NOTE

SPEAKING OF THE SPEECH OR DEBATE CLAUSE: REVISING STATE LEGISLATIVE IMMUNITY

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INTRODUCTION

An increasing number of America's most contentious issues will be resolved in state legislatures. Consequently, the ability of litigants to seek judicial review of a legislature's actions is becoming more important. The scope of state legislative immunity, a federal common-law defense that provides state legislators with absolute immunity against certain lawsuits, will also increase in importance. A recent case involving New Hampshire's legislature raises two significant questions about the scope of state legislative immunity. The first question entails how the United States Congress can abrogate the immunity, and the second question is whether legislators may claim the immunity when a legislature's rule effectively ousts other members.

In Part I, I provide an overview of the recent New Hampshire case, *Cushing v. Packard*. Part II discusses the Speech or Debate Clause of the U.S. Constitution and state legislative immunity. Part III explains the various clear statement rules applied by courts. Part IV argues that abrogating state legislative immunity requires a clear statement, akin to the heightened requirements of abrogating sovereign immunity or altering the usual balance of powers between the states and federal

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government. This best safeguards the underlying values of federalism that the immunity protects. Part V considers limitations on the scope of legislative immunity. I contend that courts should review claims by state legislators, who allege that they have effectively been ousted by legislative rules, by analyzing whether the rule is neutral and generally applicable, in light of the framework provided under the Free Exercise Clause. Furthermore, the rule must have a rational connection to the legislative process. These limitations will best promote the immunity's underlying rationale, which is to enable lawmakers to better represent their constituents.

I. THE NEW HAMPSHIRE CASE: *CUSHING V. PACKARD*

Adapting to the pandemic was challenging for New Hampshire's legislature, which has a four-hundred-member House of Representatives, making it the largest state legislature.[1] Furthermore, New Hampshire's legislators, with an average age of sixty-six, are more likely to be vulnerable to COVID-19.[2] When the pandemic began, the New Hampshire House of Representatives passed a resolution requesting the New Hampshire Supreme Court to issue an advisory opinion as to whether New Hampshire's Constitution allows for a quorum to be met with participants joining electronically.[3] The New Hampshire Supreme Court determined that a quorum could be satisfied through remote participation.[4] In December of 2020, the New Hampshire House of Representatives held its constitutionally-mandated organizational meeting outside at the University of New Hampshire.[5] About one week later,

1 *See State Government Overview, New Hampshire Almanac*, https://www.nh.gov/almanac/government.htm [https://perma.cc/66QY-LBF5] ("There are 400 Representatives and 24 Senators, making the [New Hampshire] General Court the second largest legislature in the United States following the U.S. Congress.").

2 *See* Colby Malcolm, *New Hampshire's 'Citizen' Legislature Doesn't Represent Its Citizens: A Conversation with the Youngest Member of the New Hampshire General Court, Representative Tony Labranche*, COLUM. POL. REV., http://www.cpreview.org/blog/2021/5/new-hampshires-citizen-legislature-doesnt-represent-its-citizens-a-conversation-with-the-youngest-member-of-the-new-hampshire-general-court-representative-tony-labranche [https://perma.cc/9LGD-KMUV] (May 12, 2021) (noting that the average age of a New Hampshire state legislator is sixty-six, the highest in the country). New Hampshire's legislators only make $200 per two-year term, so many legislators are retirees. *See id.*

3 Opinion of the Justices, 247 A.3d 831, 833–34 (N.H. 2020).

4 *Id.* at 840.

5 N.H. CONST. pt. 2, art. III ("The senate and house shall assemble biennially on the first Wednesday of December for organizational purposes in even numbered years . . . ."); Ray Brewer & Cherise Leclerc, *Some Lawmakers Skip Organization Day Event Held Outdoors at UNH Because of Pandemic*, WMUR (Dec. 2, 2020, 7:36 PM), https://www.wmur.com/article/new-hampshire-organization-day-2020-coronavirus/34849810 [https://perma.cc/JN9E-MNJC].

the newly elected Republican Speaker of the House of Representatives, Richard Hinch, died from COVID-19.[6]

During the organizational day meeting, an amendment to the House rules was proposed that would allow for remote participation in House proceedings.[7] The motion failed.[8] A similar amendment was proposed during the January 2021 session, and it also failed.[9] Under House Rule 65, the 2020 edition of *Mason's Manual of Legislative Procedure* applies when the Constitution, Rules of New Hampshire House, and custom are all silent.[10] *Mason's Manual* provides that "[a]bsent specific authorization by the constitution or adopted rules of the body, remote participation in floor sessions by members of the legislative body is prohibited."[11] In February of 2021, Democratic lawmakers and the New Hampshire Democratic Party initiated a lawsuit against Republican House Speaker Sherman Packard, seeking a temporary restraining order and an injunction to require Speaker Packard to allow legislators vulnerable to COVID-19 to participate remotely.[12] In their complaint, Democratic lawmakers alleged that they suffered from medical conditions or disabilities rendering them vulnerable to death resulting from COVID-19 and that their request to participate remotely was denied by the House Speaker.[13]

The plaintiffs sought injunctive relief under the Rehabilitation Act and the Americans with Disabilities Act (ADA).[14] Under the ADA,

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6 Rebekah Riess, Leslie Holland & Devan Cole, *New Hampshire's House Speaker Dies from COVID-19*, CNN POLS. (Dec. 10, 2020, 6:42 PM), https://www.cnn.com/2020/12/10/politics/richard-hinch-new-hampshire-house-speaker-died-coronavirus/index.html [https://perma.cc/AHC6-9YVL].

7 STATE OF N.H., H. REC., H.R. 167-1, 1st Sess., at 7 (2020).

8 *Id.* at 9–10.

9 STATE OF N.H., H. REC., H.R. 167-2, 2d Sess., at 8, 10 (2021).

10 STATE OF N.H., H. RULE 65 (2021).

11 NAT'L CONF. OF STATE LEGISLATORS, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 786 (2020).

12 Josh Rogers, *Democratic Lawmakers Sue over GOP Plan for In-Person, Indoor Legislative Session*, N.H. PUB. RADIO (Feb. 16, 2021, 4:28 PM), https://www.nhpr.org/nh-news/2021-02-16/democratic-lawmakers-sue-over-gop-plan-for-in-person-indoor-legislative-session [https://perma.cc/B4FM-27F7]; Complaint at 2, Cushing v. Packard, 560 F. Supp. 3d 541 (D.N.H. 2021) (No. 21-CV-147), *vacated and remanded*, 994 F.3d 51 (1st Cir. 2021), *reh'g en banc granted and opinion withdrawn*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021), *aff'd*, 30 F.4th 27 (1st Cir. 2022) (en banc), *cert. denied*, 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

13 Complaint, *supra* note 12, at 2.

14 The plaintiffs sued under these provisions as well as the Fourteenth Amendment of the United States Constitution and part I, article II of the New Hampshire Constitution, but the request for injunctive relief was based solely upon the ADA and the Rehabilitation Act. Complaint, *supra* note 12, at 1; Emergency Motion for a Temporary Restraining Order and

"no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[15] A "public entity" entails "any State or local government"[16] and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[17] The ADA abrogates sovereign immunity.[18] The Rehabilitation Act speaks in similar terms: "No otherwise qualified individual with a disability . . . [shall] solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[19] Programs or activities include the operations of "a department, agency, special purpose district, or other instrumentality of a State or of a local government."[20] The Rehabilitation Act also abrogates sovereign immunity.[21]

Whether the ADA and Rehabilitation Act abrogated legislative immunity was a question of first impression resulting in in profound disagreement.[22] The District Court denied the plaintiffs' request for injunctive relief, finding the suit barred by state legislative immunity.[23]

/or Preliminary Injunction at para. 7, Cushing v. Packard, 560 F. Supp. 3d 541 (D.N.H. 2021).

