"LIFTING THE LEGISLATIVE RUG": A PROPOSAL FOR CONGRESSIONAL ABROGATION OF STATE LEGISLATIVE PRIVILEGE IN DISCRIMINATION CASES UNDER § 1983

Abstract: Originally enacted in 1871 as part of the Ku Klux Klan Act, 42 U.S.C. § 1983 today serves as one of the primary vehicles for litigants to raise civil rights claims. The statute creates a cause of action to sue "[e]very person" who under color of state law acts in violation of a constitutional right. In recent years, plaintiffs have attempted to use the statute to hold state legislators accountable for taking discriminatory action, such as racial gerrymandering and banning the instruction of critical race theory. But many of these claims have hit a dead end because of the doctrine of legislative privilege. The privilege, which federal courts have extended to state legislators as a matter of federal common law, is an evidentiary protection that shields legislators from having to testify and provide evidence related to their legislative activity. Many courts have held that the privilege is absolute in civil cases, meaning that legislators can invoke its evidentiary protections even in contexts when legislative immunity would not offer protection—such as when legislators are third parties to discovery and face no threat of personal liability. When legislators invoke the privilege in discrimination cases, it frequently leaves plaintiffs with their hands tied: they must prove that lawmakers acted with intent to discriminate, yet they are effectively blocked from obtaining from legislators any evidence pertaining to their legislative acts and their motivations behind them. Solutions are necessary to safeguard constitutional rights in these discrimination cases. This Note suggests that one solution to this problem could lie in congressional abrogation of state legislative privilege pursuant to § 1983.

INTRODUCTION

In cases where civil rights litigants seek to hold their state legislators accountable for discrimination, the law seemingly stands at odds with itself: in any traditional discrimination case, the law instructs courts to look closely for the presence of discriminatory intent, but at the same time, the doctrine of legislative privilege tells them to avert their eyes.[1]

[1] League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1312 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (questioning how courts should reconcile the Supreme Court's pronouncement that courts should not investigate the motives of legislators with its jurisprudence in the

Unsurprisingly, the case law in this area reflects confusion amongst courts, which continue to disagree about how to handle legislative privilege when it arises in discrimination cases involving state legislators.[2] Amidst the confusion, the privilege continues to pose serious problems for litigants alleging that their state legislators have engaged in discrimination.[3]

For example, in October 2021, a group of registered Texas voters and organizations focused on fair redistricting filed a lawsuit alleging wide-ranging gerrymandering by Texas lawmakers in their 2021 redistricting plan.[4] Among their arguments, the Texas plaintiffs made an equal protection claim under 42 U.S.C. § 1983, alleging that the state legislature's redistricting plan diluted the strength of Latino voters and discriminated based on race and national origin.[5] The Supreme Court's equal protection jurisprudence imposes a high bar for litigants seeking to bring equal protection claims by requiring plaintiffs to establish that the defendant acted with *intent* to discriminate; evidence of disparate impact alone is not enough.[6] Proving intent is difficult enough as it is, but

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area of intentional discrimination, which dictates that in discrimination cases, courts *must* scrutinize legislative motive), *appeal filed*, No. 24-50128 (5th Cir. Feb. 27, 2024).

[2] *See infra* notes 120–167 and accompanying text (describing in more detail courts' disagreement about the proper scope of the privilege for state legislators in civil cases). *Compare, e.g.*, Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1344 (11th Cir. 2023) (holding that the legislative privilege is unqualified in civil cases brought under § 1983 and rejecting plaintiffs' discovery requests), *with* Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015) (reasoning that the legislative privilege is qualified in civil cases where important federal interests are at stake, and allowing plaintiffs to seek discovery related to state lawmakers' legislative activity).

[3] *See infra* notes 108–119 and accompanying text (outlining how privilege issues typically arise in discrimination cases and how the privilege operates as an obstacle for plaintiffs in the context of civil rights litigation).

[4] Complaint for Declaratory and Injunctive Relief at 3, *League of United Latin Am. Citizens*, 708 F. Supp. 3d 870 (No. 3:21-cv-00259); *see* Marilyn W. Thompson, *The GOP's Secret to Protecting Gerrymandered Electoral Maps? Claim Privilege.*, PROPUBLICA (Oct. 18, 2023), https://www.propublica.org/article/electoral-maps-gerrymandering-texas-voting-elections-privilege [https://perma.cc/4QZS-WEZG] (describing the Texas lawsuit).

[5] *See* 42 U.S.C. § 1983 (creating a cause of action against any person who, under color of state law, violates an individual's constitutional rights); Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 3 (summarizing claims and reasons for seeking declaratory and injunctive relief). The plaintiffs' complaint alleged that the Texas state legislature redrew election maps in a way that both failed to account for Latino population growth and weakened preexisting Latino majority districts. Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 19–22. The plaintiffs argued that the legislature accomplished this task by excessively and inappropriately considering race when redistricting. *Id.* at 19.

[6] *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that a law violates the Equal Protection Clause only when it has a racially discriminatory purpose, not merely when it has a disproportionate impact on members of a certain race); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (reaffirming *Washington v. Davis*'s requirement of proof of racially discriminatory intent in equal protection claims). In *Washington v. Davis*, the Supreme Court decided that even though a written test administered to applicants seeking to become police officers disproportionately excluded Black applicants, it did not violate the Equal Protection Clause because the test lacked a discriminatory purpose. 426 U.S. at 246. The year after *Davis*, the Court considered

the task became even more difficult for the Texas plaintiffs.[7] Early in the litigation, the lawmakers—who were not named as defendants and therefore did not face personal liability such that they could claim immunity—invoked legislative privilege in an attempt to block the plaintiffs from obtaining evidence that would help establish the lawmakers' intent.[8] Due in large part to the defendants' use of the privilege, the Texas voters' lawsuit became the longest-pending redistricting case in the nation that year.[9]

Legislative privilege, which for federal legislators derives from the Constitution, exists for state legislators as a matter of federal common law.[10] The privilege is an evidentiary shield that protects lawmakers from having to turn over

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in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* whether a Chicago suburb's refusal to rezone a tract of land to allow for low-income housing violated the Equal Protection Clause. *See Village of Arlington Heights*, 429 U.S. at 252 (summarizing plaintiffs' claim and procedural history). The Court held that there was inadequate proof that the rezoning denial was racially motivated, adding that the Court of Appeals' finding of racially discriminatory impact did not have sufficient significance to be a constitutional violation. *Id.* at 270–71. *Davis*'s intent requirement has made it nearly impossible to successfully bring an equal protection claim. *See* Angela Onwuachi-Willig, *From* Loving v. Virginia *to* Washington v. Davis*: The Erosion of the Supreme Court's Equal Protection Intent Analysis*, 25 VA. J. SOC. POL'Y & L. 303, 307 (2018) (explaining that the intent requirement has harmed civil rights litigation by making it essentially impossible to prove an equal protection violation). Scholars have noted how the Court's adoption in *Davis* of a very narrow definition of "intent" has since circumscribed the effectiveness of the Equal Protection Clause in eradicating discrimination. *See, e.g.*, *id.* at 308 (noting that the intent doctrine that emerged from *Davis* has made it more difficult for the Equal Protection Clause to service its intended purpose). Thus, many scholars have criticized the discriminatory intent standard. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–20 (1987) (explaining that "[m]inorities and civil rights advocates have been virtually unanimous in condemning *Davis* and its progeny" and summarizing critics' central objections to the standard); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 953–56 (1989) (criticizing the failure of the intent standard to take into account "effects-based conceptions of discrimination" and characterizing *Davis* as an effort to tame the potentially far-reaching effects of earlier civil rights advancements).

[7] *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1235–36 (Guaderrama, J., dissenting) (arguing that the court's decision to extend the privilege to the legislators involved blocked the plaintiffs from obtaining the evidence they need to prove intent and prevail on their discrimination claim).

[8] *See id.* at 876 (noting that the Texas legislators' invocation of the privilege led to a number of discovery disputes).

[9] *See* Thompson, *supra* note 4 (noting that of the eighty-seven lawsuits filed in 2021 challenging congressional and legislative redistricting, the Texas lawsuit went the longest without a trial). As of the publication of this Note, the district court's decision upholding application of the privilege is pending appeal before the Fifth Circuit. Notice of Appeal at 1, League of United Latin Am. Citizens v. Abbott, No. 24-50128 (5th Cir. filed Feb. 27, 2024).

[10] *See* Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 732 (1980) (citing Tenney v. Brandhove, 341 U.S. 367 (1951)) (explaining that the Supreme Court has recognized a common-law immunity for state legislators similar to the privilege recognized for federal lawmakers under the Constitution's Speech or Debate Clause); United States v. Gillock, 445 U.S. 360, 372 n.10 (1980) (citing Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 404 (1979)) (noting that extension of the privilege to state legislators is a matter of federal common law).

evidence or provide testimony related to their legislative work.[11] Thus, the legislators in the Texas case argued that the privilege shielded them from having to comply with plaintiffs' requests to obtain documents and unseal legislative testimony that would indicate the legislators' motives when enacting the redistricting plan.[12] In December of 2023, the District Court for the Western District of Texas agreed with the lawmakers, holding that the legislative privilege did not yield to the plaintiffs or to the U.S. government, which had intervened in the litigation.[13] The court's ruling makes it extraordinarily difficult, if not impossible, for the plaintiffs to obtain the evidence needed to prove that the legislators acted with the kind of animus required to sustain a discrimination claim.[14]

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[11] *See* U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."); Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.) ("That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."); *infra* notes 37–66 and accompanying text (outlining the development and scope of the legislative privilege in the United States); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975) (citing Doe v. McMillan, 412 U.S. 306, 316 (1973)) (reaffirming that when legislators take legitimate legislative action, the Speech or Debate Clause provides absolute protection from interference); United States v. Brewster, 408 U.S. 501, 528 (1972) (noting the inadmissibility of evidence pertaining to legislative acts protected by the Speech or Debate Clause); Gravel v. United States, 408 U.S. 606, 616 (1972) (holding that a U.S. Senator could not be forced to testify about subcommittee meeting events); *Lake Country*, 440 U.S. at 404–05 (clarifying that the Supreme Court's extension of absolute immunity to state legislators stems from the Court's reading of federal law, not from the Constitution's Speech or Debate Clause or the presence of comparable clauses in individual states' constitutions). The term "legislative privilege" is used inconsistently across the case law. *See infra* notes 37–39 and accompanying text (describing the different ways courts have used the term). This Note uses the term "legislative privilege" to refer strictly to the evidentiary privilege that prohibits admission of evidence related to legislative activity and protects legislators from being forced to provide testimony related to it. *See infra* note 40 and accompanying text (explaining in greater detail the terminology employed in this Note).

[12] *See* Defendants' Opposition to LULAC's Motion to Compel Production of Documents by the State of Texas at 11–14, *League of United Latin Am. Citizens*, 708 F. Supp. 3d 870 (No. 3:21-cv-00259) (arguing that the legislative privilege applies to the evidence requested by the plaintiffs). The defendant-legislators contended, for example, that the privilege shields communications between legislators and their attorneys, countering the plaintiffs' assertion that the sharing of certain documents with legal counsel was outside of the bounds of the legislative process. *Id.* at 12–13. Thus, according to the legislators, the plaintiffs should be blocked from obtaining documents, such as redlined and edited versions of draft redistricting legislation shared between state legislators and legal counsel. *Id.* at 13. The legislators emphasized the "chilling effect" that disclosure of the documents would have, claiming that it would discourage legislators from seeking legal advice. *Id.* at 14.

[13] *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 882–83 (explaining that the privilege applies).

[14] *See* Thompson, *supra* note 4 (quoting Harvard Law School professor Nicholas Stephanopoulos, remarking on the difficulty of proving intent, even where it actually exists, without access to legislators' evidence); Hassan Kanu, *Lawmakers Get Broad Shield in Challenge to Florida's 'Anti-Woke' Law*, REUTERS (Nov. 2, 2023), https://www.reuters.com/legal/government/column-lawmakers-get-broad-shield-challenge-floridas-anti-woke-law-2023-11-02/ [https://perma.cc/CVZ6-6869] (noting that a similar holding by the Eleventh Circuit Court of Appeals was "devastating" to the plaintiffs' case and that although plaintiffs can still rely on public record disclosure laws and subpoenas to third parties who are not legislators, those options pale in comparison to the normal discovery process). As the dissent argued, direct (as opposed to circumstantial) evidence of discriminatory intent is crucial to

A group of professors and one student in Florida encountered a similar situation when they sought to challenge the Florida legislature's newly passed Individual Freedom Act (also called the "Stop Wrongs to Our Kids and Employees Act," or the "Stop W.O.K.E. Act") in August of 2022.[15] The plaintiffs' equal protection claim, brought under § 1983, alleged that the Individual Freedom Act had a racially discriminatory purpose because it prohibited certain conversations about race and racism in public school settings.[16] During discovery, the plaintiffs subpoenaed fourteen nonparty legislators who supported the Act, seeking a range of documents and communication concerning the passage of the legislation.[17] Their efforts were halted in October of 2023, however, when the Eleventh Circuit Court of Appeals remanded the case with instructions to quash the subpoenas, holding that the legislative privilege was absolute—a total shield for the Florida legislators.[18]

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the success of a discrimination claim. *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1235 (Guaderrama, J., dissenting) (explaining that direct evidence is critical given the "heavy evidentiary burdens" for plaintiffs bringing redistricting litigation). That direct evidence, however, is rarely available in the public record. *Id.* Rather, if it exists, it likely lies somewhere in legislators' internal records and communications—which is precisely why plaintiffs had to direct their discovery requests towards that internal documentation. *See id.* at 1235–36 (explaining why the Texas plaintiffs sought nonpublic evidence directly from the legislators involved in the design of the redistricting plan).

[15] *See* Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1341 (11th Cir. 2023) (holding that the legislative privilege shields Florida legislators from having to comply with subpoenas by plaintiffs seeking information related to their equal protection claim). *See generally* Individual Freedom Act, 2022 Fla. Laws 534 (codified as amended in scattered sections of Florida Statutes).

[16] *See* Amended Complaint at 9, *Pernell*, 84 F.4th 1339 (No. 4:22-cv-304) (arguing that the Act violates the Equal Protection Clause because it was enacted to discriminate against Black teachers and students). The Individual Freedom Act prohibited, for example, teaching that a person "bears personal responsibility" for or should feel anguish about actions taken by others of the same race, color, national origin, or sex. FLA. STAT. § 1005.05(4)(a)(7) (2022), *invalidated by* Pernell v. Fla. Bd. of Governors of the State Univ. Sys., 641 F. Supp. 3d 1218 (N.D. Fla. 2022), *motion to stay pending appeal denied*, No. 22-13992-J, 2023 WL 2543659 (11th Cir. Mar. 16, 2023). Florida Governor Ron DeSantis characterized the Individual Freedom Act as "taking a stand against the state-sanctioned racism that is critical race theory." Press Release, Ron DeSantis, Governor, State of Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), https://www.flgov.com/eog/news/press/2021/governor-desantis-announces-legislative-proposal-stop-woke-activism-and-critical [https://perma.cc/WTV4-3K4X].

[17] *See Pernell*, 84 F.4th at 1342 (describing the subpoenas and information sought by the Florida plaintiffs). For example, the plaintiffs requested production of "'[a]ny and all notes, memoranda, research, written analysis, white papers, studies, reports, or opinions relied upon, created by, or reviewed by [the legislator] or [the legislator's] employees, staff, or representatives,' regarding 'creation and drafting,' the 'enactment,' and the 'implementation' of the Act." *Id.* (alterations in original). The subpoenas also demanded from the legislators "[a]ll [d]ocuments or [c]ommunications assessing or predicting the potential impacts of [the Act], or other related bills, including, but not limited to, impact on [b]lack persons, including students or educators, in Florida." *Id.* (alterations in original). The plaintiffs brought suit against the state universities' boards of trustees and board of governors; thus, the subpoenaed legislators were third parties to the discovery process rather than defendants themselves. *See id.* (characterizing the legislators as non-parties to the litigation).

