NOTES

DEVELOPING A SPEECH OR DEBATE CLAUSE FRAMEWORK FOR REDISTRICTING LITIGATION

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The Speech or Debate Clause of the United States Constitution protects legislators from being questioned at trial about their legislative acts. This protection shields legislators from being prosecuted or sued based on those acts and also sometimes protects them from having to testify about those acts at trial. While this protection is important in certain circumstances to safeguard the independence and proper functioning of the legislature, it can also be problematic when plaintiffs need to prove an invidious legislative purpose to challenge a law. This is especially the case in the redistricting context, where the standards to analyze both racial and partisan gerrymandering claims require information regarding legislative intent. Yet a close look into judicial interpretations of the Speech or Debate Clause, and the legislative privilege that stems from it, finds a conflicting set of opinions regarding when such protections should and should not apply. This confusion has made it difficult for courts to address legislative privilege questions properly and may lead courts to protect and uphold redistricting legislation more than is warranted. This Note surveys Supreme Court and lower-court Speech or Debate Clause opinions to develop a straightforward and consistent framework for addressing all Speech or Debate Clause disputes and then applies that framework to the questions that arise during redistricting litigation.

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INTRODUCTION

The Speech or Debate Clause ("SODC") of the United States Constitution states, "for any Speech or Debate in either House, [Congress] shall not be questioned in any other Place."[1] The Supreme Court has interpreted this short phrase to mean legislators are protected from having to defend themselves or their legislative acts at trial and are therefore shielded from disclosing any communications, deliberations, or documents that might reveal legislative motivation. The Court has termed these protections as either "legislative immunity" or "legislative privilege" protections.[2]

The Court's jurisprudence in this area is grounded in three general principles. First, not all legislators are treated equally. The Court has held that the SODC directly applies only to federal legislators, while their state counterparts receive no direct SODC protections.[3] Yet because most state constitutions have a clause similar or identical to that of the federal SODC,[4] the Court has recognized a federal common law protection for state legislators "similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause."[5]

Second, the protections accorded legislators are defined as either absolute or qualified. An absolute protection automatically

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[1] U.S. CONST. art. I, § 6.

[2] The two terms are sometimes used interchangeably and sometimes defined differently. *See infra* Part I.A (discussing this inconsistency).

[3] Cole v. Gray, 638 F.2d 804, 810 (5th Cir. Mar. 1981) ("[T]he Supreme Court has unequivocally ruled that the embrace of the clause does not extend to a state legislator." (citing United States v. Gillock, 445 U.S. 360, 374 (1980))).

[4] *See infra* note 36 (discussing clauses in state constitutions).

[5] Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 732 (1980) (citing Tenney v. Brandhove, 341 U.S. 367, 373–75 (1951)).

immunizes a legislator's legislative acts from trial, regardless of the facts of the case or the weight of the burden placed on the legislator. A qualified protection is instead one accorded to legislators only in certain instances, depending on the circumstances involved.

Third, in providing these protections to legislators, the Court has defined two rationales for why these protections should exist: separation of powers and legislative effectiveness. The Court has held the separation-of-powers rationale to be the stronger of the two and thus the one that accords greater protection to legislators.

The intricacies of these three principles and the manner in which they interact with one another can be quite complex. Moreover, the Supreme Court has discussed the specifics of these principles only infrequently and not in great depth. Consequently, lower courts have had difficulty fully appreciating these interactions, leading to a significant amount of confusion in lower court application of the Supreme Court's SODC jurisprudence. This confusion has led a number of courts to offer absolute protection when only qualified protection is required, thereby decreasing the likelihood that a legislator will be required to testify to the motivations behind his or her legislative acts. Immunizing legislators from testimony, in turn, undermines the discovery process and ultimately impairs the ability of courts and litigants "to obtain the fullest possible knowledge of the issues and facts before trial."[6]

This Note, therefore, seeks to clear up some of this confusion in the lower courts. Basing its conclusions on the Supreme Court's SODC jurisprudence, this Note relies on the interactions between the principles discussed above to offer a straightforward framework for determining when SODC protections should and should not apply: (1) Federal legislators should always receive absolute protection under the SODC; (2) state legislators should receive only qualified SODC protections; and (3) whether state legislators should ultimately have their testimony protected requires balancing federal against state interests, with protection more likely when legislators face personal

[6] Hickman v. Taylor, 329 U.S. 495, 501 (1947); *see also* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2001 (3d ed. 2010) (noting that the "basic philosophy" behind discovery is that all parties are "entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged" and that "discovery was broadened and the restrictions imposed upon it were directed chiefly at the use of, rather than the acquisition of, the information discovered").

liability rather than being merely compelled to testify or provide evidence about the motivations behind a particular law.

While this framework can be applied to any litigation requiring testimony based on legislative acts, this Note is particularly concerned with the interaction between the SODC and redistricting litigation, where a plaintiff challenges redistricting legislation as being an impermissible gerrymander.[7] The harms caused by gerrymandering can be quite significant.[8] Yet courts have struggled with adjudicating redistricting claims[9] because they have often been forced to base their

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[7] Gerrymandering can be defined as "any attempt to draw district lines to effect [sic] the legislature's composition or, more remotely, to influence legislative enactments." Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 WM. & MARY L. REV. 1, 10 (2008).

[8] *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 516 (1997) ("[G]errymanders are a notorious example of the agency problem inherent in representative government. When representatives of both parties agree to a district line-drawing scheme that solidifies incumbency, their constituents are unlikely to approve of the resulting arrangement. This is a classic instance of legislative entrenchment."); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 860 (1997) ("Redistricting conducted by state legislatures fosters disillusionment with the democratic process because it more deeply ingrains upon the American psyche the image of politicians as self-interested actors feathering their own nests."); Note, *An Interstate Process Perspective on Political Gerrymandering*, 119 HARV. L. REV. 1576, 1576 (2006) (listing several grounds that commentators cite to indict partisan gerrymandering).

[9] In the partisan gerrymandering context, a plurality of the Court in *Davis v. Bandemer* held that plaintiffs had to show both "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" to prove a partisan gerrymandering claim. 478 U.S. 109, 127 (1986). The Supreme Court never thereafter found a case that met such a rigorous standard. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 550 (2004) ("The plurality's test set a high—indeed, insuperable—threshold . . . ."). In the racial gerrymandering context, the Court has held that race cannot be the "predominant factor" behind district design. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place . . . voters within or without a particular district. . . . [P]laintiff must prove that the legislature subordinated traditional race-neutral districting principles, including . . . compactness, contiguity, and respect for political subdivisions or communities . . . ."). But advocates and scholars alike have had great difficulty assigning stable meaning to the phrase. *See* Richard Briffault, *Race and Representation After* Miller v Johnson, 1995 U. CHI. LEGAL F. 23, 51–52 (discussing the similarities between "racially motivated and partisan districting"); Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45, 57–60 (describing the inability of the predominant factor test to "elucidate the exact notion of causation that triggers constitutional infirmity"); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 302–06 (1996) (noting that the predominant factor test provides little help in determining when racial considerations are permitted). *See generally* Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2506 (1997) (arguing that "motive-based" approaches, such as the predominant factor test, are not "capable of sustaining constitutional doctrine in a coherent, administrable, or useful form").

decisions solely on circumstantial evidence like the shape of the districts involved and the partisan and racial make-up of the populations in those districts.[10] This is because the standards for successfully challenging a redistricting plan involve at least some focus on legislative intent,[11] but SODC protections prevent information regarding the intent or motivations of the legislators who participate in the redistricting process from being used at trial.[12] Accordingly, after defining a better framework for determining when SODC protections should and should not apply, this Note considers how that framework applies to the particulars of redistricting litigation.

Part I of this Note summarizes the confusion in SODC case law, focusing both on Supreme Court precedent and lower courts' application of this precedent. Part II develops a more consistent framework for interpreting the SODC based on Supreme Court precedent and the rationales behind the Court's SODC holdings. Finally, Part III applies this framework to redistricting litigation and suggests that under Supreme Court case law courts must deny SODC protections to state legislators involved in the redistricting process.

