1981

A New Perspective on Legislative Immunity in ' 1983 Actions

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A NEW PERSPECTIVE ON LEGISLATIVE IMMUNITY IN SECTION 1983 ACTIONS

INTRODUCTION

In the aftermath of the Civil War, the forty-second Congress[1] passed the Civil Rights Act of 1871. Section one of that Act, now section 1983, was designed to ensure the enforceability of federal constitutional and statutory rights granted to newly-freed blacks[2] by providing a civil cause of action for violations of federally guaranteed rights by any person acting under color of state law.[3] The statute clearly reflects Congress' conviction that federal con-

1. The 42d Congress, acting during the post civil war Reconstruction period, was faced with two central problems: bringing the southern states back into the Union and deciding the political and civil character the states were to possess. H. BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 76 (1978). The Congress was confronted with violent white opposition to the earlier Reconstruction reforms. By 1871, the activities of the Ku Klux Klan and other white supremacist groups had reached crisis proportions. The Congress enacted a series of measures to protect Negro civil and political rights, among them the bill which is now § 1983. *See* note 2 *infra.* The chief aim of this legislation was to control violations of constitutional rights by the Klan and other groups by placing upon the State the duty to prevent violations of civil rights. H. BELZ, *supra,* at 117-29.

2. The current version of § 1983, 42 U.S.C. § 1983 (1976), *as amended by* Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284, originated as § 2 of the 1866 Civil Rights Act, "An act to protect all persons in the United States in their Civil Rights, and furnish the means for their vindication," ch. 31, 14 Stat. 27 (1866). It was re-enacted as § 1 of H.R. 320 — "A Bill to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes," Act of Apr. 20, 1871, 17 Stat. 13 (1871). H.R. 320 is often referred to as the Ku Klux Klan Act because several of its provisions were aimed at curtailing Klan violence. Congressional debates on both the 1866 Act and the Ku Klux Klan Act provide the major sources of information about the purposes and intended scope of § 1983. Congress' realization that, in the absence of an enforcement mechanism, constitutional guarantees would have little meaning is illustrated in Lyman Trumbull's speech in support of the 1866 Act:

> This measure is intended to give effect to that declaration [the thirteenth amendment] and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 106 (B. Schwartz ed. 1970) [hereinafter cited as STATUTORY HISTORY].

3. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia,

stitutional and statutory rights have little meaning if they are unenforceable.[4] This perdurable concern has made section 1983 a vital part of modern civil rights litigation.[5]

The Supreme Court, however, continues to expand common law legislative immunity[6] to section 1983 actions, despite the potential impact on civil rights litigants. In a recent case, *Lake*

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Actions under color of state law include those of an official acting pursuant to authority granted him by state law, as well as those of an official abusing the power vested in him by the state. Monroe v. Pape, 365 U.S. 167, 199 (1961), *overruled on other grounds,* Monell v. Dept. of Social Services, 436 U.S. 658, 663 (1978). A person may be deemed to act under color of custom when his or her acts "have the force of law by virtue of the persistent practices of state officials." Adickes v. S. H. Kress & Co., 398 U.S. 144, 167 (1970).

4. Congress' commitment to the enforcement of constitutional and statutory guarantees is evident in the debates which occurred at the time § 1983 was passed. Section 1983 cannot be divorced from the sentiments which led to its passage: a burning desire to effectuate the civil rights which had been granted to newly freed blacks, and a yearning to see the restoration of the republican form of government, complete with constitutional guarantees, which had nearly been lost in the recent civil war. *See* note 2 *supra;* notes 141, 143, 169 *infra.*

5. Despite its long existence, *see* note 2 *supra,* § 1983 was rarely used between 1871 and 1961. Shortly after its enactment, the Supreme Court decided two cases which severely limited its utility. In the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872), the Court narrowly construed the "privileges and immunities" clause of the fourteenth amendment, limiting the clause's protection to the privileges and immunities of national, as opposed to state, citizenship. *Id.* at 79-82. As a result of this decision, only a few rights, such as the right to travel, were deemed federal in nature and enforceable by § 1983. Due process and equal protection were not considered privileges and immunities of national citizenship, and hence were not enforceable through § 1983.

In addition, the concept of state action was given a restrictive meaning—it was held to include only those acts committed pursuant to a state statute found to be unconstitutional. Civil Rights Cases, 109 U.S. 3, 11 (1883). This construction reduced the instances in which the fourteenth amendment could be violated and thus diminished the need for the § 1983 cause of action.

Section 1983 was revitalized by the Supreme Court's decision in Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds,* Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

In *Monroe,* the Court held that allegations of a violation of the fourth amendment under color of state authority satisfy the deprivation requirement of § 1983; that the words "under color of any statute, ordinance, regulation, custom, or usage of any state or territory" include acts of an official or policeman who can show no authority under state law or custom for his act; that the federal remedy of § 1983 is supplementary to the state remedy; that § 1983 does not require a showing of specific intent to cause a deprivation; and that cities were not meant to be persons for purposes of § 1983. Cities were subsequently held to be persons under the statute in Monell v. Dept. of Social Services, 436 U.S. 658, 701 (1978).

6. Common law legislative immunity protects state legislators and other state officials exercising legislative functions from civil rights actions brought pursuant to

Country Estates, Inc. v. Tahoe Regional Planning Agency,[7] the Court granted immunity to non-elected employees of a bi-state agency[8] without acknowledging the possible effect that such immunity could have on the utility of section 1983.[9] A grant of legislative immunity means that a section 1983 action against an immunized official will be dismissed[10] and, consequently, that a plaintiff's allegations of civil rights violations will never be heard on the merits. As the Court expands legislative immunity through decisions such as *Lake Country,* litigants are faced with a diminishing number of potential defendants.[11] This divestment of the right to sue state officials under section 1983 conflicts with both the language[12] and the spirit[13] of the statute, and may ultimately

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42 U.S.C. § 1983. *See, e.g.,* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (recognizing legislative immunity for the members of the Supreme Court of Virginia against a § 1983 action) (*see* text accompanying notes 56-58 *infra*); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (recognizing immunity for non-elected regional planners against a § 1983 action) (*see* text accompanying notes 23-25, 59-69 *infra*); Tenney v. Brandhove, 341 U.S. 367 (1951) (recognizing immunity for state legislators against a § 1983 action) (*see* text accompanying notes 29-40 *infra*). Throughout this Comment, as throughout the cases, the terms "common law legislative immunity," "legislative immunity," "common law legislative privilege," and "legislative privilege" are used interchangeably.

7. 440 U.S. 391 (1979).

8. The Tahoe Regional Planning Agency was created by California and Nevada to coordinate and regulate development in the Lake Tahoe Basin. The compact between the two states was ratified by Congress in accordance with Article I, § 10, cl. 3 of the U.S. Constitution. Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 394 (1979). Under the terms of the compact, six members of the Agency are appointed by counties and cities, and four by the two states. *Id.* at 401.

9. The Court's brief discussion of legislative immunity ignores the impact of the decision on § 1983. Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 403-406 (1979). Mr. Justice Marshall, dissenting, alluded to the impact on § 1983, stating "[a] doctrine that denies redress for constitutional wrongs should, in my judgment, be narrowly confined to those contexts where history and public policy compel its acceptance." *Id.* at 408.

10. Legislative immunity is absolute. In *Lake Country,* for example, the majority held that "petitioners' federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity." *Id.* at 405.

11. After *Lake Country,* individuals "acting in a capacity comparable to that of members of a state legislature" are absolutely immune from federal damages liability. *Id.* at 406. If other officials succeed in describing their duties as comparable to those of legislators, they too may be granted absolute immunity. As a consequence, the plaintiff seeking redress from various state officials will be faced with a whole range of officials in various positions all arguing that they have absolute immunity to § 1983 damages actions.

12. As is evident from the statutory language, § 1983 provides every citizen or other person within the jurisdiction of the United States with the right to seek relief against state officers or others acting under color of state law who cause deprivations of constitutional and statutory rights. Although the statute was part of a package of far-reaching reforms in the Reconstruction period, *see* notes 1, 2 *supra,* its language and its mandate have descended to modern law unchanged. The language gives no indication that the 42d Congress, or any Congress since, intended that § 1983 be limited or qualified.

13. At the time § 1983 was passed, *see* note 2 *supra,* the members of Congress

render unenforceable the rights protected by section 1983, thus giving rise to the very result which the forty-second Congress sought to avoid.[14]

This Comment analyzes the Supreme Court's current approach to legislative immunity and demonstrates the Court's failure to consider fully the policies of legislative immunity and the purposes of section 1983.[15] It examines the Court's legislative immunity decisions in two related contexts: suits against federal legislators where speech or debate clause immunity is invoked,[16] and federal criminal prosecutions of state legislators.[17] The Court's analysis in these contexts provides an overview of the policies which are central to legislative immunity and offers insights as to how its parameters may be determined.[18] Finally, the Comment proposes that the current analysis of legislative immunity to section 1983 be replaced by an interest-balancing approach,[19] through which the Court can achieve an immunity structure which is both faithful to the policies of legislative immunity[20] and protective of federal constitutional and statutory rights.[21]

I. THE SUPREME COURT'S CURRENT ANALYSIS OF LEGISLATIVE IMMUNITY TO SECTION 1983 DAMAGE ACTIONS[22]

The Supreme Court's decision in *Lake Country Estates, Inc. v.*

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were concerned with controlling the anarchy and corruption that were interfering with the Reconstruction effort to restore the pre-Civil War legislative processes. Section 1983 was drafted to deter state officials from abdicating their elected duties. *See* note 141 *infra.* Thus, the spirit of the times was one of ensuring that state officials performed their public duties.

