NOTE

Shouting "Fire" in a Crowded Chamber: The Speech or Debate Clause, Incitement, and the Limitations of Legislative Immunity

MAYA DEVI GANDHI*

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I've seen your frown and it's like lookin' down
The barrel of a gun,
And it goes off
And out come all these words

— "Mardy Bum," Arctic Monkeys[1]

We will not let them silence your voices. We're not going to let it happen.
— Former President Donald Trump, January 6, 2021[2]

INTRODUCTION

Former Representative Mo Brooks (R-Ala.) is one for strong rhetoric. A prominent figure in the effort to overturn the 2020 election—with an established pattern of bolstering lies about its integrity[3]—Rep. Brooks was among the most incendiary speakers at former President Donald Trump's rally just hours before the January 6 insurrection:

> Today is the day American patriots start taking down names and kicking ass. Now our ancestors sacrificed their blood, their sweat, their tears, their fortunes, and sometimes their lives to give us, their descendants, an America that is the greatest nation in world history. So I have a question for you, are you willing to do the same? My answer is yes. Louder! Are you willing to do what it takes to fight for America? Louder! Will you fight for America?[4]

We all know what happened next. Over three harrowing hours, thousands of rioters stormed the U.S. Capitol in an attempt to stop the congressional certification of the 2020 presidential election.[5] Authorities evacuated lawmakers for fear of their safety, as insurrectionists smashed their way through the Capitol—proudly waving Confederate flags, looting the office of then-Speaker of the House Nancy Pelosi (D-Cal.), and beating Capitol police officers tasked with

1. ARCTIC MONKEYS, *Mardy Bum*, *on* WHATEVER PEOPLE SAY I AM, THAT'S WHAT I'M NOT (Domino Recording Co. 2006).

2. Donald Trump, Speech on the Ellipse (Jan. 6, 2021) (transcript available at www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/9GRP-K8W6]).

3. *See* Michael Kranish, *Mo Brooks Urged a Jan. 6 Crowd to 'Fight.' Now His Actions Long Before the Insurrection Face New Scrutiny.*, WASH. POST (Jan. 10, 2022, 6:00 PM), www.washingtonpost.com/politics/2022/01/10/mo-brooks-jan6-eric-swalwell-lawsuit-insurrection/.

4. Mo Brooks, Speech on the Ellipse (Jan. 6, 2021) (transcript available at www.justsecurity.org/78932/timeline-rep-mo-brooks-january-6-and-the-effort-to-overturn-an-election/ [https://perma.cc/NBZ4-NQ2A]).

5. *See* Jacqueline Alemany, Hannah Allam, Devlin Barrett, Emma Brown, Aaron C. Davis, Josh Dawsey, Peter Hermann, Paul Kane, Ashley Parker, Beth Reinhard, Philip Rucker, Marianna Sotomayor & Rachel Weiner, *Bloodshed*, WASH. POST (Oct. 31, 2021), www.washingtonpost.com/politics/interactive/2021/what-happened-trump-jan-6-insurrection/ (detailing timeline of events during the attack on the Capitol); Ryan Lucas, *Where the Jan. 6 Insurrection Investigation Stands, One Year Later*, NPR (Jan. 6, 2022, 5:00 AM) www.npr.org/2022/01/06/1070736018/jan-6-anniversary-investigation-cases-defendants-justice [https://perma.cc/LAG9-YY6U] ("[T]he [Justice Department] estimates that between 2,000 and 2,500 people entered the Capitol on Jan. 6, 2021 . . . .").

defending the building.[6] Four rioters died; hundreds of others were injured.[7] Five police officers ultimately lost their lives, four of them dying by suicide in the days and months after the attack.[8] The insurrection was the first direct attack on the U.S. Capitol since British troops stormed the building during the War of 1812.[9]

In some ways, the government has swiftly meted out justice. Prosecutors have criminally charged over 1,000 people in connection with the attack, with offenses ranging from disorderly conduct to sedition—a charge rarely invoked in the contemporary U.S. legal system.[10] To live and work in Washington, D.C., is to viscerally feel the effects of January 6—to have scores of friends and colleagues who were at work in the Capitol when it was attacked, and to remember the subsequent weeks during which D.C. was a military-occupied city.[11] The reality of insurrection is now part of the fabric of American life.

For some involved in the insurrection, however, accountability remains tenuous. While former President Trump was eventually charged for his conduct in relation to the January 6 insurrection,[12] other officials complicit in the attack have not faced such legal ramifications.[13] Their complicity has raised thorny issues around the extent of executive and legislative immunity, both in the criminal

6. *See* Alemany et al., *supra* note 5.

7. Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html.

8. *Id.*

9. Amanda Holpuch, *US Capitol's Last Breach Was More than 200 Years Ago*, GUARDIAN (Jan. 6, 2021, 7:59 PM), www.theguardian.com/us-news/2021/jan/06/us-capitol-building-washington-history-breach [https://perma.cc/N23M-M3EV].

10. As of September 2023, 1,150 people have been charged, 667 have pleaded guilty, and 145 have been convicted at trial. *See* NPR Staff, *The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Sept. 15, 2023, 4:46 PM), https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories [https://perma.cc/J7XA-AUZ7] (tracking charges, convictions, and sentences of January 6 rioters); *see also* Aaron Blake, *We Now Have the First Seditious-Conspiracy Charges from Jan. 6. Here's How Historic That Is.*, WASH. POST (Jan. 13, 2022, 7:53 PM), www.washingtonpost.com/politics/2021/03/22/sedition-charges-capitol/ ("It has been more than a decade since the federal government brought sedition charges."); Alan Feuer & Zach Montague, *Oath Keepers Leader Convicted of Sedition in Landmark Jan. 6 Case*, N.Y. TIMES (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/us/politics/oath-keepers-trial-verdict-jan-6.html.

11. *See* Jacob Silverman, *The Military Occupation of D.C. Is a National Disgrace*, NEW REPUBLIC (Jan. 19, 2021), https://newrepublic.com/article/160979/military-occupation-dc-biden-inauguration-national-disgrace [https://perma.cc/GQV3-7LD6] (noting presence of 25,000 National Guard soldiers in D.C. in weeks after January 6).

12. *See* Charlie Savage, *Here Are the Charges Trump Faces in the Jan. 6 Case*, N.Y. TIMES (Aug. 4, 2023), https://www.nytimes.com/2023/08/01/us/politics/trump-indictment-charges-jan-6.html. *But see* Alan Feuer, *The Charges that Were Notably Absent from the Trump Indictment*, N.Y. TIMES (Aug 3, 2023), https://www.nytimes.com/2023/08/03/us/politics/indictment-trump-jan-6-violence.html (noting absence of "any count that directly accused Mr. Trump of being responsible for the violence his supporters committed at the Capitol," such as "actually encouraging or inciting the mob that stormed the building, chasing lawmakers from their duties").

13. *See* Alan Feuer, *The Indictment Says Trump Had Six Co-Conspirators in His Efforts to Retain Power*, N.Y. TIMES (Aug. 3, 2023), https://www.nytimes.com/2023/08/01/us/politics/trump-indictment-election-co-conspirators.html (discussing unnamed and unindicted co-conspirators).

context and as it relates to the work of the January 6 Committee[14] tasked with investigating the attack.[15] Rep. Mo Brooks's case illustrates these sometimes futile attempts: though one of his House colleagues, with the support of more than 20 Representatives, introduced a bill to remove him from his seat,[16] the effort quickly failed. In a more novel endeavor, Representative Eric Swalwell (D-Cal.) sued Rep. Mo Brooks in federal court, alleging the Alabama congressman engaged in civil conspiracy in connection with the attack. A judge easily dismissed the suit,[17] though not before the Justice Department loudly distanced itself from Rep. Mo Brooks's conduct.[18] And while the January 6 Committee made a valuable effort to foster public accountability, such work is subject to not only the whims of the high-ranking officials called to testify,[19] but also the political fortunes of Congress—a salient barrier given the outcome of the 2022 midterm elections, which handed the GOP a narrow majority.[20]

The mixed efforts to hold elected and high-ranking political officials accountable in the wake of January 6 reveal the uncertain limitations of executive and legislative immunity for speech that incites violence. Legislative immunity takes a particularly potent form in the Speech or Debate Clause, which dictates that members of Congress shall "not be questioned in any other Place" for "any Speech or Debate in either House."[21] Though the Clause's text is specific to

14. The "January 6 Committee," as used throughout this Note, refers to the House Select Committee to Investigate the January 6th Attack on the United States Capitol.