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[10] *See, e.g.*, Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 534–36 (M.D. Pa. 2002) (listing the population disparities between districts, the partisan vote of the passed redistricting plan, and the extent the plan splits counties, but failing to disclose any information regarding the intent of the legislators themselves); Badham v. March Fong Eu, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (cataloging the "uncouth, irregular, and bizarre" shape of some of the districts at issue, the manner in which the districting scheme was voted on, and the extent the districting plan "operates to minimize or cancel out [plaintiffs'] votes and voting strength," but mentioning nothing of the motives of the legislators themselves (alteration in original) (internal quotation marks omitted)).

[11] In *Davis v. Bandemer*, the Court established that a partisan gerrymandering claim requires proving both discriminatory effect on a specific group and intentional discrimination against that group. 478 U.S. 109, 127 (1986). In the racial gerrymandering context, the "predominant factor" test requires ascertaining the motive of the legislators who passed the redistricting scheme in question. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place . . . voters within or without a particular district. . . . [A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including . . . compactness, contiguity, and respect for political subdivisions or communities . . . .").

[12] *See* United States v. Brewster, 408 U.S. 501, 512 (1972) ("In sum, the Speech or Debate Clause prohibits inquiry . . . into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts."); Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 297 n.12 (D. Md. 1992) ("Since *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130–31 (1810), the general rule has been that inquiry into the motives of legislators was not in keeping with our scheme of government and, therefore, placing a decisionmaker on the stand is usually to be avoided." (internal quotation marks omitted)); Holmes v. Farmer, 475 A.2d 976, 984 (R.I. 1984) ("Inquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation (as plaintiffs attempted to require) falls clearly within the most basic elements of legislative privilege.").

I
COURT INTERPRETATIONS OF THE SPEECH OR DEBATE CLAUSE

Legislative immunity and privilege protections stem from the Supreme Court's interpretation of the SODC in Article I of the U.S. Constitution: "[F]or any Speech or Debate in either House, [Congress] shall not be questioned in any other Place."[13] The Supreme Court has interpreted this protection from being "questioned" as encompassing two ideas. First, federal legislators should not have to defend their legislative acts at trial.[14] Second, federal legislators should not have to be burdened with the time and effort required to testify or produce evidence at trials.[15]

Though these protections may sound fairly straightforward, both the Supreme Court and lower federal and state courts have issued inconsistent and seemingly confused opinions with respect to two major aspects of SODC jurisprudence.[16] First, the Supreme Court has failed to consistently distinguish between the protections it defines as "legislative immunity" and those it holds to be "legislative privilege."[17] Second, though the Supreme Court has been relatively clear about the scope of SODC protections as they apply to federal legislators,[18] the Court has failed to concretely establish how the SODC affects the protections provided to state legislators and how, if at all, these state protections differ from their federal counterparts. Part I.A discusses the confusing manner in which courts have used the terms "legislative immunity" and "legislative privilege." Part I.B then reviews Supreme Court precedent on whether these protections—be they called "immunities" or "privileges"—should be qualified

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[13] U.S. CONST. art. I, § 6.

[14] *See, e.g.*, Gravel v. United States, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.").

[15] *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975) ("[L]egislators acting within the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves. . . . [A private civil action] creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks . . . ." (internal quotation marks omitted)).

[16] *See generally* 26A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5675 (1st ed. 1992) (discussing the lack of clarity that surrounds interpretations of the SODC and the way courts and scholars have struggled to define its contours).

[17] *See infra* Part I.A (surveying the conflicting ways the Supreme Court has used the terms "legislative privilege" and "legislative immunity" in its SODC opinions).

[18] *See infra* notes 72–73 and accompanying text (describing the absolute protection the Supreme Court has granted federal legislators under the SODC).

(applying only in certain situations) or absolute (applying in all situations). Finally, Part I.C looks at the often-problematic way lower courts have interpreted and applied this same precedent.

A. Inconsistencies in Defining Legislative "Privileges" and "Immunities"

Part of the confusion in SODC doctrine is due to the inconsistent use of the terms "legislative immunity" and "legislative privilege" by both the Supreme Court and lower courts.[19] This imprecision—though semantic—has led to significant doctrinal confusion.

One function of the SODC 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.[20] This type of protection is generally (though not always) referred to as an *immunity*.[21] A second function allows federal legislators to withhold providing testimony or evidence that might shed light on the purposes and motivations behind their legislative acts, which functions essentially as an evidentiary *privilege*.[22] In other words, legislative immunity protects legislators where they are being threatened with personal liability—either civilly or criminally; legislative privilege is an *evidentiary* protection that shields only the evidence that a legislator might be called on to produce at trial.

However, many courts have often been inconsistent in applying these terms and concepts. This confusion was first sown by the

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[19] Because of this inconsistency, this Note will refer generically to the protections provided under the SODC as "SODC protections." It should be noted, however, that even this term is somewhat confusing. The discussion of *United States v. Gillock* below, *see infra* notes 43–51 and accompanying text, will establish that state legislators are not directly protected by the SODC and instead are protected by a federal common law privilege that courts have interpreted similarly, but not identically, to the protections accorded to federal legislators. While for consistency's sake this Note will refer to even these state protections as "SODC protections," technically they are protections that do not stem directly from the SODC.

[20] *See* United States v. Helstoski, 442 U.S. 477, 487 (1979) ("[E]vidence of a legislative act of a Member may not be introduced by the Government in a prosecution . . . ."); *In re* Grand Jury, 821 F.2d 946, 953 (3d Cir. 1987) ("The Speech or Debate Clause accomplishes [its] goals primarily by providing Congressmen and their aides with absolute immunity from criminal or civil suit . . . .").

[21] *See, e.g.*, Spallone v. United States, 493 U.S. 265, 278 (1990) (describing legislative immunity in the context of state and regional legislators); *In re Grand Jury*, 821 F.2d at 953 (referring to the freedom from criminal and civil liability as an absolute immunity); ACORN v. Cnty. of Nassau, No. CV 05-2301, 2007 WL 2815810, at *2 (E.D.N.Y. Sept. 25, 2007) (using the term "legislative immunity" to describe protections afforded to state and local legislators as analogous to those extended to Congress).

[22] *See* Loesel v. City of Frankenmuth, No. 08-11131-BC, 2010 WL 456931, at *6 (E.D. Mich. Feb. 4, 2010) (describing an "evidentiary privilege" as one "that would prevent a state legislator from testifying at a deposition or trial").

Supreme Court's own decisions.[23] The first few Supreme Court cases to interpret the SODC invariably spoke of both of its inherent protections as a privilege.[24] However, in the late 1960s the Court began to refer to the protections instead as an immunity.[25] Later cases vacillated between calling the protections a privilege and an immunity—sometimes within the same opinion.[26] Lower courts have displayed similar inconsistencies.[27]

B. Supreme Court Precedent and the Rationales Behind Legislative Protections

Though the Supreme Court's semantic use of these terms has lacked clarity, the Court has been much clearer in explaining the two rationales that justify both immunity and privilege protections: separation of powers and legislative effectiveness. This Subpart traces the manner in which the Court first established these rationales and ultimately integrated them with one another.

In *Tenney v. Brandhove*, the Court first articulated a justification for protecting legislators from trial under the SODC: preserving

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[23] *See* Wells Harrell, Note, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 VA. L. REV. 385, 386, 392–94 (2012) (arguing that the Supreme Court has failed to appreciate the difference between legislative immunity and legislative privilege).

[24] *See* United States v. Johnson, 383 U.S. 169 (1966) (describing the protection as a privilege rather than an immunity); Tenney v. Brandhove, 341 U.S. 367 (1951) (describing the protection as a privilege in the majority opinion, but as an immunity in the concurrence and dissent); Kilbourn v. Thompson, 103 U.S. 168 (1881) (describing the protection as a privilege rather than an immunity).

[25] *See* Powell v. McCormack, 395 U.S. 486, 503 (1969) (referring to "legislative immunity"); Dombrowski v. Eastland, 387 U.S. 82 (1966) (same).

[26] For example, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court first described the protection as an immunity, *id.* at 123 ("If the respondents have immunity under the Clause, no other questions need be considered for they may not be questioned in any other Place." (internal quotation marks omitted)), and later as a privilege, *id.* at 127 ("Whatever imprecision there may be in the term 'legislative activities,' it is clear that nothing in history or in the explicit language of the Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber."). In *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975), the Court again first describes the protection as an immunity, *id.* at 507 ("We conclude that the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena."), and then as a privilege, *id.* at 514 ("[A] court's inquiry in such a setting is necessarily quite limited once defendants entitled to do so invoke the privilege of the Speech or Debate Clause . . . .").

