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Monitored Disclosure: A Way to Avoid Legislative Supremacy in Redistricting Litigation

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MONITORED DISCLOSURE: A WAY TO AVOID LEGISLATIVE SUPREMACY IN REDISTRICTING LITIGATION

Mark Tyson

Abstract: The Speech or Debate Clause of the U.S. Constitution protects members of Congress from testifying about "legislative acts" or having "legislative acts" used against them as evidence. U.S. Supreme Court decisions delineating the scope of what constitutes a "legislative act" have an episodic feel and have failed to create a readily applicable test for new factual scenarios. One such scenario occurs when members of Congress communicate with state legislators regarding congressional redistricting. Courts must know how to handle instances where members of Congress assert legislative privilege in the redistricting context, and specifically when members of Congress assert the privilege in an effort to prevent disclosure of documentary material. Instead of resorting to the traditional "legislative acts" test, courts should permit disclosure of written materials subject to the rules of discovery. Courts should be vigilant in reviewing discovery requests to ensure that plaintiffs are not unduly burdening members of Congress, thereby unnecessarily distracting them from their work.

INTRODUCTION

> *[Members of Congress] shall in all Cases, except Treason, Felony 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, they shall not be questioned in any other Place.*[1]

> *Our speech or debate privilege was designed to preserve legislative independence, not its supremacy*.[2]

The Speech or Debate Clause creates a privilege for members of Congress from revealing information about "legislative acts."[3] The Clause has been both praised as essential to the independence of the legislature, in that it shields legislators from executive and judicial

1. U.S. CONST. art. I, § 6, cl. 1.
2. United States v. Brewster, 408 U.S. 501, 508 (1972).
3. Gravel v. United States, 408 U.S. 606, 615–18 (1972).

harassment,[4] and criticized as a screen behind which misbehaving legislators may escape the usual legal consequences of their actions.[5] The U.S. Supreme Court has interpreted the Clause to create a testimonial privilege that protects members of Congress from testifying regarding "legislative acts."[6] However, the circuit courts have split on the question of whether the Clause also contains a nondisclosure privilege.[7] The U.S. Supreme Court has yet to furnish an answer.

What the U.S. Supreme Court has done is to construe the scope of the privilege.[8] Before 1972, the privilege was applied broadly.[9] But in 1972, the Court narrowed the privilege's scope significantly in the seminal case of *Gravel v. United States*.[10] In spite of *Gravel*'s narrowing effect, subsequent cases applying *Gravel*'s test have an episodic feel. The U.S. Supreme Court will likely not conduct a fact-specific inquiry[11] and will not examine a Congressperson's motive.[12] But beyond that, much of the U.S. Supreme Court's guidance has come in dicta and has not proved very useful in new contexts and fresh factual scenarios.[13]

One new context is redistricting. Redistricting takes place every ten years[14] with the goal of "realign[ing] a legislative district's boundaries to reflect changes in population."[15] Congressional redistricting must adhere to a strict "one person, one vote" requirement.[16] But even within this

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4. United States v. Johnson, 383 U.S. 169, 179−81 (1966).

5. *See* Léon R. Yankwich, *The Immunity of Congressional Speech: Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 970−72 (1951).

6. *Gravel*, 408 U.S. at 616.

7. *Compare* United States v. Rayburn House Office Bldg., 497 F.3d 654 (D.C. Cir. 2007), *with* United States v. Renzi, 651 F.3d 1012 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012). A nondisclosure privilege means that the Executive or other litigant cannot review evidence that may contain a legislative act unless a legislator consents to the search. A.J. Green, Note, United States v. Renzi*: Reigning in the Speech or Debate Clause to Fight Corruption in Congress Post*-Rayburn, 2012 B.Y.U. L. REV. 493, 501 (2012).

8. *See generally infra* Part I.

9. *See infra* Part I.C.

10. 408 U.S. 606 (1972).

11. Doe v. McMillan, 412 U.S. 306, 339 (1973) (Rehnquist, J., concurring).

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

13. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 121 n.10 (1979) (stating in dictum that the Speech or Debate Clause would not protect attempts to influence executive agencies).

14. U.S. CONST. art. I, § 2.

15. BLACK'S LAW DICTIONARY 1379 (9th ed. 2009).

16. Wesberry v. Sanders, 376 U.S. 1, 18 (1964). "One person, one vote" describes the equal district population requirement under the Fourteenth Amendment. *See* Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 243 (2009).

stricture, there is a risk that redistricting bodies will use impermissible criteria—such as impermissible racial criteria—to redraw district lines. After the 2010 redistricting cycle, a group of Texas Latino voters initiated suit against the Texas congressional and legislative redistricting plan alleging that the redistricting decision makers had impermissibly used racial animosity as a redistricting criteria.[17] In an effort to prove these allegations, the plaintiffs sought to discover written communications between members of the United States Congress and members of the Texas State Legislature.[18] The members of Congress made a motion for nondisclosure, arguing that legislative privilege barred the plaintiffs from discovering their correspondence.[19] However, a Texas district court denied the motion and allowed the plaintiffs to discover the correspondence.[20] This case raises important questions regarding both the actual scope of the privilege generally and the appropriate scope of the privilege in the redistricting context specifically.

Although the modern articulation of the privilege as delineated by *Gravel* does not bar discovery in *Perez v. Texas*,[21] it is easy to foresee members of Congress using different arguments based on Congress's broad grant of authority to regulate redistricting as a method of protecting future correspondence from being discovered.[22] This is important because redistricting plaintiffs who allege racial gerrymandering already face a difficult burden to show intent.[23] If future plaintiffs were cut off from discovering information like the written correspondence in *Perez v. Texas*, members of Congress and redistricting bodies generally would be insulated from scrutiny by private litigants. The public profits immensely from "private attorney

17. *See* Plaintiff Texas Latino Redistricting Task Forces Response to Defendants Motion for Protective Order at 5, Perez v. Texas, No. 11-CA-360-OLG-JES-XR (W.D. Tex. July 29, 2011) [hereinafter Plaintiff's Response].

18. Order at 7, Perez v. Texas, No. 11-CA-360-OLG-JES-XR (W.D. Tex. Aug. 11, 2011).

19. Motion of Congresspersons Lamar Smith, Joe Barton, Louis Gohmert, Ted Poe, Samuel Johnson, Ralph Hall, Jeb Hensarling, John Culberson, Kevin Brady, Michael McCaul, Michael Conaway, Kay Granger, William Thornberry, Ronald Paul, Bill Flores, Randy Neugebauer, Pete Olson, Francisco Canseco, Kenny Marchant, Michael Burgess, Blake Farenthold, John Carter and Pete Sessions to Prevent Disclosure of Written Communications Subject to Privilege Under the Speech and Debate Clause, United States Constitution, Perez v. Texas, No. 11-CA-360-OLG-JES-XR (W.D. Tex. Aug. 5, 2011) [hereinafter Motion to Prevent Disclosure].

20. Order, *supra* note 18.

21. Order, *supra* note 18.

22. *See infra* Part IV.

23. Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 921 (2001).

generals,"[24] and losing that private check in the redistricting context would be a heavy blow not only to individual rights, especially for minority voters, but also to transparency in government generally.

For those reasons and others this Comment will explain below, at least in the redistricting context, the legislative privilege should not include an absolute nondisclosure privilege. Part I of this Comment describes the Speech or Debate clause generally. Part II outlines Congress's authority to govern redistricting and explains redistricting requirements. Part III describes *Perez v. Texas*. Part IV details how the *Perez* court's reasoning could harm future redistricting plaintiffs. Part V asserts that the Speech or Debate Clause should not contain an absolute nondisclosure privilege. Finally, Part VI argues that the *Perez v. Texas* court reached the right result but for the wrong reasons, and that courts in the future should eschew the "legislative acts" test in redistricting cases in favor of applying normal discovery rules to protect members of Congress from harassment and distraction.

I. THE SPEECH OR DEBATE CLAUSE: HISTORY, PURPOSE, AND SCOPE

The Speech or Debate Clause confers both immunity and privilege on members of Congress for "legislative acts."[25] The purpose behind the Clause is to protect the legislature from other branches of government.[26] Thus, courts have applied the Clause to both civil and criminal actions. During the first several hundred years of the Clause's existence, the U.S. Supreme Court construed it broadly.[27] However, in the 1970s, the Court narrowed what constitutes a "legislative act."[28] While the Court's test narrowed the scope of "legislative acts," it did not resolve all ambiguities, including a question over which the circuit courts have split: specifically, whether the Clause contains a nondisclosure

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24. *See* Carl Cheng, *Important Rights and the Private Attorney General Doctrine*, 73 CALIF. L. REV. 1929, 1931 (1985). "The private attorney general doctrine provides for the enforcement of public rights through the use of private lawsuits." *Id.* at 1929 n.1.

25. Doe v. McMillan, 412 U.S. 306, 312−13 (1973); Gravel v. United States, 408 U.S. 606, 616 (1972).

26. *Gravel*, 408 U.S. at 617.

27. *See* Comment, Brewster, Gravel, *and Legislative Immunity*, 73 COLUM. L. REV. 125, 131 (1973).

