

PROTESTS, INSURRECTION, AND THE SECOND AMENDMENT

Disaggregating Political Violence

By **Michael C. Dorf**, Robert S. Stevens Professor of Law, Cornell Law School

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Introduction

Police battled the mob that stormed the U.S. Capitol on January 6, 2021, with tear gas and, in one fatal incident, live fire.¹ Counting two suicides, seven people lost their lives.² Alarming and tragic as the insurrection was, it could have been worse. Although many people have understandably asked why police did not respond with greater force — especially given the more aggressive tactics used against Black Lives Matter demonstrators the previous summer³ — it is hardly clear that more force would have quelled the uprising more quickly; it might have led to much greater bloodshed. After all, some of the people involved in the insurrection appeared to have been heavily armed.⁴

Arms were not merely a *means* by which the insurrectionists sought to prevent the formalization of the 2020 presidential election outcome; arms were in an important sense the *end* at which many of them aimed. Although the mob was a diverse and motley crew of Trump loyalists and QAnon conspiracy theorists, it included Second Amendment enthusiasts and private militias of the sort that staged similar shows of strength both before and after the January 6 insurrection at or near state capitols in Michigan, Oregon, and Virginia.⁵ If the 1995 Oklahoma City bombing for a time discredited private armed militias for conservative legal elites,⁶ right-wing populists from Sarah Palin to Donald Trump have brought the militia movement into the mainstream of the Republican Party's rank and file in the last decade and a half.⁷

Private armed groups threaten public safety in various ways. Sometimes violent encounters follow confrontations between armed private militia and law enforcement. The standoffs at Ruby Ridge, Waco, and the Malheur National Wildlife Refuge in Oregon exemplified this risk.⁸ Alternatively, private armed groups demonstrating in public can clash with counterprotesters. The violence following the 2017 Unite the Right rally in Charlottesville, Virginia, and by counterprotesting police supporter Kyle Rittenhouse in Kenosha, Wisconsin, in 2020 are tragic examples of this danger.⁹

Beyond the immediate risk of violence that private armed groups pose, firearms also sabotage public life in other ways. As Reva Siegel and Joseph Blocher explain, laws restricting firearms do not merely aim at preventing deaths and injuries; they protect “Americans’ freedom and confidence to participate in every domain of our shared life, whether to attend school, to shop, to listen to a concert, to gather for prayer, or to assemble in peaceable debate.”¹⁰ To that catalogue we can add the end at which peaceable debate frequently aims: participation in representative government. Siegel and Blocher make their point with respect to arms possessed by groups *or* individuals, but certain kinds of armed *groups* in particular pose a special threat to democracy.

In another paper,¹¹ I argue that neither the First Amendment, the Second Amendment, nor any synergistic combination of the two protects a right of armed assembly. Even assuming that the Second Amendment protects an individual's right to carry firearms in public, I argue on textual, historical, doctrinal, and normative grounds that that right does not extend to groups; nor does the First Amendment right “peaceably to assemble” extend to armed assemblies, given the risk that armed groups pose of a breach of the peace. My analysis in that other paper takes constitutional law as it is and applies it to the case of armed groups. In the balance of this essay, I contend that modern First Amendment doctrine unhelpfully lumps together two kinds of threats of political violence that can and should be disaggregated.

Free speech precedents permitting government intervention against incitement of violence have hitherto involved a paradigm of what I shall call *outsider* violence — acts perpetrated by anarchists, communists, and

other marginal figures who have virtually no chance of succeeding in their political aims but nonetheless pose a threat to public safety. By contrast, with the emergence of political violence as a tactic favored by substantial numbers of supporters of one of the two major political parties, the United States now faces a threat of what I shall call *insider* violence. Like outsider violence, insider violence poses a risk to public safety, but it also poses a risk of fatally undermining democracy.

Insider political violence itself is not new in U.S. history, of course. For example, following the Civil War, the Ku Klux Klan, other armed private groups, and lynch mobs often acted with the tacit or even explicit support of state and local authorities to murder, terrorize, and disenfranchise African American citizens.¹² Likewise, Pinkerton guards and private militias in the late 19th century busted unions in close cooperation with government officials at the federal, state, and local levels.¹³ Yet while these and related events have ongoing effects, they largely predate modern free speech doctrine, which did not take hold until the 1960s. Insider political violence is thus new within the admittedly short history of what we have come to understand as the American doctrine of free speech and the still-shorter history of Second Amendment case law.

