State Legislators, Speech or Debate, and the Search for Truth

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INTRODUCTION

State legislatures are viewed with mixed emotions in this country. Their members are considered in some quarters to be out of touch with their constituencies; yet the vast number of controversial issues which legislators must address will inevitably produce a variety of positions that some, or even a majority, of their constituents will find objectionable. The procedures under which legislatures operate are often viewed as labyrinthian and enigmatic; but, for the most part, they are designed to assure that the subjects addressed by legislation are given fair and equal consideration. The legislative process itself is criticized as too “political”, as if the very word carried some nefarious connotation; but politics is essential to a functioning democracy.

Thus, we are left with a divergence of opinion on the strength and independence of state legislatures. On one end of the spectrum are those who subscribe to the notion that “[n]o man’s life, liberty or property are safe while the Legislature is in session.” On the other end are those who concur with Justice Holmes’ observation “that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”

In the last few years, this divergence has subtly entered the adjudicatory process. Because the speech or debate clause of the United States Constitution protects members of Congress from the consequences of their “official” acts, an official act of a member clearly may not be used as evidence against him. Equally certain is the...
corresponding immunity, established by forty-three state constitutions, which prevents the admission of official acts as evidence against state legislators brought to trial in state courts.\(^5\) However, the question of whether evidence of a state legislator's official activity may be used against him in a federal criminal prosecution has produced an exact split among the twenty-two federal judges who have considered the issue in four recent cases.\(^6\)

The dynamics that gave rise to the issues in each of these cases reveal that the ultimate answer to the privilege question generally was based upon the particular judge's perception of the legislative process. Accordingly, the divergence of opinion on state legislatures has some very real consequences in the context of a federal criminal trial.

This article proposes that evidence of official activity should be admitted in the federal-criminal prosecution of a state legislator. The article will reach this conclusion, first by a determination that federal evidentiary standards rather than state or federal constitutional principles control the analysis. The common law underpinnings of the speech or debate privilege as they should be interpreted in light of reason and experience will then be examined. The underlying considerations of separation of powers, need for legislative debate, judicial deference to legislative motives and the principles


Of the twenty-two federal judges who have reviewed the issue on the district and circuit court levels, eleven have found that state legislators enjoy a speech or debate privilege against the introduction of such evidence, and eleven have found no privilege to exist. In Gillock, Chief Judge Bailey (W.D. Tenn.) and Judges Edwards and Engel upheld the privilege; Judge Weick dissented. In re Grand Jury Proceedings disclosed the same division on the issue: Judge Becker (E.D. Pa.) and Judges Seitz and Weis recognized the privilege; Judge Gibbons did not. In United States v. DiCarlo, 565 F.2d 802 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978), the only decision in the group rendered after a trial on the merits, all four judges declined to recognize the privilege: Judges Skinner (D. Mass.) and the reviewing panel composed of Judges Coffin, Aldrich, and Crary (C.D. Cal., sitting by designation). In Craig, the en banc Seventh Circuit opinion reviewed a decision of Judge Kirkland (N.D. Ill.) which upheld the privilege. Judges Pell, Sprecher, Tone, Bauer, and Wood concluded that no privilege existed; Judges Cummings, Fairchild, and Swygert found otherwise. Judge Kunzig of the Court of Claims, who sat by designation on the original Craig panel but not the rehearing, also recognized the privilege.
of federalism will be assessed. Finally, the article will focus upon the modern legislative process as a basis for rejection of the speech or debate privilege.

THE CASES: DISCORD AMONG THE COURTS

In United States v. Craig, the first case to consider the question of a state legislator's speech or debate privilege, three Illinois legislators were indicted for extorting $1500 from an automotive leasing association to block passage of a bill. One defendant moved to suppress his grand jury testimony and statements to governmental agents during two interviews. The district court, in an unreported opinion, held that the speech or debate clause of the Illinois Constitution required the suppression of various portions of defendant's statements.

On the government's appeal from the suppression order, a majority of the Seventh Circuit panel took a different approach. The court held that the admission of evidence in a federal criminal trial was governed by the Federal Rules of Evidence, not state law, and traced the development of the privilege section of the Rules. It concluded that the analytical framework imposed by the Rules required a determination of whether the principles of common law, as interpreted in light of reason and experience, dictated recognition of a speech or debate privilege to be applied in federal prosecutions of state legislators.8

The majority focused on the role that the Founders intended the states to play in our dual sovereignty constitutional structure, and with heavy reliance on the ratification debates,9 found that state legislatures acting within the scope of their powers perform a function as vital to governing the state as the role Congress fulfills with regard to the nation as a whole.10 From this premise, Judge Cummings' opinion concluded that the privilege should be recognized because a legislator must not be influenced by the threat of prosecution by a hostile executive when considering whether to support or oppose a proposed law. This is true whether the threat emanates from a state or federal executive.11

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8. 528 F.2d at 776.
9. "The proposed Constitution, so far from implying an abolition of State governments, . . . leaves in their possession certain exclusive and very important portions of sovereign power." The Federalist (No. 9) 76 (New American Library ed. 1961). See also II Elliot's Debates 168, 199, 308 (1836 ed.)(Massachusetts; Connecticut; New York).
10. 528 F. 2d at 778.
11. Id. at 778-79. The opinion went on to state:
While holding the privilege applicable, the majority found that it could be, and in the case before the court, was in fact, waived. Judge Tone concurred in the result, but his reasoning was based on a refusal to recognize the privilege. He noted that the protection afforded state legislators from liability under federal law for acts done in their legislative roles is not based upon the speech or debate clause of the federal Constitution, a clause that applies only to Congress, but rather upon the common law doctrine of official immunity.\(^2\) He reasoned that judicially-created official immunity should not be extended to federal criminal cases against state legislators because separation of powers considerations are inapplicable and the threat of federal executive interference with the independence of state legislators is not confirmed by history. Finally, he concluded that, in the absence of such immunity, no purpose would be served by recognizing an evidentiary privilege.\(^3\)

Because of the \textit{Craig} panel's thorough exposition of the countervailing considerations at issue in the determination of whether to apply a speech or debate privilege to state legislators, the full Seventh Circuit, on rehearing \textit{en banc}, was content with an abbreviated \textit{per curiam}. Five judges adhered to Judge Tone's position with the caveat that legislative conduct, standing alone, could not be used to support an inference of wrongdoing. Judge Cummings held to his original majority opinion; Judge Swygert accepted the rationale of that opinion, but concluded that the privilege was not waived; Chief Judge Fairchild would have upheld the privilege on the basis of the Illinois Constitution, but agreed with the disposition on waiver grounds.\(^4\)

\textit{In re Grand Jury Proceedings}\(^5\) presented the next opportunity for the courts to review the issue. There, a senator and the chief clerk...
of the Pennsylvania State Senate intervened in a grand jury subpoena enforcement proceeding. The subpoena sought production of the financial and payroll records and other documents of the Senate Majority Appropriations Committee. The district court held that state legislators are entitled to a common law speech or debate privilege and limited the subpoena to committee payroll records and other financial records that did not apply to senators or their personal staffs. In addition, the court prohibited the grand jury’s inquiry into acts that are an integral part of the legislative process or concern a legislator’s motive behind a particular legislative act.

The senator and the clerk, in their capacities as intervenors, appealed. The Third Circuit majority rejected the application of either the federal or Pennsylvania constitutional speech or debate privilege, but nevertheless concluded that the principles of common law, viewed in light of reason and experience, warrant recognition of an evidentiary privilege. The court focused on the deep historical roots that led to the inclusion of the privilege in the federal Constitution and that of most of the states. Reinforced by the principles of federalism which mandate appropriate respect for state functions, the court deemed the evidentiary privilege necessary to protect the conscientious majority of legislators, even though the prosecution of the few who betray the public trust will be hindered.

