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NOTE

On "Mere" Constitutional Rights: The Emerging Conflict Between State Legislative Privilege and the Fourteenth Amendment

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Abstract. Legislative privilege shields legislators from discovery on acts related to their legislative functions. While the Constitution's Speech or Debate Clause affords this privilege to federal legislators, protections for state legislators instead arise from the federal common law. The Supreme Court has long recognized that the state privilege yields to important federal interests—including the need to investigate whether a legislature violates the Equal Protection Clause of the Fourteenth Amendment by enacting a law with a discriminatory purpose. This limitation on state legislative privilege helps preserve an essential balance: safeguarding legislators from interference with their core legislative functions, while allowing litigants to preserve and promote their constitutional rights.

However, a recent slate of federal courts of appeals opinions on redistricting challenges has jeopardized this careful balance, instead touting a near absolutist interpretation of state legislative privilege. As a result, when a law is passed with a discriminatory purpose, proof of that purpose can be exceedingly difficult to uncover. This Note provides a first-of-its-kind analysis of this burgeoning crisis in constitutional law. It highlights how the recent appellate court decisions expanding legislative privilege directly conflict with longstanding Supreme Court precedent on the privilege, the purposes underlying the privilege, and the limitations placed on other governmental privileges. This Note provides the first full diagnosis of this dilemma and offers a path forward towards a more coherent doctrine.

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Introduction

> *A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.*
>
> —James Madison[1]

There is a hidden crisis at work in American civil rights law. Since the Supreme Court gutted Section 5 of the Voting Rights Act (VRA) in *Shelby County v. Holder*, states previously required to get federal "preclearance" before changing their voting laws are now free to legislate without oversight.[2] After the 2020 census, state legislators across the nation began the process of redistricting for the first time since *Shelby County*.[3] The result was a flood of litigation challenging the newly drawn districts as racially discriminatory.[4] By the end of January 2025, plaintiffs had brought such suits in twenty-eight states.[5]

But these cases are getting harder to litigate. More and more, redistricting litigation is getting trapped in district court adjudication—caught in a procedural purgatory, with discovery stalled and trial far on the horizon.[6] This delay is partly due to a rising legal theory that grants state legislatures unprecedented insulation from challenges to the constitutionality of their acts: absolute state legislative privilege.[7]

The danger of this legal theory arises, in no small part, because of its obscurity. Notably, the Supreme Court has decided only one case on state legislative privilege.[8] Although federal courts of appeals have steadily expanded the protections of state legislative privilege, these cases have largely

1. Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 71, 71 (Gaillard Hunt ed., 1910).
2. 570 U.S. 529, 534-35, 557 (2013).
3. *See* Eric McGhee, Christopher Warshaw & Michal Migurski, *How Black and Latino People Did in This Last Round of Redistricting*, WASH. POST: MONKEY CAGE (updated Oct. 7, 2022, 7:59 AM EDT), https://perma.cc/9G6P-3X38; Tierney Sneed, Shelby County *Ruling Could Make It Easier for States to Get Away with Extreme Racial Gerrymandering*, CNN: POL. (updated Sept. 9, 2021, 12:11 PM EDT), https://perma.cc/4UMQ-AUBB.
4. *See Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST., https://perma.cc/2LNB-9QEK (last updated Jan. 27, 2025).
5. *Id.*
6. Marilyn W. Thompson, *The GOP's Secret to Protecting Gerrymandered Electoral Maps? Claim Privilege.*, PROPUBLICA (Oct. 18, 2023, 6:00 AM EDT), https://perma.cc/E2C9-BKRS.
7. *See id.*
8. *See* United States v. Gillock, 445 U.S. 360 (1980).

escaped discussion and criticism.[9] Legislative privilege is a doctrine enshrined in the Constitution at the federal level[10] and in common law at the state level,[11] with origins dating back to the Glorious Revolution in England.[12] But the federal privilege has received scant attention in legal scholarship over the past few decades,[13] and the state privilege even less so.[14]

Yet the scope and strength of state legislative privilege bears heavily on the enforcement of the Fourteenth Amendment's Equal Protection Clause, particularly on claims that redistricting efforts are racially discriminatory. Proving that facially neutral legislation violates the Equal Protection Clause requires a showing of "discriminatory purpose,"[15] which in turn often necessitates discovery into the actions legislators took in preparing

9. The lack of attention to the issue is puzzling. Part of the explanation may be that the decisions we focus on below are very recent, having been decided in the last two years. *See infra* note 17. However, these cases are not the first to consider the legislative privilege of state legislators in federal courts. *See* Lee v. City of Los Angeles, 908 F.3d 1175, 1186-87 (9th Cir. 2018); Am. Trucking Ass'n v. Alviti, 14 F.4th 76, 86-89 (1st Cir. 2021); *In re* Hubbard, 803 F.3d 1298, 1307-08 (11th Cir. 2015).

10. U.S. CONST. art. I, § 6, cl. 1.

11. *Gillock*, 445 U.S. at 367 n.6, 372.

12. Kilbourn v. Thompson, 103 U.S. 168, 201-02 (1881); United States v. Johnson, 383 U.S. 169, 178 (1966).

13. We found only a few pieces of scholarship on the issue and no significant works published within the last decade. *See generally* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973) (tracing the history of the Speech or Debate Clause and arguing that the legislative privilege must be interpreted with the function of the Clause in mind); Kelly M. McGuire, Note, *Limiting the Legislative Privilege: Analyzing the Scope of the Speech or Debate Clause*, 69 WASH. & LEE L. REV. 2125 (2012) (exploring the Speech or Debate Clause's protection against documentary discovery in the federal courts of appeals); John C. Raffetto, Note, *Balancing the Legislative Shield: The Scope of the Speech or Debate Clause*, 59 CATH. U. L. REV. 883 (2010) (examining the D.C. Circuit's interpretation of the scope of the Speech or Debate Clause).

14. Again, we found only a few pieces of relevant scholarship and no pieces published after the recent string of pertinent decisions by the courts of appeals discussed at note 17 below. *See generally* 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 (2017) (proposing a framework for interpreting speech or debate clauses in state constitutions in the context of legislative redistricting litigation); Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221 (2003) (presenting a framework for state courts to utilize when interpreting speech or debate clauses in state constitutions); Christopher Asta, Note, *Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. REV. 238 (2014) (developing a framework for analyzing speech or debate privileges, including that of state legislators, and applying the framework to redistricting cases).

15. Washington v. Davis, 426 U.S. 229, 239-42 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

legislation.[16] But an absolutist (or near absolutist) understanding of state legislative privilege—as many federal courts of appeals have touted in their recent cases[17]—renders such discovery impossible. Documents related to the legislative process and testimony from the legislators are sequestered from public view and labeled privileged. These circuit court decisions have placed plaintiffs seeking to vindicate their constitutional rights through civil litigation into an intractable double bind: Plaintiffs are forced to prove discriminatory intent for their claims but are denied access to the very evidence needed to do so.[18]

This Note seeks to provide a first-of-its-kind analysis of this burgeoning legal issue. The Note adds to a sparse literature on state legislative privilege and is the first to address the most recent set of circuit court decisions on the privilege. Providing an in-depth discussion of the contours of the state legislative privilege and a novel comparison with other governmental privileges, we seek to highlight this important and critically underexamined development in Fourteenth Amendment jurisprudence.

This Note proceeds in four Parts. Part I explores the history of legislative privilege, tracing its origins in England, its basis in the U.S. Constitution, and its application to the states. The image that emerges is one of an important privilege with deep roots in American history that nonetheless has consistently been treated as limited in application to state legislators.

Part II examines the growing tension between state legislative privilege and enforcement of the Fourteenth Amendment. This analysis shows that by

16. *See, e.g.*, Veasey v. Perry, No. 13-CV-193, 2014 WL 1340077, at *2-3 (S.D. Tex. Apr. 3, 2014).

17. *See, e.g.*, *In re* N.D. Legis. Assembly, 70 F.4th 460, 463 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.); La Union Del Pueblo Entero v. Abbott (*Hughes*), 68 F.4th 228, 239-40 (5th Cir. 2023); Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1345 (11th Cir. 2023); La Union Del Pueblo Entero v. Abbott (*Bettencourt*), 93 F.4th 310, 321-23 (5th Cir. 2024). As a note, we often cite these cases together when assessing redistricting cases because they present a similar mode of analysis and are most usefully analyzed in concert. The Fifth Circuit decisions in *Hughes* and *Bettencourt*, however, do not deal directly with redistricting claims but instead regulations of the voting process. *Hughes*, 68 F.4th at 231-32; *Bettencourt*, 93 F.4th at 314.

18. *Pernell*, 84 F.4th at 1354 (Pryor, J., dissenting); League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1236 (W.D. Tex. 2023) (Guaderrama, J., dissenting). It should be noted that this double bind is in no way unique to redistricting claims, and a wide variety of litigation against state legislatures is implicated by these limits on discovery. As just one example, plaintiffs challenging state restrictions on gender-affirming care can trigger heightened scrutiny through a showing that the legislation was motivated by animus, and such claims may also be hindered by the rise of an absolutist state legislative privilege shielding legislators and third-party consultants from discovery. *See, e.g.*, Doe v. Ladapo, 737 F. Supp. 3d 1240, 1268, 1272-73 (N.D. Fla. 2024).

significantly expanding the privilege, the recent set of circuit court rulings presents a deep—and ultimately irreconcilable—conflict with the Supreme Court's Fourteenth Amendment jurisprudence.

Finally, Parts III and IV outline how these recent circuit court decisions fundamentally misinterpret state legislative privilege and offer a course for correction. The courts' mistakes are along two dimensions. First, the circuit courts have made the privilege absolute, such that it does not yield in appropriate circumstances. Second, the courts have expanded the scope of the privilege so that it shields more material from discovery. Part III focuses on how recent holdings have limited the contexts in which state legislative privilege yields to claims of constitutional violations. Part IV shows how the recent holdings have expanded the scope of the privilege, stretching it to encompass third parties involved in the legislative process. The result is an increasingly powerful privilege—one that states wield to suppress racial redistricting claims arising across the country.

The rise of legislative privilege is not the only recent effort by state legislators to insulate themselves from constitutional scrutiny.[19] But unlike these other attempted power grabs,[20] changes to the doctrine of state legislative privilege have thus far proceeded largely unchecked.[21] This area of the law is in desperate need of a course correction. Without one, enforcement of the Equal Protection Clause, and particularly challenges to racially discriminatory redistricting, will be left stunted. This Note sheds light on this oft-overlooked, though deeply impactful, area of the law.

I. An Introduction to State Legislative Privilege

The legislative privilege of *federal* legislators comes from the U.S. Constitution's Speech or Debate Clause.[22] By contrast, the legislative privilege of *state* legislators derives from the federal common law, not from the Constitution.[23] Nonetheless, while the state and federal privileges are not

19. *See, e.g.*, Ethan Herenstein & Thomas Wolf, *The 'Independent State Legislature Theory,' Explained*, BRENNAN CTR. FOR JUST., https://perma.cc/B5WD-BFHC (last updated June 27, 2023) (discussing how the independent state legislative theory aims to insulate state legislative electoral decisions from judicial or executive oversight using an expansive interpretation of the Constitution's Elections Clause and Presidential Electors Clause).

20. *See* Moore v. Harper, 143 S. Ct. 2065, 2081 (2023) (rejecting the independent state legislature theory).

21. *See In re N.D. Legis. Assembly*, 70 F.4th at 463-64; *Hughes*, 68 F.4th at 239-40; *Pernell*, 84 F.4th at 1345; *Bettencourt*, 93 F.4th at 321-22.

22. U.S. CONST. art. I, § 6, cl. 1.

23. *See* United States v. Gillock, 445 U.S. 360, 372, 374 (1980) (explaining that the Speech or Debate Clause "by its terms is confined to federal legislators" and that the limitation on

footnote continued on next page

coextensive, state legislative privilege is interpreted with an eye toward the federal privilege—specifically the federal privilege's history, purposes, and scope.[24] Thus, to understand *state* legislative privilege, one must first consider the *federal* privilege. Accordingly, this Note begins by briefly recounting the history and application of the federal legislative privilege before turning to the state privilege.

A. Federal Privilege

1. English origins

Federal legislative privilege originates from the U.S. Constitution's Speech or Debate Clause.[25] The Speech or Debate Clause, in turn, grew out of English common law, specifically from a long history of power struggles between the Crown and Parliament.[26] As the history of this struggle is comprehensively documented in the scholarly literature,[27] this Note provides only a brief synopsis.

The English Crown routinely denied Parliament the freedom of speech and debate, leaving members of Parliament liable to be harassed and imprisoned for statements made on the floor of Parliament.[28] The struggle over the degree of royal interference in Parliament began as early as the fourteenth and fifteenth centuries.[29] In 1397, the Crown condemned a member of Parliament to death as a traitor for introducing a bill to "reduce the excessive

state legislators is based in "common-law absolute immunity"); *see also* FED. R. EVID. 501 (clarifying that "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege," where the Constitution, federal statute, or Supreme Court rules do not); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 93-94 (S.D.N.Y.) (affirming the applicability of Rule 501 to state legislative privilege claims under federal law), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

24. *See Gillock*, 445 U.S. at 369-73, 374 (explaining that although Congress could "have provided that a state legislator prosecuted under federal law should be accorded the same evidentiary privileges as a Member of Congress," it did not do so, and subsequently looking to "the American experience" to determine whether state legislators can invoke the privilege).

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

26. *See* Reinstein & Silverglate, *supra* note 13, at 1120-22; CARL WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 23-32 (1921).

27. *See, e.g.*, Reinstein & Silverglate, *supra* note 13, at 1120-35; WITTKE, *supra* note 26, at 23-32.

28. Reinstein & Silverglate, *supra* note 13, at 1126-27.

29. *See id.* at 1122-24.

expenditures of the royal household."[30] While Parliament formally declared the right of free speech and debate in the sixteenth century,[31] this formal declaration was by no means the end of the struggle. To the contrary, the Tudor and Stuart monarchies harassed and imprisoned members of Parliament for speeches they made and bills they introduced, particularly where the Crown thought such actions infringed on a royal prerogative.[32] Over the following century and a half, the Crown arrested, summarily tried (or detained without trial), and locked members of Parliament in the Tower of London for such "seditious" actions.[33]

The culminating case arose in 1629, when King Charles I summarily tried and convicted three members of the House of Commons for "speeches made in the House which the king considered dangerous, libellous, and seditious."[34] The King's action was deeply unpopular, and Parliament "never forgot this unwarranted invasion of their privileges."[35] After the Glorious Revolution dethroned King James II, Parliament could finally secure speech and debate rights.[36] Accordingly, it codified protections against such acts by the Crown in the English Bill of Rights in 1689.[37] The Bill of Rights provides "[t]hat the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of parliament."[38] The privilege "was never again seriously questioned or denied"[39] and "has been recognized as an important protection of the independence and integrity of the legislature."[40]

30. WITTKE, *supra* note 26, at 23-24; Samuel Rezneck, *The Early History of the Parliamentary Declaration of Treason*, 42 ENG. HIST. REV. 497, 504 (1927). The death sentence was later annulled. WITTKE, *supra* note 26, at 24.

