines to cooperate in federal efforts to round up illegal aliens.¹²¹ By claiming such an authority, the President usurps the power of Congress to decide where the money should go.¹²² Indeed, the Ninth Circuit stated that "no reasonable argument" could support this cold violation of the Spending Clause.¹²³

¹¹⁵ See *Santa Clara*, 250 F. Supp. 3d at 507-08 (noting that the government argued that Santa Clara lacked standing, did not respond to Santa Clara's constitutional challenges, and disavowed any intention to withhold the billions of dollars of funds that the order by its terms threatened to withdraw).

¹¹⁶ See *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1240-43 (9th Cir. 2018) (rejecting the argument that a DOJ memorandum limiting the Sanctuary City Order's funding restrictions to grant programs administered by the DOJ and Department of Homeland Security saves the order); see also *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 344 (E.D. Penn. 2018) (invalidating a withholding of law enforcement grant funding to force Philadelphia to aid federal immigration enforcement as unconstitutional).

¹¹⁷ See U.S. CONST. art. I, sec. 7, sec. 8, cl. 1.

¹¹⁸ See Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 30, 2017) (hereinafter Wall Order).

¹¹⁹ See *San Francisco*, 897 F.3d at 1233 (explaining that the Sanctuary Cities Order requires the withholding of grants authorized by Congress).

¹²⁰ See *NFIB v. Sebelius*, 567 U.S. 519, 537 (2012) (discussing powers to impose conditions on state receipt of federal funds and citing cases where they have done so).

¹²¹ See *Seattle v. Trump*, No. 17-497-RAJ, 2017 WL 4700144, at *20-21 (W.D. Wash. Oct. 19, 2017) (finding a violation of the Spending Clause because Congress did not delegate authority to withhold funds to the President for violations of section 1373); cf. *Chicago v. Sessions*, 264 F. Supp. 3d 933, 949, 945-46 (N.D. Ill. 2017) (finding a delegation of authority to withhold a law enforcement grant from Chicago for noncooperation with federal immigration authorities).

¹²² *San Francisco*, 897 F.3d at 1235 (holding that the president may not "withhold properly appropriated funds" to further his "own policy goals").

¹²³ See *id.* at 1234-35 (finding that "no reasonable argument" supports the President's position).

Conversely, the Wall Order attacks the Congressional power of the purse by asserting a power to spend monies not authorized by Congress. The Wall Order simply directs the Secretary of Homeland Security to “immediately . . . construct a . . . wall along the southern border. . .”¹²⁴ But Congress has not appropriated funds for the President’s wall.

B. Challenges to Treaties

Treaties bind the United States government.¹²⁵ While case law establishes a distinction between self-executing and non self-executing treaties, that case law addresses the question of when domestic courts will enforce a treaty without implementing legislation.¹²⁶ As a matter of both international and domestic law treaties bind the executive branch of our government. Indeed, the Framers drafted the Constitution in part to secure adequate compliance with treaties in the face of state efforts to interfere with their execution.¹²⁷

President Trump’s Memorandum Regarding Construction of American Pipelines¹²⁸ violates numerous international trade treaties by requiring companies manufacturing and repairing oil pipelines to use only American steel.¹²⁹ Perhaps recognizing that numerous treaties prohibit such domestic content requirements, the Memorandum orders this violation of numerous solemn international commitments “to the maximum extent possible and the extent permitted by law.”¹³⁰ An order to take actions clearly at odds with numerous treaties to the extent permitted by law constitutes an instruction to undermine the law to the extent possible.¹³¹

The Travel Ban likewise undermines treaty obligations. Under international human rights law countries must admit refugees without

¹²⁴ Wall Order, *supra* note 118, at §4(a). The order states that this wall construction should be carried out “in accordance with existing law.” *Id.* But this phrase suggests that the Secretary should comply with any statutes applying to wall construction, not that the building should await Congressional appropriation of sufficient funds. Indeed, the requirement to build the wall “immediately” reveals an intent to proceed without an appropriation of funds from Congress.

¹²⁵ See Rebecca Crotof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1786 (2011) (noting that treaties bind the U.S. as a matter of international law).

¹²⁶ Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM J. INT’L L. 695 (1995) (defining a self-executing treaty as one enforceable in court without prior legislation).

¹²⁷ See *id.* at 698-99 (explaining that the Constitution aims to prevent treaty violations); U.S. CONST. art. VI, cl. 2 (making treaties the “supreme Law of the land”).

¹²⁸ Exec. Office of the President, Memorandum for the Sec’y of Commerce, Regarding Construction of American Pipelines, 82 Fed. Reg. 8659 (Jan. 24, 2017).

¹²⁹ See, e.g., General Agreement on Tariffs & Trade, art. III; North American Free Trade Agreement, art. 301, 1106.1.

¹³⁰ *Id.*

¹³¹ *Cf.* Exec. Office of the President, Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Negotiations and Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 25, 2017) (not undermining norm of adherence to treaties, because the order withdraws the US from a treaty not yet ratified).

discrimination based on religion or country of origin.¹³² The Travel Ban blatantly disregards these treaty obligations. Hence, his executive orders promulgated in the first thirty days attack the constitutional norm of treaty compliance.

C. Frontal Challenges to the Key Premises of Statutory Law

Trump's orders collectively attack much of the United States Code. They mount this attack by deliberately undermining key policy commitments animating numerous statutes designed to meet public interest goals.

1. The Two for One Executive Order

Over the years, Congress has promulgated numerous statutes ordering administrative agencies to prevent various kinds of harm. Environmental statutes, for example, aim to protect public health and the environment from unsafe levels or air pollution,¹³³ to eliminate discharges of pollutants into navigable waters,¹³⁴ and “to promote the protection of health and the environment” through better solid waste management¹³⁵. The Occupational, Safety and Health Act aims to ensure a safe workplace to the extent possible.¹³⁶ Similarly, the Food, Drug, and Cosmetics, Act aims to protect the public from unsafe food, drugs, and cosmetics.¹³⁷ In like manner, Congress has passed a number of statutes aiming to provide for a stable financial system.¹³⁸ Statutes with such protective aims occupy large swaths of the United States Code.

Statutes that aim to protect the public from various sorts of harms necessarily require conduct changes of entities that they regulate and therefore impose some burdens upon them. Most of these statutes authorize consideration of these burdens in various ways,¹³⁹ but these statutes reflect considered decisions to embrace goals of protecting people from harms in spite of the inconvenience or cost avoiding harmful conduct might cause regulated firms.

¹³² See Koh, *supra* note 96, at 423 (arguing that the Travel Ban violates the Refugee Convention and the International Covenant on Civil and Political Rights).

¹³³ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001) (noting that the Clean Air Act requires the protection of public health with “an adequate margin of safety”).

¹³⁴ 33 U.S.C. §1251(a)(1) (2018).

¹³⁵ See 42 U.S.C. §6902(a) (2018).

¹³⁶ *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 493 (1981) (characterizing OSHA's purpose as assuring “so far as possible every working man and woman in the Nation safe and healthful working conditions...”) (quoting 29 U.S.C. §651(b)).

¹³⁷ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (characterizing safety as one of the FDCA's “core objectives”).

¹³⁸ See, e.g., *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, §112, 124 Stat. 1376, 1394 (July 21, 2010) (codified in scattered provisions of the U.S. Code) (announcing a purpose of promoting “the financial stability of the United States”).

¹³⁹ See David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 1-2 (2005) (pointing out that “consideration of cost pervades the regulatory system”).

