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The Neglected Value of the Legislative Privilege in State Legislatures

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THE NEGLECTED VALUE OF THE LEGISLATIVE PRIVILEGE IN STATE LEGISLATURES

STEVEN F. HUEFNER*

ABSTRACT

Forty-three state constitutions contain a provision, analogous to the U.S. Constitution's Speech or Debate Clause (Article I, Section 6, Clause 1), granting state legislators a legal privilege in connection with their legislative work. While some of these states' provisions have never been applied, recent judicial interpretations in other states have departed from settled federal interpretations of the legislative privilege, failing to apply it broadly to protect the legislative process and instead unduly favoring ideals of open government. This Article defends the value of a broad constitutional privilege for state legislators to protect the integrity of the deliberative process, and presents a framework for state courts to use in applying the privilege to state legislatures. The Article's analysis is particularly relevant given the increased pressures facing state legislatures today, and also the growing appetite of litigants to compel public access to the inner workings of government institutions, often under statutory open government provisions. The Article concludes that to protect representative democracy, the legislative privilege merits a more robust application at the state level than some state courts have been willing to give it.

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INTRODUCTION

In a number of recent cases,¹ state courts have construed the absolute privilege that attaches to a legislator's work more narrowly than federal courts have interpreted the corresponding privilege found in the U.S. Constitution's Speech or Debate Clause.² The constitutions of forty-three states contain a privilege for state legislators analogous to the privilege that the federal Constitution provides members of Congress, and the common law has frequently recognized a similar protection as well.³ These legislative privileges⁴

1. These cases include: *State v. Haley*, 687 P.2d 305 (Alaska 1984); *Colo. Common Cause v. Bledsoe*, 810 P.2d 201 (Colo. 1991); *Avara v. Balt. News Am. Div.* (unreported lower court decision, described in *Avara v. Balt. News Am. Div.*, 440 A.2d 368 (Md. 1982)); *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 (Ct. App. Dec. 10, 1996); *Mich. Educ. Special Servs. Ass'n v. Ins. Comm'r*, 542 N.W.2d 354 (Mich. Ct. App. 1995), *stripped of precedential effect*, 550 N.W.2d 536 (table) (Mich. 1996); *Pataki v. N.Y. State Assembly*, 738 N.Y.S.2d 512 (Sup. Ct. 2002); *Abrams v. Richmond County S.P.C.C.*, 479 N.Y.S.2d 624 (Sup. Ct. 1984); *Lincoln Bldg. Assocs. v. Barr*, 147 N.Y.S.2d 178 (Mun. Ct. 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).

2. The federal Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

3. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951) (recognizing common-law legislative privilege for state legislators in federal civil proceedings); *infra* note 42 (discussing common-law privilege for local legislators).

4. Unless otherwise indicated, this Article uses the term "legislative privilege" to describe only that privilege afforded legislators to speak and act in the legislative sphere without potential legal liability or other judicial involvement. In other contexts, however, the term sometimes is used broadly to include, for example, a legislator's privilege against civil arrest (as provided to members of Congress in an earlier portion of Article I, Section 6, Clause 1); or the legislature's power to punish for contempt; or the authority granted to legislative bodies to decide legislative elections, to discipline members, and to establish and enforce the legislature's internal rules. See MARY PATTERSON CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 2-3 (1943); CARL WITTKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 21 (1921). All of these features may in some sense have once been seen as "privileges" that the monarchy granted to Parliament. See CLARKE, *supra*, at 2; WITTKE, *supra*, at 21. As early as 1377, the House of Commons opened each Parliament with a petition from the Speaker to the Crown seeking certain privileges, which at varying times "included freedom from arrest; freedom from molestation for members and their servants; freedom of speech in debate; admittance to the royal presence; and favorable construction upon all proceedings." WITTKE, *supra*, at 21. Eventually, these petitions became more an assertion of Parliament's inherent rights than a request for royal dispensations. See *id.*

provide legislators a fundamental constitutional protection that allows them to work independently and unimpeded by threats of judicial or executive intervention, thereby sparing them from unnecessary burdens and distractions of their energy, and freeing them to legislate without the distorting influence of an inquisitorial executive or hostile judiciary.

Although issues of legislative privilege received little judicial or scholarly attention for most of the country's first two centuries, between 1966 and 1979 the U.S. Supreme Court addressed the scope of the federal Speech or Debate Clause in ten separate decisions.⁵ Lower federal courts have continued to address legislative privilege issues on many subsequent occasions, giving rise to a relatively stable federal jurisprudence.⁶ It is now well settled that the U.S. Constitution's Speech or Debate Clause protects both legislators and their staff against civil and criminal liability, as well as against compelled questioning or document production, concerning all matters that are "an integral part of the deliberative and communicative processes"⁷ of legislating. Interpretive questions continue to surface at the margins, but the essential contours of the Clause—including the Court's instruction that it must be interpreted "broadly to effectuate its purposes"⁸—are clear.

By contrast, judicial interpretations of the legislative privilege at the state level have been infrequent to date, and in almost every state the jurisprudence remains unsettled.⁹ When interpretations have occurred, some state courts have narrowed their legislative privilege to deny state legislators protections that members of Congress would receive under the federal Speech or Debate Clause. For instance, in a major departure from federal jurisprudence, New York trial courts in at least two cases have construed their legislative privilege to protect state legislators only from liability, and not from compelled questioning about their legislative work in

5. *See infra* Part II.A.

6. *See id.*

7. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

8. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975); *United States v. Johnson*, 383 U.S. 169, 180 (1966).

9. *See infra* Part II.B.

cases in which the legislators were not themselves a party.¹⁰ In Ohio, courts have twice refused to protect legislative staff from compelled questioning about the state legislature's revisions to a statutory public school funding formula.¹¹ Other state courts similarly have construed their legislative privilege to be inapplicable for broad categories of cases, such as for committee files and records, or for actions seeking only declaratory relief.¹² These evolving issues of legislative privilege in the state legislatures have yet to receive any systematic analysis.¹³

This is an especially appropriate time to consider the scope of state legislative privileges because litigation involving the privilege has begun to expand. The increased professionalization of state legislatures, combined with the growing complexity of issues facing them and the devolution of authority from the federal government to the states, are propelling more issues of state legislative privilege

10. See *Abrams v. Richmond County S.P.C.C.*, 479 N.Y.S.2d 624, 628 (Sup. Ct. 1984); *Lincoln Bldg. Assoc. v. Barr*, 147 N.Y.S.2d 178, 182 (Mun. Ct. 1955). But see *Campaign for Fiscal Equity v. State*, 687 N.Y.S.2d 227, 230-31 (Sup. Ct. 1999) (finding privilege applicable to all questioning of government officials acting in legislative sphere, with no mention of earlier cases).

11. See *DeRolph v. State*, 747 N.E.2d 823 (Ohio 2001); *DeRolph v. State*, No. 22043 (Ohio Ct. Com. Pl. filed Aug. 4, 1998) (mem.).

12. See *infra* notes 143-92 and accompanying text.

13. Sixty years ago, a doctoral dissertation treated the subject of parliamentary privilege in the American colonies. See CLARKE, *supra* note 4. Apparently no subsequent academic work has considered in any detail the interpretations of state constitutional legislative privileges, although one recent student Note includes a consideration of the impact of one state's legislative privilege provision on a blackmail prosecution. See Robert Drean, Note, *Modern Kansas Legislative Strategies: The Blackmail Gambit*, 35 WASHBURN L.J. 157, 163-68 (1995). Over the years, a few articles have addressed the scope of common-law privilege that state legislators should receive in federal court. See Gary L. Starkman, *State Legislators, Speech or Debate, and the Search for Truth*, 11 LOY. U. CHI. L.J. 69 (1979); Natalie A. Finkelman, Note, *Evidence and Constitutional Law—Evidentiary Privileges for State Legislators—In re Granite Purchases for State Capital*, 61 TEMP. L. REV. 1015 (1988); Robert J. Palmer, Note, *The Case for a Speech or Debate Privilege for State Legislators in Federal Courts*, 13 VAL. U. L. REV. 501 (1979).

For scholarship on the federal Speech or Debate Clause, see James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1 (1999); Alexander J. Cella, *The Doctrine of Legislative Privilege of Speech or Debate: The New Interpretation as a Threat to Legislative Coequality*, 8 SUFFOLK U. L. REV. 1019 (1974); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973); Leon R. Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning, and Scope*, 99 U. PA. L. REV. 960 (1951).

into the courts. In addition, society's increasing propensity to litigate and contemporary distrust of government almost guarantee that disaffected individuals—and even some political opportunists—will seek creative ways to gain relief through, extract information from, or merely harass or burden, elected state representatives.

In particular, new issues of state legislative privilege are likely to arise as a result of the trend towards open government. All states now have some form of freedom of information statute analogous to the federal Freedom of Information Act (FOIA), as well as a variety of open meeting and other “sunshine” laws.¹⁴ Behind this trend is the powerful idea that in a democracy, good government requires transparency and greater access for citizens to the workings of their government.¹⁵ In this context, the Speech or Debate provisions may seem like anomalous safeguards of secrecy, rather than fundamental constitutional protections, especially to the extent that these provisions are construed not only to protect legislators against liability but also to prohibit judicial inquiries concerning non-public aspects of the deliberative process. Indeed, interpreting the legislative privilege broadly to prohibit compelled questioning of, or document production from, legislators about their work appears to stand in direct opposition to the ideal of open government.

Yet a proper understanding of the legislative privilege reveals the importance of a broad interpretation to promote the robust functioning of representative democracy and allow elected representatives to serve their constituents more effectively. In part, the privilege exists to protect legislators from the burdens and diverting influences of a variety of potential judicial and executive intrusions upon their work. In addition, the privilege serves to free legislators to deliberate more thoughtfully and with greater autonomy about thorny legislative issues. As James Wilson argued over two hundred years ago,

14. For a compilation and (albeit slightly biased) analysis of these laws, see The Reporters' Committee for Freedom of the Press, *Tapping Officials' Secrets* (2001), at <http://www.rcfp.org/tapping> (last visited May 7, 2003) [hereinafter The Reporters' Committee].

15. See, e.g., Charles N. Davis et al., *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 41-42 (1996) (journalism professors arguing that enforcement provisions in statutory open government laws are inadequate to serve public's fundamental need for government access).

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.¹⁶

It is no less important today that our elected representatives have the same freedom of unfettered, creative deliberation, and the same broad protection from the resentments that their policymaking will inevitably occasion. This Article explores the crucial issue of how to secure these legitimate interests in the face of the important value of open government.

Part I of the Article briefly reviews the origins and purposes of the legislative privilege, categorizes the formal variations among state legislative privilege provisions, and summarizes a variety of pressures on the privilege today, especially the movement towards greater openness in government. Part II summarizes recent U.S. Supreme Court and lower federal court applications of the U.S. Constitution's Speech or Debate Clause, and identifies important ways contemporary state court jurisprudence is diverging.

Part III presents a defense of a vigorous state legislative privilege at least as broad in its protections as the federal Speech or Debate Clause, notwithstanding competing values of open government. This Part argues that a broad interpretation is important for accomplishing one of the legislative privilege's central purposes, namely protecting individual legislators' freedom to deliberate, brainstorm, and strategize creatively and confidentially with staff and colleagues. Building on this predicate, Part IV develops a framework with which state courts can assess the proper scope of their legislative privilege, and proposes categories of protected acts and actors. It argues that the privilege should insulate legislators and their staff not only from legal liability but also from declaratory relief and compelled testimony or document production. In addition, the protections should extend both to a legislator's own legislative positions and judgments, and also to such matters as staff analyses, internal documents, and other sources of information concerning

16. 2 THE WORKS OF JAMES WILSON 38 (Andrews ed., 1896), *quoted in* Tenney v. Brandhove, 341 U.S. 367, 373 (1951).

potential legislation. The Article concludes that despite competing interests, the value of a robust legislative privilege for state legislators remains as great as ever, and that the proper scope of this privilege therefore needs to be more carefully understood, especially as state courts confront these issues with increasing frequency.

I. THE PLACE OF THE LEGISLATIVE PRIVILEGE IN AMERICAN LEGISLATURES

Although it received little judicial attention during most of the country's first two centuries, the legislative privilege of free speech and debate has been a crucial element of American legislative institutions from their beginnings. Specific formulations of the privilege at the state level vary, but its purpose of protecting legislative independence has remained constant through periods of significant government restructuring and serious concern about abuses of legislative power. Today, however, the privilege faces increased pressure in the states.

A. "Good Government" Purpose of the Legislative Privilege

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. Parliament first began to articulate a privilege of free speech in the sixteenth century, in response to repeated skirmishing with Queen Elizabeth over issues of royal succession and religious reform.¹⁷ Parliament's ongoing demand for greater independence from the Crown in the mid-seventeenth century, brought to a head by conflicts with King Charles I, led eventually to the inclusion of a legislative privilege in

17. See WITTKÉ, *supra* note 4, at 26-28. The protections of the privilege remained elusive, however, for much of the next century and a half. See *id.* at 23-30; CLARKE, *supra* note 4, at 1-13. Moreover, Parliament initially was reluctant to assert its independence from the Crown too aggressively. Indeed, the House of Commons sent one of its own members, Peter Wentworth, to be imprisoned in the Tower of London for an address to the House in 1575 in which he asserted that the privilege must permit unfettered discussion of all matters, even contrary to the pleasure of the Crown. See WITTKÉ, *supra* note 4, at 27. In arguing for this interpretation, Wentworth suffered for being still slightly ahead of his time.

the English Bill of Rights of 1689.¹⁸ The skirmishing between the Crown and Parliament in the era leading to the English Bill of Rights reflected "the conflict between two 'ancient and undoubted rights,' on the one hand prerogative of the king raised to a high degree by the doctrine of divine right, and on the other the privileges of the people exercised through their representatives."¹⁹ Thus, before it reached America, the legislative privilege had taken root as "one of the chief means of upholding and preserving the liberty of the subject."²⁰

This public purpose continued to figure prominently in the incorporation of the privilege of parliamentary free speech in American colonial legislatures,²¹ where the English privilege had

18. "That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." 1 W. & M. 2, c. 2, § 9 (1689) (Eng.), reprinted in 9 PICKERING, STATUTES AT LARGE 67, 69 (1764). That this provision covered not just words spoken or debated in Parliament, but also included documents, committee proceedings, and other matters as well, was made clear by the context of its adoption: it responded not only to Parliament's repeated conflicts with Charles, including his seizure of legislative papers of five members of Parliament in 1642, but also to the prosecution in 1686-88 of Sir William Williams for republication of a committee report critical of King James II. In defending against this prosecution, Parliament joined Williams in maintaining, at the time in vain, that the privilege should cover "all of the ordinary and necessary functions of the legislature." Reinstein & Silverglate, *supra* note 13, at 1130. Meanwhile, the King argued successfully that the republication was unprotected because the legislative privilege covered only speeches, debates, and voting. After this judicial defeat, Parliament sought to codify a broader scope of the privilege in the Bill of Rights provision. See *id.* at 1129-33.

19. CLARKE, *supra* note 4, at 10.

20. *Id.* at 2. For example, John Locke reinforced this sentiment:

[F]or it is not a certain number of men, no, nor their meeting, unless they have also freedom of debating and leisure of perfecting what is for the good of society, wherein the legislative consists. When these are taken away or altered so as to deprive the society of the due exercise of their power, the legislative is truly altered ... so that he who takes away the freedom or hinders the acting of the legislative in its due seasons in effect takes away the legislative and puts an end to the government.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 215 (1690) (Although first published with an imprint of 1690, scholars now believe that Locke wrote his First and Second Treatises of Government in 1679-81, before the English Revolution. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 72-79 (Peter Laslett ed., 1960); see also GEORGE C. CHRISTIE & PATRICK MARTIN, JURISPRUDENCE 234 & n.21 (2d ed. 1995) (dating Locke's writing of the Two Treatises to 1680-81)).

21. See CLARKE, *supra* note 4, at 2; see also *Constitutional Immunity of Members of Congress, Hearings Before the Joint Comm. on Congressional Operations*, 93d Cong. 1st Sess. 2 (1973) (statement of Sen. Metcalf) ("It's not what's in it for the Congress. It's what's in it for the American People.").

become a common feature by the eighteenth century.²² Recognizing the importance of unrestrained legislative speech to a robust functioning of representative democracy, the colonies saw the legislative privilege "as a fundamental privilege without which the right to deliberate would be of little value."²³ Although specific assertions of the privilege occasionally drew the ire of particular citizens, its value of protecting the integrity of representational processes nevertheless was seen as crucial to protecting individual rights during the colonial era.²⁴

After the colonies declared their independence, the privilege quickly appeared in the new charters and constitutions of many of the original thirteen states.²⁵ Massachusetts and New Hampshire included in their respective constitutions of 1780 and 1784 a version that made explicit the purpose of securing citizen rights: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."²⁶

22. See CLARKE, *supra* note 4, at 70-71. For instance, Maryland, Virginia, New York, New Jersey, South Carolina, Pennsylvania, Georgia, and North Carolina had legislative privilege provisions that predated the Constitutional Convention, in some cases by more than a century. See *id.* at 62-70. During the colonial period, however, as during most of the first two hundred years of the United States, instances in which the privilege was enforced were unusual. Clarke speculates that this was because "obstruction to speech ... was likely to come, if at all, from the government; and might be lost to sight in the details of a larger quarrel to which it was merely incidental." *Id.* at 93-94.

23. *Id.* at 97, 121-31.

24. See *id.* at 127, 130-31.

25. Maryland was the first state to adopt such a provision. See MD. CONST. of 1776, Declaration of Rights, art. VIII, reprinted in 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 372 (William F. Swindler ed., 1975) [hereinafter 4 SOURCES AND DOCUMENTS] ("That freedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court or judicature.") 4 SOURCES AND DOCUMENTS, *supra*, at 373. Most of the remaining thirteen original states quickly adopted constitutions with an analogous privilege. The 1776 constitutions of South Carolina and New Jersey also implicitly retained the privilege through general provisions incorporating English law. See N.J. CONST. of 1776, art. XXII, reprinted in 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 449, 452 (William F. Swindler ed., 1976); S.C. CONST. of 1776, art. XXIX, reprinted in 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 462, 467 (William F. Swindler ed., 1979). Other states, as they were admitted into the Union, typically included the provision in their first constitution as well. See *infra* notes 61-64 and accompanying text.

26. MASS. CONST. of 1780, art. XXI, reprinted in 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 92, 95 (William F. Swindler ed., 1975); see also N.H. CONST. of 1784, art. XXX, reprinted in 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 394,

The Articles of Confederation also included a legislative privilege provision,²⁷ which became the basis for the Speech or Debate Clause of the U.S. Constitution in 1789.²⁸ A decade after the Constitutional Convention, Thomas Jefferson and James Madison explained the purpose of the Speech or Debate Clause in the following terms, in the course of persuading a grand jury to abandon an effort to prosecute several members of Congress for issuing allegedly "seditious" newsletters:

*That in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common-law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive.*²⁹

Jefferson and Madison continued that "to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right" would destroy the proper separation of powers and leave only a shell of representative democracy.³⁰

397.

27. "Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress" ARTICLES OF CONFEDERATION, art. V, *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 69-398, at 27, 29 (1927).

28. In the draft of the Constitution submitted to the Committee on Style, the Framers of the Constitution included essentially the same language as Article V of the Articles of Confederation, without significant discussion or debate. *See* Reinstein & Silverglate, *supra* note 13, at 1136 n.122. That committee adjusted the language from Article V to produce the provision now found in Article I, Section 6, Clause 1 of the Constitution: "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1.

29. 8 WORKS OF THOMAS JEFFERSON 322-23 (1797), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 336 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added).

30. *Id.* Two generations later, and still prior to almost all Court interpretations of the privilege, Justice Story similarly hailed the Clause as a "great and vital privilege ... without which all other privileges would be comparatively unimportant, or ineffectual." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 863 (1833). Senator Lee Metcalf offered a modern echo of these sentiments in his introductory remarks at a 1973 joint congressional hearing concerning the legislative privilege: "[T]he speech or debate clause is as essential [today] to the success of our continuing experiment in self-government as at the moment of

Despite the fundamental importance of the legislative privilege, judicial interpretations of the privilege before the latter part of the twentieth century were sparse.³¹ But the earliest cases recognized several key features of the privilege: (1) it exists to protect the integrity of the legislative process, not to protect legislators personally; (2) it should be applied broadly to achieve this protection; and (3) it need cover only core legislative activities, not all activities undertaken by legislators.³²

The first recorded American interpretation of the legislative privilege occurred in 1808 in *Coffin v. Coffin*.³³ There, in a defamation action against a state legislator for words spoken within the legislative chamber, the Supreme Judicial Court of Massachusetts refused to apply the privilege to the legislator's remarks impugning the plaintiff to another legislator, who had just sponsored a measure at the plaintiff's behest. The court reasoned that although the remarks occurred on the House floor, the defendant was not acting "in the discharge of any official duty" when, after voting on the measure had concluded, he shared with his colleague his negative opinion of the plaintiff.³⁴

The *Coffin* opinion, which the U.S. Supreme Court later called "perhaps[] the most authoritative case in this country" on the legislative privilege,³⁵ echoed the view that the privilege exists "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."³⁶ In addition, the Court concluded that

its adoption. For it is this clause which reinforces the separation of powers, without which the democratic system of government would cease to function." *Constitutional Immunity of Members of Congress*, *supra* note 21, at 2 (statement of Sen. Metcalf).

31. When the U.S. Supreme Court in 1966 addressed the Speech or Debate Clause for only the third time, it wrote: "In part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause." *United States v. Johnson*, 383 U.S. 169, 179 (1966).

32. *See infra* notes 33-47 and accompanying text.

33. 4 Mass. (1 Tyng) 1 (1808).

34. *Id.* at 29-31.

35. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Of course, this may not be such high praise, as almost no other reported American cases addressing the legislative privilege existed at the time, other than an occasional case addressing a common-law privilege for local government legislators. *See, e.g.*, *Jones v. Loving*, 55 Miss. 109 (1877).

36. *Coffin*, 4 Mass. at 27. The court also explained "that the privilege ... is not so much the

to further these ends the privilege should be construed liberally to protect "every thing said or done" by a representative acting in a legislative capacity, both in as well as out of the chamber.³⁷ At the same time, the Court concluded that it would be inappropriate to protect every slander "uttered in the walls of the representatives' chamber ..., but not uttered in executing [a representative's] official duty."³⁸

The U.S. Supreme Court's earliest interpretation of the Constitution's Speech or Debate Clause occurred seventy years later. In *Kilbourn v. Thompson*,³⁹ the Court considered whether the Clause protected voting for an unlawful resolution of the House of Representatives. The resolution declared Kilbourn in contempt of Congress and directed the House Sergeant-at-Arms to arrest him. After his arrest, Kilbourn commenced a civil action against House members who had ordered the arrest. Although the Court determined that the House lacked authority to issue the resolution and that the arrest itself was not immune from judicial review, the Court had little difficulty applying the Clause to protect the defendants' act of passing the resolution in question.⁴⁰ Echoing the *Coffin* opinion, the Court extended the privilege "to things generally done in a session of the House by one of its members in relation to the business before it," adding, "[i]t would be a narrow view of the constitutional provision to limit it to words spoken in debate."⁴¹

For the remainder of the nineteenth and much of the twentieth centuries, issues of legislative privilege arose only occasionally in state and federal courts.⁴² Where reported cases arose, the issues

privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house." *Id.*

37. *Id.*

38. *Id.* at 31. For an argument that the specific outcome in *Coffin* was inconsistent with, and even subversive of, the lofty doctrinal principles otherwise articulated within the opinion, see Alexander J. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 29-30 (1968).

39. 103 U.S. 168 (1881).

40. See *id.* at 196, 204-05.

41. *Id.* at 204.