15 42 U.S.C. § 12132 (2018). A "[q]ualified individual with a disability" "means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

16 *Id.* § 12131(1)(A).

17 *Id.* § 12131(1)(B).

18 *Id.* § 12202 ("A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." (footnote omitted)). State sovereignty exists under the Eleventh Amendment of the United States Constitution. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

19 29 U.S.C. § 794 (2018).

20 *Id.* § 794(b)(1)(A). Similar to the ADA, regulations implementing the Rehabilitation Act require reasonable accommodations. *See* 45 C.F.R. § 84.12 (2022).

21 42 U.S.C. § 2000(d)-7 (2018) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . .").

22 Other courts have applied state legislative immunity to bar ADA and Rehabilitation claims. *See* Cushing v. Packard, 560 F. Supp. 3d 541, 550 (D.N.H. 2021) (collecting cases), *vacated and remanded*, 994 F.3d 51 (1st Cir. 2021), *reh'g en banc granted and opinion withdrawn*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021), *aff'd*, 30 F.4th 27 (1st Cir. 2022) (en banc), *cert. denied*, 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178). However, this was the first time that a party argued that these statutes abrogated legislative immunity.

23 *See id.* at 550–51.

The District Court was "not persuaded by Plaintiffs' argument that an intent to abrogate legislative immunity can be inferred from an intent to abrogate sovereign immunity," and therefore the House Speaker was immune from enforcement of a House rule related to the functions of the legislature.[24]

The plaintiffs appealed to the United States Court of Appeals for the First Circuit.[25] The three-judge panel reversed, finding that Congress abrogated legislative immunity by passing the ADA and the Rehabilitation Act.[26] The First Circuit reasoned that a "statute may express a congressional intent sufficient to overbear a common-law doctrine without expressly mentioning the doctrine,"[27] and that the "question is whether the statute as a whole makes it 'evident' that Congress understood its mandate to control."[28] The First Circuit found sufficient intent to abrogate the immunity because the ADA applies to "any State . . . government,"[29] and the Rehabilitation Act also applies to a "State . . . government."[30] The First Circuit found the abrogation under the Rehabilitation Act to be persuasive, having noted that the New Hampshire legislature accepted "at least $190,000 in federal funds from the Coronavirus Aid, Relief, and Economic Security (CARES) Act."[31] The First Circuit found it unsurprising that the ADA and the Rehabilitation Act would expressly abrogate sovereign immunity without mentioning legislative immunity because sovereign immunity "is a more obvious impediment that is expressly enshrined in the Constitution."[32] Accordingly, the Supreme Court has required any abrogation of sovereign immunity to be express and unambiguous.[33] This is more demanding than the standard for abrogating the common law because a statutory purpose evincing an intention to abrogate sovereign immunity would be insufficient.[34]

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24 *Id.*

25 Notice of Appeal, Cushing v. Packard, 560 F. Supp. 3d 541 (D.N.H. 2021) (No. 21-CV-147).

26 *Cushing*, 994 F.3d at 53–56.

27 *Id.* (citing United States v. Texas, 507 U.S. 529, 534 (1993)).

28 *Id.* (quoting *Texas*, 507 U.S. at 534).

29 *Id.* (quoting 42 U.S.C. § 12131(1)(A) (2018)).

30 *Id.* (quoting 29 U.S.C. § 794(b)(1)(A)–(B) (2018)).

31 *Id.* The panel reasoned that, through accepting the funds, the legislature waived its immunity. *See id.* at 55.

32 *Id.*; *see* U.S. CONST. amend. XI.

33 *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989))).

34 *See* United States v. Texas, 507 U.S. 529, 534 (1993) (recognizing that Congress does not have to proscribe the common-law doctrine at issue to overrule it, but "courts may

Following the First Circuit panel's decision, Speaker Packard requested a rehearing en banc, and the First Circuit granted the Speaker's request.[35] The First Circuit affirmed the district court's denial of the temporary restraining order and preliminary injunction by a 3–2 vote.[36] Like the district court, the First Circuit reasoned that an abrogation of sovereign immunity did not indicate sufficient congressional intent to abrogate legislative immunity.[37] The First Circuit applied a clear statement rule, and it determined that the general language of the ADA and Rehabilitation Act was not sufficiently clear to abrogate legislative immunity.[38] The First Circuit further found that prohibiting members from engaging remotely was a legislative act,[39] protected by legislative immunity, and that this case did not involve an extraordinary circumstance justifying an exception.[40] The two dissenters, both judges on the panel that previously reversed the district court, argued that "[f]oreclosing judicial review based on the facts of this case conflicts directly with the purpose of legislative immunity" because the court approved of a neutral rule that in effect ousted elected representatives from government.[41] The plaintiffs appealed to the Supreme Court, and it denied certiorari.[42]

II. LEGISLATIVE IMMUNITY

The Speech or Debate Clause of the U.S. Constitution provides that "for any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other Place."[43] Under the Clause, legislators may claim legislative immunity for "all actions taken 'in the sphere of legitimate legislative activity.'"[44] Legislative immunity is an absolute defense to a lawsuit.[45] Whether an act is legislative depends "on the nature of the act, rather than on the motive or intent of

take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" (quoting Astoria Fed. Sav. & Loan Ass'n. v. Solimino, 501 U.S. 104, 108 (1991))).

35 Cushing v. Packard, No. 21–1177, 2021 WL 2216970, at *1 (1st Cir. June 1, 2021).

36 Cushing v. Packard, 30 F.4th 27, 29–31 (1st Cir. 2022) (en banc), *cert. denied* 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

37 *See id.* at 47.

38 *See id.* at 48.

39 *Id.* at 49.

40 *See id.* at 50–53.

41 *See id.* at 57 (Thompson, J., dissenting).