President Trump issued an executive order attacking much of the United States Code by undermining the very idea of protecting people from harm in favor of the idea of protecting the economy from any cost associated with tempering harmful activities. In other words, Trump attacked the rule of law by seeking to create a policy diametrically opposed to the policies embedded in much of the United States Code.

This executive order requires that government agencies “identify two regulations for elimination” for every newly promulgated regulation.¹⁴⁰ This Two-for-One Order also requires that new regulations impose no net cost at all.¹⁴¹ Thus, Trump has substituted the goal of protecting regulated firms from any net cost for the statutes’ goals of protecting the public from harm.

This order, however, only requires the zeroing out of net costs and two repeals for every new rule promulgated “to the extent permitted by law.” Thus, the order seeks to undermine the existing law to the fullest extent possible, rather than to faithfully implement the body of statutes governing the exercise of executive branch authority.¹⁴²

2. The Affordable Care Act Order

The Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal¹⁴³ mounts a similar assault on the Affordable Care Act (“ACA”) by seeking to systematically undermine the scheme. The ACA aims to increase the number of insured Americans and reduce the costs they pay for health care.¹⁴⁴ It does this primarily through regulations that

¹⁴⁰ Exec. Order No. 13771, §1, 82 Fed. Reg. 9339 (Jan. 30, 2017) [hereinafter 2:1 Order].

¹⁴¹ *See id.* § 2(b), (c). The 2:1 order does this in several different ways. First, it generally requires that all regulations promulgated in 2017 produce no net cost. *See id.* §2(b). It also requires two repealed regulations wholly offset the cost of any new regulation. *See id.* § 2(c).

¹⁴² *Cf.* OFFICE MGMT. & BUDGET, REGULATORY REFORM: TWO-FOR-ONE STATUS REPORT AND REGULATORY COST CAPS: EXEC. ORDER 13771: FINAL ACCOUNTING FOR FY2017 (2017) (indicating that in 2017 the federal government issued “67 deregulatory actions and only three regulatory actions”); Roncevert Ahmond et al., *Regulatory Reform in the Trump Era-The First Hundred Days*, 35 YALE J. ON REG. BULL. 29, 48-49 (2017) (stating that no agency eliminated two rules in order to implement a new one in the first hundred days and that the order seeks to “disempower agencies’ regulatory authority”); Medicare Program: Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2018, 82 Fed. Reg. 36530, 36628 (Aug. 4, 2017) (finding this rule subject to the 2:1 order and noting that the rule includes cost estimates); Energy Conservation Program: Energy Conservation Standards for Walk-in Cooler and Freezer Refrigeration Systems, 82 Fed. Reg. 31808, 31811-12 (July 10, 2017) (to be codified at 10 C.F.R. part 431) (finding net cost savings of \$1.4 to \$3.2 billion dollars from energy efficiency standards); Effluent Limitations Guidelines and Standards for the Dental Category, 82 Fed. Reg. 27154, 27156, 27175 (June 14, 2017) (finding insignificant costs but noting that OIRA reviewed this rule because of its policy significance).

¹⁴³ Exec. Order No. 13765, 82 Fed. Reg. 8351 (Jan. 24, 2017) [hereinafter ACA Order].

¹⁴⁴ *NFIB v. Sebelius*, 567 U.S. 519, 538 (2012) (stating that the ACA “aims to increase the number of Americans covered by health insurance and decrease the cost of health care”).

burden various segments of the health care market in order to construct a system of greater scope and cost effectiveness for patients.

For example, the ACA encourages patients to seek preventative care both to improve their health and to reduce the costs hospitals incur when uninsured patients end up in the emergency room for preventable illness.¹⁴⁵ To spare hospitals the cost of treating people without insurance, it required all those with the means to purchase health insurance to do so,¹⁴⁶ thereby imposing a burden on young, healthy people who might otherwise leave themselves uninsured¹⁴⁷.

The ACA aims to make sure that sick people can get health insurance so that they can receive adequate medical care, thereby increasing the scope of the insurance system. In order to accomplish this, it imposes burdens on insurance companies, forcing them to insure those with “pre-existing conditions” without discriminating against the sick on the basis of price.¹⁴⁸

The ACA Order systematically aims to undermine the ACA by directing federal officials charged with implementing the ACA to “waive, defer, grant exemptions from, or delay the implementation of any provision or requirement” imposing a burden on anybody in the health care system.¹⁴⁹ It qualifies this instruction to undermine the ACA by ordering it “to the maximum extent permitted by law.”¹⁵⁰ Thus, it seeks to weaken the ACA to the extent that agencies imagine they can get away with it.¹⁵¹

D. Narrower Executive Orders

Not all of the President’s initial executive orders directly attack core commitments in the law. A number of them change or order a review of existing policy decisions without explicitly attacking the law’s key commitments. Still, President Trump’s opponents have sometimes assumed that these orders also aim to undermine the rule of law. When an order seeks to have decisions revisited, it

¹⁴⁵ See *id.* at 593-99 (Ginsburg, J., concurring) (explaining that the uninsured raise costs when they arrive in hospital emergency rooms instead of getting preventative care and how the ACA tried to remedy that).

¹⁴⁶ See *id.* at 539 (describing the ACA’s “individual mandate” as requiring those not receiving insurance from Medicaid, Medicare, or an employer to purchase insurance); *cf.* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017) (eliminating penalties for violating the individual mandate).

¹⁴⁷ See *NFIB*, 567 U.S. at 592-93 (Ginsburg, J., dissenting) (explaining that those without insurance incur large medical expenses when they become sick that cause providers to “raise their prices”).

¹⁴⁸ See *id.* at 596-97 (Ginsburg, J., dissenting) (explaining that the ACA requires insurance companies to sell policies to those with preexisting conditions without charging higher premiums than those charged healthy customers).

¹⁴⁹ ACA Order, *supra* note 143, at § 2.

¹⁵⁰ *Id.*

¹⁵¹ See Complaint at ¶ 10, *City of Columbus v. Trump*, No. 18-cv-2364, 2018 WL 3655066 (D. Md. Aug. 2, 2018) (alleging that the ACA Order started a wide-ranging and illegal campaign to sabotage the ACA).

may still lead to violations of the law.¹⁵² And in some respects, these orders may signal an intent to undermine particular laws. Although this part will discuss some of these orders individually, the next part will argue that analysts must assess these orders in light of the Trump administration's other actions and statements.

1. The National Environmental Policy Act and Infrastructure

The Executive Order Expediting Environmental Reviews and Approval of High Priority Infrastructure Projects¹⁵³ undermines the National Environmental Policy Act ("NEPA"), which requires environmental impact statements evaluating significant federal actions, albeit in a more oblique fashion than the 2:1 Order or the ACA Order. It requires the establishment of "expedited deadlines and procedures" for completion of environmental reviews of high priority infrastructure projects "in a manner consistent with law."¹⁵⁴

This order creates an acute tension with NEPA's policies by seeking to speed up environmental review of the most important projects.¹⁵⁵ One would expect many of the most important projects to create the most environmental risks requiring the most extensive study and public involvement. Thus, the goal of expediting review of significant projects seems to undermine NEPA's goal of focusing significant review on the most environmentally significant projects. Faithful compliance with NEPA countenances scaling back review of insignificant projects, not significant ones.