42. In addition to sporadic interpretations of the constitutional legislative privilege provided to state legislators, state courts also occasionally considered the appropriate scope of a common-law legislative privilege, especially for local legislators. See, e.g., *Russell v. Tate*, 13 S.W. 130, 132 (Ark. 1890) (concluding that city council members could not be held liable

were typically straightforward,⁴³ and courts that engaged in any meaningful discussion of the issue typically relied heavily on either the *Coffin* opinion or the *Kilbourn* opinion.⁴⁴ For instance, in 1951, the U.S. Supreme Court published only its second decision concerning the legislative privilege. In *Tenney v. Brandhove*,⁴⁵ the Court concluded that a *state* legislator was entitled to a common-law immunity in a federal civil rights action.⁴⁶ In crafting this common-law protection, Justice Frankfurter's majority opinion again borrowed directly from the rationale articulated in *Coffin*, as well as building upon the importance of the Speech or Debate Clause to congressional processes.⁴⁷

B. Legislative Privilege Provisions in State Constitutions

Even though state and federal courts had only sporadic opportunities to discuss the scope of the legislative privilege during most of the country's first two centuries, the privilege maintained a central place in the structure of state legislatures. Most state constitutions have included some form of this privilege from the beginning, and have not altered it during periods of significant constitutional change typically marked by fears of legislative excess.

for erroneous use of their legislative power, but were liable for subsequent misuse of appropriated funds); *Lewis v. Denver City Waterworks*, 34 P. 993, 993 (Colo. 1893) (applying common-law privilege to protect trustees of municipal corporation when acting in legislative capacity); *Jones v. Loving*, 55 Miss. 109, 111 (1877) (finding officers of municipal corporation immune from liability for use of legislative powers); *Incorporated Vill. of Hicksville v. Blakeslee*, 134 N.E. 445, 448 (Ohio 1921) (applying common-law privilege to protect municipal council members who voted for invalid resolution); *Branigan v. State*, 244 N.W. 767, 769 (Wis. 1932) (concluding that city council members are not protected by absolute legislative privilege, but only by conditional privilege when acting in good faith).

43. See, e.g., *State v. Elder*, 47 N.W. 710, 713-14 (Neb. 1891) (refusing to apply privilege to "ministerial" (and hence nonlegislative) duty of certifying election returns); *Van Riper v. Tumulty*, 56 A.2d 611, 614 (N.J. 1948) (finding privilege covers proceedings in legislative committees as fully as in legislative chamber); *Cole v. Richards*, 158 A. 466, 467 (N.J. 1932) (applying privilege to legislator's defamatory remarks on Senate floor about private citizen); *Canfield v. Gresham*, 17 S.W. 390, 392-93 (Tex. 1891) (applying privilege to protect legislator for supporting contempt resolution).

44. See cases cited *supra* note 43.

45. 341 U.S. 367 (1951).

46. The action was brought under 8 U.S.C. § 43, the predecessor of 42 U.S.C. § 1983 (2000). See *id.* at 369.

47. See *id.* at 373-74.

Today, state legislative privilege provisions can be grouped into five loose categories:⁴⁸ (1) twenty-three states whose privilege exists under a constitutional provision essentially identical in text to the federal Speech or Debate Clause;⁴⁹ (2) three states—Massachusetts, New Hampshire, and Vermont—that continue to employ a “deliberation, speech and debate” formulation of the privilege that, as previously discussed,⁵⁰ shortly predates the federal model;⁵¹ (3) twelve states that give legislators immunity “for words spoken [or

48. For the text of all forty-three state constitutional legislative privilege provisions, see *infra* Appendix.

49. These twenty-three states are: Alabama, Arkansas, Colorado, Connecticut, Delaware, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Virginia, and Wyoming. See ALA. CONST. art. IV, § 56; ARK. CONST. art. V, § 15; COLO. CONST. art. V, § 16; CONN. CONST. art. 3, § 15; DEL. CONST. art. II, § 13; IND. CONST. art. 4, § 8; KAN. CONST. art. 2, § 22; KY. CONST. § 43; LA. CONST. art. 3, § 8; MICH. CONST. art. IV, § 11; MINN. CONST. art. IV, § 10; MO. CONST. art. III, § 19; MONT. CONST. art. V, § 8; N.J. CONST. art. IV, § IV, para. 9; N.M. CONST. art. IV, § 13; N.Y. CONST. art. III, § 11; OHIO CONST. art. II, § 12; OKLA. CONST. art. V, § 22; PA. CONST. art. II, § 15; R.I. CONST. art. VI, § 5; TENN. CONST. art. II, § 13; VA. CONST. art. IV, § 9; WYO. CONST. art. 3, § 16.

The only substantive differences in language among this group are that: (1) in addition to their standard prohibition of questioning legislators about “any Speech or Debate” in either house, the Colorado Constitution also by its terms protects speeches or debates in “any committees” of either house, the Kansas Constitution also explicitly prohibits questioning about any “written document,” the New Jersey Constitution expressly extends the protection to “any statement,” as well as to any Speech or Debate “at any meeting of a legislative committee,” and the New Mexico Constitution explicitly prohibits questioning about “any vote cast in either house”; (2) Louisiana’s and Michigan’s provisions omit any reference to “debate,” and instead refer solely to “speech”; and (3) three variations exist among all of the provisions as to whether they prohibit questioning legislators “in any other place,” “elsewhere,” or “in any court or place elsewhere.” In addition, the Rhode Island provision uses the phrase “speech in debate,” rather than “Speech or Debate,” a difference the state Supreme Court has held lacks significance. See *Holmes v. Farmer*, 475 A.2d 976, 981 (R.I. 1984).

50. See *supra* note 26 and accompanying text.

51. In Massachusetts, for instance, the provision today still reads: “The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.” MASS. CONST. pt. 1, art. XXI; see also N.H. CONST. pt. 1, art. XXX (using the same language except “action, complaint, or prosecution” replaces “accusation or prosecution, action or complaint”); VT. CONST. ch. I, art. XIV (using the same language except for omission of “either house of”).

Both because of its explicit inclusion of legislative “deliberation” among the protected activities, and because of its inclusive list of the types of prohibited judicial inquiry, this formulation arguably could admit of a broader construction than that of the federal Speech or Debate Clause. But in fact, the federal clause has been interpreted with an equally broad scope. See *infra* Part II.A.

uttered or used] in debate," a formulation that appears to date from the middle of the nineteenth century;⁵² (4) five states that employ a formulation that protects legislators from being made "liable to answer" for their legislative statements;⁵³ and (5) seven states entirely without any constitutional language granting the privilege.⁵⁴

52. These twelve states are: Arizona, Idaho, Maryland, Nebraska, North Dakota, Oregon, South Dakota, Texas, Utah, Washington, West Virginia, and Wisconsin. *See* ARIZ. CONST. art. IV, pt. 2, § 7; IDAHO CONST. art. III, § 7; MD. CONST. art. III § 18; MD. CONST. of 1867, Declaration of Rights, art. X ("That freedom of speech and debate, or proceedings in the Legislature, ought not to be impeached in any Court of Judicature."); NEB. CONST. art. III, § 26; N.D. CONST. art. IV, § 15; OR. CONST. art. IV, § 9; S.D. CONST. art. III, § 11; TEX. CONST. art. III, § 21; UTAH CONST. art. VI, § 8; WASH. CONST. art. II, § 17; W. VA. CONST. art. VI, § 17; WIS. CONST. art. IV, § 16. Ten of these jurisdictions became states between 1845 (Texas) and 1896 (Utah), and Arizona followed in 1912. Maryland, although a state since 1787, adopted a new constitution in 1867 that employed this latter-nineteenth century formulation of the legislative privilege.

53. The constitutions of Illinois, as revised in the mid-twentieth century, Georgia, and Maine, each contain a formulation of the legislative privilege that immunizes legislators from being "liable to answer" or "held to answer" for "anything spoken" or for "any speech or debate, written or oral" in either house. *See* GA. CONST. art. III, § IV, para. IX; ILL. CONST. art. IV, § 12; ME. CONST. art. IV, pt. 3, § 8. Alaska and Hawaii, in their 1959 constitutions, similarly have language providing that legislators may not "be held to answer before any other tribunal for any statement made ... in the exercise of [their] legislative functions [or duties]." ALASKA CONST. art. II, § 6; HAW. CONST. art. III, § 7.

54. The seven states are California, Florida, Iowa, Mississippi, Nevada, North Carolina, and South Carolina. All but two of these states—North Carolina and Florida—have a constitutional provision privileging its state legislators from certain types of arrest or civil process during the time the legislature is in session. Florida once had both a Speech or Debate provision and an arrest provision in its Constitution, but it has not had either provision since 1868. *See* *Girardeau v. State*, 403 So. 2d 513, 515 n.3 (Fla. Dist. Ct. App. 1981). Some interpreters occasionally have used these arrest provisions also to support the recognition of a common-law privilege of free legislative debate. *See, e.g.*, 1979-80 Op. Att'y Gen. Iowa 173, available at 1979 Iowa AG LEXIS 101 (using constitutional arrest privilege and limited statutory Speech or Debate privilege to derive broad common-law legislative privilege) [hereinafter Op. Att'y Gen. Iowa]. Such a privilege, however, likely exists even in states without a constitutional arrest clause. For example, the Florida Supreme Court in dicta has strongly signaled its readiness to recognize a legislative privilege as a matter of common-law in appropriate cases. *See* *Hauser v. Urchisin*, 231 So. 2d 6 (Fla. 1970); *see also* *Girardeau*, 403 So. 2d at 516-17. In California, state courts apparently have recognized a common-law legislative privilege for state legislators, following the U.S. Supreme Court in *Tenney v. Brandhove*. *See* *Allen v. Superior Court*, 340 P.2d 1030, 1034 (Cal. Dist. Ct. App. 1959). *But cf.* *Hancock v. Burns*, 323 P.2d 456, 461 (Cal. Dist. Ct. App. 1958) (noting that inflicting bodily injury at a hearing would not be privileged). Although Mississippi does not yet appear to have expressly recognized a legislative privilege for state legislators, it was one of the earliest jurisdictions to recognize a common-law privilege for local legislators. *See* *Jones v. Loving*, 55 Miss. 109, 109 (1877). North Carolina also has recognized a common-law legislative immunity

Conceivably, a privilege protecting a legislator from questioning "for words spoken in debate" could admit of a narrower construction than the construction historically given to the federal Speech or Debate Clause. A court could limit the privilege to remarks actually spoken in legislative proceedings, rather than extending it to the variety of other essential activities that are an integral part of the legislative function to which the federal privilege has been extended.⁵⁵ In fact, however, no state with this language has used this textual difference yet to justify a narrower interpretation, and such a construction would represent a fundamental misunderstanding of the origins and purpose of the privilege.⁵⁶

Five of the twelve states employing a "words spoken" formulation also have a further variation, which in theory also could justify a narrower construction. Specifically, the provisions of Arizona, Maryland, Nebraska, Washington, and Wisconsin by their terms do not express a complete prohibition of *questioning about* legislative speech, but rather provide only that no state legislators "shall be liable" in either civil actions or criminal prosecutions.⁵⁷ These five

for local legislators. See *Stephenson v. Town of Garner*, 524 S.E.2d 608, 612-13 (N.C. Ct. App. 2000); *Vereen v. Holden*, 468 S.E.2d 471, 473-74 (N.C. Ct. App. 1996). Meanwhile, North Carolina and Iowa have statutory privileges. The North Carolina statutory provision closely tracks the federal and typical state constitutional provisions, stating that state legislators "shall have freedom of speech and debate ... and shall not be liable to impeachment or question, in any court or place out of the General Assembly, for words therein spoken." N.C. GEN. STAT. § 120-9 (2001). In contrast, Iowa's statutory provision expressly provides only that state legislators "shall not be held for slander or libel in any court for words used in any speech or debate in either house or at any session of a standing committee." IOWA CODE § 2.17 (2002). The Iowa attorney general has opined, however, that at common law state legislators should receive the same broad immunity as provided by the U.S. Constitution's Speech or Debate Clause. See Op. Att'y Gen. Iowa, *supra*. Some states with constitutional legislative immunity provisions also have statutory immunity provisions. See, e.g., MICH. COMP. LAWS ANN. § 4.551 (West 1994). The District of Columbia also has a statutory provision granting its legislative council a privilege analogous to that provided by the federal Speech or Debate Clause. See D.C. CODE ANN. § 1-301.42 (2001).

55. The West Virginia provision expressly reduces the potential for this text-based narrowing, providing: "for words spoken in debate, or any report, motion or proposition made in either house, a member shall not be questioned in any other place." W. VA. CONST. art. VI, § 17 (emphasis added).

56. See *supra* Part I.A.

57. See ARIZ. CONST. art. IV, pt. 2, § 7; MD. CONST. art. III, § 18; NEB. CONST. art. III, § 26; WASH. CONST. art. II, § 17; WIS. CONST. art. IV, § 16. Meanwhile, the provisions of the constitutions of Idaho, North Dakota, Oregon, South Dakota, Texas, Utah, and West Virginia continue to use an express prohibition on "question[ing] in any other place." IDAHO CONST. art. III, § 7; N.D. CONST. art. IV, § 15; OR. CONST. art. IV, § 9; S.D. CONST. art. III, § 11; TEX.

states join the five states with a "liable to answer" formulation in using language that arguably only prohibits holding legislators liable as defendants in judicial proceedings, without providing them any privilege against compelled testimony or production of evidence, much as the two New York courts cited in the Introduction⁵⁸ construed the traditional formulation, rather than these models.

It may not be quite so easy to reject outright this liability-only interpretation of these versions of the privilege. Again, however, this textual variation has not been the cause of any narrow court rulings. On the contrary, one Wisconsin court decision has found the "liable in any civil action" text also to be amenable to a more inclusive construction, consistent with the broad history and purpose of the privilege. Under the Wisconsin court's construction, the prohibition on holding legislators "liable" also prohibits compelled questioning.⁵⁹ Furthermore, the "liable to answer" formulation, even more than the "liable in any civil action" formulation at issue in the Wisconsin decision, contains not only the notion that legislators may not be held legally liable as defendants, but also the broader notion that they may not be forced to explain or otherwise "answer" for their legislative acts in any proceeding, whether or not they are defendants.

Thus, 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,⁶⁰ and instead correlate most closely with the period in which each provision was adopted.⁶¹ Massachusetts, New Hampshire, and Vermont all adopted their

CONST. art. III, § 21; UTAH CONST. art. VI, § 8; W. VA. CONST. art. VI, § 17.

58. See *supra* note 10 and accompanying text.

59. See *State v. Beno*, 341 N.W.2d 668, 678 (Wis. 1984).

60. The National Municipal League, which beginning in 1921 prepared a "Model State Constitution," opined in its commentary to a 1963 revision of this document that its model Speech or Debate clause was the "same as 26 states," and that the analogous provisions in seventeen other states had the "same intent." NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION 54 (6th ed. 1963). The model provision read: "For any Speech or Debate in the legislature, the members shall not be questioned in any other place." *Id.* at 7. The commentary contains no suggestion that variations from this model reflected any difference in scope.

61. The differences do not seem to correspond directly with other patterns in state constitutional law. See, e.g., Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 *PUBLIUS* 11, 18-22 (1982).

version of the "deliberation, speech, or debate" model between 1780 and 1786. Sixteen of the twenty-three states employing the standard "federal model" adopted their provisions between 1787 and 1837, most (all but Michigan, New York, and Virginia) at the time of the adoption of their first constitution. The "words spoken" model first appeared in Texas in 1845, and then in eleven more states before 1912, again in most cases (except Maryland) at the time of each state's adoption of its first constitution.⁶² During the same period, seven other states, each newly admitted to the Union, chose instead to follow the standard federal model in their new state constitutions.⁶³ In the mid-twentieth century, the "held to answer" model, a model previously chosen by Georgia in 1789 and Maine in 1820, became the choice of Alaska and Hawaii as well, at the time of their incorporation into the Union. Illinois subsequently adopted this model in a 1970 revision to its state constitution, replacing the standard federal model it had used since 1818.⁶⁴

Illinois is one of many states whose constitutions have undergone not only frequent amendment but also complete revision.⁶⁵ As Robert Williams has described it, state constitutional development has been "a rough-and-tumble scramble for political advantage" marked by "waves of state constitution-making," and remaking, that reflected "pressing local concerns" in various eras.⁶⁶ In this light, the state Speech or Debate provisions evidence remarkable consistency, enduring in most states in essentially the same form through successive "waves" of popular reforms.

A brief review of important historical trends in state constitutional law reinforces the conclusion that, across eras, the legislative privilege has maintained its currency as a central element of protecting democratic processes. A repeated impetus for the waves

62. In addition to Texas and Maryland, these twelve states include Arizona, Idaho, Nebraska, North Dakota, Oregon, South Dakota, Utah, Washington, West Virginia, and Wisconsin. *See supra* note 52.

63. These seven states are Colorado, Kansas, Oklahoma, Minnesota, Montana, New Mexico, and Wyoming. *See supra* note 49.

64. *See* ILL. CONST. art. IV, § 14 (1870).

65. As of 1996, each state on average had adopted 120 amendments, and a majority of the states have had three or more constitutions. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23-24 (1998). In addition, only nineteen states retain their original constitutions, and some states have amended their constitution over 500 times or have completely replaced their constitution as many as ten times. *See id.*

66. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW 18 (3d ed. 1999).

of state constitutional change has been a desire to reduce legislative power and make legislatures more accountable. For instance, during the first half of the nineteenth century, reformers sought to increase popular participation in state government and to reduce the authority of the legislatures through changes in suffrage laws and prohibitions on special legislation.⁶⁷ Later, just after the Civil War, one of the most remarkable periods of state constitutional revision occurred, when thirty-seven states adopted new constitutions between 1864 and 1879.⁶⁸ Historian Morton Keller has described the main thrust of the second half of this period as "put[ting] limits on legislative and other forms of governmental power.... New and revised constitutions in the 1870s substantially reduced legislative authority."⁶⁹ Among other changes, nineteenth-century constitutional revisions frequently included granting the governor a line-item veto, limiting the ability of legislatures to engage in deficit spending, and prohibiting log-rolling by mandating that an individual legislative measure address only a single subject.⁷⁰

Thus, at the end of the nineteenth century, a commentator observed that "[o]ne of the most marked features of all recent State constitutions is the distrust shown of the Legislature."⁷¹ Distrust of state legislatures remained a motivating factor of many early twentieth-century democratic reforms as well, including campaign finance reform, direct primaries, universal suffrage, and the

67. See Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 63-64 (1982).

68. See MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 111 (1977).

69. *Id.* at 111-12; see also James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 *RUTGERS L.J.* 819, 825 (1991) (describing nineteenth century approach to creating constitutions as seeking "to restrain the legislature"). In California, one Workingman's Party delegate to the constitutional convention proposed an article entirely prohibiting the convening of a legislature and punishing as a felon anyone who even proposed a legislature. See KELLER, *supra* note 68, at 113-14.

70. See KELLER, *supra* note 68, at 112-13; Henretta, *supra* note 69, at 823-24; Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 *PUBLIUS* 91, 92-93 (1987) [hereinafter Williams, *Legislative Compliance*].

71. Amasa M. Eaton, *Recent State Constitutions*, 6 *HARV. L. REV.* 109, 109 (1892). Of course, such distrust was not new, as fears of legislative tyranny also had animated much of the thinking of the Framers of the U.S. Constitution. See, e.g., *THE FEDERALIST NOS.* 48, 51 (James Madison).

adoption of initiative and referendum processes in many states,⁷² as well as the Seventeenth Amendment's provision for direct popular election of U.S. Senators, in place of their selection by state legislatures.⁷³ Indeed, only since the 1960s, long after the legislative privilege was an established part of the constitutional fabric, have state reforms been directed toward strengthening the legislative branch in meaningful ways.⁷⁴

Yet there is no evidence that the various efforts to restrain legislative power in prior eras were ever accompanied by any attempt to limit the scope of the legislative privilege, despite the ease with which state constitutions can be revised, and the continuing frequency with which states have tinkered with their charters.⁷⁵ Rather, for more than two centuries, state legislative privileges have endured through periods of concern about legislative dominance, and despite repeated skepticism about legislative performance. Even as states in other ways revised their constitutions to include additional procedural limitations on the legislature intended to promote "a more open and deliberative state legislative process,"⁷⁶ they did not alter their legislative privilege provisions. States thus appear to have persistently shared James Wilson's view of the legislative privilege as "indispensably necessary" to a robust functioning of the legislative process.⁷⁷

72. See Henretta, *supra* note 69, at 820; Sturm, *supra* note 67, at 68-69.

73. See U.S. CONST. amend. XVII.

74. See Sturm, *supra* note 67, at 88-89.

75. For instance, thirteen states completely revised their constitutions between 1963 and 1976, an average of one per year, in large part spurred on by the reapportionment ushered in by *Baker v. Carr*, 369 U.S. 186 (1962). See Henretta, *supra* note 69, at 839.

76. Williams, *Legislative Compliance*, *supra* note 70, at 92.

77. See *supra* note 16 and accompanying text. Unfortunately, beyond these historical inferences, not much direct evidence seems to exist concerning the specific reach that the framers of state constitutions intended their legislative privilege to have. Although a comprehensive analysis of the constitutional history and framers' intentions regarding each of the forty-three state Speech or Debate clauses is beyond the scope of this Article, anecdotal reports suggest that constitutional history materials concerning the legislative privilege are relatively sparse at the state level, just as they are at the federal level. See *supra* note 28 and accompanying text. In Oregon, for instance, the Attorney General recently wrote that the framers of the state constitution gave their Debate Clause "no extensive discussion ... disclosing only that [it] was based on ... the 1851 Indiana Constitution.... Since no reported discussion exists regarding the Debate Clause, we presume that the original understanding of [the Clause] reflects the understanding of similar provisions in the United States

C. "Open Government" and Other Pressures on State Legislatures and Legislators

Despite the states' long-term commitment to the importance of the legislative privilege, some countervailing pressures are at work today in state legislatures as well. In particular, a sense that the processes of representative democracy should be more open to public scrutiny animates several recent state legislative privilege decisions. Sometimes these public access concerns may influence a court's resolution of a legislative privilege dispute simply as a matter of policy,⁷⁸ while in other cases a specific statutory open government provision may directly affect the interpretation of the legislative privilege.⁷⁹ Several other factors, including the

Constitution and in other state constitutions." 49 Op. Att'y Gen. Or. 167 (1999), available at 1999 Or. AG LEXIS 3.

Perhaps as a result, state courts that have considered these provisions have rarely found any specific basis for distinguishing among them, and instead state courts typically have said that they will look to the federal provision for guidance. *See infra* note 202. Much less frequently, state courts have espoused an independent interpretation of their provisions, but then usually have had to construct their interpretation without meaningful records of debate or discussion among their framers. For instance, the Wisconsin Supreme Court described its task as interpreting the legislative privilege independently in light of "the experiences, the tradition, and the values of the people of the territory of Wisconsin," *State v. Beno*, 341 N.W.2d 668, 674 (Wis. 1984), but had little concrete evidence about the intent of the framers to aid in this task. The scant historical record reflected only that draft alterations in the language of the clause were made "by selecting such words as conveyed the meaning most fully," and "in no case changed the meaning or sense." *Id.* at 677 (internal quotation marks omitted). The Wisconsin Supreme Court settled for interpreting the provision "to ensure the independence of the legislature and the integrity of the legislative process," which it asserted to be the objective of the framers. *Id.* In this light, we can presume that absent a historical basis to conclude otherwise, the framers designed each version of the legislative privilege to serve the same general function.

Hawaii provides a notable exception, significant in part because it is one of the most recent states to consider explicitly the desired scope of its legislative privilege. During Hawaii's constitutional convention, the delegate responsible for the Speech or Debate Clause, in answer to an inquiry, responded that the clause conferred "broader" immunity than the federal counterpart. After a relatively more extended discussion, the delegate explained that the language "in each house" was deleted to broaden the circumstances in which legislative activities would receive immunity. *See Abercrombie v. McClung*, 525 P.2d 594, 595-97 (Haw. 1974) (discussing Hawaii's constitutional convention).

78. *See infra* notes 187-92 and accompanying text (discussing *City of Dublin v. State*, 742 N.E.2d 232 (Ohio Ct. App. 2000)).

79. *See infra* notes 174-76 and accompanying text (discussing *Mich. Mut. Ins. Co. v. Dep't of Treasury*, Nos. 178228, 178330, 1996 Mich. App. LEXIS 2245 (Ct. App. Dec. 10, 1996)).

increasing range of complex matters facing state legislatures, popular disillusionment with or anger at government institutions and employees, and general litigiousness, also are adding pressure on the legislative privilege.

All fifty states have some textual commitment to open government.⁸⁰ The bulk of these provisions are freedom of information (FOI) statutes passed by the state legislatures, although a smaller number of open government provisions are included in state constitutions.⁸¹ A typical provision creates a presumption favoring public disclosure of or access to government processes, subject to certain exceptions.⁸²

Although adopted primarily to enhance access to the executive branch and administrative agencies, these presumptions in many states would seem by the terms of the particular FOI provision to apply to legislative branch activities as well.⁸³ According to an analysis by The Reporters' Committee for Freedom of the Press, at least twenty-eight state FOI statutes appear to provide for the disclosure of at least some aspects of legislative records and materials.⁸⁴ Where such provisions do not explicitly exclude from

80. See Davis et al., *supra* note 15, at 42.

81. See, e.g., *Mayhew v. Wilder*, 46 S.W.3d 760, 771 (Tenn. Ct. App. 2001) (interpreting the scope of constitutional guarantee of press freedom "to examine the proceedings of the Legislature").

