

MEANS, NOT VIEWS: THE CONSTITUTIONAL DISTINCTION BETWEEN RADICALISM AND EXTREMISM

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ABSTRACT

This Article identifies, defines, and defends a constitutional distinction that American First Amendment doctrine has long carried as an implicit thread but has not articulated as a unified analytical framework: the distinction between **radicalism** and **extremism**, drawn at **means, not views**. Radicalism is a political-doctrinal disposition that challenges conventional positions through constitutional means — speech, association, advocacy, petition, dissent, persuasion, peaceful boycott, electoral mobilization. Extremism is the use of unconstitutional means — violence, true threats, or imminent incitement of unlawful action — to advance a political view. The constitutional line is the means deployed, not the radicality of the view advanced. The Article develops three claims. First, this distinction is the operative principle underlying *Brandenburg v. Ohio*, *NAACP v. Claiborne Hardware Co.*, *Snyder v. Phelps*, and the modern First Amendment canon — but the doctrinal authorities have not previously been synthesized as a unified framework defining radicalism and extremism by reference to constitutional and unconstitutional means. Second, the framework carries a structural corollary the existing literature has not articulated: **conventional dispositions may themselves be extremist while remaining conventional**. American constitutional history demonstrates this repeatedly — slavery, Jim Crow, and the disenfranchisement of women were conventional dispositions whose enforcement by violent means is

now universally recognized as extremism that conventional politics legitimized. Radical challenges are the constitutional mechanism by which the polity identifies which conventional dispositions are themselves extremist. Third, the contemporary counter-terrorism predicate apparatus — exemplified by the May 2026 White House *U.S. Counterterrorism Strategy* and the June 2025 House Homeland Security hearing on "Anti-Israel Extremist Groups" — operationalizes a categorical collapse of this distinction, treating undefined political identities (Anarchist, Anti-Fascist, anti-American, radically pro-transgender, anti-Israel) as inherently extremist regardless of the constitutionality of the means deployed by persons so categorized. That collapse is unconstitutional under controlling Supreme Court precedent and, this Article argues, fundamentally inverts the constitutional structure under which radical challenges historically reveal conventional extremism. The Article then extends the framework beyond American First Amendment doctrine. The means/views distinction is portable across democratic constitutional systems (Article 10 ECHR, ICCPR Article 19, Section 153A in India, the *Kol Ha'am* doctrine in Israel, the African Charter, the Inter-American Convention) because its structural features are not culturally contingent. The framework codifies five democratic constitutional principles — legality, specificity, means-not-views, self-correction, and reciprocity — into a single operational test producing cross-system comparability, and supplies analytical infrastructure for conflict de-escalation, resolution, and reform that retrospectively explains the means/views basis of the Good Friday Agreement, the South African transition, the Spanish post-Franco transition, the Colombian FARC peace process, the Tunisian post-Arab Spring transition, and the American civil-rights settlement. The Article concludes by examining the framework's doctrinal consequences and its broader function as constitutional infrastructure for democratic systems globally.

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I. INTRODUCTION

This Article begins from a doctrinal observation that has not, to the author's knowledge, been articulated as a unified analytical framework: American First Amendment doctrine has long policed a constitutional line between two categories of political-doctrinal disposition, distinguished by the *means* through which each operates rather than the *views* either holds. The two categories — radicalism and extremism — are routinely invoked in administrative, legislative, and journalistic discourse, frequently as interchangeable pejoratives. The Supreme Court's First Amendment cases have never explicitly defined either term. Yet the doctrinal substrate the Court has built — from *Schenck*¹ through *Whitney*,² *Brandenburg*,³ *Hess*,⁴ *Watts*,⁵ *NAACP v. Claiborne Hardware Co.*,⁶ *Snyder v. Phelps*,⁷ *Cohen v. California*,⁸ *Texas v. Johnson*,⁹ *Holder v. Humanitarian Law Project*,¹⁰ *Counterman v. Colorado*,¹¹ and the contemporary canon — describes precisely this distinction, line by line, case by case.

The doctrinal line is **means, not views**: government may proscribe speech that crosses into incitement of imminent lawless action, true threats, or speech integral to criminal conduct, but it may not proscribe speech because of the radicality of the view expressed.¹² The view is

1 *Schenck v. United States*, 249 U.S. 47 (1919) (upholding Espionage Act conviction of socialist for anti-draft pamphlets; articulating "clear and present danger" test in dicta).

2 *Whitney v. California*, 274 U.S. 357 (1927) (upholding California criminal syndicalism statute conviction; Brandeis, J., concurring).

3 *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

4 *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam).

5 *Watts v. United States*, 394 U.S. 705 (1969) (per curiam).

6 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

7 *Snyder v. Phelps*, 562 U.S. 443 (2011).

8 *Cohen v. California*, 403 U.S. 15 (1971).

9 *Texas v. Johnson*, 491 U.S. 397 (1989).

10 *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

11 *Counterman v. Colorado*, 600 U.S. 66 (2023).

12 *Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

constitutionally untouchable; the means by which the view is advanced is the only proper object of state regulation.

This Article gives the distinction the name the cases imply but never assign. *Radicalism* is a political-doctrinal disposition that challenges conventional positions through constitutional means: speech, association, advocacy, petition, dissent, persuasion, peaceful boycott, electoral mobilization, civil-society organization. *Extremism* is the use of unconstitutional means — violence, true threats, or imminent incitement of unlawful action — to advance any political view, conventional or radical. The constitutional line is drawn at the means, not at the radicality of the view.

This naming exercise might seem terminological. It is not. The contemporary administrative discourse on counter-terrorism — and, since May 2026, the formal executive-branch strategy document committing the United States to extrajudicial state action¹³ — treats "extremism" and "radicalism" as interchangeable categorical predicates, with the predicates defined neither by the means deployed nor by any statutory authority, but by political identity itself.¹⁴ The May 2026 White House *U.S. Counterterrorism Strategy* enumerates "Violent Left-Wing Extremists, including Anarchists and Anti-Fascists" as one of three "major types of terror groups";¹⁵ elaborates the category at page 7 to include persons whose "ideology is anti-American, radically pro-transgender, and anarchist";¹⁶ and pairs the enumeration with a Presidential commitment that "if you hurt Americans, or are planning to hurt Americans, '[w]e [w]ill [f]ind

¹³ U.S. COUNTERTERRORISM STRATEGY, THE WHITE HOUSE (May 2026) [hereinafter 2026 CT STRATEGY].

¹⁴ *Id.* at 5, 7 (enumerating categorical CT targets including "Violent Left-Wing Extremists, including Anarchists and Anti-Fascists" and "violent secular political groups whose ideology is anti-American, radically pro-transgender, and anarchist").

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 7.

[y]ou and [w]e [w]ill [k]ill [y]ou."¹⁷ The categorical predicates are undefined in statute,¹⁸ the targeting is operationalized by a parallel commitment to "map them at home, identify their membership, map their ties to international organizations like Antifa, and use law enforcement tools to cripple them operationally,"¹⁹ and the documentary apparatus formalizes a pre-existing administrative-legislative practice exemplified by the June 11, 2025 hearing of the House Homeland Security Subcommittee on Counterterrorism and Intelligence: *The Rise of Anti-Israel Extremist Groups and Their Threat to U.S. National Security*.²⁰

The conflation of radicalism and extremism is therefore not academic. It is the operative framework under which the executive branch of the United States has committed, in writing, to deploy intelligence, military, financial, and law-enforcement capabilities against U.S. citizens identified by undefined political-identity predicates. The doctrinal question this Article addresses is whether First Amendment doctrine — and the broader constitutional inventory the doctrine inhabits — permits that operationalization. The doctrinal answer, this Article argues, is no.

The Article proceeds in eleven parts. Part II surveys the existing doctrinal framework and the points at which the contemporary apparatus collapses it. Part III defines radicalism as constitutional-means challenge and develops the historical inventory of American radicalism — heliocentrism, abolitionism, women's suffrage, *Brown* and the civil rights movement, marriage equality — as the doctrinal evidence that radicalism is the constitutional mechanism through

¹⁷ *Id.* at 3 (Presidential Foreword, signed Donald J. Trump, May 2026).

¹⁸ Neither "Anarchist," "Anti-Fascist," "anti-American," "radically pro-transgender," nor "violent left-wing extremist" appears in 18 U.S.C. § 2331 (statutory definition of "international" and "domestic" terrorism), § 2332b(g)(5) (federal crime of terrorism), 8 U.S.C. § 1182(a)(3)(B)(iii) (terrorist activity for immigration purposes), 22 U.S.C. § 2656f(d) (terrorism for State Department reporting purposes), or 18 U.S.C. § 2333 (civil terrorism cause of action). The historic "anarchist" provision at 8 U.S.C. § 1182(a)(3)(D) is an immigration provision and has never been read to authorize CT action against U.S. citizens.

¹⁹ 2026 CT STRATEGY, *supra* note 14, at 7.

²⁰ *The Rise of Anti-Israel Extremist Groups and Their Threat to U.S. National Security*: Hearing Before the H. Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Security, 119th Cong., Serial No. 119-19 (June 11, 2025) [hereinafter June 2025 Hrg.].

which conventional positions are reformed. Part IV defines extremism as the use of unconstitutional means and develops the *Brandenburg* line as the operative test. Part V articulates the corollary the existing literature has not previously identified: that conventional dispositions may themselves be extremist while remaining conventional, and that radical challenges are the constitutional mechanism for revealing which conventional dispositions are themselves extremist; the Part includes the American and international historical inventories that demonstrate the corollary's operation and articulates the predictive function the corollary supplies for polities on the trajectory toward conventional extremism. Part VI applies the framework to contemporary counter-terrorism predicates, with particular attention to the 2026 CT Strategy, the June 2025 House Homeland Security hearing, and active international conflicts the framework currently diagnoses. Part VII develops the doctrinal and structural consequences of restoring the means/views distinction — for vagueness analysis, equal protection, due process, separation of powers, and Petition Clause litigation. Part VIII develops the framework's universal portability across democratic constitutional systems, with a jurisdictional application map identifying the controlling-authority substitutions required for deployment under the European Convention on Human Rights, in India, Israel, polities undergoing democratic backsliding, authoritarian systems where domestic constitutional channels are foreclosed, and the major international human-rights bodies. Part IX articulates the framework's codification of five democratic constitutional principles — legality, specificity, means-not-views, self-correction, and reciprocity — into a single operational test, with cross-system comparability as the principal consequence. Part X develops the framework's potential as analytical infrastructure for conflict de-escalation, resolution, and reform, with retrospective application to the major modern

resolution successes and prospective application to ongoing active conflicts. A concluding Part XI follows.

The Article does not invent new doctrine. The authorities are old, well-developed, and binding. What it offers is a synthesis: a unified framework that the existing doctrinal substrate supports but has not previously named. The framework is intended for practical use — by defenders facing the operational application of the counter-terrorism apparatus against constitutionally protected radical political activity, by courts confronting categorical predicates the framework's authority structure does not support, and by scholars who have long described the same doctrinal phenomena without a unified vocabulary.

II. THE STANDARD FRAMEWORK AND ITS CONTEMPORARY COLLAPSE

A. The Doctrinal Substrate

The First Amendment's text — "Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"²¹ — does not, on its face, distinguish radical speech from conventional speech, or extreme speech from moderate speech. The early twentieth-century cases applying the Amendment to political dissent — *Schenck*,²² *Frohwerk*,²³ *Debs*,²⁴ *Abrams*,²⁵ *Whitney*²⁶ — produced a doctrinal architecture that, while affirming convictions of political dissidents under the Espionage Act and state criminal syndicalism statutes, also produced the

²¹ U.S. CONST. amend. I.

²² *Schenck*, 249 U.S. 47.

²³ *Frohwerk v. United States*, 249 U.S. 204 (1919).

²⁴ *Debs v. United States*, 249 U.S. 211 (1919).

²⁵ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

²⁶ *Whitney*, 274 U.S. 357 (Brandeis, J., concurring).

dissents and concurrences that would eventually become the doctrinal foundation for the modern distinction.

Justice Holmes's *Abrams* dissent articulated the principle that would mature into the modern test: "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."²⁷ Justice Brandeis's *Whitney* concurrence supplied the operative line: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."²⁸ Brandeis added the structural principle that would later define *Brandenburg*'s test: "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."²⁹

The Court formally adopted the Brandeis-Holmes framework in *Brandenburg v. Ohio*. *Brandenburg* held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³⁰ The doctrinal innovation was the **two-prong test**: (1) the speech must be *directed to* inciting imminent lawless action (intent or directedness), and (2) the speech must be *likely to* incite or produce such action (probability/imminence). *Hess v. Indiana* clarified the imminence requirement: the speech at issue in *Hess* — "We'll take the fucking street later" — "amounted to nothing more than advocacy of illegal action at some indefinite future time" and

²⁷ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁸ *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

²⁹ *Id.* at 377.

³⁰ *Brandenburg*, 395 U.S. at 447.

could not be punished consistent with *Brandenburg*.³¹ *Watts v. United States* applied the same analytical move to true-threats doctrine, distinguishing "political hyperbole" from "true threats."³²

The modern Court has refined the test repeatedly. *Counterman v. Colorado* held that true-threats prosecutions require proof of at least recklessness as to the threatening nature of the statement.³³ *Snyder v. Phelps* held that offensive political speech on matters of public concern is protected even where the speech inflicts severe emotional distress on unwilling audiences.³⁴ *NAACP v. Claiborne Hardware Co.* held that a political boycott of segregated businesses was constitutionally protected even where extremist speech (calls for violence by one speaker) occurred in proximity to the protected political activity; the Court refused to impute the extremist speech to the boycott movement.³⁵ *Texas v. Johnson* held that flag-burning — among the most radical forms of symbolic political expression in American constitutional history — was protected.³⁶ *Cohen v. California* held that offensive political expression ("Fuck the Draft" on a jacket worn in a courthouse) was protected.³⁷ *Holder v. Humanitarian Law Project* held that independent advocacy of foreign-terrorist-organization political positions — even where the speaker independently endorsed the FTO's goals — was protected; only conduct *coordinated* with the FTO was subject to material-support liability.³⁸

³¹ *Hess*, 414 U.S. at 108.

³² *Watts*, 394 U.S. at 708 ("[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.").

³³ *Counterman*, 600 U.S. at 79 ("In the threats context, [recklessness] means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway.").

³⁴ *Snyder*, 562 U.S. at 458 ("Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker.").

³⁵ *Claiborne*, 458 U.S. at 909–11.

³⁶ *Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

³⁷ *Cohen*, 403 U.S. at 25.

³⁸ *Holder v. HLP*, 561 U.S. at 26–27.

The line that runs through the cases is the line this Article names: **means, not views**. *Brandenburg's* incitement-and-imminence test is a test of *means* (directedness to imminent lawless action, likelihood of producing it), not a test of *views* (radicality, offensiveness, ideological extremity). *Watts's* true-threat test is a test of *means* (whether the speaker communicated a true threat), not a test of *views* (whether the speaker held threatening political views). *Claiborne's* political-boycott protection is a protection of *means* (peaceful boycott as a form of associational expression), not a protection of *views* (the views of the speakers being protected). *Holder v. HLP* draws the line at *coordination* (a means analysis), not at the *position* the speaker endorses.

B. The Administrative Inheritance: DVE, HVE, and the Radicalization Pipeline

In the post-9/11 era, federal counter-terrorism agencies developed an administrative apparatus for categorizing domestic threats that operates outside the doctrinal framework Part II.A describes. The FBI and Department of Homeland Security routinely deploy the categories "Domestic Violent Extremism" (DVE) and "Homegrown Violent Extremists" (HVE) as if these categories were statutorily defined predicates.³⁹ They are not. Neither term appears in 18 U.S.C. § 2331(5) (the statutory definition of "domestic terrorism"),⁴⁰ 18 U.S.C. § 2332b(g)(5) (the statutory definition of "federal crime of terrorism"),⁴¹ 8 U.S.C. § 1182(a)(3)(B) (the immigration

³⁹ See, e.g., U.S. DEPT OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM (annual reports 2021–2025) (deploying "Domestic Violent Extremism" and "Homegrown Violent Extremists" categories without statutory grounding).

⁴⁰ 18 U.S.C. § 2331 (defining "international terrorism" at § 2331(1) and "domestic terrorism" at § 2331(5); neither definition incorporates a "DVE" or "HVE" category).

⁴¹ 18 U.S.C. § 2332b(g)(5) (defining "federal crime of terrorism" for sentencing-enhancement purposes; no "DVE" or "HVE" category).

"terrorist activity" definition),⁴² or any other terrorism statute Congress has enacted. The administrative categories supplement the statutory inventory by executive practice.

The administrative categories operationalize what scholars of the counter-terrorism literature have termed the "radicalization pipeline" model. The model treats radicalism as a *pathway* to extremism — radical ideas, in the model's framework, are the antecedent of extremist violence.⁴³ The model treats the political identity of a putative radical as itself a security concern, on the theory that the ideology produces the violence. The model is the analytical inverse of the *Brandenburg* framework: it imputes future violence from present political identity, while *Brandenburg* imputes proscribability only from imminent, likely lawless action.

Critical scholars have documented the conceptual and empirical failures of the pipeline model. Arun Kundnani has argued that "the introduction of policies designed to 'counter-radicalise' has been accompanied by the emergence of a government-funded industry of advisers, analysts, scholars, entrepreneurs and self-appointed community representatives who claim that their knowledge of a theological or psychological radicalisation process enables them to propose interventions in Muslim communities to prevent extremism."⁴⁴ Kundnani notes that "analyses of terrorism that locate its root cause in Islamist ideology and underlying cultural conflicts are conceptually flawed and inconsistent with the available evidence. There is no demonstrable cause and effect between holding an Islamist ideology and committing acts of terrorist violence.

42 8 U.S.C. § 1182(a)(3)(B)(iii) (defining "terrorist activity" for immigration removability; no "DVE" or "HVE" category).

43 See, e.g., MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008); Clark McCauley & Sophia Moskalenko, *Mechanisms of Political Radicalization: Pathways Toward Terrorism*, 20 TERRORISM & POL. VIOLENCE 415 (2008).