31. Reinstein & Silverglate, *supra* note 13, at 1123-24; WITTKE, *supra* note 26, at 22.

32. *See* Reinstein & Silverglate, *supra* note 13, at 1126-27.

33. *Id.* at 1127; WITTKE, *supra* note 26, at 25-30.

34. WITTKE, *supra* note 26, at 29-30.

35. *Id.* at 30.

36. *See* Reinstein & Silverglate, *supra* note 13, at 1129-30, 1133; United States v. Johnson, 383 U.S. 169, 178 (1966).

37. *See* Bill of Rights 1689, 1 W. & M. c. 2.

38. *Id.*

39. WITTKE, *supra* note 26, at 30.

40. *Johnson*, 383 U.S. at 178 (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 866 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 4th ed. 1873); and 2 THE WORKS OF JAMES WILSON 37-38 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)).

2. The U.S. Speech or Debate Clause

Speech and debate protections in the United States flow from the struggles of the English Parliament and are enshrined in Article I, Section 6 of the Constitution.[41] The Clause reads: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."[42]

As one pair of scholars described, "The roots of the speech or debate clause, perhaps more than those of any other constitutional prohibition, can be traced directly to historical antecedents."[43] Indeed, the Supreme Court has explained that this Clause "was approved at the Constitutional Convention without discussion and without opposition."[44] This lack of discussion was "[p]resumably because the principle [of free speech or debate] was so firmly rooted" by the time of the Founding.[45] Moreover, before the Constitution was adopted, the Articles of Confederation included the same protection.[46] And several states followed suit,[47] with three state constitutions providing parallel protections even before the United States Constitution was adopted.[48] Thus, it seems a sensible conclusion that "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation."[49]

Despite its English history, application of the Speech or Debate Clause in the United States has not always been straightforward. Perhaps because the speech or debate protections were taken as a matter of course by the Founders, the Supreme Court did not interpret the Speech or Debate Clause until close to a hundred years after the Constitution was adopted.[50] Indeed, as the Court

41. U.S. CONST. art. I, § 6, cl. 1.

42. *Id.*

43. Reinstein & Silverglate, *supra* note 13, at 1120.

44. *Johnson*, 383 U.S. at 177 (citing, for example, 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 402 (Jonathan Elliot ed., Washington, D.C. rev. ed. 1845)).

45. Reinstein & Silverglate, *supra* note 13, at 1136.

46. ARTICLES OF CONFEDERATION of 1781, art. V, para. 5.

47. *See* Tenney v. Brandhove, 341 U.S. 367, 375 & n.5 (1951) ("As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege.").

48. *Id.* at 373.

49. *Id.* at 372.

50. *See* Kilbourn v. Thompson, 103 U.S. 168 (1881).

recognized, its ruling in *Kilbourn v. Thompson* was the first time *any* federal court considered the Clause.[51]

Once the Supreme Court began interpreting the Clause, however, it made clear that courts should not look solely to the English protections.[52] The Court explained that the Clause "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system."[53] Three characteristics of the resulting speech or debate jurisprudence are notable: (1) courts have interpreted the clause based on the purpose of the speech or debate protections; (2) the clause provides two distinct kinds of protections—an immunity and a privilege; and (3) the clause extends to only legislative acts. We discuss these in turn.

a. Purpose

The Supreme Court has not interpreted the Speech or Debate Clause literally, but rather has taken a functional approach based on the purposes of the Clause.[54] In *Kilbourn*, the Court declared that the Clause is to be construed "liberally" rather than strictly.[55] The Framers similarly recognized the functional nature of the protection, with James Madison writing that "[i]n the application of this privilege to emerging cases . . . . the reason and necessity of the privilege must be the guide."[56]

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51. *Id.* at 204. *Kilbourn* gave "much weight" to a Massachusetts state court case, *Coffin v. Coffin*, that applied a state constitutional speech or debate clause to state legislators. *Kilbourn*, 103 U.S. at 203-04 (citing *Coffin*, 4 Mass. (3 Tyng) 1(1808)); *see also Coffin*, 4 Mass. (3 Tyng.) at 6-7, 27.

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

53. *Id.*

54. *See Kilbourn*, 103 U.S. at 203-04.

55. *Id.* at 203 (quoting *Coffin*, 4 Mass. (3 Tyng.) at 27). The *Kilbourn* Court relied heavily on the *Coffin* ruling, *see id.* at 203-04, which interpreted the Speech or Debate Clause in the Massachusetts Constitution, *Coffin*, 4 Mass. at 27. The *Kilbourn* Court quoted *Coffin* for the proposition that

> the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office.

Kilbourn, 103 U.S. at 203 (quoting *Coffin*, 4 Mass. at 27); *see also* Hutchinson v. Proxmire, 443 U.S. 111, 124 (1979) (explaining that "the Court has given the [Speech or Debate] Clause a practical rather than a strictly literal reading").

56. Letter from James Madison to Philip Doddridge (June 6, 1832), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON: FOURTH PRESIDENT OF THE UNITED STATES 221, 221 (Philadelphia, J. B. Lippincott & Co. 1865).

The Court has identified two such purposes.[57] First, and most important, is the Clause's *separation of powers purpose*[58]—the need to protect the legislature from attacks by coequal branches of government.[59] In the United States, the Clause protects against both a domineering executive and a potentially "hostile judiciary."[60] The Clause thus serves a central function in the federal government's system of checks and balances.[61]

Second, the Clause serves a *legislative independence purpose*.[62] The Court has recognized that lawsuits against legislators "divert their time, energy, and attention from their legislative tasks" and thus can "delay and disrupt the legislative function."[63] By precluding excessive litigation, the Speech or Debate Clause limits infringement on legislators' time, ensuring they can undertake their legislative duties.

b. Protections

In light of these purposes, the Supreme Court has interpreted the Speech or Debate Clause to provide two kinds of protections for members of Congress: an immunity from suit for legislative acts,[64] and a privilege against the introduction or discovery of evidence pertaining to "the legislative performance itself."[65] These two protections, though conceptually distinct, are not always clearly delineated—even by the Court.[66] In applying the protections to state legislators, however, the Court has distinguished the immunity and privilege, and it has applied them differently. We discuss each of these protections in turn, although the privilege is particularly central to this Note.

57. United States v. Gillock, 445 U.S. 360, 369 (1980) ("Two interrelated rationales underlie the Speech or Debate Clause . . . .").

58. *See* United States v. Johnson, 383 U.S. 169, 182 (1966) ("There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum . . . is the predominate thrust of the Speech or Debate Clause."); *id.* at 181 (noting the primary purpose of the Clause is to "prevent intimidation by the executive and accountability before a possibly hostile judiciary").

59. Gravel v. United States, 408 U.S. 606, 616 (1972).

60. *Johnson*, 383 U.S. at 181; *see also* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975).

61. *Gillock*, 445 U.S. at 369.

62. *Id.* at 369, 372-73.

63. *Eastland*, 421 U.S. at 503.

64. *Johnson*, 383 U.S. at 184-85; *see also* Asta, *supra* note 14, at 244 ("One function of the [Speech or Debate Clause] is to protect members of Congress from being criminally prosecuted or sued for civil damages by shielding legislators from having to defend themselves at trial for their legislative acts.").

65. United States v. Brewster, 408 U.S. 501, 527-28 (1972).

66. *See* Asta, *supra* note 14, at 244-45 (explaining the confusion sown by early Supreme Court decisions on the distinction between legislative immunity and privilege).

The first kind of protection is an immunity from liability for "legislative acts."[67] The Court first discussed the immunity from criminal liability in 1966 in *United States v. Johnson*,[68] the second Supreme Court case interpreting the Clause.[69] Johnson was a former member of Congress indicted for conspiracy to defraud the United States, among other related charges.[70] Prosecutors alleged that Johnson agreed to give a speech in Congress in return for payments masked as campaign contributions and "legal fees."[71] The case went to trial, and federal prosecutors relied heavily on the congressional speech.[72] Johnson was convicted, but the Fourth Circuit "set aside the conviction on the conspiracy count . . . . [and] ordered a new trial on the other counts."[73] On appeal, the Supreme Court affirmed the decision, explaining that the Government improperly prosecuted Johnson for an action protected by the Speech or Debate Clause.[74] Where even the "indictment itself focused with particularity upon motives underlying the making of the speech and upon its contents," the conspiracy conviction could not stand.[75]

The immunity also protects federal legislators from civil liability for their legislative acts.[76] Indeed, *Kilbourn* itself concerned a civil suit against legislators.[77] Kilbourn, a private citizen, was imprisoned after a committee of the House of Representatives voted to hold him in contempt for refusing to testify in Congress.[78] Kilbourn sued the members of the committee, arguing that the House did not have the power to hold him in contempt and that the

67. *See Johnson*, 383 U.S. at 184-85. What counts as a legislative act is discussed in Part IV.A below.

68. But the Court emphasized that its holding was limited to cases on those facts. *Johnson*, 383 U.S. at 185 ("We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.").

69. The Court also commented on legislative privilege in the 1950s. *See* Tenney v. Brandhove, 341 U.S. 367, 369-79 (1951). However, since then, the Court has clarified that *Tenney* was not an interpretation of the Speech or Debate Clause but rather of a federal common law protection provided to state legislators. United States v. Gillock, 445 U.S. 360, 372 n.10 (1980). In *Tenney*, which will be discussed further in Part I.B below, the Court held that legislators were immune from civil liability for legitimate legislative activity and that this common law immunity was not displaced by Section 1983. 341 U.S. at 376-77.

70. *Johnson*, 383 U.S. at 170-71.

71. *Id.* at 171-72.

72. *Id.* at 173-76.

73. *Id.* at 171.

74. *Id.* at 184-86.

75. *Id.* at 184.

76. Kilbourn v. Thompson, 103 U.S. 168, 201 (1881).

77. *Id.* at 200-01.

78. *Id.* at 196.

committee members were thus responsible for his false imprisonment.[79] The Court agreed that the House did not have such a power, and it dismissed the charges against Kilbourn.[80] Nonetheless, the Court held that the legislators were not liable for the imprisonment and dismissed them from the case.[81] The Court has reaffirmed the extension of the immunity to civil contexts several times since.[82]

When applicable, the general immunity provided by the Speech or Debate Clause is absolute—it cannot be overcome by the interests of the parties.[83] The Court has explained that "[i]f the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it."[84]

Legislative immunity is the heart of the Speech or Debate Clause.[85] The protections of Parliament were first developed to shield members from personal liability arising from their statements against the Crown.[86] And both core rationales for the privilege—separation of powers and ensuring that legislators can attend to official tasks uninhibited by distractions—appear particularly acute when dealing with questions of liability.[87]

While immunity is central, it is not the only protection the Clause provides. Federal legislators also have a *privilege* protecting them in criminal and civil suits.[88] Although the Court has never expressly delineated this

79. *Id.* at 181.

80. *Id.* at 196.

81. *Id.* at 205. The Court allowed the action to proceed against a non-legislator. *Id.*

82. *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502-03 (1975) (explaining that "when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch").

83. Doe v. McMillan, 412 U.S. 306, 324 (1973); *Eastland*, 421 U.S. at 503.

84. *Eastland*, 421 U.S. at 508-09.

85. *See* United States v. Johnson, 383 U.S. 169, 182 (1966) (noting that "the instigation of criminal charges against critical or disfavored legislators" is "the predominate thrust of the Speech or Debate Clause"). *But see* Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 418 (D.C. Cir. 1995) ("Based on the text of the Constitution, it would seem that the immunity from suit derives from the testimonial privilege, not the other way around.").

86. *Kilbourn*, 103 U.S. at 201-02.

87. Cases of liability are especially concerning for the goals of the privilege for two reasons. First, being a named party to a case is highly time-consuming and thus is particularly likely to distract legislators from other official tasks. Second, the ability of the coequal branches to instigate suit against disfavored legislators is recognized as the "predominant thrust of the Speech or Debate Clause." *Johnson*, 383 U.S. at 182.

88. United States v. Brewster, 408 U.S. 501, 525 (1972).

privilege, lower courts have suggested it can be divided into two types of protections: an evidentiary privilege and a testimonial privilege.[89] The evidentiary privilege prevents evidence of legislative acts from being introduced against legislators in court.[90] Even where a legislative act is not the subject of suit, evidence of legislative acts cannot be introduced.[91] The testimonial privilege, on the other hand, protects legislators from having to answer questions about legislative acts.[92] Thus, in *Gravel v. United States*, the Supreme Court held that a legislator could not be questioned about legislative acts in front of a grand jury because the legislator "may not be made to answer—either in terms of questions or in terms of defending himself from prosecution" for legislative acts.[93] Both kinds of privilege can be implicated in a single case, since presumably when litigants wish to elicit discovery regarding legislative acts, they also wish to introduce the discoveries into evidence.

c. Scope

Finally, the Speech or Debate Clause's protections extend only to "legislative acts."[94] In *Gravel*, a case about the leak of a top secret Department of Defense study of the United States' involvement in the Vietnam War (the "Pentagon Papers"), Senator Mike Gravel sought to introduce a copy of the Papers into the Congressional Record and have them reprinted by a private publisher.[95] The Court found that the Speech or Debate Clause protected the publication in the Congressional Record but not by the private publisher, since private publication is not a legislative act.[96] The Court also cautioned against an overly broad reading of legislative acts, emphasizing that matters beyond "speech or debate in either House" can only receive protection if they

89. *See* TODD GARVEY, CONG. RSCH. SERV., NO. R45043, UNDERSTANDING THE SPEECH OR DEBATE CLAUSE 4 (rev. 2017), https://perma.cc/8ZYZ-DSDG.

90. *See* United States v. Helstoski, 442 U.S. 477, 487 (1979).

91. *Id.* at 487, 490 (stating there is "no doubt that evidence of a legislative act of a Member may not be introduced by the Government"); *see also Brewster*, 408 U.S. at 527-28 (explaining that "evidence of acts protected by the Clause is inadmissible").