Judge Gibbons concurred in the result on the ground that a cross appeal by the government would have been necessary to raise the issues adverse to its position. He also agreed with the disposition of the constitutional issues. However, he rejected what he perceived as the dictum that an evidentiary privilege exists which allows legislators to decline to testify about legislative acts or speech. After

16. Because of their status as intervenors, they were allowed to take an appeal in the absence of the generally required contempt sentence for refusal to comply with a court order. 563 F.2d at 580. See United States v. Nixon, 418 U.S. 683, 691 (1974); Perlman v. United States, 247 U.S. 7 (1918).

17. 563 F.2d at 583. Because the court recognized the privilege, it was compelled to deal with the scope of the privilege in the context of the facts before the court. See also United States v. Gillock, 587 F.2d 284, 291-94 (6th Cir. 1978), cert. granted ___ U.S. ___ (1979). Although the scope of the privilege is beyond the ambit of this article, it is worthwhile to note that recognition of the privilege will generate complex collateral issues in an area in which it is very difficult to draw the lines. Compare McSurley v. McClellan, 553 F.2d 1277 (D.C. Cir. 1977)(en banc), cert. dismissed as improvidently granted, 434 U.S. 1043 (1978) with Davis v. Passman, ___ U.S. ___, ___ 47 U.S.L.W. 4643, 4649 (1979)(Stewart, J., dissenting). See generally Note, The Scope of Immunity for Legislators and Their Employees, 77 Yale L.J. 366 (1967).

18. 563 F.2d at 586 (Gibbons, J., concurring). Whether the majority’s discussion was dicta is irrelevant here. Nonetheless, although the majority did not expressly indicate as much, its privilege discussion can be read as a means of discharging the court’s responsibility to control the grand jury process through its supervisory powers.
posing a variety of hypothetical questions left unanswered by recogni-
tion of the privilege, he concluded that a judicially-fashioned
privilege should not be created because there was no evidence that
it would increase a legislator’s tendency to be free in his utter-
ances.

The only decision on the subject that produced unanimity among
the judges who considered the issue is *United States v. DiCarlo.*21
There, a Massachusetts state senator was convicted for extorting
payments from a construction management firm in return for a
favorable report from a legislative committee that was scrutinizing
the circumstances under which the firm obtained a state contract.
The court declined to consider the issue in terms of an evidentiary
privilege, as the defendant requested, but viewed the question be-
fore it from the perspective of an extension of the official immunity
docline. On that basis, it concluded that concepts of federalism
do not compel the extension of special protection to state legisla-
tors.22 However, in order to confront the Third Circuit’s evidentiary
rationale in *Grand Jury,* the court followed the *Craig en banc* major-
ity: without a limitation on enforcement, there is no basis for creat-
ing a limitation that handicaps proof.

Finally, in *United States v. Gillock,*25 a Tennessee state senator
was charged with accepting bribes to help prevent a suspect’s extra-
dition and to secure master electrician licenses for certain individu-
als. The district court granted defendant’s motion to exclude much
of the evidence on the basis of an evidentiary speech or debate

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19. 563 F.2d at 586-87 (Gibbons, J., concurring):

Is it applicable only in federal criminal prosecutions, and only when the legisla-
tive act or speech would tend to incriminate a member of the legislature? Could
the legislator assert the privilege where another defendant sought to introduce evi-
dence of such act or speech defensively? If so, would not its recognition run afool
of the sixth amendment right to compulsory process? If it is available in civil cases,
could it be used as an effective means of preventing the successful prosecution of
civil rights cases . . .? Does it apply not only to members of the state legislature,
but also to the myriad municipalities, counties, school boards, and state adminis-
trative agencies which exercise, to one extent or another, the Commonwealth’s
legislative powers? If so, would it not thwart the successful prosecution of civil
rights cases . . .?

20. Id. at 587 (Gibbons, J., concurring).


22. Id at 806: “To the extent that a privilege exists, it antedated the rule, and was neither
created, nor enlarged, by the rule. The effect of a substantive immunity may be to bar
evidentiary use of the particular act, but the rule merely applies the immunity, rather than
establishes it.”

23. See text accompanying notes 130-39 infra.

24. Id. at 807.

Speech or Debate Clause

privilege, and the government appealed.

Before the Sixth Circuit, the parties conceded that neither the federal nor the Tennessee constitutional speech or debate clause applied. Accordingly, the point of contention was riveted on whether an evidentiary privilege should be recognized. Beginning with the proposition that the potential exists for abuse of federal prosecutorial power against members of state legislatures of an opposite political persuasion, the court traced the history of constitutional adjudication surrounding the federal speech or debate clause. Although it acknowledged the inapplicability of those decisions, the majority concluded that the long history and the need for protection of legislative speech or debate mandated the privilege's recognition.

Judge Weick's dissent contained a broad review of the issues involved. First, he considered the historic purpose which gave rise to the creation of the speech or debate principle—the conflict between Parliament and the Crown—relevant only in the context of a single government and, because no separation of powers question is raised by the federal prosecution of a state legislator, he concluded that no corresponding privilege should be recognized. Second, he accepted the Craig-DiCarlo principle that the absence of official immunity from criminal liability precludes application of an evidentiary privilege. Third, Judge Weick suggested that the nature of the American judicial and political systems made remote the threat of federal prosecutorial influence upon the affairs of state legislatures. Finally, he determined that the quagmire of complex policy decisions concerning the scope and application of the privilege were matters better left to Congress.

These four cases leave unresolved the viability of evidence of official acts in the federal prosecution of state legislators. With increased federal resources focusing upon corruption on the state and local level, it is imperative that prosecutors and judges receive guidance on this issue. As the cases indicate, the problem cannot be resolved without consideration of federal and state constitutional questions, the impact of federalism and federal-state comity, and the application of evidentiary privilege principles. The resolution ultimately depends upon how the contemporary state legislature is perceived in the American political system and the extent to which its conduct is subject to the influence of the federal executive.

26. Id. at 286.
27. Id. at 290.
28. Id. at 296-99 (Weick, J., dissenting).
THE APPLICATION OF STATE LAW

Although only two of the judges who considered the issue found the existence of a state constitutional speech or debate clause determinative,29 the theory warrants some comment. In federal question cases the clear weight of authority supports reference to federal law on the issue of existence and scope of an asserted privilege.30 Although federal courts sitting in diversity must apply the law, and with it the evidentiary privileges, of the forum state, no such requirement exists in federal question cases. This is particularly true in criminal cases where the reception of evidence is subject to the constraints of Rule 26 of the Federal Rules of Criminal Procedure,31 which was promulgated pursuant to enabling legislation, declaring that “[a]ll law in conflict . . . shall be of no force or effect . . . .”32

In accordance with the rationale of Rule 26, the cases uniformly have held that neither the statutes nor common law rules of a state control the admission of evidence in criminal cases in the district.33

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29. See United States v. Craig, 537 F.2d 957 (7th Cir.) (rehearing en banc) (per curiam) (Fairchild, C.J., concurring), cert. denied, 429 U.S. 999 (1976); United States v. Craig, No. 74 CR 877, (unreported memorandum opinion) (N.D. Ill. 1975) (Kirkland, J.), Contra, United States v. Gillock, 587 F.2d 294, 294 (6th Cir. 1978) (Weick, J., dissenting) cert. granted, ___ U.S. ___, (1979): “The Speech or Debate privilege for state legislators provided in the Constitution of the State of Tennessee is relevant only where state law is applicable, and affords no protection to state legislators who are being prosecuted in a federal court for committing a federal crime.”

