

IMMIGRATION IN THE ERA OF TRUMP: JARRING SOCIAL, POLITICAL, AND LEGAL REALITIES

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I. INTRODUCTION

In 2020, immigration is proving to be an election year issue. The Trump re-election campaign is strategically leveraging it as a political narrative to win votes while further polarizing an already fractured nation along ideological and partisan lines. Indeed, a review of related public opinion surveys may prove illuminating on this score.

According to recent data from the Public Religion Research Institute (“PRRI”), immigration ranks among the Republican party’s top three priorities.¹ A closer examination reveals a higher propensity for xenophobic views, particularly in comparison to colleagues across the political aisle. For instance, a strong majority of Republicans—a whopping 60%—perceive immigrants as increasing crime in local communities, compared to only 22% of Democrats who hold such beliefs.² Additionally, an astounding 63% of Republicans believe that immigrants are invading our country and replacing our cultural and ethnic background (37% “mostly agree” with this sentiment and 26% “completely agree”).³ In contrast, 79% of Democrats reject such anti-immigrant bias.⁴ Similarly, on the topic of assimilation, 66% of Republicans believe that recent immigrants do not make an effort to learn English while only 27% of Democrats share this viewpoint.⁵

From Trump declaring a public emergency to construct “the wall” at our southern border⁶ to escalating acts of violence against members of marginalized

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¹ *Fractured Nation: Widening Partisan Polarization and Key Issues in 2020 Presidential Elections*, PUB. RELIGION RESEARCH INST. (Oct. 20, 2019), <https://www.prii.org/research/fractured-nation-widening-partisan-polarization-and-key-issues-in-2020-presidential-elections/> [<https://perma.cc/TD8D-UXVS>] [hereinafter *Fractured Nation*].

² *Id.* Among Independents, 38% also believe that immigrants increase crime in communities. *Id.*

³ *See id.* (additional data sets on file with author).

⁴ *See id.* (additional data sets on file with author).

⁵ *See id.* (additional data sets on file with author).

⁶ Jessica Taylor & Brian Naylor, *As Trump Declares National Emergency to Fund Border Wall, Democrats Promise a Fight*, NPR (Feb. 15, 2019), <https://www.npr.org/2019/02/15/695012728/trump-expected-to-declare-national-emergency-to-help-fund-southern-border-wall> [<https://perma.cc/MHX9-DK7U>].

communities,⁷ the above-referenced stereotypes and tropes about real or perceived foreigners have disrupted and damaged innocent lives. Those impacted have been afforded little relief over the course of the last three years with Republicans controlling at least two of the three branches of government, testing the fabric of our liberal democracy. Indeed, this interdisciplinary essay argues that this xenophobia has translated into jarring social, political, and legal realities for immigrant populations and socially oppressed groups in the era of Trump. It has also adversely impacted the nation as a whole. To that end, the second section examines the contemporary social, political and racial climate confronting socially oppressed groups including members of the Muslim, Black, Latinx, and Jewish communities. In doing so, it seeks to illuminate the manner in which ideologies of oppression—anti-Black racism, Islamophobia, anti-Semitism, xenophobia—often overlap and intersect culminating in violence against minorities. The third section examines how the current climate has impacted the law. Specifically, it identifies two related categories: (a) laws that the Trump Administration has passed that are grounded in xenophobia but dressed in pre-textual garb; and (b) those proposed as a corrective, response and/or act of resistance to the first category. The essay ends with some conclusory observations.

II. THE CONTEMPORARY SOCIAL, POLITICAL, AND RACIAL CLIMATE

Since he first launched his presidential campaign in 2015, Donald J. Trump's political rhetoric has been racially charged. Upon announcing his run, for instance, then-candidate Trump described Mexican immigrants as "rapists" bringing drugs and crime into the U.S.⁸ He claimed, "The U.S. has become a dumping ground for everyone else's problems. . . . When Mexico sends its people, they're not sending their best. They're sending us not the right people."⁹ During the speech, Trump also announced his plans for a border wall, declaring that Mexico would pay for it. Shortly after those remarks, two brothers attacked a homeless Latino man in

⁷ E.g., Adeel Hassan, *Hate-Crime Violence Hits 16-Year High, F.B.I. Reports*, N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/12/us/hate-crimes-fbi-report.html> [<https://perma.cc/R63P-ZG5L>]; see also, Dani Anguiano, *'It's Worse Than Ever': How Latinos Are Changing Their Lives in Trump's America*, GUARDIAN (Oct. 7, 2019), <https://www.theguardian.com/us-news/2019/oct/06/latinos-trump-hate-crimes-el-paso> [<https://perma.cc/6RZG-FD8C>]; Peter Beinart, *How Trumpian Nativism Leads to Anti-Semitism*, THE ATLANTIC (Nov. 2, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/anti-semitism-inherent-trumps-nativism/574672/> [<https://perma.cc/4WDB-SZP4>]; Press Release, NAACP, NAACP Sees Continued Rise in Hate Crimes, Legacy of Trump's Racism (June 29, 2018), <https://www.naacp.org/latest/naacp-sees-continued-rise-hate-crimes-legacy-trumps-racism/> [<https://perma.cc/7LUX-QMY5>] [hereinafter NAACP Press Release]; *U.S. Anti-Muslim Hate Crimes Rose 15 Percent in 2017: Advocacy Group*, REUTERS (Apr. 23, 2018), <https://www.reuters.com/article/us-usa-islam-hatecrime/u-s-anti-muslim-hate-crimes-rose-15-percent-in-2017-advocacy-group-idUSKBN1HU240> [<https://perma.cc/29SG-78ST>].

⁸ *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), <https://time.com/3923128/donald-trump-announcement-speech/> [<https://perma.cc/A9L5-RS7B>].

⁹ *Id.*

Boston.¹⁰ One of the attackers stated that he was inspired by Trump's immigration rhetoric. Scholars have long "observed how political discourse and political events can play an important role in the frequency of bias-based incidents."¹¹ In fact, this phenomenon has a name today: The Trump Effect.¹² Indeed, this section examines the contemporary social, political and racial climate confronting socially oppressed groups including members of the Muslim, Black, Latinx, and Jewish communities.

A. Muslim Americans

Muslim Americans are well aware of the Trump Effect. According to academic research, during the 2016 U.S. presidential elections when political invective cast them as terrorists, religious extremists, and undesirable refugees, Muslim Americans were three to five times more likely to be victims of threats or acts of hate-motivated violence.¹³

The Trump campaign was particularly Islamophobic. During a 2015 campaign rally, for instance, as a supporter claimed, "We have a problem in this country. It's called Muslims."¹⁴ Trump nodded along saying, "Right," and "We need this question."¹⁵ The supporter continued, "When can we get rid of them [Muslims]?" Rather than offering a corrective, Trump responded, "We're going to be looking at a lot of different things."¹⁶ In addition to calling for warrantless

¹⁰ Russell Berman, *A Trump-Inspired Hate Crime in Boston*, ATLANTIC (Aug. 20, 2015), <https://www.theatlantic.com/politics/archive/2015/08/a-trump-inspired-hate-crime-in-boston/401906/> [<https://perma.cc/HVS7-H2CK>].

¹¹ Griffin Edwards & Stephen Rushin, *The Effect of President Trump's Election on Hate Crimes* 5 (Jan. 14, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652 [<https://perma.cc/UFN4-QFF2>] (citing to 1999 study linking rise in disability-motivated hate crimes to ableist statements by government officials).

