

BATTLE LINES/BALLOT LINES: DEMOCRACY STABILIZATION AND ELECTION ADMINISTRATION

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The prelude of the 2020 election is marred by dark projections of large-scale violence that could disrupt voting or a prolonged count of mail-in ballots requested due to the COVID-19 pandemic. Academics agree that this situation is unlikely to be an isolated occurrence. Rather, extreme polarization risks making violent elections a new norm in American life. Even if violence fails to materialize in November 2020, it is still worthwhile to engage in legal scenario planning to ask the question: What if? This Essay sketches a preliminary, incomplete answer to that question from the perspective of courts.

Taking as an example a complaint seeking to enjoin the Trump campaign from inciting violence, this Essay begins from the assumption that existing Fourteenth Amendment doctrine, forged in the era of 1960s desegregation, lacks a register to fully conceptualize the novel assaults on American democratic institutions today. Specifically, courts tend to employ a strict individual rights focus, which lacks the ability to conceptualize assaults on democracy that do not intentionally target any particular voter and, uncomfortably, asks courts to step into an ex ante regulatory role more familiar for a federal agency than the judicial branch. To fill that gap, courts could learn from international democratic backsliding. Specifically, the concept of a “strategy of tension” lends analytical rigor to scenarios in which regimes actively seek to foment civil unrest, cracking down on opponents and encouraging extrajudicial violence. This framework allows one to recognize such harms as injuries to democracy itself that endanger the supreme democratic principle of the state’s monopoly on the legitimate use of violence, a foundational principle of liberal governance. With that conceptualization in hand, this Essay concludes by forwarding a potential role for courts “in the breach” as exercising emergency powers to stabilize democracy under extreme stress.

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INTRODUCTION

The prelude of the 2020 election is marred by dark projections of large-scale violence interrupting voting or a prolonged count of mail-in ballots requested at record numbers due to the COVID-19 pandemic. Statistical modelling suggests that this problem may be timeless—it will not just afflict the impending election, but the elections in 2022, 2024, and so on. Analyzing structural trends, anthropologist Peter Turchin and sociologist Jack Goldstone argue extreme levels of polarization suggest that “[a]lmost any election scenario this fall is likely to lead to popular protests on a scale we have not seen this century,”¹ while the FBI projects the 2020 election may be a “potential flashpoint” for right-wing terrorism.² Even if such concerns do not materialize this time, the extreme polarization Professors Turchin and Goldstone link to violence and social unrest shows no sign of abating. This Essay thus functions both as an analysis of the status quo and an exercise in legal scenario planning that asks the question: *What if?* This is a speculative Essay, but one that takes its cues from existing cleavages and institutional failures that characterize American democracy today.

In Part I, I discuss a recent Fourteenth Amendment suit to enjoin incitements of violence by President Trump and other public officials and argue that existing individual rights protections fail to comprehend the diffuse and decentralized threat to democracy occurring today. In Part II, I argue that courts should use the concept of a “strategy of tension,” borrowed from human rights criminology, to reconceptualize the harms resulting from a state actor’s encouragement of the breakdown of the state’s monopoly on the legitimate use of violence as an injury to *democracy itself* rather than any individual voter. In Part III, I use Professor Samuel Issacharoff’s theory of judicial review, justified as an emergency “democracy stabilization” role for

¹ Jack A. Goldstone & Peter Turchin, *Welcome to the ‘Turbulent Twenties,’* NOËMA (Sept. 10, 2020), <https://www.noemamag.com/welcome-to-the-turbulent-twenties>.

² Ken Klippenstein, *As Trump Equivocates on White Supremacy, the FBI Warns of Right-Wing Terror*, NATION (Sept. 30, 2020), <https://www.thenation.com/article/politics/white-supremacist-boogaloo> (explaining the contents of a leaked FBI report predicting grim effects of extrajudicial right-wing violence exploding in the interregnum between the election and Inauguration Day).

courts, to mount a case for ex ante judicial regulation to tamp down on election-disrupting violence.

I

THE LIMITS OF CURRENT DOCTRINE

A lawsuit filed by a Latino voting rights group proposes a novel legal theory to show that the totality of the Trump Administration's actions anticipating the election violates the Fourteenth Amendment, the Ku Klux Klan Act, and the Voting Rights Act.³ But the approach suffers clear, fatal problems when plugged into traditional doctrinal requirements of subjective discriminatory intent and jurisdiction.