While circumstances have changed drastically since the Civil War, the policy underlying § 1983 is still applicable in modern times. The spirit of the Reconstruction legislation focuses on the enormous responsibility officials have to the public, on the impact of official conduct on the functioning of government, and on the real possibility that official misconduct may lead to or contribute to widespread deprivation of constitutional and statutory rights. *See* note 1 *supra.*

14. *See* note 169 & accompanying text *infra.*
15. *See* notes 22-71 & accompanying text *infra.*
16. *See* notes 72-109 & accompanying text *infra.*
17. *See* notes 110-24 & accompanying text *infra.*
18. *See* notes 22-71, 82-122 & accompanying text *infra.*
19. *See* notes 153-68 & accompanying text *infra.*
20. *See* notes 73-83 & accompanying text *infra.*
21. *See* notes 117-18 & accompanying text *infra.*
22. This Comment addresses the issue of legislative immunity to § 1983 damage actions. Section 1983 also enables litigants to seek equitable relief, and some courts have held that legislative immunity will not preclude such relief. *See, e.g.,* Bond v. Floyd, 385 U.S. 116 (1966) (Georgia House of Representatives may not refuse to seat a state legislator based on his exercise of first amendment rights). *But see* Star

Tahoe Regional Planning Agency[23] exemplifies the shortcomings of its current approach to legislative immunity. The opinion merits close attention because it is the Court's first decision dealing with common law legislative immunity since 1951[24] and because it constitutes the first extension of legislative immunity to state officials other than state legislators. While *Lake Country* goes far beyond existing precedent, the opinion is a culmination of a general theory of common law immunity which the Court has developed over the past thirty years and is best understood in the context of this precedent. Legislative immunity had previously[25] been justified on three grounds: that in enacting section 1983, the forty-second Congress could not have intended to abrogate common law legislative immunity,[26] that the immunity is necessary to further the "public good,"[27] and that immunity should be determined on the basis of function rather than on the status of the particular official.[28] These analytic strands are interwoven in the Court's current approach to legislative immunity.

A. Tenney v. Brandhove *and the Development of Legislative Immunity to Section 1983*

The Supreme Court first addressed the issue of applying legislative immunity to section 1983 actions nearly thirty years ago in *Tenney v. Brandhove.*[29] State Senator Jack Tenney, Chairman of the California Committee on Un-American Activities, summoned Brandhove, a private citizen, to testify before the committee. Brandhove appeared but refused to testify because he considered the summons a retaliation for his attempts to persuade the California legislature to terminate funding of the Tenney committee. In response to Brandhove's silence, the committee made an initial decision to prosecute him for contempt. After that suit was abandoned, Brandhove sued Tenney and other committee members pursuant to section 1983, contending that the Senator had called him as a witness in order to "intimidate . . . silence . . . deter and

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Distributors, Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980) (state legislators held immune from actions for injunctive relief).

23. 440 U.S. 391 (1979).

24. In 1951, the Supreme Court decided the landmark case of Tenney v. Brandhove, 341 U.S. 367 (1951). *See* notes 29-36, 119-21, 134, 138-46 & accompanying text *infra.*

25. *See* Tenney v. Brandhove, 341 U.S. 367 (1951), the first Supreme Court case discussing common law legislative immunity. This seminal decision has continued to influence the development not only of common law legislative immunity but of other immunity as well. *See* notes 40-43 & accompanying text *infra.*

26. *See* notes 33-35 & accompanying text *infra.*

27. *See* notes 36-37, 44 & accompanying text *infra.*

28. *See* notes 48-49 & accompanying text *infra.*

29. 341 U.S. 367 (1951).

prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances."[30] Tenney defended the lawsuit by arguing that he and the other committee members were entitled to absolute legislative immunity. The district court dismissed the suit without opinion.[31] The Supreme Court ultimately affirmed the district court's dismissal.[32]

In reaching its decision that Tenney was indeed entitled to absolute immunity, the Court undertook a review of the historical development of legislative immunity in England and America. It recognized that since common law legislative immunity is the analogue[33] of the privilege guaranteed to members of Congress by the speech or debate clause, the common law immunity could not have been overlooked by the legislators present at the forty-second Congress.[34] The Court reasoned that these legislators, aware of the historic importance of legislative immunity, could not have meant to eliminate it by enacting section 1983.[35] In support of this conclusion, the Court asserted that, as a matter of policy, legislative immunity was necessary for the "public good."[36] In the Court's view, the public good demands that legislators be spared the cost, inconvenience, and distraction of defending their official behavior in court. Litigation of this type would not only detract from working time but would also expose officials to the hazards of judgment based on jury speculation as to their motives.[37]

While the historical analysis and policy justifications of *Tenney* have served as the basis for the Court's development of immunity doctrine, the reasoning of the case is weak in several respects. Neither the language of section 1983 nor its legislative history provides evidence that the forty-second Congress intended that legislators were to be immune.[38] The Court's conclusion was

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30. *Id.* at 371.

31. *Id.*

32. *Id.* at 379.

33. *Id.* at 376.

34. "The provision in the United States Constitution was a reflection of political principles already firmly established in the States." *Id.* at 373.

35. The Court stated, "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." *Id.* at 376.

36. *Id.*

37. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Id. at 377.

38. *See* notes 138-46 & accompanying text *infra.*

based on unsupported speculation about legislative intent.[39] Moreover, the Court's attempt to tie common law legislative immunity to the speech or debate clause, while supported by history,[40] is incomplete because the Court failed to discuss the policy concerns which gave rise to the privilege—separation of powers and legislative independence.

Despite these weaknesses, the decision in *Tenney* has long been the foundation of the Court's analysis of all common law immunity to section 1983. After *Tenney,* officials acting not only in a legislative capacity, but also in judicial,[41] prosecutorial[42] and executive capacities[43] have been granted immunity to section 1983 actions. In an effort to determine the parameters of these widespread immunities, the Court has adopted an analysis which focuses on an official's function as a means of determining whether immunity should be granted.[44]

B. *The Current Emphasis on Function*

Prior to *Tenney* and the corresponding expansion of immunities to section 1983, the Court dealt with immunity largely in the context of common law tort actions against state and federal officials.[45] Immunity was granted or denied a particular official on

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39. The *Tenney* court did not view the case before it as posing "far-reaching questions of constitutionality or even of construction." The Court stated, "We think it is clear that the legislation on which this action is founded does not impose liability on the facts before us, once they are related to the presuppositions of our political history." 341 U.S. at 372. The Court cited no legislative history or other authority for this interpretation of congressional intent.

40. *See* notes 73-82 & accompanying text *infra.*

41. *See, e.g.,* Stump v. Sparkman, 435 U.S. 349 (1978) (recognizing immunity from a § 1983 action for an Indiana Circuit Judge based on his *ex parte* approval of a mother's petition to have her 15-year-old daughter sterilized).

42. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409 (1976) (recognizing immunity for district attorney from § 1983 action alleging unlawful prosecution).

43. *See, e.g.,* Wood v. Strickland, 420 U.S. 308 (1975) (recognizing qualified immunity for school officials from § 1983 actions based on expulsions from school). Qualified immunity allows an official sued in a civil rights action to raise a good faith defense. Unlike legislative immunity, which is absolute in that it requires dismissal of the § 1983 action, qualified immunity allows a suit to proceed unless an official can show subjective good faith belief in the constitutionality of his actions and that, objectively, his actions were reasonable. *Id.* at 321-22. *See also* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (recognizing qualified executive immunity for the chief executive officer of a state, the senior and subordinate officers and enlisted personnel of the state National Guard, and the president of a state-controlled university from law suits based on alleged illegal acts leading to the deaths of students at Kent State University).

44. *See* notes 50-58 & accompanying text *infra.*

45. *See, e.g.,* Spaulding v. Vilas, 161 U.S. 483 (1896) (recognizing absolute immunity of Postmaster General with regard to defamatory statements); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950) (recognizing absolute immunity for Attorneys General of the United States, District Directors of

the basis of his position within the governmental heirarchy.[46] A cabinet member would be granted immunity from a defamation suit while a lower-level official would not be protected.[47] The Court has since recognized that a test which makes immunity contingent on status is highly arbitrary.[48] The modern era has witnessed unprecedented delegations of power to officials at all levels of government. It would be unfair to deny an official immunity merely because he lacks a title, if in all other respects his work is equivalent to that of a superior. The Court has therefore abandoned the "status" approach in favor of a case-by-case analysis based on an official's function. If that function has been deemed worthy of protection, immunity will attach regardless of rank.[49]

While the Court denies having transferred its analysis of immunity in tort cases to those actions based on section 1983, the Court's approach to the immunity issue in both contexts is strikingly similar.[50] The trier of fact is asked to compare the duties of

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Enemy Alien Control Unit and District Director at Ellis Island in an action for malicious prosecution).