82. See *infra* notes 89-91 and accompanying text (describing a Connecticut FOI statute that lists more than twenty exceptions to public disclosure).

83. At the federal level, Congress excluded itself from the coverage of the Freedom of Information Act (FOIA), thereby precluding questions about whether FOIA operated to waive privileges that would otherwise exist under the Speech or Debate Clause. See Freedom of Information Act, 5 U.S.C. § 552(f)(1) (1994).

84. See The Reporters' Committee, *supra* note 14 (analyzing applicability of each state's FOI provisions to state legislature, and identifying legislatures of Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming as not exempt from the pertinent FOI statute). Although another commentator has asserted that state FOI laws "generally ... do not subject the legislative branch to their provisions," Laura Schenck, Note, *Freedom of Information Statutes: The Unfulfilled Legacy*, 48 FED. COMM. L.J. 371, 372 (1996), her conclusion appears to be based on an analysis of the number of FOI provisions that expressly include the legislative branch within their scope. Schenck identifies only Maine and Montana in this category. See *id.* at n.7. The Reporters' Committee for Freedom of the Press, however, describes Hawaii, Illinois, Maine, and Michigan as having FOI provisions that appear to include at least some of the legislative branch's formal institutional records within their scope. The Reporters'

their scope the integral aspects of the legislative process, they may give rise to interpretive issues concerning the Speech or Debate privilege. For example, a court might be asked to construe the FOI law as the legislature's waiver of the protections of the legislative privilege.⁸⁵ Alternatively, the open government provision could influence a court's analysis of whether, in the first instance, it should even interpret the constitutional legislative privilege as shielding legislative documents or proceedings from compelled public access.⁸⁶

A recent Connecticut experience exemplifies the potential impact of FOI provisions on the legislative process, as well as the still sometimes unrecognized protection of the legislative privilege in this context.⁸⁷ The Connecticut Legislative Commissioners' Office (the nonpartisan bill drafting and legal office of the Connecticut General Assembly) received an FOI request for copies of all documents in its possession describing the creation, purpose, meaning, or explanation of a particular statutory amendment that the office had drafted.⁸⁸ By its terms, Connecticut's FOI law applies to any "public agency," with no exclusion for the legislature.⁸⁹ Understandably concerned with the implications of being required to turn over internal memoranda and other material related to the drafting of a piece of legislation, the Legislative Commissioner's Office worked with the state Attorney General's office to determine if it had reasons to deny the FOI request.⁹⁰ In the end, the Office denied the request entirely on the basis of explicit exceptions in the state FOI law,⁹¹ rather than on the basis of the legislative privilege.

Committee apparently bases its conclusion on the theory that the explicit exclusion of certain draft materials or individual legislator files in these FOI provisions suggests that other records are within the scope of the provision. See The Reporters' Committee, *supra* note 14.

85. See, e.g., *Wilkins v. Gagliardi*, 556 N.W.2d 171, 175, 177-79 (Mich. Ct. App. 1996).

86. See, e.g., *Mich. Mut. Ins. Co. v. Dep't of Treasury*, Nos. 178228, 178330, 1996 Mich. App. LEXIS 2245, at *10-12 (Ct. App. Dec. 10, 1996).

87. The experience was described at the 2002 Fall Conference of the Legal Services Staff Section of the National Conference of State Legislatures, Oct. 9-12, 2002, Madison, Wisconsin. See Larry Shapiro, A Speech or Debate Clause, Address at Fall Conference and Senior Bill Drafting Seminar of the Legal Services Staff Section of the National Conference of State Legislatures (Oct. 10, 2002) (notes on file with author).

88. See *id.*

89. CONN. GEN. STAT. ANN. § 1-210(a) (West 2000).

90. See *supra* note 87.

91. See CONN. GEN. STAT. ANN. § 1-210(b) (West 2000) (providing twenty specific

As the Chief Legislative Attorney for the Legislative Commissioner's office explained, the Speech or Debate Clause was at first entirely overlooked as the basis for protecting legislative materials, because it was misunderstood to be an "ancient narrow doctrine with limited applicability today."⁹² Only in preparing to defend the denial before the state FOI commission did the legislature recognize the potential impact of the legislative privilege.⁹³

Recent events in Ohio further exemplify the tensions being felt throughout the country today between the legislative privilege and open government principles. In 1985, the Ohio General Assembly enacted an open records law, applicable by its terms to records of any "public office," including "the general assembly, or any legislative agency."⁹⁴ In 1999, worried about protecting its ability to receive confidential advice and assistance from the state's professional legislative staff office, the legislature exempted from this law most "[l]egislative document[s]," which the statute narrowly defined as internal documents of the Legislative Service Commission.⁹⁵ The legislature's concern that the legislative process was not adequately protected from judicial intrusion persisted, however. Two years later, prompted in part by several court refusals to apply the legislative privilege to protect legislators and their staff from depositions, interrogatories, or document requests concerning their legislative work,⁹⁶ the legislature passed a statutory provision explicitly recognizing legislative immunity in such circumstances.

exceptions to statute's disclosure obligations for all agencies, including an exception for "[p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure").

92. Shapiro, *supra* note 87. Of course, if a court construed a state FOI law to waive the protections of the legislative privilege, then the FOI exceptions would be the only basis for the legislature to resist the FOI request. As argued below, however, construing a FOI law as a general waiver of the legislative privilege may be problematic. See *infra* notes 250-56 and accompanying text.

93. See Shapiro, *supra* note 87. The FOI request was withdrawn before the issue reached the commission.

94. See OHIO REV. CODE ANN. § 149.011(A), (B) (West 2002).

95. See OHIO REV. CODE ANN. § 101.30(A)(1) (West 2002); *Consultants Defend Confidentiality for Legislative Work Papers*, HANNAH REPORT (Hannah News Service), July 8, 1999, at 2; Lee Leonard, *If Legislators Have Nothing to Hide, Why Confidentiality Issue?*, COLUMBUS DISPATCH, June 28, 1999, at 7A.

96. See *infra* notes 177-83, 187-92 and accompanying text; see also GONGWER OHIO REPORT, May 18, 2001, at 1-2 (reporting Ohio Senate President Richard Finan's discussion of legislators' concern over recent court decisions).

The statutory provision also provided that this statutory immunity was “cumulative” (or duplicative) of the state constitution’s legislative immunity.⁹⁷ The Governor then vetoed this provision,⁹⁸ describing it as “a substantial change in the relationship between the legislative and judicial branches of government,” and explaining that in his view the provision went too far in “exempting legislators, their staffs, and documents entirely from the judicial process.”⁹⁹

Of course, to the extent that the statutory measure in fact would have been “cumulative” of the state’s constitutional legislative privilege, the Governor’s veto did not deprive the legislature of any protection. On the other hand, the Governor apparently interpreted the provision as expanding upon the existing constitutional privilege. Similarly, the General Assembly obviously was concerned that, absent the statute, state courts might continue to interpret the less specific language of the constitutional privilege overly narrowly, so as not to encompass the particular protections explicitly included in the vetoed provision. The question thus remains whether, in the future, Ohio state courts will interpret their state constitutional

97. The provision provided:

A member of the general assembly, a member of the general assembly staff, and a member of the legislative staff, in their respective capacities as such, are not liable in a civil action for any legislative act or duty. In relation to any legislative act or duty, a member of the general assembly, a member of the general assembly staff, or a member of the legislative staff is not subject to subpoena or subpoena duces tecum in a civil action, may not be made party to a civil action, and may not be compelled to testify or to produce tangible evidence in a civil action.

This section is cumulative to [the state constitution’s Speech or Debate Clause].

Am. Sub. H.B. 94, 124th Gen. Assem., § 1, at ll. 1142-53 (2001) (enacting O.R.C. § 101.302), available at http://www.legislature.state.oh.us/BillText124/124_HB_94_CR_Y.pdf. The provision defined “general assembly staff” as any officer or employee of the general assembly acting “on behalf of a member of the general assembly or on behalf of a committee or either house of the general assembly,” OHIO REV. CODE ANN. § 101.30(A)(3), and defined “legislative staff” as “staff of the legislative service commission,” or the professional legislative staff organization, OHIO REV. CODE ANN. § 101.30(A)(2).

98. More specifically, he exercised his line-item veto authority to delete this provision from the budget bill of which it was a part.

99. Statement of the Reasons for the Veto of Items in Amended Substitute House Bill 94, Item No. 7, June 6, 2001, available at <http://Ohio.gov/gov/fullvetomsg.pdf>; see also Gov. Bob Taft, Letter to Sen. Pres. Richard Finan, June 6, 2001, available at <http://www.ohiocitizen.org/moneypolitics/explaining.htm> [hereinafter Taft Letter] (stating that vetoed provision “goes too far” in protecting legislators).

provision as narrower than, or already inclusive of, the protections included in the vetoed provision. Public and media opinion on the issue clearly runs counter to a broad construction of the constitutional privilege, a factor that seems to have played some role in the governor's veto.¹⁰⁰ Public opinion might influence subsequent judicial consideration as well, given that in Ohio, as in many states, judges must stand for reelection.

In addition to open government pressures, several other factors are compounding the number and type of issues confronting the legislative privilege today. These factors include: federal devolution; increasingly complex social problems; the expansion in recent decades in the substantive rights that citizens have against their government; an increase in the amount of constituent service that state legislators perform; society's general level of litigiousness; and popular disillusionment with, or anger at, government institutions and employees. In combination, these factors have resulted in a significant increase in litigation against elected officials. Meanwhile, several of these factors also have contributed to an increase in the circumstances in which parties may seek to subpoena testimony or documentary evidence from government sources, including legislators, who are not themselves a party to a particular legal dispute.¹⁰¹

Furthermore, the professionalization of state legislatures and the proliferation of legislative documents provide more opportunities for litigants and courts to implicate the legislative privilege. Legislative professionalization has resulted in sizeable increases in legislative staff levels and support agencies,¹⁰² increased sophistication among

100. See Taft Letter, *supra* note 99 (referencing press criticism Governor Taft would have received had he not vetoed the provision). Ohio newspapers were filled with scathing opinions about the provision in the weeks before and immediately after its passage, before the Governor's veto. See, e.g., Aaron Marshall, *A Rough Week for Bruce*, THE OTHER PAPER, May 24-30, 2001, at 4; Darrel Rowland, Editorial, *There's No Place for Secrecy in Doing the Public's Business*, COLUMBUS DISPATCH, May 27, 2001, at 3B. The newspapers then followed the veto with high praise. See, e.g., Joe Hallett, Editorial, *Finan Risks Tarnishing Fine Legacy with Brazen Stand for Secrecy*, COLUMBUS DISPATCH, June 10, 2001, at D3.

101. For example, individuals alleging a grievance against the government may attempt to subpoena legislators concerning the purpose of an enactment; documentary evidence relied upon by legislators in passing particular legislation may end up the subject of a subpoena; or prosecutors may seek access to investigate files of legislative committees.

102. See, e.g., Joel A. Thompson & Gary F. Moncrief, *The Evolution of the State Legislature: Institutional Change and Legislative Careers*, in CHANGING PATTERNS IN STATE LEGISLATIVE

lobbyists,¹⁰³ additional forums to conduct work directly related to the legislative process,¹⁰⁴ and new ways of keeping records, managing documents, and communicating.¹⁰⁵ Each of these developments multiplies the ways in which issues of legislative privilege may come before the courts. Thus, we are now in an era of a growing number of contexts in which litigants may want to name a legislator as a defendant, or may seek access to legislative records, deliberations, motives, participants, and similar information for use in third-party litigation.

II. DIVERGENT FEDERAL AND STATE INTERPRETATIONS OF THE LEGISLATIVE PRIVILEGE

In dramatic contrast to the mere handful of cases during the country's first 175 years addressing either the federal Speech or Debate Clause or individual state constitutional equivalents, the federal courts since 1966 have adjudicated scores of cases involving the Clause.¹⁰⁶ This jurisprudence establishes that in fulfilling its purpose of protecting legislative independence and integrity, the legislative privilege applies broadly both to shield legislators from the burdens of litigation and other judicial intrusions concerning their legislative work, and to foster uninhibited legislative deliberations. Yet while the broad scope of the federal legislative privilege is now well defined, analogous provisions found in most state constitutions not only lack a comparable body of jurisprudence

CAREERS 195, 200-01 (Gary F. Moncrief & Joel A. Thompson eds., 1992) (describing contributions made by enlarged legislative staffs); Alan Rosenthal, *The Legislature: Unraveling of Institutional Fabric*, in *THE STATE OF THE STATES* 108, 111 (Carl E. Van Horn ed., 3d ed. 1996) (describing an increase in numbers of legislative staff).

103. See, e.g., Rosenthal, *supra* note 102, at 133-35, 137-38 (describing increasing importance of, and range of tools used by, interest groups in state legislatures).

104. See, e.g., Thompson & Moncrief, *supra* note 102, at 200-02 (describing such changes as lengthening of legislative sessions and increased conduct of legislative oversight).

105. See, e.g., Pam Greenberg, *Legislators: You've Got Mail*, *STATE LEGISLATURES*, Mar. 2001, at 25 (describing new issues posed by the Internet age concerning government record management).

106. The dramatic increase in litigation over the scope of the federal privilege beginning in the 1960s coincided, perhaps not surprisingly, with the decline in public trust in government and the concomitant tensions between branches of the federal government that accompanied the Vietnam War and Watergate. Others have chronicled the "explosion" of litigation against the government and government officials generally since about 1960. See, e.g., PETER SCHUCK, *SUING GOVERNMENT* xii, 199-202 (1983).

articulating their purpose and clarifying their scope, but also have produced some opinions surprisingly narrow in protection.

A. Federal Speech or Debate Clause Jurisprudence

Building upon the *Kilbourn* and *Tenney* decisions, ten more Supreme Court decisions between 1966 and 1979¹⁰⁷ dramatically increased the jurisprudence concerning the federal Speech or Debate Clause.¹⁰⁸ These cases reinforced the fundamental principles that the legislative privilege is an absolute¹⁰⁹ privilege that must be

107. Many commentators interpreted this period of Supreme Court activity as narrowing or "chipping away" at the scope of the Speech or Debate Clause. See *Miller v. Transamerican Press*, 709 F.2d 524, 528 (9th Cir. 1983); Cella, *supra* note 13, at 1038-40; Reinstein & Silvergate, *supra* note 13, at 1118-20; Richard D. Batchelder, Jr., Note, *Chastain v. Sundquist: A Narrow Reading of the Doctrine of Legislative Immunity*, 75 CORNELL L. REV. 384, 389 (1990). Similarly, many members of Congress responded to some of these cases with serious concern about what they saw as the Court's unduly restrictive definition of protected legislative activities. See, e.g., *Constitutional Immunity of Members of Congress*, *supra* note 21, at 3 (statement of Sen. Metcalf); *id.* at 5 (statement of Rep. Cleveland); *id.* at 75 (statement of Sen. Fulbright); Hon. Sam J. Ervin, Jr., *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175, 184-88 (1973). An alternative interpretation, suggested here, is that as a body these decisions served to refine a Clause that until 1966 lacked much interpretation at all, in some respects circumscribing its coverage, while in other respects expanding it in light of the changed realities of the legislative process. See also Comment, *The Constitutional Limits of the Speech or Debate Clause*, 25 UCLA. L. REV. 796, 803 (1978).

108. An eleventh case, *Davis v. Passman*, 442 U.S. 228 (1979), raised a Speech or Debate issue about the applicability of the Clause to congressional personnel actions, but the Court disposed of the case without reaching this issue. See *id.* at 235 n.11. At the end of this period, the Court considered also whether to extend to federal criminal proceedings the common-law privilege it recognized in *Tenney* in 1951 for state legislators in federal court. In *United States v. Gillock*, 445 U.S. 360, 372-73 (1980), the Court concluded that a Tennessee state senator had no privilege barring the introduction of evidence of his legislative acts in a prosecution alleging a violation of federal bribery laws. The Court explained that "important federal interests are at stake ... in the enforcement of federal criminal statutes," to which principles of comity for state legislators must yield. See *infra* notes 319-23 and accompanying text.

109. In contrast to the category of qualified privileges, the much rarer category of absolute privileges cannot be defeated by establishing the official's wrongful motive or knowledge of the illegality of challenged conduct. Absolute privileges, therefore, generally will permit disposition of a claim by summary judgment, and thereby offer covered officials much greater protection. This additional protection spares them from most of the burdens involved in defending lawsuits arising out of their official duties. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949); RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1167 (4th ed. 1996) (stating that "unlike qualified immunity, absolute immunity eliminates nearly all of the possible burden, expense, and anxiety of litigation").

interpreted "broadly to effectuate its purposes,"¹¹⁰ but should "not extend beyond what is necessary to preserve the integrity of the legislative process."¹¹¹ To these ends, the Clause provides members of Congress and their staff both a testimonial privilege and liability immunity with respect to activities that are "an integral part" of the legislative process.¹¹²

The Supreme Court's opinion in *Gravel v. United States*¹¹³ is perhaps the Court's most important legislative privilege decision. The decision extended the protections of the Speech or Debate Clause to the legislative activities of congressional staff,¹¹⁴ but denied protection to the republication of legislative proceedings outside the legislative forum.¹¹⁵ The Court's opinion reiterated that not all official acts undertaken by legislators are privileged, explaining that the Speech or Debate Clause applies only to matters that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House

110. *E.g.*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975); *United States v. Johnson*, 383 U.S. 169, 180 (1966).

111. *E.g.*, *United States v. Brewster*, 408 U.S. 501, 517 (1972).

112. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

113. *Id.*

114. In the earlier case of *Dombrowski v. Eastland*, 387 U.S. 82 (1967), the Court considered whether the privilege protected a committee employee alleged to have conspired with state officials to seize the plaintiffs' records. Relying on *Kilbourn* and *Tenney*, the Court permitted the suit to continue after remarking that the privilege "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." *Id.* at 85. In *Powell v. McCormack*, 395 U.S. 486, 503-06 (1969), the Court found unprotected actions of officers of the House of Representatives in denying Congressman Adam Clayton Powell his congressional pay. The Court reached this decision though these officers were acting pursuant to a House resolution depriving Powell of his seat in the House. *Gravel*, however, seriously called into question these decisions' seemingly more limited range of staff protection.

115. In June of 1971, Senator Mike Gravel convened a hearing of the Subcommittee on Public Buildings and Grounds, during which he read and placed into the public record for the first time large portions of the classified "Pentagon Papers," a classified Department of Defense study of decisionmaking in the Vietnam War. At the time of Senator Gravel's hearing, the study remained unpublished, and the Supreme Court was examining the question of whether the government could enjoin the *New York Times* and the *Washington Post* from publishing it. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); Reinstein & Silverglate, *supra* note 13, at 1115 & nn.9-10. Thereafter, Senator Gravel arranged for private publication of the papers. When the Justice Department subpoenaed Senator Gravel's aide concerning the Senator's preparation for, conduct at, and subsequent publication of material from the hearing, Senator Gravel intervened and moved to quash the subpoena. See Reinstein & Silverglate, *supra* note 13, at 1115.

proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."¹¹⁶ Applying this standard, the Court concluded that Senator Gravel's effort to arrange for private publication of material he had included in the record of a subcommittee hearing was not an "integral part" of the legislative process.¹¹⁷

The Court also concluded, however, that the preparation for and conduct of the hearing itself were integral parts of the legislative process. More importantly, with respect to these privileged activities, the Court held that the privilege applies just as fully to an aide's involvement as to a member's.¹¹⁸ The decision recognized that elected representatives today depend on staff to perform key aspects of their work,¹¹⁹ and therefore that to protect the integrity of the

116. *Gravel*, 408 U.S. at 625. In *Doe v. McMillan*, 412 U.S. 306, 315 (1973), the Court similarly concluded that official actions of the Public Printer and the Superintendent of Documents in distributing a subcommittee report "beyond the reasonable bounds of the legislative task [i.e., to the public at large], enjoy no Speech or Debate Clause immunity." In a notable decision that ended this period of Supreme Court interpretation of the Clause, the Court in *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979), held that Senator Proxmire's issuance of a press release describing a floor speech was unprivileged because it was not an integral part of the legislative process. The release identified the recipient of Senator Proxmire's "Golden Fleece" award, an award he took pride in giving to beneficiaries of government grants whose projects Senator Proxmire deemed of dubious value. *See id.* at 114-17. At the same time, the Court made clear that the identical content as that published in the press release was absolutely privileged when spoken on the Senate floor. *See id.* at 128-30.

117. *See Gravel*, 408 U.S. at 625. This aspect of the decision provoked much of the criticism that the Court had unduly narrowed the privilege. *See supra* note 107. The decision also has been criticized because it left open the possibility that Members and their aides could be subject to questioning concerning their sources of information, at least "at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act." *Gravel*, 408 U.S. at 622. Four members of the Court dissented from this aspect of the decision, which they felt summarily and incorrectly addressed an issue not anticipated in the petitions for certiorari. *See id.* at 629-33 (Stewart, J., dissenting in part), 662-64 (Brennan, Douglas, Marshall, JJ., dissenting). In subsequent lower court decisions, this aspect of the decision has been construed very narrowly, almost confined to its particular facts. *See infra* notes 285-87 and accompanying text.

118. *See Gravel*, 408 U.S. at 616-22. Following *Gravel*, the Court in *McMillan* had no difficulty concluding that the Speech or Debate Clause protected both Representatives and their staff members for the preparation and distribution within Congress of a subcommittee report that included allegedly defamatory material concerning public school students in the District of Columbia. *See McMillan*, 412 U.S. at 312. The category of protected staff included not only regular employees of the subcommittee that prepared the report, but also the subcommittee's consultant and an investigator. *See id.*

119. The Court wrote:

modern legislative process, the member and the aide should be "treated as one" under the legislative privilege.¹²⁰ Otherwise, the Court concluded that "the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated."¹²¹

In several criminal prosecutions as well, the Supreme Court concluded that the Speech or Debate Clause should be "read broadly to effectuate its purposes," even at the cost of frustrating the government's legitimate interest in enforcing criminal laws.¹²² For instance, in *United States v. Johnson*,¹²³ the Court concluded that the Clause prohibited basing a criminal bribery charge on a legislator's motive for making a legislative speech.¹²⁴ In two subsequent cases, the Court refined its *Johnson* holding by explaining that while privileged legislative acts cannot themselves serve as a predicate for criminal prosecution, a member's illicit *promise* to perform a particular legislative act is not itself an integral part of the legislative process. Thus, a promise to perform a particular

[I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos

Gravel, 408 U.S. at 616-17. Although in subsequent decisions the Court occasionally continued to describe the distinction between members and functionaries as significant, see *McMillan*, 412 U.S. at 315-26, nn.9-10, *Gravel* unmistakably establishes that functionaries are entitled to exactly the same protection as members when performing protected conduct. See *Gravel*, 408 U.S. at 616-17; see also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 507-08 (explaining language in *Gravel* as distinguishing between protected and unprotected acts, not actors).

120. *Gravel*, 408 U.S. at 616 (quoting *United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972)). The privilege always remains the member's, however, and cannot be independently asserted by the aide. Rather, it must be asserted by the member or at the member's direction. See *id.* at 621-22.

121. *Id.* at 617 (internal citation omitted).

122. *United States v. Johnson*, 383 U.S. 169, 180-81 (1966).