A. Framing the Harm

Mi Familia Vota Education Fund v. Trump names President Trump and members of his Administration as defendants.⁴ Rather than alleging one governmental action as *per se* unconstitutional, the plaintiffs forward a novel, holistic, and inferential approach: “[Trump’s] pattern of violently suppressing opposition, sabotaging a free and fair election, and rejecting a peaceful transfer of power has the purpose and effect of intimidating Americans from . . . trying to vote.”⁵ The Complaint marshals hundreds of allegations against seemingly disparate actors—Trump, members of his Administration, extrajudicial militias supportive of the President. It touches on the extreme federal crackdowns against racial justice protestors this summer and their official designation as “terrorists.”⁶ It contrasts those crackdowns with the President’s endorsement of vigilante violence by his supporters.⁷ Against this backdrop, the plaintiffs argue, the President’s sowing of distrust in mail-in voting,⁸ his conspiracy theories about vote rigging by Democrats and “antifa,”⁹ and his solicitations of armed supporters

³ Complaint for Declaratory and Injunctive Relief ¶¶ 1–4, *Mi Familia Vota Educ. Fund v. Trump*, No. 1:20-cv-03030 (D.D.C. Oct. 21, 2020).

⁴ *Id.* ¶¶ 11–14.

⁵ *Id.* ¶ 4.

⁶ *Id.* ¶¶ 45–46; *see id.* ¶ 27 (“On June 1, 2020, Trump and Barr ordered armed federal agents to clear Washington, D.C.’s Lafayette Square of individuals peacefully demonstrating for racial justice before the city’s 7 p.m. curfew took effect.”); *id.* ¶ 35 (“At least 23 individuals were detained in Portland by DHS agents but never charged with a crime.”).

⁷ *See id.* ¶ 73 (“On August 30, 2020, Trump retweeted a tweet by reporter Mike Baker. Baker’s tweet included a video of armed men (apparently not law enforcement officers) in the back of a pickup truck bearing a Trump campaign flag, firing a weapon at a crowd on the sidewalk.”); *id.* ¶109 (“Trump has disparaged vote-by-mail, sabotaged the U.S. Postal Service to undermine the speed and reliability of mail delivery, threatened to ban voting by mail, and stated that he will not accept the results of the presidential election if he is not declared the winner.”).

⁸ *See id.* ¶ 109.

⁹ *See id.* ¶¶ 142–43 (arguing that the public announcement by a Trump-appointed U.S. Attorney of an investigation into allegedly discarded ballots, which “has *not resulted in public*

to police polling places amid an explicit refusal to commit to a peaceful transfer of power, when considered in broader context, suggest the holistic inference of “subjective intent” to interfere in the election.¹⁰

But the Complaint will almost certainly fail under conventional voter intimidation doctrine requirements, which conceptualize both subjective intent and injury in fact quite differently than the plaintiffs. On its face, as the defendants argue, the Complaint cites no single action with a disparate impact nor any smoking gun evidence showing Trump “intentionally” intimidated voters.¹¹ In contrast to the current Fourteenth Amendment framework, which requires a discrete and individualized inquiry, the plaintiffs’ holistic approach reveals something crucial: The President’s incitement to decentralized extrajudicial violence is a dangerous overall *pattern* even if no single action taken by the President, his campaign, or his supporters amounts to per se voter intimidation. And this course of conduct is not necessarily dangerous to any one individual in particular but to the stability of democracy as such.

B. *The Prayer for Relief*

The plaintiffs face an additional hurdle: They seek ex ante emergency injunctive relief prohibiting the Trump Administration and Trump Campaign from inciting extrajudicial violence, the sort of action typical of an agency or Congress.¹² Even compared to instances when courts have taken the

charges[.] served no proper law enforcement purpose Its primary purpose was to assist Barr and Trump in their effort to cast public doubt on voting, the election, and to aid Trump’s reelection campaign” (emphasis added).

¹⁰ See *id.* ¶¶ 191–94.

¹¹ See Opposition of President Donald J. Trump in His Individual Capacity to Plaintiffs’ Motion for Temporary Restraining Order, Preliminary Injunction, and Speedy Declaratory Judgment at 3, *Mi Familia Vota Educ. Fund v. Trump*, No. 1:20-cv-03030 (D.D.C. Oct. 27, 2020) (“Plaintiffs have not alleged—let alone likely proved—that the President intentionally ‘intimidate[d], threaten[ed], or coerce[d] . . . any person for voting or attempting to vote.’” (alterations in original) (citing 52 U.S.C. § 10307(b)); Official-Capacity Defendants’ Opposition to Plaintiffs’ Motion for a Temporary Restraining Order, Preliminary Injunction, and Speedy Declaratory Judgment at 25, *Mi Familia Vota Educ. Fund v. Trump*, No. 1:20-cv-03030 (D.D.C. Oct. 26, 2020) (“Plaintiffs’ alleged fears associated with the conduct of third parties cannot fairly be traced to the Defendants.”); see also *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that a single act that produces a “racially disproportionate impact” along with an allegation of “racially discriminatory purpose” or intent is necessary to state an Equal Protection claim); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 897 (1987) (“[A] showing of discriminatory intent is necessary in order to make out a violation of the equal protection clause. . . . The Court has required proof of discriminatory purpose in part because of a concern that if discriminatory effects were enough, numerous government decisions would be called into constitutional doubt.”).