The reemergence of insider violence raises an urgent set of questions about whether and, if so, how to recalibrate First and Second Amendment doctrine governing permissible restrictions on speech, assembly, and the carrying of firearms. In what follows, I disaggregate political violence and then briefly consider three kinds of legal responses to the special threat posed by insider violence: expansion of the proscribable categories of incitement and true threats; stringent restrictions on weapons; and reforms that aim to reduce political polarization.

An Incomplete Paradigm

The prophetic dissents of Justices Oliver Wendell Holmes Jr. and Louis Brandeis a century ago laid the groundwork for current First Amendment case law limiting government's ability to restrict speech for fear of political violence. Much ink has been spilled on how Holmes's "clear and present danger" test evolved in his own thinking¹⁴ and on its relation to the incitement test of *Brandenburg v. Ohio* (1969) that eventually replaced it.¹⁵ Here I put aside the precise doctrinal meanderings to focus instead on the underpinnings. I contend that modern free speech ideology allows for restrictions that combat the dangers posed by outsider political violence while mostly overlooking the additional danger of insider political violence.

Nominally, Justices Holmes and Brandeis expressed equanimity about the prospect of mass speech leading to the permanent destruction of American democracy. Dissenting in *Gitlow v. New York* (1925),¹⁶ Holmes, joined by Brandeis, wrote: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."¹⁷ Yet the context of that case and others makes clear that Holmes and Brandeis did not need to test the principle because *Gitlow* and the other free speech claimants to come before the Court during the first Red Scare were destined to fail. In *Gitlow*, the great dissenters went on to note, "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared [Gitlow's] views."¹⁸ Likewise, six years earlier, in *Abrams v. United States* (1919),¹⁹ Holmes and Brandeis had dismissed the defendant's speech as "poor and puny anonymities."²⁰

To similar effect is the Brandeis concurrence in *Whitney v. California* (1927).²¹ "The fitting remedy for evil counsels," he wrote, "is good ones."²² And so it is if the worry is that people holding harmful but fringe views —

such as anarchism or communism in the early 20th-century United States — will persuade their fellow citizens that the time is ripe to overthrow the government.

But if the mob aims not so much to displace the entire system of government (despite some loose talk of “revolution”)²³ but to intimidate one faction of the government on behalf of another, “more speech” does not address the problem, which is the intimidation itself. Armed supporters of Trump or whoever succeeds him in leading his fascist movement function like a semiofficial paramilitary force. They may in fact be quite good at keeping a kind of peace through their intimidation, so that actual violence rarely materializes. Thus, the fact that there is ample time to avoid bloodshed is beside the point.

So too with the *Brandenburg* test, which uses the Holmes-Brandeis logic to address the question of when government may step in to prevent groups holding fringe ideological views from committing acts of violence:²⁴ it leaves us vulnerable to supporters of one of the two major political parties willing to use the threat of violence to prevail in intraparty or interparty conflict.

Responses

What is to be done? I shall briefly consider a few possibilities.

The Supreme Court could tweak First Amendment doctrine to allow earlier interventions against mob violence, perhaps by relaxing or even eliminating *Brandenburg*'s requirement that a breach of the peace must be “imminent” in order for law enforcement to intervene or by expanding what counts as a proscribable “true threat.”²⁵ Early intervention could both reduce the outbreak of violence and tamp down threats of violence. It thus could be somewhat effective at combating insider violence, which, as noted above, operates as much by threat of force as by its use. However, in some circumstances, the insiders will be allied with the police or other officials charged with restraining them, which may make the latter reluctant to intervene early or at all. Modifying First Amendment precedent to allow earlier interventions is at best a partial solution to the reality and threat of insider violence.