123. *Id.*

124. See *id.* at 180. The defendant Congressman was charged with delivering remarks supportive of beleaguered savings and loan associations, in exchange for campaign and other contributions. The government argued unsuccessfully that the legislative privilege was intended to preclude only actions, such as libel counts, based upon the *content* of legislative speeches, but not charges "founded on 'the antecedent unlawful conduct of accepting or agreeing to accept a bribe.'" *Id.* at 182 (quoting Brief of the United States).

legislative act could form the basis for such a prosecution.¹²⁵ These decisions understood that immunity from prosecution might be the price necessary to protect legislative independence and avoid the distorting effects that would otherwise result.¹²⁶

In *Eastland v. United States Servicemen's Fund*,¹²⁷ the Supreme Court expounded on the privilege's role of protecting legislators from the burdens and disruptions of judicial intrusions upon the legislative process.¹²⁸ The Court rejected the suggestion that the interests protected by the privilege should be balanced against rights asserted by the petitioners, reiterating that where the privilege applies it is absolute.¹²⁹ In the following passage summarizing many of the essential aspects of the Court's expanding Speech or Debate jurisprudence, the Court refused to find any difference in the applicability of the Clause between private civil actions and government prosecutions, or between damage actions and requests for injunctive relief:

In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity "should be protected not only from the consequences of litigation's results but also from the burdens of defending themselves." Just

125. In *United States v. Brewster*, 408 U.S. 501, 526 (1972), the Court reasoned that accepting a bribe is not "part of the legislative process or function," and therefore it falls outside the scope of the Speech or Debate Clause. The Court limited the protection of the Clause to "what is necessary to preserve the integrity of the legislative process," namely "those things generally said or done in the House or the Senate in the performance of official duties." *Id.* at 512, 517. Several years later, in *United States v. Helstoski*, 442 U.S. 477 (1979), the Court reiterated that while the Speech or Debate Clause prohibits using legislative acts to form part of a criminal prosecution or other judicial inquiry, "[p]romises by a Member to perform an act in the future are not legislative acts." *Id.* at 489. In a companion case, also one of the Court's ten legislative privilege cases during this era, the Court rejected Congressman Helstoski's effort to use the Speech or Debate Clause to bring a mandamus action against the district court adjudicating his criminal case, on the basis that other avenues of relief remained available. See *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979).

126. See *Johnson*, 383 U.S. at 184-85.

127. 421 U.S. 491 (1975).

128. At issue was whether private parties could obtain an injunction barring the enforcement of a congressional subpoena seeking their bank records on the basis of the parties' First Amendment interests in protecting the information. Finding that Congress' "power to investigate and to do so through compulsory process plainly falls within th[e] definition [of activities within the legitimate legislative sphere]," the Court easily concluded that the Speech or Debate Clause prohibited such an injunction. *Id.* at 504.

129. See *id.* at 501, 509 n.16.

as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, 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. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. 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.¹³⁰

Since 1980, lower federal courts have continued to confront a variety of additional questions concerning the scope of the Clause, extending its protections to a wide range of legislative information gathering and other staff work. The courts have clarified that its protections apply just as fully to judicial efforts to obtain testimony or documentary evidence about protected activities as to efforts to predicate liability upon these activities.¹³¹ For instance, a series of decisions have shown great solicitude for Congress' right to gather and process information about legislative matters as it sees fit, making clear that the federal provision protects against efforts to compel testimony from legislators or their staff about the sources of legislative information, legislative branch analyses of legislative issues, or other aspects of the process by which legislators evaluate potential legislation.¹³² At the same time, federal courts have

130. *Id.* at 503 (internal citations omitted). Interestingly, Senator Gravel apparently believed that the Speech or Debate Clause should not protect members of Congress from civil suits, telling his colleagues, "[i]f the Congress is the people's advocate, it does not need protection from the citizens themselves." *Constitutional Immunity of Members of Congress*, *supra* note 21, at 144 (statement of Sen. Gravel).

131. It bears noting, however, that the privilege does not necessarily protect the evidentiary discovery or use of these underlying facts if they can be obtained from parties outside the legislative branch to whom the Speech or Debate privilege does not apply.

132. See, e.g., *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416, 419-20 (D.C. Cir. 1995) (stating that legislative privilege "permits Congress to conduct investigations and obtain information without interference from the courts," and describing as a "vast overreading of *Gravel*" the argument that sources of information are unprotected); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988) (protecting "the process by which a committee takes statements and prepares them for publication"); *Miller v.*

continued to treat Congress' transmission of information beyond the legislative branch as generally unprivileged.¹³³

Other decisions have considered how widely to extend the *Gravel* decision's coverage of legislative staff. Generally, lower federal courts have not hesitated to include a wide variety of staff within the scope of the Speech or Debate Clause, including employees of the legislative branch's professional staff entities outside the House and Senate, such as the General Accounting Office or the Congressional Research Service, to the extent that they are performing legislative functions protected by the Clause.¹³⁴ Meanwhile, the related issue of the extent to which personnel decisions concerning congressional staff are insulated by the privilege also has arisen repeatedly.¹³⁵ Here, courts have sought to

Transamerican Press, Inc., 709 F.2d 524, 530-31 (9th Cir. 1983) (holding that the legislator's receipt of "information pertinent to potential legislation or investigation" is part of privileged legislative process); cf. *Hutchinson v. Proxmire*, 443 U.S. 111, 121 n.10 (1979) ("Regardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies or libelous comments made during the conversations."). Several courts have held that the privilege also applies to internal congressional communications, and internal drafts of unprivileged communications, on the basis that such internal communications are "an integral part" of the legislative process and that permitting discovery of such internal matters would cause a "significant entrenchment on legislative independence." *United Transp. Union v. Springfield Terminal Ry.*, 132 F.R.D. 4, 6-7 (D. Me. 1990); see also *Miller*, 709 F.2d at 530; *Tavoulareas v. Piro*, 527 F. Supp. 676, 682 (D.D.C. 1981).

133. See, e.g., *Chastain v. Sundquist*, 833 F.2d 311, 314-15 (D.C. Cir. 1987) (holding congressional communications to executive agencies unprotected by legislative privilege when they seek not to obtain legislative information, but to influence agency action). On the other hand, communications with an executive agency may well be privileged under the Clause when their purpose is the gathering of information about the agency's performance of its statutory responsibilities, the adequacy of existing law affecting the agency, or other legitimate oversight concerns. See *Kimberlin v. Hatch*, No. 99-1590 (D.D.C. filed Mar. 30, 2001) (mem.). Truly nonlegislative activities unprotected by the Speech or Debate Clause nonetheless may be protected in some cases by principles of qualified official immunity. See *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56 (2d Cir. 1999); *Chastain*, 833 F.2d at 316; *McSurely v. McClellan*, 753 F.2d 88, 99-102 (D.C. Cir. 1985).

134. See, e.g., *Chapman v. Space Qualified Sys. Corp.*, 647 F. Supp. 551, 553-54 (N.D. Fla. 1986) (reasoning that if GAO staffer performs work at direction of member of Congress and that work would be protected had member performed it personally, then staffer's work on behalf of member also is privileged); *Webster v. Sun Co.*, 731 F.2d 1, 5 (D.C. Cir. 1984) (addressing different but related issue of whether common-law privilege to supply information to legislative body applied to communication of information to Congressional Research Service).

135. For a cogent argument that the Speech or Debate Clause should not protect any

apply the legislative privilege only to those personnel actions directly implicating essential legislative activities. The courts typically accomplish this by limiting the protections of the Clause to decisions involving key legislative staff,¹³⁶ and treating as unprivileged decisions involving constituent service staff, congressional maintenance workers, restaurant employees, and the like.¹³⁷

Still other decisions have made clear that the protections of the Speech or Debate Clause apply absolutely to all forms of legal action against legislators and staff, including those seeking only declaratory relief or not otherwise subjecting legislators to liability. For instance, in *Brown & Williamson Tobacco Corp. v. Williams*,¹³⁸ the D.C. Circuit rejected an argument that the primary purpose of the Speech or Debate Clause was to protect members of Congress against liability, and that any secondary application of the Clause in the context of third-party litigation to protect the "integrity" of the legislative process should not be absolute, but subject to a balancing of competing interests.¹³⁹ The court instead concluded

congressional personnel decisions, see Brudney, *supra* note 13.

136. See, e.g., *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23 (D.D.C. 2001) (covering dismissal of Chief of Staff).

137. See, e.g., *Browning v. Clerk, United States House of Representatives*, 789 F.2d 923, 931 (D.C. Cir. 1986). In an expansive ruling last year, however, a federal district court applied the Clause to cover a Senator's dismissal of a state district office aide whose primary duties involved meeting with and responding to constituents. The court applied the Clause on the basis that the aide's work included relaying to the Senator information of potential legislative significance obtained from the constituents. See *Bastien v. Office of Campbell*, 209 F. Supp. 2d 1095, 1104 (D. Colo. 2002). The decision has met with some alarm and a sense that the court dramatically expanded the scope of the privilege. See, e.g., *Defend the Law*, ROLL CALL, Sept. 26, 2002, at 4 (describing the decision as an "outrageous piece of judicial activism"); Suzanne Nelson & Damon Chappie, *Decision May Hurt Hill Aides*, ROLL CALL, Sept. 23, 2002, at 1, 34 (describing Professor Charles Tiefer, former House Deputy General Counsel, and others as seeing decision as extending the Clause "far beyond any previous legal holdings").

138. 62 F.3d 408 (D.C. Cir. 1995). At issue was whether the Speech or Debate Clause privileged members of Congress from responding to a subpoena requiring the production of stolen documents that they had received. Although the court noted that "congressional complicity in a scheme to seize property illegally will undo any claim of immunity," the members of Congress were not themselves implicated in the theft of *Brown & Williamson's* documents. See *id.* at 415. The issue instead arose in the course of a civil suit among third parties. See *id.*

139. *Id.* at 417. In particular, *Brown & Williamson* argued that the privilege should be limited to "protect[ing] a congressman against a hostile confrontation which seeks to impugn his or her reputation, not just a situation where a congressman is inconvenienced by a court's request for the production of documents that had been given to the congressman ... by a third

that the Clause precluded compelled testimony or document production with the same vigor that it precluded liability—indeed, the court noted that the Clause's literal terms would protect compelled questioning even more forcefully than they would provide liability immunity.¹⁴⁰

Finally, a variety of lower federal court decisions also have wrestled with how properly to hold legislators accountable for violations of criminal or other laws without chilling the legislative privilege. For instance, in *United States v. Rose*,¹⁴¹ the D.C. Circuit rejected the claim that the Speech or Debate Clause prevented using testimony given by a member of Congress before the House Committee on Standards of Official Conduct in a civil action to enforce provisions of the Ethics in Government Act. The court explained that in appearing before the Committee, the congressman "was acting as a witness to facts relevant to a congressional investigation of his private conduct; he was not acting in a legislative capacity."¹⁴²

party." *Id.* In rejecting this interpretation, the court concluded that the Clause protected the legislative process not from threats to its "reputation for rectitude," but from impairment, or any intrusion upon the functioning of Congress. *Id.* at 418-19; *see also* MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856 (D.C. Cir. 1988).

140. *See Brown & Williamson Tobacco Corp.*, 62 F.3d at 418, 421. In reaching this result, the court criticized the Third Circuit for its assertion that:

"to the extent that the Speech or Debate Clause creates a *testimonial* privilege as well as a *use* immunity, it does so only for the purpose of protecting the legislator ... from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy."

Id. at 420 (quoting *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978)). The D.C. Circuit observed that "[n]one of the Supreme Court's opinions acknowledges such a distinction [between testimonial use of documents and oral questioning of Members or aides]." *Id.*

141. 28 F.3d 181 (D.C. Cir. 1994).

142. *Id.* at 188; *see also* *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982) (filing financial disclosure reports not privileged under federal clause); *United States v. Hansen*, 566 F. Supp. 162 (D.D.C. 1983) (same); *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994) (holding that members of Congress could be criminally prosecuted in circumstances requiring proof of their congressional status without violating Speech or Debate Clause).

B. Recent State Court Interpretations of Legislative Privilege Provisions

The story of state court jurisprudence regarding the Speech or Debate privilege stands in marked contrast to the broad and now well-established protections of the federal Speech or Debate Clause. Several states have cramped or contradictory interpretations of their analogous privilege. Many other states lack any jurisprudence at all concerning the privilege, despite the fact that they can trace the provision to their first constitution. To date, less than half of the states are consistently on record as applying the privilege to protect the range of actors and activities that federal courts have found protected under the United States Constitution.¹⁴³ More ominously, although many state courts that have analyzed their Speech or Debate clause purport to embrace a broad application following the federal model,¹⁴⁴ they have in a variety of circumstances instead applied the provisions in narrow ways. These confining applications affect both the types of privileges and immunities deemed conferred by the provisions, and the substantive range of legislative activities included within these protections. For instance, some state courts have found the privilege inapplicable to third-party suits in which legislators are not themselves parties, or to suits seeking only declaratory relief from legislative defendants. Other state courts have hesitated to extend the full scope of the protection to legislative staff, to legislative documents, to certain types of information gathered in pursuit of a legislative agenda, or to the legislature itself as an institution.

1. General Sparseness of State Court Interpretations

Of the forty-three states with a constitutional Speech or Debate privilege, some eighteen have no record of ever interpreting the applicability of their provision to activities of state legislators or

143. The remaining states either have reached contrary results or have not confronted the issues in any detail. For a detailed digest of state legislative privilege cases, analyzed by Minnesota's Senate Counsel, see Peter S. Wattson, *Legislative Immunity in Minnesota*, at <http://www.senate.leg.state.mn.us/departments/scr/treatise/immunity/legimm-02.htm>.

144. See *infra* note 202.

staff.¹⁴⁵ This subset is certain to shrink, and likely to shrink fairly quickly as state legislatures become increasingly involved in more complex legislative matters and disclosure suits become more common. At the same time, the number of states yet to address their provision serves to emphasize the moment of opportunity that now exists to shape the future development of legislative privilege law through a careful understanding of the privilege.

Meanwhile, another ten states have produced only one reported case applying their constitutional privilege to state legislators or legislatures, and no state has produced more than four reported cases, other than New York, with ten cases, and Pennsylvania, with eleven cases.¹⁴⁶ On average, each of the forty-three states with a constitutional Speech or Debate privilege has produced to date a little more than one and a half reported cases applying its clause to

145. These eighteen states include: Alabama, Arizona, Arkansas, Delaware, Illinois, Indiana, Maine, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. Some of these states have, however, addressed whether to recognize an analogous common-law immunity for local government legislators, or have indirectly raised issues concerning the constitutional immunity of state legislators. In Alabama, a jurist stated in a concurring opinion that the state's legislative immunity provision arguably could have applied to a state legislator had he asserted it in the trial court, *see* *Marion v. Hall*, 429 So. 2d 937, 943-45 (Ala. 1983) (Torbert, C.J., concurring), while a case involving attorney-client privilege between legislators and staff ignored an argument by analogy to legislative privilege, *see* *Bassett v. Newton*, 658 So. 2d 398, 401 (Ala. 1995). In Arizona, a case extended a common-law legislative privilege to city council members. *See* *Sanchez v. Coxon*, 854 P.2d 126 (Ariz. 1993). In Arkansas, a case discussed the applicability of a common-law legislative immunity to town council members. *See* *Russell v. Tate*, 13 S.W. 130 (Ark. 1890). In Delaware, a case expressly held that the constitutional provision did not apply to city council members. *See* *McClendon v. Coverdale*, 203 A.2d 815 (Del. Super. Ct. 1964). In Illinois, a case reviewing a constitutional challenge to a statute alluded to the impropriety of adjudicating allegations of legislator misrepresentations. *See* *Wenger v. Finley*, 541 N.E.2d 1220, 1228 (Ill. App. Ct. 1989). In Oregon, two cases discussed the common-law privilege for local legislators. *See* *Adamson v. Bonesteele*, 671 P.2d 693 (Or. 1983); *Noble v. Ternyik*, 539 P.2d 658 (Or. 1975). In addition, one federal district court, in rejecting an action under 42 U.S.C. § 1983 against state legislators and staff for their resolution of a contested election, purported to rely in part on the Indiana Constitution's Speech or Debate Clause, *see* *Porter v. Bainbridge*, 405 F. Supp. 83, 91-92 (S.D. Ind. 1975), while another federal district court adjudicating a declaratory judgment action under 28 U.S.C. § 2201 relied upon the Virginia Constitution's Speech or Debate Clause to resolve a motion to quash a subpoena to a state legislator, *see* *Greenburg v. Collier*, 482 F. Supp. 200, 201-02 (E.D. Va. 1979).

146. The higher numbers for New York and Pennsylvania may simply reflect their reporting of more trial and lower appellate court decisions than most jurisdictions, considering that eight of the New York cases and nine of the Pennsylvania cases are from trial or lower appellate courts.

activities of its state legislature.¹⁴⁷ After discounting the approximately one-third of these cases that involve fairly straightforward or unsurprising applications of the privilege to "core" areas of protected legislative conduct (or refusals to apply the privilege to nonlegislative conduct),¹⁴⁸ roughly one case per state (on average) remains that presents interesting, novel, or questionable interpretations of the privilege. Some of these interpretations concern the types of immunity or privilege that the protections of the Speech or Debate Clause provide, while others involve the scope of protected legislative activities. Although some state courts are resolving these more interesting issues with a full appreciation of the values of the legislative privilege, many others are not.

2. State Interpretations of the Kind of Privilege or Immunity Afforded

A number of state courts have unduly limited the kind of protection afforded by a state legislative privilege provision, refusing to apply it if legislators are not facing personal legal liability. For instance, a Maryland trial court found its state's constitutional legislative privilege provision not to protect state legislators from suits seeking only declaratory relief.¹⁴⁹ A newspaper had brought an

147. Of the approximately seventy total reported cases, the vast majority have occurred since 1972, and half have occurred since 1988. In addition, half of the reported cases terminated in lower state courts.

148. These more "obvious" interpretations include, for instance, cases applying the privilege in lawsuits against legislators for: making defamatory statements at a hearing (*Oates v. Marino*, 106 A.D.2d 289 (N.Y. App. Div. 1984)); failing to enact particular legislation or passing unconstitutional measures (*Marra v. O'Leary*, 652 A.2d 974 (R.I. 1995)); *Lucchesi v. State*, 807 P.2d 1185 (Colo. Ct. App. 1990); resolving disputes about the elections or qualifications of other members (*Jubelirer v. Singel*, 638 A.2d 353 (Pa. Commw. Ct. 1994)); finding the privilege inapplicable to administrative decisions about legislative personnel (*Irvin v. McGee*, No. 78866, 1993 Mass. Super. LEXIS 311 (Super. Ct. Sept. 27, 1993)), or finding the privilege inapplicable to a legislator's press releases or public statements (*Hahn v. City of Kenner*, 984 F. Supp. 436 (E.D. La. 1997); *Mehau v. Gannett Pac. Corp.*, 658 P.2d 312 (Haw. 1983)).

149. See *Avara v. Balt. News Am. Div.*, 440 A.2d 368 (Md. 1982) (describing trial court's unreported disposition of legislative privilege issue, which was not reached by the state supreme court because it concluded on statutory grounds that the trial court lacked jurisdiction to enter declaratory judgment). The Oklahoma Supreme Court also has held that the legislative privilege was inapplicable to a declaratory judgment action brought against the Speaker of the House and the Senate President in their official capacities, on the basis that they were only "nominal parties" and the suit was in effect one "*against the State itself*."

action against members of a legislative conference committee, seeking a declaratory judgment that the state's open meetings act required the conference committee to conduct its deliberations in public session. In the face of the act's provision that as a general rule a public body "exercising legislative, quasi-legislative or advisory functions" must conduct public business "in an open and public manner," the committee had unanimously voted to conduct privately several meetings in which the conference committee was developing recommendations for the annual budget bill.¹⁵⁰ On the basis of its conclusion that in bringing the suit the newspaper "in no way whatever seeks to impeach any proceedings, or impose liability on any Defendant, either civil or criminal," the trial court found that the legislative privilege was not implicated and proceeded to reach the merits of the lawsuit.¹⁵¹

Meanwhile, in two cases decided on the same day in 1991, the Colorado Supreme Court appears to have tried to split the difference. In one of the cases, the Governor named the General Assembly as a defendant in an action seeking a declaratory judgment concerning the constitutionality of statutory "headnotes" and "footnotes" included in the 1989-90 appropriations bill.¹⁵² The Governor purported to item veto these provisions because of his view of their unconstitutionality, and the General Assembly insisted that he lacked the authority to veto them because they were not distinct items in the bill. The Governor then sought judicial resolution of the status of these provisions. After noting that a challenge to the constitutionality of a legislative enactment "would normally be brought ... against the executive agency responsible for

Ethics Comm'n v. Cullison, 850 P.2d 1069, 1074 (Okla. 1993) (emphasis added). The court reasoned that the declaratory judgment did not amount to questioning of the individual defendant legislators about any of their legislative activities. *See id.*

150. *Avara*, 440 A.2d at 369 (quoting Md. CODE, art. 76A, §§ 7, 9 (1957)).

151. *See id.* at 371 (quoting Maryland trial court's unreported disposition of Speech or Debate claim). State courts in Georgia and Kentucky, however, have reached the opposite conclusion. *See Vill. of N. Atlanta v. Cook*, 133 S.E.2d 585 (Ga. 1963); *Wiggins v. Stuart*, 671 S.W.2d 262 (Ky. Ct. App. 1984). These state court holdings are consistent with interpretations of the federal privilege. *See, e.g., Stamler v. Willis*, 287 F. Supp. 734, 738 (D. Ill. 1968), *vacated*, 393 U.S. 407 (1969) ("The nature of the remedy sought by a litigant does not determine whether the legislator engaged in legitimate legislative activity shall be called to answer before the Judiciary.... [T]he kind of relief prayed against the legislator has no effect on the availability of the defense of immunity.").

152. *See Romer v. Colo. Gen. Assembly*, 810 P.2d 215 (Colo. 1991).

the statute's enforcement," the court dismissed the individual legislators and the Colorado General Assembly as defendants because the Speech or Debate Clause requires that they "cannot be questioned or held liable in the process [of reviewing the enactment's constitutionality]." ¹⁵³

In a companion case, Common Cause sought a declaratory judgment that in enacting the same 1989-90 appropriations bill, the members of the General Assembly had violated a constitutional amendment prohibiting legislators from committing themselves in caucus meetings to vote in any particular way on a measure pending before the General Assembly. ¹⁵⁴ Here, the court reached the opposite result. The court rejected the Speech or Debate defense without explaining why it was not following the same reasoning articulated in its other case decided that same day, and indeed without even acknowledging the conflict between the two cases. Rather, the court wrote:

[T]he speech-or-debate clause does not automatically require the dismissal of legislators from a lawsuit that does not impose upon the legislators the burden of defending themselves.... [D]eclaratory-judgment actions do not present the same kind or degree of affirmative interference with legislative activities [as injunctive actions], nor do such actions impose upon legislators the same burden to defend themselves.... [T]he legislators may choose not to defend, and permit the court to determine as a matter of law whether their conduct violated [the constitution]. ¹⁵⁵

Yet the court's articulated rationale in disposing of the Governor's declaratory judgment action—namely, that a challenge to the constitutionality of a legislative enactment "would normally be

153. *Id.* at 222, 223. In another portion of the opinion, the court did allow the Governor to obtain a declaratory judgment against these defendants concerning the impact of a letter the General Assembly wrote to the Governor, on the basis that the letter was not a type of protected legitimate legislative activity. In this letter, the Assembly claimed that the Governor's attempt to veto some of these headnotes and footnotes was invalid. *See id.* at 225-26.

154. *See Colo. Common Cause v. Bledsoe*, 810 P.2d 201 (Colo. 1991).

155. *Id.* at 211. In another portion of the opinion, the court found the Speech or Debate Clause applicable to preclude injunctive relief in connection with precisely the same claim. *See id.* at 210-11.

brought ... against the executive agency responsible for the statute's enforcement"¹⁵⁶—would have seemed equally applicable here, as the constitutional amendment at issue in *Common Cause's* action provided that any legislative action taken in violation of the amendment "shall be null and void."¹⁵⁷ Furthermore, the conclusion that declaratory judgment actions do not necessarily implicate the legislative privilege reflects an overly narrow understanding of the "burdens" on legislators of defending a lawsuit, as discussed in Part IV below.¹⁵⁸

Similarly, the New York trial courts have adopted a constricted interpretation of the privilege on at least two occasions, first in 1955 and again in 1984, when they held that their Speech or Debate Clause provided state legislators only a liability immunity, and not a testimonial privilege. In the first case, a landlord challenging the constitutionality of a rent control statute had subpoenaed the majority leader of the New York State Assembly to testify about the work of a legislative study commission, of which the majority leader was the Chair.¹⁵⁹ In response to his assertion of legislative privilege, the Municipal Court of the City of New York found no need to determine what it called "the academic problem of whether immunity extends to a legislator's work in committee." The court concluded that the Speech or Debate Clause "is confined to a freedom from suit," and does not encompass a privilege against compelled questioning of one not a party to the suit.¹⁶⁰ Indeed, the court felt that the separation of powers "would be more likely to be fostered than to be hurt by compelling the testimony," because the immunity is "a constrained one It is not a complete license for which there is to be no accounting."¹⁶¹

Relying directly on this case, thirty years later another trial court declined to apply the legislative privilege to preclude testimony regarding the operation of a Senate Select Committee.¹⁶² The court, in clear conflict with the historical origins and purpose behind the

156. See *supra* note 153 and accompanying text.

157. *Colo. Common Cause*, 810 P.2d at 203-04.

