

SALVAGING THE SPEAKER CLAUSE: THE CONSTITUTIONAL CASE AGAINST NONMEMBER SPEAKERS OF THE HOUSE

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As the Founding generation understood the word, “Speaker” meant an elected member of the House. Yet modern representatives nominate non-House-members for the speakership—and many argue the practice is constitutional. To correct this constitutional drift, this Article closely analyzes the text of the Speaker Clause, the structure of the Constitution, and 700 years of history and tradition to show that the Constitution requires the Speaker of the House to be a member of the House. It also considers the practicalities of correcting this drift. If, as this Article argues, the Constitution bars nonmembers from the speakership, who can enforce that rule, especially if Congress itself is the one violating it? Though the Speaker Clause likely is not justiciable, Congress has an independent duty—equally important to that of the judiciary—to uphold the Constitution.

This Article’s conclusion is significant. It clarifies the procedure and rationale involved in choosing a Speaker of the House. And by excluding nonmembers as candidates for the speakership, this Article’s conclusion promises to make future speakership negotiations and votes smoother, eliminating one avenue for meaningless protest votes.

INTRODUCTION

For Kevin McCarthy, the 118th Congress began with a series of terrible, horrible, no good, very bad days.¹ And that was before the real trouble started.

Although McCarthy was the majority party’s candidate for Speaker of the House, razor-thin electoral margins and opposition within his own party made his journey to the chair a historically difficult one. For the first time in a century, the election of the Speaker required multiple ballots²—a phenomenon seen only 16 of the 128 speaker elections to

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¹ See generally JUDITH VIORST, ALEXANDER AND THE TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY (1972).

² Barbara Sprunt & Susan Davis, *Kevin McCarthy is Elected House Speaker After 15 Votes and Days of Negotiations*, NPR (Jan. 7, 2023, 1:43 AM), <https://www.npr.org/2023/01/06/1147470516/kevin-mccarthy-speaker-of-the-house-vote> [<https://perma.cc/9CEQ-MAWT>] (noting that the election required fifteen rounds of balloting).

date.³ In the wee hours of Saturday, January 7, 2023, after four days of horse-trading and a whopping fifteen ballots, Kevin McCarthy finally became the Speaker.⁴

Then, a mere ten months later, McCarthy made history again by becoming the first Speaker to be ousted.⁵ Clocking in at 269 days, his speakership was the third shortest in history.⁶ To bipartisan dismay, its collapse ushered in another slow, contentious Speaker election. After weeks of chaos without a Speaker and three failed Speaker candidates, Mike Johnson was elected Speaker on the fourth ballot cast to fill the vacancy.⁷

In that role, Johnson sits atop one of the tripartite peaks of American political power. He is in rare company. He occupies the same chair as giants like Henry Clay, Joseph Cannon, and Sam Rayburn. Only fifty-six people have ever served as Speaker of the House⁸ And throughout the 234-year history of that august body, every single one of them has been an elected member of the House. In fact, for three quarters of the House's existence, only House members were nominated.⁹ But

³ OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Speaker Elections Decided by Multiple Ballots*, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Office/Speakers-Multiple-Ballots/> [<https://perma.cc/LA5H-99RB>] (last visited Feb. 10, 2023).

⁴ Sprunt & Davis, *supra* note 2.

⁵ Moira Warburton, Richard Cowan & David Morgan, *Kevin McCarthy Ousted as House Speaker in Historic Vote*, REUTERS (Oct. 4, 2023, 6:01 AM), <https://www.reuters.com/world/us/mccarthy-says-he-thinks-he-will-survive-leadership-challenge-us-house-2023-10-03> [<https://perma.cc/LA5H-99RB>] (explaining the consequences of McCarthy's ouster in October, only ten months after assuming the position of Speaker).

⁶ Christopher Hickey, *McCarthy has Lost the Gavel. It was the Third Shortest Speakership in History*, CNN politics (Oct. 3, 2023, 8:19 PM), <https://www.cnn.com/2023/10/03/politics/house-speaker-shortest-kevin-mccarthy-dg/index.html> [<https://perma.cc/83VQ-F8FH>] (“When Speaker Kevin McCarthy failed to keep his leadership post, his 269-day speakership became the shortest in more than 140 years.”).

⁷ Joan E. Greve, *Republican Mike Johnson Elected House Speaker After Weeks of Chaos*, THE GUARDIAN (Oct. 25, 2023, 3:27 PM), <https://www.theguardian.com/us-news/2023/oct/25/mike-johnson-republican-house-speaker-vote> [<https://perma.cc/PR8H-4DZM>] (noting that Johnson was “House Republicans’ fourth speaker nominee in three weeks.”); *see also supra* note 3.

⁸ OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Speaker of the House Fast Facts*, HISTORY, ART & ARCHIVES, <https://history.house.gov/Institution/Firsts-Milestones/Speaker-Fast-Facts/> [<https://perma.cc/F8GT-FZP8>] (last visited Feb. 10, 2023).

⁹ VALERIE HEITSHUSEN & RICHARD S. BETH, CONG. RSCH. SERV., RL30857, *SPEAKERS OF THE HOUSE: ELECTIONS, 1913–2021*, 5-8 (2021) [hereinafter “CONG. RSCH. SERV., *SPEAKER ELECTIONS*”].

beginning with the 105th Congress (1997), a new phenomenon emerged: votes for nonmembers.¹⁰

In 1997, for the first time in history, two representatives cast their votes for candidates who were not members of the House.¹¹ Since then, this phenomenon has occurred repeatedly, and with increasing frequency. In 2013, 2015, 2019, 2021, and again in 2023, representatives proposed that nonmembers assume the speakership. The candidates have included former House members like Newt Gingrich and Lee Zeldin, as well as high-profile politicians with no ties to the House like Colin Powell, Jeff Sessions, Rand Paul, Joe Biden, Stacey Abrams, and Donald Trump.¹² In each case, these votes were cast to protest party candidates.¹³ And each time, the votes sparked an armchair debate on whether the Constitution permits the House to elect a nonmember as Speaker.¹⁴ A large contingent, backed by the Congressional Research Office, maintains that the Constitution does not prohibit nonmember Speakers, while a smaller, less-vocal group has defended a member-only view.¹⁵ A 2015 headline in the *Christian Science Monitor* encapsulates the majority view: “anyone can run for House speaker, even you.”¹⁶

¹⁰ *Id.* at 3 (highlighting that several ballots from 1997-2021 included votes for candidates that were not Members of the House at the time).

¹¹ *Id.* at 7 tbl. 1.

¹² *Id.* at 3 tbl. 1; *see also* *Matt Gaetz votes for Trump for speaker*, AXIOS (Jan. 5, 2023), <https://www.axios.com/2023/01/05/matt-gaetz-trump-house-speaker> [<https://perma.cc/F8GT-FZP8>].

¹³ *See, e.g.*, Julia Shapero, *Gaetz Votes for Trump for Speaker on 7th Ballot*, THE HILL (Jan. 5, 2023, 2:11 PM), <https://thehill.com/homenews/house/3800979-gaetz-votes-for-trump-for-speaker-on-7th-ballot/> [<https://perma.cc/D2N8-EAEK>] (explaining that Rep. Matt Gaetz nominated former President Trump for Speaker of the House in opposition of Rep. Kevin McCarthy’s bid).

¹⁴ *See, e.g.*, Peter Grier, *John Boehner Exit: Anyone Can Run for House Speaker, Even You*, CHRISTIAN SCI. MONITOR (Sept. 25, 2015), <https://www.csmonitor.com/USA/Politics/Decoder/2015/0925/John-Boehner-exit-Anyone-can-run-for-House-speaker-even-you> [<https://perma.cc/8L8Q-G2BJ>] (“Under the Constitution, the speaker does not have to be a member of the House . . . [t]he speaker can be an ordinary, private citizen.”).

¹⁵ *See, e.g.*, VALERIE HEITSHUSEN & JAMES V. SATURNO, CONG. RSCH. SERV., 97-780, THE SPEAKER OF THE HOUSE: HOUSE OFFICER, PARTY LEADER, AND REPRESENTATIVE 1-2, (2017) [hereinafter CONG. RSCH. SERV., THE SPEAKER] (“[T]here is no requirement that the Speaker be a Member of the House.”); *but see* Matthew J. Franck, *Speaker Gingrich? Not Really Constitutional*, NAT’L REV. (Sept. 30, 2015, 3:12 PM), <https://www.nationalreview.com/bench-memos/speaker-gingrich-not-really-constitutional-matthew-j-franck/> [<https://perma.cc/L6JC-8V5Z>] (“[T]here is no reason to believe that the framers intended, by the more stripped-down language of the Constitution, to open the office of speaker to non-members.”).

¹⁶ Grier, *supra* note 14.

These debates have largely taken place in the media and on the House floor. Although many have opined on whether the Constitution requires the Speaker to be a member, no one has yet mined the text, structure, and history to determine the original understanding of the Speaker Clause. Perhaps this is because the answer seems so obvious: for most organizations, it is well-settled that the leader of the group must be a member of the group. The Pope, to cite a common rhetorical question, is famously Catholic. But for the United States House of Representatives, things are rarely simple or obvious.

This Article corrects the record, offering the first in-depth analysis of the text, structure, and history of the Speaker Clause. Part I of this Article analyzes the text of the Speaker Clause, the structure of the Constitution, and 700 years of history, all of which shows that the Constitution requires the Speaker to be a member of the House. In Part II, this Article considers who, among the branches of government, can enforce the original meaning of the Speaker Clause. It concludes that, although federal courts are unlikely to settle the question, Representatives are duty-bound to observe the Speaker Clause's original meaning. Ensuring that the Speaker Clause is enforced will make future speakership negotiations smoother and quicker, eliminating a pervasive and obstructive form of protest voting.

I. THEORY

The Constitution prohibits nonmember Speakers. This rule is at least as real as the separation of powers or the Dormant Commerce Clause. Like those recognized principles, it is not obvious from a cursory reading of the constitutional text. Unlike them, however, it has not been articulated and formalized in a Supreme Court opinion. In fact, it has largely been ignored.¹⁷

This rule is derived from the original public meaning of "Speaker" in Article I, which, as used and understood at the time of the Founding, referred solely and exclusively to a member of the House concurrently occupying the chair. The rule is also a necessary inference from the

¹⁷ *But see, e.g.*, J. Harvie Wilkinson III and David F. Forte, *A Speaker Must be a Member of the House*, FEDSOC BLOG (Oct. 13, 2015), <https://fedsoc.org/commentary/fedsoc-blog/a-speaker-must-be-a-member-of-the-house> [<https://perma.cc/97QD-FFZH>] (utilizing an originalism approach to understand the text of the Constitution, and taking into account influential documents such as the Massachusetts constitution and Articles of Confederation, in finding the Speaker must be an elected Member of the House).

structure of the Constitution, which functionally precludes anyone other than a sitting House member from assuming the speakership. Using text, structure, and tradition, this section brings long-sought clarity to the Speaker Clause.

A. ARGUMENTS AND ASSUMPTIONS

Before plunging into the original meaning of the Speaker Clause, this Part first addresses the various arguments that Congress and others have made to justify the practice of nominating nonmembers to the speakership. Two main arguments shore up Congress's modern practice of nominating nonmembers for Speaker. The first is a bootstrapping argument based on the contemporary practice itself: representatives have nominated nonmembers in the past, so they must be able to continue doing so. The second argument points to other House officers, who need not be elected members, and so infers that the Speaker need not be either.

The logic of both arguments fails. More importantly, both rest on the incorrect—and untested—assumption that, when electing its Speaker, Congress operates in a vacuum of constitutional indifference.

The first argument is that, because representatives have nominated nonmembers, nonmembers must be eligible for the speakership.¹⁸ In a report titled “The Speaker of the House: House Officer, Party Leader, and Representative,”¹⁹ the Congressional Research Service sets forth its official reasoning for why nonmembers can serve as Speaker.²⁰ The report begins by noting that no House rule precludes nonmember speakers; in fact, when the Speaker is elected, the House has not formally convened or adopted any rules to govern the session.²¹ Noting the lack

¹⁸ If the Constitution truly sets no parameters, it follows that Congress is free to regulate itself, bound only by its sense of propriety and tradition. No surprise, then, that Congress is the most ardent defender of the idea that it can nominate anyone it wants to the speakership. Most of the formal research on this issue comes from within the House and can be read in the spirit of *cui bono*.

¹⁹ It is ironic that, though the body of this report states that anyone can serve as Speaker, its title characterizes the Speaker as a Representative.

²⁰ CONG. RSCH. SERV., THE SPEAKER, *supra* note 15, at 1–2.

²¹ *Id.* (“Because the election of the Speaker typically takes place before the House adopts its rules of procedure, the election process is defined by precedent and practice rather than by any formal rule.”). *But see* U.S. Const. amend. XX, §§ 1–2. Rules governing other officers, however, suggest that the House understands on some level that the Speaker must be a member. *See, e.g.*, RULES OF THE HOUSE OF REPRESENTATIVES, 118TH CONG., Rule 1 ¶ 8 (overviewing the procedure for

of any House rule—and assuming the lack of any constitutional one—the report asserts that these elections are governed solely by “precedent and practice.”²²

Next, the report asserts, in essence, that Congress *can do it* because Congress *has done it*. “Although the major parties nominate candidates for the position of Speaker, there is no limitation on for whom Members may vote. In fact, there is no requirement that the Speaker be a Member of the House.”²³ A footnote follows this remarkable statement—but it does not cite a law or other authority. Instead, it merely offers a list of nonmembers that representatives have nominated.²⁴ Since the trend began in 1997, representatives have nominated, among others, former members of the House, a secretary of state, a former comptroller general, sitting senators, and a former president.²⁵ Though the report does not connect the dots, it implies that these nominations alone authorize nonmember Speakers.

This argument—that Congress can do something because it has done it—is logically dubious. It is a variation of the old, circular philosophy that “might makes right.” More importantly, it is also constitutionally dubious. Unlike some other countries, the United States does not admit custom—let alone a practice unheard of before 1997—as a form of law.²⁶ At least since *Marbury v. Madison*,²⁷ federal courts have routinely struck down congressional acts deemed inconsistent with the

appointing a Speaker pro tempore and requiring that person be “a Member”), <https://rules.house.gov/sites/republicans.rules118.house.gov/files/documents/Rules%20and%20Resources/118-House-Rules-Clerk.pdf> [<https://perma.cc/LAV9-CW2X>]; *Id.* ¶ 8(3) (“In the case of a vacancy in the Office of Speaker, the next *Member* on the list . . . shall act as Speaker . . .”) (emphasis added).

²² CONG. RSCH. SERV., THE SPEAKER, *supra* note 15, at 1–2.

²³ *Id.* at 2.

²⁴ *Id.* at 2 n.6.

²⁵ *See id.*; Eric Garcia, *Matt Gaetz Votes for Donald Trump for House Speaker in Seventh Round*, INDEPENDENT, (Jan. 5, 2023, 6:27 PM), <https://www.independent.co.uk/news/world/americas/us-politics/matt-gaetz-trump-house-speaker-vote-b2256860.html> [<https://perma.cc/Q9PW-AJRW>] (“Representative Matt Gaetz cast his vote for former president Donald Trump in the seventh attempt for the House of Representatives to nominate a speaker . . .”).

