

NOTE

THE LOST JUDICIAL REVIEW FUNCTION OF THE SPEECH OR DEBATE CLAUSE

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The prevailing understanding of the Speech or Debate Clause of the United States Constitution is that it was transplanted without significant modification from Article 9 of the English Bill of Rights of 1689. This Note challenges that view by highlighting overlooked deviations which inform how this legislative privilege was adapted from a system of parliamentary sovereignty to fit one in which the Constitution is supreme. Courts and commentators have neglected to recognize that the Speech or Debate Clause, unlike Article 9, provides no institutional shield for the legislature in the exercise of its internal proceedings. Article 9’s protection of “proceedings in Parliament” from judicial review was omitted from the Speech or Debate Clause, and the Clause was also reconfigured to name individual members of Congress—rather than the collective body itself—as the possessors of the legislative privilege.

This novel textual analysis invites questioning of an arguably undeserved discrepancy in judicial enforcement of the Constitution as between federal statutes and congressional proceedings—those investigatory and lawmaking processes which lead up to the enactment of statutes. Favoring more robust judicial review of congressional proceedings, this Note identifies matters as to which a more textually grounded understanding of the speech or debate privilege could encourage change. Potential changes include permitting motive inquiries when individuals challenge congressional investigations as infringing their fundamental rights, lifting the enrolled bill doctrine and the extreme deference which veil the lawmaking process, and

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differentiating between lawsuits against individual legislators and those against collective legislative bodies.

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INTRODUCTION

The Speech or Debate Clause of Article I, Section 6 of the United States Constitution provides members of Congress and their close aides with immunity from suit for legislative conduct, as well as an evidentiary

privilege rendering evidence of legislative acts inadmissible.¹ Historical and purposive expositions of the Speech or Debate Clause often appeal to its textual source, Article 9 of the English Bill of Rights of 1689.² Article 9 reads: “That the Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.”³ Just a few edits at the Philadelphia Convention produced the American Clause in its constitutional form: “for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place.”⁴

Due to the shared lineage of these legislative privilege provisions, the highest American and British courts have reciprocally referred to each other’s privilege jurisprudence for interpretive guidance. For example, when considering whether the legislative privilege covered allegations of criminal conspiracy and bribery by legislators, the U.S. Supreme Court looked to the British case *Ex parte Wason* for assistance.⁵ In turn, when former members of the House of Commons were charged with false accounting in *R v. Chaytor*, the United Kingdom Supreme Court (“UKSC”) referenced the U.S. Supreme Court’s analysis in *United States v. Brewster*, writing that the interpretive issues created by the two provisions “mirror[.]” each other and that therefore “some of the reasoning in *Brewster* is relevant to consideration of the scope of [Article 9].”⁶

American courts have embraced the similarities between the two provisions but have fallen short in recognizing their stark differences. This Note seeks to highlight and begin to rectify this void. In particular, it analyzes how the differences between the two provisions evince a purposeful deviation in the American constitutional system that could make internal legislative proceedings—the investigatory and lawmaking processes which lead up to the enactment of statutes—more susceptible to judicial review.

¹ See, e.g., *Gravel v. United States*, 408 U.S. 606, 616 (1972) (immunity from suit); *United States v. Johnson*, 383 U.S. 169, 184–85 (1966) (evidentiary privilege).

² The Supreme Court recognized Article 9 of the English Bill of Rights as the predecessor of the Speech or Debate Clause in its first interpretation of the Clause in *Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880).

³ The Bill of Rights 1689, 1 W. & M. c. 2.

⁴ U.S. Const. art. I, § 6, cl. 1.

⁵ *United States v. Brewster*, 408 U.S. 501, 502, 509 (1972) (where a former senator was charged with bribery (citing *Ex parte Wason* [1869] 4 LRQB 573 at [577])); *Johnson*, 383 U.S. at 170–71, 183 (where a former congressman was charged with conspiracy to defraud the United States (citing *Ex parte Wason*, 4 LRQB at [576]–[77])).

⁶ *R v. Chaytor* [2010] UKSC 52, [38], [2011] 1 AC 684, 704.

Part I examines the text and function of Article 9, explaining that its phrase “proceedings in Parliament” provides institutional protection to Parliament from judicial review of its internal proceedings. Part II turns to the American Founding, discussing contemporaneous understandings of Article 9 and how the Framers transformed Article 9 into the Speech or Debate Clause, with adaptations fitted for the American system of government. This Part focuses on the Framers’ omission of a parallel phrase to “proceedings in Parliament,” which, along with the Clause’s individualized subject, indicates that the Clause was more likely designed to support than to suppress judicial review of internal congressional proceedings. Part III applies this novel textual analysis to the modern American judicial landscape, where Congress receives much deference for its internal proceedings. Current jurisprudence ironically employs the Speech or Debate Clause to impede judicial scrutiny of internal legislative proceedings, although the Clause’s textual and structural framing suggests instead that it contemplates more searching judicial review.

I. THE PREDECESSOR OF THE SPEECH OR DEBATE CLAUSE: ARTICLE 9 OF THE ENGLISH BILL OF RIGHTS

In nearly every case confronting the Speech or Debate Clause, the U.S. Supreme Court has commemorated the events surrounding the enactment of the English Bill of Rights in a rhetorical appeal to the American Clause’s historical roots.⁷ Forged in the aftermath of the Glorious Revolution, Article 9 of the English Bill of Rights was a key component of the long-awaited settlement to the conflicts between the Crown and Parliament.⁸ In the centuries leading up to the Revolution, members of Parliament had struggled for privileges from arrest and civil process for their legislative conduct.⁹ Article 9 ensured “freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown’s judges.”¹⁰

In light of this history, American courts have reasoned that the primary purpose of the Speech or Debate Clause is similarly to protect the

⁷ See *Brewster*, 408 U.S. at 507–08; *Powell v. McCormack*, 395 U.S. 486, 502 (1969); *Johnson*, 383 U.S. at 177–78; *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *Kilbourn*, 103 U.S. at 201–02.

⁸ *Johnson*, 383 U.S. at 178; Léon R. Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. Pa. L. Rev. 960, 963–64 (1951).

⁹ *Tenney*, 341 U.S. at 372; Yankwich, *supra* note 8, at 962–63.

¹⁰ *Chaytor*, [2010] UKSC 52 at [61], [2011] 1 AC at 711.

independence of the legislature, preventing “intimidation by the executive and accountability before a possibly hostile judiciary.”¹¹ Meriting attention, however, is that Article 9 and the Speech or Debate Clause provide different means to achieve this end. While Article 9 provides institution-wide protection for Parliament’s proceedings, a linchpin of the British system of parliamentary supremacy, the Speech or Debate Clause was designed to fit the Founders’ blueprint for a government of constitutional supremacy—crafted to reinforce, not undermine, the system of checks and balances that would equilibrate the nation’s separated powers.¹²

A. Article 9’s Anti-Judicial Review Function in the United Kingdom

As an embodiment of parliamentary autonomy,¹³ Article 9 of the English Bill of Rights surpasses the legislative immunity and evidentiary privilege offered by its American counterpart—it functions as a sweeping anti-judicial review principle that arms all of Parliament with a shield from judicial intrusions. To justify this expansive doctrine, the UKSC has, reminiscent of American courts, appealed to the historical purpose behind the Article. More than just to offer individualized privileges for members of Parliament, Article 9 was from the beginning purposed to provide institutional protection.¹⁴ There are two main functions of Article 9, which this Section addresses in turn. First, Article 9 grants Parliament exclusive control over its own legislative proceedings.¹⁵ Second, Article

¹¹ *Johnson*, 383 U.S. at 181.

¹² For a comparison between the British doctrine of parliamentary supremacy and the American doctrine of constitutional supremacy, see generally Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. Rev. 1 (2001). Constitutional supremacy is derivative of popular sovereignty. See *id.* at 9.

¹³ See Cristina Fasone, *Legislatures as Hostages of Obstructionism: Political Constitutionalism and the Due Process of Lawmaking*, 21 Rev. Const. Stud. 63, 80 (2016) (noting that “the protection of parliamentary autonomy is a landmark principle in constitutional law which can be traced back to the English Bill of Rights 1689”).

¹⁴ See *Kimathi v. Foreign & Commonwealth Off.* [2017] EWHC (QB) 3379, [8] (quoting *Off. of Gov’t Com. v. Info. Comm’r* [2008] EWHC (Admin) 774, [46]–[47]) (describing the dual purposes of Article 9: to thwart interference with individuals’ free speech in Parliament and to impede judicial interference with or criticism of legislative proceedings).

¹⁵ See Martin Chamberlain & James Segan, *Parliamentary Privilege, Article 9 of the Bill of Rights and Admissibility: What Use Can Be Made of Parliamentary Materials in Litigation?*, 23 Jud. Rev. 11, 17–18 (2018) (citations omitted).

9 precludes the use in litigation of any parliamentary material that will cause impeachment or questioning of parliamentary proceedings.¹⁶

1. Exclusive Control Over Parliamentary Proceedings

The protection of parliamentary proceedings from judicial oversight is rooted in the language of Article 9, which “confers on ‘proceedings in parliament’ protection from being ‘impeached or questioned’ in any ‘court or place out of Parliament.’”¹⁷ Distinct from the protection offered to members of Parliament themselves, Article 9 provides a freestanding parliamentary privilege that covers parliamentary proceedings.¹⁸ In effect, Parliament is “the sole judge of the lawfulness of its own proceedings,” as matters internal to Parliament are nonjusticiable,¹⁹ and courts may not subject any parliamentary proceedings to judicial review.²⁰ Summarizing the modern doctrine, the Privy Council wrote:

[T]he courts recognise that Parliament has exclusive control over the conduct of its own affairs. The courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions Alleged irregularities in the conduct of parliamentary business are a matter for Parliament alone. The constitutional principle, going back to the 17th century, is encapsulated in the United Kingdom in article 9 of the Bill of Rights 1689²¹

The anti-judicial review function of Article 9 was featured in two recent, high-profile cases before the UKSC. In *R (Miller) v. Secretary of State for Exiting the European Union*, the court was asked to opine on

¹⁶ See *id.* at 15–18.

¹⁷ Erskine May’s *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* ¶ 13.10 (25th ed. 2019) [hereinafter *Erskine May*] (quoting *The Bill of Rights 1689*, 1 W. & M. c. 2).

¹⁸ Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, 2013, HL 30, ¶ 3 (UK) [hereinafter *Joint Committee*] (describing parliamentary privilege as encompassing both “the right of each House to control its own proceedings and precincts” and “the right of those participating in parliamentary proceedings . . . to speak freely without fear of legal liability or other reprisal”).

¹⁹ *Dingle v. Associated Newspapers Ltd.* [1960] 2 QB 405 at [408]–[10]; Firoz Cachalia, *Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint*, 60 N.Y.L. Sch. L. Rev. 379, 389–90 (2015–16).

²⁰ See *R v. Chaytor* [2010] UKSC 52, [76], [2011] 1 AC 684, 715.

²¹ *Bahamas Dist. of the Methodist Church v. Symonette* [2000] UKPC 31, [27] (appeal taken from Bah.).

Parliament's failure to follow the Sewel Convention.²² The Sewel Convention, established by practice and later codified by statute,²³ stipulates that the U.K. Parliament will not “normally” legislate on matters over which the devolved governments of Northern Ireland, Scotland, and Wales have legislative competence, or alter the extent of their competence, without the governments' prior consent.²⁴ Besides finding the Sewel Convention to be an unenforceable political convention, the court further reasoned that Article 9 prevented its adjudication of the issue.²⁵ Holding Parliament accountable for non-compliance with the Sewel Convention would constitute impeachment or questioning of proceedings in Parliament, which Article 9 forbade.

In *R (Miller) v. Prime Minister*,²⁶ a challenge to Prime Minister Boris Johnson's prorogation of Parliament (ending the current parliamentary session),²⁷ the assertion of Article 9's anti-judicial review principle took a different course. The Government argued that due to Article 9, the UKSC had no authority to question the propriety of the prorogation because it was “‘a proceeding in Parliament’ which cannot be impugned or questioned in any court.”²⁸ The court disagreed, finding that the prorogation—an action imposed upon, not taken by, Parliament—did not constitute a “proceeding in Parliament” and was thus unshielded by Article 9's protection.²⁹ Because Parliament had no control over prorogation in the first place, adjudicating the issue posed no threat of the judiciary wresting control over parliamentary proceedings from Parliament's hands.

²² *R (Miller) v. Sec'y of State for Exiting the Eur. Union* [2017] UKSC 5, [136], [2018] AC 61, 163.

²³ Akash Paun, Jess Sargeant & Elspeth Nicholson, Sewel Convention, Inst. for Gov't, <https://www.instituteforgovernment.org.uk/explainers/sewel-convention> [https://perma.cc/5T6T-ESXG] (last updated Dec. 8, 2020); Scotland Act 2016, c. 11, § 2; Wales Act 2017, c. 4, § 2.

²⁴ Devolution: Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee 2013, 8, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf. [https://perma.cc/K7NR-JQL8]; see *R (Miller)*, [2017] UKSC at [145], [2018] AC at 163 (noting that the Memorandum of Understanding provides the “mechanisms for implementing the [Sewel] convention”).