But one cannot fully evaluate the extent to which this undermines NEPA's goals of ensuring adequate consideration of environmental impacts before one sees the extent to which agencies interpret the order as a signal to cut legally required corners.¹⁵⁶ Unlike the ACA and 2:1 orders, this order does not call on agencies to

¹⁵² See, e.g., Devin Henry, *Trump Regulators Trigger Pollution Fight*, THE HILL (June 20, 2017), <http://thehill.com/policy/energy-environment/338496-trump-regulators-trigger-pollution-fight> (noting that EPA reviewed its methane rule pursuant to an executive order issued in March); *Clean Air Council v. Pruitt*, 862 F.3d 1, 4 (D.C. Cir. 2017) (striking down EPA's decision to suspend the methane rule as inconsistent with the Clean Air Act); *State v. BLM*, 277 F. Supp. 3d 1106, 1127 (N.D. Cal. 2017) (striking down order postponing implementation of rule limiting venting of natural gas and clarifying when gas emitted into the environment would be subject to royalties pursuant to a review ordered by Executive Order No. 13783).

¹⁵³ Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017).

¹⁵⁴ *Id.* § 3.

¹⁵⁵ See *id.* § 2. This section defines high priority projects in part by reference to their "importance to the general welfare" and "value to the Nation." All things being equal, a project of vast size and scope with enormous environmental impacts may well stand out as being especially important and valuable. But NEPA requires environmental impact assessments to gauge whether the environmental impacts counsel a redesign, choice of a different alternative, or even rejection of projects that may appear to offer great value if their environmental costs are not considered. On the other hand, this section also makes environmental benefit a possible basis of designating a project as high priority. See *id.* While NEPA sometimes requires evaluation of projects delivering environmental benefits, expedition of environmentally beneficial projects may advance NEPA's values.

¹⁵⁶ See, e.g., Darryl Fears, *Trump Tries to Pave the Way for Development by Accelerating Environmental Reviews*, WASH. POST (Jan. 24, 2017), <http://wapo.st/2kphHvB>.

implement policies directly opposed to statutory goals to the extent permitted by law, but rather calls for expedition. While NEPA has the effect of slowing down projects, that is not its goal. Its goal is to foster adequate consideration of environmental impacts, so expedition is not a policy diametrically opposed to NEPA's.¹⁵⁷ And by requiring that expedition be “consistent with law” rather than seeking to implement opposing policies to the extent or “maximum extent” permitted by law, it does not convey an especially strong signal to destroy the law. Furthermore, unlike many of the other orders it does not seek to undermine a statute or a body of statutes across the board, but only in the context of infrastructure projects.

2. Pipeline Approvals

Good examples of more limited actions also come from presidential memoranda addressing pipeline approvals. The Presidential Memorandum Regarding the Dakota Access Pipeline (Dakota Memorandum) strongly signaled that the Army Corps of Engineers (Army) should expeditiously approve a proposed pipeline carrying oil from North Dakota to Illinois.¹⁵⁸ The Army took the hint and approved the pipeline about two weeks after President Trump issued the Dakota Memorandum.¹⁵⁹ Since the relevant law likely authorizes approval of the pipeline and the Army had conducted some environmental review before Trump became President, this order does not facially attack fundamental statutory goals.¹⁶⁰ Still, this haste may have led to a legal violation. A district court reviewing this approval at the behest of various Sioux Tribes concluded that the Army failed to adequately consider potential damage from oil spills.¹⁶¹

A similar story unfolded with respect to the Keystone XL Pipeline, which would carry oil from the Canadian Tar Sands to refineries in the Gulf Coast. Trump's memorandum strongly signaled that officials should approve this pipeline within sixty days.¹⁶² But at the time, no application to build this pipeline was pending, so the President's memorandum took the unusual step of inviting an

¹⁵⁷ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (describing NEPA as ensuring that agencies “carefully consider . . . detailed information concerning significant environmental impacts”).

¹⁵⁸ See *Construction of the Dakota Access Pipeline*, 82 Fed. Reg. 11129 (Feb. 27, 2017) [hereinafter *Dakota Memorandum*] (corrected version).

¹⁵⁹ See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 120 (D.D.C. 2017) (showing that the Army approved the pipeline on February 8, about two weeks after the President issued the Dakota Memorandum).

¹⁶⁰ See *id.* at 116-19 (showing that key officials in the Obama Administration believed that the Army had authority to approve the pipeline and had conducted adequate environmental review).

¹⁶¹ See *id.* at 129, 132-34, 139-40 (holding that the Army failed to evaluate expert criticism of its analysis of potential oil spill damage, adequately examine potential impacts on tribal hunting and fishing rights, and adequately address disproportionate impacts on the tribes); *cf.* *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 94 (D.D.C. 2017) (finding the defects in the environmental assessment insufficiently serious to justify vacating the pipeline approval).

¹⁶² *Construction of the Keystone XL Pipeline*, 82 Fed. Reg. 8663 (Jan. 24, 2017).

application.¹⁶³ Notwithstanding this inconvenience, the government approved the pipeline within this very short period of time.¹⁶⁴ This haste led, once again, to a violation of NEPA's mandate to adequately consider environmental impacts.¹⁶⁵

3. Symbolic and Discretionary Orders

Many of his orders seem appropriate legally, even if they may trouble liberals as a matter of policy. Trump's orders calling for strengthening national security and law enforcement seem on their face primarily symbolic.¹⁶⁶ His order with respect to funding of abortion abroad, while controversial, seem to represent a legally legitimate exercise of presidential authority.¹⁶⁷ And some of his orders address internal organization of the executive branch.¹⁶⁸

III. UNDERMINING THE RULE OF LAW? TRUMP'S EXECUTIVE ORDERS IN CONTEXT

The wide array of law attacked in many of these orders suggests that these orders do not merely commit some legal violations, but rather undermine the rule of law. This suggestion, however, requires further analysis.

This part begins by developing a concept of undermining the rule of law and distinguishing undermining the rule of law from occasional illegal action. For the meaning of undermining the rule of law is not obvious. How do we know when the rule of law is being undermined? Is there a valid distinction between committing a legal violation and undermining the rule of law?

¹⁶³ *Id.*

¹⁶⁴ See *Indigenous Env'tl Network v. Dep't of State*, No. CV-17-29-GF-BMM, 2017 WL 5632435, at *2 (D. Mont. Nov. 22, 2017) (noting that Trump issued his Memorandum on January 24, 2017 and the State Department issued a decision approving the pipeline on March 23, 2017).

¹⁶⁵ See *Indigenous Env'tl Network v. Dep't of State*, 317 F. Supp. 3d 1118 (D. Mont. 2018); *Indigenous Env'tl Network v. Dep't of State*, 2018 WL 5840768 (D. Mont. 2018).

¹⁶⁶ See Exec. Order No. 13774, 82 Fed. Reg. 10695 (Feb. 14, 2017) (seeking to prevent violence against law enforcement officials); Exec. Order No. 13773, 82 Fed. Reg. 10691 (Feb. 9, 2017) (seeking better enforcement of federal laws aimed at international crime); Memorandum on Plan to Defeat the Islamic State of Iraq and Syria, 2017 DAILY COMP. PRES. DOC. 1 (Feb. 2, 2017); Memorandum on Rebuilding the U.S. Armed Forces, 2017 DAILY COMP. PRES. DOC. 1 (Jan. 27, 2017); cf. Barack Obama, *Commentary: The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

¹⁶⁷ Memorandum on the Mexico City Policy, 2017 DAILY COMP. PRES. DOC. 1 (Jan. 25, 2017) (reinstating restrictions on funding organizations abroad providing abortions).