²⁶ CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 5 (La. State Univ. Press 1969) (contrasting the United States with Norway, which, “in a manner perhaps fully understandable only by her own lawyers, has used custom, directly, as a source of law, sometimes overriding even concededly clear statutory and constitutional provisions.”).

²⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803) (“An act of congress repugnant to the constitution cannot become a law.”).

Constitution.²⁸ Though Congress’s internal elections are not legislative acts, it remains true that congressional practice must yield to constitutional principle when the two conflict. And proponents of this argument have done little, if anything, to address whether the Constitution’s Speaker Clause prohibits nonmember Speakers. If the Constitution requires the Speaker of the House to be a member of the House—and there is overwhelming evidence that it does—this argument falls apart.

The second common argument in support of nonmember Speakers points out that the House does not generally require its officers to be members. In fact, it exclusively selects nonmembers as its “other officers,” like Chaplain,²⁹ Clerk,³⁰ Chief Administrative Officer,³¹ and Sergeant at Arms.³² If these officers need not be members, the argument goes, the Speaker—its chief officer—need not be either. Here, however, the constitutional text is helpful. In providing that the House “shall chuse their Speaker and other Officers[.]”³³ the text might not dictate qualifications for candidates to those offices, but it does warn the reader against analogizing them too closely. The text sets the Speaker apart from the other officers, listing it first and identifying it by name, while lumping the rest into an amorphous catch-all phrase. This choice implies that the Speaker is elevated above and separable from the other House officers.

²⁸ See *Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*, JUSTIA, <https://law.justia.com/constitution/us/acts-of-congress-held-unconstitutional.html> [<https://perma.cc/S3LJ-ALXT>] (last visited Jan. 28, 2023) (listing over one hundred congressional acts that have been struck down by federal courts).

²⁹ The Chaplain at the time of writing, Margaret Grun Kibben, retired as the Chief Chaplain of the Navy before being elected as an officer—not a member—of the House. *The Chaplaincy*, OFFICE OF THE CHAPLAIN: U.S. HOUSE OF REPRESENTATIVES, <https://chaplain.house.gov/chaplaincy/index.html> [<https://perma.cc/SR4K-8U6R>] (last visited Jan. 28, 2023).

³⁰ The Clerk at the time of writing, the Honorable Cheryl L. Johnson, was a nonmember director at the Smithsonian Institution before being elected as an officer of the House. *About the Clerk*, CLERK: U.S. HOUSE OF REPRESENTATIVES, <https://clerk.house.gov/About#OverviewContact> [<https://perma.cc/V9ZP-DY6Q>] (last visited Jan. 28, 2023).

³¹ The Chief Administrative Officer at the time of writing, Catherine Szpindor, was the House’s Chief Information Officer before being elected to her current office. *Senior Management*, CAO, <https://cao.house.gov/about/cao-senior-management> [<https://perma.cc/NC3D-8F3Y>] (last visited Jan. 28, 2023).

³² The Sergeant at Arms at the time of writing, the Honorable Paul D. Irving, held an administrative role with the Secret Service before being elected to his current office. PAUL D. IRVING: SERGEANT AT ARMS, <https://www.congress.gov/116/meeting/house/109268/witnesses/HHRG-116-HA00-Bio-IrvingP-20190409.pdf> [<https://perma.cc/TV5E-ALNQ>].

³³ U.S. CONST. art I § 2.

It makes sense to distinguish between the Speaker and “other officers.” Though Parliament historically had a chaplain, clerk, and serjeant at arms,³⁴ none of those positions was as obviously necessary—or as historically well-defined—as the Speaker. Thus, the Framers provided that the House should elect its Speaker, and then, through a catch-all phrase, allowed it to create and fill other offices as the need arose.

There is also compelling evidence that the Framers viewed the Speaker as an inherently political officer—acting simultaneously as the leader of the House and the leader of a party.³⁵ By contrast, the other officers were, and always have been, apolitical.³⁶ Because they were not political actors, they had no constituency and it did not matter that they had not been elected to the House. Moreover, though they all work together and share positions in the same organization, the roles are disparate; what is true of one need not be true of the others. Whereas the Speaker is a principal, the other officers are agents or functionaries. Thus, the traits of other House officers should no more be imposed on the Speaker than the traits of a law clerk should be imposed on a judge or the traits of a staff accountant on a CEO.³⁷

Proponents of this second argument also uncritically assume that the Constitution is, if not openly approving of nonmember speakers, at least neutral on the issue.

Thus, both arguments are dubious on their own terms. And both assume away any Constitutional difficulties. As now shown, that assumption is a mistake. A close reading of the text, structure, and relevant history shows that the Constitution firmly closes the door on the possibility of a nonmember Speaker.

³⁴ See *Principal Officers and Staff*, UK PARLIAMENT, <https://www.parliament.uk/about/mps-and-lords/principal/> [https://perma.cc/TV5E-ALNQ] (last visited Feb. 10, 2023); see also *Speaker's Chaplain*, UK PARLIAMENT, <https://www.parliament.uk/business/commons/the-speaker/supporting-the-speaker/speakers-chaplain/> [https://perma.cc/Q9PW-AJRW] (last visited Feb. 6, 2023).

³⁵ See discussion *infra* section I(D)(b) (detailing the political role of the speakership in continental legislatures).

³⁶ See discussion *infra* section I(D)(c) (showing how the First Congress expected its Speaker to be a political actor, but barred its clerk from political activity). See discussion *infra* section I(D)(e) (detailing the practice of the First Congress and the language of the original congressional oath, which strongly implies that the Speaker must be a member).

B. TEXT

The Constitution mentions the Speaker of the House only five times: once in Article I and four times in the Twenty-Fifth Amendment. Article I's Speaker Clause provides that "[t]he House of Representatives shall chuse their Speaker and other Officers"³⁸ The Twenty-Fifth Amendment lists the Speaker as one of the people responsible for receiving written notice that the President cannot discharge his duties.³⁹ Otherwise, the text is silent. This dearth of textual instruction has been widely interpreted to mean that the Constitution takes no position on who may serve as Speaker.⁴⁰

This assumption is incorrect for at least two reasons. First, the Constitution, when considered as a whole, functionally precludes anyone who is not such a member from assuming the speakership. Second, the Speaker Clause itself is not as ambiguous as it has been portrayed.⁴¹ The word "Speaker" as ordinarily used and understood in context at the time of the Founding referred, without exception, to an elected member of the House.

It should come as no surprise that an informed understanding of the Speaker Clause begins with the text.⁴² But because the Speaker Clause does not resolve the issue of nonmember Speakers in express and unwavering terms, it is appropriate to look to other interpretive tools for guidance: to the canons of construction for pointers on how to read the clause, to the rest of the constitutional scheme for necessary context, and to historical sources to find what meaning the word "Speaker" carried for ordinary Americans at the Founding.⁴³ Each tool helps to identify the original, ordinary meaning of the Speaker Clause.⁴⁴

³⁸ U.S. CONST. art. I § 2.

³⁹ See U.S. CONST. amend. XXV, §§ 3–4.

⁴⁰ See, e.g., MARY PARKER FOLLETT, *THE SPEAKER OF THE HOUSE OF REPRESENTATIVES* 32 (1896) ("In the choice of its Speaker the House is hampered by no restriction of law or Constitution; but a custom based on parliamentary and on colonial precedents requires that the Speaker shall always be a member of the House.") However ironclad this custom might have seemed to Ms. Follett in 1896, it has since eroded considerably.

⁴¹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) ("In their full context, words mean what they conveyed to reasonable people at the time they were written.")

⁴² Scalia and Garner call this the "Supremacy-of-Text" principle. *Id.* at 56.

⁴³ *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004) (turning to "the historical background" when "the text alone" did not resolve an interpretive problem).

⁴⁴ The order that these tools are discussed in is not intended to suggest a hierarchy among them.

The canons of construction are rules of thumb judges use to interpret ambiguous constitutional and statutory provisions.⁴⁵ Though they are not binding, they can be helpful when text lends itself to multiple plausible interpretations.⁴⁶ Because each can be rebutted, no one canon controls; any canon may be overcome by the strength of a contradicting one.⁴⁷

The Speaker Clause engages several semantic canons. On the one hand, under the omitted-case canon, matters not covered (or reasonably implied) by the text are to be treated as not covered.⁴⁸ It might follow that the Constitution's silence on nonmember Speakers does reflect indifference. On the other hand, under the whole-text canon, a text must be constructed as a whole.⁴⁹ In constitutional matters, the Supreme Court has not hesitated to draw negative inferences from assorted clauses and rely on them in barring legislatures from taking actions not prohibited by the text.⁵⁰

Finally, words are to be given the meaning they had when the text was ratified.⁵¹ In deciding constitutional questions, the Supreme Court has routinely expanded or contracted the meaning of clauses by giving them their original public meaning, even if it is not the one immediately suggested to modern readers.⁵² Thus, to overcome the omitted-case canon, these interpretive rules of thumb point us toward an examination of the constitutional text as a whole and the government it creates, as well as an analysis of what the word "Speaker" meant in the 1780s, inviting an examination of the role at the Founding.

45 SCALIA & GARNER, *supra* note 41, at 51.

46 *Id.*

47 *See id.* at 59; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VANDERBILT L. REV. 395, 401–06 (1950) (arguing that the canons are often contradictory and that the "thrust" of one may meet the "parry" of another). In many cases, Llewellyn's "competing canons" are better viewed as statements of rebuttable interpretive principles and statements of the rebuttal.

48 SCALIA & GARNER, *supra* note 41, at 93. The semantic theory here is that words have meaning in context.

49 *Id.* at 167.

50 Among the more salient examples are the Dormant Commerce Clause and the separation of powers. *See infra* section II(C) (demonstrating the structural logic behind the Dormant Commerce Clause and separation of powers).

51 SCALIA & GARNER, *supra* note 41, at 16 ("In their full context, words mean what they conveyed to reasonable people at the time they were written.").

52 *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008) (reading the militia clause of the Second Amendment as it would have been understood by "ordinary citizens in the founding generation").

C. STRUCTURE

Ordinary readers understand words in context, not in isolation. So, following the whole-text canon, we read the Speaker Clause in the context of the entire Constitution. Though the Constitution’s seven Articles and twenty-seven Amendments only mention the Speaker of the House a handful of times, they create, populate, empower, and limit the government the Speaker inhabits. The structure of government the Constitution creates is, in its own right, a tool of constitutional interpretation.⁵³ Indeed, some academics, most notably Charles Black and Philip Bobbitt, have argued that the Constitution’s structure can be as probative of its meaning as its text.⁵⁴ In recent years, the Court has increasingly used structural principles to tilt the scales in favor of interpretations that preserve federalism and the separation of powers.⁵⁵ Though judges rarely ground decisions solely in structure, structural logic is obvious in many important precedents. Consider three familiar examples:

- Because the federal government sits above the states, states cannot tax federal institutions;⁵⁶

⁵³ MICHAEL J. GERHARDT & THOMAS D. ROWE, *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 123 (1993) (“[T]he logic of national structure, as distinguished from the topic of particular textual exegesis, has broad validity.”); *King v. Burwell*, 576 U.S. 473 (2015) (reading a statutory provision in light of the statutory structure)

⁵⁴ *Id.* (lamenting that “in dealing with questions of constitutional law, we have preferred the method of purported explication or exegesis of the particular textual passage considered as a directive of action, as opposed to the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.”); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 78 (1982) (“For myself, structural argument is the most potent and potentially satisfying recent development in constitutional argument . . .”).

⁵⁵ *See, e.g.,* *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (relying on the Tenth Amendment and the balance of federal and state powers the court held that the power to determine the fitness of candidates for government usually lies with the states); *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (describing the major questions canon as a substantive canon used to enforce nondelegation principles). *But see* *Biden v. Nebraska*, 143 S. Ct. 2355, 2376-2384 (2023) (Barrett, J., concurring) (describing the major question canon as a semantic canon).

⁵⁶ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 361-62 (1819):
 If [states] may tax an institution of finance, they may tax the proceedings in the Courts of the United States . . . so as to expel them from the [s]tates. But, surely, the framers of the constitution did not intend that the exercise of all the powers of the national government should depend upon the discretion of the [s]tate governments. This was the vice of the former confederation, which it was the object of the new constitution to eradicate. It is a direct collision of powers between the two governments. Congress says, there shall be a branch of the bank in the state of Maryland. That [s]tate says, there shall not. Which power is supreme?

- Because the Constitution confines each branch of government to a single Article, the branches are inherently separate, and no branch can wield powers vested in another;⁵⁷ and

- Because the Constitution vests the power to regulate interstate commerce solely in Congress, it implicitly denies that power to state legislatures.⁵⁸

Aside from showing how persuasive (and pervasive) structural inferences are in constitutional interpretation, these examples also demonstrate how structure can provide context to fill gaps in the text. Though all the above principles are obvious from the composition of the Constitution, none are explicitly provided by its text.

Here, structure provides the context necessary for an informed reading of the Speaker Clause. Just as the Constitution prohibits states from taxing federal banks or Congress from constraining the President's removal power, it prohibits Congress from electing a nonmember as Speaker.

Imagine all the different nonmembers that Congress might hypothetically elect to the speakership. No matter how vast one's imagination, all of them will necessarily fall into two categories: (1) people not currently serving as elected representatives, and (2) people serving as elected representatives in bodies other than Congress. What Charles Black called "the logic of national structure" precludes both groups.⁵⁹

The fundamentally representative nature of the House makes it nonsensical to hand the reins of that body to someone the people have not elected. And the doctrines of separation of powers and federalism make it nonsensical to turn the House over to someone elected to another branch of government.

⁵⁷ *Myers v. United States*, 272 U.S. 52, 116 (1926):

[T]he Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.

⁵⁸ *Crandall v. Nevada*, 73 U.S. 35, 42 (1867):

After showing that there are some powers granted to Congress which are exclusive of similar powers in the States because they are declared to be so, and that other powers are necessarily so from their very nature, the court proceeds to say, that the authority to regulate commerce with foreign nations and among the States, includes within its compass powers which can only be exercised by Congress, as well as powers which, from their nature, can best be exercised by the State legislatures

⁵⁹ BLACK, *supra* note 22, at 11.

a. *Candidates not directly elected*

Article I creates a national legislature with two deliberative bodies. The first, the House of Representatives, is the Constitution's only original experiment with popular, direct democracy.⁶⁰ Representation in the House is allocated by population, not state, and the people choose their representatives directly by popular vote.⁶¹ The second body, the Senate, was designed to be more removed from the people.⁶² States get the same number of Senate seats regardless of population, and, until the ratification of the Seventeenth Amendment, state legislatures, not ordinary people, chose senators.⁶³

By design, the House represents the people in a way the other branches of government do not. The popular nature of the House made it especially dear to early Americans. “[M]any assumed that the House of Representatives—the new federal government’s lower house, which, as Madison put it, would be made up of ‘the immediate representatives of the people’—would prove the defining [legislative] body.”⁶⁴ It was obvious at the Founding that to whatever extent the President and Senate represented the People, the House was something different entirely:

Some had said that the president and Senate were equally the representatives of the people. But the ‘Constitution has appointed that Representatives shall be chosen by the people in proportion to their population,’ so [New Jersey assemblyman] Aaron Kitchell asked, ‘were the Senate so chosen? No. The people have no vote at all in choosing them. Are they amenable to the people for their conduct? No.’ Given these facts, ‘in no shape can they be called Representatives of the people.’ Only the House ‘represented . . . the people at large.’ Only the House could enforce the ‘people’s Constitution.’⁶⁵

If the House is the voice of the People, and the Speaker is the voice of the House, it follows that the Speaker must speak for the People. How can she, if she has not been elected by them? Because the House is, in

⁶⁰ Thomas Jefferson called the House “the popular branch of our legislature.” JONATHAN GEINAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 260 (2018).