[27] *See, e.g.*, Johnson v. Metro. Gov't of Nashville & Davidson Cnty., Nos. 3:07–0979, 3:08–0031, 2009 WL 819491, at *4 (M.D. Tenn. Mar. 26, 2009) (referring to the same protection as a "legislative privilege" and a "legislative immunity" in a single paragraph); Corporación Insular de Seguros v. Garcia, 709 F. Supp. 288, 294–95 (D.P.R. 1989) (using "legislative privilege" and "legislative immunity" similarly in adjoining paragraphs); *cf.* EEOC v. Wash. Suburban Sanitary Comm'n, 666 F. Supp. 2d 526, 531 (D. Md. 2009) (noting that the briefs of both parties used the terms interchangeably).

legislators' ability to do their jobs effectively.[28] Jack Tenney was one of several California policymakers being sued by William Brandhove for a deprivation of Brandhove's constitutional rights.[29] Importantly, the suit threatened Tenney with personal civil liability for his legislative acts.[30] The Supreme Court held that Tenney was protected by legislative privilege and thus could not be held liable,[31] reasoning that legislators must be protected from civil liability to ensure that the "uninhibited discharge of their legislative duty" is undeterred by "the cost and inconvenience and distractions of a trial."[32] In doing so, without labeling it as such, the *Tenney* Court established a "legislative-effectiveness" rationale for providing legislators with SODC protections.

The protections accorded in *Tenney*, however, did not stem directly from the SODC. Although the *Tenney* Court discussed the SODC at some length,[33] the Court decided the case based on federal common law—a point not entirely clear in the opinion, but confirmed in later Court opinions.[34] Because the SODC of the federal Constitution applies only to Congress, it does not directly protect state or local legislators.[35] But because most state constitutions contain a similar or identical clause,[36] the Supreme Court has recognized a federal common law protection for state legislators "similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause."[37]

The next case to adjudicate a SODC dispute—*United States v. Johnson*—relied on a separation-of-powers rationale to extend

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[28] *See* 341 U.S. at 373–77 (discussing the historical rationale).

[29] *Id.* at 369–70.

[30] *Id.* at 371 (stating that the plaintiff was suing Tenney for $10,000 in damages based on a legislative hearing Tenney had held).

[31] *Id.* at 377–79.

[32] *Id.* at 377.

[33] *See id.* at 372–75.

[34] *See* United States v. Gillock, 445 U.S. 360, 372 n.10 (1980) (citing Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 404 (1979)) ("Despite the frequent invocation of the federal Speech or Debate Clause in *Tenney*, the Court has made clear that the holding was grounded on its interpretation of federal common law, not on the Speech or Debate Clause.").

[35] *See, e.g.*, Cole v. Gray, 638 F.2d 804, 810 (5th Cir. Mar. 1981) ("[T]he Supreme Court has unequivocally ruled that the embrace of the clause does not extend to a state legislator.").

[36] For a more specific description of these clauses in state constitutions and the extent they do or do not vary from the SODC, see Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 236–37 (2003).

[37] Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 732 (1980) (citing *Tenney*, 341 U.S. at 372–73).

legislative immunity.[38] Thomas Johnson, a former U.S. Congressman, was convicted of accepting a bribe in exchange for, among other things, giving a speech on the House floor in support of an institution charged with mail fraud.[39] Johnson's speech, and the preparations and motivations for giving the speech, served as critical evidence in the government's case against him.[40] The Court, however, held that the speech was protected as a legislative act and thus no charges could be brought against him because of it.[41] The Court was explicit that such protections were required to insulate the legislative branch from attack by the executive or judiciary: "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."[42]

In *United States v. Gillock*,[43] the Court demonstrated how the rationales developed in *Tenney* and *Johnson* are intimately tied to the state or federal locus of each dispute. Like *Johnson*, *Gillock* involved a bribery prosecution; however, *Gillock* involved a state, rather than federal, legislator.[44] To determine whether Edgar Gillock, the accused legislator, should be accorded SODC protection, the Court first acknowledged the two rationales established in *Tenney* and *Johnson*.[45] The Court then differentiated the separation-of-powers rationale as applying only to federal legislatures. It held that the separation-of-powers rationale that informs the federal SODC "gives no support to the grant of a privilege to state legislators [such as

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[38] *See* 383 U.S. 169, 178 (1966) ("In the American governmental structure the clause serves the . . . function of reinforcing the separation of powers so deliberately established by the Founders.").

[39] *Id.* at 171–72.

[40] *Id.* at 173–76.

[41] *Id.* at 184–85.

[42] *Id.* at 179 (quoting THE FEDERALIST NO. 48, at 107 (James Madison) (Michael A. Genovese ed., 2009)).

[43] 445 U.S. 360 (1980).

[44] *Id.* at 362.

[45] *See id.* at 369 ("Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence."). Although the *Gillock* Court refers to this second rationale as "legislative independence," which sounds as though it is simply a synonym for the separation-of-powers rationale, the Court was actually referring to the legislative-effectiveness rationale established in *Tenney*. *See infra* note 48 and accompanying text (referencing the Court's understanding of legislative independence and the *Tenney* holding). Indeed, it is clear the two rationales are supposed to be distinct. *See* 26A WRIGHT ET AL. § 5675 ("Some writers have favored a 'legislative independence' rationale for the Speech or Debate Clause. However, this seems to be merely another way of stating the separation of powers argument."). Therefore, the term "legislative effectiveness" seems to more appropriately and more clearly capture the true meaning of this second rationale.

Gillock] in federal criminal prosecutions"[46] because the federal Supremacy Clause dictates that federal interests must prevail over the competing interests of the state.[47]

Having dismissed the separation-of-powers rationale, the Court turned to legislative effectiveness. The Court first accepted the *Tenney* Court's definition of the rationale[48] and then went on to consider how much weight that rationale should have in the Court's analysis:

> [A]lthough 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*. We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function . . . . [However,] we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.[49]

In other words—although not explicitly describing it as such—the Court applied a balancing analysis to determine whether the threat to legislative effectiveness was significant enough to outweigh the federal interests involved. In doing so, the Court found that the importance of protecting the "uninhibited discharge of . . . legislative duty"[50] (the legislative-effectiveness rationale articulated in *Tenney*) was insufficient to outweigh the federal interest at stake (weeding out corruption in government) and refused to provide Gillock legislative privilege protection.[51]

Finally, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, decided a year before *Gillock*, reiterated the notion, initially expressed in *Tenney*, that state legislators being sued for civil damages should be protected from trial.[52] Yet it also assumed, without discussion or any further cite to authority, that *Tenney* provided *absolute* legislative immunity.[53]

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[46] *Gillock*, 445 U.S. at 370.

[47] *See id.* ("[W]here 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.").

[48] *See id.* at 371–73 (discussing *Tenney* at length in describing the legislative-effectiveness rationale and in terms of preventing the "disruption of the state legislative process").

[49] *Id.* at 373 (emphasis added).

[50] Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

[51] *Gillock*, 445 U.S. at 373.

[52] 440 U.S. 391, 404–06 (1979).

[53] *Id.*

Lake Country involved a group of homeowners suing a local governmental agency for civil damages.[54] The Court found the agency immune from suit under federal common law.[55] In doing so, the Court cited *Tenney* in dicta, claiming that the *Tenney* Court provided state legislators "absolute immunity" from having to defend themselves at trial.[56] Yet nowhere in *Tenney* did the Court state that the protection provided to Tenney was "absolute."[57]

These cases leave three important questions unanswered: (1) Do the holdings of *Tenney* and *Lake Country* apply equally to state legislators who are not threatened with personal liability; (2) does *Gillock* develop such a balancing test because it is a criminal case, or simply because Gillock was a state legislator; and (3) does *Lake Country* claim the protections in that case to be absolute because it is a civil case, or because the legislator in question was personally threatened with liability? The following Subpart will discuss the inconsistency in the lower courts' attempts at answering these questions.

C. Lower-Court Interpretations of the Speech or Debate Clause

Lower courts have been hamstrung by the indeterminacy of the Supreme Court's SODC holdings. The Court has not clearly and comprehensively articulated when SODC protections are absolute and when they are qualified, nor the extent to which a state or federal locus affects that analysis. This Subpart provides a brief overview of the varied ways lower courts, lacking that guidance, have sought to adjudicate these questions.