¹² See Rosemary K.M. Sword & Philip Zimbardo, *The Trump Effect: An Update*, PSYCHOL. TODAY (Jan. 30, 2018), <https://www.psychologytoday.com/us/blog/the-time-cure/201801/the-trump-effect-update> [<https://perma.cc/GL42-5LR6>] (explaining that the phrase originally referred to school bullying caused by Trump's rhetoric but expanded to include religious and racial bullying, misogyny, sexual assault, "and other socially unacceptable behaviors").

¹³ Engy Abdelkader, *Clinton, Trump, and Anti-Muslim Violence*, RACE & LAW PROF BLOG (June 29, 2019), <https://lawprofessors.typepad.com/racelawprof/2016/06/clinton-trump-and-anti-muslim-violence-guest-blog-by-engy-abdelkader.html> [<https://perma.cc/5QR9-C22V>]; see also Engy Abdelkader, *When Islamophobia Turns Violent: The 2016 U.S. Presidential Elections*, BRIDGE INITIATIVE 33–38 (May 2, 2016), <https://bridge.georgetown.edu/wp-content/uploads/2018/11/When-Islamophobia-Turns-Violent.pdf> [<https://perma.cc/DN8V-NZ3K>] (describing the increase in violence against Muslims Americans during the Trump campaign); ANTI-DEFAMATION LEAGUE CENTER ON EXTREMISM, MAINSTREAMING HATE: THE ANTI-IMMIGRANT MOVEMENT IN THE U.S. 25–26 (2018) (reporting that anti-Muslim hate crimes in the U.S. climbed from 154 in 2014 to 257 in 2015, to 307 in 2016, then lowered again).

¹⁴ Theodore Schleifer, *Trump Doesn't Challenge Anti-Muslim Questioner at Event*, CNN (Sept. 18, 2015), <https://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/index.html> [<https://perma.cc/SK84-BRAX>].

¹⁵ *Id.*

¹⁶ *Id.*

surveillance of mosques, a Muslim registry, and the Muslim ban, Trump also falsely claimed that “Islam hates us.”¹⁷

Following his ascension to the Oval Office, President Trump signed executive orders banning immigrants from seven Muslim-majority countries.¹⁸ In doing so, he acted on his campaign promise calling for a “total and complete shutdown” of Muslims entering the U.S.¹⁹ As he signed the law, he insisted that he was keeping “radical Islamic terrorists” out,²⁰ even though no one from the enumerated countries ever killed anyone in terrorist attacks here.²¹ Such policies have damaged the United States’ reputation abroad²² while creating fertile soil for anti-Muslim violence at home.²³

Indeed, Muslim American advocacy groups claim that anti-Muslim hate crimes surged immediately following the Muslim Ban’s implementation.²⁴ What is more, according to a 2018 report from South Asian Americans Leading Together (SAALT), one in five perpetrators of hate violence incidents against Muslims, Arabs and South Asians have cited President Trump, a Trump policy, or a Trump campaign slogan.²⁵ For instance, in an attack against a Muslim American woman donning a

¹⁷ Jenna Johnson & Abigail Hauslohner, ‘*I Think Islam Hates Us*’: A Timeline of Trump’s Comments About Islam and Muslims, WASH. POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/> [https://perma.cc/2EE9-8MTB].

¹⁸ Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (2017); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (2017); *Timeline of the Muslim Ban*, ACLU OF WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [https://perma.cc/QD8H-YB92].

¹⁹ See Jessica Taylor, *Trump Calls For ‘Total and Complete Shutdown of Muslims Entering’ U.S.*, NPR (Dec. 7, 2015), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s> [https://perma.cc/PS34-H9JB].

²⁰ Dan Merica, *Trump Signs Executive Order to Keep out ‘Radical Islamic Terrorists’*, CNN (Jan. 30, 2017), <https://www.cnn.com/2017/01/27/politics/trump-plans-to-sign-executive-action-on-refugees-extreme-vetting/index.html> [https://perma.cc/H6K3-BWX3].

²¹ Alex Nowrasteh, *Little National Security Benefit to Trump’s Executive Order on Immigration*, CATO INST. (Jan. 2, 2017), <https://www.cato.org/blog/little-national-security-benefit-trumps-executive-order-immigration> [https://perma.cc/24DX-KGAN].

²² Azadeh Ansari, Nic Robertson & Angela Dewan, *World Leaders React to Trump’s Travel Ban*, CNN (Jan. 30, 2017), <https://www.cnn.com/2017/01/30/politics/trump-travel-ban-world-reaction/index.html> [https://perma.cc/VY7W-W9VF]; Richard Wilke, Bruce Stokes, Jacob Poushter & Janell Fetterolf, *U.S. Image Suffers as Publics Around World Question Trump’s Leadership*, PEW RESEARCH CTR. (June 26, 2017), <https://www.pewresearch.org/global/2017/06/26/u-s-image-suffers-as-publics-around-world-question-trumps-leadership/> [https://perma.cc/9JZF-FX5J].

²³ ANTI-DEFAMATION LEAGUE CENTER ON EXTREMISM, *supra* note 13; Massoud Hayoun, *Muslim Americans See a Major Spike in Hate Crimes and Political Participation*, PAC. STANDARD (July 18, 2018), <https://psmag.com/social-justice/muslim-americans-see-a-major-spike-in-hate-crimes-and-political-participation> [https://perma.cc/Y2PL-67T4] (noting rise in anti-Muslim bigotry as Trump encourages Islamophobia and white nationalism).

²⁴ ZAINAB ARAIN, COUNCIL ON AM.-ISLAMIC RELATIONS, TARGETED: 2018 CIVIL RIGHTS REPORT 6 (2018) (reporting 17% increase in anti-Muslim bias incidents in the U.S. from 2016 to 2017, 18% of which were related to the Muslim Ban).

²⁵ RADHA MODI, LAKSHMI SRIDARAN & SUMAN RAGHUNATHAN, S. ASIAN AMS. LEADING TOGETHER, COMMUNITIES ON FIRE: CONFRONTING HATE VIOLENCE AND XENOPHOBIC RHETORIC 3, 21 (2018).

hijab in New York, the perpetrator threatened “Trump is here now [and] he will get rid of all of you.”²⁶

B. *Latinx and African Immigrants*

While promising and delivering institutionalized Islamophobia, President Trump also continues to employ divisive rhetoric and politics that dehumanize and debase Latinx and African immigrants. For instance, he repeatedly uses the word “animal” to describe those crossing the southern border and accuses immigrants of committing crimes and being gang members.²⁷ During a discussion about MS-13, a criminal gang that originated in California, President Trump said, “We have people coming into the country, or trying to come in, we’re stopping a lot of them, but we’re taking people out of the country. You wouldn’t believe how bad these people are. These aren’t people. These are animals.”²⁸ Moreover, during immigration talks with lawmakers in the Oval Office, President Trump referred to Haiti, El Salvador and African countries in a degrading manner, asking, “Why are we having all these people from shithole countries come here?”²⁹ He then expressed a preference for increased immigration from European countries like Norway.