⁶¹ U.S. CONST. art. I, § 2, cl. 3.

⁶² GEINAPP, *supra* note 60, at 131.

⁶³ U.S. CONST. art. I, § 3; U.S. CONST. amend. XVII.

⁶⁴ GEINAPP, *supra* note 60, at 15.

⁶⁵ *Id.* at 283.

Madison's words, "the immediate representatives of the people,"⁶⁶ it makes no constitutional sense for that body to elect as its head someone who does not directly represent the people. Constitutional structure will not permit our most democratic institution to elect an un-democratic Speaker. To do so would betray the identity of the House.

This inference can be taken a step further. Because the Speaker represents the House as a body, she must also be representative of the House. Since the office emerged, the Speaker of the House has always been a kind of delegate's delegate: the figurehead who communicates the will of the House to the other branches of government.⁶⁷ Just as a Virginian could not properly represent Massachusetts in the House, a nonmember could not properly represent the House before the other branches of government. One cannot represent a polity that one does not belong to. This principle excludes even Senators, who are now directly elected, from acting as the Speaker.⁶⁸

The Framers, who understood this principle,⁶⁹ drafted other portions of the Constitution in a way that only makes sense if the Speaker of the House is an elected representative. The Speech and Debate Clause, for instance, privileges "Senators and Representatives" from arrest on the way to and from the Capitol, and from liability for statements made during congressional speeches and debates.⁷⁰ Because the Framers understood the Speaker to be a member of the House, they did not list Speakers of the House as a third protected category. Thus, if the modern congressional practice of nominating nonmembers to the speakership ever yielded fruit, it would create an absurd situation where the Speaker of the House was not protected by the Speech and Debate Clause. She would be subject to arrest in her travels to and from Congress and could face liability for her statements in it; an obvious miscarriage of the Framers' stated intent. Congress's desired reading of the Speaker clause has unexpected interpretive consequences: if the

⁶⁶ THE FEDERALIST NO. 63 (James Madison).

⁶⁷ See *infra* Section II(D)(a) (explaining the Speaker's original role as a spokesman for the House of Commons).

⁶⁸ The Constitution does not establish the Senate as a body that answers to the people. As originally conceived by the Founders, the Senate represented the states. See GEINAPP, *supra* note 60, at 283; see also Adam Reed Moore, *Publius's Protectors of Liberty: A Still Important Role for States*, 48 BYU L. Rev. 1961, 1987, 1995–96 (2023) (canvassing ways in which the authors of The Federalist Papers thought the Senate would represent state interests).

⁶⁹ See *infra* Section II(D)(d) (demonstrating that the state constitutions ratified before the federal constitution required the Speaker to be a member).

⁷⁰ U.S. CONST. art. I, § 6.

Speaker need not be an elected representative, other clauses across the constitutional scheme begin to make less sense.⁷¹

b. *Candidates elected to other branches*

Two more structural inferences preclude candidates who have been elected to bodies other than the House of Representatives. The first inference is horizontal. The Constitution divides the powers of government between three distinct, co-equal branches. “From this division,” the Supreme Court has held, “. . . the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires.”⁷² Thus, the separation of powers doctrine dictates that one branch may not wield the powers of another.⁷³ It would be a particularly gross violation of this doctrine to allow one branch of government to overtake or assume control of another. The Speaker is the symbolic and procedural leader of the House. Thus, if the House were to reach horizontally across the articles of the Constitution and pluck a Speaker out of the Executive or Judiciary, it would effectively surrender its control to an officer from another branch. This dramatic form of “blending” would be an obvious constitutional violation. Congress understands this inference and requires that candidates for the speakership first resign their other government offices.⁷⁴

The second inference is vertical. The Constitution creates a federal structure with independent state governments.⁷⁵ State governments retain the powers not expressly granted to the federal government, but federal law is the supreme law of the land.⁷⁶ The logic of constitutional structure dictates that states cannot exert control over the institutions of the federal government. In *McCulloch v. Maryland*, Chief Justice Marshall framed whether a state could tax the national bank as a direct conflict

⁷¹ Another canon, the presumption against ineffectiveness, prefers textual interpretations that further, rather than obstruct, the document’s purpose. This canon strongly favors reading the Speaker Clause to require the Speaker to be a member. SCALIA & GARNER, *supra* note 41, at 63.

⁷² *Myers v. United States*, 272 U.S. 52, 116 (1926).

⁷³ *Id.*

⁷⁴ FOLLETT, *supra* note 40, at 32–33.

⁷⁵ See THE FEDERALIST NO. 31 (Alexander Hamilton) (addressing the balance of powers between state and federal governments and the checks designed to prevent one from usurping the others).

⁷⁶ U.S. CONST. amend. X; U.S. CONST. art. VI.

between the federal government and the governments of the states.⁷⁷ He dispatched this conflict between state and federal powers with a rhetorical question: “[w]hich [] is supreme?”⁷⁸ If a state tax authority cannot collect revenues from a federal bank, then a state legislator or officer cannot take control of the House of Representatives. It would violate the Constitution’s system of federalism for Congress to reach down vertically and select its Speaker from a state government.

In sum, the Constitution’s structure suggests that the word “Speaker” refers only to sitting members of Congress.

D. HISTORY

While structure frames the government that the Speaker inhabits, history tells us what the word “Speaker” meant at the time of ratification. It likewise indicates that the Speaker Clause requires the Speaker to be a member of the House.

The Constitution was not framed in a vacuum. The Constitution’s text and structure were sketched against the backdrop of history. So, though the text is the unequivocal lodestar animating all constitutional interpretation,⁷⁹ history and tradition play a crucial role in constitutional construction, especially when dealing with ambiguous provisions.⁸⁰

Though the Framers were careful students of antiquity and drew upon “the accumulated experience of ages,”⁸¹ they were especially influenced by British constitutional history and their own pre-ratification experience.⁸² So, to understand the original meaning of the Speaker Clause, one must first understand English constitutional and

⁷⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 361–62 (1819).

⁷⁸ *Id.* at 362.

⁷⁹ *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1894–95 (2021) (Alito, J., concurring in the judgment) (collecting cases demonstrating the primacy of the Constitution’s text).

⁸⁰ *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022) (reading the Second Amendment historically); *Town of Greece v. Galloway*, 572 U.S. 565, 576–77 (2014) (reading the Establishment Clause historically); *Larson v. Valente*, 456 U.S. 228, 244 (1982) (same).

⁸¹ THE FEDERALIST NO. 6, at 21 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

⁸² GEINAPP, *supra* note 60, at 130:

As a national deliberative body, the inaugural federal congress was in the broadest of strokes a carryover from the Confederation Congress that had preceded it. More generally, its shape and function would be guided by Americans’ long experience in legislative politics—either directly in their colonial or state legislatures or indirectly through their keen interest in Parliament. Most members of the First Congress had gained experience in one of these prior bodies and could draw on the rules of parliamentary procedure, which they knew quite well.

pre-ratification American history. Other, more recent history—say, a congressional practice unheard of before 1997—is less probative.⁸³

Ultimately, what history shows is that at no time in the British or colonial tradition was a legislative speaker ever a nonmember: 700 years of history show that the word “Speaker” had a distinct, limiting meaning as the Framers employed it in the Speaker Clause.

a. *Parliamentary Origins*

“Since it is to England that we must always look for the germs of American institutions, we turn to the history of that country for the origin of the Speakership.”⁸⁴ At its origin, the office of Speaker was self-explanatory: its holder spoke for the House of Commons. His role was less procedural or administrative than communicative.⁸⁵ Before there was an official Speaker who acted with authority, there was an unofficial spokesman who acted from necessity.⁸⁶ Someone, after all, had to deliver the results of Parliament’s deliberations to the king.⁸⁷ Generally, these early spokesmen belonged to the bodies they spoke for; there were some notable exceptions, but these exceptions prove the rule for two reasons.⁸⁸ First, the desirability of the job hinged on the decision to be delivered. At least once, in 1301, the lords “unheroically” bullied a knight of the shire into presenting on their behalf a bill they knew would offend the king.⁸⁹ Second, in certain critical situations, Parliament was

⁸³ See 597 U.S. at 83 (Barrett, J., concurring):

[T]oday’s decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.

; see also *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246, 2258-59 (2020) (concluding a practice arising in the late 19th Century “cannot by itself establish an early American tradition” that informs the interpretation of the First Amendment).

⁸⁴ FOLLETT, *supra* note 40, at 2–3.

⁸⁵ See *The Speaker*, UK PARLIAMENT <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentwork/offices-and-ceremonies/overview/the-speaker/> [https://perma.cc/TV5E-ALNQ] (last visited Jan. 21, 2022) (“In the Parliament of 1376, the Commons chose Sir Peter de la Mare to act as its spokesman before the King.”).

⁸⁶ See FOLLETT, *supra* note 40, at 3 (“[A]lthough the Commons must always have had some one to preside over their deliberations, the term ‘Speaker’ first appears in England late in the fourteenth century.”).

⁸⁷ See THOMAS PITT TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 233 (10th ed. 1946) (discussing how the House of Lords deliberated and communicated its decisions to the King).

⁸⁸ See *id.* at 233–34 (explaining exceptions to the general rule that a member of parliament would communicate their deliberations to the king).

⁸⁹ The lords’ fears were not idle. The king imprisoned the knight in the Tower of London. *Id.* at 233.

concerned that a member of a single house might not be representative enough to speak for the three political estates combined. Thus, Sir William Trussel twice “spoke on behalf of the commons in parliament, although he [] was not a member.”⁹⁰

All three of these episodes took place before the office of Speaker existed, and Taswell-Langmead calls them “temporary expedients for dealing with casual emergencies.”⁹¹ The general practice was for spokesmen to be members of the houses they spoke for, and this practice became an unspoken rule almost immediately upon the creation of the office of Speaker, which most historians place in 1376.⁹²

In that year, the “Good Parliament” launched a political attack on John of Gaunt’s administration. Gaunt, the son of Edward III and younger brother of the Black Prince, ruled the country as an unpopular regent during the incapacity of his father and older brother.⁹³ To bring its charges against Gaunt’s allies, the House of Commons selected from among its ranks a permanent spokesman: an MP named Peter de la Mare.⁹⁴

In an era when Parliament rarely kept minutes, de la Mare’s great strength was his prodigious memory.⁹⁵ His perfect recollection of arguments gave de la Mare implied authority to steer debates.⁹⁶ It also uniquely qualified him as a messenger—he could accurately communicate the Commons’ decisions to outside groups. When it came time to choose a permanent spokesman, he was the Commons’ choice. In history’s first-ever impeachment, the Commons brought charges against John of Gaunt’s political allies.⁹⁷ On behalf of the Commons, de la Mare submitted the charges to the House of Lords, which convicted and removed the impeached courtiers.⁹⁸

90 *Id.* at 234.

91 *Id.*

92 *Id.* at 184; *see also The Speaker, supra* note 84.

93 TASWELL-LANGMEAD, *supra* note 86, at 184.

94 De la Mare was an elected knight of the shire (member of parliament) from Herefordshire. Edward Maunde Thompson, *Peter De la Mare*, in 14 *DICTIONARY OF NATIONAL BIOGRAPHY* 301–02 (Leslie Stephen ed., 1888).

95 TASWELL-LANGMEAD, *supra* note 86, at 234. After long debates, MPs would call on him to summarize the arguments and counterarguments, which he could recite almost verbatim. *Id.*

96 *Id.*

97 *Id.* at 184–85.

98 *Id.*

This first iteration of the speakership reveals much about the office. The medieval Speaker of the House was, before all else, a delegate's delegate. He was chosen for his capacity to represent the Commons before the king and lords.⁹⁹ He was as much a messenger as a leader. Most important for our purposes, he was a member of the house he spoke for.

The second Speaker—and first to be named as such in the parliamentary rolls—gives us our first articulation of a rule against nonmember Speakers. When the Black Prince died, John of Gaunt swept back into power, set on revenge.¹⁰⁰ He immediately began undoing the work of de la Mare's Good Parliament, restoring the impeached officers to their roles and calling a new "Bad Parliament" packed with his own supporters.¹⁰¹ The final step in this reversal was to throw de la Mare in prison and replace him with Gaunt's own steward, Thomas Hungerford.¹⁰² But Gaunt understood that Hungerford must be an elected member of Parliament before he could be Speaker.¹⁰³

When Hungerford—who briefly served as Speaker in 1376—was not re-elected to Parliament in 1377, John of Gaunt took extraordinary measures to get his man back in the House and eligible once more for the speakership.¹⁰⁴ The king could pack the House, and he could effectively pick the Speaker, but he could not pick a Speaker who was not a member of the House.¹⁰⁵ As parliamentary historian Hannes Kleineke writes, "when the Crown sought to place one of its supporters in the Chair, it had to secure this individual's presence among the elected Members first."¹⁰⁶

This conclusion, which might have been merely an obvious inference to John of Gaunt or Thomas Hungerford, soon became a

⁹⁹ The members of the House of Commons have always chosen their own speaker, though the king traditionally had great influence over their choice. *Id.* at 236.

¹⁰⁰ *See id.* at 185.

¹⁰¹ *Id.*

¹⁰² Hungerford was so loyal that one chronicler wrote "[h]e would not say anything other than what he knew would be[] pleasing in his Lord's eyes." Hannes Kleineke, *A Speakership that never was: Sir Thomas Hungerford and the Parliament of 1378*, THE HISTORY OF PARLIAMENT (Aug. 11, 2022), <https://thehistoryofparliament.wordpress.com/2022/08/11/a-speakership-that-never-was-sir-mthoas-hungerford-and-the-parliament-of-1378/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ ARTHUR DASENT, SPEAKERS OF THE HOUSE OF COMMONS TO 1850 52 (BURT FRANKLIN 1911), (describing how John of Gaunt was able to "pack the House with men of his own choosing").

¹⁰⁶ Kleineke, *supra* note 101.

binding rule. By 1690, when George Petyt published the rules of Parliament, his *Lex Parliamentaria* provided that the “Speaker . . . (tho’ nominated by the King’s Majesty) is to be a Member of [the] House.”¹⁰⁷ In fact, it was not enough that the Speaker merely be a Member himself; it was his role to detect and expel intruding nonmembers from parliamentary deliberations. “By the ancient usage of the House of Commons any one member by merely ‘spying’ strangers present could compel the Speaker to order their withdrawal without putting the question.”¹⁰⁸

This was the state of the speakership at the time English settlers began establishing colonies in America, carrying with them their parliamentary system and unwritten constitution.¹⁰⁹

b. *Colonial Legislatures*

“Among the customs and institutions which the colonists brought with them was the English parliamentary procedure with its important feature, the Speaker.”¹¹⁰ “The colonies followed, as nearly as their circumstances permitted, the forms of parliamentary practice” observed in Britain.¹¹¹

Over time, these institutions were modified by new conditions, and the colonial speakerships developed into very different offices than the

¹⁰⁷ GEORGE PETYT, LEX PARLIAMENTARIA 131 (1690), <https://quod.lib.umich.edu/e/ebo2/A54631.0001.001?view=toc>; *See also*.” *Id.* at 132 (“The Speaker ought to be religious, honest, grave, wise, faithful, and secret.”).