SODC claims generally can be divided into four discrete areas: (1) suits involving federal legislators, (2) criminal suits involving state legislators, (3) civil suits involving state legislators being threatened with personal liability (that is, immunity cases), and (4) civil suits involving state legislators not being threatened with personal liability (that is, evidentiary privilege cases). Supreme Court precedent

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[54] *Id.* at 394.

[55] *Id.* at 405. Notably, the Court quoted from the same language in *Tenney* that first defined legislative effectiveness as being the rationale that justifies that protection. *Id.* at 404–05.

[56] *Id.* at 404.

[57] In fact, the *Tenney* Court did not define the protection being provided to Tenney as an "immunity" at all. Instead, the Court defined it as a "legislative privilege." *See* Tenney v. Brandhove, 341 U.S. 367, 372 (1951) ("The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries."). This is one of many instances where the Court is inconsistent and careless with the terms it uses to describe SODC protections. *See supra* Part I.A (surveying the inconsistency in judicial use of "legislative immunity" and "legislative privilege").

directly addresses the first three areas: Numerous opinions address the first;[58] *Gillock* addresses the second; *Tenney* and *Lake Country* address the third. Thus, in the first three of these areas, lower courts can and do simply follow Supreme Court precedent.[59]

The fourth area—civil suits where state legislators are not faced with personal liability—has never been directly addressed by the Supreme Court.[60] As a result, lower courts have struggled in applying the holdings of *Tenney*, *Johnson*, *Gillock*, and *Lake Country* to these suits and have not provided consistent answers to the questions presented above.

Lower courts making determinations in this fourth area fall into two groups: those that find these protections to be absolute, despite the fact that the legislators in question are not threatened with personal liability, and those that find these protections to be qualified. The different conclusions these two groups reach can largely be traced to whether the court relies solely on *Tenney* or whether it also includes a discussion of the *Gillock* balancing test.

With one exception,[61] those courts that find evidentiary protections to be absolute look to *Tenney* for Supreme Court authority but

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[58] *See infra* notes 72–73 and accompanying text (discussing cases).

[59] For lower courts adjudicating cases in the first area in this manner, see, for example, United States v. Jefferson, 546 F.3d 300, 310 (4th Cir. 2008) (stating that the Speech or Debate Clause "provides legislators with absolute immunity for their legislative activities"); Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 416 (D.C. Cir. 1995) ("[T]he legislative privilege is 'absolute' where it applies at all." (quoting Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 509 (1975))); Taylor v. Duncan, 720 F. Supp. 2d 945, 953 (E.D. Tenn. 2010) ("'[O]nce it is determined that Members are acting within the "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference.'" (alteration in original) (quoting *Eastland*, 421 U.S. at 503)).

For cases in the second area, see, for example, Martineau v. United States, No. CR 07-129-ML, 2010 WL 2196071, at *3 (D.R.I. June 1, 2010) (citing *Gillock* for the notion that in criminal cases against local legislators, legislative immunity does not apply); United States v. Boender, No. 09 CR 186-1, 2010 WL 680952, at *3–4 (N.D. Ill. Feb. 23, 2010) (same).

For cases in the third area, see, for example, Aitchison v. Raffiani, 708 F.2d 96, 99 (3d Cir. 1983) (holding that "members of a municipal council acting in a legislative capacity are absolutely immune from damage suits under section 1983"); Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 298 (D. Md. 1992) ("[A] state legislator acting within the sphere of legitimate legislative activity may not be a party to a civil suit concerning those activities." (internal quotation marks omitted)).

[60] No Supreme Court case has addressed an SODC dispute where a state legislator has not been personally threatened with civil liability, but is instead only asked to testify or produce documentary evidence.

[61] *Miles-Un-Ltd., Inc. v. Town of New Shoreham, R.I.* does mention *Gillock*, but it only does so to illustrate the broader protection afforded federal—as opposed to state—legislators. 917 F. Supp. 91, 99–100 (D.N.H. 1996). It does not use *Gillock* to make a determination about whether the legislators in the case should be provided absolute or qualified protection and holds that the immunity should be absolute. *Id.* at 97–98, 102.

ignore *Gillock*.[62] These courts read *Tenney*'s holding broadly, finding the Court's provision of SODC protections to Tenney as signifying that all federal common law SODC protections in the civil context must be absolute.[63] By doing so, these courts are addressing the first of the three questions and are extending the holding of *Tenney* (and *Lake Country*) from cases where a legislator faces personal liability to cases where the legislator does not.

In contrast, those courts that find these evidentiary privileges to be qualified read *Tenney* more narrowly and look instead to *Gillock* for authority. These courts view *Gillock*'s creation of a federal-interest balancing test as a broad prescription for analyzing SODC disputes, extending its use beyond just criminal prosecutions, and thereby effectively answering the second question regarding whether the basis for the *Gillock* balancing test was the criminal nature of the case or that the defendant was a state legislator.[64]

The consequences of a court's decision on whether to accord absolute or qualified protections in such cases is significant, as it directly bears on whether plaintiffs will prevail on the merits of their case. When plaintiffs must prove legislative intent as part of their claim, a finding of absolute protection will often make it impossible for plaintiffs to prevail.[65] This is especially true in redistricting litigation.[66] The remainder of this Note attempts to resolve the difficulties

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[62] *E.g.*, Schlitz v. Virginia, 854 F.2d 43, 45 (4th Cir. 1988), *overruled by* Berkley v. Common Council of Charleston, 63 F.3d 295 (4th Cir. 1995); Sizeler Hammond Square Ltd. v. City of Hammond, No. Civ.A. 99-1816, 1999 WL 615173, at *2 (E.D. La. Aug. 12, 1999); 2BD Assocs. Ltd. v. Cnty. Comm'rs for Queen Anne's Cnty., 896 F. Supp. 528, 531 (D. Md. 1995).

[63] *See, e.g.*, *Miles-Un-Ltd.*, 917 F. Supp. at 97 (citing to *Tenney* for the notion that legislators should be absolutely protected from civil suit, whether it involves personal liability or simply having to testify); Small v. Hunt, 152 F.R.D. 509, 512 (E.D.N.C. 1994) (citing to *Tenney* to establish that state legislators should be provided absolute immunity from civil suit and then extending that immunity to evidentiary protections).

[64] *See, e.g.*, Kay v. City of Rancho Palos Verdes, CV 02-03922, 2003 WL 25294710, at *12–14 (C.D. Cal. Oct. 10, 2003) (applying a balancing test in determining the applicability of legislative privilege to a civil suit); Searingtown Corp. v. Inc. Vill. of N. Hills, 575 F. Supp. 1295, 1299 (E.D.N.Y. 1981) (same).

[65] *See, e.g.*, Suhre v. Bd. of Comm'rs, 894 F. Supp. 927, 933 (W.D.N.C. 1995) (concluding that absolute legislative immunity protected a county commissioner from trial and accordingly granting summary judgment for that county commissioner), *rev'd on other grounds sub nom.* Suhre v. Haywood Cnty., 131 F.3d 1083 (4th Cir. 1997); *cf.* Cano v. Davis, 193 F. Supp. 2d 1177, 1181 (C.D. Cal. 2002) (Reinhardt, J., concurring in part and dissenting in part) ("When a plaintiff must prove discriminatory intent on the part of a legislature, the statements of legislators involved in the process . . . may in some instances be the best available evidence as to legislative motive."); *id.* at 1182 ("Motive is often most easily discovered by examining the unguarded acts and statements of those who would otherwise attempt to conceal evidence of discriminatory intent.").

[66] *See supra* note 10 (listing several gerrymandering cases where the court was only able to rely on circumstantial factors like district shape and geographical boundaries).

lower courts have faced in applying the Supreme Court's SODC precedent by suggesting a more consistent framework for interpreting the Clause, with a focus on redistricting litigation.

II
Developing a Consistent Speech or Debate Clause Framework

Properly assessing whether SODC protections should be provided to legislators in a particular matter—including redistricting litigation—requires determining whether legislative privilege should be absolute or merely qualified. This Part proposes a framework for interpreting the SODC to answer this question in a simple and clear fashion: Both legislative immunity and privilege should constitute absolute protections in the federal context but should be qualified when applied to state legislators. To determine whether the testimony of state legislators should ultimately be protected, courts should follow *Gillock*'s balancing test, which requires balancing federal interests against state interests.