15. *See, e.g.*, Alan Feuer & Maggie Haberman, *Trump Lawyers Push to Limit Aides' Testimony in Jan. 6 Inquiry*, N.Y. TIMES (Sept. 23, 2022), www.nytimes.com/2022/09/23/us/trump-privilege-investigation.html; Charlie Savage & Glenn Thrush, *Jan. 6 and Mar-a-Lago Inquiries Converge in Fights over Executive Privilege*, N.Y. TIMES (Sept. 30, 2022), www.nytimes.com/2022/09/30/us/politics/trump-executive-privilege.html.

16. Removing Representative Mo Brooks from the House of Representatives, H.R. Res. 46, 117th Cong. (2021).

17. Swalwell v. Trump, No. 21-cv-1678 (D.D.C. March 9, 2022).

18. The United States' Response to Defendant Mo Brooks's Petition to Certify He Was Acting Within the Scope of His Office or Employment at 1, Swalwell v. Trump, No. 21-cv-586 (D.D.C. July 27, 2021); *see also* Marshall Cohen & Tierney Sneed, *DOJ Won't Protect GOP Rep. Mo Brooks in Insurrection Lawsuit*, CNN (July 27, 2021, 10:58 PM), www.cnn.com/2021/07/27/politics/mo-brooks-lawsuit-doj [https://perma.cc/TLF8-RFHD].

19. *See, e.g.*, Manu Raju & Morgan Rimmer, *Rep. Mo Brooks Says He's Willing to Testify in Public as Jan. 6 Committee Prepares to Reissue Him a Subpoena*, CNN (June 22, 2022, 8:47 PM), www.cnn.com/2022/06/22/politics/mo-brooks-testify-january-6-committee/index.html [https://perma.cc/MP8C-MAWM].

20. Deirdre Walsh, *Republicans Narrowly Retake Control of the House, Setting up Divided Government*, NPR (Nov. 16, 2022, 6:35 PM), https://www.npr.org/2022/11/16/1133125177/republicans-control-house-of-representatives [https://perma.cc/M9HT-M6VX]. Soon after taking the majority, House Republicans established a highly politicized House Select Subcommittee on the Weaponization of the Federal Government, using the defunct January 6 Committee as a model. The Subcommittee, which replaced scrutiny of the insurrection with scrutiny of the Biden Administration, reflects the degree to which congressional efforts for accountability rely on partisan control. *See* Lexie Schapitl & Claudia Grisales, *House Panel on 'Weaponization' of the Government's First Hearing Takes Aim at DOJ, FBI*, NPR (Feb. 9, 2023, 5:51 PM), https://www.npr.org/2023/02/09/1155459408/house-panel-on-weaponization-of-the-federal-government-will-hold-its-first-heari [https://perma.cc/CDM4-78GV].

21. U.S. CONST. art. I, § 6, cl. 1.

members of Congress speaking in the physical chamber, courts have interpreted the doctrine broadly to cover an expansive set of people and acts.[22] The broad and ambiguous reach of such immunity is especially concerning at a moment where violent political speech is not merely on the rise but in fact a new reality of the American political discourse.[23]

In this Note I argue that, despite this longstanding broad interpretation, the Speech or Debate Clause does not offer immunity for incitement by members of Congress, except when that speech is explicitly protected by the text of the Clause, because incitement definitionally falls outside of the sphere of "legitimate legislative activity." In this way, based on the text of the Clause and interpretive case law, a Speech or Debate analysis considers both the content of the speech (whether it constitutes incitement or other unprotected speech) and the forum (whether the speech physically takes place in the chamber).[24] This Note assumes a bright-line rule, under which speech on the literal floor of the House or Senate is fully protected, carving out a singular, geographic exception to the proposition that the Clause should not protect incitement.[25]

This principle, that congressional incitement does not merit immunity, is especially salient as it relates to the January 6 insurrection, my primary case study. The blurry line between hyperbolic political rhetoric and incitement can make immunity tempting. However, the potential of congressional incitement to undermine the very foundations of American democracy, as was the aim of the January 6 riot, indicates that separation of powers interests counsel in favor of accountability, rather than broad immunity, for members of Congress.

This Note will proceed in four Parts. Part I will provide background on the Speech or Debate Clause and the law of incitement. Part II will discuss the theoretical and jurisprudential reasons that the Clause should not apply to incitement, including its inapplicability to other unprotected speech, such as defamation. Part III will articulate the separation of powers implications of applying Speech or Debate immunity to incitement. Finally, Part IV will examine the seminal case study, looking at the January 6 insurrection to elucidate the role of the Speech or Debate protection in cases of congressional incitement.

I. BACKGROUND

This Part will provide the requisite background on two complicated bodies of law. First, this Part will overview the Supreme Court's Speech or Debate Clause

22. *See infra* Section I.A.

23. *See generally* Rachel Kleinfeld, *The Rise of Political Violence in the United States*, J. DEMOCRACY, Oct. 2021, at 160 (describing how "acts of political violence in the United States have skyrocketed in the last five years").

24. The Court has not established the audience of speech as a dispositive factor in a Speech or Debate analysis. *But see* Hutchinson v. Proxmire, 443 U.S. 111, 133 (1979) (holding newsletters and press releases, which are "primarily means of informing those outside the legislative forum," are not covered by Speech or Debate immunity).

25. Though, normatively, I believe incitement should incur liability even on the floor of the chamber, I make this concession to the clear text of the Clause.

jurisprudence, ultimately revealing a longstanding broad interpretation of the Clause. Then, this Part will pivot to First Amendment law, reviewing the foundations of unprotected speech doctrine to explain how the law views speech that incites violence.

A. SPEECH OR DEBATE CLAUSE OVERVIEW

The Speech or Debate Clause dictates that members of Congress

> shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.[26]

Though the Clause excepts "Treason, Felony and Breach of the Peace" from immunity, that exception appears to apply only to the "privilege[] from Arrest," rather than the protection for "any Speech or Debate."[27]

Courts have paid limited attention to the Speech or Debate Clause over the last 150 years. The Supreme Court first interpreted the provision in *Kilbourn v. Thompson*.[28] There, invoking the protection of the Clause, the Court barred a plaintiff from suing House members for false imprisonment after a House committee held him in contempt for his refusal to testify.[29] Because House members were acting within their official duties when they held him in contempt, Kilbourn could not "question[]" them "in any other place"—that is, hold them liable—for such action.[30] Tracing the evolution of the Speech or Debate Clause from parliamentary protections, the Court affirmed its application not only to mere "words spoken in debate" in the House or Senate, but also to acts "generally done in a session of the House by one of its members in relation to the business before it."[31] This declaration expanded the scope of the Clause past pure speech, applying it to congressional action, such as the decision to hold Kilbourn in contempt. In doing so, the Court embraced an expansive interpretation of the Clause.

The importance of the Speech or Debate Clause is its protection of legislative independence and integrity; as the Court has repeatedly affirmed, separation of powers interests are at the heart of this function.[32] In *Powell v. McCormack*, for

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26. U.S. CONST. art. I, § 6, cl. 1.

27. *Id.*; *see* John R. Vile, *Speech and Debate Clause*, FIRST AMEND. ENCYC. (2009), www.mtsu.edu/first-amendment/article/1021/speech-and-debate-clause [https://perma.cc/CSE7-QTEA] (distinguishing the moot Arrest Clause from the Speech or Debate Clause).

28. 103 U.S. 168 (1880).

29. *Id.* at 201, 204.

30. *Id.* at 201.

31. *Id.* at 201–04.

32. *See* Dean Joel Kitchens, Comment, *The Constitutional Limits of the Speech or Debate Clause*, 25 UCLA L. REV. 796, 800 (1978) (describing the "firm entrenchment" of a broad Speech or Debate privilege because of its "important role in preserving a balance of power among the branches of government").

example, when an elected congressman sued House members and employees for refusing to seat him, the Court dismissed the complaints against the members of Congress under Speech or Debate immunity, but allowed the lawsuit to go forward against the House employees.[33] In this way, the Court's decision served "[t]he purpose of" the Speech or Debate Clause, which "is not to forestall judicial review of legislative action[,] but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks."[34] In other words, the role of the Clause is to "prevent [the] intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary."[35] The Clause is, at its core, a way to maintain the separation and balance of powers between the coordinate branches.

In addition to these separation of powers interests, the Court's longstanding broad interpretation of the Speech or Debate Clause has often relied on a "public good" justification—the belief that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process."[36] The Court relied on this principle in *Tenney v. Brandhove* when it extended absolute legislative immunity to state legislators for actions arising out of their legislative duties.[37] In a decision firmly rooted in the underpinnings of the federal Speech or Debate Clause, the Court held that it was "indispensably necessary" for legislators to "enjoy the fullest liberty of speech" and "be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence."[38] In other words, a broad legislative immunity served the public by allowing legislators to act unimpededly.[39]

Since the Speech or Debate Clause made its interpretive debut in *Kilbourn*, the Court has applied it expansively. Under its modern interpretation, the Clause covers any acts "in relation" to congressional business and extends even to people

33. 395 U.S. 486, 506 (1969).