¹⁰⁸ TASWELL-LANGMEAD, *supra* note 86, at 660.

¹⁰⁹ From the time the American colonies began creating their own traditions of parliamentary practice, the American and British traditions began to diverge. In recent years, Congress has imposed ambiguity on the issue of nonmember speakers, but that issue remains firmly settled in Britain. Today, the House of Commons’ standing order on speakership elections limits candidates for that office to sitting members. *See Standing Orders of the House of Commons-Public Business 2018*, UK PARLIAMENT (2018), <https://publications.parliament.uk/pa/cm201719/cmstords/1020/body.html> (noting the House of Commons would need to choose a new Speaker if the incumbent “ceased for any reason to be a Member of this House”). In today’s House of Commons, opposing political parties traditionally will not contest the seat of the Speaker, implying that, were the Speaker to lose his seat in Parliament, he would necessarily lose the speakership as well. *See Kleineke, supra* note 101 (“There is a modern-day convention that at a general election sees a sitting Speaker of the House of Commons unopposed by the major political parties, thus all but guaranteeing their re-election and consequent availability to resume the chair at the beginning of the new Parliament”).

¹¹⁰ FOLLETT, *supra* note 40, at 12.

¹¹¹ *Id.* at 30; *see also* *Martin v. Waddell’s Lessee*, 41 U.S. 367, 384 (1842) (viewing royal charters as containing “the powers of government, according to the principles of the British Constitution.”).

Speaker of the House of Commons.¹¹² While the British speaker eventually became an apolitical presiding parliamentarian, several colonial speakers became political power brokers on top of their parliamentary roles.¹¹³ What stayed static, however, was the “colonial custom of following the English precedent, [which] gave to the House the choice of its presiding officer, subject, usually, to the approval of the Governor, as the representative in America of the British Crown.”¹¹⁴

Power struggles between colonial governors and legislatures sometimes broke out over whether the legislature’s choice of speaker truly required the governor’s consent. Sometimes, the legislatures prevailed.¹¹⁵ On other occasions, the governors triumphed.¹¹⁶ Yet at all times the selected speakers were members of their legislative bodies. Follett posits that “from such experiences the colonies learned the importance of the principle, afterward embodied in the Constitution without opposition, that every deliberative assembly should have the final voice of its own officers.”¹¹⁷

The scope of the colonial speakers’ powers also eclipsed that of their British counterpart.¹¹⁸ Parliamentary duties became overshadowed by the political power and influence that accrued in the chair.¹¹⁹ In the colonial assemblies, it would have been anathema for a speaker to shed his rights as a representative for the sake of the speakership.¹²⁰ And typically, as the highest elected government officials elected by the people, colonial speakers were looked to as the people’s natural leaders.¹²¹

Thus, in every American colony, as in England, legislative speakers were always required to be members of the legislative body. Otherwise, the person sitting at the pinnacle of legislative power would not be

112 FOLLETT, *supra* note 40, at 12.

113 *Id.* at 12-13.

114 *Id.*

115 *See, e.g., id.* at 13 (highlighting a 1693 example when the Massachusetts General Court “voted that ‘it was not in the governor’s power to refuse the election of a Speaker.’” The Governor finally yielded when he realized he needed appropriations from the body) (quoting 3 JOHN G. PALFREY, *THE HISTORY OF NEW ENGLAND* 273–74 (1858)).

116 *See, e.g.,* FOLLETT, *supra* note 40, at 13–14 (discussing a 1720 fight between the General Court and governor culminating in the Explanatory Charter of 1724. This charter issued by George I “expressly affirmed the necessity of the Governor’s consent in the election of the Speaker.”).

117 *Id.* at 14.

118 Wilkinson & Forte, *supra* note 17; *see also* FOLLETT, *supra* note 40, at 14.

119 FOLLETT, *supra* note 40, at 14.

120 *Id.* at 17.

121 *Id.* at 19.

directly tied to the people. This representative connection was especially important in an era of very limited democracy. So, while the Framers outright rejected the colonial practice of subjecting the legislature's selection of a speaker to external restraints, they did not go as far as upending the axiomatic tradition that the Speaker be an elected representative. The same was true of the Continental Congresses and the Congress of the Confederation.

c. *Continental Congresses, Congress Under the Articles of Confederation, and the Constitutional Convention*

The unbroken practice of exclusively electing member speakers continued in the Continental Congresses and the Congress of the Confederation, though the title of "Speaker" was not formally used.

The president of the Continental Congresses served, as his title suggests, as the presiding officer of that body.¹²² And naturally, he was also a member. His duties included "ruling on parliamentary issues, managing official correspondence, advancing or holding back legislation, and meeting with important allies and foreign dignitaries as the 'first member' of the Continental Congress."¹²³ Though the office was otherwise remarkably similar to that of colonial speakers, the president had no power over committees.¹²⁴ Still, it was an important role, filled without exception by elected congressional representatives.

The inaugural president of the First and Second Continental Congresses was Peyton Randolph, a Virginian who had served before as Speaker of the House of Burgesses.¹²⁵ Like Randolph, subsequent presidents of the Continental Congresses had experience presiding over legislative assemblies; five of the seven had presided over their state's legislature.¹²⁶ Presidents included luminaries like John Jay, John

¹²² OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Presidents of the Continental Congresses and Confederation Congress, 1774-1789*, HISTORY, ART & ARCHIVES <https://history.house.gov/People/Continental-Congress/Presidents/> (last visited Feb. 10, 2023) [hereinafter OFFICE OF THE HISTORIAN, *Presidents*].

¹²³ *Id.* (citing JENNINGS B. SANDERS, *THE PRESIDENCY OF THE CONTINENTAL CONGRESS: A STUDY IN AMERICAN INSTITUTIONAL HISTORY* 39-41 (Rev. Ed. 1930)).

¹²⁴ *Id.* (citing SANDERS, *supra* note 122, at 39-41).

¹²⁵ *Id.* (citing SANDERS, *supra* note 122, at 39-41).

¹²⁶ CALVIN C. JILSON & RICK K. WILSON, *CONGRESSIONAL DYNAMICS: STRUCTURE, COORDINATION, AND CHOICE IN THE FIRST AMERICAN CONGRESS, 1774-1789* 77 (1994).

Hancock, and Samuel Huntington, who, like all the other presidents, were elected members of the body over which they presided.¹²⁷

After the Articles of Confederation went into effect in 1781,¹²⁸ the Confederation Congress “elected a president to preside over its debates,” as the presidents of the Continental Congresses had.¹²⁹ The Articles dictated—like Petyt’s *Lex Parliamentaria* had centuries earlier—that Congress’s president must be a member of Congress. “The united States [sic] in Congress assembled shall . . . appoint *one of their number* to preside.”¹³⁰ This phrase, the direct antecedent to the Constitution’s Speaker Clause, demonstrates what the word “Speaker” meant to the Framers and their contemporaries: a member of congress. So why did that clarifying language not carry over into the new Federal Constitution?

If the Framers had intended to scrap the centuries-old rule against nonmember speakers, they would not have done so lightly. Such a change would have warranted deliberation and debate. But none took place.¹³¹ Instead, the Speaker Clause quietly emerged from the Constitutional Convention’s non-substantive committees on detail and style in its present form, with the “one of their number” language trimmed. Thus, the answer is to be found, not in the minutes of Convention debates, but in the methodology of the committees on detail and style.

Gouverneur Morris, the “penman of the Constitution”¹³² and de facto leader of the Convention’s Committee on Style, pushed to eliminate redundant and equivocal language. Writing to Thomas Pickering years after the Convention, Morris said that the Constitution “was written by the fingers which write this letter” and that “having rejected redundant and equivocal terms, I believed it to be as clear as

¹²⁷ OFFICE OF THE HISTORIAN, *Presidents*, *supra* note 121 (citing SANDERS, *supra* note 122, at 39-41).

¹²⁸ ARTICLES OF CONFEDERATION of 1781.

¹²⁹ OFFICE OF THE HISTORIAN, *Presidents*, *supra* note 121.

¹³⁰ ARTICLES OF CONFEDERATION of 1777, art. IX, para. V (emphasis added).

¹³¹ FOLLETT, *supra* note 40, at 25.

¹³² CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787* 236 (1966) (calling Morris the “amanuensis” of the Committee). Madison wrote, “The *finish* given to the style and arrangement, . . . fairly belongs to the pen of Mr. Morris.” *Id.* at 242; *see also* Annabel LaBrecque, *Gouverneur Morris*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/gouverneur-morris/> [https://perma.cc/F5WZ-YUUV] (last visited Feb. 24, 2023).

our language would permit.”¹³³ So, according to Morris, the goal was to tighten the Constitution’s language: to trim fat and eliminate surplusage. This emphasis is obvious in the iterations of the Speaker Clause that the committees produced.

The Committee of Detail’s draft shortened the Articles’ language, stating merely that “It [the House] shall choose its Speaker.”¹³⁴ Then, in remarkable pursuit of brevity, the Committee on Style eliminated a redundancy that would not even occur to modern readers. It replaced the two Os in the word “choose” with a single letter U: “The House of Representatives shall chuse their Speaker.”¹³⁵

Obviously, the committees were deeply concerned about surplusage, but they were also concerned about equivocal language. They would not have willingly replaced a clear, uncontroversial clause with an ambiguous one. These changes only make sense in the context of the centuries-old rule against nonmember Speakers. It was so obvious to the Framers that the Speaker must be a member of the House that they eliminated the Articles’ language to that effect as surplusage.

Because there was no formal debate on the speakership during the Constitutional Convention, the modern Speaker Clause presumably inherited its meaning unaltered from the Articles of Confederation (and its state contemporaries, which, as shown below, also required their respective speakers to be members).¹³⁶ By omitting the “one of their number” language found in the Articles of Confederation, the Framers did not abandon the rule that the Speaker must be a member.¹³⁷ The Constitution’s shortened Speaker Clause did not upend centuries of history. The Speaker’s membership requirement was already baked into the original meaning of the word “Speaker.”

Likewise, as explained above, some have argued that because the Constitution’s Speaker Clause commands the House to choose “other officers” in the same breath as the Speaker, the Speaker need not be a

¹³³ BOWEN, *supra* note 131, at 241–42.

¹³⁴ *We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity*, LIBRARY OF CONGRESS, (1787), <https://www.loc.gov/resource/bdsdcc.c01a1> [<https://perma.cc/R67X-P627>] (“[The House of Representatives] shall choose its Speaker and other officers”).

¹³⁵ U.S. CONST. art. I § 2.

¹³⁶ *See infra* section II(D)(d).

¹³⁷ *See, e.g.,* Wilkinson & Forte, *supra* note 17.

member. Besides this probably being another of Morris's benign stylistic revisions, there is another argument supporting the harmony between the seemingly conflicting language in the two instruments. Like the Constitution's Speaker Clause, the Articles also gave Congress the ability to appoint other "civil officers as may be necessary for managing" the government, which at that time solely consisted of the unicameral Confederation Congress.¹³⁸ Though those other officers were typically not members of Congress, the president was required to be a member.

Weaving these theoretical strands together, the historical record under the Continental Congress and Articles of Confederation indicates that the original understanding of the Constitution's Speaker Clause, at the time of adoption, contemplated no other person than a member occupying the chair. And even though the Articles were amended out of existence and replaced by the Constitution, the rule requiring the Speaker to be a member carried over. It will come as no surprise that the rule against nonmember speakers, codified both in Stuart England and Colonial America, was strictly observed by the thirteen original states.

d. *Thirteen Original State Constitutions*

"The lower house, as organized in the first State constitutions, was [] a continuation of the lower house which already existed in the colonies"¹³⁹ English charters, in their various forms,¹⁴⁰ were the precursors to the state constitutions that sprang up at the dawn of independence.¹⁴¹ But the seed for state constitutions was planted as early as the summer of 1775, when John Adams urged "[T]he [First] Continental Congress . . . to recommend that conventions of the people be called to establish governments for the colonies independent of their English charters."¹⁴² And on the eve of Independence, the Second Continental Congress "adopted Adams's resolution . . . recommending that each of the 'united colonies' assume the powers of government and 'adopt such government

¹³⁸ ARTICLES OF CONFEDERATION of 1777, art. IX, para. 5.

¹³⁹ William C. Morey, *The First State Constitutions*, 4 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 20 (1893).

¹⁴⁰ See, e.g., Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution*, 34 CAMPBELL L. REV. 7, 65-66 (2011) (explaining how the colonial charters set up three types of colonies: proprietary, corporate, and royal).

¹⁴¹ See Jesse Cross, "Done in Convention": *The Attestation Clause and the Declaration of Independence*, 121 YALE L.J. 1236, 1252 (2012) (explaining how charters served as templates).

¹⁴² Andrew G. I. Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061, 1072 (2014).

as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”¹⁴³

With their newfound independence, all but two states quickly went to work framing written constitutions.¹⁴⁴ By 1780, all of the original states had adopted their first constitutions.¹⁴⁵ Each of these documents contemplated their speakers being members of the legislative body, particularly the lower house, if the state had a bicameral legislature. Some explicitly commanded that they be, while others, echoing Morris’s preference for brevity, succinctly stated the obvious without further elaboration. Further, several of the original state constitutions stated that they were carrying on the pre-independence powers of the legislatures, which necessarily included the Speaker’s membership requirement. Whether explicitly or implicitly, all required the speaker to be a member.

TABLE 1: SPEAKER CLAUSES IN FOUNDING-ERA STATE CONSTITUTIONS

| State | Year | Text |
|-------|------|---|
| CT | N/A | After independence, the legislature decreed that the state “shall continue to be established by Charter received from Charles the Second, King of England, so far as an Adherence to the same will be consistent with an absolute Independence of this State on the Crown of Great Britain . . .” |
| DE | 1777 | Art. 5: “The right of suffrage in the election of members for both houses shall remain as exercised by law at present; and each house shall choose its own speaker . . .” |
| | 1792 | Art. II, § 5: “Each house shall choose its speaker and other officers; and also each house, whose speaker shall exercise the |

¹⁴³ *John Adams & the Massachusetts Constitution*, MASS.GOV, <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution> [<https://perma.cc/JSK6-JFYU>] (last visited Feb. 10, 2023).

¹⁴⁴ LEONARD W. LEVY, *SEASONED JUDGMENTS* 307 (1995) (noting Rhode Island and Connecticut “merely modified their colonial charters.”).