42 Cushing v. Packard, No. 22-178, 2022 WL 6572202 (U.S. Oct. 11, 2022) (mem.).

43 U.S. CONST. art. I, § 6.

44 Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

45 *Id.* at 49.

the official performing it."[46] While the Speech or Debate Clause applies only to members of the federal legislature, the federal common law recognizes that state legislators may claim a similar legislative immunity.[47] The Supreme Court has not addressed legislative immunity in about two decades, leaving uncertainty in the doctrine.[48] It will become more relevant moving forward, as the Supreme Court returns matters to the states.[49]

The New Hampshire lawsuit serves as a lens to analyzing contemporary issues in the doctrine. I argue in favor of the First Circuit's requirement of a clear statement before finding that a federal law has abrogated state legislative immunity because this approach best promotes federalism through respecting the independence of state legislatures. However, immunity creates a possibility of legislators being shielded when creating rules that exclude other lawmakers from the legislative process. Accordingly, when legislators claim that a rule related to the legislative process excludes them from participating, courts should, as occurs in Free Exercise cases, assess whether the challenged rules are neutral and generally applicable.

I will begin by recounting the history of the Speech or Debate Clause. The Clause mirrors the English Bill of Rights of 1689, which was adopted following centuries of conflict between Parliament and

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46 *Id.* at 54. Some courts consider a variety of factors to determine whether an act is legislative, such as "(1) 'whether the act involves ad hoc decisionmaking, or the formulation of policy'; (2) 'whether the act applies to a few individuals, or to the public at large'; (3) 'whether the act is formally legislative in character'; and (4) 'whether it bears all the hallmarks of traditional legislation.'" Kaahumanu v. Cnty. of Maui, 315 F.3d 1215, 1220 (9th Cir. 2003) (quoting Bechard v. Rappold, 287 F.3d 827, 829 (9th Cir. 2002)).

47 *See Bogan*, 523 U.S. at 49 ("The Federal Constitution, the Constitutions of many of the newly independent States, and the common law thus protected legislators from liability for their legislative activities.").

48 The Supreme Court last heard a case involving legislative immunity in 1998. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).

49 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (reversing Supreme Court precedent recognizing a fundamental right to an abortion and returning the matter to the states). This Term, the Supreme Court is hearing another case, *Moore v. Harper*, which may further increase the power of state legislatures. *See Moore v. Harper*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/moore-v-harper-2/ [https://perma.cc/G4YN-V57M] (last visited Oct. 2, 2022). In *Moore*, the Court will decide whether a state's judicial branch can nullify regulations adopted by a state legislature under the Elections Clause of the U.S. Constitution. *See id.* The Elections Clause provides that: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed *in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

the Crown.[50] Parliament requested the Monarch to respect its members' free speech as early as the 1300s.[51] Members of Parliament were arrested and imprisoned based on the positions they took during debates.[52] The Speech or Debate Clause preserves the independence of the legislature and promotes free expression through preventing others from penalizing members of Congress for expressing their ideas and voting on legislation.[53] Following the Glorious Revolution, the English Bill of Rights included a provision that protected the free speech and debate of Parliament.[54] After the American Revolution, American colonists incorporated a similar clause into state constitutions to protect the independence of state legislators.[55] The Constitutional Convention adopted the Speech or Debate Clause with brief debate and no opposition because the importance of an independent legislature was well understood.[56]

While the Founding generation could easily agree to incorporate legislative immunity into the American system, many questions as to its scope remained.[57] The scope of legislative immunity depends on its purpose: does legislative immunity protect legislators or the people? One of the earliest judicial interpretations of legislative immunity was in 1808 by the Supreme Judicial Court of Massachusetts, and the court

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50 "[T]he freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament . . . ." An Act Declaring the Rights and Liberties of the Subject, and Setting the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2 (Eng.).

51 Carl Wittke, *The History of English Parliamentary Privilege*, OHIO ST. U. BULL., Aug. 30, 1921, 23–24 (discussing the House of Commons agreeing upon laws contrary to the king's prerogative during the 1300s).

52 *See id.* at 29 (discussing three members of the House of Commons being prosecuted for their speeches in the House).

53 *See id.* at 30 (noting that the privilege "protects members from outside interference only" since the legislative body retains the right to discipline its members); United States v. Johnson, 383 U.S. 169, 178 (1966) ("Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.").

54 *See* An Act Declaring the Rights and Liberties of the Subject, and Setting the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c.2 (Eng.) ("[T]he freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.").

55 *See, e.g.*, Coffin v. Coffin, 4 Mass. (3 Tyng) 1, 7 (1808) (quoting MASS. CONST. art. XXI) (discussing a similar provision from Massachusetts' constitution).

56 *See Johnson*, 383 U.S. at 177 ("The Speech or Debate Clause of the Constitution was approved at the Constitutional Convention without discussion and without opposition.").

57 *See* Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity*, 32 YALE L. & POL'Y REV. 351, 357 (2014) (noting that "the Framers of the American Constitution incorporated centuries of English experience into the Clause, [and] they left little in the way of specifics about what they intended it to mean for the American system of three co-equal branches").

suggested that the immunity existed to protect legislators.[58] In *Coffin v. Coffin*, a Massachusetts state legislator was sued for defamation, and he asserted a legislative immunity defense.[59] The court wrote that "[t]he freedom of deliberation, speech, and debate, secured by the declaration of rights to each house of the legislature, is rather the privilege of the individual members, than of the house as an organized body" because the freedom "derived from the will of the people, the members are entitled to it, even against the will of the house."[60] While the court suggested a broad personal immunity for legislators, the defendant-legislator's claim failed because he was not acting as a legislator when he allegedly made the defamatory remarks.[61]

The United States Supreme Court first interpreted the Speech or Debate Clause in *Kilbourn v. Thompson* in 1880.[62] In *Kilbourn*, the plaintiff, a citizen, filed suit after he was imprisoned for failing to be a witness and produce documents that the House of Representatives ordered.[63] Kilbourn sued members of the House of Representatives as well as the Sergeant-at-Arms.[64] The Court wrote that "[i]t would be a narrow view of the constitutional provision [on legislative immunity] to limit it to words spoken in debate," so the Court extended the immunity "to things generally done in a session of the House by one of its members in relation to the business before it."[65] The Court granted the legislators immunity while denying it to the Sergeant-at-Arms.[66] The Court cautiously wrote that there may be actions "of an extraordinary character, for which the members who take part in the act may be held legally responsible."[67] The Court speculated as to what such acts would be, writing:

> If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of

58 *Coffin*, 4 Mass. (3 Tyng) at 1.
59 *Id.* at 1–2.
60 *Id.*
61 *Id.* at 16–17.
62 Kilbourn v. Thompson, 103 U.S. 168 (1880).
63 *Id.* at 172–74.
64 *Id.* at 170.
65 *Id.* at 204.
66 *See id.* at 205.
67 *Id.* at 204.