46. *See, e.g.,* Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam,* 275 U.S. 503 (1927) (recognizing absolute immunity for a Special Assistant to the United States Attorney General in an action for malicious prosecution). In *Yaselli,* the Court stated, "The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions." *Id.* at 406.

47. *See, e.g.,* Spalding v. Vilas, 161 U.S. 483 (1895) (recognizing absolute immunity for Postmaster General and heads of executive departments); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949) (adopting the reasoning of *Spalding* to hold that United States Attorneys General, District Directors of Enemy Alien Control Unit of Department of Justice, and District Directors of Immigration at Ellis Island had absolute immunity), *cert. denied,* 339 U.S. 949 (1950).

48. *See, e.g.,* Barr v. Matteo, 360 U.S. 564, 572 (1959). There the Court stated, "We do not think that the principle announced in *Vilas* can properly be restricted to executive officers of cabinet rank, and in fact it never has been so restricted by the lower federal courts."

49. *See, e.g., id.* at 573, where the Court stated:

> The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.

See also Butz v. Economou, 438 U.S. 478 (1978), in which the Court held that administrative hearing officers, members of the executive branch, were immune from suit because their duties resembled those of a judge. The Court stated, "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge." *Id.* at 513.

50. The Court read *Tenney* as establishing the principle that "§ 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." Imbler v. Pachtman, 424 U.S. 409, 418 (1976). In *Imbler,* the Court stated that in Wood v. Strickland, 420 U.S. 308 (1975) and Sheuer v. Rhodes 416 U.S. 232 (1974), "the considerations underlying the nature of the immunity of the

one seeking immunity to those of an official already deemed immune. If there is no meaningful distinction between their tasks, immunity is extended.[51] Because of the overlapping and interrelated nature of government positions, this analysis leads to an expansion of immunity for public officials.[52]

Although the Court has attempted to limit immunity by extending it only upon "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it,"[53] the current analysis is not always grounded in historical roots. In some instances the Court has required a historical basis for immunity,[54] yet in others no mention has been made of common law roots.[55] Thus, the limiting factors in the Court's analysis do little to halt the extension of immunity to an ever-increasing number of officials.

The Supreme Court's recent decision in *Supreme Court of Virginia v. Consumers Union*[56] epitomizes the current approach. In that case, the Court faced the question of whether members of the Virginia Supreme Court were entitled to legislative immunity for their role in promulgating the Virginia Code of Professional Responsibility.[57] More generally, the Court had to resolve the issue of whether members of the judicial branch could invoke legislative immunity. The Supreme Court compared the Virginia court's role with the duties of state legislators and concluded that, in promulgating the disciplinary rules, the court had acted as a legislative body. It reasoned that since members of the Virginia

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respective officials in suits at common law led to essentially the same immunity under § 1983." 424 U.S. at 419.

51. Thus, in *Imbler,* the court held:

> We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate.

424 U.S. at 430, 431.

52. *See, e.g.,* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (common law legislative immunity granted to judges); notes 56-58 & accompanying text *infra*.

53. Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

54. *See, e.g.,* Downs v. Sawtelle, 574 F.2d 1 (1st Cir.) (immunity to social worker must be denied where the court is unable to trace such immunity to the common law), *cert. denied,* 439 U.S. 910 (1978).

55. *See, e.g.,* Walker v. Hoffman, 583 F.2d 1073 (9th Cir. 1978) (granting qualified immunity to forestry officials without any inquiry as to common law precedent), *cert. denied,* 439 U.S. 1127 (1979).

56. 446 U.S. 719 (1980).

57. The Virginia Code of Professional Responsibility is a set of rules which organizes and governs the Virginia State Bar. VA. PROF. & OCC. CODE §§ 54-48 to -83 (1978).

legislature would have been absolutely immune from a section 1983 action based on their enactment of the Code, the court, too, should be entitled to absolute immunity. [58] Thus, the nature of the judges' duties—promulgation of the code—and not their position within a particular government branch entitled them to legislative immunity.

C. *Implications of the Current Approach*

While the Court's current emphasis on function is surely more equitable than the "status" approach, it fails to consider adequately the issues posed by an ever-expanding web of immunities to section 1983. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*[59] reveals the shortcomings of the Court's legislative immunity analysis. In 1973, property owners in the Lake Tahoe basin filed suit against the individual members of the Tahoe Regional Planning Agency.[60] The owners contended that the Agency had taken their property without due process of law.[61] The Supreme Court reversed the Ninth Circuit's holding that the individual agency members had not acted " 'under color of state law within the meaning of § 1983.' "[62] Nonetheless, the Court affirmed the circuit court's ruling that the agency members—state and county appointees[63]—were "entitled to absolute immunity from federal damages liability" for actions taken in their legislative capacity.[64]

The Court's grant of absolute immunity resolved a critical issue—whether legislative immunity could be extended to officials other than members of the state legislature. In deciding that it could and should be extended, the Court relied on the holding of *Tenney v. Brandhove* that legislative immunity had survived the enactment of section 1983.[65] Building on prior cases,[66] the Court

58. 446 U.S. 719, 733-34 (1980).

59. 440 U.S. 391 (1979).

60. The Tahoe Regional Planning Agency as an entity was also a named defendant. The Agency claimed eleventh amendment immunity, but the Supreme Court held that it was subject to the judicial power of the United States. *Id.* at 402.

61. *Id.* at 394.

62. *Id.* at 399.

63. The members of the Tahoe Regional Planning Agency are unelected officials. Six of the 10 governing members are appointed by counties and cities and four by the states of California and Nevada. *Id.* at 401.

64. *Id.* at 402-03, 406.

65. *Id.* at 403.

66. The *Lake Country* Court reiterated the policy of "public good" set forth in *Tenney* and found this reasoning "equally applicable to federal, state, and regional legislators." 440 U.S. at 405. It also noted that its holding was supported by Butz v. Economou, 438 U.S. 478 (1978). The *Lake Country* Court stated:

> In that case [*Butz*] we rejected the argument that absolute immunity should be denied because the individuals were employed in the Execu-

justified the extension of immunity from the state to the regional level by pointing to the analogous nature of the officials' duties. Since state legislators would be protected from suit if they committed the acts complained of in *Lake Country,* the Court found no valid reason to exclude the regional planners from the scope of immunity.[67] It left open the question of whether officials employed at the local level would also be extended immunity to section 1983 actions.[68]

In his dissent in *Lake Country,* Justice Marshall noted that the majority's analysis seemed inevitably to lead to the conclusion that any official at any level of government should be afforded immunity so long as he acts in a legislative capacity.[69] The majority's discussion of the policy justifying immunity lends credence to Marshall's observation. If the Court is correct in its notion that the purpose of immunity is to spare officials the distraction and inconvenience of trial, then immunity is justifiable whenever litigation is foreseeable. Moreover, it should extend to a wide range of public officials, elected or unelected, at state, regional or local levels, for all are susceptible to the distraction and inconvenience of litigation.

The continual expansion of immunity seemingly compelled by the current decisions is inconsistent with the policies of legislative immunity and the purposes of section 1983.[70] In deciding questions of legislative immunity in the contexts of the speech or debate clause and federal criminal prosecutions of state officials, the Court has adopted a different analysis—one which is far more

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> tive Branch, reasoning that "[j]udges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." This reasoning also applies to legislators.

440 U.S. at 405 (citations omitted).

67. "We agree . . . that to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 406 (1979).

68. "Whether individuals performing legislative functions at the purely local level, as opposed to the regional level, should be afforded absolute immunity from federal damages claims is a question not presented in this case." *Id.* at 404 n.26.

69. Equally troubling is the majority's refusal to confront the logical implications of its analysis. To be sure, the Court expressly reserves the question whether individuals performing legislative functions at the local level should be afforded absolute immunity from federal damages claims. But the majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the " 'uninhibited discharge of their legislative duty' " applies with equal force whether the officials occupy local or regional positions.

Id. at 407-08 (citations omitted).

70. *See* text accompanying notes 125-26, 169-71 *infra.*

sensitive to the advantages and disadvantages of immunity in particular circumstances.[71] Exploration of this alternative doctrinal approach illuminates the flaws in the current analysis of legislative immunity to section 1983 and suggests a means of remedying them.

II. LEGISLATIVE IMMUNITY OUTSIDE THE CONTEXT OF SECTION 1983

Although the Court's analysis of legislative immunity in the contexts of the speech or debate clause and federal criminal prosecutions of state legislators is by no means clear and is sometimes inconsistent, it nonetheless provides some insight into how legislative immunity to section 1983 should be approached. In both instances, the Court's analysis is influenced by the policies which underlie the privilege.[72] A brief history of legislative immunity will acquaint the reader with these policies.

