NOTE

CONSTRAINING LEGISLATIVE EXPULSION

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Every U.S. legislature, from the U.S. Congress to all fifty state legislatures, possesses the constitutional power to expel a member, a power that originated in English Parliament. As recently illustrated by the expulsions of two Tennessee legislators, however, this power may conflict with other constitutional rights of legislators and their constituents. This Note explores the tension between the constitutional power to expel and the constitutional rights of legislators and their constituents. In doing this, the Note responds to gaps in legal scholarship surrounding expulsion's historical, legal, and theoretical dimensions. Most significantly, scholars have not comprehensively examined state constitutional powers of expulsion. While historical practice and precedent suggest that some bases for expulsion are unconstitutional, courts—whether ruling on the merits or eschewing political questions—have upheld legislative expulsions in almost every case. The Note argues that this dynamic is evidence of a right-remedy gap that threatens the vindication of constitutional rights. Given significant barriers to judicial relief, this Note argues that legislatures must reform their powers of expulsion—voluntarily or in response to citizen advocacy. Additionally, litigants should test a narrow avenue left open by recent Supreme Court precedent. With one-party supermajorities near their most numerous in modern American history, making expulsion more feasible, reform is urgently needed to prevent irremediable constitutional violations and to uphold the integrity of the democratic process.

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INTRODUCTION

On the morning of March 27, 2023, a shooter killed three nine-year-old children and three staff members at the Covenant School in Nashville, Tennessee.[1] In the months following, parents of the victims,[2] thousands of Nashville-area students,[3] and a sizeable, bipartisan coalition of

[1] Cries for Covenant: Deadly Mass Shooting Hits Nashville, The Tennessean (May 18, 2023, 11:59 AM), https://www.tennessean.com/in-depth/news/2023/05/18/cries-for-covenant-deadly-mass-shooting-hits-nashville/70204202007/ [https://perma.cc/ULP3-H9B8].

[2] Emily Cochrane, The Covenant Parents Aren't Going to Keep Quiet on Guns, N.Y. Times (Dec. 26, 2023), https://www.nytimes.com/2023/12/26/us/politics/nashville-school-shooting-covenant-parents.html.

[3] Marta W. Aldrich, Nashville Students Rally for Tougher Gun Laws, As Governor Seeks Armed Guards for Every School, Chalkbeat (Apr. 3, 2023, 7:12 PM), https://www.chalkbeat.org/tennessee/2023/4/3/23668031/nashville-school-shooting-walkout-march-lives-capitol-protest-gun-safety/ [https://perma.cc/LPL3-2JJM].

Tennesseans[4] expressed support for various gun reforms intended to prevent another attack. After a special session devoted to such reforms, all major legislative proposals failed in Tennessee's General Assembly, with only modest bills aimed at mental health and security resources passing.[5] Amidst this painfully familiar pattern of American political history, something unprecedented occurred. Days after the shooting, Tennessee Representatives Gloria Johnson, Justin Jones, and Justin Pearson gathered in the heart of the Tennessee House chamber from 10:49 AM until 11:42 AM and "shouted, pounded on the podium, led chants with citizens in the gallery, and generally engaged in disorderly and disruptive conduct, including refusing to leave the well, sitting on the podium, and utilizing a sign displaying a political message" to advocate for gun law reforms.[6] Representatives Jones and Pearson also "used a bullhorn to amplify their protestations."[7] For these acts, House Republicans filed three nearly identical resolutions to remove the Democratic lawmakers from office.[8]

After six hours of proceedings on the House floor, the legislature voted to expel Representatives Jones (72-25) and Pearson (69-26), both of whom are Black men under the age of thirty, while voting not to expel Representative Johnson (65-30), who is a white woman in her sixties.[9]

[4] Vanderbilt Poll: State Legislature's Approval Remains Low; Bipartisan Support for Abortion Exceptions, Gun Safety Laws; More, Vanderbilt Univ. (Dec. 14, 2023, 6:00 AM), https://news.vanderbilt.edu/2023/12/14/vanderbilt-poll-tennessee-december-2023/ [https://perma.cc/5Y9U-N4S2].

[5] Emily Cochrane, Tennessee Session Ends in Chaos, With No Action on Gun Control, N.Y. Times (Aug. 29, 2023), https://www.nytimes.com/2023/08/29/us/politics/tennessee-special-session-gun-control.html.

[6] H.R. 65, 113th Gen. Assemb., 1st Reg. Sess. (Tenn. 2023); see also Melissa Alonso & Dakin Andone, Tennessee House Republicans Take Steps to Remove Democratic Lawmakers After They Joined Gun Control Protest, CNN (Apr. 4, 2023, 10:20 PM), https://www.cnn.com/2023/04/04/us/tennessee-reps-expulsion-gun-control/index.html [https://perma.cc/WNQ5-SGRW] (noting Representative Sam McKenzie's view that this "political retribution is unconstitutional").

[7] Tenn. H.R. 65.

[8] Id.; H.R. 64, 113th Gen. Assemb., 1st Reg. Sess. (Tenn. 2023); H.R. 63, 113th Gen. Assemb., 1st Reg. Sess. (Tenn. 2023); Alonso & Andone, supra note 6. Only the representatives' names, pronouns, legislative districts, and home counties differ among the three resolutions, along with the resolutions' sponsors.

[9] Adam Friedman, 'An Abomination:' TN House Expels Two Dems Over Gun Protest, Despite Removal Looking Temporary, Tenn. Lookout (Apr. 7, 2023, 8:56 AM), https://tennesseelookout.com/2023/04/07/an-abomination-tn-house-expels-two-dems-over-gun-protest-despite-removal-looking-temporary/ [https://perma.cc/GUW9-TD3K]; Tenn. Gen. Assemb., HR 0065, https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HR0065&ga=

Apart from recognizing Representatives Jones's and Pearson's use of a bullhorn, the expulsion resolutions did not distinguish among the legislators' alleged conduct.[10] During his expulsion hearing, Representative Pearson stated: "I take full accountability and responsibility for my actions . . . [but] there was in no world or way that I thought that would lead to us being expelled from this House that we got elected into by our constituents. . . . That is antidemocratic."[11] President Joe Biden called Pearson's expulsion "shocking" and "undemocratic."[12]

When asked why he voted to expel Representatives Pearson and Jones but flipped his vote in favor of Representative Johnson, one House Republican explained:

> I'm an attorney, and Ms. Johnson was the only representative that showed up with legal counsel. And their legal counsel made an opening statement, pointing out deficiencies in the resolution that had been filed that we were voting on. And once those deficiencies were pointed out, in my view as an attorney, then it was incumbent upon the debate to present evidence to correct that and to establish clearly what it was that Ms. Johnson did to rise to the level of expulsion. I just don't think that we established that during the debate.[13]

113 [https://perma.cc/7E27-GUMJ] (last visited Jan. 7, 2025) (Rep. Jones); Tenn. Gen. Assemb., HR 0063, https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HR0063&GA=113 [https://perma.cc/RC4C-AEY4] (last visited Jan. 7, 2025) (Rep. Pearson); Tenn. Gen. Assemb., HR 0064, https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HR0064&ga=112 [https://perma.cc/A5CW-CR2V] (last visited Jan. 7, 2025) (Rep. Johnson); Representative Justin J. Pearson, Tenn. Gen. Assemb., https://wapp.capitol.tn.gov/apps/legislatorinfo/member.aspx?district=h86 [https://perma.cc/3QKK-6A8U] (last visited Oct. 11, 2024).

[10] Tenn. H.R. 65; Tenn. H.R. 64; Tenn. H.R. 63.

[11] Tennessee House of Representatives, House Floor Session 21st Legislative Day—April 6, 2023, YouTube (Apr. 6, 2023) (statement of Rep. Pearson), at 9:21:00–9:21:36, https://www.youtube.com/live/ZZK--_x3gIU?t=30894s [https://perma.cc/KMJ2-4249].

[12] Chris Megerian, Aamer Madhani & Josh Boak, Biden Thanks 'Tennessee Three' for 'Standing Up,' Associated Press (Apr. 24, 2023, 6:07 PM), https://apnews.com/article/biden-tennessee-three-lawmakers-pearson-jones-johnson-bb74e4bdb9628d53d64d13acf004248c; cf. Editorial, The Tennessee Bullhorn Isn't Democracy, Wall St. J. (Apr. 19, 2023, 6:45 PM), https://www.wsj.com/articles/tennessee-justin-jones-justin-pearson-bullhorn-biden-white-house-chuck-schumer-gun-control-b9a4d4f5 (arguing that the conduct of the Tennessee Three was sufficiently disruptive to justify expulsion).

[13] Erika Ryan, Patrick Jarenwattananon & Mary Louise Kelly, Tennessee GOP Rep. Barrett on Why He Voted to Expel Two Colleagues But Not the Third, NPR (Apr. 7, 2023, 5:24 PM), https://www.npr.org/2023/04/07/1168728769/tennessee-gop-rep-barrett-on-why-he-voted-

In a leaked tape recording of the House Republicans' caucus meeting after the expulsion votes, Representative Jason Zachary said: "I don't want to hear why there wasn't preponderance of the evidence as an attorney—I need to know why you flipped your vote at the last minute."[14]

Following their expulsions, Representatives Pearson and Jones were reinstated to their seats within a week.[15] Despite their prompt returns, the expulsions temporarily nullified roughly 10,000 combined votes cast for the representatives, were projected to incur taxpayer expenses exceeding $475,000, and disrupted Representatives Pearson's and Jones's committee assignments.[16] Only Representative Jones raised constitutional challenges to the General Assembly's actions, though his suit remains in a preliminary posture as of early 2025.[17]

The U.S. Constitution[18] and every state constitution[19] empower legislatures to remove duly elected members, temporarily depriving constituents of their democratic representation. American legislatures have rarely exercised this power.[20] When they have, legislators have been puzzled by expulsion's obscurity and its inherent constitutional

to-expel-two-colleagues-but-not-the-th [https://perma.cc/K7R9-VTZY]; see also Tenn. H.R. 64 (proposed resolution expelling Rep. Johnson).

[14] Cheyanne M. Daniels, Leaked Audio Shows Tennessee GOP Infighting Over Expulsion of Black Lawmakers, The Hill (Apr. 14, 2023, 3:59 PM), https://thehill.com/homenews/state-watch/3951196-leaked-audio-shows-tennessee-gop-infighting-over-expulsion-of-black-lawmakers/.

[15] Bill Chappell & Katie Riordan, Both Black Tennessee Lawmakers Have Been Reinstated After Being Expelled by GOP, NPR (Apr. 12, 2023, 2:46 PM), https://www.npr.org/2023/04/12/1169444850/justin-pearson-vote-memphis-tennessee-house [https://perma.cc/BAZ4-BG4M].

[16] Sam Stockard, Special Elections for Three Seats Could Hit $570,000, Tenn. Lookout (Apr. 27, 2023, 10:35 AM), https://tennesseelookout.com/2023/04/27/special-elections-for-three-seats-could-hit-570000/ [https://perma.cc/SFL5-6ANK]; see infra note 186 (indicating that Representatives Jones and Pearson earned 9,831 combined votes); see also Nadine Yousif, Brandon Drenon & Melisa Goh, Lawmakers Expelled: What to Know About the 'Tennessee Three,' BBC (Apr. 7, 2023), https://www.bbc.com/news/world-us-canada-65182502 [https://perma.cc/WZ35-PAQL].

[17] Jones v. Sexton, No. 23-cv-01033, 2024 WL 4631658, at *1 (M.D. Tenn. Oct. 30, 2024).

[18] U.S. Const. art. I, § 5, cl. 2.

[19] Although Massachusetts, New Hampshire, New York, North Carolina, and South Dakota lack constitutional expulsion provisions, courts have interpreted other provisions to impliedly confer the power to expel. See Hiss v. Bartlett, 69 Mass. (3 Gray) 468 (1855); Horton v. McLaughlin, 821 A.2d 947 (N.H. 2003); Monserrate v. N.Y. State Senate, 599 F.3d 148 (2d Cir. 2010); Alexander v. Pharr, 103 S.E. 8 (N.C. 1920); Gray v. Gienapp, 2007 SD 12, 727 N.W.2d 808; see also infra Appendix: State Constitutional Expulsion Provisions.

[20] Todd Garvey, Cong. Rsch. Serv., R45078, Expulsion of Members of Congress: Legal Authority and Historical Practice 4, 9 (2023).

tensions.[21] Even against such sparse precedent, the Tennessee legislature's 2023 expulsion votes raised new constitutional questions that were previously relegated to hypotheticals[22] and dicta,[23] provoking a national reckoning with an unfamiliar legislative power. That reckoning continued months later with the historic removal of Congressman George Santos for his financial misdeeds.[24] Urgent questions that implicate democratic principles of representation, due process, and free expression remain unresolved. What constitutional rules govern expulsion proceedings? Are there any constraints on a legislature's expulsion power when the grounds for expulsion implicate constitutional rights?