158. See *infra* notes 275-76 and accompanying text.

159. See *Lincoln Bldg. Assocs. v. Barr*, 147 N.Y.S.2d 178 (Mun. Ct. 1955).

160. *Id.* at 182.

161. *Id.*

162. See *Abrams v. Richmond County S.P.C.C.*, 479 N.Y.S.2d 624 (Sup. Ct. 1984).

legislative privilege, wrote: "As to the public good, so long as there is no threat of prosecution, legislators must come forward when summoned and give an accounting when asked."¹⁶³ Although in 1999 another New York trial court, without acknowledging these earlier rulings, reached the opposite conclusion in extending a testimonial privilege to an executive branch employee for her work done on behalf of state legislators,¹⁶⁴ the August 2003 edition of *New York Jurisprudence* continued to describe New York's constitutional legislative immunity as "confined to a freedom from suit Accordingly, a legislator may be ordered to testify in litigation to which he or she is not a party."¹⁶⁵

In contrast, the Wisconsin Supreme Court has unequivocally rejected the argument that the privilege should be limited to immunity from suit,¹⁶⁶ even though the text of the Wisconsin provision actually would be more susceptible to such an interpretation, as noted above.¹⁶⁷ Several other states also have soundly interpreted their legislative immunity provisions to provide both testimonial and documentary privileges, as well as liability immunity,¹⁶⁸ in accord with federal jurisprudence.¹⁶⁹

3. State Interpretations of the Scope of Protected Legislative Activity

In addition to the above examples of issues about the kind of immunity the legislative privilege should confer, a number of cases have considered to whom or to what activities the protections of the privilege should apply. For instance, in a New York case last year,

163. *Id.* at 628.

164. *See Campaign for Fiscal Equity v. State*, 687 N.Y.S.2d 227, 230-31 (Sup. Ct. 1999); *see also Humane Soc'y v. City of New York*, 729 N.Y.S.2d 360 (N.Y. Sup. Ct. 2001) (interpreting common-law legislative immunity to provide testimonial privilege to members of State Board of Health).

165. 96 N.Y. JUR. 2d *State of New York* §120 (Aug. 2003 update).

166. *See State v. Beno*, 341 N.W.2d 668, 677-78 (Wis. 1984).

167. *See supra* notes 57-58 and accompanying text.

168. *See, e.g., Lucchesi v. State*, 807 P.2d 1185 (Colo. Ct. App. 1990) (liability immunity); *Copsey v. Baer*, 593 So. 2d 685 (La. Ct. App. 1991) (documents); *Blume v. County of Ramsey*, No. C9-88-2861, 1988 Minn. Tax LEXIS 125 (Minn. Tax Ct. Oct. 27, 1988) (testimony); *Oates v. Marino*, 106 A.D.2d 289 (N.Y. App. Div. 1984) (liability immunity).

169. *See supra* notes 131-40 and accompanying text.

reminiscent of the Colorado cases a decade earlier,¹⁷⁰ the Governor sought a declaratory judgment against the state legislature concerning the constitutionality of a host of appropriations measures.¹⁷¹ In evaluating the claim that the Speech or Debate Clause precluded the suit, the court distinguished between individual legislators and the legislature as a whole. The court opined that the clause "appears to grant a privilege to the individual members of the Senate and Assembly and does not speak to an institutional immunity."¹⁷² The court then rejected the immunity defense on the basis of what it saw as a need for judicial review of budget disputes between the Governor and the legislature about constitutional issues. The court reasoned that "otherwise facially inapplicable provisions, such as [the Speech or Debate Clause] are not going to be applied by this Court to bar such review."¹⁷³

Narrowly viewing the legislative privilege as applicable only to individual legislators, and not to their collective interest as a body, also raises interesting questions concerning the potential of the legislative privilege to protect a variety of other institutional interests as well, such as committee proceedings or documents. For example, a Michigan court in 1996 also distinguished individual member interests from institutional interests in determining that the legislative privilege "does not prevent the subpoena of documents from committee files."¹⁷⁴ Heavily influenced by a statutory elaboration of the legislative privilege, which explicitly sheltered the files and records of individual legislators from civil discovery, but expressly excluded committee materials from the same protection, the court interpreted the state's Speech or Debate Clause as likewise not protecting committee files and records.¹⁷⁵ Rather than treating the statute as the legislature's waiver of a

170. See *supra* notes 152-58 and accompanying text.

171. See *Pataki v. N.Y. State Assembly*, 738 N.Y.S.2d 512 (Sup. Ct. 2002).

172. *Id.* at 522.

173. *Id.* On the other hand, Colorado, Kansas, and Kentucky have reached the opposite conclusion, as have several federal courts. See *Romer v. Colo. Gen. Assembly*, 810 P.2d 215 (Colo. 1991); *Stephan v. Kan. House of Representatives*, 687 P.2d 622 (Kan. 1984); *Kraus v. Ky. State Senate*, 872 S.W.2d 433 (Ky. 1993); see also *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (upholding House subcommittee's assertion of privilege for its documents under the Speech or Debate Clause).

174. See *Mich. Mut. Ins. Co. v. Dep't of Treasury*, Nos. 178228, 178330, 1996 Mich. App. LEXIS 2245, at *12 (Ct. App. Dec. 10, 1996).

175. *Id.* at *11-12.

constitutional privilege that otherwise would have applied to its committee documents, the court instead simply ruled that the Michigan Speech or Debate Clause “does not mandate our departure from the literal construction of [the statute].”¹⁷⁶

State courts also have reached some narrow results with respect to both the applicability of the privilege to staff, and the extent to which the privilege protects the internal operations and information gathering processes of the state legislature. For instance, an Ohio trial court recently required the Director of Policy and Communications of the Majority Caucus Staff of the state Senate, and the Director of Finance for the Majority Caucus Staff of the state House of Representatives, over their objections,¹⁷⁷ to respond to deposition questions concerning details of the legislature’s drafting of a public school funding measure.¹⁷⁸ Although the court’s order contained no explanation for denying the legislative privilege claim, the plaintiffs had contested the assertion of privilege on multiple grounds. They argued alternatively that “immunity for non-legislators [i.e. staff] ... has never been recognized by any Ohio Court,” and that even if the privilege did extend to staff it did not apply to preclude discovery. The plaintiffs argued further that in this case any applicable legislative privilege had been waived because two state legislators were already among the defendants’ witnesses.¹⁷⁹ In response to this last argument, the staffers noted that they worked for all the members of their respective caucuses, and that the willingness of any one member to testify about the legislative process could not act as a waiver with respect to staff work done on behalf of all other members.¹⁸⁰

In subsequent proceedings in the same case, the Ohio Supreme Court similarly refused to quash subpoenas to two members of the Legislative Service Commission, the state legislature’s professional

176. *Id.* at *12.

177. See The State Defendants’ Motion for a Protective Order to Prevent the Depositions of Liz Connolly and Tim Keen, *DeRolph v. State* (Ohio Ct. Com. Pl., filed July 24, 1998) (No. 22043) (on file with author) [hereinafter “State Defendants’ Motion for Protective Order”].

178. See *DeRolph v. State*, No. 22043 (Ohio Ct. Com. Pl., filed Aug. 4, 1998) (mem.).

179. Plaintiffs’-Appellees’ Memorandum in Opposition to The State Defendants’ Motion for a Protective Order at 3-9, *DeRolph v. State* (Ohio Ct. Com. Pl., filed Aug. 1, 1998) (No. 22043) (on file with author).

180. See State Defendants’ Motion for Protective Order, *supra* note 177, at 6.

staff organization.¹⁸¹ The plaintiffs again argued alternatively that in this case the privilege had already been waived and that it only applied to liability immunity. The plaintiffs further argued that the privilege did not apply at all to "individuals who are not employees of the General Assembly, but who are only employees of a separate entity which, while providing a supporting role to the General Assembly, is not part of the staff of the General Assembly."¹⁸² The court did not make clear which if any of these rationales was persuasive, but the ruling was perceived by some members of the state legislature "to declare 'open season' on the deposition of legislators in such cases."¹⁸³

Similarly, in 1995 a Michigan court refused to protect a legislative staffer from being questioned about the substance of his workplace conversations with the Senator for whom he worked concerning a state agency's investigation of a teachers' health insurance program.¹⁸⁴ The private administrator of the program, as the plaintiff in a suit alleging that the state investigation was politically motivated, sought information from the aide about the Senator's knowledge of the investigation. Although the court had no trouble concluding that the privilege covered legislative aides, it found the more difficult question to be whether the particular communication at issue in this case was "conduct within the sphere of legitimate legislative activity."¹⁸⁵ The court concluded that "the fact that [the Senator] may have been involved in introducing legislation concerning public school districts and contracts for health

181. See *DeRolph v. State*, 747 N.E.2d 823 (Ohio 2001). While the court refused to quash the deposition subpoenas, it left open the possibility that the legislative privilege could provide a basis for the Legislative Service Commission employees to object to specific deposition questions. The court also displayed some dissatisfaction with this possibility, however, and the additional delays it could entail. See *id.* at 824-25. Of course, a recognition of the applicability of the legislative privilege to these subpoenas in their entirety would have obviated these concerns.

182. Plaintiffs'-Appellees' Memorandum in Opposition to State's Emergency Motion for Clarification and to Quash Deposition Subpoenas and for Protective Order at 10, *DeRolph v. State*, 747 N.E.2d 823 (Ohio, filed May 4, 2001) (No. 99-0570) (on file with author).

183. GONGWER OHIO REPORT, May 18, 2001, at 1. The decision also was widely perceived as a triumph of open government over efforts to protect legislative documents and processes from judicial intrusion. See, e.g., Darrel Rowland, *State Forced to Turn Over School-Funding Documents*, COLUMBUS DISPATCH, May 12, 2001, at 1B.

184. See *Mich. Educ. Special Servs. Ass'n v. Ins. Comm'r*, 542 N.W.2d 354 (Mich. Ct. App. 1995), *stripped of precedential effect*, 550 N.W.2d 536 (Mich. 1996) (table).

185. *Id.* at 357.

care coverage" did not bring the Senator's knowledge of the agency investigation within the legislative sphere.¹⁸⁶

In addition, another Ohio appellate court recently required legislators to respond to interrogatories seeking to identify private individuals with whom they had met to discuss legislation that had become the subject of a civil lawsuit. The avowed purpose of the interrogatories was to discover "the source or basis of the language of the disputed enactments."¹⁸⁷ Relying upon an outdated and inapposite federal court decision,¹⁸⁸ the court stated that the Speech or Debate clause "is not a privilege to refuse to disclose; it is, rather, a privilege barring the use of such materials as evidence."¹⁸⁹ But unlike the state case, the earlier federal case arose out of a criminal investigation of a member of Congress, and involved a document request directed not to the member asserting the privilege but to the House Clerk. Furthermore, subsequent federal decisions had specifically discredited the earlier federal case.¹⁹⁰ Nevertheless, the state court, now in an entirely different context, followed the federal court's assertions that the privilege is only "one of nonevidentiary use, not of non-disclosure,"¹⁹¹ and provides a testimonial immunity "only for the purpose of protecting the legislator ... from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy."¹⁹²

In contrast to the preceding examples of comparatively narrow interpretations of state legislative privileges, a few state courts have extended the scope of their constitutional provisions further than that of the federal privilege. In particular, in a pair of decisions that preceded the U.S. Supreme Court's contrary treatment of a similar issue in *Hutchinson v. Proxmire*,¹⁹³ courts in both Hawaii and Oklahoma found that their states' constitutional privileges protected at least some legislators' communications with the

186. *See id.* at 356-57.

187. *City of Dublin v. State*, 742 N.E.2d 232, 232-33 (Ohio Ct. App. 2000).

188. *See In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978); *see supra* note 140.

189. *City of Dublin*, 742 N.E.2d at 236.

190. *See, e.g., Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995).

191. *In re Grand Jury Investigation*, 587 F.2d at 597.

192. *City of Dublin*, 742 N.E.2d at 237 (quoting *In re Grand Jury Investigation*, 587 F.2d at 597) (internal quotation marks omitted).

193. 443 U.S. 111, 130, 133 (1979); *see supra* note 116.

media.¹⁹⁴ And in an astonishing ruling last year, the New York Court of Appeals concluded that the legislative privilege even precluded a political party from using an elected representative's legislative voting record as a basis for rescinding that representative's affiliation with the party.¹⁹⁵ Still, where state court interpretations of the legislative privilege diverge from federal court jurisprudence, the trend appears to be primarily in the direction of giving state legislators less protection than the federal Speech or Debate Clause affords.

III. A DEFENSE OF BROAD STATE LEGISLATIVE PRIVILEGES

Given the constricted or divergent interpretations of the legislative privilege found in some states, as well as the complete dearth of interpretations in others, this Part argues that state Speech or Debate provisions generally deserve to be interpreted at least as broadly as the federal privilege, notwithstanding the growing pressures they face. The variety of ways in which a broad legislative privilege protects the integrity of the legislative process can be grouped into two general categories, loosely corresponding to negative and positive liberties¹⁹⁶: (1) providing absolute protection from the harms and burdens, both incidental and deliberate, that might otherwise result from judicial intrusions into the legislative process, and (2) freeing legislators to deliberate more candidly and creatively among themselves and their staff by granting them fuller autonomy and allowing them to preserve confidences where desired.

194. See *Abercrombie v. McClung*, 525 P.2d 594, 595, 597 (Haw. 1974) (protecting a legislator's response to press inquiries "clarifying" antecedent floor speech); *State v. Nix*, 295 P.2d 286, 288, 291-92 (Okla. 1956) (applying the privilege to protect a Senator's delivery to newspapers of written remarks criticizing state court).

195. See *Rivera v. Espada*, 777 N.E.2d 235, 238 (N.Y. 2002). This is an exceedingly broad interpretation of the prohibition on questioning that nonsensically begins to approach a prohibition on holding legislators even politically accountable for their legislative activities.

196. See Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY* 166, 168-69 (Henry Hardy ed., 2002). Berlin observed that the "negative" and "positive" notions of freedom or liberty "may, on the face of it, seem concepts at no great logical distance from each other—no more than negative and positive ways of saying much the same thing." *Id.* at 178. He argued, however, that they had developed into the often conflicting notions of freedom from control and freedom to control. See *id.* at 178-81. This Part employs the terms only to suggest different perspectives with which to understand the value of the legislative privilege, not to claim that the two perspectives on the privilege are in conflict, or even logically distinct.

This Part also argues that although legislatures can and should determine, as an institutional political matter, the extent to which they will conduct their formal processes openly and publicly, nevertheless they should not be allowed to waive the protections of the legislative privilege that would otherwise be applicable to individual legislators.

A. Freedom From Interference: Absolute Protection Against Resentments

Although state governments, in the view of many political scientists, functioned as “mere managers” for much of the twentieth century, by the early 1990s some commentators accurately perceived that such governments were experiencing “a new vitality” and once again were acting with “a sense of moral purpose.”¹⁹⁷ This contemporary vitality was the product of a combination of factors, including the reapportionment revolution that followed the Supreme Court’s 1962 decision in *Baker v. Carr*,¹⁹⁸ legislative professionalization in the 1960s and 1970s,¹⁹⁹ the states’ rights movement of the 1980s and 1990s,²⁰⁰ and the beginnings of federal devolution.²⁰¹ Partly as a result of these factors, state legislatures now routinely must tackle many complex policy issues, and they are well equipped to do so. Yet if our institutions of representative democracy are to fulfill their sense of public purpose, ensuring their independence remains as important as ever. This section and the following one set forth a basic argument for broadly interpreting the legislative privilege to protect legislative independence.

At the outset, it is worth noting that most state courts that have considered their Speech or Debate provision have recognized in principle that it reflects a policy choice to constitutionalize a broad, effective legislative privilege. Furthermore, as argued in Part I.B above, this is a policy that has endured through many eras of

197. Henretta, *supra* note 69, at 839.

198. 369 U.S. 186 (1962); see Rosenthal, *supra* note 102, at 108; Thompson & Moncrief, *supra* note 102, at 198.

199. See Rosenthal, *supra* note 102, at 109-17.

200. See Richard P. Nathan, *The Role of the States in American Federalism*, in *THE STATE OF THE STATES* 13, 16-17 (Carl E. Van Horn ed., 3d ed. 1996).

201. See *id.* at 14-15.

legislative distrust. But the precise contours of this broad privilege today understandably are not universally agreed upon.²⁰² The following discussion is intended to provide a justification for interpreting the legislative privilege broadly, even in the face of the important principles—and attractive rhetoric—of open government.

As with all legal privileges, the legislative privilege does impose some costs, and the broader the privilege, the greater these costs will be. In part because the federal legislative privilege is absolute where it applies, federal courts have been unwilling to apply it to all official activities of Senators and Representatives, and instead have circumscribed it by applying the privilege only to core legislative activities.²⁰³ Limiting the privilege to activities essential to the legislative process meaningfully reduces the chances that the privilege will be abused to infringe on individual rights, especially as compared with the ability of executive or administrative officials improperly to intrude upon the rights of individual citizens. For instance, unlike executive branch employees, individual American legislators are not routinely in a position to discriminate unlawfully in the distribution of government benefits to citizens. They generally lack both the authority and resources to engage in covert surveillance of citizens, and they are not otherwise well-positioned to intrude in the affairs of private individuals.²⁰⁴ Likewise,

202. Many state courts claim to follow federal jurisprudence in the area of legislative privilege. *See, e.g.*, *State v. Dankworth*, 672 P.2d 148, 151 (Alaska Ct. App. 1983); *Romer v. Colo. Gen. Assembly*, 810 P.2d 215, 220-21 (Colo. 1991); *State v. Neufeld*, 926 P.2d 1325, 1332 (Kan. 1996); *People v. Ohrenstein*, 565 N.E.2d 493, 501 (N.Y. 1990). Other states may see the federal model only as "helpful" or "instructive." *See, e.g.*, *Blume v. County of Ramsey*, No. C9-88-2861, 1988 Minn. Tax LEXIS 125, at *5 (Minn. Tax Ct. Oct. 27, 1988); *Bowles v. Clipp*, 920 S.W.2d 752, 758 (Tex. App. 1996). Others may expressly disclaim any reliance on federal or other state interpretations of similar or identical provisions. *See State v. Beno*, 341 N.W.2d 668, 674-75 (Wis. 1984). On occasion, even states which claim to follow the federal model in fact have interpreted the scope of the privilege differently. *See, e.g.*, *Kerttula v. Abood*, 686 P.2d 1197, 1202-03 (Alaska 1984) (describing some state interpretations as broader than their federal counterpart); *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 209 (Colo. 1991) (refusing to apply legislative privilege to protect state legislators from the burden of defending a lawsuit concerning the legality of a legislative procedure).

203. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 624-25 (1971). The legislative privilege thus differs significantly from other official privileges, such as qualified immunity or executive privilege, which apply to all official acts of covered actors.

204. Historically, members of Congress also have not often abused their official investigatory powers to infringe on individual rights, with the notable exception of occasional invocations of national security to investigate and otherwise harass citizens, as in the McCarthy era and proceedings of the House UnAmerican Activities Committee. *State*

legislatures as institutions, *apart from their unquestionably extensive power to enact statutes*, pose little threat themselves to individual citizens. Of course, a legislature's statutory enactments can and do profoundly affect individual rights, yet a robust legislative privilege in no way deprives individuals of their ability to challenge the constitutionality of all such enactments in traditional lawsuits brought against executive departments or other enforcement agencies, rather than against the legislature or individual legislators. With respect to grievances specifically against legislators for their legislative activities, however, as the Supreme Court stated in 1955 in *Tenney v. Brandhove*, "[c]ourts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."²⁰⁵

In an earlier era, the paramount concern of the legislative privilege may well have been to spare legislators from the resentments of the executive branch. On this theory, Robert Reinstein and Harvey Silverglate argued some thirty years ago, in a detailed analysis of the then just-burgeoning jurisprudence concerning the federal Speech or Debate Clause, for a comparatively narrow scope of the federal Clause when applied to *private* civil suits against members of Congress, especially over constitutional rights.²⁰⁶ But Reinstein and Silverglate also argued for a dynamic,

legislators, of course, generally lack this pretext for invasive investigations. *See infra* notes 219-20 and accompanying text.

The Supreme Court plurality's discussion of a similar issue over forty years ago in the context of executive immunity also is especially instructive:

We are told that we should forbear from sanctioning any such rule of absolute privilege lest it open the door to wholesale oppression and abuses on the part of unscrupulous government officials. It is perhaps enough to say that fears of this sort have not been realized within the wide area of government where a judicially formulated absolute privilege of broad scope has long existed. It seems to us wholly chimerical to suggest that what hangs in the balance here is the maintenance of high standards of conduct among those in the public service. To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good.

Barr v. Matteo, 360 U.S. 564, 576 (1959).

205. *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

206. *See* Reinstein & Silverglate, *supra* note 13, at 1148, 1171-77; *see also Constitutional Immunity of Members of Congress*, *supra* note 21, at 144 (statement of Sen. Gravel) (arguing that the privilege should not extend to private actions against Members). While acknowledging the absence of any textual justification in the Clause for distinguishing

rather than a static, understanding of legislative privilege, applying the privilege's timeless purpose of protecting legislative independence to the ever-changing realities of the legislative process.²⁰⁷ Just as a dynamic approach once may have helped foster a recognition that legislative deliberation had become much more than mere oratory, and therefore that more than literal "speech or debate" merited protection, that approach also counsels recognizing that today many of the most significant threats to legislative independence may come not from executive branch interference, but from private attempts, through the courts, to intrude upon the inner processes of legislatures.²⁰⁸

between private questioning and criminal prosecution of legislators, Reinstein and Silverglate postulated that significant differences in the nature and extent of these kinds of intrusions only justified extending the Clause's fullest protections to executive branch interference. See Reinstein & Silverglate, *supra* note 13, at 1171-77. But not only is there no textual basis for such a distinction, as a historical matter, the privilege also is much more amenable to application to private charges than Reinstein and Silverglate suggest. Not only were there early examples of private actions against members of Parliament, but in both England and the American colonies "[a]ny sort of legal action was considered molestation" and "was counted as a violation [of] privilege." CLARKE, *supra* note 4, at 109-10. In addition, as Reinstein and Silverglate themselves indicate, Parliament's separate practice of punishing with contempt anyone who insulted a member provided an even more forceful protection against private civil actions. See Reinstein & Silverglate, *supra* note 13, at 1148 n.180.

Significantly, both Parliament's contempt power and the privilege against molestation were applicable to *any* private civil action against legislators, whether or not it concerned legislative activity. Although Framers of the Speech or Debate Clause in the U.S. Constitution, as well as the framers of contemporaneous state constitutional provisions, intentionally omitted such sweeping forms of privilege, a strong historical argument exists that American legislative privilege provisions preserved a much narrower version of this protection, applicable only to suits concerning protected legislative activities. Indeed, several state Speech or Debate clauses explicitly place civil and criminal protections on precisely the same footing. See *supra* note 57 and accompanying text. In 1975, the United States Supreme Court conclusively did so as well in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503; see *supra* notes 127-30 and accompanying text. The Court reinforced this aspect of the legislative privilege in its subsequent decision in *Davis v. Passman*, 442 U.S. 228, 246 (1979). The *Davis* Court explained that the Speech or Debate Clause affords protections against *Bivens* actions brought by citizens against members of Congress for alleged constitutional violations. *Id.*

207. See Reinstein & Silverglate, *supra* note 13, at 1144-45.

208. Reinstein and Silverglate, in arguing against a broad application of the Speech or Debate Clause to private civil actions, also sought to discount the historical applications of the legislative privilege to civil litigation as entirely a product of Parliament's *judicial* function, a function that obviously was not reproduced in American legislatures. *Id.* at 1171-72. Their resulting willingness to abandon the protections of the legislative privilege in civil actions in part may have reflected an earlier era, in which rampant private lawsuits against politicians for their legislative activities may not have been as certain as they would be today,

Because contemporary state legislatures are now the arbiters of many of the most difficult social policy issues, they also have become the focus of intense scrutiny, and often of popular ridicule. In addition, the complexity of the issues typically results in the involvement of more people, more sophisticated compromises, and more partially dissatisfied parties than in earlier eras. In turn, more individuals then seek some basis to undermine an aspect of the legislative process, or some misstep with which to damage an incumbent's re-election bid. Accordingly, James Wilson's sentiment remains as true today for state legislators as ever: "[I]t is indispensably necessary, that [a representative] should enjoy the fullest liberty of speech, and ... be protected from the resentment of *every one*, however powerful, to whom the exercise of that liberty may occasion offence."²⁰⁹

Indeed, the variety of ways offended persons seek to satisfy their "resentments" against legislators *notwithstanding* the legislative privilege²¹⁰ suggests that the settled core of the privilege already serves an important role in foreclosing the numerous other similar efforts that almost surely would occur absent such a privilege.²¹¹ Yet

absent the legislative privilege. Whether or not such lawsuits are or were commonplace, however, the more important reason for applying a legislative privilege to all types of questioning is that American legislatures necessarily and routinely do make judgments that inevitably affect individual private citizens, many of whom will be just as unhappy with those judgments as they might have been with an adverse judicial resolution of some particular controversy. Moreover, because legislative judgments typically affect not just one party but thousands of citizens, the prospects that some unsatisfied individual will then attempt to seek relief personally from the decisionmaker in fact are dramatically enhanced.