A. *History of Legislative Immunity in England and America*

Legislative immunity in the United States is a product of two distinct historical eras. The first era, which gave rise to legislative immunity, was one of political strife between the English Parliament and the Tudor and Stuart monarchs.[73] The second era, in which legislative immunity was adapted to the American political system, began with the fermentation of revolutionary spirit in the British colonies in America and ended with the adoption of the United States Constitution.[74]

In England, legislative privilege arose out of a fierce battle for supremacy between Parliament and the English monarchs.[75] The members of Parliament aspired to become more than mere advisors to the Crown, but were unable to surmount one major obstacle—the monarchs' power to prosecute those who dared to defy them.[76] The British royalty viewed certain matters of state, principally religion and the succession, as committed entirely to the crown. Any attempts by members of Parliament to influence the crown in these areas were viewed as infringements on the royal

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71. *See* text accompanying notes 125-27 *infra.*

72. *See* notes 91, 97-99, 108, 116 & accompanying text *infra.*

73. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers,* 86 HARV. L. REV. 1113, 1134 (1973).

74. *See generally* M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES (1943).

75. *See* United States v. Johnson, 383 U.S. 169, 177-85 (1966) for an excellent summary of the origins of the speech or debate clause.

76. C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 15-16 (1921); Neale, *The Commons' Privilege of Free Speech in Parliament,* in TUDOR STUDIES 257, 271 (R. Seton-Watson ed. 1924).

prerogative.[77] In response to royal aggression, the members of Parliament began to claim a privilege which would preclude the King from prosecuting them for their speeches and debates in Parliament.[78] Although challenged by the monarchs, this developing legislative privilege was finally guaranteed to members of Parliament by the Bill of Rights of 1689.[79]

Parliamentary privilege was thus well engrained in the English system by the time the British began to colonize America, and was incorporated in the colonial system of government along with other English rights.[80] As the American revolution began to stir, legislative privilege took on a special significance. In the political structure proposed by Madison and Jefferson, legislative privilege served to protect the legislature from encroachment by the executive and judicial branches.[81] Thus, its role was to promote the independence of the legislative branch and to maintain the separation of powers.[82] The elevation of legislative privilege to consti-

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77. C. WITTKE, *supra* note 76, at 26.

78. The privilege was first formalized in 1542 in the Speaker's Petition. The Speaker's Petition was a plea to the monarch to respect the freedom of speech and was asserted at the beginning of Parliamentary Sessions by members of the House of Commons such as Peter Wentworth and Sir Thomas More. *See* Reinstein & Silverglate, *supra* note 73, at 1124-25.

79. The English Bill of Rights was enacted in the wake of the Case of Seven Bishops. In 1687, James II had published a declaration asserting the right to nullify statutes passed by Parliament. He ordered the churches to proclaim his declaration, and when seven bishops petitioned him to rescind his order, they were charged with seditious libel. The Bill of Rights of 1689 abolished the King's suspending power and guaranteed freedom of speech or debate. "Together, the two provisions preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a system of separate powers." *Id.* at 1134-35.

80. As the colonies developed, they adopted the British custom of formally recognizing and granting legislative privilege. It was in existence in Maryland in 1682, in Virginia in 1684, in New York in 1691, in South Carolina in 1702, in New Jersey in 1703, in Pennsylvania in 1707, in Georgia in 1755 and in North Carolina in 1760. M. CLARKE, *supra* note 74, at 70.

81. The philosophy of the American political structure is evidenced by the words of James Madison:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

J. MADISON, THE FEDERALIST No. 47, at 301 (1st ed. Signet 1961).

The French philosopher Montesquieu was a major influence on American political theorists. He believed that "when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty." MONTESQUIEU, THE SPIRIT OF THE LAWS, *reprinted in* 38 GREAT BOOKS OF THE WESTERN WORLD 70 (R. Hutchins ed. 1952).

82. Thomas Jefferson described the purpose of legislative privilege as follows:

> [I]n order to give the will of the people the influence it ought to have,

tutional stature as the speech or debate clause[83] must be attributed to the importance of its position in the developing political structure.

Although legislative privilege is constitutionally guaranteed to members of Congress, the speech or debate clause has never been held applicable to the states.[84] For this reason, state legislators and officials performing legislative duties must rely on the protection of the common law legislative privilege. While the Supreme Court has stated that it considers the common law legislative immunity to be analogous to the speech or debate clause, it has noted that common law immunity, by virtue of its judicial origins, need not be accorded the deference due the speech or debate clause.[85] This fundamental difference should be kept in mind in comparing the two types of legislative immunity.

B. *Legislative Immunity Under the Speech or Debate Clause*

The language of the speech or debate clause would seem to confine its protection to speeches or debates made on the floor of Congress.[86] The Court has construed the protection to be far more expansive, however.[87] In recent years, the Court has been faced with claims of speech or debate immunity based on activi-

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> and the information which may enable them to exercise it usefully, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive.

7 WRITINGS OF THOMAS JEFFERSON 158 (Ford ed. 1896).

83. U.S. CONST. art. I, § 6, cl. 1.

84. In *Lake Country,* the Court stated that the speech or debate clause is inapplicable to state legislators. 440 U.S. 391, 404 (1979). Mr. Justice Blackmun, dissenting in part, cautioned the Court against deciding the question "with a passing fiat." *Id.* at 409. The Fourth Circuit has held that the speech or debate clause is applicable to the states. Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1973) (reading Tenney v. Brandhove, 341 U.S. 367 (1951) to extend the protection of the speech or debate clause to state legislators).

85. "In statutes subject to repeal or in judge-made rules of evidence readily changed by Congress or the judges who made them, the protection would be far less than the legislative privilege created by the Federal Constitution." United States v. Gillock, 445 U.S. 360, 369 (1980). The *Gillock* Court does not indicate how much less the protection conferred by common law legislative immunity would be.

86. U.S. CONST. art. I, § 6, cl. 1 provides, in relevant part:

> [Senators and Representatives] 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.

87. *See, e.g.,* Kilbourn v. Thompson, 103 U.S. 168 (1881), the first case construing the speech or debate clause. In *Kilbourn,* the Court extended the clause beyond its literal terms to include written reports, resolutions and the act of voting, "[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it." *Id.* at 204.

ties not traditionally associated with the legislative process.[88] In deciding whether these activities should be protected, the Court has reevaluated the purposes of legislative immunity.[89]

In response to the novel factual circumstances of *Gravel v. United States,*[90] for example, the Court deepened its analysis of the speech or debate clause. Senator Gravel and his aide were being investigated by a grand jury for violations of federal criminal statutes based on Gravel's reading of the Pentagon Papers before Congress, and publication of the Papers both in the *Congressional Record* and through a private publishing company. In deciding whether to allow Gravel immunity, the Court fashioned a test to determine the types of acts which would be protected by the speech or debate clause.

The Court first recognized that the speech or debate clause "protects Members against prosecutions that directly impinge upon or threaten the legislative process."[91] It then noted that the clause is not to be extended to protect all acts in any way related to the legislative process, but only those which are "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."[92]

The standard enunciated in *Gravel v. United States* constitutes the most specific statement of the Court's approach to determining the scope of the speech or debate clause. Yet it provides no guidance as to how courts should determine which acts are integral to the legislative process. Some acts—communications with constituents, for example—have been held not integral to the legislative process.[93] Other acts—such as the gathering of informa-

88. *See, e.g.,* Hutchinson v. Proxmire, 443 U.S. 111 (1979) (speech or debate clause immunity denied for issuance of press releases and newsletters); Doe v. McMillan, 412 U.S. 306 (1973) (speech or debate clause immunity upheld for congressional investigation and compilation of report on the quality of District of Columbia schools); Gravel v. United States, 408 U.S. 606 (1972) (speech or debate clause immunity denied for republication of Pentagon Papers).

89. In all of its cases construing the speech or debate clause the Court evaluates the facts before it in light of the traditional purposes of immunity. *See, e.g.,* Doe v. McMillan, 412 U.S. 306, 311 (1973); Gravel v. United States, 408 U.S. 606, 612-13 (1972); United States v. Johnson, 383 U.S. 169, 173-77 (1966).

90. 408 U.S. 606 (1972).

91. *Id.* at 616.

92. *Id.* at 625.

93. *See, e.g.,* Hutchinson v. Proxmire, 443 U.S. 111 (1979), in which Senator Proxmire was sued for defamation because of his efforts to publicize what he considered a wasteful expenditure of federal funds. The Supreme Court held that Proxmire's newsletter and press releases were beyond the scope of the speech or debate clause. *Id.* at 130. *See also* Gravel v. United States, 408 U.S. 606 (1971), in

tion by legislative committees—have been accorded protection even when they threaten to impinge on constitutionally protected rights.[94] This confusion is accentuated by the Court's emphasis on certain policies in the context of speech or debate clause immunity to criminal actions, and other policies in the context of speech or debate clause immunity to civil actions.

1. Speech or Debate Clause Immunity to Criminal Actions

In effect, a legislator charged with a violation of a federal criminal statute faces a prosecution by the executive branch. Even an action prosecuted in good faith poses a risk of executive encroachment on legislative independence and a threat to the separation of powers. Although these are the very dangers which the Framers of the Constitution sought to avoid when they adopted the speech or debate clause,[95] in recent cases the Court has consistently denied legislators the protection of the speech or debate clause.[96]

In *United States v. Brewster,*[97] the Court implicitly acknowl-

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which it was argued unsuccessfully that the effort by Senator Gravel to publish the Pentagon Papers privately was a part of his duty to keep constituents informed of internal affairs. *Id.* at 633 (Douglas, J., dissenting).