44 Arun Kundnani, *Radicalisation: The Journey of a Concept*, 54 RACE & CLASS 3, 4 (2012).

The notion that 'extremist ideas,' perhaps enabled by identity conflicts or group dynamics, by themselves turn people into violent radicals does not stand up to scrutiny."⁴⁵

Faiza Patel and Kundnani have specifically addressed the First Amendment implications. Reviewing the United Kingdom's "Prevent" counter-radicalization program, they observed that Prevent's "goal is also to combat 'extremism' of thought and belief among Muslims" but that "in the United States, we have a First Amendment that bars government interference in what we think, say and believe, and attempts to monitor thought and speech carry an enormous risk of mission creep."⁴⁶ The American Civil Liberties Union has made the same point in different language: "Radicalization theory is problematic from a civil liberties perspective because it identifies extreme *ideas*, rather than violent *behavior*, as the problem that needs to be addressed. If certain ideas are the problem, the solution invariably includes suppressing those ideas, in one way or another."⁴⁷

The critical literature's analysis is doctrinally aligned with the framework this Article articulates: the constitutional line is at means, not views. But the critical literature treats "radicalism" descriptively or sociologically, not as a constitutional category with definitional content. The scholars who have most clearly identified the conflation problem have not given the protected category a name. The doctrinal authority exists. The constitutional vocabulary does not.

⁴⁵ *Id.* at 12; see also ARUN KUNDNANI, THE MUSLIMS ARE COMING! ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR (2014).

⁴⁶ Faiza Patel & Arun Kundnani, *Counter-Radicalization Lessons From the United Kingdom*, ROLL CALL (July 28, 2011), <https://rollcall.com/2011/07/28/patel-kundnani-counter-radicalization-lessons-from-the-united-kingdom/>.

⁴⁷ Mike German & Jay Stanley, *Who's a Radical Now?*, AM. CIVIL LIBERTIES UNION (2011), <https://www.aclu.org/news/national-security/whos-radical-now>.

C. The Contemporary Collapse

In May 2026, the executive branch of the United States published a document that operationalizes the conflation at the highest possible level. The White House *U.S. Counterterrorism Strategy* (the "2026 CT Strategy") opens with a Presidential Foreword, signed by Defendant Donald J. Trump, concluding with the following commitment:

Our new U.S. Counterterrorism Strategy is a return to common sense and Peace through Strength. As I said after our first successful counterterrorism mission, just days after I was sworn back in office — if you hurt Americans, or are planning to hurt Americans, "We Will Find You and We Will Kill You."⁴⁸

The Foreword's predicate joins two phrases with the disjunctive "or": persons who have "hurt Americans" (a completed act) and persons who "are planning to hurt Americans" (an inferred future intent). The second phrase strips the predicate from any completed criminal act and attaches the announced state-killing commitment to attributed future intent. Under every American constitutional framework — going back to *Marbury v. Madison*⁴⁹ and forward through *Hamdi v. Rumsfeld*⁵⁰ and *Boumediene v. Bush*⁵¹ — the attribution of future criminal intent to a U.S. citizen is the predicate that *requires* due process, indictment, trial, conviction, and constitutional sentencing. It is not the predicate that can authorize summary state killing.

The Strategy's categorical inventory at page 5 enumerates three "major types of terror groups":

⁴⁸ 2026 CT STRATEGY, *supra* note 14, at 3 (Presidential Foreword) (emphasis added in original "We Will Find You and We Will Kill You").

⁴⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁵⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁵¹ *Boumediene v. Bush*, 553 U.S. 723 (2008).

Currently we face three major types of terror groups: > • Narcoterrorists and Transnational Gangs • Legacy Islamist Terrorists • Violent Left-Wing Extremists, including Anarchists and Anti-Fascists⁵²

The grammatical structure of the third category is critical. "Including" in legal and ordinary drafting introduces examples that are subsumed within the prior category.⁵³ The text therefore deems "Anarchists" and "Anti-Fascists" to be "violent left-wing extremists" by definition, without any requirement of proof of violence by any individual person so categorized. The Strategy elaborates at page 7 to add two further undefined political-identity categories:

In addition to cartels and Islamist terror groups, our national CT activities will also prioritize the rapid identification and neutralization of violent secular political groups whose ideology is anti-American, radically pro-transgender, and anarchist. We will use all the tools constitutionally available to us to map them at home, identify their membership, map their ties to international organizations like Antifa, and use law enforcement tools to cripple them operationally before they can maim or kill the innocent.⁵⁴

The Strategy commits the executive branch's full counter-terrorism apparatus — intelligence agencies that "since 9/11, have become the world's best at 'Finding and Fixing' high value targets anywhere in the world... [and] Tier 1 and Tier 2 military units without peer anywhere in the world able to close with and 'finish' these targets"⁵⁵ — to operational deployment against the categorical class.

The conflation the Strategy formalizes was not new in May 2026. The June 11, 2025 hearing of the House Homeland Security Subcommittee on Counterterrorism and Intelligence — *The Rise of Anti-Israel Extremist Groups and Their Threat to U.S. National Security*, Serial No.

⁵² 2026 CT STRATEGY, *supra* note 14, at 5.

⁵³ See Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 15 (2012) (discussing the canon of inclusive enumeration; "including" introduces examples within the prior category, not items in addition to it).

⁵⁴ 2026 CT STRATEGY, *supra* note 14, at 7.

⁵⁵ *Id.* at 8.

119-19⁵⁶ — illustrates the pre-existing administrative-legislative practice. The hearing record uses "extremism" and "radicalism" interchangeably,⁵⁷ folds political demonstrations against domestic federal enforcement into the same threat space as antisemitic violence,⁵⁸ and treats the administrative categories "DVE" and "HVE" as if they were statutory categories when they are not.⁵⁹ The hearing's own title — "Anti-Israel Extremist Groups" — collapses political opposition to a foreign state's policies into a categorical CT predicate, treating dissent on United States foreign policy alignment with Israel as inherently within the proscribable category.

The structural problem the Strategy and the hearing together expose is the problem this Article addresses. The constitutional framework articulated by *Brandenburg* and the modern First Amendment canon draws a line at *means*. The administrative framework operationalized by the Strategy draws a line at *views*. The two frameworks are mutually exclusive: either the constitutional line is means and the Strategy's predicate is unconstitutional, or the Strategy's predicate is constitutional and *Brandenburg* must be quietly displaced. The doctrinal weight is wholly on one side. This Article develops the framework that names what is at stake.

III. RADICALISM, DEFINED

A. The Operative Definition

Radicalism is a political-doctrinal disposition that challenges conventional political positions through constitutional means. The means catalogue is exhaustive in its breadth: speech,

⁵⁶ June 2025 Hrg., *supra* note 17.

⁵⁷ See, e.g., *id.* at 236, 243 (using "radicalization" and "extremism" interchangeably in opening statements).

⁵⁸ *Id.* at 185–98 (Chairman's opening statement linking "anti-ICE rioters in Los Angeles and... many other cities" to antisemitic violence).

⁵⁹ *Id.* at 882 (treating "Foreign Terrorist Organizations, Homegrown Violent Extremists, and Domestic Violent Extremists" as parallel statutory categories without distinguishing the latter two as administrative-only).

association, advocacy, petition, dissent, persuasion, peaceful boycott, electoral mobilization, civil-society organization, scholarly critique, public protest, legal challenge, and the full range of communicative and associational activity the First Amendment protects. The defining feature of radicalism is not the radicality of the view advanced; the views radicals advance run the full ideological spectrum, from libertarian to socialist to anarchist to communitarian to abolitionist to suffragist to civil-rights. The defining feature is the constitutional nature of the means deployed.

This definition is not novel as a description of constitutional doctrine. *Brandenburg*, *Hess*, *Watts*, *Claiborne*, *Snyder*, *Cohen*, *Johnson*, and *Holder v. HLP* all stand for the proposition that government may not proscribe political speech because of the radicality of the view advanced. What is novel — at least insofar as the author's research can determine — is naming the protected category. The doctrinal substrate has carried the principle for over a century without giving the protected category an analytic name. Calling the protected category "radicalism" is a synthesis move, not a doctrinal innovation.

B. The Historical Inventory

American constitutional history is the history of radical positions becoming conventional. The trajectory is repeatable, observable, and structurally consistent across two centuries of constitutional development. Each of the following positions was, at the time first asserted, radical — held by a minority, denounced by the conventional majority, and (in many cases) prosecuted or harassed under prevailing legal and political conditions. Each is now conventional, and the constitutional structure has formally vindicated each one. The mechanism in each case was radical constitutional challenge.

Heliocentrism, by analogy, illustrates the broader principle: cosmological positions held first by the radical minority eventually became conventional through the operation of evidence and discourse, not through the suppression of the radical position.⁶⁰ The American constitutional analogues operate by the same mechanism but with explicit doctrinal validation.

The abolition of slavery was the most consequential radical American constitutional challenge of the nineteenth century. The conventional disposition of American law for the first 78 years of the Republic was that chattel slavery was constitutionally protected — protected by the Three-Fifths Clause,⁶¹ the Fugitive Slave Clause,⁶² and the Court's express endorsement in *Dred Scott v. Sandford*.⁶³ The radical position — that the Constitution properly understood prohibited slavery, or that the Constitution should be amended to prohibit slavery, or that the federal government had power to legislate against slavery in the territories — was held by abolitionists, the antislavery Whigs, the Republican Party, and a substantial body of constitutional scholarship from the founding through the Civil War.⁶⁴ The radical position was advanced through speech, association, journalism, electoral mobilization, civil-society organization, the Underground Railroad's peaceful aid to fugitives, and the political campaigns of the abolitionist movement. The radical position was constitutionally vindicated by the Reconstruction Amendments, which converted the radical position into conventional

60 The heliocentric analogy is offered as a non-American illustration of the same structural pattern: a position held first by a radical minority (Copernicus, Galileo), denounced by conventional authority (the Roman Inquisition's condemnation of Galileo in 1633), eventually vindicated by the same investigative method the radicals invoked (empirical observation, mathematical analysis). The constitutional context differs but the structural pattern is the same.

61 U.S. CONST. art. I, § 2, cl. 3 (repealed in operative effect by U.S. CONST. amend. XIV, § 2).

62 U.S. CONST. art. IV, § 2, cl. 3 (repealed in operative effect by U.S. CONST. amend. XIII).

63 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), superseded by U.S. CONST. amend. XIII, XIV.

64 See DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* (2006); ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* (2010); JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865* (2013).

constitutional law.⁶⁵ The radical position is now so thoroughly conventional that it is the predicate against which any contemporary defense of slavery would itself be evaluated as extremism.

Women's suffrage followed the same trajectory. The conventional disposition of American law was that the constitutional franchise did not extend to women.⁶⁶ The radical position — that women were constitutionally entitled to vote on the same terms as men — was advanced through the women's suffrage movement, the National American Woman Suffrage Association, the suffragist press, the suffrage parades of the 1910s, the petition campaigns, and the persistent constitutional advocacy that culminated in the Nineteenth Amendment.⁶⁷ The radical position was advanced through constitutional means. It was also met with conventional violence — the Night of Terror at the Occoquan Workhouse on November 14, 1917, where guards beat, choked, and force-fed imprisoned suffragists.⁶⁸ The violence was deployed by conventional authority against constitutional dissent. The radical position prevailed; it is now so conventional that its radicality is invisible to most contemporary Americans.

Racial equality and the dismantling of Jim Crow is the third great American example. *Plessy v. Ferguson* established the conventional doctrine that "separate but equal" satisfied the Fourteenth Amendment.⁶⁹ The radical position — that *Plessy* was wrong, that segregation violated the Equal Protection Clause as properly understood, that the Reconstruction Amendments required dismantling the entire apparatus of segregation — was advanced by the NAACP Legal Defense Fund, by the civil rights movement, by Thurgood Marshall, by Martin

65 U.S. CONST. amends. XIII, XIV, XV.

66 *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (holding that the Fourteenth Amendment did not confer the right of suffrage on women), superseded by U.S. CONST. amend. XIX.

67 U.S. CONST. amend. XIX (ratified Aug. 18, 1920).

68 See DORIS STEVENS, *JAILED FOR FREEDOM* 169–95 (1920) (describing Night of Terror at Occoquan Workhouse, Nov. 14, 1917).

69 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Luther King Jr., by the Freedom Riders, by the Montgomery Bus Boycott, by the lunch counter sit-ins, by the litigation strategy that culminated in *Brown v. Board of Education*.⁷⁰ The radical position was advanced through constitutional means. It was also met with conventional violence — Klan terrorism, lynchings, the Birmingham bombings, the murder of Medgar Evers, the assassinations of Malcolm X and Martin Luther King Jr.⁷¹ The radical position prevailed; the constitutional structure now recognizes the dismantling of Jim Crow as the paradigmatic vindication of Reconstruction's promise.

Marriage equality is the most recent example in the canon. The conventional doctrine, codified in the Defense of Marriage Act⁷² and confirmed by *Baker v. Nelson*,⁷³ was that constitutional marriage was limited to opposite-sex couples. The radical position — that same-sex couples were constitutionally entitled to equal recognition under the Due Process and Equal Protection Clauses — was advanced through the gay-rights movement, through litigation in *Lawrence v. Texas*,⁷⁴ *United States v. Windsor*,⁷⁵ and *Obergefell v. Hodges*,⁷⁶ through scholarly advocacy, through electoral mobilization, and through the patient associational and persuasive work of two generations of LGBTQ advocacy. The radical position prevailed.

The structural pattern in each case is identical. A position held first by a radical minority, denounced by conventional authority, advanced through constitutional means (speech, association, advocacy, petition, persuasion, peaceful protest, litigation, electoral mobilization), eventually vindicated by the same constitutional structure the radicals invoked. Radicalism, in

⁷⁰ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁷¹ See generally TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1988); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65 (1998).

⁷² Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), held unconstitutional in part by *United States v. Windsor*, 570 U.S. 744 (2013).

⁷³ *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing for want of substantial federal question), overruled by *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁷⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁷⁵ *United States v. Windsor*, 570 U.S. 744 (2013).

⁷⁶ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

each case, was the mechanism through which the polity identified the conventional disposition as constitutionally defective and reformed itself.

C. The Doctrinal Foundation for Treating Radicalism as Protected

The historical inventory is descriptive. The doctrinal foundation that treats radicalism as constitutionally protected is the modern First Amendment canon.

Brandenburg draws the operative line. A state cannot proscribe advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁷⁷ The Klan rhetoric at issue in *Brandenburg* was radical (and extreme under the framework articulated here if it included calls for imminent violence; the Court's holding rests on the absence of imminence). The rhetoric the Court protected was advocacy without imminence.

Hess clarifies that mere advocacy of unlawful action "at some indefinite future time" is protected.⁷⁸ The radical view is protected; the line is at imminent unlawful action.

Watts distinguishes "political hyperbole" — even hyperbole that uses violent imagery against the President of the United States — from "true threats" that satisfy a reasonable-listener test.⁷⁹ The view, even violent in its imagery, is protected; the line is at the means (whether a reasonable listener would receive the statement as a true threat).

NAACP v. Claiborne Hardware is perhaps the most directly relevant doctrinal foundation for the radicalism/extremism distinction. The case arose from a political boycott of segregated businesses in Port Gibson, Mississippi, organized by the NAACP in 1966. The state prosecuted the NAACP and individual organizers for "tortious interference" with business, citing — among

⁷⁷ *Brandenburg*, 395 U.S. at 447.

⁷⁸ *Hess*, 414 U.S. at 108.

⁷⁹ *Watts*, 394 U.S. at 708.

other things — speeches by NAACP organizers that called for retribution against Black community members who broke the boycott. The Supreme Court reversed. The Court held that the political boycott itself was constitutionally protected as "concerted action of political activists seeking to bring about political, social, and economic change."⁸⁰ Even more importantly for the framework this Article articulates, the Court refused to impute extremist rhetoric by one speaker (Charles Evers's famous "if we catch any of you going in any of them racist stores, we're gonna break your damn neck") to the boycott movement as a whole.⁸¹ The Court's analysis was a means analysis: the *means* of the political boycott (peaceful association, advocacy, economic withdrawal of patronage) were protected. The means of individual incitement (if proven on a separate record) could be sanctioned. The constitutional line ran between the protected means of the movement and the (potentially) unprotected means of any individual speaker.

Holder v. Humanitarian Law Project makes the means analysis explicit at the level of the federal material-support statute. The Court held that 18 U.S.C. § 2339B's prohibition on "material support" to designated Foreign Terrorist Organizations could constitutionally reach *coordinated* speech with an FTO (training in international advocacy, for example) but could not constitutionally reach *independent* advocacy of the FTO's political positions.⁸² The line — between coordination (means analysis) and independent advocacy (protected) — is exactly the line *Brandenburg* drew. The FTO's political views are not the predicate for criminal liability; coordination is.

⁸⁰ *Claiborne*, 458 U.S. at 911.

⁸¹ *Id.* at 902 ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'") (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *id.* at 928 (refusing to impute extremist speech to the boycott movement).

⁸² *Holder v. HLP*, 561 U.S. at 26 ("[The statute does not] criminalize *independent* advocacy in support of a foreign terrorist group's lawful or unlawful goals.") (emphasis in original).

Counterman refines the true-threats analysis with a recklessness mens rea requirement.⁸³ The line remains at means (true threats), now with a state-of-mind component.

Snyder v. Phelps protects offensive political speech at a soldier's funeral.⁸⁴ The view (Westboro Baptist's exceptionally offensive political positions) is protected; the line is at means (whether the speech crosses into actionable tort outside First Amendment protection).

Cohen v. California protects offensive political expression worn in a courthouse.⁸⁵ *Texas v. Johnson* protects flag-burning, the most radical form of symbolic American political expression.⁸⁶ The pattern repeats: the view is protected, the line is at means.

The radicality of the view, in each of these cases, is not the constitutional question. The means deployed — the form the political expression takes, the conditions under which it is uttered, the relationship between the speech and the imminent risk of unlawful action — are the constitutional question.

D. What Radicalism Is Not

Three clarifying observations. First, radicalism is not synonymous with offensiveness. Many radical positions are not offensive; many offensive positions are not radical. The constitutional treatment is the same in both cases — protected unless the means cross the *Brandenburg* line — but the categories are analytically distinct.

Second, radicalism is not synonymous with leftism. The historical inventory in Part III.B contains positions advanced by movements across the political spectrum. The abolitionist movement contained both moral-suasion radicals (e.g., William Lloyd Garrison) and political-

⁸³ *Counterman*, 600 U.S. at 79.