¹⁴⁵ *Id.* (noting Rhode Island and Connecticut had charters operating as constitutions).

| | | |
|-------------------|------|---|
| | | office of governor, may choose a speaker pro tempore.” |
| GA | 1776 | [No mention of Speaker] |
| | 1777 | Art. VII: “. . . house of assembly shall choose its own speaker . . . appoint its own officers . . . “ (unicameral body) |
| | 1789 | Art. I, § 8: “The house of representatives shall choose their speaker and other officers.” |
| | 1798 | [Same as above] |
| MD | 1776 | Sec. VII: “That not less than a majority of the Delegates, with their Speaker (to be chosen by them, by ballot) constitute a House, for the transaction of any business other than that of adjourning.” |
| MA ¹⁴⁶ | 1780 | Pt. I, ch. I, § 3, art. X: “The house of representatives shall . . . choose their own speaker; appoint their own officers, and settle the rules and orders of proceeding in their own house . . .” |
| NH | 1776 | [Mentions Speaker but not the selection process; implied continuance of colonial tradition.] |
| | 1784 | Pt. II, art. 22: “The house of representatives shall choose their own speaker, appoint their own officers, and settle the rules of proceedings in their own house.” |
| NJ | 1776 | Sec. V: “That the Assembly, when met, shall have power to choose a Speaker, and other their officers . . . and to empower their Speaker to convene them, whenever |

¹⁴⁶ Of particular note, as the last enacted constitution and the only one to be framed by a constitutional convention rather than by a state legislature, the Massachusetts Constitution, principally drafted by John Adams, had the most direct bearing on the federal Constitution. *John Adams & the Massachusetts Constitution*, *supra* note 142; *see also* Paul J. Cornish, *John Adams*, FREE SPEECH CENTER AT MIDDLE TENNESSEE STATE UNIVERSITY, <https://www.mtsu.edu/first-amendment/article/1156/john-adams> [<https://perma.cc/2UW5-K9Q3>] (last visited Feb. 10, 2023) (explaining the importance of Adams’s *Thoughts on Government* and *A Defense of the Constitutions of the United States* on the Framers).

| | | |
|----|------|---|
| | | any extraordinary occurrence shall render it necessary.” |
| NY | 1777 | Art. IX: “That the assembly, thus constituted, shall choose their own speaker, be judges of their own members, and enjoy the same privileges, and proceed in doing business in like nianner (sic) as the assemblies of the colony of New York of right formerly did.” |
| NC | 1776 | Sec. X: “. . . that the senate and house of commons when met, shall each have power to choose a speaker and other officers . . . “ |
| PA | 1776 | Art. 1, § 9: “. . . house of representatives . . . shall have power to choose their speaker . . . “ |
| | 1790 | Art. 1, § XI: “. . . each house shall choose its speaker and other officers.” |
| RI | N/A | [Governed by charter until 1842] |
| SC | 1776 | Art. IX: “. . . that the general assembly and legislative council shall each choose their respective speakers, and their own officers, without control.” |
| | 1778 | Art. XVIII: “That the senate and house of representatives shall each choose their respective officers by ballot, without control . . . “ |
| | 1790 | Art. I, § 11: “Each house shall choose by ballot its own officers . . . “ |
| VA | 1776 | Ch. II, art. VII: “. . . that the right of suffrage in the election of members of both Houses shall remain as exercised at present, and each House shall choose its own speaker . . . “ |

The states’ Founding Era constitutions collectively require their speakers to be members—both those ratified before the federal Constitution and those ratified afterward. Again, this rule carried over to the First Congress under the Federal Constitution.

e. *First Congress*

When the First Congress met in New York, as soon as a quorum was established, their first order of business was electing a Speaker.¹⁴⁷ At that time, there was no confusion, question, or debate on what to do or how to do it. The House was simply doing what all legislative bodies in Britain and America had done until then—selecting one of their own as Speaker.

Upon a resolution to “proceed to the choice of a Speaker by ballot,” the House elected Frederick Augustus Muhlenberg, a representative from Pennsylvania, and conducted him to the chair.¹⁴⁸ Their choice in Speaker made sense. Muhlenberg had served as a member of the Continental Congress, as a member in and Speaker of the Pennsylvania House of Representatives, and as a member and president of Pennsylvania’s constitutional convention called to ratify the federal Constitution.¹⁴⁹ Upon reaching the chair, Speaker Muhlenberg thanked “the House for so distinguished an honor,” and then the House proceeded to its next order of business, selecting a Clerk.¹⁵⁰

Unlike Muhlenberg, who was necessarily a member, as clerk the House elected John Beckley, an attorney from Virginia who was not a member of the House.¹⁵¹ This choice also made sense. Beckley had been clerk of the Virginia House of Delegates, Senate, and Court of Appeals.¹⁵² So, although, like Muhlenberg, Beckley had much experience with legislative bodies, he never was a member of the bodies he clerked for. In fact, Beckley only became the first Clerk after a member of the House, James Madison, sponsored him.¹⁵³ What’s more,

¹⁴⁷ 1 H. JOURNAL 1st Cong., 1st Sess. 6 (Apr. 1, 1789).

¹⁴⁸ *Id.*

¹⁴⁹ OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Frederick Augustus Conrad Muhlenberg*, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Detail/18657> [https://perma.cc/K3AD-47AC] (last visited Feb. 10, 2023) [hereinafter OFFICE OF THE HISTORIAN, *Muhlenberg*].

¹⁵⁰ 1 H. JOURNAL 1st Cong., 1st Sess. 6 (Apr. 1, 1789).

¹⁵¹ *Id.*

¹⁵² OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *John Beckley*, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Detail/38343> [https://perma.cc/PM8U-SJ5W] (last visited Feb. 10, 2023) [hereinafter OFFICE OF THE HISTORIAN, *Beckley*].

¹⁵³ See Jessica Farrish, *John Beckley to figure in Constitutional lecture series*, REGISTER-HERALD (Nov. 18, 2019), https://www.register-herald.com/news/john-beckley-to-figure-in-constitutional-lecture-series/article_673768b0-5332-5d58-8d2e-84caa68d88d0.html. [https://perma.cc/82TA-RP48] (“Madison sponsored [Beckley] as a clerk of the House of Representatives.”).

although he was the Clerk during the first four Congresses,¹⁵⁴ in 1796, “he operated as the nation’s first political party manager” organizing Jefferson’s Pennsylvania campaign for president, and “[a]s a result, . . . lost his job as clerk of the House of Representatives.” It wasn’t until later that he was reelected Clerk for the 7th, 8th, and 9th Congresses, which took place after Jefferson became president.¹⁵⁵

The distinction between Muhlenberg and Beckley is critical because it further illustrates the difference between the House’s “Speaker” and its “other [o]fficers.”¹⁵⁶ Muhlenberg’s legislative experience had come as a member, while Beckley’s legislative experience was only as a nonmember “other officer.” Further, as the Speaker and a member of the House, Muhlenberg appropriately acted as any other political official would, but when Beckley acted politically on behalf of Jefferson, he was dropped from his apolitical role as Clerk.¹⁵⁷

The First Congress continued to draw a clear line distinguishing the selection of the Speaker from other officers. On the day after the Speaker and Clerk were elected, the House moved to appoint a doorkeeper and an assistant doorkeeper “for the service of this House.”¹⁵⁸ From 1789 to 1995, this now-defunct Doorkeeper was “elected by a resolution at the opening of each Congress” to control access to the House.¹⁵⁹ The First Congress created this office “based on precedent from the Continental Congresses,” and “[w]ithout debate.”¹⁶⁰ Before the office’s demise, thirty-five people served as Doorkeeper.¹⁶¹ Of particular note, two of the Doorkeepers also served as members, but only “either prior to or after their service as a House officer.”¹⁶²

¹⁵⁴ OFFICE OF THE HISTORIAN, *Beckley*, *supra* note 152.

¹⁵⁵ *Id.*; OFFICE OF THE HISTORIAN, *Beckley*, *supra* note 152.

¹⁵⁶ U.S. CONST. art I § 2.

¹⁵⁷ See *Frederick Augustus Conrad Muhlenberg*, PA. HOUSE OF REPRESENTATIVES, <https://www.legis.state.pa.us/cfdocs/legis/SpeakerBios/SpeakerBio.cfm?id=113> [<https://perma.cc/J8YU-UG7J>] (last visited Feb. 10, 2023) (highlighting some of Muhlenberg’s political actions as a member and the Speaker of the House); *John James Beckley*, *supra* note 155.

¹⁵⁸ 1 H. JOURNAL 1st Cong., 1st Sess. 6 (Apr. 2, 1789).

¹⁵⁹ OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Doorkeepers of the House*, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Office/Doorkeepers/> [<https://perma.cc/NP6A-RJKT>] (last visited Feb. 10, 2023).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

The same goes for the House’s Sergeant at Arms and Chaplain, both currently constituted offices also created during the First Congress.¹⁶³ Eight Sergeants at Arms and two Chaplains served in the House as members, but, as it was with the Doorkeeper, never concurrently.¹⁶⁴ Other officers whose offices were created after the First Congress have also never concurrently served as representatives.¹⁶⁵

The First Congress also set apart the Speaker from other officers and confirmed the requirement that the Speaker be a member in the way it set up representatives’ oath of office. The third clause of Article Six of the Constitution requires that “Senators and Representatives” and “Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the Several States . . . be bound by Oath or Affirmation, to support” the Constitution. The Constitution only provides the text for the presidential oath. So, on top of selecting the Speaker, setting up the rules committee, and choosing other officers, one of the House’s earliest acts was providing an oath of office for itself. A group of representatives, including James Madison, were selected to create the oath.¹⁶⁶ Its language is instructive: “I, A B a Representative of the United States in the Congress thereof, do solemnly swear (or affirm, as the case may be) in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me GOD.”¹⁶⁷ A couple of days after the oath was approved, each member

¹⁶³ OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Sergeants at Arms*, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Office/Sergeants-at-Arms/> [<https://perma.cc/S5MH-NL3V>] (last visited Feb. 10, 2023) [hereinafter OFFICE OF THE HISTORIAN, *Sergeants*]; OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Chaplains of the House*, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Office/Chaplains/> [<https://perma.cc/4STL-W3QZ>] (last visited Feb. 10, 2023) [hereinafter OFFICE OF THE HISTORIAN, *Chaplains*].

¹⁶⁴ *Id.*

¹⁶⁵ Four Parliamentarians, a current office created in the mid-1800s, also served as House members following their time as Parliamentarian. *Parliamentarian of the House*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/officers-and-organizations/parliamentarian-of-the-house> [<https://perma.cc/7CP7-UBSA>] (last visited Feb. 11, 2023). The title Parliamentarian wasn’t implemented until the 70th Congress, but officers bearing other titles fulfilled this role. Likewise, one Postmaster, a defunct office created in the 1830s, served as a representative after his service as an officer. OFFICE OF THE HISTORIAN, U.S. HOUSE OF REPRESENTATIVES, *Postmasters of the House*, HISTORY, ART & ARCHIVES, <https://history.house.gov/People/Office/Postmasters/> [<https://perma.cc/8L4X-U9NX>] (last visited Feb. 10, 2023).

¹⁶⁶ 1 H. JOURNAL 1st Cong., 1st Sess. 7 (Apr. 6, 1789).

¹⁶⁷ *Id.*

of the House individually took the oath, starting with the Speaker.¹⁶⁸ This practice confirms that the Founding generation understood the Speaker of the House to be a “representative.”

Today, in accordance with Art. VI of the Constitution, members of the House still take an oath, always beginning with the Speaker. The current oath went into effect in 1966 and is codified at 5 U.S.C. § 3331. Unlike the original oath, however, the current oath is uniform for every “individual, except the president, elected or appointed to an office of honor or profit in the civil service or uniformed services.” Because the other officers in the House are individuals elected or appointed to an office of honor or profit in the civil service, they take the same oath as House members,¹⁶⁹ including the Speaker, but this doesn’t make the other officers members of the House any more than a law clerk having to take the same oath would make her a judge. What’s more, it could be colorably argued that the other House officers are not constitutionally required to take an oath, although that is now the practice under federal statutory law, further signaling why the Speaker must be a member.

In determining the Constitution’s original meaning, courts have often looked to the First Congress and other early Congresses filled with Founders. For this reason, the actions of the First Congress should be dispositive. And those actions confirm the requirement that the Speaker must be a member.

f. The History Summed Up

History teaches us much about the role of the Speaker of the House. First, in the almost 700 years that the office has existed, it has never once been filled by a nonmember. An unbroken tradition nearly as old as constitutional government itself dictates that the Speaker is always a member of the House. Second, the nature of the office makes it unsuitable for nonmembers. The modern Speaker of the House is many things, but she remains, like Peter de La Mare or Frederick Muhlenberg, a delegate’s delegate. As the Speaker *for* the House, she must be representative of it. A person who is not a member of the House cannot speak for the House. Finally, history reveals where Congress’s current confusion about nonmember Speakers began: with the Constitutional Conventions’ semantic committees’ preference for brevity. The Speaker

¹⁶⁸ 1 H. JOURNAL, 1st Cong., 1st Sess. 11 (Apr. 8, 1789).

¹⁶⁹ 1 DESCHLER’S PRECEDENTS 579 (1994), H. DOC. 94-661.

Clause's terseness does not express an intent to throw the doors of the speakership open to anyone. If anything, it shows that, at the Founding, tradition had rendered the word "Speaker" so self-explanatory that no further language was needed to set qualifications for the office. It was so obvious to the Framers that the Speaker must be a member that they eliminated the Articles of Confederation's language to that effect as surplusage.

E. THEORY CONCLUSION

So, the arguments in favor of nonmember Speakers fail. These arguments presuppose that the Constitution leaves the qualifications of the Speaker entirely up to Congress, without expressing any preference either way. But in looking at the document as a whole, constitutional structure logically precludes everyone who is not a sitting member of the House from serving as the Speaker. And the story of the speakership, from its inception to the present, shows that speakers have *always* been members of the houses they represent. As the Framers used the word, and as early Americans understood it, "Speaker" referred to a member of the House.

Thus, in nominating nonmembers for the speakership, members of Congress engage in a licentious act of constitutional revisionism. They give the word "Speaker" a meaning *that it never had* before 1789, nor in the immediate years afterward. They read the Speaker Clause in isolation, without considering the necessary context that the rest of the articles and amendments provide.

The rule against nonmember Speakers is as real and concrete as the separation of powers or the dormant commerce clause. The only reason it has not yet been recognized as a formal constitutional rule is because it has not yet triggered judicial scrutiny. Though representatives violate it in spirit every time they cast votes for a nonmember, Congress has not yet taken—and may never take—the concrete steps necessary to bring the issue before a federal court. And even if it did, a plaintiff would struggle to persuade the courts that the question was justiciable. But the rule matters all the same.

II. PRACTICAL SIGNIFICANCE

If most people think that the Constitution allows nonmember Speakers, what is the point of showing that they are wrong?

Representatives mainly use votes for nonmember Speakers as a form of protest; a way to grandstand for their constituents or to build political cachet with their base. If constituents think that such votes are permitted, does the fact that the Constitution precludes nonmember Speakers really matter?

It turns out that the conclusion does matter, and it matters a lot. For one, the issue might make its way into federal court. Obviously, federal courts have authority to enforce the Constitution even when Congress and prevailing public opinion disagree.¹⁷⁰ If the election of a nonmember Speaker was justiciable, a court could hold it unconstitutional, and votes for nonmembers would stop.

But, one might say, relying on the federal courts—creatures of limited jurisdiction—might not be practical. Would the issue of nonmember Speakers be justiciable? Outside of a few, narrow and unlikely scenarios, probably not. But the fact that the judiciary might not reaffirm a constitutional rule does not make the rule any less important. Indeed, relying on the judiciary to resolve all constitutional problems is as inadvisable as it is impossible. Recognizing that the people may not spot every instance in which a government actor exceeds constitutional limits, the Founders set up a system that uses as a backdrop the People's power to enforce constitutional limits themselves. Officers in the political branches, state governments, legal scholars, and even individual citizens can do so as well—and perhaps more effectively.