Moreover, allowing earlier intervention by law enforcement would risk stifling legitimate free expression. It is not difficult to imagine that law enforcement would be eager to use new powers first and most aggressively against, say, peaceful demonstrators protesting police brutality and systemic racism.²⁶

That very fact might be used to support a more radical doctrinal change. My colleague Steven Shiffrin has argued persuasively that the right of dissent lies at the heart of the First Amendment.²⁷ Perhaps the law ought to afford greater protection to outsider speech — dissent — than to insider speech. Attractive as this approach might be in principle, however, it is doubtful that a broadly acceptable definition of dissent could be found. Depending on the time and place, pro-life as well as pro-choice speakers could justifiably claim to be dissenters. So too for just about every controversial issue. A Supreme Court that has made content neutrality and especially viewpoint neutrality central to free speech jurisprudence would surely be unreceptive to a doctrine that distinguishes between dissenting and nondissenting speech.²⁸

How about targeting guns rather than assembly? As I observed above, properly construed, the Second Amendment poses no obstacle to prohibiting armed assembly.²⁹ And limiting armed assemblies certainly would be useful. However, doing so would not be a panacea. For one thing, if — as the Supreme Court might

hold in a pending case³⁰ — there is an *individual* right to carry firearms in public, then even if an armed assembly is unlawful, law enforcement may lack the means to prevent one. Coordinating via social media or otherwise, legally armed individuals could simultaneously descend on a target location, where they could then constitute themselves a formidable militia.³¹ A world in which individuals can legally carry firearms may be one in which, as a practical matter, groups can be armed as well.

Moreover, mobs do not need firearms to achieve violent aims. Domestic police understandably reluctant to fire on civilians can be overwhelmed by a sufficiently large mob armed with flagpoles, fire extinguishers, and stolen police shields.³² Indeed, when acting with the encouragement of a demagogue who holds political power, there may be no limit to the evil a lightly armed and highly inflamed mob can perpetrate. For example, although firearms played a role in the 1994 Rwandan genocide, more than two-thirds of the victims were either hacked to death with machetes or beaten to death with clubs.³³ Gun control is worth pursuing for many reasons, but even if it were to succeed, it would not necessarily prevent insider political violence.

In the end, the best way to stop insider political violence is to stop politicians from catering to people who are violent. To be sure, that may be easier said than done. Perhaps when Trump fades from the political scene, so too will the modern Republican Party's dalliance with fascism. Yet it is at least as likely that Trumpism will find some new champion who is equally willing not only to inflame the base with lies but to wink at or openly encourage violence.

Political realignment could be part of the solution. The post-2012 election GOP “autopsy” report urged a moderation of views so that the party could reach out to a more diverse electorate rather than having to rely on voter suppression and winning elections while losing the popular vote.³⁴ Trump and Trumpism instead doubled down, but it is possible to imagine a reversal, perhaps one that builds on Republicans' somewhat surprising strength in 2020 among Latinx voters.³⁵ A Republican Party capable of winning electoral majorities would have no need for political violence.

Some such movement is inevitable given demographics, but it could take several election cycles — each of which provides an opportunity for catastrophic damage to the institutions of U.S. government. If one judges that there is insufficient time to wait, then perhaps the top priority ought to be reducing political polarization. When the parties' policy prescriptions are relatively close to one another, people who support a losing candidate are unlikely to resort to political violence; however, if the supporters of one candidate or party believe that leaders of the other major party are Satan-worshipping pedophiles,³⁶ they are substantially more likely to regard any election their side loses as wholly illegitimate and thus occasion for insurrection.

To be sure, belief in irrational conspiracy theories is more than a matter of polarization. The problem is not so much the *distance* between those who believe in QAnon and Trump's Big Lie and those who do not, but that millions of Americans hold the delusional beliefs in the first place.³⁷ Yet those delusional beliefs may well be as much an effect as a cause of Trumpism. Yes, conspiracy theories are as old as time, and recent exogenous factors — like social media bubbles — make them more potent now than in the past. But none of that explains why, despite the tendency of all human beings to believe what they want to believe, in the third decade of the 21st century, so many more Americans on the right than on the left want to believe especially dangerous nonsense. Trump, his allies, and his enablers nurtured the demonization of Democrats and thus a taste for political violence.³⁸

If polarization plays an important role in fostering the risk of political violence, then we ought to look for ways to reduce polarization. Fortunately, there is no shortage of excellent proposals.³⁹ Unfortunately, most of them

would require either a constitutional amendment or an act of Congress that will remain beyond reach so long as 41 Senators retain the power to prevent a vote on ordinary legislation.⁴⁰