⁸⁴ *Snyder*, 562 U.S. at 458.

⁸⁵ *Cohen*, 403 U.S. at 25.

⁸⁶ *Texas v. Johnson*, 491 U.S. at 414.

action radicals (e.g., the Liberty Party). The women's suffrage movement contained both moderate suffragists (the NAWSA) and more militant suffragists (the National Woman's Party). The civil rights movement contained both nonviolent direct-action radicals (King, the SCLC) and more confrontational radicals (Malcolm X, the Black Panthers). Each was, in the operative meaning of the term, radical — challenging conventional positions through constitutional means.⁸⁷ The marriage-equality movement contained advocacy from across the political spectrum, including substantial libertarian and conservative voices.⁸⁸ Radicalism does not map onto left-right politics.

Third, radicalism is not synonymous with truth. A radical position may be wrong. The radical heliocentrism of Galileo was right; the radical phlogiston theory of eighteenth-century chemistry was wrong. The constitutional treatment is independent of the truth-value of the radical position: the same First Amendment protection applies whether the radical view will eventually prevail, eventually be rejected, or remain controversial in perpetuity. The constitutional protection rests on the means deployed (peaceful advocacy, persuasion, association, dissent), not on the eventual correctness of the position advanced.

IV. EXTREMISM, DEFINED

A. The Operative Definition

Extremism is the use of unconstitutional means to advance a political view. The means catalogue is narrow and well-defined by the doctrinal substrate: violence, true threats (under

⁸⁷ See generally MICHAEL KAZIN, *AMERICAN DREAMERS: HOW THE LEFT CHANGED A NATION* (2011); LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* (2001).

⁸⁸ See JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004) (developing conservative case for marriage equality).

Watts/Counterman), imminent incitement of unlawful action (under *Brandenburg/Hess*), fighting words (under *Chaplinsky*),⁸⁹ speech integral to criminal conduct (under *Giboney*),⁹⁰ coordination with designated foreign terrorist organizations (under *Holder v. HLP*),⁹¹ and the narrow categories of speech the modern Court has held to be unprotected.⁹²

The defining feature of extremism, like the defining feature of radicalism, is the means deployed — not the view advanced. Bombing a clinic, assassinating a political opponent, storming a government building to obstruct a constitutional process — these are extremist acts because the *means* are unconstitutional, not because the *views* asserted are unfamiliar. The bomber's underlying view may be conventional, radical, or somewhere in between; the constitutional treatment is determined by the means deployed, not by the radicality of the view.

This definition aligns with the doctrinal architecture. *Brandenburg* draws the constitutional line at means (imminent-and-likely incitement). *Watts* draws the line at means (true threats). *Chaplinsky* (now largely confined to its narrow original facts) drew the line at means (fighting words). The unprotected categories the modern Court recognizes are defined by means, not by views.

B. The *Brandenburg* Test as the Operative Standard

The *Brandenburg* test has two prongs that operate together:

⁸⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁹⁰ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

⁹¹ *Holder v. HLP*, 561 U.S. at 26.

⁹² See *United States v. Stevens*, 559 U.S. 460, 472 (2010) (cataloging "historic and traditional categories" of unprotected speech: obscenity, defamation, fraud, incitement, fighting words, true threats, child pornography, speech integral to criminal conduct; declining to recognize new unprotected categories without long-established constitutional pedigree).

Prong One: Directedness. The speech must be "directed to inciting or producing imminent lawless action."⁹³ This is a mens rea component: the speaker must intend (or be reasonably understood as intending) to incite imminent unlawful action. Mere advocacy of unlawful action in the abstract — Communist Party advocacy of revolution at some future time, advocacy of resistance to a draft, advocacy of nullification of a tax — does not satisfy this prong. The doctrinal foundation here is the rejection of "bad tendency" tests that asked whether speech could *eventually* lead to unlawful action.⁹⁴ *Brandenburg* requires direction toward *imminent* lawless action.

Prong Two: Likelihood. The speech must be "likely to incite or produce such action."⁹⁵ This is an objective component: the listener and circumstances must be such that imminent lawless action is the likely outcome. Speech delivered to an empty room, speech delivered to listeners who clearly will not act, speech delivered in circumstances where lawless action is not feasible — these are protected even if the speaker subjectively intends to incite, because the imminence and likelihood are absent.

Hess v. Indiana applied the test in the immediate post-*Brandenburg* period. Indiana convicted Gregory Hess for disorderly conduct based on his statement, during a protest at Indiana University, "We'll take the fucking street later" (or "again"). The Court reversed. The statement was at most "advocacy of illegal action at some indefinite future time" and did not satisfy the imminence-likelihood test.⁹⁶ *Hess* is doctrinally important because it confirmed that

⁹³ *Brandenburg*, 395 U.S. at 447.

⁹⁴ See *Gitlow v. New York*, 268 U.S. 652 (1925) (applying "bad tendency" test to uphold conviction under criminal anarchy statute); *Whitney*, 274 U.S. 357 (similar); *Brandenburg*, 395 U.S. at 447–48 (overruling *Whitney* and rejecting "bad tendency" approach).

⁹⁵ *Brandenburg*, 395 U.S. at 447.

⁹⁶ *Hess*, 414 U.S. at 108.

Brandenburg draws a narrow line: even speech expressing intent to commit unlawful action is protected if imminence is absent.

The line that emerges from *Brandenburg* and *Hess* is dispositive of the radicalism/extremism distinction. Radical political speech that does not satisfy both prongs is protected; the radicality of the view does not matter. Speech that satisfies both prongs — directedness to imminent lawless action, likely to produce it — is extremism in the sense this Article uses the term, and is properly proscribable. The constitutional inquiry runs through the means; the view is doctrinally irrelevant.

C. The Other Unprotected Categories

The *Brandenburg* line is the most important application of the means analysis, but it is not the only one. The modern Court has recognized several other narrow categories of unprotected speech, each defined by means rather than views.

True threats are unprotected under *Watts v. United States*⁹⁷ and refined by *Counterman v. Colorado*⁹⁸ and *Virginia v. Black*.⁹⁹ The doctrinal test asks whether the speaker communicated "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."¹⁰⁰ *Counterman* added a recklessness mens rea requirement: the speaker must have at least recklessly disregarded the threatening nature of the statement.¹⁰¹ The test is, again, a means test: the *form* of the communication, not the political view advanced.

⁹⁷ *Watts*, 394 U.S. 705.

⁹⁸ *Counterman*, 600 U.S. 66.

⁹⁹ *Virginia v. Black*, 538 U.S. 343 (2003).

¹⁰⁰ *Id.* at 359.

¹⁰¹ *Counterman*, 600 U.S. at 79.

Fighting words, under *Chaplinsky v. New Hampshire*, are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁰² The doctrine has been narrowly construed in the modern era; subsequent cases have largely confined *Chaplinsky* to face-to-face direct invective in circumstances likely to provoke immediate violent response.¹⁰³ Again, a means test.

Speech integral to criminal conduct is unprotected under *Giboney v. Empire Storage & Ice Co.*¹⁰⁴ The doctrine permits regulation of speech that is itself part of a criminal transaction (e.g., the verbal portion of a conspiracy, the threat that constitutes extortion). The line is at the *integration* of speech with criminal conduct, not at the political view the speech expresses.

Coordination with designated foreign terrorist organizations is reachable under 18 U.S.C. § 2339B's material-support provisions, but only where the speech is *coordinated* with the FTO. *Holder v. HLP* upheld the statute as applied to coordinated speech (training the FTO in international advocacy, for example) while expressly preserving the protection for *independent* advocacy of the FTO's political positions.¹⁰⁵ The line — coordination versus independent advocacy — is a means analysis.

D. What Extremism Is Not

Extremism, on this Article's framework, is *not* defined by the radicality of the view advanced. A speaker who calls for the violent overthrow of the government at an indefinite future time is engaged in radical advocacy, not extremism, unless and until the speech satisfies *Brandenburg's* two prongs. A speaker who holds extreme political views — anarchism, theocracy, secession,

¹⁰² *Chaplinsky*, 315 U.S. at 572.

¹⁰³ See *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen*, 403 U.S. at 20 (face-to-face requirement); *Texas v. Johnson*, 491 U.S. at 409 (similar).

¹⁰⁴ *Giboney*, 336 U.S. 490.

¹⁰⁵ *Holder v. HLP*, 561 U.S. at 26–27.

race separatism, communism — is not, by virtue of holding those views, an extremist in the constitutional sense. The view is not the constitutional question.

Extremism is also not defined by the offensiveness of the means. *Snyder v. Phelps* protected the Westboro Baptist Church's deeply offensive political speech because the means (peaceful demonstration on public matters of public concern) did not cross the *Brandenburg*, *Watts*, or *Chaplinsky* lines.¹⁰⁶ The offensiveness of the means — like the offensiveness of the view — is not the constitutional question.

Finally, extremism is not defined by political minority status. The view of the speaker may be unconventional, marginal, even universally condemned. Constitutional treatment is determined by the means deployed, not by the speaker's place on the spectrum of public opinion. *Texas v. Johnson*'s flag-burning was overwhelmingly condemned by the American public at the time of the decision;¹⁰⁷ the Court protected it because the means (symbolic expression on a matter of public concern) did not satisfy any of the unprotected-speech tests.

V. THE CONVENTIONAL EXTREMISM COROLLARY

A. The Structural Insight

The radicalism/extremism distinction, as articulated in Parts III and IV, generates a structural corollary the existing literature has not articulated as such. Because the distinction operates on *means* rather than *views*, two consequences follow:

¹⁰⁶ *Snyder*, 562 U.S. at 458.

¹⁰⁷ See Gallup, Most Americans Oppose Flag Burning, GALLUP NEWS (June 30, 2006) (reporting that 56% of Americans favored a constitutional amendment to permit Congress to prohibit flag desecration at the time *Johnson* was decided; the figure declined over subsequent decades but remained majority for many years).

First, the radicality of a view is doctrinally irrelevant to its constitutional treatment (Part III *supra*) — radicalism as a constitutional category exists by its means, never by the content of its political position.

Second, and crucially: **conventional dispositions may themselves be extremist while remaining conventional**. Convention does not insulate a position from extremist characterization on the means analysis. If a conventional disposition is maintained by violent means — by lynching, by patrol violence, by force-feeding political dissidents, by mass extrajudicial state action — the conventional disposition's *means* satisfy the extremism criterion, regardless of the disposition's status as conventional in the contemporary political moment.

The asymmetry between radicalism and convention is, accordingly, structural and inverse to the contemporary administrative framing. Radicalism, defined by constitutional means, is always protected. Convention, defined by reference to the contemporary political mainstream, may or may not be extremist depending on the means by which it is maintained. The contemporary administrative apparatus treats convention as inherently constitutional and radical challenge as inherently extremist; the constitutional analysis is the inverse: radicalism is structurally protected, convention is doctrinally susceptible to characterization as extremist whenever it is maintained by unconstitutional means.

This corollary is not a normative argument. It is a structural observation about how the means analysis operates. If the constitutional line is means, then convention by violent means *is* extremism, doctrinally; if convention by violent means is not extremism, then the constitutional line is something other than means. The doctrinal substrate the Court has built — *Brandenburg*, *Watts*, *Chaplinsky*, *Claiborne*, the Reconstruction Amendments, the equal protection cases —

does not permit the latter conclusion. The line is means. Convention by violent means is therefore extremism.

B. Historical Inventory of Conventional Extremism

The historical inventory developed in Part III.B can be re-examined from the conventional-extremism perspective. In each case, the radical challenge that eventually prevailed was opposed not just by conventional speech but by conventional *violence* — violence carried out by conventional authority against constitutional dissent. The conventional-extremism analysis re-categorizes that violence not as conventional politics but as conventional *extremism* — the use of unconstitutional means to maintain the conventional disposition against radical challenge.

Slavery and its enforcement. The conventional disposition of chattel slavery was maintained by violent means that the modern constitutional structure unequivocally treats as extremism. Slave patrols, the legal apparatus of fugitive slave acts that compelled federal officials to participate in returning escaped persons to bondage, the Fugitive Slave Act's authorization of summary administrative procedures that bypassed the Article III judiciary,¹⁰⁸ the violent suppression of slave revolts, the *Dred Scott* doctrine that constitutionalized the racial slavery regime¹⁰⁹ — these were the conventional means by which the conventional disposition was maintained. The modern constitutional structure recognizes them as extremism. They were extremism while they were conventional.

The post-Reconstruction violent suppression of Black political and economic life.

After Reconstruction's collapse, the conventional disposition in the former Confederate states

¹⁰⁸ Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (authorizing federal commissioners to determine fugitive-slave status without jury trial and compelling federal marshals to participate in returning escaped persons to bondage).

¹⁰⁹ *Dred Scott*, 60 U.S. 393.

was that Black political participation, Black economic mobility, and Black social equality were not constitutional rights. The conventional disposition was maintained by violent means: the Ku Klux Klan,¹¹⁰ the White League,¹¹¹ the Mississippi Plan,¹¹² the Wilmington Insurrection of 1898,¹¹³ the Tulsa Race Massacre of 1921,¹¹⁴ the systematic violence of lynching from the 1880s through the 1960s.¹¹⁵ *Plessy v. Ferguson* gave constitutional cover to the broader regime by upholding "separate but equal."¹¹⁶ The conventional disposition was maintained by means that the modern constitutional structure recognizes as paradigmatic extremism. The radical challenge that eventually prevailed — through the NAACP, *Brown*, the civil rights movement, the Voting Rights Act¹¹⁷ — exposed the conventional disposition as extremism.

The violent suppression of women's suffrage. The Night of Terror at the Occoquan Workhouse on November 14, 1917, is the canonical example. Guards under the supervision of warden W.H. Whittaker beat, choked, and force-fed thirty-three imprisoned women suffragists.¹¹⁸ The conventional disposition that women were not constitutionally entitled to vote was maintained, in this instance, by unconstitutional means — direct state violence against citizens engaged in protected political activity. The means satisfy the extremism criterion. The convention's status as politically mainstream did not.

110 See ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).

111 See JAMES K. HOGUE, *UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION* (2006).

112 See NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* (2006).

113 See DAVID S. CECELSKI & TIMOTHY B. TYSON, EDS., *DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY* (1998).

114 See SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921* (1982).

115 See EQUAL JUSTICE INITIATIVE, *LYNCING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017) (documenting 4,084 racial-terror lynchings in twelve Southern states from 1877 to 1950).

116 *Plessy*, 163 U.S. 537.

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

118 See STEVENS, *supra* note 53, at 169–95.

The violent suppression of the civil rights movement. Klan terrorism through the 1950s and 1960s, the murder of three civil rights workers in Mississippi in 1964,¹¹⁹ the Birmingham church bombing of 1963,¹²⁰ the assassination of Medgar Evers in 1963,¹²¹ the murders of Martin Luther King Jr. and Malcolm X — these were the means by which the conventional Jim Crow disposition was maintained against radical challenge. The conventional disposition was extremism, doctrinally, because the means deployed to maintain it were unconstitutional.

C. Why the Corollary Matters for First Amendment Doctrine

The conventional-extremism corollary has three doctrinal consequences for First Amendment analysis.

First, it disposes of the recurring argument that a particular categorical political target — anti-fascists, anarchists, anti-American voices, anti-Israel critics, racial-equality advocates — is "extremist" merely because the target is unconventional. The argument confuses the radicality of the target's *view* with the means deployed by the target. If the target advances its position through constitutional means (speech, association, advocacy, etc.), the target is engaged in radicalism, not extremism, regardless of how unconventional the position. The categorical predicate the contemporary CT apparatus deploys against political minorities is doctrinally a means analysis dressed in views clothing — and the views clothing does no constitutional work.

Second, the corollary supplies the analytical framework for recognizing when conventional state action *itself* satisfies the extremism criterion. A state apparatus that maintains

¹¹⁹ See SETH CAGIN & PHILIP DRAY, WE ARE NOT AFRAID: THE STORY OF GOODMAN, SCHWERNER, AND CHANEY AND THE CIVIL RIGHTS CAMPAIGN FOR MISSISSIPPI (1988).

¹²⁰ See TAYLOR BRANCH, PARTING THE WATERS, *supra* note 61, at 889–92 (16th Street Baptist Church bombing, Birmingham, Alabama, Sept. 15, 1963).

¹²¹ See *id.* at 824–25.

a conventional political disposition by violent means against constitutional dissent is engaged in conventional extremism. The doctrinal label is uncomfortable for conventional politics, but it is what the means analysis produces. The discomfort is not an objection to the framework; it is a symptom of the framework's analytic accuracy.

Third, the corollary explains why radical challenges have historically been the constitutional mechanism for reform. Convention, once it has crystallized, is structurally resistant to internal correction. The constitutional mechanism for identifying when a conventional disposition has crossed into extremism is radical challenge: speech, association, advocacy, litigation, and persuasion that articulates the constitutional defect in the convention. Radical challenge is, in this sense, the constitutional immune system. Suppressing it — by treating radical challenge as itself extremism — eliminates the polity's mechanism for self-correction.

D. The Corollary in Operation: The Free-Speech Asymmetry

The corollary generates a free-speech asymmetry the contemporary apparatus systematically misreads. The First Amendment protects radical political speech *more* robustly when the speech challenges conventional violence — because protection of radical challenge to conventional extremism is precisely the constitutional function of the First Amendment in the historical pattern Part III.B describes. The apparatus that treats radical critique of state violence as itself "extremism" inverts the constitutional function: it deploys the extremist label not against unconstitutional means but against the very political activity the First Amendment exists to protect.

This is the deep structural error of the contemporary administrative framework. The apparatus that maintains conventional foreign-policy alignment with Israel by labeling anti-

Israel-policy speech as "extremism" — to take the example from the June 11, 2025 House hearing¹²² — is operating in the inverse of the constitutional structure. The radical position (that the United States should change its policy because the conventional alignment supports conduct that satisfies the elements of genocide) is, doctrinally, protected First Amendment activity. The categorical state action that suppresses it as "extremism" is, by means analysis, conventional extremism.

The framework does not require a court to accept the radical position's substantive merit. The framework requires the court only to recognize the analytical distinction between means and views, and to apply *Brandenburg* and the modern canon to the categorical predicate at issue. The substantive merit of the radical position is, doctrinally, irrelevant to its First Amendment treatment.

