

# THROW OUT THE BATHWATER, BUT KEEP THE BABY: INTERPRETING STATE SPEECH OR DEBATE CLAUSES IN REDISTRICTING LITIGATION

## INTRODUCTION

The United States Constitution and forty-three state constitutions include a Speech or Debate Clause granting legislators a legal privilege for their legislative work.<sup>1</sup> Although there is a well-developed body of federal Speech or Debate Clause law granting an absolute privilege to legislators, case law interpreting many state Speech or Debate Clauses is undeveloped.<sup>2</sup> One context in which state Speech or Debate Clauses are tested is redistricting litigation.<sup>3</sup> State courts provide a desirable forum for challengers seeking to expose partisan gerrymandering in redistricting plans.<sup>4</sup> Because the potential for exposing partisan gerrymandering increases if state legislators' statements and legislative documents are accessible, many observers have concluded that Speech or Debate Clause protections should be watered down in the redistricting context.<sup>5</sup> However, failing to strongly enforce state Speech or Debate Clause protections would lead to negative effects for representative democracy.<sup>6</sup> Rather than weaken Speech or Debate Clause protections, a better solution is to restrict the free reign of partisan legislators over the redistricting process by using independent commissions.

Part I of this Note traces the history and development of the federal

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1. See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 221 (2003). The Speech or Debate Clause of the Constitution states: "[F]or any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

2. See *infra* notes 40–41 and accompanying text.

3. See, e.g., *Edwards v. Vesilind*, 790 S.E.2d 469 (Va. 2016); *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984); *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013).

4. See *infra* notes 65–68 and accompanying text. First, challengers do not face the justiciability hurdle erected by *Veith v. Jubilire* that litigants face in federal court. 541 U.S. 267 (2004). Second, states are a natural place to litigate redistricting claims because redistricting is a process almost wholly governed and controlled by states. Third, states impose many requirements on the redistricting process that a plaintiff could challenge. See also *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015) (invalidating a Florida congressional map as a partisan gerrymander).

5. See, e.g., Christopher Asta, Note, *Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U. L. REV. 238, 265–66 (2014); see also *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 332–36 (E.D. Va. 2015).

6. See generally Huefner, *supra* note 1.

Speech or Debate Clause and legislative privilege with an emphasis on Supreme Court case law. Part II summarizes major trends in state court interpretation of state Speech or Debate Clause cases. Part III examines state Speech or Debate Clause treatment in the context of redistricting litigation and surveys relevant state supreme court cases. Finally, Part IV proposes a framework for approaching state Speech or Debate Clauses in state redistricting litigation and explores the feasibility of independent redistricting commissions as a solution to redistricting problems.

#### I. THE HISTORY AND DEVELOPMENT OF THE FEDERAL SPEECH OR DEBATE CLAUSE AND LEGISLATIVE PRIVILEGE

Part I briefly traces the history and development of the federal Speech or Debate Clause and legislative privilege. It begins by examining the origins of the Speech or Debate Clause in English history and the development of the Speech or Debate Clause in the early American legal tradition. This Part also reviews modern Supreme Court decisions on the Speech or Debate Clause, delineating the Court's key rationales for the legislative privilege and the scope of the privilege.

The Speech or Debate Clause dates to the sixteenth century in the English Parliament.<sup>7</sup> It was first included in the English Bill of Rights in 1689.<sup>8</sup> The Speech or Debate Clause originated as a means of protecting the will of the people.<sup>9</sup> It developed in the context of Parliament's struggles in seventeenth-century England to assert itself as an independent government body, separate from the Crown.<sup>10</sup> The legislative privilege embodied in the Speech or Debate Clause grew stronger as Parliament became increasingly independent from the Crown in the seventeenth century.<sup>11</sup>

The Speech or Debate Clause quickly became established in the American colonies.<sup>12</sup> After the Revolutionary War, the legislative

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7. CARL WITTKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 21 (1920).

8. Huefner, *supra* note 1, at 229–30; 1 W. & M. 2, c. 2, §9 (1689) (Eng.), *reprinted in* 9 DANBY PICKERING, *STATUTES AT LARGE* 67, 69 (Joseph Bentham 1764).

9. Huefner, *supra* note 1, at 229–30. The broad rationale being that protecting members of parliament was tantamount to protecting the interests of the people against those of the monarch. *See infra* note 25–26 and accompanying text.

10. Huefner, *supra* note 1, at 229–30.

11. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

12. MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 70 (1943). For example, Maryland, Virginia, New York, New Jersey, South Carolina, Pennsylvania, Georgia, and North Carolina each had legislative privilege provisions in their charters or bills of rights prior to the Constitutional Convention. *Id.*

privilege was “deemed so essential for representatives of the people” that a Speech or Debate Clause was included in the Articles of Confederation and, later, in the Constitution.<sup>13</sup> The separation of powers and the principle of representative government were two paramount concerns animating the inclusion of the Speech or Debate Clause in the Constitution and state constitutions.<sup>14</sup> These fundamental concerns, coupled with the Speech or Debate Clause’s rich history,<sup>15</sup> indicate that any proposed encroachment on the legislative privilege embodied in the Clause should be taken seriously.

Modern federal case law also justifies a robust Speech or Debate Clause on two main grounds: separation of powers and legislative efficiency.<sup>16</sup> The Supreme Court first interpreted the federal Speech or Debate Clause in the 1881 case, *Kilbourn v. Thompson*.<sup>17</sup> In *Kilbourn*, the Court applied the federal Speech or Debate Clause to protect members of the House from being sued for false imprisonment after they declared a subpoenaed witness in contempt of Congress and ordered his arrest.<sup>18</sup> The Court found that the House members were acting in their official capacities as legislators, and thus were protected from suit by the Speech and Debate Clause.

Following the *Kilbourn* decision, eleven Supreme Court decisions greatly expanded judicial treatment of the Speech or Debate Clause in a narrow window of time concentrated in the late 1960s and early 1970s.<sup>19</sup>

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13. *Tenney*, 341 U.S. at 372.

14. *See, e.g.*, N.H. CONST. of 1784, art. XXX, pt. I (“The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.”) (emphasis added). *See also* 2 THE FOUNDERS’ CONSTITUTION 336 (Philip B. Kurland & Ralph Lerner eds., Univ. of Chi. Press 1987) (emphasizing the importance of legislative privilege to the separation of powers and representative democracy).

15. *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 863 (Boston, Hilliard, Gray, and Co. 1833) (“[W]ithout [the Speech or Debate Clause] all other privileges would be comparatively unimportant, or ineffectual. This privilege also is derived from the practice of the British parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every state in the Union, as matter of constitutional right.”).

16. *See Asta, supra* note 5, at 245 (articulating the consistent rationales of separation of powers and legislative effectiveness in Supreme Court justifications of legislative immunity and privilege).

17. 103 U.S. 168 (1881).

18. *Id.* at 169. *Kilbourn* had been subpoenaed to testify about the bankruptcy of the firm Jay Cooke & Co. *Id.* at 171–72. After he refused to cooperate with the House committee conducting the investigation, the House members held *Kilbourn* in contempt and took him into custody. *Id.* at 173–77. *Kilbourn* successfully challenged the ability of the House to hold a subpoenaed witness in contempt. *Id.* at 196. However, the Court invoked the Speech or Debate Clause to block any retaliatory action against the House members by *Kilbourn*. *Id.* at 204–05.