30. Heathman v. United States District Court, 503 F.2d 1032, 1034 (9th Cir. 1974) (state privilege for tax returns inapplicable in federal question case).

31. Rule 26, as pertinent, originally provided:

The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. CRIM. P. 26. Following adoption of the Federal Rules of Evidence, Rule 26 was amended to provide: “In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.” FED. R. CRIM. P. 26.

32. 18 U.S.C. § 3771. The scant legislative history surrounding the enabling legislation indicates that the “all laws in conflict” provision was intended to avoid the confusion that was generated by the need to refer to state law to decide issues in federal cases. As the House Committee reported, “So long as it remains necessary to search the common law, the statutes, and constitutional provisions of the States, just so long will our procedure remain confused and complex.” H.R. REP. No. 2492 76th Cong., 3d Sess. 2 (1940) (emphasis added). Compare Holtzoff, Reform of Federal Criminal Procedure, 3 F.R.D. 445, 453 (1944) stating that Rule 26 was drafted to bring order to the chaos caused by reliance on the divergent state laws and to insure that “[t]he federal courts would not be fettered or shackled to the variations of the local law of evidence,” with Howard, Evidence in Federal Criminal Trials, 51 YALE L.J. 763 (1942).

33. United States v. Woodall, 438 F.2d 1326, 1327 (5th Cir. 1970) (en banc), cert. denied, 403 U.S. 933 (1971); see Weinstein, Recognition in the United States of the Privileges of
For example, in *United States v. Harper*, defendant claimed that Mississippi's statutory physician-patient privilege barred the admission of testimony of two doctors who had diagnosed his mental competence. The court based its decision against the defendant on Rule 26. It held that under common law principles, as interpreted and applied by the federal courts, no physician-patient privilege existed. Consequently, under the federal standard, the testimony of the two doctors was admissible.

As the courts have recognized, Rule 26 envisions a uniform federal practice in all federal criminal cases; it does not make admissibility of evidence in federal courts dependent upon diverse state laws. Based upon this established principle, it is incorrect to rely upon the speech or debate provision of a state constitution as a basis for suppression of evidence in a federal prosecution of a state legislator.

**The Federal Evidentiary Standard**

Prior to 1833, the Supreme Court had taken a relatively static approach toward the admission of evidence in federal criminal trials. That approach, governed exclusively by state law, resulted in the then black letter principle that the law of the respective states in 1789 or when the state was admitted to the union was applicable in the federal criminal courts unless state legislation or judicial decisions have established a weight of authority in favor of a more modern view.
The break with tradition came with the Court's decision in *Funk v. United States,* in which the common law doctrine that a wife could not testify in her husband's behalf was abandoned. The Court recognized, for the first time, that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy of the rule.

That *Funk* had signaled the dawn of an evolving federal common law of criminal evidence was made apparent, later in the same term, by *Wolfe v. United States.* In *Wolfe,* the lower court had admitted, through a stenographer, a statement in a letter that defendant had written to his wife. Admission was justified on the basis of a statute in force when the territory of Washington was admitted to statehood. Although affirming the conviction, the Court, in a unanimous opinion written by Justice Stone, held that, under *Funk,* evidentiary questions in "criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience."

Liberally paraphrasing Justice Stone's language in *Wolfe,* Congress approved Rule 26 to place its imprimatur on the notion of a developing federal common law to govern evidentiary questions in criminal cases. However, the rule did not prove to be a panacea. While cognizant of its power to develop a federal common law in this regard, the Supreme Court demonstrated a reluctance to alter longstanding rules by decision. And the lower federal courts, for the most part, failed to show progress toward modernization.

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40. *Id.* at 381.
41. 291 U.S. 7 (1934).
42. *See* Wolfe v. United States, 64 F.2d 566, 567 (9th Cir. 1933), aff'd, 291 U.S. 7 (1934).
43. 291 U.S. at 12.
44. The courts consistently have recognized that Rule 26 grew out of the *Funk-Wolfe* rationale. *See, e.g.*, Hawkins v. United States, 358 U.S. 74 (1958); Shores v. United States, 174 F.2d 838, 840 (5th Cir. 1949); Brunner v. United States, 168 F.2d 281, 283 (6th Cir. 1948).
46. Justice Jackson described the reason for the reluctance in the following manner: "It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be." Michaelson v. United States, 335 U.S. 469, 486 (1948).
47. Judge Clark believed that the lower courts tended "to overlook the fact that our duty is to interpret 'the principles of the common law,' in the 'light of reason and experience,'"
Given these failings, the courts recognized the wisdom of establishing a continuing body to study and recommend uniform rules of evidence in the federal courts.\textsuperscript{48}

The ideas ultimately reached fruition with the establishment of an advisory committee to recommend federal rules of evidence. As various proposed drafts were presented to the Court and returned to the committee for continuing revision, a lengthy and detailed series of rules regarding the question of privilege emerged.\textsuperscript{49} However, the privilege section of the proposed rules, as eventually transmitted to Congress by the Court, created such controversy\textsuperscript{50} that the House Judiciary Committee eliminated all of the enumerated privileges and replaced them with a single rule\textsuperscript{51} that left the courts free to develop privileges under the standard set forth in Rule 26.\textsuperscript{52} 

**FEDERAL COMMON LAW**

Under the language of Rule 501, the “principles of common law” appear to serve as a guidepost to the determination of whether a privilege should exist. If the common law did not recognize a privilege, the rule does not seem to prevent a court from creating the privilege “in the light of reason and experience.”\textsuperscript{53} On the other hand, reason and experience may dictate that a privilege founded on the common law should not be applied in particular factual circumstances. The recognition of a privilege in common law, how-

and assailed the courts for failing to recognize that Rule 26 “compels us to discover anew a rational rule.” United States v. Walker, 176 F.2d 564, 569 (2d Cir. 1949)(dissenting opinion).


\textsuperscript{50} In presenting the Conference Report to the House, Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated that “50 percent of the complaints received by the Criminal Justice Subcommittee related to the privilege section.” Cong. Rec. H. 12253 (1974). See generally United States v. Craig, 528 F.2d 773, 776 (7th Cir.), cert. denied, 425 U.S. 973 (1976).

\textsuperscript{51} Having come full cycle from Rule 26, Rule 501, as enacted, read:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.


\textsuperscript{53} See United States v. Hankins, 581 F.2d 431 (5th Cir. 1978); Lewis v. United States, 517 F.2d 236 (9th Cir. 1975).
ever, should establish a form of presumptive validity which would require a more compelling showing, under the reason and experience barometer, to justify its abandonment. Viewed in this manner, the rule is sufficiently flexible to endow the courts with latitude to determine whether reason and experience authorize the creation of a privilege in a specific case.\(^{54}\)

The history of the speech or debate privilege has been so well documented elsewhere\(^{55}\) that, for present purposes, its relevant precepts may be gleaned from an examination of Mr. Justice Frankfurter's opinion in *Tenney v. Brandhove*.\(^{56}\) Engulfed in the national emotion engendered by the McCarthy era, *Tenney* involved a suit for damages, under the Civil Rights Act, against members of the California state legislature's Un-American Activities Committee.