Despite the urgency of these foundational questions, expulsion scholarship has remained frozen in time. As recently as 2022, the Supreme Court cited as authoritative a 1978 article on expulsion's early history—a study authored nearly *fifty years ago* without the benefit of digital archival research.[25] Recent federal cases have explored the boundaries of expulsion law, yet they have not been scrutinized by the Congressional Research Service—a key resource for legislators.[26] Scholars have also examined the federal expulsion power in isolation, despite the fact that most expulsions arise under state constitutions rather

[21] See, e.g., Investigation of Sen. Joseph R. McCarthy: Hearings on S.R. 187 Before the Subcomm. on Privileges & Elections of the S. Comm. on Rules & Admin., 82d Cong. 62 (1952) [hereinafter McCarthy Hearing] (statement of Sen. William Benton) (explaining that the Senate "is not an investigating body" and identifying the need for "procedure, in the form of a committee" to pursue expulsion charges); see also, e.g., Cong. Globe, 37th Cong., 2d Sess. 969–70 (1862) (statement of Sen. John Sherman) (debating the procedure and scope of expulsion with other Senators).

[22] Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 92 (S.D.N.Y. 2010) (describing "hypothetical worst-case scenarios of the misuse of the expulsion power to discriminate against racial, ethnic, and political minorities"), *aff'd*, 599 F.3d 148 (2d Cir. 2010); see also Expulsion of House Member for Conduct Pre-Dating Election, Tenn. Att'y Gen. Op. No. 19-20, at 5 (2019) (observing that "the equal protection guarantees of Tennessee and U.S. Constitutions would prevent racially discriminatory expulsion decisions").

[23] Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1263–64 (2022) (reserving the question of a First Amendment retaliation claim in the context of legislative expulsion).

[24] Michael Gold & Grace Ashford, George Santos Is Kicked Out of Congress in a Historic Vote, N.Y. Times (Dec. 1, 2023), http://www.nytimes.com/2023/12/01/nyregion/santos-expulsion-vote-congress.html; H.R. Res. 878, 118th Cong., 169 Cong. Rec. H6062–63 (daily ed. Dec. 1, 2023) (enacted).

[25] See Dorian Bowman & Judith Farris Bowman, Article I, Section 5: Congress' Power to Expel—An Exercise in Self-Restraint, 29 Syracuse L. Rev. 1071 (1978); *Wilson*, 142 S. Ct. at 1259 (citing Bowman & Bowman, supra); Garvey, supra note 20, at 3 n.22.

[26] See, e.g., Garvey, supra note 20, at 5–7 (discussing predominately early to mid-twentieth century case law).

than under the U.S. Constitution.[27] Scholarship has yet to comprehensively examine state expulsion powers even while the Supreme Court has emphasized the centrality of state law in *Dobbs v. Jackson Women's Health Organization*[28] and *Whole Woman's Health v. Jackson*.[29] In short, legal scholarship offered precious little in response to the Tennessee Three and the incident's constitutional questions.

This Note offers a modern synthesis of expulsion's historical, legal, and theoretical dimensions. Part I retraces the historical roots of expulsion from English Parliament through the Founding Era, uncovering previously unexamined perspectives on expulsion from James Madison, Alexander Hamilton, and Abigail Adams.[30] With the advent of digital archival tools, these Founding Era sources enrich our understanding and recontextualize Dorian and Judith F. Bowman's 1978 account. This Part also provides a comprehensive analysis of state expulsion provisions, filling a gap in the literature and highlighting the importance of state-level practices where most expulsions occur.[31]

Part II surveys judicial review of expulsions, including recent federal case law examining constitutional challenges to expulsion (and similar procedures).[32] This Part demonstrates that judicial review is ill-equipped to address the sort of constitutional issues raised by the Tennessee Three, exposing a gap between constitutional rights and judicial remedies for their violation that requires further scholarly attention.[33] Part III proposes specific reforms to prevent antidemocratic abuses of the expulsion power, including legislative amendments and claims-making in the First Amendment retaliation context, which appears ripe for challenge

[27] See, e.g., id.; Robyn Sanders & Andrew Garber, The Unconstitutional Expulsion of Legislators, Brennan Ctr. for Just. (May 25, 2023), https://www.brennancenter.org/our-work/research-reports/unconstitutional-expulsion-legislators [https://perma.cc/6ZX4-9RWQ].

[28] 142 S. Ct. 2228, 2242, 2256 (2022).

[29] 142 S. Ct. 522, 537–38 (2021).

[30] The author is unaware of any expulsion scholarship to date that examines James Madison's reflections on French expulsion, Alexander Hamilton's proposal to abolish expulsion, Abigail Adams's reflections on partisan expulsion, or various Anti-Federalist concerns about the Constitution's expulsion power. See infra notes 58, 61, 65, 66, 67, 87 and accompanying text.

[31] See infra notes 70, 72–74 and accompanying text; Appendix: State Constitutional Expulsion Provisions.

[32] Most notably, this includes *Houston Community College System v. Wilson*, 142 S. Ct. 1253 (2022). The author is unaware of expulsion scholarship evaluating other recent federal opinions such as *Hernandez v. Oregon Legislature*, 521 F. Supp. 3d 1025 (D. Or. 2021), or *Shooter v. Arizona*, 4 F.4th 955 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 898 (2022).

[33] See infra note 178 and accompanying text.

following the Supreme Court's ruling in *Houston Community College System v. Wilson*.[34]

While this Note does not purport to definitively resolve all the complex constitutional questions surrounding expulsion, it takes a critical step forward by offering historical insights, exposing current legal deficiencies, and charting a path for future research and reform efforts. Taken as a whole, this Note calls attention to an understudied topic of foundational importance to American democracy. Expulsion matters because it has the potential to censor the political process, alter legislative outcomes, and deprive citizens of democratic representation. Although the mine-run of expulsions involving criminal convictions may not appear facially unconstitutional, the Tennessee Three incident suggests that when constitutional issues do emerge in the expulsion context, they raise significant right-remedy gaps.[35] Without additional guardrails to uphold the constitutional rights of legislators and their constituents, the expulsion power may be exploited for antidemocratic purposes. That risk of exploitation appears even greater today, when one-party supermajorities are near their most numerous in modern American history, making expulsion more feasible.[36]

I. ORIGINS AND APPLICATIONS OF THE EXPULSION POWER

A. Expulsion in English Parliamentary Practice

Expulsion emerged in English Parliament, where members were routinely expelled for virtually any reason—or no reason at all.[37] Between 1581 and the American Constitutional Convention of 1787, the House of Commons expelled hundreds of members for a litany of offenses, ranging from "genuine misconduct" to "expression of unpopular views."[38] Dorian and Judith F. Bowman, whose analysis of the House of Commons Journal has been cited by the Supreme Court as authoritative, concluded that Parliament possessed "an inherent and absolute discretion to determine

[34] 142 S. Ct. 1253.

[35] See generally John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87 (1999) (discussing this term and the shortfall between the goals of rights and the realities of implemented remedies).

[36] See infra notes 207–08 and accompanying text.

[37] Bowman & Bowman, supra note 25, at 1075.

[38] Id. at 1074–75.

what misconduct presented a sufficient threat to its integrity or to its proper functioning."[39]

Political dynamics of early modern England help explain Parliament's immense self-regulatory power and distinguish its application in the early American context.[40] Leading up to the enactment of the Qualification Act of 1710, which required that members of Parliament be landed gentry, landed parliamentarians battled against the influence of monied members.[41] Expulsion and exclusion featured prominently in this debate over fundamental qualifications for public office, empowering landed members to contest ex post criteria that today's election systems address ex ante.[42] For example, while a modern congressional candidate would be prevented from seeking a House seat if they possessed U.S. citizenship for fewer than seven years,[43] an analogous parliamentary member may have been duly elected and then removed by his peers for an unworthy record of citizenship. While pleading for the House of Commons to adopt the Qualification Act of 1710, Henry St. John warned that without this property-based protection, landed members would eventually face the threat of parliamentary exclusion by monied members.[44]

The lack of English suffrage over the same period further distinguishes British expulsion, a self-regulatory measure, from its American descendant, a power subject to the will of constituent voters. Early modern parliamentarians were understood to represent the kingdom as a whole, a medieval vestige obviating universal suffrage.[45] The expansion of English suffrage over the nineteenth century correlated with Parliament's evolving conception of representation, "from the idea that

[39] Id. at 1083; *Wilson*, 142 S. Ct. at 1259.

[40] See Bowman & Bowman, supra note 25, at 1073 (cautioning that reliance on "the English precedents must . . . be tempered by the awareness that the Framers did not necessarily adopt uncritically every aspect of parliamentary practice").

[41] Helen E. Witmer, The Property Qualifications of Members of Parliament 18 (1943); Qualification Act 1710, 9 Ann. c. 5 (Gr. Brit.). "Landed" in this context refers to a British social class of gentlemen who historically enjoyed privileges of land ownership. See Lawrence Stone, Social Mobility in England, 1500–1700, 33 Past & Present 16, 17–18, 28–29 (1966) (distinguishing "landed classes" from members of trades and professions). "Monied," by contrast, refers to wealthy Britons whose income was derived from banking, for example, rather than land. Id. at 18–19, 55.

[42] Witmer, supra note 41, at 41.

[43] See U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . .").

[44] Witmer, supra note 41, at 40.

[45] See J.R. Maddicott, The Origins of the English Parliament, 924–1327, at 108, 140, 378 (2010).

[members] represent the entire *regnum*, as feudal tenants of the crown, and towards a more direct if still virtual form of representation by local men."[46] The English franchise historically excluded significant portions of the public from expressing their views on the fitness of their parliamentary representatives through voting, but the First Reform Act of 1832 significantly expanded the ability to vote.[47] And, as Professor Charles Seymour observed, while this Act of 1832 "sounded the knell of aristocracy," universal male suffrage would not arrive in England until much later.[48] In the absence of public oversight, a broad expulsion power theoretically allowed Parliament to act on behalf of the *regnum*'s interests by policing itself.

Despite Parliament's generally unimpeachable expulsion practice, members of the House of Commons confessed once in 1782 that their expulsion of John Wilkes had been "subversive of the rights of the whole body of electors of this kingdom."[49] This remarkable acknowledgment came only after repeatedly expelling Wilkes between 1763 and 1769 for criticizing the King's peace treaty with France.[50]

B. Formation of the United States Federal Expulsion Power

In Philadelphia, the Founding generation debated the extent to which the Constitution would adopt or limit the traditional parliamentary power of expulsion. Unlike Parliament's tradition of virtual *regnum* representation, American democracy championed *actual* representation from the outset.[51] Expulsion would have to be reimagined to avoid violating the critical relationship between constituents and their representatives.[52] In the related area of impeachment, Professor Cass

[46] Id. at 378; see also J.B. Conacher, Introduction *to* The Emergence of British Parliamentary Democracy in the Nineteenth Century 3, 9–10 (J.B. Conacher ed., 1971).

[47] Conacher, supra note 46, at 9–10; Reform Act 1832, 2 Will. 4 c. 45 (UK).

[48] Charles Seymour, Electoral Reform in England and Wales, 1832–1885 (1915), *reprinted in* The Emergence of British Parliamentary Democracy in the Nineteenth Century, supra note 46, at 164, 167.

[49] 22 The Parliamentary History of England 100 (London, T.C. Hansard 1814); Powell v. McCormack, 395 U.S. 486, 528 (1969) (citing id.).

[50] Garvey, supra note 20, at 3–4; Bowman & Bowman, supra note 25, at 1079–80.

[51] U.S. Const. art. I, § 2, cl. 1. Actual representation, while distinct from *regnum* representation in a philosophical sense, was available in practice primarily to property-owning white men at the Founding.

[52] See Joseph Fishkin, Taking Virtual Representation Seriously, 59 Wm. & Mary L. Rev. 1681, 1682 (2018) (describing actual representation as "the spine of our dominant democratic narrative").