28. *Gravel*, 408 U.S. at 624–26; *see* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1118 (1973); Brewster, Gravel, *and Legislative Immunity*, *supra* note 27, at 146; Matthew R. Walker, *Constitutional Law—Narrowing the Scope of the Speech or Debate Clause Immunity*, 68 TEMP. L. REV. 377, 388−90 (1995).

privilege.[29] Additionally, nearly all of the states have adopted some version of the Clause;[30] however, many have interpreted the Clause even more narrowly than the U.S. Supreme Court's interpretation.[31] This section will survey the past and current state of Speech or Debate Clause jurisprudence as a way to feature the areas in which future application is in doubt.

A. The Speech or Debate Clause Creates Both an Immunity and a Privilege

Article I, Section 6 of the U.S. Constitution provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place."[32] According to well-settled and long-standing U.S. Supreme Court precedent, the Clause immunizes members of Congress and their aides from criminal or civil liability for all acts "within 'the legislative sphere,' even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes."[33] The Clause also contains a testimonial and evidentiary privilege that shields members of Congress from testifying about legislative acts or having legislative acts used against them as evidence.[34] The Clause has been both praised as essential to the independence of the legislature in that it shields legislators from executive and judicial harassment,[35] and criticized as a screen behind which misbehaving legislators may escape the usual legal consequences of their actions.[36] In some cases, the Clause will conceal

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29. United States v. Renzi, 651 F.3d 1012, 1032 (9th Cir. 2011); United States v. Rayburn House Office Bldg., 497 F.3d 654, 660 (D.C. Cir 2007) (citing Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995)).

30. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 221 (2004).

31. *Id.* at 236–37.

32. U.S. CONST. art. I, § 6, cl. 1. The Clause was based on a similar provision from England. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975). However, the American Speech or Debate Clause is more expansive than its progenitor. *See id.* ("English history does not totally define the reach of the Clause."); *see also* United States v. Brewster, 408 U.S. 501, 508 (1972) (arguing that the privilege "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system").

33. Doe v. McMillan, 412 U.S. 306, 312−13 (1973) (quoting *Gravel*, 408 U.S. at 624−25 (citations omitted)).

34. United States v. Helstoski, 442 U.S. 477, 487 (1979) (evidentiary privilege); *Gravel*, 408 U.S. at 616 (testimonial privilege).

35. United States v. Johnson, 383 U.S. 169, 178−81 (1966).

36. *See* Yankwich, *supra* note 5, at 970−72.

and protect misconduct,[37] yet it has been acknowledged that this consequence is inevitable if the Clause is to serve its fundamental purpose.[38]

B. The Clause's Purpose Is to Preserve Legislative Independence, and Courts Have Applied It to Both Civil and Criminal Actions

Historically, the Clause's fundamental purpose was to free the legislature from executive and judicial oversight that threatens legislative independence.[39] The Court has been willing to go beyond the actual text of the Clause in order to effectuate this purpose.[40] But the Court has made clear that the Clause was meant to preserve legislative independence—not to establish legislative supremacy.[41] Additionally, the Clause is meant to protect the "functioning of Congress," not the reputation of its members.[42] Courts applying the Clause are tasked with doing so in a manner that will ensure Congress's independence without elevating it at the expense of the other two branches.[43]

The language of the Clause does not differentiate between civil actions brought by individuals and criminal actions brought by the executive branch.[44] The U.S. Supreme Court has established that the Clause immunizes members of Congress from civil actions seeking redress for individual rights violations.[45] These decisions indicate that the Clause applies equally in cases initiated by the executive and in cases brought by private citizens.[46] A private civil action "creates a distraction

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37. *Brewster*, 408 U.S. at 521.

38. *See* Reinstein & Silverglate, *supra* note 28, at 1170. Professor Reinstein and Silverglate acknowledge that wrongdoing may go unpunished because courts will refuse to find jurisdiction over the offense and the legislature will fail to discipline its misbehaving member. *Id.*

39. *Gravel*, 408 U.S. at 618.

40. *See Brewster*, 408 U.S. at 516 ("Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility."); John C. Raffetto, *Balancing the Legislative Shield: The Scope of the Speech or Debate Clause*, 59 CATH. U. L. REV. 883, 889−90 (2010).

41. *Brewster*, 408 U.S. at 508.

42. Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 419 (D.C. Cir. 1995).

43. *See Brewster*, 408 U.S. at 508.

44. Reinstein & Silverglate, *supra* note 28, at 1171.

45. *See* Dombrowski v. Eastland, 387 U.S. 82, 84−85 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951); Kilbourn v. Thompson, 103 U.S. 168, 201−05 (1881).

46. *See* Reinstein & Silverglate, *supra* note 28, at 1172. However, Professor Reinstein and Silverglate argue that the privilege's scope should not be coterminous in cases initiated by the executive and in cases brought by private citizens. They argue for what they dub a "functional approach" which "views the privilege as evolving dynamically in response to changing

and forces members to divert their time, energy, and attention from legislative tasks to defend the litigation."[47] Private civil actions can also be used to "delay and disrupt" the legislative process.[48] And in the modern era, civil actions brought by private parties may be an even more significant threat to legislative independence than criminal investigations and charges initiated by the executive branch.[49]

Without the Clause protecting members of Congress, litigants could disrupt the legislative process by using civil discovery.[50] Civil discovery threatens to have a chilling effect on the business of legislators, including whether they choose to exchange views on legislative activity. According to the U.S. Court of Appeals for the D.C. Circuit:

> [E]xchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.[51]

Further, the U.S. Supreme Court has explained that even though a private civil action does not implicate the executive branch in separation

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governmental functions in order to fulfill the historic purpose of the privilege—the preservation of legislative independence in a system of separation of powers." *Id.* at 1121. This approach would limit the privilege's scope in cases brought by private citizens where separation of powers was not at issue. *Id.* at 1122. *But see* Huefner, *supra* note 30, at 273 n.206. Professor Huefner disagrees with Professor Reinstein and Silverglate, stating that "not only is there no textual basis" for distinguishing between civil and criminal actions, historically, "the privilege also is much more amenable to application to private charges than Reinstein and Silverglate suggest." *Id.*

47. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975).

48. *Id.*

49. Huefner, *supra* note 30, at 274. Professor Huefner examines the article written by Reinstein and Silverglate and concludes that "[t]heir 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, 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." *Id.* at 274, n.208.

50. MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) ("A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive.").

51. United States v. Rayburn House Office Bldg., 497 F.3d 654, 661 (D.C. Cir. 2007).

of powers concerns, legislative independence is still threatened by the judiciary.[52] "[W]hether 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."[53] It follows that regardless of whether the government or a private citizen initiates suit, legislative privilege applies to legislative acts.[54]

C. The U.S. Supreme Court Initially Construed the Privilege Broadly, but Narrowed Its Scope Significantly in the 1970s

Early interpretations of the Speech or Debate Clause construed it broadly.[55] *Kilbourn v. Thompson*[56] defined what became the traditional scope of the legislative privilege:[57] "[T]hings generally done in a session of the House by one of its members in relation to the business before it."[58] With this definition, the Court effectively hewed actions by legislators in two, creating distinct categories for Speech or Debate Clause purposes: (1) legislative, and (2) non-legislative action.[59]

Building on this distinction, the Court has cautioned that not all conduct related to the legislative process is protected by the Speech or Debate Clause.[60] Thus, the mere fact that "Senators generally perform

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52. *Eastland*, 421 U.S. at 503; United States v. Renzi, 651 F.3d 1012, 1038 (9th Cir. 2011) ("If the Clause applies, it applies absolutely—there is no balancing of any interests nor any lessening of the protection afforded depending on the branch that perpetrates the intrusion."); *cf*. *Rayburn*, 497 F.3d at 658, 661, 671 (D.C. Cir. 2007) (concluding that the privilege prohibited any executive exposure to records of legislative acts, but that the judiciary could review evidence claimed to be privileged).

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

54. *Id.*

55. Brewster, Gravel, *and Legislative Immunity*, *supra* note 27, at 131 ("*Coffin* and *Kilbourn* established the broad principle that 'speech or debate' was to be given a somewhat expansive reading; actions within the scope of the legislative role were to be deemed within the ambit of the privilege.").

56. 103 U.S. 168 (1880).

57. Brewster, Gravel, *and Legislative Immunity*, *supra* note 27, at 131.

58. *Kilbourn*, 103 U.S. at 204.

59. *See* Doe v. McMillan, 412 U.S. 306, 315 (1973) (noting that while the Speech or Debate Clause protects members of Congress when they vote, it would not protect members carrying out nonlegislative acts like the Sergeant at Arms in *Kilbourn* when, at the direction of the House, he made an arrest that the courts found was made without authority).

60. United States v. Brewster, 408 U.S 501, 515 (1972). The Court also noted that "the Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions." *Id.* at 528. "The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Id.*

certain acts in their official capacity" does not make those acts "legislative in nature."[61] In *Gravel v. United States*, the Court set forth the modern definition of what constitutes a legislative act:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House 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.[62]

This definition significantly narrowed the scope of activities protected by the Clause.[63] The *Kilbourn* definition used general language to delineate the Clause's scope—"things generally done in a session of the House by one of its members in relation to the business before it"[64]—but the *Gravel* Court was careful to use more specific, detailed language in setting the Clause's outer limits.[65] The *Gravel* definition is now the authoritative standard for determining whether legislative action is privileged.[66]

The Ninth Circuit, drawing on the language from *Gravel*, fashioned a two-part test for determining whether legislative privilege should apply to a given action.[67] This characterization provides a useful analytical framework for applying the *Gravel* test, but does not purport to add or subtract anything from the substance of the test.[68] The two prongs of the test are as follows: "*First*, it must be 'an integral part of the deliberative and communicative processes by which Members participate in Committee and House proceedings.' . . . *Second*, the activity must address proposed legislation or some other subject within Congress' constitutional jurisdiction."[69]

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

62. *Id.*

63. *See* Reinstein & Silverglate, *supra* note 28, at 1118; Brewster, Gravel*, and Legislative Immunity*, *supra* note 27, at 146; Walker, *supra* note 28, at 377.

64. Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

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

66. *See generally* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973).

67. *See* Miller v. Transamerican Press, Inc., 709 F.2d 524, 529 (9th Cir. 1983).

68. *Id.*

69. *Id.* (emphasis in original) (citations omitted) (quoting *Gravel*, 408 U.S. at 625).

Prior to *United States v. Brewster*[70] and *Gravel*[71]—the two seminal legislative privilege cases decided in 1972—there had been only five U.S. Supreme Court decisions[72] and few lower court decisions in which speech or debate questions were raised.[73] Despite the relative dearth of case law, two patterns have emerged: first, the Court will not conduct a fact-specific inquiry on what constitutes a legislative act;[74] second, circuit courts are currently split on whether there should be a nondisclosure privilege.[75]

1. The U.S. Supreme Court Will Not Conduct a Fact-Specific Inquiry in Determining What Constitutes a Legislative Act

The somewhat formal distinction *Gravel* draws between legislative and non-legislative acts is important to preserving the legislative privilege.[76] In drawing this distinction, the U.S. Supreme Court created a legal regime that helps avoid problematic fact-based inquiries.[77] Otherwise, each case would require a fact-specific inquiry, which would risk eviscerating the privilege altogether.[78] For example, if a court could examine the motive behind legislative acts, then the Clause's protection would be illusory because a litigant could circumvent the Clause merely by alleging an improper purpose;[79] then, the privilege would not provide the protection for which it was designed,[80] and improper motives would

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70. 408 U.S. 501 (1972).

71. 408 U.S. 606 (1972).

72. *See* Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880). Worth noting in *Johnson*—only the third time the Court had addressed the privilege—the Court 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." *Johnson*, 383 U.S. at 179.

73. *See* Brewster, Gravel, *and Legislative Immunity*, *supra* note 27, at 129.

74. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-20 (3d ed. 2000).

75. *See* United States v. Renzi, 651 F.3d 1012, 1032 (9th Cir. 2011); United States v. Rayburn House Office Bldg., 497 F.3d 654, 660 (D.C. Cir 2007) (citing Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995)).

76. *See* TRIBE, *supra* note 74, at § 5-20.

77. *Id.*

78. Doe v. McMillan, 412 U.S. 306, 339 (1973). "Put simply, we'd better make sure we don't so thoroughly question and probe each 'speech or debate' in assessing its privileged status that by the time the member's ordeal is over, being told that the privilege applies after all would be anticlimactic." TRIBE, *supra* note 74, at 1017.

79. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 508−09 (1975).

80. *Id.*

be ascribed to legislative acts in "times of political passion."[81] For these reasons, the Court will not probe into an alleged improper purpose in determining whether an act is "legislative."[82] Furthermore, the Court will not balance the interests behind the privilege against the rights asserted by the opposing party.[83] Where the privilege applies, it is absolute.[84]

In recent years, the Court has provided some guidance as to what type of legislative action lies within the ambit of the Speech or Debate Clause.[85] The Court has stated in dictum that members of Congress who intervene before executive agencies would not be protected by legislative privilege.[86] Although not binding, the Court would likely follow this dictum because any intervention or attempt to influence an executive agency would contravene an original basis for the privilege: namely, separation of powers.[87] Recognizing that the scope of the privilege is hazy, courts have often resorted to defining the privilege by what it does not cover rather than by what it does.[88]

For example, taking a bribe is never considered a legislative act.[89] Other things not considered legislative acts include: "speeches delivered outside of the legislature; political activities of legislators; undertakings for constituents; assistance in securing government contracts; republication of defamatory material in press releases and newsletters; solicitation and acceptance of bribes; and criminal activities, even those committed to further legislative activity."[90] While there seems to be consensus regarding the above activities, the circuit courts have split on

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81. Tenney v. Brandhove, 341 U.S. 367, 378 (1951) (cautioning that courts should not be in the business of determining motive).

82. United States v. Johnson, 383 U.S. 169, 180 (1966).

83. *Eastland*, 421 U.S. at 501, 509 n.16.

84. *Id.*

85. *See* Johnson, 383 U.S. at 172; *see also* Hutchinson v. Proxmire, 443 U.S. 111, 121 n.10 (1979).

86. *See Johnson*, 383 U.S. at 172; *see also Hutchinson*, 443 U.S. at 121 n.10 (citing dictum in *Johnson*, 383 U.S. at 172); Reinstein & Silverglate, *supra* note 28, at 1163.

87. *See* Reinstein & Silverglate, *supra* note 28, at 1164.

88. United States v. Jefferson, 546 F.3d 300, 310 (4th Cir. 2008) (taking a bribe is never a legislative act); Irons v. R.I. Ethics Comm'n, 973 A.2d 1124, 1131 (R.I. 2009) ("Activities that remain unprotected by this immunity include, but are not limited to: speeches delivered outside of the legislature; political activities of legislators; undertakings for constituents; assistance in securing government contracts; republication of defamatory material in press releases and newsletters; solicitation and acceptance of bribes; and criminal activities, even those committed to further legislative activity.").

89. *Jefferson*, 546 F.3d at 310.

90. *Irons*, 973 A.2d at 1131.

the question of how the Clause is applied,[91] specifically, the question of whether the Clause contains a nondisclosure privilege.[92]

2. Two Circuit Courts Have Split over Whether the Clause Contains a Nondisclosure Privilege and the U.S. Supreme Court Has Yet to Resolve the Split

The U.S. Supreme Court has never spoken directly on the issue of whether the Clause includes a nondisclosure privilege.[93] It is well established that the Speech or Debate Clause includes a use privilege.[94] In the context of the Speech or Debate Clause, a use privilege means that the executive or other litigant cannot use any evidence that came from a protected legislative act against a legislator in court.[95] It is also well established that the Clause includes a testimonial privilege.[96] Although the U.S. Supreme Court has not spoken directly on whether the Clause includes a nondisclosure privilege, two circuit courts have.[97]

The D.C. Circuit held that in both the civil and the criminal context, the Clause does include a nondisclosure privilege for documentary evidence that comes from or involves "legislative acts."[98] In *Brown & Williamson Tobacco Corp. v. Williams*,[99] the D.C. Circuit held that the Clause includes a nondisclosure privilege.[100] The court stated that nondisclosure is part of the privilege because "[d]ocumentary evidence can certainly be as revealing as oral communications—even if only indirectly when . . . the documents . . . do not detail specific

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91. *Compare* United States v. Rayburn House Office Bldg., 497 F.3d 654 (D.C. Cir 2007), *with* United States v. Renzi, 651 F.3d 1012 (9th Cir. 2011).

92. *Compare Rayburn*, 497 F.3d at 660, *with Renzi*, 651 F.3d at 1032.

93. A nondisclosure privilege means that the executive or other litigant cannot force disclosure of evidence that may contain a legislative act unless a legislator consents to the search. Green, *supra* note 7, at 501.

94. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975).

95. *See* Green, *supra* note 7, at 501; *see also* United States v. Helstoski, 442 U.S. 477, 487 (1979).

96. Gravel v. United States, 408 U.S. 606, 616 (1972); *see* Wells Harrell, Note, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 VA. L. REV. 385, 417 (2012).

97. *Renzi*, 651 F.3d at 1032; *Rayburn* 497 F.3d at 660 (citing Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995)).

98. *See Rayburn*, 497 F.3d at 660; *Brown & Williamson*, 62 F.3d at 415.

99. 62 F.3d 408 (D.C. Cir. 1995).

100. *See id.* at 420−21; *see also* Huefner, *supra* note 30, at 225 ("It is now well settled that the . . . Speech or Debate Clause protects both legislators and their staff from . . . document production . . . .").

congressional actions."[101] The court emphasized that the purpose of the Clause was to prevent interference with legislative activity.[102] Thus, the court concluded that plaintiffs could reach documentary material through direct suit or subpoena only if "the circumstances by which they come" are not considered within "'legislative acts' or the legitimate legislative sphere."[103] In *United States v. Rayburn House Office Building*,[104] the D.C. Circuit reiterated that the Clause's testimonial privilege extends to nondisclosure of written legislative materials.[105] The *Rayburn* decision was not well received by legal academia.[106] Scholarship criticizing the *Rayburn* decision was published quickly;[107] however, none of the other circuits addressed the decision until 2011.[108]

In 2011, the Ninth Circuit expressly disagreed with the D.C. Circuit, holding that the Clause did not contain an absolute nondisclosure privilege, even for documentary evidence that comes from or involves "legislative acts."[109] In *United States v. Renzi*,[110] the Ninth Circuit refused to find that the Speech or Debate Clause contained a nondisclosure privilege in both civil and criminal discovery.[111] In directly rejecting the D.C. Circuit's position in *Rayburn*, the Ninth

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101. *Brown & Williamson*, 62 F.3d at 420.

102. *Id.* at 421.

103. *Id.*

104. 497 F.3d 654 (D.C. Cir 2007).