Conclusion

The risk to American democracy from insider violence presents a challenge because it does not fit into the First Amendment doctrine that has evolved in the last century chiefly to address the distinct problem of outsider violence. However, as noted above, insider violence itself is hardly unprecedented. During the antebellum period and through the Civil War, enslavers used violence in an effort to preserve the white supremacist character of American government.⁴¹ During and after Reconstruction, nominally private groups like the Ku Klux Klan often worked in partnership with elected officials toward the same goal.⁴²

The good news is that despite the deep roots of political violence, progress can be made to promote democracy. The bad news is that such progress can take a very long time and then give way to backsliding. A century passed between the end of the Civil War and the enactment of the Voting Rights Act (VRA).⁴³ Then, after almost another half-century had passed, the Roberts Court declared that “things have changed dramatically” as an excuse for gutting the VRA.⁴⁴ Numerous voter suppression measures ensued.⁴⁵

These and related developments should give pause to anyone who thinks that democracy can be saved simply by tinkering with legal doctrine. Despite John Hart Ely’s conception of the Warren Court as “representation-reinforcing,”⁴⁶ for five decades the Supreme Court has more frequently allowed or taken measures to undercut representation. In addition to neutering the VRA, the Court has invalidated campaign finance laws,⁴⁷ disallowed federal court challenges to partisan gerrymandering,⁴⁸ and, most notoriously, invented a one-time-only equal protection doctrine to resolve a presidential election in favor of the Republican candidate.⁴⁹ To its credit, the Supreme Court did not fulfill Trump’s fantasy of a judicially assisted coup, but perhaps only because the 2020 election fell outside the “margin of litigation.”⁵⁰

Under the right circumstances, would the Supreme Court knuckle under to or even approve of insider political violence? Probably not, but the case law just described suggests that it need not do so to undermine democracy. Deliverance from the legal and extralegal threats to self-rule will not come from the Court. It will come, if at all, through the same arduous process that generations of abolitionists, civil rights marchers, and other activists used to bring about social and political change during earlier periods of American history and also against the odds — through the peaceful exercise of First Amendment rights, whether or not so recognized by the courts.

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Endnotes

¹ Rebecca Tan et al., *Trump Supporters Storm U.S. Capitol, with One Woman Killed and Tear Gas Fired*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/local/trump-supporters-storm-capitol-dc/2021/01/06/58afc0b8-504b-11eb-83e3-322644d82356_story.html.

² Will Wright, *Two Officers Who Defended the Capitol Have Died by Suicide, a Police Chief Says*, N.Y. TIMES (Jan. 27, 2021), <https://www.nytimes.com/live/2021/01/27/us/biden-trump-impeachment#two-officers-who-defended-the-capitol-have-died-by-suicide-a-police-chief-says>.

³ See, e.g., Rachel Chason & Samantha Schmidt, *Lafayette Square, Capitol Rallies Met Starkly Different Policing Response*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/>.

⁴ See Brad Heath & Sarah N. Lynch, *Arrested Capitol Rioters Had Guns and Bombs, Everyday Careers and Olympic Medals*, REUTERS (Jan. 14, 2021), <https://www.reuters.com/article/us-usa-trump-protest-cases-insight/arrested-capitol-rioters-had-guns-and-bombs-everyday-careers-and-olympic-medals-idUSKBN29J2V8>.

⁵ See Charles Homans, *Out of the Barrel of a Gun*, N.Y. TIMES MAG. (Jan. 26, 2021), <https://www.nytimes.com/interactive/2021/01/26/magazine/armed-militia-movement-gun-laws.html>.

⁶ See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 229–36, 243 (2008) (explaining how “Americans can appeal to the law-and-order Second Amendment as the founders’ Second Amendment and can make claims on others outside their normative community through it — as they could not if they were to embrace a republican Second Amendment that authorized violent insurrection and the forms of originalism the militias practiced in the 1990s”).