Starting with the proposition that freedom of speech and debate in the legislature was accepted as a matter of course by the Founders of this country, the Court canvassed the development of the privilege through the state constitutions. Having found the principle of speech or debate firmly rooted in our history, the Court concluded that the Civil Rights Act which formed the basis of the suit was not intended to impinge on a tradition so well grounded in history and reason.\(^{57}\) Accordingly, the Court held that the action could not be

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\(^{54}\) See United States v. Allery, 526 F.2d 1362, 1366 (8th Cir. 1975)(federal courts have "the right and the responsibility to examine the policies behind the federal common law privileges and to alter or amend them when reason and experience so demand"); 120 CONG. REC. H. 12254 (1974).

This interpretation of the Rule is consistent with the natural development of the law. "The year books can teach us how a principle or rule had its beginnings. They cannot teach us that what was the beginning shall also be the end." B. CARDOZO, *THE GROWTH OF THE LAW* 104-05 (1924). See also Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1896).

Thus, while not determinative, the existence of a common law speech or debate privilege operates to color the issue of whether that type of privilege should be recognized, in the light of reason and experience, in the federal prosecution of state legislators.


\(^{56}\) 341 U.S. 367 (1951).

\(^{57}\) Id. at 376.
maintained against the California legislators.

There is no question that the holding in *Tenney* was extremely narrow;\(^5\) but some confusion has resulted from the Court's failure to specifically identify the axis of that holding.\(^5\) At the time *Tenney* was decided, California had no speech or debate privilege.\(^6\) Nothing in the opinion suggests that the Court purported to apply the federal constitutional privilege to the issue. Therefore, as the Court has subsequently indicated, *Tenney* simply was not a speech or debate clause case.\(^6\) Rather, the decision rested on the proposition that the Civil Rights Act did not affect the common law immunity of legislators.\(^6\)

The common law immunity on which *Tenney* rested was not intended to mirror the speech or debate protection embodied in the Constitution.\(^3\) Rather, it reflected the official immunity which the common law recognized to insulate officials from liability for their decisions and action in functioning within the public trust.\(^6\)

\(^5\) We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct." 341 U.S. at 379. See United States v. Gillock, 587 F.2d 284, 297 (6th Cir. 1978) (Weick, J., dissenting), cert. granted, ___ U.S. ____ (1979) ("Even though the Supreme Court in *Tenney* discussed at some length the speech or debate privilege, its holding was quite narrow . . .").

\(^5\) Compare Reinstein & Silvergate, supra note 55, at 1114 n.3 ("The discussion [of the Speech or Debate Clause] in *Tenney*, although extensive, was technically dictum since the suit was brought against state legislators under the Civil Rights Act of 1871 . . . and the Court fashioned a common law privilege similar to the constitutional privilege for congressmen") with Cell, supra note 55, at 1087 n.212 (*Tenney* indicated that immunity for civil and criminal liability for state legislators is the same).

\(^6\) California's Constitution provided legislators with only freedom from arrest. See 341 U.S. at 375-76 n.5; Cal. Const. art. IV, § 11.

\(^6\) United States v. Brewster, 408 U.S. 501, 516 n.10 (1972). For this reason, language in Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1973), which suggests that *Tenney* had extended the federal constitutional clause to the states, is clearly incorrect. This statement may be regarded as pure dicta since *Eslinger*, nevertheless, was correctly decided; *Tenney*, in fact, held that "members of a state legislative committee, acting in a field where legislators traditionally have power to act, are immune from liability under the Civil Rights Act." Gambocz v. Sub-Committee on Claims, 423 F.2d 674, 675 (3d Cir. 1970).

\(^6\) Fidtler v. Rundle, 497 F.2d 794, 798 (3d Cir. 1974)(emphasis added); see Pierson v. Ray, 386 U.S. 547,554 (1967) ("§ 1983 gives no clear indication that Congress meant to abolish wholesale all common law immunities. Accordingly, this Court held in *Tenney* . . . that the immunity of legislators for acts within the legislative role was not abolished by § 1983"); Adickes v. Kress & Co., 398 U.S. 144, 231 (1967) (Brennan, J., dissenting)(*Tenney* cited for proposition that "standards governing the granting of relief under § 1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law").

\(^6\) See In re Grand Jury Proceedings, 563 F.2d 577, 581 (3d Cir. 1977)(footnote omitted)("*Tenney* v. *Brandhove* did not apply the Speech or Debate Clause of the United States Constitution to a state legislator as has sometimes been asserted.").

\(^6\) "The privilege is not a badge or emolument of exalted office, but an impression of a
Official immunity, as derived from the common law, has been recognized in a variety of situations in which state public officials were sued for civil damages. However, there is no corresponding immunity in criminal cases. The reason for the distinction was clearly articulated in United States v. Anzelmo, where a state attorney general, charged with mail fraud, interposed the bar of official immunity. The court held that in civil suits, the susceptibility of an official to harassment is present since any individual can institute a civil suit against another. Immunity is necessary, therefore, to protect against suits based on official conduct. In contrast, the potential for harassment is not present in criminal prosecutions because only government officials can bring the action, and only after a grand jury indictment.

Thus, a precise evaluation of the type of immunity which Tenney extended to state legislators is critical. If the Court intended to create a federal common law immunity for state legislators which is commensurate with constitutional speech or debate protection, that immunity would establish a “common law” starting point for Rule 501 analysis. This, in turn, would require a compelling demonstration of why reason and experience should make the common law doctrine inapplicable to federal prosecutions of state legislators. On the other hand, if Tenney was based on nothing more than official immunity, the common law protection would not extend to a criminal prosecution, and reason and experience would have to dictate the creation of an evidentiary privilege in these circumstances. For several reasons, it appears that Tenney represents the latter position.

First, the Court repeatedly has relied upon Tenney in cases in-
volving an official immunity analysis. *Doe v. McMillan*, 68 provides the most striking example. In *Doe*, an injunction was sought by the parents of school children who had been referred to in a derogatory manner in a report submitted by a House subcommittee after an investigation into the District of Columbia public school system. Named defendants ranged from the Chairman and members of the House Committee on D.C. Affairs to representatives of the Government Printing Office.

Justice White commenced the Court’s opinion by indicating that the case concerned the scope of congressional immunity under the speech or debate clause of the United States Constitution *as well as* the reach of official immunity in the legislative context. 69 Having indicated that the two doctrines were in fact separate, Justice White, after relating the facts, divided his opinion into two distinct parts. The first part, holding the members of Congress and their aides immune under the speech or debate clause, did not mention *Tenney*. The second, limiting the official immunity of Printing Office representatives to the extent that publishing and distribution serve a legitimate legislative function, extensively relied upon *Tenney* and employed it to support the proposition that official immunity has been held applicable to the legislative branch. 70

The second basis for an assessment of the scope of *Tenney* rests on the injunction cases. Attempts to enjoin the legislative activities of the United States Congress uniformly have been barred by the absolute immunity provided by the speech or debate clause. 71 However, the same result has not held true for injunction suits against state legislatures.

Although many federal decisions have authorized injunctions against state legislators without discussing either common law official immunity or the speech or debate privilege, 72 the Fourth Circuit

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69. *Id.* at 307 (emphasis added).

It is significant to note that one of the Court’s most recent pronouncements in the area specifically addressed Speech or Debate immunity in the context of federal legislators, noting that “the Clause shields federal legislators with absolute immunity ‘not only from the consequences of litigation’s result, but also from the burden of defending themselves.’” *Davis v. Passman*, ___ U.S. ___, ___ n.11, 47 U.S.L.W. 4643, 4645 n.11 (1979) (emphasis added) (citation omitted).