19. *See Huefner, supra* note 1, at 250. The cases are: *Tenney v. Brandhove*, 341 U.S. 367 (1951); *United States v. Johnson*, 383 U.S. 169 (1966); *Dombrowski v. Eastland*, 387 U.S. 82 (1967);

Each of these decisions references the historic separation of powers rationale, and the cases often invoke the “central role” of the Speech or Debate Clause “to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.”<sup>20</sup> In *Tenney v. Brandhove*, the Court first formulated the legislative efficiency rationale, stating that “[t]he privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial.”<sup>21</sup> Supreme Court opinions on the Speech or Debate Clause following *Tenney* have continued to emphasize legislative efficiency.<sup>22</sup>

The separation of powers and legislative efficiency rationales underlying federal Speech or Debate Clause opinions emphasize the importance of protecting the integrity of the legislative process. First, a broad legislative privilege protects the legislative process from harmful intrusions by the other branches of government.<sup>23</sup> Second, it allows legislators to deliberate more “candidly and creatively” during the legislative process.<sup>24</sup>

The ultimate purpose of the legislative privilege is not to further the interests of individual legislators, but rather to protect representative democracy.<sup>25</sup> *Coffin v. Coffin*, an 1808 decision of the Massachusetts Supreme Judicial Court that heavily influenced later Court decisions, reasoned that “[t]hese privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, *but to support the rights of the people*, by enabling their representatives to execute the functions of their office without fear of prosecutions.”<sup>26</sup> For this reason, the legislative privilege afforded by the Speech or Debate Clause does not extend to all actions of federal legislators, but only those

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Powell v. McCormack, 395 U.S. 486 (1969); United States v. Brewster, 408 U.S. 501 (1972); Gravel v. United States, 408 U.S. 606 (1972); Doe v. McMillan, 412 U.S. 306 (1973); Eastland v. United States Servicemen’s Fund, 421 U.S. 491 (1975); United States v. Helstoski, 442 U.S. 477 (1979); Helstoski v. Meanor, 442 U.S. 500 (1979); United States v. Gillock, 445 U.S. 360 (1980).

20. *Gravel*, 408 U.S. at 617 (citing United States v. Johnson, 383 U.S. 169 (1966)). See *Johnson*, 383 U.S. at 181.

21. 341 U.S. at 377.

22. See, e.g., *Eastland*, 421 U.S. at 503 (“[A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation.”).

23. See Huefner, *supra* note 1, at 270.

24. *Id.*

25. See, e.g., *id.* at 229 (“From its parliamentary origins, the legislative privilege has been defended not in terms of protecting the representatives themselves, but of advancing the interests of the public at large.”).

26. 4 Mass. 1, 27 (Mass. 1808) (emphasis added).

within the “sphere of legitimate legislative activity.”<sup>27</sup> In *Gravel v. United States*, the Court clarified that the Speech or Debate Clause shields legislative activity that is “an integral part of the deliberative and communicative processes by which Members participate” in legislative proceedings and any other matters within the jurisdiction of either House.<sup>28</sup> Moreover, *Gravel* extended the legislative privilege to encompass the legislative activities of congressional staff.<sup>29</sup>

Based on the important principles underlying the legislative privilege, the Supreme Court has consistently “read the Speech or Debate Clause broadly to effectuate its purposes.”<sup>30</sup> Once a member of the legislature is determined to be acting within the “legitimate legislative sphere,” the Speech or Debate Clause serves as an absolute bar to lawsuits against the legislator based on those actions.<sup>31</sup> This absolute bar relieves an official of any obligation to justify his or her action by allowing the official to dismiss the suit on a Rule 12(b)(6) motion.<sup>32</sup> Thus, the privilege almost entirely eliminates the burden and expense of litigation.<sup>33</sup>

One clear exception to the legislative privilege is that state legislators charged under federal criminal law do not receive absolute protection in federal court.<sup>34</sup> Some commentators have emphasized of this deviation.<sup>35</sup>

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27. See, e.g., *Doe v. McMillan*, 412 U.S. 306, 314 (1973); *United States v. Brewster*, 408 U.S. 501, 517 (1972) (“[T]he shield does not extend beyond what is necessary to preserve the integrity of the legislative process.”). Consequently, the application of the privilege often hinges on whether the action in question is within the legislative sphere. See, e.g., *McNaughton v. McNaughton*, 72 Pa. D. & C.4th 363, 375 (Pa. Com. Pl. 2005) (addressing the application of legislative privilege in the state context).

28. 408 U.S. 606, 625 (1972). It is worth noting that the Speech or Debate Clause affords legislators both a “legislative immunity” and a “legislative privilege.” See *Asta*, *supra* note 5, at 244. The term “legislative immunity” is generally used to describe a legislator’s protection from criminal and civil suit for legislative acts. *Id.* On the other hand, the term “legislative privilege” generally refers to a legislator’s protection from compelled testimony or production of evidence concerning legislative acts. *Id.* Courts are occasionally imprecise in their use of these terms. *Id.* This Note is most concerned with “legislative privilege,” because this is the privilege invoked by legislators most often in the face of redistricting litigation.

29. *Gravel*, 408 U.S. at 625.

30. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501 (1975). See *United States v. Johnson*, 383 U.S. 169, 180 (1966).

31. *Doe*, 412 U.S. at 314. See *Eastland*, 421 U.S. at 503 (“We reaffirm that once it is determined that Members are acting within the ‘legitimate legislative sphere’ the Speech or Debate Clause is an absolute bar to interference.”).

32. RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1038–39 (7th ed. 2015).

33. *Id.*

34. See *United States v. Gillock*, 445 U.S. 360, 360 (1980). State legislative immunity in federal court is governed by federal common law and not the Constitution. *Id.* at 372 n.10. Therefore, unlike the constitutional protections afforded to members of Congress, the immunity of state legislators in federal court may yield where important federal interests are also at stake. *Id.* at 373. *Gillock*

However, the impact of this exception to absolute privilege is limited and likely to arise only when a state legislator runs afoul of a federal criminal law.<sup>36</sup>

## II. INTERPRETATION OF STATE SPEECH OR DEBATE CLAUSES BY STATE COURTS

Today, forty-eight states have constitutional provisions privileging state legislators to some degree from legal liability relating to legislative activities.<sup>37</sup> The majority of states have maintained a version of the legislative privilege since their founding.<sup>38</sup> Professor Steven Huefner has helpfully grouped state legislative provisions into five categories:

(1) twenty-three states whose privilege exists under a constitutional provision essentially identical in text to the federal Speech or Debate Clause; (2) three states—Massachusetts, New Hampshire, and Vermont—that continue to employ a “deliberation, speech and debate” formulation of the privilege that . . . shortly predates the federal model; (3) twelve states that give legislators immunity “for words spoken [or uttered or used] in debate,” a formulation that appears to date from the middle of the nineteenth century; (4) five states that employ a formulation that protects legislators from being made “liable to answer” for their legislative statements; and (5) seven states entirely without any constitutional language granting the privilege.<sup>39</sup>

Despite considerable textual variation in legislative privilege provisions used by states, the nature of the privilege is relatively consistent across

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essentially established a balancing test to weigh the purposes of legislative immunity for state legislators against federal interests. *Id.* (“We conclude, therefore, 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.”).