[18] *See id.* at 1344 (explaining that the plaintiffs sought information related to the motives behind legislative acts, which is information covered by the privilege).

The situations that the Texas and Florida plaintiffs found themselves in are not unique, nor are they likely to disappear.[19] The kind of legislation that gave rise to the plaintiffs' claims in those lawsuits continues to pop up across the country.[20] Legislators—Republican and Democrat alike—have raised the privilege as a defense in states from Louisiana, to North Dakota, to Washington.[21] In turn, courts have continued to recognize the privilege in similar civil rights cases, defining it as a wide-ranging protection for legislators.[22]

This Note argues that applying an absolute legislative privilege in discrimination cases involving state legislators may threaten to limit the efficacy of key enforcement mechanisms like § 1983 and creates a risk that constitutional rights will go unprotected.[23] Therefore, Congress should protect those rights by abrogating the legislative privilege pursuant to § 1983 in limited situations where a plaintiff's claim alleges discrimination and therefore requires proof of motive.[24] Part I of this Note provides background on legislative privi-

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[19] *See id.* at 1359 (Pryor, J., dissenting) (characterizing the majority's holding as a concerning development that may impair enforcement of constitutional rights and critical federal interests); *infra* notes 20–22 and accompanying text.

[20] *See Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 [https://perma.cc/5DJY-VMMK] (Jan. 27, 2025) (noting that as of January 2025, there were eighty-four cases filed in twenty-eight states challenging redistricting maps as racially discriminatory and/or partisan gerrymanders); Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUCATIONWEEK, https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/248B-S93S] (Jan. 31, 2025) (stating that since January 2021, forty-four states have set forth bills or otherwise taken measures to restrict teaching critical race theory and limit discussions of racism or sexism).

[21] *See* Thompson, *supra* note 4 (reporting that Republicans in Louisiana and North Dakota, like in Texas, have fought redistricting challenges against them by invoking legislative privilege); Joseph O'Sullivan, *WA Lawmakers Work to Keep Public Records from the Public—Again*, CASCADE PBS (Feb. 28, 2023), https://crosscut.com/politics/2023/02/wa-lawmakers-work-keep-public-records-public-again [https://perma.cc/UR6L-7YZR] (detailing how Democrats in Washington State have invoked legislative privilege to avoid compliance with state public disclosure laws). Legislators invoke the privilege in a surprisingly wide array of cases, and sometimes in contexts that catch the attention of major news outlets—like when Republican Senator Lindsey Graham claimed that the privilege protected him from having to testify before a special grand jury investigating attempts to overturn President Trump's 2020 election loss in Georgia. *See generally* Eliza Fawcett, *Lindsey Graham and the 'Speech or Debate' Clause, Explained*, N.Y. TIMES (Oct. 24, 2022), https://www.nytimes.com/2022/10/24/us/lindsey-graham-speech-debate-clause-supreme-court.html [https://perma.cc/7GM8-8SE2] (providing overview of why and how Lindsey Graham attempted to use the privilege to avoid testifying in connection with the Georgia investigation).

[22] *See, e.g.*, Lee v. City of Los Angeles, 908 F.3d 1175, 1187–88 (9th Cir. 2018) (allowing city officials to invoke the privilege to avoid being deposed regarding redistricting plan); *In re* N.D. Legis. Assembly, 70 F.4th 460, 463–64 (8th Cir. 2023) (upholding the privilege and shielding legislators from document production and being forced to testify in redistricting challenge brought under the Voting Rights Act).

[23] *See infra* notes 219–224 and accompanying text; *Pernell*, 84 F.4th at 1346 (Pryor, J., dissenting) (arguing that allowing legislators to invoke the privilege in the context of § 1983 discovery requests severely restricts plaintiffs' ability to litigate important constitutional claims).

[24] *See infra* notes 176–224 and accompanying text.

lege, congressional abrogation of federal common law principles, and § 1983.[25] Part II details how state legislators have invoked the privilege to evade discovery in discrimination cases and discusses the various approaches courts have taken when defining the scope of legislative privilege in discrimination litigation.[26] Part II also addresses proposed solutions to the issues stemming from the presence of legislative privilege in discrimination cases.[27] Part III suggests that congressional legislation abrogating the privilege in specific § 1983 cases is an effective way to protect constitutional rights and to preserve the purpose and proper functioning of § 1983.[28]

I. Legal and Historical Background: Legislative Privilege, Congressional Abrogation of the Common Law, and § 1983

Legislative privilege presents a significant roadblock for civil rights plaintiffs, for whom § 1983 is a key enforcement mechanism.[29] As one judge put it, recognizing an absolute legislative privilege in § 1983 cases that depend on proof of legislative intent means plaintiffs might wind up litigating constitutional issues "with one hand tied behind their backs."[30] Although the issues stemming from legislative privilege have garnered attention from researchers and some judges, the approaches advanced tend to focus on judicial solutions.[31] This Note, however, proposes the use of congressional legislation to

[25] *See infra* notes 29–103 and accompanying text.

[26] *See infra* notes 104–167 and accompanying text.

[27] *See infra* notes 168–175 and accompanying text.

[28] *See infra* notes 176–224 and accompanying text.

[29] *See* League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1311 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (arguing that courts' adoption of an absolute legislative privilege for state legislators raises the risk that litigants will be unable to vindicate certain key civil rights that "form the backbone of our democracy"), *appeal filed*, No. 24-50128 (5th Cir. Feb. 27, 2024); Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners at 13–14, Whole Woman's Health v. Jackson, 595 U.S. 30 (2021) (No. 21-463) (highlighting that § 1983 is the cause of action principally relied on by civil rights litigants and that many of the Supreme Court's landmark civil rights decisions stemmed from § 1983 claims); Scott Michelman, *Happy 150th Anniversary, Section 1983!*, ACLU of D.C. (Apr. 20, 2021), https://www.acludc.org/en/news/happy-150th-anniversary-section-1983 [https://perma.cc/E9GK-ADW2] (explaining that ACLU offices across the country continue to employ § 1983 to advance civil rights claims, and noting that the District of Columbia office has used the statute to challenge actions like unreasonable searches, use of excessive force, unconstitutional arrests, and failure to guard patients in mental health hospitals from COVID-19 exposure).

[30] Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1346 (11th Cir. 2023) (Pryor, J., dissenting).

[31] *See, e.g.*, Julie A. Davies, Comment, *A New Perspective on Legislative Immunity in Section 1983 Actions*, 28 UCLA L. Rev. 1087, 1112–18 (1981) (proposing that courts employ an interest-balancing test to ensure the effectiveness of § 1983 without entirely eviscerating the legislative privilege); Christopher Asta, Note, *Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. Rev. 238, 252–58 (2014) (suggesting alternative framework for interpreting the Speech or Debate Clause in redistricting cases). Some judges, too, have expressed a desire for a

address the predicament faced by civil rights litigants who seek to hold state legislators accountable for taking discriminatory action.[32]

This Part of the Note explains the concept of legislative privilege and provides background and context on two aspects of this Note's proposed solution to the issues stemming from the privilege: congressional abrogation of the federal common law and § 1983.[33] First, Section A discusses the legislative privilege, outlining its origins and covering Supreme Court cases that have defined and expanded the privilege.[34] Section B then turns to a discussion of the federal common law, with a focus on Congress's abrogation power.[35] Finally, Section C provides a brief history of § 1983 and describes how the statute functions to protect civil rights.[36]

A. The Legislative Privilege in Supreme Court Cases

The Supreme Court and lower courts alike have used the term "legislative privilege" inconsistently to capture different ideas.[37] Early Supreme Court cases on the topic tended to use "legislative privilege" as an umbrella term encompassing two distinct protections: (1) legislative *immunity* (which protects legislators from facing personal liability for their legislative acts), and (2) legislative *privilege* (which operates as an evidentiary shield to prevent the admission of evidence relating to legislators' acts at trial).[38] The imprecision with which courts have used (and in some cases continue to use) the term has predictably created some doctrinal confusion.[39] This Note therefore uses the term "legislative immunity" to refer to legislators' protection from personal liability for their legisla-

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judicial solution, suggesting that the Supreme Court should weigh in on the issue of legislative privilege and provide guidance for lower courts. *See, e.g.*, *League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1312–13 (Guaderrama, J., dissenting) (noting that lower courts would benefit from guidance from either the Supreme Court or the Fifth Circuit Court of Appeals on several unanswered questions regarding application of the legislative privilege in the discrimination context).

[32] *See infra* notes 176–224 and accompanying text.

[33] *See infra* notes 37–103 and accompanying text.

[34] *See infra* notes 37–66 and accompanying text.

[35] *See infra* notes 67–79 and accompanying text.

[36] *See infra* notes 80–103 and accompanying text.

[37] *See* Asta, *supra* note 31, at 244–45 (explaining the different ways that the Supreme Court and lower courts have used the term); League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1237–38 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (explaining that the term "legislative privilege" has been used inconstantly), *appeal filed*, No. 24-50128 (5th Cir. Feb. 27, 2024).

[38] *See, e.g.*, Kilbourn v. Thompson, 103 U.S. 168, 200–05 (1880) (referring to the immunity held by members of Congress as a "privilege" conferred by the Constitution).

[39] *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1238 (Guaderrama, J., dissenting) (noting that the "terminological looseness" in this area has produced confusion because the use of the catch-all term "legislative privilege" has led some courts to gloss over the doctrinal differences between legislators' immunity and the evidentiary legislative privilege); Asta, *supra* note 31, at 244 (noting that inconsistent use of the term "legislative privilege" has led to doctrinal confusion).

tive acts, and the term "legislative privilege" to refer strictly to the aforementioned evidentiary protection that shields evidence of legislative activity.[40]

Part of the existing terminological confusion may stem from the Supreme Court's use of the term in its early interpretations of the Constitution's Speech or Debate Clause, which states that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[41] The Court has interpreted the Clause to serve two main functions specifically for federal legislators.[42] First, it provides an immunity protection, meaning that members of Congress cannot be held personally liable for actions they have taken within the realm of their legislative authority—to reiterate, what this Note calls "legislative immunity."[43] Second, the Court has recognized evidentiary and testimonial protections associated with the Clause—what this Note calls "legislative privilege."[44] These protections ensure that any evidence of acts protected by the privilege are inadmissible in court, and that lawmakers cannot be forced to testify about their legislative activity.[45]

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[40] *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1237–38 (Guaderrama, J., dissenting) (using the same terminology).

[41] U.S. CONST. art. I, § 6, cl. 1; *see Kilbourn*, 103 U.S. at 200–02 (interpreting the Speech or Debate Clause as conferring the privilege on members of Congress by tracing the Clause's roots to debates in the English Parliament and the English Bill of Rights); Asta, *supra* note 31, at 244–45 (noting terminological inconsistencies in Supreme Court and lower court decisions). Although the Constitution's Speech or Debate Clause forms the foundation of the American concept of legislative privilege, the Clause itself parallels a similarly-worded provision in the English Bill of Rights: "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament." Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.). The history of legislative privilege in England stretches back to long before the concept was included as part of the Bill of Rights, which was written in 1689. *See* JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 68–75 (2007) (summarizing early English cases in which Members of Parliament asserted the privilege). In many of the earliest privilege cases in England, Members of Parliament invoked the privilege against monarchs who were attempting to influence or interfere with parliamentary proceedings. *Id.* at 69–70. The clause was apparently uncontroversial at the time of its adoption and was seemingly discussed very little at the Constitutional Convention in 1787. *See id.* at 87–90 (discussing the text and history of the Clause at the Convention and outlining several of the framers' later comments on the meaning and interpretation of it); *see also* David M. Lederkramer, Note, *A Statutory Proposal for Case-by-Case Congressional Waiver of the Speech or Debate Privilege in Bribery Cases*, 3 CARDOZO L. REV. 465, 470–71 (1982) (summarizing the proposals for and ultimate adoption of the Speech or Debate Clause at the Constitutional Convention).

[42] *See infra* notes 43–45 and accompanying text; *see also* Asta, *supra* note 31, at 244 (describing the functions of the legislative privilege).

[43] *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501–03 (1975) (holding that the Constitution's Speech or Debate Clause confers on members of Congress immunity from lawsuits based on any action taken "within the sphere of legitimate legislative authority" (citing Dombrowski v. Eastland, 387 U.S. 82, 85, 87 (1967))).

[44] *See, e.g.*, United States v. Helstoski, 442 U.S. 477, 489 (1979) (explaining that the Speech or Debate Clause protects against inquiry into acts that a legislator takes during the legislative process).

[45] *See* United States v. Brewster, 408 U.S. 501, 528 (1972) (noting the inadmissibility of evidence of acts protected by the legislative privilege); Gravel v. United States, 408 U.S. 606, 616 (1972) (hold-

The Supreme Court began defining the reach of both of these protections broadly from its first case involving the Speech or Debate Clause.[46] In 1880, in *Kilbourn v. Thompson*, the Court considered whether members of Congress could invoke the Speech or Debate Clause as a defense to a civil action brought by Hallet Kilbourn, whose arrest had been ordered by the congressmen through approval of a contempt resolution.[47] Although the Clause refers specifically to "Speech or Debate," the Court reasoned that limiting the Clause's protections strictly to words spoken in debate would be too narrow.[48] Instead, the Court adopted a more expansive view, holding that the Speech or Debate Clause's protections extended to written reports, to the act of voting, and to anything else typically done by members of Congress during a legisla-

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ing that a U.S. Senator could not be forced to testify about events which had occurred at a Senate subcommittee meeting).

[46] *See Kilbourn*, 103 U.S. at 200 (stating the need to consider the privilege claim raised by the defendants, who were members of Congress); *ArtI.S6.C1.3.3 Activities to Which the Speech or Debate Clause Applies*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S6-C1-3-3/ALDE_00013302/#ALDF_00022470 [https://perma.cc/F6P7-SNXD] (noting that *Kilbourn v. Thompson* was the Supreme Court's first assessment of the Speech or Debate Clause). One other important early case on the privilege, *Coffin v. Coffin*, arose not in federal court, but rather in the Supreme Judicial Court of Massachusetts (SJC). *See* CHAFETZ, *supra* note 41, at 93 (describing *Coffin* as the most important early American case on legislative privilege). *See generally* 4 Mass. (1 Tyng) 1 (1808). *Coffin* involved interpretation of Article XXI of the Massachusetts Constitution, a predecessor to the federal Constitution's Speech or Debate Clause. *See Coffin*, 4 Mass. (1 Tyng) at 1 (explaining that the clause should be construed liberally); MASS. CONST. art. XXI ("The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."). The SJC in *Coffin* ultimately held that the privilege did not protect the defendant-legislator because the statements for which he was sued were delivered outside the scope of his legislative duty. *See Coffin*, 4 Mass. (1 Tyng) at 29–30 (reasoning that the legislator had not acted in his official capacity). Nonetheless, the court in dicta described the privilege broadly, applying not just to the giving of a speech, but to "every other act resulting from the nature, and in the execution, of the office." *Id.* at 27. Roughly seventy years later, in 1880, the Supreme Court in *Kilbourn* directly quoted *Coffin*'s broad definition of the privilege, despite the fact that the SJC in that case held that the privilege should not apply. *See Kilbourn*, 103 U.S. at 203–04 (quoting *Coffin* and referring to it as the "most authoritative case in this country" on the construction of the Speech or Debate Clause and legislative privilege); *see also* CHAFETZ, *supra* note 41, at 93–96 (giving an overview of *Coffin* and describing how the Supreme Court relied on dicta from that case in deciding *Kilbourn*).

[47] *Kilbourn*, 103 U.S. at 181, 200 (describing Kilbourn's challenge to his arrest as a result of his being held in contempt of Congress and describing the privilege defense raised by the members of Congress).