¹² See Complaint for Declaratory and Injunctive Relief, *supra* note 3, at 51 (requesting that the court “[e]njoin Defendant Trump from encouraging, urging, and/or importuning his supporters: to bring weapons to polling places, to block access to polling places, to question or otherwise intimidate voters, or to otherwise interfere with voting and ballot counting”).

unusual step of regulating electioneering, this request is expansive. For example, during the 1981 New Jersey gubernatorial contest, the Republican National Committee (RNC) itself paid off-duty police to patrol majority-minority polling places.¹³ Visibly armed, they wore the armbands of an official-sounding but fictitious organization.¹⁴ The Republican won by a “razor thin margin.”¹⁵ Litigation resulted in a 1982 Consent Decree requiring Republicans to seek judicial preclearance for any poll-watching efforts.¹⁶

Yet even this landmark Decree did not approach the *scale* that the plaintiffs seek: It bound only the 150 *official* RNC members and their agents.¹⁷ Illustrating these limits, in 2016, a court held it did not apply to then-candidate Trump, who lacked official membership, although it agreed that his suggestion that armed supporters police voter fraud would be a violation of the Decree.¹⁸ The relief sought in *Mi Familia* differs in another important respect—the plaintiffs seek *ex ante* relief *before* any harm has occurred, defying, as the defendants argue, the jurisdictional requirement of showing injury in fact before a court may intervene.¹⁹

These twin problems—inability to conceptualize the harm *structurally* and difficulty justifying *jurisdiction*—reveal the inadequacy of traditional doctrine to redress modern attacks on democracy lacking clear Jim Crow analogues. Current doctrine, forged in response to historically specific disenfranchisement practices associated with southern states in the pre-*Brown* era, lacks both register and vocabulary to even frame the inquiry in response to novel attacks on voting and free elections.

¹³ Shaila Dewan, *Armed Observers, Chants of ‘4 More Years’ at Polls: Is That Legal?*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/poll-watching-intimidation.html> (“[O]ff-duty sheriff’s deputies and police officers in New Jersey patrolled predominantly Black and Latino polling places on Election Day while wearing armbands with a made-up name, the National Ballot Security Task Force.”).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Consent Order at 5–6, Democratic Nat’l Comm. v. Republican Nat’l Comm, No. 81-3876 (D.N.J. Nov. 1, 1982), <https://www.brennancenter.org/sites/default/files/2020-07/1982%20consent%20decree.pdf> (requiring, *inter alia*, any official under direct employment of the RNC to seek judicial preclearance for poll-watching and ballot security initiatives); see also Democratic Nat’l Comm. v. Republican Nat’l Comm., No. 81-03876, 2016 WL 6584915, at *1–3 (D.N.J. Nov. 5, 2016) (summarizing the history leading up to the 1982 Consent Order).

¹⁷ *Id.* at *3 (“There was an exception for ballot security efforts that complied with the Decree and the law, and had been precleared by the Court.”).

¹⁸ *Id.* at *6 (citing Trump’s comments to a Pennsylvania crowd in October, urging supporters that it was “[s]o important to watch other communities because we don’t want this election stolen from us” (alteration in original) (citation omitted)).

¹⁹ See Official-Capacity Defendants’ Opposition to Plaintiffs’ Motion for a Temporary Restraining Order, Preliminary Injunction, and Speedy Declaratory Judgment, *supra* note 11, at 13 (“These fears of possible future injury are far too speculative to satisfy Article III’s [standing] requirement.”).

II

STRATEGIES OF TENSION: DESTABILIZING THE STATE'S NORMATIVE
MONOPOLY ON THE LEGITIMATE USE OF VIOLENCE

Courts should embrace the “strategy of tension” framework, developed in human rights criminology, to reconceptualize the nature of the injury posed by the disturbing pattern identified by the *Mi Familia* plaintiffs as a harm to *democracy itself*. The contrast between Trump’s actions toward opponents and supporters that the plaintiffs draw is crucial, but the structural danger it poses eludes the individual rights approach described in Part I.

Criminologists Matt Clement and Vincenzo Scalia use “strategy of tension” to describe a particular “state crime” in which a regime makes the strategic choice to foment the breakdown of the state’s normative monopoly on the legitimate use of violence, undermining “statecraft” itself.²⁰ Professors Clement and Scalia further suggest that this framing accounts for recent democratic declines in which there is no dramatic cancellation of elections, but rather a hollowing out of democracy from within. With a strategy of tension, a regime induces anarchy in order to justify imposing order, creating chaos which it “alone can fix.”²¹ As Kellyanne Conway put it, “The more chaos and anarchy and vandalism and violence reigns, the better it is”²²

A strategy of tension consists of a “double-bind.”²³ First, regimes exaggerate the threat of violence from opponents, including through overly harsh crackdowns that provoke counterviolence. Second, regimes sanction extrajudicial violence by *their* supporters, often paramilitary forces. This two-pronged approach produces a self-perpetuating escalation which undermines the traditional democratic modes for conflict resolution—the courts and free elections. Erosion of the state’s normative monopoly on violence hollows out democracy from within. Professors Clement and Scalia use Italy’s Years of Lead as a case study, a period from the late 1960s to 1980s characterized by paramilitary right-wing and left-wing terrorism. Where relevant, I use it to draw out potential consequences of strategies of tension.