Sunstein has described this process as the "American reformulation," whereby the Founders framed protections against abuse of official power "in distinctly republican terms."[53]

Most prominently, James Madison argued that the Constitution should allow for expulsion only with broad consensus among legislators.[54] On August 10, 1787, Madison "observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused."[55] For Madison, faction's root causes were incurable; instead, faction's "common impulse of passion" could only be subdued by mitigating its effects through representative democracy.[56] To guard against such impulses, he successfully proposed that a two-thirds majority requirement be added to the Constitution.[57] Only a few years later, the French Revolution would validate Madison's cautionary approach, prompting him to reflect that French legislative expulsions were "extraordinary" and "illegitimate" acts that "violat[ed] the trust committed to [elected representatives]."[58]

Contrastingly, Gouverneur Morris argued in favor of a simple majority to expel because the power "may be safely trusted to a majority. To require more may produce abuses on the side of the minority."[59] Morris's faith in legislative majorities to wield the expulsion power contrasted sharply with his view that the impeachment power could not be entrusted to the Congress without "enumerated and defined" guardrails.[60] Taking a more radical position altogether, Alexander Hamilton wished to abolish expulsion in the new nation.[61] In his September 17, 1787 "Draft of a Constitution," written separately from the Convention records, Hamilton wrote succinctly and remarkably when discussing the powers of the U.S.

[53] Cass R. Sunstein, Impeachment: A Citizen's Guide 37–38 (2017).

[54] 2 The Records of the Federal Convention of 1787, at 254 (Max Farrand ed., 1911).

[55] Id.

[56] The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

[57] Adrian Vermeule has described Madison's introduction of a two-thirds voting requirement for expulsion as "anticipating modern work on the economics of voting rules" insofar as it "rais[ed] the costs of assembling the necessary faction." Adrian Vermeule, The Constitutional Law of Congressional Procedure, 71 U. Chi. L. Rev. 361, 395 (2004).

[58] James Madison, Political Reflections (Feb. 23, 1799), *in* 17 The Papers of James Madison Digital Edition 237, 239 (J.C.A. Stagg ed., 2010).

[59] The Records of the Federal Convention of 1787, supra note 54, at 254.

[60] Sunstein, supra note 53, at 45.

[61] Alexander Hamilton, Draft of a Constitution (Sept. 17, 1787), *in* 4 The Papers of Alexander Hamilton Digital Edition 253, 258 (Harold C. Syrett ed., 2011).

Senators to punish members—"[legislative] punishment shall not extend to life or limb; nor to expulsion."[62]

Although James Madison's proposal prevailed and set expulsion's textual boundary, the power embraced new meaning within the federal Constitution as compared to its English antecedent. Contrasting with English politics and franchise, the new national government enshrined direct representation, abolished property requirements, and compensated congressmen in order to extend eligibility for office beyond monied or landed men.[63] As a consequence, constitutional expulsion as a form of congressional self-regulation hung in tension with the right of the electorate to perform the same function at regular electoral intervals. Additionally, while the Framers shared Parliament's fear of corruption, they channeled this fear into structural decisions previously enshrined in colonial constitutions, particularly the separation of powers principle.[64] Whereas the parliamentary system largely employed expulsion as a means of checking corruption, the new federal Constitution leveraged the competing branches of government to perform a similar task. Altogether, expulsion became constrained by the constitutional order from the outset.

Even with these constraints, Anti-Federalists worried about expulsion's potential for abuse. Critics were particularly concerned that Article I, § 5's conditioning expulsion on "disorderly [b]ehaviour" would be easily manipulated for political purposes: "[D]ifferent sentiments from those of the majority may be construed into disorderly conduct . . . which may in effect take away the freedom of deliberation in the House."[65] In New York, one anonymous columnist colorfully imagined that a member of Congress could be expelled "[n]ot [only] for disorderly behaviour," but also for "not appearing in the ton of the 'ten-mile-square,' or not living in the style of the court."[66] Even less critical citizens acknowledged expulsion's inherent assumptions, like one Philadelphian who wrote that

[62] Id.

[63] Jill Lepore, These Truths: A History of the United States 121–22 (2018).

[64] See Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 156–58 (1998) (noting "emphatic" prohibitions against magisterial influence on the legislative power, evidencing the perceived risk of corruption).

[65] U.S. Const. art. I, § 5; To the Convention of Massachusetts, Am. Herald (Bos.), Jan. 14, 1788, *in* 5 The Documentary History of the Ratification of the Constitution Digital Edition 709, 712 (John P. Kaminski et al. eds., 2009).

[66] Hugh Hughes, Expositor I, N.Y.J. (Jan. 24, 1788, Jan. 31, 1788, Feb. 7, 1788), *in* 20 The Documentary History of the Ratification of the Constitution Digital Edition 658, 663 (John P. Kaminski et al. eds., 2009) (emphasis omitted).

"expulsion . . . will be a sufficient restraint, unless a majority of the house and senate should become corrupt, which is not easily presumable."[67]

C. Formation of State Legislative Expulsion Powers

Colonial legislatures and newly formed states had adopted various expulsion provisions that would remain intact after ratification of the federal Constitution.[68] The contours of these early powers, as well as their present-day progeny, differ significantly from state to state, a fact that has received minimal scholarly treatment.[69] Five states' constitutions lack an expulsion provision entirely; instead, their state courts have interpreted expulsion to fall within the plenary powers of the legislature.[70] Twenty-seven states protect legislators who are returned by voters after one expulsion from a second expulsion for the same offense, whereas twenty-three, and the federal Constitution, theoretically permit an endless cycle of expulsions.[71] Five state provisions expressly preserve criminal charges separate and apart from any legislative discipline.[72] Five other state

[67] A Citizen of Philadelphia—Remarks on the Address of Sixteen Members (Oct. 18, 1787), *in* 13 The Documentary History of the Ratification of the Constitution Digital Edition 297, 303 (John P. Kaminski et al. eds., 2009).

[68] Bowman & Bowman, supra note 25, at 1086.

[69] See, e.g., id. (characterizing the distinctions among colonial expulsion provisions as inconsequential, except for those states precluding a second expulsion for the same offense); Jack Maskell, Cong. Rsch. Serv., RL31382, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives 7 (2005) (acknowledging that "some States provide that members expelled from their State legislatures are ineligible to be re-elected to that legislature").

[70] See infra Appendix: State Constitutional Expulsion Provisions; see, e.g., Hiss v. Bartlett, 69 Mass. (3 Gray) 468, 469, 473 (1855) (holding that the "power of expulsion is a necessary and incidental power, to enable the house to perform its high functions"); see also Recent Case, *Wilson v. Houston Community College System*, 955 F.3d 490 (5th Cir. 2020), 134 Harv. L. Rev. 2638, 2642–43 (2021) (quoting H.R. Res. 2, Gen. Assemb., Extra Sess. (N.C. 2008)) (connecting common law discipline to unenumerated disciplinary provisions as "inherent authority" to "discipline").

[71] Adrian Vermeule also offers an originalist argument for interpreters of the federal Constitution to read this form of protection into the constitutional text. Vermeule, supra note 57, at 396–97; see infra Appendix: State Constitutional Expulsion Provisions.

[72] Ark. Const. art. V, § 12 ("A member expelled for corruption shall not, thereafter, be eligible to either house; and punishment for contempt, or disorderly behavior, shall not bar an indictment for the same offense."); Colo. Const. art. V, § 12 ("A member expelled for corruption shall not thereafter be eligible to either house of the same general assembly, and punishment for contempt or disorderly behavior shall not bar a prosecution for the same offense."); N.M. Const. art. IV, § 11 ("Punishment for contempt or disorderly behavior or by expulsion shall not be a bar to criminal prosecution."); Pa. Const. art. II, § 11 ("[P]unishment for contempt or disorderly behavior shall not bar an indictment for the same offense."); Wyo.

provisions impose a good cause requirement.[73] And, while forty-four provisions set a two-thirds majority threshold for expulsion, six constitutions lack a specific majority threshold.[74] These variations counsel against adopting a monolithic conception of state expulsion powers. Indeed, they underscore the importance of granular comparison among states and between states and Congress. They also suggest that even as the federal and state constitutional standards against which expulsion proceedings are judged have converged,[75] the sources of that power remain fragmented.

To illustrate how these state expulsion powers emerged in early state constitutions, consider the example of Tennessee, the state that has witnessed the most recent controversy over expulsion. Tennessee's 1796 Constitution, which "Thomas Jefferson described . . . as the 'least imperfect and most republican of the state constitutions,'"[76] included an expulsion provision that has remained substantively unchanged to the present.[77] Territorial Governor William Blount presided over Tennessee's constitutional convention in January of 1796.[78] Prior to his gubernatorial appointment, Blount actively participated in North Carolina politics and

Const. art. III, § 12 ("[P]unishment for contempt or disorderly behavior shall not bar a criminal prosecution for the same offense.").

[73] See, e.g., Mont. Const. art. V, § 10 ("Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members."); Idaho Const. art. III, § 11 ("Each house may, for good cause shown, with the concurrence of two-thirds of all the members, expel a member."); Mich. Const. art. IV, § 16 ("The reasons for such expulsion shall be entered in the journal . . . ."); Utah Const. art. VI, § 10 ("Each house . . . may . . . with the concurrence of two-thirds of all the members elected, expel a member for cause."); Kan. Const. art. 2, § 8 ("Each house shall provide for the expulsion or censure of members in appropriate cases.").

[74] See, e.g., Vt. Const. ch. II, § 14 (noting that "[t]he Representatives . . . may expel members" without specifying a majority threshold for doing so); see infra Appendix: State Constitutional Expulsion Provisions.

[75] See infra note 103 and accompanying text.

[76] J.G.M. Ramsey, The Annals of Tennessee to the End of the Eighteenth Century 657 (Phila., Lippincott, Grambo & Co. 1853).

[77] Compare Tenn. Const. of 1796, art. I, § 9 ("Each house may . . . with the concurrence of two thirds, expel a member, but not a second time for the same offence; and shall have all other powers necessary for the legislature of a free state."), with Tenn. Const. art. II, § 12 ("Each House may . . . with the concurrence of two-thirds, expel a member, but not a second time for the same offence; and shall have all other powers necessary for a branch of the Legislature of a free State.").

[78] Journal of the Proceedings of a Convention 3 (1796), *reprinted in* The Library of Congress' Early State Records Project, LLMC Digital, https://llmc.com/openaccess/docDisplay5.aspx?textid=74550171 [https://perma.cc/FW5T-WDVU] (last visited Jan. 7, 2025).

was among the federal Constitution's signatories from that state in 1787.[79] Given his background, Blount was well acquainted with the federal Constitution and presumably familiar with the North Carolina Constitution of 1776, which lacked an expulsion provision.[80]

Similar to those of the federal convention, the records of the Tennessee convention provide limited insight into the drafters' perspective on expulsion. The expulsion provision first appeared on January 30, 1796, in a draft that modified two aspects of language otherwise identical to the federal Constitution: (1) "but not a second time for the same offence," (2) "and shall have all other powers necessary for the legislature of a free state."[81] The first change would prevent the legislature from repeatedly expelling a member over and against the voters' repeated reelection of that member, perhaps manifesting wisdom gleaned from the Wilkes affair.[82] The second change confers broad plenary power to the legislature, alluding to without naming "other powers," which differs sharply from the federal Constitution's Tenth Amendment.[83] Tennessee's expulsion provision, in other words, incorporated by reference the parliamentary power that had only recently been modified and adapted into the federal Constitution. Even from the eighteenth century, therefore, federal and state expulsion laws would become interchangeable given their common origin.

[79] NCC Staff, The Constitution Signer Who Was Impeached and Expelled, Nat'l Const. Ctr. (July 7, 2024), https://constitutioncenter.org/blog/the-constitution-signer-who-was-impeached-and-expelled [https://perma.cc/4V8F-JXXR]; William Blount and the Constitution: Editorial Note, *in* 30 The Documentary History of the Ratification of the Constitution Digital Edition 143, 143 (John P. Kaminski et al. eds., 2009).

[80] N.C. Const. of 1776.

[81] Tenn. Const. of 1796, art. I, § 9. The latter clause, despite its sweeping language, has rarely been interpreted by courts. When it has cropped up, courts have quoted the provision to support general presumptions about legislative power. See, e.g., Mayhew v. Wilder, 46 S.W.3d 760, 770 (Tenn. Ct. App. 2001) (holding that the clause prevents one legislative term from binding its successors); Sharpless v. Mayor of Phila., 21 Pa. 147, 165 (1853) (holding that an analogous clause in the Pennsylvania constitution "confer[s] certain parliamentary privileges on the separate branches, so that each house, when in session, could, without the concurrence of the other, promptly protect itself against indecency, disorder, corruption, or other misbehavior of members or strangers").

[82] See Vermeule, supra note 57, at 396–97, for an originalist defense of this interpretation.