92. The Supreme Court has never considered whether the testimonial privilege protects federal legislators from discovery of documentary evidence. The circuits that have considered the issue disagree on whether such a protection exists. *Compare* United States v. Renzi, 651 F.3d 1012, 1039 (9th Cir. 2011) (holding that there is no protection from discovery of documentary evidence), *with* United States v. Rayburn House Off. Bldg., 497 F.3d 654, 655-56 (D.C. Cir. 2007) (holding that documentary evidence is protected from discovery).

93. 408 U.S. 606, 616 (1972).

94. *Id.* at 626.

95. *Id.* at 608-10.

96. *Id.* at 616, 625-26.

constitute "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings."[97] That is, the protection should be afforded "only when necessary to prevent indirect impairment of [legislative] deliberations."[98] In *United States v. Brewster*, the Court clarified that acts that are "political in nature rather than legislative" receive no protection.[99] Federal legislators are not "super-citizens," completely immune from criminal and civil responsibility for their non-legislative actions.[100]

B. State Legislative Privilege and Immunity.

While the Supreme Court has addressed the Speech or Debate protections for federal legislators many times, the protections for state legislators in federal courts have received scant treatment.[101] Indeed, the Supreme Court has only dealt with the state protections on two occasions: once dealing with immunity,[102] and once with privilege.[103]

In the first case addressing state legislative protections, *Tenney v. Brandhove*, the Court found that state legislators were entitled to absolute legislative immunity akin to that provided to federal legislators.[104] *Tenney* came at the height of McCarthyism in 1951, with the plaintiff, William Brandhove, suing state legislators on the California Senate Fact-Finding Committee on Un-American Activities (the "Tenney Committee").[105] Brandhove claimed the state legislators violated his civil rights by prosecuting him for refusing to give testimony before them.[106] The Supreme Court found

97. *Id.* at 625; *see also* Doe v. McMillan, 412 U.S. 306, 313 (1973) ("Our cases make perfectly apparent . . . that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause.").

98. *Gravel*, 408 U.S. at 625 (quoting United States v. Doe, 455 F.2d 753, 760 (1st Cir. 1972)).

99. 408 U.S. 501, 512 (1972). *Brewster* also rejected the notion that *Kilbourn* and *Johnson* established that "everything that 'related' to the office of a Member was shielded by the Clause" and instead concluded that "only acts generally done in the course of the process of enacting legislation were protected." *Id.* at 513-14.

100. *Id.* at 516.

101. The Court has only considered two cases that directly addressed the speech or debate protections due to state legislators. Tenney v. Brandhove, 341 U.S. 367, 369, 376-77 (1951); United States v. Gillock, 445 U.S. 360, 373 (1980). The Court has also considered only two cases that directly addressed the speech or debate protections due to regional or municipal legislators. Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 402-06 (1979); Bogan v. Scott-Harris, 523 U.S. 44, 53-54 (1998).

102. *Tenney*, 341 U.S. at 369, 376-77.

103. *Gillock*, 445 U.S. at 373.

104. 341 U.S. at 369, 376-77.

105. *Id.* at 369.

106. *Id.* at 369-71.

that the state legislators were immune from liability, pointing to legislative immunity's roots in English and early American history and the legislative nature of the contested acts.[107] *Tenney* thus extended an absolute legislative immunity from civil suit to state legislators.[108]

But the Supreme Court did not replicate *Tenney*'s extension of absolute legislative immunity in the case of state legislative privilege. Instead, in *United States v. Gillock*, the only Supreme Court case on state legislative privilege, the Court held that federal interests could override state legislators' common-law privilege.[109] *Gillock* concerned the prosecution of a Tennessee senator, Edgar Gillock, who allegedly accepted payment for certain legislative acts and favors.[110] The federal government indicted Gillock for bribery and racketeering, and at trial Gillock moved to suppress evidence relating to his legislative activities under a claim of privilege.[111] The Supreme Court rejected Gillock's claim that state legislative privilege took priority over his prosecution, explaining that "although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields."[112] Thus, the evidence against Gillock could be introduced.[113]

The *Gillock* Court pointed to several justifications for holding that state legislative privilege was qualified rather than absolute. First, the Court explained that the state privilege is based in common law rather than the federal Constitution.[114] While the Federal Speech or Debate Clause provides important limits on federal prosecutions, the Clause is "by its terms . . . confined to federal legislators."[115]

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107. *Id.* at 372-77; *see also id.* at 379 (Black, J., concurring) ("This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities."). The Court also concluded that the Civil Rights Act of 1871 had not overridden state legislative immunity. *Id.* at 376 (majority opinion).

108. *Gillock*, 445 U.S. at 372.

109. *Id.* at 373.

110. *Id.* at 362.

111. *Id.*

112. *Id.* at 373.

113. *Id.* at 366, 374.

114. *Id.* at 367-68, 372 n.10 (clarifying that despite the heavy reliance on the Speech or Debate Clause in the *Tenney* ruling, the state legislature's protections arose out of federal common law); *see also* Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 732 (1980) ("We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts . . . .").

115. *Gillock*, 445 U.S. at 374; *see also* Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *5 (N.D. Ill. Oct. 12, 2011); Fla. Ass'n of

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Second, the Court noted that one of the core rationales justifying the absolute federal protection, protecting the separation of powers, did not support an absolute state privilege.[116] The Speech or Debate Clause aims "to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch."[117] But the same concerns do not extend to the states, where the "struggles for power" that had inspired the Clause "as a restraint on the Federal Executive to protect federal legislators" are absent.[118] Thus, the core rationale for creating an absolute privilege is obviated.[119]

Third, the Court argued that while principles of federalism and comity may justify a state privilege, these interests were less persuasive than those implicated in the federal privilege: "[F]ederal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch."[120] Similarly, while the Founders drew from the English Parliament's fight for independence from the Crown to justify a far-reaching federal privilege,[121] the United States' federal-state divide has "no counterpart in England."[122] Accordingly, governmental privileges ultimately have to be "interpreted in light of the American experience."[123]

Finally, the Court found that the Supremacy Clause provides a limit on when state interests could prevail over federal interests, be they constitutional or statutory.[124] Dating back to at least *McCulloch v. Maryland*, the Supreme Court has consistently held that "States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress."[125] The Court has roundly rejected past attempts to assert

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Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs., 164 F.R.D. 257, 266 (N.D. Fla. 1995).

116. *See Gillock*, 445 U.S. at 370; United States v. Johnson, 383 U.S. 169, 179-81 (1966); Gravel v. United States, 408 U.S. 606, 616, 618 (1972).

117. *Gillock*, 445 U.S. at 369.

118. *Id.* at 370. *But see* Huefner, *supra* note 14, at 304 (calling into question the *Gillock* Court's conclusion that the privilege is not an imperative of federalism); Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1827 (1994) (same).

119. *See Johnson*, 383 U.S. at 180-81; *Gravel*, 408 U.S. at 616.

120. *Gillock*, 445 U.S. at 370; *see also* Clinton v. Jones, 520 U.S. 681, 691 (1997) (noting that the rationales behind government immunity in the state context are rooted in federalism and comity, as opposed to the separation of powers interests at the heart of federal immunity doctrine).

121. *See Johnson*, 383 U.S. at 178.

122. *Gillock*, 445 U.S. at 369.

123. *Id.*

124. *Id.* at 370.

125. 17 U.S. (4 Wheat.) 316, 436 (1819).

state power over federal prerogatives as "extreme position[s]" which, if endorsed, would render the Constitution a set of "impotent phrases."[126] The *Gillock* Court continued in the tradition of upholding federal supremacy.[127] The Court found that federal power over the states is nowhere so great as the tyranny from which Parliament sought to shield itself in first creating the privilege.[128] But it is also not so weak as to yield to a state's claims of privilege: "[I]n those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power."[129] Thus, the state legislative privilege is narrower and weaker than its federal counterpart.

II. The Problem: The Discriminatory Intent Double Bind

Both the Court and commentators have long recognized the drawbacks of providing an immunity and privilege to legislators. As the Court has written, the Speech or Debate Clause "has enabled reckless men to slander and even destroy others with impunity."[130] Indeed, upon codification of speech or debate protections in England, Parliament began to abuse the privilege.[131] No doubt the Framers "were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards."[132] In creating a state legislative privilege, the Supreme Court has sought a balance—providing the protections necessary for a functioning state legislature, while making clear that the legislative privilege is only qualified.[133]

In recent years, however, a growing number of courts have embraced a theory of state legislative privilege that impedes not only suits against individual legislators but also inquiries into the constitutionality of legislation

126. Sterling v. Constantin, 287 U.S. 378, 397-98 (1932).

127. *See* 445 U.S. at 373. Notably, even in the federal context, the Speech or Debate Clause has not been found to preclude judicial review. *See* Powell v. McCormack, 395 U.S. 486, 503, 505-06 (1969) (writing that "[l]egislative immunity does not, of course, bar all judicial review of legislative acts," and emphasizing that legislative proceedings must be "in conformity with the Constitution" (quoting *Kilbourn*, 103 U.S. 168, 199 (1881))).

128. *Gillock*, 445 U.S. at 370.

129. *Id.* The Court also noted that when Congress was assessing a proposed addition to the Federal Rules of Evidence that would have protected evidentiary privileges, the draft listed out "nine specifically enumerated privileges," but none of the drafting bodies "saw fit" to include a protection for state legislative privilege, which suggested "the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *Id.* at 367-68.

130. United States v. Brewster, 408 U.S. 501, 516 (1972).

131. *Id.* at 517.

132. *Id.*

133. *Gillock*, 445 U.S. at 373.

itself. This creates a double bind for litigants, wherein they are barred from accessing the very evidence they need to win their claims. In this Part, we explain this tension in the doctrine of state legislative privilege: the ability of an overly expansive privilege to interfere with the vindication of constitutional rights, particularly rights guaranteed by the Fourteenth Amendment. We first briefly explain how the doctrine of state legislative privilege has expanded in recent years, making discovery into legislative acts exceedingly difficult. Then, we turn our attention to the Fourteenth Amendment, with a focus on the requirement of proving intentional discrimination in the context of voting rights litigation. Ultimately, as we show, without discovery into legislative motive, plaintiffs are largely precluded from vindicating their Fourteenth Amendment rights.

A. Recent Circuit Court Decisions Expanding State Legislative Privilege.

In recent years, the Fifth, Eighth, and Eleventh Circuits have issued rulings making it increasingly difficult for litigants to obtain discovery from state legislators.[134] This pattern has held even where the legislators are not named as parties to the suit,[135] and has been particularly present in voting rights cases.[136] Although this is not the first time that circuit courts have considered the state legislative privilege,[137] there has been a recent increase in cases considering the privilege and stretching the doctrine beyond its justifiable limits.[138] The holdings of these cases, explored in more detail in Part III, elucidate the double bind litigants find themselves in when pursuing Fourteenth Amendment claims.

Two recent holdings from the Fifth Circuit have greatly expanded the scope of the state legislative privilege and significantly limited the contexts where the privilege yields.[139] In the first case, *Hughes*, the United States and

134. La Union Del Pueblo Entero v. Abbott (*Hughes*), 68 F.4th 228, 231 (5th Cir. 2023); La Union Del Pueblo Entero v. Abbott (*Bettencourt*), 93 F.4th 310, 314 (5th Cir. 2024); *In re* N.D. Legis. Assembly, 70 F.4th 460, 464 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.); Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1341 (11th Cir. 2023).

135. *See, e.g.*, *In re N.D. Legis. Assembly*, 70 F.4th at 462, 464; *Hughes*, 68 F.4th at 232; *Pernell*, 84 F.4th at 1342; *Bettencourt*, 93 F.4th at 313-14.

136. *See, e.g.*, *In re N.D. Legis. Assembly*, 70 F.4th at 462; *Hughes*, 68 F.4th at 231-32; *Bettencourt*, 93 F.4th at 314.

137. *See, e.g.*, Lee v. City of Los Angeles, 908 F.3d 1175, 1186-87 (9th Cir. 2018); Am. Trucking Ass'n v. Alviti, 14 F.4th 76, 86-89 (1st Cir. 2021); *In re* Hubbard, 803 F.3d 1298, 1307-08 (11th Cir. 2015).

138. *See In re N.D. Legis. Assembly*, 70 F.4th at 464-65; *Hughes*, 68 F.4th at 236-38; *Pernell*, 84 F.4th at 1344-45; *Bettencourt*, 93 F.4th at 323-25.

139. *See Hughes*, 68 F.4th at 236-38; *Bettencourt*, 93 F.4th at 323-25.

private plaintiffs brought suit alleging that changes to the Texas Election Code were racially discriminatory and thus violated the U.S. Constitution and the VRA.[140] The private plaintiffs sought discovery of documents from non-party state legislators who had been instrumental in revising the code.[141] The Fifth Circuit denied discovery, holding that the materials sought were privileged and that the privilege does not yield "even when constitutional rights are at stake."[142] In the second case, *Bettencourt*, plaintiffs sought discovery from defendant-intervenor, the Harris County Republican Party, for documents and communications regarding the same Texas election law.[143] The Fifth Circuit doubled down on its expansion of the legislative privilege, denying the discovery requests and emphasizing that a "mere" constitutional claim cannot overcome the privilege.[144]

The Eighth Circuit took a similarly extreme position.[145] In a case that the Supreme Court has since vacated as moot,[146] *In re North Dakota Legislative Assembly*, the Eighth Circuit barred requests for documentary discovery and testimony in redistricting litigation brought under Section 2 of the VRA.[147] Referring to the state legislative privilege as "absolute," the court held that the VRA provided no exception.[148]

Finally, in *Pernell v. Florida Board of Governors of the State University*, the Eleventh Circuit held that the state legislative privilege is unqualified in cases brought under Section 1983, the civil rights statute used to litigate many constitutional claims.[149] The court rejected the argument that the privilege gives way "when the claim depends on proof of legislative intent."[150]

140. 68 F.4th at 231-32.

141. *Id.* at 232.

142. *Id.* at 236, 238.

143. 93 F.4th at 313-14.

144. *Id.* at 324; *see also id.* at 325 ("[Plaintiffs] merely allege[] that 'the Texas Legislature enacted S.B. 1 with an intent to discriminate against racial minorities.' [Plaintiffs'] case thus fails to implicate any important federal interest *beyond* constitutional or statutory claims of racial animus.").

145. *See In re* N.D. Legis. Assembly, 70 F.4th 460, 463-65 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.).

146. *Turtle Mountain Band of Chippewa Indians*, 144 S. Ct. at 2709.

147. *In re N.D. Legis. Assembly*, 70 F.4th at 462, 465.

148. *Id.* at 463 (quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975)).

149. 84 F.4th 1339, 1344-45 (11th Cir. 2023); *see also* 42 U.S.C. § 1983.

150. *Pernell*, 84 F.4th at 1345.