105. *See id.* at 660. *Rayburn* involved a search warrant of a congressperson's office, whereas *Brown & Williamson* involved a subpoena to compel document disclosure. *Brown & Williamson*, 62 F.3d 408. Despite these differences, *Rayburn* affirmed *Brown & Williamson* based on the same rationales. *See Rayburn*, 497 F.3d at 660 ("[O]ur opinion in *Brown & Williamson* makes clear that a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put.").

106. *See* Sarah Letzkus, Comment, *Damned If You Do, Damned If You Don't: The Speech or Debate Clause and Investigating Corruption in Congress*, 40 ARIZ. ST. L.J. 1377 (2008); Recent Case, *D.C. Circuit Holds that FBI Search of Congressional Office Violated Speech or Debate Clause*—United States v. Rayburn House Office Building, *497 F.3d 654 (D.C. Cir. 2007)*, 121 HARV. L. REV. 914 (2008); Brian Reimels, Note, United States v. Rayburn House Office Building, Room 2113*: A Midnight Raid on the Constitution or Business as Usual?*, 57 CATH. U. L. REV. 293 (2007); James Walton McPhillips, Note, "*Saturday Night's Alright for Fighting": Congressman William Jefferson, the Saturday Night Raid, and the Speech or Debate Clause*, 42 GA. L. REV. 1085 (2008).

107. *See* sources cited *supra* note 106.

108. *See* United States v. Renzi, 651 F.3d 1012 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).

109. *Id.* at 1032.

110. 651 F.3d 1012.

111. *Id*.

Circuit made clear that preventing distraction to legislators was not the absolute purpose of the Clause.[112] Further, the court concluded that the D.C. Circuit had prioritized protecting legislators from distraction without considering the legitimate counter interests in preventing illegal acts like corruption and bribery.[113] The court stated that a correct interpretation of U.S. Supreme Court precedent reveals that "concern for distraction *alone* precludes inquiry *only* when the underlying action itself is precluded . . . ."[114] Thus, *Renzi* affirmed the district court's recognition that the privilege "is one of use, not non-disclosure."[115]

Despite the circuit split created by the *Renzi* decision, the U.S. Supreme Court refused to grant petition for certiorari.[116] However, *Renzi* quickly generated positive responses from scholars.[117] These scholars also criticized the *Rayburn* decision and the D.C. Circuit's position that the Clause contains a nondisclosure privilege.[118]

D. While Most States Have a Version of the Federal Speech or Debate Clause, Many Have Interpreted Their Versions More Narrowly than the Federal Counterpart

Forty-three state constitutions have some version of the Speech or Debate Clause,[119] and the common law has also recognized a similar privilege.[120] Twenty-three of the forty-three states have a constitutional provision that is essentially identical to the Federal Speech or Debate Clause.[121] But many of the states that have considered the Clause have narrowly interpreted their own provisions, denying state legislators "protections that members of Congress would receive under the federal Speech or Debate Clause."[122] For example, two New York trial courts

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112. *Id.* at 1034.

113. *Id.*

114. *Id.* at 1035 (emphasis in original). The court cited the following U.S. Supreme Court cases to illustrate this point: *United States v. Helstoski*, 442 U.S. 477, 480–81, 488 n.7 (1979); *United States v. Johnson*, 383 U.S. 169, 173–77 (1966) (describing the Government's investigation into actual legislation and other clear legislative acts); *Gravel v. United States*, 408 U.S. 606, 629 n.18 (1972). *Renzi*, 651 F.3d at 1036−37.

115. *Renzi*, 651 F.3d at 1018.

116. *Id.* at 1034, *cert. denied*, 132 S.Ct. 1097 (2012).

117. *See* Harrell, *supra* note 96, at 385; Green, *supra* note 7, at 493.

118. *See* sources cited *supra* note 117.

119. *See* sources cited *supra* note 117.

120. Tenney v. Brandhove, 341 U.S. 367, 373 (1951).

121. Huefner, *supra* note 30, at 236.

122. *Id.* at 225.

held that their state version of the Speech or Debate Clause only protected legislators from liability, but not from being forced to answer questions about their work.[123] Some states could justify this narrow construction based on different language in the state provisions, but the textual differences seem to be more indicative of stylistic preference rather than of substantive alteration.[124]

Although some states have interpreted their own clauses narrowly, other states have little or no jurisprudence addressing their version of the Speech or Debate Clause.[125] However, at least one scholar predicts that state courts will soon be forced to interpret the state versions of the Clause.[126] Professor Huefner, who has published extensively on election law, predicts that disclosure suits will become more common in states.[127] He foresees these kinds of disclosure suits proliferating based on a number of developments, including: state legislatures becoming more professionalized combined with increasingly complex issues and more authority being accorded to state legislatures from Congress; a more litigious society that will seek to harass and burden legislatures based on political motivations; and finally, the trend towards more open government, exemplified by state copycat versions of the Freedom of Information Act as well as other "sunshine" laws.[128]

Part II briefly describes the redistricting process, highlighting the role of Congress in that process. The reason for this shift in focus is to provide context for the substantive area in which courts will apply the preceding Speech or Debate Clause jurisprudence.

II. THE CONSTITUTION GRANTS CONGRESS AUTHORITY TO REGULATE CONGRESSIONAL REDISTRICTING

While U.S. Supreme Court decisions addressing the Speech or Debate Clause have increased since the 1970s, the Court has never decided a Speech or Debate Clause case in the redistricting context. Yet

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123. Abrams v. Richmond Cnty. S.P.C., 479 N.Y.S. 2d 624, 628 (Sup. Ct. 1984); Lincoln Bldg. Assocs. v. Barr, 147 N.Y.S. 2d 178, 182 (Mun. Ct. 1955).

124. Huefner, *supra* note 30, at 239.

125. *Id.* at 259.

126. *Id.* at 260.

127. *Id.*

128. *Id.* at 226−27. State "sunshine" laws "requir[e] governmental bodies to give the public access to the decision-making process in the form of public meetings, so the citizenry can learn not only what decisions are made, but also why and how decisions are made." 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 (1996).

redistricting litigation occurs routinely,[129] and district courts will surely have to address Speech or Debate Clause issues in redistricting cases.[130] It is already very difficult for private litigants to prove wrongdoing, especially those alleging improper redistricting practices based on racially motivated decisionmaking.[131] Litigants alleging racially motivated decisionmaking should know whether civil discovery in redistricting cases is a worthwhile avenue to pursue.

Redistricting is intertwined with congressional activity.[132] Members of the House of Representatives are elected based on where voters reside as determined by the redrawing of electoral lines, and Congress, acting as a body, has significant power to affect how redistricting occurs.[133] While the Constitution imposes some direct limitations on the final redistricting product,[134] it also gives Congress power to affect the process and, ultimately, the outcome.[135]

A. Several Constitutional Provisions Govern Redistricting

Article I, Section 2 of the U.S. Constitution provides that "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers."[136] The U.S. Supreme Court has interpreted this Section to govern population equality for congressional redistricting.[137] Congressional redistricting involves drawing districts from which members of the United States House of Representatives are elected.[138] While Section 2 provides for equal reapportionment, Article I, Section 4, Clause 1—known as the Elections

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129. Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 879 (2001).

130. *Id. See generally* Order, *supra* note 18. As noted above, the Court has yet to resolve whether the Clause includes a nondisclosure privilege. With the ubiquity of email correspondence, it is easy to foresee similar factual scenarios as the one that arose in *Perez v. Texas*, making this analysis particularly timely.

131. *See supra* note 24 and accompanying text.

132. *See, e.g.*, U.S. CONST. art. I, § 2; U.S. CONST. art. I, § 4; U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XIV, § 5.

133. *See* sources cited *supra* note 132.

134. *See, e.g.*, U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2.

135. *See, e.g.*, U.S. CONST. art. I, § 4 (elections for federal office); U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

136. U.S. CONST. art. I, § 2.

137. J. GERALD HEBERT ET AL., THE REALIST'S GUIDE TO REDISTRICTING 4 (2d ed. 2010)*; see also* Karcher v. Dagget, 462 U.S. 725 (1983).

138. AMERICAN BAR ASS'N, CONGRESSIONAL REDISTRICTING: A PUBLIC INFORMATION MONOGRAPH 1 (1981).

Clause—gives Congress the ultimate authority to regulate federal elections.[139]

The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[140] This Clause allows states, in the absence of congressional mandate, to regulate elections for federal office.[141] If Congress enacts statutes that conflict with state regulations, federal law will prevail.[142] Additionally, Congress may govern federal and state elections based on Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment.[143]

B. Congressional Districts Must Be Reapportioned Equally and Are Regulated by Constitutional and Statutory Law

The U.S. Supreme Court has held that the population of congressional districts in the same state must be as nearly equal in population as practicable.[144] "[T]here are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification."[145] In other words, the state must prove that population variations could not have been reduced or eliminated by a good-faith effort to draw districts of equal population.[146]

As noted above, Article I, Section 2 of the U.S. Constitution requires a congressional plan to comply with the "one person, one vote" principle;[147] in addition, the Fourteenth Amendment extends the "one person one vote" requirement to legislative redistricting.[148] The U.S.

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139. *See* Foster v. Love, 522 U.S. 67, 69 (1997).

140. U.S. CONST. art. I, § 4.

141. *See Foster*, 522 U.S. at 69.