[48] *Id.* at 204. The Court arrived at this conclusion after analyzing the Speech or Debate Clause's English origins and the SJC's interpretation of a similar provision in its state constitution in *Coffin*. *Id.* at 201–03; *see also supra* note 46 (describing *Coffin*). The Court first looked to a provision in the English Bill of Rights, which provided that Members of Parliament could not be questioned regarding their speech, debates, or other parliamentary proceedings. *Kilbourn*, 103 U.S. at 201–02; *see also supra* note 41 (describing the provision in the English Bill of Rights). Noting that the framers had borrowed language from the English Bill of Rights, the Court explained that the framers intended for the Speech or Debate Clause to convey the same meaning as its English origin. *Kilbourn*, 103 U.S. at 202. This conclusion was further supported, reasoned the Court, by the presence of similar provisions in early state constitutions, like Massachusetts's 1780 Constitution. *Id.* at 203.

tive session.[49] Applying this expansive definition, the Court held that Kilbourn's arrest constituted the kind of legislative act for which the Speech or Debate Clause affords congressional members protection from suit.[50]

Building off of the holding in *Kilbourn*, the Court has consistently taken a broad approach when determining what actions are legislative in nature and thus qualify for protection under legislative immunity and/or privilege.[51] In 1951, in *Tenney v. Brandhove*, for example, the Court defined the protections as extending to any action taken within the realm of actual legislative activity.[52] Reasoning that the investigative efforts of a California Senate subcommittee fell within that sphere, the Court held that the defendant-legislators could not be held civilly liable.[53]

In its interpretations of the Speech or Debate Clause and the legislative protections more generally, the Court has centered on two predominant ration-

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[49] *Kilbourn*, 103 U.S. at 204.

[50] *See id.* at 205 (agreeing with the congressional members' privilege defense). Notably, the Court suggested that Kilbourn's arrest by the members of Congress was unlawful. *See id.* at 199–200 (stating that the House of Representatives was without authority to hold Kilbourn in contempt). Nonetheless, the Court decided that the defendants' privilege defense was sufficient grounds for the decision on its own, holding that the members could not be questioned in court for the acts they took against Kilbourn. *See id.* at 205 (stating that the court need not consider any arguments beyond the privilege defense because the privilege prevented the legislators from being questioned in court in the first place).

[51] *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975) (stating that the Court has invariably read the Speech or Debate Clause broadly to give effect to its purposes).

[52] *See* 341 U.S. 367, 376–79 (1951) (deciding that the defendants' actions were the kind of legislative actions that fall under the coverage of the legislative privilege). In *Tenney v. Brandhove*, William Brandhove sued Jack Tenney and other members of the California Legislature who were serving on the Senate Fact-Finding Committee on Un-American Activities. *Id.* at 369. The suit stemmed initially from Brandhove's protest against the Committee, specifically from his circulating a petition to persuade the state legislature to cut off the Committee's funding. *Id.* at 370. The Committee subsequently summoned Brandhove to testify at a hearing. *Id.* Brandhove appeared, but refused to testify, which prompted the Committee's Chairman to read into the record Brandhove's alleged criminal record and several statements denying the allegations he had made about the Committee. *Id.* at 370–71. Brandhove then brought suit under § 1983, alleging that the hearing was not held for a proper legislative purpose and that the Committee's members had effectively denied him his constitutional rights to free speech and equal privileges and immunities. *Id.* at 371. For further discussion of *Tenney*, see *infra* notes 122–128 and accompanying text.

[53] *Tenney*, 341 U.S. at 379 (holding that the defendants could not be held liable because the legislative privilege shielded them from suit). In *Tenney*, the Court considered whether Congress had in fact abrogated the privilege when it passed § 1983. *See id.* at 376 (questioning whether the language of Section 1 of the Ku Klux Klan Act effectively stripped state legislators of legislative immunity). The Court questioned in the first place whether Congress would have such power to abrogate state legislative privilege. *See id.* (remarking that it "would be a big assumption" to assume that Congress can limit the application of the privilege). But the Court ultimately dodged this question of congressional power, deciding instead that even if Congress did have the ability to strip state legislators of the privilege, the plain language of the statute did not suggest that Congress had intended to do so through passage of the Ku Klux Klan Act. *See id.* (reasoning that Congress would not have abrogated the privilege "by covert inclusion" or in "general language"). For further discussion of *Tenney*, see *infra* notes 122–128 and accompanying text.

ales that justify extension of legislative immunity and privilege.[54] First, in cases involving federal legislators, the Court has stressed that the Speech or Debate Clause protections serve important separation of powers functions.[55] For example, in 1966, in *United States v. Johnson*, former Congressman Thomas Johnson sought to overturn his criminal conviction by asserting that the government improperly introduced evidence of his motives for giving a speech on the House floor.[56] The Court overturned the conviction, emphasizing that the privilege critically preserves the independence of the legislature from interference by the executive and judicial branches of government.[57]

The Court has also justified legislative immunity and privilege because of the need to guard legislative effectiveness.[58] The Court appealed to this line of reasoning in *Tenney*, for example, noting that suits against legislators disrupt the legislative process because they force lawmakers to divert their attention and time to avoiding liability and defending themselves.[59] Thus, the Court reasoned that legislative privilege serves a public good by preserving the effectiveness of the legislature.[60]

Although the Speech or Debate Clause relates specifically to members of the U.S. Congress, the Supreme Court has extended very similar immunity and

[54] *See* Asta*, supra* note 31, at 240 (noting that the Court has justified its decisions regarding the legislative privilege by pointing to the separation of powers and legislative effectiveness).

[55] *See infra* notes 56–57 and accompanying text. For an overview and discussion of the philosophies and rationale underlying the separation of powers, see generally Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433 (2013).

[56] 383 U.S. 169, 171–72 (1966) (describing the charges and the evidence used to obtain Johnson's conviction); *id.* at 177 (describing Johnson's defense). The conviction Johnson challenged involved one count of conspiracy to defraud the U.S. government. *Id.* at 170–71. The government presented evidence inquiring into Johnson's motives for giving a speech on the House floor that prosecutors framed as proof of his conspiracy with institutions perpetrating fraud. *Id.* at 173–76.

[57] *See id.* at 182 (reasoning that preventing the executive branch from bringing charges against unpopular legislators or legislators who voice criticism is a key reason for the existence of the Speech or Debate Clause). There are various different aspects to the manner in which legislative privilege guards against separation-of-powers-related threats. *See* Lederkramer, *supra* note 41, at 466 (summarizing three interrelated threats that would endanger legislative independence without the legislative privilege). First, without the privilege, legislators would act out of fear of facing suit rather than in "unflinching discharge of [their] legislative duty." *Id.* Second, if legislators were forced to face criminal suit for their legislative acts, the legislature would be accountable to the judiciary and the executive instead of an independent branch of government. *Id.* And third, if legislators could be prosecuted or investigated by the executive, the executive could effectively control the legislature by threatening to prosecute legislators for taking action with which the executive disagrees. *Id.* In short, the privilege enshrined in the Speech or Debate Clause serves a critical goal of government by ensuring that the legislature is accountable to the people instead of another coordinate branch of government. *Id.*

[58] *See infra* notes 59–60 and accompanying text.

[59] *See* 341 U.S. 367, 377 (1951) (noting the hindrance legislators would face if called into court to defend themselves).

[60] *See id.* (adding that the value of the privilege would be diminished if legislators could be distracted from their legislative duties because of their involvement in a trial).

privilege protections to state legislators on the basis of federal common law.[61] In cases involving state legislators, the Court has recognized that it is exclusively the second of these aforementioned rationales—legislative effectiveness—that justifies the extension of these safeguards.[62] Critically, although federal legislators have "absolute" protections under the Speech or Debate Clause, state legislators are not entitled to that same level of unqualified protection.[63] Specifically, the Court has held that the legislative privilege in particular may be qualified in cases that involve important federal interests, such as in suits that involve the enforcement of federal criminal law.[64] Lower courts have splintered when it comes to deciding when and how the privilege should be qualified for state legislators.[65] This Note weighs in on one aspect of the debate amongst lower courts: the proper scope of state legislative privilege in civil cases where legislators face no threat of personal liability—i.e., where immunity is not applicable.[66]

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[61] *See* Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 732 (1980) (citing Tenney v. Brandhove, 341 U.S. 367 (1951)) (noting that the Supreme Court has recognized a legislative privilege for state legislators similar to the privilege recognized for U.S. Congressmen under the Constitution's Speech or Debate Clause); United States v. Gillock, 445 U.S. 360, 372 n.10 (1980) (citing Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 404 (1979)) (clarifying that the privilege has been extended to state legislators as a matter of federal common law). Some courts have underscored the different source of the privilege for state legislators as an important indicator that the privilege may be qualified for state legislators, whereas it is absolute for members of Congress whose protections are constitutionally enshrined. *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 333–34 (E.D. Va. 2015) (explaining that because state legislative privilege is based on federal common law, it may be qualified in instances where Congress has abrogated immunity or where upholding the privilege would produce conflict with federal statutory law).

[62] *See Gillock*, 445 U.S. at 370 (reasoning that the separation of powers rationale does not support extension of the legislative privilege to state senators).

[63] *See* Shane Coughlin, Note, *Speaking of the Speech or Debate Clause: Revising State Legislative Immunity*, 98 NOTRE DAME L. REV. REFLECTION 50, 60 (2022), (https://ndlawreview.org/speaking-of-the-speech-or-debate-clause-revising-state-legislative-immunity/) [https://perma.cc/5TKD-P7QW] (noting the distinction between federal legislative immunity and state legislative immunity). Members of the U.S. Congress derive their legislative immunity directly from the Constitution. *Id.*; *see supra* notes 41–45 and accompanying text (describing the Speech or Debate Clause). Thus, the privilege is absolute for federal legislators. Coughlin, *supra*, at 63. On the other hand, state legislators derive their legislative immunity as a matter of federal common law. *Id.* Thus, the privilege for state legislators is more qualified, and could potentially be abrogated by Congress. *See id.* (noting that congressional abrogation of state legislative privilege is possible because state legislative privilege is a creation of federal common law); *Bethune-Hill*, 114 F. Supp. 3d at 333–34 (describing the differences in application of the privilege for federal legislators versus state legislators); *infra* notes 129–138 and accompanying text (describing how the Supreme Court has qualified the privilege for state legislators).

[64] *See Gillock*, 445 U.S. at 372–73 (holding that the privilege is qualified in criminal cases involving state legislators); *infra* notes 129–136 and accompanying text (discussing *Gillock*).

[65] *See infra* notes 120–167 and accompanying text.

[66] *See infra* notes 176–224 and accompanying text.

B. Federal Common Law Privileges and Congress's Abrogation Power

As mentioned above, legislative privilege exists for state legislators as a matter of federal common law rather than constitutional law—a point frequently emphasized in cases discussing state legislative privilege.[67] But what exactly is federal common law?[68] How does it govern a claim of privilege for state legislators?[69] And most importantly for purposes of this Note, what power does Congress have to change or abrogate common law privilege doctrines, like that governing state legislative privilege?[70]

The term "federal common law" refers to the body of legal rules derived from federal court decisions, instead of from statutes or the Constitution.[71] State legislative privilege falls within this category of court-created legal rules because the language of the Constitution's Speech or Debate Clause explicitly covers only federal legislators.[72] State legislative privilege applies through Federal Rule of Evidence 501, which dictates that in federal question cases, "[t]he common law—as interpreted by United States courts in light of reason and experience—governs a claim of privilege."[73]

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[67] *See, e.g.*, *Gillock*, 445 U.S. at 372 n.10 (citing Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 404 (1979)) (noting that state legislative privilege is grounded in the federal common law); *Bethune-Hill*, 114 F. Supp. 3d at 333 (same).

[68] *See infra* note 71 and accompanying text.

[69] *See infra* notes 72–73 and accompanying text.

[70] *See infra* notes 74–76 and accompanying text.

[71] *Common Law*, BLACK'S LAW DICTIONARY (12th ed. 2024). The Supreme Court famously curtailed the scope of the federal common law in 1938, in *Erie R.R. Co. v. Tompkins*. *See* 304 U.S. 64, 78 (1938) (holding that federal courts must apply state law in cases not controlled by the Constitution or federal statutory law). Although the Court in *Erie* held that "[t]here is no federal general common law," federal courts still retain some common lawmaking powers. *Id.*; 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4514–4519 (3d ed. 1998). For a discussion of the federal common law post-*Erie*, see generally WRIGHT, MILLER & COOPER, *supra* (giving an overview of the federal courts' common-law powers).

[72] U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."); *see Lake Country*, 440 U.S. at 404–05 (underscoring that the Court's extension of absolute immunity for state legislators stems strictly from the Court's interpretation of the federal common law—not from the federal Constitution's Speech or Debate Clause or from any comparable clause within a state constitution). Although the Court has been clear that state legislative privilege is governed by federal common law, it has sometimes analogized state legislative privilege to the constitutionally enshrined privilege of federal legislators. *See, e.g.*, Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 733 (1980) (first citing Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502–03, 505, 506 (1975); then citing Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967); then citing United States v. Johnson, 383 U.S. 169, 180 (1966); and then citing Tenney v. Brandhove, 341 U.S. 367, 377–79 (1951)) (explaining that the court has typically "equated" state legislative immunity under § 1983 to the legislative immunity of federal legislators under the Constitution's Speech or Debate Clause). Of course, if the Court somehow did redefine state legislative privilege as directly grounded in the Constitution, then only a constitutional amendment would suffice to change it. *See* U.S. CONST. art. V (providing the process for amending the Constitution).

[73] FED. R. EVID. 501. The Rule provides three exceptions for when the common law will *not* govern a privilege claim in federal court: namely, when the U.S. Constitution, a federal statute, or

Importantly, Congress holds the power to abrogate the common law.[74] But because Congress is normally presumed to have legislated in line with common-law principles, the Supreme Court has articulated a specific standard to assess whether a statute should be interpreted to eliminate a common-law rule.[75] Namely, the statute must "'speak directly' to the question addressed by the common law" such that a court can clearly discern that it was Congress's purpose to override the common-law principle in question.[76]

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rules prescribed by the Supreme Court provide otherwise. *Id.* It also states that "in a *civil* case, *state law* governs privilege regarding a claim or defense for which state law supplies the rule of decision." *Id.* (emphasis added). The potential application of state privilege rules in civil cases might at first glance seem to undermine the proposal of this Note—even if Congress were to abrogate the privilege as defined by federal common law, doing so may have no effect where state law mandates that a privilege apply, such as through Speech or Debate-style clauses in state constitutions. *See, e.g.*, TEX. CONST. art III, § 21 ("No member shall be questioned in any other place for words spoken in debate in either House."); VA. CONST. art. IV, § 9 ("Members of the General Assembly shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the sessions of their respective houses; and *for any speech or debate in either house shall not be questioned in any other place*." (emphasis added)). Importantly, however, the advisory committee notes to Rule 501 clarify that in *federal question* civil cases, "federally evolved rules on privilege should apply since it is Federal policy which is being enforced." FED. R. EVID. 501 advisory committee's note to 1974 enactment. The same is true with respect to pendent state-law claims in federal question cases. *Id.* Thus, as the cases in this Note reflect, federal common law typically will control the application of state legislative privilege in § 1983 cases (even though they are civil cases) because such cases necessarily involve a federal question. *See* Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1350 (11th Cir. 2023) (Pryor, J., dissenting) (explaining that federal common law governs a privilege claim in federal question cases, and proceeding to apply the common law to the instant case, which involved a § 1983 claim).

[74] *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) (noting that the Court has "always recognized that federal common law is 'subject to the paramount authority of Congress'" (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))). For an interesting discussion of whether Congress's abrogation power may be more limited when it comes to strictly *procedural* common-law rules, see generally Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008).