> their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate.[68]

The Supreme Court began to consider legislative immunity as a defense to criminal activity in the 1960s. In *United States v. Johnson*, a congressman was indicted and convicted for violating a conflict-of-interest statute and for conspiring to defraud the United States after giving speeches on the House floor in exchange for compensation.[69] During the prosecution, the government relied on information regarding the preparation of the speeches and the congressman's motives.[70] The Court found that inquiring into the congressman's motives "is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry" and that "it is apparent from the history of the clause that the privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary."[71] The Court cautioned that its "decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them."[72] Subsequently, in *United States v. Brewster*, the Court addressed whether a Senator who was charged with accepting a bribe in exchange for his vote could assert legislative immunity.[73] The Court held that the suit could proceed because "no inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a prima facie case."[74] Because accepting a bribe was not a legislative act, the Senator could not assert a legislative immunity defense.[75]

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68 *Id.* at 204–05.

69 United States v. Johnson, 383 U.S. 169, 170–72 (1966).

70 *See id.* at 173–77.

71 *Id.* at 180–81.

72 *Id.* at 185.

73 United States v. Brewster, 408 U.S. 501, 502 (1972).

74 *Id.* at 525. The Court examined each statute to assess "whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute." *Id.* at 526. The Court concluded that no such inquiry was necessary since "[t]he illegal conduct is taking or agreeing to take money for a promise to act in a certain way." *Id.* at 526. Justice White's dissent rejected the Court's distinction between promise (accepting a bribe to vote a certain way) and performance (voting in accordance with the bribe). *See id.* at 552 (White, J., dissenting).

75 *Id.* at 526.

The Speech or Debate Clause in the United States Constitution does not apply to state legislators,[76] but they have an immunity under the federal common law that "is similar in scope and object to the immunity enjoyed by federal legislators under the Speech or Debate Clause."[77] But there is an essential distinction between federal and state legislative immunity. Because the federal immunity stems from the Constitution, it is absolute. On the other hand, with state legislative immunity being a creation of the federal common law, it can be abrogated by Congress.[78]

III. THE COMMON LAW, CLEAR STATEMENT RULES, AND ABROGATION

In this Part, I explain how courts interpret statutes as they relate to the common law, state sovereign immunity, and the allocation of authority between the federal government and the states. The Supreme Court has created clear statement rules that require Congress to legislate with specificity before a court will interpret a law in a manner that infringes on what is seen as a protected value or background norm, like the common law.[79] Such rules have existed for over two centuries.[80] Some critique clear statement rules because they subvert the text and legislative will.[81] However, clear statement rules are "constitutionally inspired," facilitating values derived from the Constitution, such as federalism.[82]

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76 *See* U.S. CONST. art I, § 6.

77 Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 629 (1st Cir. 1995).

78 *See* Bethune-Hill v. Va. State Bd. of Elections, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015) (discussing the differences between legislative immunity for federal and state legislators) (citing United States v. Gillock, 445 U.S. 360 (1980)).

79 *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 402 (2010) ("All such clear statement rules share the defining feature of trying to safeguard constitutional values without the more obviously countermajoritarian step of invalidating acts of Congress.").

80 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (discussing Supreme Court cases from the early 1800s in which the Court cautioned that statutes ought to apply retroactively only if the intent is clear); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 125–54 (2010) (documenting the historical development of substantive canons of construction, such as the rule of lenity and the presumption against retroactivity).

81 *See, e.g.*, *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it.").

82 Barrett, *supra* note 80, at 168.

A. Clear Statement Rules and Abrogating the Common Law

The common law consists of court-made rules[83] that Congress may supplant by passing laws.[84] However, courts presume that Congress has legislated in conformity with the common law, unless there is a clear intent to depart from it.[85] As Justice Frankfurter explained, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[86] This principle is well-illustrated by *United States v. Texas*, a case in which the Supreme Court considered whether the Debt Collection Act altered the federal common-law norm of states paying prejudgment interest on their debts.[87] The Court determined that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."[88] But "Congress need not 'affirmatively proscribe' the common-law doctrine at issue."[89] Courts presume that Congress legislated in accordance with the common law except "when a statutory purpose to the contrary is evident."[90] Because the Debt Collection Act did "not speak directly to the Federal Government's right to collect prejudgment interest on debts," Texas had to pay prejudgment interest under the common-law rule.[91] Of all of the clear statement rules examined in this Part, this is the least demanding.

B. Clear Statement Rules and Abrogating Sovereign Immunity

The Supreme Court requires a heightened degree of clarity from Congress when it is abrogating state sovereign immunity, which is

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83 *See Common Law*, BLACK'S LAW DICTIONARY (2d ed. 1910) ("As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.").

84 *See* Milwaukee v. Illinois, 451 U.S. 304, 313 (1981) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'" (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))).

85 United States v. Texas, 507 U.S. 529, 534 (1993) (citing Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

86 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

87 *Texas*, 507 U.S. at 530–31.

88 *Id.* at 534 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

89 *Id.* (quoting Brief for Respondents at 3–4, United States v. Texas, 507 U.S. 529 (1993) (No. 91-1729)).

90 *Id.* (quoting *Isbrandtsen Co.*, 343 U.S. at 783).

91 *Id.*

expressly protected in the Constitution.[92] This is an example of a constitutionally-inspired canon because it promotes state sovereign immunity by avoiding abrogation through statutes with vague language.[93] Under *Kimel v. Florida Board of Regents*, the Court requires that Congress make "its intention unmistakably clear in the language of the statute" that it is abrogating sovereign immunity.[94] This standard is more demanding than the principle established under *Texas*, allowing for abrogation of the common law when Congress has spoken directly "to the question addressed by the common law" and the statutory purpose evinces a clear purpose of abrogation.[95]

C. Clear Statement Rules and Protecting State Interests

The Supreme Court has applied clear statement rules when interpreting broad statutes to avoid interpretations that would preempt state powers. For example, in *Gregory v. Ashcroft*, the Supreme Court rejected the proposition that the federal Age Discrimination in Employment Act[96] (ADEA) preempted Missouri's Constitution, which contained a forced retirement age of seventy for most state judges.[97] Congress expressed a broad remedial purpose in the ADEA.[98] The *Gregory* Court reasoned that "[c]ongressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers."[99] Therefore, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[100] Because "it [was] at least ambiguous whether

92 *See* U.S. CONST. amend XI.

93 *See* Barrett, *supra* note 80, at 168.

94 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000).

95 *See Texas*, 507 U.S. at 534 (first citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978); and then citing Milwaukee v. Illinois, 451 U.S. 304, 315 (1981)).

96 As explained by the Supreme Court, "The ADEA makes it unlawful for an 'employer' 'to discharge any individual' who is at least 40 years old 'because of such individual's age.'" Gregory v. Ashcroft, 501 U.S. 452, 456 (1991) (quoting 29 U.S.C. §§ 623(a), 631(a)). The term "employer" includes "a State or political subdivision of a State." *Id.* (quoting 29 U.S.C. § 630(b)(2)).

97 *Id.* at 455–57.

98 29 U.S.C. § 621(b) (2018) ("It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.").

99 *Gregory*, 501 U.S. at 460.