142. *Id.* However, the U.S. Supreme Court has made clear that "nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction." Wesberry v. Sanders, 376 U.S. 1, 6 (1964).

143. *See* Shelby Cnty. v. Holder, 679 F.3d 848, 864 (D.C. Cir. 2012).

144. *Wesberry*, 376 U.S. at 7–8.

145. Karcher v. Daggett, 462 U.S. 725, 734 (1983).

146. *See id.* at 739.

147. *See* U.S. CONST. art. I, § 2.

148. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964); *Wesberry*, 376 U.S. at 7–8; Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733–34 (1998).

Constitution also prohibits map drawers from purposefully discriminating against racial minorities.[149] In theory, it does not allow redistricting maps to be the product of excessive political gerrymandering.[150] Finally, the U.S. Constitution prohibits map drawers from "subordinat[ing] traditional race-neutral districting principles" to race-based districting principles.[151] Federal statutory law imposes further restrictions. Section 2 of the Voting Rights Act of 1965 (VRA)[152] prohibits a plan from resulting in the dilution of minority voting strength.[153] Section 5 of the VRA prohibits a plan from reducing minority-voting strength relative to prior levels.[154] Finally, a plan must use single-member districts.[155]

The Equal Protection Clause has given states broader latitude in legislative redistricting.[156] A state must make a good-faith effort to create districts that are as close to "equal population as is practicable."[157] But, because the Court has recognized that it is "a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters[,]" the Court allows states to deviate from the equal population ideal.[158] A legislative apportionment plan is not facially invalid so long as the maximum population deviation falls below ten percent.[159] And even if the range is more than ten percent, a state may be able to justify the inequality by proffering other legitimate objectives.[160] Allowing states to justify deviations from equal population combats an "overemphasis on raw population figures" that could trample

149. *See* Karlan, *supra* note 148, at 733.

150. *Id.*; *see also* Davis v. Bandemer, 478 U.S. 109, 124–25 (1986).

151. *See* Miller v. Johnson, 515 U.S. 900, 916 (1995); Karlan, *supra* note 148, at 733.

152. 42 U.S.C. § 1973 (2006). Congress enacted Section 2 of the Voting Rights Act "to help effectuate the Fifteenth Amendment's" suffrage protection. Voinovich v. Quilter, 507 U.S. 146, 152 (1993). Section 2 of the Voting Rights Act prohibits any state or political subdivision from imposing any "voting qualification[s] or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement" of a United States citizen's right to vote on account of race, color or status as a member of a language minority group. 42 U.S.C. § 1973(a).

153. *See* Karlan, *supra* note 148, at 733−34.

154. *See* Karlan, *supra* note 148, at 734.

155. 2 U.S.C. § 2c (2006); *see* Karlan, *supra* note 148, at 734.

156. Mahan v. Howell, 410 U.S. 315, 322 (1973).

157. Reynolds v. Sims, 377 U.S. 533, 577 (1964).

158. *Id.*

159. Brown v. Thomson, 462 U.S. 835, 842 (1983).

160. *Mahan*, 410 U.S. at 324–25. The justification for the overall range exceeding ten percent in this case was a desire to respect the boundaries of political subdivision. *Id.* at 325. Another justification is to provide for "compact districts of contiguous territory." *Reynolds*, 377 U.S. at 578.

other factors that are important to acceptable reapportionment arrangement.[161]

In spite of these substantive constraints—and the Voting Rights Act in particular—it is still very difficult for a plaintiff to prove that congressional redistricting was based on impermissible factors, such as racial animosity.[162] As evidence of impermissible consideration, courts will rely on, among other things, "statements made by legislators and their staff."[163] But what if plaintiffs could no longer access these kinds of statements? How would plaintiffs prove intent to use impermissible factors such as racial animosity? These questions were implicated by a recent Texas case, *Perez v. Texas*, where members of Congress refused to disclose their written communications with Texas state legislators.[164] The *Perez* court's order provided an excellent opportunity to define the contours of the Speech or Debate Clause in the redistricting context.

III. THE APPROPRIATE SCOPE OF THE LEGISLATIVE PRIVILEGE IN THE REDISTRICTING CONTEXT WAS RECENTLY IMPLICATED BY *PEREZ V. TEXAS*

Litigation has proliferated in recent redistricting cycles.[165] Plaintiffs initiate redistricting suits for all sorts of reasons, including as a political maneuver to block plans that risk harming a political faction.[166] However, not all suits are political ploys: minority voters often bring suit when they feel that they have been discriminated against in the redistricting process.[167] One such suit occurred in 2011 when a group of Hispanic voters from Texas initiated suit against Texas state legislators, alleging impermissible use of racial criteria in the redistricting process.[168] During discovery, the plaintiffs requested that Texas state legislators disclose certain written communications.[169] The request demonstrates the importance of defining the appropriate scope of the legislative privilege in the redistricting context.

On August 5, 2011, members of the U.S. Congress submitted a

161. Gaffney v. Cummings, 412 U.S. 735, 749 (1973).

162. HEBERT ET AL., *supra* note 137, at 63−64.

163. *Id.* at 65.

164. Order, *supra* note 18, at 3.

165. *Federal Court Involvement in Redistricting Litigation*, *supra* note 129, at 879.

166. *Id.* at 879–80.

167. *See* Plaintiff's Response, *supra* note 17, at 5.

168. *Id.*

169. Order, *supra* note 18, at 3.

motion to prevent disclosure of written communication between themselves and certain Texas state legislators regarding the Texas state legislature's redistricting.[170] The plaintiffs, who were suing the Texas state legislators, had requested production of the written communications.[171] The members' legal theory for nondisclosure was that the communication was privileged under the Speech or Debate Clause.[172]

In their motion, the members of the U.S. Congress stated that no court has ever forced a "sitting Member of Congress, their staff, or their counsel to submit to either deposition or production of documents in a redistricting case . . . ."[173] Although the plaintiffs had requested production only from the Texas state legislators, the members of Congress argued that the nondisclosure privilege was absolute and thus barred production of privileged information no matter who was producing the information.[174] The members argued that the reason why a court has never forced members of Congress to submit to discovery requests in a redistricting case is because "[e]very Member of Congress takes an interest in, and is affected by, redistricting, and as such it is an important part of congressional business."[175]

Next, the members of Congress cautioned the court that allowing the correspondence to be discovered would create an easy avenue for political opponents to use "compelled testimony of Members of Congress or production of their privileged communication with their constituent legislators" to work mischief.[176] Specifically, the members of Congress were concerned that potential plaintiffs would use discovery to obtain political strategies.[177] The members of Congress also feared that allowing their communication to be discoverable would have a "chilling effect" on Congress because its members would "not be able to have frank and honest communications with their constituent legislators regarding Congressional business."[178]

To illustrate that such a "chilling effect" was a real threat, the members of Congress noted that many of the same plaintiffs had sought

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170. *Id.* at 3–4.

171. *Id.* at 5.

172. *Id.* at 3.

173. Motion to Prevent Disclosure, *supra* note 19, at 4.

174. *Id.* at 3 n.7.

175. *Id.* at 4.

176. *Id.*

177. *Id.*

178. *Id.*

discovery from one of the same members in the previous redistricting cycle.[179] The members of Congress also pointed out that the Texas District Court in that case had quickly quashed the plaintiffs' subpoenas.[180] The members of Congress also relied on a California case, *Cano v. Davis*.[181] According to the members of Congress, an amicus brief filed in that case identified the problem with allowing communications between members of Congress and their constituent state legislators to be discovered:

> Parties to redistricting litigation will inevitably attempt to pry into politically sensitive discussions between Representatives and state legislators, other Members of Congress, constituents, party representatives and/or political consultants . . . . Worse, given the inherently political nature of redistricting litigation, plaintiffs unhappy with the outcome of the state legislative process may also seek to question Representatives to harass, embarrass or damage political opponents or other perceived beneficiaries of the redistricting legislation, or to obtain publicity for a political agenda . . . .[182]

The *Perez* court denied the motion for nondisclosure.[183] Relying on *Gravel*[184] and *Brewster*,[185] the court found that the communication between the members of Congress and their constituent legislators fell outside the ambit of the privilege.[186] The court adopted the two-part test that the Ninth Circuit had formulated based on the *Gravel* test for determining which actions or activities qualify for the privilege.[187] "First, it must be 'an integral part of the deliberative and communicative processes by which Members participate in Committee and House proceedings. Second, the activity must address proposed legislation or some other subject within Congress' constitutional jurisdiction.'"[188] To pass the *Gravel* test, a member of Congress must meet both of these

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179. *Id.* at 5. The Congressman is Joe Barton. *Id.*

180. *Id.*

181. 211 F. Supp. 2d 1208 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003).

182. Motion to Prevent Disclosure, *supra* note 19, at 5 (quoting Brief for Bipartisan Legal Advisory Group of the U.S. House of Representatives in Support of Motion to Quash Subpoenas Filed by U.S. Representatives Berman, Filner and Shennan, *Cano*, 211 F. Supp. 2d 1208).

183. Order, *supra* note 18, at 7.

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

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

186. Order, *supra* note 18, at 5−6.

187. *See id.* at 4–5 (citing Miller v. Transamerican Press, Inc., 709 F.2d 524, 529 (9th Cir. 1983)).