Again, such volatile language is not without consequence. The President’s xenophobia—including calling Latino immigrants “invaders” who are “infesting our country”—continues to embolden perpetrators of hate-motivated violence against these communities. In what has emerged as a broad national trend, his supporters often explicitly reference him during criminal attacks (and not solely Islamophobic ones). Representative is a 2017 assault against an undocumented immigrant in Michigan where two male assailants stapled a note to the victim’s stomach that read, “Trump doesn’t like you.”³⁰ In a distinct 2018 incident, a woman verbally attacked a Latino man and his mother who were doing yard work in California, calling them “animals” and “rapists.”³¹ When he responded, “Why do you hate us?” She

²⁶ Michael Levenson, *Man Charged with Hate Crime at JFK is Worcester Businessman, Political Donor*, BOS. GLOBE (Jan. 27, 2017), <https://www.bostonglobe.com/metro/2017/01/27/man-charged-with-hate-crime-jfk-worcester-businessman-political-donor/4YxJkAoRpJuDMXp4uor2qN/story.html> [<https://perma.cc/M6D9-WG9A>].

²⁷ Gregory Korte & Alan Gomez, *Trump Ramps up Rhetoric on Undocumented Immigrants: ‘These Aren’t People. These Are Animals.’*, USA TODAY (May 16, 2018), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/> [<https://perma.cc/RVA3-BURL>].

²⁸ *Id.*

²⁹ Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html [<https://perma.cc/MC9V-PU6Z>].

³⁰ Karel Vega, Reginald Hardwick & Ian Hawley, *Lansing Police Investigate Attack on Immigrant*, WKAR (July 13, 2017), <https://www.wkar.org/post/lansing-police-investigate-attack-immigrant#stream/0> [<https://perma.cc/8ELK-DUJE>].

³¹ Avi Selk, *‘Rapist!’ She Yelled at a Hispanic Man. ‘She’s Quoting the President,’ He Thought*, WASH. POST (June 26, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/06/26/rapist-she-yelled-at-a-hispanic-man-shes-quoting-the-president-he-thought/> [<https://perma.cc/PG6F-AZ7K>].

explained, “Because you’re Mexicans.”³² When the victim, who is an American citizen, responded, “We’re honest people right here,” the woman retorted, “Yeah, rapists.” She then added, “Even the President of the United States says you’re a rapist.”³³

Since launching his 2020 re-election campaign, President Trump has continued to play on popular fears, racial anxieties, and other divisions. Recall that 63% of Republicans believe immigrants are invading our country and replacing our nation’s national and ethnic background.³⁴ In this vein, President Trump’s re-election campaign is responsible for 2,200 Facebook ads in the last year that reference an “invasion” when referring to immigrants at the southern border.³⁵ Moreover, during a political rally last year, President Trump asked his audience how they would stop migrants from entering this country. When a supporter responded, “Shoot them,” the President grinned, nodded and failed to offer any appropriate corrective.³⁶ For many in the Latinx community, the El Paso mass shooting targeting “Mexicans” a few months later was a natural progression from inflammatory speech to xenophobic violence.³⁷ The El Paso attack left twenty-two dead, including six victims of Mexican heritage. The attacker had authored a racist, anti-immigrant manifesto that warned of an America overrun by Latino immigrants.³⁸ Such xenophobia mirrors the President’s language and the sentiments expressed in public opinion data as noted above.³⁹

C. Jewish Americans

To be sure, members of other historically marginalized groups have been similarly impacted. Specifically, Jewish Americans have experienced a number of tragic attacks. In 2018, for instance, in what is regarded as the worst anti-Semitic

³² *Id.*

³³ *Id.*

³⁴ *Fractured Nation*, *supra* note 1.

³⁵ Julia Wong, *Trump Referred to Immigrant ‘Invasion’ in 2,000 Facebook Ads, Analysis Reveals*, GUARDIAN (Aug. 5, 2019), <https://www.theguardian.com/us-news/2019/aug/05/trump-internet-facebook-ads-racism-immigrant-invasion> [<https://perma.cc/3896-NW9Q>].

³⁶ Phillip Rucker, *‘How Do You Stop These People?’: Trump’s Anti-Immigrant Rhetoric Looms Over El Paso Massacre*, WASH. POST (Aug. 4, 2019), https://www.washingtonpost.com/politics/how-do-you-stop-these-people-trumps-anti-immigrant-rhetoric-looms-over-el-paso-massacre/2019/08/04/62d0435a-b6ce-11e9-a091-6a96e67d9cce_story.html [<https://perma.cc/Y8KW-9JDC>]. The President responded by telling the crowd that you can only “get away with” shooting immigrants in the Florida Panhandle. *Id.*

³⁷ *See id.* (noting similarities between Trump’s rhetoric and the shooter’s anti-immigrant manifesto, although the shooter claimed that he was anti-immigrant before Trump’s campaign began and that blaming the President for the shooting would be “fake news”).

³⁸ Yasmeen Abutaleb, *What’s Inside the Hate-Filled Manifesto Linked to the Alleged El Paso Shooter*, WASH. POST (Aug. 4, 2019), <https://www.washingtonpost.com/politics/2019/08/04/whats-inside-hate-filled-manifesto-linked-el-paso-shooter/> [<https://perma.cc/B42U-LA5U>] (reporting that the manifesto claimed the attack was “in response to the Hispanic invasion of Texas,” which would turn the state Democratic and take jobs from low-skilled Americans).

³⁹ Pete Williams, *Feds File Hate Crime Charges Against Defendant in El Paso Walmart Shooting*, NBC NEWS (Feb. 6, 2020), <https://www.nbcnews.com/news/latino/walmart-shooting-suspect-faces-hate-crime-charges-says-ap-source-n1131656> [<https://perma.cc/5QT5-CK25>].

attack on American soil, a shooter espousing white nationalist ideology murdered eleven worshipers at the Tree of Life synagogue in Pittsburgh.⁴⁰ Prior to the shootings, the attacker posted xenophobic screeds online about the Hebrew Immigrant Aid Society (HIAS), a Jewish nonprofit working tirelessly to bring refugees and other immigrants around the world to America.⁴¹ Representative posts include, “HIAS likes to bring invaders in that kill our people. I can’t sit by and watch my people get slaughtered;” “Why hello there HIAS! You like to bring in hostile invaders to dwell among us?” and “Open you [sic] Eyes! It’s the filthy EVIL jews Bringing in the Filthy EVIL Muslims into the Country.”⁴² Notably, the attacker was a white supremacist who believed that white-majority nations are being turned into white-minority countries via immigration.⁴³ White genocide theorists such as the Tree of Life attacker believe that Jews are orchestrating this onslaught of immigration. Interestingly, this particular incident highlights the manner in which ideologies of oppression—Islamophobia and anti-Semitism—intersect and overlap culminating in extra-judicial violence.

D. Intersectional Hate-Motivated Violence

To be sure, these attacks are part of a much broader pattern of hate-motivated violence against historically marginalized groups. According to the most recent FBI Hate Crimes Statistics Report, for instance, hate crimes involving physical violence—e.g., intimidation, assault, and homicide—has reached a 16-year high.⁴⁴ What is more, religious, racial, and ethnic minority groups are experiencing disproportionate levels of violence. Many of the impacted communities—such as the Latinx, Black, Jewish, and Muslim communities—attribute this increased violence to President Trump’s inflammatory political rhetoric and discriminatory policies. Additionally, this intensifying violence reveals how ideologies of oppression—anti-Black racism, xenophobia, Islamophobia, anti-Semitism—may overlap and intersect, culminating in real world consequences.

Advocacy groups have attributed the disproportionate increase in physical violence against marginalized groups to President Trump. For instance, hate crimes

⁴⁰ Nicole Chavez, Emanuella Grinberg & Elliott C. McLaughlin, *Pittsburgh Synagogue Gunman Said He Wanted All Jews to Die, Criminal Complaint Says*, CNN (Oct. 28, 2018), <https://www.cnn.com/2018/10/28/us/pittsburgh-synagogue-shooting/index.html> [<https://perma.cc/KL4M-2NRT>].