100 *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). The Supreme Court noted that the requirement of unmistakable clarity (from *Atascadero*)

Congress intended that appointed [state] judges" were protected under the ADEA, the Court did "not attribute to Congress an intent to intrude on state governmental functions."[101] The Court explained that a clear statement requirement "assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision" of whether the states should be able to place mandatory retirement ages on judges.[102] The *Gregory* Court applied the more demanding clear statement rule required to abrogate sovereign immunity[103] by insisting that Congress make its intention *unmistakably* clear.[104] In light of these principles, I will next examine how Congress can abrogate state legislative immunity.

IV. ABROGATING STATE LEGISLATIVE IMMUNITY

Even though state legislative immunity is a common-law doctrine, the Supreme Court was initially skeptical about whether Congress could abrogate it. In *Tenney v. Brandhove*, the Supreme Court considered whether Congress abrogated state legislative immunity in passing a statute that allowed for suits against persons for a deprivation of constitutional rights.[105] The Court framed the question as follows: "Did [Congress] mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of state legislators acting within their traditional sphere. That would be a big assumption."[106] The Supreme Court's concern about the immunity reflects its unique position within the common law. State legislative immunity differs from other federal common-law doctrines because it mirrors the Constitution's Speech or Debate Clause and is designed to protect the independence of the legislature as well as principles of federalism. Thus, in *Tenney*, rather than confronting the

involved the Eleventh Amendment, but the requirement applied to other contexts, such as Congress intending to preempt the historic powers of the States. *Id.*

101 *Id.* at 470.

102 *Id.* at 461 (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989)).

103 *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989))).

104 *Gregory*, 501 U.S. at 460–61; *see also Kimel*, 528 U.S. at 73 (quoting *Dellmuth*, 491 U.S. at 228). Justice White's concurrence critiqued the majority for imposing a clear statement rule. *See Gregory*, 501 U.S. at 477–81 (White, J., concurring in part, dissenting in part, and concurring in the judgment).

105 Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

106 *Id.*

constitutional question of whether Congress could abrogate the immunity, the Court reasoned: "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."[107] The statute at issue provided a cause of action against "[e]very person" who violated the Act.[108] Since *Tenney*, the Supreme Court has suggested that Congress has the power to abrogate legislative immunity because it originates from the federal common law.[109] However, the *Tenney* Court's concerns about Congress's authority to abrogate state legislative immunity support the need for a clear statement for abrogation.

The traditional test for determining whether the common law has been abrogated is inappropriate for state legislative immunity because it fails to account for how this immunity promotes federalism by respecting the independence of state legislatures. In the federal system, legislative immunity is important to the separation of powers because it promotes free deliberation among legislators as well as accountability. Without the immunity, the executive might be able to prosecute legislators based on their political positions. The same risks are present within state governments. There is a danger that state legislators would have distorted incentives since their decision-making process might be clouded by a fear of lawsuits and personal liability.[110] Denying legislative immunity "destroy[s] accountability by allowing courts to interfere with legislation before it is enacted."[111] The same effects

107 *Id.* The suit was brought under a statute that is similar to 42 U.S.C. § 1983 (2018) today: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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." *Id.* at 369 (quoting 8 U.S.C. § 43 (1946)).

108 *Id.* (quoting 8 U.S.C. § 43 (1946)).

109 *See* Pulliam v. Allen, 466 U.S. 522, 529 (1984) ("Our cases have proceeded on the assumption that common-law principles of legislative and judicial immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." (first citing Pierson v. Ray, 386 U.S. 547, 554–55 (1967); and then citing *Tenney*, 341 U.S. at 367)).

110 *See* Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998) (first citing Spallone v. United States, 493 U.S. 265, 279 (1990); and then citing Kilbourn v. Thompson, 103 U.S. 168, 201–04 (1880)).

111 J. Robert Robertson, *The Effects of Consent Decrees on Local Legislative Immunity*, 56 U. CHI. L. REV. 1121, 1131 (1989). Having a court intervene during the legislative process contrasts with judicial review, which occurs after a law is passed. At this point, the legislature has deliberated and can be held accountable by the people for enacting a law undergoing judicial review. *Id.* This makes legislative immunity greatly differ from other common-law norms.

would occur if a federal court intervened into a state legislature's deliberative process.

Returning to the New Hampshire case to illustrate how these concepts work, both the ADA and the Rehabilitation Act speak in broad and general terms, authorizing suits against any entity (or instrumentality) of the state.[112] Based on one natural reading of the text, the state legislature would be an entity (or instrumentality) of the state.[113] However, as the Supreme Court warned in *Tenney*, courts should be hesitant to assume that this "general language" indicates sufficient congressional intent to abrogate legislative immunity.[114] The language in question here is more specific than *Tenney*'s broad language. Entities of the state is further confined than "[e]very person."[115] The ADA and Rehabilitation Act arguably "'speak directly' to the question addressed by the common law" doctrine of state legislative immunity.[116] Furthermore, one could argue that Congress intended to depart from the common law because "a statutory purpose to the contrary is evident."[117] Congress's purpose, as written in the ADA, was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[118] The plaintiffs in the New Hampshire lawsuit made a strong argument that Congress abrogated state legislative immunity by passing broad remedial legislation—the argument was so persuasive that a panel of the First Circuit adopted it.[119] But the underlying constitutional values of federalism would be better fulfilled by a more demanding clear statement rule,

112 See *supra* notes 15–20 and accompanying text for the relevant statutory language.

113 As the First Circuit's panel decision noted, "[i]n this particular instance, Congress expressly said that the requirements of the ADA apply to 'any State . . . government.' 42 U.S.C. § 12131(1)(A) (2018). And the Speaker unsurprisingly makes no argument that the New Hampshire House of Representatives is not part of New Hampshire's state government." Cushing v. Packard, 994 F.3d 51, 53–56 (1st Cir. 2021) (quoting 42 U.S.C. § 12131(1)(A) (2018)), *reh'g en banc granted and opinion withdrawn*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021), *aff'd*, 30 F.4th 27 (1st Cir. 2022) (en banc), *cert. denied*, 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

114 *Tenney*, 341 U.S. at 376.

115 *Id.* at 369.

116 United States v. Texas, 507 U.S. 529, 534 (1993) (first quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978); and then quoting Milwaukee v. Illinois, 451 U.S. 304, 315 (1981)).

117 *Id.* (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

118 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 329 (codified at 42 U.S.C. § 12101) (2018).

119 Cushing v. Packard, 994 F.3d 51, 53–56 (1st Cir. 2021) (quoting 42 U.S.C. § 12131(1)(A) (2018)), *vacated and remanded*, 994 F.3d 51 (1st Cir. 2021), *reh'g en banc granted, opinion withdrawn*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021), *aff'd*, 30 F.4th 27 (1st Cir. 2022) (en banc), *cert. denied*, 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

akin to what the Court requires when abrogating sovereign immunity or altering the usual balance of federal and state powers.