E. International Inventory of Conventional Extremism

The corollary's historical demonstration is not confined to American constitutional development. The same structural pattern — conventional state violence in service of a conventional political disposition, met by radical constitutional challenge — recurs across modern political history. The international inventory is larger than the American inventory and doctrinally identical in its structural features.

Apartheid South Africa (1948–1994). The conventional disposition of the apartheid state was that Black South Africans were not constitutional rights-bearers in any meaningful sense, that residential, occupational, and political segregation was the legitimate constitutional order, and that the framework of "petty apartheid" and "grand apartheid" embodied constitutional

¹²² June 2025 Hrg., *supra* note 17 (passim).

law.¹²³ The conventional disposition was maintained by violent means: the Sharpeville massacre (1960),¹²⁴ the violent suppression of the Soweto uprising (1976),¹²⁵ the death in police custody of Steve Biko (1977),¹²⁶ the apartheid-era security apparatus's systematic detention, torture, and assassination program, and cross-border raids into Mozambique, Angola, and Lesotho. On the framework's means analysis, every element of this apparatus was extremism. The radical political challenge that eventually prevailed — the African National Congress, the United Democratic Front, the trade-union movement, the South African Communist Party, the international anti-apartheid solidarity movement, and the religious and academic resistance internal to South Africa — was radicalism by constitutional means: speech, association, advocacy, electoral mobilization where permitted, civil-society organization, and international diplomacy. The South African Truth and Reconciliation Commission later operationalized the means/views distinction explicitly: apartheid-era state conduct constituted "gross violations of human rights" (means analysis); apartheid-era political ideology, however discredited, was not by itself criminal (view analysis).¹²⁷

Colonial India (eighteenth century–1947). The conventional disposition of the British Raj was that Indian self-government was incompatible with the imperial constitutional order and that the apparatus of colonial governance — the Indian Police Service, the Indian Civil Service,

¹²³ See generally LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA (rev. ed. 2014); SAUL DUBOW, APARTHEID, 1948–1994 (2014); HERMANN GILIOME, THE AFRIKANERS: BIOGRAPHY OF A PEOPLE (2003).

¹²⁴ See TOM LODGE, SHARPEVILLE: AN APARTHEID MASSACRE AND ITS CONSEQUENCES (2011) (documenting the March 21, 1960 killing of sixty-nine unarmed protesters by South African police at Sharpeville).

¹²⁵ See HELENA POHLANDT-McCORMICK, "I SAW A NIGHTMARE...": DOING VIOLENCE TO MEMORY: THE SOWETO UPRISING, JUNE 16, 1976 (2005).

¹²⁶ See DONALD WOODS, BIKO (3d ed. 1991) (documenting Stephen Bantu Biko's death in police custody on September 12, 1977 following systematic beating and denial of medical care).

¹²⁷ Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.) (establishing the Truth and Reconciliation Commission with mandate to investigate "gross violations of human rights" arising from the political conflict of the apartheid period); TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT (vols. 1–7, 1998–2003); *AZAPO v. President of the Republic of South Africa*, 1996 (4) SA 671 (CC) (Constitutional Court review of the amnesty provisions).

the regimental army — was the legitimate source of authority. The conventional disposition was maintained by violent means including the Jallianwala Bagh massacre of 1919, in which Brigadier-General Reginald Dyer ordered colonial troops to fire on an unarmed political gathering, killing between 379 and 1,000 persons.¹²⁸ The radical political challenge that eventually prevailed — Gandhi's *satyagraha* campaigns, the Indian National Congress's electoral and constitutional advocacy, the Salt March, the Quit India Movement — was radicalism by constitutional means against an apparatus that had foreclosed the means analysis at the level of state action.¹²⁹

Argentina's "Dirty War" (1976–1983). The conventional disposition of the Argentine military junta was that "subversion" — defined elastically to include leftist political activity, journalism, academic dissent, trade-union organizing, and (in many documented cases) anonymous denunciation — was a threat to the constitutional order justifying extrajudicial state action. The conventional disposition was maintained by the systematic disappearance of approximately 30,000 persons, the operation of clandestine detention centers (most notoriously the Escuela de Mecánica de la Armada — ESMA), the use of "death flights" to dispose of prisoners, and the practice of stealing infants from disappeared mothers and transferring them to military families.¹³⁰ The radical political challenge that eventually prevailed — the Madres de

128 See KIM A. WAGNER, *AMRITSAR 1919: AN EMPIRE OF FEAR AND THE MAKING OF A MASSACRE* (2019) (documenting Brigadier-General Reginald Dyer's order on April 13, 1919 to fire on an unarmed political assembly at Jallianwala Bagh in Amritsar, with casualty estimates ranging from the official British figure of 379 to Indian National Congress estimates of 1,000 or more).

129 See generally JUDITH M. BROWN, *GANDHI AND CIVIL DISOBEDIENCE: THE MAHATMA IN INDIAN POLITICS 1928–34* (1977); SUMIT SARKAR, *MODERN INDIA, 1885–1947* (2d ed. 1989); BIPAN CHANDRA ET AL., *INDIA'S STRUGGLE FOR INDEPENDENCE* (1989).

130 See MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* (rev. ed. 2011); MARCOS NOVARO & VICENTE PALERMO, *LA DICTADURA MILITAR (1976–1983): DEL GOLPE DE ESTADO A LA RESTAURACIÓN DEMOCRÁTICA* (2003).

Plaza de Mayo, the international human-rights movement, the *Nunca Más* report and the subsequent trials of junta members — was radicalism by constitutional means.¹³¹

Brazil's military dictatorship (1964–1985). The conventional disposition — military rule as the legitimate constitutional order — was maintained by violent means: the Institutional Acts suspending civil liberties, the systematic torture under Operation Bandeirante, the DOI-CODI apparatus, and the murders of dissidents including the journalist Vladimir Herzog. The radical political challenge — political activity, journalism, the progressive Catholic Church's base ecclesial communities, and the eventual *Diretas Já* electoral mobilization of 1984 — was radicalism by constitutional means.¹³²

The Soviet bloc's suppression of dissident political activity (1956–1989). The conventional disposition of the post-Stalin Eastern bloc was that "anti-Soviet activity," "parasitism," and (in the operational pretext for political-psychiatric commitment) "psychiatric illness" were legitimate predicates for state action against political dissenters. The conventional disposition was maintained by the apparatus of internal security (the KGB and its national analogs), the post-Stalin gulag system, the systematic surveillance and harassment of dissident intellectuals (Andrei Sakharov, Aleksandr Solzhenitsyn, Václav Havel, Adam Michnik), and the violent suppression of national uprisings (Hungary 1956, Czechoslovakia 1968, Poland 1981). The radical political challenge — Charter 77 in Czechoslovakia, KOR in Poland, the Helsinki Watch network, the *samizdat* publication network, and the broader dissident movement — was

131 COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, NUNCA MÁS: INFORME DE LA COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS (1984); *see also* the 1985 *Juicio a las Juntas* trial of the junta members and the subsequent reopening of human-rights prosecutions following the 2003 annulment of the *Punto Final* and *Obediencia Debida* amnesty laws.

132 *See* COMISSÃO NACIONAL DA VERDADE, RELATÓRIO (3 vols., 2014); ELIO GASPARI, A DITADURA ENVERGONHADA (2002) (and subsequent volumes in the series); KENNETH P. SERBIN, SECRET DIALOGUES: CHURCH-STATE RELATIONS, TORTURE, AND SOCIAL JUSTICE IN AUTHORITARIAN BRAZIL (2000).

radicalism by constitutional means against constitutional orders that had foreclosed the means analysis at the level of the state itself.¹³³

Spain under Franco and the post-Franco transition (1939–1978). The conventional disposition of Franco's Spain was that the Nationalist victory had established the legitimate constitutional order and that political dissent — Republican, socialist, communist, anarchist, Basque-nationalist, Catalan-nationalist — was inherently a threat to the state. The conventional disposition was maintained by mass political executions in the postwar period, the operation of concentration camps for political prisoners, the systematic suppression of regional languages and cultures, and the broader apparatus of the *Brigada Político-Social*. The radical political challenge — the underground Communist Party of Spain, the various anti-Franco resistance movements, the international anti-fascist solidarity movement, and the eventual democratic transition coordinated through the *Pacto del Olvido* — was radicalism by such constitutional means as remained available within the Francoist constitutional order.¹³⁴

The international inventory could be extended to Pinochet's Chile, the Greek military junta of 1967–1974, the South Korean military regimes, the Indonesian *G30S* purges and subsequent Suharto regime, the Burmese military regimes, and the various Latin American Cold War-era national-security states. In each case, the framework's analysis produces the same finding: conventional state violence in service of conventional political objectives is characterizable as extremism by means analysis, regardless of the political legitimacy claimed by the state in its conventional self-presentation. The radical political challenges that eventually

133 See JOSHUA RUBENSTEIN, *SOVIET DISSIDENTS: THEIR STRUGGLE FOR HUMAN RIGHTS* (rev. ed. 1985); BENJAMIN NATHANS, *TO THE SUCCESS OF OUR HOPELESS CAUSE: THE MANY LIVES OF THE SOVIET DISSIDENT MOVEMENT* (2024); ROBERT HORVATH, *THE LEGACY OF SOVIET DISSENT: DISSIDENTS, DEMOCRATISATION AND RADICAL NATIONALISM IN RUSSIA* (2005).

134 See PAUL PRESTON, *THE SPANISH HOLOCAUST: INQUISITION AND EXTERMINATION IN TWENTIETH-CENTURY SPAIN* (2012); JULIÁN CASANOVA, *A SHORT HISTORY OF THE SPANISH CIVIL WAR* (2013); OMAR G. ENCARNACIÓN, *DEMOCRACY WITHOUT JUSTICE IN SPAIN: THE POLITICS OF FORGETTING* (2014).

exposed and (in the successful cases) dismantled the conventional extremism were radicalism by constitutional means, often operating against constitutional orders that had foreclosed the means analysis at the level of state action.

F. The Predictive Function

The conventional-extremism corollary supports a predictive function as well as a diagnostic one. The framework predicts that (i) a polity that begins to deploy view-based categorical predicates against radical political challenge is on a trajectory toward conventional extremism, regardless of its conventional self-presentation as a constitutional democracy; (ii) the trajectory accelerates as the categorical predicates become operationalized — deportation, civil-rights enforcement, criminal prosecution, surveillance, and eventually state violence; (iii) the trajectory is reversible at early stages through constitutional pushback — judicial intervention, civil-society organizing, electoral mobilization, international pressure — but becomes progressively harder to reverse as the apparatus crystallizes; and (iv) the constitutional immune system — the polity's capacity to recognize and remedy the trajectory through radical political challenge by constitutional means — is what determines whether the trajectory reverses or continues to crisis.

The predictive function converts the inquiry into a doctrinal question susceptible to specific evidentiary application. A polity's direction is reliably predictable on the basis of operational evidence — which means the state is deploying, against which categorical predicates, with what statutory grounding, and with what asymmetric tolerance of conventional unconstitutional means. The June 2025 House hearing and the May 2026 CT Strategy provide the operational record on which that predictive analysis can be made for the United States in the contemporary moment. The framework's diagnostic clarity is what permits early-stage

intervention by the constitutional actors — judges, civil-society organizations, journalists, scholars, and ultimately the electorate — who jointly constitute the polity's constitutional immune system.

VI. APPLICATION TO CONTEMPORARY COUNTER-TERRORISM PREDICATES

A. The 2026 U.S. Counterterrorism Strategy

The May 2026 *U.S. Counterterrorism Strategy* operationalizes the conflation the framework Parts III–V articulates. The Strategy enumerates three "major types of terror groups":¹³⁵

- Narcoterrorists and Transnational Gangs • Legacy Islamist Terrorists • Violent Left-Wing Extremists, including Anarchists and Anti-Fascists

Pages 6 and 7 elaborate. The Strategy commits to "use all the tools constitutionally available to us to map them at home, identify their membership, map their ties to international organizations like Antifa, and use law enforcement tools to cripple them operationally before they can maim or kill the innocent."¹³⁶ The Strategy adds two further undefined categories: "violent secular political groups whose ideology is anti-American, radically pro-transgender, and anarchist."¹³⁷ The Presidential Foreword commits to extrajudicial killing: "if you hurt Americans, or are planning to hurt Americans, 'We Will Find You and We Will Kill You.'"¹³⁸

The Strategy's categorical structure does precisely what Parts III and IV identify as constitutionally impermissible. **Anarchism**, **anti-fascism**, **anti-American** views, and **radical pro-transgender** advocacy are political-doctrinal dispositions — *views*, in the framework's

¹³⁵ 2026 CT STRATEGY, *supra* note 14, at 5.

¹³⁶ *Id.* at 7.

¹³⁷ *Id.*

¹³⁸ *Id.* at 3.

vocabulary. The means deployed by persons holding these views are not specified by the Strategy; the Strategy attaches the extremist label to the views themselves, treating the views as predicates for state action regardless of the means deployed. That is the constitutional move the framework identifies as the means/views collapse, and that the doctrinal substrate from *Brandenburg* through the modern canon forbids.

The Strategy's grammatical structure makes the analytical move explicit. "Violent Left-Wing Extremists, **including** Anarchists and Anti-Fascists" — the "including" subsumes Anarchists and Anti-Fascists within the prior category, treating them as Violent Left-Wing Extremists by definition.¹³⁹ No proof of violence by any individual person so categorized is required; the categorical inclusion does the constitutional work. The Strategy thereby converts a means category ("violent extremists") into a views category (anyone holding anarchist or anti-fascist views) by drafting fiat.

The same maneuver appears at page 7. "Violent secular political groups whose ideology is anti-American, radically pro-transgender, and anarchist" treats *ideology* as the predicate. The "violent" qualifier modifies the noun "groups," not the ideology — but the categorical enumeration treats ideology as the discriminating feature. The constitutional predicate the Strategy thereby installs is ideological, not behavioral.

B. The Definitional Bridge: IHRA, Executive Order 13899, and Executive Order 14188

The 2026 CT Strategy does not invent its "anti-American" predicate from whole cloth. The Strategy inherits a definitional bridge constructed across two prior executive orders that adopted the International Holocaust Remembrance Alliance ("IHRA") Working Definition of Antisemitism as the federal standard for Title VI civil-rights enforcement. The bridge supplies

¹³⁹ Scalia & Garner, *supra* note 25, § 15.

the analytical move by which "anti-Israel" political speech is converted into a categorical predicate for state action — first against campus protest, then against immigration status, and ultimately, in the Strategy's 2026 architecture, against the broader categorical class of "anti-American" political identities.

Executive Order 13899, signed December 11, 2019, directed federal agencies to consider the IHRA definition — including its eleven "contemporary examples" — when adjudicating Title VI civil-rights complaints involving alleged antisemitism on college and university campuses.¹⁴⁰ The order characterized the IHRA framework as a "useful guidance for identifying contemporary manifestations of anti-Semitism," and directed all executive departments and agencies charged with enforcing Title VI to consider the framework in their assessments.

Executive Order 14188, signed January 29, 2025, expanded the framework substantially.¹⁴¹ The order directed federal agencies to use "all available and appropriate legal tools, to prosecute, remove, or otherwise hold to account the perpetrators of unlawful anti-Semitic harassment and violence." The order mandated that federal agencies "examine and report on their existing criminal and civil authority to combat antisemitism," and required an inventory of "all pending administrative complaints and court cases alleging civil rights violations involving colleges and universities arising from campus protests related to the post-Oct. 7, 2023, Israel-Gaza conflict." The order's targeting was explicit: it directed federal enforcement attention at "campus protests" critical of Israeli government conduct in Gaza.

140 Exec. Order No. 13899, *Combating Anti-Semitism*, 84 Fed. Reg. 68779 (Dec. 16, 2019).

141 Exec. Order No. 14188, *Additional Measures to Combat Anti-Semitism*, 90 Fed. Reg. 8847 (Jan. 29, 2025); see also Southern Poverty Law Ctr., *Trump's Executive Order on Antisemitism — Explained* (2025), <https://www.splcenter.org/resources/guides/trump-executive-action-antisemitism-faq/>.

The IHRA Working Definition, as drafted, treats certain forms of political speech concerning the State of Israel as examples of antisemitism. Of the eleven "contemporary examples" the definition supplies, seven concern Israel specifically.¹⁴² The contested examples include "[d]enying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor"; "[d]rawing comparisons of contemporary Israeli policy to that of the Nazis"; and "[a]pplying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation."¹⁴³ The framework thereby converts certain *views* on Israeli government policy — anti-Zionism, comparative critiques, claims about state policy — into examples of antisemitic conduct that may then be addressed under federal civil-rights enforcement authority.

The Trump Administration's interpretation of the IHRA framework made the analytical move explicit. In a *New York Times* op-ed defending E.O. 13899, then-Senior Advisor Jared Kushner wrote that the IHRA framework "makes clear" that "[a]nti-Zionism is anti-Semitism."¹⁴⁴ The phrase "anti-Zionism" appears nowhere in the IHRA definition itself. The administration's interpretation supplied the additional analytical step that converted political opposition to Israeli government policy ("anti-Zionism") into a categorical predicate for state action.

The IHRA framework's authorship and policy origin make the U.S.-Israeli coordination explicit. The IHRA is an intergovernmental organization founded in 1998 in which the State of

142 See INTERNATIONAL HOLOCAUST REMEMBRANCE ALLIANCE, WORKING DEFINITION OF ANTISEMITISM (May 26, 2016) (listing eleven contemporary examples of antisemitism, seven of which concern the State of Israel).

143 *Id.* The Working Definition's full text characterizes antisemitism as "a certain perception of Jews, which may be expressed as hatred toward Jews," but the contested doctrinal weight of the framework lies in the eleven illustrative examples that follow.

144 Jared Kushner, *President Trump Is Defending Jewish Students*, N.Y. TIMES (Dec. 12, 2019) ("Anti-Zionism is anti-Semitism."). The phrase "Zionism" appears nowhere in the IHRA Working Definition itself; the formulation supplies an additional analytical step that converts political opposition to Israeli government policy into a categorical predicate.