²⁵ *R (Miller)*, [2017] UKSC at [145], [2018] AC at 163.

²⁶ [2019] UKSC 41, [2020] AC 373.

²⁷ *Id.* at [1]–[2], [2020] AC at [394].

²⁸ *Id.* at [63], [2020] AC at [410] (quoting The Bill of Rights 1689, 1 W. & M. c. 2).

²⁹ *Id.* at [68], [2020] AC at [411].

In addition to Article 9, British courts are also bound by a related doctrine: exclusive cognizance. To the extent the two principles are not coterminous,³⁰ exclusive cognizance appears to supplement Article 9 to prevent review of parliamentary affairs that do not fall within the contours of Article 9's "proceedings in Parliament" language.³¹ Together, Article 9 and exclusive cognizance form the overarching doctrine that courts "will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges."³² This principle is consequential, as it deprives "those outside [of Parliament] who are adversely affected by things said or done in Parliament" from being "able to seek redress through the courts."³³ Overriding the infringement of individual legal rights, this creates "an exception to the general principle of the rule of law."³⁴

2. Use of Parliamentary Material in Court Proceedings

The second main institutional function of Article 9 is that it precludes parties and tribunals from making certain references to official materials kept by the Houses of Parliament. Courts may cite to proceedings in Parliament so long as the proceedings are not "questioned or impeached."³⁵ But courts must tread lightly when referring to parliamentary proceedings, as there is a thin line between permissibly citing parliamentary materials and impermissibly suggesting impropriety.³⁶

³⁰ Authorities describe the relationship between parliamentary privilege under Article 9 and the exclusive cognizance doctrine somewhat differently. Compare Joint Committee, *supra* note 18, ¶ 16 (stating that Article 9 "encapsulated a pre-existing claim to exclusive cognizance over things said or done in Parliament"), with *R v. Chaytor*, [2010] UKSC 52, [51], [2011] 1 AC 684, 708 (describing the Article 9 privilege as "narrow" and exclusive cognizance as "broader").

³¹ Chamberlain & Segan, *supra* note 15, at 18.

³² *Prebble v. Television N.Z. Ltd.* [1995] 1 AC 321 (PC) at 332 (appeal taken from N.Z.) (citations omitted).

³³ Joint Committee, *supra* note 18, ¶ 17.

³⁴ *Id.* ¶ 18; see also Lord Mance, *Justiciability*, 67 *Int'l & Compar. L.Q.* 739, 756 (2018) (stating that Article 9 "debars the courts from fulfilling their ordinary function").

³⁵ Office of the Leader of the House of Commons, *Green Paper on Parliamentary Privilege*, 2012, Cm 8318, ¶ 88 [hereinafter *Green Paper*].

³⁶ See *Prebble*, [1995] 1 AC at 337 (describing "confusion between the right to prove the occurrence of Parliamentary events and the embargo on questioning their propriety").

Courts may only employ parliamentary proceedings for certain limited uses. First, and least controversially, courts may reference proceedings to provide background information on what occurred in Parliament as a matter of fact or history, without suggesting any improper action.³⁷ Second, in cases of judicial review of Government action,³⁸ courts may employ the records of the proceedings to identify the Government's policy.³⁹ Third, to show motivation for Government action, a minister's statement may be used even as evidence of impropriety on the part of the executive.⁴⁰ Fourth, as established in *Pepper v. Hart* in the early 1990s, to interpret ambiguous legislation, courts may rely on clear statements by the minister who promoted the bill.⁴¹

Parliamentary authorities have become wary of potential infringements of Article 9 through such references to parliamentary materials. Commentators have urged courts to narrowly apply the *Pepper v. Hart* principle so as not to approach "a U.S. free-for-all interpretation of parliamentary intention."⁴² As to cases of judicial review of executive

³⁷ Green Paper, supra note 35, ¶ 84 (citations omitted); see also Joint Committee, supra note 18, ¶ 121; *Prebble*, [1995] 1 AC at 337 (stating that under Article 9, "parties to litigation . . . cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, interference or submission) that the actions or words were inspired by improper motives or were untrue or misleading").

³⁸ Here, "Government action" pertains to action by the U.K. Government, which "consists of the Prime Minister, their Cabinet and junior ministers, supported by the teams of non-political civil servants that work in government departments." See Parliament and the Government, UK Parliament, <https://www.parliament.uk/about/how/role/relations-with-other-institutions/parliament-government/> (last visited Mar. 4, 2021) [<https://perma.cc/U2KD-HAM5>].

³⁹ Green Paper, supra note 35, ¶ 84 (citation omitted); see also *R v. Sec'y of State for the Home Dep't, Ex parte Brind* [1991] 1 AC 696 (HL) 715–16 (appeal taken from Eng. & Wales) (admitting statements from parliamentary proceedings to demonstrate what the Government policy is).

⁴⁰ Green Paper, supra note 35, ¶ 84; see also *Toussaint v. Att'y Gen. of St. Vincent* [2007] UKPC 48, [29] (appeal taken from St. Vincent) (explaining that ministerial statements to Parliament are admissible so as not to convert "a source of protection of the legislature against the executive" into "a source of protection of the executive from the courts and the rule of law").

⁴¹ Green Paper, supra note 35, ¶ 84. The court in *Pepper* reasoned that referring to parliamentary proceedings to resolve statutory ambiguities was "a way of making more effective proceedings in Parliament" and did not "involve any impeachment, or questioning of the freedom of speech and debates or proceedings in Parliament." [1993] AC 593 (HL) 614 (appeal taken from Eng. & Wales).

⁴² Joint Committee, supra note 18, ¶ 119–20 (citations omitted); see also HL Deb (20 Mar. 2014) (753) cols. 329–30 (statement of Lord Norton of Louth) (stating that *Pepper v. Hart* "was not an invitation to pass judgment on what was said and done in either House, but some judges seemed to think that it gave them latitude for such commentary").

action, the Joint Committee on Parliamentary Privilege warned parties and tribunals against relying on parliamentary materials like committee opinions to support their own arguments or conclusions, because this necessarily invites the opposing party to attempt to undermine or question the substance of those materials in support of their own argument.⁴³ This improper questioning amounts to “not just the breaching of Article 9, but the blurring of the constitutional separation of Parliament and the courts.”⁴⁴

B. The Meaning of “Proceedings in Parliament”

As *R (Miller) v. Prime Minister* exemplifies, the application of Article 9 turns on whether the particular action at issue constitutes a “proceeding in parliament” such that it is shielded from judicial review.⁴⁵ Accordingly, judicial authorities and scholars have focused on defining the meaning and scope of this key phrase. An authoritative definition, which has gained approval from the UKSC, is contained in *Erskine May’s Parliamentary Practice*: “The primary meaning of proceedings, as a technical Parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity.”⁴⁶

Parliamentary privilege under Article 9 operates at both the individual and the collective levels. As to its individualized application, Article 9 closely parallels the American Speech or Debate Clause. *Erskine May* recognizes the American Clause as the analogue to the English in this regard, identifying the phrase “legislative sphere”⁴⁷ in the American doctrine as the counterpart to “proceedings in Parliament.”⁴⁸ Individual

⁴³ See Joint Committee, *supra* note 18, ¶ 122–29, 136 (citations omitted) (discussing pitfalls of over-reliance on parliamentary materials and recommending that Parliament adopt a narrow view of *Pepper*).

⁴⁴ *Id.* ¶ 126.

⁴⁵ See *supra* notes 28–29 and accompanying text.

⁴⁶ *R (Miller) v. Prime Minister* [2019] UKSC 41, [67], [2020] AC 373, 411 (quoting *Erskine May*, *supra* note 17, ¶ 13.12).

⁴⁷ “Congressmen and their aides are immune from liability for their actions within the ‘legislative sphere’ . . .” *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (citing *Gravel v. United States*, 408 U.S. 606, 624–25 (1972)). The “legislative sphere” includes acts which are “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to . . . matters which the Constitution places within the jurisdiction of either House.” *Gravel*, 408 U.S. at 625.

⁴⁸ *Erskine May*, *supra* note 17, ¶ 13.12 n.2; see also 2 Joseph Story, *Commentaries on the Constitution* 329 (Boston, Hilliard, Gray & Co. 1833) (stating that in England the “privilege

legislators under both systems receive protection for a broad range of legislative actions, not just speaking or debating.⁴⁹

As a shield against judicial review, the rigor of Article 9 derives from its application to Parliament and Parliament's Houses and committees as collective bodies.⁵⁰ Definitionally, proceedings are actions "taken by the House in its *collective* capacity."⁵¹ Individual members of Parliament, as well as legislative aides, may receive protection when they are involved in such proceedings, but Article 9 moreover protects the proceedings themselves in an institution-wide manner.⁵² Owing to this collective application, internal affairs are shielded from judicial scrutiny, such that courts may not adjudicate issues surrounding, for example, rules of procedure, committee reports, and parliamentary investigations.⁵³

The significance of the phrase "proceedings in Parliament" in British constitutional law has transcended national boundaries, as nations with British legacies have confronted whether their legal systems also forbid judicial inquiry into legislative proceedings. For instance, South Africa and India have both embraced judicial review of internal legislative proceedings despite their British colonial roots, attributing their divergence to the written nature of their national constitutions and their

[was] strictly confined to things done in the course of parliamentary proceedings, and d[id] not cover things done beyond the place and limits of duty" and that "the same principles seem applicable to the privilege of debate and speech in congress").

⁴⁹ Compare *R v. Chaytor* [2010] UKSC 52, [52], [2011] 1 AC 684, 708 (stating that privilege "is not confined to words spoken in debate" and extends to "everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business"), with *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (stating that the speech or debate privilege covers "things generally done in a session of the House by one of its members in relation to the business before it").

⁵⁰ See European Centre for Parliamentary Research and Documentation ("ECPRD"), *Parliament & Judiciary* 153 (2007) ("In the United Kingdom, parliamentary privilege covers not only the freedom of speech of individual members, but all '*proceedings in parliament.*' Consequently, Parliament has exclusive control over its internal affairs.").

⁵¹ Erskine May, *supra* note 17, ¶ 13.12 (emphasis added).

⁵² See ECPRD, *supra* note 50, at 153; see also *id.* at 127 (statement of John Vaux, Speaker's Counsel at the House of Commons) (stating that under Article 9, "[t]he courts are prohibited from interfering in any way with the proceedings of either House of Parliament").

⁵³ See ECPRD, *supra* note 50, at 156 (excluding the United Kingdom from a list of countries where there is some form of judicial review of rules of procedure); *id.* at 161 (explaining that, in the United Kingdom, there can be no judicial review of "collective acts of political oversight" because "such collective acts would be covered by parliamentary privilege"); *Dingle v. Associated Newspapers Ltd.* [1960] 2 QB 405 at [409] ("To attack the validity of [a committee] report on the ground that the procedure of the committee was defective would clearly fall within article 9.").

replacement of parliamentary supremacy with constitutional supremacy.⁵⁴ In *Raja Ram Pal v. The Hon'ble Speaker*, the Supreme Court of India also reasoned that the constricted language of its parallel constitutional provision (Article 122, which states that “[t]he validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure”)⁵⁵ “displaces the English doctrine of exclusive cognizance of internal proceedings.”⁵⁶ In the next Part, this Note addresses whether the U.S. Constitution, by the terms of its own legislative privilege provision, likewise departed from its British heritage.

II. A COMPARATIVE INTERPRETATION OF THE SPEECH OR DEBATE CLAUSE

A. *The Status of Article 9 as of the American Founding*

Article 9 of the English Bill of Rights was almost a century old when the U.S. Constitution’s Framers convened in Philadelphia. The origins and history of Article 9 and its key phrase—“proceedings in Parliament”—indicate that by the time of American independence, the Article had a known collective, institutional application in England. Article 9 was founded on the idea that Parliament, which served as both England’s supreme legislative body and its highest court,⁵⁷ adhered to a *lex et consuetudo parliamenti*, or “*lex parliamenti*,” a body of law peculiar to Parliament and largely thought to be unknowable to the courts.⁵⁸

⁵⁴ Chuks Okpaluba, Can a Court Review the Internal Affairs and Processes of the Legislature? Contemporary Developments in South Africa, 48 *Compar. & Int’l L.J. S. Afr.* 183, 200–01 (2015); V. Shyam Kishore, Parliamentary Privileges and the Judiciary—A Search for the Common Ground, 33 *Commonwealth L. Bull.* 443, 454–58 (2007) (citations omitted).

⁵⁵ India Const. art. 122(1).

⁵⁶ (2007) 3 SCC 184, 359, ¶ 386.

⁵⁷ Together, both the House of Lords and the House of Commons constituted the High Court of Parliament in medieval times. See ECPRD, *supra* note 50, at 167. The House of Commons ceased its judicial work in 1399, while the House of Lords, through its judicial committee, continued to serve as the nation’s supreme appellate court until the independent U.K. Supreme Court began operating in 2009. *Id.*; William Arnold, The Supreme Court of the United Kingdom (UKSC), an Exploration of the Roles of Judicial Officers and Court Administrators and How the Relationship Between Them May Be Improved and Enhanced: A Case Study, 6 *Int’l J. for Ct. Admin.*, 19–20 (2014).