¹⁶⁸ See, e.g., Exec. Order No. 13775, 82 Fed. Reg. 10697 (Feb. 14, 2017) (providing an order of succession within the Department of Justice); Memorandum on Organization of the National Security Council and the Homeland Security Council, 2017 DAILY COMP. PRES. DOC. 1 (Jan. 28, 2017), *revoked by* Memorandum on Organization of the National Security Council and the Homeland Security Council, and Subcommittees, 2017 DAILY COMP. PRES. DOC. 1 (Apr. 4, 2017); see also Exec. Order No. 13770, 82 Fed. Reg. 9333 (Feb. 3, 2017) (addressing ethics of executive branch appointees); cf. *Am. Fed'n of Fed. Emps. v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018) (striking down a later executive order violating federal employee's rights to collectively bargain).

With this conceptual work accomplished, this part considers the question of whether the promulgation of orders challenging so many fundamental commitments of our constitutional system seeks to undermine the rule of law. This question involves an inquiry into motive, which is not completely observable. Yet, this part shows that other actions President Trump has taken suggest that the body of orders promulgated in the first thirty days aim to undermine the rule of law.

Finally, this part addresses a possible response to suggestions that President Trump's executive actions undermine the rule of law, an attempt to normalize his approach as similar to that of previous presidents. A full analysis of whether President Trump's actions constitute a unique challenge to the rule of law would require a review of the executive orders of all previous presidents and convert this article into a book. Instead, this article will compare President Trump's executive actions to those of his immediate predecessor, Barack Obama, to provide a partial test of whether Trump's initial corpus of executive actions appears unusual.

A. The Concept of Undermining the Rule of Law: Beyond Violating the Law

Actions undermine the rule of law when they weaken the custom of obeying the law. Presidents can undermine the rule of law by creating precedent for ignoring or deliberately violating the law. A series of actions that flout the law (either deliberately or through neglect) can undermine it by normalizing a custom diminishing or eliminating law's role in shaping decisions.

Not all actions violating the law undermine the rule of law. When somebody commits a murder, she does not undermine the rule of law. The law against murder remains intact even though somebody violates it. And the rule of law does not sustain damage because somebody violates a single law. Murder usually does not create precedent for ignoring or violating the law, as the rule against murder remains firmly in place after a murder occurs.

Still, one might think that an institutional actor like the President undermines the rule of law anytime he violates the law. When the person most responsible for executing the law disobeys the rules limiting his own conduct, a more plausible case for equating legal violation with undermining the rule of law emerges.

Yet, even when a President violates the law, one should not equate every violation with an undermining of the rule of law. The law is frequently complex, and a President may, despite his best efforts to understand the law, misinterpret a law and promptly correct a violation in response to a court order. Such a mistake does not undermine the rule of law, because error in interpreting a single law does not establish precedent for flouting the law. On the other hand, a large number of "errors" in interpreting the law may suggest establishment of a custom of giving the law insufficient weight in policy decisions and undermining of the rule of law.

If our presidents simply ignored all law and took whatever action they liked regardless of what the law said, clearly that would mean that the rule of law

has ended.¹⁶⁹ For such an approach would end legislative supremacy, a key component of the rule of law. And ignoring law could be incompatible with respecting individual and states' rights, the other key features of the American conception of the rule of law. Ignoring law when creating executive actions undermines the rule of law by contributing to the development of a norm of not taking it seriously, regardless of the motivation for ignoring the law.

We should understand a President as upholding the rule of law when he seeks to faithfully execute the law, even if his actions occasionally violate the law. Conversely, if he puts in place policies without considering the law, he has undermined the Constitutional requirement of faithful law execution that lies at the heart of the Framers' achievement in constructing a rule of law. If he considers the law, but mostly ignores it when it limits his conduct, that also undermines the rule of law. And, of course, if he deliberately seeks to undermine the law, that harms the rule of law.

B. Trump's Executive Orders in the Context of His Other Actions and Statements

Several of Trump's executive orders ignore and flagrantly violate constitutional norms, including federalism norms, due process norms, equal protection, Congressional control of the purse, and obedience to treaties. Many others undermine the principle of legislative supremacy by systematically and very deliberately seeking to undermine the law's goals. On the other hand, orders challenging legislative supremacy typically purport to limit the attack by only permitting assaults "to the extent permitted by law."¹⁷⁰ Giving this caveat a somewhat charitable interpretation, these orders encourage actions obeying the law's letter while destroying its spirit. They demand faithless law execution, by establishing norms diametrically opposed to the law's principle goals but seek to avoid judicial reversal.¹⁷¹

These orders collectively challenge much of the constitutional order. The sheer scope of law attacked here suggests an assault on the rule of law, in spite of the caveats in some of the executive orders and my suggestions that some of the violations are clearer than others.

Since we cannot read Trump's mind, we cannot know whether he seeks to deliberately undermine the Constitution or has done so from extreme recklessness. But Trump's state of mind does not determine whether he has attacked the rule of

¹⁶⁹ See Eric Barendt, *Separation of Powers and Constitutional Government*, in SEPARATION OF POWERS, *supra* note 7, at 275, 282 (noting that the primary objective of separation of powers is the prevention of "arbitrary government, or tyranny" arising from "the concentration of power").

¹⁷⁰ See, e.g., *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1239-40 (9th Cir. 2018) (discussing the Sanctuary City Order's "to the extent consistent with law" limitation).

¹⁷¹ See *id.* (finding that the caveat does not save the Sanctuary Cities Order because it still threatens the withdrawal of "all federal grants" and reading it broadly would make judicial review meaningless).

law.¹⁷² A series of actions ignoring constitutional principles can create precedent undermining the rule of law whether or not the official taking the actions seeks to destroy the rule of law. On the other hand, evidence that the President wishes to undermine the rule of law certainly strengthens the case that his actions should be viewed as an attack.

We know that in a number of these cases Trump at least ignored constitutional principles in an extremely reckless way. Thus, the failure to consult fully with the Office of Legal Counsel shows that the first Travel Ban attacked the rule of law. Similarly, Trump ignored the law when he adopted Sanctuary Cities Order without consulting competent attorneys.¹⁷³ Even many of the broader orders that contain caveats suggesting awareness of legal limitations so directly contradict legal principles in their substance as to suggest a specific intent to undermine laws that Trump does not like.

Furthermore, a great deal of evidence beyond the executive orders themselves supports the hypothesis that he seeks to undermine the rule of law. President Trump has attacked democratic institutions vital to the rule of law.¹⁷⁴ He has famously attacked the judiciary, describing judges' rulings as purely political decisions and suggesting that a judge's ethnic background explains his rulings.¹⁷⁵ The rule of law depends in part, on the custom of obeying judges' rulings. We obey their rulings because we accept judges' legitimacy. Attacking their legitimacy undermines the rule of law.

Similarly, democracy and the rule of law depend upon informed debate about policy issues. Accordingly, the First Amendment protects freedom of speech, so that the press may freely criticize elected officials and bring facts to public attention that might embarrass those holding high office. President Trump has sought to undermine the news media by characterizing mainstream media reporting of facts as fake news.¹⁷⁶ This criticism has persuaded a large minority of the public that the mainstream media makes up facts.¹⁷⁷ By creating a narrative undermining the legitimacy of the press, his statements may weaken the press' ability to countervail abuse of political power and even create public support for

¹⁷² See LEVITSKY & ZIBLATT, *supra* note 2, at 75 (noting that many elected demagogues have destroyed democracies without "a blueprint for autocracy").

¹⁷³ See W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 826-829, 834 (2018) (citing the Sanctuary Cities Order as an example of legal error stemming from a lack of adequate review by executive branch legal experts).