When constitutional violations are nonjusticiable outside a narrow set of scenarios, the people need a nonjudicial way to become informed about the violation and to enforce the Constitution. This Article plays that role. Correcting the record about the Constitution's speakership requirements, it gives constituents and other representatives fodder to critique votes cast for nonmember Speakers by a few rebel representatives. And by so doing, it promises to eliminate a meaningless form of protest vote that hinders government stability and erodes the credibility of the House.

¹⁷⁰ Indeed, that is the very point of judicial review: to enforce Constitutional provisions over and against competing legislative enactments, even when—precisely when—those enactments have popular support. *E.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Stated in familiar terms, courts exercise higher-law “judgment” over and against legislative “force” or democratic “will.” See THE FEDERALIST NO. 78 (Alexander Hamilton); ROBERT J. McCLOSKEY, THE AMERICAN SUPREME COURT, 13 (5th ed., 2010) (suggesting the Court's role is to enforce “fundamental law as a force in its own right,” which is “distinguishable from . . . popular will”).

F. JUSTICIABILITY

The issue of nonmember Speakers could make its way into federal court and there be definitely resolved and enforced. The issue likely is not a political question, and some few plaintiffs might have standing to challenge the nomination or election of a nonmember Speaker. In these contexts, a court should hold, for the reasons discussed above, that the Constitution's Speaker Clause requires that the Speaker of the House be a member of the same.

a. *Political Question*

A challenge to a representative's vote for, or the election of, a nonmember as Speaker of the House would likely not present a political question. Under the political question doctrine, federal courts cannot decide questions that are committed to a political branch or that lack judicially manageable standards.¹⁷¹

The political question doctrine has a long history; the Court hinted at it as early as *Marbury v. Madison*.¹⁷² Yet both the Court's treatment of the doctrine and the scholarly commentary discussing that treatment are muddled and inconclusive.¹⁷³ Contemporary scholarship generally agrees that the Supreme Court's discussion of the political question doctrine is wrong and unhelpful,¹⁷⁴ but the scholarship itself is even more

¹⁷¹ *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality op.) (“[T]he judicial department has no business entertaining . . . [a] question [that] is entrusted to one of the political branches or involves no judicially enforceable rights.”).

¹⁷² 5 U.S. (1 Cranch) at 170 (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”); *e.g.*, *Aziz Z. Huq, Removal as a Political Question*, 65 STAN. L. REV. 1, 20 (2013) (tying the doctrine to *Marbury*); *But see* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 NYU L. REV. 1908, 1911 (2015) (arguing the doctrine was not created until the mid-twentieth century).

¹⁷³ For a helpful overview of the scholarly commentary, see Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, STAN. L. REV. (forthcoming) (manuscript at 4-15) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172365) [<https://perma.cc/X77V-DHV6>].

¹⁷⁴ Louis Henkin, *Is There a “Political Question” Doctrine?* 85 YALE L.J. 597, 622-23 (1976) (arguing there is no such thing as a single political question doctrine and that the ‘doctrine’ is simply a repackaging of several existing doctrines); Grove, *supra* note 173, at 1911 (arguing the Court uses the doctrine to “entrench,” rather than to limit, “its emerging supremacy over constitutional law”); Martin H. Redish, *Judicial Review and the “Political Question”*, 79 NW. U. L. REV. 1031, 1059-60 (1984) (“[W]e must abandon the political question doctrine. . . .”); Bradley & Posner, *supra* note 174, at 12-13 (collecting scholarship that argues the Court has failed to apply the doctrine consistently).

muddled and inconsistent than the Court's doctrine.¹⁷⁵ Because this Section seeks to show that a court would likely not view a suit challenging the nomination or election of a nonmember Speaker as presenting a political question, this Section focuses on the Court's explanation of the political question doctrine, relegating scholarly disagreement to the footnotes.

As explained by the Court, the political question doctrine is a constitutional restraint on jurisdiction stemming from Article III.¹⁷⁶ The Warren Court identified six circumstances in which cases would present nonjusticiable political questions,¹⁷⁷ but subsequent cases have (over strong separate writings¹⁷⁸) ignored four of the six.¹⁷⁹ Under the

¹⁷⁵ The relevant commentary is canvassed in Bradley & Posner, *supra* note 174, at 10-14. Skipping to the most contemporary views, Professor Pushaw argues that the Constitution imposes a presumption of judicial reviewability that is rebutted by a textual commitment of discretionary power to another branch. Robert J. Pushaw Jr., *Judicial Review and the Political Question Doctrine: Revising the Federalist Rebuttable Presumption Analysis*, 80 N.C. L. REV. 1165, 1196-97 (2002). Professor Grove has argued that the political question doctrine is a modern invention. Grove, *supra* note 173, at 1911-16. Professor Harrison has argued that there are really two types of political question cases: cases in which the Court considers itself, to some extent, bound by the judgments of the political branches and cases in which the remedy sought would require the Court to interfere impermissibly with other branches' discretion. John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 460-86 (2017). In both cases, Professor Harrison argues the doctrine is correctly viewed as giving finality to nonjudicial decisions, not as limiting jurisdiction. *Id.* at 486. Professor Fallon has argued that the doctrine is jurisdictional, but that courts retain some responsibility over ensuring other branches do not exceed their constitutional limits. Richard H. Fallon Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1485 (2020). And Professor Dodson has argued that the political question doctrine derives from substantive law, rather than Article III. Scott Dodson, *Article III and the Political Question Doctrine*, 116 NW. U. L. REV. 681 (2021). In short, there is very little consensus in the contemporary scholarly debate.

¹⁷⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (framing the political question as a limit stemming from Article III's case-or-controversy requirement); *see especially id.* at 2494 ("In . . . case[s] . . . present[ing] a 'political question,' [the claim is] nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction."). *But see* Harrison, *supra* note 176, at 486-87 (arguing the political question doctrine is a doctrine of deference, not of jurisdiction).

¹⁷⁷ *Baker v. Carr*, 369 U.S. 186, 217 (1961). The six factors are (1) whether the Constitution "textually" commits the decision to a political branch, (2) whether there are "judicially discoverable and manageable standards for resolving" the issue, (3) whether the issue can be resolved "without an initial policy" question beyond judicial competence, (4) whether the issue can be resolved without showing an undue lack of respect to a political branch, (5) whether there is an "unusual need" to defer to a political question already made, and (6) the risk that having different branches come out differently on a question will cause "embarrassment." *Id.*

¹⁷⁸ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 202-06 (2012) (Sotomayor, J., concurring in part and in judgment) (analyzing and cataloging all six factors); *id.* at 212-13 (Breyer, J., dissenting) (analyzing all six factors and emphasizing the final four).

¹⁷⁹ 139 S. Ct. at 2493-98 (discussing only the lack of judicially manageable standards); 566 U.S. at 195 (discussing only the textual commitment and lack of judicially manageable standards); *Nixon v.*

remaining two, a case presents a political question when the Constitution’s text “demonstrabl[y] . . . commit[s]” the issue to a political branch or when there are no “judicially discoverable and manageable standards” for resolving the issue.¹⁸⁰ Two cases applying these standards are especially relevant here. In *Powell v. McCormack*, the Court held that a challenge to the House of Representatives’ use of its power to review the qualifications of any member did not present a political question.¹⁸¹ The Constitution commits to the House the authority to “be the Judge of the . . . Qualifications of its own Members,” suggesting that whether a Representative was qualified presented a political question.¹⁸² But the question of identifying those qualifications was not a political question—because the Constitution specifically lays out what those qualifications are and did not textually commit authority to the House to identify additional criteria.¹⁸³

By contrast, in *Nixon v. United States*, the Court held that a challenge to the Senate’s impeachment procedures presented a political question.¹⁸⁴ The Constitution gives the Senate the “sole” power to try all impeachments, and the Court interpreted that provision as committing the authority to determine impeachment trial procedures to the Senate.¹⁸⁵ That commitment, together with the fact that judicial oversight over impeachment proceedings would be anomalous with

United States, 506 U.S. 224, 228-29 (1993) (discussing only the textual commitment and lack of judicially manageable standards); *see also generally* 566 U.S. at 189 (suggesting, especially in light of Justice Breyer’s dissent, that the first two factors are the most important, with the final four capable of changing the outcome only in rare cases).

The Court’s opinion in *Baker* suggests that the six factors were not viewed as factors, but as different “formulations” of the same test. 369 U.S. at 217. Different formulations could apply in different settings, and the fact that a case failed any one of the different formulations sufficed to render the issue nonjusticiable. *Id.* The fact that subsequent cases have focused only on one or more of the circumstances (e.g., *Rucho*) is thus potentially consistent with *Baker*’s entire list. The general view, however, seems to be that the listed items are factors to be weighed. Some Justices have even variously described the listed items as factors and as circumstances in the same opinion. *Compare Zivotofsky*, 566 U.S. at 202 (Sotomayor, J., concurring) (describing the list as “an amalgam of circumstances . . . in which an issue might present a political question”), *with id.* (describing the list as “factors”), *and id.* at 203 (suggesting the factors are to be weighed against each other).

¹⁸⁰ 566 U.S. at 195.

¹⁸¹ *Powell v. McCormack*, 395 U.S. 486 (1969).

¹⁸² U.S. Const. art. I § 5; *see also* 395 U.S. at 548 (concluding the Constitution commits to Congress “at most” the authority “to judge only the qualifications expressly set forth in the Constitution”); 506 U.S. at 237 (interpreting *Powell* as suggesting that “whether a Member satisfied these qualifications *was* [a political question]”).

¹⁸³ 395 U.S. at 547-48.

¹⁸⁴ *Nixon v. United States*, 506 U.S. 224 (1993).

¹⁸⁵ *Id.* at 230-31.

respect to both history and constitutional structure,¹⁸⁶ led the Court to conclude that the Court lacked authority to adjudicate the issue. Distinguishing *Powell*, the Court noted that “no separate provision of the Constitution” laid out impeachment procedures or required that those procedures be enforced by a branch outside the Senate.¹⁸⁷ Thus, the *Nixon* Court read *Powell* as establishing a sort of a rebuttable presumption: if the text of the Constitution specifically commits a discretionary power to a political branch, questions about the exercise of that discretion likely present political questions, unless another provision of the Constitution lays out limits on that power.¹⁸⁸

Under these principles, a suit challenging the nomination or election of a nonmember Speaker is likely not a political question. The text of the Constitution commits to the House authority to choose the Speaker of the House: “The House of Representatives shall chuse their Speaker[.]”¹⁸⁹ Certainly, this textual commitment entails substantial discretion; a federal court would not have authority to choose a Speaker or determine the procedures the House uses in selecting a Speaker, just as *Nixon* held that the textual commitment of power to try impeachments to the Senate deprived courts of the authority to determine impeachment results and procedures.¹⁹⁰

Yet the Constitution limits the exercise of that discretion, and those limits are judicially enforceable. As detailed above, “Speaker,” as it appears in Article I, is best interpreted as imposing a membership requirement on Congress. Just as in *Powell*, where the Constitution’s enumeration of representatives’ qualifications imposed a judicially enforceable limit on House discretion, so too does the Constitution’s requirement that the Speaker be a member limit the House’s discretion—and provide a hook for judicial review.

As an analogy, consider the Commerce Clause: though it grants Congress discretionary authority to determine whether and how to

¹⁸⁶ *Id.* at 234-36 (noting the judiciary had not exercised oversight over impeachment proceedings and that such oversight would be inconsistent with the delicate separating of the power of impeachment).

¹⁸⁷ *Id.* at 237-38.

¹⁸⁸ *See id.* (noting “a textual commitment of unreviewable authority was defeated by the existence of [a] separate provision” in *Powell* and finding a political question because “there is no separate provision” applicable). *Contra* Pushaw, *supra* note 176, at 1196-97 (arguing constitutional structures impose the opposite presumption: there is a presumption of judicial reviewability that is rebutted by a textual commitment of discretionary power to another branch).

¹⁸⁹ U.S. CONST. art. I, § 2.

¹⁹⁰ 506 U.S. at 230-31.

regulate commerce,¹⁹¹ that discretion does not strip the federal courts of authority to ensure that Congress’s regulations are reaching “Commerce,” as that word is interpreted by the Court.¹⁹² In a similar way, the fact that “Speaker” entails a judicially manageable limit on the House’s discretion—requiring that the Speaker be a member of the House—allows the judiciary to enforce that limit. Thus, a case challenging the election of a nonmember Speaker would likely not present a nonjusticiable political question.

b. Standing

Some few plaintiffs might have standing to challenge the nomination or election of a nonmember Speaker.

Article III gives federal courts jurisdiction over “cases” and “controversies.”¹⁹³ For a claim to present a “case” or a “controversy” under Article III, a plaintiff must be the right person to bring the

¹⁹¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

¹⁹² See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Nat’l Feder. of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

¹⁹³ U.S. CONST. art. III, § 2. The terms “case” and “controversy” are widely understood to mean the same thing. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937) (quoting *In re Pacific Ry. Comm’n*, 32 F. 241, 255 (C.C.N.D. Cal.) (Field, J.) (“The term ‘controversies,’ if distinguishable at all from ‘cases,’ is so in that it is less comprehensive tha[n] [sic] the latter, and includes only suits of a civil nature.”)).

claim¹⁹⁴—and seek every form of relief requested.¹⁹⁵ Plaintiffs have standing under Article III if they allege “a concrete and particularized” injury that is fairly traceable to the defendant’s conduct and likely redressable by a favorable court ruling.¹⁹⁶ The injury must both be “personal”¹⁹⁷ and legally cognizable.¹⁹⁸

Because one plaintiff may have standing to pursue an action where other plaintiffs do not, standing should be analyzed for each potential plaintiff, not dispensed in gross.

Here, the question is whether a case presenting the nonmember Speaker issue could make its way through a federal court. Such a case could arise either if a nonmember was elected as Speaker or if a

¹⁹⁴ Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (noting standing is an element of the case-or-controversy requirement of Article III); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (justifying standing as an element of the case-or-controversy requirement). *But see* Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969) (arguing standing is not constitutionally required). The Court has described some traditional standing requirements as prudential, not constitutional. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (“The term ‘standing’ subsumes a blend of constitutional requirements and prudential considerations.”). Prudential requirements have included the third-party harm rule, the rule barring generalized grievances, and the zone-of-interest rule. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004). However, the Court has not been clear about the difference between prudential and constitutional standing. Flast v. Cohen, 392 U.S. 83, 92 (1968) (noting uncertainty about whether the generalized grievance rule was constitutionally required or a prudential rule of “self-restraint”); *see* Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 (2014) (holding the zone-of-interest test is a question of statutory interpretation, not a principle of prudential standing); *Compare also* Warth v. Seldin, 422 U.S. 490, 499 (1975) (suggesting the generalized grievance rule is prudential), *with* Lexmark, 572 U.S. at 127-28 n.3 (noting generalized grievances are “barred for constitutional reasons, not ‘prudential’ ones”). And it has recently called the entire notion of prudential standing into question. Lexmark, 572 U.S. at 126-27 (internal quotation omitted) (noting prudential standing is “in some tension with . . . the principle that a federal court’s obligation to hear and decide cases within its jurisdiction is virtually unflagging”); June Med. Servs. v. Russo, 140 S. Ct. 2103, 2144 (2020) (Thomas, J., dissenting) (“[O]ur recent decision in Lexmark . . . questioned the validity of our prudential standing doctrine more generally.”); Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014) (rejecting a prudential standing claim solely on the basis of Lexmark’s criticism of prudential standing doctrine).