⁵⁸ See Erskine May, *supra* note 17, ¶ 16.2. While the opposing view—“that the *lex parliamenti* is part of the common law and known to the courts, and that resolutions of either House declaratory of privilege will not bind the courts”—existed at the time, the Article itself

Renowned English jurist Sir Edward Coke embraced this concept in the early seventeenth century, writing that “judges ought not to give any opinion of a matter of [P]arliament, because it is not to be decided by the common laws, but *secundum legem et consuetudinem parliamenti* (according to the law and usage of Parliament).”⁵⁹ The concept of *lex parliamenti* was rooted in British law even before the Glorious Revolution. As early as the fifteenth century, recognition of the exclusive province of Parliament took the form of allowing Parliament to define the extent of its own privileges.⁶⁰

This concept of parliamentary privilege emerged from Parliament’s judicial function.⁶¹ In *The Earl of Shaftsbury’s Case* of 1677, the House of Lords committed one of its members to the Tower of London for contempt.⁶² When challengers contested the order of contempt as insufficient, the Court of King’s Bench held that it lacked jurisdiction to review Parliament’s action.⁶³ The court reasoned that because the Parliament was the supreme court, ordinary courts of justice had no authority “to judge of any law, custom, or usage of Parliament,”⁶⁴ and could not “take[] upon them the judgment of what is *lex et consuetudo Parliamenti*.”⁶⁵

The King’s Bench did not always accord full respect to this principle. In *Elliot’s Case*, the court imprisoned and fined three members of the House of Commons for making a libelous speech and restraining the Speaker in his chair, despite the defendants’ plea that the court could not

was a response to such opposition. See *id.*; see also *infra* text accompanying notes 66–72 (discussing cases endorsing the opposing view and Parliament’s response).

⁵⁹ Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* 14 (London, E. & R. Brooke 1797).

⁶⁰ See *Burdett v. Abbot* (1811) 104 Eng. Rep. 501 (KB), 510–11; 14 E. 1, 24–27 (describing *Thorpe’s Case* of 1456, in which the House of Commons asserted that its Speaker was entitled to privilege and should be released from custody, but judges advising the House of Lords denied that they were able to determine the privileges of Parliament); *Barnardiston v. Soame* (1674) 6 Howell’s State Trials 1064 (KB) 1101 (finding an action by a parliamentary candidate against a sheriff for a false election return unmaintainable because judges “know not what is the course of parliament, nor the privilege of parliament”).

⁶¹ Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. Rev. 879, 894 (1985). For a history of Parliament’s judicial function as developed from feudal times, see Carl Wittke, *The History of English Parliamentary Privilege* 12–14 (1921).

⁶² (1677) 86 Eng. Rep. 792 (KB) 792; 1 Mod. 144, 144.

⁶³ *Id.*

⁶⁴ *Id.* at 800, 1 Mod. at 158.

⁶⁵ See *id.* at 798, 1 Mod. at 154 (argument of the Attorney General).

exercise jurisdiction over offenses that occurred in Parliament, the higher court.⁶⁶ The King's Bench reasoned in part that parliamentary privilege did not cover offenses by individual members because they were not decisions made by Parliament acting collectively as a court.⁶⁷ In other words, privilege would prevent the court's jurisdiction over parliamentary matters only *after* the House had reached a collective decision on the matter, but not where the matter was within the House's cognizance and subject to its unique law, but no collective action had yet been taken. Parliament later declared that this prosecution was a breach of privilege.⁶⁸

A case which commenced in the 1680s, *Rex v. Williams*,⁶⁹ is credited as directly giving rise to Article 9.⁷⁰ When Sir William Williams, the Speaker of the House of Commons, was charged with seditious libel for ordering the printing of a pamphlet in his official capacity, he rested on the then-familiar argument that the court had no jurisdiction to adjudicate the case due to parliamentary privilege—the case was instead governed by *lex parliamenti*.⁷¹ The court rejected this argument and fined Sir Williams for the crime, but the House of Commons proceeded to resolve that the court's judgment was illegal and “against the Freedom of Parliament” soon after Parliament's promulgation of the Bill of Rights.⁷²

Some scholars, including Professor Craig Bradley, have interpreted Parliament's reaction to *Williams* as informing the broad scope of the protection for individual legislators under Article 9.⁷³ The most direct

⁶⁶ (1629) 3 Cobbett's State Trials 293 (KB) 293–94, 309–10.

⁶⁷ See *id.* at 309.

⁶⁸ *Id.* at 310.

⁶⁹ (1684–1695) 13 Howell's State Trials 1369 (KB).

⁷⁰ Robert J. Reinstein & Harvey A. Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113, 1130 (1973); Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 74–75 (2007).

⁷¹ *Williams*, 13 Howell's State Trials at 1369, 1425; see Craig M. Bradley, The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption, 57 N.C. L. Rev. 197, 207 (1979) (explaining the argument of Williams's counsel).

⁷² *Williams*, 13 Howell's State Trials at 1441–42; see Chafetz, *supra* note 70, at 74–75.

⁷³ Bradley, *supra* note 71, at 208–10 (arguing that Article 9 expanded the protection for individual legislators to cover “proceedings” as well as speech); see Reinstein & Silverglate, *supra* note 70, at 1130 (stating that “Parliament asserted that the privilege encompassed all of the ordinary and necessary functions of the legislature” rather than only “speeches, debates and votes within the walls of Parliament”).

textual predecessor of Article 9 was contained in the Protestation of 1621,⁷⁴ which stated that

in the handling and proceeding of those businesses every member of the House of Parliament hath and of right ought to have freedom of speech, to propound, treat, reason and bring to conclusion the same . . . and that every member of the said House hath like freedom from all impeachment, imprisonment and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning or declaring of any matter or matters touching the parliament or parliament business.⁷⁵

Through its altered language, Article 9 successfully progressed parliamentary privilege from covering merely the freedom of speech *in* proceedings as asserted by the Protestation (“speaking, reasoning, or declaring” on parliamentary matters) to “proceedings in Parliament” themselves, which Bradley calls a “most notable expansion” of the privileges belonging to members of Parliament.⁷⁶ But Article 9 did more than enlarge the individualized privileges for members of Parliament. Importantly, Article 9 codified the *lex parliamenti* principle—that those internal matters of Parliament could only be judged by Parliament, under

⁷⁴ Speakers of the House of Commons have petitioned the Crown for the privilege of freedom of speech since at least the sixteenth century. See Wittke, *supra* note 61, at 21–22. The Protestation of 1621 may have been the first parliamentary declaration of the privilege to include the notion of “impeachment,” as Article 9 later would. See Erskine May, *supra* note 17, ¶ 13.11. The Protestation asserted that parliamentary privileges were a matter of right, not a matter of grace from the Crown. In response, King James I tore the Protestation from the official journal, declared it null and void, and imprisoned the parliamentary ringleaders who were involved. See Chafetz, *supra* note 70, at 72–73; Wittke, *supra* note 61, at 28–29. Another notable parliamentary declaration was Strode’s Act of 1512, which nullified a Stannary Court judgment fining a burgess of Parliament for authoring a bill to regulate the Cornwall tin industry, and, like the Protestation that would follow, stated that any suit against a member of Parliament “for any bill, speaking, reasoning, or declaring of any matter or matters concerning the parliament to be commenced and treated of, be utterly void and of none effect.” 4 Hen. 8 c. 8 (spelling modernized); see also Bradley, *supra* note 71, at 200 (providing a brief discussion of the Strode Act and its fallout).

⁷⁵ Protestation of the House of Commons (Dec. 18, 1621), *reprinted in* Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I, at 313, 314 (G.W. Prothero ed., Oxford, Clarendon Press 1894).

⁷⁶ Bradley, *supra* note 71, at 208–09; see also Reinstein & Silverglate, *supra* note 70, at 1130 (noting how Article 9 was meant to confer a much “broader construction” of parliamentary privilege).

the unique law of Parliament, not by the courts of the Crown.⁷⁷ By protecting “proceedings in Parliament” from being questioned or impeached by the courts, Parliament rejected the proposition from *Williams* that parliamentary matters could be adjudicated by lower tribunals.⁷⁸

The Case of Brass Crosby,⁷⁹ decided in 1771, displays the sweeping status of parliamentary privilege on the eve of the American Revolution. In a habeas corpus proceeding, Brass Crosby, a member of the House of Commons, challenged the House’s order under which he was detained in the Tower of London for breach of privilege, arguing that the House did not have sufficient cause to detain him.⁸⁰ Crosby contended that the Court of Common Pleas was obliged to decide whether the House had exceeded its authority. The *lex parliamenti*, he argued, was part of the law of the land and was cognizable by the courts—the House of Commons did not have unlimited power, and its privilege was “not to be supposed so transcendent and mystical, as to exclude all inquiry.”⁸¹

The court declined Crosby’s invitation to question the proceedings of the House. Chief Justice de Grey stated that the *lex parliamenti* remained unknowable: “[W]e cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges.”⁸² And Parliament was supreme and unbeholden to any law: “The laws can never be a prohibition to the Houses of Parliament; because, by law, there is nothing superior to them.”⁸³ The Chief Justice explained that “[t]here are two sorts of privileges which ought never to be confounded; *personal*

⁷⁷ See Joint Committee, *supra* note 18, ¶ 16 (“[Article 9] encapsulated a pre-existing claim to exclusive cognisance over things said or done in Parliament—the preamble to the Bill of Rights notes that King James II had sought to subvert the liberties of the realm ‘by Prosecutions in the Court of King’s Bench for Matters and Causes cognizable only in Parliament.’” (quoting *The Bill of Rights 1689*, 1 W. & M. c. 2) (spelling modernized in original)).

⁷⁸ During Parliament’s debates leading up to the passage of the Bill of Rights, the drafting committee’s chair, Sir George Treby, stated that the free speech provision “was put in for the sake of . . . Sir William Williams, who was punished out of Parliament for what he had done in Parliament.” 9 A. Grey, *Debates of the House of Commons* 81 (London, D. Henry & R. Cave 1763) (spelling modernized); see also Erskine May, *supra* note 17, ¶ 16.2 (“[T]he Bill of Rights condemned the prosecution for having been taken in King’s Bench when the matter was cognizable only in Parliament.” (citation omitted)).

⁷⁹ (1771) 95 Eng. Rep. 1005; 3 Wilson 188 (KB).

⁸⁰ *Id.* at 1005, 3 Wilson at 188.

⁸¹ *Id.* at 1006–08, 3 Wilson at 191–93.

⁸² *Id.* at 1012, 3 Wilson at 200–01.

⁸³ *Id.* at 1013, 3 Wilson at 202.

privilege, and the privilege belonging to the *whole collective body* of that assembly.”⁸⁴ When personal privileges of individual members come incidentally before the court, the court could determine the matter—but where the body’s collective privilege is directly at issue, such that to decide the case the court “must supersede the judgment and determination” of a parliamentary body, the court may not exercise jurisdiction.⁸⁵ Justice William Blackstone agreed, stating that “[t]he House of Commons is the only judge of its own proceedings.”⁸⁶

By the time of the American Founding, the concepts of *lex parliamenti*, unreviewable parliamentary proceedings, and Parliament’s ability to define the extent of its own privileges were well entrenched in British law. Blackstone accorded them much attention in his *Commentaries on the Laws of England*, writing: “It will be sufficient to observe, that the whole of the law and custom of parliament has [its] original from this one maxim; that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.”⁸⁷ But Blackstone also recognized the danger this posed to judicial fairness and the rule of law. Parliament, he wrote, “being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy.”⁸⁸ It was not until decades after the ratification of the U.S. Constitution, in the 1839 case of *Stockdale v. Hansard*,⁸⁹ that the Queen’s Bench decided that the *lex parliamenti* was judicially cognizable as part of the law of the land, such that each House of Parliament could no longer determine the extent of its own privileges.⁹⁰

B. The Development of the American Analogue

Events in Great Britain concerning parliamentary privilege garnered attention across the Atlantic in the pre-revolutionary era. The case of John

⁸⁴ Id. at 1012, 3 Wilson at 201 (emphasis added).

⁸⁵ Id. at 1012–13, 3 Wilson at 201–02.

⁸⁶ Id. at 1014, 3 Wilson at 205.

⁸⁷ 1 William Blackstone, *Commentaries* *158–59 (internal quotation marks omitted).

⁸⁸ Id. at *157.

⁸⁹ (1839) 112 Eng. Rep. 1112; 9 Ad. & E. 1.

⁹⁰ Id. at 1112; 9 Ad. & E. at 1. Chief Justice Denman in *Stockdale* abrogated *The Case of Brass Crosby*, stating that “nothing could . . . be less needful or less judicial than the wide assertion of privilege that was volunteered by the Chief Justice,” and deeming Blackstone’s concurring position “untenable.” Id. at 1158; 9 Ad. & E. at 119–20.