94. *See, e.g.,* Doe v. McMillan, 412 U.S. 306 (1973), in which a House Committee prepared a report on the District of Columbia schools which allegedly deprived plaintiffs, parents of the subject children, of their right to privacy. The Supreme Court held that submission and use of the report within Congress was protected by the speech and debate clause. The Public Printer and the Superintendent of Documents, however, were held not to be immune from a suit based on public distribution of the report. *But see* McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976), *cert. dismissed as improvidently granted sub nom.* McAdams v. McSurely, 438 U.S. 189 (1978). In that case, plaintiffs' private papers were seized pursuant to a Kentucky sedition statute. A federal court subsequently declared the statute unconstitutional and directed the district attorney to hold the materials pending appeal. Meanwhile, a Senate subcommittee investigator examined the documents and sent photocopies of 234 of them to Washington, D.C. The D.C. Circuit refused to dismiss plaintiff's action for violation of the fourth amendment, stating that "[t]he employment of unlawful means to implement an otherwise proper legislative objective is simply not 'essential to legislating.'" *Id.* at 1288.

95. *See* text accompanying notes 80-83 *supra.*

96. *See* United States v. Helstoski, 442 U.S. 477 (1979) (denying speech or debate clause immunity on grounds that a promise to do an act in the future is not a legislative act); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972) (denying speech or debate clause immunity on grounds that prosecution for bribery does not require inquiry into legislative acts or motivation). *But see* United States v. Johnson, 383 U.S. 169, 184-85 (1966) (granting speech or debate clause immunity from a federal prosecution for conspiracy).

97. 408 U.S. 501 (1972). In *Brewster,* a federal prosecution was being brought pursuant to 18 U.S.C. § 201, a bribery statute. Subsections (c)(1) and (g) of § 201 prohibit asking, demanding or agreeing to accept anything of value in return for performance of any official act. The Supreme Court determined that no inquiry into legislative acts or motivations was necessary for the government to make out a *prima facie* case under § 201. The Court stated:

edged that the interest in enforcement of federal anti-bribery legislation outweighed the benefits of speech or debate clause immunity. There, a United States Senator faced charges based on alleged misconduct in voting and in other official duties. While the Court endorsed the policies of separation of powers and legislative independence, it expressed concern that granting immunity to a criminal prosecution would make Brewster a "super-citizen"—one beyond the reach of criminal law.[98] In allowing the criminal prosecution to proceed, the Court emphasized that "[t]aking a bribe is, obviously, not part of the legislative process or function; it is not a legislative act."[99] By finding Brewster's acts to be non-legislative, the Court avoided a confrontation between the interest in enforcing criminal legislation and the competing interest of protecting legislative activity. Similarly, in the recent case of *United States v. Helstoski,*[100] the Court denied a former Congressman's claim of speech or debate clause immunity by holding that promises to perform future acts, as opposed to present acts, were not legislative conduct.[101]

The Court's analysis in these criminal cases reveals implicit interest balancing. While it is clear that the Court recognizes the purposes of legislative immunity—preventing "intimidation of legislators by the Executive and accountability before a possibly hostile judiciary"[102]—it is unwilling to sacrifice the federal interest in enforcement of anti-bribery legislation.[103] This tension explains the often tenuous semantic manipulation by which the Court classifies certain acts as "non-legislative."

> The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Id. at 526. Justice Brennan, dissenting, criticized the majority's holding:

> With all respect, I think that the Court has adopted a wholly artificial view of the charges before us. The indictment alleges, not the mere receipt of money, but the receipt of money in exchange for a Senator's vote and promise to vote in a certain way. Insofar as these charges bear on votes already cast, the Government cannot avoid providing the performance of the bargained for acts, for it is the acts themselves, together with the motivating bribe, that form the basis of Count 9 of the indictment.

Id. at 535-36.

98. *Id.* at 516.

99. *Id.* at 526.

100. 442 U.S. 477 (1979).

101. *Id.* at 490.

102. Gravel v. United States, 408 U.S. 606, 617 (1971) (quoting United States v. Johnson, 383 U.S. 169, 181 (1966)).

103. *See, e.g.,* United States v. Brewster, 408 U.S. 501, 525 (1972): "Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence."

2. Speech or Debate Clause Immunity in Civil Cases

In civil cases, the Court deals with suits brought not by the executive branch but by private individuals. While the Court considers the speech or debate clause in light of traditional policies of legislative independence and separation of powers,[104] in the civil context it views the clause primarily as a means of avoiding the inconvenience and distraction of trials.[105] In *Eastland v. United States Servicemen's Fund,*[106] for example, private citizens sued to enjoin a subpoena which would have enabled a Senate subcommittee to obtain all of the Fund's bank records. Members of the servicemen's organization contended that the subcommittee investigation would chill the exercise of first amendment rights.[107] In holding that the subpoena could issue, the Supreme Court stated:

> Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation.[108]

The Court's emphasis on the need for speech or debate clause immunity as a means of protecting legislators from litigation is important because it constitutes an additional factor militating in favor of immunity. While the inclusion of this factor marks a departure from analysis based on the original purposes of the speech or debate clause,[109] for purposes of this Comment it is sufficient to note that the Court implicitly balances the interests at stake in a private civil action against the purposes of speech or debate clause immunity.

C. *Common Law Legislative Immunity from Federal Criminal Prosecution*

In recent years, the circuits have disagreed as to whether a state legislator should enjoy a privilege which bars the introduction of evidence of legislative acts in federal criminal trials.[110]

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104. *See* notes 73-83 & accompanying text *supra.*

105. *See* note 108 & accompanying text *infra.*

106. 421 U.S. 491 (1975).

107. *Id.* at 495.

108. *Id.* at 503.

109. *See* Comment, *Speech or Debate Clause Immunity for Congressional Hiring Practices: Its Necessity and Its Implications,* 28 UCLA L. REV. 217 (1980), which argues that the distinction between legislative and non-legislative conduct is arbitrary, and criticizes both the factors that the Court weighs and the balance that it strikes.

110. *Compare* United States v. DiCarlo, 565 F.2d 802 (1st Cir. 1977) (denying evidentiary privilege and federal common law legislative privilege in federal criminal prosecution), *cert. denied,* 435 U.S. 924 (1978) *and* United States v. Craig, 537 F.2d 957, 958 (7th Cir. 1976) (en banc) (holding that "the protection afforded state legislators under the federal law for acts done in their legislative roles is based on the com-

This question was finally resolved in the Supreme Court's decision in *United States v. Gillock.*[111] Edgar Gillock, a Tennessee State Senator, was indicted under a federal statute for accepting money to perform certain acts in the course of his legislative duties.[112] Both the district court and the court of appeals granted his pretrial motion to suppress all evidence relating to his legislative activities.

Gillock based his claim of evidentiary privilege on two related grounds. He claimed, unsuccessfully, that Federal Rule of Evidence 501[113] created an evidentiary privilege for state legislators in federal criminal prosecutions.[114] He also claimed that common law legislative immunity barred introduction of evidence of his legislative acts. The Court noted that although common law legislative immunity is analogous to speech or debate clause immunity, the protection it affords is "far less than the legislative privilege created by the Federal Constitution."[115] It then evalu-

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mon law doctrine of official immunity . . . and since the immunity does not extend to criminal liability neither should the privilege"), *cert. denied,* 429 U.S. 999 (1976) *with In re* Grand Jury Proceedings, 563 F.2d 577 (3d Cir. 1977) (recognizing the existence of a personal privilege which may be asserted by a legislator in a federal criminal case to exclude any evidence of his action performed in strictly legislative capacity). Note that *DiCarlo* and *Craig* refer to the privilege in question as "official immunity." This characterization is extremely doubtful in light of the Supreme Court's later decision in Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

111. 445 U.S. 360 (1980).

112. Gillock was indicted on five counts of obtaining money under color of official right in violation of 18 U.S.C. § 1951, one count of using an interstate facility to distribute a bribe in violation of 18 U.S.C. § 1952, and one count of participating in an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962. 445 U.S. at 362.

113. FED. R. EVID. 501 states that in federal courts, privileges shall be "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

114. Gillock contended that the rule could be interpreted to provide an evidentiary privilege for state legislators in federal criminal prosecutions. 445 U.S. at 368. An examination of the legislative history of Rule 501, however, failed to uncover any reference to such a privilege. The Court had not been cited to one instance in the legislative history in which any member of Congress had shown interest in providing an evidentiary privilege in federal criminal prosecutions. *Id.* at 368 n.7. The Supreme Court stated that "[a]lthough that fact standing alone would not compel the federal courts to refuse to recognize a privilege omitted from the proposal, it does suggest that the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism." *Id.* at 367-68 (footnote omitted).

115. Suffice it to recall that England's experience with monarchs exerting pressure on members of Parliament by using judicial process to make them more responsive to their wishes led the authors of our Constitution to write an explicit legislative privilege into our organic law. In statutes subject to repeal or in judge-made rules of evidence readily changed by Congress or the judges who made them, the protection would be far less than the legislative privilege created by the Federal Constitution.