⁴¹ See Masha Gessen, *Why the Tree of Life Shooter Was Fixated on the Hebrew Immigrant Aid Society*, NEW YORKER (Oct. 27, 2018), <https://www.newyorker.com/news/our-columnists/why-the-tree-of-life-shooter-was-fixated-on-the-hebrew-immigrant-aid-society> [<https://perma.cc/3669-WLT6>].

⁴² *Id.* (capitalization errors in original).

⁴³ Lev Golinkin, *The Pittsburgh Synagogue Shooting’s Anniversary Shows What’s Needed to Defeat White Terrorism*, NBC NEWS (Oct. 2019), <https://www.nbcnews.com/think/opinion/pittsburgh-synagogue-shooting-s-anniversary-shows-what-s-needed-defeat-ncna1072481> [<https://perma.cc/7DJ8-DNJR>].

⁴⁴ Elli Hall, *The FBI Says Violent Hate Crimes Have Surged to a 16-Year High. Activists Aren’t Surprised*, BUZZFEED (Nov. 2019), <https://www.buzzfeednews.com/article/ellievhall/fbi-violent-hate-crimes-race-religion-latino> [<https://perma.cc/4WUK-ST2B>].

against the Latinx community surged more than 50% since the 2016 elections.⁴⁵ Latinx advocacy groups blame the vitriol coming from President Trump and the right wing of the Republican Party.⁴⁶ Similarly, the NAACP has attributed the continued rise in anti-Black hate crimes to President Trump's political rhetoric and racist policies.⁴⁷ While African Americans comprise only 13% of the total US population, anti-Black hate crimes make up approximately 47% of all race- or ethnicity-based hate crimes,⁴⁸ speaking to the grossly disproportionate levels of violence the minority community is experiencing. Further, Jewish organizations have blamed anti-Semitic incidents in part on President Trump's anti-immigrant rhetoric and the emboldening of the far right.⁴⁹ According to the most recent government statistics, anti-Semitic hate crimes account for 57% of all such religiously-motivated crimes.⁵⁰ Notably, Jews comprise a mere two to three percent of the total U.S. population.⁵¹ Similarly, Muslim Americans make up a mere 1.1% of the population,⁵² but reported bias incidents against Muslim people account for 15% of all religiously-motivated hate crimes in the U.S.⁵³ These groups are all experiencing disproportionate levels of violence. For the sake of perspective, non-Hispanic white people comprise approximately 60% of Americans⁵⁴ but experience 20% of all racially-motivated hate crimes.⁵⁵

The causative relationship between inflammatory political rhetoric and discriminatory policies to hate-motivated violence is not merely a matter of popular

⁴⁵ Tom Porter, *Donald Trump and Rising Hate Crime Numbers, Is He Responsible?*, NEWSWEEK (July 2018), <https://www.newsweek.com/donald-trump-and-rising-california-hate-crime-numbers-he-responsible-1017517> [<https://perma.cc/R8GX-C4LY>].

⁴⁶ Amelia Thomson-Deveaux, *Most Latinos Now Say It's Gotten Worse For Them In The U.S.*, FIVE THIRTYEIGHT (Aug. 8, 2019), <https://fivethirtyeight.com/features/the-share-of-latinos-who-say-its-gotten-worse-in-the-u-s-has-skyrocketed/> [<https://perma.cc/8TZN-XEP7>].

⁴⁷ NAACP Press Release, *supra* note 7.

⁴⁸ See *2018 Hate Crime Statistics: Victims*, FED. BUREAU OF INVESTIGATION (Fall 2019), <https://ucr.fbi.gov/hate-crime/2018/topic-pages/victims> [<https://perma.cc/BB2L-TQS9>] (reporting that nearly 60% of hate crime incidents in 2018 were motivated by the target's race, ethnicity, or ancestry, and of those incidents, 47% were committed against Black or African American individuals).

⁴⁹ See, e.g., Dara Lind, *The Conspiracy Theory that Led to the Pittsburgh Synagogue Shooting, Explained*, VOX (Oct. 29, 2018), <https://www.vox.com/2018/10/29/18037580/pittsburgh-shooter-anti-semitism-racist-jewish-caravan> [<https://perma.cc/AEN8-WETM>]; Press Release, Anti-Defamation League, *New ADL Study Details How Extreme Anti-Immigrant Hate Has Been Thrust into the Mainstream* (Nov. 2018), <https://www.adl.org/news/press-releases/new-adl-study-details-how-extreme-anti-immigrant-hate-has-been-thrust-into-the> [<https://perma.cc/T7GA-G54V>].

⁵⁰ *2018 Hate Crime Statistics*, *supra* note 48.

⁵¹ Emily Guskin, *How Many Jews Live in the U.S.? That Depends on How You Define 'Jewish,'* WASH. POST (Feb. 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/02/23/measuring-the-size-of-the-u-s-jewish-population-comes-down-to-identity/> [<https://perma.cc/Z8K8-8KD6>].

⁵² Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, PEW RESEARCH CTR. (Jan. 3, 2018), <https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/> [<https://perma.cc/4X9R-CQ43>].

⁵³ *2018 Hate Crime Statistics*, *supra* note 48.

⁵⁴ See Katherine Schaeffer, *The Most Common Age Among Whites in U.S. is 58 – More than Double that of Racial and Ethnic Minorities*, PEW RESEARCH CTR. (July 30, 2019), <https://www.pewresearch.org/fact-tank/2019/07/30/most-common-age-among-us-racial-ethnic-groups/> [<https://perma.cc/MC7C-XGF5>].

⁵⁵ *2018 Hate Crime Statistics*, *supra* note 48.

perception. A number of academics have published research that bolsters claims that hateful speech incites lawless violence. For instance, American researchers from the University of Alabama and Loyola University Chicago confirmed that the 2016 U.S. presidential elections and Trump's ultimate ascension to the Oval Office were associated with a statistically significant surge in reported hate crimes across the country.⁵⁶ Another team of researchers from the University of North Texas and Texas A&M found that counties that hosted a 2016 Trump campaign rally saw a 226% increase in reported hate incidents over those counties that did not.⁵⁷ What is more, counties that voted for President Trump by 60% or more experienced the largest increases in reported hate crimes.⁵⁸

In fact, the academic research confirms that the Trump Effect is around 33 times larger than the effect on hate crimes after terror attacks such as those in Orlando, Florida or San Bernardino, California. Significantly, the research reveals the Trump Effect is so statistically significant to hate crimes that it is rivaled by few other events in modern American history with the exception of September 11th.⁵⁹

III. XENOPHOBIA AND U.S. LEGAL DEVELOPMENTS

This particular racial, social and political climate is reflected not only in the lives of historically marginalized groups but in a number of notable legal developments that continue to influence those experiences. First, the Administration has passed laws grounded in xenophobia but dressed in pre-textual garb. Notably, these measures have far-reaching effects, not only on vulnerable communities, but on democratic governance as well. Representative measures include the multiple iterations of the so-called "travel ban" and the presidential declaration of a public emergency to construct "the wall" at the southern border. Second, others have proposed laws as a corrective, response, and/or act of resistance to such contemporary realities. Illustrative are new domestic terrorism laws and the No Ban Act, ending the Muslim Ban while preventing similar future measures.⁶⁰ Both categories are addressed below.