Wilkes elevated the issue to its apex in the 1760s.⁹¹ Wilkes, expelled from membership in the House of Commons, was denied his seat by the Commons following his reelection, as the House claimed exclusive authority to determine the qualification of its members.⁹² The public in Great Britain and in America decried this denial of membership as an abuse of parliamentary power, and Wilkes became an icon for Americans who championed the cause of restraining Parliament's authority.⁹³ In exercising its power to deny Wilkes his elected seat, Parliament had followed the traditional course, flaunting its authority as exclusive and absolute. Blackstone sided with Parliament in the controversy: the House had the right to exclude Wilkes "for any reason it deemed proper"⁹⁴ because "it would expose the judicature of the house of commons to the most flagrant insult and contempt . . . if the member whom they expelled to-day, should be forced upon them again to-morrow."⁹⁵

John Lilburne, a seventeenth-century figure who endured demonstrations of parliamentary might before the English Bill of Rights, also impacted Americans' perception of legislative power.⁹⁶ When Parliament arrested Lilburne for libel and treason, Lilburne "demand[ed] procedural guarantees, refus[ed] to testify against himself, and finally question[ed] the Lords' jurisdiction over a commoner."⁹⁷ Parliament denied his requests and banished him for life.⁹⁸ Having earlier fought for Parliament against the Crown during the first English Civil War,⁹⁹ Lilburne realized that Parliament too could be an instrument of tyranny.¹⁰⁰

⁹¹ Bradley, *supra* note 71, at 211.

⁹² *Powell v. McCormack*, 395 U.S. 486, 527–28 (1969).

⁹³ See Bradley, *supra* note 71, at 211; Nicholas Handler, *Rediscovering the Journal Clause: The Lost History of Legislative Constitutional Interpretation*, 21 U. Pa. J. Const. L. 1219, 1262 (2019).

⁹⁴ Handler, *supra* note 93, at 1262.

⁹⁵ William Blackstone, *The Case of the Late Election*, reprinted in *An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England* 59, 71 (Phila., Robert Bell 1772).

⁹⁶ See *Barenblatt v. United States*, 360 U.S. 109, 160–61 (1959) (Black., J., dissenting) (noting that the memory of John Lilburne "was particularly vivid when our Constitution was written").

⁹⁷ Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 Const. Comment. 359, 365 (1991).

⁹⁸ Edward Vallance, *Reborn John? The Eighteenth-Century Afterlife of John Lilburne*, 74 *Hist. Workshop J.* 1, 7 (2012).

⁹⁹ Curtis, *supra* note 97, at 363.

¹⁰⁰ A fellow Leveller, William Walwyn, credited Lilburne for condemning Parliament's incriminatory questions as against his individual rights and sparking the question of "whether

Lilburne has since long been remembered for advocating for the restraint of legislative power in favor of individual rights.¹⁰¹ Parliament's treatment of figures like Wilkes and Lilburne forged the American public consciousness during the Founding era, fostering appreciation for the need to check the most powerful branch.

1. Early States and the Articles of Confederation

Before the Constitutional Convention, three of America's original states had adopted versions of Article 9's legislative privilege in their state constitutions or bills of rights: Maryland, Massachusetts, and New Hampshire.¹⁰² (Vermont, which was an independent territory until 1791, also had.)¹⁰³ These provisions took two different forms. One was in Maryland's Declaration of Rights of 1776, which stated, quite similarly to Article 9: "That freedom of speech, and debates, or proceedings, in the legislature, ought not to be impeached in any other court or judicature."¹⁰⁴ The second form was first featured in Massachusetts's Declaration of Rights of 1780 and repeated in the New Hampshire Constitution of 1784 and the Vermont Constitution of 1786: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."¹⁰⁵ This latter version diverged more significantly from

Parliament was bound by the law" in his pamphlet *England's Lamentable Slaverie*. Id. at 365–66 (citing William Walwyn, *England's Lamentable Slaverie* 2 (1645), reprinted in 3 *Tracts on Liberty in the Puritan Revolution, 1638–47*, at 312–13 (William Haller ed., 1933)).

¹⁰¹ *Barenblatt*, 360 U.S. at 160–61 (Black, J., dissenting) (stating that the Founders implemented procedural safeguards for trials "because not long before worthy men had been deprived of their liberties, and indeed their lives, through parliamentary trials without these safeguards. The memory of one of these, John Lilburne—banished and disgraced by a parliamentary committee on penalty of death if he returned to his country—was particularly vivid when our Constitution was written.").

¹⁰² Md. Const. of 1776, Declaration of Rights, art. 8; Mass. Const., Declaration of Rights, art. 21 (adopted in 1780); N.H. Const., Bill of Rights, art. 30 (adopted in 1784).

¹⁰³ Vt. Const., ch. 1, art. 16 (adopted in 1786). For a discussion of Vermont's unique political history, see Gary J. Aichele, *Making the Vermont Constitution: 1777–1824*, 56 *Proc. Vt. Hist. Soc'y* 166 (1988).

¹⁰⁴ Md. Const. of 1776, Declaration of Rights, art. 8.

¹⁰⁵ Mass. Const., Declaration of Rights, art. 21; N.H. Const., Bill of Rights, art. 30; Vt. Const., ch. 1, art. 16 (including slight variations).

Article 9, removing the protection of “proceedings” and cabining the scope of the privilege to immunity for legislative acts.¹⁰⁶

Early legal challenges in state courts show divergence from the British principle of non-reviewability of legislative proceedings. Of the few instances of judicial review by state courts before the Convention, most appear to have involved invalidation of statutes on substantive grounds, frequently in service of the right to trial by jury.¹⁰⁷ But there is also one notable example of invalidation of a legislative action on procedural grounds. In *Commonwealth v. Caton*, the Supreme Court of Appeals of Virginia (then the state’s highest court) held a legislative pardon legally ineffective because it was passed by only one house of the state legislature, not the constitutionally required two.¹⁰⁸ The court’s president, Edmund Pendleton, embraced the justiciability of the pardon’s procedural validity but doubted whether the court could evaluate the substantive constitutionality of the statute that authorized the pardon, characterizing this issue as “a deep, important, and . . . tremendous question” which he was “happy” not to confront.¹⁰⁹ This readiness to check the procedural regularity of legislative measures, as opposed to the substantive constitutionality, suggests that the former method of review was relatively unprovocative at the time.

The first national analogue to Article 9 of the English Bill of Rights was Article V of the Articles of Confederation, which read: “Freedom of speech and debate in congress shall not be impeached or questioned in any court, or place out of congress.”¹¹⁰ The provision largely resembles that of Maryland’s Declaration of Rights (the only American version of the provision in existence when the Continental Congress drafted the Articles of Confederation in 1777),¹¹¹ but it excluded protection of “proceedings.” The provision also retained language from Article 9 that the Maryland article had omitted—the prohibition on “question[ing]” and

¹⁰⁶ *Coffin v. Coffin*, 4 Mass. (4 Tyng) 1, 27 (1808) (defining the Massachusetts provision “as securing to every member exemption from prosecution”); see Wells Harrell, *The Speech or Debate Clause Should Not Confer Evidentiary or Non-Disclosure Privileges*, 98 Va. L. Rev. 385, 397–98 (2012).

¹⁰⁷ See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1135–45 (1987) (citing cases).

¹⁰⁸ *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 20 (1782).

¹⁰⁹ *Id.* at 16–18.

¹¹⁰ Articles of Confederation of 1781, art. V.

¹¹¹ See *supra* note 104 and accompanying text; 9 Journals of the Continental Congress 1774–1789, at 887 (Worthington Chauncey Ford ed., 1907).

the generalized location of “any . . . place out of Congress”—showing that Article 9 remained a focal source.

2. *The Drafting of the Speech or Debate Clause*

Along with first integrating renditions of Article 9 into their own founding documents, early states also impacted the Framers’ approach towards legislative power and privilege through their struggles with legislative supremacy. Predominant in the governments of most early states, state legislatures aroused fear as dangerous instruments of majoritarianism when improperly checked.¹¹² Delegates to the Constitutional Convention were wary of legislatures exercising power arbitrarily, even as to internal legislative processes.¹¹³ The new national Congress was to be one of limited power, prerogative, and privilege.

The Framers were also guided by lessons imparted by the British Parliament. Desire to avoid the peril of an over-powerful legislature directly contributed to the Framers’ design choices regarding legislative privilege.¹¹⁴ At the Convention, when it was proposed that Congress should fix the qualifications of its members, James Madison vigorously opposed the idea “as vesting an improper & dangerous power in the Legislature. . . . [T]he British Parlia[ment] possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention.”¹¹⁵ After this admonishment, the Framers decided against granting Congress this power, honoring the legacy of John Wilkes.¹¹⁶ In addition, the requirement that Congress publish a journal of its proceedings was designed to invalidate the House of Commons’ rule which required the

¹¹² Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 *Wash. & Lee L. Rev.* 787, 791–92 (1999).

¹¹³ See Handler, *supra* note 93, at 1266.

¹¹⁴ See Reinstein & Silverglate, *supra* note 70, at 1136–38.

¹¹⁵ 2 *Records of the Federal Convention of 1787*, at 248–50 (Max Farrand ed., 1911) [hereinafter *Farrand, Records*]. Madison stated that to allow Congress this power “was as improper as to allow them to fix their own wages, or their own privileges.” *Id.*

¹¹⁶ See Reinstein & Silverglate, *supra* note 70, at 1136–37 & n.131; see *supra* notes 91–95 and accompanying text.

House's leave to publish proceedings.¹¹⁷ Individual privileges from arrest and civil process were also truncated.¹¹⁸

Analyses of the Speech or Debate Clause too hastily conclude that unlike these other aspects of legislative power and privilege, the Clause largely adhered to the form of its British predecessor and so preserved nearly the full scope of the privilege.¹¹⁹ Besides, so the argument goes, the scarce drafting history and absence of debate on the provision would not support a different conclusion.¹²⁰ But there is more to the story—the privilege did undergo telling development during the Convention.

On July 23, 1787, the document referred to the Committee of Detail included a broad reference to legislative privilege: “That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation.”¹²¹ A later draft of the Committee read: “The delegates shall be privileged from arrest [or] *personal restraint* during their attendance . . . (*and they shall have no other privileges whatsoever*).”¹²² A similar provision was written for senators.¹²³ In both provisions, the latter clause (italicized above) was crossed out—the Framers had made an affirmative choice to expand legislative privileges beyond those provided in their initial drafts.

¹¹⁷ Reinstein & Silverglate, *supra* note 70, at 1137–38; Michael L. Shenkman, Talking About Speech or Debate: Revisiting Legislative Immunity, 32 *Yale L. & Pol’y Rev.* 351, 386 (2014).

¹¹⁸ Reinstein & Silverglate, *supra* note 70, at 1137 & n.128 (noting that the privilege was curtailed so as not to apply to legislators’ families and estates, in alignment with British statutes passed after the Bill of Rights of 1689); Raveson, *supra* note 61, at 897 & n.131 (same).

¹¹⁹ See, e.g., Reinstein & Silverglate, *supra* note 70, at 1138 (“Alone among the privileges claimed by Parliament, freedom of speech or debate was placed in the Constitution virtually unchanged.”); Raveson, *supra* note 61, at 896–97 (noting that the language of the two speech or debate provisions are “nearly identical” but emphasizing the “modification or exclusion of certain other privileges”); Shenkman, *supra* note 117, at 358–59, 385–86 (arguing that the Framers’ adoption of the same text from Article 9 “merged” English principles as they existed at the time of the Framing into the U.S. Constitution).

¹²⁰ E.g., Dean Joel Kitchens, Comment, The Constitutional Limits of the Speech or Debate Clause, 25 *UCLA L. Rev.* 796, 798–99 (1978) (noting “that the privilege was adopted from English law almost verbatim and without significant discussion”); Shenkman, *supra* note 117, at 358–59 (describing “the limited attention paid to the Speech or Debate Clause at the Convention”).

¹²¹ Farrand, *Records*, *supra* note 115, at 129–31.

¹²² *Id.* at 140 (second emphasis added).

¹²³ *Id.* at 141.

As the issue awaited further attention, the lone phrase “Freedom of Speech” remained on the margins in a Committee draft.¹²⁴ Finally, on August 6, the Committee reported to the Convention a draft that included the provision: “Freedom of speech and debate in the Legislature shall not be impeached or questioned in any Court or place out of the Legislature.”¹²⁵ The provision passed as reported, without recorded debate.¹²⁶

Having ostensibly resolved the issue of legislative privilege, the Framers then revisited it. On August 20, a proposal was referred to the Committee of Five which provided: “Each House shall be the Judge of [its] own privileges, and shall have authority to punish by imprisonment every person violating the same.”¹²⁷ South Carolina delegate Charles Pinckney later raised the proposal to the full Convention for debate.¹²⁸ Edmund Randolph and Madison countered him, advocating for postponement and doubting the propriety of the idea.¹²⁹ Madison “suggested that it would be better to make provision for ascertaining by *law*, the privileges of each House, than to allow each House to decide for itself.”¹³⁰

This was a pivotal moment: by denying the authority of each House to decide its own privileges, the Framers directly spurned the unbounded ability of the Houses of Parliament to do just that.¹³¹ Rather than being allowed to define the scope of its privileges and thus shield any actions it deemed to be within its privileges from review, Congress would be privileged only to the extent that the written text of the Constitution provided. The Committee of Style reported the Speech or Debate Clause in its final form on September 12: “for any speech or debate in either

¹²⁴ *Id.* at 156–57.