Congress's broad language in the ADA and the Rehabilitation Act is understandable because Congress sought to eliminate "discrimination against individuals with disabilities."[120] However, finding an abrogation of legislative immunity under the ADA and Rehabilitation Act would alter the "usual constitutional balance of federal and state powers."[121] State legislatures have traditionally had authority to decide how to conduct their proceedings, and federal courts have typically barred ADA lawsuits against state legislators because of their immunity.[122] If the ADA and the Rehabilitation Act are interpreted to abrogate legislative immunity, then Congress has empowered the federal judiciary to become involved in how state legislatures conduct their business.[123] It is unlikely that Congress thought about or intended this.[124]

The broad language of the ADA and Rehabilitation Act contrasts with a statute that specifically identifies state legislatures and accordingly satisfies the clear statement test. If Congress passed a statute that said the "New Hampshire legislature shall not exclude disabled persons from any of its activities,"[125] the clear statement test would be satisfied. The statute satisfies the standard required to abrogate the common law because the statute singles out the legislature directly, speaking to whether state legislative immunity may bar the suit.[126] Furthermore, naming the legislature in the statute makes Congress's intent to "alter the 'usual constitutional balance between the States and the Federal Government . . . unmistakably clear in the language of the

120 Americans with Disabilities Act § 2(b)(1).

121 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

122 Cushing v. Packard, 560 F. Supp. 3d 541, 550 (D.N.H. 2021), *vacated and remanded*, 994 F.3d 51 (1st Cir. 2021), *reh'g en banc granted, opinion withdrawn*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021), *aff'd*, 30 F.4th 27 (1st Cir. 2022) (en banc), *cert. denied*, 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

123 Under both statutes, disabled persons are entitled to reasonable accommodations, as assessed by the court. *See supra* notes 15–20 and accompanying text for the relevant statutory language.

124 *Cf. Gregory*, 501 at 461 (explaining that a clear statement rule ensures that the legislature has considered and intended to bring about an issue).

125 Oral Argument at 58:40, Cushing v. Packard, 30 F.4th 27 (1st Cir. 2022) (No. 21-1177), https://www.ca1.uscourts.gov/sites/ca1/files/oralargs/21-1177_20210910.mp3 [https://perma.cc/H3AM-JGYF].

126 *See* United States v. Texas, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." (first quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978); and then quoting Milwaukee v. Illinois, 451 U.S. 304, 315 (1981))).

statute.'"[127] Legislative immunity must be abrogated because otherwise the statute would be meaningless; legislators could always raise an immunity defense, and the statute would never be enforced. This is not the case with the ADA[128] and the Rehabilitation Act[129] since they apply much more broadly, and an abrogation of immunity is not essential to the statutory framework since the statutes would cover other entities of the state.

V. HAVING A LIMIT ON STATE LEGISLATIVE IMMUNITY

In the New Hampshire case, the clear statement rule applies and is decisive because the statutes do not clearly abrogate legislative immunity; however, this does not mean that legislators can always claim immunity to avoid complying with federal antidiscrimination laws. Without any limits, lawmakers could intentionally violate antidiscrimination laws by excluding other lawmakers from the legislative process while being protected by the immunity.[130] For example, a legislature could require that "all members must stand to address the legislative body, but one of the members is wheelchair bound."[131] Such an exclusion would clearly violate the ADA and Rehabilitation Act since someone is excluded based on their disability, but the legislator enforcing the rule would be protected from suit. Under current doctrine, courts cannot consider the motives of state legislators in deciding whether an act is legislative.[132] Otherwise, plaintiffs could defeat legislative immunity defenses by alleging facts that show bad motives, and the

127 *Gregory*, 501 U.S. at 460–61 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984)).

128 *See* 42 U.S.C. § 12132 (2018) ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

129 *See* 29 U.S.C. § 794 (2018) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .").

130 If legislative immunity had no limits, then state legislators could claim legislative immunity to avoid having to comply with other federal antidiscrimination statutes, such as Title VII of the Civil Rights Act, which prohibits discrimination by covered employers "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2018).

131 Cushing v. Packard, 30 F.4th 27, 62 (1st Cir. 2022) (en banc) (Thompson, J., dissenting), *cert. denied* 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

132 *See* Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."); *supra* notes 70–74.

immunity is supposed to be absolute so that cases are dismissed immediately.[133] If courts had to consider the motives of legislators, then discovery, and perhaps a trial, would be necessary.

When legislatures pass laws that are illegal or unconstitutional, parties typically sue someone responsible for enforcing the law (in their official capacity) for an injunction.[134] The issue here is that the legislators enforce these rules, so there is nobody else to sue. When legislators cannot be held responsible in court due to their immunity, the proper remedies are elections, impeachment, or indictment.[135] But many of these ordinary checks do not function when legislators pass rules that effectively oust other lawmakers, like the wheelchair-bound member. Impeachment would be ineffective since ousted members could not participate. An indictment seems unlikely, and it may also be barred by legislative immunity if the underlying behavior was a legislative act.[136] Ultimately, an election would have to result in enough members being elected to repeal a rule that effectively ousts other legislators.

Because state legislative immunity is an absolute defense, it should have limits, based on its purpose, that make it harder for state legislators to claim the defense when ousting others from the legislative process. The underlying purpose of legislative immunity is to protect state legislators so that they can serve the people, and the doctrine should function to help facilitate representative government.[137] Such limits can come from incorporating the doctrinal framework of the Free Exercise Clause, which usually permits laws of general and neutral applicability. I argue that only legislators enforcing neutral and generally

133 *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951) ("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.").

134 *See Ex Parte* Young, 209 U.S. 123, 159–60 (1908).

135 *See Bogan*, 523 U.S. at 50 ("[W]hen a local legislator exercises discretionary powers, he 'is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done.'" (quoting Wilson v. Mayor of New York, 1 Denio 595, 599 (N.Y. Sup. Ct. 1845))).

136 *See* United States v. Johnson, 383 U.S. 169, 184–85 (1966) (holding that a prosecution dependent on inquiries into a congressman's motives violated the Speech or Debate Clause).

137 *See* JAMES WILSON, LEGISLATIVE DEPARTMENT, LECTURES ON LAW (1791), *reprinted in* 2 THE FOUNDER'S CONSTITUTION 331 (Philip B. Kurland & Ralph Lerner eds., 2000) ("In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech . . . .").

applicable rules connected to the legislative process should receive the protection of state legislative immunity.

A. The Extraordinary Circumstances Exception

The Supreme Court in 1880, when first interpreting the Speech or Debate Clause in *Kilbourn v. Thompson*, recognized that legislative immunity might need limits.[138] In dicta, the Supreme Court remarked that there may be things "of an extraordinary character, for which members who take part in the act may be held legally responsible."[139] The Court had outrageous behavior in mind, such as "imitat[ing] the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment."[140] Subsequently, Justice Black's concurrence in *Tenney* observed that "there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act."[141] Circuit courts have also recognized the need for limitations.[142] With legislative immunity defenses being rare, and the extraordinary circumstances exception being recognized only in dicta, it is unclear what constitutes an extraordinary circumstance. At least in the context of state legislators claiming an ouster due to policies adopted by the majority, courts should assess whether a rule is neutral and generally applicable in accordance with the Free Exercise tests from *Employment Division v. Smith*[143] and *Church of the Lukumi Babalu Aye v. City of Hialeah.*[144] Furthermore, a legislative rule must have a rational connection to the legislative process. Under this framework, legislators claiming that they were ousted could potentially defeat a legislative immunity defense.