Israel is a foundational participant.¹⁴⁵ The Working Definition was developed with substantial Israeli-government input and has been formally adopted by the State of Israel as its official definition for purposes of state action. The Trump Administration's adoption of the IHRA Working Definition as a U.S. federal-enforcement reference therefore imports an Israeli-government-aligned definitional framework into U.S. domestic policy. The "anti-Israel" predicate in the June 2025 House hearing and the "anti-American" predicate in the 2026 CT Strategy are downstream applications of the framework E.O. 13899 and E.O. 14188 installed.

The framework's First Amendment vulnerability is precisely the vulnerability Parts III–V identify. The IHRA framework targets *views* — anti-Zionism, comparative critique of Israeli policy, "double standards" with respect to Israel. The means deployed by persons holding these views are not the framework's analytical concern. A view-based categorical predicate, imported from an intergovernmental Israeli-aligned framework into U.S. civil-rights enforcement, is the structural inversion of the *Brandenburg* line. The contemporary administrative apparatus operates against U.S. citizens and lawful U.S. residents on the basis of the imported framework's view-based predicates.

C. The June 2025 House Homeland Security Hearing

The June 11, 2025 hearing of the House Homeland Security Subcommittee on Counterterrorism and Intelligence formalizes at the legislative-hearing level the framework E.O. 13899 and E.O. 14188 installed at the executive level.¹⁴⁶ The hearing's title — *The Rise of Anti-Israel Extremist*

¹⁴⁵ The International Holocaust Remembrance Alliance (originally the Task Force for International Cooperation on Holocaust Education, Remembrance, and Research) was founded in 1998. The State of Israel is a foundational participant; the Working Definition was developed with substantial Israeli-government input and has been formally adopted by the State of Israel as its official definition for purposes of state action. *See* About the IHRA, INT'L HOLOCAUST REMEMBRANCE ALLIANCE, <https://www.holocaustremembrance.com>.

¹⁴⁶ June 2025 Hrg., *supra* note 17.

Groups and Their Threat to U.S. National Security — is itself the analytical move the framework identifies as impermissible. The phrase "Anti-Israel Extremist Groups" collapses political opposition to Israeli government policy (a *view*) with extremism (a *means* category) by drafting choice. The hearing's title operates against the doctrinal backdrop the IHRA framework supplies (see § VI.B *supra*), which has been federal Title VI civil-rights enforcement reference since 2019.

The hearing record contains several specific conflation the framework's analysis exposes:

Interchangeable use of "extremism" and "radicalism." The hearing transcript repeatedly substitutes the terms for one another without any distinction in meaning. The two terms operate as interchangeable pejoratives, not as analytical categories.¹⁴⁷

Conflation of anti-ICE protests with antisemitic violence. The Chairman's opening statement treats demonstrations against domestic federal immigration enforcement as part of the same threat space as antisemitic violence in Washington, D.C. and Boulder, Colorado.¹⁴⁸ The conflation operates by category, not by means: anti-ICE protests use protected political means; antisemitic violence uses unconstitutional means; the categorical framing treats both as "extremism."

Administrative categories as if statutory. The hearing treats "Domestic Violent Extremism" (DVE) and "Homegrown Violent Extremists" (HVE) as if they were statutorily defined CT categories. They are not. The categories are administrative-DHS coinages without

¹⁴⁷ *Id.* at 236, 243.

¹⁴⁸ *Id.* at 185–98.

statutory grounding in 18 U.S.C. § 2331, § 2332b, or the immigration "terrorist activity" definitions.¹⁴⁹

The categorical title. The hearing's title presupposes that "Anti-Israel" political views are extremist as such. The presupposition does the constitutional work: persons targeted by the hearing's apparatus are targeted because of their views on a contested foreign-policy question, not because of the means they have deployed.

D. The Anti-Israel Conflation in Doctrinal Detail

The Anti-Israel example is doctrinally clean because it admits of a precise *Brandenburg* application. Two propositions illustrate the line the framework draws:

Proposition (a): "Israel is committing genocide; therefore [a specific violent action against a specific target]."

This is extremism if and only if it satisfies *Brandenburg*'s two prongs. If the speaker directed the statement to inciting imminent lawless action, and if the statement was likely to incite or produce such action, the speech is proscribable. The view ("Israel is committing genocide") is irrelevant; the *means* (the specific incitement to imminent lawless action) is the constitutional question. *Watts* would also analyze the conditional-violence phrasing under the true-threats test.¹⁵⁰

Proposition (b): "Israel is committing genocide; therefore the United States should cease all funding and military aid."

¹⁴⁹ *Id.* at 882.

¹⁵⁰ The conditional-violence phrasing of Proposition (a) — "therefore [a specific violent action]" — admits of *Watts* analysis depending on the speaker's reckless awareness of the threatening nature of the statement (*Counterman*, 600 U.S. at 79) and the reasonable-listener test (*Virginia v. Black*, 538 U.S. at 359). The point for this Article's framework is that the analysis runs through the means, not through the radicality of the underlying view about Israeli government conduct.

This is radicalism by the framework's definition. The view advanced is radical (a substantial position critical of conventional U.S. foreign-policy alignment with Israel). The means deployed is petition for policy change through constitutional channels — speech, association, electoral mobilization, peaceful boycott. *Snyder v. Phelps* protects offensive political speech on matters of public concern;¹⁵¹ *NAACP v. Claiborne* protects political boycott as concerted political activity;¹⁵² *Holder v. HLP* protects independent advocacy of FTO political positions (which, regardless of the speaker's views on Israeli government conduct, addresses a paradigmatic political question on which independent advocacy is protected).¹⁵³ The factual basis for the radical proposition — including ongoing proceedings at the International Court of Justice under the Genocide Convention,¹⁵⁴ UN Human Rights Council findings,¹⁵⁵ and contemporaneous mass-casualty data ¹⁵⁶ — does not transform protected political speech into proscribable extremism. *Citizens United v. FEC* holds that political speech is the "primary object of First Amendment protection";¹⁵⁷ *Mills v. Alabama* holds that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."¹⁵⁸

The hearing's title — and the Strategy's "anti-American" categorical predicate — treats Propositions (a) and (b) as the same threat. The framework articulated in this Article makes the distinction the doctrine requires: (a) is extremism if it satisfies *Brandenburg*, regardless of the

151 *Snyder*, 562 U.S. at 458.

152 *Claiborne*, 458 U.S. at 911.

153 *Holder v. HLP*, 561 U.S. at 26–27.

154 See Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order (Provisional Measures), 2024 I.C.J. (Jan. 26).

155 See, e.g., Independent International Commission of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, Report, U.N. Doc. A/HRC/56/26 (June 19, 2024).

156 Sources documenting casualty data in the Gaza conflict include U.N. Office for the Coordination of Humanitarian Affairs reporting, Gaza Health Ministry data, and independent academic analysis. See, e.g., Rasha Khatib, Martin McKee & Salim Yusuf, *Counting the Dead in Gaza: Difficult but Essential*, 404 LANCET 237 (July 5, 2024).

157 *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

158 *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

radicality of the underlying view; (b) is radicalism regardless of how unconventional the political position, because the means deployed are constitutional.

E. Operational Application: The Khalil Deportation, Title VI Enforcement, and State-Level Implementation

The IHRA framework adopted by E.O. 13899 and E.O. 14188 is not merely declaratory. It has been operationalized as actual state action against U.S. residents and citizens engaged in protected political activity.

The Khalil deportation case. In March 2025, Mahmoud Khalil — a former graduate student at Columbia University and a prominent face of pro-Palestinian campus protests during the post-October 7 period — was arrested by undercover federal agents and detained for deportation.¹⁵⁹ The administration sought removal on the ground that Khalil's pro-Palestinian political activities were "harmful to U.S. foreign affairs." The case was the first prominent application of the IHRA-aligned framework to immigration removal: a U.S. lawful resident, engaged in constitutionally protected political speech on a contested foreign-policy question, targeted for state action because his political expression was deemed adverse to U.S. relations with Israel. Khalil was released from custody in June 2025 but has continued to face deportation proceedings, with the administration's filings alleging that his views and associations — not any unlawful conduct — supply the predicate for removability.¹⁶⁰

Title VI campus enforcement. E.O. 14188's inventory mandate has been operationalized through Department of Education Office of Civil Rights investigations and through cooperative

¹⁵⁹ See SPLC, *Trump's Executive Order on Antisemitism — Explained*, *supra* note 175 (documenting Mahmoud Khalil's March 2025 arrest, deportation proceedings, and the administration's framing of his pro-Palestinian political activities as "harmful to U.S. foreign affairs").

¹⁶⁰ As of the date of this Article, Khalil's deportation proceedings remain pending. The case is the first prominent application of the IHRA-aligned categorical framework to immigration removal of a U.S. lawful resident engaged in constitutionally protected political speech.

federal-state enforcement actions at major U.S. universities.¹⁶¹ The Title VI framework converts the IHRA "anti-Zionism is antisemitism" interpretation into the operative standard for evaluating campus speech, association, and political activity. Universities subject to federal enforcement pressure under the framework face material incentives to suppress protected political activity critical of Israeli government policy — the chilling effect the United States District Court for the Western District of Texas has held to violate the First Amendment.¹⁶²

State-level adoption. As of mid-2025, multiple states have adopted IHRA-aligned definitions as state policy. Florida adopted the IHRA framework statewide in 2024.¹⁶³ Iowa adopted the IHRA definition together with anti-BDS legislation in 2022.¹⁶⁴ Texas Governor Greg Abbott issued Executive Order GA-44 in March 2024, incorporating the IHRA framework into state public-university policy.¹⁶⁵

The state-level adoptions have produced concrete operational consequences. In Florida, after IHRA adoption, a university administrator directed staff to review course syllabi "for signs of 'antisemitism or anti-Israel bias.' Any class syllabus containing the keywords *Israel, Israeli, Palestine, Palestinian, Middle East, Zionism, Zionist, Judaism, Jewish or Jews* was flagged for review."¹⁶⁶ As part of that vetting, the university banned a textbook titled *Terrorism and Homeland Security*, which a state legislator described as "pro-Muslim terror" — though the

161 See Exec. Order No. 14188, *supra* note 174, § 3 (directing federal agencies to inventory pending civil-rights complaints from campus protests post-October 7, 2023, and to coordinate federal Title VI enforcement against alleged campus antisemitism through the IHRA framework).

162 *Students for Justice in Palestine at the Univ. of Hous. v. Abbott*, No. 1:24-cv-00523-RP (W.D. Tex. Oct. 30, 2024) (Pitman, J.) (holding that Texas Executive Order GA-44, which incorporated the IHRA framework into state public-university policy, violates the First Amendment as applied to anti-Israel political speech on Texas public-university campuses).

163 See Fla. Stat. § 1000.05(7) (2024); see also The Forward, *The IHRA definition of antisemitism is becoming law in more states* (2024), <https://forward.com/news/723667/ihra-antisemitism-state-laws/>.

164 See 2022 Iowa Acts ch. 1118 (adopting IHRA definition for state civil-rights purposes alongside anti-BDS legislation restricting state business with companies that boycott Israel).

165 Tex. Exec. Order GA-44 (Mar. 27, 2024) (Abbott, Gov.) (incorporating the IHRA Working Definition into Texas public-university speech and conduct policies).

166 See The Forward, *supra* note 180 (documenting Florida university administrator memo directing keyword-based syllabus review after IHRA adoption).

legislator later admitted he had not read the book.¹⁶⁷ The keyword-vetting and book-banning are concrete operational applications of a view-based categorical predicate against constitutionally protected academic activity.

The operational record demonstrates that the IHRA-aligned framework is doing the constitutional work the 2026 CT Strategy's "anti-American" predicate later formalizes. Federal removal proceedings, Title VI civil-rights enforcement actions, and state-level keyword vetting are all categorical applications of view-based predicates against constitutionally protected political expression. The framework Parts III–V articulates supplies the doctrinal analysis the Texas federal court applied in *Students for Justice in Palestine v. Abbott* (see § VI.G *infra*), and that further courts must apply to the broader administrative architecture.

F. The Asymmetric Application: Settler Violence as Conventional Extremism

The conventional-extremism corollary developed in Part V predicts that an apparatus that maintains conventional foreign-policy alignment by suppressing radical political challenge will exhibit asymmetric treatment of *means*: the apparatus will tolerate unconstitutional means deployed in service of the convention, while suppressing constitutional means deployed in service of the radical challenge. The contemporary U.S. policy posture on Israeli settler violence supplies the documented empirical case.

The Atlantic Council's recent analysis catalogues the underlying conduct.¹⁶⁸ Israeli settler violence in the West Bank "meets both the academic and policy definitions of terrorism: the deliberate creation of fear through violence or the threat of violence in pursuit of a political

¹⁶⁷ *Id.* (documenting Florida university's ban of *Terrorism and Homeland Security* textbook based on state legislator's characterization of the book as "pro-Muslim terror"; the legislator subsequently admitted he had not read the book).

¹⁶⁸ David Schenker, *Israeli Settler Terrorism Demands a Tougher US Response*, ATLANTIC COUNCIL (2025), <https://www.atlanticcouncil.org/dispatches/israeli-settler-terrorism-demands-a-tougher-us-response/>.

objective." The Israel Defense Forces and Shin Bet themselves classify the incidents as "nationalistic crime" and "extremist Israeli settler violence" in internal data and public statements.¹⁶⁹ The IDF, however, has consistently declined to label individual perpetrators as "terrorists," and the Israeli legal system has prosecuted settler violence at rates well below the analogous rates for Palestinian-perpetrated violence.

The U.S. administrative response under the Trump Administration has been the inverse of the response to anti-Israel political speech. President Biden's Executive Order 14115, signed February 1, 2024, established sanctions authority targeting "persons undermining peace, security, and stability in the West Bank," including violent settlers and settlement-aligned organizations.¹⁷⁰ Biden's order was revoked by President Trump immediately upon taking office in January 2025.¹⁷¹ As of the date of this Article, the Trump Administration has imposed no new sanctions on violent settlers or settlement-aligned organizations, and the diplomatic response to documented incidents — including a November 2025 condemnation by Ambassador Mike Huckabee that the Atlantic Council described as "particularly significant" because it was so out of pattern with the administration's general posture — has been described by independent analysts as "milquetoast."¹⁷²

The asymmetric application has the structure the conventional-extremism corollary predicts:

169 *Id.* (citing internal IDF and Shin Bet classification of settler violence as "nationalistic crime" and "extremist Israeli settler violence" while noting the institutions' refusal to label individual perpetrators as "terrorists").

170 Exec. Order No. 14115, *Imposing Certain Sanctions on Persons Undermining Peace, Security, and Stability in the West Bank*, 89 Fed. Reg. 7457 (Feb. 5, 2024).

171 Exec. Order No. 14148, *Initial Rescissions of Harmful Executive Orders and Actions*, 90 Fed. Reg. 8237 (Jan. 20, 2025) (revoking Exec. Order No. 14115 along with seventy-seven other Biden-era executive orders).

172 See Schenker, *supra* note 184 (describing Ambassador Mike Huckabee's November 2025 condemnation of one incident of settler violence as "terrorism" as "particularly significant" because it was so out of pattern with the administration's general posture, and characterizing the broader U.S. diplomatic response as "milquetoast").

- **Settler violence — unconstitutional means in service of conventional foreign-policy alignment with the maximalist settlement project — is met with sanctions removal and minimal diplomatic pressure.**

- **Anti-Israel political speech — constitutional means (campus protest, academic critique, BDS advocacy, divestment petitions, electoral mobilization) in service of a radical challenge to the conventional alignment — is met with deportation proceedings, Title VI enforcement actions, IHRA-based campus restrictions, state-level keyword vetting, and the categorical "anti-Israel" and "anti-American" predicates the June 2025 hearing and the 2026 CT Strategy install.**

The framework this Article articulates supplies the doctrinal language for the structural finding. The U.S. administrative posture treats conventional unconstitutional means as tolerable while treating radical constitutional means as the priority CT-apparatus target. By the means analysis the framework requires, the posture is inverted: the unconstitutional means (settler violence) is doctrinally extremism; the constitutional means (anti-Israel political speech and association) is doctrinally radicalism. The apparatus's actual treatment is the opposite of the doctrinal characterization.

The discrepancy between the doctrinal characterization and the operational treatment is itself the conventional-extremism analysis in operation. The discrepancy is not subtle. Settler violence is documented, prosecutable, and matches every academic and policy definition of terrorism the relevant institutions have articulated. The IDF and Shin Bet — Israel's own institutional authorities — classify the conduct in their internal data using terms ("nationalistic crime," "extremist Israeli settler violence") that satisfy the means criterion. The U.S. administration's choice to remove sanctions while operationalizing the IHRA-aligned categorical

predicate against anti-Israel political speech makes the asymmetric application a matter of executive choice, not of doctrinal compulsion. The choice is the conventional-extremism corollary in observable operation.

The broader implication for the framework should be stated plainly. The contemporary administrative apparatus is doctrinally interested in suppressing radical political challenge because radical political challenge is the constitutional mechanism through which conventional dispositions are exposed as extremism and reformed. The apparatus that suppresses anti-Israel-policy speech, anti-fascist organizing, anarchist constitutional critique, and pro-transgender advocacy is, on the means analysis, the institutional manifestation of conventional extremism — the apparatus deploying unconstitutional means (categorical surveillance, undefined-predicate targeting, the announced commitment to "find and kill" persons identified by ideological category) to maintain conventional dispositions against radical challenge. The constitutional structure has confronted the same institutional logic in slavery, in Jim Crow, in the suppression of women's suffrage, in the suppression of the civil rights movement; the contemporary apparatus is doctrinally identical in operation, even where the substantive content differs.

G. Federal-Court Pushback: Students for Justice in Palestine v. Abbott

The means/views distinction the framework articulates has already received doctrinal application in federal court. In *Students for Justice in Palestine at the University of Houston v. Greg Abbott*, U.S. District Judge Robert L. Pitman (W.D. Tex.) ruled in October 2024 that Texas Governor Greg Abbott's Executive Order GA-44 — which incorporated the IHRA definition into state

public-university policy — violated the First Amendment as applied to anti-Israel political speech on Texas public-university campuses.¹⁷³

Judge Pitman's analysis tracks the framework this Article articulates with notable precision. The court held that "[t]he IHRA definition specifically targets expressions critical of Israel, thus chilling a form of 'political speech that is fundamental to the university experience.'"¹⁷⁴ The court further observed that universities, as "centres of intellectual debate," are "vital spaces" where students should be able to engage in "robust discussions on contentious issues, including foreign policy matters such as the Israeli-Palestinian conflict."¹⁷⁵ The court accepted that universities have a responsibility to prevent "genuine harassment and anti-Semitism" — a means-based standard — but held that "enforcing a definition which includes political criticism of Israel as anti-Semitic oversteps constitutional boundaries."¹⁷⁶

The court's reasoning is precisely the means/views distinction. *Genuine harassment* — conduct directed at individual students because of their identity or protected characteristics — is a means-based predicate susceptible to constitutional regulation. *Political criticism of Israel* — speech advancing a view on a contested foreign-policy question — is the protected radical political activity the framework identifies. The court's holding distinguishes the two by reference to the means deployed, not by reference to the radicality of the underlying view. The court's analytical move is the means/views distinction in doctrinal application.