¹²⁵ *Id.* at 180.

¹²⁶ *Id.* at 246; see also *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (noting that this provision was “adopted . . . without debate”).

¹²⁷ Farrand, *Records*, *supra* note 115, at 334, 340–41.

¹²⁸ *Id.* at 502.

¹²⁹ *Id.* at 503.

¹³⁰ *Id.*

¹³¹ See 1 William Blackstone, *Commentaries* *159 (stating that “the principal privilege of parliament” was “that [its] privileges were not certainly known to any but the parliament itself”); see also *supra* notes 79–89 and accompanying text (describing *The Case of Brass Crosby* and the sweeping status of parliamentary privilege in the late eighteenth century); Wittke, *supra* note 61, at 17 (describing how Parliament “grossly abused” its ability to define its own privileges in the seventeenth and eighteenth centuries).

house, [Senators and Representatives] shall not be questioned in any other place.”¹³²

3. Ratification and Early Commentators

During the ratification effort, the Speech or Debate Clause was not at the forefront of debate but was subjected to some limited scrutiny. For instance, a writer in a Georgia gazette worried that the Speech or Debate Clause would render senators and representatives unaccountable to their constituents:

[I]s it meant by this section that a member, either of the Senate or Representatives, is not to account for his acts to his constituents? If so, this is contrary to the idea entertained by freemen who delegate their power for a limited time. That the representative should be called on by his constituents to answer and give his reasons for his measures is one of the firmest barriers to liberty.¹³³

The Clause’s immunity from suit for individual legislators could be said to validate the writer’s concerns. But the writer focuses only on the lack of accountability of individual representatives, not of Congress as an institution. If the Clause was understood to cover not just legislators individually but Congress collectively as well, commentators would likely have voiced pertinent concerns.

Participants in the ratification debates who were wary of legislative overreach recognized that the Constitution supported a system in which the judiciary would provide a crucial check against illegal exercises of legislative power. During the Virginia debates, Edmund Pendleton, who had earlier presided over the state’s highest court when it invalidated an illegal action of the state legislature,¹³⁴ assured others that the federal judiciary would also serve this checking function as to Congress.¹³⁵ An understanding that the Speech or Debate Clause would not prevent judicial review of internal congressional proceedings, unlike its British counterpart, allows this view.

¹³² Farrand, Records, *supra* note 115, at 593.

¹³³ 3 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Delaware, New Jersey, Georgia, Connecticut 239 (Merrill Jensen ed., 1978).

¹³⁴ See *supra* notes 108–08 and accompanying text.

¹³⁵ 10 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia [3], 1197 (John P. Kaminski et al. eds., 1993).

Discussion in the early Congress also elucidates the public understanding of how the Speech or Debate Clause operated within the Constitution's scheme of legislative privileges. Charles Pinckney—who, as a delegate to the Constitutional Convention, had unsuccessfully proposed leaving the scope of legislative privilege entirely up to the Houses' discretion¹³⁶—proclaimed the narrowness of legislative privileges as a senator. In 1800, the Senate contemplated a resolution that would have allowed the body to adjudicate libel against it by the newspaper *Aurora*, which had mistakenly published that a certain bill had passed the Senate that had not.¹³⁷ Arguing that the Senate lacked the power to try the libel as a breach of privilege, Pinckney embarked on a lengthy exposition of legislative privilege under the new Constitution.¹³⁸ Legislative privileges were not crafted to provide an impenetrable shield from inquiry into the legislative process, Pinckney explained. They allowed the maintenance of order, punishment of members, and avoidance of disturbance due to legislators' arrests, for which the Houses could exercise the contempt power. But privileges did not go so far as to allow a chamber to conduct a trial for alleged libel against it; for that offense, the accused would face trial by jury, not trial by plaintiff.¹³⁹

Pinckney described how the Framers had intentionally departed from the parliamentary privileges of Great Britain. The Framers “well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here.”¹⁴⁰ Rather than allow broad and indeterminate privileges, the Constitution narrowly conscribed them.¹⁴¹ Because “no subject had been more abused than privilege,” the Framers “set the example, in merely limiting privilege to what was necessary, and no more.”¹⁴² The American system of government, Pinckney concluded, would not allow “a

¹³⁶ See *supra* notes 127–27 and accompanying text.

¹³⁷ 6 *Annals of Cong.* 68, 86 (1799–1801) (Gales & Seaton ed., 1851).

¹³⁸ *Id.* at 69–74.

¹³⁹ *Id.* at 72. In contrast, the privileges of Parliament were not so restricted. See *Parliamentary Privileges*, 3 *L. Rev. & Q.J. British & Foreign Juris.* 389, 390–92 (1846) (stating that through the power to define conduct as a breach of privilege after it occurred and to “invent[] new privileges at its sole discretion,” a House of Parliament could simultaneously act as “the law-maker,” “the party injured by its breach,” “the prosecutor,” “the judge,” and “the punisher”).

¹⁴⁰ 6 *Annals of Cong.*, *supra* note 137, at 72.

¹⁴¹ *Id.* at 69–70.

¹⁴² *Id.* at 74.

single branch, without check or control, [to] become judges in their own case.”¹⁴³

As to the individualized protection the Speech or Debate Clause offered to senators and representatives, the American Clause better resembled its British predecessor in scope. A 1799 essay by Hortensius (George Hay) stated that “[t]he object of this clause is, manifestly, to secure to the members, freedom of speech and debate,” defined as “total exemption from the control of any law, or the jurisdiction of any court.”¹⁴⁴ Hay noted that “[t]he word *freedom* when applied to *debate* is understood precisely in the same way in the British parliament” and that “freedom of debate in parliament, is secured, . . . in terms similar to those used in the Constitution of the United States.”¹⁴⁵

C. Expressio Unius and the Meaning of the Speech or Debate Clause

The U.S. Supreme Court has not rigorously examined the text of the Speech or Debate Clause.¹⁴⁶ Rather, cases addressing the Clause generally reference, in glowing terms, the history of the Clause as descending from the English Bill of Rights—with Parliament’s struggles against the Crown’s oppression serving as a compelling allusion favoring the separation-of-powers principle, of which the Speech or Debate Clause is just one textual manifestation.¹⁴⁷ The Court often then recites the rule that the Clause is to be read broadly to effectuate its separation-of-powers purposes.¹⁴⁸ Without much scrutiny, the Court has repeatedly stated that the Clause is nearly identical to Article 9.¹⁴⁹ Commentators analyzing the

¹⁴³ Id. at 80.

¹⁴⁴ Hortensius (George Hay), *An Essay on the Liberty of the Press* 42 (Phila., 1799).

¹⁴⁵ Id. at 42–43 (emphasis added).

¹⁴⁶ See Harrell, *supra* note 106, at 394–95.

¹⁴⁷ See, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 201–02 (1880); *Tenney v. Brandhove*, 341 U.S. 367, 372–73 (1951); *United States v. Johnson*, 383 U.S. 169, 177–78 (1966); *Powell v. McCormack*, 395 U.S. 486, 502 (1969).

¹⁴⁸ See *Johnson*, 383 U.S. at 179; *Gravel v. United States*, 408 U.S. 606, 624 (1972); *Doe v. McMillan*, 412 U.S. 306, 311 (1973); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 501–02 (1975).

¹⁴⁹ See *Johnson*, 383 U.S. at 177 (“The language of [Article V of the Articles of Confederation], of which the present clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689”); *Kilbourn*, 103 U.S. at 202 (“[I]t may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.”); see also *Tenney*, 341 U.S. at 372–73 (describing Article V of the Articles of Confederation as “quite close to the English Bill of Rights” without identifying textual differences in the Constitution’s Speech or Debate Clause).

Clause also often overlook the crucial textual differences between it and its British predecessor.¹⁵⁰ The Clause features several alterations that warrant attention.

First, the Speech or Debate Clause reordered the provision such that “Senators and Representatives,” rather than “freedom of speech or debate,” is the subject—the recipient of the Clause’s protection. This formulation differs from both Article 9 and the provisions included in early state constitutions.¹⁵¹ One commentator has noted this difference in wording, but concluded that “[b]ecause scant debate informed the drafting of the Speech or Debate Clause, we cannot know why the Framers chose to make members themselves, rather than freedom of legislative speech, the object that ‘shall not be questioned.’”¹⁵²

Second, the verbs contained in Article 9 were halved: rather than forbidding both questioning and impeaching, the Speech or Debate Clause only forbids legislators from being “questioned.” This too counters the Maryland Declaration of Rights, which included the word “impeached” but not “questioned.”¹⁵³ But it more closely adheres to Article 9’s text than the other early state constitutions, which did away with these verbs entirely, only forbidding the particular action of making “deliberation, speech, and debate” the “foundation” of any legal action.¹⁵⁴ The change of the Clause’s subject affects the meaning of its verb. When the subject was “freedom of speech or debate”—a legal concept—the rule that the concept shall not be “questioned” operated in conjunction with the rule that the concept not be “impeached.” Altogether, this language means that the concept must be upheld and treated as given, its validity incapable of being undermined.¹⁵⁵ But when the subject of the provision is transfigured from a legal concept to individual persons, the verb “question,” especially standing alone, most naturally reads as “put interrogatories to,” as one would “question” a witness.¹⁵⁶

¹⁵⁰ See Bradley, *supra* note 71, at 208 (noting that Reinstein and Silverglate ignore the omission of the phrase “*proceedings* in Parliament”); Harrell, *supra* note 106, at 397–98 (acknowledging “obvious textual differences” but resting on the assumption “that the drafters did not intend to substantially affect the Clause’s meaning”).

¹⁵¹ See *supra* notes 102–03 and accompanying text.

¹⁵² Harrell, *supra* note 106, at 397 (quoting U.S. Const. art. I, § 6, cl. 1).

¹⁵³ See *supra* note 104 and accompanying text.

¹⁵⁴ See *supra* note 105 and accompanying text.

¹⁵⁵ See Harrell, *supra* note 106, at 397–98.

¹⁵⁶ *Id.* at 417–18.

The two foregoing alterations suggest that the Speech or Debate Clause was redesigned to focus on providing immunity and testimonial privileges to individual members of Congress. A third particularly unnoticed textual change, which reinforces this notion and implies an intentional shift away from the collective shield of internal legislative proceedings, is the omission of the phrase “proceedings in Congress,” or another parallel to “proceedings in Parliament” included in Article 9.

Only one scholarly analysis has examined the possible significance of this change. Professor Craig Bradley attributed the omission of the phrase to the Framers’ intention to limit the scope of activities for which individual legislators were protected, such that the Speech or Debate Clause would strictly cover only speech and debate—not voting, committee activities, or other formal legislative actions.¹⁵⁷ This interpretation is dubious: the individual privileges under the Speech or Debate Clause were understood to be broad from the beginning. In the earliest American case interpreting a speech or debate provision, *Coffin v. Coffin*, the Massachusetts Supreme Judicial Court interpreted the state constitution as providing an expansive privilege, covering “every thing said or done by [a legislator], as a representative, in the exercise of the functions of that office.”¹⁵⁸ The Supreme Court has treated *Coffin*’s interpretation as instructive regarding the Speech or Debate Clause of the U.S. Constitution.¹⁵⁹

This Note presents an alternative interpretation to Bradley’s: rather than extending the individualized protection beyond the activities of speech and debate, the phrase “proceedings in Parliament” asserted the principle that actions which occur in Parliament are only governed by the law of Parliament and are not subject to judicial cognizance.¹⁶⁰ Article 9 was Parliament’s pronouncement that it would no longer tolerate judicial scrutiny of matters it controlled. Accordingly, the omission of a similar phrase in the American Clause (e.g., “proceedings in Congress”) contemplates a restoration of judicial review of Congress’s actions.

The interpretive weight of this omission must be assessed. Because the phrase was such an important aspect of Article 9, Bradley reasoned that “[i]t seems unlikely . . . that the Framers of the Constitution would simply

¹⁵⁷ Bradley, *supra* note 71, at 213.

¹⁵⁸ *Coffin v. Coffin*, 4 Mass. (4 Tyng) 1, 27 (1808).

¹⁵⁹ See *Spallone v. United States*, 493 U.S. 265, 279 (1990); *United States v. Helstoski*, 442 U.S. 477, 491 (1979); *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1880).

¹⁶⁰ See *supra* notes 76–78 and accompanying text.

have overlooked such a key term in the Bill of Rights provision.”¹⁶¹ Instead, “it is more reasonable to assume that the phrase was omitted for the purpose of narrowing the privilege.”¹⁶² This sentiment reflects the canon of interpretation *expressio unius est exclusio alterius* (“[t]he expression of one thing is the exclusion of another”).¹⁶³ Generally, this maxim should be applied with caution,¹⁶⁴ but there is a strong case for its application here.