209. 2 THE WORKS OF JAMES WILSON, *supra* note 16, at 421 (emphasis added). Justice Harlan echoed this sentiment more recently, when he recognized as a "consideration[] of high importance" the public interest in "shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Barr v. Matteo*, 360 U.S. at 564, 564-65 (1959). Although he recognized as a conflicting consideration of high importance "the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government," he and the Court had little difficulty resolving the conflict in favor of protecting government officers. *Id.* at 564-65, 574.

210. *See, e.g.*, *Kniskern v. Amstutz*, 760 N.E.2d 876 (Ohio Ct. App. 2001) (holding that state legislators have immunity from suits brought under § 1983 by citizens challenging legislators' votes in favor of tort reform legislation).

211. *Cf. Butz v. Economou*, 438 U.S. 478, 512 (1978) ("The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus.").

beyond this core of more obvious applications, such as when a citizen wants to complain about an injury resulting from how a legislator voted, or claims to have been defamed by words spoken in legislative debate, questions remain about the proper scope of the privilege. Analyzing this issue invites us to think about the range of legal and political resentments to which legislators today are vulnerable, and other ways in which legislators could be harassed, burdened, or improperly pressured, absent the privilege.

Of course, the less broadly the privilege is applied, the greater the inevitable burdens upon legislators from subpoenas and document requests, as well as from genuine or trumped-up litigation against them or their staff. These potential burdens—in the forms of diversions of “time, energy, and attention,” as well as “delay[ing] and disrupt[ing]” the legislative work²¹²—are certainly as great today as ever, given the variety of ways in which individuals and organizations may seek to question legislators about their legislative acts. Furthermore, the impact of these burdens on the ability of a legislator to remain undistracted and focused on the legislative task is often just as severe when a private party seeks to intrude on the legislative sphere as when the executive branch does so.²¹³

Beyond these sheer burdens, the legislative process also may be adversely affected—indeed distorted—in other ways. Prosecutors might seek to piggyback on a legislator’s investigatory work by compelling the release of background information or sources, thereby chilling the legislature’s future ability to receive meaningful information from outside sources. Litigants disputing the meaning of a statute before an agency or in court might seek to revise or augment the legislative record by obtaining a draft of a legislative

212. *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 503 (1975); see *supra* note 130 and accompanying text.

213. *Eastland*, 421 U.S. at 503. Furthermore, as the Supreme Court also recognized in *Eastland*, separation of powers concerns are implicated whenever a private party employs court authority to seek information or relief from the legislative branch, because “judicial power is still brought to bear on [legislators] and legislative independence is imperiled.” *Id.* Moreover, in the many states that elect their judges, private civil actions may be even more likely to become a vehicle for improper judicial interference with the legislature, to the extent that political pressure makes it more likely that courts will side with citizens against government officials. In such states, a robust legislative privilege applicable equally to private actions may be even more important in preserving the proper separation of powers.

document or by questioning individual members and staff,²¹⁴ when the legislative product instead should stand on its own merits, in whatever form and context the legislature as an institution has chosen to fashion it.²¹⁵ Disgruntled constituents could seek to embarrass a legislator by compelling staff to testify concerning the type, amount, or lack, of attention given a particular issue, thus at least implicitly engaging in a form of second-guessing of the legislator's work.²¹⁶ Potential opponents might seek to access legislative documents to hunt for examples of extreme statements of views, unpolished texts, or position changes—all potentially ripe for political exploitation²¹⁷—thereby diminishing legislators' willingness to think creatively, solicit diverse opinions and advice, or explore what in hindsight turn out to be blind alleys.²¹⁸

Moreover, with respect to each of these threats to legislative independence, state legislators are just as vulnerable as are members of Congress. Accordingly, if the downsides of a vigorous legislative privilege were roughly equal at the state and federal

214. For instance, as the leader of the coalition challenging Ohio's statutory school funding formula recently claimed: "Information from internal communications among legislators and staffers helped the coalition win the school-funding case last year." Darrel Rowland, *Officials Hold Back Funding Documents*, COLUMBUS DISPATCH, June 10, 2001, at 1A.

215. A proper application of the legislative privilege in this context in no way prevents litigants from making traditional legislative history arguments. See, e.g., *Pa. Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs*, 805 A.2d 476, 485-86 (Pa. 2002) (permitting school district to challenge statute because district neither sought privileged legislative documents nor sought to impose liability on legislators). Indeed, proper application of the privilege should strengthen, rather than impede, litigants' general ability to argue from legislative history, by reinforcing a legislature's institutional role of determining independently what will be the content of that history. Meanwhile, permitting litigants to compel release of nonpublic records of legislative deliberations not only may result in inappropriate (because not "intended") interpretations of particular statutory meanings, but more importantly could have a chilling effect on subsequent behind-the-scenes legislative conduct.

216. Cf. *City of Dublin v. State*, 742 N.E.2d 232, 234, 237 (Ohio Ct. App. 2000) (describing plaintiff's effort to identify lobbyists with whom legislators met in connection with the passage of a challenged bill which, given the attenuated relevance to the purely legal question of whether the statute on its face violated the single subject rule, may have been an effort intended primarily to embarrass the legislators).

217. Cf. Lee Leonard, *If Legislators Have Nothing to Hide, Why Confidentiality Issue?*, COLUMBUS DISPATCH, June 28, 1999, at 7A (describing Ohio Senate President Richard Finan's concerns regarding political opponents' campaign use of internal legislative documents).

218. These latter concerns are precisely the type of value that can also be articulated in terms of protecting legislators' positive liberty to deliberate freely. See *infra* notes 221-48 and accompanying text.

levels, there would be little reason not to construe them similarly. In fact, however, state legislators may deserve even broader protections because the costs of a vigorous legislative privilege at the state level may be lower. In particular, state legislators, though often maligned in comparison to their federal counterparts, as a rule may pose less danger to individual rights than members of Congress for several reasons. First, state legislatures lack the mandate to preserve national security that historically has provided the most common pretext for Congress to abuse its investigatory powers.²¹⁹ In addition, individual state legislators are less likely to reap the kind of political benefits that may occasionally motivate members of Congress to subpoena individuals unfairly for the principal purpose of pillorying them as witnesses at legislative hearings. This is largely because state legislatures receive less media attention than Congress, but also because state legislators lack the investigatory resources to prepare for and execute such displays. Furthermore, state legislators may simply gain more political advantage by maintaining a good neighbor image than by cultivating the persona of an aggressive prosecutor, whereas members of Congress may more easily become heroes to their home-state constituents by taking on the crooks and criminals located elsewhere in the nation.²²⁰

In any event, legislative activities provide far fewer opportunities for government officials to infringe on individual citizens' constitutional rights than do executive or administrative activities. Where parties in fact are injured by legislative activity, a robust legislative privilege does not preclude them from obtaining relief from unprivileged defendants, such as those implementing a statutory mandate. Nor does a robust privilege bar criminal prosecutions of legislators for official misconduct, though it perhaps may complicate them. Furthermore, legislators remain fully accountable politically. Meanwhile, the liberating effect of liability immunity is perhaps most palpable by imagining its absence, with legislators worrying at every turn not only about personal liability but also about the

219. See *supra* note 204 and accompanying text.

220. In this connection, it is worth noting the rarity with which state legislatures even invoke their subpoena power, a power that all state legislatures have, either expressly or implicitly. See generally *McGrain v. Daugherty*, 273 U.S. 135, 165-66 (1927) (collecting authorities that support state legislatures' power to subpoena).

political and personal burdens of becoming a defendant. The potential downsides, therefore, of a broad privilege that protects state legislators from the types of inquiries and other intrusions described above, as well as from the more obvious intrusions of seeking to impose liability for legislative remarks or votes, are small compared with the benefits of facilitating a creative and energetic legislative process.

A second liberating, but perhaps more controversial, purpose for a robust legislative privilege is the protection of confidential information. The specific value of this benefit, as well as its comparatively less significant accompanying costs, are discussed in more detail in the next section.

B. Freedom to Deliberate: The Value of Legislative Confidentiality

A broad legislative privilege should provide two distinct kinds of immunity: it should free legislators from the burdens and distorting effects of potential legal liability for their legislative acts, and it should relieve them from the multifarious pressures, and potential distortions, that would result from being subjected to compelled questioning concerning those acts. Although often slighted, this second aspect of the privilege is also fundamentally important, and it may be helpful to conceptualize it as a type of positive liberty. In particular, by enabling legislators to maintain the confidentiality of a variety of internal aspects of their legislative activities, the privilege against questioning frees them to approach tough legislative problems with an open mind and to seek solutions in creative and nuanced ways. Freedom of information laws and the policies behind them, while also important, do not provide sufficient justification for depriving the legislative privilege of this full scope.²²¹

The values of protecting confidential legislative information are sometimes unappreciated precisely because this component of the legislative privilege is undeniably in tension with the values of access and disclosure.²²² These values are often articulated, for

221. This conflict has rarely arisen directly at the federal level because, by their terms, the Freedom of Information Act and other major open government statutes do not apply to Congress. See *supra* note 83 and accompanying text.

222. See, e.g., *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978) (asserting mistakenly that legislative privilege is "one of nonevidentiary use, not of non-disclosure," for

example, in terms of promoting "free and open comment about the public business by those responsible for conducting it,"²²³ as well as providing "a meaningful check against corruption."²²⁴ As several journalism professors recently put it, "[d]eeply imbedded in the principles of democratic government is the notion that the processes of government should be open to public scrutiny."²²⁵

James Wilson's views during the Constitutional Convention at first appear to confirm the historical legacy of this notion, particularly with respect to the legislative branch: "The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."²²⁶ These are powerful sentiments. Yet attractive as they may sound, the Framers did not anticipate applying to Congress the sort of open records and open meetings policies that are prevalent today.

In fact, James Wilson's expression occurred only in connection with the decision to include in Article I of the Constitution the requirement that each House "keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."²²⁷ This expression did not arise in connection with the much broader issue of whether to provide for public access to all proceedings occurring or records produced as part of the legislative process. Indeed, as the Supreme Court wrote in 1974, in addressing whether to recognize an executive privilege:

There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. Moreover, all records of those meetings were sealed for more than 30 years after the

democracy "has only a limited toleration for secrecy"); *City of Dublin v. State*, 742 N.E.2d 232, 236-37 (Ohio Ct. App. 2000) (explaining that the Clause is not meant to promote confidences by sustaining secrecy).

223. *McClendon v. Coverdale*, 203 A.2d 815, 816 (Del. Super. Ct. 1964).

224. *Schenck*, *supra* note 84, at 372.

225. *Davis et al.*, *supra* note 15, at 41.

226. 2 THE FOUNDERS' CONSTITUTION, *supra* note 29, at 290-91.

227. U.S. CONST. art. I, § 5, cl. 3. When Wilson made his remark, the final clause of the provision under consideration read "except such part of the proceedings of the Senate, when acting not in its Legislative capacity as may be judged by that House to require secrecy." 2 THE FOUNDERS' CONSTITUTION, *supra* note 29, at 290.

Convention. Most of the Framers acknowledged that *without secrecy no constitution of the kind that was developed could have been written*.²²⁸

Furthermore, the United States Senate, like the Constitutional Convention and the Continental Congress before it, also met in secret for the first several years,²²⁹ and the Journal kept by each House pursuant to the Article I requirement advocated by James Wilson has always contained only a summary of formal legislative action, not a complete record of legislative proceedings.²³⁰

Thus, the Founders' original conception of American democracy did not include a notion that elected representatives must conduct every aspect of their work in public, any more than today's open government laws force all aspects of government into the open. Rather, just as contemporary FOI provisions contain many categories of exceptions,²³¹ the Framers also recognized that some amount of government privacy or confidentiality would often serve the interests of representative democracy.²³² Similar concerns also

228. *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974) (emphasis added) (internal citations omitted).

229. The Senate conducted all of its business behind closed doors from 1789 until 1795, when it opened a visitors' gallery under public pressure. See *THE UNITED STATES SENATE, ONE HUNDRED SIXTH CONGRESS, 1999-2000*, S. Pub. 106-14.

230. The Congressional Record contains a much more complete record of floor proceedings of each House.

231. See, e.g., 5 U.S.C. § 552b(c)(1)-(c)(9) (2000) (excluding from public access such categories of material as classified information, internal personnel rules, trade secrets, personal medical files, etc.).

232. Delegates to the Constitutional Convention unanimously agreed to conduct their law-making deliberations in secret in order, among other reasons, to "secure the requisite freedom of discussion," "save both the Convention and the community from a thousand erroneous and perhaps mischievous reports," and "prevent mistakes and misrepresentation until the business shall have been completed, when the whole may have a very different complexion from that in which the several crude and indigested parts might, in their first shape, appear if submitted to the public eye." CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 135 (1929). In addition, James Madison subsequently explained that "[h]ad the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion, no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth and was open to argument." *Id.* at 136. Similarly, Alexander Hamilton wrote, "Had the deliberations been open ... [p]ropositions made without due reflection, and perhaps abandoned by the proposers themselves on more mature reflection, would have been handles for a profusion of ill-natured accusation." *Id.* at 137. Thomas Jefferson, on the other hand, was entirely unsympathetic to these reasons for closing the deliberations. See *id.* But Jefferson

continue to justify the recognition at common law of executive and judicial privileges as well.²³³ As the Supreme Court has explained, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."²³⁴

Among other values, legislative confidentiality may facilitate negotiation and deal making, foster staff independence and forthrightness, protect government employees from harassment, and enable representatives to be creative and vigorous leaders.²³⁵ In fact, at times legislative openness may operate adversely, in at least two ways. First, it may prompt legislators to say what they believe the public or a key constituency wants to hear, and even to commit themselves to an ultimately inferior policy position, rather than allowing them carefully to develop a superior course of action and then go about marketing it to colleagues and constituents.²³⁶ Second, it also may enable special interest groups to orchestrate for themselves narrow legislative deals not in the public interest.²³⁷ In

joined Madison in defending the importance of preserving Congress' freedom from any *judicial* coercion concerning such matters, eloquently arguing for the protection of legislators' private as well as public communications. See *supra* notes 29-30 and accompanying text.

233. Of course, executive privilege in particular also has come under increasing pressure as part of the trend towards open government. See, e.g., RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 301-03 (1974) (arguing that executive branch secrecy is indefensible).

234. *United States v. Nixon*, 418 U.S. 683, 705 (1974). The Court's determination that the President and his advisors "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately," *id.* at 708, has similar validity for legislators and their staff.

235. Many discussions of the role of government confidentiality tend to focus rather narrowly on national security issues, in which it is the *outcome* of a deliberative process that remains secret, see, e.g., 2 *THE FOUNDERS' CONSTITUTION*, *supra* note 29, at 290-91; PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* 291 (1996), while ignoring the much broader benefits of confidentiality at interim stages of a deliberative process.

236. Part of the problem is the public's tendency to oversimplify legislative issues. If elected representatives can be prematurely compelled to divulge all the complexities with which they are wrestling in pursuit of a particular policy, some of those subtle nuances and difficulties could easily be distorted as part of a campaign against that policy.

237. See, e.g., WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION* 302 (3d ed. 2001) (describing legislators' private negotiations during consideration of Tax Reform Act of 1986); see also JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 209-13* (1987) (providing fuller details concerning enactment of the Tax Reform Act of 1986).

other words, confidentiality provides elected representatives with both time and freedom to thoroughly understand an issue, to explore and determine a course of action, to build support for the right policy, to take strategic advantage of circumstances, and still to regroup or make midcourse corrections as necessary.²³⁸ As a state legislator recently observed in defending the importance of legislative privacy,

[y]ou're going to have dumb ideas along the way Your enemies in this business are going to take them and use them for nothing that is for the public good. I want (legislators) to feel empowered and not be pilloried for the dumb stuff on the way to the creative stuff.²³⁹

Nevertheless, it remains all too easy to dismiss the notion of legislative confidentiality as irrelevant if a legislator has "nothing to hide."²⁴⁰ But the trade-off in preventing legislators from "hiding" aspects of their legislative work would be a significant disruption to the deliberative process. Permitting open or easy access to legislators' internal memoranda, legislative correspondence, recollections of caucus deliberations, and the like could quickly become a goldmine for disgruntled lobbyists and interest groups, as well as for political opponents. Even in circumstances in which an FOI request is already clearly foreclosed, it is more than conceivable that some cause of action could be commenced in which subpoenas or discovery requests, directed either to legislators or their staff, would attempt to force the release of internal legislative information, unless a robust legislative privilege precluded this.

Moreover, broadly applying Speech or Debate clauses to allow legislators the ability to preserve the confidentiality of their legislative work is unlikely to halt the flow of information from the legislature, for legislators have a personal interest in voluntarily

238. Cf. Rosenthal, *supra* note 102, at 138 (describing today's legislative process as "less deliberative" because under glare of media spotlight and other contemporary pressures "deliberation often gives way to expediency").

239. Lee Leonard, *If Legislators Have Nothing to Hide, Why Confidentiality Issue?*, COLUMBUS DISPATCH, June 28, 1999, at 7A (quoting Rep. E.J. Thomas, Ohio General Assembly).

240. See, e.g., *id.*

sharing many aspects of their internal deliberations.²⁴¹ The heart of the legislative process—floor proceedings, the votes of representatives on legislative business before them, committee hearings—is likely always to be a matter of public record.²⁴² As a political matter, legislatures are always free to alter their internal rules to permit even greater public access to aspects of the legislative process, for instance by choosing to require that even party caucus meetings be open to the public.²⁴³ In addition, notwithstanding a broad legislative privilege, legislators will continue to be expected to justify their positions for their constituents. Those who refuse to do so, or who provide unsatisfactory explanations, will be subject to the ultimate political accountability at the ballot box.²⁴⁴

Indeed, a vigorous legislative privilege ought to make it *more* likely that legislatures will voluntarily permit increased access to their internal workings. When legislators are confident of the protections of the privilege, their resulting freedom from concern about becoming embroiled in litigation or entangled in discovery efforts should have salutary effects on their attitude toward open government. Knowing of their absolute immunity against questioning beyond the walls of the legislature should increase their comfort level in conducting legislative proceedings in public and disclosing other aspects of their internal deliberations.

Meanwhile, other information protected by the legislative privilege may sometimes be obtained from nonprivileged sources. For instance, while the legislative privilege protects legislators and their staff from the burdens of compelled questioning about their legislative work, the privilege does not transfer to other actors, such as lobbyists or executive officials, who may be privy to some of the same information.²⁴⁵ In addition, a robust state legislative privilege would in no way preclude much stronger lobbying

241. Indeed, the "openness" of legislative proceedings has steadily increased in the past several decades. See Rosenthal, *supra* note 102, at 138.

242. In some states, separate constitutional provisions govern the extent to which these parts of the legislative process must be open. The Ohio Constitution, for instance, provides as a general rule that all legislative "proceedings" be open to the public. OHIO CONST. art. II, § 13.

243. See, e.g., Dan Harrie, *Proposal Seeks to Pry Open Caucuses*, SALT LAKE TRIB., Jan. 21, 2003, at B1 (describing state legislator's proposed bill to require open caucus meetings).

244. Cf. Rosenthal, *supra* note 102, at 138.

245. See *supra* note 131.

disclosure provisions, a preferable means of enhancing public information about the nature and sources of legislative influence without directly compromising the values of confidentiality discussed above. Finally, a legislator may always elect to waive the privilege.²⁴⁶ In some circumstances, a legislator's refusal to relinquish the legal right to protect privileged information also may have political costs.

An important distinction therefore exists between an adequately informed and enlightened citizenry, on the one hand, and on the other, a citizenry with sweeping access to internal aspects of the legislative process. Such a distinction should be acknowledged before blithely dismissing the application of the legislative privilege to prevent the compelled release of legislative documents or other internal information about legislative activities as inconsistent with ideals of open government.²⁴⁷ Undoubtedly, as a political matter, our legislatures will continue to choose generally to conduct their sessions and hearings in public and to provide a variety of other information about the legislative process. Beyond that, however, room remains to recognize the value of behind-the-scenes negotiation, confidential advice from aides, and other internal aspects of

246. Formulations of the legislative privilege, such as the federal Speech or Debate Clause, that by their terms provide that legislators "shall not be questioned" outside the legislative arena concerning their legislative activities could in theory be interpreted as gag orders that even prohibited legislators from voluntarily responding to inquiries. Of course, this type of gag order would immediately conflict with other constitutional values, including the freedom of speech. Such an extreme interpretation of the privilege also is not necessary to serve the key purposes of the privilege, namely freeing legislators from the burdens and distortions of compelled questioning or potential liability, and freeing them to deliberate more candidly and openly. Accordingly, it is entirely appropriate for holders of the legislative privilege to decide to waive its protections in particular cases.

247. This is not to say that the movement towards open government cannot produce beneficial effects within the legislative branch. For instance, at the federal level, televised coverage of both congressional debate and committee proceedings on C-SPAN has now become a regular feature of our national political life. Congress decided voluntarily to enhance the national dialogue in this fashion with C-SPAN's creation in 1979. *See* S. Con. Res. 22, 101st Cong. (1989) (not enacted) (recognizing C-SPAN's tenth anniversary). More recently, Senator McCain has taken a leading role in urging his congressional colleagues to make public the confidential reports prepared by the Congressional Research Service at the request of individual members. Senator McCain argues that taxpayers deserve to see this material because their dollars have paid for its creation. *See* S. Res. 54, 108th Cong. (2003). Although his general argument runs counter to the justification for a legislative privilege, it too is an example of a voluntary undertaking to increase public access to congressional proceedings.

the deliberative process that deserve to be "as free from bias or pressure as possible."²⁴⁸

C. Individual Nature of the Privilege: Questions of Waiver

Apart from political and administrative questions that legislatures must face as institutions about what kinds of records to publicize and what aspects of the process to open to the public, jurisprudential questions also arise about whether the legislature can strip an individual member of the legislative privilege protections that would otherwise apply to that member. As previously observed,²⁴⁹ a legislator may always choose to waive whatever legislative privilege that member is entitled to assert. But may the legislature as an institution also waive an individual legislator's privilege? In particular, one of the more important questions concerning the relationship between the legislative privilege and open government provisions is whether by enacting such a provision the legislature has waived whatever privilege would otherwise have applied to legislative documents and proceedings. Here, a distinction may exist between institutional records, such as committee documents, and legislators' personal records, such as staff memoranda and correspondence.

With respect to the legislative activities and records of individual members, the legislature should not be allowed to waive the applicable protections of the legislative privilege.²⁵⁰ The same overarching concern, evident throughout the Constitution, of protecting minority views from the tyranny of the majority also counsels against allowing the majority of a legislative body to waive a privilege designed to protect individual members' abilities to serve

248. *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958).

249. See *supra* note 246 and accompanying text.

250. See Brudney, *supra* note 13, at 28-30 (indicating that the Framers rejected the idea that Congress should control its own privilege); Reinstein & Silverglate, *supra* note 13, at 1166-70 (arguing that it is within the courts' power, not Congress', to define the legislative privilege). But see Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption?*, 57 N.C. L. REV. 197, 223-25 (1979) (arguing that the institution should be able to waive an individual member's privilege); Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389, 434-36 (1994) (same).

as free and independent voices on their constituents' behalf.²⁵¹ Indeed, without such a personal privilege of free speech and debate, an individual member's right to participate in deliberations and to vote would necessarily be compromised. Accordingly, several state courts have held that the privilege is personal to each member.²⁵² The United States Supreme Court also has acknowledged the force of the historical argument that the privileges and immunities of the Speech or Debate Clause are individual to each member,²⁵³ although whether an institutional waiver might be possible in some circumstances has not been conclusively resolved as a matter of federal law.²⁵⁴

Thus, open government provisions that might otherwise be interpreted to apply to an individual state legislator's documents and records should remain limited by the legislative privilege. For instance, a freedom of information statute providing that "all public records [kept by any public office] shall be ... available for inspection to any person," and defining public office to include "any state agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of

251. Furthermore, the typical context of constitutional legislative privilege provisions among other grants to individual "Senators and Representatives," "members," or "legislators"—as distinguished from other provisions' grants of power to "each House" of the legislature—reinforces the individual nature of the privilege. See Brudney, *supra* note 13, at 28-29.