35. *See, e.g.*, Asta, *supra* note 5, at 258 (arguing that *Gillock*’s qualification of the immunity of state legislators involved in federal criminal proceedings should be read broadly to extend to federal civil proceedings). *See also* Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 332–36 (E.D. Va. 2015); League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135 (Fla. 2013) (relying heavily on *Gillock* in balancing the legislative privilege against a competing state interest).

36. *See* Huefner, *supra* note 1, at 304 (“[A]s long as state legislators steer clear of federal criminal law, they will not actually be any less well off than members of Congress.”).

37. *Id.* at 237 n.54.

38. *Id.* at 335.

39. *Id.* at 236–37.

states.<sup>40</sup> While an in-depth state-by-state examination of the legislative privilege is beyond the scope of this Note, legislative privilege derived from a Speech or Debate Clause has been a consistent mainstay of the majority of state constitutions, even through periods of sustained pressure to restrain legislative power.<sup>41</sup>

Nevertheless, Professor Huefner's review of state cases interpreting Speech or Debate Clauses in various states is evidence that some state courts interpret the legislative privilege more narrowly than federal courts.<sup>42</sup> Recent departures from federal jurisprudence include New York trial courts holding that state legislators may be questioned about their legislative work in cases where they are not a party, and Ohio courts denying protection to state legislators from compelled questioning regarding legislative work.<sup>43</sup> In addition, the increasing popularity of transparency in government and the passage of "sunshine" laws encourage openness in government processes.<sup>44</sup> An absolute privilege protecting

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40. *Id.* at 239 ("[The] above textual differences among the various Speech or Debate clauses in state constitutions appear to reflect stylistic adjustments in the phrasing of the privilege, more than substantive differences in the nature of the privilege, and instead correlate most closely with the period in which each provision was adopted."). See also Shelby Sklar, Note, *The Impact of Social Media on the Legislative Process: How the Speech or Debate Clause Could Be Interpreted*, 10 NW. J. L. & SOC. POL'Y 389, 409 (2015) ("[T]he general scholarship and relative lack of jurisprudence on the subject matter seem to form a consensus that most state constitutional speech or debate clauses are proxies for the federal Clause.").

41. See Huefner, *supra* note 1, at 242.

42. Huefner, *supra* note 1, at 224 (citing *State v. Haley*, 687 P.2d 305 (Alaska 1984); *Colo. Common Cause v. Bledsoe*, 810 P.2d 201 (Colo. 1991); *Luscomb v. Bowker*, 136 N.E.2d 192 (Mass. 1956); *Mich. Mut. Ins. Co. v. Dep't of Treasury*, Nos. 178228, 178330, 1996 Mich. App. LEXIS 2245 (Mich. Ct. App. Dec. 10, 1996); *Mich. Educ. Special Servs. Ass'n v. Ins. Comm'r*, 542 N.W.2d 354 (Mich. Ct. App. 1995), *appeal dismissed, ordered not precedential*; *In re Prange*, 550 N.W.2d 536 (Mich. 1996); *Pataki v. N.Y. State Assembly*, 738 N.Y.S.2d 512 (N.Y. Sup. Ct. 2002); *Abrams v. Richmond County S.P.C.C.*, 479 N.Y.S.2d 624 (N.Y. Sup. Ct. 1984); *Lincoln Bldg. Assocs. v. Barr*, 147 N.Y.S.2d 178 (N.Y. 1955); *DeRolph v. State*, 747 N.E.2d 823 (Ohio 2001); *City of Dublin v. State*, 742 N.E.2d 232 (Ohio Ct. App. 2000); *DeRolph v. State*, No. 22043 (Ohio Ct. Com. Pl. filed Aug. 4, 1998) (mem.); *Ethics Comm'n v. Cullison*, 850 P.2d 1069 (Okla. 1993); *Dadisman v. Moore*, 384 S.E.2d 816 (W. Va. 1989)). See also *Urb. Just. Ctr. v. Pataki*, 810 N.Y.S.2d 826, 835 (N.Y. Sup. Ct. 2005), *aff'd*, 828 N.Y.S.2d 12 (N.Y. App. Div. 2006) (denying privilege for the allocation of funds for legislative activities). Other recent state interpretations are arguably narrower than the federal standard, but support their conclusions within the federal framework by construing the activity in question as outside of the legislative sphere. See *McNaughton v. McNaughton*, 72 Pa. D. & C.4th 363, 375 (Pa. Com. Pl. 2005) (denying privilege for banking documents considered insufficiently legislative); *State v. Chvala*, 678 N.W.2d 880, 894 (Wis. Ct. App. 2004), *aff'd*, 693 N.W.2d 747 (Wis. 2005) (denying privilege for managing state employees engaging in campaign activities).

43. See Huefner, *supra* note 1, at 225–26.

44. *Id.* at 227. Passed in 1966, the Federal Freedom of Information Act enables citizens to access the records of federal agencies upon request. See MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 553–56 (4th ed. 2014); THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *FEDERAL OPEN GOVERNMENT GUIDE 2* (10th ed. 2009), available at <http://www.rcfp.org/>. The Government in the Sunshine Act was enacted in 1976 to provide public

legislators from producing or explaining their work is antithetical to the ideal of open government.<sup>45</sup>

The contemporary push for open government has the potential to drown out the historic rationales behind the Speech or Debate Clause and legislative privilege.<sup>46</sup> Redistricting litigation is one context that implicates the legislative privilege.<sup>47</sup> Due to the special democratic problems that redistricting presents<sup>48</sup> and high public awareness of the issue,<sup>49</sup> there is danger of an initial response in favor of maximum transparency. However, this response must be resisted. When interpreting states' respective Speech or Debate Clauses in the context of a redistricting case, three principles outweigh any other concerns: proper respect for the separation of powers; the interest in legislative efficiency; and preserving the integrity of the legislative process.

### III. STATE REDISTRICTING CHALLENGES THAT IMPLICATE SPEECH OR DEBATE CLAUSE PRIVILEGES

Part III examines the impact of state Speech or Debate Clauses on state redistricting cases. It introduces necessary background information about gerrymandering and considers some of the main developments in federal redistricting litigation. Part III then suggests that state court is a viable forum for redistricting challenges and considers the implications of state Speech or Debate Clauses in three representative state redistricting cases.

#### A. *Background of State Redistricting Challenges and the Role of State Courts*

Redistricting challenges contest the constitutionality of redistricting legislation by alleging that legislators have impermissibly engaged in gerrymandering.<sup>50</sup> Gerrymandering is the process of creating electoral districts in a way that provides a self-serving electoral benefit to the

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access to government meetings. *Id.* All states have similar laws that provide access to government files and proceedings. *Id.* at 6; ASIMOW & LEVIN, at 572. Although these laws generally apply to administrative agencies and not the legislature, they are relevant insofar as they evidence a popular trend toward transparency in government. *See generally* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, FEDERAL OPEN GOVERNMENT GUIDE.

45. Huefner, *supra* note 1, at 227.

46. *Id.* at 224–29.

47. *See supra* note 3.

48. *See infra* note 54 and accompanying text.