²⁰ Matt Clement & Vincenzo Scalia, *The Strategy of Tension: Understanding State Labeling Processes and Double-Binds*, CRITICAL CRIMINOLOGY 1–2 (2020), <https://link.springer.com/content/pdf/10.1007/s10612-020-09494-5.pdf>.

²¹ President Donald J. Trump, Acceptance of the 2016 Republican Nomination for President of the United States (July 21, 2016) (“I alone can fix it.”).

²² Neil Vigdor, *Conway Says the More Violence Erupts, ‘the Better It Is’ for Trump’s Re-Election Prospects*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/27/us/elections/conway-says-the-more-violence-erupts-the-better-it-is-for-trumps-re-election-prospects.html>.

²³ Clement & Scalia, *supra* note 20, at 3.

A. *Constructing and Radicalizing an Enemy*

Strategies of tension depend on enemy construction. To provoke opponents, the Years of Lead regime violently cracked down on trade-unionist demonstrations and criminalized Marxist university courses.²⁴ The result was to drive the members of such organizations out of the parliamentary system and into radical terrorist organizations, culminating in, for example, the assassination of Italian socialist leader Aldo Moro in 1979.²⁵

In a parallel manner, the Trump Administration has undermined local efforts to compromise with Black Lives Matter (BLM) demonstrators in Portland and elsewhere, instead instituting disproportionately violent crackdowns.²⁶ Despite research showing *zero* fatalities perpetrated by an “anti-fascist” in twenty-five years compared to 117 killings by right-wing terrorists since 2010 alone, and that right-wing groups account for ninety percent of terrorism *this year*,²⁷ a Justice Department taskforce lists antifa as a major terrorist threat without even mentioning the radical right.²⁸ Trump said that “everything I see is from the left-wing,” but his own FBI Director warned of a “violent extremist threat”²⁹ from right-wing militia groups, and the current Department of Homeland Security reported that “white supremacist extremists . . . remain the most persistent and lethal threat” facing American law enforcement today.³⁰ Former FBI agent Michael

²⁴ *Id.* at 4–5 (“[T]he state, rather than incorporating the claims of protesters, chose the path of repression. The manufacture of political polarization . . . created a climate of popular fear that damaged the left. . . . [T]he removal of political dissent through prevention and repression reproduced the cycle of tension.”).

²⁵ *See id.* at 4 (describing the killing of Aldo Moro by a disaffected group of Marxist-Leninists and the critical reception by the parliamentary socialist parties); *see generally* Richard Drake, *The Aldo Moro Murder Case in Retrospect*, 8 J. COLD WAR STUD. 114 (2016) (book review) (summarizing the history leading to Moro’s assassination).

²⁶ *See, e.g.*, David A. Graham, *Trump’s Effort to Provoke Violence Is Working*, ATLANTIC (July 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/trump-getting-what-he-wants-portland/614635> (“The president’s aim in deploying federal agents to Portland and elsewhere was barely concealed from the start: Send federal forces into liberal cities where they are unwelcome, wait for trouble to start, and then use it as both retroactive justification and political leverage for the president’s troubled reelection campaign.”).

²⁷ SETH G. JONES, CATRINA DOXSEE & NICHOLAS HARRINGTON, THE ESCALATING TERRORISM PROBLEM IN THE UNITED STATES 1 (2020), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200612_Jones_DomesticTerrorism_v6.pdf (surveying data gleaned by classifying all domestic terrorist attacks over the last twenty-five years).

²⁸ *See, e.g.*, Complaint for Declaratory and Injunctive Relief, *supra* note 3, ¶ 29 (“Trump described the ongoing protests against racism and police brutality as follows: ‘Anarchists and left-wing extremists have sought to advance a fringe ideology that paints the United States of America as fundamentally unjust and have sought to impose that ideology on Americans through violence and mob intimidation.’” (quoting Exec. Order No. 13,933, 85 Fed. Reg. 40,081 (June 26, 2020))).

²⁹ *See* Klippenstein, *supra* note 2.

³⁰ U.S. DEP’T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT 18 (2020), https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf.

German described tactics “directed from the top levels of” the Administration targeting activist opponents “more aggressively” than right-wing extremists, who tend to support the President.³¹

In an absurd but not atypical case, one BLM demonstrator was charged with a sentence-enhancing crime involving “foreign commerce” for holding a tequila bottle which had been manufactured in Mexico at a protest.³² Since the killing of George Floyd, over 10,000 racial justice supporters have been arrested.³³ In stark contrast, a Brennan Center report prepared by former Special Agent German suggests that terrorism laws are rarely enforced against right-wing extremists, at least in part due to significant infiltration of local law enforcement.³⁴ This extreme procedural unfairness instills in regime opponents a sense of nihilism and pessimism about compromise and negotiation, accelerating polarization and radicalization. Strategies of tension are processes of cloning: State repression constructs *and* provokes its enemy, which benefits the regime as the guarantor of order.³⁵