B. Incorporating Smith *and* Lukumi *as a Check on Legislative Immunity*

Smith and *Lukumi* both govern Free Exercise challenges. In *Smith*, the plaintiffs claimed that an Oregon statute prohibiting the use of

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

139 *Id.* at 204.

140 *Id.* at 204–05.

141 Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (Black, J., concurring).

142 *See, e.g.*, Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 634 (1st Cir. 1995) (recognizing that there may be some conduct, "even within the legislative sphere, that is so flagrantly violative of fundamental constitutional protections that traditional notions of legislative immunity would not deter judicial intervention").

143 494 U.S. 872, 886 n.3 (1990).

144 508 U.S. 520, 531 (1993).

peyote violated the Free Exercise Clause because the law forbade what their religion required.[145] The Court determined that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[146] The Court opined that "a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[147] The application of *Smith* was further clarified in *Lukumi*, a case involving members of the Santeria faith, whose religion calls for sacrificing animals on certain occasions.[148] A Santeria church planned to open in Hialeah, prompting the city council to meet and pass resolutions and ordinances.[149] The city council passed a resolution expressing concern that "certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety."[150] The city also passed an ordinance that punished unnecessarily or cruelly killing any animal.[151] Sacrifice was defined as including the unnecessary killing of an animal in public or a private ritual, but the definition excluded killing for the primary purpose of food consumption.[152] The ordinance exempted slaughtering by licensed establishments for the purpose of making food.[153] Slaughter was defined as "the killing of animals for food," and slaughter was prohibited "outside of areas zoned for slaughterhouse use," but there was an exemption for the slaughter or processing of a sale of a "small number[] of hogs and/or cattle per week in accordance with" state law.[154]

The Supreme Court determined that the ordinances failed to satisfy *Smith*'s requirement of neutrality and general applicability.[155] The Court observed that "[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."[156] The Court wrote that "[a]part

145 *Smith*, 494 U.S. at 878.

146 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

147 *Id.* at 877.

148 *See Lukumi*, 508 U.S. at 525.

149 *Id.* at 526.

150 *Id.*

151 *Id.*

152 *Id.* at 536–37.

153 *Id.* at 527–28.

154 *Id.* at 528.

155 *See id.* at 531–32.

156 *Id.* at 534.

from the text, the effect of a law in its real operation is strong evidence of its object."[157] Regarding the text of the ordinances, "few if any killings of animals [were] prohibited other than Santeria sacrifice" due to the various exceptions and the interpretation that killings for religious reasons were unnecessary.[158] The ordinances were also overbroad, prohibiting Santeria sacrifices even when they would not threaten the city's interest in public health.[159] Justice Kennedy, writing a section which did not command a majority of the Court, wrote that equal protection cases, which consider the direct and circumstantial evidence of the decision-making process, may be relevant.[160] He wrote that the statements of councilmembers and city officials further established that the object of the ordinances was to target animal sacrifice.[161] This framework could effectively be applied to limit abuses of legislative immunity.

The First Circuit has previously incorporated some of *Smith* and *Lukumi*'s elements in setting limits on legislative immunity. In *National Association of Social Workers v. Harwood*, private organizations and lobbyists brought a lawsuit against the Speaker of the Rhode Island House of Representatives and the House's head doorkeeper to challenge the constitutionality of a House rule purporting to ban lobbyists and lobbying from the floor of the House while it was in session.[162] The First Circuit implicitly incorporated the requirements of neutrality and general applicability, writing that where a legislature "adopts a rule, not invidiously discriminatory on its face . . . that bears upon its conduct of frankly legislative business, we think that the doctrine of legislative immunity must protect legislators and legislative aides who do no more than carry out the will of the body by enforcing [it]."[163] The limitations of neutrality and general applicability are logical because legislative immunity protects legislative acts. The quintessential legislative act is a legislator passing a law that will be neutral and generally

157 *Id.* at 535.

158 *See id.* at 536–37.

159 *Id.* at 538–39.

160 *See id.* at 540 (opinion of Kennedy, J.) ("Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977))).

161 *See id.* at 541–42.

162 Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 624–25 (1st Cir. 1995).

163 *Id.* at 631.

applicable.[164] However, not all laws or legislative acts are neutral or generally applicable. For example, legislators may decide to cut an employee's position. This would not be neutral or generally applicable because one person has been singled out, but the decision to cut the position would be a protected legislative act, regardless of motive.[165] Rules governing legislative proceedings will typically be neutral and generally applicable since most rules apply to all members.[166]

In the New Hampshire case, the plaintiffs argued that this was an extraordinary circumstance because the Republican majority was using "state legislative immunity to prevent a protected class of legislators in the minority Democratic Party from legislating."[167] The impact of political polarization surrounding the pandemic must be acknowledged.[168] Democrats have tended to regard the pandemic as a more

164 *See* Kaahumanu v. Cnty. of Maui, 315 F.3d 1215, 1220 (9th Cir. 2003) (describing "whether the act applies to a few individuals, or to the public at large" as one factor in determining whether an act is legislative) (quoting Bechard v. Rappold, 287 F.3d 827, 829 (9th Cir. 2002)).

165 *See* Bogan v. Scott-Harris, 523 U.S. 44, 55–56 (1998).

166 Perhaps some rules would address the duties performed by the leadership, and these rules would not be generally applicable.

167 En Banc Brief of Plaintiff-Appellants at 13–14, Cushing v. Packard, 994 F.3d 51 (1st Cir. 2021), *reh'g en banc granted and opinion withdrawn*, No. 21-1177, 2021 WL 2216970 (1st Cir. June 1, 2021), *aff'd*, 30 F.4th 27 (1st Cir. 2022) (en banc), *cert. denied*, 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