Id. at 368-69.

ated Gillock's claim of common law immunity in light of the purposes which underlie the speech or debate clause—"first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence."[116]

The Court concluded that the separation of powers doctrine gave no support to Gillock's claim that state legislators should be granted immunity from federal criminal prosecutions.[117] In areas where both the states and the federal government are empowered to act, the supremacy clause resolves any conflict in favor of the federal government. Thus, "under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause as a restraint on the Federal Executive to protect federal legislators."[118]

In evaluating the need for common law legislative immunity as a means of ensuring legislative independence, the Court was confronted with its discussion of the issue in *Tenney v. Brandhove.*[119] Gillock contended that the Court's decision in *Tenney,* which extended immunity in order to spare state legislators performing legislative functions the inconvenience of trial, should be applied with equal vigor in his case. The Court, however, rejected this reading of *Tenney,* viewing that case merely as a reflection of sensitivity to interference with the functioning of state legislators.[120] Although the Court acknowledged that the holding in *Tenney* mandated that state legislators be afforded immunity from private civil actions, it did not read *Tenney* as applicable to state legislators faced with federal criminal prosecutions.[121]

While the Court conceded that the denial of immunity might have some impact on the exercise of legislative function,[122] it held that, on balance, the enforcement of federal criminal statutes must prevail.[123] By explicitly weighing the interests sought to be furthered by immunity as opposed to the federal interest in the en-

116. *Id.* at 369.
117. *Id.* at 370.
118. *Id.*
119. 341 U.S. 367, 377 (1951).
120. In *Gillock,* the Court stated, "Although *Tenney* reflects this Court's sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as Gillock would have us." 445 U.S. at 372.
121. *Id.*
122. We recognize that a denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in United States v. Nixon, 418 U.S. 683 (1974), when balanced against the need of enforcing federal criminal statutes. *Id.* at 373.
123. *Id.*

forcement of federal criminal statutes, the Court concluded that "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process."[124]

D. *Interest Balancing as the Crux of the Court's Analysis and the Reasons for Differentiating Section 1983*

While there are inconsistencies in the Court's approach to speech or debate clause immunity and common law immunity from federal criminal prosecutions, several factors appear important to any determination of legislative immunity. First, the traditional policies of separation of powers and legislative independence are recurrent themes in the Court's evaluation.[125] Second, the Court recognizes the possibility that legislative immunity may promote inappropriate conduct[126] and, in the face of conflicting interests, the Court balances the need for immunity against the interests which will be sacrificed if immunity is granted.[127]

If interest balancing enables the Court to preserve the essence of the legislative process while at the same time recognizing important countervailing interests, it is perhaps surprising that such an approach has not been adopted in the section 1983 context. The Court has offered several reasons for distinguishing section 1983 actions. The Court reads *Tenney* as valid precedent for the proposition that state legislators are immune from civil suits.[128] In *Gillock,* the Court narrowed its reading of *Tenney* to allow a federal criminal prosecution, but indicated that the latter decision would still preclude private actions.[129] Moreover, the Court perceived a greater threat to legislative independence in suits brought by private citizens than in criminal actions brought by the federal government.[130] Finally, the Court indicated that alternative sanctions—criminal prosecutions or disciplinary rules—could ensure adequate punishment for officials without posing the problems of

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124. *Id.*

125. *See* notes 82-109 & accompanying text *supra.*

126. *See* United States v. Brewster, 408 U.S. 501, 517 (1972).

127. *See* notes 102-03, 108-09, 122-24 & accompanying text *supra.*

128. United States v. Gillock, 445 U.S. 360, 373 (1980).

129. "[I]n protecting the independence of state legislators, Tenney and subsequent cases on official immunity have drawn the line at civil actions." *Id.*

130. The Court's perception is implicit in its discussion of *Tenney*: "Although Tenney reflects this Court's sensitivity to interference with the functioning of state legislators, we do not read that opinion as broadly as Gillock would have us. First, Tenney was a civil action brought by a private plaintiff to vindicate private rights." *Id.* at 372. The Court thus implied that the threat to the legislative process discussed in *Tenney* existed because of the private nature of the action.

private civil actions.[131]

The Court's differentiation of the section 1983 context from that of a federal criminal prosecution may further be justified by its unstated assumption that section 1983 is not as important as federal criminal statutes. While the Court has openly embraced the enforcement of criminal laws as an interest of high priority,[132] in deciding questions of immunity, it has virtually ignored the federal interest in enforcing civil rights through section 1983.

The Court's justifications for differentiating legislative immunity to section 1983 are open to criticism. The Court has yet to explain why it considers private suits more threatening to the legislative process than criminal actions. Nor has it illustrated how alternative sanctions take the place of section 1983. The Court's silence on the issue of section 1983 as an important federal interest is bewildering, especially in light of its emphasis on federal interests in analogous contexts.[133]

Equally disturbing is the Court's failure to account for its adoption of a static and inflexible analysis in the section 1983 context. Even if the factors discussed above were to militate in favor

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131. The Court stated: "Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." *Id. See also* O'Shea v. Littleton, 414 U.S. 488, 503 (1974).

132. *See* United States v. Gillock, 445 U.S. 360, 373 (1980); United States v. Brewster, 408 U.S. 501 (1972). In *Brewster,* the Court stated:

> We do not discount entirely the possibility that an abuse might occur, but this possibility, which we consider remote, must be balanced against the potential danger flowing from either the absence of a bribery statute applicable to Members of Congress or a holding that the statute violates the Constitution. As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.

Id. at 524.

133. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court held that a city is not entitled to the "good-faith" defense which is accorded its officials. In rejecting the city's arguments that it should have some immunity to civil rights actions, the Court recognized that the legislative history of § 1983 reveals congressional intent to create a broad remedy. The Court quoted the words of Rep. Shellabarger, author of the bill, who stated: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and benificently construed." *Id.* at 636 (quoting CONG. GLOBE, 42d Cong., 1st Sess., 68 app. (1871)).

Despite the Court's definite recognition of § 1983 as an important federal statute, and its conclusion that "neither history nor policy support a construction of § 1983 that would justify the qualified immunity accorded the City of Independence," 445 U.S. at 637, it reaffirmed its belief that Congress had intended to preserve common law legislative immunity.

of immunity, there is no reason why they could not be balanced against countervailing policies. These inconsistencies in the Court's analysis are the necessary focus of an attempt to revise the current approach to legislative immunity in section 1983 actions.

III. Interest Balancing to Determine Whether Officials Should Be Granted Legislative Immunity to Section 1983 Damage Actions

The Court's current analysis of legislative immunity to section 1983 can be faulted on two grounds. First, the Court reads *Tenney v. Brandhove*[134] as precluding inquiry into the propriety of common law legislative immunity in civil actions at the state and regional levels.[135] In addition, its current approach extends immunity on the basis of function without considering whether the policies of legislative immunity justify a particular result.[136] An alternative interpretation of *Tenney* would allow the Court to adopt an interest-balancing analysis in which the policies of legislative independence and separation of powers would be weighed against the federal interest in the enforcement of constitutional and statutory rights.[137]

A. *Criticism of* Tenney*'s Interpretation of the Legislative History of Section 1983*

The holding in *Tenney v. Brandhove*[138] that state legislators are immune from private civil actions brought pursuant to section 1983 does not necessarily preclude further inquiry into the propriety of common law legislative immunity. The rationale of the *Tenney* holding was that the forty-second Congress intended common law legislative immunity to survive the enactment of section 1983. There are several reasons to question the validity of the *Tenney* Court's interpretation of legislative intent.

While the legislative history of section 1983 does not directly address the immunity issue, it indicates that the drafters assumed that liability extended to public officials. The drafters designed the statute to apply to persons "acting under color of state law or custom."[139] As interpreted by the Supreme Court, this phrase

134. 341 U.S. 367 (1951).

135. *See* United States v. Gillock, 445 U.S. 360, 373 (1980).

136. *See* text accompanying notes 50-58 *supra.*

137. *See* notes 153-71 & accompanying text *infra.*

138. 341 U.S. 367 (1951).

139. *See* the remarks of Michael Kerr regarding § 2 of the Civil Rights Act of 1866 (the predecessor of § 1983), *quoted in* 1 Statutory History, *supra* note 2, at 133-34:

> It cannot be claimed that the persons to whom I have referred could not

means that the only potential defendants are state employees or private persons acting in conspiracy with state officials.[140] Additionally, in debating the passage of section 1983, the members of the forty-second Congress spoke as though they assumed that liability would extend to state officials;[141] indeed, section 1983 was described by its opponents as a "sword of Damocles" hanging over the heads of officials.[142]

Most of the allusions made by the members of Congress in the course of their debates focus on the liability of local officials.[143] However, this does not necessarily mean that the members contemplated that officials at the regional and state levels should enjoy immunity to section 1983. Rather, the references to local officials may simply reflect the central role of local govern-

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> be punished under provisions of this bill because they were acting as officers and their conduct was the result of errors of judgment only. That would be no defense—no defense at all—against the positive terms of this law. I hold that the only persons intended to be punished by this bill are persons acting under State authority in some sort of official capacity. By its very terms, it only applies to persons who shall do these prohibited acts "under *color* of any law, statute, ordinance, regulation or custom." Who can act under such color but officers of some kind?