34. *Id.* at 505.

35. *Id.* at 502 (second alteration in original) (quoting United States v. Johnson, 383 U.S. 169, 181 (1966)).

36. Spallone v. United States, 493 U.S. 265, 279 (1990).

37. 341 U.S. 367, 379 (1951).

38. *Id.* at 373 (quoting a Framer responsible for the Clause).

39. The public interest, however, can cut both ways. Although immunity typically protects legislators from executive or judicial interference, recent cases have demonstrated that rejecting Speech or Debate immunity can serve the public interest by promoting transparency. In January 2023, the D.C. District Court rejected Representative Scott Perry's (R-Pa.) motion to stay the disclosure of thousands of cell phone records to the Justice Department in its criminal investigation of former President Trump's election fraud scheme. *See In re* Search of the Forensic Copy of the Cell Phone of Representative Scott Perry at 12, No. 22-sc-2144 (D.D.C. Jan 4, 2023) (matter sealed). Then-Chief Judge Beryl A. Howell cited, in part, "[t]he government and the public['s] . . . strong interest in reviewing expeditiously the records" in question. *Id.* at 10. On appeal, the D.C. Circuit demurred from adopting either Rep. Perry's broad assertion of immunity or the district court's proposed categorical rule, instead remanding the dispute for a case-by-case analysis of the communications. *In re* Sealed Case, No. 23-3001 (D.C. Cir. Sept. 13, 2023); *see also* Spencer S. Hsu, *Fight over Rep. Perry's Phone Has Prevented Review of 2,200 Documents in Jan. 6 Probe*, WASH. POST (Feb. 25, 2023, 10:15 AM), https://www.washingtonpost.com/dc-md-va/2023/02/25/perry-phone-records-judge-jan6/.

who are not legislators, but nonetheless engage in lawmaking.[40] Put most succinctly, the Clause's immunity applies when legislators are "engaged 'in the sphere of legitimate legislative activity.'"[41] *Gravel v. United States* illustrates the boundaries of this sphere.[42] There, Senator Mike Gravel (D-Alaska) read portions of the Pentagon Papers into the *Congressional Record*, then arranged to have the full study published by a private book publisher.[43] Following a grand jury investigation, the government subpoenaed Sen. Gravel's aide for information on his role facilitating the publication. The Senator intervened to quash the subpoena, and the case wound its way up to the Supreme Court, which issued two key Speech or Debate holdings. First, the Court held that Sen. Gravel's reading of the Papers into the *Congressional Record* was a legislative act immunized from liability under the Speech or Debate Clause.[44] Second, however, the Court concluded that his deal with the private publisher was unprotected: "Legislative acts are not all-encompassing," Justice Byron White wrote on behalf of a 5–4 majority.[45] Rather, such acts "must be an integral part of the deliberative and communicative processes" of legislating or other explicit congressional duties.[46] This distinction—between Sen. Gravel's introduction into the *Congressional Record* and his private publication—helps clarify the tricky line the Court has drawn regarding the scope of "legislative acts" under the Speech or Debate Clause.[47]

Gravel also reflects the Supreme Court's position that the Speech or Debate Clause applies to an expansive set of people, rather than just to members of

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40. Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (establishing the Clause's broad, relational scope); *see also* Gravel v. United States, 408 U.S. 606, 616–19 (1972) (extending the Speech or Debate protection to congressional aides when they stand in the shoes of legislators); *cf. Powell*, 395 U.S. at 493, 506 (refusing the privilege for House employees who were sued in their official capacity for non-legislative actions).

41. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (per curiam) (quoting *Tenney*, 341 U.S. at 376).

42. *Gravel*, 408 U.S. 606.

43. *Id.* at 608–10. The Pentagon Papers were a Defense Department effort to catalog the history of the Vietnam War, including missteps by numerous presidential administrations. *See* Elizabeth Becker, *The Secrets and Lies of the Vietnam War, Exposed in One Epic Document*, N.Y. TIMES (Aug. 1, 2021), https://www.nytimes.com/2021/06/09/us/pentagon-papers-vietnam-war.html. The disclosure of the Pentagon Papers to the *New York Times* and the *Washington Post* by whistleblower Daniel Ellsberg kicked off a landmark press freedom battle, culminating in *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). Sen. Gravel's additional disclosures were intended to bolster the attention brought to the Papers by Ellsberg's leaks. *See How the Pentagon Papers Came to Be Published by the Beacon Press: A Remarkable Story Told by Whistleblower Daniel Ellsberg, Dem Presidential Candidate Mike Gravel and Unitarian Leader Robert West*, DEMOCRACY NOW! (July 2, 2007) [hereinafter *How the Pentagon Papers Came to Be Published by the Beacon Press*], www.democracynow.org/2007/7/2/how_the_pentagon_papers_came_to [https://perma.cc/V7LV-6FB3].

44. *Gravel*, 408 U.S. at 616.

45. *Id.* at 625–26.

46. *Id.* at 625.

47. The "legislative acts" analysis has found its way into January 6 cases with a recent ruling that a district court does not have jurisdiction to block a subpoena from the January 6 Committee to former White House Chief of Staff Mark Meadows: the Speech or Debate Clause covers the issuance of the subpoena, a "legislative act," and thus bars the suit. *See* Meadows v. Pelosi, No. 21-cv-03217, 2022 WL 16571232, at *9–10, *13 (D.D.C. Oct. 31, 2022).

Congress. The text of the Clause articulates its applicability to members of both congressional houses.[48] *Gravel*, however, extends the Clause's protection to congressional aides "insofar as the [aide's] conduct . . . would be a protected legislative act if performed by the Member himself."[49] The Court held that Sen. Gravel's aide, who helped the Senator read the Papers into the *Congressional Record* because of his dyslexia, was also protected under the confines of the Clause.[50] In the decades since *Gravel*, the Court has also recognized the applicability of similar immunity to state and local legislators.[51] The Court has even alluded to the extension of Speech or Debate-like protections to the Executive Branch.[52] In this way, a broad interpretation of the Speech or Debate Clause is the jurisprudential norm, in terms of both the acts and the people covered.

Despite this broad interpretative trend, courts have not extended the protections of the Speech or Debate Clause "beyond the legislative sphere."[53] Furthermore, the fact "[t]hat Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature."[54] This distinction arises most clearly in *Hutchinson v. Proxmire*, where the Court held that the Speech or Debate Clause protected defamatory statements made on the floor of the Senate, but not those published in the Senator's newsletters and press releases.[55] In other words, the Speech or Debate privilege extends outside of the walls of Congress "only when necessary to prevent indirect impairment of [legislative] deliberations."[56] Press releases and newsletters, though certainly distributed in the Senator's official capacity, were "primarily means of informing those *outside* of the legislative forum" and thus not vital to his legislative deliberation or duty.[57] As a result, they did not merit immunity.[58]

Moreover, despite its empirically broad scope, the Clause does not provide immunity for legislators from criminal prosecution. Though the Clause bars "prosecution under a general criminal statute dependent on . . . inquiries" into speeches

48. *See* U.S. CONST. art. I, § 6, cl. 1.

49. *Gravel*, 408 U.S. at 618.

50. *See id.* at 616–17; *How the Pentagon Papers Came to Be Published by the Beacon Press*, *supra* note 43 (interview with Sen. Gravel recounting the events of the case).

51. *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (holding a state legislative committee's actions in relation to an investigative hearing were covered by legislative immunity); Spallone v. United States, 493 U.S. 265, 278–80 (1990) (drawing on federal Speech or Debate Clause analysis to reject imposition of sanctions on individual councilmembers); Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (holding that "local legislators are [also] absolutely immune from suit under § 1983 for their legislative activities").

52. *See* Mitchell v. Forsyth, 472 U.S. 511, 536 (1985) (Burger, C.J., concurring in part) ("[T]he logic underlying *Gravel* applies equally to top Executive aides.").

53. *Gravel*, 408 U.S. at 624–25.

54. *Id.* at 625.

55. 443 U.S. 111, 133 (1979); *see infra* Section II.C.

56. *Id.* at 127 (quoting *Gravel*, 408 U.S. at 625).

57. *Id.* at 133 (emphasis added).

58. A similar distinction would likely apply to modern day congresspeople's tweets and posts, the equivalent contemporary form of constituent communication.

made on the floor of the House,[59] it does not protect members of Congress from criminal liability writ large. In *United States v. Brewster*, the Court ruled that a Senator's alleged acceptance of a bribe could not constitute a "legislative act," even though it was tied to his official role.[60] Because it is not a legislative act, accepting a bribe thus falls outside of the protection of the Speech or Debate Clause. In sum, members of Congress may be criminally prosecuted, so long as that prosecution does not rely on evidence that consists of legislative acts.[61] This principle has strong contemporary resonance: in 2017, the Court declined to hear a similar Speech or Debate immunity argument made by Senator Robert Menendez (D-N.J.), who was also seeking to dodge bribery charges.[62] The case is a reminder that legislative immunity does not extend to all acts that bear some nexus of connection to one's elected office.