188. *Id.* at 4 (quoting *Miller*, 709 F.2d at 529).

requirements.[189]

Here, the court determined that the members of Congress had failed both steps.[190] First, the court stated that "[b]ecause . . . their legislative affairs are affected only incidentally," and "because the communications [fell] outside of [their] sphere of legislative duties" the communications were not a part of the "'deliberative and communicative process.'"[191] Second, the court stated that the communication did not involve "proposed legislation or some other subject within Congress' constitutional jurisdiction."[192]

Additionally, the court analogized the factual scenario in *Perez* to two U.S. Supreme Court cases where the Court had noted that any attempt by the legislature to influence executive agencies would not be protected by legislative privilege.[193] While the interaction in *Perez* was not factually identical, the court said that the principle from those cases is that the legislature cannot invoke the privilege when it discusses a matter outside of its jurisdiction and seeks "to influence the decisions of a state legislative body."[194]

IV. THE *PEREZ V. TEXAS* CASE RAISES AN IMPORTANT CONSTITUTIONAL QUESTION AND AFFECTS HOW FUTURE MEMBERS OF CONGRESS WILL ASSERT THE PRIVILEGE IN REDISTRICTING CASES

While this order from *Perez v. Texas* may seem like a small issue in what is a much larger redistricting case,[195] the practical implications are

189. *See Miller*, 709 F.2d at 529.

190. Order, *supra* note 18, at 5−6.

191. *Id.* at 5 (quoting *Miller*, 709 F.2d at 529).

192. *Id.*

193. *Id.* at 5−6 (citing Hutchinson v. Proxmire, 443 U.S. 111, 121 n.10, 131 (1979); United States v. Johnson, 383 U.S. 169, 172 (1966)). *But see* Reinstein & Silverglate, *supra* note 28, at 1163. Professor Reinstein and Silverglate propose arguments for why legislators intervening before executive agencies on behalf of their constituents may be a good thing. "It may be argued that there is a congressional role akin to that of an ombudsman with respect to executive agencies. With the tremendous growth of these federal agencies and the mushrooming number of bureaucrats, there is much to be said for Members of Congress using their influence to protect constituents from injustice. And the positive effects of such intervention on the workings of government go beyond relief for individual constituents who feel helpless when confronted with a gigantic bureaucracy; the intervening legislator is also in a position to help administrators keep in touch with popular opinion concerning the activities of their agency. In addition, studies of Congress attest generally to the fairly widespread nature of legislative intervention before executive agencies." *Id.* at 1163–64 (footnotes omitted).

194. Order, *supra* note 18, at 6.

195. Broadly stated, the issue in the case was "[w]hether Texas' redistricting plan violates the

significant, and the order raises an important constitutional question: what is the appropriate scope of the legislative privilege in the redistricting context? The *Perez* court seemed sure that this communication was outside the modern version of the test.[196] But the broad textual grant of Congress's plenary authority over federal redistricting matters in the Constitution,[197] along with the practical concerns highlighted by the members of Congress,[198] indicates that this question deserves a more thorough analysis.

Moreover, it is foreseeable that this issue will continue to arise in the context of suits where large groups of minority plaintiffs sue, alleging that redistricting committees have inappropriately re-drawn congressional districts in such a way that dilutes a group's ability to elect a candidate of their choice. In fact, the Texas plaintiffs had sought discovery from one of the members of Congress named in this litigation in the previous redistricting cycle.[199]

It is also foreseeable that members of Congress will continue to consult various individuals including state legislators who are in charge of re-drawing the district lines, and so, it is important that members of Congress understand whether those communications will be protected by legislative privilege. Framed more directly, are these communications "legislative acts" under the standard *Gravel* test? And, regardless of the answer to the first question, normatively, *should* they be protected by legislative privilege in light of the peculiarities of redistricting?[200] Even if the act of communicating with certain individuals regarding redistricting is not considered a "legislative act," questions linger. In fact, the way that the Texas court resolved this problem, while seemingly innocuous, could be potentially dangerous for future plaintiffs alleging impermissible gerrymandering.[201]

Constitution because it does not make a good faith effort to maintain population equality and treats inmates as residents of the counties in which they are incarcerated." Ohio State Univ. Moritz College of Law, Perez v. Texas, ELECTION LAW @ MORITZ, http://moritzlaw.osu.edu/electionlaw/litigation/PerezVTexas.php (last updated Oct. 3, 2012).

196. *See* Order, *supra* note 18, at 3–6.

197. *See* U.S. CONST. art. I, § 4.

198. *See* Motion to Prevent Disclosure, *supra* note 19.

199. *Id.* at 5.

200. What distinguishes redistricting from most other contexts in which these cases have taken place is Congress's nearly plenary authority over redistricting matters. *See supra* Parts II & II.A.

201. *See infra* Part VI.

A. Members of Congress Might Use Other Arguments to Reach the Shelter of Legislative Privilege, Thereby Depriving Redistricting Plaintiffs of Access to Important Evidence

The Texas court failed to foresee alternative ways that the members of Congress could have argued the motion, and in doing so, the court may have inadvertently encouraged members of Congress to exploit a gap in the "legislative acts" test. The members of Congress could have resorted to other arguments, especially in light of Congress's broad authority over redistricting matters, to put themselves in what is clearly a protected category of the Speech or Debate Clause. To illustrate this, it is helpful to think about how these discovery requests could take place in future cases.

Plaintiffs would first make a discovery request, asking the members of Congress to turn over correspondence. Then, the members of Congress would have a choice to make. They could try to do what the members of Congress in *Perez v. Texas* did by asserting that their communications constitute "legislative acts" and hope that another court is more sympathetic to their position. However, after *Perez*, a well-advised member of Congress might take a different tack.[202]

Instead, members of Congress might choose to link their activity to something that the U.S. Supreme Court has unequivocally stated is activity that falls within the legislative sphere. For instance, members of Congress in the process of investigating potential legislation are squarely protected by the Speech or Debate Clause.[203] Future members of Congress could assert that they were investigating redistricting legislation and invoke their broad authority under Article I, Section 4 of the U.S. Constitution and the enforcement provisions of the Fourteenth and Fifteenth Amendments.[204] That explanation should suffice to keep the communications sheltered under existing precedent, at least in a jurisdiction such as the Court of Appeals for the District of Columbia,

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202. Of course, other courts might have decided this differently, and so it is conceivable that members of Congress will continue to attempt this argument. However, because of the dearth of precedent in this area, a future court would almost surely consult the Texas court's order as a source of guidance.

203. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504–05 (1975) (explaining that the privilege will attach when Congress investigates in a procedurally regular manner).

204. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4; *see* U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

which recognizes the nondisclosure privilege.[205]

It is this possibility that makes the need to examine the scope of the Clause all the more acute. To that end, this Comment will first address the issue of whether the Clause should contain a nondisclosure privilege. Second, it will address whether the actions of the members of Congress in *Perez v. Texas* should fall within the modern articulation of the privilege. Third and finally, this Comment will examine redistricting and explore whether it warrants special treatment in light of Congress's authority over regulating redistricting matters from Article I, Section 4 of the U.S. Constitution.

V. A FUNCTIONAL ANALYSIS OF THE SPEECH OR DEBATE CLAUSE DEMONSTRATES THAT THE CLAUSE SHOULD NOT CONTAIN AN ABSOLUTE NONDISCLOSURE PRIVILEGE

As a threshold matter, it is important to first determine whether the Speech or Debate Clause contains a nondisclosure privilege, not just a testimonial privilege.[206] It is important because if the Clause does not contain a nondisclosure privilege, then there is no basis to say that the Clause should shield all documentary evidence—containing or stemming from "legislative acts"—from discovery. This would help prevent members of Congress from exploiting the gap in the "legislative acts" test in the redistricting context because, even if they linked their activity to legitimate "legislative activity," the documentary evidence could still at least be disclosed, if not necessarily used. However, if the Clause does contain an absolute nondisclosure privilege, at least in the redistricting context, members of Congress may be able to prevent almost all disclosure.[207]

A. Neither Distraction Concerns Nor Separation of Powers Concerns Support Incorporating an Absolute Nondisclosure Privilege into the Speech or Debate Clause

The U.S. Supreme Court has never definitively stated that the Clause

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205. United States v. Rayburn House Office Bldg., 497 F.3d 654, 660 (D.C. Cir. 2007).

206. There is some debate among the circuit courts over this issue. The D.C. Circuit held that the Clause does contain a nondisclosure privilege. *Compare Rayburn*, 497 F.3d at 660 (citing Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995)), *with* United States v. Renzi, 651 F.3d 1012, 1034 (9th Cir. 2011) (expressly disagreeing with the D.C. Circuit regarding the existence of a nondisclosure privilege), *cert. denied*, 132 S.Ct. 1097 (2012).

207. *See Rayburn*, 497 F.3d at 660; *Brown & Williamson*, 62 F.3d at 420−21.

includes a nondisclosure privilege;[208] however, it has made clear that it will read the Clause "broadly to effectuate its purposes" and that the Clause's purpose "is to insure that the legislative function the Constitution allocates to Congress may be performed independently."[209] This language and U.S. Supreme Court precedent suggest that the Court will undertake a functional analysis.[210] Congress could be impeded from performing its legislative function independently if plaintiffs could, as a matter of right, compel members of Congress to disclose documentary evidence stemming from "legislative acts." As the members of Congress argued, having to respond to discovery requests from plaintiffs unhappy with the outcome of the state legislative process could be a major distraction.[211]

However, the *Renzi* court took the position that distraction alone is not the only consideration when determining whether the privilege should attach unless the underlying action itself is barred.[212] The *Renzi* court held that the Clause "does not blindly preclude disclosure and review by the Executive[213] of documentary 'legislative act' evidence."[214] Furthermore, in the redistricting context, as noted above, members of Congress could avoid disclosure through artful pleading that would place their activity within the "legislative activity" sphere.[215] Limiting disclosure to non-legislative activities could run the risk of barring redistricting plaintiffs from accessing the information necessary to show impermissible gerrymandering.[216]

Separation of powers is one of the bases for the Clause,[217] and this concern is simply not acute in redistricting cases. This kind of case is

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208. *Rayburn*, 497 F.3d at 660.

209. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501−02 (1975).

210. *See* Harlow v. Fitzgerald, 457 U.S. 800, 811 (1982).

211. Motion to Prevent Disclosure, *supra* note 19, at 5.

212. United States v. Renzi, 651 F.3d 1012, 1035 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012). The court cited the following U.S. Supreme Court cases to illustrate this point: *United States v. Helstoski*, 442 U.S. 477, 480–81, 488 n.7 (1979); *Gravel v. United States*, 408 U.S. 606, 629 n.18 (1972); *United States v. Johnson*, 383 U.S. 169, 173–77 (1966) (describing the government's investigation into actual legislation and other clear legislative acts). *Renzi*, 651 F.3d at 1036−37.

213. *Renzi* was a criminal case, and so the executive branch was involved. *See* 651 F.3d at 1018. However, based on the analysis in Part I.B, there is good reason to believe that *Renzi*'s reasoning applies in civil actions as well as criminal.

214. *Renzi*, 651 F.3d at 1037.

215. *See supra* note 202 and accompanying text.

216. Many of the same concerns have analogs in the criminal context. *See* Harrell, *supra* note 96, at 389−90.

217. *See* Reinstein & Silverglate, *supra* note 28, at 1164.

significantly different from the bribery and corruption cases that have recently been the subject of Speech or Debate Clause cases.[218] In bribery and corruption cases, the executive branch investigates and potentially prosecutes legislators.[219] That means that the executive branch will subpoena documents[220] or acquire a search warrant.[221] Then, members of the executive branch will review material that may or may not be legislative in nature.[222] That scenario is perilous because of the separation of powers concerns—one of the Clause's key rationales.[223]

However, civil discovery is different. Plaintiffs can make discovery requests, but they cannot obtain search warrants.[224] More importantly, plaintiffs seeking to show improper redistricting criteria represent a diminished threat to separation of powers. Private plaintiffs do not form a coequal branch of government, so there is little risk of encroaching on legislative independence. Of course, the power of the judiciary may be brought to bear on members of Congress, but only as a *response* to discovery requests initiated by a plaintiff or group of plaintiffs.[225] And yet, even in the criminal context, where separation of powers concerns are much more pronounced, the Ninth Circuit has refused to "blindly preclude disclosure."[226] This is because there are legitimate counter interests to the legislature's need for independence.[227]

The *Renzi* court identified crimes such as corruption and bribery that the executive branch would prosecute.[228] While the bad acts are different in the civil context, they still present legitimate counter interests to the legislature preserving independence and avoiding distraction.[229] In *Perez*

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218. *See, e.g.*, United States v. Rayburn House Office Bldg., 497 F.3d 654 (D.C. Cir. 2007).

219. *See id.*

220. *See, e.g.*, Gravel v. United States, 408 U.S. 606, 608–10 (1972).

221. *See, e.g.*, *Rayburn*, 497 F.3d at 660.

222. *See, e.g.*, *id.* at 656−57.

223. *See* Reinstein & Silverglate, *supra* note 28, at 1164.

224. *See Overview of the Fourth Amendment*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 3, 4 (2008).

225. For example, in *Perez v. Texas*, the plaintiffs made a discovery request, the members of Congress asserted legislative privilege as a basis for nondisclosure, and the court then issued a memorandum opinion compelling the members of Congress to disclose the requested material. *See* Order, *supra* note 18. Although separation of powers is still a concern when one branch exerts power against another branch, it is simply not an acute concern in this case because the judiciary cannot initiate a confrontation unilaterally.

226. United States v. Renzi, 651 F.3d 1012, 1037 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).

227. *See* Harrell, *supra* note 96, at 404−05.

228. *Renzi*, 651 F.3d at 1020.

229. *Id.*

v. Texas, for example, the plaintiffs had a legitimate interest in vindicating their voting rights.[230] Proving intent to redistrict based on impermissible criteria is a difficult task,[231] and if plaintiffs were precluded from this avenue because members of Congress were able to artfully plead that they were undertaking "legislative activity," then it would be nearly impossible for plaintiffs to vindicate their voting rights.[232]

Permitting documentary disclosure may not be appropriate for all forms of congressional activity, but redistricting simply does not implicate concerns that justify a nondisclosure privilege.[233] To the contrary, the restrictions on impermissible redistricting practices should be vindicated by a transparent discovery process that allows plaintiffs to access the information they need to show impermissible gerrymandering.

B. Courts Should Apply Discovery Rules and Existing Privileges Instead of Resorting to a Nondisclosure Privilege

Discovery rules can act as a check on plaintiffs who abuse the power to compel disclosure in redistricting cases. Although Federal Rule of Civil Procedure 34 does allow for broad disclosure, members of Congress will still have an opportunity to respond to inappropriate requests.[234] Members of Congress may be concerned that plaintiffs will bring suit and seek discovery to pry into political strategy or just to block a redistricting plan based on partisan motives. The latter kind of suit happens anyway,[235] and courts can act as discovery referees to ensure that plaintiffs are not abusing the discovery system. Courts should not hesitate to impose Rule 26(g)[236] sanctions on plaintiffs who misuse this broad regime of disclosure.

Moreover, members of Congress will still be protected by the use privilege[237] and by the testimonial privilege of the Speech or Debate

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230. *See* Order, *supra* note 18.

231. HEBERT ET AL., *supra* note 137, 63−64.

232. *See supra* Part II.B.

233. Because separation of powers concerns are diminished in the civil context, and because pragmatic concerns—such as harassment and distraction—can be dealt with through other, less drastic means, redistricting does not merit a nondisclosure privilege.

234. *See* FED. R. CIV. P. 34.

235. *Federal Court Involvement in Redistricting Litigation*, *supra* note 129, at 879−80.

236. FED. R. CIV. P. 26(g).

237. Green, *supra* note 7, at 501. A use privilege, in the context of the Speech or Debate Clause, means that the Executive or other litigant cannot use any evidence that came from a protected

Clause.[238] Even if plaintiffs gain access to documentary evidence stemming from legitimate "legislative acts," if they try to use that evidence in impermissible ways, members may assert legislative privilege.[239] If the documentary evidence does stem from "legislative acts," then a court can prevent plaintiffs from using it as evidence, and can certainly prevent the evidence being used as the basis for liability.[240]

Members of Congress may be generally concerned that the legislative process would run the risk of being disrupted.[241] Of course, some plaintiffs will still probably find ways to abuse the system, but the current reality is that there is serious power asymmetry between members of Congress and many plaintiffs, especially minority groups.[242] Part of that asymmetry is deliberate, but only to the extent that it allows Congress to operate without fear of coercion from the other two branches of government[243] and without distraction from legitimate legislative activity.[244] This Comment's proposed solution tries to level the playing field without sacrificing Congress's independence or its ability to function properly.

VI. THE MODERN ARTICULATION OF A "LEGISLATIVE ACT" SHOULD NOT COVER MEMBERS OF CONGRESS COMMUNICATING WITH STATE LEGISLATORS REGARDING REDISTRICTING

The Clause's underlying rationales and the realities of redistricting do not support including an absolute nondisclosure privilege, but it is still important to define the scope of the privilege in the event that others

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legislative act against a legislator in court. *Id.*

238. *See* United States v. Renzi, 651 F.3d 1012, 1035 n.27 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).

239. *See* Green, *supra* note 7, at 501.

240. *See* Harrell, *supra* note 96, at 404−05.

241. *See* United States v. Rayburn House Office Bldg., 497 F.3d 654, 661 (D.C. Cir. 2007) ("This compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process."); MINPECO, S.A. v. Conticommodity Servs. Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) ("A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive.").

242. *See* HEBERT ET AL., *supra* note 137, 63−64.

243. *See* Gravel v. United States, 408 U.S. 606, 618 (1972).

244. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975).

disagree that the Clause is not one of nondisclosure. For example, the Texas court resolved the *Perez* dispute by resorting to the "legislative acts" test. While it is arguably a dangerous approach for future plaintiffs, it is nonetheless a predictable one. This section describes how the *Perez v. Texas* court applied the test, and argues that such an application could allow future members of Congress to exploit Speech or Debate Clause protection.

The key question for the "legislative acts" test is this: to what extent will members of Congress be protected from disclosing documentary material? And, more specifically, to what extent—if any—will members be protected from disclosing documentary material relating to their involvement in congressional redistricting? For the legislative privilege to apply, the action "[f]irst . . . must be 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' . . . . Second, the activity must address proposed legislation or some other subject within Congress' constitutional jurisdiction."[245] As this Comment explains below, the activity in *Perez v. Texas*—based on *how* the members invoked the privilege—falls outside of the Speech or Debate Clause. However, if the members had asserted the privilege in a different manner, the court might have been bound to find that the members were acting "legislatively."