¹⁷⁴ See LEVITSKY & ZIBLATT, *supra* note 2, at 75-76 (explaining that autocrats usually begin their assaults on Democracy with verbal attacks on opponents).

¹⁷⁵ See Kristine Phillips, *All the Times Trump Personally Attacked Judges—And Why His Tirades Are "Worse than Wrong"*, WASH. POST (Apr. 26, 2017), <http://wapo.st/2q72hM6>.

¹⁷⁶ See Steven Erlanger, *Globe's Autocrats Echo Trump's "Fake News" Cry*, N.Y. TIMES, Dec. 12, 2017, at A1 (stating that Trump uses the phrase "fake news" to "discredit mainstream American news media").

¹⁷⁷ See Peter Baker & Sydney Ember, *Trump Escalates His Criticism of the News Media, Fueling National Debate*, N.Y. TIMES, Dec. 11, 2017, at A21 (reporting a poll finding "that 46% of Americans believe the news media makes up stories about the President").

restrictions on freedom of speech.¹⁷⁸ President Trump has made statements suggesting that he intends to curtail press freedom.¹⁷⁹ The actions threatened include facilitating or bringing libel actions and withdrawing broadcast licenses of hostile news outlets.¹⁸⁰ Even the threat of such things can chill press freedom as the heart of our constitutional order.¹⁸¹ But Trump has done more than threaten actions undermining free speech, he has filed lawsuits and denied journalists access to his political campaign and to the White House in order to intimidate critics.¹⁸²

Steven Bannon, who served as the Trump's "Chief Strategist" early in the Trump Administration, has said that the Trump Administration intends to "deconstruct" the administrative state.¹⁸³ The administrative state exists because statutes approved by Congress, previous presidents, and the courts have created it. An intent to destroy the administrative state strongly suggests an assault on legislative supremacy, because so many statutes rely on administrative agencies to achieve public policies goals adopted in laws. While abolishing administrative agencies through legislation comports with legislative supremacy, seeking to destroy the administrative state without amending existing laws to accomplish the task undermines the rule of law. Hence, in the area of statutes, notwithstanding the qualifying language in many of the executive orders, we have very strong evidence that Trump seeks to undermine the rule of law.

Bannon also said that President Trump chose cabinet officers in order to deconstruct the administrative state.¹⁸⁴ And the backgrounds of most of his cabinet appointees suggest that many of them vehemently oppose the laws that they must

¹⁷⁸ See generally Yascha Mounk, *The Real Coup Plot is Trump's*, N.Y. TIMES, Dec. 21, 2017, at A31 (stating that calling honest reporting "fake news" while blatantly lying prepares "the ground for egregious violations of basic democratic norms").

¹⁷⁹ See, e.g., Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 INDIANA L. REV. 177, 191-92 (2018) (noting that Trump has threatened to sue journalists and called them "enemies of the people").

¹⁸⁰ See Adam Liptak, *From Provocative Tweet to Black-Letter Reality*, N.Y. TIMES, Mar. 30, 2017, at A13 (discussing Trump's promises to "open up" libel law to facilitate suits against the Washington Post and the New York Times); see also Chris Stevenson, *Donald Trump Suggests He Wants US Law to Limit Free Speech in Wake of Publication of Explosive Book*, INDEPENDENT (Jan. 6, 2018), <http://www.independent.co.uk/news/world/americas/us-politics/trump-free-speech-libel-law-michael-wolff-fire-fury-mental-state-latest-a8145741.html> (quoting Trump as saying that with stronger libel laws people would not be able to "say whatever comes into" their heads).

¹⁸¹ See Baker & Ember, *supra* note 177 (discussing Trump's threat to revoke a broadcast license for NBC and claims that he has sought to force AT&T to divest Turner Broadcasting or DirectTV as a condition of approval of a merger with Time Warner).

¹⁸² See Michael M. Grynbaum, *Trump Again Vows Review of "Sham" U.S. Libel Laws*, N.Y. TIMES, Jan. 11, 2018, at B3 (discussing Trump's filing of two libel suits and his threat of a third against researchers and media outlets who oppose him); Michael M. Grynbaum, *White House Bars Presidential Reporter from Presidential Event*, N.Y. TIMES, July 25, 2018, at B4; Siegel, *supra* note 179, at 191 (noting that Trump has denied journalists he disagrees with access to his campaign).

¹⁸³ See Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for "Deconstruction of the Administrative State"*, WASH. POST (Feb. 23, 2017), <http://wapo.st/2IL8zRW>.

¹⁸⁴ See *id.*

administer.¹⁸⁵ Trump's cabinet appointees provide further strong evidence of an intent to attack the rule of law.

Furthermore, Trump has carried out a number of other actions that undermine administrative agencies as effective and competent institutions. In order to faithfully and competently execute the law, administrative agencies need a cadre of expert civil servants committed to the values embedded in the statutes they administer and able to competently evaluate proposals' congruence with statutory goals.¹⁸⁶ These civil servants must have the ability to openly and honestly assess facts in order to conform to due process norms for rational decision-making. Furthermore, agencies' legitimacy as institutions, which is important to the rule of law, depends in part on public understanding of agency decisions. Accordingly, administrative agencies must have the ability to share information with the public. President Trump has taken a number of actions that chill free speech and open discussion of facts within administrative agencies, which have greatly weakened morale and undermined the agencies as democratic institutions capable of faithful law execution. These actions include a hiring freeze, firing or encouraging the resignation of competent career civil servants, and censorship of government information and discussion.¹⁸⁷ Undermining professionalism in administrative agencies encourages substituting a rule of autocratic presidential personality for an honest, deliberative, and competent rule of law.¹⁸⁸

This broader context should color one's assessment of executive orders that seem somewhat benign on their face. For example, during his first thirty days in office, Donald Trump published executive orders calling for review of the

¹⁸⁵ See, e.g., Kevin Hechtkopf, *Rick Perry Fails to Remember What Agency He'd Get Rid of in GOP Debate*, CBS NEWS (Nov. 10, 2011), <http://www.cbsnews.com/news/rick-perry-fails-to-remember-what-agency-hed-get-rid-of-in-gop-debate/> (showing that Energy Secretary Rick Perry had proposed to abolish the agency he now heads); Erin McCann, *Coretta Scott King's 1986 Statement to the Senate About Jeff Sessions*, N.Y. TIMES (Feb. 8, 2017), <http://nyti.ms/2k3v1kK> (explaining that Jeff Sessions had sought to undermine voting rights protected by federal statutes); Dominique Mosbergen, *Scott Pruitt Has Sued the Environmental Protection Agency 13 Times. Now He Wants To Lead It*, HUFFINGTON POST (Jan. 17, 2017), http://www.huffingtonpost.com/entry/scott-pruitt-environmental-protection-agency_us_5878ad15e4b0b3c7a7b0c29c (explaining that Scott Pruitt has supported abolishing the EPA and is regarded as hostile to clean air and safe drinking water, which are major objectives of environmental statutes); Meg Jacobs, *Trump is Appointing People Who Hate the Agencies They Will Lead*, CNN (Dec. 12, 2016), <http://cnn.it/2h9OKRY> (discussing a pattern of Trump appointing cabinet secretaries hostile to their agency's missions, including Tom Price, a foe of the ACA to be secretary of the Office of Health and Human Services).

¹⁸⁶ See Metzger, *supra* note 67, at 7 (characterizing an "expert civil service" as "essential for the accountable, constrained, and effective exercise of executive power").