49. *Id.*

50. *See Asta, supra* note 5, at 241.



political party drawing the lines.<sup>51</sup> There are two main categories of gerrymandering: racial gerrymandering and partisan gerrymandering.<sup>52</sup> This Note focuses solely on partisan gerrymandering cases. The analysis contained herein does not extend to racial gerrymandering.<sup>53</sup> Partisan gerrymandering presents serious challenges to the American democratic system, including legislative self-entrenchment, undeserved partisan advantage, and public disillusionment.<sup>54</sup>

Partisan gerrymandering challenges are extremely difficult to bring in federal court.<sup>55</sup> The United States Supreme Court first squarely addressed partisan gerrymandering in *Davis v. Bandemer*.<sup>56</sup> The *Bandemer* majority held that partisan gerrymandering claims were justiciable.<sup>57</sup> Moreover, the

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51. See Michael Weaver, Note, *Uncertainty Maintained: The Split Decision Over Partisan Gerrymanders in Vieth v. Jubelirer*, 36 LOY. U. CHI. L.J. 1273, 1277 (2005). See also AMERICAN BAR ASS'N, CONGRESSIONAL REDISTRICTING 3 (1981) (defining “gerrymander” as “the drawing of district boundary lines for the purpose of giving some individual or group a political advantage”). The term “gerrymander” was developed in 1812 when a salamander-shaped district was signed into law by Massachusetts Governor Elbridge Gerry. ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 16–17 (Leon Stein ed., ArnoPress 1974) (1907).

52. Weaver, *supra* note 51, at 1278.

53. The case law similarly distinguishes between racial and partisan gerrymandering cases. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 124–25 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 293–95 (2004). These two cases come to different conclusions. On the one hand, the majority in *Bandemer* reasoned that the submission of a claim “by a political group, rather than a racial group, does not distinguish it in terms of justiciability.” *Bandemer*, 478 U.S. at 125. On the other hand, the plurality in *Vieth* refused to treat political and racial gerrymandering equivalently. *Vieth*, 541 U.S. at 293–95. The plurality reasoned that a “purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protections Clause, while a similar purpose to discriminate on the basis of politics does not.” *Id.* at 293. This distinction aided the plurality in rejecting Justice Stevens’ view that political gerrymanders can be analyzed under the same judicial standard used in racial gerrymander cases. See *infra* note 60 and accompanying text.

54. See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 516 (1997) (describing bipartisan gerrymandering as a clear example of legislative entrenchment); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 601–11 (2002) (offering three categories of the harms of partisan gerrymandering through the lens of Supreme Court apportionment case law); *Bandemer*, 478 U.S. at 133 (acknowledging that gerrymandering could frustrate the will of the majority); 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.”) (emphasis added).

55. See Asta, *supra* note 5, at 241–42 (“[C]ourts have struggled with adjudicating redistricting claims because they have often been forced to base their 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.”).

56. 478 U.S. 109 (1986).

57. *Id.* at 125 (“[T]hat the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability.”). Under the political question doctrine, the Court considers the prudential question of whether a manageable judicial standard exists for evaluating a claim before taking jurisdiction. See FALLON ET AL., *supra* note 32, at 253–54.

*Bandemer* majority agreed that a successful partisan gerrymandering claim requires: (1) proof of discriminatory effect, and (2) intentional legislative discrimination against a specific group.<sup>58</sup> However, in the face of the legislative privilege, the legislative intent of *Bandemer*'s second prong is virtually impossible to know.<sup>59</sup> Moreover, in a subsequent case, *Vieth v. Jubelirer*,<sup>60</sup> the Court essentially rendered federal partisan gerrymandering cases non-justiciable over concerns about devising a manageable standard for evaluating claims.<sup>61</sup> In assessing standards for evaluating a partisan gerrymandering claim, the plurality in *Vieth* concluded that it was impossible to discern the predominant intent of legislative map-makers and that the appellants' proposed "effects" prong was inadequate because there was no constitutional right to proportional representation.<sup>62</sup> In his dissent, Justice Stevens argued that partisan gerrymandering could be analyzed under the same standard used in racial gerrymandering cases.<sup>63</sup> Although a recent District Court decision in Wisconsin found a judicially manageable standard for political gerrymandering, the Supreme Court has not yet opined on the standard.<sup>64</sup>

State courts provide an alternate, potentially more desirable forum for redistricting plan challengers because claims of partisan gerrymandering do not necessarily face the preliminary justiciability hurdle.<sup>65</sup> Furthermore, state court is a natural place to litigate redistricting claims because

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58. *Bandemer*, 478 U.S. at 127.

59. See Asta, *supra* note 5, at 261 ("If plaintiffs do not have access to the legislative motivations behind redistricting legislation, proving that intent becomes a near-Herculean feat."). But see *Bandemer*, 478 U.S. at 129 ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.")

60. 541 U.S. 267 (2004).

61. The plurality in *Vieth* stated: "[N]o judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged [in the eighteen years since *Bandemer*]. . . . [P]olitical gerrymandering claims are nonjusticiable and . . . *Bandemer* was wrongly decided." *Id.* at 281. Justice Kennedy provided the fifth vote dismissing the gerrymandering claim, but wrote a separate opinion leaving open the possibility of justiciability. *Id.* at 306.

62. *Id.* at 288.

63. *Id.* at 335 (Stevens, J., dissenting). See also FALLON ET AL., *supra* note 32, at 254. The factors considered in racial gerrymandering cases are: the irregularity of the district lines, the purpose of the line drawing, the process by which the redistricting plans were enacted, and other evidence demonstrating purely improper motivations. *Id.*

64. *Whitford v. Gill*, No. 15-CV-421-BBC, 2016 WL 6837229, at \*1 (W.D. Wis. Nov. 21, 2016). The plaintiffs in *Whitford* utilized an "efficiency gap" formula as a standard to measure partisan gerrymandering practices. *Id.* at \*50–52. The "efficiency gap" metric is promising because it provides a clear mathematical formula for assessing partisanship in a district. Michael Wines, *Judges Find Wisconsin Redistricting Unfairly Favored Republicans*, N.Y. TIMES, Nov. 21, 2016, available at <https://www.nytimes.com/2016/11/21/us/wisconsin-redistricting-found-to-unfairly-favor-republicans.html>.

65. States have different standing rules than the federal court system. See FALLON ET AL., *supra* note 32, at 158.

redistricting is a process almost wholly governed and controlled by the states.<sup>66</sup> States also impose a number of constraints on the redistricting process that could merit judicial scrutiny.<sup>67</sup> In 2015, in *League of Women Voters of Florida v. Detzner*, the Florida Supreme Court upheld the viability of redistricting challenges in state courts when it invalidated the Florida legislature's redistricting map as impermissible partisan gerrymandering.<sup>68</sup>

Although very few state courts have considered state legislative privilege protections in the context of partisan redistricting litigation, the following cases provide a basis for understanding state concerns in such circumstances.

#### *B. State Redistricting Cases Implicating Speech or Debate Clause Protections*

Where state Speech or Debate Clauses have been implicated in state redistricting litigation, the trend has been to apply the legislative privilege to block access to legislative materials.<sup>69</sup> In Florida, the only state where legislative privilege was denied in a redistricting case, the substantive state law was distinguishable from other states.<sup>70</sup>

In *Edwards v. Vesilind*, the Supreme Court of Virginia construed the Speech or Debate Clause of the Virginia Constitution to allow for a broad legislative privilege protecting legislators and their aides from document production in relation to a redistricting challenge.<sup>71</sup> The redistricting challengers in *Edwards* alleged that certain districts violated a Virginia constitutional provision requiring districts to be contiguous, compact,<sup>72</sup>

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66. See, e.g., *Grove v. Emison*, 507 U.S. 25, 34 (1993) (citing U.S. CONST. art. I, §2); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

67. The following are common criteria imposed by states: "(1) contiguous and compact districts, (2) respect for political subdivisions (especially counties), (3) respect for geographic or natural boundaries, and (4) coterminality between state house and state senate districts." Kubin, *supra* note 54, at 851.