173 *Students for Justice in Palestine at the Univ. of Hous. v. Abbott*, No. 1:24-cv-00523-RP, slip op. (W.D. Tex. Oct. 30, 2024); see Middle East Monitor, *Texas Judge: Enforcing the IHRA Definition of Anti-Semitism Limits Speech* (Oct. 31, 2024), <https://www.middleeastmonitor.com/20241031-texas-judge-enforcing-the-ihra-definition-of-anti-semitism-limits-speech/>.

174 *Students for Justice*, *supra* note 189, slip op. at __ (quoting Pitman, J., on the IHRA definition's targeting of expressions critical of Israel).

175 *Id.* (Pitman, J.) (on universities as "vital spaces" for "robust discussions on contentious issues, including foreign policy matters such as the Israeli-Palestinian conflict").

176 *Id.* (Pitman, J.) (distinguishing "genuine harassment and anti-Semitism," which the court treated as a means-based standard susceptible to regulation, from "political criticism of Israel as anti-Semitic," which the court held to be constitutionally protected).

The *Students for Justice* ruling is directly citable for the framework's contemporary doctrinal application. The means/views distinction is not theoretical; it is the analytical move Judge Pitman applied to find the IHRA-based state restrictions unconstitutional. The federal-court pushback that *Students for Justice* represents will, this Article submits, recur as additional courts confront IHRA-based predicates, the categorical applications of the 2026 CT Strategy, and the broader administrative apparatus that operationalizes view-based targeting against radical political activity. The framework supplies the doctrinal vocabulary; the doctrine itself has been there all along.

H. The Framework's Application to International Active Conflicts

The framework's diagnostic function is not confined to American CT predicates. Active international conflicts admit the same analysis, and the framework cuts across the political alignment of the parties because the inquiry runs through means rather than through view. Five clusters of active conflict illustrate the framework's diagnostic application beyond the U.S. domestic context.

Israel–Palestine. The framework's application to U.S. domestic enforcement of the IHRA-aligned categorical predicate is developed at length in Sections VI.B through VI.G *supra*. The framework's broader diagnostic application to the underlying conflict tracks the same analytical move. The framework distinguishes anti-occupation political activity (radicalism by constitutional means — campus protest, BDS advocacy, electoral mobilization, international solidarity, journalistic reporting, academic critique) from violence (means analysis applied symmetrically across all parties). Hamas's October 7, 2023 attacks against Israeli civilians satisfy the means-based proscription criteria the framework articulates; documented settler violence

against Palestinian civilians satisfies the same means-based criteria;¹⁷⁷ and conduct meeting the elements of war crimes, crimes against humanity, or genocide — the legal question currently under judicial assessment at the International Court of Justice on South Africa's Application under the Genocide Convention¹⁷⁸ — satisfies the same means-based criteria as a matter of doctrinal characterization. The framework's distinctive contribution is making the symmetric analysis available: a doctrinal analysis politically resisted by every party that prefers view-based targeting of its political adversaries.

Russia–Ukraine. Russian "discrediting the armed forces" prosecutions of anti-war citizens fail the means analysis: constitutional dissent is treated as criminal predicate without any violent conduct by the prosecuted speaker.¹⁷⁹ The Russian state's conduct in Ukraine — the documented filtration apparatus, the systematic deportation of Ukrainian children (the subject of the International Criminal Court's March 2023 arrest warrants for President Vladimir Putin and Children's Rights Commissioner Maria Lvova-Belova),¹⁸⁰ and the targeting of civilian infrastructure — satisfies multiple means-based criteria for state extremism. Ukrainian wartime restrictions on speech and political activity must themselves be evaluated by means: restrictions necessary to wartime operational security pass the means analysis; restrictions that target political dissent without operational necessity do not. The framework's diagnostic function operates symmetrically on both sides of the conflict.

¹⁷⁷ See Schenker, *Israeli Settler Terrorism Demands a Tougher US Response*, ATLANTIC COUNCIL (2025), <https://www.atlanticcouncil.org/dispatches/israeli-settler-terrorism-demands-a-tougher-us-response/>; see also Section VI.F *supra* (developing the asymmetric-application analysis).

¹⁷⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Afr. v. Isr.), Order (Provisional Measures), 2024 I.C.J. (Jan. 26); see also Section VI.D *supra*.

¹⁷⁹ Federal Law No. 32-FZ (Russian Federation, Mar. 4, 2022) (amending the Russian Criminal Code to add Article 207.3 (public dissemination of knowingly false information about the Russian Armed Forces) and Article 280.3 (public actions discrediting the use of the Russian Armed Forces)); see also OVD-Info, *Anti-War Cases* (ongoing dataset documenting prosecutions under the discrediting provisions), <https://ovd.news/en>.

¹⁸⁰ *Situation in Ukraine* (Putin), ICC-01/22 (Pre-Trial Chamber II, Mar. 17, 2023) (arrest warrant for President Vladimir Putin); *Situation in Ukraine* (Lvova-Belova), ICC-01/22 (Pre-Trial Chamber II, Mar. 17, 2023) (arrest warrant for Maria Lvova-Belova) (alleging war crime of unlawful deportation of children from occupied areas of Ukraine to the Russian Federation under the Rome Statute).

The People's Republic of China. The conventional disposition of the Chinese state is that the Communist Party of China holds legitimate constitutional authority and that political activity outside the Party's framework is incompatible with constitutional order. The conventional disposition is maintained by the systematic suppression of Tibetan political activity, the documented mass-detention apparatus targeting Uyghurs in Xinjiang,¹⁸¹ the suppression of the Hong Kong democracy movement under the 2020 National Security Law,¹⁸² the systematic harassment of human-rights lawyers (most notoriously in the July 2015 "709 Crackdown"),¹⁸³ and the disappearance of dissidents, including Chinese citizens detained in third countries and forcibly returned. The framework's analysis characterizes the apparatus as conventional extremism at scale. The radical political challenge — Hong Kong protesters, Uyghur human-rights advocates in diaspora, dissident intellectuals, the 709 lawyers, and the broader civil-society network operating in increasingly constrained internal space — is radicalism by constitutional means against a constitutional order that has foreclosed the means analysis at the level of state action.

Iran, Saudi Arabia, the United Arab Emirates, Egypt, and Arab-world authoritarian systems. The framework's diagnostic structure applies in each case. The conventional disposition — clerical rule in Iran, monarchical absolutism in Saudi Arabia and the Gulf monarchies, military rule in Egypt — is maintained by violent state means against radical

181 Office of the U.N. High Commissioner for Human Rights, OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China (Aug. 31, 2022); *see also* INDEPENDENT TRIBUNAL INTO THE CRIMES AGAINST HUMANITY AND GENOCIDE OF THE UYGHUR, TURKIC AND OTHER TURKIC-MUSLIM PEOPLES BY THE PEOPLE'S REPUBLIC OF CHINA, JUDGMENT (Dec. 9, 2021).

182 Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (June 30, 2020); *see also* HONG KONG WATCH, PROSECUTING DISSENT: ANNUAL REPORT ON NATIONAL SECURITY LAW PROSECUTIONS (annual editions, 2021–present).

183 *See* CHINA HUMAN RIGHTS LAWYERS CONCERN GROUP, REPORT ON THE 709 CRACKDOWN (2016); EVA PILS, CHINA'S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE (2014).

political challenge.¹⁸⁴ The framework's contribution is providing a doctrinal vocabulary that international human-rights bodies, exile journalism, and transnational civil-society organizations can deploy in country reports, in litigation before regional human-rights bodies, and in transnational advocacy.

Politics in democratic backsliding. In Hungary (the Fidesz period), Poland (the PiS period, with restoration efforts now active under the Tusk government), Turkey (the AKP-era judicial and journalistic crackdowns), the Philippines (the Duterte-era drug-war extrajudicial killings, with ongoing assessment under Marcos), India (BJP-era prosecutions of journalists, academics, and political dissidents under the UAPA), and Brazil (the Bolsonaro period, now in transition), the predictive pattern articulated in Section V.F *supra* becomes observable in real time: conventional extremism is tolerated; radical constitutional challenge is suppressed.¹⁸⁵ Recognizing the pattern early permits constitutional course-correction before crisis hardens into institutional fact.

The active-conflict inventory demonstrates that the framework is not solely an American doctrinal apparatus. The framework's structural features — the means/views distinction, the conventional-extremism corollary, and empirical verifiability on the facts of conduct — operate identically across these conflicts. The doctrinal vocabulary the framework articulates supplies civil-society organizations, journalists, scholars, judicial actors (where they retain independence), and international human-rights bodies a shared analytical infrastructure for characterizing state conduct and the categorical predicates being deployed against radical

¹⁸⁴ See generally MARC LYNCH, THE ARAB UPRISING: THE UNFINISHED REVOLUTIONS OF THE NEW MIDDLE EAST (2012); HUMAN RIGHTS WATCH, WORLD REPORT (annual country chapters on Iran, Saudi Arabia, the United Arab Emirates, and Egypt).

¹⁸⁵ See generally AZIZ HUQ & TOM GINSBURG, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018); Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2016).

political challenge. Part X *infra* develops the framework's prospective application as analytical infrastructure for conflict de-escalation, resolution, and reform in active conflicts of this kind.

VII. DOCTRINAL AND STRUCTURAL CONSEQUENCES

A. Void-for-Vagueness

The vagueness doctrine — articulated in modern form by *Grayned v. City of Rockford*¹⁸⁶ and applied to criminal predicates by *Sessions v. Dimaya*¹⁸⁷ and *Johnson v. United States*¹⁸⁸ — requires that government predicates for state action "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."¹⁸⁹ The doctrine applies *a fortiori* to predicates that authorize state killing.

The Strategy's categorical predicates — "Anarchist," "Anti-Fascist," "anti-American," "radically pro-transgender," "violent left-wing extremist" — fail the vagueness test by orders of magnitude. None is statutorily defined. Each is susceptible to elastic application against any citizen the apparatus chooses. *Dimaya* invalidated the residual clause of the "crime of violence" definition under 18 U.S.C. § 16(b) for vagueness even though the residual clause had a structural meaning susceptible to judicial construction.¹⁹⁰ *Johnson* invalidated the Armed Career Criminal Act's residual clause for vagueness even though "violent felony" had decades of judicial application behind it.¹⁹¹ The categorical predicates the Strategy invokes are categorically vaguer than the predicates struck down in *Dimaya* and *Johnson*.

186 *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

187 *Sessions v. Dimaya*, 584 U.S. 148 (2018).

188 *Johnson v. United States*, 576 U.S. 591 (2015).

189 *Grayned*, 408 U.S. at 108.

190 *Dimaya*, 584 U.S. at 156–57.

191 *Johnson*, 576 U.S. at 596–98.

The radicalism/extremism distinction supplies the doctrinal lever the vagueness analysis requires. A statute (or executive predicate) that targeted means — true threats, imminent incitement, coordination with an FTO — would supply the ascertainable conduct the doctrine demands. A statute (or executive predicate) that targets views is, by its structure, vague: the categorical predicates of view are not susceptible to ascertainable definition because the categories operate by political characterization rather than by conduct.

B. Equal Protection

The Strategy pairs the targeting enumeration at pages 5 and 7 with a parallel protection enumeration at page 6. The protected categories include "conservative Catholics attending traditional mass in Virginia, parents standing up for their children at schoolboard meetings, Members of Congress, [and] President Trump and his associates."¹⁹² The juxtaposition establishes, on the document's face, viewpoint-based asymmetry: certain political viewpoints are enumerated as protected from CT-apparatus weaponization, while opposing political viewpoints are enumerated as targeted *with* the apparatus.

The equal protection violation is straightforward under *Bolling v. Sharpe*¹⁹³ (Fifth Amendment due-process clause reverse-incorporates equal-protection principles against federal government) and *Hunter v. Underwood*¹⁹⁴ (discriminatory purpose invalidates facially neutral law). The Strategy is not facially neutral; the discriminatory purpose appears on its face. The radicalism/extremism distinction supplies the analytic explanation for the asymmetry: the protected categories are *views* the apparatus shares; the targeted categories are *views* the

¹⁹² 2026 CT STRATEGY, *supra* note 14, at 6.

¹⁹³ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹⁹⁴ *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

apparatus opposes. The asymmetry has nothing to do with means and everything to do with views — which is precisely the constitutional inversion the framework identifies.

C. Due Process

The Fifth Amendment provides that "[n]o person shall... be deprived of life, liberty, or property, without due process of law."¹⁹⁵ The Strategy's Presidential Foreword commits to extrajudicial killing of persons identified by undefined political-identity categories. *Mathews v. Eldridge*¹⁹⁶ supplies the procedural-due-process framework; *Hamdi v. Rumsfeld*¹⁹⁷ holds that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."¹⁹⁸ *Hamdi* required process even for a citizen detained as an enemy combatant in a declared overseas conflict. *A fortiori*, U.S. citizens at home who fall within undefined political-identity categories — and against whom no act of war has been declared — cannot be summarily killed.

The substantive due process analysis is equally direct. *County of Sacramento v. Lewis* forbids state action that is "so arbitrary that it shocks the conscience."¹⁹⁹ Predicating extrajudicial state killing of citizens on attributed future intent — without any process for testing the attribution, and based on undefined categorical predicates of view — is the paradigm shock-the-conscience case.

The radicalism/extremism distinction supplies the doctrinal vocabulary the due process analysis requires. The Strategy's categorical predicates target views, not means; the targeting is therefore unconstitutional. The framework provides courts confronted with the predicate a clean analytical move: identify whether the categorical predicate is doing work on means or on views,

¹⁹⁵ U.S. CONST. amend. V.

¹⁹⁶ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁹⁷ *Hamdi*, 542 U.S. 507.

¹⁹⁸ *Id.* at 536.

¹⁹⁹ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

and apply *Brandenburg* and the means analysis accordingly. The doctrinal infrastructure is already in place; the framework supplies the synthesis.

D. Structural Separation of Powers

The Strategy operationalizes a constitutional move at the structural level that compounds the substantive violations: it asserts executive authority to define new CT predicates, designate U.S. citizens as members of CT categories, authorize operational action against them, and bypass Article III adjudication of the predicates underlying that operational action. The framework's analysis exposes each of these as ultra vires.

Congress alone defines CT predicates. The Constitution vests "[a]ll legislative Powers herein granted" in Congress.²⁰⁰ The definition of criminal and CT predicates affecting citizen rights is a quintessentially legislative function. *INS v. Chadha* holds that the legislative function may be exercised only by Congress through bicameralism and presentment.²⁰¹ Congress has enacted at least six statutory definitions of "terrorism," each tied to a specific statutory purpose;²⁰² none includes "Anarchist," "Anti-Fascist," "anti-American," "radically pro-transgender," or "violent left-wing extremist" as a categorical predicate. The executive branch's invention of these predicates is the usurpation of the Article I legislative function.

The judiciary alone determines guilt sufficient to authorize the taking of life. Article III vests the judicial power in the Supreme Court and inferior courts. *Marbury v. Madison* holds that "it is emphatically the province and duty of the judicial department to say what the law is."²⁰³

²⁰⁰ U.S. CONST. art. I, § 1.

²⁰¹ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

²⁰² The six statutory definitions are: 18 U.S.C. § 2331(1) (international terrorism); 18 U.S.C. § 2331(5) (domestic terrorism); 18 U.S.C. § 2332b(g)(5) (federal crime of terrorism); 8 U.S.C. § 1182(a)(3)(B)(iii) (terrorist activity for immigration purposes); 22 U.S.C. § 2656f(d) (terrorism for State Department reporting purposes); 18 U.S.C. § 2333 (civil terrorism cause of action).

²⁰³ *Marbury*, 5 U.S. at 177.

A "find and kill" commitment that bypasses Article III adjudication is a structural assault on the constitutional separation of powers. *Youngstown Sheet & Tube Co. v. Sawyer* (Jackson, J., concurring) holds that executive authority is "at its lowest ebb" when acting against the express or implied will of Congress.²⁰⁴ No AUMF authorizes CT action against U.S. citizens domestically on political-identity predicates. The executive's commitment is therefore at the lowest ebb of constitutional authority, exercised against the implied will of Congress as embodied in the six statutory definitions Congress has enacted.

The framework supplies the analytical bridge between the substantive First Amendment violation and the structural separation-of-powers violation. The Strategy's predicates target *views* because, by their structure, only view-based predicates can authorize the categorical state action the Strategy contemplates. A predicate that targeted *means* would be limited by the means analysis to the unconstitutional means the doctrinal substrate already permits the state to address. The substitution of view-based predicates for means-based predicates is the doctrinal move that enables the structural-separation-of-powers usurpation.

E. Petition Clause

The First Amendment Petition Clause protects "the right of the people... to petition the Government for a redress of grievances."²⁰⁵ The Clause protects access to the courts and to the political branches as channels for the remedy of constitutional and statutory wrongs.²⁰⁶ The contemporary administrative apparatus, applied to civil-rights litigants challenging federal officials or major U.S. corporations through the federal courts, threatens the Petition Clause

²⁰⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²⁰⁵ U.S. CONST. amend. I.

²⁰⁶ See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011) (Petition Clause protects access to the courts as a constitutional channel for the redress of grievances).

directly: the "planning to hurt Americans" predicate, joined to the categorical inclusion of Anarchists and Anti-Fascists, reaches a pro se litigant whose pleadings seek declaratory and injunctive relief against named federal officials. That construction would chill the petition right of any citizen prosecuting civil-rights claims against named federal officials.²⁰⁷

The radicalism/extremism distinction frames the Petition Clause analysis as the doctrinal substrate requires. Litigation is the paradigm form of constitutional means: it is the constitutionally specified channel for the redress of grievances. A categorical predicate that treats litigation against the apparatus as "planning to hurt Americans" — and authorizes state action against the litigant on that predicate — is the structural inversion of the Petition Clause. The framework supplies the doctrinal vocabulary the Petition Clause analysis requires: litigation is radicalism by means; the apparatus that suppresses it is, by means analysis, conventional extremism.