B. The Fourteenth Amendment and the Harms of Expansive Legislative Privilege.

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[151] Passed in the wake of the Civil War, the Amendment is a limit on state power, allowing the federal government to engage in litigation and pass legislation aimed at preventing discrimination by the states.[152] Private parties who believe their rights have been violated are also entitled to sue.[153]

However, proving a violation of the Fourteenth Amendment is seldom straightforward. It is well established that when a law is facially race-neutral, plaintiffs must generally show that it was passed with a "discriminatory racial purpose,"[154] meaning that the law is intentionally discriminatory.[155] Absent extreme circumstances, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[156] Thus, to prove a Fourteenth Amendment violation, a plaintiff must often look to the intentions of legislators in passing a law, which requires an inquiry into legislative motive.[157]

Unsurprisingly, proving discriminatory motive generally requires discovery beyond the public record.[158] For the most part, the days when legislators freely admitted discriminatory motives are gone. Questionable

151. U.S. CONST. amend. XIV, § 1.

152. *See* MICHAEL J. GARCIA ET AL., CONG. RSCH. SERV., NO. 112-9, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2244 (Centennial ed. 2017); *see also* City of Boerne v. Flores, 521 U.S. 507, 517-18 (1997); U.S. CONST. amend. XIV, § 5.

153. *See, e.g.*, 42 U.S.C. § 1983 (allowing for monetary damages and injunctive relief); Obergefell v. Hodges, 576 U.S. 644, 653-54 (2015) (suing for injunctive relief).

154. Washington v. Davis, 426 U.S. 229, 244-45 (1976); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

155. *See Davis*, 426 U.S. at 239.

156. *Arlington Heights*, 429 U.S. at 264-66. For one such extreme circumstance, see *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

157. *See Arlington Heights*, 429 U.S. at 265-66.

158. *See* Smith v. Town of Clarkton, 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials . . . seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."); League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1235 (W.D. Tex. 2023) (Guaderrama, J., dissenting) ("[A] legislator in this century would have to be uncommonly brazen or obtuse to broadcast in the legislative record that he and his colleagues purposefully drew an electoral map to diminish a racial group's voting power. So, if direct evidence of discriminatory intent *does* exist in any particular case, the plaintiff probably won't find it in the public record; it's probably hiding in the legislators' internal communications and actions." (footnote omitted)).

dealings are sequestered to private meetings, email chains, and quiet phone calls.[159]

The Supreme Court has recognized that discovery is "highly relevant" and will often be appropriate in Fourteenth Amendment cases.[160] Indeed, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*—decided just one term after the discriminatory purpose test was established—the Court explained that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[161] As examples of such evidence, the Court offered that "legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."[162] Accessing these materials often requires discovery.[163] Indeed, the *Arlington Heights* Court recognized that even highly disruptive discovery could be justified, explaining that in some "extraordinary instances," a legislator "might be called to the stand at trial to testify concerning the purpose of the official action,"[164] though placing a legislator on the stand is "usually to be avoided."[165] In short, far from

159. *League of United Latin Am. Citizens*, 708 F. Supp. 3d at 1235 (Guaderrama, J., dissenting). For evidence of the fact that legislators used to blatantly note their discriminatory intent, see, for example, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (writing that the delegates to Alabama's "all-white" Constitutional Convention in 1901 were "not secretive about their purpose" but rather they explicitly sought to "establish white supremacy in this State" (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, at 8 (1940) (statement of John B. Knox, President, Ala. Const. Convention)).

160. *See Arlington Heights*, 429 U.S. at 268.

161. *Id.* at 266.

162. *Id.* at 268.

163. For cases where plaintiffs have sought discovery to prove discriminatory intent, see, for example, *Plain Local School District Board of Education v. DeWine*, 464 F. Supp. 3d 915, 918 (S.D. Ohio 2020); and *League of Women Voters of Michigan v. Johnson*, No. 17-14148, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018).

164. 429 U.S. at 268 (citing Tenney v. Brandhove, 341 U.S. 367 (1951); United States v. Nixon (*Nixon I*), 418 U.S. 683, 705 (1974); and 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2371 (John T. McNaughton ed., rev. ed. 1961)).

165. *Id.* at 268 n.18 (quoting Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 420 (1971)). The Court also noted that placing a legislator on the stand to testify about the purpose of the official action "frequently will be barred by privilege." *Id.* at 268. However, it is not clear that the Court had speech or debate in mind as the relevant privilege. The Court relied in part on a treatise on rules of evidence at the common law. *See id.* (citing, for example, 8 WIGMORE, *supra* note 164. § 2371). But the portion of the treatise the Court relies on discusses the legislative privilege from *arrest*, not the privilege of speech or debate. *See* 8 WIGMORE, *supra* note 164, § 2371, at 753 ("At common law, members of parliament were exempt from attending court in any capacity, and Article I, Section 6 of the United States Constitution, privileging members of both houses from arrest, has been interpreted as retaining this parliamentary privilege."). The privilege

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barring all inquiry into the motives of state legislators, the Court has acknowledged that such inquiry is not only appropriate, but may be crucial for plaintiffs to prevail on Fourteenth Amendment claims.[166]

The *Arlington Heights* ruling is particularly relevant for voting rights cases, especially challenges to racially discriminatory redistricting. Plaintiffs often litigate redistricting cases on multiple bases, such as directly under the Equal Protection Clause of the Fourteenth Amendment and the VRA.[167] Where plaintiffs bring suits against facially neutral laws directly under the Equal Protection Clause, they must prove intentional discrimination per *Arlington Heights*.[168] Moreover, as the Court has recently explained in *Alexander v. South Carolina State Conference of the NAACP*, there is a presumption of good faith afforded to state legislators in redistricting cases that renders a plaintiff's evidentiary burden "especially stringent."[169] In *Alexander*, the Court suggested that direct evidence of discriminatory intent can be "smoked out over the course of litigation," and explained that "[p]roving racial predominance with circumstantial evidence alone is much more difficult."[170] Thus, legislators' intent is often at the center of redistricting cases. [171]

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from arrest, as explained in the same treatise, does not excuse legislators from providing evidence by means other than testifying in court. *See id.* § 2371, at 749 ("Whenever [the exemption from attendance in court] applies, the testimonial duty at large—i.e., to disclose one's evidential knowledge—nevertheless continues and may be exacted and performed by the taking of a deposition, which, on the ground of necessity, is then admissible instead of oral testimony." (citation omitted)).

166. *See Arlington Heights*, 429 U.S. at 268. Indeed, to prevail on equal protection claims, plaintiffs must prove that a law was passed with a discriminatory purpose. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239-40 (1976); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979); Shaw v. Reno, 509 U.S. 630, 640-41 (1993); Miller v. Johnson, 515 U.S. 900, 913 (1995).

167. *See, e.g.*, Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *1 (N.D. Ill. Oct. 12, 2011) (brought under both); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 93 (S.D.N.Y.) (brought under both), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); Veasey v. Perry, No. 13-CV-193, 2014 WL 1340077, at *2-3 (S.D. Tex. Apr. 3, 2014) (brought under both); S.C. State Conf. of the NAACP v. McMaster, 584 F. Supp. 3d 152, 157 (D.S.C. 2022) (brought under the Fourteenth Amendment). The Eighth Circuit recently held that there is no private right of action under the VRA. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206-07 (8th Cir. 2023). Thus, private litigants in states in the Eighth Circuit must bring these claims through other means, such as the Equal Protection Clause.

168. 429 U.S. at 264-65.

169. 144 S. Ct. 1221, 1236 (2024).

170. *Id.* at 1234.

171. *See id.*; *see also id.* at 1254, 1256 (Thomas, J., concurring in part).

Even where plaintiffs are not *required* to show discriminatory intent, such as under Section 2 of the VRA,[172] it is often in their best interest to do so. Section 2 provides plaintiffs a prophylactic remedy through which they can prove constitutional violations by showing that the law has a disproportionate impact on minority groups.[173] However, proof of intentional discrimination still substantially bolsters Section 2 claims.[174] Additionally, showing intentional discrimination allows plaintiffs to seek different and more effective remedies under Section 3 of the VRA.[175] Thus, without the ability to inquire into legislative motives through discovery, plaintiffs are significantly stifled in their ability to challenge voting regimes—both because claims brought directly under the Equal Protection Clause are rendered all but impossible, and because achieving meaningful results in VRA claims becomes substantially more difficult.

Given the current state of Fourteenth Amendment doctrine and the increasing difficulty of proving intentional discrimination in voting rights cases, plaintiffs' ability to conduct discovery into the actions of state legislators in redistricting cases is more important than ever.[176] The barriers created by the recent expansion of state legislative privilege are thus even more salient. Framed in the context of these Fourteenth Amendment requirements, the recent decisions in the Fifth, Eighth, and Eleventh Circuits present a deeply flawed and dangerous understanding of legislative privilege. As we show in Parts III and IV below, these rulings fundamentally misinterpret the state legislative privilege, stretching the common-law privilege far beyond what is justified by our constitutional structure, the history of the privilege, and the relevant Supreme Court cases on the topic. In doing so, these decisions undermine the capacity of plaintiffs to enforce the Fourteenth Amendment against state legislatures.

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172. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301).

173. *See id.*; Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (noting that "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone").

174. *See* Rodriguez v. Pataki, 280 F. Supp. 2d 89, 102 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); Danielle Lang & J. Gerald Herbert, *A Post-*Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J. F. 779, 792-94 (2018) (explaining how intentional discrimination evidence aids in Section 2 claims).

175. Voting Rights Act of 1965 § 3(c) (codified as amended at 52 U.S.C. § 10302(c)). For a discussion of the benefits of proving intentional discrimination under Section 3 of the VRA, see Lang & Herbert, note 174 above, at 789-90.

176. The loss of the pre-clearance process under Sections 4 and 5 of the VRA has also increased the importance of such litigation. *See* Shelby County v. Holder, 570 U.S. 529, 551, 557 (2013) (holding that Section 4 of the VRA is unconstitutional and thus increasing reliance on private suits for voting rights protections).

These recent circuit court decisions depart from justifiable understandings of state legislative privilege in two primary ways. First, they fail to recognize that the state legislative privilege—unlike state legislative immunity—is qualified and *yields* to important federal interests, including the protection of constitutional rights. Second, they have stretched the *scope* of state legislative privilege to encompass far more activity than can be justified. We now take these issues in turn, explaining where these courts have gone wrong and offering alternative tools for analyzing the reach of the legislative privilege.

III. A Qualified Privilege: When State Legislative Privilege Must Yield to Federal Interests

As discussed in Part I above, the Supreme Court has decided only one case on the application of legislative privilege to state legislators.[177] In that case, *United States v. Gillock*, the Court made clear that state legislative privilege is qualified.[178] Although the comity interests of states required "careful consideration," the Court held that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields."[179] This was so despite the fact that the "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function."[180] Balanced against "the legitimate interest of the Federal government," a merely "speculative benefit to the state legislative process" provided no shield.[181]

Admittedly, the Supreme Court has not offered much guidance on how lower courts should decide whether the state legislative privilege yields in a given case. Although it is clear that the privilege yields in the face of important government interests,[182] the Court has not offered any standard to determine when an interest is sufficiently important to require the privilege to give way. However, in finding a limitation to state legislative privilege, the *Gillock* Court undertook an implicit balancing test: It weighed the federal interests at stake against the intrusion of discovery on the legislative function.[183]

In this Part, we explain how lower courts have historically applied such a balancing test, how the recent circuit court decisions depart from the balancing approach, and why and how we think courts should reinstate a balancing test. Part III.A explains the most popular balancing test used by lower courts and

177. *See supra* Part I.B.

178. 445 U.S. 360, 373 (1980).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *See id.*

how the Fifth, Eighth, and Eleventh Circuits have mistakenly jettisoned this approach in favor of an absolute (or near absolute) privilege. Part III.B, in turn, discusses some of the factors we believe courts should look to in balancing whether the privilege should yield, specifically focusing on (1) the federal interests at stake in the lawsuit, (2) the potential burdens of discovery, (3) the government's participation in the litigation, and (4) a comparison with other governmental privileges. Two of the factors discussed, the burdens of discovery and the comparison with other governmental privileges, are novel suggestions not yet explicitly used by lower courts.

A. Balancing tests and recent circuit court decisions.

Taking the cue from *Gillock*, numerous lower courts have used a balancing test to determine when the state legislative privilege yields.[184] Although the courts rely on various factors in their balancing tests, many consider the interests of the government and the degree of intrusion on the legislative process.[185] One particularly popular test was first applied by the Southern District of New York in *Rodriguez v. Pataki*.[186] There, the court adopted as "[a]mong the factors" to consider:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.[187]

Many courts have found *Rodriguez* persuasive and applied a similar or identical test.[188]

In their recent decisions, the Fifth, Eighth, and Eleventh Circuits rejected the balancing approach, instead largely cabining *Gillock* to the criminal context

184. *See, e.g.*, *In re* Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987) ("*Gillock* instructs us that any [legislative] privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides."); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 100-01 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); N.Y. Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. County of Nassau, No. CV 05-2301, 2007 WL 2815810, at *2 (E.D.N.Y. Sept. 25, 2007).

185. *See* N.C. State Conf. of the NAACP v. McCrory, No. 13CV658, 2014 WL 12526799, at *4 (M.D.N.C. Nov. 20, 2014) (collecting cases).

186. 280 F. Supp. 2d at 100-01; *see infra* note 188 (collecting cases applying the *Rodriguez* factors).

187. *Rodriguez*, 280 F. Supp. 2d at 100-01 (quoting *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979)).