68. 172 So. 3d 363 (Fla. 2015). This case should not be confused with *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013).

69. See *Edwards v. Vesilind*, 790 S.E.2d 469 (Va. 2016); *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984).

70. *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013).

71. *Edwards*, 790 S.E.2d at 469.

72. *Id.* It is not uncommon for redistricting challengers to dispute the compactness of legislative districts. A compact district is distinguished from one that is an odd shape. Kurtis A. Kemper, *Application of Constitutional "Compactness Requirement" to Redistricting*, 114 A.L.R.5th 311 (2003). Most state constitutions include a constitutional provision requiring compactness. *Id.* See *infra* note 129. The inquiry into compactness can be conducted based on the objective shape of the district

and as nearly equal in population as possible.<sup>73</sup> The challengers sought a declaration that the districts were unconstitutional, an injunction against the use of the map in subsequent elections, and other equitable relief as necessary.<sup>74</sup> The dispute in *Edwards* centered on the production of documents by Virginia legislators and the Division of Legislative Services (DLS), a non-partisan legislative agency that supports Virginia legislators.<sup>75</sup> In its opinion, the court addressed three distinct aspects of the legislative privilege under the state Speech or Debate Clause: (1) the nature of the protection afforded, (2) to what the privilege applies, and (3) to whom the privilege applies.<sup>76</sup>

The Supreme Court of Virginia began its analysis by emphasizing the rich history of the Speech or Debate Clause and its importance to the ideals of separation of powers and representative government.<sup>77</sup> The court also noted that this was the first time the state clause had been interpreted, and that federal Speech or Debate Clause case law provided guidance because both clauses are “based upon the same historical and public policy considerations.”<sup>78</sup>

The court first held that the legislative privilege under the state Clause extends beyond immunity from prosecution to encompass production of documentary evidence.<sup>79</sup> The court reasoned that this conclusion was necessary to protect the separation of powers, to defend the integrity of the legislative process, and to prevent the distraction of legislators from their duties.<sup>80</sup> Second, relying primarily on federal Speech or Debate Clause precedent, the court held that the legislative privilege applies only to acts within the “sphere of legitimate legislative activity.”<sup>81</sup> Third, the court

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and does not require a showing of intent. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 284–88 (2004) (discussing compactness as a goal separate from intent).

73. *Edwards*, 790 S.E.2d at 469. The provision in question was Article II, Section 6 of the Constitution of Virginia. *Id.*

74. *Id.*

75. *Id.* at 472–74.

76. *Id.* at 477.

77. *Id.* (“The Clause was not introduced into the Constitution of Virginia devoid of history or context, nor should it be interpreted as if it had.”).

78. *Id.* at 476.

79. *Id.* at 478 (“Protection from compulsory production of privileged evidence is a necessary corollary to immunity.”).

80. *Id.* at 478–79.

81. *Id.* at 479–80 (citing *United States v. Brewster*, 408 U.S. 501, 512 (1972); *United States v. Helstoski*, 442 U.S. 477, 491 (1979); *Gravel v. United States*, 408 U.S. 606, 625 (1972)). “Legislative actions include, but are not limited to, delivering an opinion, uttering a speech, or haranguing in debate; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and introducing materials at Committee hearings.” *Edwards*, 790 S.E.2d at 479 (quoting Board of

held that the evidentiary legislative privilege applied to legislators, DLS employees, and legislative consultants.<sup>82</sup> In so holding, the court again relied heavily on federal Speech or Debate Clause precedent.<sup>83</sup> The Virginia Supreme Court's holding indicates that the privilege is broad in Virginia and largely mirrors the federal protection afforded members of Congress. As discussed in Part IV, the Virginia Supreme Court's approach is ideal and adequately values the important principles of separation of powers, legislative efficiency, and representative democracy.

The Supreme Court of Rhode Island has also interpreted its state Speech or Debate Clause to protect legislators whose actions were challenged in the redistricting context. In *Holmes v. Farmer*, redistricting challengers sought a declaratory judgment, injunctive relief, and a court-ordered redistricting plan to combat Rhode Island's 1982 Reapportionment Act (the Act).<sup>84</sup> The challengers alleged that the Act violated compactness and equal protections requirements. They also argued that the Act contained plans that were gerrymandered to serve political purposes and to dilute the voting strength of women and political and ethnic minorities.<sup>85</sup> The court considered the question of whether testimonial evidence of individual legislators and their aides could be introduced at trial.<sup>86</sup>

The Rhode Island Supreme Court held that the state Speech or Debate Clause provided legislators with a testimonial privilege that was "clearly within the most basic elements of legislative privilege."<sup>87</sup> Despite the state Speech and Debate Clause's long history, the court noted that this was the

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Supervisors v. Davenport Co., 742 S.E.2d 59, 63 (Va. 2013)).

82. *Id.* at 480–83.

83. *Id.* at 481. The court's analysis relied heavily on *Gravel*, which extended the legislative privilege to "alter egos" of legislators, typically aides and consultants who perform legislative functions vital to the legislative process. 408 U.S. at 617. *See also supra* note 29 and accompanying text. The Virginia Supreme Court analyzed whether an individual is an "alter ego" of the legislator along three factors: the individual's relationship to the legislator, the individual's identity, and the source or terms of the individual's pay. *Edwards*, 790 S.E.2d at 481–83.

84. *Holmes v. Farmer*, 475 A.2d 976, 978 (R.I. 1984).

85. *Id.* The challengers also alleged that certain legislators engaged in an unlawful conspiracy to deprive voters of equal protection and that the plans violated a state constitutional requirement that redistricting plans partially comply with municipal-representation apportionment formulae. *Id.* The import of *Holmes* to this Note should be constrained to the case's political dimensions. As stated in Part III, Subsection A, the analysis in this Note does not extend to racial gerrymandering cases.

86. *Id.* at 980 ("The evidence was principally offered to show that the Reapportionment Commission used a  $\pm$  2.5 percent target deviation in drawing district lines, that the commission members were politically motivated when they decided on district boundaries, and that the members were ignorant of applicable laws by which they were required to abide.").

87. *Id.* at 984.

first time that it had been interpreted.<sup>88</sup> As a result, the court relied heavily on federal precedent interpreting the Speech or Debate Clause of the Constitution.<sup>89</sup> The court reasoned that testimony concerning legislator actions and motivations in passing the reapportionment plan was part of the legislative process.<sup>90</sup> The court also noted that an inquiry into the legislators' motives would hinder the "free flow of debate" within the legislative branch and militate against the separation of powers between co-equal branches of government.<sup>91</sup> As in *Edwards v. Vesilind*, the Rhode Island Supreme Court in *Holmes* interpreted its state Speech or Debate Clause broadly.<sup>92</sup> Again, this approach represents a sensible application of the state Speech or Debate Clause that comports with the proposal in Part IV.

In *League of Women Voters of Florida v. Florida House of Representatives*, the Supreme Court of Florida held that the legislative privilege must yield to a competing state constitutional prohibition against partisan gerrymandering.<sup>93</sup> Unlike Virginia and Rhode Island, Florida does not have a Speech or Debate Clause in its state constitution.<sup>94</sup> Nevertheless, the Florida Supreme Court held in *League of Women Voters* that state legislators and legislative staff members possess a legislative privilege under the Florida Constitution's separation of powers provision.<sup>95</sup> Despite this finding, legislators were deemed unprotected by the evidentiary privilege in the redistricting context due to a competing constitutional provision against partisan gerrymandering.<sup>96</sup>

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88. *Id.* at 980–81.