B. Sanctioning Extrajudicial Violence from Allies

The second step of any strategy of tension is to signal approval of, and even sanction, extrajudicial violence from regime allies. By way of comparison, the Years of Lead regime championed “patriotic” extrajudicial violence: Italian conservatives lauded paramilitary groups, mainly unreconstructed Mussolini loyalists and regime-aligned Mafia families, who engaged in countless murders of political opponents.³⁶

While of course lacking the same mortality rate, President Trump’s strategy of tension is in some ways even more brazen, as the discussion of the *Mi Familia* complaint illustrates. Additionally, over the summer of 2020, President Trump openly defended the killings of two unarmed demonstrators by a supporter during protests in Kenosha.³⁷ He has refused to agree to a

³¹ Sam Levin & Maanvi Singh, *America’s Protest Crackdown: Five Months After George Floyd, Hundreds Face Trials and Prison*, GUARDIAN (Oct. 27, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/oct/27/americas-protest-crackdown-five-months-after-george-floyd-hundreds-face-trials-and-prison>.

³² *Id.*

³³ *Id.*

³⁴ See MICHAEL GERMAN, HIDDEN IN PLAIN SIGHT: RACISM, WHITE SUPREMACY, AND FAR-RIGHT MILITANCY IN LAW ENFORCEMENT (2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> (“[D]espite the FBI’s acknowledgement of the links between law enforcement and . . . suspected terrorist groups, the Justice Department has no national strategy designed to identify white supremacist police officers or to protect the safety and civil rights of the communities they patrol.”)

³⁵ See Clement & Scalia, *supra* note 20, at 2 (“We are thus facing an interactive context, wherein the enemy is *cloned* to the extent that it is both engendered by state terror and that it apes the state’s *modus operandi*.”).

³⁶ *Id.* at 8–9.

³⁷ Matthew Choi, *Trump Defends Gunman Charged with Murdering 2 in Kenosha*, POLITICO

peaceful transfer of power and, when asked to disavow some militia's intentions to revolt should he lose, instructed them merely to "stand by."³⁸ The President's most ardent supporters heard this as a call to arms. Some right-wing militia groups are preparing for what they describe as a looming "civil war" immediately after the election,³⁹ while others plan to station themselves, heavily armed, at polling places in swing states to police Democrats' conspiracy to rig the results. The result is stark:

[T]he . . . American . . . strategy of tension is carried out largely in the open. . . . America is awash in legal weapons. . . . [S]ocial media platforms allow [militias and vigilantes] to operate freely. Police chat up . . . gunmen as they both eye BLM protesters. While the revelations regarding the Italian . . . political establishment's relationship to right-wing violence didn't fully emerge until [years later] . . . , Republicans have publicly embraced figures like Kyle Rittenhouse, the alleged Kenosha shooter whom Fox News has transformed into a folk hero.⁴⁰

C. *Reconceptualizing the Harm to Democracy*

Though uncommon, courts have at times recognized the importance of interaction between formal executive powers and the extralegal powers presidents possess as political leaders. In his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, recognized as birthing modern executive power law,⁴¹ Justice Jackson emphasized that an accurate assessment of a president's *political* powers is essential to formulating doctrine that could conceptualize the true power of the presidency: "[The] rise of the party system has made a significant extraconstitutional

(Aug. 31, 2020, 8:02 PM), <https://www.politico.com/news/2020/08/31/trump-defends-kenosha-gunman-406377> ("That was an interesting situation," the president said. "He was trying to get away from them, I guess it looks like, and he fell and then they very violently attacked him . . . I guess he was in very big trouble. He probably would've been killed.").

³⁸ See Sheera Frenkel & Annie Karni, *Proud Boys Celebrate Trump's 'Stand By' Remark About Them at the Debate*, N.Y. TIMES (Sept. 29, 2020), <https://www.nytimes.com/2020/09/29/us/trump-proud-boys-biden.html> (detailing celebration of President Trump's refusal to explicitly condemn right-wing groups organizing to provide extrajudicial armed security at polling places).

³⁹ Mike Giglio, *A Pro-Trump Militant Group Has Recruited Thousands of Police, Soldiers, and Veterans*, ATLANTIC (Sept. 30, 2020), <https://www.theatlantic.com/magazine/archive/2020/11/right-wing-militias-civil-war/616473> ("When Trump warned of civil war, Rhodes [leader of the Oath Keepers, a militia that is national in scope with tens of thousands of members] voiced his assent. 'This is the truth,' he wrote. 'This is where we are.'").

⁴⁰ Alex Yablon *America Is About to Enter Its Years of Lead*, FOREIGN POL'Y (Sept. 30, 2020, 12:42 PM), <https://foreignpolicy.com/2020/09/30/america-years-of-lead-political-violence-trump-election>.