188. *See, e.g.*, *ACORN*, 2007 WL 2815810, at *2 (using the *Rodriguez* factors); Perez v. Perry, No. 11-CV-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (same); *see also* Benisek v. Lamone, 263 F. Supp. 3d 551, 553 (D. Md.), *aff'd*, 241 F. Supp. 3d 566 (D. Md. 2017) (using factors similar to those used in *Rodriguez*).

and adopting a near absolutist interpretation of state legislative privilege.[189] The Eleventh Circuit is perhaps the frankest about its absolutist approach. In *Pernell*, the court held that the state legislative privilege is unqualified in cases brought under Section 1983, and it rejected the notion that the privilege "give[s] way when the claim depends on proof of legislative intent."[190] Citing earlier circuit precedent, the court cabined *Gillock* to the criminal context, noting that the "Supreme Court has never expanded the *Gillock* exception beyond criminal cases."[191] Absent another decision by the Supreme Court, the Eleventh Circuit was "reluctant to adopt a manipulable balancing test . . . that links the derogation of the legislative privilege to a subjective judgment of the case's importance."[192]

The Eighth Circuit took a similar tack in *In re North Dakota Legislative Assembly*.[193] In a decision that cited *Gillock* only once,[194] the court began with the questionable claim that "[s]tate legislators enjoy a privilege under the federal common law that largely approximates the protections afforded to federal legislators under the Speech or Debate Clause of the Constitution."[195] "In civil litigation," the Eighth Circuit supposed, "there is no reason to conclude

189. La Union Del Pueblo Entero v. Abbott (*Bettencourt*), 93 F.4th 310, 324-25 (5th Cir. 2024); *see* La Union Del Pueblo Entero v. Abbott (*Hughes*), 68 F.4th 228, 237-38 (5th Cir. 2023); *In re* N.D. Legis. Assembly, 70 F.4th 460, 464-65 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.); Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1344-45 (11th Cir. 2023). In assessing whether *Gillock* should be cabined to the criminal context, it is important to distinguish the desire to insulate state legislators from frivolous litigation—an important imperative—and the desire to shield them from claims that they are violating constitutional rights. The former can be a real risk at all levels of the government, as noted in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 386 (2004), but the latter ignores the way that *Arlington Heights* interacts with the holding in *Gillock*, *see* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977). It also ignores the reality that courts often treat suits aimed at combatting discrimination and protecting constitutional rights differently than regular civil suits. *See* Dellums v. Powell, 561 F.2d 242, 247 (D.C. Cir. 1977) (holding that executive privilege can yield in contexts dealing with the "enforcement of constitutional rights"); Waters v. U.S. Capitol Police Bd., 218 F.R.D. 323, 323-24 (D.D.C. 2003) (concluding that interview notes are not protected by the law enforcement privilege in a discrimination case); Newport Pac. Inc. v. County of San Diego, 200 F.R.D. 628, 638-39 (S.D. Cal. 2001) ("[T]he Court agrees with Plaintiffs' assertion that the possibility of discrimination favors disclosure.").

190. 84 F.4th at 1344-45.

191. *Id.* at 1344 (citing *In re* Hubbard, 803 F.3d 1298, 1311-12 (11th Cir. 2015)).

192. *Id.*

193. *See* 70 F.4th at 463-65.

194. *Id.* at 463 ("[S]tate legislators do not enjoy the same privilege as federal legislators in criminal actions . . . ." (citing United States v. Gillock, 445 U.S. 360, 372-73 (1980))).

195. *Id.* The court offered no citation for this proposition. *Id.* For more on why this claim is contestable, see the discussion of *Gillock* in Part I.B above.

that state legislators and their aides are 'entitled to lesser protection than their peers in Washington.'"[196] The court also referred to the legislative privilege as "absolute."[197] It rejected the use of a balancing test, stating that "[d]icta from *Village of Arlington Heights* does not support the use of a five-factor balancing test in lieu of the ordinary rule that inquiry into legislative conduct is strictly barred by the privilege."[198]

The Fifth Circuit took a slightly different approach, though one with similar results. In the first of two recent decisions, *Hughes*, the court appeared to reject any balancing test.[199] It stated that although "legislative privilege gives way 'where important federal interests are at stake, as in the enforcement of federal criminal statutes,'" the Supreme Court has drawn the line of privilege at civil actions.[200] Noting that any qualifications to the privilege cannot "subsume the rule," the court held that the privilege did not yield "even when constitutional rights are at stake."[201]

A year later, the Fifth Circuit revisited its analysis of state legislative privilege. In *Bettencourt*, the court laid out a three-part test for determining whether state privilege should yield.[202] The court suggested that to be an "extraordinary civil case" in which the privilege yields, a case must satisfy all three conditions.[203] In doing so, the court transformed characteristics that

196. *In re N.D. Legis. Assembly*, 70 F.4th at 463 (quoting Reeder v. Madigan, 780 F.3d 799, 805 (7th Cir. 2015)).

197. *Id.* (quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975)). Interestingly, the Eighth Circuit reserved the question of whether there would be an exception in a case requiring proof of discriminatory intent. *Id.* at 464-65. But given the court's reasoning elsewhere in the opinion, it is hard to see how it could fashion an exception in such cases. *See, e.g.*, *id.* at 465 ("Even where 'intent' is an element of a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole.").

198. *Id.* at 465. Of course, part of what this Note argues is that there is no ordinary rule that inquiry into state legislative conduct is strictly barred by privilege.

199. *See* 68 F.4th 228, 237-38 (5th Cir. 2023) (quoting *Gillock*, 445 U.S. at 373).

200. *Id.* (quoting *Gillock*, 445 U.S. at 373). This conclusion seems at least in part to be the product of a confusion between legislative immunity and legislative privilege. The *Hughes* Court repeatedly referred to the decisions in *Tenney v. Brandhove* and *Bogan v. Scott-Harris* as decisions about legislative privilege, while they were actually decisions regarding immunity. *Id.* at 238 (citing Tenney v. Brandhove, 341 U.S. 367, 373, 377 (1951); and Bogan v. Scott-Harris, 523 U.S. 44, 47-48 (1998)). Admittedly, the *Tenney* Court itself used conflicting language on this subject, *see* 341 U.S. at 372-79, which has been a source of confusion in lower courts. *See also* Asta, *supra* note 14, at 244-45 (discussing the confusion caused by courts' "inconsistent use of the terms 'legislative immunity' and 'legislative privilege'").

201. *Hughes*, 68 F.4th at 238.

202. 93 F.4th 310, 324 (5th Cir. 2024) (quoting *Hughes*, 68 F.4th at 239).

203. *Id.* at 324-25.

were *sufficient* for yielding in *Gillock* into *requirements* for yielding in the Fifth Circuit.

The first and most notable requirement was that "the civil case must implicate important federal interests beyond a *mere constitutional or statutory claim*."[204] The court's choice of language in calling constitutional claims "mere" is extraordinary and trending toward oxymoronic. Remarkably, the court uses a version of this language again, stating that the plaintiff "merely alleges that 'the Texas Legislature enacted S.B. 1 with an intent to discriminate against racial minorities.'"[205] Beyond the choice of language, the court does not indicate what could satisfy this remarkably high requirement.[206] Statutory claims and constitutional claims appear to exhaust, or at least nearly exhaust, the category of civil cases.[207]

Second, the *Bettencourt* court stated that "the civil case must be more akin to a federal criminal prosecution than to a case in which a private plaintiff seeks to vindicate his own rights."[208] As one measure, the court noted that the federal government alone "is entitled to bring federal criminal prosecutions."[209] This suggests that civil suits pursued under statutes featuring private causes of action, even when brought by the government, might be unable to override the interest in state legislative privilege. Third, echoing *Hughes*, the court held that "the civil case cannot be brought so frequently that it would, in effect, destroy the legislative privilege."[210]

As explained in Part II.B above, these decisions make litigating Fourteenth Amendment cases extraordinarily difficult.[211] However, beyond these cases' troubling effects, the Eighth and Eleventh Circuits departed from a great deal of well-reasoned case law in rejecting a balancing test.[212] And the Fifth Circuit, in crafting a test that is nearly impossible to meet, created a functionally absolute legislative privilege.[213] Considering *Gillock* and the demands of *Arlington Heights*, these circuits are in need of a course correction. Both the

204. *Id.* at 324 (emphasis added).

205. *Id.* at 325.

206. *See id.* at 324.

207. *See id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *See supra* Part II.B.

212. *See supra* Part I.A.2; *see also supra* note 188.

213. *See supra* notes 199-210 and accompanying text.

Supreme Court and other federal courts point to approaching state legislative privilege in a way that allows it to yield to important federal interests.[214]

B. Framework for Yielding

Given *Gillock*'s explicit balancing of the federal interests at stake in a lawsuit with the comity due to state legislators[215] and *Arlington Heights*' recognition that discovery into the legislative process "may be highly relevant" for enforcement of the Fourteenth Amendment,[216] a balancing test is appropriate to determine whether the privilege yields. Used correctly, a balancing test affords proper respect to legitimate claims of privilege by state legislators without impeding enforcement of the Fourteenth Amendment's guarantee of equal protection under the law. There are four key considerations courts should use to make these decisions[217]: (1) the federal interests at stake in the lawsuit, (2) the potential burdens of discovery, (3) the government's participation in the litigation, and (4) a comparison with other governmental privileges.

1. The federal interests at stake in the lawsuit

First, since *Gillock* made clear that the privilege yields in the face of "important federal interests,"[218] courts should consider whether such an interest is present in a given civil case. Some courts have made a great deal of the fact that the Supreme Court has not applied *Gillock*'s reasoning to civil cases.[219] But the Court has not heard a civil case on state legislative privilege, so it has had no opportunity to rule on one. Moreover, *Arlington Heights* clearly stated that discovery is possible in some civil cases, even allowing that "[i]n some extraordinary instances the members [of a decision-making body] might be called to the stand at trial to testify."[220] Thus, even if an important federal

214. *See, e.g.*, United States v. Gillock, 445 U.S. 360, 373 (1980); Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011); S.C. State Conf. of the NAACP v. McMaster, 584 F. Supp. 3d 152, 162 (D.S.C. 2022); League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 456 (N.D. Fla. 2021).

215. 445 U.S. at 373.

216. 429 U.S. 252, 264-65, 268 (1977).

217. The courts have not settled on the proper balance of these factors yet. But it is something that should continue to be explored.

218. 445 U.S. at 373.

219. *See, e.g.*, Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1344 (11th Cir. 2023); Lee v. Va. State Bd. of Elections, No. 15CV357, 2015 WL 9461505, at *5 (E.D. Va. Dec. 23, 2015).

220. 429 U.S. at 268.

interest is required for the privilege to yield, the unavoidable implication of *Arlington Heights* is that some civil cases can involve such interests.[221]

This is exactly the conclusion many federal courts have reached.[222] Indeed, applying *Gillock*'s "important federal interest" language to civil cases is no novel concept. With redistricting and VRA claims, federal courts have found that such suits present sufficiently important federal interests for the privilege to yield.[223] This is likely because, as the Eastern District of Virginia has written, "The right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance."[224] The Supreme Court itself has noted that the right to vote, as protected by the VRA, is "one of the most fundamental rights of our citizens."[225] Many courts have thus found that, because the VRA requires "vigorous and searching federal enforcement," the federal interest in voting rights is "compelling."[226] The courts' application of *Gillock* has followed in lockstep. In assessing challenges to redistricting maps, federal courts have held that suits brought through the VRA constitute an "important federal interest," and thus the plaintiffs can overcome claims of privilege by state legislatures.[227] Though such holdings have not been universal,[228] by and large courts have

221. *Gillock*, 445 U.S. at 373. This is not to say that all civil cases will undo the privilege. Rather, at least for putting legislators on the stand at civil trials, it would take "extraordinary" civil cases. *Arlington Heights*, 429 U.S. at 268.

222. *See, e.g.*, Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011); S.C. State Conf. of the NAACP v. McMaster, 584 F. Supp. 3d 152, 162, 165 (D.S.C. 2022); League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 456 (N.D. Fla. 2021).

223. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *6; *S.C. State Conf. of the NAACP*, 584 F. Supp. 3d at 162, 165; *League of Women Voters of Fla.*, 340 F.R.D. at 456-58 (writing that "some civil cases," including voting rights cases, "implicate federal interests that are at least as important—if not more important—than the enforcement of federal criminal statutes, where the privilege undoubtedly gives way").

224. Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014).

225. Bartlett v. Strickland, 556 U.S. 1, 10 (2009).

226. United States v. Irvin, 127 F.R.D. 169, 174 (C.D. Cal. 1989); Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1070 (D. Ariz. 2014) ("The federal government has a strong interest in securing the equal protection of voting rights guaranteed by the Constitution, an interest that can require the comity interests underlying legislative privilege to yield.").

227. *See, e.g.*, *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *6 ("Voting rights cases, although brought by private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions [for purposes of *Gillock*]."); *S.C. State Conf. of the NAACP*, 584 F. Supp. 3d at 162 ("[W]hen cherished and constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield."); *League of Women Voters of Fla.*, 340 F.R.D. at 456 (explaining that the federal government's legitimate interests in protecting voting rights are sufficiently important to meet the threshold that the Court established in *Gillock*).

228. *See, e.g.*, Texas v. Holder, No. 12-128, 2012 WL 13070061, at *1 (D.D.C. Apr. 20, 2012) ("[W]e cannot agree with the United States that every litigated Section 5 case under the

footnote continued on next page

held that voting rights cases "require the comity interests underlying legislative privilege to yield."[229]

2. Burdens of discovery: Infringement of the legislative function

As the *Gillock* Court recognized, courts should exhibit a "sensitivity to interference with the functioning of state legislators."[230] Thus, it is appropriate that courts consider the degree to which discovery would intrude upon the state legislator.[231] However, even where "some minimal impact" on legislative function can be expected, evidence should not be barred where the result of such interference is merely "speculative."[232] The recent decisions in the Fifth and Eleventh Circuits did not consider the kinds of discovery at issue or their degrees of intrusion in the legislative process at all.[233] The Eighth Circuit in *In re North Dakota Legislative Assembly* went so far as to claim "[t]he degree of intrusion is not material" to whether the privilege applies, but the court provided no analysis to support this conclusion.[234]

Not all kinds of discovery are equally disruptive or distracting to the legislative process. For instance, it may take an extraordinary case to require a state legislator to take time out of their schedule to come to trial and take the stand.[235] But testifying is comparatively more disruptive than, for example, a single day of depositions.[236] And in turn, both testimony and depositions are

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Voting Rights Act constitutes an 'extraordinary instance' warranting a need to 'intru[de] into the workings' of the state legislature." (second alteration in original) (citation omitted) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 n.18 (1977))).

229. Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1070 (D. Ariz. 2014); *see also* League of United Latin Am. Citizens v. Abbott, 708 F. Supp. 3d 870, 1267-68 & nn.296-300, 1271 (W.D. Tex. 2023) (Guaderrama, J., dissenting) (collecting cases).

230. 445 U.S. 360, 372 (1980).

231. *See id.* at 372-73. Some lower courts already factor this into their balancing analysis. *See, e.g.*, Benisek v. Lamone, 263 F. Supp. 3d 551, 555 (D. Md.), *aff'd*, 241 F. Supp. 3d 566 (D. Md. 2017); Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 342 (E.D. Va. 2015).

232. *Gillock*, 445 U.S. at 373.

233. *See* La Union Del Pueblo Entero v. Abbott (*Bettencourt*), 93 F.4th 310, 324 (5th Cir. 2024); La Union Del Pueblo Entero v. Abbott (*Hughes*), 68 F.4th 228, 237-40 (5th Cir. 2023); Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1344-45 (11th Cir. 2023).

234. 70 F.4th 460, 463-64 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.).

235. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

236. Some courts have also allowed interrogatories instead of in-person testimony. *See, e.g.*, Favors v. Cuomo, 285 F.R.D. 187, 194, 196 (E.D.N.Y. 2012).

more invasive than many cases of documentary discovery, which may be both less time intensive and less likely to be done by the legislator themselves.[237]

Moreover, courts should consider how they might modify discovery orders to be less burdensome for legislators by, for example, limiting the kinds or scope of discovery. Courts may also use the well-established tools of privilege logs and in camera review of documents to preclude undue disclosures.[238] With these tools, courts can minimize the litigation's intrusion on state legislators' work even where discovery is allowed to go forward.

3. Participation of the government in the litigation

One factor in the widely used *Rodriguez* balancing test is "the role of the government in the litigation."[239] This factor seems to serve as an additional method of analyzing the strength of the government interest at hand, as well as the potential burdens of discovery. One reason to consider the government's involvement in the case is because the federal government has limited resources—the government cannot bring every possible case, which means that when it brings litigation, an important federal interest is more likely to be at stake, and the chance of burdensome recurrent litigation is capped. Thus, where the government is a party to the lawsuit, the privilege should be more likely to yield.

However, there are areas where federal and private prerogatives intersect so frequently that the lack of a government litigator says little about the importance of federal interests.[240] Such is the case where litigation "raises serious charges about the fairness and impartiality of some of the central institutions of . . . state government," as is the case in racial redistricting cases and equal protection claims more generally.[241] Moreover, should private enforcement of voting rights be circumscribed, the federal government's ability to enforce this fundamental right would be significantly hampered,

237. A number of cases have allowed physical discovery. *See, e.g.*, *id.* at 195-96; Benisek v. Lamone, 263 F. Supp. 3d 551, 553-55 (D. Md.), *aff'd*, 241 F. Supp. 3d 566 (D. Md. 2017); *see also Arlington Heights*, 429 U.S. at 268-70 (considering evidence from the lower court, including testimony from local legislative officers and rezoning plans).

238. *See, e.g.*, N.Y. Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. County of Nassau, No. CV 05-2301, 2007 WL 2815810, at *6 (E.D.N.Y. Sept. 25, 2007) (discussing in camera review); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 103 (S.D.N.Y.) (discussing privilege log), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

239. 280 F. Supp. 2d at 100-01 (quoting *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979)).

240. The Supreme Court has noted that private suits seeking to enforce civil rights laws often call on citizens to act as "private attorney[s] general," representing the government's interests. *See* Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

241. *Rodriguez*, 280 F. Supp. 2d at 102.

thwarting federal interests.[242] In light of the above, the Fifth Circuit erred in its suggestion that yielding required not only that litigation be brought by the government, but that the cause of action must be one that "[*o*]*nly* the United States" can litigate.[243]

4. Looking to other governmental privileges

Finally, courts can look to other governmental privileges to assess whether a claim of legislative privilege must yield.[244] Looking to the approach taken in other governmental immunities is not novel—indeed, it is one of the primary ways in which the Supreme Court and other federal courts have assessed governmental immunities.[245] In *Gillock*, the Supreme Court relied on *United States v. Nixon* (*Nixon I*),[246] the leading case on executive privilege, in holding that the legislative privilege yields in the face of key federal interests.[247] The Court explained that even in the context of executive privilege, appeals to protect confidentiality "were found wanting" where they impaired "the legitimate interest of the Federal Government."[248] Even "internal exchanges at the highest levels of the Executive Branch" were not enough to overcome judicial imperatives.[249] Similarly, in *Arlington Heights*, the Court cited to *Nixon I* when observing that not all cases of discriminatory intent would justify putting legislators on the stand.[250] Circuit courts have followed in step, noting that "the legislator's need for confidentiality is similar to the need for confidentiality . . . between executive officials, and between a President and his aides."[251] A similar approach has also been taken in reverse,

242. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 555-56 (1969) (finding a private right under Section 5 of the VRA in part because voting rights "could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General").

243. La Union Del Pueblo Entero v. Abbott (*Bettencourt*), 93 F.4th 310, 324 (5th Cir. 2024) (emphasis added).

244. While the Supreme Court has often compared different governmental privileges in making decisions about the constitutional bounds of a given privilege, *see, e.g.*, United States v. Gillock, 445 U.S. 360, 373 (1980), a central contribution of this Note is making this comparison more explicit and using executive privilege as a guidepost for the uppermost limits of the common-law state constitutional privilege.

245. *See, e.g.*, *Gillock*, 445 U.S. at 373; Nixon v. Sirica, 487 F.2d 700, 716-17 (D.C. Cir. 1973).

246. 418 U.S. 683 (1974).

247. *Gillock*, 445 U.S. at 373 (citing *Nixon I*).

248. *Id.*

249. *Id.*

250. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) (citing, for example, *Nixon I*, 418 U.S. at 705).

251. *In re* Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987) (citing, for example, *Nixon I*, 418 U.S. at 708); Nixon v. Sirica, 487 F.2d 700, 717 (D.C. Cir. 1973).

with courts pointing to legislative privilege to help define executive protections.[252]

Comparison between state legislative privilege and executive privilege is helpful in another regard, too. The Supreme Court gives executive protections extraordinary deference,[253] recognizing that "[t]he President occupies a unique position in the constitutional scheme."[254] The Court recently reaffirmed that "[t]he President is the only person who alone composes a branch of government."[255] This unparalleled singularity is coupled with the President's powers as chief executive and commander in chief, which are, the Court has written, "of unrivaled gravity and breadth."[256] The President's broad protections make a comparison with legislative protections particularly useful. State legislative privilege, moreover, lacks grounding in the Constitution and is limited by both the Supremacy Clause and Fourteenth Amendment. Any case that extends such a privilege further than the protections afforded to the President thus deserves particular scrutiny.

This comparison with executive privilege confirms that legislative privilege should yield to both constitutional and evidentiary imperatives. It is unquestioned that executive privilege yields in at least some contexts. Executive privilege (distinguished from executive immunity)[257] is not absolute, but only presumptive.[258] As the Court noted in *Nixon I*, with the exception of claims over "military, diplomatic, or sensitive national security

252. This approach can be seen with both the Supreme Court and circuit courts. United States v. Nixon (*Nixon I*), 418 U.S. 683, 703-04 (1974); Clinton v. Jones, 520 U.S. 681, 692-94 (1997); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 729-30 (D.C. Cir. 1974); *Sirica*, 487 F.2d at 716-17.

253. As a note, "executive privilege" is a term that is often used in vague ways to encompass multiple privileges held by the President. The term will most commonly be used in this Note to refer to the *presidential communications privilege*, often simply called the *presidential privilege*, which serves to protect the President's ability to communicate with and receive the advice of their closest advisors. *See Nixon I*, 418 U.S. at 705, 710-11; *In re* Sealed Case, 121 F.3d 729, 745, 750-52 (D.C. Cir. 1997).

254. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

255. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020).

256. Trump v. Vance, 140 S. Ct. 2412, 2425 (2020); *see* Trump v. United States (*Presidential Immunity*), 144 S. Ct. 2312, 2329 (2024) (writing that an empowered executive is implicit in the Constitution, since "[t]he Framers 'sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many'" (quoting *Jones*, 520 U.S. at 712 (Breyer, J., concurring in the judgment))).

257. *See Presidential Immunity*, 144 S. Ct. at 2329-30.

258. Dellums v. Powell, 561 F.2d 242, 246 (D.C. Cir. 1977) ("The privilege rooted in confidential communications with the President is constitutionally based, and entitled to great weight, but it has been consistently viewed as presumptive only." (citation omitted) (collecting cases)).

secrets," neither the separation of powers nor the need for confidentiality in "high-level communications" is enough to trump all "other values" in the judicial process.[259] Thus, while the President is undoubtedly entitled to heightened judicial deference, and "[i]n no case . . . would a court be required to proceed against the president as against an ordinary individual,"[260] a "sufficient showing of need" or a "public interest" in disclosure can overcome claims of privilege.[261] In particular, courts often emphasize two areas where the public interest favoring disclosure overcomes presidential protections: the demands of Congress and the imperatives of civil discovery.[262]

First, executive privilege yields to the "strong constitutional value[s]" arising from the demands of other "institution[s] of government."[263] In particular, when Congress exercises its power to make inquiries into "weighty interest[s]," like investigation of the January 6 insurrection attempt[264] or the Watergate scandal,[265] executive privilege yields.[266] This is especially true

259. 418 U.S. 683, 706 (1974). Protections over state secrets have consistently been treated differently than other types of claims of executive privilege, with waiver harder to establish and protections unyielding. *See* John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure—Federal Law*, 159 A.L.R. Fed. 153 (2000) (collecting cases where confidential information was inadvertently disclosed to the public but courts nonetheless found the information privileged); *Nixon I*, 418 U.S. at 710 ("He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.").

260. *Nixon I*, 418 U.S. at 708 (quoting United States v. Burr, 25 F. Cas. 187, 192 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Circuit Justice) (alteration in original)).

261. Trump v. Thompson, 20 F.4th 10, 31-32 (D.C. Cir. 2021) ("In cases concerning a claim of executive privilege, the bottom-line question has been whether a sufficient showing of need for disclosure has been made so that the claim of presidential privilege 'must yield[.]'" (quoting Nixon v. Adm'r of Gen. Servs. (*Nixon II*), 433 U.S. 425, 454 (1977)) (alteration in original)); Sun Oil Co. v. United States, 514 F.2d 1020, 1024 (Ct. Cl. 1975); Nixon v. Sirica, 487 F.2d 700, 716 (D.C. Cir. 1973) (noting the public interest imperative); *see also Presidential Immunity*, 144 S. Ct. at 2330 (noting that prosecution "poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in [the President's] possession").

262. The constitutional imperatives of the judiciary are particularly tied up with criminal prosecutions. As the Court wrote in *Nixon I*, "the generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." 418 U.S. at 713. The Court noted there, as well as in *Trump v. Vance*, that allowing the President to be considered apart from the people in assessing the public's right to "every man's evidence" would undermine a core premise of the criminal justice system. *Nixon I*, 418 U.S. at 709-10; Trump v. Vance, 140 S. Ct. 2412, 2424 (2020) (quoting *Nixon I*, 418 U.S. at 709).

263. *Thompson*, 20 F.4th at 26 (first quoting Dellums v. Powell, 561 F.2d 242, 247 (D.C. Cir. 1977); and then quoting Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730 (D.C. Cir. 1974)).

264. *Id.* at 35.

265. *Nixon II*, 433 U.S. at 435.

when Congress seeks to fulfill one of its enumerated constitutional duties, such as verifying the Electoral College vote under the Twelfth Amendment.[267]

Second, executive privilege can yield in civil cases.[268] In *Sun Oil Co. v. United States*, the U.S. Court of Claims noted that while "the burden on the litigant seeking discovery" may be "heavier" than in a criminal case, the same balancing process is "applicable to [a President's] claim of privilege in a civil case."[269] The *Sun Oil* Court reasoned that a "need to develop the facts by resort to discovery" could create a showing of need sufficient to overcome a "generalized claim of privilege."[270] The D.C. Circuit affirmed this principle shortly thereafter, with a focus on the civil enforcement of constitutional rights.[271] In *Dellums v. Powell*, the court noted that the "strong constitutional value" in enforcing "constitutional rights [through] civil action[s] for damages" overcame the need to protect the candor of a President's advisors—at least where the charge was that high level government officials sought to "deny a class of citizens of their constitutional rights" and where the demand did not "reflect[] mere harassment."[272] Put more simply, where high government officials work to deny citizens their constitutional rights, a non-frivolous civil suit can overcome claims of privilege.[273]

This finding should be unsurprising. The Supreme Court has consistently held that the President can be subjected to the civil justice system since, "properly managed," such a system is "unlikely to occupy any substantial amount" of the President's time,[274] given the many tools "federal courts have . . . to deter and, where necessary, dismiss vexatious civil suits."[275] Indeed, the Supreme Court has noted that the interest in "shed[ding] light upon issues in

266. *Thompson*, 20 F.4th at 36; *Senate Select Comm.*, 498 F.2d at 730 (stating that "a showing that the responsibilities of [another institution of government] cannot responsibly be fulfilled without access to records of the President's deliberations" takes precedent over the President's interests in confidentiality). Similarly, the D.C. Circuit has implied that one imperative that can be important in assessing whether presidential privilege yields is the "public interest in the integrity of the electoral process." *Sirica*, 487 F.2d at 717-18.

267. *Thompson*, 20 F.4th at 37.

268. Presidents have been found absolutely immune from civil suits related to their official acts. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

269. 514 F.2d 1020, 1024 (Ct. Cl. 1975).

270. *Id.* at 1025.

271. Dellums v. Powell, 561 F.2d 242, 247 (D.C. Cir. 1977).

272. *Id.*; *see also In re* Sealed Case, 121 F.3d 729, 744 (D.C. Cir. 1997) (quoting both *Sun Oil Co.* and *Dellums* to reach a similar conclusion).

273. *Dellums*, 561 F.2d at 247.

274. Clinton v. Jones, 520 U.S. 681, 702 (1997).

275. Trump v. Vance, 140 S. Ct. 2412, 2428 (2020) (referencing and affirming the Court's holding in *Jones*).

civil or criminal litigation" is one "that cannot be doubted."[276] The contrast to the *Bettencourt* Court's language—that state legislative privilege need not yield in the face of "mere" constitutional rights[277]—is stark.

The conclusion is clear. The rulings from cases like *Bettencourt*, *Hughes*, *In re North Dakota Legislative Assembly*, and *Pernell* not only clash with established understandings of legislative privilege and the supremacy of the Fourteenth Amendment, but they also extend beyond even the broadest federal governmental privileges. Whereas presidential privilege, in protecting the "unrivaled gravity and breadth" of the President's powers,[278] still yields to constitutional imperatives from Congress and civil discovery demands relating to constitutional rights,[279] the recent circuit court decisions countenance no such limitation on legislative privilege.[280] According to these courts, neither "mere" claims of Fourteenth Amendment violations, nor Congress's demands through the VRA, are sufficient to overcome a state legislator's privilege.