⁷ See Nick Corasaniti & Maggie Haberman, *Donald Trump Suggests “Second Amendment People” Could Act Against Hillary Clinton*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html>; Tierney Sneed, *Trump Just the Latest on Hard Right to Call for “2nd Amendment Remedies,”* TALKING POINTS MEMO (Aug. 11, 2016), <https://talkingpointsmemo.com/dc/trump-second-amendment-people-context>; Sam Stein, *Sharron Angle Floated “2nd Amendment Remedies” as “Cure” for “The Harry Reid Problems,”* HUFFPOST (June 16, 2010), https://www.huffpost.com/entry/sharron-angle-floated-2nd_n_614003.

⁸ Nicholas K. Geranios, *25 Years Later, Ruby Ridge Standoff Inspires Militia Groups*, ASSOCIATED PRESS (Aug. 30, 2017), <https://apnews.com/article/d1c37606732147ee9cb04627facaf87a>; Melissa Chan, *The Real Story Behind the Waco Siege: Who Were David Koresh and the Branch Davidians?*, TIME (Jan. 24, 2018), <https://time.com/5115201/waco-siege-standoff-fbi-david-koresh>; *Oregon Standoff Timeline: 41 Days of the Malheur Refuge Occupation and the Aftermath*, OREGONIAN (Feb. 14, 2017), <https://www.oregonlive.com/portland/2017/02/oregon-standoff-timeline-41-da.html>.

⁹ Mitch Smith, *James Fields Sentenced to Life in Prison for Death of Heather Heyer in Charlottesville*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/james-fields-sentencing.html>; Mark Guarino et al., *17-Year-Old Charged with Homicide After Shooting During Kenosha Protests, Authorities Say*, WASH. POST (Aug. 26, 2020), <https://www.washingtonpost.com/nation/2020/08/26/jacob-blake-kenosha-police-protests>.

¹⁰ Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Under Heller*, 115 NW. U. L. REV. (forthcoming 2021); see also Reva B. Siegel & Joseph Blocher, *Why Regulate Guns?*, 48 J. L. MED. & ETHICS 11, 11 (2021).

¹¹ Michael C. Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, NW. U. L. REV. (forthcoming 2021).

¹² See EQUAL JUSTICE INITIATIVE, *Documenting Reconstruction Violence*, in RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 (2020), <https://eji.org/report/reconstruction-in-america/documenting-reconstruction-violence>.

¹³ See, e.g., LIBRARY OF CONGRESS, *Homestead Strike: Topics in Chronicling America*, <https://guides.loc.gov/chronicling-america-homestead-strike> (last visited May 8, 2021) (describing the violent encounter between Pinkerton guards and steel workers in the 1892 Homestead Strike).

¹⁴ See generally THOMAS HEALY, *THE GREAT DISSSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND — AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013).

¹⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also *id.* at 450–54 (Douglas, J., concurring) (criticizing the clear and present danger test while canvassing the Court’s First Amendment jurisprudence).

¹⁶ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁷ *Id.* at 673 (Holmes, J., joined by Brandeis, J., dissenting). *U.S. Reports* designates the dissent as that of Holmes alone, but it begins by purporting to speak for both Holmes and Brandeis. Accordingly, I treat Brandeis as having joined.

¹⁸ *Id.*

¹⁹ *Abrams v. United States*, 250 U.S. 616 (1919).

²⁰ *Id.* at 629 (Holmes, J., joined by Brandeis, J., dissenting).

²¹ *Whitney v. California*, 274 U.S. 357 (1927).

²² *Id.* at 375 (Brandeis, J., concurring).

²³ See, e.g., Molly Hennessy-Fiske, “*Second Revolution Begins*”: *Armed Right-Wing Groups Celebrate Capitol Attack*, L.A. TIMES (Jan. 6, 2021), <https://www.latimes.com/world-nation/story/2021-01-06/the-second-revolution-begins-today-armed-right-wing-groups-celebrate-attack-on-capitol> (reporting on members of Trump-aligned far-right groups who viewed the January 6 rampage on the Capitol as the start of a “second” American revolution).

²⁴ See *Brandenburg* at 447–48.

²⁵ See *id.*; see also *Virginia v. Black*, 538 U.S. 343, 359–60 (2003); cf. *Elonis v. United States*, 575 U.S. 723 (2015) (construing federal criminal statute to require purpose or knowledge of communicating a threat rather than merely that a reasonable person would perceive a true threat, and thus not deciding whether the First Amendment permits true-threat liability based on victim’s perspective).