140. *See* note 3 *supra.*

141. *See, e.g.,* CONG. GLOBE, 42d Cong., 1st Sess. 321-22 (1871) (remarks of Mr. Stoughton):

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst government on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals.

See also id. at 337 (remarks of Mr. Whitthorne):

> That is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with loaded pistol flourishing it, and etc., and by virtue of any ordinance, law, or usage, either of city or state, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals.

142. *Id.* at 365 (remarks of William Arthur):

> But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy [sic] an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error of judgment, they are liable.

143. *See, e.g.,* CONG. GLOBE, 42d Cong., 1st Sess., 78 app. (1871) (remarks of Mr. Perry):

> Where these gangs of assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance . . . . Sheriffs, having eyes to see, see not; judges having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.

ment in 1871.[144] It would be unreasonable to assume that the examples of potential liability which emerged in the congressional debates were intended to suggest the parameters of section 1983 liability rather than merely to illustrate its most likely applications.

The *Tenney* Court seems to have interpreted the absence of comments on the immunity issue as indicating that Congress intended to retain common law legislative immunity.[145] The Court assumed that common law legislative immunity was the prevailing rule in the states. Apparently, no data exists as to whether legislative immunity was in fact the prevailing rule.[146]

If the present Supreme Court recognized the absence of evidence that legislative immunity was the prevailing rule in the states, there is every indication that the Court would reach a different conclusion about legislative intent. In *United States v. Gillock,*[147] the Court was confronted with an analogous issue—whether an evidentiary privilege for state legislators prosecuted under federal criminal statutes should be inferred from the legislative history of Federal Rule of Evidence 501. Finding that the members of Congress had failed to address the issue, the Court inferred that no such privilege was intended.[148] The Court's treatment of this question in *Gillock* is plainly inconsistent with its approach in *Tenney.* If the Court has reversed the manner in which it interprets legislative history, it should reevaluate the conclusions reached in *Tenney.*

B. *An Alternative View of the Legislative History of Section 1983*

Because the legislative history of section 1983 sheds so little light on whether the forty-second Congress meant to maintain legislative immunity, the Court should not rely upon that legislative history as the major factor in determining the boundaries of mod-

144. Even during the Reconstruction period, local rights and local control retained their importance. The period was, in essence, one of compromise. The Republicans established minimum national standards for civil rights policies, yet the states retained the primary power and responsibility to regulate civil rights. This compromise was grounded in a "peculiar idea of federalism which regarded states' rights and local self-government as the truest and most effective expression of American nationality." H. BELZ, *supra* note 1, at 139-40.

145. *See* notes 34-39 & accompanying text *supra.*

146. The conclusion that absolute immunity was the prevailing rule has been proven erroneous with regard to judicial immunity. Although the Court has extended judicial immunity based on the presumption that it was the prevailing rule, empirical data now shows that it existed in only 13 out of 37 states. *See* Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 326 (1969).

147. 445 U.S. 360 (1980). *See* notes 110-24 & accompanying text *supra.*

148. 445 U.S. at 366-68.

ern common law legislative immunity.[149] *Tenney* dealt with immunity for members of the state legislature who were engaged in a common legislative activity. It was in this particular context that the Supreme Court held that the forty-second Congress could not have intended to abrogate common law legislative immunity.[150] Since *Tenney,* however, the concept of legislative immunity has expanded to include regional-level officials and even members of the judicial branch.[151] In short, any official who claims to be exercising a legislative function may come within the shelter of legislative immunity. Moreover, the types of acts for which an official may invoke immunity have been expanded to include far more than speech, debate, or the introduction of legislation.[152]

Because of the magnitude of the changes which have occurred since 1871, any speculation as to how the Reconstruction Congress would have applied modern common law legislative immunity would be pure conjecture. Yet the Court need not rely on suppositions in determining when immunity should be granted; it is well equipped to fashion a reasoned analysis of legislative immunity to section 1983 on concrete grounds: the policies of legislative immunity and the purposes of section 1983.

C. *Interest Balancing as a Means of Deciding When Officials Should be Immune*

The Supreme Court's decisions dealing with legislative immunity reveal several complicated issues which must be evaluated in determining whether a particular official should be immune from suit.[153] An interest-balancing approach would enable the Court to evaluate and compare each of these factors in the context of particular immunity claims. Given the numbers of public offi-

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149. Barr v. Matteo, 360 U.S. 564, 569-76 (1959).

150. The *Tenney* Court itself recognized the narrow scope of its holding, stating:

> We have only considered the scope of the privilege as applied to the facts of the present case. As Mr. Justice Miller said in the *Kilbourn* case: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." We conclude *only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act,* and that the statute of 1871 does not create civil liability for such conduct.

341 U.S. at 378-79 (citation omitted) (emphasis added). Thus, the *Tenney* decision does not purport to govern the nontraditional forms of legislative activity which have emerged since it was decided.

151. *See, e.g.,* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (granting legislative immunity to non-elected employees of bi-state agency). *See* notes 67-68 & accompanying text *supra.*

152. *See* notes 56-58, 59-64 & accompanying text *supra.*

153. *See* text accompanying notes 86-133 *supra.*

cials at various levels of government who might be potentially immune, a flexible balancing approach is more capable of ensuring adequate protection for legislators without eviscerating section 1983 than is the current approach which is based on function.

1. The Impact of Section 1983 Actions Upon the Policies of Legislative Immunity

The Court's current analysis of legislative immunity to section 1983 focuses principally on whether the "public good" will be furthered if legislators are spared the inconvenience of trial. Yet the history of legislative immunity reveals that the policies of separation of powers and legislative independence have been the traditional focus of judicial inquiry.[154] The Court's analysis of speech or debate clause immunity and common law legislative immunity to criminal prosecutions rests heavily on these policies.[155] Because legislative immunity to section 1983 is intimately tied to these related areas,[156] the Court should adopt a similar analysis which considers whether immunity to section 1983 is necessary to ensure the separation of powers and legislative independence. This Comment contends that legislative liability in section 1983 actions poses no threat either to the political structure or the legislative process.

In *United States v. Gillock,*[157] the Supreme Court recognized that the federal prosecution of a state legislator does not jeopardize the separation of powers. The Court reasoned that when a federal criminal prosecution poses any danger of conflict between governmental branches, the conflict is between a state legislative body and the federal executive branch. The *Gillock* Court did not perceive such a conflict as the type of threat generally sought to be

154. *See* notes 86-103, 115-18 & accompanying text *supra.*

155. *Id.*

156. The Supreme Court consistently cites Tenney v. Brandhove, 341 U.S. 367 (1951), in cases construing the speech or debate clause. Although the Court recognizes that *Tenney* dealt with common law immunity, the analysis of speech or debate clause immunity is sufficiently similar so as to be helpful to the Court. *See, e.g.,* Doe v. McMillan, 412 U.S. 306, 324 (1973), where the Court, in discussing the scope of judicially fashioned official immunity for a public printer and Superintendent of Documents, stated, "The scope of inquiry becomes equivalent to the inquiry in the context of the speech or debate clause and the answer is the same." The Court then quoted *Tenney* as authority for the proposition that legislators acting outside the sphere of legitimate legislative activity enjoy no special protection from local libel laws. *Id. See also* United States v. Johnson, 383 U.S. 169, 179-81 (1966) (in discussing legislative privilege, the Court relied heavily on *Tenney* without differentiating it from speech or debate clause cases). The Court has also cited *Tenney* as precedent in federal prosecution cases. *See, e.g.,* United States v. Gillock, 445 U.S. 360, 368-73 (1980) (citing both *Tenney* and *Lake Country* and the speech or debate clause cases).

157. 445 U.S. 360 (1980). *See* notes 111-24 & accompanying text *supra.*

averted by the separation of powers doctrine.[158] If the federal criminal prosecution in *Gillock* posed no significant threat to separation of powers, it is difficult to see how a section 1983 action could do so. Because a section 1983 action is brought by private individuals against state officials, it is inherently incapable of creating a conflict between the co-equal branches of government.

Although immunity may not be necessary to further the separation of powers, the Supreme Court has indicated that it believes immunity is necessary to preserve the independence of the legislative process.[159] This belief stems from the Court's fear that section 1983 actions will undermine legislative independence. The Court has indicated that the dangers of section 1983 actions are greater than the threat posed by federal criminal prosecutions.[160]

The Court's attempt to distinguish civil actions from federal criminal prosecutions is unsatisfying and affords little help in evaluating the policy concerns of legislative independence. Any lawsuit, civil or criminal, poses a threat which might coerce a potential defendant into action inconsonant with legislative independence. While it is likely that civil suits would outnumber criminal actions, criminal prosecutions might prove far more disruptive of legislative independence because of their stigma and the possibility of penal sanctions.[161] In both civil and criminal cases, however, unfounded or frivolous suits can be dismissed through pretrial motions. The civil-criminal distinction is thus irrelevant in determining whether legislative independence would be defeated by allowing section 1983 liability.