IV. Stretching Too Far: The Proper Scope of State Legislative Privilege

Beyond making state legislative privilege nearly absolute, the recent circuit court decisions have also expanded legislative privilege's *scope*. In *Bettencourt*, the Fifth Circuit held that "the scope of the legislative privilege is 'necessarily broad'" and "extends to material provided by or to third parties involved in the legislative process."[281] The court relied on its observation that

276. *Nixon II*, 433 U.S. 425, 453-54 (1977). Naturally, plaintiffs' access to discovery in civil suits against the President is limited. In *Cheney v. United States District Court for the District of Columbia*, the Supreme Court cabined "overly broad discovery requests" brought against the Vice President and the National Energy Policy Development Group. 542 U.S. 367, 383-84, 386 (2004). The Court noted that civil suits did not share the constitutional weight of criminal prosecutions and created a greater risk of frivolous litigation. *Id.* at 386. The *Cheney* ruling was limited in several ways: The suit involved statutory compliance rather than constitutional claims, a goal the Court noted was of lesser consequence, and the Court critiqued the discovery order as vastly overbroad because it asked for "everything under the sky." *Id.* at 374, 386-87. The ruling ultimately emphasized the ability of district courts to modify capacious discovery requests, instead of requiring detailed invocations of privilege to rebut them. *Id.* at 388-91.

277. 93 F.4th 310, 324 (5th Cir. 2024).

278. *Vance*, 140 S. Ct. at 2425.

279. Sun Oil Co. v. United States, 514 F.2d 1020, 1024 (Ct. Cl. 1975); Trump v. Thompson, 20 F.4th 10, 35 (D.C. Cir. 2021).

280. La Union Del Pueblo Entero v. Abbott (*Hughes*), 68 F.4th 228, 238 (5th Cir. 2023); *Bettencourt*, 93 F.4th at 324; *In re* N.D. Legis. Assembly, 70 F.4th 460, 463 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.).

281. 93 F.4th at 322 (quoting *Hughes*, 68 F.4th at 236).

state legislators routinely meet with third parties throughout the legislative process.[282] Thus, where evidence is "created, transmitted, and considered *within* the legislative process itself," the court held that legislative privilege applies—full stop.[283] The only exception, the court wrote, is where evidence is "publicly released *outside* of the legislative process."[284] But as the court observed in *Hughes*, "[t]he very fact that Plaintiffs need discovery to access these documents shows that they have not been shared publicly."[285]

A similar approach was taken by the Eighth Circuit in *In re North Dakota Legislative Assembly*, where the court noted that "[c]ommunications with constituents, advocacy groups, and others outside the legislature" were covered by the privilege.[286] The implication is simple: Evidence must already be in the public domain to be accessible in discovery—a condition that renders the very need for discovery a nullity. This position marks another radical departure from common understandings of both legislative privilege and governmental privileges more broadly, cordoning off a key avenue of discovery for evidence of intentional discrimination.

In this Part, we explain how these courts' analyses have gone awry. Part IV.A examines already-existing limits on the scope of legislative privilege and the ways in which the recent circuit court decisions have bypassed these limits. Part IV.B compares the recent circuit decisions with the scope of other governmental privileges.

A. Assessing Limits on the Scope of Legislative Privilege

To understand the departure of these recent rulings, we must look at what is covered by legislative privilege. Here, the precedent consists mostly of rulings on the federal legislative protections.[287] Since the scope of the state legislative privilege is, at its very broadest, co-extensive with the Speech or Debate Clause,[288] these cases provide an essential reference point. Where the federal privilege stretches, the state privilege can stretch no further. Within federal protections, the scope of legislative privilege is defined along two axes: the *type* of action at issue, and the *person* engaged in it.

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282. *Id.* at 323.

283. *Id.*

284. *Id.*; *see id.* at 326 (Graves, J., dissenting) (noting discovery was sought from "a lobbyist").

285. 68 F.4th at 237.

286. 70 F.4th at 464.

287. *See* Kilbourn v. Thompson, 103 U.S. 168, 204-05 (1881); United States v. Brewster, 408 U.S. 501, 502, 528-29 (1972); Gravel v. United States, 408 U.S. 606, 616 (1972).

288. *See* United States v. Gillock, 445 U.S. 360, 369-70 (1980).

1. Limits on actions: Distinguishing between political and legislative acts

First, legislative privilege does not cover all *types of action*. The scope of the Speech or Debate Clause is confined by the *purpose* with which a legislator acts—extending no further than actions that serve a legislative aim.[289] Writing for the Court in *Brewster*, Chief Justice Burger explained legislative privilege's scope.[290] He noted that while "purely legislative" acts—acts "generally done in the course of the process of enacting legislation"—were protected, the "many activities" that members of Congress engage in outside of these bounds were not.[291] "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process."[292] Thus, the Speech or Debate Clause leaves unprotected a "wide range" of legitimate activities, including communications with constituents, creating appointments with agencies, or assisting in securing government contracts, all of which constitute "political matters" instead of legislative ones.[293] The scope of a legislator's official duties is thus broader than their protection against suit and discovery.[294]

The Court further clarified what qualifies as a "legislative act[]" in *Gravel*.[295] Only actions that are an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" and which relate to their "consideration and passage or rejection of proposed legislation," or to the "other matters which the Constitution places within the jurisdiction of either House," are privileged.[296] Arguments that sought to extend the privilege further by drawing upon the "flavor of the rhetoric and the sweep of the language used by courts" were rejected.[297]

289. *Brewster*, 408 U.S. at 512-16.

290. *Id.* at 512-13.

291. *Id.* at 512-14.

292. *Id.* at 515.

293. *Id.* at 512. While some courts have argued that the legislative privilege covers not only official legislative investigations, but also informal investigative efforts such as fact-finding and information gathering, this is not the consensus view. *See* GARVEY, *supra* note 89, at 14-15.

294. Doe v. McMillan, 412 U.S. 306, 313 (1973) ("Our cases make perfectly apparent . . . that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause.").

295. 408 U.S. 606, 625 (1972).

296. *Id.*

297. United States v. Brewster, 408 U.S. 501, 516 (1972).

The recent circuit court rulings rely on the legislative acts language to justify their holdings that the privilege extends to third parties.[298] As the Fifth Circuit argued in *Bettencourt*, because the third parties that the legislators met with were themselves "involved in the legislative process"—helping to craft the legislator's policies—they, too, should be covered by state legislative privilege.[299] This is an extension of the doctrine beyond the bounds outlined by the Supreme Court, which has never held that the actions of non-legislative third parties are covered by the privilege.[300] But, more importantly, the circuit courts' approach runs headfirst into another core limitation on the scope of legislative privilege: the *persons* to whom it applies. Such limits further emphasize just how at odds the holdings in *Bettencourt*, *Hughes*, and *In re North Dakota Legislative Assembly* are with constitutional understandings of the privilege's scope.

2. Limits on persons: Protecting those who act as a legislator

In *Gravel*, the Supreme Court explained that legislative privilege was not limited to members of Congress alone. Instead, it extends also to the aides whose "day-to-day work . . . is so critical to the Members' performance that they must be treated as the latter's alter egos."[301] This is a commonsense extension—one that fits with the core purpose of the Speech or Debate Clause, if not its literal text. Legislators and their aides can be "treated as one" to the extent that aides perform acts that the legislator would have performed "personally."[302] If the Speech or Debate Clause's scope did not extend this far, the Court worried that the purpose of the Clause would "inevitably be diminished and frustrated."[303]

298. *See, e.g.*, La Union Del Pueblo Entero v. Abbott (*Hughes*), 68 F.4th 228, 236 (5th Cir. 2023); *In re* N.D. Legis. Assembly, 70 F.4th 460, 463-64 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.).

299. 93 F.4th 310, 322-23 (5th Cir. 2024).

300. Indeed, in *Gravel*, the Supreme Court explicitly ruled that the non-legislative publisher was not covered by legislative privilege. 408 U.S. at 625-26.

301. *Id.* at 616-17.

302. *Id.* at 616 (first quoting United States v. Doe, 455 F.2d 753, 761 (1st Cir. 1972); and then quoting United States v. Doe, 332 F. Supp. 930, 938 (D. Mass. 1971)); *see also* Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 664 (E.D. Va. 2014) (writing that in some circumstances, legislative staffers enjoy the state legislative privilege's protections as well).

303. *Gravel*, 408 U.S. at 616-17.

However, despite the need for protections to cover proxies for legislators themselves, the Court was careful not to extend the privilege much further.[304] This difficult task of line drawing requires parsing whether subcommittee counsels,[305] or the House's Sergeant-at-Arms executing orders,[306] act as sufficient proxies for a legislator to qualify for privilege. The *Gravel* Court acknowledged concerns about "the abuses that history reveals have occurred when legislators are invested with the power to relieve others from the operation of otherwise valid civil and criminal laws," but found these concerns were "for the most part obviated" by its narrow extension of the legislative privilege.[307] As a result, while a legislator or aide can invoke the privilege "on the [legislator's] behalf," privilege extends only to those acts that would be privileged "if performed by the [legislator] himself."[308]

By setting the scope for the privilege, this distinction clarifies when the privilege is waived. Waiver of evidentiary privileges occurs when privileged information is shared outside the bounds of the privilege.[309] And these principles apply to governmental privileges as well,[310] even if the scope of such waiver is more confined.[311] Federal courts have thus consistently found that legislators waive privilege over communications and information shared with third parties.[312] Though Supreme Court holdings on this issue are sparse,

304. Courts have extended protection to essential staff within congressional committees, including "chief counsel, clerk, staff director, and investigator." GARVEY, *supra* note 89, at 11 (citing Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 507 (1975); Doe v. McMillan, 412 U.S. 306, 309 (1973); and Rangel v. Boehner, 785 F.3d 19, 24-25 (D.C. Cir. 2015)).

305. *Gravel*, 408 U.S. at 619-20.

306. *See* Tenney v. Brandhove, 341 U.S. 367, 378-79 (1951) (citing Kilbourn v. Thompson, 103 U.S. 168, 204 (1881)).

307. 408 U.S. at 621.

308. *Id.* at 622.

309. *See* 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL PROCEDURE § 2016.4 (West 2024) ("[I]n most instances privilege depends upon confidentiality and broaching this confidentiality as to one person destroys it as to the world."); *see also* Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 294 (4th Cir. 2004); Simmions v. Pierless Fish Corp., 592 F. Supp. 3d 68, 73 (E.D.N.Y. 2020).

310. *See* 8 WRIGHT & MILLER, *supra* note 309, § 2019 ("The discovery rules apply to the United States—and to states and other governmental subdivisions and bodies—just as fully as they apply to any other person."); 26A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5692 (West 2024) ("[W]aiver of the governmental privileges is accomplished in the same fashion as waiver of other privileges; i.e., by voluntary disclosure of a significant portion of the information claimed to be privileged." (footnote omitted)); Mobil Oil Corp. v. U.S. EPA, 879 F.2d 698, 700-01 (9th Cir. 1989).

311. *Mobil Oil Corp.*, 879 F.2d at 700-01 (collecting cases).

312. *See* Danielle Bolong, Annotation, *Legislative Privilege of Federal and State Officials from Discovery of Information Concerning Discriminatory Intent*, 76 A.L.R. Fed. 3d Art. 4 (2022)
footnote continued on next page

Gravel supports the idea that waiver occurs when legislators communicate with outside parties.[313] There, the Court found that the privilege protected the publication of the Pentagon Papers in the Congressional Record, but not their publication with a third-party publisher.[314]

However, this issue has primarily been litigated in the lower federal courts dealing with state legislatures' claims of privilege.[315] And in such cases, the notion that communications with third parties waive the common law legislative privilege is well established.[316] As one court explained in allowing discovery of communications with third parties, even federal legislators would not be protected by privilege from "discovery concerning communications with non-privileged third parties," and thus similar communications by *state* legislators are clearly not protected, since they are "arguably entitled to even less protection under the privilege."[317] This accords with the holding in *New York Association of Community Organizations for Reform Now (ACORN) v. County of Nassau*, where the Eastern District of New York noted that communications with an outside consulting firm in preparing a redistricting report were not covered by privilege, since a "contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider

(collecting cases); *see also* Plain Loc. Sch. Dist. Bd. of Educ. v. DeWine, 464 F. Supp. 3d 915, 922 (S.D. Ohio 2020).

313. 408 U.S. at 626-27 (explaining that neither the publication of the Pentagon Papers in a private press, nor testimony before a grand jury about the publication, was privileged because they "were not part and parcel of the legislative process").

314. *Id.*

315. *See, e.g.*, N.Y. Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. County of Nassau, No. CV 05-2301, 2007 WL 2815810, at *6 (E.D.N.Y. Sept. 25, 2007).

316. *See* Cano v. Davis, 193 F. Supp. 2d 1177, 1179 & n.1 (C.D. Cal. 2002) (per curiam) (citing to *Gravel* and denying protection for a third party non-legislator, since they were beyond the scope of privilege); Baldus v. Brennan, No. 11-CV-562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) (noting that "the [l]egislature clearly did not concern itself with maintaining . . . privilege when it hired outside consultants" and has "waived its legislative privilege to the extent that it relies on . . . outside experts for consulting services"); Favors v. Cuomo, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) (writing that "knowledgeable outsiders" were not covered by the privilege and noting that "[t]he law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations" (quoting Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003)); League of Women Voters of Mich. v. Johnson, No. 17-14148, 2018 WL 2335805, at *6 (E.D. Mich. May 23, 2018) ("Communications between legislators or staff members and third parties consulted during the redistricting process are not protected by the legislative privilege."). This view, while predominant, is not universal. Several courts have held that such communications can fall within the scope of legislative privilege. *See, e.g.*, Puente Ariz v. Arpaio, 314 F.R.D. 664, 670 (D. Ariz. 2016); League of Women Voters of Fla., Inc. v. Lee, 340 F.R.D. 446, 454 (N.D. Fla. 2021).

317. *DeWine*, 464 F. Supp. 3d at 922.

in some capacity."[318] Legislators "are certainly free to seek information from outside sources," but they are not free to "assume that every such contact is forever shielded from view."[319] The court in *ACORN* drew on a similar holding in *Rodriguez v. Pataki*, where the Southern District of New York held that an advisory task force created by the legislature with the express purpose of aiding the redistricting process was not fully shielded, since the workings of the task force were "akin to . . . conversation[s] between legislators and knowledgeable outsiders, such as lobbyists . . . for which no one could seriously claim privilege."[320] Such holdings are commonplace.[321]

Against the weight of authority, the Fifth Circuit held in *Bettencourt* that communications with lobbyists are privileged.[322] Supporters of *Bettencourt*'s holding could argue that given the constitutionally protected nature of partisan gerrymandering, redistricting is a special context where input by political parties and partisan consultants is particularly warranted.[323] But this proposition directly clashes with *Gravel*, where the Court held that legislative privilege reached only acts that could be "performed by the [legislator]" themselves, and should be extended "only when necessary to prevent indirect impairment of [legislative] deliberations."[324] Other federal courts have recognized this tension when assessing claims of privilege over documents shared with political parties and lobbyists.[325] As one district court noted, while members of political party committees and partisan lobbyists "may have a heightened interest in the outcome of the redistricting process," they cannot

318. 2007 WL 2815810, at *6.