²⁶ See, e.g., Hannah Hagemann & Scott Neuman, “*I Can’t Breathe*”: *Peaceful Demonstrators Continue to Rally over George Floyd’s Death*, NPR (June 3, 2020), <https://www.npr.org/2020/06/03/869186653/demonstrations-over-george-floyds-death-and-police-brutality-carry-on> (reporting on peaceful protests staged across the United States in the wake of George Floyd’s death in 2020).

²⁷ See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 86–109 (1990).

²⁸ See, e.g., *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (asserting that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).

²⁹ See Dorf, *supra* note 11.

³⁰ On April 26, 2021, the Supreme Court granted a petition for a writ of certiorari in *New York State Rifle v. Corlett*, No. 20-843, a case presenting the question of whether a state law restricting public concealed carriage of firearms to persons who can show “proper cause” violates the Second Amendment.

³¹ See, e.g., Michael Martina & Seth Herald, *Hundreds Protest in Michigan Seeking End to Governor’s Emergency Powers*, REUTERS (Apr. 30, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-michigan/hundreds-protest-in-michigan-seeking-end-to-governors-emergency-powers-idUSKBN22C38W> (describing the members of militia groups who gathered at the Michigan capitol building in April 2020 to protest the state’s coronavirus policies).

³² See Marshall Cohen et al, *Guns, Knives, Bombs and Bear Spray: Here Are the Weapons Trump Supporters Brought to DC on the Day of the Capitol Attack*, CNN (Feb. 17, 2021), <https://www.cnn.com/2021/02/17/politics/capitol-insurrection-weapons-ron-johnson/index.html> (members of the Capitol mob were seen armed with “a baseball bat, a fire extinguisher, a wooden club, a spear, crutches, a flagpole, bear spray, mace, chemical irritants, stolen police shields, a wooden beam, a hockey stick, a stun gun, and knives.”)

³³ See Philip Verwimp, *Machetes and Firearms: The Organization of Massacres in Rwanda*, 43(1) J. PEACE RES. 5, 13 (2006), <https://journals.sagepub.com/doi/pdf/10.1177/0022343306059576>.

³⁴ REPUBLICAN NAT’L COMM., *GROWTH & OPPORTUNITY PROJECT* 4–8 (2013), <https://online.wsj.com/public/resources/documents/RNCreport03182013.pdf>.

³⁵ Suzanne Gamboa & Carmen Sesin, *Trump’s Gains Among Latino Voters Shouldn’t Come as a Surprise. Here’s Why*, NBC NEWS (Nov. 5, 2020), <https://www.nbcnews.com/news/latino/trump-s-gains-among-latino-voters-shouldn-t-come-surprise-n1246463>.

³⁶ See Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. TIMES (Mar. 4, 2021), <https://www.nytimes.com/article/what-is-qanon.html>.

³⁷ See *id.*

³⁸ See Peter Baker, *A Long History of Language That Incites and Demonizes*, N.Y. TIMES (updated Sept. 23, 2020), <https://www.nytimes.com/2020/08/31/us/politics/trump-police-protests.html>.

³⁹ See generally SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (NATHANIEL PERSILY ed., 2015).

⁴⁰ See VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RSCH. SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE (updated Apr. 7, 2017), <https://www.senate.gov/CRSpubs/3d51be23-64f8-448e-aa14-10ef0f94b77e.pdf>.

⁴¹ See, e.g., SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2003) (detailing an essential means of enforcing white supremacy through the threat and use of force).

⁴² See S. POVERTY L. CTR., KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE 15–20 (2011), <https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf>; EQUAL JUSTICE INITIATIVE, *supra* note 12.

⁴³ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

⁴⁴ *Shelby Cnty. v. Holder*, 570 U.S. 529, 547 (2013).

⁴⁵ See *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

⁴⁶ JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

⁴⁷ *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010); see *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014).

⁴⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

⁴⁹ See *Bush v. Gore*, 531 U.S. 98, 110–11 (2000) (per curiam).

⁵⁰ Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 938 (2005).