The *expressio unius* canon more properly applies when one can point to a particular omission as compared to either a different text which served as the source for the provision at issue, or a different provision within the same text, than when the text at issue itself contains a certain term or list which is then argued to imply exclusion of any other terms not included.¹⁶⁵ In *McCulloch v. Maryland*, the Supreme Court exemplified this approach when it reasoned that the Tenth Amendment’s omission of the word “expressly,” which was included in a similar provision in the Articles of Confederation, bolstered the argument that the Constitution grants implied powers.¹⁶⁶ The Court stated, “The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments.”¹⁶⁷ Likewise, the Framers knew of the danger of shielding parliamentary proceedings from judicial scrutiny, and likely purposefully omitted a phrase like “proceedings in Congress” to craft legislative privilege into an individualized, rather than institutional, protection.

¹⁶¹ Bradley, *supra* note 71, at 209–10.

¹⁶² *Id.*

¹⁶³ Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1241–42 & n.65 (1995) (quoting The Federalist No. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

¹⁶⁴ See, e.g., Stephen M. Durden, Textualist Canons: Cabining Rules or Predilective Tools, 33 Campbell L. Rev. 115, 131–35 (2010); Vasan Kesavan & J. Gregory Sidak, The Legislator-in-Chief, 44 Wm. & Mary L. Rev. 1, 12 (2002) (stating that the maxim “must be contextually and sensitively applied”); Saikrishna Prakash, Removal and Tenure in Office, 92 Va. L. Rev. 1779, 1802 (2006) (labeling some constitutional provisions as “poor candidate[s] for the application of the *expressio unius est exclusio alterius* maxim”).

¹⁶⁵ Cf. The Federalist No. 83, at 496–97 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the canon does not apply to support the conclusion that the Constitution precludes Congress from mandating jury trials in civil cases only because it requires jury trials in criminal cases).

¹⁶⁶ 17 U.S. (4 Wheat.) 316, 406 (1819).

¹⁶⁷ *Id.* at 406–07.

This canon applies when comparing the U.S. Constitution to its American predecessor—the Articles of Confederation—as well as its British predecessors—the common law and the English Bill of Rights. The Supreme Court has utilized direct comparisons to British common law to inform the meaning of constitutional provisions. For example, in *Williamson v. United States*, the Court applied the British exception to the legislative privilege from arrests for “treason, felony and breach of the peace” to inform the meaning of the same phrase in the U.S. Constitution.¹⁶⁸ By using the same words as were settled under British common law, the Framers “intended to adopt, with the words, the full meaning which had been given to them by usage and authoritative construction” such that “the privilege of exemption from legal process may be considered the same as it is in England.”¹⁶⁹ In contrast, the textual deviations described above belie an inference of identical meaning as between Article 9 and the Speech or Debate Clause.

D. Departure from the British Example

American jurisprudence on the Speech or Debate Clause is steeped with references to British law even beyond the repeated acknowledgement of Article 9 as the Clause’s direct source. As the Supreme Court has encountered new proposed applications of the Clause, it has referred to British case law in a dynamic way, allowing the interpretation of the Clause to ebb and flow with the evolving understandings of parliamentary privilege.¹⁷⁰ But this method of analysis presents a pressing tension. At the same time that American case law leans on the developments of the British doctrine, it cannot ignore the fundamental structural differences between the two systems of

¹⁶⁸ 207 U.S. 425, 439–44 (1908).

¹⁶⁹ *Id.* at 445–46 (quoting Luther Stearns Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* 230 (Boston, Little, Brown & Co. 1856)).

¹⁷⁰ For example, in *Kilbourn v. Thompson*, 103 U.S. 168, 197–98 (1880), the Court abrogated its prior reasoning in *Anderson v. Dunn* to the extent that it suggested the House had a general power to punish for contempt, on the basis that the English case *Stockdale v. Hansard* had occurred in the intervening period after *Anderson*. While *Anderson* was decided “undoubtedly under pressure of the strong rulings of the English courts in favor of the privileges of the two Houses of Parliament,” *Stockdale* changed the English doctrine, such that courts now had power to “examine[] the[] reasonableness and justice” of Parliament’s resolutions or acts, “where the rights of third persons, in litigation before us, depend upon their validity.” *Kilbourn*, 103 U.S. at 198 (quoting *Stockdale v. Hansard* (1839) 112 Eng. Rep. 1112, 1196; 9 Ad. & E. 1, 224).

governance and the respective legislative privileges that each can withstand.

In its analyses of legislative privilege, the U.S. Supreme Court has lauded the institutional differences between Parliament and Congress. The systems differ in three key respects regarding the meaning and impact of the speech or debate privilege. First, while Article 9 is a manifestation of parliamentary supremacy,¹⁷¹ the Speech or Debate Clause was “designed to preserve legislative independence, not supremacy.”¹⁷² Second, Article 9 was founded upon Parliament’s role as the nation’s highest judicial authority,¹⁷³ while the Speech or Debate Clause was crafted to fit a system of co-equal, separated powers.¹⁷⁴ Third, the United Kingdom possesses no constraining, written constitution against which to measure the acts of Parliament,¹⁷⁵ while the U.S. Constitution is not only written, but supreme.¹⁷⁶

Molded to fit a novel constitutional structure in which the legislature would possess limited power and privileges, the Speech or Debate Clause,

¹⁷¹ See *United States v. Johnson*, 383 U.S. 169, 178 (1966).

¹⁷² *United States v. Brewster*, 408 U.S. 501, 508 (1972).

¹⁷³ See *The Case of Brass Crosby* (1771) 95 Eng. Rep. 1005, 1014; 3 *Wilson* 188, 204 (KB) (statement of Blackstone, J.) (stating that “[t]he House of Commons is a Supreme Court, and they are [the] judges of their own privileges and contempts”).

¹⁷⁴ *Gravel v. United States*, 408 U.S. 606, 616 (1972); see *Kilbourn*, 103 U.S. at 189 (“[T]he powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States,—a body which is in no sense a court . . .”).

¹⁷⁵ The British Constitution consists of a “potpourri of written statutes, practices, judicial opinions, and theoretical writings.” James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 *Buff. L. Rev.* 645, 657–58 (1992). It is considered “unwritten” because there is no single supreme document that is conducive to judicial review, and the statutes that compose it can be repealed by a majority vote of Parliament. See *id.* at 657 & n.45; Hardwari Lal, *Myth and Law of Parliamentary Privileges* 18 (1979). Under Albert Venn Dicey’s modern conception of parliamentary sovereignty, “the unwritten constitution does not provide any sort of *legal* limitations on Parliament.” Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 *Nw. U. L. Rev.* 543, 551 (2014).

¹⁷⁶ Compare Jo Eric Khushal Murkens, *Judicious Review: The Constitutional Practice of the UK Supreme Court*, 77 *Cambridge L.J.* 349, 349 (2018) (stating that the United Kingdom lacks the foundation for constitutional review in part because it does not have “a constitutional document [which] purports to constrain the enactment of laws and the exercise of public power”), with Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 *Tex. L. Rev.* 1459, 1469 (2001) (“An absence of judicial review would transform our constitutional system into one of legislative supremacy, which contradicts the Constitution’s core principle of a national government of limited powers.”).

in its omission of protection for legislative proceedings, better aligns with the Framers' vision for the structure of American government. Not only is the Clause a manifestation of separation-of-powers principles, as courts and commentators most often emphasize,¹⁷⁷ but more particularly it is an instrument of checks and balances between the branches.¹⁷⁸ The omission of a phrase like "proceedings in Congress" from the Clause should be recognized as a key adaptation from the British model of government, thereby providing American courts unprecedented authority to address allegedly unconstitutional congressional proceedings.

III. LEGISLATIVE PRIVILEGE AND JUDICIAL REVIEW OF CONGRESSIONAL PROCEEDINGS

The Speech or Debate Clause, as construed here, reinforces the principle that Congress is bound by the strictures of the Constitution in its statutory enactments and its legislative proceedings alike. Since the Supreme Court's first interpretation of the Speech or Debate Clause in *Kilbourn v. Thompson* in the late nineteenth century, judicial authority to review the constitutionality of legislative proceedings has not been denied. There, the Court announced:

Especially is it competent and proper for this court to consider whether [Congress's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine . . . whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.¹⁷⁹

As this passage conveys, the Constitution governs both the legislative process and the result of that process—enacted legislation.

¹⁷⁷ See, e.g., *United States v. Johnson*, 383 U.S. 169, 178 (1966); Stephen Gardbaum, *Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa*, 9 *Const. Ct. Rev.* 1, 3 (2019).

¹⁷⁸ Checks and balances is an animating component of a functional system of separation of powers: both checks and balances and the division of power comprise the American separation-of-powers principle. See Dimitrios Kyritsis, *Shared Authority: Courts and Legislatures in Legal Theory* 106–09 (2015).

¹⁷⁹ *Kilbourn*, 103 U.S. at 199 (quoting *Burnham v. Morrissey*, 80 Mass. (14 Gray) 226, 238 (1859)) (alterations adopted).

Despite the stable foundation supporting judicial review of both legislation and congressional proceedings, courts in many instances more readily scrutinize the former than the latter. This Part addresses two key dichotomies related to the misinterpretation of the Speech or Debate Clause which contribute to this result: first, the distinction between judicial review of legislation and judicial review of internal legislative proceedings; and second, the distinction between protection for individual legislators and protection for collective congressional bodies. The first distinction is entrenched in the case law and deserves to be questioned, while the second is ignored and warrants attention.

A. Judicial Review of Legislation Versus Internal Proceedings

American courts have largely maintained the British practice of non-intervention in internal matters of the legislature, even when they affect the rights of parties outside the legislature.¹⁸⁰ In the name of separation of powers, courts abstain from intervening in legislative proceedings, honoring the principle that “each arm of the State has its own domain, in which it is (to varying degrees) a master of its own process.”¹⁸¹ The prevailing perception is that “judicial review of congressional procedures is more problematic than review of its substantive outcomes, so that almost never is the former undertaken.”¹⁸² This trend is apparent in two aspects of judicial review: inquiring into legislative motive and enforcing compliance with the Constitution’s procedural rules governing the lawmaking process. As shown by the Speech or Debate Clause’s omission of institutional protection for legislative proceedings from judicial review, the Constitution does not contain a general rule that internal proceedings are non-reviewable. Permitting motive inquiries when individuals challenge congressional investigations as infringing their fundamental rights and relaxing the extreme deference which veils the

¹⁸⁰ See Andrew McCause Wright, *Congressional Due Process*, 85 *Miss. L.J.* 401, 466 (2016); see also Gardbaum, *supra* note 177, at 3 (noting that judicial non-intervention in the internal affairs of the legislature was “originally captured” in Article 9 of the English Bill of Rights).

¹⁸¹ Gardbaum, *supra* note 177, at 3 (quoting Anurag Deb, *Privacy International: A Matter of Constitutional Logic and Judicial Trust?*, *UK Const. L. Ass’n* (Jan. 8, 2019), <https://ukconstitutionallaw.org/2019/01/08/anurag-deb-privacy-international-a-matter-of-constitutional-logic-and-judicial-trust/> [https://perma.cc/HYB9-U36E]).

¹⁸² *Id.* at 4.

lawmaking process would lead courts to better achieve the robust judicial review of internal proceedings that the Speech or Debate Clause allows.

1. Legislative Motive

While modern courts are willing to look behind the veil of an asserted permissible purpose in assessing the constitutionality of legislation in a wide range of substantive areas of constitutional law—including under the Equal Protection Clause, the Establishment Clause, the Free Exercise Clause, the Free Speech Clause, the dormant Commerce Clause, and the Cruel and Unusual Punishments Clause¹⁸³—they are unwilling to do the same when internal legislative proceedings are at issue. In particular, courts refuse to allow an alleged impermissible motive to vitiate the constitutional validity of congressional investigations. Instead, judicial review of investigations consists of inquiry into: (1) whether the committee is acting within the scope of its delegated authority;¹⁸⁴ (2) whether the investigation serves a legitimate legislative purpose;¹⁸⁵ and (3) when there is an alleged infringement of an individual right, whether the public interest in gaining the information outweighs the private interest at stake.¹⁸⁶

Whether there is a valid legislative purpose is often the decisive question in determining the legality of an investigation or a subpoena issued in furtherance thereof, but courts afford Congress much deference. Congress may not conduct an investigation or serve a subpoena for the purpose of “law enforcement,” “to punish those investigated,” or “to expose for the sake of exposure.”¹⁸⁷ But in making this assessment of legislative purpose, courts may not inquire into the true motives behind the investigation: “motives alone would not vitiate an investigation which

¹⁸³ See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784, 1850–56 (2008); Katherine Shaw, *Speech, Intent, and the President*, 104 Cornell L. Rev. 1337, 1351–55 (2019).

¹⁸⁴ See *Watkins v. United States*, 354 U.S. 178, 187, 205–06 (1957) (holding that congressional subpoenas are invalid where they exceed the delegation of the House); *United States v. Rumely*, 345 U.S. 41, 42–43, 47–48 (1953) (holding that a congressional committee was without power to compel production of information because the requests exceeded the scope of the authorizing resolution).

¹⁸⁵ *Barenblatt v. United States*, 360 U.S. 109, 127 (1959); see *Kilbourn v. Thompson*, 103 U.S. 168, 193–94 (1880) (finding the House’s exercise of inherent contempt authority invalid where the investigation was judicial in nature, rather than legislative).