The policy of legislative independence can be addressed more appropriately by interest balancing, because this analysis enables the Court to gauge the potential risks in varying factual situations. By accurately appraising any risks to legislative independence, the Court can engage in a sensitive evaluation of whether such risks outweigh the federal interest in allowing section 1983 actions to proceed.

Proponents of legislative immunity argue vehemently that the "public good" will be furthered if legislators enjoy immunity to section 1983 actions.[162] This argument envisions a multitude of

158. *Id.* at 370.

159. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979).

160. This belief is substantiated by the Court's acceptance of a dichotomy between civil and criminal actions, with absolute immunity attaching in the civil cases. United States v. Gillock, 445 U.S. 360, 372-73 (1980).

161. Reinstein & Silverglate, *supra* note 73, at 1173.

162. *See, e.g.*, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731 (1980); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 (1979); Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

civil rights actions, the costs of which will ultimately be borne by the state taxpayers. Such costs would include not only attorneys' fees, but also the loss of an official's time and the consequent disruption of the legislative process.[163] While the monetary costs of section 1983 actions and the potential disruption of the legislative process are not traditional policy concerns,[164] they may be relevant to current questions of common law legislative immunity.[165] Nonetheless, they should not be the decisive factors. Abandoning the current approach to immunity, which rests solely on the policy of the "public good," will enable the Court to resolve claims of immunity in light of various factors—legislative independence, separation of powers, the public good and the purposes of section 1983.

2. The Availability of Alternative Sanctions

In *United States v. Gillock*,[166] the Court indicated that legislative immunity to section 1983 is acceptable because other methods exist for disciplining wayward officials.[167] For example, an official might be subject to federal or state criminal prosecution for violation of a citizen's constitutional or statutory rights.[168] Alternatively, he might be disciplined through procedures developed by the governmental body which employs him.

As currently structured, these sanctions cannot replace a section 1983 damages action. In many cases there will be no criminal statute under which an official can be prosecuted. Disciplinary sanctions are effective only if conscientiously administered. While prosecutions and disciplinary rules further the interests of society as a whole, they do not compensate particular plaintiffs for injuries suffered. Because they preclude personal vindication, they do not quell the outrage of an individual whose rights have been violated. Current alternative sanctions are thus not viable substitutes for section 1983 actions.

The fact that section 1983 is a congressionally approved means of vindicating federal constitutional and statutory rights

163. Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

164. *See* text accompanying notes 40, 82, 104-09 *supra*.

165. In accordance with the need to take into account issues affecting the modern era, the "public good" argument may indeed be a valid consideration—one which should be balanced along with other relevant factors.

166. 445 U.S. 360 (1980).

167. "Moreover, the cases in this Court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." *Id.* at 372.

168. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 429 (1976), where the Court described the criminal sanctions which might be imposed upon a prosecutor who wilfully deprives a person of constitutional rights. Presumably, similar sanctions could be imposed on legislators.

should render all discussion of alternative sanctions irrelevant. Until such time as Congress withdraws or amends its mandate, citizens are entitled to invoke section 1983 to enforce their federal rights. They should not be deprived of this benefit merely because some other means exist by which the violators of those rights may be disciplined. Thus, in balancing various factors, the Court should ignore the existence of possible alternative sanctions.

3. Section 1983 as a Vehicle for the Enforcement of Federal Rights

The legislative history of section 1983 articulates clearly the political and philosophical concerns which led to that statute's enactment. The forty-second Congress realized that the fourteenth amendment would be valueless unless it was bolstered by an enforcement mechanism such as section 1983.[169] Fearing that a federal remedy against state officials would precipitate a redistribution of state-federal power, which would in turn destroy state autonomy, some members of Congress vehemently opposed its passage.[170] Yet despite these pessimistic predictions, section 1983 was adopted.

The passage of time has not lessened the federal interest in protecting constitutional and statutory rights. Congress has not modified or rescinded the section 1983 cause of action; rather, it has reaffirmed its commitment to the vindication of federal rights in enacting 42 U.S.C. § 1988 to provide attorneys' fees to prevailing parties in civil rights litigation.[171]

While the primary purpose of section 1983 is to enable pri-

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169. *See* CONG. GLOBE, 42d Cong., 1st Sess. 382 (1871) (remarks of Mr. Hawley): "Unless the Constitution of the United States carries with it the power to pass laws for the protection of the citizens in these rights, then the Constitution of the United States is of no value whatever." *See also id.* at 367 (remarks of Mr. Sheldon):

> My fear of centralization and despotism is not so great as my apprehension of confusion and anarchy. The right to live, to own and possess property, are the dearest interests of mankind, and it is the highest duty of the Government to provide means to protect and secure every citizen in the undisturbed enjoyment of these rights. The Government of the United States was established not merely to declare the true principles of liberty, but to provide for their maintenance and perpetuation.

170. *Id.* at 365 (remarks of Mr. Arthur): "It overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions and offices of the States."

171. 42 U.S.C. § 1988 (1970), *as amended by* Act of Oct. 19, 1976, Pub. L. 94-559, § 2, 90 Stat. 2641, and Act of Oct. 20, 1980, Pub. L. 96-481, Title II, §§ 205(c), 208, 94 Stat. 2330, provides in relevant part:

> In any action or proceeding . . . to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

For the legislative history of § 1988, see [1976] U.S. CODE CONG. & AD. NEWS 5908.

vate individuals to redress violations of their rights, it also operates to assure society as a whole that constitutional guarantees are still operative. It invests the populace with the knowledge that citizens have the right to challenge officers of the state who cause deprivations of federally protected rights. By participating in the protection of their federal rights, Americans are able to appreciate that these rights are not ephemeral promises, but instead are concrete guarantees which the government will enforce. Officials, in turn, are given incentive to respect the rights of the public they serve.

The interests embodied in section 1983 are no less crucial than the federal interest in the enforcement of criminal laws. Each plays a fundamental role in maintaining the integrity of our political and societal structure. Consequently, in adopting a balancing approach, the Court should recognize that section 1983 represents an important federal interest and should take full account of its significance.

C. *Application of a Balancing Test*

The protection of the legislative process is admittedly a matter of great importance, one which may sometimes justify extending legislative immunity to state officials. Yet the Court's current tendency to grant immunity on a mere showing that an official performs legislative duties as part of his job provides protection far in excess of what is required to maintain the integrity of our political system. Moreover, this broad protection significantly impinges on the ability of citizens to pursue their remedies for violations of federal constitutional and statutory rights.

By carefully balancing the risk of harm to the legislative process against the federal interest in the enforcement of civil rights, the Court can confine legislative immunity to those situations where it is truly warranted. In practice, the balancing of these interests might take the following form. In *Lake Country Estates,*[172] where the immunity of regional planners was in question, the Court could have scrutinized the impact of suits on the policies of legislative immunity. The separation of powers doctrine clearly does not require the immunity of state officials such as regional planners. These officials simply do not occupy positions that would involve them in the balance of power between co-equal branches of the federal government. In addition, it is difficult to anticipate a real threat to legislative independence; the regional planners' jobs were far from the core of legislative activity origi-

172. 440 U.S. 391 (1979).

nally sought to be protected by legislative immunity.[173] Civil rights actions might actually have the salutary effect of motivating officials such as the regional planners to consider the impact of their decisions on civil rights. The courts could weed out any frivolous suits. While less efficient than dismissal based on legislative immunity, a dismissal on the merits is far more protective of federal rights. Finally, the burden of defending against section 1983 actions and the consequent loss of an official's time would ultimately fall on the general public, which, in turn, would reap the benefits of greater protection of civil rights.

Thus, in the case of the regional planners, immunity is not a necessary safeguard of the legislative process, but rather is a convenient way of protecting officials from the distraction of trials. Balanced against the federal interest in enforcing civil rights, convenience cannot justify the extension of legislative immunity. The right of the American people to challenge the actions of officials must not be sacrificed merely for the sake of expedience. In sum, any benefits to the legislative process which accrue from immunity are purely speculative, while the negative impact of such immunity to section 1983 actions is certain.

An interest-balancing approach allows the Court to examine legislative immunity in light of the traditional policies, and to protect the essence of the legislative process without permitting wholesale infringement of federally guaranteed rights. The civil rights of the American people and the integrity of the legislative process are both essential to the maintenance of freedom. Interest balancing, unlike the current approach, will permit reconciliation and preservation of these two cornerstones of democracy.

CONCLUSION

The Court's current analysis of legislative immunity creates a seemingly irreconcilable conflict between immunity and section 1983; each expansion of immunity decreases the utility of section 1983 as a vehicle for the vindication of federal rights. This Comment has demonstrated that an approach in which the function of an official is the determinant factor in applying immunity cannot be supported by precedent or legislative history. The balancing test suggested by this Comment, on the other hand, is firmly based on the traditional policies of legislative immunity and the purposes of section 1983. It is a test which acknowledges the importance of maintaining the independence of the legislative branch and the structure of the political system. Yet, unlike the current analysis, a balancing test recognizes a strong federal interest in the

173. *See* text accompanying notes 73-85 *supra*.

protection of the cherished constitutional and statutory guarantees which form the basis of our democracy.

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* The author wishes to acknowledge the help and encouragement offered by Julie Heldman, Sharon Rudnick, Gerry Treacy, and Prof. Gerald P. López.