B. UNPROTECTED SPEECH AND INCITEMENT OVERVIEW

This Part will now pivot to explain incitement and other forms of unprotected speech. To understand the law of incitement, it is helpful to understand the categorical approach to speech. This methodological framework, which has shaped First Amendment jurisprudence for decades, dictates that certain "categories" of speech fall outside the confines of First Amendment protection.[63] However, this approach has grown unwieldy over the years, as the Court has established complex approaches to and exceptions within each of the categories.[64] The traditional understanding of the categorical approach holds that certain types of speech—obscenity, defamation, incitement, and others—do not merit First Amendment protection because they are "low-value" forms of speech that contribute little to public discourse.[65]

More recently, however, the Court has moved away from this "low-value" rationale, doubling down on the categorical approach in a formalist, historical manner and effectively foreclosing new categories of unprotected speech. In *United*

59. United States v. Johnson, 383 U.S. 169, 184–85 (1966).

60. 408 U.S. 501, 526 (1972) ("Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an 'act resulting from the nature, and in the execution, of the office.' Nor is it a 'thing said or done by him, as a representative, in the exercise of the functions of that office.'" (quoting Coffin v. Coffin, 4 Mass. 1, 27 (1808))).

61. *See id.*; United States v. Helstoski, 442 U.S. 477, 487–89 (1979) (stating there is "no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution" for accepting a bribe).

62. Andrew Chung, *Supreme Court Rejects U.S. Senator's Bid to Escape Corruption Case*, REUTERS (Mar. 20, 2017, 9:54 AM), https://www.reuters.com/article/us-usa-court-menendez-idUSKBN16R1GO [https://perma.cc/96P8-UW7F]. The case ended in a mistrial, after which the Justice Department dropped all charges. Matt Friedman & Ryan Hutchins, *Justice Department Drops Corruption Case Against Menendez*, POLITICO (Jan. 31, 2018, 4:06 PM), https://www.politico.com/story/2018/01/31/dismissal-of-menendez-case-380230 [https://perma.cc/MA74-VHUT].

63. *See* DAVID KOHLER, LEE LEVINE, DAVID ARDIA, DALE COHEN & MARY-ROSE PAPANDREA, MEDIA AND THE LAW 118 (2d ed. 2014).

64. *See* Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 917–19 (2009).

65. *See* KOHLER ET AL., *supra* note 63, at 118.

States v. Stevens, the Court struck down a federal provision banning animal "crush" videos, an online trend that depicted animal torture.[66] The Court, led by Chief Justice John Roberts, held that "animal cruelty videos were not among any historically banned category of speech"—a "finite set of unprotected speech categories" rooted in the historical, traditional balancing of speech interests,[67] not an "ad hoc [interest] balancing of relative social costs and benefits."[68] Because no historically recognized category of unprotected speech included these videos and because, according to the Court, new categories of unprotected speech are unacceptable, the Court deemed the speech protected under the First Amendment and the law unconstitutionally overbroad.[69] A year later, Justice Antonin Scalia, writing for the Court, struck down a state law restricting the sale of violent video games to minors on similar reasoning: because "violent depictions were not a traditional category of unprotected expression," the Court applied a strict scrutiny analysis to the law, which it failed.[70]

Though its theoretical underpinnings have shifted from an interest-balancing to a formalist, historical approach, the categorical regime of First Amendment jurisprudence remains good law.[71] And among the most robustly articulated categories of unprotected speech is incitement. Speech loses First Amendment protection when it incites or is likely to incite violence or other illegal action.[72] In the Court's seminal incitement case, *Brandenburg v. Ohio*, police arrested Ku Klux Klan leader Clarence Brandenburg after a Klan rally that included cross-burning and speeches advocating "revengeance" against Black and Jewish people.[73] The state charged Brandenburg with advocating violence under an Ohio criminal syndicalism law, which he subsequently challenged.[74] In an unsigned per curiam opinion striking down the law, the Warren Court held that speech is unprotected incitement only when it is (1) directed or intended to incite; (2) imminent lawless action; (3) and is likely to incite or produce such an action.[75]

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66. 559 U.S. 460, 482 (2010).

67. Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 498 (2015).

68. *Stevens*, 559 U.S. at 470; *see* Tsesis, *supra* note 67, at 498 ("Chief Justice Roberts seemed to be saying that judges could only identify low-value speech categories through strictly historical findings rather than through a principle-rich analysis.").

69. *See Stevens*, 559 U.S. at 468–72, 482.

70. Tsesis, *supra* note 67, at 500 (discussing Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791–92 (2011)).

71. *See Stevens*, 559 U.S. at 469–72 (applying categorical analysis); *Brown*, 564 U.S. at 791–95 (same).

72. For the jurisprudential history of incitement, see Kent Greenawalt, *Speech and Crime*, 5 AM. BAR FOUND. RSCH. J. 645, 687–726 (1980).

73. 395 U.S. 444, 444–47 (1969) (per curiam).

74. *Id.* at 444–45.

75. *Id.* at 447; *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."). Though *Brandenburg* formally overruled *Schenck* by dramatically raising the standard for incitement, Justice Oliver Wendell Holmes's encapsulation of the incitement doctrine therein has withstood the test of time.

Pre-*Brandenburg* precedents help reveal how the case raised the standard for incitement. Prior to *Brandenburg*, courts interpreted the incitement doctrine more liberally to penalize intense political rhetoric, particularly speech that the Court deemed radical or anti-government. In *Feiner v. New York*, the Court upheld the disorderly conduct conviction of a college student who stood on a street corner and urged Black people to "rise up in arms and fight for equal rights."[76] Writing for the majority, Chief Justice Fred Vinson held that Feiner's conduct—namely, his refusal to stop speaking when police asked him to do so—constituted incitement to riot, disqualifying it from First Amendment protections.[77] Presaging the language of *Brandenburg*, the dissenters—Justice William O. Douglas and Justice Hugo Black—argued that there was no evidence of imminent breach of the peace, and that law enforcement shirked their duty when they silenced, rather than protected, an unpopular speaker.[78]

A similar, contemporary fact pattern arose in *Bible Believers v. Wayne County*.[79] There, the Sixth Circuit held that state officials violated a Christian evangelical group's First Amendment rights when they removed the group from an Arab International Festival to protect them from a "hostile audience."[80] "The hostile reaction of a crowd does not transform protected speech into incitement," Judge Eric Clay wrote for the en banc panel.[81] Because the speech did not meet the *Brandenburg* imminence standard, the First Amendment protected it and the state could not constitutionally censor it, according to the court.[82] The dichotomy between *Feiner* and *Bible Believers* illustrates that, in a post-*Brandenburg* First Amendment landscape, incitement is much more difficult to establish, as the emphasis has shifted from "mere advocacy" of violence to potential causation of actual violence.[83]

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76. 340 U.S. 315, 317, 321 (1951).

77. *Id.* at 320–21.

78. *Id.* at 325–26 (Black, J., dissenting) ("As to the existence of a dangerous situation on the street corner, it seems far-fetched to suggest that the 'facts' show any imminent threat of riot or uncontrollable disorder. It is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things." (footnote omitted)); *id.* at 331 (Douglas, J., dissenting).

In a similar case just a year before *Brandenburg* was decided, the Court issued a per curiam denial to review the case of a progressive labor leader convicted of conspiring to riot and advocating the overthrow of state government after he made strong anti-police statements. Epton v. New York, 390 U.S. 29 (1968) (per curiam). Epton said that the police "declared war on us and we should declare war on them and every time they kill one of us damn it, we'll kill one of them and we should start thinking that way right now . . . because we had better stop talking about violence as a dirty word." People v. Epton, 227 N.E.2d 829, 832 (N.Y. 1967) (omission in original).

79. 805 F.3d 228 (6th Cir. 2015) (en banc).

80. *Id.* at 236, 244–46.

81. *Id.* at 246.