[75] *See* United States v. Texas, 507 U.S. 529, 534 (1993) (acknowledging the long-standing principle that statutes that infringe the common law should be presumed to retain common-law principles absent statutory language indicating a contrary purpose).

[76] *Id.* (first quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978), *reh'g denied*, 439 U.S. 884 (1978) (mem.); and then quoting *City of Milwaukee*, 451 U.S. at 315). In *United States v. Texas*, the Court reasoned that the Debt Collection Act did not explicitly speak to the federal government's ability to collect prejudgment interest on debts that states owe it. *Id.* Thus, the Court refused to accept Texas's argument that the Act eliminated states' longstanding common-law responsibility to pay prejudgment interest to the federal government. *Id.* at 535. The Court has imposed a somewhat similar (though more demanding) standard for congressional abrogation of state sovereign immunity, requiring Congress to unequivocally express in the text of the statute an intent to abrogate states' immunity. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (stating requirement of clear statutory language), *superseded by statute*, 42 U.S.C. § 2000d-7(a), *as recognized in* Lane v. Pena, 518 U.S. 187 (1996); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) (same). For example, in 1985, in *Atascadero State Hospital v. Scanlon*, the Supreme Court held that the Rehabilitation Act, which proscribes employment discrimination based on disability, did not abrogate state sovereign immunity. *See* 473 U.S. at 242 (refusing to temper the requirement of clear statutory language and holding that the Rehabilitation Act's language lacked the clarity required by the Court's precedent to uphold congressional abrogation of states' immunity). The Court relied on prior

Although it has never meaningfully addressed the issue, the Supreme Court has previously made specific reference to Congress's power to abrogate state legislative immunity.[77] In *Tenney*, the Court called it a "big assumption" to presume that Congress has the power to eliminate state legislative immunity, but it ultimately left the question unanswered.[78] Nevertheless, the Court has subsequently implicitly recognized this power of Congress, noting in 1984, in *Pulliam v. Allen*, that its "cases have proceeded on the assumption that common-law principles of legislative and judicial immunity were incorporated into [the U.S.] judicial system and that they should not be abrogated *absent clear legislative intent to do so*."[79]

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precedent that held that Congress should communicate its intention to abrogate states' sovereign immunity in "unmistakable language" in the statute's text. *Id.* at 243 (noting that its holding regarding clear statutory language falls in line with the Court's precedent on the subject). The Court explained that the requirement of clear statutory language is rooted in principles of federalism. *See id.* at 242 (noting that the states occupy an important and specific place in the U.S.' constitutional system, and that the Eleventh Amendment's guarantee of state sovereign immunity helps preserve that position). Because congressional abrogation of sovereign immunity upsets the constitutional balance of power between the states and the federal government, courts must be certain of Congress's intent to interfere with that balance. *See id.* (stating that the very purpose of the Eleventh Amendment is to preserve the balance between the states and federal government that exists by way of the states' sovereign immunity). Responding to the Court's decision in *Atascadero*, Congress amended the Rehabilitation Act to include language clearly abrogating states' sovereign immunity under the Act. *See* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . ."). For discussion considering whether the Court should apply a more stringent standard when assessing congressional abrogation of state legislative immunity, *see* Coughlin, *supra* note 63, at 64–66 (arguing that the standard for assessing abrogation of the common law should not apply to abrogation of legislative immunity and advocating instead for the use of a clear-statement test similar to the one courts utilize for abrogation of state sovereign immunity).

[77] *See infra* notes 78–79 and accompanying text (explaining the Supreme Court's previous assessments of Congress's abrogation power). The power to abrogate legislative *immunity* implies the lesser power to abrogate legislative *privilege* because allowing for the personal liability of legislators for their legislative acts would entail the admission of evidence related to those acts at trial. *See* United States v. Gillock, 445 U.S. 360, 374 (1980) (reasoning that because there is no constitutional limit on Congress's power to subject state officials to criminal penalties, there is no basis to exclude evidence relevant to the crimes with which a state official has been charged).

[78] 341 U.S. 367, 376 (1951). The Court avoided this question in *Tenney* by reasoning that even if Congress did have the power to abrogate state legislative immunity, it had not done so through the general language of § 1983. *See id.* (deciding that in the language of § 1983, Congress did not express intent to abrogate state legislators' immunity protections). For more detailed discussion of *Tenney*, see *infra* notes 122–128 and accompanying text.

[79] Pulliam v. Allen, 466 U.S. 522, 529 (1984) (emphasis added) (first citing Pierson v. Ray, 386 U.S. 547, 554–55 (1967); and then citing *Tenney*, 341 U.S. at 367), *superseded by statute*, Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996) (codified as amended in scattered sections of U.S.C.), *as recognized in* Kelsey v. Clark, No. 22-22, 2023 WL 1980307 (2d Cir. Feb. 14, 2023).

C. History, Purpose, and Function of 42 U.S.C. § 1983

This Note proposes that abrogating state legislative privilege in discrimination cases pursuant to 42 U.S.C. § 1983 would be an effective means of addressing the barrier that the privilege often poses.[80] This Section provides an overview of the statute's history and function, underscoring the critical role it plays in the context of civil rights litigation.[81]

Section 1983 is the primary statute relied upon by plaintiffs seeking to protect and enforce civil rights.[82] It has formed the basis of claims that have produced some of the Supreme Court's landmark civil rights decisions, such as in 1954 in *Brown v. Board of Education*, where plaintiffs' § 1983 claim led to the Court's momentous ruling that school segregation is unconstitutional.[83]

Congress originally enacted § 1983 as Section I of the Ku Klux Klan Act of 1871.[84] The Act's initial purpose was to create a federal remedy for the unconstitutional activity of local and state government officials in the South after the Civil War and during Reconstruction.[85] In particular, the Act was intended

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[80] *See infra* notes 176–224 and accompanying text.

[81] *See infra* notes 82–103 and accompanying text.

[82] *See* Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners, *supra* note 29, at 13 (noting that civil rights litigation most commonly takes place in federal court and that in such litigation, § 1983 is the principal cause of action on which civil rights litigants depend). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

[83] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954); *see* Michelman, *supra* note 29 (explaining that the plaintiffs in *Brown* invoked § 1983); Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners, *supra* note 29, at 11 (surveying major civil rights cases brought initially as § 1983 claims in federal court). Other examples of cases illustrating the importance of § 1983 and its impressive reach in securing different rights include *Gideon v. Wainwright*, in which plaintiffs' § 1983 claim led to the Court's decision that the Sixth Amendment affords criminal defendants the right to an attorney, and *Engel v. Vitale*, in which a § 1983 claim produced the Court's ruling that the First Amendment prevents school officials from encouraging students to recite school prayers. Gideon v. Wainwright, 372 U.S. 335, 342 (1963); Engel v. Vitale, 370 U.S. 421, 424 (1962).

[84] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871) (current version at 42 U.S.C. § 1983); *see* Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1153–55 (1977) (providing historical overview of the events leading to the passage of the Ku Klux Klan Act in 1871); Davies, *supra* note 31, at 1087 (noting the passage of § 1983 as part of the Ku Klux Klan Act).

[85] *See* Monroe v. Pape, 365 U.S. 167, 175–76 (1961) (explaining how one senator, Senator Osborn of Florida, advocated for passage of the Ku Klux Klan Act because of the states' inability to enforce their own criminal laws necessitated congressional action to remedy the constitutional harms committed in some southern states), *overruled in part by* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1961); David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections*

to address southern officials' collusion with the Ku Klux Klan and unwillingness to enforce the Fourteenth Amendment—activity that was contributing to increasingly widespread violence against Black citizens.[86] The Court has frequently referenced this history of the statute in its decisions.[87]

In practice, the statute provides a federal cause of action against state and local government officials who act in a way that violates constitutionally protected rights.[88] In 1970, in *Adickes v. S.H. Kress & Co.*, the Supreme Court clarified the two requirements for bringing an action under § 1983.[89] First, plaintiffs must establish that the defendant stripped them of a right granted by the Constitution and laws of the United States.[90] Second, plaintiffs must demonstrate that this deprivation of a right occurred "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[91]

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on the 150th Anniversary of Section 1983, 2022 CARDOZO L. REV. DE NOVO 90, 91, https://cardozolawreview.com/wp-content/uploads/2022/03/GANS_DN_43_PUBLISH.pdf [https://perma.cc/92QH-7DU9] (explaining that the provision of a remedy for the violation of protected rights is necessary to effectuate those rights and achieve accountability).

[86] *See* Briffault, *supra* note 84, at 1153 (detailing how southern officials were linked with the Ku Klux Klan and refused to take action to enforce post-Civil War congressional enactments designed to extend constitutional protections to Black citizens); Gans, *supra* note 85, at 91 (explaining that Congress enacted § 1983 against the backdrop of extreme violence against Black citizens, which was frequently perpetuated by systemic abuse of official power). For discussion of the Reconstruction Amendments and their historical context, see generally ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019). For discussion of racial violence in the post-war South, see generally EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 (2020), https://eji.org/wp-content/uploads/2005/11/reconstruction-in-america-rev-111521.pdf [https://perma.cc/2XME-BA5J]. An expansive report by the Equal Justice Initiative estimates that thousands of Black women, men, and children were killed, physically and sexually assaulted, and victimized by mob violence between 1865 and 1876. *Id.* at 6.

[87] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 162–66 (1970) (analyzing the legislative history and purpose of § 1983 as originally passed in the Ku Klux Klan Act); *Monroe*, 365 U.S. at 172–83 (providing a lengthy overview of the purpose and legislative debate behind the passage of the Ku Klux Klan Act).

[88] 42 U.S.C. § 1983. The statute provides for the liability of "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage" of a state deprives another of their constitutional rights. *Id.*

[89] *See Adickes*, 398 U.S. at 150 (describing the two elements necessary for recovery).

[90] *Id.*

[91] *Id.* (quoting 42 U.S.C. § 1983). In short, plaintiffs must show that the defendant acted "under color of law." *Id.* In *Adickes v. S.H. Kress & Co.*, the Court held that a restaurant owner's refusal to serve a patron would meet the "under color of law" requirement if it was driven by a state-enforced custom of segregation. *See id.* at 173–74 (describing the central holding of the case). Precisely when an action occurs "under color of law" has been the subject of much litigation. *See, e.g.*, *Monroe*, 365 U.S. at 186–87 (rejecting defendants' vigorous argument that the Court's construction of "under color of law" violates states' rights and federalism principles). But in 1941, in *United States v. Classic*, the Court offered a commonly accepted definition: acting "under color of law" entails abusing power held by virtue of state law and only made possible because the offender is "clothed with the authority of state law." 313 U.S. 299, 326 (1941) (first citing *Ex parte* Virginia, 100 U.S. 339, 346 (1879); then citing Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1913); and then citing Hague

For § 1983 to be applicable, a defendant must qualify as a "person" for whom § 1983 provides liability.[92] In 1961, in *Monroe v. Pape*, the Court held that natural persons who engage in state action are suable even when acting contrary to state law or policy.[93] It also held, however, that municipalities and local governments could not be sued under the statute.[94] In 1978, in *Monell v. Department of Social Services*, however, the Court reversed the second aspect of *Monroe*'s holding and expanded the definition of "person" to include local governments and municipal entities.[95] The Court based its decision on a revisited analysis of the legislative history behind § 1983, reasoning that Congress intended for municipal entities to be liable under the statute.[96] Finally, in 1979, in *Quern v. Jordan*, the Court held that states and state officials acting in their official capacity are not "persons" falling within the meaning of § 1983.[97] Like in *Monell*, the Court analyzed the legislative history behind § 1983, explaining that neither the history of the statute nor its plain language demonstrated that

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v. Comm. for Indus. Org., 307 U.S. 496, 507 (1939)). In *Classic*, the Court considered whether the defendants, who were Louisiana elections commissioners, acted under color of law to violate Louisiana citizens' right to vote. *Id.* at 308. The plaintiffs in the case alleged that the commissioners altered ballots and falsely certified the number of votes in order to secure the election for their preferred candidate. *Id.* The Court reasoned that the defendants acted under color of law because their challenged activity occurred while they were performing the duties assigned to them by state statute. *Id.* at 325–26. In 1961, in *Monroe v. Pape*, the Court expressed its ongoing approval of this definition. *See* 365 U.S. at 184 (noting that the definition of the phrase "under color of law" as expressed in *Classic* had not been questioned). The precise meaning of "under color of law" and the case law attempting to discern when a given action properly constitutes the kind of state action contemplated by § 1983 is largely beyond the scope of this Note. For an overview and analysis of the "under color of law" standard, see generally Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992) (summarizing the history of the "under color of" legal expression and explaining its meaning and application as a metaphor).

[92] *See infra* notes 93–98 and accompanying text.

[93] *See* 365 U.S. at 171–72 (holding that Congress can enforce the Fourteenth Amendment against state officials regardless of whether those officials are properly acting in accordance with their granted authority). In *Monroe*, thirteen officers from the city of Chicago broke into James Monroe's apartment, strip-searched his entire family and every room in the apartment, and then detained Monroe for ten hours without bringing charges against him or allowing him to call an attorney. *Id.* at 169. The officers had no search or arrest warrants. *Id.* The Court rejected the argument that because there existed a remedy under state law to address such illegal activity, Monroe had no federal remedy under § 1983. *Id.* at 170.

[94] *See id.* at 187–92 (claiming that the legislative history behind § 1983 did not contain any intent of Congress to subject municipalities to § 1983 liability).

[95] *See* 436 U.S. 658, 690 (1978) (holding that the legislative history behind § 1983 compelled reading the statute to include municipalities and local governing bodies among its suable "persons").

[96] *See id.* at 665–69 (summarizing the congressional debates leading up to the passage of § 1983). The Court explained that corporate and political bodies were understood to fall under the term "person" at the time Congress considered passing § 1983. *Id.* at 668–69. Because municipal corporations were considered "bodies politic and corporate," the Court reasoned, Congress likely intended for them to be liable under the Act. *Id.* (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431).

[97] *See* 440 U.S. 332, 343 (1979) (holding that states are not suable under § 1983).

Congress intended to use § 1983 to abrogate the immunity of the states and state officials.[98]

Finally, turning to the purposes of the statute, the Court explained in 1961, in *Monroe*, that § 1983 serves three essential functions in protecting federal constitutional rights.[99] First, if a state law is contrary to federal law, then § 1983 operates as a tool to override the state law.[100] Second, if a state law affords a remedy for the deprivation of a constitutionally protected right but the remedy is inadequate, then § 1983 provides an alternative federal remedy.[101] Third, and finally, if an adequate state remedy exists in theory but is unavailable in practice, then § 1983 provides a federal remedy.[102] These three purposes underscore the statute's central function as a means for the federal government to correct the unconstitutional activity of state actors.[103]

II. The Legislative Privilege in Discrimination Cases

This Part examines courts' approaches and researchers' proposals for handling legislative privilege in civil cases that allege discrimination by state legislators.[104] Section A of this Part explains how state legislators have asserted the privilege in civil cases and documents the effect of the privilege's application in discrimination cases.[105] Section B outlines how courts have decided privilege claims in cases that hinge on proof of legislative intent.[106] Finally, Section C explores alternative proposals suggested by scholars for dealing with the barrier the privilege poses in civil rights litigation.[107]

A. How the Privilege Operates as a Dead End for Plaintiffs Alleging Discrimination by State Legislators

Illustrating how legislative privilege operates once a legislator invokes its protections is key to understanding how the privilege poses a barrier to plain-

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[98] *Id.* at 343–45. The Court reasoned that given the importance of states' sovereign immunity within the U.S.' federal system, if members of the 42nd Congress believed Section 1 of the Ku Klux Klan Act overrode that immunity, the congressional record would have reflected debate on the subject. *Id.* at 343. Instead, the Court noted there was limited debate on the topic of abrogation, reflecting Congress's belief that the Act left the states' sovereign immunity intact. *Id.*

[99] *See Monroe*, 365 U.S. at 173–74 (characterizing § 1983 as having three main aims, as evidenced by the legislative history and the debates preceding passage of the statute).