252. See *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298-99 (D. Md. 1992) (holding that "legislative immunity is personal and belongs to the individual members of the Maryland Legislature themselves"); *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808) (stating that "each individual member ... is entitled to this privilege, even against the declared will of the house").

253. See *United States v. Helstoski*, 442 U.S. 477, 492-93 (1979); see also *United States v. Brewster*, 408 U.S. 501, 507, 524 (1972) (explaining that the Speech or Debate Clause exists "to protect the integrity of the legislative process by insuring the independence of individual legislators").

254. In any event, the Court also has said that such a waiver "could be shown only by an explicit and unequivocal expression." *Helstoski*, 442 U.S. at 493. In *Wilkins v. Gagliardi*, 556 N.W.2d 171, 178 (Mich. Ct. App. 1996), the Michigan Court of Appeals employed this standard to conclude that the state's Open Meetings Act, while expressly applicable to a "state ... legislative ... committee," did not waive the applicable legislative privilege. *But see* Mich. Mut. Ins. Co. v. Dep't of Treasury, Nos. 178228, 178330, 1996 Mich. App. LEXIS 2245, at *12 (Ct. App. Dec. 10, 1996) (interpreting the constitutional privilege as inapplicable to committee documents in light of the statutory privilege applicable only to individual legislators' records, not committee files). This case is discussed also *supra* notes 174-76 and accompanying text.

government,"²⁵⁵ would appear by its terms to require public access to the records kept by a state legislator's personal office.²⁵⁶ At the same time, a broad interpretation of the legislative privilege would absolutely protect the entire subset of these records that pertain to the legislator's legislative work. The existence of the open government statute should neither become a reason to construe the legislative privilege so narrowly as not to encompass these legislative documents in the first instance, nor be interpreted as the legislature's institutional waiver of the otherwise applicable protections of the privilege to an individual member's legislative activities. Only the legislator should be able to relinquish these protections of the legislative process enshrined in the Speech or Debate clauses.

On the other hand, where the legislative privilege applies to institutional rather than individual interests—as to committee files, for example, or the transcript of a closed executive session of the legislature—an institutional waiver then becomes a genuine possibility. At the federal level, it is routine to distinguish between the personal records of an individual legislator and the records maintained by the House or Senate as institutions, either directly or through such constituent parts as committees and subcommittees.²⁵⁷ Indeed, to ensure that the distinction is properly maintained, the U.S. Senate provides by rule that individual Senators may not release personal Senate records in their possession without Senate approval.²⁵⁸ At the state level it likewise

255. OHIO REV. CODE ANN. §§ 149.43(B)(1), 149.011(A) (West 2002).

256. Even more starkly, a FOI statute might expressly include the legislature's records within its definition of public records. *See, e.g.*, IDAHO CODE § 9-337(10) to (13) (Michie Supp. 2002); N.H. REV. STAT. ANN. § 91-A:4 (Supp. 2002). Illinois' applicable statute also employs such a definition, *see* 5 ILL. COMP. STAT. ANN. 140/2(a), (c) (West Supp. 2002), although a separate provision excludes "[p]reliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated," *see* 5 ILL. COMP. STAT. ANN. 140/7(1)(f) (West Supp. 2002).

257. *See* STANDING RULES OF THE SENATE, Rule XXVI, para. 10(a), *reprinted in* 2 GUIDE TO CONGRESS (5th ed. 2000) (requiring that official committee records, as government property, not be mixed with personal office records); *see also* *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992) (concluding that Presidential documents are President's private property, not government's institutional property).

258. *See* STANDING RULES OF THE SENATE, *supra* note 257, at Rule XI, para. 1 ("No memorial or other paper presented to the Senate, except original treaties finally acted upon, shall be withdrawn from its files except by order of the Senate."). The Senate's longstanding construction of this rule is to apply it to all Senate documents, including personal office

would not usually be difficult to distinguish between individual and institutional records and interests, by focusing for instance on whether documents are under the possession and control of an individual member's personal office, or instead are the files and records of a formally constituted institutional component.²⁵⁹

Where the legislative privilege protects information controlled by the legislature as a whole (or by one of its component parts), the determination of whether to waive the privilege appropriately resides with the institution (perhaps with deference to the view of the particular component). Such a waiver of course could be made on a case-by-case basis, after evaluating the particular public interest to be served thereby.²⁶⁰ Alternatively, the legislature could in advance make a blanket determination to forgo the protections of the legislative privilege in a specific class of cases, for instance, by providing that all committee documents be included within the scope of a public records law or otherwise made publicly accessible.²⁶¹

Legislatures already routinely make similar determinations by internal rule, such as deciding what committee activities to open to the public, or whether to release or even create transcripts of their proceedings. Of course, a legislature's decision to conduct committee meetings in public already involves a trade-off of some of the potential benefits of private deliberation²⁶² in exchange for the important values of open government. Just as legislatures must balance these considerations in establishing their institutional rules, they also are the appropriate entities to determine whether to forgo the protections of the legislative privilege with respect to

records (as well as to all testimony by legislators or their staff concerning their official duties). The Senate then routinely approves the release of particular records upon the request of an individual Senator, provided the Senate is satisfied that the records in question are the individual member's documents. *See, e.g.*, S. Res. 28, 107th Cong. (2001). The same rule also requires full Senate approval before a committee may elect to waive its privilege and release documents, although the Senate's usual practice is also to defer to the committee's judgment concerning the advisability of such a waiver. *See, e.g.*, S. Res. 317, 107th Cong. (2001).

259. In fact, in many states it might be exceedingly easy to distinguish between individual and institutional records, because of the relative dearth of official committee records and legislative history materials generally in state legislatures.

260. *See, e.g.*, S. Res. 317, 107th Cong. (2001) (authorizing Senate subcommittee to release records from the Enron investigation to various law enforcement offices).

261. *See, e.g.*, MICH. COMP. LAWS ANN. § 4.554 (West 1994) (expressly excluding legislative committee records from provision exempting legislator's personal records from civil subpoena).

262. *See supra* Part III.B.

institutional materials or information. Although committee memoranda may as a result be somewhat less candid or direct than if any committee member had the power to preserve their privileged status,²⁶³ it is appropriate that the institution be able to trump the views of individual members in matters of deciding how to conduct its formal processes. Just as it would be a strange form of legislative privilege that would allow an individual legislator to insist, contrary to the legislature's determination to conduct its proceedings in public, that the galleries be cleared and the cameras be turned off before making a floor speech, it also would be anomalous not to allow the legislature to decide the extent to which it was willing to allow external scrutiny of its institutional records.

However, in order to ensure that a legislature's waiver of its applicable privilege in fact represents the institution's considered judgment of the appropriate trade-off between competing values, including the potential detriment to individual members, any such waiver should be explicit and unequivocal.²⁶⁴ This standard not only establishes that the legislature has made a deliberate choice to waive the privilege, but also with respect to prospective waivers ensures that individual legislators are on notice of the resulting narrower scope of privileged activities. Thus, a Michigan court concluded in 1996 that an open meetings statute did not waive the applicable protections of the state Speech or Debate Clause, even though the statute did not expressly exclude legislative proceedings from its operation. Therefore a legislator's actions in conducting a committee hearing, even in intentional violation of the open meetings act, remained privileged.²⁶⁵ A Louisiana court similarly concluded that its constitutional Speech or Debate Clause continued to protect legislative files and records from forced release under provisions of a freedom of information statute,²⁶⁶ just as a Tennessee court held that the legislative privilege precluded judicial

263. Presumably, the intended readers of such a memorandum would also recognize that it does not necessarily contain the more unvarnished analysis that might result if any individual legislator retained a veto power over the question of whether to waive the applicable legislative privilege, and accordingly such readers could seek additional and perhaps more candid analysis from other sources.

264. In light of the interests at stake, it is also appropriate to require that an *individual* legislator's waiver of any applicable legislative privilege also be explicit and unequivocal.

265. See *Wilkins v. Gagliardi*, 556 N.W.2d 171, 175, 177-79 (Mich. Ct. App. 1996).

266. See *Copsey v. Baer*, 593 So. 2d 685, 687-89 (La. Ct. App. 1991).

review of the legislature's exercise of its authority to hold closed sessions.²⁶⁷

IV. A FRAMEWORK FOR ANALYSIS OF SPECIFIC ISSUES OF STATE LEGISLATIVE PRIVILEGE

It is useful to consider on a preliminary basis how the broader concept of the legislative privilege defended in Part III would affect several key applications of the privilege that certain states have approached narrowly or that otherwise merit specific discussion.²⁶⁸ These areas include: whether to extend the privilege to civil suits seeking only equitable relief or in which the privilege holder is not a party; the type of legislative staff to whom a derivative privilege should apply; the types of official legislative activities of legislators and staff that should, and should not, be protected; the applicability of the privilege to personnel decisions; and the prosecution of crime.

A. Kinds of Protection: Third-Party Suits and Declaratory Relief

In light of both the historical origins of the legislative privilege²⁶⁹ and the typical provision's textual prohibition of "questioning" about legislative matters,²⁷⁰ it is surprising that several state courts have

267. See *Mayhew v. Wilder*, 46 S.W.3d 760, 772-76 (Tenn. Ct. App. 2001).

268. Certain core applications of the legislative privilege are widely accepted and do not merit a detailed discussion here. These core applications include: protecting legislators from damage suits in defamation based on statements made or positions taken in performing legislative acts, see *Oates v. Marino*, 106 A.D.2d 289, 290-91 (N.Y. App. Div. 1984); protecting legislators from liability predicated on their support of or opposition to particular legislative measures, see *Lucchesi v. State*, 807 P.2d 1185, 1189 (Colo. Ct. App. 1990); protecting legislative leaders' ability to discuss session strategy and agenda with governor, see *Kerttula v. Abood*, 686 P.2d 1197, 1204 (Alaska 1984); and prohibiting the introduction of evidence of legislative acts in a bribery prosecution, see *Blondes v. State*, 294 A.2d 661, 670 (Md. Ct. Spec. App. 1972), *rev'd*, 330 A.2d 169 (Md. 1975).

269. One of the formative events in the development of the privilege was the 1642 order of King Charles I to seize the papers of five members of Parliament. See *supra* note 18 and accompanying text.

270. The provisions of thirty states (the twenty-three states with provisions essentially identical to the federal provision, see *supra* note 49, plus seven of the twelve states using a "for words spoken [or uttered or used] in debate" formulation of the privilege, namely Idaho, North Dakota, Oregon, South Dakota, Texas, Utah, and West Virginia, see *supra* note 52 and text accompanying note 57) expressly prohibit "questioning," like the federal provision, while the provisions of thirteen states specifically prohibit only "actions" or "prosecutions." See *infra* Appendix.

failed to construe the privilege literally to protect legislators from being compelled to discuss or account for their legislative work. As noted above, examples include: cases denying the privilege in circumstances in which the legislator is "merely" a witness, rather than a party;²⁷¹ cases refusing to extend the privilege to complaints seeking only declaratory relief from legislators named as defendants;²⁷² and cases prohibiting only evidentiary use, but not mere disclosure, of privileged information.²⁷³ These examples demonstrate an unfortunate misunderstanding of both the negative and positive freedoms that the privilege protects.

The failure to extend the legislative privilege in these areas may reflect both the impact of open government ideals, as well as the courts' greater familiarity with other forms of privilege, which are generally interpreted narrowly. Yet as described above, confidentiality of the internal aspects of the legislative process is important in its own right.²⁷⁴ Moreover, efforts to compel legislators to reveal privileged information, or to participate in litigation in which they do not face liability, also would impose precisely the burdens that thoughtful interpreters of the privilege have consistently recognized should not be imposed.²⁷⁵ The failure to extend the privilege also could make legislators less willing to increase public access to the legislative process voluntarily.²⁷⁶

271. See, e.g., *supra* notes 159-65 and accompanying text.

272. See, e.g., *supra* notes 149-51, 154-58 and accompanying text.

273. See, e.g., *supra* notes 187-92 and accompanying text.

274. As discussed above, the U.S. Court of Appeals for the District of Columbia recently recognized that legislators merit at least as much protection from efforts merely to force them to reveal aspects of the legislative process as they do from attempts to hold them liable for their legislative activities. See *supra* notes 138-40 and accompanying text; *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418, 421 (D.C. Cir. 1995); see also *Stamler v. Willis*, 287 F. Supp. 734, 738 (N.D. Ill. 1968), *vacated*, 393 U.S. 407 (1969) (explaining that the remedy sought does not alter the immunity, for "[t]he precedents, the history of the provision and the required broad reading of the Clause dictate the conclusion that the kind of relief prayed against the legislator has no effect on the availability of the defense of immunity.").

275. See *supra* notes 208-18 and accompanying text. It is fanciful to suggest that legislators could avoid these burdens by choosing not to defend themselves when all that is at issue is a declaratory judgment. See *Colo. Common Cause v. Bledsoe*, 810 P.2d 201, 211 (Colo. 1991). As parties to the action, they still face non-negligible political risks, as well as discovery obligations.

276. If broadly interpreted, the legislative privilege should remove some of the potential barriers or disincentives to voluntary openness. These include legislators' concerns about becoming the victim of a lawsuit because of their actions or otherwise being required to

Accordingly, the legislative privilege should apply *absolutely* to all protected legislative acts, prohibiting not only liability but also all forms of judicial “questioning” of, or other compelled disclosures from, individual members.

B. Protected Legislative Actors: Scope of Staff Coverage

In *Gravel* in 1972, the United States Supreme Court recognized, with respect to the United States Congress, that the modern legislative process had evolved to the point that members necessarily depended on aides to perform key aspects of their legislative function.²⁷⁷ Since that time, many state legislatures also have come to rely more and more heavily on the assistance of legislative staff,²⁷⁸ who on many occasions now naturally perform work that undoubtedly would be protected by the legislative privilege had it been performed by the legislators themselves. Although state legislatures continue to lag well behind Congress in quantity and specialization of staff members, and great variation in the level of legislative professionalization exists between states, any decision to employ staff should be respected as the legislature’s judgment that such assistance is essential to the successful conduct of its legislative affairs. In such circumstances, the legislators on whose behalf the staff are working as “alter egos” should be able to invoke the legislative privilege to prohibit questioning their aides about their legislative activities.²⁷⁹

As a general principle, there appears to be little dispute about this proposition. Yet in practice, many courts are often tempted to view the legislative work of staff as somehow less protected than the same work performed by legislators, rather than focusing on the correct issue of whether the activities in question are an integral part of the legislative process.²⁸⁰ As a result, some courts simply have failed to recognize correctly what staff work is privileged

explain, justify, or defend their legislative activities in court. The absolute protections of a broad legislative privilege therefore may even increase legislators’ voluntary willingness to disclose or reveal additional aspects of their internal deliberations.

277. See *supra* notes 118-21 and accompanying text.

278. See *supra* note 102.

279. Because the privilege is personal to each member and extends to staff only indirectly or derivatively, the member must ask the staff person to assert the privilege. See *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 299, 301 (D. Md. 1992).

280. See, e.g., *id.* at 298.

legislative work. Little doubt should exist, for instance, that key fiscal policy analysts for party caucus leaders should not be compelled to answer questions about the advice that they have given legislators regarding the effects of various possible funding formulas under legislative consideration.²⁸¹ The courts also should recognize that the privilege should extend to the work of a legislature's professional staff organization in drafting or analyzing proposed bills at members' requests.²⁸² Alter egos include a legislature's professional staff, an individual legislator's personal staff, and caucus personnel, whenever they perform acts that would be protected if performed by a member. The refusal to extend the privilege to their activities risks significantly curtailing the appropriate scope of legislators' deliberative freedom.

C. Protected Legislative Acts: Gathering Information

Some state courts may have failed to protect legislative staff adequately partly out of difficulty in recognizing what are integral parts of the legislative function. Although there is little disagreement that attending hearings, debating, and voting are essential legislative acts, it should be equally clear that seeking and receiving information about potential legislative issues, analyzing that information, caucusing, and otherwise communicating about it also are legitimate legislative activities that legislators should feel fully at liberty to undertake.²⁸³ Accordingly, legislators and their staff should not be questioned about their confidential analysis or advice, should not be required to disclose who has participated in

281. See *DeRolph v. State*, No. 22043 (Ohio Ct. Com. Pl., filed Aug. 4, 1998) (mem).

282. See *DeRolph v. State*, 747 N.E.2d 823 (Ohio 2001).

283. As the Ninth Circuit has properly concluded, "[o]btaining information pertinent to potential legislation or investigation is one of the 'things generally done in a session of the House,' *Kilbourn v. Thompson*, 103 U.S. at 204, concerning matters within the 'legitimate legislative sphere,' *Eastland*, 421 U.S. at 503." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983). Several federal district courts also have held that the legislative privilege applies to internal congressional communications, and internal drafts of unprivileged communications, on the bases that such internal communications are "an integral part" of the legislative process and that permitting discovery of such internal matters would cause a "significant entrenchment on legislative independence." *United Transp. Union v. Springfield Terminal Ry. Co.*, 132 F.R.D. 4, 6-9 (D. Me. 1990); see also *Miller*, 709 F.2d at 530-31; *Tavoulareas v. Piro*, 527 F. Supp. 676, 682 (D.D.C. 1981).

legislative discussions, and should not otherwise "be catechized about the manner in which [they] obtained information."²⁸⁴

An understandable misreading of the Supreme Court's Speech or Debate Clause jurisprudence may explain some state courts' unduly narrow decisions refusing to treat information gathering as an integral part of the legislative process.²⁸⁵ In particular, the Supreme Court had declared in a portion of its *Gravel* opinion that members of Congress might be questioned about their sources of information, at least "at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act."²⁸⁶ In practice, however, inquiries of legislators about the sources of legislative information almost always *will* require testimony about a legislative act, namely, the act of formulating a legislative position. Accordingly, a number of lower federal courts appear already to have confined this aspect of *Gravel* to its particular facts,²⁸⁷ and state courts should also decline to follow it.

284. *Miller*, 709 F.2d at 530.

285. *See, e.g., City of Dublin v. State*, 742 N.E.2d 232 (Ohio Ct. App. 2000).

286. *Gravel v. United States*, 408 U.S. 606, 622 (1972). This aspect of the *Gravel* decision, which was addressed *sua sponte* (over the objections of four dissenters) and arose in the charged atmosphere surrounding the theft of classified government documents, may have been somewhat ill-considered.

287. For instance, in 1983, the Ninth Circuit distinguished this aspect of *Gravel* and instead relied on *Eastland* to hold that in civil proceedings the Speech or Debate Clause extended to prohibit questioning about a legislator's sources of information, because a legislator's receipt of "information pertinent to potential legislation or investigation" is a part of the privileged legislative process. *Miller*, 709 F.2d at 528-31. The court refused to distinguish between information that legislators or their staff actively solicit in connection with legislative activity, and information that they may passively receive from noncongressional sources. *See id.* But *see Tavoulareas*, 527 F. Supp. at 680 (concluding that "mere passive receipt by congressional staff of information voluntarily proffered by various sources" is not a protected legislative act). Other cases have shown a similar solicitude for Congress' right to inform itself about legislative matters as it sees fit. *See, e.g., Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416, 419-20 (D.C. Cir. 1995) (stating that legislative privilege "permits Congress to conduct investigations and obtain information without interference from the courts," and describing the argument that sources of information are unprotected as a "vast overreading of *Gravel*"); *MINPECO S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988) (protecting "process by which a committee takes statements and prepares them for publication"); *cf. Hutchinson v. Proxmire*, 443 U.S. 111, 121 n.10 (1979) ("Regardless of whether and to what extent the Speech or Debate Clause may protect calls to federal agencies seeking information, it does not protect attempts to influence the conduct of executive agencies or libelous comments made during the conversations.").

It simply is not more valuable to allow litigants or others to require a legislator to reveal with whom that legislator has conferred, for instance,²⁸⁸ than it is to protect the legislator's ability to receive information freely from a variety of sources. Alternative means exist to advance the legitimate public interest in monitoring the influence on the legislative process of lobbyists, interest groups, and other actors. In particular, lobbying disclosure and campaign finance laws can provide a preferable means of policing and regulating these influences directly, rather than encroaching upon legislative freedom in an effort to achieve indirectly the laudable purpose of identifying improper influence or pressure on the legislative process.²⁸⁹ Furthermore, protecting legislators' information gathering and processing activities will often have the secondary benefit of protecting citizens' rights to petition their government in confidence.²⁹⁰ Although performing constituent casework should not be treated as a protected legislative act, in the member's hands, a constituent's request for such assistance often may be privileged, to the extent that it could become the predicate for, or provide information relevant to, a *legislative* response. For instance, a citizen's complaint to her representative about an agency's delay in processing her claim may lead the representative not to gently prod the agency to be more responsive, but instead to propose a statutory reorganization of the agency, or to appropriate new funds for additional agency personnel.

288. See *City of Dublin*, 742 N.E.2d at 232.

289. Justice Brandeis' cautionary remarks of seventy-five years ago may again be instructive here:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

290. See, e.g., *Melvin v. Doe*, 48 Pa. D. & C.4th 566, 574-76 (Ct. Com. Pl. 2000) ("[E]ven if the questioning were not barred by the Speech or Debate Clause of the Pennsylvania Constitution, it would violate a citizen's right to petition the government in confidence.").

D. Unprotected Official Acts: Disseminating Information to the Public

Of course, a healthy representative democracy heavily depends upon effective two-way communication between the legislature and the citizenry. Nevertheless, in comparison with collecting and analyzing legislative information, ensuring that legislative information is shared with the general public is a less essential aspect of a legislator's duties, primarily because it can also be accomplished by the press and other legislative observers.²⁹¹ As a general matter, these observers can ensure that the public is informed about what the legislature has done, without needing to apply the legislative privilege to legislators' media appearances or press releases.

Otherwise, despite the benefits to the legislative process that would flow were the privilege applied to protect legislators' ability to communicate openly and directly with the public about the legislative agenda,²⁹² the temptations would be great for legislators to abuse the legislative privilege in campaign speeches or constituent mass mailings, for instance, to accomplish purely political ends.²⁹³ Legislators may simply feel less naturally constrained to avoid exaggeration or rhetorical excess—in short, may have too much positive liberty—in press releases or post-hoc rationalizations on the town square, whereas when legislators provide full explanations for their acts within the chamber in full view of their colleagues, they may at least sometimes be more circumspect. To ensure that the public can be well informed, the legislature in turn should voluntarily permit as much of its official

291. On this point, many members of Congress were most upset with the Supreme Court's similar view in *Hutchinson v. Proxmire*, *Doe v. McMillan*, and *Gravel*, that members' press releases or private publication of committee reports were unprivileged. See *supra* notes 116-17 and accompanying text; see also *supra* note 107.

292. A recognition of the importance of the informing function of legislatures may explain the decisions of Hawaii and Oklahoma to apply their legislative privilege even to statements in the press. See *supra* note 194 and accompanying text. Furthermore, other circumstances present in those cases significantly reduced the types of hazards that would ordinarily be present in legislators' mass communications.

293. Of course, an elected representative's legislative work typically has a political component. Nonetheless, it is common to distinguish direct campaigning and other political activities from legislative activities, for instance, as in prohibiting legislative staff from engaging in political activities on government time.

processes as possible to occur as a matter of public record.²⁹⁴ Furthermore, to the extent that legislators' privileged floor remarks are also subject to abuse for partisan or personal political ends, it is nonetheless crucially important that their speeches and debates remain privileged, because they can directly influence their colleagues and will become part of the official record of the proceedings.²⁹⁵

In contrast to legislators' mass communications, legislators' private communications with constituents about legislative issues should remain privileged. Although this is an issue that has not been clearly addressed by any court as a matter of either state or federal law, it is worth observing that the hazards noted above of applying the privilege to legislators' press statements and media appearances are not present in the natural give-and-take over the merits of a specific issue that may and should occur between legislators and individual constituents. Whether oral or written, these "retail" communications concerning legislative issues merit the protections of the legislative privilege. These protections are necessary to foster the fullest exchange of ideas at germinal stages of the legislative process, as well as to preclude courts from inappropriately seeking to divine legislative purpose or otherwise intrude upon the deliberations of individual legislators.