¹⁸⁷ See Presidential Memorandum on Hiring Freeze, 82 Fed. Reg. 8493 (Jan. 25, 2017); Lisa Friedman et al., *EPA Officials, Disheartened by Agency's Direction, Leave in Droves*, N.Y. TIMES, Dec. 22, 2017, at A16 (stating that since Trump took office more than 700 people have left the EPA, including more than 200 scientists, and that staff believes that the administration is "purposefully draining the agency of expertise" and damaging morale).

¹⁸⁸ Cf. Metzger, *supra* note 67, at 78-79 (arguing that internal bureaucratic norms "foster important rule-of-law values" including the norm against arbitrary decisions).

fiduciary rule and financial regulation more broadly.¹⁸⁹ On their face, these orders articulate seemingly benign principles to govern review of financial regulation.¹⁹⁰ But consistent with Bannon's pledge to destroy the administrative state, Trump has promised to "do a big number on Dodd-Frank."¹⁹¹ Promising to undermine a statute that the Constitution requires a President to properly administer attacks the rule of law. And a fairly neutral order coming from a President who says he intends to undermine the law may trigger actions undermining the law. Even without such specific evidence, orders seeking review of laws that the President obviously does not like, even in fairly neutral terms, very likely undermine the rule of law when top-level appointees oppose the law they are administering, Trump undermines the civil service, and Trump has so clearly signaled his opposition to similar laws in more specific orders.

Collectively, Trump's orders and other actions constitute an attack on a rule of law. They convey a message that law does not matter and should not matter. Instead, they send a message that the President unilaterally controls policy, a notion thoroughly at odds with the rule of law. They strongly suggest that legislative supremacy, constitutional rights, federalism, factual deliberation, freedom of the press, and judicial review constitute illegitimate nuisances interfering with the Presidential right to realize his sacred direct covenant with the American people. This notion of a direct bond between the head of state and a people unmediated by law has a rich tradition in world history. It is the tradition of monarchies and dictatorships unrestrained by the rule of law.

C. President Obama's Executive Orders: Do They All Do That?

A common response to suggestions that the Trump administration has unleashed an assault on the rule of law involves some variant of the argument that everybody does this. Prior presidents' misconduct would not excuse Trump's misconduct, but it could support characterizing his conduct as normal, rather than aberrational.

A thorough evaluation of the question of whether Trump's executive orders constitute a *unique* assault on the rule of law would require a comprehensive evaluation of all presidents' executive orders.¹⁹² This article spares the reader the tedium of such an evaluation and focuses on a more manageable and politically salient issue: did Barack Obama do the same thing? Since Trump's defenders

¹⁸⁹ Exec. Order No. 13772, 82 Fed. Reg. 9967 (Feb. 8, 2017) (requiring review of financial regulation generally); Executive Memorandum on the Fiduciary Duty Rule, 82 Fed. Reg. 9657 (Feb. 7, 2017).

¹⁹⁰ See John Crawford, *Lesson Unlearned?: Regulatory Reform and Financial Stability in the Trump Administration*, 117 COLUM. L. REV. ONLINE 127, 127 n.5 (2017) (characterizing the principles announced in executive order 13772 to govern review of financial regulation as "unobjectionable").

¹⁹¹ *Id.* at 127 (suggesting that executive orders allow a president to substitute his "political aims" for legal duties).

¹⁹² Cf. LEVITSKY & ZIBLATT, *supra* note 2, at 138 (noting that President Roosevelt issued 3,000 executive orders but arguing that we did not slide into autocracy because of bipartisan resistance to overreaching).

usually address attacks on Trump's fidelity to the rule of law by suggesting that Obama was worse, this seems like a fair (albeit partial) way of addressing the normalization argument.¹⁹³

To preserve parallelism, the analysis of President Obama's executive orders focuses initially on the first thirty days of his first term. But to more thoroughly address concerns of Trump's supporters (and Obama's critics) this analysis also addresses actions held illegal by a court, even though enacted after the first thirty days.

The argument that President Obama relied on executive orders proves correct.¹⁹⁴ Indeed, President Obama issued more executive orders (twenty-seven, counting memoranda) than President Trump did in his first thirty days of office (twenty-four, counted the same way). But President Obama's orders during the first thirty days did not assault the rule of law. They generally underwent appropriate vetting by the Office of Legal Counsel and administrative agencies.¹⁹⁵ None of them provoked law suits. Far from attacking the rule of law, many of these orders either correct illegal practices of President Obama's predecessor or make discretionary decisions clearly within the President's powers.

The most significant orders involve counterterrorism policies. One required a review of the status of Guantanamo detainees, a review needed to protect inmates' rights under *Hamdan v. Rumsfeld*.¹⁹⁶ President Obama also issued an executive order forbidding torture, thereby bringing United States practices into line with pertinent domestic and international law.¹⁹⁷ Finally, Obama ordered a review of detention policy options more broadly.¹⁹⁸ These counterterrorism orders reinforce, rather than undermine pertinent legal norms. They also generally lessen, rather than enhance, presidential power.

¹⁹³ Cf. ANDREW C. MCCARTHY, FAITHLESS EXECUTION: BUILDING THE POLITICAL CASE FOR OBAMA'S IMPEACHMENT 102 (2014) (criticizing executive orders as part of a case that Obama has attacked the rule of law).

¹⁹⁴ See generally Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 698 (2016) (stating that President Obama controlled the executive branch more tightly than his predecessors).

¹⁹⁵ Isaac Arnsdorf et al., *Trump's Flashy Executive Actions Could Run Aground*, POLITICO (Jan. 25, 2017), <http://www.politico.com/story/2017/01/trumps-flashy-executive-actions-could-run-aground-234200> (noting that Obama's early executive orders went through weeks of vetting with agencies, lawmakers, and sometimes private sector attorneys before adoption); Ceci Connolly & R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions*, WASH. POST, Nov. 9, 2008, at A16 (noting that Obama's team, consisting mostly of lawyers, reviewed proposed policy changes and vetted them with many concerned experts and policymakers before Obama even took office); Lisa Lerer & Ben Smith, *44 to Reverse 43's Executive Orders*, POLITICO (Jan. 13, 2009), <http://www.politico.com/story/2009/01/44-to-reverse-43s-executive-orders-017365> (discussing Obama's legal team's review of how to close Guantanamo before executive orders on Guantanamo issued).

¹⁹⁶ 584 U.S. 557 (2006); Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009) (requiring closure of the Guantanamo Bay detention facilities and a review of the status of individuals detained there).

¹⁹⁷ Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

¹⁹⁸ Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 27, 2009).

Another significant group of orders involved federal procurement. President Obama issued a series of executive orders aimed at encouraging federal contractors to treat employees fairly.¹⁹⁹ Although federal procurement orders have frequently caused legal problems and provoked litigation,²⁰⁰ the orders promulgated in the first thirty days did not.

Midway through President Obama's second term, however, a court invalidated an executive order requiring contractors earning more than \$500,000 from the federal government to disclose labor law violations.²⁰¹ The challenged order also instructed federal agencies awarding contracts to review these disclosures and evaluate whether they reveal a lack of integrity and business ethics that should figure in federal contracting decisions.²⁰² A federal district court judge sitting the Eastern District of Texas issued a preliminary injunction against enforcing this order primarily on the ground that it illegally supplemented specific contractual bars found in applicable labor law.²⁰³ He also found a likelihood of success on two constitutional claims, one that the executive order violated free speech rights by compelling speech and a second that it violated due process rights by requiring reporting of "non-final agency allegations" of labor law violations.²⁰⁴ This constitutes the only instance I have found of a court finding an Obama administration executive order illegal.