¹⁹⁵ City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that a plaintiff must demonstrate standing for every form of relief requested).

¹⁹⁶ 504 U.S. at 555.

¹⁹⁷ Allen v. Wright, 468 U.S. 737, 751 (1984); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543-33 (1986) (finding no standing because a school board member “ha[d] no personal stake in the outcome of the litigation”).

¹⁹⁸ Spokeo, Inc. v. Robins, 578 U.S. 330, 341-42 (2016) (recognizing Congress’s role “in identifying and elevating intangible harms” but holding that the violation of “a statute grant[ing] a person a statutory right and purport[ing] to authorize that person to sue” may not present a “concrete” injury); TransUnion, LLC v. Ramirez, 141 S. Ct. 2190 (2021) (applying and reaffirming Spokeo and holding the risk of injury is not “concrete”).

representative nominated and voted for a nonmember to be Speaker. It would be easier for a plaintiff to show standing in the first case—if a nonmember Speaker was nominated, voted for, and ultimately elected. For this reason, we first consider standing in that context. If a plaintiff lacks standing to challenge the election of a nonmember Speaker (which includes both nomination and successful election), then the plaintiff also lacks standing to sue if a representative unsuccessfully nominates and votes for a nonmember Speaker.

Hypothetically, there are several potential plaintiffs who might sue if a nonmember was elected as Speaker. Private citizens, legislators who voted for an opposing candidate, and even the nonmember nominee him or herself might try to sue to challenge the nomination or election. Private citizens might have standing to challenge the election of a nonmember Speaker, but only if subpoenaed by Congress. A nonmember nominee might have standing to challenge her nomination if she could argue that the nomination harmed her reputation. Legislators would likely lack legislative standing.

i. Private Citizens

Private citizens might have standing to challenge the election of a nonmember Speaker when responding to a legislative subpoena.

The Speaker of the House signs all subpoenas issued by the House.¹⁹⁹ When applicable, the Speaker also is charged with certifying to a United States Attorney that an individual is in contempt of a House committee.²⁰⁰ The validity of either a congressional subpoena or a congressional contempt charge can be challenged in court, and both might allow the respondent to argue that a nonmember cannot act as Speaker (and that the contempt charge or subpoena are therefore invalid).²⁰¹ In these contexts, the respondent could rely on Supreme

¹⁹⁹ RULES OF THE HOUSE OF REPRESENTATIVES, 118th Cong., Rule 1 ¶ 4.

²⁰⁰ 1 DESCHLER'S PRECEDENTS 466-67 (2013).

²⁰¹ Such an argument might be raised as a defense to a contempt proceeding initiated by a United States Attorney or as an affirmative suit challenging the validity of either. An affirmative suit against House members or the committee authorizing the subpoena would be barred by Speech or Debate Clause immunity, which some courts interpret to be a jurisdictional bar. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975) (extending Speech or Debate Clause immunity to subcommittee work within the "legitimate legislative sphere"); *Republican Nat'l Comm. v. Pelosi*, 602 F. Supp. 3d 1, 17-22 (D.D.C. 2022) (dismissing a challenge to a subpoena issued by the January 6th Committee as barred by the Speech or Debate Clause); *Budowich v. Pelosi*, No. 21-3366, 2022

Court precedents such as *Collins v. Yellen* to argue that the structural defect (that is, the failure to adhere to the separation of powers) caused their injury. To establish an injury, a respondent would need to trace it to the “alleged unlawful [conduct]”—the election of the nonmember as Speaker.²⁰² In other words, if the respondent could plausibly allege that she would not have been subpoenaed if the nonmember Speaker did not hold that office, she would have standing to challenge the subpoena.

Outside the context of being subpoenaed or otherwise responding to direct Congressional action, private citizens would not have standing for they would not have suffered a “particularized” injury.²⁰³ The constituents’ theory would be that they have an interest in being represented in the House and that the representatives violated that interest by voting for an unconstitutional appointment in the House. But at bottom, this is an interest right to have the House “observe the procedures required by law.” Such generalized grievances cannot confer standing.²⁰⁴ Thus, a constituent would not have standing to challenge the election of a nonmember as Speaker of the House.

ii. Nonmember nominee

Ironically, a nonmember nominated as Speaker might have standing to challenge their nomination. Of course, this would require the nonmember nominee to argue that being nominated for an undesired position is a legally cognizable injury. To determine whether an injury

WL 2274359, at **4-7 (D.D.C. June 23, 2022) (same); *McCarthy v. Pelosi*, 5 F.4th 34, 38 (D.C. Cir. 2021), *cert. denied*, 142 S. Ct. 897 (2022) (describing Speech or Debate immunity as a jurisdictional bar). But an affirmative suit against a nonmember Speaker might not be barred, as the Speech or Debate Clause protects “The Senators and Representatives.” U.S. CONST. art. I, § 6.

²⁰² See *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021).

²⁰³ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

²⁰⁴ *Id.* at 573 (“[Plaintiffs assert] an abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law. We reject this view.”); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (“[T]o have standing in court, [plaintiffs] must show an injury . . . to a particular right of their own, as distinguished from the public’s interest in the administration of the law.”); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[W]hen the asserted harm is a ‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”).

As discussed *supra* note 195, the rule against generalized grievances is now viewed as a constitutional rule rather than a prudential one. There is historical support for this view. The Federalist No. 62 (“It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust.”).

is concrete enough to be legally cognizable, the Court has looked at whether the injury has “a close historical or common-law analogue.”²⁰⁵ An undesired nomination is not a tangible harm,²⁰⁶ but intangible harms are also legally cognizable if they have a “close relationship” to harms “traditionally recognized as providing a basis for lawsuits in American courts.”²⁰⁷

And the Court has recognized that reputational harms are one such intangible harm.²⁰⁸ If the nonmember nominee could argue that her nomination as Speaker of the House will concretely harm her reputation, she may have standing to challenge that nomination as unconstitutional.

iii. Legislators

Representatives who objected to the election of a nonmember speaker would likely not have standing. The Court has recognized standing for legislators on the basis of both a “personal” injury suffered by legislators and an “institutional” injury suffered by a group of legislators. Neither would allow a legislator to challenge colleagues’ election of, or votes for, a nonmember Speaker.

²⁰⁵ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

²⁰⁶ *Id.* (noting physical and monetary harms are “obvious . . . traditional tangible harms”).

²⁰⁷ *Id.*

²⁰⁸ *Id.* (citing *Meese v. Keene*, 481 U.S. 465, 473-75 (1987) (finding a state senator had standing to challenge an act banning “political propaganda” because of the harm that association would inflict on his reputation and electability)); David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name*, 2009 BYU L. REV. 1277, 1318-23 (arguing that reputational injuries meet the injury-in-fact requirement); Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOKLYN L. REV. 1555, 1574 n.83 (2016) (collecting cases upholding standing on the basis of reputational injuries); Matthew Funk, Note, *Sticks and Stones: The Ability of Attorneys to Appeal from Judicial Criticism*, 157 U. PA. L. REV. 1485, 1492-1500 (2009) (collecting cases to argue that most courts of appeals have upheld reputational injuries as sufficient to confer standing in a lawyer-specific context). *But see* *Spencer v. Kemna*, 523 U.S. 1, 16-17 n.8 (1998) (suggesting reputational harm does not suffice to create standing to challenge a criminal conviction). Reputational harm is the same injury that underlies defamation suits, which have long been allowed at common law. Yonathan A. Arbel & Murat Mungan, *The Case Against Expanding Defamation Law*, 71 ALA. L. REV. 453, 460-62 (2019) (arguing defamation law exists to protect reputations).

The unwanted disclosure of private information, the intrusion upon seclusion, and violations of First Amendment rights are additional examples of intangible harms the Court has found to be legally cognizable. *Id.* In some contexts, the stigma associated with racial discrimination can also support standing. *Allen v. Wright*, 468 U.S. 737, 754-55 (1984) (concluding that stigmatic injuries were not legally cognizable when “suffered by all members” of the group discriminate against but that such injuries could be legally cognizable for “those persons who are personally denied equal treatment”).

1. *Personal injury*

The standing inquiry proceeds as normal when legislators assert interests in a “private capacity,” such as when a congressperson was excluded from the House and lost his salary and sued to challenge that loss.²⁰⁹ When a legislator claims that he or she was deprived of something to which he or she was “personally [are] entitled—such as their seats as members of Congress after their constituents had elected them”—standing is straightforward.²¹⁰ The legislator suffers a loss of an interest to which he or she is personally entitled, and has therefore suffered a personal and concrete injury.²¹¹ The election of a nonmember Speaker, however, does not harm the private interests of any objecting representative.²¹² The only interests harmed—the interest in being led by a member Speaker and the interest in voting for a constitutionally permitted Speaker—are held in an official or institutional capacity, not a personal capacity.²¹³

2. *Institutional injury*

The Court has also recognized that legislators can assert standing on the basis of an institutional injury.²¹⁴ Because legislators “have a plain, direct and adequate interest” in maintaining an effective vote, they have standing to sue when their votes are “overridden” and “held for naught.”²¹⁵ That is, when legislators vote for an action, have sufficient votes to approve that action, but are wrongfully kept from taking that action, their votes are essentially nullified, and they have standing to challenge the obstruction.²¹⁶ This vote-nullification theory of standing was applied in *Coleman v. Miller*, in which the Court found that state legislators had standing to challenge the lieutenant governor’s tiebreaker vote on a resolution.²¹⁷ The legislators argued that the

²⁰⁹ *Powell v. McCormack*, 395 U.S. 486 (1969); *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (framing the suit in *Powell* as asserting an injury in a “private capacity”).

²¹⁰ 521 U.S. at 821.

²¹¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

²¹² 395 U.S. at 486.

²¹³ 521 U.S. at 825-26 (discussing the argument that legislators have lost the “effectiveness” of their vote as an institutional injury).

²¹⁴ *Coleman v. Miller*, 307 U.S. 437 (1939) (asserting that senators have an interest in continued effectiveness of their votes, thus, are able to assert standing).

²¹⁵ *Id.* at 438.

²¹⁶ *Id.* at 446.

²¹⁷ *Id.* at 438.

lieutenant governor had no authority to cast a tiebreaker vote, and if that argument were correct, the legislators' votes "would have been sufficient to defeat the resolution."²¹⁸ Accordingly, the legislators could argue that the lieutenant governor's wrongful vote had nullified their legislative power.²¹⁹

According to the Court, the institutional injury doctrine does not diverge from the typical standing principles.²²⁰ In that vein, it has required the injury, although institutional, to be concrete and particularized.²²¹ At times, the Court has suggested that the "loss of political power" or another "abstract dilution of institutional legislative power" that affects the entire legislature equally would not suffice as an Article III injury.²²² At other times, however, the Court has recognized a loss-of-power theory, finding standing when legislators lose a rightful power—even when the entire legislature experiences the loss equally.²²³ Thus, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court found that the Arizona legislature had standing to challenge a state ballot initiative that transferred redistricting, a power previously held by the state legislature, to an independent commission—even though the initiative impacted the entire legislature equally.²²⁴ The Court has since limited the loss-of-power theory to authorize standing only for representatives of the entire body to whom the lost legislative power pertains.²²⁵ For example, representatives of a single house lack standing to challenge the loss of a power that is held jointly with another house.²²⁶

²¹⁸ *Id.* at 446.

²¹⁹ *Id.*

²²⁰ *Id.* at 446 (“[W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy . . .”).

²²¹ *Raines v. Byrd*, 521 U.S. 811, 812, 829 (1997) (finding legislators lacked standing because their asserted interest was not personal, unlike in *Powell*, and was “wholly abstract and widely dispersed,” impacting “all Members of Congress equally,” unlike in *Coleman*).

²²² *Id.* at 821, 826 (challenging the Line Item Veto Act as diluting the entire Congress’s legislative power).

²²³ *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787 (2015).

²²⁴ *Id.* at 802-03 (explaining that the current situation is more similar to *Coleman* than *Raines*, thus, the plaintiffs have standing).

²²⁵ *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019) (concluding a single camera of the Virginia legislature lacked standing to challenge the loss of a legislative power that could not be exercised without the other camera).

²²⁶ *Id.*

The notion that institutional injuries support standing is controversial.²²⁷ Perhaps for this reason, the Court has kept it narrow, upholding legislative standing in only a few scenarios.²²⁸ In fact, the Court has applied the vote-nullification theory in only one case—*Coleman*—and that case has been criticized biting since.²²⁹ It has also applied the loss-of-power theory in only one case—*Arizona State Legislature*—and has since significantly narrowed that holding.²³⁰ The Court has also floated the possibility that institutional injuries support standing for state legislators only, not for their federal counterparts.²³¹ And the Court has never found standing for legislatures whose votes would be insufficient to approve the action that, allegedly, was wrongfully obstructed.²³² Institutional injuries exist under current doctrine, but they exist on shaky footing.

²²⁷ Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. 611, 615 (2019) (“The concept of ‘institutional injury’ rests on a fundamental misunderstanding of our constitutional scheme.”) (noting the Constitution allocates rights to individuals, not institutions); *Ariz. State Legislature*, 576 U.S. at 857-58 (Scalia, J., dissenting) (noting that the holding in *Coleman* does not follow the Court’s previous jurisprudence); *id.* at 856-57 (Scalia, J., dissenting) (arguing the Court had previously “affirmatively rejected” the loss-of-power injury asserted in *Arizona State Legislature*); Michael Sant’Ambrogio, *Legislative Exhaustion*, 58 WM. & MARY L. REV. 1253, 1258 (2017) (noting *Arizona State Legislature*’s standing inquiry “points toward a different approach to legislative standing” than the traditional framework).

²²⁸ Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845, 852 (2018) (“[L]egislative standing has been upheld thus far only in quite limited circumstances . . .”). See also 139 S. Ct. at 1953-54 (limiting the loss-of-power theory).

²²⁹ 576 U.S. at 857-58 (Scalia, J., dissenting) (“*Coleman* stands out like a sore thumb from the rest of our jurisprudence, which denies standing for intragovernmental disputes . . . *Coleman* should be charitably ignored.”)

²³⁰ 139 S. Ct. at 1953-54 (concluding a single camera of the Virginia legislature lacked standing to challenge the loss of a legislative power that could not be exercised without the other camera).

²³¹ *Raines v. Byrd*, 521 U.S. 811, 824 n.8 (1997); see also 576 U.S. at 803 n.12 (“The case before us does not touch or concern the question whether Congress has standing to bring suit against the President.”).

²³² *E.g.*, 521 U.S. at 824 n.7. See also 139 S. Ct. (holding one camera of the legislature lacked standing to challenge the loss of a particular legislative power because the power could be exercised only by both cameras together).