A. *Is There Really a National Emergency?*

⁵⁶ Edwards & Rushin, *supra* note 11, at 13–16.

⁵⁷ Ayal Feinberg, Regina Branton & Valerie Martinez-Ebers, *Counties That Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes> [<https://perma.cc/5JJN-YYXE>].

⁵⁸ Edwards & Rushin, *supra* note 11, at 3, 15–16.

⁵⁹ Edwards & Rushin, *supra* note 11, at 6–9 (reporting that U.S. hate crimes rose by over 21% following the September 11 attack and 13% in 2015 and 2016, with the highest spike in the fourth quarter of 2016); *see also* ANTI-DEFAMATION LEAGUE CENTER ON EXTREMISM, *supra* note 13, at 25 ("Anti-Muslim hate crimes reached a peak in 2016, representing the second highest number of anti-Muslim hate crimes since the FBI started collecting hate crime data—second only to the backlash against the Muslim community after the September 11, 2001 attacks.").

⁶⁰ *See generally*, *FAQ: The No Ban Act*, NAT'L IMMIGRATION LAW CTR. (Apr. 30, 2019), <https://www.nilc.org/issues/immigration-enforcement/faq-the-no-ban-act/> [<https://perma.cc/G5HZ-PS6T>].

The current racial, social, and political climate has culminated in a manufactured emergency to ward off immigration. Indeed, the President's 2019 declaration of a national emergency to construct a wall at the southern border is grounded in xenophobia and shrouded in pretext. It has significant implications for executive powers, the separation of powers doctrine, and democratic governance. As such, xenophobia not only adversely impacts the lived experiences of socially oppressed groups but the nation as a whole.

1. *The President's Declaration*

Following his inauguration, and pursuant to his campaign promises, President Trump issued an executive order making construction of a barrier wall across the southwest U.S. border a federal priority.⁶¹ The wall could not be built, however, unless Congress provided him with the funds. While President Trump insisted on \$5.7 billion to construct the barrier, the House of Representatives was only willing to give him \$1.3 billion because the White House failed to provide "a full budgetary justification" for the expense.⁶² During the negotiation process, the President repeatedly threatened to use emergency powers to pressure Congress into giving him what he wanted. After the House refused to do so, the President held a press conference in the Rose Garden. Claiming a crisis at the border involving crime, drugs and human trafficking (despite evidence from the federal government showing otherwise), he declared a national emergency pursuant to the National Emergencies Act.⁶³

Congress passed the National Emergencies Act in 1976.⁶⁴ The Act permits the President to pronounce a national emergency when he considers it appropriate.⁶⁵ It offers no specific definition of "emergency" and allows a President to declare one entirely at her discretion. Notably, almost all such past emergencies were declared to sanction foreign governments and groups for reasons such as human rights violations—not to spend money Congress intended for other purposes.⁶⁶ By declaring a national emergency, the President avails herself of dozens of specialized laws.⁶⁷ Some of these powers have funds the President otherwise could not access.

⁶¹ Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

⁶² Marianne LeVine & Quint Forgy, *White House Asks Congress for \$5.7 Billion for 'Steel Barrier,'* POLITICO (Jan. 6, 2019), <https://www.politico.com/story/2019/01/06/trump-emergency-border-wall-government-shutdown-1082712> [<https://perma.cc/25RW-SJGL>].

⁶³ CBS News, *Donald Trump Full Press Conference at the Rose Garden*, YOUTUBE (Jan. 4, 2019), <https://www.youtube.com/watch?v=-VTpFOswgqA> [<https://perma.cc/6LCJ-5FRV>].

⁶⁴ National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. §§ 1601–1641 (2018)).

⁶⁵ National Emergencies Act, 50 U.S.C. § 1621(a) (2018) ("With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency.").

⁶⁶ Charlie Savage, *Presidents Have Declared Dozens of Emergencies, but None Like Trump's*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/15/us/politics/trump-presidency-national-emergency.html> [<https://perma.cc/EG26-R8VU>].

⁶⁷ Deanna Paul & Colby Itkowitz, *What Exactly is a National Emergency? Here's What that Means and What Happens Next*, WASH. POST (Feb. 15, 2019),

President Trump's declaration at the southern border created a firestorm of controversy with many accusing him of creating a "fake emergency" to circumvent Congress, thereby undermining the separation of powers doctrine.⁶⁸ As supporting evidence, they pointed to his own words. At his Rose Garden press conference, for instance, President Trump declared, "I didn't need to do this. . . . I just want to do it faster."⁶⁹ Members of the Administration have also made public statements with negative implications. For instance, in an interview on "Fox News Sunday", White House senior policy adviser Stephen Miller, the chief architect of the so-called "travel ban," attempted to convince a national audience that the emergency is real.⁷⁰ He argued that there was an "increasing number of people crossing" the southern border and "a huge increase in drug deaths" in the past decade.⁷¹ When Fox News host Chris Wallace challenged his assertion with government statistics evidencing attempted crossings at their lowest levels in almost four decades and that most drugs arrive at ports of entry, Miller responded, "You don't know what you don't know, and you don't catch what you don't catch. But as a matter of national security, you cannot have uncontrolled, unsecured areas of the border where people can pour in undetected."⁷² The declaration has also engendered a rebuke from Congress, which passed two joint resolutions to terminate the national emergency.⁷³ Unsurprisingly, President Trump vetoed both measures.⁷⁴

In addition to the resolutions to terminate, litigation ensued. For instance, a coalition of sixteen states filed a federal lawsuit arguing that the President's decision

<https://www.washingtonpost.com/politics/2019/02/15/what-exactly-is-national-emergency-heres-what-that-means-what-happens-next/> [<https://perma.cc/HJY7-RWFV>].

⁶⁸ See, e.g., John Cassidy, *A Weak and Rambling President Declares a Fake National Emergency*, NEW YORKER (Feb. 16, 2019), <https://www.newyorker.com/news/our-columnists/a-weak-and-rambling-president-declares-a-fake-national-emergency> [<https://perma.cc/4WCG-MX5D>]; Paul Bledsoe, *Trump Border Emergency is Fake and Climate Crisis is Real. Guess Which Just Got Funded?*, USA TODAY (Feb. 19, 2019), <https://www.usatoday.com/story/opinion/2019/02/19/donald-trump-fake-emergency-fund-wall-denies-climate-change-column/2899621002/> [<https://perma.cc/7LWQ-Z45R>]; Bernie Sanders & Earl Blumenauer, *Trump Invents Fake Emergencies. Congress Should Declare a Real One on Climate*, CNN (July 17, 2019), <https://www.cnn.com/2019/07/17/opinions/congress-declare-a-climate-emergency-sanders-blumenauer/index.html> [<https://perma.cc/J7WC-2YKQ>].

⁶⁹ CBS News, *supra* note 63.

⁷⁰ Amy B. Wang, *White House Defends Trump's Emergency Declaration as Lawsuits and Political Battles Mount*, WASH. POST (Feb. 18, 2019), <https://www.washingtonpost.com/politics/2019/02/17/uncharted-territory-political-legal-hits-continue-after-trumps-emergency-declaration/> [<https://perma.cc/AK3W-5BQA>].

⁷¹ *Id.*

⁷² *Id.*

⁷³ Jordain Carney, *Senate Again Votes to End Trump Emergency Declaration on Border Wall*, HILL (Sept. 25, 2019), <https://thehill.com/homenews/senate/462983-senate-again-votes-to-end-trump-emergency-declaration-on-border-wall> [<https://perma.cc/T5ED-EQN6>].