[100] *Id.* at 173.

[101] *Id.* at 173–74.

[102] *Id.* at 174.

[103] *See* Katherine Mims Crocker, *Reconsidering Section 1983's Nonabrogation of Sovereign Immunity*, 73 FLA. L. REV. 523, 527 (2021) (explaining that like the Fourteenth Amendment, § 1983's central target is state action).

[104] *See infra* notes 105–175 and accompanying text.

[105] *See infra* notes 108–119 and accompanying text.

[106] *See infra* notes 120–167 and accompanying text.

[107] *See infra* notes 168–175 and accompanying text.

tiffs with discrimination claims.[108] First, notwithstanding the privilege, Supreme Court precedent imposes a high burden on plaintiffs who allege that an official has discriminated against them based on a constitutionally protected ground.[109] In 1977, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court made clear that proof of racially discriminatory intent is necessary to succeed on an equal protection claim.[110] Even where disproportionate impact is clear, a discrimination claim will not survive if unaccompanied by evidence that proves the official intended to discriminate.[111]

For plaintiffs alleging that state lawmakers have passed discriminatory legislation, the most powerful and straightforward evidence of intent would, of course, take the form of admissions from a legislator.[112] But the reality is that legislators are unlikely to make public that they have passed a piece of legislation out of malicious, discriminatory intent.[113] Plaintiffs' next best option, then, is to investigate the legislative record for evidence of discriminatory motive.[114] Consequently, plaintiffs in these cases often turn to the discovery process to obtain the evidence necessary to successfully make their discrimination claim.[115]

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[108] *See infra* notes 109–119 and accompanying text.

[109] *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (defining requirements for discrimination claim). For a brief summary of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, see *supra* note 6.

[110] 429 U.S. at 265; *see supra* note 6 (describing the basic facts and outcome in *Arlington Heights* and summarizing criticism of the intent standard).

[111] *See Arlington Heights*, 429 U.S. at 265 (noting that disproportionate impact may be relevant, but, on its own, is insufficient to sustain a discrimination claim).

[112] *See id.* at 267–68 (outlining a non-exhaustive list of different examples of evidence that might be used to establish discriminatory intent). The Court in *Arlington Heights* explained that plaintiffs will have to investigate various pieces of circumstantial and direct evidence in order to prove the existence of motive where discriminatory purpose is not facially or immediately apparent. *Id.* at 266. The Court then illustrated what kind of evidence might be helpful to plaintiffs. *Id.* First, explained the Court, some action produces a pattern of disproportionate impact on one race versus others in such a way that can only be explained by racially-motivated purpose. *Id.* The evidentiary inquiry is "relatively easy" where such a pattern exists, but as the Court acknowledged, "such cases are rare." *Id.* Where such a determinative pattern of disparate impact does not exist, the Court suggested that plaintiffs look elsewhere for evidence of motive—to things like the historical background of the challenged action, the sequence of events leading up to it, and the legislative history. *Id.* at 266–68.

[113] *See* Nashville Student Org. Comm. v. Hargett, 123 F. Supp. 3d 967, 970 (M.D. Tenn. 2015) (acknowledging the reality that officials rarely if ever openly declare that they are taking a particular course of action on account of a discriminatory intent); League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1235 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (pointing out that evidence of discriminatory motive is seldom available in the public domain because legislators would have to be "uncommonly brazen or obtuse" to openly state in the legislative record that they have purposefully gerrymandered a voting district in order to target the voting power of a certain racial group), *appeal filed*, No. 24-50128 (5th Cir. Feb. 27, 2024).

[114] *See Arlington Heights*, 429 U.S. at 268 (noting the relevance of the legislative and administrative record to proving discriminatory intent and explaining that plaintiffs will likely seek the statements of legislators even though those statements will frequently be covered by privilege).

[115] *See id.* (listing examples of the kind of evidence plaintiffs should seek when attempting to prove racially discriminatory purpose).

Plaintiffs commonly serve subpoenas on the legislators involved, seeking access to documentation such as legislators' notes, research, and communication leading up to the enactment of the challenged legislation.[116] Important to note is that the legislators in these cases are often involved merely as third parties to discovery and are not named as defendants (because such suits would be barred by immunity).[117]

With immunity thus inapplicable, legislators generally raise the privilege during discovery, asserting that it shields them from having to comply with plaintiffs' requests and subpoenas to answer questions concerning their legislative activity or motivations for it.[118] If a court agrees with the legislators, plaintiffs essentially reach a dead end: unable to obtain the information they need to prove discriminatory intent, their claim is all but bound to fail.[119]

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[116] *See, e.g.*, Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1342 (11th Cir. 2023) (describing the array of documents and other evidence sought by plaintiffs suing state legislators in Florida for discrimination). In *Pernell v. Florida Board of Governors of the State University*, the plaintiffs sought a wide range of evidence, including the internal notes and memoranda of the legislators and their staff members and the research and opinions they relied upon leading up to the enactment of a law that banned teaching critical race theory. *Id.* The legislators characterized the plaintiffs' subpoenas as a "fishing expedition[]" for evidence, which, they asserted, the legislative privilege prohibits. *Id.*

[117] *See* Coughlin, *supra* note 63, at 68 (explaining that plaintiffs typically sue the person responsible for enforcement of an allegedly unconstitutional law for an injunction) (citing *Ex Parte* Young, 209 U.S. 123, 159–60 (1908)); *see, e.g.*, *Pernell*, 84 F.4th at 1342 (noting that the subpoenaed legislators were nonparties to the litigation); *id.* at 1357 (Pryor, J., dissenting) (distinguishing the instant case from *Tenney v. Brandhove* by emphasizing that *Tenney* did not answer whether legislators might be required to disclose evidence as third parties); Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 329 (E.D. Va. 2015) (explaining that the plaintiffs filed suit against the Virginia State Board of Elections and some of its members, and did not name a legislative body or any individual legislators as defendants).

[118] *See, e.g.*, *Pernell*, 84 F.4th at 1342 (noting the legislators' argument that the documentation and evidence sought was covered by legislative privilege). Importantly, lawmakers need not be threatened with personal liability in order to claim these other aspects of the privilege. *See* EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011) (explaining that the protections of the privilege can apply even if the legislators themselves have not been sued because the costs of litigation can still fall on the legislators and thus endanger legislative effectiveness). Legislators can and often do invoke the evidentiary and testimonial components of legislative privilege even in suits where the legislators themselves do not face personal liability. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 417 (D.C. Cir. 1995) (summarizing the arguments of subpoenaed congressmen, who argued that the privilege automatically "drops like a steel curtain" over legislative activity, thus preventing plaintiffs from obtaining evidence of the activity even as part of third-party discovery in a lawsuit where the congressmen themselves did not face liability). Thus, even where legislators are merely involved in third-party discovery, or even where a plaintiff seeks declaratory or injunctive relief instead of damages, legislative privilege can still operate to shield the statements and actions of legislators. *See, e.g.*, *id.* at 421 (deciding that the privilege protects legislators just as strongly whether they invoke its immunity protections or its evidentiary and testimonial protections).

[119] *See Pernell*, 84 F.4th at 1346 (Pryor, J., dissenting) (suggesting that preventing plaintiffs from obtaining discovery from legislators in discrimination claims is akin to forcing them to make their case "with one hand tied behind their backs"); Asta, *supra* note 31, at 251 (explaining that a court's decision as to whether legislative privilege is qualified versus absolute will typically have significant

B. Courts' Varying Approaches to Assessing Privilege Claims in § 1983 and Other Civil Discrimination Cases

In general, courts differ in defining the precise scope of the legislative privilege in civil cases and there exists no universally agreed-upon test or framework for considering such privilege claims.[120] Notably, however, courts considering claims of legislative privilege in civil cases typically all confront a central question in their analysis: the proper reach of the Supreme Court's holding in *United States v. Gillock* and its interaction with an earlier case, *Tenney v. Brandhove*.[121]

In 1951, in *Tenney v. Brandhove*, William Brandhove brought suit under § 1983 against Jack Tenney and several other members of the California state legislature who together were members of the Senate Fact-Finding Committee on Un-American Activities.[122] The lawsuit stemmed from Brandhove's circulation of a petition that advocated against further appropriation of funds to the Committee.[123] In response to the petition, the Committee asked local prosecutors to bring criminal charges against Brandhove and summoned him to a hearing before the Committee.[124] After the hearing, Brandhove alleged that the Committee held the hearing solely to intimidate and silence him, and he

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consequences for plaintiffs because if the legislators can successfully claim complete protection, plaintiffs will typically be unable to prove intent and succeed on their discrimination claim).

[120] *See infra* notes 141–167 and accompanying text (describing the two different approaches courts have taken for assessing the legislative privilege in the civil context).

[121] *See* United States v. Gillock, 445 U.S. 360, 373 (1980) (holding that legislative privilege yields in cases, like criminal cases, that involve important federal interests); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (deciding that § 1983 did not abrogate legislators' immunity, and that legislators faced with personal liability can invoke the privilege's immunity protections); Asta, *supra* note 31, at 250–51 (explaining how lower courts that have held that the protections of state legislative privilege are absolute tend to rely solely on *Tenney*, while courts that have held that the protections are qualified frequently rely more on *Gillock*). *Compare, e.g.*, *Pernell*, 84 F.4th at 1344 (deciding that *Gillock* does not extend beyond criminal cases, rejecting the lower court's holding that *Gillock* does extend), *with Bethune-Hill*, 114 F. Supp. 3d at 337 (holding that *Gillock* extends to non-criminal cases that involve important federal interests).

[122] *See Tenney*, 341 U.S. at 369 (describing the cause of action and listing defendants named in the suit); 42 U.S.C. § 1983 (providing a federal cause of action against any person for violation of a constitutional right under color of law). The Committee was colloquially known as the Tenney Committee. *Id.* For a general overview of the activity of the Tenney Committee, including key investigations it conducted and reports it issued, see generally EDWARD L. BARRETT, JR., THE TENNEY COMMITTEE: LEGISLATIVE INVESTIGATION OF SUBVERSIVE ACTIVITIES IN CALIFORNIA (1951).

[123] *See Tenney*, 341 U.S. at 370 (describing the petition). The petition alleged that the Tenney Committee had used Brandhove to smear another congressman, Franck R. Havenner, as a "Red" while he was running for Mayor of San Francisco. *Id.* Brandhove's petition further charged that the Tenney Committee had conspired with Havenner's opponent to perpetuate the smear campaign against Havenner. *Id.*

[124] *Id.*

sought—directly from the legislators—both compensatory damages related to his attendance at the hearing and punitive damages.[125]

The Court ultimately held that Tenney and the other legislators sued could not be held civilly liable for their actions on the Committee, which fell within the sphere of legitimate legislative activity.[126] Legislative immunity, reasoned the Court, granted the state lawmakers protection from civil suit based on their legislative acts.[127] The Court explicitly rejected the notion that in passing § 1983, Congress had abrogated the immunity traditionally afforded to legislators.[128]

The Supreme Court again had occasion to assess the protections accorded to state legislators in its 1980 decision in *United States v. Gillock*.[129] In *Gillock*, the Court considered whether the privilege should shield the defendant, Tennessee state senator Edgar Gillock, from federal bribery charges he was facing.[130] When the government sought to introduce evidence related to Gillock's

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[125] *Id.* at 371 (describing Brandhove's legal claims). Brandhove alleged that the Committee in effect prohibited him from exercising his free speech rights and right to petition the legislature for redress of grievances. *Id.* He further claimed that the Committee's activities deprived him of equal protection, due process, and equal privileges and immunities. *Id.*

[126] *Id.* at 379 (holding that the legislators could not be liable). The Court explained that the investigatory efforts of the Tenney Committee, including its choice to call Brandhove to testify in a hearing, fell into the realm of legitimate legislative activity. *Id.* It was clear, according to the Court, that the actions of the Committee did not infringe on the power of either the judiciary or the executive, strengthening the conclusion that the Committee's activity was legislative in nature. *Id.* Importantly, language at the end of the opinion suggests that the Court viewed its holding as limited in nature. *See id.* at 378–79 (explaining "[w]e have only considered the scope of the privilege as applied to the facts of the present case" and "[w]e conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that [§ 1983] does not create civil liability for such conduct").

[127] *See id.* at 376–77 (discussing whether the legislators were shielded by immunity). The Court stressed that the immunity afforded by legislative privilege serves the public good because it enables legislators to be uninhibited by fear of suit when acting in their legislative roles. *Id.* at 377 (explaining that there would be little value to the privilege if legislators could be forced to defend themselves from personal liability in civil suits). The Court explained that this legislative effectiveness rationale for the privilege was firmly rooted in the privilege's history. *See id.* at 372–75 (discussing the history of the legislative privilege in English Parliament and in several state constitutions that preceded adoption of the federal Constitution).

[128] *See id.* at 376 (discussing § 1983). The Court called it a "big assumption" to assume that Congress could constitutionally "limit the freedom of State legislators acting within their traditional sphere." *Id.* Even if Congress did have this power, reasoned the Court, there was no reason to believe that Congress had exercised it when it passed § 1983. *Id.* The Court explained that the language of § 1983 was too general to justify the assumption that Congress had intended to abrogate the immunity of state legislators with passage of the statute. *Id.* But, as noted below, some scholars have criticized the Court's assessment of § 1983 and its legislative history. *See infra* notes 174–175 and accompanying text.

[129] *See generally* United States v. Gillock, 445 U.S. 360 (1980) (assessing the scope of the legislative privilege in the context of a federal criminal prosecution against a state senator).

[130] *Id.* at 362 (describing the charges against Gillock and Gillock's assertion of the privilege). Gillock was charged with accepting money for using his position as a state senator to block a defendant's extradition from Tennessee to Illinois and for proposing legislation that would assist four indi-

legislative activities and his motivations for them, Gillock claimed that the evidence was covered by legislative privilege and could not be introduced.[131]

But the Supreme Court disagreed and ultimately decided that the evidence Gillock claimed was protected was in fact admissible.[132] The Court reasoned that although the principles of comity underlying the legislative privilege deserve careful consideration, comity yields "where important federal interests are at stake," such as in criminal cases under federal law.[133] In other words, the federal government's interest in prosecuting Gillock outweighed the interests justifying application of the legislative privilege.[134]

In its analysis, the Court revisited *Tenney*, noting how the Court in that case extended immunity to state legislators facing civil liability under § 1983.[135] The Court then distinguished *Tenney*, emphasizing that *Tenney* was a civil action and reasoning that the criminal nature of the investigation against Gillock represented the kind of important federal interests to which the privilege must yield.[136]

The Court in *Gillock* did not make explicit, however, whether the holding limited its interest-balancing approach to criminal cases or whether it applied to civil cases too.[137] Is the federal criminal law the only "important federal interest" that can justify overriding the evidentiary components of state legisla-

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viduals in skirting the state electrician licensing process. *Id.* Prior to trial, Gillock moved to suppress the evidence relied on by the Government that related to his legislative activities. *Id.*

[131] *Id.* at 363–65 (summarizing the evidence that the government sought to introduce and which Gillock claimed was shielded by legislative privilege). For example, the government sought to introduce proof that Gillock had told four individuals he could pass legislation that would enable them to obtain master electricians' licenses. *Id.* at 364. Gillock had apparently set a contingent fee of $5,000 per individual, which he would refund if the state legislature did not pass the legislation. *Id.* at 364–65. The District Court for the Western District of Tennessee and the Sixth Circuit both agreed with Gillock that the legislative privilege protected him and prevented the presentation of evidence relating to his legislative activity and his motivations for that activity. *See* United States v. Gillock, 587 F.2d 284, 291 (6th Cir. 1978) (noting its affirmance of the district court's decision that Gillock was shielded by common law legislative privilege), *rev'd*, 445 U.S. at 360.