A second legal controversy, however, merits consideration as it figures prominently in they-all-do-this claims—the Obama administration's program for deferred action for parents of Americans and lawfully permanent residents ("DAPA").²⁰⁵ This program authorizes certain benefits, including deferral of

¹⁹⁹ Exec. Order No. 13494, 74 Fed. Reg. 6101 (Feb. 4, 2009) (forbidding contractors from billing the government for monies expended on influencing employees' collective bargaining activities); Exec. Order No. 13495, 74 Fed. Reg. 6103 (Feb. 4, 2009) (providing rights for qualified workers to continue working on projects when contracts are renewed); Exec. Order No. 13496, 74 Fed. Reg. 6107 (Feb. 4, 2009) (requiring federal contractors to post notices informing workers of their collective bargaining rights); *see also* Exec. Order No. 13502, 74 Fed. Reg. 6985 (Feb. 11, 2009) (encouraging use of project labor agreements for federal construction projects); UAW-Labor Emp't & Training Corp. v. Chao, 325 F.3d 360 (D.C. Cir. 2003) (upholding an executive order very similar to that of Executive Order 13496).

²⁰⁰ *See, e.g.,* Chao, 325 F.3d at 360 (upholding an executive order requiring federal contractors to post notices advising employees of their rights not to participate in a union); Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 166-67 (4th Cir. 1981) (disapproving application of an executive order demanding affirmative action from contractors to underwriters of worker's compensation on federal projects); Am. Fed. of Labor v. Kahn, 618 F.2d 784, 796 (D.C. Cir. 1979) (en banc) (upholding an order requiring federal contractors to comply with wage and price guidelines); Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 736-38 (D.Md. 2009) (upholding an executive order requiring federal contractors to verify the immigration status of their employees).

²⁰¹ 70 Fed. Reg. 45309 (Aug. 5, 2014).

²⁰² *See id.*

²⁰³ Assoc'd Builders & Contractors of Se. Tex. v. Rung, 2016 WL 8188655, *6-8 (E.D. Tex. 2016).

²⁰⁴ *Id.* at 8-12; *cf.* Cecilia R. Taylor, *The Unsettled State of Corporate Disclosure Law after the Conflict Mineral Rule Case*, 21 LEWIS & CLARK L. REV. 427, 449-52 (2017) (suggesting that there was substantial uncertainty about the First Amendment issue). The district court judge found likelihood of success on other claims as well. *See id.* at 12-14.

²⁰⁵ *Cf.* MCCARTHY, *supra* note 193, at 102 (suggesting that the DAPA program become part of an

deportation, for illegal immigrants who are parents of American citizens and lawful permanent residents.²⁰⁶ According to the district court judge who reviewed the program, the President did not directly establish this program; rather, the Secretary of the Department of Homeland Security established the program.²⁰⁷ Be that as it may, the Fifth Circuit concluded that DAPA likely violated the Immigration and Nationalization Act (“INA”).²⁰⁸

If we count DAPA as an executive order (even though it is not one),²⁰⁹ these two illegal executive orders fall well short of a presidential assault upon the rule of law. Two illegal actions in eight years amounts to a good record of legal compliance, especially considering that President Obama did issue a lot of executive orders, as his critics allege. Furthermore, neither of these actions constitute the kind of defiance of fundamental constitutional norms and entire bodies of statutory law that we repeatedly saw in just thirty days of Trump executive orders. Indeed, a fair reading of the complexity of the laws governing the issues raised in Obama’s actions suggests that these actions almost surely followed a good faith effort to pursue the administration’s policy objectives within a rule of law framework.²¹⁰

This is most clearly and obviously true of the most controversial action, the DAPA program. Every court that looked at the program thought it involved tough legal issues. The federal district court judge who enjoined the program characterized the issues it presented as “complex” and resolved the DAPA case on procedural grounds, rather than tackle the merits.²¹¹ The Fifth Circuit ruling that reached the substantive merits (and affirmed the district court injunction)

article of impeachment against Obama).

²⁰⁶ See *Texas v. United States*, 86 F. Supp. 3d 591, 611-13 (S.D. Tex. 2015) (describing the memoranda creating the DAPA program).

²⁰⁷ See *id.* at 607 (noting that the “President in his official capacity has not” created DAPA and that he has issued “no executive orders or other presidential proclamation”).

²⁰⁸ See *Texas v. United States*, 809 F.3d 134, 178-86 (5th Cir. 2015) (explaining why DAPA violates the INA).

²⁰⁹ See Peter Shane, *Mashaw and Berke on Presidentialism Versus Pluralism: The Missing Epilogue to Madison’s Nightmare*, YALE J. REG. NOTICE & COMMENT (July 30, 2018), <http://yalejreg.com/nc/mashaw-and-berke-on-presidentialism-versus-pluralism-the-missing-epilogue-to-madisons-nightmare-by-peter-m-shane> (noting some journalists’ “confusion” as to whether Obama created DAPA and DACA through executive orders).

²¹⁰ See Mashaw & Berke, *supra* note 65, at 567-68 (characterizing DACA as reflecting “serious legal reasoning and process”).

²¹¹ See *Texas v. United States*, 86 F. Supp. 3d 591, 605-06, 677 (S.D. Tex. 2015) (noting that the case involves “complex issues related to immigration” and declining to reach the substantive claim).

generated a dissent.²¹² And the Supreme Court split on its validity, affirming the Fifth Circuit by an equally divided Court.²¹³

The executive order seeking information on federal labor law violations posed similarly difficult legal issues. As a general matter, the order aimed to improve compliance with well-established labor law requirements. The question of whether a President may use procurement policies to advance labor law policies, however, has divided courts.²¹⁴ The district court's constitutional rulings pushed the envelope in ways that a conscientious administration would have difficulty anticipating. The court's holding that requiring contractors to report their labor law offenses violates corporate free speech rights calls into question a long tradition of requiring corporate reporting and stands in considerable tension with relevant Supreme Court precedent.²¹⁵ The holding that this executive order violates procedural due process seems premature, because the executive order and accompanying statutes suggest that an agency might well offer some process before refusing to do business with a corporation sullied by its reported labor law violations.²¹⁶

²¹² See *Texas v. United States*, 809 F.3d 134, 214-19 (5th Cir. 2015) (King, J., dissenting) (explaining why he believes that DACA does not violate the INA); *Univ. of Cal. v. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037-42 (N.D. Cal. 2018) (affirming the legality of DACA partly based on the Supreme Court's approval of discretionary relief from removal while distinguishing the DAPA ruling); *Betalia Vidal v. Nielsen*, 279 F. Supp. 3d 401, 437-38 (E.D.N.Y. 2018) (holding the Attorney General's finding that DACA is unlawful "legally erroneous"); *Nat'l Ass'n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018) (vacating the DACA rescission because the agency's judgment about DACA legality was "virtually unexplained"); cf. *Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018) (finding that DACA rescission was likely lawful in light of the DAPA ruling).

²¹³ See *United States v. Texas*, 136 S. Ct. 2271 (2016); see also *United States v. Texas*, 136 S. Ct. 906 (2016) (granting certiorari and requiring briefing only on the issue of whether the memorandum violated the Take Care Clause).

²¹⁴ *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (upholding an executive order using procurement to advance anti-union policies); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (en banc) (striking down an executive order advancing pro-union policies).