168 Partisanship has resulted in strikingly different approaches by Democrats and Republicans in New Hampshire addressing the pandemic. For example, in October of 2021, New Hampshire's Executive Council voted to reject federal funding for COVID vaccinations 4–1 along partisan lines due to concerns about the contracts requiring New Hampshire to submit to federal pandemic policies, such as vaccine and quarantine mandates. Alli Fam & Josh Rogers, *N.H. Executive Council Rejects $27 Million in Federal Contracts Related to COVID Vaccination Efforts*, N.H. PUB. RADIO (Oct. 13, 2021, 5:00 PM), https://www.nhpr.org/nh-news/2021-10-13/nh-executive-council-rejects-27-million-in-federal-contracts-related-to-covid-vaccination-efforts [https://perma.cc/23U5-RLNN]. The Executive Council later approved the funding. Alli Fam, *In Reversal, N.H. Executive Council Approves Millions in Federal Vaccine Aid*, N.H. PUB. RADIO, (Nov. 10, 2021, 3:18 PM), https://www.nhpr.org/nh-news/2021-11-10/in-reversal-n-h-executive-council-accepts-millions-in-federal-vaccine-aid [https://perma.cc/V9AN-UB76]. Back when the House of Representatives met at the University of New Hampshire, some Republican House members refused to wear masks inside. KC Downey, *NH House Speaker Apologizes to UNH After Some Reps Drink Beer in Hall*, WMUR (Sep. 18, 2020, 10:49 AM), https://www.wmur.com/article/new-hampshire-house-speaker-apologizes-to-unh-after-some-reps-drink-beer-in-hall/34074274# [https://perma.cc/5TZM-88JX]. Some members of the House of Representatives were also drinking beer. *Id.*; *see also* Daniela Allee, *State Reps Draw Criticism for Drinking Beer, Not Wearing Masks on UNH Campus*, N.H. PUB. RADIO (Sept. 17, 2020, 8:23 PM), https://www.nhpr.org/politics/2020-09-17/state-reps-draw-criticism-for-drinking-beer-not-wearing-masks-on-unh-campus [https://perma.cc/BT9D-VZD7].

serious health threat than Republicans.[169] Presumably, at least some Republicans in the House majority were also vulnerable to severe complications or death from COVID-19, but they do not appear to have requested remote access, and they did not join the Democrats as plaintiffs.[170] The plaintiffs argued that this situation was an extraordinary circumstance because legislators sued to be able to fulfill their obligations without risking death.[171] They argued that granting legislative immunity to the House Speaker would prevent the plaintiff-legislators from doing their jobs since they could not legislate safely.[172] The First Circuit declined to apply *Kilbourn*'s exception because a violation of statutory rights was insufficient to establish an extraordinary circumstance.[173]

The result *could* differ by examining whether the in-person requirement is neutral and generally applicable under my proposed framework. Like the prohibition on peyote in *Smith*, the requirement of in-person attendance is neutral and generally applicable since all legislators must participate in-person.[174] However, if the Speaker selectively enforced the rule, then its enforcement would not be generally applicable under the principles of *Lukumi*.[175] The record does not contain any evidence of an intent to exclude lawmakers. Instead, the Republican majority raised concerns regarding remote access to

169 *See* Katherine Schaeffer, *Despite Wide Partisan Gaps in Views of Many Aspects of the Pandemic, Some Common Ground Exists*, PEW RSCH. CTR. (Mar. 24, 2021), https://www.pewresearch.org/fact-tank/2021/03/24/despite-wide-partisan-gaps-in-views-of-many-aspects-of-the-pandemic-some-common-ground-exists [https://perma.cc/W82E-A465] (observing that "Republicans and Democrats are far more divided on ways to address coronavirus than at [the] start of [the] outbreak").

170 *See* Complaint, *supra* note 12, at 1–3.

171 *See* En Banc Brief of Plaintiff-Appellants, *supra* note 167, at 18.

172 *See id.* at 14 ("Legislative immunity makes some sense when employed to protect the ability of legislators to deliberate and enact laws free of distraction as long as they do not commit acts of 'extraordinary character' while doing so. It makes absolutely no sense to use this judicially created prudential doctrine to *prevent* legislators from doing their jobs.").

173 *See* Cushing v. Packard, 30 F.4th 27, 51 (1st Cir. 2022) (en banc) (noting that claims of constitutional violations have been found to not be an extraordinary circumstance), *cert. denied*, 2022 WL 6572202 (Oct. 11, 2022) (No. 22-178).

174 *See* Emp. Div. v. Smith, 494 U.S. 872, 890 (1990).

175 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (recognizing that the government "cannot in a selective manner impose burdens" on conduct motivated by religion because the law would no longer be generally applicable). This principle was reaffirmed in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). In *Fulton*, the Court addressed whether Philadelphia's refusal to contract with a Catholic foster care agency, unless it agreed to certify same-sex couples, violated the Free Exercise Cause. *See id.* at 1874. Because the city administered a system with individual exemptions, its actions were not generally applicable. *See id.* at 1878.

legislative proceedings, such as the importance of being transparent to the public and the difficulties concerning the facilitation of remote participation and vote counting.[176]

It would be a more challenging case if there was evidence that legislators intentionally passed a neutral and generally applicable rule that violates federal antidiscrimination and excludes other lawmakers from participating in lawmaking. For example, a legislature could—with the intent of excluding disabled members—pass a requirement that all members must stand to vote. The rule would be neutral and generally applicable since it applies to all members. Even though legislators acted with an intent to exclude other disabled lawmakers, courts are prohibited from considering the motives of legislators in deciding whether an act is legislative.[177] Furthermore, as Justice Scalia noted in his concurrence in *Lukumi*, "it is virtually impossible to determine the singular 'motive' of a collective legislative body."[178] However, as suggested by *Harwood*, courts could consider a rule's relationship to the legislative process[179] when lawmakers argue that they are being excluded by the legislature's rules. A rule, like the standing requirement, has an attenuated connection to the legislative process; therefore, legislative immunity should not be available because it would not seriously infringe on the independence of the legislature in deciding how to conduct its business. On the other hand, the in-person requirement certainly has a substantial impact on the legislative process. Accordingly, state legislative immunity should still apply if the legislators decided to pass the in-person requirement to intentionally exclude other lawmakers because of the requirement's rational connection to the lawmaking process.

CONCLUSION

Cushing v. Packard is potentially the first of many cases that will address state legislative immunity in the context of legislators claiming

176 *See* Oral Argument at 1:10:26, Cushing v. Packard, 30 F.4th 27 (1st Cir. 2022) (No. 21–1177), https://www.ca1.uscourts.gov/sites/ca1/files/oralargs/21-1177_20210910.mp3 [https://perma.cc/H3AM-JGYF] (discussing reasons why the House of Representatives prefers operating in-person).

177 *See* Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).

178 *See Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment).

179 Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 631 (1st Cir. 1995) ("Where, as here, a legislative body adopts a rule, not invidiously discriminatory on its face . . . *that bears upon its conduct of frankly legislative business*, we think that the doctrine of legislative immunity must protect legislators and legislative aides who do no more than carry out the will of the body by enforcing [it] . . . .") (emphasis added).

that they have been ousted by legislative rules. The future of the pandemic is uncertain, and it is possible that legislatures will have to decide whether to permit remote participation if COVID-19 infections increase once again. Furthermore, as the importance of state legislatures increases, it becomes more likely that majorities will attempt to bolster their strength by passing rules making it harder for the minority to participate. When these rules are challenged, courts will have to address whether the legislators enforcing the rules are protected by legislative immunity. This Note has proposed a framework of analysis for these future cases.