VIII. THE FRAMEWORK'S UNIVERSAL PORTABILITY ACROSS DEMOCRATIC CONSTITUTIONAL SYSTEMS

A. Three Structural Features Underwriting Portability

The framework articulated in Parts III–V is portable across democratic constitutional systems because its three structural features are not culturally contingent. The means/views distinction (Parts III–IV) maps onto every system that distinguishes protected political expression from proscribable conduct, with the doctrinal vocabulary differing across systems — *Brandenburg*, Article 10 ECHR, ICCPR Article 19, Section 153A jurisprudence in India, *Kol Ha'am*, the

²⁰⁷ See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963) (state action chilling access to courts as a method of advancing civil rights is unconstitutional).

African Charter, the Inter-American Convention — while the analytical move remains the same. The conventional-extremism corollary (Part V) is structural: wherever a constitutional system polices state means and possesses some capacity for political reform, the corollary applies, even though the historical inventory differs by country (§ V.E *supra*). And empirical verifiability — the framework's testable proposition that a given case is means-based or views-based on the facts of conduct, not on the speaker's political alignment — operates identically across systems. The framework's portability is therefore translation rather than adaptation: the structural features travel; only the surrounding doctrinal furniture changes.

B. Jurisdictional Application Map

The framework can be deployed in the following jurisdictions and supranational systems, with the substitution of local controlling authority for the American authorities cited in Parts III–VII *supra*.

1. United Kingdom

The United Kingdom has no First Amendment but has the Human Rights Act 1998 incorporating Article 10 of the European Convention on Human Rights into domestic law.²⁰⁸ Article 10 protects freedom of expression subject to "such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society."²⁰⁹

The framework would apply to: (i) the broadened "extremism" definition announced by the then-Conservative government in March 2024, which defined extremism as "the promotion or advancement of an ideology based on violence, hatred or intolerance" and was explicitly

²⁰⁸ Human Rights Act 1998, c. 42 (U.K.).

²⁰⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221.

drafted to authorize state restriction of speech and association beyond what existing criminal law reaches²¹⁰ — the framework exposes the predicate as view-based; (ii) the Prevent program, which has been criticized for monitoring political and religious belief on the theory that ideological "radicalization" precedes violent extremism²¹¹ — the framework recharacterizes Prevent's predicate as view-based and exposes its Article 10 vulnerability; and (iii) the Counter-Terrorism and Border Security Act 2019, Schedule 3, which authorizes border detention without reasonable suspicion for purposes of determining involvement in "hostile state activity" or "terrorism"²¹² — the predicate-elasticity here is structurally analogous to the U.S. categorical CT predicates this Article analyzes.

Article 10 ECHR jurisprudence already contains the means/views distinction in operation. *Handyside v. United Kingdom* held that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received... but also to those that offend, shock or disturb."²¹³ *Sunday Times v. United Kingdom*, *Lingens v. Austria*, *Castells v. Spain*, *Karatas v. Turkey*, and the broader Turkish line of cases distinguish political advocacy from incitement to violence even where the speech is radical and aligned with banned political movements.²¹⁴ The framework supplies the analytical vocabulary the ECHR doctrine has consistently applied without unified articulation.

210 U.K. Department for Levelling Up, Housing and Communities, *New Definition of Extremism* (Mar. 14, 2024) (announcing the administrative definition of "extremism" for purposes of state action). The definition has been criticized as inconsistent with Article 10 ECHR by the U.K. parliamentary Joint Committee on Human Rights and by independent civil-liberties organizations.

211 See, e.g., INDEPENDENT REVIEW OF PREVENT (Shawcross Review, Feb. 2023); HM Inspectorate of Constabulary and Fire & Rescue Services, *Prevent: An Inspection of How Effectively Police Forces Tackle Terrorism* (2022); ARUN KUNDNANI, *THE MUSLIMS ARE COMING! ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* (2014).

212 Counter-Terrorism and Border Security Act 2019, c. 3, sch. 3 (U.K.).

213 *Handyside v. United Kingdom*, App. No. 5493/72, Eur. Ct. H.R. ¶ 49 (Dec. 7, 1976).

214 *Sunday Times v. United Kingdom* (No. 1), App. No. 6538/74, Eur. Ct. H.R. (Apr. 26, 1979); *Lingens v. Austria*, App. No. 9815/82, Eur. Ct. H.R. (July 8, 1986); *Castells v. Spain*, App. No. 11798/85, Eur. Ct. H.R. (Apr. 23, 1992); *Karatas v. Turkey*, App. No. 23168/94, Eur. Ct. H.R. (Grand Chamber, July 8, 1999); *Süreş v. Turkey* (No. 1), App. No. 26682/95, Eur. Ct. H.R. (Grand Chamber, July 8, 1999); *Erdogdu v. Turkey*, App. No. 25723/94, Eur. Ct. H.R. (June 15, 2000).

2. European Union and Council of Europe

ECHR Article 10 jurisprudence is the controlling doctrinal substrate for the forty-six member states of the Council of Europe and, by reference, for the European Union itself. The framework supports application against: (i) national counter-terrorism frameworks (France's post-2015 emergency powers and subsequent legislative entrenchment; Germany's *Verfassungsschutz* surveillance of political movements; Spain's anti-terrorism laws as applied to Catalan self-determination advocacy; Hungary's "Stop Soros" legislation and broader Fidesz-era restrictions; Poland's anti-LGBTQ "ideology" measures during the PiS period); (ii) the EU's Digital Services Act and analogous platform-regulation regimes insofar as those regimes require platforms to suppress political speech on view-based predicates; and (iii) application by the European Court of Human Rights itself as an analytical synthesis of its existing Article 10 line.²¹⁵

3. India

India has a developed First Amendment-analogous doctrine, though weakened in recent practice. Article 19(1)(a) of the Indian Constitution protects freedom of speech and expression, subject to "reasonable restrictions" under Article 19(2).²¹⁶ The Supreme Court of India has applied a *Brandenburg*-analogous imminent-lawless-action test in *S. Rangarajan v. P. Jagjivan Ram* (requiring "spark in a powder keg" for restrictions on political speech)²¹⁷ and in *Shreya Singhal v.*

²¹⁵ See DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ch. 11 (5th ed. 2023) (synthesizing the Court's Article 10 jurisprudence).

²¹⁶ INDIA CONST. art. 19(1)(a) (freedom of speech and expression); art. 19(2) (enumerating "reasonable restrictions" in "the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence").

²¹⁷ *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574 (Sup. Ct. India) ("[T]he anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression.... The expression of thought should be intrinsically dangerous to the public interest.... [I]t should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg.'").

Union of India (striking down Section 66A of the Information Technology Act as vague and overbroad).²¹⁸

The framework would apply to: (i) Section 153A of the Indian Penal Code ("promoting enmity between different groups"), increasingly used to prosecute political speech, journalism, and dissent²¹⁹ — the framework distinguishes incitement (means-based) from political-doctrinal advocacy (view-based, protected); (ii) the Unlawful Activities (Prevention) Act, India's principal CT statute, frequently used against journalists, activists, and academic dissenters²²⁰ — the framework supplies an analytical structure courts can use to police UAPA prosecutions that target political view rather than statutory means; and (iii) sedition prosecutions under Section 124A (suspended in 2022 pending review), where the framework's analysis was implicitly available in *Kedar Nath Singh v. State of Bihar* but has not been articulated as a unified framework.²²¹

4. Israel

Israel has a developed freedom-of-expression doctrine under Basic Law: Human Dignity and Liberty and the *Kol Ha'am Co. v. Minister of Interior* line — the 1953 founding decision recognizing the centrality of political dissent to democratic government.²²² The framework would

218 *Shreya Singhal v. Union of India*, AIR 2015 SC 1523 (Sup. Ct. India) (striking down Section 66A of the Information Technology Act, 2000, as unconstitutionally vague and overbroad).

219 Indian Penal Code § 153A (criminalizing "[p]romoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony"); see INTERNATIONAL COMMISSION OF JURISTS, ANTI-MINORITY LAWS AND PRACTICES IN INDIA (2024).

220 Unlawful Activities (Prevention) Act, No. 37 of 1967, India Code (as amended through 2019); see PEOPLE'S UNION FOR CIVIL LIBERTIES, *UAPA: CRIMINALISING DISSENT AND STATE TERROR* (2022).

221 *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955 (Sup. Ct. India) (upholding Section 124A sedition statute but narrowing its application to speech with "the tendency to create public disorder by the use of violence"); *S.G. Vombatkere v. Union of India*, W.P. (C) No. 682 of 2021 (Sup. Ct. India, May 11, 2022) (suspending all sedition prosecutions pending the Court's further consideration).

222 *Kol Ha'am Co. v. Minister of Interior*, HCJ 73/53, 7 P.D. 871 (1953) (Agranat, J.) (founding decision of Israeli freedom-of-expression doctrine, holding that newspapers could not be closed for political-doctrinal content absent a near-certainty of harm to public order).

apply to: (i) Israeli administrative-detention powers used against anti-occupation activists, conscientious objectors, and Palestinian citizens of Israel, where the administrative-detention apparatus operates on categorical predicates that the framework's analysis would expose as view-based where the conduct alleged is political speech, association, or advocacy rather than violent or incitement-based;²²³ (ii) Israeli prosecutions of anti-Zionist Israeli citizens, where the framework supports defenders confronting prosecutions that conflate political doctrine with criminal predicate; and (iii) the 2018 Nation-State Basic Law and subsequent legislation that asymmetrically protects Jewish-Israeli political identity while restricting Palestinian-Israeli or non-Zionist political activity, where the framework's conventional-extremism corollary applies directly.²²⁴ The framework is doctrinally available to Israeli civil-liberties defenders precisely because *Kol Ha'am* already articulates the underlying principle in Israeli constitutional law.

5. Politics in Democratic Backsliding

Section VI.H *supra* develops the framework's diagnostic application to Hungary, Poland, Turkey, India, the Philippines, Brazil, and analogous polities exhibiting the predictive pattern articulated in Section V.F *supra*. The framework supplies, in addition, the reform criteria available to any subsequent democratic transition or constitutional restoration where the apparatus of view-based predicates has crystallized but the constitutional immune system retains the capacity for self-correction.

223 See B'TSELEM & HAMOKED, WITHOUT TRIAL: ADMINISTRATIVE DETENTION OF PALESTINIANS BY ISRAEL AND THE INTERNMENT OF UNLAWFUL COMBATANTS LAW (2009); Emergency Powers (Detentions) Law, 5739–1979 (Isr.); Internment of Unlawful Combatants Law, 5762–2002 (Isr.).

224 Basic Law: Israel — The Nation State of the Jewish People (passed July 19, 2018) (Isr.); *Adalah — The Legal Center for Arab Minority Rights in Israel v. Knesset*, HCJ 5555/18 (Sup. Ct. Isr. July 8, 2021) (Court's review of constitutional challenge to the Nation-State Basic Law).

6. Authoritarian Systems

In jurisdictions where internal constitutional channels do not exist or have been captured (the People's Republic of China, Iran, Saudi Arabia, North Korea, Belarus, Eritrea, contemporary Russia), the framework operates as a critical-analytical tool deployed from outside the captured system. International human-rights bodies, exile journalism, transnational civil-society organizations, and scholars can deploy the framework to characterize state conduct on means analysis even where domestic constitutional review is unavailable. The framework's empirical-verifiability feature makes it useful precisely in contexts where the state's own characterization of its conduct is unreliable.

7. International Human-Rights Systems

The framework can be deployed at the level of international human-rights jurisprudence: by the United Nations Human Rights Council in country-specific reports and Universal Periodic Reviews; by the United Nations Human Rights Committee in interpretive applications of ICCPR Article 19 (freedom of expression) and Article 21 (freedom of assembly);²²⁵ by the Inter-American Commission on Human Rights and Inter-American Court of Human Rights in cases applying Article 13 of the American Convention on Human Rights;²²⁶ by the African Commission on Human and Peoples' Rights in cases applying Article 9 of the African Charter;²²⁷ by Special Rapporteurs on freedom of expression, on counter-terrorism and human rights, and on the situation of human-rights defenders; and by treaty-monitoring bodies assessing state

²²⁵ International Covenant on Civil and Political Rights, arts. 19, 21, Dec. 16, 1966, 999 U.N.T.S. 171; *see also* U.N. Hum. Rts. Comm., General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

²²⁶ American Convention on Human Rights, art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123; *see* INTER-AM. COMM'N H.R., INTER-AMERICAN LEGAL FRAMEWORK REGARDING THE RIGHT TO FREEDOM OF EXPRESSION, OEA/Ser.L/V/II CIDH/RELE/INF.2/09 (Dec. 30, 2009).

²²⁷ African Charter on Human and Peoples' Rights, art. 9, June 27, 1981, 1520 U.N.T.S. 217.

compliance with applicable human-rights instruments. The framework supplies a doctrinal vocabulary that cuts across these systems and supports the consistent application of the means/views distinction in country-specific assessments.

C. What Adaptation Requires

Deployment of the framework in non-American jurisdictions requires substitution of three components, but not modification of the framework's analytical structure: (i) substitution of controlling authority — *Brandenburg* becomes *Handyside* in ECHR systems, *Hamdi* becomes *A v. Secretary of State for the Home Department* for citizen-detention cases,²²⁸ *NAACP v. Claiborne* becomes the relevant local political-association cases, *Holder v. HLP* becomes the local material-support or designation analogs; (ii) substitution of statutory inventory — the six U.S. statutory terrorism definitions become the local equivalents (the United Kingdom's Terrorism Act 2000 and subsequent amendments, India's UAPA, the EU's Framework Decision on Combating Terrorism, the ICCPR-derived state obligations); and (iii) substitution of historical inventory — slavery, Jim Crow, women's suffrage, and the civil-rights movement become the local analogs (apartheid in South Africa, colonial subjugation in India, the suppression of women's suffrage in Switzerland and other late-extending franchises, the Catholic Emancipation in Ireland and the United Kingdom, the dismantling of religious-establishment frameworks across European post-Enlightenment history). Each polity has its own inventory of radical challenges that became conventional and conventional dispositions that were eventually recognized as extremist.

²²⁸ *A v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (House of Lords) (holding that the indefinite detention of foreign nationals certified as terrorism suspects under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Articles 5 and 14 of the European Convention on Human Rights).

The framework's structural elements — the means/views distinction, the conventional-extremism corollary, the empirical-verifiability test, and the five democratic constitutional principles codified in Part IX *infra* — do not change. What changes is the surrounding doctrinal furniture.

IX. CODIFICATION OF FIVE DEMOCRATIC CONSTITUTIONAL PRINCIPLES

A. The Principles Codified

The framework codifies five democratic constitutional principles into a single analytical apparatus. The principles are recognizable in virtually every democratic constitutional tradition; the framework's contribution is the operational synthesis.

1. Legality. No state action against citizens without statutory predicate. The principle that the state acts only pursuant to law is foundational to every constitutional system descended from the rule-of-law tradition.²²⁹ The framework's analysis identifies categorical predicates that operate outside statutory authority — the "DVE" and "HVE" administrative coinages in the U.S. inventory (Section II.B *supra*) and the various "extremism" administrative classifications in other jurisdictions — and exposes them as legality violations.

2. Specificity. Predicates for state action must be defined with ascertainable conduct, not invocations of identity. The void-for-vagueness doctrine in American constitutional law (Section

²²⁹ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."); *Sunday Times v. United Kingdom* (No. 1), App. No. 6538/74, Eur. Ct. H.R. ¶ 49 (Apr. 26, 1979) ("[T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.").

VII.A *supra*), the legality principle (*nulla poena sine lege*) in continental systems,²³⁰ the "prescribed by law" requirement in ECHR Article 10(2), and the analogous components of other rights-protection frameworks all articulate the same principle. The framework operationalizes the principle by requiring that the predicate be capable of empirical verification on means.

3. Means-not-Views. The constitutional line runs through conduct, not through ideas — the central claim Parts III–IV develop. The principle has direct analogs across democratic constitutional systems: *Brandenburg's* imminent-and-likely incitement test, Article 10 ECHR's "necessary in a democratic society" review, and ICCPR Article 19(3)'s necessity-and-proportionality requirement²³¹ each draw the line on means. The framework names the principle.

4. Self-Correction. Radical political challenge is the constitutional mechanism by which the polity identifies conventional extremism and reforms itself. The principle is implicit in the structural premise of every democratic constitutional system — that the political process is the legitimate channel for reform, that protected political speech and association are the inputs to that process, and that the system's legitimacy depends on the availability of radical challenge as an option. The framework's contribution is naming the principle and articulating its structural function.

5. Reciprocity. The same standard applies to state means as to citizen means. Conventional state action that satisfies the extremism criterion is doctrinally identical to citizen extremism. The principle is implicit in the supremacy clause and equal protection clause of the U.S. Constitution, in the rule-of-law tradition of common-law and civil-law systems, and in the requirement that international human-rights obligations bind states with the same force they bind

230 The *nulla poena sine lege* principle is recognized in Article 7 of the European Convention on Human Rights, Article 15 of the International Covenant on Civil and Political Rights, Article 9 of the American Convention on Human Rights, and Article 7(2) of the African Charter on Human and Peoples' Rights, as well as in the domestic constitutional traditions of every civil-law system and the common-law systems that have codified the principle.

231 ICCPR, art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171.

non-state actors.²³² The framework's contribution is articulating reciprocity as an analytical move — not merely an aspiration — that produces specific findings when applied to specific state conduct.

B. Why Codification Matters

The five principles are not new. The doctrinal substrate in every democratic constitutional tradition recognizes some or all of them. What is new is the unified operational test: the framework's claim that the means/views distinction is the single criterion that codifies all five principles into a single analytical move.

This codification has three consequences. **First**, it generates a single test rather than a multi-factor doctrine. The means analysis is sufficient. A predicate that operates on means satisfies all five principles; a predicate that operates on views violates all five. The framework's analytical economy is part of its utility — defenders, courts, and scholars do not need to apply five separate doctrinal frameworks. One analysis answers the question.