¹⁸⁶ See *Barenblatt*, 360 U.S. at 126, 134.

¹⁸⁷ *Watkins*, 354 U.S. at 187, 200 (internal quotation marks omitted).

had been instituted by a House of Congress if that assembly's legislative purpose is being served."¹⁸⁸ Out of deference to the legislature, the Court has applied a strong presumption of legitimate legislative purpose.¹⁸⁹

This message was repeated in a line of Supreme Court cases during the McCarthy era involving challenges to congressional investigations of the Communist Party.¹⁹⁰ For example, in *United States v. Barenblatt*, a committee witness challenged his conviction for contempt of Congress on the grounds that the investigating subcommittee violated the First Amendment by inquiring into his membership in the Communist Party.¹⁹¹ Justice Black was sympathetic to the argument that such investigations were chiefly aimed at "exposure and punishment" because of the witnesses' political affiliations,¹⁹² but the majority of the Court refused to conduct an inquiry into this allegedly impermissible motive because it deemed the investigation an exercise of legislative power.¹⁹³ Justice Black, evoking John Lilburne, argued that this was a particularly egregious abdication of the judicial duty to enforce the Bill of Rights in light of the lessons that the Framers learned from parliamentary trials that were conducted without safeguards for individual rights.¹⁹⁴

Based on the 1810 case *Fletcher v. Peck*,¹⁹⁵ the Court has imbedded within its legislative privilege jurisprudence the rule that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators."¹⁹⁶ As applied to the context of allegedly racially

¹⁸⁸ Id. at 200.

¹⁸⁹ See *McGrain v. Daugherty*, 273 U.S. 135, 177–78 (1927); John W. Gilligan, *Congressional Investigations*, 41 J. Crim. L. & Criminology 618, 624–25, 631 (1951).

¹⁹⁰ See *Barenblatt*, 360 U.S. at 113, 133; *Tenney v. Brandhove*, 341 U.S. 367, 369–370, 377 (1951); *Wilkinson v. United States*, 365 U.S. 399, 407, 412–13 (1961).

¹⁹¹ *Barenblatt*, 360 U.S. at 113–16.

¹⁹² Id. at 162 (Black, J., dissenting).

¹⁹³ Id. at 132–33.

¹⁹⁴ Id. at 160–62 (Black, J., dissenting); see also *supra* notes 97–101 and accompanying text (discussing the parliamentary trial of John Lilburne).

¹⁹⁵ 10 U.S. (6 Cranch) 87, 131 (1810) ("[I]f the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.").

¹⁹⁶ See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (citing *Fletcher*, 10 U.S. at 130); see also *Barenblatt*, 360 U.S. at 132–33 (stating that the principle that "the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of [constitutional] power" applies "as well to committee investigations into the need for legislation as to the enactments which such investigations may produce" (citing *Tenney*, 341 U.S. at 377–78)); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508–09 (1975) ("Our cases make clear

discriminatory statutes, the *Fletcher* rule required that statutes neutral on their face could not be exposed to “impeachment by evidence that [legislators] were actually motivated by racial considerations.”¹⁹⁷ *Fletcher* has since been undermined in the very context in which it originated—review of enacted statutes—beginning in 1977 with the Court’s decision in *Village of Arlington Heights v. Housing Development Corp.*¹⁹⁸ However, the Court in distanced reliance on *Fletcher* has persisted in precluding motive inquiries in cases involving legislative proceedings. Since *Fletcher*’s abrogation in the statutory context, the Supreme Court has eluded motive inquiries in the name of the Speech or Debate Clause alone, even though prior cases restricting motive inquiries were based on *Fletcher*.¹⁹⁹

The Supreme Court’s recent decision in *Trump v. Mazars* offers some promise that this gap in scrutiny between legislation and legislative proceedings may narrow. There, the Court issued a list of new guidelines for courts facing challenges to congressional subpoenas that target the President’s information, including that “courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose.”²⁰⁰ The guidance reads as applying to all subpoenas, not just those directed against the President, though the Court stated that this need for attentiveness to evidence is “particularly true when Congress contemplates legislation that raises sensitive constitutional issues.”²⁰¹ This may invite lower courts to scrutinize the

that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.”).

¹⁹⁷ *Washington v. Davis*, 426 U.S. 229, 242–43 (1976) (citing *Palmer v. Thompson*, 403 U.S. 217, 224–26 (1971)).

¹⁹⁸ *Nelson*, supra note 183, at 1851 (explaining how the Court reversed course and “indicated that judges could legitimately seek to unearth the hidden motivations behind legislative acts” (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977))).

¹⁹⁹ See *United States v. Helstoski*, 442 U.S. 477, 487–90 (1979) (relying on *United States v. Johnson*, 383 U.S. 169 (1966) in holding evidence of past legislative acts inadmissible); *Johnson*, 383 U.S. at 179–80, 184–85 (finding inquiries into motive for legislative acts impermissible in criminal prosecutions under general criminal statutes based on the *Fletcher* rule); see also *Helstoski*, 442 U.S. at 490 (“Revealing information as to a legislative act—speaking or debating—to a jury would subject a Member to being ‘questioned’ in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause.”); *United States v. Gillock*, 445 U.S. 360, 366–67 (1980) (stating that *Helstoski* reaffirmed the rule that the Speech or Debate Clause bars motive inquiries).

²⁰⁰ *Trump v. Mazars USA*, 140 S. Ct. 2019, 2036 (2020).

²⁰¹ *Id.*

purpose behind congressional investigations more closely and to require more robust evidence of a permissible purpose. But so long as a finding of “legislative purpose” remains enough to mask a constitutionally impermissible motive of the legislators taking part in the contested action,²⁰² such as a desire to expose or punish a witness for his associational involvements or religious beliefs, congressional investigations will remain shielded from meaningful judicial review in a manner not contemplated by the text of the Constitution or supported by the Speech or Debate Clause.

2. *Legislative Procedures*

Where the Constitution’s procedural requirements for lawmaking are at issue, courts are more willing to intensively review legislation than internal congressional proceedings. Unlike impeachment procedures,²⁰³ lawmaking procedures are constitutionally specified and judicially enforceable.²⁰⁴ The Supreme Court has exercised its judicial power over legislative procedures in some respects. Though the Constitution gives each House of Congress the power “[to] determine the Rules of its Proceedings,”²⁰⁵ the Houses may not through this rulemaking power “ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be

²⁰² See *Barenblatt v. United States*, 360 U.S. 109, 133 (1959) (explaining that the purpose inquiry ends where the investigation is found to be an exercise of legislative power rather than “a power which could only be properly exercised by another branch of the government” (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1880))).

²⁰³ See *Nixon v. United States*, 506 U.S. 224, 228–29 (1993) (finding Senate impeachment trial procedures nonjusticiable). But see *id.* at 253–54 (Souter, J., concurring in the judgment) (recognizing that there might be circumstances in which the Senate’s impeachment process “might be so far beyond the scope of its constitutional authority . . . as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence”). It is an open question whether the Due Process Clause is enforceable as to impeachment proceedings. See Todd Garvey, Cong. Rsch. Serv., R45983, *Congressional Access to Information in an Impeachment Investigation* 17–18 & n.118 (2019); Robert S. Catz, *Judicial Review of Congressional Exercise of Impeachment Powers*, 40 Kan. L. Rev. 853, 854 (1992).

²⁰⁴ Constitutional provisions specifying lawmaking procedures include the Bicameralism and Presentment Clause and the Origination Clause. U.S. Const. art. I, § 7. The Supreme Court explained that courts are to enforce the latter Clause, just as they would other constitutional commands, in *United States v. Munoz-Flores*, 495 U.S. 385, 396–97 (1990) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–80 (1803)).

²⁰⁵ U.S. Const. art. I, § 5.

attained.”²⁰⁶ The Court has also permitted review of whether congressional committees have properly followed a House’s own rules,²⁰⁷ and it has second-guessed a House’s construction of its own rule where the rule affected people outside of the legislature.²⁰⁸

In other respects, the Court has shied away from judicial review of the legislative process. Under the Court’s present doctrines, a statute that creates a new legislative procedure which does not comport with constitutional procedural requirements can be judicially invalidated more readily than a statute that itself failed to satisfy those requirements.²⁰⁹ In *INS v. Chadha*, the Court exemplified the former by finding a statute which established a legislative veto unconstitutional, violative of bicameralism and presentment.²¹⁰ However, under the enrolled bill doctrine, established in *Marshall Field & Co. v. Clark*, courts will decline to review whether a particular law was validly enacted, relying on the enrolled bill as conclusive evidence of proper enactment.²¹¹ In effect, even where a bill did not itself satisfy bicameralism—for instance, by not having been passed in the same form by both chambers of Congress²¹²—the validity of the bill cannot be questioned, as courts refuse to turn to the congressional journals as evidence that the constitutional requirements were not satisfied. Benefitting from this deference, the Senate has even passed bills into law by “unanimous consent” when the Senate Chamber was in fact nearly empty.²¹³ The Court countenanced this practice in

²⁰⁶ *United States v. Ballin*, 144 U.S. 1, 5–6 (1892).

²⁰⁷ *Christoffel v. United States*, 338 U.S. 84, 89–90 (1949); *Yellin v. United States*, 374 U.S. 109, 110 (1963).

²⁰⁸ *United States v. Smith*, 286 U.S. 6, 33, 37–38 (1932).

²⁰⁹ See Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. Rev. 1915, 1917–18 (2011) [hereinafter Bar-Siman-Tov, *Puzzling Resistance*].

²¹⁰ 462 U.S. 919, 957–59 (1983); see Gardbaum, *supra* note 177, at 4 & n.15; see also *Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (invalidating a statute that established the line-item veto).

²¹¹ 143 U.S. 649, 674 (1892); see Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine*, 97 Geo. L.J. 323, 327–31 (2009) [hereinafter Bar-Siman-Tov, *Legislative Supremacy*].

²¹² This has occurred at least once in recent times. See Bar-Siman-Tov, *Legislative Supremacy*, *supra* note 211, at 325–26, 331–32 (describing alleged discrepancies between the House and Senate versions of the Deficit Reduction Act of 2005, challenges to which were uniformly rejected under the enrolled bill doctrine).

²¹³ See 573 U.S. 513, 552–55 (2014). The Court’s refusal to second-guess the actual presence of a quorum, where the Senate Journal indicates that a quorum was present, stems from “the same principle” as the enrolled bill doctrine. *Id.* at 551–52. Even C-SPAN coverage showing an almost-empty chamber was unable to surmount this extreme deference. *Id.* at 554.

NLRB v. Noel Canning, so as not to “risk undue judicial interference with the functioning of the Legislative Branch.”²¹⁴

The enrolled bill doctrine originates from British common law, which requires that when the validity of a statute is challenged, “the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed or weakened by the journals of Parliament.”²¹⁵ Some American courts have felt obliged to adhere to this doctrine upon the premise that “there has been no departure from the principles of the common law,” reasoning that there is no constitutional or statutory provision departing from the rule.²¹⁶ But adherence to the enrolled bill doctrine is likely unwarranted. As this Note argues, a constitutional departure from the British doctrine does exist in the Federal Constitution, not only in the structural system of checks and balances and the import of the written constitution, but also in the Framers’ deviation in the Speech or Debate Clause from the anti-judicial review principle of Article 9.²¹⁷

Only a minority of states follow the enrolled bill doctrine.²¹⁸ State courts that follow the doctrine often justify their adherence in terms of respect for the legislature as a co-equal branch,²¹⁹ while those that have moderated or abandoned the doctrine prioritize their allegiance to constitutional, rather than legislative, supremacy.²²⁰ Another differentiating factor affecting whether a state accepts the doctrine is the weight it places on British parliamentary practice.²²¹ For its part, the U.S.

²¹⁴ *Id.* at 552–55.

²¹⁵ *Marshall Field & Co. v. Clark*, 143 U.S. at 675 (quoting *Sherman v. Story*, 30 Cal. 253, 276 (1866)).

²¹⁶ *Id.* (quoting *Sherman*, 30 Cal. at 276).

²¹⁷ See *supra* Section II.D.

²¹⁸ Bar-Siman-Tov, *Legislative Supremacy*, *supra* note 211, at 340.

²¹⁹ See, e.g., *Eyman v. Wyman*, 424 P.3d 1183, 1192 (Wash. 2018); *Geja’s Café v. Metro. Pier & Exposition Auth.*, 606 N.E.2d 1212, 1221 (Ill. 1992).

²²⁰ See, e.g., *D & W Auto Supply v. Dep’t of Revenue*, 602 S.W.2d 420, 424 (Ky. 1980) (rejecting “the premise that the equality of the various branches of government requires that we shut our eyes to constitutional failings and other errors of our coparceners in government”); *State Terminal Corp. v. Gen. Scrap Iron, Inc.*, 264 A.2d 334, 337 (R.I. 1970).