82. *Id.*

83. *Compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (holding speech did not meet the *Brandenburg* imminence standard because no subsequent violence was associated with it), *with* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1072, 1088 (9th Cir. 2002) (enjoining violent speech of anti-abortion group because subsequent murders

The lynchpin word in the *Brandenburg* incitement test is "imminent." Given the prominence of this imminence analysis in a post-*Brandenburg* world, determining when speech constitutes incitement is highly fact specific, implicating the colorful details of First Amendment jurisprudence. In *Hess v. Indiana*, for example, the Court overturned the disorderly conduct conviction of an anti-war protestor who declared that demonstrators would "take the fucking street later."[84] There, the Court found that Hess's speech could not be construed as intending to incite imminent lawlessness, given his particular word choice, his volume relative to other speakers at the protest, and the fact that he did not address a specific person or group with his rhetoric.[85] Because the Court found Hess did not intend to incite imminent disorder, the First Amendment shielded his speech.[86]

NAACP v. Claiborne Hardware Co. similarly reveals the highly fact-specific nature of the incitement analysis.[87] There, a Mississippi trial court—and later the state supreme court—held NAACP organizers liable for leading an economic boycott of white businesses, which included strong, violent language by an organizer.[88] On review, the U.S. Supreme Court reversed, affirming the First Amendment protection of economic boycotts, even when violent language is used to achieve such an ends.[89] Because no subsequent violence could be linked to the organizer's speech, the Court held it did not meet the imminence standard for incitement.[90] In other words, "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment" without the factual imminence that would make such speech incitement.[91] Decades later, in *Virginia v. Black*, the Court reiterated this narrow view of incitement, striking down a state cross-burning ban as unconstitutionally overbroad.[92]

In *Stewart v. McCoy*, Justice John Paul Stevens urged clarification of incitement doctrine, specifically on the scope of the *Brandenburg* test:

> While the requirement that the consequence be "imminent" is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. As our cases have long

linked to their campaign revealed threat of violence). The contrast between these two cases underscores the heightened nature of the *Brandenburg* standard—an "imminence" test that almost requires actual violence to constitute incitement.

84. 414 U.S. 105, 106–07, 109 (1973) (per curiam).

85. *Id.* at 107–09; *see also* Kevin R. Davis, Hess v. Indiana *(1973)*, FIRST AMEND. ENCYC. (2009), www.mtsu.edu/first-amendment/article/461/hess-v-indiana [https://perma.cc/E8DZ-W8RA].

86. *See Hess*, 414 U.S. at 108–09.

87. *Claiborne*, 458 U.S. 886.

88. *See id.* at 889–96. The defendant organizer in *Claiborne* threatened that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

89. *Id.* at 933–34.

90. *Id.* at 929.

91. *Id.* at 927.

92. 538 U.S. 343, 364–65 (2003). The Court held that the law impermissibly used cross-burning as prima facie evidence of unprotected intent to intimidate without considering other, purportedly permissible, functions of the cross-burning. *See id.*

> identified, the First Amendment does not prevent restrictions on speech that have "clear support in public danger."[93]

That clarification, however, has yet to come.

This line of cases—stretching from *Brandenburg* to *Hess* to *Claiborne* to *Stewart*—proscribes narrow restrictions around what kind of speech constitutes incitement. However, this trend does not mean that parties can never meet the standard for incitement. In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, the Ninth Circuit upheld an injunction and fine against an anti-abortion group that had published "Wanted" posters of abortion providers, which included their names and addresses.[94] With particular attention to the multiple abortion providers murdered in the wake of this campaign, the Ninth Circuit held that "while advocating violence is protected, threatening a person with violence is not."[95] As *Planned Parenthood* establishes, the limiting principle on permissible speech is an actual threat of violence, drawing a tenuous line between protected violent advocacy and unprotected incitement or threats.[96]

II. INAPPLICABILITY OF SPEECH OR DEBATE TO INCITEMENT

Having outlined the two complex bodies of law involved, this Note will now overview the discrete arguments on whether the Speech or Debate Clause does and ought to apply to congressional speech that incites violence. Ultimately, it will conclude that the Clause ought not apply to such speech when it occurs outside the floor of the House or Senate. First, this Part will overview how the theoretical underpinnings of First Amendment doctrine counsel against applying the Speech or Debate Clause to incitement—taking into consideration the Court's recent movement away from this First Amendment framework. Then, this Part will argue that incitement, when it occurs off of the congressional floor, inherently falls outside of the scope of "legislative acts," removing it from the scope of the Speech or Debate Clause. Finally, this Part will turn to another realm of unprotected speech in which the Speech or Debate Clause has mixed applicability: defamation. With a careful analysis of *Hutchinson v. Proxmire*, that Section

93. 537 U.S. 993, 995 (2002) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

94. 290 F.3d 1058, 1088 (9th Cir. 2002).

95. *Id.* at 1072.

96. Though *Brandenburg* has long set the high standard for incitement, recent cases indicate the standard can be wielded in politically charged ways to criminalize marginalized speech or affiliation with such—exactly the type of behavior that cases like *Claiborne* intended to prevent. *See* 458 U.S. at 919 (reminding of the "danger that one in sympathy with the legitimate aims of [a protest], but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes" (quoting Noto v. United States, 367 U.S. 290, 299–300 (1961))).

In *Doe v. Mckesson*, a police officer injured by an unidentified assailant at a protest sued the protest's Black Lives Matter organizers. 945 F.3d 818, 823 (5th Cir. 2019), *vacated*, Mckesson v. Doe, 141 S. Ct. 48 (2020) (per curiam) (remanding to Louisiana Supreme Court for certification on state law question). The Fifth Circuit allowed the negligence claim against the organizers to proceed, holding, through a suspiciously cherrypicked reading of *Claiborne*, that the First Amendment did not bar such liability. *See id.* at 828–29.

will ultimately conclude that a similar logic should apply here, removing Speech or Debate immunity for incitement outside of the clear textual protection of the Clause. In sum, this Part illustrates that classical First Amendment theory, which lowers protections for low-value speech; the proscriptions around Speech or Debate immunity for "legislative acts"; and case law revealing the inapplicability of the Clause to other forms of unprotected speech all indicate that the Speech or Debate protection ought not apply to incitement when it is not textually covered by the Clause (that is, literally in the congressional chamber).[97]

A. THEORETICAL JUSTIFICATIONS FOR INAPPLICABILITY

"Conflicts between the [S]peech or [D]ebate [C]lause and other constitutional guarantees have produced anomalous and unpredictable results . . . ."[98] As such, "[t]he search for a workable solution requires consideration of the underlying purposes and policies of the [Clause] both in light of its history and its contemporary justifications."[99] Returning to the first principles of First Amendment theory—and their significant overlap with the policy underpinnings of the Speech or Debate Clause—can elucidate how and when the Clause applies.

One of the most foundational theoretical justifications of First Amendment protections is the "marketplace" theory—the idea that free speech protections are crucial to ensure robust debate in the "marketplace of ideas," the exchange of which will eventually lead to the discovery of truth.[100] The categorical approach to the First Amendment fits well with this theoretical underpinning: certain types of speech lack constitutional protection because they hold such low value in the marketplace of ideas. Though the Court has shifted somewhat away from this framework as it has embraced a more formalist view of the categorical approach,[101] the

97. *See supra* note 25.

98. Kitchens, *supra* note 32, at 797.

99. *Id.*

100. *See* KOHLER ET AL., *supra* note 63, at 61–64; *see also* ERWIN CHEMERINSKY, *Why Should Freedom of Speech Be a Fundamental Right?*, *in* CONSTITUTIONAL LAW 1179, 1179–84 (6th ed. 2020) (overviewing common justifications for speech protections).

Perhaps the earliest appearance of the marketplace theory comes from John Milton: "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength." *See* JOHN MILTON, AREOPAGITICA 58 (Cambridge Univ. Press 1918) (1644); *see also* KOHLER ET AL., *supra* note 63, at 63–64. John Stuart Mill was also an early adopter of the concept. *See generally* JOHN STUART MILL, *Of the Liberty of Thought and Discussion*, *in* ON LIBERTY 31 (2d ed. 1859). But the first proper articulation of the marketplace of ideas came from Justice Oliver Wendell Holmes in 1919. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); *see also* David Schultz, *Marketplace of Ideas*, FIRST AMEND. ENCYC. (June 2017), www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas [https://perma.cc/546R-KABS]. Like economic markets, however, the marketplace of ideas often advantages those who already have systemic power. *See, e.g.*, Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2232 (2018) ("There is an intrinsic relationship between the right to speak and the ownership of places and things.").

101. *See supra* Section I.B. *See generally* United States v. Stevens, 559 U.S. 460 (2010) (maintaining rigid historical categories of unprotected speech, and holding that depictions of animal cruelty do not fall within them).

intuitive idea that speech need not implicate First Amendment protections when it does not contribute to the exchange of ideas retains conceptual and rhetorical salience. Moreover, this understanding of First Amendment law maps easily on to the purpose and applicability of the Speech or Debate Clause. Because incitement does not serve the legislative purposes or "public good" the provision was intended to shield, the Clause should not, purposively speaking, protect incitement.[102]

On the other hand, however, expansive First Amendment protections are fundamental to protect the very exchange of ideas core to the marketplace theory. Many First Amendment doctrines, in this vein, aim to provide "breathing room" for speakers, so as to avoid the possible chilling of their speech. In the defamation arena, for example, the Court has established the heightened "actual malice" standard, which public figures must meet to prove defamation.[103] This burden of proof is an additional First Amendment insulation, designed to ensure the specter of liability does not chill journalism.[104] In this way, the anti-chill principle embedded throughout First Amendment jurisprudence dovetails well with the rationale for the Speech or Debate Clause, which is "to prevent [the] intimidation [of legislators]."[105] As such, a "breathing room" rationale could support the idea that Speech or Debate immunity should apply to incitement. However, given the already high bar for incitement, especially under *Brandenburg*,[106] the necessity of additional First Amendment insulation from liability is unnecessary. Perhaps legislators *should* fear the specter of liability when they intend to cause violence.