⁷⁴ Eric Beech, *Trump Vetoes Measure to End His Emergency Declaration on Border Wall*, REUTERS (Oct. 15, 2019), <https://www.reuters.com/article/us-usa-trump-congress-emergency/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKBN1WV06P> [<https://perma.cc/JGL7-T8C7>].

to declare a national emergency is unconstitutional.⁷⁵ Accusing the President of an “unconstitutional and unlawful scheme,” the complaint asserts that the states are trying “to protect their residents, natural resources, and economic interests from President Donald J. Trump’s flagrant disregard of fundamental separation of powers principles engrained in the United States Constitution.”⁷⁶ Further, the House of Representatives also filed a lawsuit alleging violations of the Appropriations Clause and the constitutional separation of powers doctrine.⁷⁷ Relatedly, Speaker of the House Nancy Pelosi explained,

The Congress has a solemn responsibility to defend its exclusive constitutional responsibilities and protect our system of checks and balances. The very integrity of our democratic institutions are at stake. We will not let the president trample over the Constitution.⁷⁸

In a different lawsuit, advocacy groups argued that the president’s actions threaten border communities, the environment, and the Constitution’s separation of powers.⁷⁹ In what one of the plaintiffs’ lawyers called a temporary setback,⁸⁰ the U.S. Supreme Court allowed construction of the barrier wall to proceed while the case proceeds on its merits in the courts below.⁸¹

2. Separation of Powers Doctrine, Executive Power, and U.S. Democracy

It is interesting to note that despite overwhelming support within their party for the barrier wall,⁸² a number of Republicans have joined Democrats to criticize

⁷⁵ Francesca Paris, *16 States Sue Over Trump's National Emergency Declaration*, NPR (Feb. 18, 2019), <https://www.npr.org/2019/02/18/695821740/16-states-sue-over-trumps-national-emergency-declaration> [<https://perma.cc/CA2Z-HEUX>].

⁷⁶ Complaint at 3, *California v. Trump*, 407 F. Supp. 3d 869 (N.D. Cal. 2019) (No. 3:19-cv-00872), 2019 WL 669456.

⁷⁷ See Complaint, *U.S. House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019) (No. 1:19-cv-00969), 2019 WL 1504099. The case was ultimately dismissed for lack of standing. 379 F. Supp. 3d at 11.

⁷⁸ Tim Ryan, *House Sues Over Trump National Emergency Order*, COURTHOUSE NEWS SERV. (Apr. 5, 2019), <https://www.courthousenews.com/house-sues-over-trump-national-emergency-order/> [<https://perma.cc/DD75-YZMB>].

⁷⁹ Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/us/politics/supreme-court-border-wall-trump.html> [<https://perma.cc/3KA6-GA4D>].

⁸⁰ See *id.*

⁸¹ *Trump v. Sierra Club*, 588 U.S. —, 140 S. Ct. 1, 1 (2019).

⁸² *Most Border Wall Opponents, Supporters Say Shutdown Concessions Are Unacceptable*, PEW RESEARCH CTR. (Jan. 16, 2019), <https://www.people-press.org/2019/01/16/most-border-wall-opponents-supporters-say-shutdown-concessions-are-unacceptable/#partisans-differ-over-whether-shutdown-is-a-very-serious-problem> [<https://perma.cc/J324-F7ZA>] (reporting that 82% of Republican and Republican-leaning individuals, but only 6% of Democratic and Democratic-leaning people, supported substantially expanding the U.S.-Mexico border wall).

the emergency declaration as setting a negative precedent—undermining the separation of powers doctrine and expanding executive power.⁸³

The Declaration of Independence, US Constitution, and Bill of Rights are our country’s foundational documents responsible for outlining national values, principles, and laws. The balance of powers both between the three branches of government and between the federal and state governments are among these foundational values. Separation of powers doctrine embodies the principle that the Constitution creates three separate co-equal branches of the federal government to guard against the abuse of power by individuals or groups. By distributing the balance of power and providing for institutional checks, the Framers of the Constitution sought to curb government abuses of power.

Specifically, President Trump’s executive decision declaring a national emergency to fulfill a campaign promise to build a wall on the southern border carries precedential value for executive power with largely negative implications for democratic governance and the rule of law. While seemingly enhancing the reach of his presidential authority, President Trump’s actions have left many wondering about the constitutional limits of that power and its impact—now and in the future—on the separation of powers doctrine in a federalist system.

Within the separation of powers framework, the constitutional contours, historical practices and legal jurisprudence surrounding executive power is key to the border wall controversy. Article II of the U.S. Constitution states: “The Executive Power shall be vested in a President.”⁸⁴ According to the stewardship theory or inherent powers approach to understanding executive powers, “the president has all the powers listed in Article II plus those additional powers needed to run the nation—regardless of whether the Constitution specifically authorizes their exercise.”⁸⁵ Proponents of the stewardship theory argue that as a national leader, the President must be empowered to exercise personal judgments in conducting the nation’s affairs. To carry out Article II, Section 3, which empowers the President to “take Care that the Laws be faithfully executed,” she must have powers that go beyond those explicitly enumerated in the Constitution.

To better understand the stewardship theory of executive powers, consider the case of a fourth-grade teacher whose employment contract explicitly empowers her to provide instruction. While that contract is silent on her ability to engage students in classroom activities, employ power point presentations, or organize field trips, such powers are inherent to said instruction. Yet, should she require all of the school’s students to make a financial contribution toward a cause she favors, she would violate the terms of her contract. The school principal or district may be empowered to coordinate such charitable donations, but she cannot.

⁸³ See, e.g., Bridget Bowman & Simone Pathe, *Meet the 12 GOP Senators Who Voted To Terminate Trump’s National Emergency*, ROLL CALL (March 14, 2019), <https://www.rollcall.com/2019/03/14/meet-the-12-gop-senators-who-voted-to-terminate-trumps-national-emergency/> [<https://perma.cc/56XQ-74MA>] (giving reasons that Republican Senators voted to end Trump’s national emergency).

⁸⁴ U.S. CONST., art. II, § 1.

⁸⁵ LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS* 200 (10th Ed., 2020).

It is significant to note that the Supreme Court has traditionally supported the stewardship theory. In *In re Neagle* (1890), the Supreme Court embraced the idea that the President is required to “take care that the laws be faithfully executed,” and that the clause vests in the President implied powers beyond those expressly listed in the Constitution and independent of congressional statutes.⁸⁶ In *In re Debs* (1895), heard five years later, the Supreme Court supported its *Neagle* ruling.⁸⁷

3. *The Youngstown Sheet Case*

Still, and this is important in the era of Trump, the executive is subject to congressional checks pursuant to the separation of powers doctrine. The 1952 *Youngstown Sheet* case, commonly referred to as *the Steel Seizure Case*, is instructive on this score.⁸⁸ A landmark Supreme Court decision addressing presidential power, the concurring opinion of Justice Robert Jackson is particularly noteworthy.