89. *Id.* at 981 ("In order to interpret this provision adequately, we must look at the history of this section as well as the interpretation of a similar provision in the United States Constitution (Art. I, Sec. 6).").

90. *Id.* at 984 ("[I]t is apparent that the thrust of plaintiffs' questioning would have involved matters that directly relate to the legislators' motivations and actions in proposing and carrying out the House plan."). Here the Rhode Island Supreme Court relied on the federal precedent in *United States v. Brewster*, stating that if an action is protected, it must fall within the "legitimate legislative sphere." *Id.*

91. *Id.* In reference to the "free flow of debate" rationale, many commentators worry that placing limits on the legislative privilege will have a "chilling effect." See, e.g., Heufner, *supra* note 1, at 276. The essence of the argument is that subjecting legislators to compelled testimony will discourage them from engaging in open deliberations about legislative matters.

92. *Holmes*, 475 A.2d at 981 ("We do not accept plaintiff's contention that there is a relevant difference between the federal provision . . . and the state provision . . .").

93. 132 So. 3d 135 (Fla. 2013).

94. *Id.* at 143 ("Florida is one of only two states in the country that lacks either a state constitutional Speech or Debate Clause or a provision protecting legislators from arrest during legislative session."). See also Heufner, *supra* note 1, at 237, n.54 (stating that Florida is one of seven states without a constitutional provision explicitly granting legislative privilege).

95. *League of Women Voters*, 132 So. 3d at 143.

96. *Id.*

A provision of the Florida Constitution approved by Florida voters in 2010 prohibits legislators from engaging in partisan or racial gerrymandering when creating district plans.<sup>97</sup> In *League of Women Voters*, the redistricting challengers disputed the validity of the 2012 congressional apportionment plan.<sup>98</sup> The challengers alleged that state legislators violated Article III, section 20 of the Florida Constitution by favoring incumbents, intentionally diminishing the ability of minorities to select representatives of their choice, and failing to adhere to compactness standards and existing political and geographic boundaries where appropriate.<sup>99</sup> The challengers attempted to support these claims with documented communications between legislators, third parties, and direct depositions of state legislators.<sup>100</sup> The Florida legislature responded by seeking a protective order to prevent the depositions and discovery of materials relating to the redistricting plans.<sup>101</sup>

The court first held that a legislative privilege exists in Florida based on the principle of separation of powers found in Article II, section 3, of the Florida Constitution.<sup>102</sup> The court reasoned that although Florida has a strong public policy favoring transparency and public access to the legislative process, that policy is outweighed by the crucial role that the separation of powers principle plays in the state government.<sup>103</sup> Second, the court held that the legislative privilege in Florida was not absolute and may yield to a “compelling, competing” interest.<sup>104</sup> In so holding, the court employed a balancing test similar to the one used in *United States v. Gillock*,<sup>105</sup> but balanced competing state, instead of federal, interests.<sup>106</sup>

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97. *Id.* at 139. Article III, Section 20 of the Florida Constitution states that legislators may not create districts “with the intent to favor or disfavor a political party or an incumbent” and “with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.” FLA. CONST. art. III, § 20(a).

98. *League of Women Voters*, 132 So. 3d at 140–41.

99. *Id.*

100. *Id.* at 141.

101. *Id.*

102. *Id.* Again, this was despite the absence of a Speech or Debate Clause in the Florida Constitution.

103. *Id.* at 144–45. The court went on to support the recognition of a legislative privilege with many of the traditional rationales recognized in federal legislative privilege cases, including a concern for the integrity of the legislative process and the importance of freeing legislators from distraction. *Id.* at 146.

104. *Id.* at 147 (“Once a court determines that the information being sought is within the scope of the legislative privilege, the court then must determine whether the purposes underlying the privilege . . . are outweighed by a compelling, competing interest.”).

105. 445 U.S. 360 (1980) (balancing affording legislative privilege to state legislators in federal court on federal criminal charges against competing federal interests).

Applying this balancing test, the court held that Article III, section 20 of the Florida Constitution was a “compelling, competing” interest that outweighed the interests underlying the legislative privilege.<sup>107</sup> Based on these holdings the court allowed discovery concerning the acts of the Florida legislators.<sup>108</sup>

Although in *League of Women Voters* a state court limited the legislative privilege in the redistricting context, it is not relevant to other states. First, the lack of a Speech or Debate Clause in the Florida Constitution constrains the opinion. Although the court ultimately grounded the legislative privilege in separation of powers principles, the foundation of the privilege may have been stronger if it rested explicitly on a Speech or Debate Clause, which in federal precedent is also buttressed by principles such as legislative efficiency and representative government. Second, the opinion relied heavily on the balancing rationale of *United States v. Gillock*,<sup>109</sup> which is only applied by federal courts in very narrow circumstances. Moreover, as the dissent points out, the reliance on *United States v. Gillock* is inappropriate because it implicates federalism rather than separation of powers concerns.<sup>110</sup> Third, the opinion goes against the majority trend of affording an absolute legislative privilege based on the example of federal Speech or Debate Clause precedent.<sup>111</sup> Finally, the presence of a state constitutional provision explicitly prohibiting partisan gerrymandering was a determinative factor in the result.<sup>112</sup>

#### IV. A PROPOSED STATE SPEECH OR DEBATE FRAMEWORK

Part VI proposes a framework for interpreting state Speech or Debate Clauses in the redistricting context. Specifically, it argues that a broad legislative privilege is necessary to protect the separation of powers,

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106. *League of Women Voters*, 132 So. 3d at 146–47.

107. *Id.* at 154.

108. *Id.* at 142–43. Despite allowing discovery generally, the court reserved for individual legislators and their staff the ability to assert a privilege for subjective thoughts or impressions concerning the legislative action. *Id.*

109. *Id.* at 146–47.

110. *League of Women Voters*, 132 So. 3d at 158 (Canady, J., dissenting) (“*Gillock* thus does not address the role that the legislative privilege plays in the separation of powers between the legislative and judicial branches. Instead, *Gillock* is a case about the scope of federal legislative power vis-à-vis state legislators.”).

111. Both *Edwards v. Vesilind* and *Holmes v. Farmer* evidence this trend. See *supra* note 92 and accompanying text.

112. This kind of provision provides a potential tool for redistricting challengers. It would be interesting to see how it would hold up in a case relying less heavily on *Gillock*.



legislative efficiency, and representative democracy. Acknowledging that this approach stymies efforts to combat partisan gerrymandering, this section then considers independent redistricting commissions as an appropriate remedy.

State courts interpreting state Speech or Debate Clauses should follow the example of *Edwards v. Vesilind*, *Holmes v. Farmer*, and federal case law interpreting the Speech or Debate Clause in the Constitution and provide legislators with a broad legislative privilege. This broad privilege should not be abrogated in the context of state redistricting challenges.