[83] Compare Tenn. Const. of 1796, art. I, § 9, with U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

D. Expulsion in American Legislative Practice

Just as the expulsion power has been a pervasive feature of U.S. state constitutionalism, so too has discomfort with its use been a common refrain from even its first application. In a historical irony, Blount would become the first Member of Congress expelled under the federal Constitution for "a high misdemeanor" just one year after he shepherded Tennessee to statehood in 1796.[84] Blount's expulsion captured the attention of many throughout the fledgling nation, including Thomas Jefferson[85] and George Washington.[86] Abigail Adams summarized the partisan dynamics of Representative Roger Griswold's expulsion proceedings just one year later: "[I]nstead of considering what was due to the Honour of the House, as Legislatures and as gentlemen, they have suffer[e]d narrow party views . . . [creating] more ill will, than the most momentous questions of National concern."[87]

Expulsion's transatlantic journey produced both express (e.g., two-thirds majority requirement) and implied constraints; however, limits imposed by the constitutional order remained ambiguous or unarticulated at the Founding. As the Supreme Court has instructed, the historical practices of Congress and other legislative bodies therefore have the potential to enrich the constitutional *meaning* of expulsion.[88] Proponents of liquidation as an interpretive method have emphasized historical practice occurring between the Founding and the early nineteenth century because such history evidences contemporary understandings of a

[84] William Blount and the Constitution: Editorial Note, *in* 30 The Documentary History of the Ratification of the Constitution Digital Edition, supra note 79, at 143, 144 n.1; NCC Staff, supra note 79.

[85] Notes on William Blount's Impeachment Trial, *in* 30 The Papers of Thomas Jefferson Digital Edition 614, 614 (James P. McClure & J. Jefferson Looney eds., 2008) (noting the "odious" impeachments as the "rival of trial of jury").

[86] Letter from George Washington to James McHenry (Aug. 14, 1797), *in* 1 The Papers of George Washington Digital Edition 299, 299 (2008) ("It will be to be regretted, *much*, if [Blount's expulsion] is not probed to the bottom."); see also Letter from William Cocke to George Washington (Feb. 1, 1797), *in* 21 The Papers of George Washington Digital Edition 621, 621 (2008) (mentioning Blount in a writing to George Washington).

[87] Letter from Abigail Adams to Elizabeth Smith Shaw Peabody (Feb. 13, 1798), *in* 12 The Adams Papers Digital Edition 397, 399 (Sara Martin ed., 2008).

[88] See, e.g., Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022) ("Often, 'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases.'" (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 The Writings of James Madison 447, 450 (Gaillard Hunt ed., 1908))).

provision, and it liquidates or resolves constitutional meaning.[89] However, the operative historical period for liquidation extends into the mid-to-late nineteenth century in the expulsion context because the Fourteenth Amendment's adoption in 1868 generated new legal standards bearing on the constitutionality of expulsion.[90]

The Civil War resulted in the greatest concentration of legislative expulsions in American history: in 1861 alone, three Representatives and eleven Senators were expelled for disloyalty to the Union.[91] In addition, the Civil War ushered in a new federal legal framework governing the constitutionality of state expulsions through the advent of the Reconstruction Amendments to the U.S. Constitution, which subjected expulsion to new standards.[92] Until 2023, American legislatures have almost exclusively reserved expulsion for legislators convicted of crimes, typically bribery or treason.[93] After Reconstruction, Congress has wielded its expulsion power only three additional times: two stemming from bribery convictions and a third, in 2023, from the unprecedented allegations of fraud against Representative George Santos even in the absence of a conviction.[94] The Brennan Center for Justice conducted a recent nationwide analysis of state legislative expulsions, concluding that 122 state legislators have been expelled since 1788.[95] Although the Center identified eight instances of speech-related expulsion and one

[89] See generally William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1 (2019) (explaining that constitutional liquidation is using deliberate practices to settle textual indeterminacies and that a constitutional settlement occurs when the dissenting side acquiesces and the public ratifies the settlement); The Federalist No. 37, supra note 56, at 229 (James Madison) ("All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

[90] See infra Part II; see also Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution 55–92 (2019) [hereinafter Foner, The Second Founding] (explaining generally the legal changes resulting from the ratification of the Fourteenth Amendment).

[91] Garvey, supra note 20, at 20.

[92] See Bowman & Bowman, supra note 25, at 1071, 1092 (pointing out the relationship between the Civil War and congressional expulsions); see also Foner, supra note 90, at 55–92 (explaining the legal changes resulting from the Fourteenth Amendment and its implications for states).

[93] Garvey, supra note 20, at 20; Sanders & Garber, supra note 27.

[94] Sanders & Garber, supra note 27; Gold & Ashford, supra note 24.

[95] Sanders & Garber, supra note 27.

Reconstruction Era mass expulsion in Georgia, the vast majority have stemmed from similar criminal offenses.[96]

Expulsion researchers have overlooked another pattern emerging from historical practice: legislators have frequently debated whether other constitutional requirements (e.g., due process) apply to expulsion proceedings. As early as 1808, Senator John Pope, who understood the Senate to possess "unlimited power" to expel, argued that someone facing expulsion must be afforded "an opportunity of defending himself."[97] A subcommittee investigating Senator Joseph McCarthy debated at length whether he was owed procedural rights in pre-expulsion hearings.[98] Even Congress's most recent expulsion of Representative Santos featured handwringing about the legal standards governing expulsion.[99] For example, Representative Elise Stefanik, Chair of the House Republican Conference, stated: "No Member of Congress has ever been expelled without a conviction; this is a dangerous precedent[,] and I am voting no based upon my concerns regarding due process."[100] Returning to the theory of constitutional liquidation, this pattern of uncertainty poses a challenge: Does recurring confusion about a constitutional provision among the very individuals entrusted with its enforcement render liquidation inapplicable for want of coherent evidence? Or, perhaps, does this confusion necessitate an even broader window of historical evidence to properly understand expulsion's liquidation (i.e., rarely used constitutional provisions necessarily take more generations to fully define through practice)? As the next Part explores, courts have yet to address such interpretive theories; indeed, they have yet to rule on more obvious constitutional questions.

[96] Id.

[97] 17 Annals of Cong. 95 (1808) (statement of Sen. John Pope).

[98] McCarthy Hearing, supra note 21, at 3. Sen. McCarthy prompted this discussion by writing: "If your subcommittee attempts to deny me the usual right to appear and question the witnesses, I think it might be well to have the full committee meet prior to the date set for your hearings to pass upon this question." Id.

[99] Lauren Peller, Sarah Beth Hensley & Alexandra Hutzler, GOP Rep. George Santos, Facing Possible Expulsion, Defends Himself on House Floor, ABC News (Nov. 30, 2023), https://abcnews.go.com/Politics/rep-george-santos-speaks-ahead-expulsion-vote-bullying/story?id=105269372 [https://perma.cc/6QHP-DXSH].

[100] Lauren Peller & Alexandra Hutzler, Republican George Santos Becomes First House Member Expelled in More than 20 Years, ABC News (Dec. 1, 2023), https://abcnews.go.com/Politics/expel-george-santos-house-set-possibly-historic-vote/story?id=105289657 [https://perma.cc/KX7R-FH7T].

II. JUDICIAL INTERPRETATIONS OF EXPULSION

Federal and state legislators expelled from office have sought judicial relief for allegedly unconstitutional bases or procedures leading up to their expulsion.[101] The vast majority of reported cases involve state legislators alleging federal constitutional violations, which makes sense in procedural[102] and substantive terms. To whatever extent pre-Reconstruction state and federal expulsions were subject to distinctive constitutional standards, the ratification of the Fourteenth Amendment rendered the most frequently litigated standards formally coextensive.[103] Despite that theoretical clarity, courts have occasionally noted federalism concerns in the expulsion context where a legislator argues that federal constitutional provisions "constrain[] the ability of a state legislature to exercise its authority, under the state constitution."[104] Nevertheless, the general subjugation of state legislative acts to the federal Constitution prevents a state from shielding otherwise unconstitutional activity through constitutional amendments, statutes, or rules of decorum.[105]

[101] Legislators facing expulsion have most frequently brought suit under 42 U.S.C. § 1983, which allows litigants to seek damages and injunctive relief from allegedly unconstitutional official action. See, e.g., Shooter v. Arizona, 4 F.4th 955, 957 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 898 (2022).

[102] See infra Section II.A.

[103] Because the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, and "freedom of speech . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment," portions of the Bill of Rights are said to be "incorporated" against the states, Gitlow v. New York, 268 U.S. 652, 666 (1925); see also Timbs v. Indiana, 139 S. Ct. 682, 687, 690 (2019). Because of Fourteenth Amendment incorporation, state expulsions are now subject to these federal constitutional protections in addition to those secured by state constitutions. As historian Eric Foner has aptly demonstrated, the Fourteenth Amendment amounted to a "Second Founding" by enabling this incorporation of federal rights; indeed, many of the Congressional drafters expressly envisioned the amendment as affirming the preeminent nature of federal constitutional rights. Foner, The Second Founding, supra note 90, at 55–92. Incorporation of the First and Fourteenth Amendments has been tacitly endorsed in the legislative disciplinary context by numerous courts, as well. See, e.g., *Shooter*, 4 F.4th at 962 (addressing the merits of a Fourteenth Amendment claim raised by a state legislator); Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022) (evaluating the merits of a First Amendment claim against a state entity).

[104] *Shooter*, 4 F.4th at 962.

[105] See, e.g., Hernandez v. Or. Legislature, 521 F. Supp. 3d 1025, 1033 (D. Or. 2021) ("[I]n those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." (quoting United States v. Gillock, 445 U.S. 360, 370 (1980))).

State legislators who have been expelled by their fellow legislators have almost invariably had no recourse in the courts. Courts have rejected their claims before reaching the merits, on the basis of the political question doctrine and legislative immunity, or when reaching the merits, rejecting First Amendment, due process, and other claims.[106] The fact that most courts reaching the merits have ruled in a preliminary procedural posture casts even greater doubt on the plausibility of expelled legislators accessing judicial relief because, per Federal Rule of Civil Procedure 12(b)(6), courts ruling on such motions should "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff."[107] Though some First Amendment and equal protection claims show potential, legislators have struggled to advance persuasive constitutional claims.

A. Barriers to Judicial Relief

Courts have rarely opined on the constitutional limits of legislative expulsions,[108] in part because such cases confront "a presumption in Anglo-American government that courts do not disrupt legislatures' well-established internal practices."[109] There are at least two specific barriers that militate against courts' hearing claims from expelled lawmakers: the political question doctrine and legislative immunity.

The political question doctrine posits that matters involving certain political topics are inappropriate for judicial consideration and therefore nonjusticiable.[110] Although *Baker v. Carr*[111] announced six factors for identifying nonjusticiable political questions, the modern Court has

[106] See Durham v. Eley, 507 F. Supp. 3d 956, 959 (M.D. Tenn. 2020) (denying legislator's motion for summary judgment and resulting in a show cause order as to why judgment should not be entered in favor of defendants); Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 86 (S.D.N.Y. 2010) (denying legislator's motion to preliminarily enjoin legislature from expelling him), *aff'd*, 599 F.3d 148 (2d Cir. 2010); *Hernandez*, 521 F. Supp. 3d at 1033 (denying legislator's motion for temporary restraining order to enjoin expulsion); *Shooter*, 4 F.4th at 957 (affirming dismissal of legislator's suit for failure to state a claim); Gerald v. La. State Senate, 408 So. 2d 426, 428 (La. Ct. App. 1981) (affirming dismissal of legislator's suit).

[107] Durham v. Martin, 388 F. Supp. 3d 919, 929 (M.D. Tenn. 2019) (quoting Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007)), *aff'd sub nom.* Durham v. McWhorter, 789 F. App'x 533 (6th Cir. 2020).

[108] Garvey, supra note 20, at 5.

[109] Recent Case, supra note 70, at 2645.

[110] Jay M. Zitter, Annotation, Construction and Application of Political Question Doctrine by State Courts, 9 A.L.R. 6th 177 (2005).

[111] 369 U.S. 186, 217 (1962).

retained only two key factors: (1) a textual commitment to a coordinate political department and (2) a lack of judicially manageable standards for resolving the dispute.[112] In the expulsion context, therefore, courts must decide whether expulsion is textually committed to the legislative branch and whether they possess judicially manageable standards to review expulsion proceedings.