In *Youngstown Sheet and Tube Co. v. Sawyer*, the U.S. was at war in Korea when President Harry Truman ordered federal officials to seize and operate the nation’s steel mills to avert a planned strike.⁸⁹ Truman argued that the strike would interrupt steel production thus disrupting the war effort and safety of our soldiers on the ground. Significantly, Truman had the option of using the Taft-Hartley Act, a federal statute passed by Congress, to obtain a court order prohibiting a strike for 80 days.⁹⁰ During that time, he could have asked Congress for emergency legislation. Politics, however, prevented him from doing so. Specifically, Truman was a Democratic President and the unions were an important component of his constituency. The unions despised the Taft-Hartley Act, which was enacted over Truman’s veto.⁹¹

Set against this political backdrop, Truman claimed presidential power pursuant to the Constitution to seize the steel mills and have the federal government run them.⁹² To do so, Truman cited his powers as Commander-in-Chief and Article II allowing the President to “take Care that the Laws be faithfully executed” and vesting him with “the executive Powers.”⁹³ In response, the steel mill owners sued, challenging the constitutionality of the president’s action.

⁸⁶ *In re Neagle*, 135 U.S. 1, 63–68 (1890).

⁸⁷ *In re Debs*, 158 U.S. 564, 586 (1895); see also Robert Cash, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME L. REV. 44, 49–50 (1963) (discussing the Court’s treatment of *Neagle* in the *Debs* opinion).

⁸⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸⁹ *Youngstown Sheet & Tube Co.*, 343 U.S. at 582–83; Exec. Order No. 10,340, 17 Fed. Reg. 3,139 (1952).

⁹⁰ *Youngstown Sheet & Tube Co.*, 343 U.S. at 656–57 (Burton, J., concurring).

⁹¹ See Harry S. Truman, Speech Regarding the Taft-Hartley Bill Veto (June 20, 1947), available at <https://millercenter.org/the-presidency/presidential-speeches/june-20-1947-veto-taft-hartley-bill> [<https://perma.cc/B7C9-ULWC>] (explaining that he vetoed the law because it would weaken unions and give more power to management).

⁹² Exec. Order No. 10,340, 17 Fed. Reg. 3,139, 3,141 (1952).

⁹³ *Youngstown Sheet & Tube Co.*, 343 U.S. at 587.

The Supreme Court rejected Truman's arguments. It found that none of the provisions that he cited authorized the President to nationalize the steel mills.⁹⁴ The case spawned opinions by seven of the justices, of which Justice Black's majority opinion and Justice Jackson's concurrence advanced the same result through two distinct approaches to understanding presidential power.

First, Justice Hugo Black wrote for the majority in what would come to be understood as the "formalist approach."⁹⁵ The majority reasoned that the steel mills were too far from the battlefield to trigger the Commander-in-Chief powers.⁹⁶ The "take care" power and the executive power both limited the President to executing laws that Congress had enacted.⁹⁷ Here, the President's seizure of the mills, in the absence of corresponding legislation, was too similar to lawmaking rather than the law-executing responsibility that inheres in the executive. Truman's nationalization of the mills was unconstitutional because it violated a bright categorical divide between the formal powers given to Congress and to the Executive.⁹⁸

In contrast, Justice Jackson introduced the functionalist approach, whereby the President's powers are not rigidly fixed under the Constitution but adjustable. According to functionalism, the lines separating the three branches of government are blurry and subject to ebbs and flows.⁹⁹ Such variances are permissible as long as each branch retains its core functions and has capacity to check and balance others.

Significantly, Justice Jackson described three zones of presidential power that prove relevant to understanding the executive actions that are the subject of the instant inquiry. First, executive power is strongest when Congress authorizes the President to act.¹⁰⁰ In this instance, Jackson explained, the courts should defer to the politically accountable branches of government. Next, executive power is weakest when Congress has acted to curb presidential authority.¹⁰¹ Finally, Justice Jackson spoke of a "zone of twilight:" the space between congressionally authorized and congressionally forbidden assertions of executive authority, where it is unclear whether Congress, the President, or both hold power.¹⁰² President Truman's steel mill seizure fell into the second category, where the President's power "is at its lowest ebb."¹⁰³

⁹⁴ *Id.* at 585–86 (finding that no federal statute authorized the president's action); *id.* at 587–89 (finding that no constitutional provision authorized the president's action).

⁹⁵ See EPSTEIN & WALKER, *supra* note 85, at 51 ("Formalism emphasizes a basic idea behind the system: that the Constitution creates clear boundaries between and among the branches of government by bestowing a primary power on each. Under this school of thought, federal judges and justices should not allow deviations from this plan unless the text of the Constitution permits them.").

⁹⁶ *Youngstown Sheet & Tube Co.*, 343 U.S. at 587 ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.").

⁹⁷ *Id.* at 587–89.

⁹⁸ *Id.*

⁹⁹ See EPSTEIN & WALKER, *supra* note 85, at 51.

¹⁰⁰ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–37 (Jackson, J., concurring).

¹⁰¹ *Id.* at 637–38.

¹⁰² *Id.* at 637.

¹⁰³ *Id.* at 637–40 ("In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress.").

In addition, Justice Jackson discussed the perils surrounding presidential emergency powers in response to the Solicitor General's argument that Truman was merely responding to an emergency pursuant to his inherent powers.¹⁰⁴ In rejecting that position, Justice Jackson explained the founding fathers' wisdom in omitting such emergency powers from the U.S. Constitution, writing "They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."¹⁰⁵

Jackson's framework for understanding presidential authority is useful in analyzing the border wall controversy. For instance, the Administration claims to be acting pursuant to congressional authority found in the National Emergencies Act. To that end, the statute is analogous to the Taft-Hartley Act that President Truman chose to ignore.

Still, critics of the President's declaration of a national emergency cite to its pre-textual nature.¹⁰⁶ As evidence, they point not only to the declaration's timing—President Trump claimed a public emergency only after Congress denied him funding. But, critics also point to the President's own words. Specifically, Trump stated during last year's press conference in the Rose Garden that he did not have to declare an emergency at all but chose to do so in order to accelerate the process.¹⁰⁷ Indeed, emergency powers kindled an emergency just as Justice Jackson warned.

Further, while the Administration claims to have declared the emergency pursuant to statutory authority, it is clear that Congress rejected the President's request for additional funding. In fact, on two separate occasions, Congress has attempted to terminate the national emergency by joint resolution only to have their efforts met with a presidential veto.¹⁰⁸ The House of Representatives also filed a federal lawsuit.¹⁰⁹

Keeping Justice Jackson's framework in mind, has the President acted with or without congressional approval? Is that approval signified by virtue of statutory authority granted vis-à-vis the National Emergencies Act, or is disapproval signified by virtue of denial of funding the President's wall not to mention two congressional resolutions to terminate the public emergency? Regarding the National Emergencies Act, is it time for legislative reform to curb potential executive abuses in the future?

B. *New Domestic Terrorism Laws*

A second category of laws reflecting the racial, social, and political climate of the Trump era are those intended as correctives, responses and/or resistance. This

¹⁰⁴ *Id.* at 648–50.

¹⁰⁵ *Id.* at 650.

¹⁰⁶ See Joe Perticone, *The Lawsuits Challenging Trump's National Emergency Declaration to Build the Border Wall Keep Piling up*, BUSINESS INSIDER (Feb. 20, 2019), <https://www.businessinsider.com/lawsuits-against-trump-border-wall-national-emergency-declaration-2019-2> [<https://perma.cc/RJ8Q-EFWZ>]

¹⁰⁷ See Ilya Somin, *Why Trump's Emergency Declaration is Illegal*, VOLOKH CONSPIRACY (Feb. 23, 2019), <https://reason.com/2019/02/23/why-trumps-emergency-declaration-is-ille/> [<https://perma.cc/5HB7-NCCG>].

¹⁰⁸ Carney, *supra* note 73.