Second, it produces cross-system comparability. Because the five principles are recognizable across democratic constitutional traditions, the framework's single test produces comparable analytical results across jurisdictions. A judgment that a particular state action satisfies the framework's criterion in the United States is meaningfully comparable to a judgment about the same kind of state action in the United Kingdom, India, or Brazil. The cross-system comparability supports human-rights reporting, comparative constitutional scholarship, and international civil-society advocacy.

²³² See International Law Commission, Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001) (codifying secondary rules of state responsibility); *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 4 (July 29, 1988) (recognizing state obligation to investigate, prosecute, and compensate violations of human-rights obligations).

Third, it makes the principles operational. Abstract principles do not by themselves constrain state action. They require operational tests that can be applied to specific predicates by defenders, judges, and reformers. The framework supplies the operational test. Each of the five principles, before the framework, required separate doctrinal analysis with no unified synthesis. After the framework, a single inquiry — *what means are deployed?* — produces the operational answer.

C. The Limits of Codification

Codification has limits. The framework does not resolve every constitutional question; it does not eliminate hard cases at the *Brandenburg* line, the true-threats line, the material-support coordination line, or analogous lines in other systems. Specific applications continue to generate genuine doctrinal difficulty. What codification does is organize the inquiries under a unified analytical heading and supply the structural vocabulary for resolving them.

Nor does the framework displace the substantive moral and political questions the targeting addresses. A polity that confronts genuine threats — actual incitement to violence, genuine terrorism, true threats against specific persons — must address them. The framework does not say: do not address them. The framework says: address them by means analysis, not by view-based categorical predicates that suppress radical constitutional challenge.

The codification is, accordingly, modest in its substantive claims and ambitious in its analytical claims. It does not solve every constitutional problem. It supplies a single test that codifies five principles into an operational analysis usable across democratic constitutional traditions.

X. THE FRAMEWORK AS INFRASTRUCTURE FOR CONFLICT DE-ESCALATION, RESOLUTION, AND REFORM

A. The De-Escalation Mechanism

Violent political conflict typically escalates through a recurring structural pattern:

1. A radical political challenge emerges through constitutional means.
2. Conventional authority labels the challenge "extremist."
3. The label justifies state action against constitutional channels.
4. The radical movement is pushed out of constitutional channels.
5. Deprived of constitutional channels, some elements turn to unconstitutional means.
6. Those unconstitutional means retroactively confirm the original "extremist" label.
7. The cycle escalates, and what began as radical political challenge ends as actual extremism.

The framework breaks the cycle at step 2. The categorical labeling is what does the constitutional work; the framework deprives the label of its analytical force by making it answer the means question. A speaker called "extremist" can ask: *which unconstitutional means am I deploying?* If no answer comes back, the label is exposed as ideological rather than analytical, and the apparatus that deployed the label loses its constitutional cover. The escalation cycle cannot move from step 2 to step 3 without first surviving the means analysis.

This is the structural de-escalation mechanism. It does not require any party to abandon its political view. It requires only that the parties (and the polity surrounding them) recognize the means/views distinction as the controlling constitutional criterion. The framework lets people remain radically disagreed and still preserve the constitutional channels through which the disagreement can be worked out without violence.

B. The Resolution Function

The framework's resolution function operates at three levels.

Empirical level. When state action against a category of persons is challenged, the framework asks two answerable questions: *what means is the state deploying, and what means did the persons deploy?* The answers can be tested on the facts of conduct. Disputes about substantive ideology continue (and should); disputes about the constitutional legitimacy of state action are resolved on means. The empirical-verifiability feature of the framework is what enables this. A dispute that would otherwise be irresolvable on substantive ideological grounds becomes resolvable on procedural-conduct grounds.

Procedural level. The framework legitimizes radical challenge as the proper mechanism for constitutional reform. Movements that would otherwise be radicalized by exclusion from constitutional channels can be re-incorporated into the constitutional system by being recognized as engaged in legitimate radicalism. Section X.C *infra* develops the historical precedents — the Good Friday Agreement, the South African transition, the Spanish post-Franco transition, the Colombian FARC process, the Tunisian post-Arab Spring transition, and the American civil-rights settlement — in which the means/views distinction operated as the controlling procedural criterion even where the parties did not articulate it as such.²³³

Institutional level. When state apparatuses are shown to be operationalizing view-based predicates, their claim to legitimacy is undermined from within. The reform pressure comes not just from challenged citizens but from constitutional actors inside the apparatus — judges, civil servants, military lawyers, civil-rights officers, intelligence-community inspectors general — who confront the framework's analytical clarity and must justify their conduct on means-based

²³³ See JONATHAN POWELL, GREAT HATRED, LITTLE ROOM: MAKING PEACE IN NORTHERN IRELAND (2008); JOHN McGARRY & BRENDAN O'LEARY, THE NORTHERN IRELAND CONFLICT: CONSOCIATIONAL ENGAGEMENTS (2004).

grounds. The institutional self-correction is the constitutional immune system's response to the framework's diagnostic clarity.

C. Historical Precedents the Framework Retrospectively Explains

Several major conflict-resolution successes can be retrospectively understood as implementations of the framework's structural distinction. In each case, the resolution worked because the parties (or the surrounding international system) implicitly accepted the means/views distinction. Where the distinction was rejected, resolution failed; where it was accepted, resolution became possible even between parties who remained radically disagreed about the underlying political question.

Northern Ireland Troubles → Good Friday Agreement (1998). Sinn Féin was recognized as a political actor once IRA decommissioning began. Means analysis was applied to the violent wing; the radical political view (a united Ireland) was preserved as a legitimate political position. The Agreement explicitly distinguished the constitutional channels for political change (including the principle of consent under Article 1) from the violent means previously deployed.²³⁴

South African apartheid → democratic transition (1990–1994). The African National Congress was unbanned on February 2, 1990; the Truth and Reconciliation Commission distinguished conduct from ideology (means analysis from view analysis); the 1996 Constitution institutionalized the constitutional channels for radical political reform.²³⁵ Conventional

²³⁴ Agreement Reached in the Multi-Party Negotiations (Belfast Agreement / Good Friday Agreement), Apr. 10, 1998, U.K.–Ir.–N. Ir., art. 1 (Constitutional Issues).

²³⁵ See PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA (1997); ALLISTER SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA'S NEGOTIATED REVOLUTION (1995); CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.

extremism (apartheid-era state violence) was named as such by the TRC's findings; radical challenge (the ANC, the United Democratic Front, the mass democratic movement, trade-union organizing) was re-incorporated into the constitutional system. The Commission's distinction between "gross violations of human rights" (means-based predicate) and political-ideological position (view-based, not by itself criminal) is the framework's distinction in institutional operation.

Spain post-Franco transition (1975–1978). The Communist Party of Spain was legalized on April 9, 1977; the *Pacto del Olvido* drew the line at means rather than at views; the 1978 Constitution institutionalized constitutional channels for political change including substantial regional autonomy for previously suppressed national identities (Catalan, Basque, Galician).²³⁶ Franquismo's state violence and ETA terrorism (means analysis) were distinguished from broader political ideologies (views). The transition was politically difficult and contested but structurally tracked the framework's distinction.

Colombia FARC peace process (2012–2016). The Havana negotiations and the resulting peace accords distinguished combatant means from political objectives. FARC's political views were preserved (the agrarian-reform and land-tenure positions that had originated the conflict); the means were renounced; political reintegration was permitted through the formation of the Comunes party and protected congressional seats in the transitional period.²³⁷ The Special Jurisdiction for Peace operationalized the means analysis through transitional-justice procedures that distinguished combat-related conduct from political activity.

²³⁶ See CHARLES T. POWELL, *EL PISO Y EL TECHO DE LA TRANSICIÓN ESPAÑOLA* (2001); Javier Pradera, *La cultura política de la transición*, in JAVIER TUSELL & ÁLVARO SOTO, EDS., *HISTORIA DE LA TRANSICIÓN, 1975–1986* (1996); SPANISH CONSTITUTION, 1978.

²³⁷ Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera (Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace), Nov. 24, 2016 (Colombia–FARC-EP); JURISDICCIÓN ESPECIAL PARA LA PAZ, MARCO JURÍDICO Y MANDATO (2017).

Tunisia post–Arab Spring (2011–2014). Ennahda was legalized after Ben Ali's fall in March 2011; the movement participated in the National Constituent Assembly election of October 2011 and in the constitutional drafting process that produced the 2014 Constitution.²³⁸ The transition operationalized the framework's distinction at the level of political-Islamist movements: previously proscribed political activity (radicalism by constitutional means) was re-incorporated into the constitutional system without requiring the movement to abandon its political-ideological orientation.

United States civil-rights movement (1954–1965). *Brown v. Board of Education* (1954), the Civil Rights Act of 1964, and the Voting Rights Act of 1965 institutionalized the constitutional outcome of radical political challenge through deliberately nonviolent direct action. King's choice of nonviolence as a strategic and ethical commitment was, in the framework's vocabulary, a choice of radicalism by constitutional means in deliberate contradistinction to the extremism by unconstitutional means that conventional Jim Crow authority had been deploying. The conventional extremism (Klan violence, Bull Connor, the Birmingham bombings, the murders of civil-rights workers) was named and dismantled through constitutional channels.

D. Prospective Application to Ongoing Conflicts

The framework's de-escalation, resolution, and reform potential is not limited to retrospective explanation. The diagnostic clusters developed in § VI.H *supra* — Israel–Palestine, Russia–Ukraine, the People's Republic of China, the Arab-world authoritarian systems, and the democratic-backsliding cases — admit prospective resolution application as well. The

²³⁸ TUNISIAN CONSTITUTION (Jan. 27, 2014); see Duncan Pickard, *Tunisia's Constitution: Drafting Process and Conclusions*, 56 ARAB STUD. J. 36 (2014).

framework does not resolve any underlying substantive political dispute, but it preserves the constitutional channels through which disputes can be worked out without further escalation toward state violence, and it supplies the analytical structure for any future transitional-justice processes that will distinguish state-extremism conduct from political-ideological position. One additional active context warrants separate treatment here because it does not appear in § VI.H *supra*:

U.S. internal political polarization. The framework cuts across the U.S. political spectrum, supplying a shared analytical vocabulary that does not align with either party. Right-coded movements engaged in violent conduct (the January 6 conduct that satisfied *Brandenburg's* test) are extremism by means; right-coded movements engaged in constitutional political activity are radicalism. Left-coded movements engaged in violent conduct are extremism; left-coded movements engaged in constitutional political activity are radicalism. The framework's symmetric application makes it useful as a depolarizing analytical tool — both sides confront the same test, and accusations of "extremism" leveled in either direction must answer the means question.

Democratic-backsliding cases. Sections V.F, VI.H, and VIII.B.5 *supra* develop the diagnostic application; the prospective contribution is deployment of the framework's reform criteria during any subsequent transition or restoration phase, with the framework supplying opposition political parties, civil-society organizations, and constitutional actors a shared vocabulary for institutional reconstruction on means-based predicates.

E. The Reform Program

If the framework were widely adopted as a diagnostic and reform tool, the reform program would have a specific institutional shape: (i) **Statutory drafting reform** — counter-terrorism statutes, hate-speech laws, anti-extremism predicates, and analogous state-action statutes redrawn around means rather than views; (ii) **Administrative-category reform** — "DVE," "HVE," and analogous administrative categories rebuilt to be means-based predicates with statutory grounding, with categories that operate on undefined view-based predicates losing administrative legitimacy and being replaced; (iii) **Operational doctrine reform** — intelligence agencies, police forces, civil-rights enforcement agencies, and immigration agencies operating under guidelines that explicitly distinguish means from views; (iv) **Judicial application** — courts adopting the means/views distinction as the operative analytical framework, with Judge Pitman's *Students for Justice* ruling (Section VI.G *supra*) supplying the leading-edge American example and analogous rulings in Article 10 ECHR cases, Section 153A Indian cases, *Kol Ha'am*-line Israeli cases, and Brazilian Supreme Federal Tribunal freedom-of-expression cases building on the same analytical move; and (v) **International human-rights reporting** — the U.N. Human Rights Council, the Inter-American Commission, the European Court of Human Rights, the African Commission, the Special Rapporteurs, and the treaty-monitoring bodies deploying the framework in country reports and judicial decisions, with the empirical-verifiability feature making the assessments more rigorous and harder to politically contest.

F. The Framework as Constitutional Immune System

The structural insight underlying this Part is that radical political challenge is the constitutional immune system. Conflict, in the metaphor's terms, is what happens when the immune system

fails or is suppressed. The framework's diagnostic value is that it identifies immune-system failures — suppression of radical constitutional challenge — before they produce systemic collapse.

Polities with functioning constitutional immune systems experience political conflict but rarely descend into systemic violence; polities with suppressed or absent immune systems experience the escalation cycle described in Section X.A. The framework's broader public-utility function is making the immune system legible. When citizens, scholars, journalists, judges, and reformers have a shared vocabulary for naming what the immune system is doing — or failing to do — they can detect immune-system failures earlier and intervene with constitutional rather than violent corrective measures.

The framework is not a guarantee. Polities can refuse the analysis, refuse to apply the means/views distinction, refuse to recognize the conventional-extremism corollary. Authoritarian movements actively reject the framework because it constrains their categorical-predicate apparatus. But the framework provides the analytical infrastructure on which de-escalation, resolution, and reform can build when the political will is present. The infrastructure is empirical, doctrinal, and portable. The political will is what citizens and institutions provide.

XI. CONCLUSION

The constitutional distinction between radicalism and extremism is the operative principle of American First Amendment doctrine from *Whitney* through *Brandenburg* through the contemporary canon. The principle has not previously been articulated as a unified analytical framework defining the two named categories by reference to constitutional and unconstitutional

means. This Article supplies the synthesis. The doctrinal substrate is well-developed and binding; the framework is recognition, not creation.

The framework's significance lies in three structural moves. *First*, it draws the constitutional line at means, not views — a line that runs through every modern First Amendment case but that has not been named. *Second*, it carries the corollary that conventional dispositions may themselves be extremist while remaining conventional, and that radical challenges are the constitutional mechanism for revealing which conventional dispositions are themselves extremist. *Third*, it supplies the doctrinal vocabulary needed to analyze contemporary categorical counter-terrorism predicates — predicates that target views rather than means and that, by their structure, invert the constitutional framework the doctrinal substrate maintains.

The contemporary application — the May 2026 *U.S. Counterterrorism Strategy*, the June 11, 2025 House Homeland Security hearing, the broader administrative apparatus that operationalizes view-based targeting against political minorities — exposes the framework's practical stakes. The apparatus authorizes state action against U.S. citizens on the basis of undefined political-identity predicates. The framework's analysis shows that the predicates are not just bad policy but doctrinally impermissible: they collapse the means/views line the First Amendment requires, install view-based targeting in place of the means analysis the doctrinal substrate mandates, and treat radical political challenge — the constitutional mechanism for reform — as itself the threat.

The doctrinal authorities supporting the framework are old. *Brandenburg* is from 1969; the foundational concurrences in *Whitney* and *Abrams* are from the 1920s; the modern canonical cases span the half-century since *Brandenburg*. A court applying the framework is applying existing law, not creating new law. The synthesis the framework provides is conceptual, not

doctrinal: it gives the protected and unprotected categories the names the cases imply but never assign.

If the framework is correctly stated, it has three immediate implications beyond the specific contemporary application this Article addresses. First, it provides a defensive constitutional standard available to any litigant facing a categorical CT predicate or analogous state-action predicate built on view-based targeting. Second, it provides a legislative-drafting standard for any Congress considering CT or domestic-extremism statutes: the predicates must be means-based to survive constitutional analysis. Third, it provides an analytical framework for academic and journalistic discourse on radicalism, extremism, and the contested boundary between them — a framework grounded in constitutional doctrine rather than in the political contingency of the labels.

Parts VIII through X extend the framework's analytical scope beyond American First Amendment doctrine. Part VIII develops the framework's universal portability across democratic constitutional systems — Article 10 ECHR, ICCPR Article 19, Section 153A jurisprudence in India, the *Kol Ha'am* doctrine in Israel, the American Convention, the African Charter, and the broader system of international human-rights instruments — with substitution of local controlling authority and preservation of the analytical move. Part IX codifies five democratic constitutional principles — legality, specificity, means-not-views, self-correction, and reciprocity — into a single operational test that produces cross-system comparability and makes the principles operational rather than aspirational. Part X develops the framework's potential as analytical infrastructure for conflict de-escalation, resolution, and reform: the framework breaks the escalation cycle through which categorical labeling converts radical political challenge into actual extremism, and retrospectively explains the means/views basis of the Good Friday

Agreement, the South African transition, the Spanish post-Franco transition, the Colombian FARC peace process, the Tunisian post-Arab Spring transition, and the American civil-rights settlement. Conflict, in this Article's analysis, is what happens when the constitutional immune system fails or is suppressed; the framework's structural function is making that immune system legible to the constitutional actors whose work sustains it.

The framework does not resolve every difficult case. The means analysis is the doctrinal beginning of the inquiry; specific applications will continue to generate hard cases — cases at the *Brandenburg* line where imminence and likelihood are contested, cases at the *Watts/Counterman* line where the true-threats analysis turns on mens rea and reasonable-listener reception, cases at the *Holder v. HLP* line where coordination with a designated FTO is contested. The framework does not collapse these inquiries; it organizes them under the proper analytical heading.

What the framework does is supply the analytical vocabulary the contemporary moment requires. The administrative apparatus operates on a view-based predicate the constitutional doctrine forbids. The doctrinal substrate forbidding it is already in place. The framework names the line the substrate draws — *means, not views* — and the structural relationship between the two named categories — radicalism, defined by constitutional means and always protected; extremism, defined by unconstitutional means and properly proscribable; conventional dispositions, susceptible to characterization as extremist whenever the means by which they are maintained satisfy the extremism criterion.

The Article submits this framework for public use. It is intended for defenders confronting categorical CT predicates, for courts confronting the predicates' operational application, for legislators considering CT legislation, and for the academic and journalistic

discourse that articulates the constitutional values the doctrine maintains. The framework is not the author's invention; it is the doctrine's. The author has supplied only the synthesis. The doctrinal architecture the framework rests on is the work of the constitutional system the framework defends.

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