²¹⁵ See *Glicksman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (upholding a requirement that fruit growers pay a fee supporting advertising of their products as part of a regulatory scheme regulating agricultural prices); *Univ. of Penn. v. E.E.O.C.*, 493 U.S. 182, 185-86, 199-200 (1990) (upholding requirement to release tenure reviews in spite of claim that the disclosure infringed on academic freedom); *Meese v. Keene*, 481 U.S. 465, 470-71, 480-81 (1987) (upholding a requirement that disseminators of foreign propaganda provide a notice that they act as a foreign agent for a named country because it adds information to public discourse); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (characterizing an advertiser's interest in "not providing . . . particular . . . information" as minimal); *Taylor*, *supra* note 204, at 435-36 (noting the long tradition of government demanding corporate disclosure of information); but see *United States v. United Foods, Inc.*, 533 U.S. 405, 408-17 (2001) (finding a requirement that mushroom growers not subject to price regulation pay a fee to support advertising of mushroom products offends the First Amendment); *Riley v. Nat'l Fed. for the Blind of N. Carolina*, 487 U.S. 781, 795-801 (1988) (striking down a requirement that fundraisers for charities disclose the percentage of collected fund going to charities).

²¹⁶ The district court assumed that the government would disqualify contractors without giving them a hearing based on information contained in their reports. See *Assoc'd Builders & Contractors of SE*

I do not mean to argue against the court's statutory rulings in these cases. But these cases pose sufficiently close issues to make it hard to characterize the actions at issue as deliberate challenges to any law, let alone an assault on the rule of law. Rather, these executive orders appear to represent legal errors of the kind that presidents commonly make.

So, an examination of President Obama's executive orders does not support the notion that Obama mounted an assault on the rule of law similar to that evident in the Trump Administration's first thirty days in office.²¹⁷ In Obama's

Tex. v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *11 (E.D. Tex. Oct. 24, 2016) (stating that the order directs contracting officers to consider reported information as "potentially disqualifying" even if it has never been contested at a hearing). It is far from clear that this is a correct reading of the executive order. First of all, the court claims that existing statutes create hearing rights and there is nothing in the executive order that abrogates those rights. *See id.* Furthermore, the order itself includes requirements that may generate hearings. The order requires "contracting officers" to consider the reported information. *See* Exec. Order No. 13673, 79 Fed. Reg. 45309, 45310 § 2(iii) (July 31, 2014). But it requires that this consideration be consistent with final rules issued by the Federal Acquisition Regulatory Council under the order, which might require a hearing. *See id.* The order also requires contracting officers to provide an opportunity for those reporting damning information to show that they have corrected violations and improved compliance, which might involve a hearing. *Id.* at § 2(ii). Another provision requires various officials to "be available, as appropriate, for consultation with the contractor" regarding evaluation of submitted information, which seems to imply a hearing. *Id.* at § 2(vi). There is also some doubt about whether due process requires a hearing. *See* Old Dominion Dairy Prods., Inc. v. Sec'y Def., 631 F.2d 953, 968 (D.C. Cir. 1980) (stating that no formal hearing is required). Although the court focused on the possibility of an applicant losing a contract based on an unproven accusation of misconduct, in many cases the applicant would have received a hearing before the reported misconduct was found. So, the court's decision to find a lack of due process seems premature in light of the many possibilities for adequate process prior to the reporting or afterwards.

²¹⁷ Critics who accuse Obama of undermining the rule of law rhetorically focus on executive orders, but the facts they cite stem from just about everything else. *See, e.g.,* MCCARTHY, *supra* note 193. Accordingly, this article only claims that Trump's assault on the rule of law *through executive orders* appears extraordinary. No article can completely refute the attacks on Obama, because his critics mount blunderbuss attacks that convert every political disagreement into a rule of law claim. *See, e.g., id.* at 132-33 (suggesting that various political statements by Obama should be bases for impeachment). Some of this criticism is so misleading as to cast doubt on the whole litany Obama's critics employ. For example, Andrew McCarthy accuses the Obama Administration of unilateral amendment of the Clean Air Act ("CAA"), because EPA applied the CAA to greenhouse gas emissions. *See id.* at 102. But the Supreme Court held that the CAA does apply to greenhouse gas emissions. *See* Massachusetts v. EPA, 549 U.S. 497, 528 (2007); *see also* Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2436-37, 2443 (2014) (Scalia, J.) (rejecting the literal reading of the CAA's provisions on the scope of greenhouse gas regulation that McCarthy accuses Obama of unlawfully avoiding). Similarly, McCarthy suggests that the Obama administration frivolously attacked an Arizona immigration statute, since preemption doctrine does not prohibit Arizona from "strengthening enforcement provisions." MCCARTHY, *supra* note 193, at 77-78. McCarthy says that the Supreme Court "upheld the disputed provision of Arizona's law." *Id.* at 78. The Court, however, struck down three disputed provisions of the Arizona statute strengthening immigration enforcement while declining to enjoin the one provision McCarthy singles out. *See* Arizona v. United States, 567 U.S. 387, 400-13 (2012) (striking down requirement to carry an alien registration card, a prohibition on aliens applying for work, and an authority for the state police to arrest aliens while declining to enjoin a requirement that Arizona police check with ICE about detainees' immigration status). And the Court left the door open to as-applied challenges to the provision it did not enjoin. *See id.* at 413-

first thirty days, every order he issued conformed to the law, and many of them aimed to correct legal violations. In the remainder of his administration, he issued one executive order that may have seemed legal but turned out not to be. And his administration took one additional action usually attributed to Obama that likewise posed difficult legal issues.²¹⁸ Donald Trump's executive orders violated the law much more egregiously and often in thirty days than Obama's did in eight years. And his orders attacked numerous core principles of our constitutional order.

IV. CONCLUSION

President Trump carried out an assault on the rule of law in the first thirty days of his administration. His executive orders attack an astonishing variety of fundamental constitutional norms. Considered in the context of Trump's other actions and statements, the orders can best be understood as an effort to establish unilateral presidential control of policy as a substitute for the rule of law. Recognizing this assault on the rule of law for what it is raises a host of issues for legal scholars, Congress, and the courts. These issues include both obvious questions, such as whether Congress should impeach President Trump, and more subtle ones, such as whether Trump's disregard for the rule of law should change the nature of judicial review.

This early assault invites ongoing assessment about whether the assault has continued.²¹⁹ In making this sort of assessment, future scholarship should follow this article's lead in considering a variety of actions together, rather than only treating each action as an individual case triggering doctrinal analysis. Doctrinal analysis of individual cases works very well when the President may have made a mistake. It proves radically incomplete when the President poses a potential challenge to the entire constitutional order.

15 (leaving the door open to a challenge to the immigration status check if it produced unconstitutional detentions); *see also* Melendres v. Arapaio, 989 F. Supp. 3d 822, 891-907 (D. Ariz. 2013), *aff'd* 784 F.3d 1254 (9th Cir. 2015) (invalidating detention under the Arizona program as contrary to the Fourth and Fourteenth Amendments).

²¹⁸ *See* Mashaw & Berke, *supra* note 65, at 564-55 (noting that Obama announced the DAPA program personally).

²¹⁹ *See, e.g.*, OIG REPORT, *supra* note 69, at 6-7 (finding that the CBP effectively circumvented court orders enjoining the first Travel Ban in some respects); *cf.* Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC MONTHLY (Oct. 2017), <http://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> (arguing that Trump continues to attack the rule of law but that "checks and balances" have constrained his law breaking).