Other theoretical underpinnings of the First Amendment also counsel against Speech or Debate immunity for incitement. First Amendment theory proposes a number of different values served by free speech protections, including: self-governance, because speech is essential to an informed electorate; individual autonomy, because expression is crucial to self-fulfillment; and accountability, because free speech, press, and assembly all serve as checks on the abuse of power.[107] Yet, protecting incitement to violence serves none of these functions. Violence does not promote an informed electorate, does not further self-fulfillment, and is not vital to checking public power. In fact, violent and harmful speech undermines the fundamental justifications for free speech when, through its threatening power, it chills others' speech, creating an imbalance in the

102. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1474 (2022) (endorsing proportional, purposive view of First Amendment protections).

103. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantee[] . . . prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

104. *See id.* at 271–72 ("[An] erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ." (second omission in original) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

105. *See* Powell v. McCormack, 395 U.S. 486, 502 (1969) (second alteration in original) (quoting United States v. Johnson, 383 U.S. 169, 181 (1966)).

106. *See supra* Section I.B.

107. *See* CHEMERINSKY, *supra* note 100, at 1180; KOHLER ET AL., *supra* note 63, at 61–74.

marketplace of ideas.[108] Recognizing incitement as aligning with any of the fundamental justifications for free speech protections would simply further normalize political violence as a form of political speech.[109] Rather, the theoretical roots of the First Amendment are fundamentally antithetical to the protection of violent incitement.

B. INCITEMENT AS OUTSIDE THE SCOPE OF "LEGISLATIVE ACTS"

While Section II.A gave a conceptual explanation of why incitement does not merit Speech or Debate immunity, this Section, taking a more pragmatic approach, will explain how the same conclusion can be reached, consistent with current Speech or Debate jurisprudence, by merely framing incitement as intrinsically outside of the scope of "legislative acts." In other words, "[a]nother possible approach to the constitutional clash . . . can be neatly accomplished by deciding that [proscribed] activity is, by definition, not within the 'legitimate legislative sphere' and therefore is unprotected."[110] As political violence shifts from an aberration to a norm, courts must reaffirm that not only violence, but also incitement to such, is fundamentally antithetical to legitimate legislative activity.[111]

Though the Speech or Debate Clause applies to "legislative acts,"[112] the case law reveals that not all acts by members of Congress fall within the legislative sphere. The Clause protected, for example, Sen. Gravel's reading of the Pentagon Papers into the *Congressional Record*.[113] This act—on the very floor of the chamber—is the quintessential conduct for which the Clause offers immunity, the most literal "Speech . . . in either House" that the Clause was designed to protect.[114] The Clause did not cover, however, the Senator's agreement to privately publish the Papers with Beacon Press, as this arrangement was not "an integral part of the deliberative and communicative processes" by which members of

108. *See, e.g.*, Danielle Keats Citron, *Restricting Speech to Protect It*, *in* FREE SPEECH IN THE DIGITAL AGE 122, 122 (Susan J. Brison & Katharine Gelber eds., 2019) ("Cyber harassment is now widely understood as profoundly damaging to victims' expressive and privacy interests.").

109. *See infra* Section II.B.

110. Kitchens, *supra* note 32, at 807.

111. Though the January 6 insurrection is the most salient example, political violence is in many ways the new norm of American democracy. *See, e.g.*, Joanna Slater, *Three Men Convicted of Aiding Plot to Kidnap Michigan Gov. Whitmer*, WASH. POST (Oct. 26, 2022, 12:52 PM), www.washingtonpost.com/nation/2022/10/26/whitmer-kidnapping-verdict/; Jeremy B. White, *'Take Them All Out': New Details from Paul Pelosi Assault Emerge as Suspect Arraigned*, POLITICO (Nov. 1, 2022, 8:55 PM), www.politico.com/news/2022/11/01/pelosi-attack-jail-trial-00064512 [https://perma.cc/534S-H76Q]; Barbara Rodriguez & Jennifer Gerson, *'Where Is Nancy?': How Threats Against Women in Power Are Tied to Threats Against Democracy*, 19TH* (Oct. 31, 2022, 4:02 PM), https://19thnews.org/2022/10/paul-nancy-pelosi-attack-political-threats-women-democracy/ [https://perma.cc/78N9-VCSS]; *see also* Kleinfeld, *supra* note 23, at 160–61 ("[M]illions of Americans [are] willing to undertake, support, or excuse political violence . . . .").

112. *See supra* Section I.A.

113. Gravel v. United States, 408 U.S. 606, 620–21 (1972).

114. *See* Hutchinson v. Proxmire, 443 U.S. 111, 124 (1979) (describing a strict reading of the Clause as "the protection to utterances made within the four walls of either Chamber"); *see also* Kitchens, *supra* note 32, at 798 (discussing historical use of the Clause to protect members of Parliament).

Congress legislate.[115] *Hutchinson v. Proxmire* contains a similar distinction—Senator William Proxmire (D-Wis.) sponsored a satirical "Golden Fleece" award for government programs he viewed as a waste of taxpayer dollars and awarded it to agencies that sponsored research by behavioral scientist Ronald Hutchinson.[116] As part of this shaming campaign, Sen. Proxmire spoke on the Senate floor criticizing Hutchinson's work, issued a press release, went on television, and blasted a newsletter about the award to roughly 100,000 people.[117] In response, Hutchinson sued for defamation. The Court held that the Clause covered Sen. Proxmire's allegedly defamatory statements on the floor of the chamber as the archetypal legislative acts, because of their physical location in the legislative chamber.[118] The Clause did not, however, protect his newsletters and press releases: though part of the Senator's congressional duties, they were not "necessary to prevent indirect impairment of [legislative] deliberations."[119] In other words, the protection of the Speech or Debate Clause extends outside of the four walls of the congressional chamber only to protect legitimate legislative acts—that is, speech fundamental to the legislative functions at the heart of congressional responsibilities.

Given the rising trend of political violence, courts must affirm that such conduct—and incitement to such—is squarely outside of legitimate legislative activity. Case law defining "legislative acts" as proscribing particular criminal acts also supports this proposition. In *United States v. Brewster*, for example, the Court held that a Senator's alleged acceptance of a bribe did not fall within the ambit of legitimate legislative activity because "[i]t is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator."[120] This rhetoric draws on a similar logic as *Gravel* and *Proxmire*, distinguishing between acts done as a result of one's congressional role (such as taking a bribe) and acts done in one's legitimate legislative capacity. In drawing such a distinction, the Court underscored the mutual exclusivity between legitimate legislative activity and criminal speech—including incitement to violence.

C. APPLICABILITY OF SPEECH OR DEBATE CLAUSE TO DEFAMATION

While the previous two Sections have given theoretical and constitutional interpretation arguments against the applicability of the Clause to incitement, this Section will look at a precedential path to the same outcome. Under existing Speech or Debate jurisprudence, the Clause does not apply to defamatory speech outside of the walls of the congressional chambers. In that vein, this Section argues that other unprotected speech such as incitement does not merit Speech or

115. *Gravel*, 408 U.S. at 624–25.
116. 443 U.S. at 114.
117. *Id.* at 115–17.
118. *Id.* at 130.
119. *Id.* at 127 (quoting *Gravel*, 408 U.S. at 625).
120. 408 U.S. 501, 526 (1972); *see also* Recent Development, *Speech or Debate Clause—Alleged Criminal Conduct of Congressmen Not Within the Scope of Legislative Immunity*, 26 VAND. L. REV. 327, 333–34 (1973).

Debate immunity. Defamation, a reputational tort, creates liability for the publication of false information about a third party.[121] Like incitement, defamation is unprotected speech under the First Amendment's categorical framework because, according to a marketplace theory analysis, false speech provides little value to the public discourse.[122] As such, comparable Speech or Debate analyses ought to apply to both defamation and incitement.

Proxmire's elucidation of when the Speech or Debate Clause protects defamation provides helpful guidance on how the Clause applies to unprotected speech more broadly. Sen. Proxmire's speech on the Senate floor criticizing Hutchinson —within the four walls of the congressional chamber—was undoubtedly within the protection of the Clause, reflecting one of the most clear-cut legislative acts.[123] The Clause did not, however, protect the Senator's newsletter and press releases with the same content. Rather, because the publications were not "necessary to prevent indirect impairment of [legislative] deliberations," they did not merit Speech or Debate immunity, and the defamation suit was allowed to proceed on those counts.[124] In this way, unprotected speech outside of the strictest definition of legitimate legislative activity—or even, perhaps, physically outside of the four walls of the chamber—does not invoke the Speech or Debate protection.