The Supreme Court has never addressed expulsion as a political question, but it famously held in *Powell v. McCormack* that a suit for declaratory relief over legislative *exclusion* (i.e., refusal to seat a duly elected member) was a justiciable question.[113] Because Adam Clayton Powell, Jr., sought *declaratory* relief, the Court did not rule as to whether federal courts possess the authority to issue mandamus or injunctions compelling reinstatement of an excluded or expelled member.[114] Although *Powell* merely declared legal rights, Chief Justice Warren dealt with much broader questions surrounding legislative discipline. For example, he noted that because the John Wilkes affair[115] made a singular impression on American colonists, any "precedential value" of England's unlimited parliamentary expulsion power was "nullified prior to the Constitutional Convention."[116] According to the Court, "the principles upon which [early expulsions] had been based were repudiated by the very body the colonial assemblies sought to imitate and whose precedents they generally followed."[117] Even if Chief Justice Warren overestimated the Wilkes affair's effect on colonial expulsion practice, his opinion does not shy away from political questions concerning legislative discipline; to the contrary, he held that features of American government subjected

[112] See Rucho v. Common Cause, 139 S. Ct. 2484, 2500 (2019) (holding that courts lack judicially manageable standards to resolve gerrymandering disputes); cf. Zivotofsky v. Kerry, 576 U.S. 1, 32 (2015) (holding that courts possess judicially manageable standards to rule on the power to formally recognize foreign sovereigns).

[113] Powell v. McCormack, 395 U.S. 486, 548 (1969).

[114] Id. at 517. As a historical matter, Powell was already reseated in Congress by the time his case came before the Supreme Court, which gave rise to a mootness argument ultimately rejected by the Court. Therefore, it is unclear whether Congress would have acted in direct response to the ruling by seating Powell. See Melvin I. Urofsky, The Warren Court: Justices, Rulings, and Legacy 185 (2001). After the opinion came down, however, Congress enacted the Federal Contested Elections Act, 2 U.S.C. §§ 381–396 (1976), to formalize a process for contesting general elections.

[115] See supra note 49 and accompanying text.

[116] *Powell*, 395 U.S. at 527.

[117] Id. at 529.

expulsion and related measures to constitutional standards from the outset.[118]

In the absence of Court precedent on expulsion-as-political-question, lower federal courts have permitted several state legislators to circumvent the political question doctrine.[119] Because the first *Baker* factor probes only textual commitments to a *coordinate* political branch, it does not limit federal review of expulsions from state legislatures that are not coequal or coordinate.[120] As for *Baker*'s second requirement of judicially manageable standards, expelled legislators have typically raised quintessentially judicial questions regarding individual rights.[121] Despite this formal clarity, the political question doctrine has long been derided as, at best, an ill-defined justiciability consideration and, at worst, merits adjudication by another name.[122] But even if courts are looking beneath *Baker*'s wooden prongs to other nebulous considerations, they have tended to find that expulsion claims are quite different from

[118] Id. at 548. But see id. at 553 (Douglas, J., concurring) (arguing that expulsion, as opposed to exclusion, would pose a nonjusticiable political question). Prior to Chief Justice Warren's historical interpretation in *Powell*, some legislators had argued that the Constitution imported an *identical* expulsion power from Parliament. See, e.g., Cong. Globe, 37th Cong., 2d Sess. 970 (1862) (statement of Sen. John Sherman) (arguing that the Senate derived unlimited expulsion power from Parliament).

[119] See, e.g., Hernandez v. Or. Legislature, 521 F. Supp. 3d 1025, 1034 (D. Or. 2021) ("Questions as to whether this Court could impose manageable standards resolving disputes over the expulsion of a state legislator . . . are best left for another day. For now, it is sufficient to note that numerous other Courts have not dismissed similar due process suits on political question grounds."); Gamrat v. Allard, 320 F. Supp. 3d 927, 939 (W.D. Mich. 2018) ("[N]o reasonable person with even a rudimentary understanding of the political system could believe that one or two individuals—the Speaker and/or the Majority Counsel—could guarantee votes, particularly on an issue as sensitive as censuring or ejecting a member."). For one argument that state and federal courts ought to implement the political question doctrine differently, see Daniel B. Rodriguez, The Political Question Doctrine in State Constitutional Law, 43 Rutgers L.J. 573, 590 (2013).

[120] See, e.g., Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 90 (S.D.N.Y. 2010) (holding that "federal claims are not cabined by *Baker* because they involve the relationship between the federal and a state government, as opposed to coordinate, co-equal branches"), *aff'd*, 599 F.3d 148 (2d Cir. 2010).

[121] See infra Subsections II.B.1–3.

[122] See John Harrison, The Political Question Doctrines, 67 Am. U. L. Rev. 457, 517 (2017) (arguing that the doctrine fundamentally concerns non-judicial finality and limits on prospective remedies).

gerrymandering,[123] foreign affairs,[124] and other instances exemplifying the doctrine's applicability.[125]

Consider, for example, the tendency of state legislators seeking review in a state's highest court to overcome the political question doctrine—despite the potential conflict with *Baker*'s coordinate branch prong. The Supreme Court of Pennsylvania ruled that procedural due process determinations fall squarely within the power of the judiciary, regardless of political circumstances.[126] Similarly, the Tennessee Attorney General determined that expulsion was subject to state review while analyzing the expulsion of Representative Jeremy Durham for alleged sexual misconduct.[127] The state's counsel wrote that expulsion "is subject to state and federal constitutional restraints" and therefore may be exercised "only to the extent consistent with the voters' constitutional right to choose their representatives and with the member's state and federal constitutional rights."[128] More recently, the Colorado Supreme Court extensively analyzed the scope of the political question doctrine as applied to state courts reviewing federal provisions;[129] however, the U.S. Supreme Court offered no guidance regarding the political question

[123] Rucho v. Common Cause, 139 S. Ct. 2484, 2500 (2019) (holding that courts lack judicially manageable standards to resolve gerrymandering disputes).

[124] Goldwater v. Carter, 444 U.S. 996, 997–98 (1979) (Powell, J., concurring) (stating that the President's unilateral break from a defense treaty with Taiwan was a nonjusticiable political question).

[125] According to the Court, gerrymandering and foreign affairs "pose[] basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Rucho*, 139 S. Ct. at 2500.

[126] Sweeney v. Tucker, 375 A.2d 698, 709 (Pa. 1977) ("[T]he procedures employed by the House in expelling a member have not been exclusively committed to that body by the Pennsylvania Constitution and can be reviewed by the courts when it is alleged the House action violated a member's right to procedural due process."). But see Expulsion of House Member for Conduct Pre-dating Election, Tenn. Att'y. Gen. Op. No. 19-20 (2019) (noting that state courts reviewing state expulsions have generally found nonjusticiable political questions).

[127] Joel Ebert & Dave Boucher, Jeremy Durham Expelled from Tennessee House in 70-2 Vote, The Tennessean (Sept. 21, 2016, 9:25 AM), https://www.tennessean.com/story/news/politics/2016/09/13/house-prepares-jeremy-durham-expulsion-vote/90127546/ [https://perma.cc/AS7Q-M4PL].

[128] Expulsion of House Member for Conduct Pre-dating Election, Tenn. Att'y. Gen., Op. No. 19-20 (2019).

[129] See Anderson v. Griswold, 543 P.3d 283, 318 (Colo. 2023) ("Absent an affirmative constitutional *commitment*, we cannot abdicate our responsibility to decide a case that is properly before us."), *rev'd sub nom.* Trump v. Anderson, 144 S. Ct. 662 (2024) (per curiam).

doctrine's applicability on appeal from the Colorado court's decision.[130] Justice Barrett's concurrence arguably acknowledged in dicta that the political question doctrine did not preclude the Court from affirming former President Donald Trump's eligibility for office: "The Court has settled a politically charged issue in the volatile season of a Presidential election."[131]

The second barrier is legislative immunity. Under the canonical holding of *Tenney v. Brandhove*, absolute legislative immunity attaches to all actions "in the sphere of legitimate legislative activity," thereby defeating any suit for damages at the outset.[132] Since the landmark *Powell* case, government defendants have argued that this general immunity, as well as the Speech and Debate Clause,[133] should bar courts from reviewing legislative discipline.[134] Some federal courts evaluating expulsion-related claims have ruled that legislative immunity encompasses expulsion, which is clearly legislative in nature.[135]

However, the Supreme Court held in *Powell* that while individual legislators are immunized from liability, suits that challenge legislative discipline differ because such suits will not burden legislators individually or inhibit their political speech.[136] In other words, an expelled legislator may sue the legislature in its corporate capacity for acting to

[130] Trump v. Anderson, 144 S. Ct. 662, 665–66 (2024) (per curiam).

[131] Id. at 671 (Barrett, J., concurring in part).

[132] 341 U.S. 367, 376 (1951).

[133] U.S. Const. art. I, § 6 ("[F]or any speech or debate in either house, [legislators] shall not be questioned in any other place.").

[134] Sweeney v. Tucker, 375 A.2d 698, 704 (Pa. 1977) (noting that the Pennsylvania House argued that the state's Speech and Debate Clause should be an absolute bar to expulsion-related suit); see also Powell v. McCormack, 395 U.S. 486, 505–06 (1969) (holding that the Speech and Debate Clause should not "forestall judicial review of legislative action," but rather should spare legislators from "being called into court to defend their actions").

[135] See, e.g., Chase v. Senate of Va., 539 F. Supp. 3d 562, 567 (E.D. Va. 2021) (holding that absolute immunity applies against a challenged legislature censure); Hernandez v. Or. Legislature, 521 F. Supp. 3d 1025, 1035 (D. Or. 2021) (noting that absolute legislative immunity attaches to all legitimate legislative activity); see also James L. Buchwalter, Annotation, Legislative Immunity of State and Local Officials from Liability or Equitable Relief Under 42 U.S.C.A. § 1983, 91 A.L.R. Fed.3d Art. 2 (2024) (writing that state and local officials enjoy absolute immunity from federal claims against them in their legislative capacities).

[136] 395 U.S. at 505 (holding that "[f]reedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves"); see also Payne v. 35th Legislature of V.I., No. 23-cv-00126, 2024 WL 1235532, at *4 (V.I. Mar. 22, 2024) (holding that a legislature sued in its corporate capacity cannot invoke the Speech and Debate Clause).

discipline that legislator. The fact that expelled legislators have sought injunctive or declaratory relief, rather than money damages, likely also bears on the willingness of courts to move past the potential defense of legislative immunity.[137]

B. Constitutional Claims

1. Due Process

Expelled legislators most commonly assert deprivations of property or liberty without due process in violation of the Fourteenth Amendment.[138] For a due process claim to sound under 42 U.S.C. § 1983, expelled legislators must show that a property or liberty interest attached incident to their service. An alleged property interest in public office itself is likely to fail.[139] But one federal court in Tennessee held that an expelled legislator possessed a property interest in the right to continued participation in the state's health insurance plan.[140] Mark Fitzgerald has argued, without persuading any courts so far, that elected seats are analogous to trusts, which would also permit courts to rule on due process claims.[141]

Alternatively, legislators may establish a deprivation of liberty through a so-called stigma-plus claim, which adds to the standard defamation claim a "tangible and material state-imposed burden."[142] Whether the state imposed a burden necessarily turns on the adequacy of procedural

[137] See, e.g., McCarley v. Sanders, 309 F. Supp. 8, 9 n.2 (M.D. Ala. 1970) (reasoning that the Speech and Debate Clause does not apply in full force where "purely preventative or remedial" relief is sought).

[138] U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[139] See, e.g., Khan v. City of Lodi, No. 23-cv-00566, 2023 WL 2728915, at *4 (E.D. Cal. Mar. 31, 2023) (rejecting a § 1983 claim alleging wrongful removal from city council because "there is generally no property interest in an elected office"); Sweeney v. Tucker, 375 A.2d 698, 713 (Pa. 1977) ("An elected official can never have tenure in the same sense as an ordinary public employee.").

[140] Durham v. Eley, 507 F. Supp. 3d 956, 964 (M.D. Tenn. 2020) (holding that, pursuant to Tenn. Code Ann. § 8-27-208, state health insurance "gave rise to a legitimate claim of entitlement protected by the Due Process clause").

[141] See Mark R. Fitzgerald, Should Elected Officials Have a Property Interest in Their Positions?, 1995 U. Chi. Legal F. 365, 387.