A. Gravel *Narrowed the Privilege's Scope, but Failed to Provide Concrete Guidance*

When the U.S. Supreme Court articulated the legislative acts test in *Gravel*, it signaled a significant narrowing of the scope of the privilege.[246] This definition is adequate for easy cases such as those involving formal action in official business, including "voting, conducting hearings, issuing reports, and issuing subpoenas."[247] But it does not resolve the lingering problems that arise when applying the privilege to new facts that do not, at first-glance, fall neatly within the categories of "legislative" or "non-legislative" action.

The drawback to the *Gravel* test, and U.S. Supreme Court Speech or Debate Clause precedent generally, is that it does not provide much

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245. Miller v. Transamerican Press, Inc., 709 F.2d 524, 529 (9th Cir. 1983) (quoting *Gravel*, 408 U.S. at 625).

246. *See* Brewster, Gravel*, and Legislative Immunity*, *supra* note 27, at 146; Reinstein & Silverglate, *supra* note 28, at 1118; Walker, *supra* note 28, at 377.

247. Bastien v. Office of Campbell, 390 F.3d 1301, 1314 (10th Cir. 2004).

concrete guidance for interpreting the scope of the privilege in cases that are not factually on-point.[248] Courts and scholars have tried to delineate the scope of the Clause by drawing on dicta from U.S. Supreme Court cases.[249] However, since *Gravel*, the Court has had limited opportunities to apply the new test.[250] While these few cases help to define the scope of the privilege by accretion, there is still substantial uncertainty. Each case has an episodic feel, as if there is no well-defined test that courts can readily apply to new factual scenarios.[251]

B. Future Courts May Find Communications Like Those in Texas v. Perez *to Be "Legislative" in Nature*

The *Perez* court tried to draw on precedent to put flesh on the bare-bones standards used by previous courts dealing with legislative privilege. It cites to cases involving members of Congress trying to influence executive agencies,[252] and distills a principle from those cases: specifically, that the members of Congress "[had] discussed a matter outside of their jurisdiction" and had sought "to influence the decisions of the state legislative body."[253] This is a clever move by the court, and the court's principle does have some appeal. But it is questionable whether the court's reading of those cases really extends to the facts of *Perez*.

In both *Hutchinson v. Proxmire*[254] and *United States v. Johnson*,[255] the Court stated in dictum that members of Congress who try to influence executive agencies would not be shielded by the Speech or Debate Clause.[256] In those instances, the Court presumably would be concerned with separation of powers issues. But in the Texas redistricting case, the members of Congress were conferring with the state legislature.[257]

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248. 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5675 (1992).

249. *Id.*

250. *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); United States v. Brewster, 408 U.S. 501 (1972).

251. 26A WRIGHT & GRAHAM, *supra* note 248, § 5675.

252. Order, *supra* note 18, at 5–6 (citing *Hutchinson*, 443 U.S. at 121 n.10, 131; United States v. Johnson, 383 U.S. 169, 172 (1966)).

253. *Id.* at 6.

254. 443 U.S. 111 (1979).

255. 383 U.S. 169 (1966).

256. *See Hutchinson*, 443 U.S. at 121 n.10, 131; *Johnson*, 383 U.S. at 172.

257. Order, *supra* note 18, at 3.

Unlike in *Hutchinson* and *Johnson*, there are no separation of powers concerns. There may be issues of federalism, but there is no evidence that the Speech or Debate Clause has roots in federalism similar to its roots in separation of powers.[258] While the court's argument has some appeal, it does not seem to square with the origins of the Speech or Debate Clause.

Regardless of whether these cases were apposite, the *Perez* court was correct in finding that what the members of Congress claimed to be doing was not "legislative."[259] The correspondence with the Texas state legislators had nothing to do with any part of a house or committee proceeding, which is the first part of the two-part test fashioned by the Ninth Circuit. Also, the way the members argued for nondisclosure seems to fall outside of the second part of the test, which requires the activity to involve proposed legislation or some other subject within Congress's constitutional jurisdiction. Even though Congress has broad constitutional authority to regulate redistricting, the members did not argue this point.[260] Had they made that argument, the *Perez* court might have reached a different result.

C. By Resorting to Gravel*'s Legislative Acts Test, the* Perez *Court Left a Means by Which Future Members of Congress May Circumvent the Test*

Redistricting, as has been noted,[261] is unique. Congress has a textual grant of authority to regulate election matters, which extends to redistricting.[262] While that grant does not authorize members of Congress to try to persuade state legislators to redistrict based on impermissible criteria, such as racial animosity,[263] it does create a sturdy hold to which members of Congress could link their activity to legitimate "legislative acts" and so invoke the protection of the Speech or Debate Clause. The members of Congress did not make that argument; instead, they seemed to rely on the lack of precedent and the future distractions that could ensue if the court did allow for disclosure.[264]

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258. *See* Reinstein & Silverglate, *supra* note 28, at 1164.

259. *Id.* at 5−6.

260. *See* Motion to Prevent Disclosure, *supra* note 17.

261. *See supra* Part II.

262. *See* U.S. CONST. art. I, § 4.

263. *See supra* Part II.B.

264. *See* Motion to Prevent Disclosure, *supra* note 19, at 5. Additionally, the members of

Now that members of Congress know that the Texas court—and perhaps future courts—will reject arguments involving a lack of precedent and potential distraction, they will surely explore other options. One option mentioned above is to try to link redistricting to an activity that the U.S. Supreme Court has protected in no uncertain terms. Congress has a textual grant of authority to regulate redistricting matters,[265] and it is foreseeable that Congress could use that authority to legislate in the area of redistricting. This means that the next time a scenario like the one in Texas takes place, members of Congress could instead explain that they were investigating potential redistricting legislation.

As noted above, the U.S. Supreme Court has squarely held that investigating potential legislation constitutes "legislative activity" for purposes of the legislative privilege.[266] In fact, the *Perez* court, in denying the Congresspersons' motion, explicitly stated that "[t]his was not proposed legislation or some other subject within Congress' constitutional jurisdiction."[267] This adds support to the theory that if the members of Congress could have tied what they were doing to activity that the U.S. Supreme Court and the Constitution authorized them to do, then their correspondence would have been protected.

D. Even Though the Privilege "Breaks," Plaintiffs Will Still Struggle to Obtain These Kinds of Communications Because of the State Versions of the Federal Speech or Debate Clause

One solution to the potential problem of members of Congress evading disclosure through using the arguments discussed above is to obtain the information by forcing the other party to the communication—in the *Perez* case, the state legislators—to disclose. However, as noted earlier, most states have some kind of speech or debate clause that is more or less the same as the Federal Speech or Debate Clause.[268] And although some states have interpreted their versions of the Clause more narrowly than have federal courts,[269]

Congress relied on the previous redistricting cycle when the same plaintiffs had sought discovery and the court had quashed those subpoenas, as well as the district court's decision in *Cano v. Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003). *Id.*

265. *See* U.S. CONST. art. I, § 4.

266. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504−05 (1975) (explaining that the privilege will attach when Congress investigates in a procedurally regular manner).

267. Order, *supra* note 18, at 5.

268. Huefner, *supra* note 30, at 224, 235–37.

269. *See id.* at 259.

Professor Huefner has advocated for states to interpret their state versions to make them coextensive with the Federal Clause.[270]

If states follow Professor Huefner's advice, then the privilege would not actually "break" in practice. Instead, plaintiffs would be unable to access key information from either state legislators or members of Congress because both would likely be protected by the Clause. Of course, that is assuming that the state legislators would also assert the state privilege. Interestingly, in the *Perez* case, the Texas state legislators did not assert their state legislative privilege.[271]

CONCLUSION

While the seemingly narrow "legislative acts" test may seem to help plaintiffs, it could have the opposite effect in redistricting cases. If courts merely dispose of this issue by resorting to the standard "legislative acts" test, then they will incentivize legislators to give more artful explanations for why what they are doing constitutes a "legislative act." And Congress's entrenched authority over redistricting matters may leave future courts with no choice but to prevent disclosure.[272]

To prevent that outcome, future courts should undertake the following analysis. First, courts should follow the Ninth Circuit's approach and clarify that the Speech or Debate Clause does not contain an absolute nondisclosure privilege.[273] By addressing this as a threshold matter, courts will obviate the need to use the "legislative acts" test until later. Second, courts should use the Federal Rules of Civil Procedure to filter out discovery requests not made in good faith. By using these rules, courts can protect members of Congress from being harassed by overly burdensome discovery requests. Third, if a litigant tries to use documentary evidence obtained through discovery, courts should then conduct the "legislative acts" test to determine whether the evidentiary privilege that is undoubtedly included within the Speech or Debate Clause prevents the litigant from using the documentary evidence in court. While members of Congress may face some increased distraction, courts should be well-equipped to ensure that plaintiffs are not making

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270. *See id.* at 270.

271. Order, *supra* note 18, at 5.

272. In spite of *Gravel*'s narrowing language, the dearth of cases in which the test has been applied—coupled with their episodic feel—indicates, at best, that things remain uncertain. *See supra* Part IV.A.

273. United States v. Renzi, 651 F.3d 1012, 1034 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1097 (2012).

such requests only to harass and to delay. Whatever minor distress members of Congress undergo will be offset by the benefit to redistricting plaintiffs, and governmental transparency in general.