A. Defining the Framework

The central issue in interpreting the SODC (and the federal common law protections that stem from it) is whether legislators should receive absolute or qualified SODC protections in any particular case. This Note proposes a simple framework for answering the question. In conformity with the Supreme Court's jurisprudence described *infra* in Part II.B, the framework turns foremost on whether the legislator requesting protection is a federal or state representative. First, federal legislators, directly protected by the federal SODC, should receive *absolute* SODC protections in both civil and criminal suits. Second, state legislators, protected only by federal common law, should receive *qualified* protection, regardless of whether the suit is civil or criminal. Third, because state legislators only receive qualified protection, courts should employ the *Gillock* federal-interest balancing test on a case-by-case basis to determine whether a legislator should receive protection in a particular case. In applying this balancing test, courts should be more inclined to provide SODC protection when state legislators are threatened with personal liability, as in both *Tenney* and *Lake Country*, and less inclined when plaintiffs seek only injunctive or declaratory relief.

Finally, to encourage consistency and avoid confusion, courts should cabin "legislative immunity" to instances where the court is protecting legislators from personal liability, and treat "legislative

privilege" as covering only evidentiary protections. Apart from encouraging consistency, clearer definitions would also resolve some doctrinal confusion. Most courts, if they distinguish between the two terms, tend to see legislative immunity as being a stronger, more robust protection than legislative privilege.[67] Typically, this leads courts to regard legislative immunity as providing an absolute protection.[68] On the other hand, there is more disagreement over the scope of legislative privilege; some courts find it absolute and others qualified.[69] Because many courts are quick to view the terms within these doctrinal boxes, the lack of a clear and accepted meaning can have a significant effect on the outcome of a case.[70] The proposed framework, however, avoids this problem because the only relevant distinction according to the framework is a legislator's federal or state locus. Whether the protection is termed "immunity" or "privilege" has no effect on the scope of the protection provided. Nonetheless, using the terms consistently in the manner described above can still provide courts a useful shorthand for describing these protections. Thus, though their meaning is irrelevant to the framework proposed here, their consistent use would allow courts to more clearly communicate the rationales behind their SODC adjudications without allowing the terminology to influence their decisions.

B. Analyzing the Framework Based on the Supreme Court's Speech or Debate Clause Jurisprudence

The framework proposed above is both consistent with Supreme Court precedent and an extension of the rationales the Court has said underlie the SODC. It rests on the central notion that *Gillock* requires courts to apply its balancing test in determining whether

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[67] *See, e.g.*, *Kay*, 2003 WL 25294710, at *9 ("Legislative *immunity* shields legislators from fear that courageous pursuit of their legitimate public duties may subject them to liability. From this immunity springs a limited legislative *privilege* against supplying evidence . . . ."); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 95 (S.D.N.Y. 2003) ("Legislative immunity entitles a state legislator . . . to the dismissal of all of the claims against him or her in the complaint . . . . Legislative privilege, on the other hand, is not absolute.").

[68] *See, e.g.*, Larsen v. Senate of Pa., 152 F.3d 240, 249 (3d Cir. 1998) ("[S]tate legislators are . . . entitled to absolute legislative immunity from suit under [42 U.S.C.] § 1983 for legitimate legislative activities taken in their legislative capacities.").

[69] For a list of courts that have decided the issue on either side, see *Kay*, 2003 WL 25294710, at *11–14.

[70] For instance, say Court *A* refers to a given protection as a legislative immunity and, after balancing the interests of both sides of the case, determines that the legislator involved should be protected from trial. Court *B* might then look to Court *A* as precedent, see that Court *A* termed the protection an immunity, and assume the protection is absolute. Court *B* would then fail to apply the balancing test, even though the facts of the case might be different and might have led Court *A* to have denied the legislators in that situation any SODC protection.

state legislators should be afforded SODC protections, which necessarily means that state legislators only receive *qualified* protection.[71] In doing so, the proposed framework addresses the three issues left unanswered by existing Supreme Court precedent. The protections provided in *Tenney* and *Lake Country* do not automatically extend to state legislators not facing personal liability, the *Gillock* balancing test applies in all cases, not just criminal cases, and the "absolute" protection provided in *Lake Country* was based on the legislator facing personal liability and not because the case was civil.

After briefly discussing the absolute protections accorded to federal legislators under the SODC, this Subpart analyzes *Gillock* to demonstrate that all state SODC protections must be qualified. It then shows how this balancing test can be applied to both *Tenney* and *Lake Country* in a manner that results in the same outcome but better keeps to the two rationales that justify SODC protection.

The Supreme Court has held on numerous occasions that federal legislators must be provided absolute SODC protections. This is the case regardless of whether a legislator is being threatened with personal liability,[72] or whether she is simply being made to testify or provide documentary evidence in a suit seeking injunctive or declaratory relief.[73] Thus, the framework simply reflects Supreme Court precedent in providing absolute SODC protections to federal legislators.

Gillock provides support for the other part of the framework—that all state legislators should be provided only qualified legislative protections. It does so by applying the two rationales behind the SODC to the federal or state locus of legislators. First, *Gillock* establishes a clear distinction between the two rationales used to justify SODC protections.[74] The separation-of-powers rationale justifies greater protection than does legislative effectiveness. While the separation-of-powers rationale—which applies only to federal legislators—is strong enough to protect legislators absolutely,[75]

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[71] *See supra* notes 49–51 and accompanying text (discussing the *Gillock* balancing test); *infra* notes 74–79 and accompanying text (same).

[72] *See, e.g.*, United States v. Helstoski, 442 U.S. 477, 489 (1979) (providing absolute immunity in a bribery case involving personal liability); United States v. Johnson, 383 U.S. 169, 184–85 (1966) (finding absolute immunity for conspiracy charges against a legislator).

[73] *See, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975) (finding immunity although only injunctive relief was requested because defending a suit diverts time, energy, and attention from legislative tasks); Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967) (deciding that legislators should be protected not only from personal liability, but also from the burden of defending themselves).

[74] 445 U.S. 360, 369 (1980).

[75] *See supra* notes 72–73 and accompanying text (noting how the Supreme Court has been consistent in holding that federal legislators should be provided absolute SODC protection whether they are threatened with personal liability or not).

regardless of the facts of the case or the interests on the other side, the legislative-effectiveness rationale is not as strong.[76] Accordingly, a court relying on the legislative-effectiveness rationale must balance the interests of both parties to the litigation in question before SODC protections can be provided.[77]

Second, *Gillock* acknowledges that these rationales apply differently to federal and state legislators.[78] According to *Gillock*, the separation-of-powers rationale does not apply in the state setting,[79] meaning that state legislators can rely only on the legislative-effectiveness rationale. Because legislative effectiveness is weaker than the separation of powers rationale, any protection provided to state legislators is inherently weaker than those provided to federal legislators. Therefore, *Gillock*'s holding suggests that the weakness of the legislative protection afforded to state legislators requires applying a balancing test to determine whether such protections should apply in an individual case.

Thus, by applying a balancing test, the *Gillock* Court necessarily defined the protection potentially available to state legislators as a qualified one. A balancing test, by its very nature, is a fact-dependent test that presupposes that in some circumstances the legislator will not receive protection.

However, it is important to recognize that casting all common law SODC protections as qualified is not the same as refusing to provide state legislators any SODC protection whatsoever. It simply means that *Gillock*'s balancing test must be used to determine whether SODC protections should be available to state legislators in an individual case. Indeed, as discussed above, the proposed framework suggests that courts should be more inclined to provide SODC protection to legislators threatened with personal liability and less inclined when plaintiffs seek only injunctive or declaratory relief.[80]

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[76] *See supra* notes 48–51 and accompanying text (discussing the weakness of the legislative-effectiveness rationale compared to the separation-of-powers rationale).

[77] *See* United States v. Gillock, 445 U.S. 360, 373 (1980) (concluding that legislative privilege must sometimes yield to important federal interests such as the enforcement of criminal statutes).

[78] *See supra* note 46 and accompanying text (discussing *Gillock*'s analysis of the two rationales); *cf.* Huefner, *supra* note 36, at 304 ("[S]tate legislators broadly protected by a state Speech or Debate clause equivalent in scope to the federal clause perform their legislative work with less protection than is available to members of Congress.").