72. *See, e.g.*, Bond v. Floyd, 385 U.S. 116 (1966) (Georgia legislature enjoined from refus-
confronted the issue in *Jordan v. Hutcheson.*\(^73\) Three black lawyers sought an injunction against a Virginia legislative committee to prevent harassment of their right to seek judicial recourse against racial segregation in the state. Holding that an injunction could be available under the circumstances, the court found that the official immunity recognized in *Tenney* was limited to dollar damages.\(^74\)

The fact that state legislators have been subjected to federal injunction suits scarcely accords with the absolute nature of speech or debate protection. Because state legislators may be enjoined, it appears that, unlike their federal counterparts, the federal common law protection which they were provided in *Tenney* was something less that the equivalent of speech or debate immunity.

Finally, *O'Shea v. Littleton*\(^75\) suggests that *Tenney* was not based on anything beyond judicially fashioned common law immunity. Commenting on the vulnerability of state judges to criminal prosecution, the Court acknowledged that legislative officers stand in the same footing as their judicial and executive brethren with respect to criminal offenses.\(^76\) The Court thus indicated that the common law immunity of legislators does not extend to criminal liability.

The judges who have refused to recognize a federal speech or debate privilege for state legislators have based their position on the fact that, unlike members of Congress, state legislators enjoy no common law official immunity from criminal liability. Taking the matter one step further, they have concluded that, in the absence of underlying immunity, there is no reason to recognize an evidentiary privilege.\(^77\) In order to take that step, however, it is necessary

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\(^73\) 323 F.2d 597 (4th Cir. 1963).
\(^74\) Id. at 602.
\(^76\) The Court stated:

> [W]e have never held that the performance of the duties of judicial, legislative or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. On the contrary, the judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct as proscribed by an Act of Congress. 

Id. at 503 (emphasis added) (citations omitted).

\(^77\) See United States v. Gillock, 587 F.2d 284, 298 (6th Cir. 1978) (Weick, J., dissenting) cert. granted, --- U.S. --- (1979); United States v. DiCarlo, 565 F.2d 802, 807 (1st Cir. 1977), cert. denied, 438 U.S. 924 (1978); In re Grand Jury Proceedings, 563 F.2d 577, 587 (3d Cir. 1977) (Gibbons, J., concurring); United States v. Craig, 537 F.2d 997 (7th Cir.) (rehearing
to read Rule 501 to indicate that "whether the claimed privilege should be recognized as a development in the federal common law of evidence depends on whether there is an underlying immunity."  

This proposition provides the correct result when applied to the federal prosecution of a state legislator; but it is inconsistent with the intent of Rule 501, and its general application would remove the federal judiciary from the development of the law with respect to privileges and leave that matter to Congress alone. Although there are those who believe that Congress is better suited than the courts to deal with the ramifications of a privilege's creation, the rule was specifically designed "to provide the courts with flexibility to develop rules of privilege on a case-by-case basis." This was done to calm the fury created by an earlier draft of the rule which contained controversial modifications or restrictions upon common law privileges.

If a privilege, in order to achieve recognition under Rule 501, must depend on an underlying immunity, there are few situations in which a federal court could create a privilege under the rule. In the absence of a governing statute, a witness who received an informal grant of immunity might prevail on the court, under this doctrine, to provide him with a privilege of some type to prevent the introduction of evidence derived from his immunized testimony. But these situations are rare. Indeed, were we without a Bill of Rights, a court would be prohibited from recognizing a privilege against self-incrimination because there is obviously no underlying immunity.

Yet, the common law has recognized a number of privileges in order to prevent intrusions upon full and open communication in a socially desirable relationship. And the courts have acknowledged that in certain circumstances confidential matters are shielded for considerations of policy, while in other cases a witness may be ex-

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cused from telling all he knows. Because of the intricate policy considerations involved in the creation of a privilege, Rule 501 seems to envision a development of the law of privilege on the basis of the practical impact of evolving relationships in a maturing society, or, in other words, "reason and experience." Thus, to correlate the creation of a privilege solely to an underlying immunity would contravene the intent of the rule.

Under this interpretation of the rule, the conclusion that state legislators have no common law official immunity remains important. That, however, does not end the matter. It merely establishes that there is no presumption in favor of a privilege to be overcome by reason and experience. The courts are free to decide whether the underlying policy considerations, as seen through the eyes of reason and experience, authorize the creation of a speech or debate privilege for state legislators in federal prosecutions.

Privilege Based on Reason and Experience

Wigmore has commented that "when we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." The Supreme Court, in discussing privileges, has often recognized that whatever their origins, the exceptions to the demand for every man's evidence are not lightly created nor expansively construed because they are in derogation of the search for truth. It is in this posture that one must consider whether a speech or debate privilege for state legislators should be recognized in light of reason and experience.

Reason

The doctrine of speech or debate has been recognized in this country to secure the separation of powers, to insure unrestrained legis-

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86. 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton Rev. 1961). Dean Wigmore's anti-privilege assumption springs from the well-accepted notion that "the public has a right to every man's evidence." Branzburg v. Hayes, 408 U.S. 665, 688 (1972); Blackmer v. United States, 284 U.S. 421, 438 (1932).
88. See text accompanying notes 91, 92 infra.
lative debate,\textsuperscript{89} and to maintain judicial deference to legislative motives.\textsuperscript{90} These reasons have significant, historical weight when applied to the federal Congress; but when they are examined in the context of a federal prosecution of state legislators, the impact of the reasons underlying the privilege is lost. Accordingly, the "reason" which supports the privilege has no application to state legislators.

1. Separation of Powers

There is little doubt that the separation of powers doctrine is the dominant reason behind the speech or debate provision in the Constitution.\textsuperscript{91} At the heart of the separation of powers theory is the belief that one branch of the federal government shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments.\textsuperscript{92} Since the Constitution does not impose a similar three-branch government structure upon the individual states,\textsuperscript{93} separation of powers provides neither a reason nor a parallel for the application of the legislative privilege to the federal prosecution of a state legislator. That type of situation obviously involves no question of the permissible power of one branch of the federal government to intrude upon or review the actions of another branch.\textsuperscript{94}

\textsuperscript{89} See text accompanying note 99 infra.
\textsuperscript{90} See text accompanying notes 105-07 infra.
\textsuperscript{91} "[T]he privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." United States v. Brewster, 408 U.S. 501, 525 (1972).
\textsuperscript{92} O'Donoghue v. United States, 289 U.S. 516, 530-31 (1933); see Springer v. Philippine Islands, 277 U.S. 189, 201 (1928). As the court has repeatedly recognized, "[t]he purpose of the clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently." Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); see Doe v. McMillen, 412 U.S. 306, 311 (1973); Gravel v. United States, 408 U.S. 602, 616 (1972); United States v. Brewster, 408 U.S. 501, 507 (1972); United States v. Johnson, 383 U.S. 169, 178-79 (1966). See also 8 WORKS OF THOMAS JEFFERSON 325-27 (Ford ed. 1904).

Accordingly, in our tripartite federal system, Speech or Debate serves the "function of reinforcing the separation of powers so deliberately established by the Founders." United States v. Johnson, 383 U.S. 169, 178 (1966).


\textsuperscript{94} For the same reason, Tenney v. Brandhove, 341 U.S. 367 (1951), was not a separation of powers case. See Jordan v. Hutcheson, 323 F.2d 597, 602 n.5 (4th Cir. 1963).