²²¹ Compare, e.g., *Wilmington Savings Fund Soc’y v. Green*, 288 A.2d 273, 274 (Del. 1972) (stating that the enrolled bill doctrine is “historically founded on the respect in England for Parliamentary act, considered to be regal, and thus, in a sense, undisputable” and that “[t]his idea has been transposed to our system”), with *Opinion of the Justices*, 35 N.H. 579, 580–81 (1858) (opining that legislative journals are not “mere remembrances of proceedings” but authentic records). The idea that journals are “remembrances only,” not records, is derived from English custom, and the U.S. Constitution diverged from that custom by requiring Congress to publish journals. See *Weeks v. Smith*, 18 A. 325, 326–27 (Me. 1889).

Supreme Court has begun re-evaluating its adherence to the enrolled bill doctrine, but whether the Court will follow the states that have wholly rejected the doctrine remains to be seen.²²² To the extent that the enrolled bill doctrine at the federal level rests upon the notion that the American constitutional system imported the same level of judicial deference towards Congress as British courts accord Parliament, the textual deviations of the Speech or Debate Clause should undermine the doctrine's validity. The Speech or Debate Clause, in contrast to Article 9, neither shields the lawmaking process from judicial review nor forbids the courts from referring to legislative materials, so the text of the Clause leaves the enrolled bill vulnerable to impeachment by available evidence.

In limited areas of constitutional law, federal courts are also willing to engage in what is called “semiprocedural review,”²²³ in which they “review[] the legislative process as part of [the] substantive constitutional review of legislation.”²²⁴ Courts will assess the internal congressional proceedings leading to enactment, analyzing the nature and quality of deliberation and whether there was adequate justification in the legislative record for the substantive goals and policy means chosen.²²⁵ So far, this review only occurs when the substantive content of the legislation is allegedly unconstitutional.²²⁶ This again exemplifies courts' greater willingness to review statutes alleged to be substantively unconstitutional—treating inadequate deliberation as evidence of a substantive infirmity—than to review the adequacy of the legislative

²²² In *United States v. Munoz-Flores*, the Supreme Court held that the enrolled bill doctrine does not apply where a “constitutional provision is implicated,” such as the Origination Clause, but this rule apparently does not encompass the bicameralism requirement of Article I, Section 7. 495 U.S. 385, 391 n.4 (1990); see Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361, 426 & n.209 (2004); see also Bar-Siman-Tov, *Legislative Supremacy*, supra note 211, at 351–52 (describing that lower federal courts have applied the abrogation of the enrolled bill doctrine to the Origination Clause only).

²²³ There are a variety of other terms used, including “semisubstantive review,” “on the record review,” review according to “rights-driven rules of deliberation and dialogue,” “structural safeguards of substantive rights,” and “structural due process.” See Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. Cal. L. Rev. 1281, 1282–83 & n.18 (2002).

²²⁴ Bar-Siman-Tov, *Puzzling Resistance*, supra note 209, at 1924.

²²⁵ Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L.J. 1707, 1708, 1728 (2002). For a critique of this practice, see Ruth Colker & James J. Brudney, *Dissing Congress*, 100 Mich. L. Rev. 80, 85–86 (2001) (arguing that the result of this practice is the “Court taking greater power for itself, displacing Congress's proper factfinding role”).

²²⁶ Bar-Siman-Tov, *Puzzling Resistance*, supra note 209, at 1924.

process as a freestanding procedural requirement.²²⁷ Faulty legislative procedures standing alone, whether they violate the lawmaking process of Article I, Section 7 or notions of due process of lawmaking,²²⁸ will not yield a judgment that Congress or its chambers acted unconstitutionally or that the legislation is void. For reasons not supported by the text of the Constitution, courts prefer to inspect the substantive validity of enacted legislation and any associated procedural shortcomings, otherwise evading inquiry into the procedural validity of legislation.²²⁹

The omission of Article 9's anti-judicial review principle from the Speech or Debate Clause means that American courts possess the authority, along with the duty, to review the constitutionality of these congressional proceedings. To be sure, the American judiciary has stretched far beyond its British counterpart in its incidental review of internal legislative proceedings. American courts, unlike British courts,²³⁰ have the power to review the constitutionality of statutes, to inquire into legislative purpose behind challenged statutes, and to cite records of congressional proceedings in a manner that may question their sufficiency or propriety. But there is no reason supported by the text of the Constitution that judicial review of internal legislative proceedings must remain only incidental to alleged substantive constitutional infirmities of enacted legislation. Because the Speech or Debate Clause shows a deliberate departure from the principle of non-reviewability of congressional proceedings, the Constitution permits independent review of the procedural constitutionality of statutes—along with review of the constitutionality of legislative investigations and other proceedings. The question remains whether prudential considerations, through mechanisms like the political question doctrine,²³¹ can by themselves justify only

²²⁷ See *id.*

²²⁸ For arguments in favor of an independent due process requirement for lawmaking, see generally Frickey & Smith, *supra* note 225; Victor Goldfeld, Note, Legislative Due Process and Simple Interest Group Politics: Ensuring Minimal Deliberation through Judicial Review of Congressional Processes, 79 N.Y.U. L. Rev. 367 (2004).

²²⁹ Hans Linde, in the exposition of his theory on “due process of lawmaking,” decries the lacuna in judicial review for legislation that does not adhere to the proper lawmaking process itself but otherwise lacks substantive constitutional infirmity. See Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 242–43 (1976).

²³⁰ See *supra* Section I.A.

²³¹ But see *United States v. Munoz-Flores*, 495 U.S. 385, 389–96 (1990) (finding the claim that an assessment statute violated the Origination Clause was justiciable and not a political question); *Powell v. McCormack*, 395 U.S. 486, 548–50 (1969) (finding that adjudicating

shallow review of congressional proceedings despite this textual departure.

B. Collective Versus Individualized Protection from Judicial Scrutiny

The Framers' revisions to the Speech or Debate Clause suggest not only that internal congressional proceedings are susceptible to robust review, but also that the protections from judicial scrutiny the Clause provides are applicable to legislators as individuals—and inapplicable to collective congressional institutions, including the full Congress, the chambers, and committees.²³² Like any institution, Congress consists of both a whole and its parts, though courts often fail to distinguish between them.²³³

Courts have struggled to reconcile the Speech or Debate Clause with judicial review of congressional proceedings. Justice Marshall, concurring in *Eastland v. United States Servicemen's Fund*, focused on this issue, stating that “the Speech or Debate Clause protects legislators and their confidential aides from suit; it does not immunize congressional action from judicial review.”²³⁴ In attempt to alleviate this tension, courts have drawn a distinction between defensive claims of unconstitutionality and claims where the congressional member or body is a named defendant.²³⁵ But the distinction between individual members and congressional bodies better reflects the text and purpose of the Speech or Debate Clause.

whether the House of Representatives unconstitutionally excluded Powell was justiciable and not a political question).

²³² Cf. Yankwich, *supra* note 8, at 966 (“It is plain that the [Speech or Debate] immunity began as a protection against executive interference with the individual legislator. It broadened so as to become an absolute shield against all outside interference with the legislative process itself.”).

²³³ See Frickey & Smith, *supra* note 225, at 1731–32. For example, the U.S. Court of Appeals for the D.C. Circuit, on rehearing en banc, recently corrected the panel's failure to distinguish between individual members of Congress and Houses as collective bodies in its standing analysis. *Comm. on the Judiciary of the U.S. House of Representatives v. McGahn*, 968 F.3d 755, 774–75 (D.C. Cir. 2020). But earlier, in *Common Cause v. Biden*, the D.C. Circuit implied that the Speech or Debate Clause protects both individual senators and the Senate as a whole from suit, such that a complaint against either would be dismissed. 748 F.3d 1280, 1283 (D.C. Cir. 2014).

²³⁴ 421 U.S. 491, 513 (1975) (Marshall, J., concurring in the judgment).

²³⁵ See *United States v. AT&T*, 567 F.2d 121, 129 (D.C. Cir. 1977) (distinguishing cases on the basis of whether the challenge to congressional investigatory activity was raised as a defense).

As to immunity from suit, courts have failed to meaningfully notice, much less accept, this distinction. Often, plaintiffs raising an affirmative or anticipatory challenge to legislative proceedings name individual members of Congress as defendants, and the suit against the legislators will be properly dismissed, leaving as defendants any named congressional staff not classified as a close aide.²³⁶ But even where congressional committees or other bodies are named as defendants, courts have dismissed claims against both the bodies and individual legislators without distinction.²³⁷ As a result, for judicial review of congressional proceedings to occur, the case must fall within a narrow range of permissible procedural postures. Individuals may challenge the constitutionality of congressional proceedings as a *defense*, as when

²³⁶ See, e.g., *Doe v. McMillan*, 412 U.S. 306, 324 (1973) (maintaining the suit against the superintendent of documents and the public printer); *Powell*, 395 U.S. at 506 (maintaining the suit against House employees); *Kilbourn v. Thompson*, 103 U.S. 168, 170, 204–05 (1880) (maintaining the suit against the Sergeant-at-Arms).

²³⁷ In *Tenney v. Brandhove*, 341 U.S. 367, 367, 379 (1951), the Supreme Court concluded that “the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act,” and dismissed the suit against both. Although the Court in *Tenney* did not apply the Speech or Debate Clause directly, but rather the Civil Rights Act of 1871 (42 U.S.C. § 1983) in light of federal common law, the Court largely based its analysis on its interpretation of the Speech or Debate Clause, reasoning that the Clause informed the “presuppositions of our political history.” *Id.* at 372–76; see *United States v. Gillock*, 445 U.S. 360, 371–72 & n.10 (1980). Following *Tenney*, the D.C. Circuit has stated that both “legislative [aides] and committees” can invoke the Speech or Debate Clause. See *Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 9 & n.9 (D.C. Cir. 2006) (en banc) (plurality opinion). Courts of appeals have been divided in whether they address suits against congressional bodies under the rubric of the Speech or Debate Clause as opposed to sovereign immunity. Compare *Jud. Watch, Inc. v. Schiff*, 998 F.3d 989, 990, 993 (D.C. Cir. 2021) (affirming the dismissal of a lawsuit against a House committee and its chairman based on the Speech or Debate Clause and declining to address whether the lawsuit should be dismissed due to sovereign immunity) and *Shade v. Congress*, No. 13-5185, 2013 WL 5975978, at *1 (D.C. Cir. Oct. 15, 2013) (dismissing claims against the U.S. Government and the Secretary of Agriculture on the basis of sovereign immunity but claims against Congress and the House of Representatives on the basis of the Speech or Debate Clause), with *Rockefeller v. Bingaman*, 234 F. App’x 852, 855–56 (10th Cir. 2007) (dismissing claims against the House of Representatives and the Senate based on sovereign immunity and claims against individual legislators based on the Speech or Debate Clause) and *Keener v. Congress of the U.S.*, 467 F.2d 952, 953 (5th Cir. 1972) (upholding the dismissal of claims against Congress on the basis of sovereign immunity). A full exploration of the relationship between the application of the Speech or Debate Clause to congressional bodies and the sovereign immunity of congressional bodies in the context of suits that allege constitutional violations is beyond the scope of this Note, but the two concepts are likely closely connected. Cf. *Rockefeller*, 234 F. App’x at 855 (stating that the exceptions to sovereign immunity “for ultra vires and unconstitutional conduct would in effect nullify the legislative immunity provided to members of Congress by the Speech or Debate Clause” and so finding the exceptions unavailable).

charged with contempt,²³⁸ but they may not proactively sue to protect their rights unless they name as defendants legislative agents who are distant enough from the legislative activity to lack immunity.²³⁹ Even where a congressional committee files suit to enforce its subpoena, courts may do no more than refuse to order compliance with the subpoena; they may not exercise injunctive authority if they find the subpoena unlawful.²⁴⁰

As this Note argues, the Speech or Debate Clause narrowed legislative immunity from covering Congress and its chambers as institutions, as is the case for the British Parliament under Article 9, to protecting only the “Senators and Representatives” who are the subject of the Clause. In service of the judicial duty to enforce the written provisions of the Constitution, courts should reassess whether the Clause can bar claims against legislative bodies.

CONCLUSION

The Constitution’s limitations on the exercise of legislative power are not feeble, unenforceable guidelines. Just as Congress is constrained in its powers, so too is it limited in its privileges. By omitting protection for Congress from judicial review of legislative proceedings, the Framers abandoned a system of government that places the legislature not only above the other separated powers, but above the rule of law itself. Closer study of the text and history of the Speech or Debate Clause and its British analogue, Article 9 of the English Bill of Rights, evidences this departure. The Speech or Debate Clause—properly understood as a narrower descendent of Article 9, rather than its twin—enlivens the American notion that the judiciary can and should enforce the strictures of the written Constitution against Congress in both its final legislative product and the processes that lead to it.

²³⁸ See *Tenney*, 341 U.S. at 380 (Black, J., concurring).

²³⁹ *Powell*, 395 U.S. at 506 & n.26 (maintaining the suit against House employees and reserving the question of whether the suit could be maintained “solely against members of Congress where no agents participated in the challenged action and no other remedy was available”).

²⁴⁰ See Senate Permanent Subcomm. on Investigations v. Ferrer, 856 F.3d 1080, 1086–87 (D.C. Cir. 2017) (finding that the Speech or Debate Clause forbids the court from enjoining committees in activities that are related to legislative functions).