⁴¹ See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) (describing the study of separation of powers doctrine as containing "decades of dissecting Justice Jackson's *Youngstown* opinion").

supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system.”⁴² Writing shortly after World War II, Justice Jackson endorsed drawing inferences from the decline of “Continental European” democracies in Germany and Italy to test doctrine and justify judicial constraints on executive action, as the strategy of tension does today.⁴³

Using the strategy of tension as an analytically formal device to define a harm to democracy, courts should take judicial notice of current political dynamics. As the informal influence a president had over members of his party defined Jackson’s era, the current President’s reach extends to a well-armed, violent movement—one he has primed to interfere in the 2020 election. Courts should embrace the strategy of tension framework to reconceptualize the *nature* of the threat to the core democratic principle of peaceful dispute resolution. Regardless of subjective intent, a strategy of tension risks frequent breakdowns of the state’s normative monopoly on the legitimate use of violence and corrosively distorts normal political processes. The frame moves judicial focus from individualized discriminatory harms to injury to democracy and the foundations of statecraft itself.

III

COURTS AS DEMOCRACY STABILIZERS

To abate this pattern of democracy destabilization, the *Mi Familia* plaintiffs ask that courts assume an *ex ante* regulatory posture in electoral administration—a role more typical of administrative agencies than courts. This second doctrinal problem is primarily one of jurisdiction. Professor Issacharoff’s democracy stabilization theory provides a means to render such a claim justiciable *without* waiting for an election to be marred by extrajudicial violence. In Professor Issacharoff’s telling, just as central banks assume extraordinary powers to avert full financial collapse in times of emergency, courts should, in some instances, intervene in similarly extraordinary ways to stabilize democracy amid extreme institutional stress.⁴⁴

Two criteria permit judicial intervention under Professor Issacharoff’s democracy stabilization theory. First, there must be a violation of a *supreme democratic principle*—typically, one that is “super” constitutional, preexisting and informing constitutional text. As the Italian Constitutional

⁴² 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

⁴³ *See id.* at 641 (“Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian.”).

⁴⁴ *See* Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 5–9 (2019) [hereinafter Issacharoff, *Stabilizing Democracy*].

Court said in striking down an executive power-grab during the Years of Lead, judicial intervention can be sustained based on

a constitutional commitment to democracy [containing] some supreme principles that cannot be subverted or modified in their essential content either by laws of constitutional amendment or other constitutional laws . . . [.] [including principles not expressly mentioned in the Constitution, but which nonetheless form] part of the supreme values on which the Italian Constitution is based.⁴⁵

Second, democracy stabilization is an option of last resort. Only when normal institutional channels fail to protect a supreme democratic principle ought courts step “in the breach.”⁴⁶

Overlaying democracy stabilization with the strategy of tension framework shows that the status quo verges on a breakdown in the state’s ability to peacefully administer an election—a supreme democratic principle justifying judicial democracy stabilization. That is, current threats, in Professors Clement and Scalia’s parlance, are revealed as injuries to statecraft as such.

A. *A Supreme Democratic Principle*

The state’s monopoly on the legitimate use of violence is a supreme democratic principle. This idea animates constitutional theory from the origins of liberalism to the present. Thomas Hobbes situated the core justification of statehood as the creation of a sovereignty so powerful that it can vanquish private violence, the “war of all against all.”⁴⁷ Abraham Lincoln, during the 1864 election, proclaimed that only fair elections, administered even during war, could prevent the breakdown of the remaining Union states into paralyzed localism.⁴⁸ As Lincoln intimated, the purpose of American elections is to avert social breakdown and political violence—elections channel social antagonisms into public fora for peaceful resolution. A century later, French philosopher Michel Foucault situated the field of democratic politics itself as a “sort of silent war” by other means—but a

⁴⁵ Samuel Issacharoff, *The Corruption of Popular Sovereignty* 11 (N.Y. Univ. Sch. of L. Pub. L. Rsch. Paper, Working Paper No. 20-2, 2020) (third alteration in original) (citation omitted), <https://ssrn.com/abstract=3550172>.

⁴⁶ Samuel Issacharoff, *Democracy’s Deficits*, 85 U. CHI. L. REV. 485, 510 n.86 (2018) [hereinafter Issacharoff, *Democracy’s Deficits*].

⁴⁷ See THOMAS HOBBS, PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY (1651), as reprinted in MORAL PHILOSOPHY FROM MONTAIGNE TO KANT 115 (J.B. Schneewind ed., 2003) (“[T]he state of men without civil society, which state we may properly call the state of nature, is nothing else but a mere *war of all against all* . . .” (emphasis added)).