[132] *See Gillock*, 445 U.S. at 365–66, 373 (noting the decisions of the lower courts but concluding that they were wrong on the issue of whether the privilege should cover the evidence the government sought).

[133] *Id.* at 373.

[134] *See id.* (reasoning that upholding the privilege in Gillock's case would significantly impair the federal government's ability to enforce federal criminal law, while providing only speculative benefit to the legislative process in the state).

[135] *Id.* at 371–72 (citing Tenney v. Brandhove, 341 U.S. 367 (1951)) (summarizing the Court's holding in *Tenney*).

[136] *Id.* at 372–73 (distinguishing *Tenney* and holding that although recognizing principles of comity is important, comity yields "where important federal interests are at stake"). In *Gillock*, the Court specifically noted that the enforcement of criminal statutes is one federal interest to which comity must yield. *Id.* at 373.

[137] *See id.* (holding that criminal cases represent the kind of important federal interests to which the privilege must yield, but neglecting to clarify whether any such important interests exist in the civil context).

tive privilege, or are there other, non-criminal interests that rise to the same level of importance?[138] Is it possible that the privilege could be qualified in civil cases under § 1983, or does *Tenney*'s holding—that state legislators have *immunity* when faced with personal liability in such suits—mean that state lawmakers can also claim the *privilege* in cases where they do not face personal liability?[139] Thus, courts have largely split into two camps: those who read *Gillock* as applying strictly to criminal cases (described below in Subsection 1), and those who extend *Gillock*'s interest-balancing framework in certain civil contexts, including in § 1983 litigation (described below in Subsection 2).[140]

1. The More Legislator-Friendly Approach: Holding That Legislative Privilege Is Absolute in Civil Cases

Some courts have interpreted *Gillock*'s interest-balancing holding to be confined to criminal cases.[141] Reading *Gillock* narrowly in this way, these courts hold that the privilege is absolute and unqualified in civil rights cases, even where legislators do not face personal liability.[142] Many courts read *Tenney* as bolstering this holding, despite the fact that *Tenney* concerned legislative *immunity*, rather than the evidentiary legislative *privilege*.[143]

In 2023, in *Pernell v. Florida Board of Governors of the State University*, the Eleventh Circuit Court of Appeals took this approach.[144] In *Pernell*, seven professors and a student from Florida's public universities brought suit against the administrative body responsible for enforcing the Individual Freedom Act,

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[138] *Id.*; *see* Asta, *supra* note 31, at 247–49, 254–55 (noting the open question regarding the scope of *Gillock*'s holding and arguing that the interest-balancing approach in *Gillock* can apply in both civil and criminal cases).

[139] *See Tenney*, 341 U.S. at 379 (stating the Court's holding); Asta, *supra* note 31, at 249 (noting the unanswered question of whether *Tenney*'s holding applies in instances where state legislators do not face personal liability); Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1357 (11th Cir. 2023) (Pryor, J., dissenting) (critiquing the majority's failure to discern the difference between *Tenney*, in which the plaintiff sought to hold an individual legislator personally liable for money damages, and civil suits in which litigants only seek evidence from litigators as third parties to an action).

[140] *See infra* notes 141–167 and accompanying text (describing the two approaches courts have taken).

[141] *See, e.g.*, *Pernell*, 84 F.4th at 1344 (acknowledging that *Gillock* could theoretically be extended, but refusing to extend its holding beyond criminal cases absent Supreme Court guidance on the proper reach of the case).

[142] *See id.* (rejecting extension of *Gillock*'s interest-balancing approach and holding that the privilege is unqualified in civil rights cases brought under § 1983).

[143] *See, e.g.*, Lee v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018) (acknowledging that *Tenney*'s holding rested on immunity, but stating that the reasoning of *Tenney* justifies extension of the evidentiary and testimonial protections of the privilege to state lawmakers); La Union Del Pueblo Entero v. Abbott, 68 F.4th 228, 239–40 (5th Cir. 2023) (noting *Tenney*'s immunity holding and reasoning that "[b]y the same token," state legislators' immunity in civil actions encompasses protection against compelled discovery).

[144] *See infra* notes 145–148 and accompanying text.

alleging that the Act discriminated based on race in violation of the Equal Protection Clause.[145] Seeking to prove the Act's discriminatory purpose, the plaintiffs subpoenaed fourteen legislators who supported passage of the legislation—all of whom were merely third parties to discovery and not named as defendants themselves.[146] The nonparty legislators fought the subpoenas by arguing that the evidence sought by the plaintiffs was protected by legislative privilege, and the court ultimately agreed.[147] Concluding that the privilege is absolute and insurmountable in civil actions under § 1983, the court remanded the case with instructions to quash the plaintiffs' subpoena requests.[148]

In its reasoning, the Eleventh Circuit explained that since *Gillock*, the Supreme Court has never defined (beyond the federal criminal law) any additional important federal interests to which the privilege might yield.[149] Therefore, the court rejected the use of a balancing test in civil cases to determine whether the privilege should yield.[150] The court made clear that the requirement of proving legislative intent was not enough to justify allowing the privilege to yield.[151] Curiously, the court read *Tenney* as supportive of the notion that the *privilege* is insurmountable in § 1983 actions—even though *Tenney* involved

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[145] *Pernell*, 84 F.4th at 1341 (describing plaintiffs' claims). For an overview of the provisions of the Individual Freedom Act, see *supra* note 16. The Individual Freedom Act is just one example of a growing pattern of so-called "anti-woke" legislative efforts. *See* Nicholas Confessore, *'America Is Under Attack': Inside the Anti-D.E.I. Crusade*, N.Y. TIMES (Jan. 20, 2024), https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html [https://perma.cc/3AKE-8T8Y] (describing a multi-state network of conservative think tanks and political organizations working to persuade and help state lawmakers to pass legislation banning the teaching of theories such as Critical Race Theory). These conservative groups have sent proposals advocating for the end of diversity, equity, and inclusion (D.E.I.) initiatives to lawmakers in states such as Florida, Louisiana, North Carolina, Oklahoma, Tennessee, and Texas. *Id.* Lawmakers in Arkansas, North Carolina, and Oklahoma have, like Florida, taken aim at D.E.I. initiatives in schools, all seemingly falling in line with the Republican political strategy advanced by the conservative think tanks focused on education. *Id.* Classroom D.E.I. initiatives have not been the only target of these Republican political efforts. *See, e.g.*, Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES, https://www.nytimes.com/2023/01/25/us/politics/transgender-laws-republicans.html [https://perma.cc/AM2D-NXM9] (June 20, 2023) (characterizing the flood of state anti-transgender legislation as part of a national effort by Republican strategists to "harness voter anger," and likening it to conservative efforts to ban critical race theory in schools).

[146] *Pernell*, 84 F.4th at 1342 (describing the subpoenas and the evidence sought by plaintiffs).

[147] *See id.* (noting the legislators' argument that plaintiffs' attempts at discovery were akin to "fishing expeditions").

[148] *See id.* at 1344 (emphasizing in particular that the *Gillock* Court made clear that § 1983 did not abrogate the official immunity of state legislators).

[149] *Id.*

[150] *Id.* at 1344–45 (explaining reluctance to adopt a balancing test for the privilege's application in civil cases without explicit endorsement from the Supreme Court).

[151] *See id.* at 1345 (reasoning that allowing such an exception would render legislative privilege valueless).

legislative *immunity* under the statute because the legislators in that case (unlike the instant one) were threatened with personal liability.[152]

2. The More Plaintiff-Friendly Approach: Interest-Balancing to Assess When the Privilege Yields

On the opposite end of the spectrum are courts that reject an unqualified, absolute application of the privilege in civil cases.[153] Instead, these courts apply an interest-balancing method derived from *Gillock*.[154]

For example, in 2015, in *Bethune-Hill v. Virginia State Board of Elections*, the District Court for the Eastern District of Virginia took this interest-balancing approach.[155] The plaintiffs alleged that twelve Virginia House of Delegates districts were unlawfully gerrymandered in violation of the Equal Protection Clause.[156] To successfully make this claim, the plaintiffs needed to establish that the lawmakers acted with discriminatory intent.[157] Therefore, they sought documents and testimony related to the challenged redistricting plan from the legislators involved.[158] In response, the lawmakers asserted that the evidence sought was covered by the legislative privilege.[159]

In its analysis, the court cited *Gillock*, noting its holding that the privilege yields to important federal interests.[160] The court then reasoned that *Tenney* did

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[152] *See id.* at 1344 (invoking *Tenney*'s holding that § 1983 did not abrogate the legislative immunity of state legislators). Seemingly in an attempt to link *Tenney*'s immunity holding to legislative privilege, the court cited the following from a decision by the D.C. Circuit: "We do not perceive a difference in the vigor with which the privilege protects against compelling a congressman's testimony as opposed to the protection it provides against suit." *Id.* (quoting Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 421 (D.C. Cir. 1995)).

[153] *See, e.g.*, Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015) (explaining that the legislative privilege must be qualified in the face of important public rights secured by federal law and the Constitution).

[154] *See, e.g.*, *id.* at 339 (expressing approval of five-factor balancing test to weigh whether the privilege should yield). The Court in *Gillock* did not explicitly state that it was utilizing interest-balancing in its analysis, although that was in effect the approach it took. *See* 445 U.S. 360, 373 (1980) (weighing the purpose and value of legislative privilege against the government's need to enforce the criminal law); Asta, *supra* note 31, at 248 (explaining how the Court applied interest-balancing in its analysis, even though it did not refer to it as such).

[155] *See Bethune-Hill*, 114 F. Supp. 3d at 339–43 (applying the balancing test).

[156] *Id.* at 329.

[157] *See id.* at 339 (quoting Baldus v. Brennan, Nos. 11–CV–562, 11–CV–1011, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8, 2011)) (describing the importance of establishing legislative intent in cases brought under the Equal Protection Clause).

[158] *Id.* at 329–30 (providing overview of the evidence sought). The plaintiffs sought an array of documentation, including all communications of the Virginia House of Delegates with political lobbyists, consultants, and national Republican party leadership organizations. *Id.*

[159] *Id.* at 330.

[160] *See id.* at 333–34 (explaining how the federal common law roots of state legislators' privilege means that it yields to important federal interests where enforcement of the privilege would produce conflict with federal statutory law).

not foreclose application of *Gillock*'s balancing approach in this context because the legislators in the instant case—unlike in *Tenney*—did not face individual liability.[161]

Having decided that the privilege was not absolute, the court then applied a five-factor interest-balancing test to see whether the privilege should shield the evidence plaintiffs sought, weighing the following factors: (1) the relevance of the evidence in question; (2) the availability of other, non-privileged evidence; (3) the seriousness of the litigation and issues at stake; (4) the role of the government in the litigation; and (5) whether failing to recognize the privilege would infringe on its central function.[162] Weighing these factors and underscoring that legislative intent was the determinative issue in the case, the district court ultimately concluded that the privilege should yield in the face of the plaintiffs' request for evidence.[163]

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[161] *See id.* at 334–35 (reasoning that the principles that justify application of the privilege in cases where legislators face personal liability are not the same as in cases brought against a state itself, in which legislators do not face individual liability). The court explained that there is heightened concern about legislative effectiveness when legislators might face personal liability for their legislative actions. *Id.* Conversely, there is "little to no threat" to legislative effectiveness and independence when a legislator does not face personal liability. *Id.* at 335. According to the court, "[t]he only interest advanced by the legislative privilege in [cases in which legislators do not face individual liability] is the legislator's interest in being free from the distraction of compulsory process." *Id.* (citing EEOC v. Wash. Sanitary Comm'n, 631 F.3d 174, 180 (4th Cir. 2011)). The court stressed that upholding the privilege would impede the goals of federal law in protecting crucial public rights. *Id.*

[162] *See id.* at 339–43 (analyzing each factor individually and weighing them against one another).

[163] *Id.* at 343. The court explained that the first factor, relevance of the evidence, weighed in favor of disclosure because Equal Protection cases hinge on proof of legislative intent. *Id.* at 339–40. The second factor, the availability of non-privileged evidence, also weighed in favor of disclosure. *Id.* at 340–41. Although other circumstantial evidence was available that might have pointed to discriminatory intent, the court stressed that such circumstantial evidence supported but did not supplant the direct evidence that plaintiffs sought in the case. *Id.* Considering a third factor, the court reasoned that the right to vote and the rights associated with the Equal Protection Clause lie at the heart of representative government. *Id.* at 341. Highlighting the serious deprivation of rights alleged by the plaintiffs, the court concluded that this third factor weighed heavily in favor of disclosure. *Id.* Next, the court pointed out that the legislature's direct role in the ongoing redistricting litigation also supported disclosure. *Id.* Lastly, acknowledging the privilege's central function in preventing distraction and preserving legislative effectiveness, the court admitted that the last factor weighed against disclosure. *Id.* at 341–42. Because four out of the five factors favored disclosure, the court held that the privilege should yield, approving plaintiffs' request for a wide set of documents and communications from the legislators. *See id.* at 343–45 (explaining evidence that the plaintiffs were allowed to seek moving forward). Two years after the District Court for the Eastern District of Virginia issued its decision on the issue of legislative privilege, the Supreme Court heard the plaintiffs' gerrymandering claims, but did not review the district court's use of the five-factor balancing test. *See* Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. 178, 181–83 (2017) (describing the plaintiffs' equal protection claims and the procedural history of the case). The Court affirmed the District Court's judgment that one of the challenged districts had not violated the Voting Rights Act, but remanded the case for the District Court to determine, consistent with the Supreme Court's holding, whether the remaining eleven districts represented unconstitutional gerrymanders. *Id.* at 194–96.

In her dissenting opinion in 2023, in *Pernell v. Florida Board of Governors*, Judge Pryor took a similar approach, weighing the federal interests at stake against the values underpinning legislative privilege.[164] Critiquing the majority's holding that the privilege is absolute in cases brought under § 1983, Pryor engaged in a detailed description of the statute's original purpose, noting how it has historically been used to vindicate a score of critically important constitutional rights.[165] Pryor argued that the privilege should yield in civil cases brought under § 1983 where the values underlying the legislators' privilege claim are outweighed by the importance of the federal right at stake in the case.[166] And she explicitly distinguished *Tenney*, reasoning that *Tenney*'s application of absolute immunity for state legislators is limited to situations in which legislators face personal liability—not when they are merely third parties to discovery.[167]

C. Alternative Proposals for Handling the Issue of Legislative Privilege in Cases Alleging Discrimination by State Legislators

Like the courts described above in Subsection 2, some researchers and academics have expressed concern about the potential effects of upholding an absolute and unyielding legislative privilege, particularly in the civil rights context.[168] Accordingly, several have proposed alternative frameworks and judicial solutions to address the barrier the privilege often poses.[169]

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[164] *See* Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1350 (11th Cir. 2023) (Pryor, J., dissenting) (endorsing the *Gillock*-inspired balancing approach of the lower court).

[165] *See id.* at 1351–52 (arguing that the original purpose and historical use of § 1983 demonstrates that it is often used to vindicate the kind of important federal interests to which the legislative privilege should yield). Judge Pryor explained that Congress adopted § 1983 to enforce the Fourteenth Amendment in large part due to pervasive white supremacy and racial violence in the South after the Civil War. *Id.* With this lawlessness and the southern states' corresponding failure to act in mind, Congress enacted § 1983 to serve three essential purposes: to override state laws in conflict with the federal government's Reconstruction agenda, to provide a federal remedy where existing state law remedies were insufficient, and to provide a federal remedy where state law remedies were not available in practice. *Id.* at 1352. After explaining these initial purposes of § 1983, Judge Pryor highlighted that the statute has been the foundation of the cause of action in many cases that have vindicated important federal rights. *See id.* (listing § 1983 cases that have involved First Amendment free speech rights, the Eighth Amendment's prohibition of cruel and unusual punishment, the Second Amendment right to bear arms, and the Fourteenth Amendment's prohibition of segregation). This long history, reasoned Judge Pryor, demonstrates why courts must closely assess whether the privilege should yield in § 1983 cases, rather than issue a blanket holding that the privilege never yields in civil cases. *Id.*

[166] *Id.* at 1350.