[79] *See supra* note 47 and accompanying text (discussing *Gillock*'s application of the separation-of-powers rationale in the context of a state legislator).

[80] *See supra* Part II.A (establishing the proposed framework and suggesting that legislators should be provided less protection in suits requesting declaratory or injunctive relief, since those suits do not threaten the legislator with personal liability).

Tenney provides a good example of the viability of the proposed framework. Tenney was afforded legislative immunity from defending himself at trial against civil liability.[81] The Court would likely have reached the same outcome if it had applied the *Gillock* balancing test to the facts of *Tenney*. Because Tenney was facing civil liability, rather than criminal, the federal interest in *Tenney* was weaker than it was in *Gillock*.[82] The legislative-effectiveness interest, however, was high, since Tenney was being threatened with personal liability.[83] That combination would likely be sufficient to find Tenney deserving of legislative-immunity protection under the *Gillock* balancing test. Indeed, it seems likely that whenever state legislators are threatened with civil liability, legislative immunity will protect those legislators from having to defend themselves from that liability.[84]

A case with different facts—for instance, those that might apply in the redistricting context—may well come out differently under the *Gillock* balancing test. The *Tenney*-*Gillock* line of cases seems to indicate that the federal interest in private suits brought by individual plaintiffs seeking civil damages is fairly low.[85] However, a case bringing a constitutional challenge affecting the federal rights of a large group of citizens might be seen by courts as constituting a stronger federal interest than suits focused on civil damages.[86] At the same time, the legislative-effectiveness interest is likely smaller when

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[81] For an overview of the Supreme Court's opinion in *Tenney*, see *supra* notes 28–37 and accompanying text.

[82] *See* Nixon v. Fitzgerald, 457 U.S. 731, 754 n.37 (1982) ("The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions." (citing *Gillock*, 445 U.S. at 371–73)).

[83] *See* Tenney v. Brandhove, 341 U.S. 367, 371 (1951) (noting that the plaintiff had asked for compensatory and punitive damages).

[84] The holdings of several Supreme Court cases would seem to indicate as much. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (holding that local legislators have the same absolute immunity as legislators in other levels of government when facing personal liability); Spallone v. United States, 493 U.S. 265, 279–80 (1990) (finding that local legislators should receive immunity in personal liability cases because that liability could coerce them into acting against local interests); Supreme Court of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 734 (1980) (deciding that even judges acting in a legislative capacity have legislative immunity when threatened with civil liability).

[85] Comparing *Tenney* and *Gillock* makes this fairly clear. Gillock was being threatened with criminal charges that carried a prison sentence, while Tenney had to be concerned only with his pecuniary interests. It seems reasonable to assume that the interests of the defendant are going to be higher when threatened with prison time than when only threatened with pecuniary loss. Yet Tenney was protected from trial and Gillock was not. This would seem to indicate that the federal interest in the suit against Tenney was fairly low.

[86] *See, e.g.*, Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011) ("There can be little doubt that plaintiffs' allegations are serious. Plaintiffs raise profound questions about the legitimacy of the redistricting process . . . . This is not, then, the usual 'deliberative process' case in

legislators are not being threatened with personal liability, but instead are being asked merely to provide testimonial or documentary evidence in a trial that otherwise does not affect them personally.[87] This makes sense, as the time and effort required for a legislator to defend herself personally at trial would have a much greater impact on her legislative duties than would having to spend a day or two testifying about a law she helped pass.

One difficulty with a framework in which all protections for state legislators are qualified is that it is contrary to dicta in *Lake Country* that maintained state legislators are *absolutely* protected when threatened with personal civil liability.[88] An examination of *Lake Country* and *Tenney*, based on the Court's two rationales for SODC protections, however, suggests that *Lake Country*'s reading of *Tenney* is flawed.

First, though the *Lake Country* Court claimed Tenney was provided absolute protection, the *Tenney* Court did not actually state that the protection it was affording Tenney was absolute. The *Lake Country* Court seems to have conflated the notion of providing protection with the notion that such protection was necessarily absolute. In other words, just because a court provides a legislator SODC protection in a given instance does not mean that the court is holding that legislators in similar situations should always be provided protection.

Instead, *Tenney* should be understood as a case in which the Court defined the protection at issue as *qualified*, but determined that the protection should apply based on the facts of the case and the interests of the parties. Certainly, this requires reading more into the opinion than exists within the text. But *Tenney* was one of the first SODC cases the Court heard,[89] and the Court had not yet clearly and comprehensively articulated the rationales for providing SODC protections that would guide subsequent opinions.[90]

In the alternative, if *Tenney* is properly understood as affording only *qualified* protection to state legislators, both *Tenney* and *Lake*

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which a private party challenges governmental action . . . ." (internal quotation marks omitted)).

[87] *See, e.g.*, Manzi v. DiCarlo, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) (describing the different protection analyses required when dealing with an immunity as opposed to an evidentiary privilege).

[88] For a more complete discussion of *Lake Country*, see *supra* notes 54–57 and accompanying text.

[89] In *Powell v. McCormack*, the Court stated that it had assessed the SODC in four previous cases. 395 U.S. 486, 501 (1969). *Tenney* is listed as the second, and the first in the twentieth century. *Id.*

[90] *See supra* notes 45–51 and accompanying text (discussing *Gillock*'s integration of the rationales first defined in *Tenney* and *Johnson*).

Country establish strong precedent that state legislators should generally be protected from trial when personally threatened with civil liability.[91] Therefore, regardless of whether a court applies a balancing analysis to such cases, it would likely find that protections apply based on precedent.[92]

Nonetheless, the balancing inquiry should still be a required part of the analysis. Doing so makes clear that a different outcome could be reached on a different set of facts or circumstances and discourages courts from simply assuming that state legislators will be protected without weighing the interests involved. Moreover, this lack of a functional difference between protecting legislators after engaging in a balancing analysis and automatically protecting legislators based on a theory of absolute protection only occurs when a legislator is threatened with personal liability. If instead a legislator is only asked to testify at a trial that does not threaten her personally with liability, a balancing analysis is more likely to result in something less than absolute protection.[93]

C. Reading Gillock *Broadly to Apply in Both Civil and Criminal Contexts*

While the Supreme Court's holding in *Gillock* provides significant authority for differentiating the protections accorded legislators based on their state or federal position, as discussed in Part II.B above, some lower courts have read *Gillock* to apply only to criminal cases.[94] This Subpart counters the arguments used by these lower courts and asserts that *Gillock* was not written to apply only in the criminal context. Instead, *Gillock*'s holding should apply to all state legislators, whether they are involved in criminal or civil proceedings. Consequently, *Gillock* should be read to require all state legislative protections to be qualified.

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[91] *See supra* notes 28–37, 54–57 and accompanying text (discussing *Tenney* and *Lake Country*).

[92] This is not a balancing test that the Court appears to employ explicitly. In situations where legislators are personally threatened with liability, the Court can look to precedent to know exactly how such a balancing test will come out: The legislators will be accorded protection. So the Court seems to simply jump to this conclusion in its opinions, rather than actually stepping through a balancing analysis. *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (providing legislative immunity protections to local legislators by looking to *Tenney* and *Lake Country*); Spallone v. United States, 493 U.S. 265, 278–80 (1990) (same).

[93] *See infra* note 111 and accompanying text (noting that many courts involved in redistricting litigation that view the SODC protection at issue as a qualified privilege go on to ultimately refuse legislators that protection).

[94] *See, e.g.*, United States v. Irvin, 127 F.R.D. 169, 172 (C.D. Cal. 1989) (concluding that *Gillock* does not control in civil suits).

The *Gillock* Court refused to cabin its holding solely to criminal prosecutions. It held that because Gillock was a state legislator, he could only be protected after the application of a balancing test weighing the federal interest in seeing the case move forward against a legislator's interest in legislative effectiveness.[95] Yet in so holding, the Court stated: "[A]lthough 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."[96] The Court did not say that comity yields *only* when the enforcement of federal criminal statutes is at stake. Rather, the Court held that comity yields when important federal interests *in general* are at stake, and then provided the protection of criminal statutes—obviously at issue in the case at hand—as one example of such an important federal interest. Thus, the Court left room for interests other than criminal prosecution to be strong enough to outweigh the state's interest in "comity." Indeed, a few lower courts have approached *Gillock* in exactly this way, asserting that the federal interest in policing the redistricting process is strong enough to outweigh the interests on the other side.[97]

In sum, *Gillock* was not stating that the provision of federal common law SODC protections requires a balancing analysis in *some* instances, but rather that *every* potential application of common law SODC protections requires weighing the interests of both sides. Accordingly, under *Gillock*—which remains good law[98]—all federal common law SODC protections must be viewed as qualified, rather than absolute, protections.