¹⁰⁹ U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019).

category includes but is not limited to new domestic terrorism laws. From the Tree of Life shooting to the El Paso attack described above, increased acts of mass violence motivated by hatred against minority communities have prompted elected officials to introduce new laws that attach criminal penalties to the existing statutory definition of domestic terrorism.

For instance, last August, New York Governor Andrew Cuomo introduced legislation that would treat mass hate shootings as domestic terrorism.¹¹⁰ Citing to government data, Cuomo argued that since 9/11, far right extremists carried out three times as many attacks on Americans than any self-identifying Muslims. According to his new law, the “Hate Crimes Domestic Terrorism Act,” anyone who launches a mass attack and kills on the basis of race, nationality, ethnicity, religion, disability, sexual orientation or gender identity will receive life imprisonment without the possibility of parole. In April of 2020, the New York State legislature voted to pass the nation’s first domestic terrorism law.¹¹¹ Jewish community leaders in particular have applauded this development, while indicating that they will approach other governors and state legislatures to adopt similar legislation.¹¹²

Similar laws have been proposed at the federal level as well. U.S. Congressman Adam Schiff (D-CA), for example, introduced the “Confronting the Threat of Domestic Terrorism Act,” which would create a federal domestic terrorism crime.¹¹³ Congressman Schiff explained that treating white supremacist terrorism differently than international terrorism makes the public take it less seriously, despite the fact that Americans today are more likely to be killed by far-right extremists than self-identifying Muslims. The proposed law would require the Attorney General to provide written certification that an alleged act of domestic terrorism meets certain statutory requirements prior to any charges being brought. Specifically, the suspect must be found to have intended to intimidate or coerce a civilian population or to influence government policy through coercion or intimidation.

In reaction to these new legislative responses, civil libertarians have expressed concerns.¹¹⁴ They warn that law enforcement officials—who have

¹¹⁰ Governor Andrew Cuomo, Remarks on Advancing First-in-the-Nation Domestic Terrorism Law to Include Mass Violence Motivated by Hate (Aug. 15, 2019), *available at* <https://www.governor.ny.gov/news/remarks-prepared-governor-cuomo-advances-first-nation-domestic-terrorism-law-include-mass> [<https://perma.cc/F6TT-WYLV>].

¹¹¹ *See Governor Cuomo Signs FY 2021*, GOVERNOR ANDREW M. CUOMO (Apr. 3, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-fy-2021-budget> [<https://perma.cc/BX9D-9NUU>].

¹¹² *See* Danielle Ziri, *New York Passes Bill to Prosecute Hate Crimes as Domestic Terrorism*, HAARETZ (Apr. 5, 2020), <https://www.haaretz.com/us-news/.premium-new-york-passes-bill-to-prosecute-hate-crimes-as-domestic-terrorism-1.8741450> [<https://perma.cc/4APZ-FDGG>].

¹¹³ Press Release, Congressman Adam Schiff, Schiff Introduces Legislation to Create a Federal Domestic Terrorism Crime (Aug. 16, 2019), <https://schiff.house.gov/news/press-releases/schiff-introduces-legislation-to-create-a-federal-domestic-terrorism-crime> [<https://perma.cc/RWA4-M53U>].

¹¹⁴ *See* Jessica Schulberg & Ryan J. Reilly, *Congress to Consider Domestic Terrorism Bill*, HUFFINGTON POST (Aug. 16, 2019), https://www.huffpost.com/entry/adam-schiff-domestic-terrorism-bill_n_5d56f7b8e4b0eb875f2383a1 [<https://perma.cc/23T6-WEZZ>] (“Civil Liberties advocates say it’s a good thing that prosecutors don’t have an easy way of going after people who are thinking about committing a crime.”).

prioritized “Black Identity Extremists” as terrorist threats over white nationalists and al-Qaeda, according to leaked documents—may later misuse these laws to silence non-violent dissent.¹¹⁵ They further argue that law enforcement agencies have sufficient legal authority and resources to investigate, charge, and prosecute perpetrators of white nationalist violence for terrorism-related offenses but choose not to due to misplaced priorities.¹¹⁶ As such, whether new domestic terrorism laws will alleviate the plight of socially oppressed groups, or further exacerbate their struggle for equality, remains subject to debate.

IV. CONCLUSION

Arguably, none of this is altogether surprising, particularly in light of PRRI’s research findings. When 75% of Republicans believe immigrants burden local communities by using more than their share of social services—such as Medicare and food assistance¹¹⁷—the Administration’s “public charge” rule¹¹⁸ targeting poor immigrants is unsurprising. When 74% of Republicans support temporarily preventing people from some majority Muslim countries from entering the country,¹¹⁹ the Administration’s so-called “travel ban” is unsurprising. When 56% of Republicans object to allowing immigrants brought illegally to the U.S. as children to gain legal resident status,¹²⁰ the Administration’s rescission of Deferred Action for Childhood Arrivals (“DACA”)¹²¹ is similarly unsurprising. Xenophobia has translated into jarring social, political, and legal realities for immigrant populations and socially oppressed groups in ways that overlap and intersect as

¹¹⁵ Harsha Panduranga & Faiza Patel, “Domestic Terrorism” Bills Create More Problems Than They Solve, JUST SEC. (Aug. 28, 2019), <https://www.justsecurity.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve/> [<https://perma.cc/23T6-WEZZ>].

¹¹⁶ See Ryan J. Reilly & Jessica Schulberg, *The Fight Over Treating Neo-Nazi Terrorists Differently From Muslim Ones*, HUFFINGTON POST (March 27, 2019), https://www.huffpost.com/entry/domestic-terrorism-federal-law-white-supremacists_n_5c8fec1ee4b071a25a857262 [<https://perma.cc/HWX8-KYSE>] (describing a critique from the director of the ACLU’s National Security Project); see also Hina Shamsi, *White Supremacist Violence Is On the Rise. Expanding the FBI’s Powers Isn’t the Answer.*, ACLU (Sept. 25, 2019), <https://www.aclu.org/blog/national-security/discriminatory-profiling/white-supremacist-violence-rise-expanding-fbis> [<https://perma.cc/4LD5-5MVB>] (calling for Congress to hold law enforcement agencies accountable for their failure to focus resources on white supremacist violence); Michael German, *Wrong Priorities on Fighting Terrorism*, BRENNAN CTR. FOR JUSTICE (Oct. 31, 2018), <https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism> [<https://perma.cc/GG9P-5ZXZ>] (rejecting the argument that, in the absence of domestic terrorism laws, federal law enforcement is not sufficiently empowered to prosecute white supremacist violence, and arguing for more intense Congressional oversight of law enforcement resource allocation).

¹¹⁷ See *Fractured Nation*, *supra* note 1, (additional data sets on file with author). Further, 68% of Americans oppose letting undocumented immigrants receive government benefits, and 46% believe that undocumented immigrants who are likely to use public welfare benefits should not be allowed to apply for citizenship. *Id.*

¹¹⁸ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).

¹¹⁹ See *Fractured Nation*, *supra* note 1.

¹²⁰ See *Fractured Nation*, *supra* note 1.

¹²¹ Memorandum from Secretary Kirstjen M. Nielsen, Dep’t of Homeland Sec., Concurring with Secretary Duke’s Memorandum (June 22, 2018); Memorandum from Acting Secretary Elaine C. Duke, Dep’t of Homeland Sec., On Rescission of Deferred Action for Childhood Arrivals (Sept. 5, 2017).

noted. Ultimately, such developments not only test the fabric of our democracy but also who we are as a nation.