319. *Id.*

320. *Id.* at *5; *Rodriguez*, 280 F. Supp. 2d at 101.

321. *See DeWine*, 464 F. Supp. 3d at 921-22 (collecting cases); N.C. State Conf. of the NAACP v. McCrory, No. 13CV658, 2015 WL 12683665, at *7-8 & n.5 (M.D.N.C. Feb. 4, 2015) (collecting cases); Almonte v. City of Long Beach, No. CV 04-4192, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005) ("Legislative and executive officials are certainly free to consult with political operatives or any others as they please, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative process or the basis on which to invoke privilege."); Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015).

322. 93 F.4th 310, 322 (5th Cir. 2024); *id.* at 326 (Graves, J., dissenting).

323. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2495-96, 2506-07 (2019).

324. Gravel v. United States, 408 U.S. 606, 622, 625 (1972) (quoting United States v. Doe, 455 F.2d 753, 760 (1st Cir. 1972)).

325. *See, e.g.*, Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 663 (E.D. Va. 2014) (rejecting a political consultant's claim that he was covered by privilege because his prominent role in redistricting efforts made his "status equivalent to a legislative aide"); Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) (holding that "[c]ommunications between Non-Parties and outsiders to the legislative process," including lobbyists, are not covered by the legislative privilege).

"vote for or against the Redistricting Act, nor [do] they work for someone who could."[326] Thus, "legislative privilege does not apply."[327]

By extending legislative privilege to all interactions with third parties purportedly involved in the legislative process, *Bettencourt* broadens the scope of the privilege beyond even that of the federal Speech or Debate Clause. This makes discovery of discriminatory intent all the harder. In the context of a state common-law privilege that should yield to the demands of federal legislation and constitutional rights,[328] this obviation of the regular standard of waiver becomes exceedingly difficult to justify.

B. Other Governmental Privileges: The Scope of Presidential Privilege

As with yielding, executive privilege is a useful litmus test for how far the recent circuit court holdings have extended the scope of state legislative privilege. In many regards, the scope of executive privilege, and the presidential communications privilege in particular, closely tracks the federal legislative privilege.

To begin, much as legislative privilege is limited to those communications that qualify as legislative acts,[329] the presidential privilege is similarly cabined. In *Nixon v. Administrator of General Services* (*Nixon II*), the Court explained that the presidential privilege "is limited to communications 'in performance of [a President's] responsibilities' . . . and made 'in the process of shaping policies and making decisions.'"[330] Put more simply: The privilege extends to only those communications that relate to the President's official executive duties, but no further.

The people included within the privilege are similarly limited. Much as with a legislator and their aides, circuit courts have consistently found that the presidential privilege extends only to a President's advisors—and to those "communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate."[331] As

326. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10.

327. *Id.*

328. *See supra* Part III.A.

329. *See Gravel*, 408 U.S. at 625.

330. 433 U.S. 425, 449 (1977) (alteration in original) (quoting United States v. Nixon (*Nixon I*), 418 U.S. 683, 708, 711 (1974)).

331. *In re* Sealed Case, 121 F.3d 729, 752, 757 (D.C. Cir. 1997) ("[T]his privilege extends to cover communications which do not themselves directly engage the President, provided the communications are either authored or received in response to a solicitation by presidential advisers in the course of gathering information and

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the phrase "broad and significant responsibility" indicates, courts have found that the "operational proximity" to the President is a key consideration in determining whether confidentiality interests are implicated.[332] The D.C. Circuit elaborated on this point in *In re Sealed Case*.[333] Only communications at the level of an "immediate White House adviser's staff" are "close enough to the President to be revelatory of his deliberations or to pose a risk to the candor of his advisers."[334] The court wrote that "[e]xtending presidential privilege" any further than the President and his close aides risked sequestering "a broad array of materials . . . from public view."[335] Thus, much as a federal legislator's privilege extends only to their immediate aides, courts have found that the presidential privilege diminishes the further away in the executive branch the claimant gets.[336]

Consistent with this cabined view that presidential privilege extends to only those instrumental to the President's decision-making, courts regularly recognize waiver as part of the presidential privilege.[337] Waiver of the privilege can be voluntary and explicit, as when presidents have publicly disavowed their privilege "in times of pressing national need."[338] But waiver

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preparing recommendations on official matters for presentation to the President. The privilege also extends to communications authored or solicited and received by those members of an immediate White House advisor's staff who have broad and significant responsibility for investigating and formulating the advice to be given to the President on a particular matter.").

332. *Id.* at 752 (quoting Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 910 (D.C. Cir. 1993)).

333. *Id.*

334. *Id.*; *see also* Jud. Watch, Inc. v. Dep't of Just., 365 F.3d 1108, 1116 (D.C. Cir. 2004) (quoting *In re Sealed Case*, 121 F.3d at 752).

335. *In re Sealed Case*, 121 F.3d at 749; *see Jud. Watch*, 365 F.3d at 1116-17, 1122 (rejecting efforts to extend presidential privilege to internal documents produced by the Department of Justice as "unprecedented and unwarranted," and noting that "[c]ourts have long been hesitant to extend the presidential communications privilege so far").

336. *See* 26A WRIGHT & MILLER, *supra* note 310, § 5673 ("Certainly the separation of powers argument becomes weaker the farther the privilege is stretched from the President, as is the candor rationale for the privilege." (footnote omitted)). The Supreme Court's recent decision in *Trump v. United States*, while not directly related to this question, seems to hint that the current Court will still adhere to this proposition. 144 S. Ct. 2312, 2334-40 (2024). As the Court noted in remanding the case, communications between the President and the Attorney General are clearly immune from prosecution, but it is less clear whether immunity stretches to cover communications between the President and the Vice President acting in their legislative role, state officials, or private parties. *Id.* at 2334-37.

337. *E.g.*, *In re Sealed Case*, 121 F.3d at 741-42; Trump v. Thompson, 20 F.4th 10, 26 (D.C. Cir. 2021).

338. *Thompson*, 20 F.4th at 26, 35 (listing Biden's waiver of privilege for the January 6 investigation, Nixon's waiver of privilege for Watergate, Reagan's waiver of privilege for the Iran-Contra affair, Bush's waiver of privilege for the September 11 attacks, and

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also occurs when communications are extended to third parties beyond the President and their aides.[339] Notably, the D.C. Circuit has held that the White House can "waive[] its claims of privilege" for "specific documents . . . voluntarily revealed to third parties outside the White House."[340] Recognizing the special nature of presidential interests compared to other evidentiary privileges, the court limited the waiver to only those specific communications disclosed—rather than to all related documents, as with waivers of attorney-client privilege.[341] But disclosure constitutes waiver nonetheless.

The importance of confidentiality in executive decision-making has led courts to counsel caution in inferring waiver.[342] But starting with the Supreme Court in *Nixon I*, courts have also consistently noted that evidentiary privileges—exemptions from the general rules of disclosure—must neither be "lightly created nor expansively construed, for they are in derogation of the search for truth."[343] This is especially true for "[c]ommon law privileges," like the state legislative privilege, which should be "accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominate principle of utilizing all rational means for ascertaining the truth.'"[344]

Thus, while the *Hughes* court argued that it would "swallow" legislative privilege "almost whole" if state legislators' communications with outside party leaders and lobbyists constituted waiver, this approach was a departure not just from common understandings of legislative privilege, but also from conceptions of government privilege writ-large.[345] It substituted the careful

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Trump's decision not to invoke privilege to prevent the testimony of FBI Director James Comey).

339. *In re Sealed Case*, 121 F.3d at 741-42; Protect Democracy Project, Inc. v. NSA, 10 F.4th 879, 890-91 (D.C. Cir. 2021).

340. *In re Sealed Case*, 121 F.3d at 741-42; *Protect Democracy Project*, 10 F.4th at 890-91; *see also* Nixon v. Adm'r of Gen. Servs. (*Nixon II*), 433 U.S. 425, 448 (1977) (referring to the Court's previous ruling in *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), that the state secrets privilege cannot be claimed by third parties, but not indicating whether the Court supported the application of that principle to the presidency more broadly).

341. *Protect Democracy Project*, 10 F.4th at 890-91.

342. *In re Sealed Case*, 121 F.3d at 741 ("[W]aiver should not be lightly inferred." (quoting SCM Corp. v. United States, 473 F. Supp. 791, 796 (1979))).

343. 418 U.S. 683, 709-10 (1974); *see also* Jud. Watch, Inc. v. Dep't of Just., 365 F.3d 1108, 1122-23 (D.C. Cir. 2004).

344. *In re* Grand Jury, 821 F.2d 946, 955 (3d Cir. 1987) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)); *see also* Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011).

345. 68 F.4th 228, 236 (5th Cir. 2023). One could argue that privilege claims made under the deliberative process privilege, particularly by agencies trying to rebuff Freedom of Information Act (FOIA) inquiries, are a better analogy for state legislative privilege. In *Department of Interior v. Klamath Water Users Protective Association*, the Supreme Court

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balancing between the government's interest in confidentiality and the public's interest in both controlling and understanding their government for a far more absolutist understanding of privilege. Recognizing waiver is not "an indirect attack on [legislative] privilege's scope,"[346] but rather a proper recognition of its outer limits.

Conclusion

State legislative privilege has received little attention in part because of its obscurity and lack of doctrinal clarity. Protections for state legislators arise

observed, but did not explicitly embrace, that FOIA's codification of the deliberative process privilege ("Exemption 5") had been interpreted by a number of circuit courts to occasionally cover "document[s] prepared outside the Government," since they served the same role as "documents prepared by an agency personnel." 532 U.S. 1, 9-10 (2001). This "functional" approach to FOIA's Exemption 5 has been adopted by a number of circuit courts to cover documents prepared by various actors. Such rulings can be seen in cases dealing with independent property appraisers, as in *Government Land Bank v. General Services Administration*, 671 F.2d 663, 665-66 (1st Cir. 1982) and *Hoover v. United State Department of the Interior*, 611 F.2d 1132, 1135-36 (5th Cir. 1980). They can be seen in cases dealing with U.S. Senators, as in *Ryan v. Department of Justice*, 617 F.2d 781, 789-91 (D.C. Cir. 1980). And they can be seen in cases dealing with outside consultants or experts, as in *Lead Industry Association v. Occupational Safety and Health Administration*, 610 F.2d 70, 80, 83-84 (2d Cir. 1979). Indeed, in *Formaldehyde Institute v. Department of Health and Human Services*, the D.C. Circuit held that the deliberative process privilege extended to third party documents that were not created "as part of the [agency's] consultative process," and where the parties had no "formal relationship" to the agency itself. 889 F.2d 1118, 1121-24 (D.C. Cir. 1989) (quoting the case record). Thus, in some ways, these decisions represent a close proxy to the arguments for allowing third party documents to be covered by state legislative privilege. However, there are a number of reasons to reject such an analogy. To begin with, many of the cases rely heavily on interpreting the statutory language of FOIA's Exemption 5, and particularly the phrases "'inter-agency' or 'intra-agency,'" a context which does not translate well outside of FOIA's bounds. *See, e.g.*, *Ryan*, 617 F.2d at 790. Further, a number of cases have noted that the deliberative process privilege likely still yields to legitimate claims of discrimination or showings of relevance, meaning that insofar as *Arlington Heights* can be applied by analogy, the imperatives of proving discriminatory intent would likely trump privilege claims in the deliberative process context as well. *See, e.g.*, *Gov't Land Bank*, 671 F.2d at 666; Waters v. U.S. Capitol Police Bd., 218 F.R.D. 323, 324 (D.D.C. 2003); Newport Pac. Inc. v. County of San Diego, 200 F.R.D. 628, 638-39 (S.D. Cal. 2001). Finally, the Supreme Court was clear in *Klamath Water* that the work of an outside consultant was only privileged where the consultant acts "just as an employee would" and "the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." 532 U.S. at 11. Any communication that implicated interests that "might be affected by the Government action addressed by the consultant" is not protected. *Id.* at 12. Thus, the type of political consultants and party representatives at issue in cases like *Bettencourt* would likely be excluded from any privileges as well. *See* 93 F.4th 310, 326 (5th Cir. 2024) (Graves, J., dissenting).

346. *Hughes*, 68 F.4th at 236.

from the common law and have received scant treatment by the Supreme Court. Firm legal definition remains elusive. And yet the privilege, when interpreted as broadly as in the recent holdings by the Fifth, Eighth, and Eleventh Circuits, risks fundamentally undermining core enforcement efforts of the Equal Protection Clause.[347]

In *Arlington Heights*, the Supreme Court acknowledged that discovery is often needed to prove a legislature acted with discriminatory purpose.[348] And in *Gillock*, the Court affirmed that legislative privilege provides no absolute bar to accessing testimony and documentary evidence from state legislatures.[349] Federal courts have applied these two principles to allow discovery against legislators in challenges to racialized redistricting.[350] But a theory of absolute—or near absolute—state legislative privilege undermines this understanding.

Giving state legislators, and the third parties they communicate with, sweeping and unyielding protections from discovery denies plaintiffs the evidence they need to vindicate their constitutional rights.[351] And it shields state legislators from public scrutiny and transparency. This theory of absolute privilege thus departs from longstanding understandings of state legislative privilege. And the risks are not limited to discriminatory redistricting, but extend to a variety of contexts where plaintiffs are seeking to check potential discriminatory intent by state legislatures.[352]

This Note serves to shed light on this growing legal theory. And in doing so, we present an overview of the many constitutional and legal critiques that can be levied against such far-reaching legislative protections. Without more attention and scrutiny, proponents of an absolutist theory of state legislative privilege prosper under the shield of obscurity. Our constitutional rights—be they "mere" or profound—suffer the consequences.

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347. *In re* N.D. Legis. Assembly, 70 F.4th 460, 463-64 (8th Cir. 2023), *vacated as moot sub nom.* Turtle Mountain Band of Chippewa Indians v. N.D. Legis. Assembly, 144 S. Ct. 2709 (2024) (mem.); *Hughes*, 68 F.4th at 239-40; Pernell v. Fla. Bd. of Governors of the State Univ., 84 F.4th 1339, 1344-45 (11th Cir. 2023); *Bettencourt*, 93 F.4th at 324-25.

348. *See* 429 U.S. 252, 268 (1977).

349. 445 U.S. 360, 373 (1980).

350. *See, e.g.*, Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *4, *6 (N.D. Ill. Oct. 12, 2011); S.C. State Conf. of the NAACP v. McMaster, 584 F. Supp. 3d 152, 162, 164 (D.S.C. 2022).

351. *Arlington Heights*, 429 U.S. at 265-68; Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1234 (2024).

352. *See supra* note 18.