In the federal system, the speech or debate clause acts as a means of preserving the balance of power among the three co-equal branches of government. To maintain that unique balance, the Supreme Court necessarily has questioned its constitutional power, in light of the clause, to examine intra-legislative action. To do so may upset the balance of power in the form of an exertion of undue influence on a co-equal branch of government.

Separation of powers does not provide a basis for extending a speech or debate privilege to state legislators because the power to bring a federal prosecution evolves from the co-equal functioning of all three federal branches. Congress has passed the laws on which the prosecution rests; the executive has elected to pursue the case; and the judiciary stands ready to hear it. Accordingly, the question is not one of intra-federal power.

2. Legislative Debate

A second reason for the existence of the privilege arose from the English history that preceded the founding of this country. Throughout the sixteenth and seventeenth centuries, as Parliament clashed with the kings, who were prone to use the sedition laws to intimidate critical members, the privilege evolved to secure a basic right of free speech. When certain members began to denounce the King's policies, the prosecutions which ensued culminated in 1689 with the insertion of an unequivocal speech or debate provision in the English Bill of Rights.

With the precepts of the Bill of Rights woven into our democratic fabric, freedom of speech and action in the legislature was presumed by those who severed the colonies from the Crown and founded our nation. On that basis, the speech or debate clause was inserted in

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federal judiciary to the states does not give rise to a political question); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (state insulation from judicial review is not carried over when state power circumvents federal rights).


97. See Proceedings Against Sir William Williams, 13 How. St. Tr. 1370 (1684-95) (prosecution against member for republication of House committee report which alleged misconduct by King); Proceedings Against Sir John Elliot, Denzil Hollis and Benjamin Valintine, 3 How. St. Tr. 294 (1629) (prosecution of members of House of Commons for seditious libel). See generally Reinstein & Silverglate, supra note 55, at 1122-35.

the Constitution, with little comment, to provide that a legislator "should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense." So viewed, speech or debate protection, designed to insure unbridled legislative debate which is totally free from executive intimidation, is, in context, similar to the safeguard provided by the first amendment.

Therefore, it is important, from a legal standpoint, to consider whether the absence of a legislative privilege will hamper free debate by state legislators. As indicated, the speech or debate clause evolved from the prosecutions brought by the King for various seditious and treasonous speeches in Parliament. The development of first amendment theory in this country has made analogous prosecutions of state legislators impossible. Consequently, the first amendment's protection is alone sufficient to promote freedom of speech in the state legislature.

The protection of robust legislative debate by the first amendment is evidenced by Bond v. Floyd. In Bond, the Georgia Legislature refused to seat a duly elected representative because of his anti-war statements. Without considering the legislative privilege implications raised by the injunction that Bond sought against the state legislature, the Court rested its decision to grant the injunction on first amendment grounds.

The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment, . . . is that 'debate on public issues should be uninhibited, robust, and wide-open.' . . . Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected. The State argues that [this] principle should not be extended to statements by a legislator because the policy of encouraging free debate about governmental operations only applies to the citizen-critic of his government. . . . The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.
It has been argued that the first amendment is an inadequate substitute for the speech or debate privilege because it neither creates a privilege against giving evidence nor prohibits a jury from questioning the motives of the speaker. However, this position confuses the scope of the privilege with the reason for its creation. Investigatory inquiry into a legislator's official acts and statements was prohibited in the broadest language because of threat posed to Parliament by broad sedition and treason laws. The first amendment, as interpreted today, protects all citizens from criminal prosecution on the basis of the type of political expression which gave rise to the doctrine of speech or debate. Absent separation of powers considerations, there is no corresponding benefit to be gained from extending the privilege beyond the ambit of first amendment protection.

3. Deference to Legislative Motive

The third reason furnished by the courts to support the legislative privilege arises from the theory of judicial deference to the motives that underlie legislative acts. As Justice Frankfurter recognized in *Tenney*, the holding of *Fletcher v. Peck*, that it did not comport with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. The rationale is based upon the belief that legislators must be free to speak and act without fear that their motives will be questioned at some later time in a court of law.

When separation of powers considerations and the threat to free debate are removed from the structure, the doctrine of judicial deference to the sanctity of legislative motives is eliminated. To a great extent, that doctrine was removed from the speech or debate framework in *United States v. Brewster*, where the Chief Justice indicated that speech or debate does not proscribe inquiry into ille-

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104. To the extent that the first amendment would not immunize state legislators from civil suits for libel or slander, the doctrine of official immunity would provide the necessary protection. See *Barr v. Matteo*, 360 U.S. 564 (1959).
105. 10 U.S. (6 Cranch) 87 (1810).
106. 341 U.S. at 377.
107. See *United States v. Johnson*, 383 U.S. 169, 183 (1966), quoting *Ex parte Wason*, L.R. 4 Q.B. 573, 577 (1869) (Lush, J.) ("I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House").
gal conduct simply because it has some nexus to legislative functions.\textsuperscript{109}

Moreover, the cases that established the doctrine of judicial deference to legislative motives all involved challenges to statutes allegedly enacted for a corrupt purpose.\textsuperscript{110} There is, however, a significant distinction between an act of the legislature and an act of one of its members.\textsuperscript{111} While a court may be “bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes,”\textsuperscript{112} it is unrealistic to apply that presumption to an individual legislator.

\textit{Experience}

Separation of powers, the need for legislative debate and deference to legislative motive are the several policies underlying the speech or debate clause’s original creation and inclusion in the federal Constitution. Because these “reasons” are inapposite in federal prosecutions of state legislators, only one step remains. Rule 501 dictates that “experience”, as well as “reason”, be examined to determine whether practical developments in contemporary society warrant recognition of the privilege.

1. Federal Prosecution of Local Political Corruption

In evaluating whatever guidance experience may offer, it is noteworthy that this country’s historical experience reveals that the threat of groundless indictments against legislators is negligible.\textsuperscript{113}

\begin{footnotes}
\item[109] Id. at 528. The statement was made in response to the position taken by the dissenters in \textit{Brewster} who argued that, under \textit{Johnson} and the decision of the Queen’s Bench in \textit{Wason}, see note 107 supra, the Court could not “divide a distinction between promise and performance” for purposes of analyzing a legislator’s motives. 408 U.S. at 561 (White, J., dissenting); Id. at 535-36 (Brennan, J., dissenting). However, the majority concluded that “the English analogy . . . and the reliance on \textit{Wason} are inapt.” Id. at 518.


\item[111] Inquiry into the motives of legislators responsible for the enactment of a law is concededly inadvisable (if not impossible) since the stability of statute law would be impaired if the good or bad intentions of individual members become a criterion for judging validity. The passage of a statute, moreover, is the work of the legislature as a responsible branch of government about whose operation assumptions of legitimacy should be made. Deference to the formal enactment of an institution does not, however, justify similar respect for the motives of individual officials. From a practical standpoint, moreover, the insuperable difficulties of proof involved in investigating the motives of representatives responsible for the enactment of a statute are not duplicated when the object of investigation is a single legislator. \textit{Bribed Congressman’s Immunity}, supra note 55, at 340 (footnotes omitted).


\item[113] \textit{Bribed Congressman’s Immunity}, supra note 55, at 348:
\end{footnotes}
Aside from one notable instance, American history has recorded no convictions of congressmen for the dissemination of statements offensive to the Executive. Thus, experience shows that even though the inevitable discretion of prosecuting officials to initiate groundless prosecutions is presented under every statute, it appears doubtful that this discretion deters honest legislative speech.