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[95] United States v. Gillock, 445 U.S. 360, 373 (1980).

[96] *Id.*

[97] *See* 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) ("Voting rights cases, although brought by private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions. Thus, much as in *Gillock*, 'recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal [G]overnment.'" (quoting *Gillock*, 445 U.S. at 373)); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 95–97, 100–03 (S.D.N.Y. 2003) (discussing *Gillock* at length to ultimately find legislative privilege is qualified and distinct from legislative immunity); Cano v. Davis, 193 F. Supp. 2d 1177, 1181 (C.D. Cal. 2002) (Reinhardt, J., concurring in part and dissenting in part) ("The majority's creation of a blanket prohibition on testimony by state legislators . . . is unwarranted in light of both the important federal interest at stake—the constitutional and statutory right to vote—and the less expansive nature of the common law privilege accorded state legislators."). *But see Irvin*, 127 F.R.D. at 172 (concluding that *Gillock* does not control in civil suits).

[98] No Supreme Court case has ever questioned or disputed *Gillock*. In fact, the Court cited *Gillock* with approval as recently as 2007 in *Wilkie v. Robbins*, 551 U.S. 537, 564–65 (2007).

III
Interpreting the Speech or Debate Clause in the Redistricting Context

This Part applies the framework established in Part II to the redistricting context. It begins with a brief description of redistricting litigation and the way it interacts with the SODC. It then explains how, under Part II's framework, any legislative privilege available in redistricting litigation should be qualified and, therefore, should be analyzed under *Gillock*'s balancing test. Finally, it discusses how the *Gillock* balancing test would be applied in the context of redistricting litigation and briefly outlines an argument that, under the balancing test, legislative privilege should not apply.

A. The Speech or Debate Clause's Effect on Redistricting Litigation

Every ten years, following the decennial census, the responsibility to draw federal and state legislative districts in accordance with that census falls mostly to state legislators across the country.[99] This process often involves legislators drawing the lines of their own districts and those of their colleagues. Consequently, individuals and groups affected by the way these districts are drawn regularly challenge these laws for having been drawn with impermissible purposes.[100]

Plaintiffs typically have great difficulty prevailing in redistricting litigation.[101] Part of the reason for that difficulty stems from courts' interpretation of the SODC in these cases. Because courts often hold that legislators are protected from testifying as to the motivations behind their redistricting legislation,[102] plaintiffs are forced to rely on circumstantial evidence such as the shape of the districts involved and

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[99] *See* Justin Levitt, Brennan Ctr. for Justice, A Citizen's Guide to Redistricting 16, 20 (2010 ed.), *available at* http://www.brennancenter.org/publication/citizens-guide-redistricting (providing basic information regarding the redistricting process, including which political actors are responsible and when districts must be drawn).

[100] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 271 (2004) (declaring the plaintiff's claims that the Pennsylvania General Assembly's redistricting plan was unconstitutional partisan gerrymandering to be non-justiciable).

[101] For instance, only one case—a particularly extreme example—has ever come close to explicitly striking down a partisan gerrymander. *See* Republican Party of N.C. v. Martin, 980 F.2d 943, 956–58, 961 (4th Cir. 1992) (holding that appellants "set forth sufficient allegations of a violation of the Fourteenth Amendment to survive a motion to dismiss for failure to state a claim" of partisan gerrymandering). The case involved a claim by the Republican party that despite Republicans making up twenty-seven percent of all North Carolina voters, it was essentially impossible for a superior court judge to win election as a Republican—as had not been done in nearly a century—because all judges, though local in office, were elected on a statewide basis. *Id.* at 956–57.

[102] *See supra* note 12 (listing several cases protecting legislators from participating in redistricting trials).

the partisan and racial make-up of the populations in those districts.[103] Yet the standards that the Supreme Court has established for deciding these issues all require at least some focus on legislative intent.[104] If plaintiffs do not have access to the legislative motivations behind redistricting legislation, proving that intent becomes a near-Herculean feat.

Plaintiffs have a better chance of proving impermissible intent if no legislative privilege protects legislators from testifying at trial. No legislator is likely to testify that she intentionally drew district lines for explicitly discriminatory purposes. Nevertheless, the documentary evidence that could be gathered through discovery—if not protected by legislative privilege—might tell a story different from the innocuous one a testifying legislator might offer on the stand.[105] Moreover, if district lines were truly drawn for partisan or racial ends, the legislators involved might be unable to invent a non-discriminatory rationale for the outcome.[106] Therefore, a court's decision as to whether legislative privilege should apply to a redistricting case can have a significant effect on the outcome.

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[103] *See supra* note 10 (listing gerrymandering cases where the court was only able to rely on circumstantial factors like district shape and geographical boundaries).

[104] *See supra* note 11 and accompanying text (discussing the "predominant factor" test and the necessity of proving legislative intent in redistricting litigation).

[105] *See* Cano v. Davis, 193 F. Supp. 2d 1177, 1181–82 (C.D. Cal. 2002) (Reinhardt, J., concurring in part and dissenting in part) (holding that "unguarded acts and statements" are sometimes the best evidence of the legislative motive of legislators "who would otherwise attempt to conceal evidence of discriminatory intent").

[106] This is likely to be at least partially a result of the technology used in modern redistricting. All sophisticated gerrymandering is accomplished with complex computer software that requires specific inputs to determine how the software should draw particular district lines. *See* Stephanie Cirkovich, *Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote*, 31 CARDOZO L. REV. 1823, 1858 n.58 (2010) ("Most redistricting bodies use advanced software, such as Maptitude, which allows them to consider factors such as population and demographics and to configure and reconfigure district lines instantaneously."); *see also USA 2010 Census Data Mapping*, MAPTITUDE, http://www.caliper.com/Maptitude/Census_Data_Mapping/default.htm (last visited Nov. 2, 2013) (describing mapping software specifically formulated for map creation based on census data, including "variables that describe population, age, race, gender, ethnicity, and housing, as well as ACS data for income, occupation, education, language spoken, marital status, travel mode and time, housing value, and housing costs"). The inputs used to generate particular district lines could speak volumes about the intentions of those involved in constructing the overall districting scheme; however, such inputs could be withheld from disclosure if legislative privilege is found to apply. *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 312–13 (2004) (Kennedy, J., concurring) ("[N]ew technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.").

B. Applying the Framework to Redistricting Litigation

Analyzing redistricting litigation under the framework proposed in Part II yields a strong argument that courts should not provide legislators with SODC protections in redistricting claims that allege unconstitutional gerrymandering. First, the framework recommends that any SODC protection available to legislators involved in these suits should be defined as a legislative privilege rather than immunity because redistricting litigation does not typically threaten individual legislators with personal liability. Instead, the suits typically seek injunctive or declaratory relief striking down the scheme as unconstitutional under the Equal Protection Clause.[107] The framework's second prong requires that, because redistricting legislation is crafted and passed by state (or local) legislators,[108] any SODC protection available to legislators involved in these suits should be qualified. Because state (or local) legislators should only be entitled to qualified protection, the framework then directs courts to apply the *Gillock* balancing test to determine whether that protection should actually apply in a given case.

C. Applying the Gillock *Federal-Interest Balancing Test*

Courts assessing whether the state legislators involved in the redistricting process should be provided with qualified legislative privilege protections must weigh the federal interest in disclosure against a legislator's interests in legislative effectiveness. Yet the Supreme Court has never engaged in this balancing analysis in the redistricting context,[109] making it a particularly unmoored exercise.[110]

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[107] *See, e.g.*, Veith v. Pennsylvania, 67 F. App'x 95, 97 (3d Cir. 2003) (describing plaintiffs' claims as challenging the redistricting scheme drawn by Pennsylvania state legislators, and seeking to have new districts drawn remedially); Favors v. Cuomo, 881 F. Supp. 2d 356, 361 (E.D.N.Y. 2012) (alleging that defendants' redistricting scheme was unconstitutional under the New York State Constitution); Larios v. Cox, 300 F. Supp. 2d 1320, 1322 (N.D. Ga. 2004) (stating the Georgia redistricting scheme was unconstitutional under the Equal Protection Clause).