[142] Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 92 (S.D.N.Y. 2010) (quoting Velez v. Levy, 401 F.3d 75, 87 (2d Cir. 2005)), *aff'd*, 599 F.3d 148 (2d Cir. 2010); see also Shooter v. Arizona, 4 F.4th 955, 961 (9th Cir. 2021) (noting the representative's pleading of the stigma-plus theory), *cert. denied*, 142 S. Ct. 898 (2022).

protections afforded to the legislator, collapsing the distinction between the method and object of deprivation in the expulsion context. For example, the U.S. Court of Appeals for the Ninth Circuit rejected a stigma-plus claim wherein the expelled legislator "was given an opportunity to present his side of the matter to the outside counsel conducting the investigation."[143]

Even where claimants have succeeded in showing a protected interest, they have generally failed to show the process they received was constitutionally inadequate.[144] For example, in *Monserrate v. New York State Senate*, a federal district court found that New York law provided constitutionally sufficient process prior to depriving a senator of reputational interests.[145] In a more extreme example, *Hernandez v. Oregon Legislature*, the U.S. District Court for the District of Oregon ruled that a legislator seeking a temporary injunction had already received constitutionally sufficient process *prior to an expulsion vote*.[146] Specifically, the Oregon court rejected claims that the legislator was owed an opportunity to cross-examine his accusers.[147] A Louisiana state court reached a similar conclusion, holding that expulsion proceedings more nearly resemble civil trials than criminal ones; accordingly, "the right of confrontation and compulsory process are only constitutionally mandated in criminal trials."[148] Even a court noting in dicta that expulsion procedures were "arguably . . . improper" nevertheless concluded that this "does not detract from the essential fact that the legislature is granted the power to discipline and expel."[149]

A final category of due process claim exists apart from any specific property or liberty interest. In *McCarley v. Sanders*, the U.S. District

[143] *Shooter*, 4 F.4th at 964.

[144] See *Sweeney*, 375 A.2d at 713.

[145] 695 F. Supp. 2d at 94–95.

[146] 521 F. Supp. 3d 1025, 1036 (D. Or. 2021). The willingness of the *Hernandez* court to prospectively review *potential* legislative discipline suggests that courts may enforce constitutional rights even in the absence of a formal expulsion vote. For example, a legislator who was deprived of committee assignments or building access could plausibly allege constitutional deprivations in the same manner as an expelled legislator.

[147] Id. at 1037.

[148] Gerald v. La. State Senate, 408 So. 2d 426, 430 (La. Ct. App. 1981). This line of reasoning is particularly interesting when considered in the context of Representative George Santos's recent expulsion proceeding, which functioned much like a criminal trial because it adjudicated his guilt for certain alleged criminal misconduct prior to a judicial judgment to that effect. See supra note 94 and accompanying text.

[149] Durham v. Martin, 388 F. Supp. 3d 919, 935 (M.D. Tenn. 2019), *aff'd sub nom.* Durham v. McWhorter, 789 F. App'x 533 (6th Cir. 2020).

Court for the Middle District of Alabama instead found a free-standing right to due process.[150] In the only instance of a federal court reversing a state expulsion identified in this Note, the court determined that merely providing an investigative committee hearing without subsequent opportunities to cross-examine witnesses was constitutionally inadequate.[151] One subsequent case interpreting *McCarley* characterized its holding as anomalous because of its "extreme facts," including the expedited timeline of proceedings and lack of evidentiary record.[152] Of course, isolating "extreme" expulsions as judicially remediable creates circular reasoning where the definition of an "extreme" case worthy of judicial intervention is self-referential, based solely on the limited instances where courts have previously intervened. The result is a high and possibly inconsistent threshold for what constitutes a due process violation in expulsions, potentially undermining the very rights *McCarley* sought to protect. Because *McCarley* does not bind virtually any federal courts, it is unlikely that other courts will attempt to clarify its line-drawing effort.

2. First Amendment

The First Amendment has been interpreted to prohibit retaliatory actions based on an individual's protected speech.[153] The Supreme Court has clearly held that legislative speech, as opposed to the act of voting in isolation, falls within the First Amendment's coverage.[154] A handful of expelled legislators have alleged that their expulsion amounted to a

[150] 309 F. Supp. 8, 11 (M.D. Ala. 1970).

[151] Id.

[152] Shooter v. Arizona, 4 F.4th 955, 965 (9th Cir. 2021).

[153] Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022) (quoting Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019)).

[154] Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 125–26 (2011) (holding that legislators' speech, unlike votes cast, falls within the First Amendment's coverage); see also Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (noting the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office" (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971))); Bond v. Floyd, 385 U.S. 116, 136 (1966) (holding that a legislator's "statements criticizing public policy and the implementation of it must be similarly protected" under the First Amendment); Steven N. Sherr, Freedom and Federalism: The First Amendment's Protection of Legislative Voting, 101 Yale L.J. 233, 249 (1991) (describing *Bond* as "the first case to propose that the First Amendment protects 'legislative speech'").

forbidden speech-based retaliation under the First Amendment.[155] In *Bond v. Floyd*, Chief Justice Warren penned a majority opinion invalidating the Georgia House of Representatives' exclusion of Representative Julian Bond because the legislature's act was predicated upon Bond's comments regarding American policy in Vietnam.[156] The *Bond* Court rejected the legislature's requirement of a loyalty oath, holding that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."[157] As previously mentioned with respect to *Powell*, the fact that *Bond* involved legislative *exclusion* rather than expulsion should be kept in mind; however, Chief Justice Warren offered little reason to suspect that the First Amendment's purposes would not be similarly thwarted by speech-based expulsions.

While ruling on the constitutionality of legislative censure, the Supreme Court much more recently suggested in dicta that speech-related expulsion may be unconstitutional.[158] In *Houston Community College System v. Wilson*, the Fifth Circuit split from its sister circuits by deeming a speech-based censure unconstitutional, a holding that threatened to "disturb practices predating the Founding."[159] Writing for the majority, Justice Gorsuch reversed the Fifth Circuit because the original public meaning of the First Amendment did not constrain the ability of legislative bodies to discipline their members.[160] However, the fact that Wilson's claim involved a censure—and not an expulsion—turned out to be a dispositive factor for the Court.[161] Indeed, Justice Gorsuch held open the door for challenges to other forms of legislative discipline, noting that

[155] Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 96–97 (S.D.N.Y. 2010) *aff'd*, 599 F.3d 148 (2d Cir. 2010). See Bowman & Bowman, supra note 25, at 1106 ("[T]he values implicit in the first amendment would pose a barrier to the expulsion of a representative for expressing unpopular views . . . .").

[156] 385 U.S. 116, 135–36 (1966). Southern Poverty Law Center ("SPLC") President Margaret Huang connected the Tennessee Three to the story of Julian Bond, who founded the SPLC. Huang argued that the *Bond* Court's reasoning with respect to First Amendment protections applied to the Tennessee Three, as well. Margaret Huang, The Tennessee Three: Attempt to Silence Lawmakers Strikes at Heart of Democracy, S. Poverty L. Ctr. (Apr. 17, 2023), https://www.splcenter.org/news/2023/04/17/tennessee-three-attempt-silence-lawmakers-strikes-heart-democracy [https://perma.cc/9MV9-6Y6H].

[157] *Bond*, 385 U.S. at 135–36.

[158] *Wilson*, 142 S. Ct. at 1258–59, 1263.

[159] Recent Case, supra note 70, at 2641.

[160] *Wilson*, 142 S. Ct at 1259–60.

[161] Id. at 1262 (noting that a censure did not "materially inhibit[] Mr. Wilson's ability to speak freely" under the circumstances, unlike, e.g., expulsion from office).

"[o]ur case is a narrow one. . . . It does not involve expulsion, exclusion, or any other form of punishment."[162] The *Wilson* Court further distinguished expulsion by rejecting attempts to invoke *Bond*: "The legislature's action in *Bond* implicated not only the speech of an elected official, it also implicated the franchise of his constituents."[163]

Wilson identified two reasons that a legislative censure fails to satisfy the materiality standard required to make out a prima facie case of speech-related retaliation: elected officials must tolerate counter-speech, and counter-speech itself often enjoys First Amendment protection.[164] According to Justice Gorsuch, "we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes."[165] Moreover, while the First Amendment "surely promises an elected representative . . . the right to speak freely on questions of government policy," "it cannot be used as a weapon to silence other representatives seeking to do the same."[166] Both reasons resonate with the Court's longstanding First Amendment jurisprudence, reaching back even to Justice Holmes's famous claim that: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[167]

There are several potential explanations for Justice Gorsuch's reservations about applying the same standard to censure in a case of expulsion. Most immediately, expulsion goes well beyond censure as a form of counter-speech because it completely silences a legislator and his constituents in the legislative chamber. As a matter of historical interpretation, the *Wilson* Court noted that the John Wilkes affair of 1763 was ill-suited to interpretations of permissible legislative censure.[168] While Justice Gorsuch rejected the suggestion that "legislative censures

[162] Id. at 1263.
[163] Id.
[164] Id. at 1261.
[165] Id. Although the majority cites *Mills v. Alabama*, 384 U.S. 214, 218 (1966), the notion that public officials ought to shoulder a greater degree of criticism resonates throughout the Court's First Amendment jurisprudence. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that public officials must demonstrate actual malice to allege libel); id. at 275 ("The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.").
[166] *Wilson*, 142 S. Ct. at 1261.
[167] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[168] *Wilson*, 142 S. Ct. at 1263.

are at odds with the American legal tradition," he did not mention an arguably greater source of tension: the regret that Parliament would eventually come to feel about Wilkes's expulsion stemmed largely from the fact that its acts of removal had stemmed from John Wilkes's speech about France—speech that would fall squarely within modern First Amendment protection.[169] Given such clear distinctions between censure and expulsion in the First Amendment retaliation context, future litigants should attempt to enter the door held open by Justice Gorsuch in *Wilson*.[170]

3. Equal Protection

No court has yet ruled on whether racial discrimination may constrain expulsion; however, commentators have recognized the potential merits of such a claim. In rejecting hypotheticals offered by plaintiffs, the *Monserrate* court described a racially suspect expulsion as a "worst-case scenario[]."[171] The Supreme Court dodged allegations of racial discrimination in *Bond* by resolving that case on separate, First Amendment grounds.[172] The Brennan Center's recent analysis of the Tennessee Three suggested that a federal court evaluating a legislature's alleged discriminatory intent would likely turn to the factors outlined by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which would ascertain whether the expulsion produced "a clear pattern, unexplainable on grounds other than race."[173] Whether the Tennessee Three incident would satisfy the *Arlington Heights* standard may turn on separate, evidentiary issues. As previously noted, the text of the three expulsion resolutions alleged that the three legislators committed nearly identical acts; therefore, the race, age, and seniority of the legislators are among plausible explanations for the disparate impact of the votes cast. However, if a reviewing court evaluated additional evidence (e.g., video recordings, member testimony), it may reconstruct other plausible explanations for the expulsion outcomes.

[169] Id.

[170] See infra Part III.

[171] Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 92 (S.D.N.Y. 2010).

[172] Bond v. Floyd, 385 U.S. 116, 137 n.14 (1966) (noting that despite amicus briefs arguing race prejudice was "inextricably involved" with the legislative exclusion, the Court need not address "the other issues").

[173] 429 U.S. 252, 266 (1977); Sanders & Garber, supra note 27.

4. Constituents' Constitutional Rights

In addition to individual constitutional deprivations, expelled legislators have alleged that their expulsions have deprived voters of their right to representation in the lawmaking process.[174] With the lone exception of *McCarley*, courts have rejected this theory.[175] The *Bond* Court declined to rule on a voter-based claim of constituent constitutional deprivations.[176] *Monserrate* also rejected this theory, noting that the legislator's seat "will only be vacant for a few weeks . . . no greater [burden] than that imposed by occasional vacancies due to death or resignation."[177] Although the temporal equivalence drawn between expulsion and the unforeseeable death of legislators makes some sense, it is not difficult to imagine a circumstance in which a politically motivated expulsion—even *very* short in its effect—could swing a legislature's critical vote. A court may more favorably assess a constituent theory of deprivation in such a case where, but-for the constituents' elected representative's absence due to expulsion, the legislature would have passed a particular piece of legislation, for example.

C. Right-Remedy Gap

To the extent that expelled legislators or their constituents suffer constitutional violations, the inability of courts to provide meaningful redress gives rise to a right-remedy gap.[178] According to Professor John Jeffries, Jr., the right-remedy gap framework reflects the widely shared view that victims of constitutional violations deserve redress.[179] However, Jeffries characterizes the right-remedy gap "not [as] an unmitigated disaster but a double-edged sword."[180] In other words, the under-remediation of certain constitutional violations may serve important ends, including "a redistributive bias in favor of the future" by allowing courts

[174] See also Expulsion of House Member for Conduct Pre-dating Election, Tenn. Att'y Gen. Op. No. 19-20, at 6 (2019) ("The expulsion power is in tension with the people's constitutional right to choose their representatives because an expulsion in effect negates the electorate's choice.").

[175] McCarley v. Sanders, 309 F. Supp. 8, 9 n.1 (M.D. Ala. 1970) (noting that voters possessed standing to sue to invalidate the expulsion of their elected state senator).

[176] 385 U.S. at 137 n.14.

[177] Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 90–91 (S.D.N.Y. 2010).

[178] See generally Jeffries, supra note 35 (arguing that the right-remedy gap facilitates constitutional innovation and shifts focus from past reparations to future reforms).