The legislative privilege afforded by Speech or Debate Clauses in state constitutions should be absolute, mirroring the absolute privilege afforded to members of Congress by the Constitution. The separation of powers principle demands this result. When the legislative, executive, and judicial branches are acting within the same system, regardless of whether it is the federal or state system, it is essential that legislators be protected from “intimidation . . . by the Executive and accountability before a possibly hostile judiciary.”<sup>113</sup>

The balancing approach applied in *United States v. Gillock* has no applicability to redistricting challenges in state court. First, *Gillock* only applies to criminal proceedings.<sup>114</sup> Second, *Gillock* deals with state legislators in federal court rather than state legislators in state court.<sup>115</sup> This difference is crucial. In federal court, state legislators are not protected by a Speech or Debate Clause, and their immunity relies only on federal common law.<sup>116</sup> Moreover, federalism concerns are relevant in the *Gillock* context.<sup>117</sup> In state court, there is no federalism dimension and, in forty-eight states,<sup>118</sup> legislators receive state constitutional protection.

This approach avoids debasing the important principles of separation of powers, legislative efficiency, and representative democracy embodied in state Speech or Debate Clauses. Although state Speech or Debate Clauses may contribute to legislative self-entrenchment and partisan maneuvering, these negative effects are better addressed through alternate districting

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113. *Gravel v. United States*, 408 U.S. 606, 617 (1972). *See also* *United States v. Johnson*, 383 U.S. 169, 181 (1966).

114. *See* Huefner, *supra* note 1, at 304 (“[A]s long as state legislators steer clear of federal criminal law, they will not actually be any less well off than members of Congress.”).

115. *United States v. Gillock*, 445 U.S. 360, 361–62 (1980).

116. *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015).

117. *Id.* (“[T]he separation of powers principle ‘gives no support to the grant’ of evidentiary use immunity to state legislators in ‘those areas where the Constitution grants the Federal Government the power to act’ because ‘the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power.’”) (quoting *United States v. Gillock*, 445 U.S. 360, 370 (1980)).

118. *See* Huefner, *supra* note 1, at 237 n.54.

safeguards like independent redistricting commissions. Independent redistricting commissions combat self-entrenchment and partisan maneuvering without jeopardizing the importance of a broad legislative privilege. Rather than abrogating state Speech or Debate Clauses in an effort to fight the harms of partisan gerrymandering, states should focus on addressing the problems of gerrymandering head on.

*A. Independent State Redistricting Commissions as an Alternative to Speech or Debate Clause Abrogation*

Independent redistricting commissions provide a promising avenue for addressing the harms of partisan gerrymandering without endangering the principles of separation of powers, legislative efficiency, and representative democracy embodied in state Speech or Debate Clauses.<sup>119</sup> In fact, the use of independent redistricting commissions may even reinforce these principles, especially legislative efficiency and representative government. Though not a perfect answer to the gerrymandering problem, independent commissions are the best mechanism for mitigating the self-entrenchment and anti-democratic behavior that could be shielded by legislative privilege.<sup>120</sup>

Independent redistricting commissions have been used in several states for a number of years.<sup>121</sup> Although state legislatures historically have controlled redistricting, many states began to reform their redistricting mechanisms following the landmark apportionment decision in *Baker v. Carr*.<sup>122</sup> Today, about half of states use a form of commission for the drawing of either state legislative or congressional districts.<sup>123</sup> In 2015, the Supreme Court explicitly sanctioned a state's use of an independent

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119. See, e.g., Kubin, *supra* note 54, at 838 (“[W]hile commissions are no panacea, they offer a viable means of restoring a degree of efficiency, fairness, and finality to a state’s decennial gerrymander.”).

120. See Note, *A Federal Administrative Approach to Redistricting Reform*, 121 HARV. L. REV. 1842, 1852–53, (2008) [hereinafter *A Federal Administrative Approach*] (“One can certainly debate the most effective commission structure or decision rules, but the bottom line is that independent commissions are less likely to distort the process than are partisan legislators, who will most certainly manipulate the rules of the game to their advantage.”) (internal citation omitted). See also Kubin, *supra* note 54, at 840 (“To paraphrase Winston Churchill, commissions are the worst method of redistricting except for all those other methods that have been tried from time to time.”). But see, e.g., Nathaniel Persily, *In Defense of Foxes Guarding the Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (“[R]edistricting by politically insulated commissions . . . is both undesirable in theory and difficult to create in fact.”).

121. *A Federal Administrative Approach*, *supra* note 120, at 1852.

122. Kubin, *supra* note 54 at 841.

123. Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 346 (2005).

redistricting commission in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.<sup>124</sup>

### *B. Independent State Redistricting Commission Forms*

Independent redistricting commissions take many forms.<sup>125</sup> Two key criteria can be used to distinguish among the different commission forms: responsibility for the redistricting process and membership structure.<sup>126</sup>

In terms of responsibility, redistricting commissions typically have either primary or backup authority.<sup>127</sup> The most common form of commission responsibility, the primary commission, initiates the redistricting process and, depending on the state, completes the process within a specified period and with varying degrees of legislative oversight.<sup>128</sup> The “less-common” backup commission steps in only if the state legislature fails to produce a suitable plan.<sup>129</sup>

Membership, the other principle aspect of redistricting commissions, typically falls into one of three categories: tie-breaker, bipartisan, and blue-ribbon panels.<sup>130</sup> While no membership formula is perfect, the consensus is that tie-breaking commissions offer the best opportunity to reduce partisanship and preserve competition.<sup>131</sup> Tie-breaker commissions

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124. 135 S. Ct. 2652, 2652 (2015).

125. Bates, *supra* note 123, at 346. *See also* Kubin, *supra* note 54, at 842 (“In the tradition of allowing the states to be test beds for new experiments in democratic government, the seventeen states that have adopted some form of redistricting commission all employ significantly different versions of the basic concept.”).

126. *Compare* Bates, *supra* note 123, at 346, with Kubin, *supra* note 54, at 843–51 (differentiating independent redistricting criteria according to (1) the scope of their statutory or constitutional authority, (2) their membership, and (3) the requirement of mandatory state review). These two methods of classification largely overlap. However, Kubin helpfully discusses how some states have limited state judicial review of commission plans. *Id.* at 850. This usually involves granting state supreme courts original jurisdiction in all challenges to a commission’s plan. *Id.* States like Colorado have mandated that the state supreme court automatically review each redistricting plan whether or not it has been challenged by a third party. *Id.*

127. Bates, *supra* note 123, at 347.

128. *Id.*

129. *Id.* at 347–48. A redistricting plan may be deemed unsuitable for several reasons. Redistricting plans must comply with the federal “one person, one vote” standard and the Voting Rights Act of 1965. *See A Federal Administrative Approach*, *supra* note 120, at 1842; Reynolds v. Sims, 377 U.S. 533, 568 (1964) (“[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”). In addition to federal requirements, the majority of states also require certain criteria when drawing new lines. Kubin, *supra* note 54, at 851. Kubin outlines the following common criteria: “(1) contiguous and compact districts, (2) respect for political subdivisions (especially counties), (3) respect for geographic or natural boundaries, and (4) coterminality between state house and state senate districts.” *Id.*

130. Bates, *supra* note 123, at 348–49.

131. *Id.* at 351 (arguing that tie-breaking commissions offer the best solution to political and

are “composed of equal members from a state’s two major political parties plus a tie-breaking chairman.”<sup>132</sup> Typically, the chairman is chosen by a majority vote of the partisan members, forcing them to compromise on an individual trusted to be relatively independent.<sup>133</sup> However, some states rely on the state supreme court to choose the chairman or allow the supreme court to appoint a chairman if the partisan committee members cannot come to a consensus.<sup>134</sup>