Some Justices have suggested that legislative standing should extend beyond these situations. Justice Alito, for example, has argued that Congress has standing to defend its legislation whenever its constitutionality or applicability is challenged and the Executive branch agrees with the plaintiffs. *United States v. Windsor*, 133 S.Ct. 2675, 2711-13 (Alito, J., dissenting). Justice Alito argued that this principle was consistent with *Raines*—because the House’s votes are necessary to enact legislation, the House’s votes are “completely nullified” if the Act is not enforced. *Id.* at 2713-14. But his position would expand *Raines* in at least one way. *Raines* held that legislators had standing when they were wrongfully prevented from taking a legislative action that they had authority to take (i.e., sufficient votes). But when the alleged injury is that the Executive has failed to defend a law, there is no legislative action left to take—the law has already been enacted, and the only

Under these principles, and especially because the institutional injury theories have been limited and critiqued, representatives would likely lack standing to challenge the election of a nonmember Speaker. Under the vote-nullification theory, the standing argument would be that the objecting representatives' votes for speaker are nullified by the election of a nonmember Speaker. But the vote-nullification theory applies only if the representatives' votes "would have been sufficient to defeat" the election "if their contention [that the Speaker must be a member] were sustained."²³³ That could not be the case. If a nonmember were elected as Speaker, it would be because the objecting representatives' votes were *insufficient* to defeat the election. Accordingly, under current law, representatives could not argue that their votes were nullified by the election of a nonmember Speaker. The sufficiency of the objecting legislators' votes to defeat the legislation was a key fact in *Coleman*—indeed, it is the fact that allowed *Coleman* to (arguably) stay within the bounds of traditional standing principles.²³⁴ And it is the fact that later Courts have emphasized in describing *Coleman*.²³⁵ Given the Justices' criticism of *Coleman*,²³⁶ a court would probably not expand its holding to a case so readily distinguishable from it.

That leaves the newer, loss-of-power theory. The theory here would be that the election of a nonmember Speaker would cause the objecting representatives to lose the power to select a Speaker of the House. That

question is the extent to which it will be enforced. Justice Alito's position would expand *Raines* to authorize legislative standing to challenge *executive* actions (enforcement)—actions that even a unanimous Congress lacks authority to approve. *See also* 133 S.Ct. at 2704 (Scalia, J., dissenting) (making a similar point).

Some commentators support Justice Alito's position, or something akin to it. Tom Campbell, *Executive Action and Nonaction*, 95 N.C. L. REV. 553, 587-95 (2017) (arguing legislatures' interests in seeing their laws enforced should be sufficient to support legislative standing); Sant'Ambrogio, *supra* note 228, at 1253 (arguing legislative standing should exist only when there are no nonjudicial ways of resolving the issue). *But see* Jackson, *supra* note 229, at 892-93 (arguing for a flexible approach to standing but noting that "most controversies between the branches are best addressed through political mechanisms"); Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 574 (2014) (arguing Congress does not have authority to defend legislation in Court).

²³³ *Coleman v. Miller*, 307 U.S. 433, 438, 446 (1939).

²³⁴ Again, *Coleman* claimed its holding was "no departure" from traditional standing doctrine, and that was because the legislators' votes, "if [the legislators'] contention were sustained, would have been sufficient to defeat the resolution." *Id.* at 446.

²³⁵ 521 U.S. at 823 (concluding *Coleman* stands "at most" for the proposition that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect) . . .").

²³⁶ 576 U.S. at 858 (Scalia, J., dissenting) ("*Coleman* should be charitably ignored.>").

power, however, is held by the entire House, not any subset of it.²³⁷ And the Court has made clear that the loss-of-power theory applies only when the plaintiff-legislators represent the entire body that holds the legislative power that has wrongfully been taken away.²³⁸ The objecting representatives challenging the election of a nonmember Speaker would not represent the entire body to whom the power of selecting a Speaker belongs.²³⁹ Accordingly, they would not have standing under a loss-of-power theory.

c. Justiciability Summed Up

A challenge to the nomination or election of a nonmember as Speaker of the House might be justiciable in a few contexts. The issue of nonmember Speakers is likely not a political question because the Constitution's text, if interpreted properly, limits the speakership to members. Private citizens might have standing to challenge the election of a nonmember Speaker when responding to a legislative subpoena authorized by the Speaker. The nonmember nominee might successfully show standing to challenge his or her nomination by showing that the nomination is unwanted and will concretely harm his or her reputation.

Outside these narrow, unlikely contexts, plaintiffs would lack standing to challenge the election or nomination of a nonmember Speaker. Legislators would likely not have legislative standing. Private citizens' suits would present prohibited generalized grievances outside the narrow context mentioned above. And a nonmember nominee might find it difficult to credibly allege concrete reputational injury from a nomination to one of the highest positions in American government. Though possible, it is improbable that a court will ever resolve the nonmember Speaker issue.

G. NONJUDICIAL CHANGE

Still, the issue of whether nonmember Speakers are permitted is crucial, and the fact that the issue is not readily justiciable does not make it less important. Indeed, the issue's nonjusticiability makes this Article's conclusion even more important. Unable to rely on the judiciary to

²³⁷ U.S. CONST. art. I § 2 (“The House of Representatives shall chuse their Speaker . . .”).

²³⁸ *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019).

²³⁹ 576 U.S. at 787.

resolve the issue, articles such as this are needed to persuade representatives and their constituents to enforce the Constitution. Nonjusticiable constitutional issues also give the People a chance to relax our current and troubling reliance on the federal courts to resolve all constitutional questions.

Under the Constitution, government power ultimately derives from the People, and the People are therefore ultimately responsible to ensure that the Constitution is adhered to.²⁴⁰ But as noted in *The Federalist Papers*, the people are too busy or unsophisticated to adequately identify every constitutional violation by government actors.²⁴¹ They thus rely on competing government actors to “watch[] and control[]” each other, keeping each other within constitutional limits.²⁴²

There are several constitutional mechanisms by which competing government actors keep each other in line. The most familiar of those mechanisms is judicial review, which stems from the structural separation of powers.²⁴³ But judicial review is by no means the only such mechanism. Every government official takes an oath “to support th[e] Constitution,” and every official therefore has a duty to enforce it.²⁴⁴ Legislators thus have an obligation to not vote for unconstitutional laws.²⁴⁵ The President should veto and can refrain from defending

²⁴⁰ Of course, government actors such as federal judges enforce constitutional limits. But these government actors act on behalf of the People and with power derived from the People, and the People retain *ultimate* responsibility to uphold the Constitution. See THE FEDERALIST NO. 78 (Alexander Hamilton) (noting legislative acts are acts “of a delegated authority” and that the people “are superior” to their representatives); *id.* (“[C]ourts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”); see David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 MCGILL L.J. 543, 576, 584 (arguing every branch has a “fiduciary trust” from the people); see generally MCCLOSKEY, *supra* note 171 (arguing that the Court will never stray too far from the People); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 240 (1984) (noting Court judgments are “likely to [reflect] proposition[s] ‘to which widespread acceptance may fairly be attributed’ . . .”).

²⁴¹ THE FEDERALIST NO. 17, at 82 (Alexander Hamilton) (noting only the most “speculative” citizens would understand the workings of the federal government).

²⁴² THE FEDERALIST NO. 52, at 276 (James Madison).

²⁴³ THE FEDERALIST NO. 78 (Alexander Hamilton).

²⁴⁴ U.S. CONST. art. VI.

²⁴⁵ See, e.g., Anant Raut & J. Benjamin Schrader, *Dereliction of Duty: When Members of Congress Vote for Laws They Believe to Be Unconstitutional*, 10 N.Y. CITY L. REV. 511, 511 (2007) (“Members of Congress have an obligation not to vote for legislation they believe to be unconstitutional.”). Scholars have disputed whether Congress actually fulfills this duty, but all agree that the duty is one Congress has. Compare Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983) (arguing Congress lacks the institutional and political capacities needed to adequately

unconstitutional laws.²⁴⁶ States participate in this process too.²⁴⁷ Every time the federal government exceeds its powers, states have an incentive to “mark the innovation, to sound the alarm to the people, and to exert their local influence [to] effect[] a change of federal representatives.”²⁴⁸ The most important enforcement mechanism—the mechanism that applies even when the others do not—stems directly from the People: the People can vote out officials who take unconstitutional actions or espouse unconstitutional policies.

As a society, we have relied almost exclusively on the judiciary to enforce the Constitution. This overreliance is unfortunate. It has strengthened the judiciary and, at the same time, politicized it by relying on it to resolve the most divisive partisan issues; allowed other mechanisms of constitutional enforcement to atrophy; and, consequently, weakened the People’s control over legal change and constitutional enforcement. There are also many constitutional issues that the judiciary is not competent to resolve. Jurisdictional limits allow Congress to withhold many issues from the federal courts that could otherwise be decided by them. The generalized grievance doctrine keeps large policy questions, especially those relating to tax policy, out

deliberate about the constitutionality of statutes), *with* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) (arguing Congress has the resources to assess the constitutionality of its statutes).

The constitutional avoidance canon is based in part on this duty, relying in part on the notion that Congress does not intentionally pass laws violating the constitution, or coming close to that violation. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (grounding the avoidance canon in “respect for Congress, which we assume legislates in the light of constitutional limits”). There is competing empirical evidence of this intent. *Compare* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 948 (2013) (noting legislative drafts try to stay within constitutional bounds), *and* *FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1840 (2009) (Breyer, J., dissenting) (“Congress would prefer a less-than-optimal interpretation of its statute to the grave risk of a constitutional holding that would set the statute entirely aside.”), *with* HENRY J. FRIENDLY, *BENCHMARKS* 210 (1967) (“It does not seem in any way obvious . . . that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them.”).

²⁴⁶ *E.g.*, *United States v. Windsor*, 570 U.S. 744, (2013) (noting the President declined to defend a law he deemed unconstitutional).

²⁴⁷ Indeed, states were the “first” line of defense the Constitution put in place against federal encroachment. *THE FEDERALIST* NO. 51, at 270 (James Madison) (noting power is divided “first” between the states and the federal government and then within each seat of power).

²⁴⁸ *THE FEDERALIST* NO. 44, at 235 (James Madison). The Constitution’s primary mechanisms are structural: Hamilton wrote that “all observations founded upon the danger of usurpation,” referring to the fear that the federal government would overstep its Constitutional bounds, “ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.” *THE FEDERALIST* NO. 31, at 153 (Alexander Hamilton).

of court. The political question doctrine keeps the judiciary from interfering in all those discretionary decisions assigned to the political branches. And other standing doctrines keep issues—such as the issue of nonmember Speakers—out of federal court even though state courts hypothetically could hear them. In each case, when the federal judiciary lacks authority to resolve an issue, the responsibility to enforce the Constitution falls to the other branches and to the People. But overreliance on litigation may keep the People from even recognizing this responsibility, and actors in other branches may seize the situation to take unauthorized action.²⁴⁹

Happily, the federal judiciary is not the sole entity charged with enforcing the Constitution. The Founders may have considered other enforcement mechanisms to be even more important than the judiciary. And they did not intend the federal judiciary to have the last word on every legal issue that divides society. Nonjusticiable but important constitutional issues provide constituents an opportunity to uncover and utilize these non-litigation methods of enforcing the Constitution. As discussed in the preceding section, the Speaker issue might be one of these nonjusticiable but vitally important constitutional issues. In some ways, then, the fact that the nonmember Speaker issue is likely nonjusticiable is a feature, not a bug. By allowing society a chance to lessen its reliance on the federal judiciary, it promises to strengthen the Constitution's security in the end.

For these reasons, the People should welcome constitutional issues that are beyond the judiciary's authority. These opportunities allow the People to reassert their responsibility over enforcing the Constitution. That the Speaker issue is unlikely to be reviewed in federal court does not make this Article's conclusion any less important—in fact, it makes the conclusion all the more important. Rather than writing to enact legal change through judicial oversight, this Article's conclusion invites constitutionally obedient representatives and their constituents to enforce the Constitution themselves, thereby inviting the People to reassume the most important power they have: the power to govern themselves and keep government within the Constitution's bounds.

²⁴⁹ There are many examples of this, likely from every administration. A good recent example might have been President Biden's student debt forgiveness policy, which lacks statutory authority but also initially appeared not justiciable. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023) (holding that a state entity has standing to challenge the policy and that the relevant statute does not authorize the policy).

H. PRACTICAL IMPACT

What is the practical impact of enforcing the Constitution's requirement that the Speaker of the House be a member of the same? Beyond allowing the People to reassume ultimate responsibility for enforcing the Constitution, this Article's conclusion promises to make Speaker elections smoother. The contemporary phenomenon of casting votes for nonmember Speakers has been a noxious issue. These protest votes, cast, not with the intent to elect a Speaker (for there never has been any indication that the nonmember nominee will even come close to being elected), but to prevent a plurality of representatives from electing a Speaker, gum up the constitutional machinery. The incentive is great: a handful of representatives can stop the entire House from convening until a plurality makes concessions to them. By showing that the Speaker must be a member of the House, this Article's conclusion eliminates one prominent form of meaningless protest votes.

It also prevents the House from demeaning itself. The idea that anyone can be Speaker erodes the authority and credibility of not only the office, but the entire legislative body. Protest votes for nonmember speakers imply that no sitting House member is qualified to assume the speakership, so America must look elsewhere for legislative leadership.²⁵⁰ They also imply that the role is so simple that it could be assigned to anyone, regardless of constituency or qualifications. These inferences are unworthy of the House, its Speaker, and its members.

With this point in mind, protest votes for nonmembers should be off the table. Future Speaker elections should be smoother and less of a self-aggrandizing spectacle.

CONCLUSION

Since 1997, a new pattern has emerged: when a small faction within the House's majority party disagrees with their party's Speaker nominee,

²⁵⁰ The Framers would have been familiar with the story of the Roman emperor Caligula, who so despised the Senate that he proposed to nominate his favorite horse as consul. CASSIUS DIO, *ROMAN HISTORY* Bk. 59, ch. 14, v. 7 (Earnest Cary trans., 1927) ("One of the horses, which he named Incitatus, he used to invite to dinner, where he would offer him golden barley and drink his health in wine from golden goblets; he swore by the animal's life and fortune and even promised to appoint him consul, a promise that he would certainly have carried out if he had lived longer."). If a horse could do it, anyone could, and the office of Consul was undeserving of respect. See ALOYS WINTERLING, *CALIGULA: A BIOGRAPHY*, 132–71 (2011). Protest votes for nonmembers similarly undermine both the House and the office of Speaker.

they vote for a nonmember Speaker. Representatives in these small factions have an incentive to vote for nonmembers. Voting for someone other than the mainstream nominee can prevent the entire House from coming into session, giving these representatives bargaining power to demand concessions from their party mainline. And voting for a famous nonmember—such as Donald Trump, Mitt Romney, or Joe Biden—propels the representative into the headlines, tying that representative to a well-known figure. With these incentives, it is no wonder that outlying representatives have voted for nonmembers with increasing frequency.

This pattern has sparked discussion about whether the Speaker of the House can be a nonmember. Congress thinks that the Constitution allows nonmember Speakers, as do many bloggers and pundits. But no article—until this one—has comprehensively analyzed the text, history, and tradition of the Constitution’s Speaker Clause to determine whether that conclusion is correct.

It is not. The Constitution does not allow nonmember Speakers. Indeed, 1997 was the first time a vote was cast for a nonmember Speaker. British practice, colonial practice, state practice, and modern practice before 1997 all suggest that the word “Speaker,” as originally and consistently understood, is properly interpreted to impose a membership requirement. The text and structure, informed by 700 years of history and tradition, show that the Speaker must be a member of the House.