On the other hand, the proven conduct of various officials has prompted the courts to depict corruption in public office as "a betrayal of trust of the most alarming type to a free society." This legitimate sense of outrage springs from the notion that "[p]ersonal influence to be exercised over an officer of government . . . is not a vendible article in our system of law and morals."

There is, of course, no need to belabor the condemnation of political corruption; isolated incidents of corruption must be overlooked as part of the price we pay for the interests served by the speech or debate clause. However, in the absence of constitutional restraints, it is imperative that the courts consider the type of conduct that will go unpunished because of the creation of a speech or debate evidentiary privilege.

The phrase "speech or debate" is not a magical incantation. "It is part of wisdom, particularly for judges, not to be victimized by

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(footnotes omitted)

114. In Lyon's Case, 15 Fed. Cas. 1183 (No. 8646)(Vt. Cir. Ct. 1795)(decided in 1798), Congressman Mathew Lyon was convicted under the Sedition Act of 1798 for publishing two derogatory letters about President Adams. The Speech or Debate Clause was not raised in defense. With an outraged citizenry in his favor, Lyon gained reelection while in prison, refused a pardon and, upon release, returned in triumph to Washington. In 1840, legislation was enacted to void his conviction. See J. SMITH, FREEDOM'S FETTERS 221-41 (1956); Reinstein & Silverglate, supra note 55, at 1142-44.

115. See Legislative Immunity, supra note 55, at 128.


words." Thus, without considering how far motives commonly classified as ignoble have been camouflaged with a high sounding name, "it is necessary to look the facts in their face." When one looks the "facts in their face" in the cases that gave rise to the state legislative privilege controversy, he finds a variety of sordid schemes by state legislators: the acceptance of a pay-off to block an extradition; the receipt of bribes to enact legislation to ease the task of obtaining valuable licenses; the use of extortionate means to gain payments from a company under investigation by a legislative investigating commission to assure a favorable report; extortion to defeat a bill unfavorable to the victim industry.

Conduct of this nature is undoubtedly rare in the state legislative process throughout the nation; and it is likewise undoubtedly repulsive to almost every state legislator in the country. But because the examples do exist, the recognition of a speech or debate privilege, as a matter of experience, should take into consideration the realistic threat that political corruption of the type described would gravely undermine the public perception of legislative integrity and the right of the citizenry to honest representation. The only reason

120. Shapiro v. United States, 335 U.S. 1, 56 (1948); see Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443, 460 (1899) ("We must think things not words . . .").

121. Justice Oliver Wendell Holmes: His Book Notices, Letters and Uncollected Letters and Papers 141 (Schriver Ed. 1936). Cf. Hollen v. Annunzio, 468 F.2d 522, 526 (7th Cir. 1973) (Stevens, J.) ("logic dictates that we should not close our eyes in the face of extrinsic evidence which reveals that an appearance of official business is nothing more than a mask for private purpose").

122. United States v. Gillock, 587 F.2d 284 (6th Cir. 1978), cert. granted, ___ U.S. ___ (1979). Since the Gillock trial has not proceeded at the time of this article, the textual reference is not intended to give the grand jury's probable cause finding more weight than it deserves.

123. Id.


125. United States v. Craig, 528 F.2d 773 (7th Cir.), cert. denied, 425 U.S. 973 (1976). The nature of the scheme is more fully set forth in the subsequent appeal from the conviction of two legislators on the merits. See United States v. Craig, 573 F.2d 513 (7th Cir. 1978). The court acknowledged that the case involved a "fetcher" bill—"A bill introduced by legislators for purposes of extracting money from an industry." Id. at 515 n.1. See also United States v. Craig, 573 F.2d 455 (7th Cir. 1977) (more pervasive scheme of legislative corruption emanating from same investigation).

126. The phenomenon is not new. See Chicago Daily News, Oct. 9, 1882 ("When I want to buy up any politicians I always find the anti-monopolists the most purchaseable. They don't come so high.") (comments of William H. Vanderbilt).

127. Considerations of this nature motivated the Chief Justice to issue the following comments in United States v. Brewster, 408 U.S. 501, 524-25 (1972):

The purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and
that might legitimately allow the courts to overlook these considerations is a truly compelling concern for the principles of federalism.

2. Federalism

The courts that have recognized the privilege have paid considerable deference to the principles of federalism in reaching their conclusions. Relying upon *Younger v. Harris*,\textsuperscript{128} they have found the privilege necessary to promote a proper respect for state functions.\textsuperscript{129}

Reliance upon *Younger* in this context represents a cogent example of "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation."\textsuperscript{130} *Younger* and its progeny, exhibiting the Supreme Court's solicitude for the states' interests in their judicial and prosecutorial functions, have insulated state prosecutions from federal injunctive or declaratory intervention in the absence of bad faith.\textsuperscript{131}

However, a refusal to recognize a federal speech or debate privilege would do nothing to intrude upon the freedom of the states to deal with local political corruption. It may well be that the primary responsibility for ferreting out their political corruption must rest with the state, which is the most directly involved political unit.\textsuperscript{132} But resource limitations, on overwhelming public concern for the prosecution of violent crime, and the bold specter of local political influence, have combined to prevent the states from effectively dealing with crimes in public office. Thus, although free to bring prosecutions as they choose, state prosecutors have welcomed fed-

\textsuperscript{128} 401 U.S. 37 (1971). The Court indicated that the concept of federalism represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." \textit{Id.} at 44.


eral intervention insofar as the prosecution of public officials is involved.\footnote{133}{See Comment, The Scope of Federal Criminal Jurisdiction Under the Commerce Clause, 1972 U. ILL. L.F. 80 [hereinafter cited as Jurisdiction Under the Commerce Clause]: [I]t should be noted that the use of the commerce clause as an expansive basis for federal intervention in the area of crime control has not been opposed by the states, though similar federal intervention in economic affairs faced heavy resistance. State acquiescence, if not encouragement, can be attributed to several factors: the federal government has not preempted state powers; federal intervention has helped states deal with problems serious enough to override the usual states' rights fears; and the federal government has entered this area gradually, reluctantly, and primarily with programs aimed at organized crime, a problem generally felt to be incapable of solution by the states acting alone. Id. at 822.}

The federalism argument may have credence in a dispute concerning the overextension of federal jurisdiction to reach conduct uniquely within the concern of local criminal laws. But it is too late in the day to argue that federal criminal jurisdiction does not extend to local political corruption,\footnote{134}{See, e.g., United States v. Staszcuk, 517 F.2d 53 (7th Cir. 1975) (en banc), cert. denied, 423 U.S. 837 (1976); United States v. Issacs, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974); United States v. States, 488 F.2d 761 (8th Cir. 1973); Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 554 (1941). See generally Stern, Prosecution of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 SEATON HALL L. REV. 1 (1973); Jurisdiction Under the Commerce Clause, supra note 133, at 824.} and that very argument was rejected by the courts that recognized the privilege.\footnote{135}{See In re Grand Jury Proceedings, 563 F.2d 577, 582 (2d Cir. 1977) (the criminal statutes forming the basis of the grand jury investigation do not pose "a substantial interference with state functions in the context of this case"); United States v. Craig, 528 F.2d 773, 779 (7th Cir.), cert. denied, 425 U.S. 973 (1976) ([I]t is within the province of the United States Attorney to prosecute local officials who violate federal law . . . .").} In light of the prosecution's legitimacy, the federal intrusion is too attenuated to support the creation of a privilege. Nothing in the Younger line of cases suggests that the principles of federalism should be invoked to create an evidentiary privilege designed to inhibit a prosecution which does not intrude upon those very same principles.\footnote{136}{See Steffel v. Thompson, 415 U.S. 452, 482 (1974) (Rhenquist, concurring) ("Those decisions . . . . depended upon considerations relevant to the harmonious operation of separate federal and state court systems, with a special regard for the state's interest in enforcing its own criminal law . . . .")}.