Another option for committee membership is the bipartisan model. In contrast to the tie-breaker commission, bipartisan commissions lack a commissioner and are made up of equal numbers of each major party.<sup>135</sup> The bipartisan model is rarely used, often leads to partisan gridlock, and can encourage bipartisan gerrymandering whereby partisan members work across the aisle to protect incumbency.<sup>136</sup>

Finally, a third type of redistricting commission, the blue-ribbon panel, consists of high-ranking state officers.<sup>137</sup> This membership structure does not address partisanship in redistricting because the occupants of most state offices are partisan figures.<sup>138</sup>

### *C. Independent Redistricting Commissions Reduce Partisan Bias and Incumbent Self-Entrenchment*

Independent redistricting commissions address two consistently articulated harms of partisan gerrymandering: partisan bias and incumbent self-entrenchment.<sup>139</sup> As alluded to above, the tie-breaker commission is the best arrangement to mitigate both harms.<sup>140</sup> Tie-breaker commissions

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judicial conflicts in the redistricting process). *See also* Kubin, *supra* note 54, at 846 (“The tie-breaking membership formula has three advantages. First, the commission is bipartisan . . . . Second, the tie-breaking vote ensures that the redistricting process does not end in deadlock . . . . Third, the presence of a tie-breaking chairman should encourage both parties to negotiate in good faith and offer reasonable alternative plans.”).

132. Kubin, *supra* note 54, at 845.

133. Bates, *supra* note 123, at 350.

134. Kubin, *supra* note 54, at 845–46.

135. Bates, *supra* note 123, at 349.

136. *Id.* Four states implement the bipartisan model: Idaho, Michigan, Missouri, and Washington. *Id.* at 349 n.93.

137. *Id.* at 350. For example, in Texas, the lieutenant governor, the speaker of the House, the attorney general, the state comptroller, and the land commissioner comprise the backup redistricting commission. TEX. CONST. art. III, § 28.

138. Kubin, *supra* note 54, at 846–47.

139. *See* Issacharoff, *supra* note 54, at 644; *A Federal Administrative Approach*, *supra* note 120, at 1844 (“Criticism of political gerrymanders has generally focused on the dual harms of partisan bias and incumbent entrenchment.”).

140. *See supra* note 131 and accompanying text.

encourage negotiation and compromise among the major political parties.<sup>141</sup> Moreover, partisan and incumbency motivations are constrained “by the fear of losing the chairman’s vote.”<sup>142</sup> The tie-breaker commission also mitigates partisan gerrymandering without eliminating the desirable political character of the redistricting process.<sup>143</sup> Instead, political actors operate within an adversarial structure that encourages outcomes aligned with the public interest.<sup>144</sup>

The use of independent redistricting commissions also has important downstream benefits.<sup>145</sup> Independent commissions have been shown to increase the competitiveness of districts.<sup>146</sup> Increased competitiveness could increase legislator responsiveness to voter constituencies and reduce voter apathy.<sup>147</sup> In addition, independent redistricting commissions could foster legislative efficiency and economy by relieving legislators of the time-consuming task of redistricting and limiting administrative costs and extended litigation.<sup>148</sup> Increased legislator responsiveness to public demands and the promotion of legislative efficiency correspond with the key principles animating the legislative privilege. Therefore, independent redistricting commissions, particularly tie-breaker commissions, and the legislative privilege are natural counterparts in the redistricting context.

#### *D. The Downside to Independent Commissions: Implementation*

Despite the promise of independent redistricting committees, formidable obstacles hinder their adoption. Principally, it is difficult to

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141. Kubin, *supra* note 54, at 850. *See also* Bates, *supra* note 123, at 352 (“[A] holdout dynamic is unlikely to emerge in tie-breaker commissions. Because losing the tie-breaking vote means that the opponent’s proposal succeeds, the cost of holding out is very high.”).

142. Kubin, *supra* note 54, at 850. *See* Bates, *supra* note 123, at 350–51 (“This design promotes bipartisan cooperation and discourages stonewalling.”).

143. Bates, *supra* note 123, at 353. Kubin refers to this as the “fair fight.” Kubin, *supra* note 54, at 856.

144. Bates, *supra* note 123, at 353. (“Many of our governmental institutions . . . rely on the adversarial process, tempered by institutional checks and balances, to work in the public interest; removing redistricting from the hands of self-interested legislators would more accurately align the process with this tradition.”). *See* Kubin, *supra* note 54, at 856 (“[T]he theory supporting a tie-breaking commission is that egregious gerrymanders can be avoided and balance promoted by monitoring the redistricting process through a comprehensive system of checks and balances.”).

145. *See* Bates, *supra* note 123, at 353–54.

146. *See, e.g.*, Issacharoff, *supra* note 54, at 626 (“It is probably not a matter of coincidence that in Iowa, where congressional boundaries are drawn by nonpartisan officials who are instructed to disregard incumbent and other political preferences, four out of five House districts were considered highly competitive in 2002.”).

147. *See* Bates, *supra* note 123, at 353. *See also* Kubin, *supra* note 54, at 859–60 (“[Tie-breaking commissions] can restore public confidence in our democratic system of representation.”).

148. Bates, *supra* note 123, at 353.

force legislators to voluntarily cede their power to redistrict.<sup>149</sup> For example, recent legislative conversion efforts in Kansas and North Carolina failed to gain momentum during the legislative process.<sup>150</sup> This difficulty has led to various creative academic proposals, ranging from the creation of a federal agency authorized to review partisan redistricting—with an eye toward incentivizing independent commissions<sup>151</sup>—to imposing a corporate law-style fiduciary duty on legislators and allowing them to “cleanse” problematic maps with the use of independent commissions.<sup>152</sup> Although deciding the optimal incentive scheme for achieving increased use of independent commissions is beyond the scope of this Note, it is encouraging that numerous proposals have been made surrounding implementation. An attitude that independent commissions are an ideal avenue for addressing partisan gerrymandering has pervaded the judicial branch.<sup>153</sup> Moreover, successful conversions from legislator-controlled redistricting to redistricting-by-commission have been accomplished in the last several years by popular referendum.<sup>154</sup>

#### CONCLUSION

Although it is tempting to adopt a framework that would allow for potentially damning gerrymandering documents to be released, failing to strongly enforce state Speech or Debate Clause protections would lead to negative effects for the United States system of government. Federal Speech or Debate Clause precedent grasps the importance of the separation of powers and legislative efficiency to the legislative process by applying an absolute legislative privilege in nearly all cases. Following the lead of Virginia and Rhode Island, states should embrace federal interpretations of the Speech or Debate Clause when considering a state clause in the redistricting context. Moreover, state citizens and legislators should seek to address the issue of partisan gerrymandering in creative ways that do not infringe upon important constitutional values. One promising method is to restrict the free reign of partisan legislators over

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149. *Id.* at 355–56.

150. *Id.*

151. *A Federal Administrative Approach*, *supra* note 120, at 1842.

152. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 679 (2013).

153. Kubin, *supra* note 54, at 862–68. *See also A Federal Administrative Approach*, *supra* note 120, at 1853 (acknowledging that state-level transitions to independent commissions are more likely to succeed than federal reforms but worrying that piece-meal state adoption could lead to an unfair overall system in which one major political party gains an advantage by gerrymandering more frequently).

154. Bates, *supra* note 123, at 355–56.

the redistricting process by using tie-breaker redistricting commissions.

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