[167] *See id.* at 1357–58 (emphasizing that *Tenney*'s holding concerned the immunity aspect of the privilege, and did not address the scope of the evidentiary protections of the privilege).

[168] *See, e.g.*, Davies, *supra* note 29, at 1088–90 (explaining that the Supreme Court's continued expansion of common law legislative immunity in § 1983 cases will negatively impact civil rights plaintiffs); Asta, *supra* note 31, at 251 (noting that providing absolute protection to state legislators will typically make it impossible for civil rights litigants to prevail on claims that hinge on proof of legislative motive).

[169] *See infra* notes 170–175 and accompanying text.

First, some researchers, similar to the courts described above in Subsection 2, have argued that state legislative privilege (and in some instances, legislative immunity) should be qualified in certain civil cases.[170] They suggest that courts should apply a version of *Gillock*'s interest-balancing approach on a case-by-case basis, accounting for factors such as whether the legislators are threatened with personal liability or whether plaintiffs only seek declaratory or injunctive relief.[171]

Another proposal specifically addresses redistricting litigation—where privilege issues have proven particularly troubling and common—and suggests removing the redistricting process from lawmakers' purview altogether.[172] Proponents of this approach argue that placing the responsibility of redistricting in independent commissions would mitigate the harmful legislative activity that the privilege often shields.[173]

Finally, some researchers have called into question the Supreme Court's interpretation that § 1983 did not abrogate legislative immunity.[174] They high-

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[170] *See, e.g.*, Asta, *supra* note 31, at 252 (arguing that the legislative privilege is qualified for state legislators in both the civil and criminal contexts). Asta argues based on the Supreme Court's holding in *Gillock* that state legislators should receive qualified legislative privilege protections, even though federal legislators have absolute protections. *Id.* at 254. He explains that while two rationales—legislative effectiveness and the separation of powers—justify extension of the privilege to federal legislators, extension of the privilege to state legislators is justified based only on the legislative-effectiveness rationale—the weaker of the two. *Id.* at 254–55. He contends that combined with its reliance on the legislative-effectiveness rationale, *Gillock*'s use of a balancing test defined the privilege as qualified when invoked by state legislators. *Id.* at 255*; see also* Davies, *supra* note 31, at 1112–13 (calling for case-by-case evaluation to decide the proper scope of legislative immunity in § 1983 actions).

[171] *See* Asta, *supra* note 31, at 252 (advocating for case-by-case application of an interest-balancing test). Asta explains that under this interest-balancing framework, courts should be more inclined to grant legislative privilege protections when state legislators face personal liability, and less inclined to extend those protections when plaintiffs seek declaratory or injunctive relief. *Id.* Asta thus endorses the use of the *Gillock*'s interest-balancing test to assess state legislators' privilege claims in both civil and criminal cases. *Id.* For an example of how this sort of interest balancing might operate in practice, see *id.* at 262–65 (applying the interest-balancing test to the redistricting context and concluding that legislative privilege should not shield state legislators when they are involved in redistricting litigation), and see Davies, *supra* note 31, at 1117–18 (proposing application of an interest-balancing test that weighs the threat to the legislative process versus the federal government's interest in enforcing civil rights to decide whether the privilege should yield in § 1983 cases).

[172] *See* J. Pierce Lamberson, Note, *Drawing the Line on Legislative Privilege: Interpreting State Speech or Debate Clauses in Redistricting Litigation*, 95 WASH. U. L. REV. 203, 220–23 (2017) (arguing that giving the job of redistricting to independent commissions may help to resolve issues related to the legislative privilege). States that have elected to use a version of an independent commission at some point in the redistricting process all employ significantly different variations of the concept. *See id.* at 221–22 (giving overview of the different forms of independent redistricting commissions).

[173] *See id.* at 222–23 (noting that independent commissions may help to address self-entrenchment and other undemocratic activity by legislators).

[174] *See, e.g.*, Davies, *supra* note 31, at 1109–11 (questioning the Supreme Court's conclusion in *Tenney* that Congress did not intend for § 1983 to abrogate legislative immunity). In a similar vein, some scholars have contended that § 1983 abrogated state sovereign immunity. *See, e.g.*, Crocker,

light, for example, that contrary to the Court's analysis, the legislative history behind § 1983 indicates that Congress did not fully consider or clearly reject the notion that state officials and legislators might be suable under § 1983.[175]

III. Removing the Privilege Barrier

This Part argues that passing legislation that abrogates state legislative privilege in specific discrimination cases may be an effective way to resolve the barrier that the privilege currently poses to civil rights litigants.[176] Section A discusses the constitutional permissibility of such legislation in light of Supreme Court precedent, and why legislation might be an effective and perhaps even desirable solution.[177] Section B then proposes that § 1983 would be an appropriate vehicle for abrogation.[178]

A. The Case for a Bold Solution: Exploring the Constitutionality and Efficacy of Congressional Abrogation of Legislative Privilege

The legislative privilege does in many cases serve an important purpose in the state legislative context: by shielding the disclosure during discovery and at trial of evidence and testimony related to legislative activity, the privilege ensures robust debate and legislative effectiveness—things that can signal a healthy democracy and in general tend to serve the public interest.[179] But reading the privilege too broadly may enable legislators to strategically rely on its protections to pursue and then cover up unconstitutional activity without

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supra note 103, at 547–82 (negatively and affirmatively critiquing the Court's line of decisions holding that § 1983 did not abrogate states' sovereign immunity as initially written). Katherine Mims Crocker specifically highlights the Court's imposition in the abrogation context of the clear-statement requirement, i.e., the requirement that Congress must clearly state its intention to abrogate state sovereign immunity before the Court will uphold state suability. *Id.* at 576; *see also supra* note 76 (describing the clear-statement requirement). Crocker argues that the retroactive application of the clear statement requirement, developed after § 1983's passage, is antidemocratic especially given the lack of strong evidence that Congress explicitly desired for § 1983 to reach states themselves. *See* Crocker, *supra* note 103, at 576 (suggesting that if Congress had been aware of a clear-statement rule, it may have elected to use different language in the statute).

[175] *See* Davies, *supra* note 31, at 1109–11 (arguing that the legislative history of § 1983 in fact offers little insight into whether Congress intended for the statute to preserve or abrogate legislative immunity). At least one researcher has explored the text and history of the Speech or Debate Clause itself and suggested that the Clause should not provide legislators any evidentiary privilege in the first place. *See generally* Wells Harrell, Note, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 VA. L. REV. 385 (2012).

[176] *See infra* notes 177–224 and accompanying text.

[177] *See infra* notes 179–208 and accompanying text.

[178] *See infra* notes 209–224 and accompanying text.

[179] *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (explaining that legislative privilege exists not for legislators' "private indulgence," but rather for the good of the general public).

fear of repercussion.[180] And when state lawmakers, for example, racially gerrymander districts knowing that they can simply assert the privilege if and when litigation arises, the privilege can certainly no longer be said to be operating in the public interest.[181]

The law as currently applied does much more than establish a barrier to liability or a limit to certain kinds of relief—it effectively blocks plaintiffs from even *asking* in the first place whether their elected representatives have acted in a way that violates the Constitution.[182] This limitation strikes against some of the most basic values underlying the American political system, including accountability for elected officials and representative government itself.[183] Considering these high stakes, legislation, although a bold solution, should at least be contemplated as an option.[184]

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[180] *See* League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1237 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (explaining that if the privilege completely bars plaintiffs from securing evidence of discriminatory intent, "state legislators could potentially commit intentional discrimination with impunity—so long as they didn't carelessly let their unlawful motives slip into the public legislative record"), *appeal filed*, No. 24-50128 (5th Cir. Feb. 27, 2024).

[181] *See* Thompson, *supra* note 4 (explaining that systemic use of the privilege is part of a strategic Republican campaign to gerrymander electoral maps). In Texas, a national GOP organization had in fact helped to train the state legislators on how to approach redistricting lawsuits, including by utilizing legislative privilege to their advantage. *Id.*

[182] *See supra* notes 108–119 and accompanying text (explaining how application of the privilege often functions as a dead end for civil rights plaintiffs); Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1354 (11th Cir. 2023) (Pryor, J., dissenting) (arguing that upholding an absolute legislative privilege in discrimination cases places plaintiffs in a "double bind," forcing them to meet the high standard of proving discriminatory intent without the discovery tools normally available to litigants in civil cases).

[183] *See* Kelly M. McGuire, Note, *Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause*, 69 WASH. & LEE L. REV. 2125, 2160–65 (2012) (explaining that self-government is an important American ideal and arguing that broad interpretations of the Speech or Debate Clause harm political accountability by permitting legislators to take actions that in fact harm their constituents' interests).

[184] *See supra* notes 108–119 and accompanying text (explaining how the privilege is especially harmful in discrimination cases). There have been recent calls for legislation to address problems posed by other immunity doctrines that similarly insulate public officials and police officers, such as the doctrine of qualified immunity. *See, e.g.*, Editorial, *End the Court Doctrine That Enables Police Brutality: A Series on George Floyd and America*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html [https://perma.cc/FS6P-VRX6] (calling for the end of qualified immunity in the wake of the death of George Floyd, who was murdered by police officer Derek Chauvin in 2020); Ed Yohnka, Julia Decker, Emma Andersson & Aamra Ahmad, *Ending Qualified Immunity Once and for All Is the Next Step in Holding Police Accountable*, ACLU (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable [https://perma.cc/ACP5-7VRN] (arguing for the end of qualified immunity and describing the ACLU's efforts to end the doctrine). Democrats in Congress have in recent years introduced legislation that would end qualified immunity by amending § 1983. *See* Ending Qualified Immunity Act, H.R. 2847, 118th Cong. (2023) (proposing to amend § 1983 to abrogate qualified immunity); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Congress (2021) (same).

Legislation that abrogates the privilege for state legislators need not be broadly sweeping to be effective.[185] The basic framework of the legislation should abrogate the privilege only where (1) there is no threat of personal liability for the legislator(s) involved, and (2) the plaintiff's claim depends on proof of legislative motive.[186] Abrogation of this sort is likely constitutionally permissible, and it arguably still accords with the rationale and justifications for the privilege as often expressed by the Supreme Court and lower courts.[187]

As a preliminary matter, the common-law roots of state legislative privilege make it less protective than the constitutionally-enshrined privilege of federal legislators.[188] The Supreme Court has implicitly recognized as much, and in fact seemed to leave open the possibility of congressional abrogation of

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[185] *See infra* notes 186, 193–200 and accompanying text (arguing for abrogation of the evidentiary protections of the privilege while leaving its immunity protections intact).

[186] *See infra* notes 187–208 and accompanying text (explaining the contours and benefits of this legislative proposal). Further research would be required to analyze how congressional abrogation of state legislative privilege would operate when § 1983 cases are heard in state court. *See* Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 235–42, 259–70 (2003) (noting that most states have legislative privilege provisions in their own constitutions and explaining that some state courts have interpreted these provisions as offering narrower protections than those available to federal legislators under the Speech or Debate Clause). But regardless, under this Note's proposal, plaintiffs would be entitled to litigate their § 1983 claims in federal court and could therefore take advantage of the abrogation this Note proposes. *See* 28 U.S.C. § 1331 (granting federal district courts original jurisdiction over claims arising under the Constitution and federal law).

[187] *See infra* notes 188–197 and accompanying text (explaining how legislation abrogating the privilege would be consonant with Supreme Court and lower court precedent). One obvious critique of the framework offered here is that a one-size-fits-all approach is simply too broadly sweeping. *See* Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1356 (11th Cir. 2023) (Pryor, J., dissenting) (arguing that the privilege should be qualified in certain civil cases brought under § 1983, but emphasizing that categorically refusing to apply the privilege in all § 1983 cases would go too far). This Note aims to propose a general, open-ended framework, and acknowledges that there are other factors Congress could (and likely should) consider taking into account when designing this sort of legislation in order to narrow its potentially expansive reach. *See supra* note 163 and accompanying text (describing multifactor balancing test some courts have employed to assess whether the privilege should yield). Importantly, this Note does not propose as part of its abrogation approach to strip courts of their general discretion to tailor discovery narrowly where appropriate, nor does it suggest that courts can or should ignore their responsibilities to limit discovery where burdensome or where material could be obtained in a more convenient way. *See, e.g.*, FED. R. CIV. P. 26(b)(1) (providing the general rule for the scope of discovery); *id.* R. 26(b)(2)(C) (directing courts to limit discovery in certain instances).

[188] *See* Am. Trucking Ass'ns, Inc. v. Alviti, 14 F.4th 76, 87 (1st Cir. 2021) (explaining that the common law privilege belonging to state legislators is less protective than the privilege held by federal lawmakers because the separation of powers rationale comes into play when a federal legislator invokes the privilege under the Speech or Debate Clause, but is not relevant to state legislators' invocation of the privilege); Asta, *supra* note 31, at 255 (explaining that state legislators' protections are generally weaker because unlike their federal counterparts, state lawmakers cannot invoke the separation of powers to justify extension of the privilege, and must rely on the weaker legislative-effectiveness rational for the privilege).

state legislative immunity pursuant to § 1983 in *Tenney v. Brandhove*.[189] Likewise, the Court did not foreclose the possibility that the privilege could be qualified in certain civil cases when it decided *United States v. Gillock*.[190] Although the Court in *Tenney* called it a "big assumption" to infer that Congress holds the power to eliminate state legislative immunity (and left the question unanswered in that case), the Court has subsequently implied that this congressional power exists.[191] In theory, then, Congress could abrogate state legislative privilege and immunity if it so chose.[192]

This Note acknowledges, however, that broad-sweeping abrogation of legislative *immunity* alongside legislative privilege would risk creating conflict with the rationale for those protections, which has been consistently emphasized by courts at every level of the federal judiciary.[193] But there are important distinctions between legislative privilege and legislative immunity.[194] Although abrogating legislators' immunity protections may go too far, abrogating solely legislative *privilege* does not produce the same tension with existing precedent—nor does it pose the same threat to legislative effectiveness.[195] Where

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[189] *See* United States v. Gillock, 445 U.S. 360, 373 (1980) (holding that the privilege may be a qualified one where state legislators assert it in a way that would impair an interest of the federal government); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (assuming for the sake of analysis that Congress has the power to abrogate, but leaving the question unanswered after ultimately deciding for other reasons that Congress in fact did not abrogate state legislative privilege when it enacted § 1983 originally).

[190] *See Gillock*, 445 U.S. at 373 (explaining that the principles of comity underlying legislative privilege yield in instances where "important federal interests are at stake," but neglecting to define any such important federal interests other than enforcement of the federal criminal law); *Pernell*, 84 F.4th at 1344 (11th Cir. 2023) (conceding that *Gillock* left open the possibility that the legislative privilege could yield in contexts other than criminal suits brought by the federal government against a state legislature).

[191] *Tenney*, 341 U.S. at 376.

[192] *See* Coughlin, *supra* note 63, at 63–64 (explaining how *Tenney* implied but did not actually decide whether Congress has the power to abrogate, but noting that the Court in subsequent cases has suggested that Congress does, in fact, have abrogation power). Since *Tenney*, the Court has underlined that "cases have proceeded on the assumption that common-law principles of legislative and judicial immunity were incorporated into [the U.S.] judicial system and that they should not be abrogated absent clear legislative intent to do so." Pulliam v. Allen, 466 U.S. 522, 529 (1984) (first citing Pierson v. Ray, 386 U.S. 547, 554–55 (1967); and then citing *Tenney*, 341 U.S. at 367).