Moreover, in the context of federal prosecution of local corruption, the principles of federalism should be used as a sword rather than a shield. Sensitivity to the legitimate interests of both state and federal governments is not diminished by federal prosecutions of local officials. The federal government has an obligation to assure that its citizens, in their dual capacity as state citizens, are provided with a state government in which official activities are conducted

\footnote{133}{See Comment, The Scope of Federal Criminal Jurisdiction Under the Commerce Clause, 1972 U. ILL. L.F. 80 [hereinafter cited as Jurisdiction Under the Commerce Clause]: [I]t should be noted that the use of the commerce clause as an expansive basis for federal intervention in the area of crime control has not been opposed by the states, though similar federal intervention in economic affairs faced heavy resistance. State acquiescence, if not encouragement, can be attributed to several factors: the federal government has not preempted state powers; federal intervention has helped states deal with problems serious enough to override the usual states' rights fears; and the federal government has entered this area gradually, reluctantly, and primarily with programs aimed at organized crime, a problem generally felt to be incapable of solution by the states acting alone. Id. at 822.}
in accordance with the law. State prosecuting authorities, due to their acknowledged difficulties in dealing with local political corruption, have gladly deferred cases of this nature to federal prosecution. Consequently, there has been no intrusion on legitimate state interests. Further, the goals of federalism can be frustrated by the creation of a privilege which erodes the ability of federal prosecutors to provide their state counterparts with welcomed assistance in dealing with crimes by political officials. When so viewed, there is nothing in the federal-state relationship that pre-empts the government's need of evidence of federal crime.\textsuperscript{137}

\textbf{The Modern State Legislature}

As indicated at the outset, the need for a speech or debate privilege for state legislators has turned upon a particular judge's perception of the legislative process. The judges who have accepted the privilege have viewed it as a necessary bulwark for an effective and uninhibited state legislature;\textsuperscript{138} those who have rejected it have concluded that the nature of our political system makes the federal threat to the state legislative process remote.\textsuperscript{139} Underlying these divergent positions is the particular judge's intuitive recognition of the operations of the modern state legislature.

During the past twenty years, legislative strength and independence has increased and state legislatures have improved.\textsuperscript{140} Whereas legislators were once left to their own devices, they now have considerable support services, particularly through the addition of professional staffs. Modernization of the legislative process through standing committees and open public hearings has increased public participation and understanding. The part-time citizen legislature has, in recent years, given way to a system which provides greater compensation and enables members to spend more time in session and interim work.

These developments have provided the contemporary legislator with a heightened capability to review and analyze pending legislation. As a result, the high turnover that has historically plagued the legislative process is beginning to decline as more and more quali-

\textsuperscript{137} United States v. DiCarlo, 565 F.2d 802, 806 (1st Cir. 1977), cert. denied, 435 U.S. 924 (1978).
\textsuperscript{138} See text accompanying notes 11, 17, and 26 supra.
\textsuperscript{139} See text accompanying notes 13, 20, and 28 supra.
fied citizens become attracted to legislative service. In related developments, the trend toward open government, prompted by Watergate, has reached new heights. Economic disclosure laws and lobbyist regulation have been tightened and restrictions on campaign financing have increased dramatically.

The practical impact of these beneficent alterations in the process has resulted in individual legislators who are better qualified, more knowledgeable, and far more independent than their predecessors. Professional staff and time for analysis make it unnecessary to place undue reliance upon lobbyists to understand the merits of a bill. Campaign financing is no longer cloaked in the shroud of secrecy that once led to unwarranted speculation. Public participation in the process, through committee testimony, has led to a better comprehension of constituent positions.

In light of the manner in which the modern legislature operates, it is highly doubtful that the threat of federal prosecution looms as a serious inhibition. Contemporary legislators support or oppose matters for articulated reasons and can point to staff analysis or constituent material or investigative research to document their positions. It strains credulity to assume that a legislator in today's society will take a position because he or she fears federal prosecuting authorities.

As the cases make clear, the modern legislature is not free from corruption. If the courts were to grant each of the 7,562 state legislators in this country a judicially created evidentiary privilege (which honest members do not need and dishonest ones can use to transform their public positions into "vendible commodities") confidence in the legislative process will diminish. Such a result

144. See Pound & Tubbesing, supra note 140, at 13. The number is as of January, 1978.

It is not unreasonable to believe that public confidence in the administration of justice in the federal courts will be undermined if state legislators are permitted to violate, with impunity, the criminal statutes of the United States because of a court-created special privilege in their favor, but not in favor of any other person, which privilege results in the suppression of relevant and material evidence of the criminal conduct of the state legislators.
would seriously erode the gains that modern legislatures have made.

Thus, it is clear that the judges who have recognized the speech or debate privilege because they perceived a need to protect the legislative process from outside intrusion have genuinely underestimated the strength and independence of the modern legislature. The road that legislative leaders have traveled to reach this level has not been an easy one. A judicial decision that operated to shield a few guilty members without benefit to the great majority of honest and conscientious ones would cause a substantial retreat along that road.

CONCLUSION

When the speech or debate cloak is removed from consideration, the legal issues to be determined in connection with the state legislator’s privilege fall within the framework of two previously decided Supreme Court cases.

The secrecy and inaccessibility of the deliberative process and the motives of jurors have remained, from their common law underpinnings, significant aspects of the jury system. In Clark v. United States,146 however, Mr. Justice Cardozo recognized that, although freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world,147 the juror’s privilege is not without exception. Accordingly, the Court held that evidence of a juror’s conduct during deliberations may be admitted to prove that she engaged in contempt by committing perjury during the voir dire. In dictum, the Court posed an example that has acute relevance to the instant situation:

Let us assume for illustration a prosecution for bribery. Let us assume that there is evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote. The argument for the petitioner, if accepted, would bring us to a holding that the case for the People must go to the triers of the facts without proof that the vote has been responsible to the bribe. This is paying too high a price for the assurance to a juror of serenity of mind.148

In United States v. Nixon,149 the Court relied heavily upon the

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Although Judge Weick articulated his concern in terms of public confidence in the administration of justice, the argument applies with equal, if not greater, force to public confidence in the legislative process.

146. 289 U.S. 1 (1933).
147. Id. at 13.
148. Id. at 14.
Clark analysis to conclude that presidential communications are not insulated from the criminal process. By inserting a few words relevant to state legislators in place of those used by the Court with respect to the President, the controlling nature of the Nixon opinion becomes clear:

In this case we must weigh the importance of the general privilege of confidentiality of [speech or debate] in performance of the [state legislator's] responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that [state legislators] will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.150

In the absence of a constitutional mandate, the need for a speech or debate privilege is no different than the need for a juror's privilege or a presidential privilege. The competing policy considerations, pitting the need for uninhibited communication against the demands of the criminal law, are the same.

When the historical underpinnings of the constitutional speech or debate principle are examined in the light of reason and experience, there is no justification for a judicially-created evidentiary privilege to protect state legislators in federal criminal prosecutions. The courts that have allowed the use of evidence of official acts have done no more than "manifest their general impatience with legalisms, with dry and sterile dogma, and with virtually unfounded assumptions which served to insulate the law and the Constitution it serves from the hard world it is intended to affect."151

150. Id. at 711-12 (footnotes omitted).