⁴⁸ President Abraham Lincoln, In Response to a Serenade (Nov. 10, 1864) (“We can not [sic] have free government without elections; and if the rebellion could force us to forego, or postpone a national election it might fairly claim to have already conquered and ruined us.”).

peaceful one that contains and redirects civil conflict.⁴⁹

This core justification for electoral contests directly parallels the democratic goal of the civil legal system. In the modern era, Rule 8 of the Federal Rules of Civil Procedure established a diminished pleading standard in order to incentivize bringing private feuds into public courts for peaceful resolution in lieu of violent retribution—the goal of statecraft itself.⁵⁰ Like elections, American civil procedure turns on channeling private antagonism into adversarial, but peaceful, confrontations in court.⁵¹ Crucially, this lineage shows that both the judicial *and* electoral systems serve primarily as vehicles to maintain the peace and prevent the descent into a war of all against all. These overlapping purposes militate toward a democracy stabilizing role for courts *at least* when a breakdown into private violence threatens peaceful election administration.

The strategy of tension framework, moreover, reveals that it is precisely the notion of maintenance of the state’s normative monopoly on the legitimate use of violence imperiled by actors in the Administration that nominally represent the state at present.

B. Institutional Failure

The second requirement for judicial democracy stabilization under Professor Issacharoff’s theory is institutional failure. Such institutional failure is plainly present. As Section I.A suggests, the Trump Administration sees largescale extrajudicial violence as in its political interest, posing a significant moral hazard.⁵² The Justice Department acknowledges that even *armed* voter intimidation is “largely subjective” and “difficult to prosecute.”⁵³ Congress has failed to act whatsoever. In a hyperpolarized media environment, about one third of Americans now agree that violence could be an acceptable means to achieve their political goals, unthinkable even five years ago.⁵⁴

⁴⁹ MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976 16 (Trans. David Macey, 1997).

⁵⁰ FED. R. CIV. P. 8(a) (“A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought . . .”); see Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What’s Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH. L. REV. 587, 587–88 (2010) (explaining that the purpose of the diminished pleading standard of the revolutionary Federal Rules was to bring private disputes into court for public resolution).

⁵¹ See J.A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT. & COMP. L. Q. 281–84 (2003) (tracing the historic emergence and contrasting the decentralized, adversarial model of American civil litigation with the inquisitorial European model).

⁵² See *supra* notes 4–10 and accompanying text.

⁵³ U.S. DEP’T OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 50 (Richard C. Pilger ed., 8th ed. 2017).

⁵⁴ Larry Diamond, Lee Drutman, Tod Lindberg, Nathan P. Kalmoe & Lilliana Mason,

Some doubt that courts are well suited to fashion this kind of ex ante regulation.⁵⁵ But whether the judicial branch is the *best* actor is an idealistic, even utopian, inquiry. The reality is that courts are the *last* safeguard left for the normal democratic process.

Moreover, my argument is not that *any* strategy of tension should be met with judicial intervention, expanding the judicial role significantly. Rather, when there is a clear threat to electoral administration descending into extrajudicial violence, judicial intervention is uniquely appropriate. As Judge Dan Polster said while presiding over opioid epidemic litigation, “The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government . . . have punted.”⁵⁶

Recently, there is some evidence that courts *have* embraced their role as democracy stabilizers, though such evidence is only subtly present in written opinions. Judge Emmet Sullivan, for example, appeared to apply Judge Polster’s logic to suspicious Postal Service budget cuts likely to significantly impact mail-in voting. Judge Sullivan enjoined USPS to institute policies “to the maximum extent necessary to increase on-time mail deliveries, particularly for Election Mail.”⁵⁷ To “enforce and monitor compliance,” Judge Sullivan required USPS to send him daily reports about the speed of every level of mail distribution, embracing a regulatory role.⁵⁸ Judge Sullivan’s approach shows that courts are well-suited to address *democracy* stabilization. While courts may not be expert in nearly all areas of regulation and administration, courts *are* experts in democracy.

It also illustrates that Judge Polster’s logic applies to a certain category of electoral disputes. Perhaps we *should* have a non-partisan electoral commission to regulate and standardize our elections, as many

Americans Increasingly Believe Violence Is Justified If the Other Side Wins, POLITICO (Oct. 9, 2020, 6:00 PM), <https://www.politico.com/news/magazine/2020/10/01/political-violence-424157>. In addition, “44 percent of Republicans and 41 percent of Democrats said there would be at least ‘a little’ justification for violence if the other party’s nominee wins the election.” *Id.*

⁵⁵ Cf. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government.”).

⁵⁶ Transcript of Proceedings at 4, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-02804 (N.D. Ohio Jan. 12, 2018); see also Issacharoff, *Stabilizing Democracy*, *supra* note 44, at 46–47 (2019) (discussing Judge Polster’s comments and arguing that they illustrate a general mode of judicial review as a “competent gap-filler[.]” amid broader institutional failure). State courts have adopted a similar ex ante regulatory role in the context of the COVID-19 pandemic, refusing to find their power to order greater safety measures preempted by federal guidelines. See, e.g., *Massey v. McDonald’s Corp.*, No. 20 CH 4247, 2020 WL 5700874, at *16 (Ill. Cir. Ct. June 24, 2020) (“[W]hile there are many individuals who believe the pandemic is no longer a threat, science and medical research indicate otherwise.”).