The logical conclusion of this comparison is that incitement, like its kin defamation, does not merit Speech or Debate immunity when it occurs outside the narrowest definition of a "legislative act," specifically, outside the four walls of the congressional chamber. Though courts have defined "legislative acts" broadly in other contexts,[125] the taboo, low-value nature of unprotected speech, from defamation to incitement, indicates that "legislative acts" should be more narrowly defined here—a notion that *Proxmire* supports. The decision in *Proxmire* hinged on the allegedly defamatory content of the newsletters, noting that "nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber."[126] Under this logic, incitement would not be protected by the Speech or Debate Clause either, except when it falls within the most stringent definition of a legitimate legislative act—that is, the text of a bill or a speech on the floor of a congressional chamber. The danger of this rule, given the differences between incitement and defamation, is the possibility that incitement might merit greater protections than defamation, given the often hyperbolic, even violent nature of political rhetoric. However, the high bar to establishing incitement

121. *See* KOHLER ET AL., *supra* note 63, at 255.

122. *See id.* at 118, 132–34; *see also, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751 (1985) (allowing defamation recovery against credit agency's report that "was false and grossly misrepresented respondent's assets and liabilities"). *But see* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (establishing higher bar for defamation liability with regard to public figures).

123. *Hutchinson*, 443 U.S. at 130.

124. *Id.* at 127 (quoting *Gravel*, 408 U.S. at 625).

125. *See supra* Section I.A.

126. *Hutchinson*, 443 U.S. at 127.

provides a sufficient cushion for charged political rhetoric,[127] ameliorating the necessity of additional Speech or Debate immunity except in the specific cases covered explicitly by a narrow, textual view of the Clause.

III. SEPARATION OF POWERS IMPLICATIONS

This Part will consider the separation of powers implications of Speech or Debate immunity for incitement, ultimately concluding that separation of powers interests counsel against such protection. In the Speech or Debate context, the separation of powers interest, as typically conceptualized, is in protecting the Legislative Branch from penalties imposed by either the Executive or Judicial Branch. However, this Note also argues for a new and distinct conceptualization of separation of powers interests in protecting the continued existence of a three-branch governmental system. Given the threat that political violence poses to the democratic status quo, legislative immunity for violent speech implicates this new conception of the separation of powers.

The notion of "separation of powers interests" is an inherently abstract one.[128] In the Speech or Debate context, the interest goes back to English common law. Under the English monarchial system, the executive (the monarch) was significantly more powerful than the legislature (Parliament), requiring a heightened protection of legislative integrity.[129] Though "[American] history does not reflect a [similar] catalogue of abuses at the hands of the Executive that gave rise to the privilege in England," that fact "does not undermine the validity of the Framers' concern for the independence of the Legislative Branch."[130]

The standard separation of powers interest of the Speech or Debate Clause is in preserving legislative integrity from encroachment by the coordinate branches.[131] In *Powell v. McCormack*, for example, the Court dismissed complaints against members of Congress after they refused to seat an embattled member-elect, while allowing the complaint to go forward against congressional employees.[132] This dual-pronged approach served the purpose of the Clause: "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions" without "forestall[ing]

127. *See supra* Section I.B (describing evolution of incitement standard).

128. Justin Weinstein-Tull, *The Experience of Structure*, 55 ARIZ. ST. L.J. (forthcoming 2023) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4484760 [https://perma.cc/2NB3-3AJ8] (arguing that "courts reason about [separation of powers] abstractly in a way that both ignores and erases human experience").

129. *See* Kitchens, *supra* note 32, at 798 ("Prior to the adoption of legislative free speech in England, the Crown regularly punished members of Parliament who made embarrassing or disfavored statements by imposing fines or by torturing and incarcerating offenders in the Tower, leaving them to moderate their views or to die.").

130. United States v. Brewster, 408 U.S. 501, 508 (1972).

131. *See* David M. Lederkramer, *A Statutory Proposal for Case-by-Case Congressional Waiver of the Speech or Debate Privilege in Bribery Cases*, 3 CARDOZO L. REV. 465, 466 (describing "three interrelated sources" via which the Speech or Debate Clause guards against threats to legislative independence).

132. 395 U.S. 486, 506 (1969).

judicial review of legislative action."[133] In this way, the Court has shown itself to be attentive to a view of the Speech or Debate Clause that maintains a cordial separation and balance of power between the coordinate branches.

Students of this history may view the removal of legislative immunity from incitement as a threat to the carefully calibrated separation of powers.[134] Given the blurry line between hyperbolic political rhetoric and incitement, the prospect of bringing liability against members of Congress for this speech may raise the specter of politicized prosecution—the capacity of one branch to criminalize the politics of another. However, the high bar to establish speech as incitement—especially under the *Brandenburg* test—accounts for the risk of overcriminalizing speech.[135] As such, the removal of legislative immunity, which typically checks the separation and balance of powers, would not threaten the separation of powers function of the Clause.

To this point, this Note has primarily defined the separation of powers interest in terms of preserving legislative integrity against the encroachment of the other branches. However, this Note goes one step further by arguing for a new conceptualization of the separation of powers interest in the continued existence of the three-branch system. Typically, separation of powers refers to the balancing of political power among the three branches. This new conception, however, argues that there is a distinct interest in *maintaining* the three branches, an interest threatened by contemporary democratic erosion—including in the form of insurrection. Applying this new conceptualization, separation of powers interests counsel against applying Speech or Debate immunity to incitement when that speech threatens the very existence of the branch seeking immunity—that is, through an armed insurrection against the legislature. In this way, when congressional incitement undermines the fabric of the American democratic system, separation of powers considerations counsel in favor of accountability for members of Congress.

IV. CASE STUDY: JANUARY 6

Having argued that the Speech or Debate Clause ought not apply to speech that incites violence for theoretical, interpretative, precedential, and structural reasons, this Note will now apply this framework to the most salient example of violent congressional speech, the January 6 insurrection. Of the 147 members of Congress who voted to overturn the 2020 election results on January 6, 2021,[136] several made statements on the floor of the House or Senate, on social media, or at the protest

133. *Id.* at 505.

134. *See id.* at 502 (describing how Speech or Debate Clause "prevent[s] intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary" (second alteration in original) (quoting *Johnson*, 383 U.S. at 181)); *see also* Kitchens, *supra* note 32, at 799–800.

135. *See supra* Section I.B.

136. *See* Karen Yourish, Larry Buchanan & Denise Lu, *The 147 Republicans Who Voted to Overturn Election Results*, N.Y. TIMES (Jan. 7, 2021), www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html.

preceding the insurrection that foreshadowed or echoed the violence.[137] In the aftermath of the insurrection, efforts to hold high-ranking political participants accountable have had mixed results, underscoring the expansiveness of executive and legislative immunity.[138]

Prosecuting a member of Congress for violence or violent speech is virtually unheard of—in part because congressional violence was an aberration until January 6, 2021. To find a comparable episode, one must reach back to the antebellum era. On May 22, 1856, Representative Preston Brooks (D-S.C.), a pro-slavery congressman, attacked the abolitionist Senator Charles Sumner (R-Mass.) on the floor of the Senate.[139] Sen. Sumner was vocal about abolition, giving a fervent anti-slavery speech entitled "The Crime Against Kansas" just days earlier on the Senate floor. His speech included a specific ad hominem attack against a fellow, pro-slavery senator who was a relative of Rep. Preston Brooks.[140] In retaliation, the congressman from South Carolina beat Sen. Sumner nearly to death with a cane, disabling him from service for several years.[141] The Brooks–Sumner affair was an antebellum symbol of the deep polarization in the country; it was also a rare instance in which the government prosecuted a sitting congressman for a violent crime on the chamber floor. Police arrested Rep. Preston Brooks for the assault, and the state tried him, convicted him, and fined him $300; he faced no prison time.[142] Though Rep. Preston Brooks did not invoke a Speech or Debate analysis,[143] the Brooks–Sumner affair elucidates the incompatibility of congressional violence with permissible political speech.

In that vein, this Part will look at the remarks of one congressman—former Representative Mo Brooks (R-Ala.)[144]—as a case study of violent congressional speech. Rep. Mo Brooks's speech, which encouraged protesters to "start taking

137. *See, e.g.*, Chase Woodruff, *Rep. Boebert Under Scrutiny for Tweets Relaying 'Intel' During Capitol Attack*, COLO. NEWSLINE (Jan. 11, 2021, 4:09 PM), https://coloradonewsline.com/2021/01/11/rep-boebert-under-scrutiny-for-tweets-relaying-intel-during-capitol-attack/ [https://perma.cc/UVD9-ADZH] (examining criticism of Colorado congresswoman for allegedly tweeting about then-House Speaker Pelosi's location as the insurrection began).