[179] Id. at 89.

[180] Id. at 91.

to develop more rights-protective doctrines.[181] As the foregoing cases make clear, courts have identified numerous ends justifying the maintenance of a right-remedy gap in the expulsion context: honoring parliamentary tradition, immunizing legislators, or eschewing political questions.[182] But unlike the "silver lining[s]" identified by Jeffries in constitutional tort actions and structural reform litigation, courts have not seized upon legislative immunity or the political question doctrine to protect future legislators.[183] Generally, expulsion case law neither compensates past injuries nor prevents future harms.

While courts often disavow the existence of a right-remedy gap for expelled legislators, their judgments further entrench the unavailability of remedies. Put simply, courts want to have their cake (i.e., reserve power to deem legislative expulsions unconstitutional) and eat it, too (i.e., withhold said power in almost every instance). Rhetorically, courts consistently state that expulsion proceedings are subject to constitutional constraints with *legal* consequences; they do not merely encourage legislators to honor the spirit of the law.[184] Practically, however, courts have refused to take up even arguable constitutional questions, allowing legislatures to determine the constitutionality of expulsion for themselves.[185] In practice, the lowest-common-denominator understanding of a constitutional right *is* a legislator's constitutional right in the expulsion context—as well as the right of their constituents.

Of course, a court's overturning of a supermajority expulsion vote could be viewed as overriding the will of the legislature, undermining public trust in courts themselves. Regardless of a court's reasoning in such a case, it would assuredly be understood by many as a partisan act. But without courts—those best positioned to defend the rights of those in

[181] Id. at 113.

[182] See, e.g., Monserrate v. N.Y. State Senate, 599 F.3d 148, 154 (2d Cir. 2010) (holding that *even if* an expulsion burdens constitutional rights, "any such burden is justified by the state interest in maintaining the integrity of the Senate").

[183] Jeffries, supra note 35, at 98.

[184] See, e.g., Hernandez v. Or. Legislature, 521 F. Supp. 3d 1025, 1034–36 (D. Or. 2021) (while not addressing the issue directly, the court points to the fact that "numerous other Courts" have stated that political question doctrine and legislative immunity are not barriers to merits consideration, suggesting that certain violations could be actionable).

[185] With respect to expulsion, *McCarley v. Sanders* is the sole exception. 309 F. Supp. 8 (M.D. Ala. 1970). With respect to legislative discipline generally, *Bond v. Floyd*, 385 U.S. 116 (1966), and *Powell v. McCormack*, 395 U.S. 486 (1969), provide the only two other exceptions.

the minority—a majority can undermine core democratic principles and individual rights.

To illustrate the consequence of this judicially endorsed gap, one need look no further than the Tennessee Three. In many ways, it is the extreme test case hypothesized by courts: multiple protected interests of legislators and their constituents, including a novel racial discrimination claim.[186] Yet, the same case law that purported to reserve judgment for a case like the Tennessee Three entrenched legal barriers sufficient to persuade the expelled legislators to stay out of court. This result parallels broader trends in the availability of federal review—"accelerating attenuation of the relationship between substantive constitutional rights and rights to remedies" according to Professor Richard Fallon's analysis of a recent case seeking federal injunctive relief against an unconstitutional Texas law.[187] Because courts have painted themselves into a corner on expulsion's constitutionality, closure of this right-remedy gap will mostly depend on legislatures' willingness to proactively subject their own power to constitutional constraints.

III. EXPULSION REFORM

If courts are unable or unwilling to enforce the Constitution in these circumstances, then it is incumbent on all legislative bodies to constrain their own power to prevent future abuses. As the Second Circuit observed, procedural prerequisites to expulsion need not diminish a legislature's substantive power to expel; instead, they would channel that power to prevent constitutional conflicts.[188] Although legislatures shoulder the

[186] Consider also the 8,596 and 1,235 votes cast for Representatives Jones and Pearson, respectively, which came from communities of predominately Black, Hispanic, and other non-white voters. Tenn. Sec'y of State, Nov. 8, 2022, State General Election Results (Dec. 13, 2022), https://sos-prod.tnsosgovfiles.com/s3fs-public/document/20221108ResultsbyCounty.pdf [https://perma.cc/DQ74-ZU8N]; Tenn. Sec'y of State, Jan. 24, 2023, House District 86 Special Primary Election Results (Feb. 16, 2023), https://sos-prod.tnsosgovfiles.com/s3fs-public/document/Primary%20TN%20House%2086%20County%20Totals.pdf [https://perma.cc/2QY7-S2TH]; Tenn. Comptroller of the Treasury, House District 52 Community Profile, https://comptroller.tn.gov/content/dam/cot/pa/documents/district-infographics/house/52.html [https://perma.cc/MH78-KNHS] (last visited Jan. 7, 2025); Tenn. Comptroller of the Treasury, House District 86 Community Profile, https://comptroller.tn.gov/content/dam/cot/pa/documents/district-infographics/house/86.html [https://perma.cc/U57Y-HHAC] (last visited Jan. 7, 2025).

[187] Richard H. Fallon, Jr., Constitutional Remedies: In One Era and Out the Other, 136 Harv. L. Rev. 1300, 1302 (2023).

[188] Monserrate v. N.Y. State Senate, 599 F.3d 148, 157 (2d Cir. 2010).

primary burden of reform, litigants could test the First Amendment retaliation avenue held open by *Wilson*. This Part proposes two legislative reforms and one promising avenue for future claims-making for expelled legislators.

A. Enact Expulsion Rules That Conform to the Constitutional Standard

Since Madison's introduction of a two-thirds majority requirement, American expulsion has generally been subject to at least one explicit procedural barrier. If courts are unable to protect legislators' and voters' constitutional rights to due process under the Fourteenth Amendment, legislatures must enact stronger prophylactic procedural measures. Due process prevents bias and arbitrary expulsions; it subjects the will of a legislature to confirmatory proceedings.[189] Considering the foregoing discussion of a right-remedy gap, New York and Kansas stand apart insofar as they have enshrined certain constitutional protections in expulsion. New York requires formal lodging of charges against a legislator, the formation of an investigative committee, and a committee report on the charges prior to an expulsion vote.[190] While rejecting a void-for-vagueness challenge, the *Monserrate* court ruled that these requirements satisfied the constitutional standards of due process.[191] Similarly, Kansas formalized the expulsion process by requiring bipartisan committees to evaluate accusations without rushed deliberation and recommend discipline proportional to the offense (e.g., censure instead of expulsion).[192]

Taking the Tennessee Three as an example, New York's and Kansas's rules would have forced one of three likely outcomes prior to the expulsion vote: (1) an investigation would deem Representatives Johnson, Jones, and Pearson's conduct constitutionally protected and caution against expulsion, (2) an investigation would deem all of their conduct equally blameworthy and recommend the expulsion of all three, or (3) an investigation would identify and document reasons to distinguish

[189] See supra Subsection II.B.1.

[190] N.Y. Legis. Law § 3 (McKinney 2023) ("Each house has the power to expel any of its members, after the report of a committee to inquire into the charges against him shall have been made.").

[191] Monserrate v. N.Y. State Senate, 695 F. Supp. 2d 80, 96 (S.D.N.Y. 2010).

[192] James Hampton, The Impeachment and Expulsion Procedures of Kansas, 29 Kan. J.L. & Pub. Pol'y 94, 98–99 (2019); see also Kan. House Rules, Art. 49, 2023–2024 Sess. (Kan. 2023).

the conduct of Representative Johnson from that of Representatives Jones and Pearson, recommending disparate treatment of the legislators. In other words, even if the General Assembly's expulsion votes came out the exact same way, these procedural rules would have clarified and distinguished the grounds for impeachment as to each legislator. By providing the legislators with additional fora and time to defend themselves, this procedure would also mitigate allegations that the General Assembly acted in a biased or arbitrary manner.

Of course, hyperpolarized legislatures that are willing to abuse the expulsion power seem unlikely to enact rules of self-restraint. As with other seemingly intractable political challenges, the solution may lie with voters themselves. While the Tennessee Three attracted national attention and some reckoning with the potential for abuse of other state expulsion powers, that awareness has not yet been channeled toward due-process protections or similar reforms. Whether via state constitutional amendment, referendum vote, or traditional legislative lobbying, democratic advocates should seize on the interest generated in expulsion by the Tennessee Three to lobby for constitutional protections in their state or Congress. Given that nearly one-third of Americans question democracy's future and close to a majority would endorse overriding constitutional protections to achieve partisan ends,[193] advocates must clearly articulate the advantages of due process to promote free expression.

B. Establish Vote Thresholds and Returning Legislator Protection

Twenty-three state constitutions and the federal Constitution theoretically permit repeated expulsions of a legislator for the same offense *even after* constituents have returned them to their seat.[194] This possibility clearly conflicts with voters' right to choose their representatives, as well as the lessons taught by the Wilkes affair. As Professor Adrian Vermeule has argued, returned legislator protection may already be inferred as applicable to constitutional provisions without an explicit protection based on an originalist view of early expulsion practice.[195] However, in the absence of a test case for this interpretive

[193] Project Home Fire, Univ. of Va. Ctr. for Pol., Voice of the Voter Survey, at 11, 14 (Oct. 2023), https://centerforpolitics.org/wp-content/uploads/2024/01/VoV-Presentation-FINAL.pdf [https://perma.cc/DER2-74JW].

[194] See infra Appendix: State Constitutional Expulsion Provisions.

[195] Vermeule, supra note 57, at 396–97.

theory, legislators should reform expulsion to honor this basic limitation that would position elected legislators' judgment over the will of constituents.

Relatedly, six state constitutions omit any specific majority voting requirement to expel a legislator.[196] Such an omission appears ripe for exploitation and arbitrary changes in legislative rules based on the balance of political power in a given chamber. While this issue is less pervasive than returned legislator protection, state legislatures should adopt clear rules for expulsion that, at a minimum, formalize the basic procedural steps necessary to expel.

C. Test Wilson*'s First Amendment Opening*

As Part II demonstrated, courts have generally entrenched a significant right-remedy gap in expulsion cases; however, Justice Gorsuch rather emphatically held open a pathway for an expelled (and perhaps excluded) legislator to raise a First Amendment claim.[197] Even if such a challenge failed, a future litigant who rooted their pleadings in *Wilson*'s logic may perform an important service of legal clarification. In the best-case scenario, the Supreme Court could use such an opportunity to close the right-remedy gap in speech-related cases. In addition to Justice Gorsuch's invitation, Chief Justice Warren's treatment of the influential Wilkes affair, which involved an analogous form of speech-based retaliation, provides originalist material to bolster a legislator's claim.[198] While that patchwork solution would leave other procedural protections unresolved, it would have almost certainly made a difference in the case of the Tennessee Three.

It remains unclear whether the precedential value of *Wilson* provides enough legal cover to substantiate other, non-First Amendment challenges. The most significant of these alternatives appears to be a claim of racial discrimination rooted in equal protection, which has *never* been evaluated by the courts. While the prospect of facts similar to the Tennessee Three emerging seems doubtful, even an oblique challenge based on *Wilson* could push expulsion's legal framework forward by clarifying the relationship between constitutional provisions.

[196] See infra Appendix: State Constitutional Expulsion Provisions.
[197] See supra notes 160–63 and accompanying text.
[198] See supra notes 113–18 and accompanying text.

CONCLUSION

In the lead up to Representative Santos's expulsion from Congress, one journalist remarked: "[I]t's another in this series of moments where we as a country, as a political system, are redefining what's allowable and what we can accept."[199] The Tennessee Three offered another such moment and it remains a live issue in Nashville: the General Assembly passed rules in January of 2024 permitting the Speaker of the House to silence any legislator deemed "off topic" at the Speaker's discretion.[200] Another House measure would strip jurisdiction from Tennessee courts over any legal challenges to House and Senate procedures, decried by one Tennessee Senator as an "extreme" alternative to "passing constitutional rules that meet legal muster."[201] National and international observers have connected these seemingly procedural moves to a larger strategy of silencing opposing views from legislators and constituents.[202] Whether in

[199] The Daily, Botox, Hermès and OnlyFans: Why This May Be George Santos's Last Week in Congress, N.Y. Times, at 25:29 (Nov. 27, 2023), https://www.nytimes.com/2023/11/27/podcasts/the-daily/santos-house-ethics.html.

[200] Jonathan Mattise, New Tennessee House Rules Seek to Discourage More Uproar After Highly Publicized Expulsions, Associated Press (Jan. 10, 2024, 6:05 PM), https://apnews.com/article/tennessee-house-rules-debate-7e9483d818e8e337a6b708dfe5f7f2b9; Tenn. H.R., Tennessee House of Representatives Permanent Rules of Order, §§ 2, 19–21, 113th Gen. Assemb. (Tenn. 2024).