E. Legislative Personnel Decisions

In most states, the professionalization of state legislatures that occurred in the latter part of the twentieth century brought with it

294. On this theory, the Supreme Court's refusal in *Doe v. McMillan*, 412 U.S. 306 (1973), to apply the legislative privilege to the distribution of committee reports is questionable. *Abercrombie v. McClung*, 525 P.2d 594 (Haw. 1974), adds an interesting nuance, with the state court applying the privilege to a legislator's "clarification" of a floor speech, entirely in response to an unsolicited press inquiry.

295. One benefit of the legislative privilege is that it permits the legislative branch to determine what aspects of its processes will be available as legislative history materials to statutory interpreters. See *supra* note 215. Absent the privilege, litigants and courts might encounter a range of post-hoc explanations of legislative purpose or intent, dependent entirely on the happenstance of which legislators were compelled to testify about the meaning of the enactment. But the existence of the legislative privilege instead requires interpreters to rely only on whatever formal contemporaneous record of the legislative process the legislature has decided to create.

an increase in legislative staff. An important question concerning the scope of state legislative privileges therefore is in what contexts the privilege should protect employment decisions concerning legislative staff. Of course, unless some substantive legal right would provide a legislative staff member with a cause of action against a legislator or legislative office, the issue is moot.²⁹⁶ But in many jurisdictions, state employment laws may not exclude the legislative branch from the scope of covered government employers.²⁹⁷

Assuming that a state legislature has enacted a generally applicable law giving an aggrieved legislative employee a cause of action against a legislative employer, the issue becomes in what circumstances that statutory right will give way to the legislative privilege. As the Supreme Court recognized in *Gravel*,²⁹⁸ legislators often depend on staff to perform essential legislative activities. On the other hand, staff may also perform a great deal of work that is not integrally related to the deliberative process. Moreover, staff who are adversely affected by a legislator's personnel decision are in a different position than disgruntled constituents.²⁹⁹

Ideally, the legislative privilege should insulate only those personnel decisions made because of their impact on the legislative process,³⁰⁰ in order to spare legislators the burdens of litigation arising directly out of their legislative judgments, and to allow them

296. In Congress, such personnel issues were rare prior to passage of the Congressional Accountability Act in 1995, because until that point, Congress had exempted itself from most federal labor and employment provisions.

297. In addition, certain federal employment obligations continue to apply to state legislators and legislatures, notwithstanding the Supreme Court's recent dramatic narrowing of federal laws applicable to state actors. With respect to these federal rights, the legislative privilege question is actually a matter of federal common law, rather than of the scope of the applicable state constitutional provisions that are the focus of this Article.

298. See *supra* notes 118-21 and accompanying text.

299. See Brudney, *supra* note 13, at 48:

When outside individuals or groups complain about official congressional conduct, the existence of a public record will likely provide an accessible and adequate basis for resolving legal claims.... By contrast, when current or former legislative aides complain about the actions of their employers, ... it is likely that such speech or conduct was observed only by the legislator and the prospective plaintiffs.

300. For example, a legislator's decision to hire a key aide on the basis of ideology or personal background. See *id.* at 33-39.

appropriate flexibility in pursuing their legislative agenda. As a practical matter, however, it may be difficult to identify which personnel decisions are the result of a legislator's judgment about how best to further this agenda, and which are not. For instance, although the privilege might ordinarily cover employment actions affecting those key legislative staff who function as a member's "alter ego," we might not wish to insulate from judicial scrutiny certain employment actions affecting even these personnel.³⁰¹ Conversely, although the privilege might rarely apply to employees whose typical duties are remote from the policy-making arena,³⁰² we can imagine exceptions to this presumption as well.

One way to balance the tension in this area is to require a threshold showing of legislative purpose from a legislator who seeks to invoke the privilege. In the absence of this threshold showing, a personnel decision would be presumed to be administrative and unprivileged, rather than legislative.³⁰³ With respect to any particular employment decision, a legislator could make such a showing either by establishing a *prima facie* case that some judgment about the legislative process motivated the decision (as for instance when a legislator newly elected to a leadership position decides that a key aide now needs to have a background in fiscal analysis), or by demonstrating that effective judicial scrutiny of the personnel decision would inevitably require intrusive inquiries into privileged legislative conduct (such as into the nature of strategic

301. *Cf. Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 31 n.5 (D.D.C. 2001) (considering scope of federal Speech or Debate Clause when Senator's Chief of Staff alleges sexual harassment).

302. *See State v. Haley*, 687 P.2d 305 (Alaska 1984); *Irvin v. McGee*, No. 78866, 1993 Mass. Super. LEXIS 311 (Super. Ct. Sept. 27, 1993).

303. An alternative effort to balance this tension is the approach that Congress has taken in the Congressional Accountability Act, which allows congressional employees to bring personnel actions only against the institution through the "employing office" of the employee, rather than personally against an individual legislator. *See* 2 U.S.C. §§ 1405, 1408 (2000). This approach represents Congress' judgment that for purposes of personnel actions, these employing offices are simply outside the scope of the legislative privilege. At the same time, nothing about the Congressional Accountability Act impairs the applicability of the legislative privilege to documents or testimony that might otherwise be important to a personnel action brought under the Act. In other words, a legislator retains absolute immunity from being questioned concerning legislative acts even at the expense of thwarting a claim for relief under the Act.

disagreements between a legislator and an aide).³⁰⁴ In making this threshold showing, a legislator should be subject to limited cross-examination, provided the cross-examination itself does not involve questioning about integral parts of the legislative process.³⁰⁵ Once this threshold showing is made, it then could be rebutted only by satisfactory evidence that the personnel decision in fact was the product of unprivileged motives. In that case, a legislator might then need to defend the merits of the lawfulness of the challenged personnel action at trial.³⁰⁶ In the course of such a trial, however, the legislator still should be able to mount as a legal defense the claim that a privileged motive justified the personnel action.

F. Prosecution of Criminal Conduct

A robust legislative privilege need not and should not preclude vigorous enforcement of criminal laws focused on potential abuses of legislative and government power. Principal among these are anti-bribery laws,³⁰⁷ conflict of interest prohibitions,³⁰⁸ and fraud or theft in office provisions.³⁰⁹ At the same time, prosecutors may face some unique obstacles in pursuing these charges because of the legislative privilege.³¹⁰

304. Hypothetical arguments about how a staffer could serve as the legislator's alter ego, a type of argument recently accepted by a District Court in *Bastien v. Office of Campbell*, 209 F. Supp. 2d 1095, 1103-04 (D. Colo. 2002), should not suffice. See *supra* note 137.

305. Admittedly, it might sometimes be tricky for a court to apply this standard, but because it derives immediately from the language of the legislative privilege itself, it is the most appropriate way to preserve the privilege.

306. At this stage as well, state legislatures could adopt an alternative system in which aggrieved legislative employees can continue to maintain their personnel action only against the state, rather than against individual legislators, as Congress elected to do under the Congressional Accountability Act. See *supra* note 303. In creating such a system, the legislature would want to consider how to handle a circumstance in which a legislator, now serving as a witness, continues to assert a valid privilege against providing testimony or other evidence relevant to the adjudication of the personnel matter. Options would include receiving such evidence *in camera*, or permitting the plaintiff to recover monetary damages essentially by default. Injunctive relief—requiring promotion or reinstatement, for instance—would be problematic where a valid privilege exists.

307. See, e.g., *Blondes v. State*, 294 A.2d 661, 665-68 (Md. Ct. Spec. App. 1972).

308. See, e.g., *State v. Gregorio*, 451 A.2d 980, 987-88 (N.J. Super. Ct. Law Div. 1982).

309. See, e.g., *People v. Ohrenstein*, 565 N.E.2d 493, 500-01 (N.Y. 1990).

310. See, e.g., *State v. Dankworth*, 672 P.2d 148 (Alaska Ct. App. 1983) (dismissing conflict of interest charge for lack of admissible evidence); *Blondes*, 294 A.2d at 665-68 (dismissing

For instance, if a legislator takes a bribe to vote in a certain way, both the fact of the legislator's vote and the motivation for doing so should remain privileged.³¹¹ To conclude otherwise would render elected representatives too vulnerable to politically motivated prosecutions challenging the very core of legislative activities that the Speech or Debate privilege is designed to protect.³¹² On the other hand, proof of the legislator's receipt of the bribe, without more—and in particular, without proof that the legislator in fact voted a particular way—should suffice for purposes of obtaining a criminal conviction. The Supreme Court's distinction between privileged legislative activity and unprivileged illicit promises to perform a certain legislative act therefore remains a workable one.³¹³

In addition, the legislative privilege should not compromise states' abilities to prosecute legislators for violations of campaign laws and financial disclosure obligations.³¹⁴ Although the underlying activities of campaigning and raising money are obviously related to the legislative process, they are not themselves integral parts of "the consideration and passage or rejection of proposed legislation."³¹⁵ The legislative privilege should protect the deliberative processes among our elected representatives, but not the processes by which we select our representatives, or the essentially political activities of those representatives.³¹⁶

bribery charge for lack of admissible evidence).

311. See *supra* notes 123-26 and accompanying text.

312. See, e.g., *State v. Neufeld*, 926 P.2d 1325, 1333-41 (Kan. 1996) (discussing dangers of judicial inquiry into motives for legislative acts).

313. See *supra* note 125 and accompanying text.

314. See, e.g., *State v. Gregorio*, 451 A.2d 980, 987-88 (N.J. Super. Ct. Law Div. 1982) (holding Speech or Debate Clause did not protect filing false financial disclosure report).

315. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

316. See *State v. Dankworth*, 672 P.2d 148, 151 (Alaska Ct. App. 1983) (distinguishing political activities, performed to ensure reelection, from legislative activities, performed to influence legislation). For cases denying claims of legislative privilege when legislators used government employees for campaign activities, see *United States v. Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir. 1995), and *People v. Ohrenstein*, 565 N.E. 2d 493, 500-01 (N.Y. 1990).

G. A Note on State Legislators and the Federal Common-Law Legislative Privilege

One remaining aspect of the scope of the legislative privilege available to state legislators concerns the immunity available to them in proceedings under federal law, where principles of supremacy mean that their state constitutional privilege offers them no protection. The Supreme Court established in 1951 that, as a matter of federal common law, state legislators had an absolute immunity against civil liability in federal court for their performance of legislative duties.³¹⁷ The Court described the common-law legislative privilege as “a tradition so well grounded in history and reason” that it could not believe that in enacting the precursor of 42 U.S.C. § 1983, Congress covertly intended for federal statutory law to impinge upon this tradition.³¹⁸

Thirty years later, however, the Court determined that federal *criminal* law covertly did supersede a state legislator’s claim to federal common-law legislative immunity.³¹⁹ In answering the question whether federal common law should recognize a legislative privilege for state legislators in this context, the Court first interpreted a primary purpose behind such a privilege as protecting the horizontal separation of powers.³²⁰ In light of the Supremacy Clause the Court rejected this purpose as a justification for recognizing a common-law privilege for state legislators in federal criminal proceedings.³²¹ The Court then recognized another primary purpose of the privilege as “the need to insure legislative independence.”³²² Here, while acknowledging that “principles of comity command careful consideration” of the state legislative interests at stake, the Court ultimately concluded that comity must yield to the federal interest in enforcing federal criminal statutes.³²³ The Court therefore refused to extend a common-law legislative privilege to state legislators in federal criminal proceedings. As a result, barring

317. See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

318. *Id.* at 376.

319. See *United States v. Gillock*, 445 U.S. 360 (1980).

320. *Id.* at 369-70.

321. *Id.* at 370.

322. *Id.* at 371.

323. *Id.* at 373.

either a congressional or judicial change in this area of the law, even state 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.

This disparity in protection was a questionable result even at the time of the Court's decision. The Court's increasing solicitude for state sovereignty in the past decade,³²⁴ however, raises the question whether the Court would have struck the balance differently had the issue come before it for the first time today, particularly given that a core function of state sovereignty is to protect the processes by which state laws are made. Furthermore, apparently absent from the decision was any consideration of the Constitution's guarantee to every state of a "Republican Form of Government."³²⁵ Coupled with principles of state sovereignty, this guarantee might have provided a stronger basis for preserving the salutary effects, partially conceded by the Court,³²⁶ of a vigorous common-law legislative privilege, even over the undeniable potential that federal criminal wrongdoing might as a result go unpunished. This of course is merely the same trade-off that the Founders originally made with respect to members of Congress, as the Court itself has often recognized in interpreting the federal Speech or Debate Clause.³²⁷ But for now, state legislators have no legislative privilege in federal criminal proceedings.

An easy, but inadequate, response is to assert that as long as state legislators steer clear of federal criminal law, they will not actually be any less well off than members of Congress. This misses a point the Supreme Court has repeatedly made about the federal Speech or Debate Clause: the Clause appropriately was designed to prohibit judicial inquiry into legislative acts even, *and indeed especially*, where this might preclude criminal prosecutions or

324. The literature concerning the "New Federalism" is already quite rich. See, e.g., Marci A. Hamilton, *Nine Shibboleths of the New Federalism*, 47 WAYNE L. REV. 931 (2001); Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 OKLA. CITY U. L. REV. 869 (2000); Mark Tushnet, *What Is the Supreme Court's New Federalism?*, 25 OKLA. CITY U. L. REV. 927 (2000).

325. U.S. CONST. art. IV, § 4.

326. See *Gillock*, 445 U.S. at 373.

327. See *supra* notes 122-26 and accompanying text.

make them more difficult, precisely because threats of prosecution historically have been used to intimidate legislators.³²⁸ In addition, the protections may well be unavailable not in a case in which a legislator is suspected or accused of any federal criminal wrongdoing, but only in a context in which a federal prosecutor, for purposes of prosecuting a third party, seeks evidence from state legislators that would otherwise be privileged. This latter possibility means that core legislative functions performed by state legislators today are simply never absolutely privileged, given that in myriad unanticipated ways a federal prosecutor one day may compel disclosures about them.

CONCLUSION

A growing body of state court decisions addresses the application of the constitutional legislative privilege of free speech and debate to aspects of contemporary state legislative process. In the vast majority of the states, the legislative privilege provisions persist today in almost the same form and with fundamentally the same purpose that the privilege had in England centuries ago. Nevertheless, recent experiences in several states suggest that the value of a robust legislative privilege in protecting legislative independence today is not fully understood or appreciated. The privilege exists not only to grant legislators the freedom to speak openly and directly without fear of reprisal or judicial second-guessing, but also to provide them the liberty to work creatively, energetically, and at times confidentially, without threat of subsequent intrusion or compelled disclosure.

Because state legislatures increasingly serve as the forums for significant policy choices, the public obviously has an interest in seeing these decisions made through open processes. Yet there is nothing necessarily inconsistent with having open institutional legislative processes while also protecting legislators' abilities to protect those aspects of their individual consideration and deliberation that they desire to keep private, by insulating these processes from judicial interference. The alternative—compelled

328. See, e.g., *United States v. Helstoski*, 442 U.S. 477, 488-89, 491-92 (1979).

access to internal documents, to behind the scenes deal making, to the work of legislative staff—may seem superficially attractive, but in the end would come at a price. Elected representatives would become reluctant to exchange drafts or brainstorm with colleagues. Personal staff members would become cautious in their advice. Professional legislative staff would be silenced or might hedge their counsel out of fear that it could be misused for partisan gain. Caucuses would be less able to strategize effectively. Litigants and attorneys could seek to manipulate the legislative process for the purpose of advancing a litigation strategy or a private discovery agenda. In short, legislators forced, either directly or through their staff, to produce documents or answer interrogatories would face unnecessary and inappropriate burdens that interrupt the legislative business, limit their independence, and reduce their freedom and ability to legislate effectively. Ironically, to the extent that legislatures lack confidence in the privileged status of their work, they might in the end choose to conduct less of their processes in public.

Accordingly, states struggling to balance ideals of open government with legislative independence should recognize that the proper solution remains political accountability, rather than judicial compulsion. Legislators already understand the importance of having public institutional processes, for indeed this openness is crucial to the success of their relationship with constituents. Legislatures therefore will continue, as a matter of institutional rule, shaped by both constitutional constraints and political and policy concerns, to provide for public access to floor sessions and committee hearings, with only rare exceptions. Lobbying and campaign finance disclosure laws are a more appropriate vehicle to increase the kind and amount of additional information publicly available about the variety of influences on the legislative process, without the burdens and distortions that result from judicial intrusions into legislators' privileged activities. Moreover, appropriate individual waivers of the legislative privilege in particular circumstances would allow "questioning" concerning otherwise protected aspects of the process, thus further enhancing the flow of information to the public from legislatures. But beyond these measures, we should be careful not to undermine the legislative

process by denying legislators their constitutional privilege to decline judicial efforts to expose those aspects of their legislative work that they choose to conduct privately. Rather, we should focus our efforts on working to enhance legislators' political accountability for legislative judgments and activities.

APPENDIX – STATE CONSTITUTIONAL LEGISLATIVE PRIVILEGES

ALABAMA

Members of the legislature shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house shall not be questioned in any other place. ALA. CONST. art. IV, § 56.

ALASKA

Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, going to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace. ALASKA CONST. art. II, § 6.

ARIZONA

No member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate. ARIZ. CONST. art. IV, Pt. 2, § 7.

ARKANSAS

The members of the General Assembly shall, in all cases except treason, felony and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place. ARK. CONST. art. V, § 15.

CALIFORNIA

No constitutional provision.

COLORADO

The members of the general assembly shall, in all cases except treason or felony, be privileged from arrest during their attendance at the sessions of their respective houses, or any committees thereof, and in going to and returning from the same; and for any speech or debate in either house, or any committees thereof, they shall not be questioned in any other place. COLO. CONST. art. V, § 16.

CONNECTICUT

The senators and representatives shall, in all cases of civil process, be privileged from arrest, during any session of the general assembly, and for four days before the commencement and after the termination of any session thereof. And for any speech or debate in either house, they shall not be questioned in any other place. CONN. CONST. art. III, § 15.

DELAWARE

The Senators and Representatives shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place. DEL. CONST. art. II, § 13.

FLORIDA

No constitutional provision today.

GEORGIA

The members of both houses shall be free from arrest during sessions of the General Assembly, or committee meetings thereof, and in going thereto or returning therefrom, except for treason, felony, or breach of the peace. No member shall be liable to answer in any other place for anything spoken in either house or in any committee meeting of either house. GA. CONST. art. III, § IV, Para. IX.

HAWAII

No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions; and members of the legislature shall, in all cases except felony or breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same. HAW. CONST. art. III, § 7.

IDAHO

Senators and representatives in all cases, except for treason, felony, or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and shall not be liable to any civil process during the session of the legislature, nor during the ten days next before the commencement thereof; nor shall a member, for words uttered in debate in either house, be questioned in any other place. IDAHO CONST. art. III, § 7.

ILLINOIS

Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings. ILL. CONST. art. IV, § 12.

INDIANA

Senators and Representatives, in all cases except treason, felony, and breach of the peace, shall be privileged from arrest, during the session of the General Assembly, and in going to and returning from the same; and shall not be subject to any civil process, during the session of the General Assembly, nor during the fifteen days next before the commencement thereof. For any speech or debate in either House, a member shall not be questioned in any other place. IND. CONST. art. IV, § 8.

IOWA

No constitutional provision.

KANSAS

For any speech, written document or debate in either house, the members shall not be questioned elsewhere. No member of the legislature shall be subject to arrest—except for treason, felony or breach of the peace—in going to, or returning from, the place of meeting, or during the continuance of the session; neither shall he be subject to the service of any civil process during the session, nor for fifteen days previous to its commencement. KAN. CONST. art. II, § 22.

KENTUCKY

The members of the General Assembly shall, in all cases except treason, felony, breach or surety of the peace, be privileged from arrest during their attendance on the sessions of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place. KY. CONST. § 43.

LOUISIANA

A member of the legislature shall be privileged from arrest, except for felony, during his attendance at sessions and committee meetings of his house and while going to and from them. No member shall be questioned elsewhere for any speech in either house. LA. CONST. art. III, § 8.

MAINE

The Senators and Representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at, going to, and returning from each session of the Legislature, and no member shall be liable to answer for anything spoken in debate in either House, in any court or place elsewhere. ME. CONST. art. IV, Pt. 3, § 8.

MARYLAND

No Senator or Delegate shall be liable in any civil action, or criminal prosecution, whatever, for words spoken in debate. MD. CONST. art. III, § 18.

MASSACHUSETTS

The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever. MASS. CONST. Pt. 1, art. XXI.

MICHIGAN

Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house. MICH. CONST. art. IV, § 10.

MINNESOTA

The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place. MINN. CONST. art. IV, § 10.

MISSISSIPPI

No constitutional provision.

MISSOURI

Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the session of the general assembly, and for the fifteen days next before the commencement and after the termination of each session; and they shall not be questioned for any speech or debate in either house in any other place. MO. CONST. art. III, § 19.

MONTANA

A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature. MONT. CONST. art. V, § 8.

NEBRASKA

No member of the Legislature shall be liable in any civil or criminal action whatever for words spoken in debate. NEB. CONST. art. III, § 26.

NEVADA

No constitutional provision.

NEW HAMPSHIRE

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. N.H. CONST. Pt. 1, art. 30.

NEW JERSEY

Members of the Senate and General Assembly shall, in all cases except treason and high misdemeanor, be privileged from arrest during their attendance at the sitting of their respective houses, and in going to and returning from the same; and for any statement, speech or debate in either house or at any meeting of a legislative committee, they shall not be questioned in any other place. N.J. CONST. art. IV, § IV, para. 9.

NEW MEXICO

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house. N.M. CONST. art IV, § 13.

NEW YORK

For any speech or debate in either house of the legislature, the members shall not be questioned in any other place. N.Y. CONST. art. III, § 11.

NORTH CAROLINA

No constitutional provision.

NORTH DAKOTA

Members of the legislative assembly are immune from arrest during their attendance at the sessions, and in going to or returning from the sessions, except in cases of felony. Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings. N.D. CONST. art. IV, § 15.

OHIO

Senators and representatives, during the session of the general assembly, and in going to, and returning from the same, shall be privileged from arrest, in all cases, except treason, felony, or breach of the peace; and for any speech, or debate, in either house, they shall not be questioned elsewhere. OHIO CONST. art. II, § 12.

OKLAHOMA

Senators and Representatives shall, except for treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, and, for any speech or debate in either House, shall not be questioned in any other place. OKLA. CONST. art. V, § 22.

OREGON

Senators and Representatives in all cases, except for treason, felony, or breaches of the peace, shall be privileged from arrest during the session of the Legislative Assembly, and in going to and returning from the same; and shall not be subject to any civil process during the session of the Legislative Assembly, nor during the fifteen days next before the commencement thereof: Nor shall a member for words uttered in debate in either house, be questioned in any other place. OR. CONST. art. IV, § 9.

PENNSYLVANIA

The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place. PA. CONST. art. II, § 15.

RHODE ISLAND

The persons of all members of the general assembly shall be exempt from arrest and their estates from attachment in any civil action, during the session of the general assembly, and two days before the commencement and two days after the termination thereof, and all process served contrary hereto shall be void. For any speech in debate in either house, no member shall be questioned in any other place. R.I. CONST. art. VI, § 5.

SOUTH CAROLINA

No constitutional provision.

SOUTH DAKOTA

Senators and representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same; and for words used in any speech or debate in either house, they shall not be questioned in any other place. S.D. CONST. art. III, § 11.

TENNESSEE

Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place. TENN. CONST. art. II, § 13.

TEXAS

No member shall be questioned in any other place for words spoken in debate in either House. TEX. CONST. art. III, § 21.

UTAH

Members of the Legislature, in all cases except treason, felony or breach of the peace, shall be privileged from arrest during each session of the Legislature, for fifteen days next preceding each session, and in returning therefrom; and for words used in any speech or debate in either house, they shall not be questioned in any other place. UTAH CONST. art. VI, § 8.

VERMONT

The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever. VT. CONST. chap. I, art. XIV.

VIRGINIA

Members of the General Assembly shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during the sessions of their respective houses; and for any speech or debate in either house shall not be questioned in any other place. They shall not be subject to arrest under any civil process during the sessions of the General Assembly, or during the fifteen days before the beginning or after the ending of any session. VA. CONST. art. IV, § 9.

WASHINGTON

No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate. WASH. CONST. art. II, § 17.

WEST VIRGINIA

Members of the legislature shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during the session, and for ten days before and after the same; and for words spoken in debate, or any report, motion or proposition made in either house, a member shall not be questioned in any other place. W. VA. CONST. art. VI, § 17.

WISCONSIN

No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate. WIS. CONST. art. IV, § 16.

WYOMING

The members of the legislature shall, in all cases, except treason, felony, violation of their oath of office and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place. WYO. CONST. art. III, § 16.