138. *See* Thompson v. Trump, No. 21-cv-00400, slip op. at 23 (D.D.C. Feb. 18, 2022) (denying former President Trump's claim of presidential immunity from suit for inciting January 6 riot); Meadows v. Pelosi, No. 21-cv-03217, 2022 WL 16571232, at *13 (D.D.C. Oct. 31, 2022) (denying suit to block subpoena of former White House Chief of Staff).

139. *See The Caning of Senator Charles Sumner*, U.S. SENATE, www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [https://perma.cc/A3U8-HY6Z] (last visited Sept. 1, 2023).

140. *Id.*

141. *See* WILLIAMJAMES HULL HOFFER, THE CANING OF CHARLES SUMNER: HONOR, IDEALISM, AND THE ORIGIN OF THE CIVIL WAR 3 (2010); *see also Outrage in the United States Senate—Senator Sumner, of Massachusetts, Knocked Down and Beaten till Insensible by Mr. Brooks, of South Carolina.*, BALT. SUN, May 23, 1856, at 1.

142. HOFFER, *supra* note 141, at 79–80.

143. The Arrest Clause does, after all, except "Felony and Breach of the Peace" from its protection. U.S. CONST. art. I, § 6, cl. 1.

144. Despite the coincidence, the two Representatives Brooks are, to this Author's knowledge, unrelated.

down names and kicking ass,"[145] falls outside of the scope of legitimate legislative acts.[146] In the first instance, his speech occurred outside of the four walls of the congressional chamber, removing it from the narrowest interpretation of "legitimate legislative acts" under the Speech or Debate Clause. In this way, his speech invokes the same principle as Sen. Proxmire's newsletters: just as the Senator's purportedly defamatory newsletters did not merit the Speech or Debate protection, neither do Rep. Mo Brooks's potential calls to violence, because such content is not within the sphere of "legitimate legislative activity."[147] The Justice Department's refusal to defend Rep. Mo Brooks's speech as government-sanctioned conduct reflects that the content of his speech places it purely outside of his legislative role.[148] Though Rep. Mo Brooks sought Justice Department protection under the theory that "he was acting as a government employee when he spoke at [the] Trump rally before the attack," the Justice Department could not determine that he was "acting within the scope of his office or employment as a Member of Congress at the time of the incident," underscoring how far beyond any reasonable conception of the congressional role Rep. Mo Brooks's conduct was.[149] That Rep. Mo Brooks's speech falls outside of his congressional duties, and thus outside of the realm of legitimate legislative activity, makes it an easy example to remove from Speech or Debate protection.

Still, even under a theory- or structure-focused framework, Rep. Mo Brooks's speech does not merit Speech or Debate protection. Under a marketplace theory of speech protections, such speech would not merit immunity because it does not serve any of the foundational purposes of free speech—the eventual emergence of truth in the "marketplace of ideas," the self-fulfillment of the individual, or the ability for people to self-govern.[150] Moreover, both separation of powers interests at issue here counsel against granting Speech or Debate immunity for this content.[151] In the face of an insurrection on the U.S. Capitol, which included exhortations by high-ranking executive and legislative officials,[152] heightened legislative

145. *See* Mo Brooks, Speech on the Ellipse, *supra* note 4.

146. Rep. Mo Brooks's entire speech is full of such violent rhetoric. *See id.* ("[O]ur ancestors sacrificed their blood, their sweat, their tears, their fortunes, and sometimes their lives to give us, their descendants, an America that is the greatest nation in world history. So I have a question for you, are you willing to do the same?").

147. *See* Hutchinson v. Proxmire, 443 U.S. 111, 130 (1979); *supra* Section II.C.

148. *See* The United States' Response, *supra* note 18, at 8–16. The Justice Department's response came not in a Speech or Debate inquiry, but rather in the context of the Westfall Act, which "authorizes the Department to determine whether [a federal] employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* at 1. Still, the Department's determination, that "Brooks's conduct was undertaken as part of a campaign-type rally, and campaign activity is not 'of the kind he is employed to perform,' or 'within the authorized time and space limits' for a Member of Congress," remains salient in the Speech or Debate context. *Id.* at 7–8.

149. Cohen & Sneed, *supra* note 18.

150. *See* CHEMERINSKY, *supra* note 100, at 1179–84; *supra* Section II.A.

151. *See supra* Part III.

152. Former President Trump is, of course, the most notable official to encourage the January 6 insurrectionists in the hours before the riot. *See* Donald Trump, Speech on the Ellipse, *supra* note 2 ("We fight like hell. And if you don't fight like hell, you're not going to have a country anymore."); *see*

immunity would not guard against a monarchical executive.[153] Similarly, if the maintenance of a three-branch democratic system is a separation of powers interest, then the serious threat of American democratic backsliding dwarfs the significance of legislative immunity.[154] In this way, Rep. Mo Brooks's speech—and other speech like it—not only lacks Speech or Debate protection under a black-letter law reading of the Clause, but also does not deserve the shield of such immunity based on a first-principles interpretation of the provision.

CONCLUSION

This Note has argued that incitement does not merit the traditional Speech or Debate protection conferred upon congressional speech within the sphere of "legitimate legislative activity." Though the difficulty of meeting the incitement standard under *Brandenburg* may appear to make this debate merely academic, the sharp rise of political violence over the last several years gives the issue new salience.[155] The January 6 insurrection illustrates this fear better than anyone could have imagined. This Note has overviewed different argumentative methodologies—theoretical, definitional, precedential, and structural—to argue that speech that incites violence does not merit Speech or Debate immunity. Rather, members of Congress must be held accountable as all other insurrectionists are.

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also Eric Cortellessa & Vera Bergengruen, *Trump Drafted a Tweet Urging Supporters to March to Capitol, Jan. 6 Committee Reveals*, TIME (July 12, 2022, 5:13 PM), https://time.com/6196451/jan-6-hearing-trump-draft-tweet/ [https://perma.cc/EQZ2-KYYL].

But former President Trump was hardly alone, accompanied in his rhetoric by a number of other public officials. *See, e.g.*, Charles Duncan, *"This Crowd Has Some Fight in It": N.C. Rep Spoke at Rally Before Attack at Capitol*, SPECTRUM NEWS 1 (Jan. 7, 2021, 10:18 AM), https://spectrumlocalnews.com/nc/charlotte/politics/2021/01/07/nc-rep–madison-cawthorn-spoke-at-rally-before-capitol-attacked [https://perma.cc/DP47-VRL6] (former Representative Madison Cawthorn (R-N.C.)) ("[T]his crowd has some fight in it. . . . I just rolled down from the Capitol building about two miles away down Pennsylvania Avenue. And I will tell you, the courage I see in this crowd is not represented on that hill."); Tim Hains, *GOP Rep. Marjorie Taylor Greene: Saying January 6 Would Be a "1776 Moment" Was Not a "Term of Violence,"* REALCLEARPOLITICS (Apr. 22, 2022), https://www.realclearpolitics.com/video/2022/04/22/gop_rep_marjorie_taylor_greene_saying_january_6_would_be_a_1776_moment_was_not_a_term_of_violence.html [https://perma.cc/Q388-TE7D] (Representative Marjorie Taylor Greene (R-Ga.)) (discussing Rep. Greene's use of a term co-opted by far-right extremist groups, including the Proud Boys, the day before January 6); Emma Platoff, *Ken Paxton Told Trump Supporters to "Keep Fighting." When They Breached the Capitol, He Falsely Claimed It Wasn't Them.*, TEX. TRIB. (Jan. 7, 2021, 5:00 PM), https://www.texastribune.org/2021/01/07/texas-ken-paxton-trump-supporters/ [https://perma.cc/R7NS-AHVB] (Texas Attorney General Ken Paxton) ("We're here. We will not quit fighting . . . . We are Texans, we are Americans, and we're not quitting.").

153. *See* United States v. Brewster, 408 U.S. 501, 508 (1972) (discussing the "catalogue of abuses at the hands of the Executive that gave rise to the [Speech or Debate] privilege in England").

154. *See* INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE GLOBAL STATE OF DEMOCRACY 2021: BUILDING RESILIENCE IN A PANDEMIC ERA 15 (2021), https://idea.int/gsod-2021/sites/default/files/2021-11/global-state-of-democracy-2021.pdf [https://perma.cc/RK36-6L4W] (underscoring severity of democratic backsliding in the United States between 2015 and 2020); *see also supra* Part III.

155. *See generally* Kleinfeld, *supra* note 23 (describing upward trend of political violence in the United States).