[108] In some instances, actors other than state or local legislators engage in the redistricting process. *See* LEVITT, *supra* note 99, at 20–23 (surveying the various actors who participate in the redistricting process). Nonetheless, because the distinction the Court has drawn is between federal legislators and nonfederal legislators, *see* United States v. Gillock, 445 U.S. 360, 370–73 (1980), the legislative privilege potentially accorded to these actors would also be qualified.

[109] Even in *Gillock*, the Court was not particularly explicit about how the interests on both sides should be weighed, providing no particular factors to take into account in such a balancing. *See supra* note 49 and accompanying text (discussing the *Gillock* balancing test).

[110] Some lower courts have drawn from deliberative process privilege—which traditionally applies only to executive branch officials—to give more substantive content to the *Gillock* balancing test. *See, e.g.*, Favors v. Cuomo, 285 F.R.D. 187, 209–10 & n.22 (E.D.N.Y. 2012) (referring to the deliberative process privilege as a persuasive factor in

Nonetheless, several factors make a compelling case that state legislators should not receive legislative privilege and, consequently, that full disclosure is required in redistricting litigation. As an initial matter, simply establishing that legislative privilege should be qualified makes it more likely that legislative privilege will be denied altogether, since many of the courts that find SODC protections qualified in the redistricting context go on to deny those protections to legislators.[111]

Moreover, the relative strengths of the state and federal interests at issue in the *Gillock* balancing test suggest that legislators should not receive legislative privilege in redistricting cases. The only legitimate state interest in protecting state legislators from trial is the legislator's interest in legislative effectiveness.[112] However, this interest should be viewed as fairly weak in comparison to the Supreme Court cases discussed in Part I.B. In those cases, the legislators in question were being threatened personally with either criminal or civil liability.[113] In the redistricting context, however, legislators do not face personal liability and are merely being asked to provide testimonial or documentary evidence in a constitutional challenge. Certainly, legislators may have a desire to see the redistricting scheme they crafted upheld. But the interest in legislative effectiveness is implicated no more in redistricting litigation than in any other suit for injunctive or declaratory relief. Because these legislators do not have to worry about defending themselves, the time and effort they will likely have to expend on a redistricting suit is less than it would be if they were personally threatened with liability.[114] As such, the state interest in the

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the *Gillock* balancing test); 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) ("Other courts . . . have applied a qualified legislative privilege to protect state lawmakers from producing documents related to their legislative activities[,] . . . similar to the deliberative process privilege . . . ."); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y. 2003) (holding that courts should take into account the negative effect that disclosure would have on legislative deliberations).

111 *E.g.*, *Favors*, 285 F.R.D. at 209, 221; Baldus v. Brennan, Nos. 11–CV–562, 11–CV–1011, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011); *Rodriguez*, 280 F. Supp. 2d at 102–03; United States v. Irvin, 127 F.R.D. 169, 173–74 (C.D. Cal. 1989).

112 *See Gillock*, 445 U.S. at 370–71 (reaffirming the Court's concern for "the potential for disruption of the state legislative process"); *see also supra* note 45–51 and accompanying text (describing *Gillock*'s discussion of the rationales behind SODC protections as applied to the states). While others besides legislators surely have an interest in legislative effectiveness as well, the Supreme Court has located the interest solely with the legislators themselves. *See supra* text accompanying note 32.

113 *See supra* Part I.B (surveying the holdings of *Tenney*, *Johnson*, *Gillock*, and *Lake Country*).

114 *See* Mark Tyson, Note, *Monitored Disclosure: A Way to Avoid Legislative Supremacy in Redistricting Litigation*, 87 WASH. L. REV. 1295, 1320–22 (2012) (arguing that document

redistricting context is at least weaker than it is when legislators are threatened with personal liability, as was the case in *Gillock*.

An additional argument for why the state interest is relatively low in the redistricting context is provided by the *Tenney* Court's explanation of legislative effectiveness: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence *but for the public good*."[115] In other words, the entire basis for legislative privilege is so the legislature can effectuate the work its constituents require.[116] Legislators are protected from the burden of trial so that they can use their time to meet with constituents, confer with other legislators, and draft and pass the legislation their constituents demand. Legislators are protected not so that they can pass laws, but so that they can pass laws *that benefit their constituency*.[117] Therefore, the state's interest in legislative effectiveness should be especially low when the acts in question are those that potentially allow legislators to bypass the voters and make their reelection so secure that they become less responsive to their constituents—exactly the issue in gerrymandered redistricting. In such cases, the benefit that "the People" are supposed to derive from protecting the legislative process disappears and there is arguably no reason why the courts should privilege legislators' time. Thus, the state's interest in legislative privilege during redistricting litigation is low.

In contrast, the federal interest in disclosure is relatively strong. Perhaps the best argument for a strong federal interest is found in political process theory, as explored by scholars like John Hart Ely. Ely asserted that in our government of separated powers only the courts have the power to check legislative self-entrenchment.[118] Many scholars have argued that gerrymandering is a quintessential example

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disclosure is not as significant a burden—and thus should not be as thoroughly protected—as is defending oneself from liability).

115 Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (emphasis added). The Supreme Court has reiterated this idea in later cases. *See, e.g.*, United States v. Brewster, 408 U.S. 501, 507 (1972) ("The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process . . . .").

116 *See In re* Grand Jury, 821 F.2d 946, 955 (3d Cir. 1987) ("Common law privileges 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 prudent principle of utilizing all rational means for ascertaining truth." (internal quotation marks omitted)).

117 *See supra* note 115 and accompanying text (discussing the Court's emphasis on protecting the integrity of the legislative process for the public good).

118 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 117 (1980) ("[U]nblocking stoppages in the democratic process is what judicial review is preeminently to be about . . . ."); *see also id.* at 103 (arguing that when the electoral process is malfunctioning, elected representatives are "the last persons we should trust" to fix the malfunction, since it is in their interest for the malfunction to remain in place).

of that entrenchment.[119] Thus, the judiciary's unique ability to police the redistricting process warrants ensuring that it has as much information as possible to help make the difficult determinations about which redistricting plans are legitimate and which are not. Therefore, the strong federal interest in the redistricting context, coupled with the relatively weak state interest, suggests that state legislators should not receive legislative privilege in redistricting litigation under the *Gillock* balancing test.

Conclusion

The SODC has played a meaningful role in the inability of courts to adjudicate gerrymandering disputes, shielding from view the legislative purposes a judge needs to assess redistricting schemes properly. Consequently, I have sought to analyze carefully the Supreme Court's SODC opinions to define a simple and consistent framework that, if followed, should help courts across the country better assess when legislators should and should not be accorded SODC protections. By drawing a bright line between the absolute protections that should be accorded to federal legislators and the qualified protections their state counterparts should receive, analyzing the appropriate scope of the SODC should prove far simpler than it has been up to this point. Moreover, since the framework requires courts to individually assess whether state legislators should be provided evidentiary protections, and since it should stop courts from improperly deeming state legislative protections absolute, it should increase the likelihood that courts will require full disclosure in the redistricting context.

The harms caused by gerrymandering can be quite significant. Yet the tests and standards the Supreme Court has created for adjudicating such claims and remedying such harms have proved generally unworkable and unstable. Full legislative disclosure provides courts with at least the basic information they require to begin to adjudicate these disputes more effectively and may ultimately encourage the creation of better, more workable standards and tests. If courts are provided legislative purpose information on a more frequent basis,

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[119] *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 624 (2002) (asserting that the pattern of incumbent entrenchment has only gotten worse as legislators have gotten better at gerrymandering); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 116 (2000) ("Partisan gerrymandering is designed to entrench a particular political faction against effective political challenge—sometimes even to give a political minority effective control."); *cf.* Vieth v. Jubelirer, 541 U.S. 267, 360–62 (2004) (Breyer, J., dissenting) (suggesting a means of policing gerrymandering that is designed by the legislature to entrench incumbents from a particular party whom the voters have rejected).

and as legislators continue to abuse the redistricting process in perhaps increasingly significant ways, the likelihood that courts will be able to more fully police the redistricting process should increase accordingly.