⁵⁷ Minute Order Granting Emergency Motion to Enforce and Monitor Compliance with Preliminary Injunction, *Richardson v. Trump*, No. 20-cv-02262 (D.D.C. Oct. 27, 2020), <https://www.politico.com/f/?id=00000175-6ced-d665-a1ff-eeed21e30000>.

⁵⁸ *Id.*

commentators have suggested.⁵⁹ But as all other institutions continue to “punt,” we are left with federal courts.

To buttress opinions like this, courts can adapt principles from related election law doctrines to both limit and justify their role as democracy stabilizers. *Baker v. Carr* concerned a constitutional challenge to gerrymandering in Tennessee.⁶⁰ The Supreme Court held that if the judicial branch provided the only backstop against irreparable injury—a skewed vote tally—federal courts had discretionary power to hear such claims.⁶¹ Finding no other avenue for relief than “through the federal courts,” Justice Clark saw the Court as permitting courts to adopt an *ex ante* regulatory role, prophylactically striking down the district maps *before* elections.⁶²

Courts could also draw support from a simple, ancient tradition by framing democracy-stabilizing powers a part of a long tradition dating to the early English Chancery courts, using their equitable powers to fashion expansive, creative injunctive relief where “no adequate remedy existed at law” despite a pressing upheaval facing the social order.⁶³ This shows that judicial involvement here is not alien to our system. Since the Middle Ages, English courts have fashioned broad equitable relief to respond to pressing social problems where there is no adequate remedy at law, that is, through normal political processes.⁶⁴

The overlap between assault on a supreme democratic principle and the unique role of courts faced with irreparable electoral injuries supplied by *Baker* provides a limiting principle: Courts’ democracy stabilizing powers can be restricted to electoral circumstances with *no other conceivable remedy*.

By the same token, current institutional failure is extreme and could substantially alter voting or COVID-19-induced lengthy vote tallies, justifying expansive, prophylactic, democracy-stabilizing relief. The equitable tradition of judicial gap-filling—responding to punts by the political branches—can sustain a democracy-stabilizing role for courts

⁵⁹ See, e.g., Lee Drutman & Charlotte Hill, *America Needs a Federal Elections Agency*, NEW AM. (Nov. 4, 2020), <https://www.newamerica.org/political-reform/reports/america-needs-federal-elections-agency> (proposing a new federal agency with rulemaking and adjudicative authority to resolve electoral disputes).

⁶⁰ 369 U.S. 186 (1962).

⁶¹ *Id.* at 198–99 (holding “that the matter set forth in the complaint does arise under the Constitution,” and so federal courts have subject-matter jurisdiction); *id.* at 233 n.59 (explaining that “irreparable injuries” should guide discretionary judicial judgments based on equity (quoting *Am. Fed’n of Lab. v. Watson*, 327 U.S. 582, 593 (1946))).

⁶² *Id.* at 258 (Clark, J., concurring).

⁶³ See Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 224–30, 270–75 (2018) (surveying and cataloguing the history of the powers of equitable chancellors and tying the equitable powers of the courts to recent debates about the separation of powers)

⁶⁴ See *id.* at 229 (surveying the ancient history of judicial powers in equity).

today.

CONCLUSION

As threats to democracy change, so must doctrine. This Essay outlines a skeletal sketch of three doctrinal innovations to keep pace with looming extrajudicial violence that risks disrupting elections. First, *Mi Familia*'s holistic approach, considering a diffuse, decentralized campaign of incitement rather than a single per se act of voter intimidation, is an essential starting point. Second, courts should embrace the strategy of tension framework to reconceptualize the *nature* of this injury to the core democratic principle of the state's normative monopoly on the legitimate use of violence. Third, where strategies of tension destabilize peaceful electoral administration, courts should correct institutional failure and stabilize democracy through expansive and prophylactic orders regulating incitements to violence around the election *ex ante*.

The anti-democratic tactics I have discussed are neither uniquely right-wing nor American. Around the world, helming regimes as ideologically dissonant as those of Venezuela, Hungary, and the Philippines, to name only a few, charismatic autocrats use similar tactics to push existing institutional settlements to their breaking point and hollow out democracy from within.⁶⁵ The strategy of tension is but one weapon in their arsenal. Seen through this gloss, my argument lacks ideological, regional, or partisan valence. Though I focus on President Trump in the context of *this* election, this is a generally applicable framework.

According to Professors Turchin and Goldstone, the current crisis is will intensify, even if Donald Trump loses. During the "turbulent twenties," they argue, "polarization and distrust . . . [likely will produce] civil conflict, violence and democratic decline."⁶⁶ The specter of election-related violence may be an enduring feature of this hyperpolarized era. Courts should plan for such an outcome by developing tools and doctrine to stabilize a democracy under extreme stress.

⁶⁵ See Issacharoff, *Democracy's Deficits*, *supra* note 46, at 517–18 (surveying populist authoritarianism from the rise of Chavez and Bolsonaro in Latin America to Trump in the United States to Brexit in the UK and Viktor Orbán in Hungary).

⁶⁶ Goldstone & Turchin, *supra* note 1.