[193] *See Tenney*, 341 U.S. at 377 (emphasizing that state legislators' immunity protections serve the public good by minimizing threats to legislative effectiveness).

[194] *See* League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1237–38 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (defining legislative immunity and privilege), *appeal filed*, No. 24-50128 (5th Cir. Feb. 27, 2024). Legislative immunity shields legislators from lawsuits, prosecution, and liability for any actions taken within the legitimate legislative sphere. *Id.* at 1238. The term "legislative privilege" refers to legislators' ability to withhold evidence during the discovery process. *Id.* (emphasis removed)*; accord supra* notes 42–45 and accompanying text (giving brief outline of these different protections and the terminology courts use when referring to them).

[195] *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1254–56 (Guaderrama, J., dissenting) (explaining that *Tenney* only addressed the immunity aspect of the privilege, leaving open the question of how courts should treat the evidentiary aspects of the privilege).

legislators do not face personal liability, the threat to legislative effectiveness is lower.[196] The Supreme Court has recognized this distinction, as have lower courts, which, recognizing that *Tenney* only addressed immunity, have held that the privilege may yield in certain civil cases.[197]

This more measured approach—abrogation in limited contexts of only state legislative *privilege*—would still be effective.[198] Although it does not provide plaintiffs a direct path to sue state legislators themselves, it would enable them to seek key evidence and testimony from legislators as part of third party discovery in cases where plaintiffs have named as defendants an individual or governing body other than a legislator.[199] Opening the door to this kind of inquiry will help plaintiffs gather the evidence needed to meet the demanding intent requirement of *Arlington Heights v. Metropolitan Housing Develop-*

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[196] *See id.* at 1256 (highlighting that "the legislative interference concerns that justify granting state legislators absolute *immunity* aren't necessarily as weighty when the question isn't whether to let a litigant *sue* a state legislator, but instead whether to let that litigant introduce *evidence* of legislative acts"). The holding in *United States v. Gillock* lends support to this conclusion. *See* 445 U.S. 360, 373 (1980) (assessing some "minimal impact" on state legislators' function and decision-making when the privilege yields to allow certain evidence of legislative activity into the record).

[197] *See* Owen v. City of Independence, 445 U.S. 622, 655–56 (1980) (analyzing the effect of the threat of personal liability on government officials). In 1980, in *Owen v. City of Independence*, the Supreme Court considered the justifications for qualified immunity and reasoned that application of the immunity is more important in cases where an individual official faces personal liability because the threat of personal liability creates greater distraction for government officers:

> At the heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed.

Id. (footnote omitted). In *Bethune-Hill v. Virginia State Board of Elections*, a redistricting case, the District Court for the Eastern District of Virginia picked up on this language from *Owen*. Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 334–35 (E.D. Va. 2015). Reasoning from this language in *Owen*, the court explained that there is minimal threat to legislative effectiveness and independence when a legislator does not face individual liability. *Id.* at 335. According to the court, in cases where a legislator faces no such liability and merely asserts the evidentiary protections of the privilege to avoid turning over evidence, "[t]he only interest advanced by the legislative privilege . . . is the legislator's interest in being free from compulsory process." *Id.* (citing EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 177 (4th Cir. 2011)); *see also supra* notes 153–167 and accompanying text (discussing cases where courts have recognized *Tenney*'s holding as confined to cases involving legislative immunity).

[198] *See infra* notes 198–200 and accompanying text.

[199] Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1353–54 (11th Cir. 2023) (Pryor, J., dissenting) (highlighting that holding the legislative privilege to be absolute cuts off third-party discovery, which can be a source of legislative intent helpful in meeting the *Village of Arlington Heights v. Metropolitan Housing Development Corp.* inquiry).

ment Corp.—without trampling the important functions that the privilege—and more importantly, immunity—often serve.[200]

Finally, congressional action may make for a more promising solution than some alternative proposals to address the issues posed by the privilege.[201] First, reassignment of some legislative functions (like redistricting) to non-legislative commissions might help address certain contexts where the privilege poses issues most frequently.[202] But such reassignment cannot address all of the contexts where the privilege creates problems for civil rights plaintiffs, and the likelihood of its implementation may be unrealistic: legislators are unlikely to voluntarily give up their redistricting power, especially when those legislators are employing redistricting as a means of increasing their chances of winning election.[203] Second, judicial solutions, although arguably more promising, come with another set of complications.[204] Lower courts are presently in disarray over how to interpret and apply the privilege in these contexts.[205] Supreme Court guidance could of course help clarify, but there is good reason to doubt that the present Court would resolve the dispute among lower courts in a way favorable to litigants alleging discrimination, especially in the face of congressional silence in this area.[206] And even if the Court were to hold that the privilege may be qualified in

[200] *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1247–53 (Guaderrama, J., dissenting) (discussing *Arlington Heights* and the Court's approach in that case to the requirement that plaintiffs prove discriminatory intent); Asta, *supra* note 31, at 260–61 (calling it a "near-Herculean feat" to prove intent in the redistricting context without access to evidence of legislative motive).

[201] *See supra* notes 168–175 and accompanying text (summarizing the proposals of researchers and scholars regarding the issues posed by legislative privilege).

[202] *See* Lamberson, *supra* note 172, at 220–23 (explaining how the use of independent redistricting commissions, which would remove legislators from the process of redistricting, could provide a work-around to the privilege).

[203] *See id.* at 223–24 (acknowledging hurdles to establishing independent redistricting commissions); *see, e.g.*, *Pernell*, 84 F.4th at 1345 (upholding the application of the privilege to block plaintiffs from obtaining evidence related to the passage of a Florida law banning critical race theory). *Pernell v. Florida Board of Governors of the State University* is merely one example of a suit that involved privilege issues and had nothing to do with redistricting. *See supra* notes 144–148 and accompanying text (describing the basic facts in *Pernell*).

[204] *See infra* notes 205–208 and accompanying text.

[205] *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1311–12 (Guaderrama, J., dissenting) (highlighting the vastly different outcomes that lower courts have reached when assessing the scope of state legislative privilege).

[206] *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (refusing to infer that § 1983 abrogated state legislative privilege because the language of the statute did not clearly convey that Congress intended for it to have such effect). Professor Mark Lemley has argued that the current conservative majority on the Court is choosing to advance its chosen policy preferences through decisions that withdraw power from the other coequal branches of government. *See* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113 (2022) (noting that a theme in the current Court's decisions has been the centralization of power within the Court itself, and arguing that the Court is "not only the most activist of any Court in the past century, but increasingly the locus of all legal power"). Recent decisions like *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* may signal, broadly speaking, where the Court stands on issues like race and discrimination. *See* 600 U.S. 181, 213 (2023) (holding that affirmative action programs that utilize race as a factor for admis-

certain civil cases, case-by-case analysis by lower courts could produce inconsistent results.[207] A bright line rule from Congress would avoid this risk.[208]

B. Why Use § 1983 as a Vehicle for Abrogation?

This Section argues that amending § 1983 to enact the aforementioned legislative framework would be an effective means of addressing the barrier the privilege often poses in discrimination cases.[209] As a preliminary matter, because § 1983 is the principal statute on which civil rights litigants rely when seeking to vindicate key constitutional rights, abrogation under the statute would be effective in addressing a large portion of cases where plaintiffs encounter privilege difficulties.[210]

Additionally, abrogation pursuant to § 1983, especially in light of its history and purposes, may help to address some of the central counterarguments and concerns with this sort of abrogation of the privilege.[211] First, critics may worry that an abrogation approach will work too great a harm to the legislative-effectiveness purpose of the privilege.[212] But refocusing on the driving

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sion violate the Equal Protection Clause). Furthermore, it seems that the current Court might be inclined to uphold the extension of certain kinds of immunity that it perceives as longstanding or rooted in the Constitution. *See* Trump v. United States, 603 U.S. 593, 609 (2024) (concluding that the President is absolutely immune from criminal prosecution for any conduct falling within the realm of presidential authority as outlined in the Constitution).

[207] *See supra* notes 162–163 and accompanying text (describing the multi-factor balancing test that some courts have applied, which requires intensive case-by-case analysis of the facts and evidence at play within a given case).

[208] *See supra* note 186 and accompanying text (proposing basic framework for congressional abrogation of the privilege). Since *Gillock*, courts have wrestled with the question of whether enforcement of the federal criminal law is the only context in which the privilege may be qualified, or whether there are other important federal interests to which the privilege must yield. *See League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1312 (Guaderrama, J., dissenting) (questioning what characteristics a case must involve in order for a court to conclude that the privilege should not provide evidentiary or testimonial protections to a legislator). Abrogation of the privilege in discrimination cases brought under § 1983 would essentially codify a clear-cut response to that question: eradicating discrimination by state actors, particularly those serving in a legislative capacity, is one such important federal interest to which the privilege yields. *See* United States v. Gillock, 445 U.S. 360, 373 (1980) (explaining that the principles of comity underlying the legislative privilege give way when "important federal interests" are involved, but failing to provide further guidance on the kinds of federal interests that could rise to such a level of importance).

[209] *See infra* notes 210–224 and accompanying text.

[210] *See supra* notes 82–83 and accompanying text (explaining the prevalence and importance of § 1983).

[211] *See infra* notes 212–224 and accompanying text.

[212] *See* Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1345 (11th Cir. 2023) (explaining that allowing the privilege to yield in every case that requires proof of legislative intent would render the privilege valueless); Huefner, *supra* note 186, at 227–33 (explaining the "good government" purpose of the legislative privilege, which is to protect the general public by ensuring that legislators can speak and act freely in the course of their legislative duties). To reiterate, the legislative-effectiveness rationale is the central justification for the privilege in the state context because the

force behind the legislative-effectiveness justification shows that this concern may be misplaced in the context of the kinds of discrimination claims historically litigated under § 1983.[213] The rationale generally works something like this: the privilege must apply because it safeguards legislative effectiveness, and legislative effectiveness *benefits the public interest*.[214] Thus, the need for effectiveness is not for the legislators' own sake, but rather for the sake of their constituents—the general public.[215] But it is much harder to see how the general public benefits when the privilege applies to shield crucial evidence of discriminatory intent by a legislature—effectively blocking plaintiffs from assessing whether their own representatives have acted unconstitutionally.[216] Indeed, the privilege can hardly be said to be operating in the public interest when it prevents plaintiffs from making that assessment.[217]

Finally, to the extent that there exists concern about whether abrogation of the privilege may represent too great an intrusion by the federal government into the state legislative process, § 1983's purposes and history offer a response.[218] The statute's background illustrates that its core function and animating philosophy is to remedy and deter the unconstitutional activity of state actors.[219] Its initial goal, for example, was to curb the lawlessness of state offi-

separation of powers rationale that undergirds the federal legislative privilege is not applicable. *See supra* note 62 and accompanying text.

[213] *See infra* notes 214–217 and accompanying text.

[214] *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 373–74 (1951) (explaining that the privilege applies "not with the intention of protecting [legislators] against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal" (quoting Coffin v. Coffin, 4 Mass. (1 Tyng) 1, 27 (1808))).

[215] *See* Huefner, *supra* note 186, at 229 (noting that reaching back to its English origins, "the legislative privilege has been defended not in terms of protecting the representatives themselves, but of advancing the interests of the public at large"); Asta, *supra* note 31, at 264 (explaining that legislative privilege exists so that lawmakers have more time to focus on meeting with constituents and passing legislation that will benefit the communities they serve).

[216] *See* League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1236–37 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (arguing that if the legislative privilege never yields in discrimination cases, it is not clear how plaintiffs and courts will be able to detect and eliminate racial gerrymandering, and further, that legislators may take steps to hide evidence of discriminatory intent if they know they can later successfully invoke the privilege), *appeal filed*, No. 24-50128 (5th Cir. Feb. 27, 2024).

[217] *See id.* at 1311 (explaining that upholding an absolute legislative privilege in discrimination cases may "prevent litigants from vindicating the statutory and constitutional rights that form the backbone of our democracy"); Davies, *supra* note 31, at 1118 (arguing that the federal government's interest in protecting civil rights outweighs the benefits that legislative immunity provides to legislators and the legislative process, and underscoring the negative impact that legislative immunity has in context of § 1983 litigation); Asta, *supra* note 31, at 264 (arguing that legislative privilege fails to serve the public interest when it operates to shield evidence of illegal redistricting, and that the government's interest in the privilege is consequently low in redistricting cases).

[218] *See infra* notes 219–224 and accompanying text.

[219] *See supra* notes 84–103 and accompanying text.

cials in the South after the Civil War in order to prevent racial violence and overt violations of the Reconstruction Amendments.[220] And since the statute's original enactment, its aim has remained accountability for state officials.[221] It has consistently served that purpose, and has over the years helped to vindicate some of the most important constitutional rights—rights which are now often at stake in litigation where state legislators are invoking the privilege.[222] Federal oversight, then, is in some sense precisely what § 1983 was designed to effect—and abrogation of the privilege helps facilitate that critical function.[223] Thus, executing abrogation through § 1983 is best viewed not as a needless intrusion, but rather as a tool to further the statute's core purposes of preventing unconstitutional activity by state actors and securing accountability for state officials who violate the Constitution.[224]

CONCLUSION

As the country continues to wrestle with difficult questions about immunity—from ending qualified immunity for police officers to the scope of presidential immunity—Congress should consider, too, the serious roadblock that legislative privilege poses for civil rights litigants seeking to hold their state lawmakers accountable for discrimination. As long as state legislators are able to invoke the privilege to avoid subpoenas and other discovery requests in dis-

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[220] *See supra* notes 84–87 and accompanying text (explaining the history of § 1983, including its original enactment as part of the Ku Klux Klan Act).

[221] *See supra* notes 85–86 and accompanying text (explaining how the original goal of § 1983 was to provide a federal remedy for the violation of constitutional rights as a result of state officials' failures to abide by the Reconstruction Amendments).

[222] *See supra* note 83 and accompanying text (giving examples of landmark civil rights cases brought pursuant to § 1983).

[223] *See* Owen v. City of Independence, 445 U.S. 622, 656 (1980) (explaining that "[t]o criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'être*" and implying that some level of impact on the state legislative process is actually positive because legislators should indeed pause to consider the constitutionality of their actions before pursuing them (quoting Briffault, *supra* note 84, at 1224) (citing Johnson v. State, 447 P.2d 352, 359–60 (Cal. 1968))); *supra* notes 80–102 and accompanying text (providing an overview of § 1983).

[224] *See* Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1352–53 (11th Cir. 2023) (Pryor, J., dissenting) (highlighting that § 1983's historic use as a means to hold state officials accountable for their constitutional violations demonstrates how it has often been linked with the kinds of important federal interests to which the legislative privilege yields). Important to note is that Congress enacted § 1983 pursuant to its authority to enforce the Fourteenth Amendment. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982). The Supreme Court has recognized that Congress has considerable power to pass legislation that it deems necessary for enforcing the provisions of that amendment—even condoning legislation that interferes with the independence or immunity of the states. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); *see, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress may subject the states to suit under the Fourteenth Amendment, even if such a suit would be held unconstitutional in a different context).

crimination cases, plaintiffs will continue to encounter dead ends as they struggle to meet the requirement of proving discriminatory intent. Continued recognition of an absolute, unyielding legislative privilege therefore risks that important constitutional rights will go unprotected. Congress could solve this problem by passing legislation to abrogate the privilege where a claimant's discrimination claim hinges on proof of legislative intent. § 1983 provides a promising mechanism for introducing such legislation, given its history and its purpose of preventing abuses by state officials. Finally, legislation in this area need not be broad-ranging to be effective: by abrogating the privilege in limited cases that hinge on proof of legislative intent, Congress can ensure both greater political accountability at the state level and adherence to the anti-discrimination principles that underlie the nation's goal of equality under law.

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