[201] Melissa Brown, Tennessee Bill Would Block State Courts from Overturning Legislature's Rules, The Tennessean (Jan. 9, 2024, 4:38 PM), https://www.tennessean.com/story/news/politics/2024/01/09/tennessee-general-assembly-courts-rules-jurisdiction-gino-bulso/72152146007/ [https://perma.cc/H4BL-7253]; see H.B. 1652, 114th Gen. Assemb., 22d Legis. Sess. (Tenn. 2024); see also Sam Stockard, Another Tennessee Legal Battle Brews Over Bill Preventing Challenge of House Rules in State Court, Tenn. Lookout (Feb. 29, 2024, 5:01 AM), https://tennesseelookout.com/2024/02/29/another-tennessee-legal-battle-brews-over-bill-preventing-challenge-of-house-rules-in-state-court/ [https://perma.cc/ZH69-2HV2] (noting that the bill's sponsor argued that the First Amendment does not "come into play on House rules").

[202] George Chidi, 'You Have Imprisoned Our Democracy': Inside Republicans' Domination of Tennessee, The Guardian (Apr. 5, 2024, 6:00 AM), https://www.theguardian.com/us-news/2024/apr/05/tennessee-republicans-one-party-state [https://perma.cc/M5GK-NY63]; see also Mary Ellen Klas, What's Happening in Tennessee Isn't Funny, Bloomberg (Apr. 5, 2024, 8:30 AM), https://www.bloomberg.com/opinion/articles/2024-04-05/tennessee-legislature-s-2024-session-is-a-lesson-in-extremist-politics?embedded-checkout=true [https://perma.cc/32AS-HPAE] (connecting recent moves by the Tennessee legislature to a broader history of one-party control suppressing political opponents); Anne Applebaum, Is Tennessee a Democracy?, The Atlantic (July 18, 2023), https://www.theatlantic.com/ideas/archive/2023/07/tennessee-republican-partisanship-one-party-state/674732/# [https://perma.cc/23X5-7RV9] (analyzing Tennessee's shift from bipartisanship to one-party rule, highlighting how the Republican majority increasingly suppresses dissenting voices through procedural changes and punitive actions); NPR's Supermajority Podcast Tackles Single Party Rule, NPR (June 17, 2024),

Tennessee, Congress, or any other legislature, expulsion has *always* revolved around discretion to draw lines of acceptability. As this Note has argued, the U.S. Constitution and state constitutions should not disappear from view when those lines are drawn; to the contrary, constitutional protections should be vigorously defended *especially* when legislatures eliminate democratic representation without the People's consent—when, as Madison feared, expulsion could be "dangerously abused."[203]

The Parliament of Australia, which abolished its expulsion power in 1987, offers hope for those interested in expulsion reform.[204] Nearly *seventy years* after expelling a foreign-born legislator for the content of his political speech,[205] a nonpartisan committee noted that "it is for the electors to determine the constitution of the Houses . . . [the incident] revealed the unavoidable danger of that power being abused for partisan purposes."[206] Political power shifts gradually over decades, rendering reform more challenging still. The likely precondition of bipartisan consensus is especially instructive when, in the United States, supermajorities reached their peak abundance in early 2024 before decreasing modestly in November.[207] One political party currently holds the necessary votes to expel a minority party's member in thirty-one state legislative chambers.[208] Whether seventy years or more are required for these legislatures to summon the requisite bipartisan consensus, expulsion should be constitutionally constrained.

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https://www.npr.org/2024/06/17/g-s1-4761/nprs-supermajority-podcast-tackles-single-party-rule [https://perma.cc/3REG-SYV4] (noting the increasingly extreme measures taken in Tennessee to silence opposing views).

[203] Farrand, supra note 54, at 254.

[204] Michael Sloane, 100th Anniversary of the Expulsion of Hugh Mahon from the House of Representatives, Parliament of Austl. (Nov. 11, 2020), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2020/November/Expulsion_of_Mahon [https://perma.cc/T6M2-K9TY]. Although any international constitutional comparison should be caveated by noting the vast differences between two sovereign nations, comparative constitutionalism has demonstrated the potential for meaningful international analogies of this sort. See, e.g., Madhav Khosla, Is a Science of Comparative Constitutionalism Possible?, 135 Harv. L. Rev. 2110, 2110–11, 2116 (2022) (noting the growing legitimacy of comparative constitutionalism since the 1990s).

[205] Jeff Kildea, This Bloody and Accursed Empire, Hist. Ir., Nov./Dec. 2020, at 42, 42.

[206] Sloane, supra note 204.

[207] David A. Lieb, Supermajorities in State Capitols Push Controversial Policies to the Edge, Associated Press (June 17, 2023, 12:15 AM), https://apnews.com/article/state-legislatures-supermajorities-extreme-policies-5cff2be330289aa034dce295fa0a3a56.

[208] Following the November 2024 elections, twenty-four of those states possess one-party, two-thirds supermajorities in *both* chambers of their legislatures. See infra Appendix: State Constitutional Expulsion Provisions.

APPENDIX: STATE CONSTITUTIONAL EXPULSION PROVISIONS[209]

State	Citation	Mirrors U.S. Const.	Returned Legislator Protection	Preservation of Criminal Charges	Good Cause Limitation	Statutory Limitation	Supermajority (Nov. 2024)
*AL**	Ala. Const. art. IV, § 53	✓	✓				✓✓ (R)
*AK**	Alaska Const. art. II, § 12	✓					
*AZ**	Ariz. Const. art. 4, pt. 2, § 11	✓					
*AR**	Ark. Const. art. 5, § 12	✓	✓	✓			✓✓ (R)
*CA**[210]	Cal. Const. art. IV, § 5(a)(1)	✓					✓✓ (D)
*CO**	Colo. Const. art. V, § 12	✓	✓	✓			
*CT**	Conn. Const. art. 3d, § 13	✓	✓				✓✓ (D)

[209] States denoted with asterisks require a two-thirds vote to expel a member of the legislature.

"Mirrors U.S. Const." tracks whether a given state's expulsion provision shares substantial similarity with the text of the federal expulsion provision. See U.S. Const. art. I, § 5, cl. 2.

"Returned legislator protection" tracks whether a given state prohibits expulsion for the same offense twice (i.e., thereby "protecting" a legislator who is reelected or reappointed to her seat from further expulsion proceedings on the same grounds).

"Preservation of criminal charges" refers to some state provisions that expressly indicate that an expelled legislator remains subject to future criminal prosecution for the same conduct. In other words, expulsion will not pose a double jeopardy concern in separate criminal proceedings.

"Good cause limitation" refers to states that include *any* adjective or modifier to limit the conduct or actions that are eligible for expulsion.

"Statutory limitation" refers to states that have enacted separate statutes, in addition to their constitutional provision, that regulates or channels expulsion proceedings.

"Supermajority" reflects the current political party composition in one, or both, of a state's legislative changes. Each ✓ denotes a chamber in that state's legislature where one party possesses sufficient votes to prevail on a two-thirds majority expulsion vote. 2024 State & Legislative Partisan Composition, Nat'l Conf. of State Legislatures (Dec. 9, 2024), https://documents.ncsl.org/wwwncsl/Elections/LegisControl_2024_Post%20Election_Prelim_12.09.pdf [https://perma.cc/64VT-H4MX].

States denoted with a footnote have a unique expulsion feature or method of expulsion incorporation unique to that state.

[210] California requires a roll call vote.

State	Citation	Mirrors U.S. Const.	Returned Legislator Protection	Preservation of Criminal Charges	Good Cause Limitation	Statutory Limitation	Supermajority (Nov. 2024)
*DE**	Del. Const. art. II, § 9	✓					✓ (D Senate)
*FL**	Fla. Const. art. III, § 4(d)	✓					✓✓ (R)
*GA**	Ga. Const. art. III, § IV, ¶¶ VII	✓					
*HI**	Haw. Const. art. III, § 12	✓					✓✓ (D)
*ID**	Idaho Const. art. III, § 11	✓			✓		✓✓ (R)
*IL**	Ill. Const. art. IV, § 6	✓	✓				✓ (D Senate)
*IN**	Ind. Const. art. 4, § 14	✓	✓				✓✓ (R)
*IA**	Iowa Const. art. III, § 9	✓	✓				✓✓ (R)
KS[211]	Kan. Const. art. 2, § 8				✓	✓	✓✓ (R)
*KY**	Ky. Const. § 39	✓	✓				✓✓ (R)
*LA**[212]	La. Const. art. III, § 7	✓					✓✓ (R)
*ME**	Me. Const. art. IV, pt. 3d, § 4	✓	✓				
*MD**	Md. Const. art. III, § 19	✓	✓				✓✓ (D)
MA	None.[213]						✓✓ (D)
*MI**	Mich. Const. art. IV, § 16	✓	✓		✓		
MN	Minn. Const. art. IV, § 7	✓	✓				

[211] Kansas implements its constitutional provision through the statutory scheme for relevant expulsion procedures, see House Rules, Art. 49, 2023–2024 Sess. (Kan. 2023).

[212] Louisiana's constitution notes that expulsion creates a vacancy.

[213] *Hiss v. Bartlett*, 69 Mass. (3 Gray) 468, 473 (1855), interpreted Mass. Const. pt. 2d, ch. I, § III, art. X, to include expulsion power.

State	Citation	Mirrors U.S. Const.	Returned Legislator Protection	Preservation of Criminal Charges	Good Cause Limitation	Statutory Limitation	Supermajority (Nov. 2024)
*MS**[214]	Miss. Const. art. 4, § 55	✓	✓				✓ (R Senate)
*MO**	Mo. Const. art. III, § 18	✓	✓				✓✓ (R)
*MT**	Mont. Const. art. V, § 10(1)	✓			✓		
*NE**	Neb. Const. art. III, § 10	✓	✓				(Nonpartisan)
*NV**	Nev. Const. art. 4, § 6	✓					
NH	None.[215]						✓ (R Senate)
*NJ**	N.J. Const. art. IV, § IV, ¶ 3	✓					
*NM**	N.M. Const. art. IV, § 11	✓	✓	✓			
NY[216]	None.[217]					✓	✓ (D House)
NC	None.[218]						
*ND**	N.D. Const. art. IV, § 12	✓					✓✓ (R)
*OH**[219]	Ohio Const. art. II, § 6	✓	✓				✓ (R Senate)
*OK**	Okla. Const. art. 5, § 30	✓					✓✓ (R)
*OR**	Or. Const. art. IV, § 15	✓	✓				

[214] Mississippi permits re-expulsion for certain criminal acts.
[215] But see N.H. Const. pt. 2d, art. 17, 38.
[216] N.Y. Legis. Law art. II, § 3, provides relevant expulsion procedures.
[217] But see N.Y. Const. art. III, § 9.
[218] But see N.C. Const. art. II, § 20.
[219] Ohio's constitution empowers the legislature to obtain evidence.

State	Citation	Mirrors U.S. Const.	Returned Legislator Protection	Preservation of Criminal Charges	Good Cause Limitation	Statutory Limitation	Supermajority (Nov. 2024)
*PA** [220]	Pa. Const. art. II, § 11	✓	✓	✓			
*RI**	R.I. Const. art. VI, § 7	✓	✓				✓✓ (D)
*SC**	S.C. Const. art. III, § 12	✓	✓				✓✓ (R)
*SD**	None.[221]						✓✓ (R)
*TN**	Tenn. Const. art. II, § 12	✓	✓				✓✓ (R)
*TX**	Tex. Const. art. III, § 11	✓	✓				
*UT** [222]	Utah Const. art. VI, § 10	✓			✓		✓✓ (R)
VT [223]	Vt. Const. ch. II, §§ 14, 19		✓				
*VA**	Va. Const. art. IV, § 7	✓					
*WA**	Wash. Const. art. II, § 9	✓	✓				
*WV**	W. Va. Const. art. VI, § 25	✓	✓				✓✓ (R)
*WI**	Wis. Const. art. IV, § 8	✓	✓				
*WY** [224]	Wyo. Const. art. 3, § 12	✓		✓			✓✓ (R)

[220] In Pennsylvania, preservation of criminal charges is limited to contempt or disorderly behavior.

[221] But see S.D. Const. art. III, § 9; Gray v. Gienapp, 727 N.W.2d 808, 811 (S.D. 2007).

[222] Utah's constitution establishes an independent legislative ethics commission.

[223] In Vermont, a legislator cannot be expelled for something known by constituents at the time of the legislator's election.

[224] In Wyoming, preservation of criminal charges is limited to contempt or disorderly behavior.