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Newtonian Government: Is the Contract with America Unconstitutional

Christopher J. Soller

"*Newt*onian Government:" Is the Contract with America Unconstitutional?

INTRODUCTION

Section 106 of the Contract with America (the "House Rule") provides:

> SEC. 106. The Rules of the House of Representatives of the One Hundred Third Congress, including applicable provisions of law or concurrent resolution that constituted rules of the House at the end of the One Hundred Third Congress, together with such amendments thereto in this resolution as may otherwise have been adopted, are adopted as the Rules of the House of Representatives of the One Hundred Fourth Congress, with the following amendments:
>
> Limitation on Tax Increases
>
> (a) THREE-FIFTHS VOTE REQUIRED FOR TAX INCREASE MEASURES AND AMENDMENTS.-In clause 5 of rule XXI, add the following new paragraph at the end:
>
> "(c) No bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase shall be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting."[1]

The debate over whether this rule should be enacted was hotly contested. Representative Watt called the supermajority measure "unAmerican and unconstitutional."[2] Representative Borski asserted that "[s]uch a rule, however, runs contrary to the fundamental democratic principle of majority rule. The Constitution clearly specifies the exceptional cases in which a supermajority is required. . . . [R]equiring a supermajority vote on taxes sets dangerous precedent that could be used to create similar requirements for other controversial issues."[3] Representative Porter expressed his reservation regarding the constitutionality of the House Rule but asserted "[t]his obviously, ultimately, would be a

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1. H.R. Res. 6, 104th Cong., 1st Sess. § 106 (1995).

2. 141 CONG. REC. H42 (daily ed. January 4, 1995) (statement of Representative Watt).

3. 141 CONG. REC. H43 (daily ed. January 4, 1995) (statement of Representative Borski).

question for the judicial branch to be resolved in the course of litigation challenging the constitutionality of our rule."[4]

On the other side of the debate Representative Franks contended that the new House Rule amendment would "enforce fiscal discipline in Congress."[5] Representative Fox asserted that after the passage of the House Rule, a tax increase could only happen with "the broad support of Democrats and Republicans working together when all other reasonable alternatives have been exhausted."[6] After heated debate, the resolution passed 279 to 152.[7]

The purpose of this comment is not to analyze whether the supermajority requirement is a wise political decision. This will be left to the political pundits.[8] Instead, this comment analyzes whether the House Rule violates the Constitution by removing the ability of Congress to pass ordinary legislation with a simple majority vote. It is the constitutionality of the House Rule that is at issue, not the motives behind it or the purposes of it.

Before a decision on the House Rule's constitutionality can be reached, however, two hurdles must be overcome. First, a plaintiff challenging the House Rule must satisfy the Article III requirements of standing and second, the challenge to the House Rule must be a justiciable issue. Therefore, in the first section of this comment, the possible plaintiffs who may assert standing to challenge the House Rule are discussed. In the second section, the issue of whether the court should refrain from deciding this issue as a political question is analyzed.[9] Finally, provided that a

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4. 141 CONG. REC. H44-45 (daily ed. January 4, 1995) (statement of Representative Porter).

5. 141 CONG. REC. H43 (daily ed. January 4, 1995) (statement of Representative Franks).

6. 141 CONG. REC. H63 (daily ed. January 4, 1995) (statement of Representative Fox).

7. 141 CONG. REC. H71 (daily ed. January 4, 1995).

8. As the Supreme Court has noted, "the advantages or disadvantages, the wisdom or folly, of such a rule [does not] present any matters for judicial consideration. With the courts the question is only one of power." United States v. Ballin, 144 U.S. 1, 5 (1891).

9. The issues of standing and justiciability have often been misapplied by courts in its determination of whether a legislator may bring suit in federal court. *See, e.g.*, Kurtz v. Baker, 829 F.2d 1133, 1140 (D.C. Cir. 1987). Standing and justiciability, however, are separate issues and must be addressed as such. *Kurtz*, 829 F.2d at 1148-49 (Ginsburg, J., dissenting) *but cf.* Moore v. United States House of Representatives, 733 F.2d 946, 961 & n.6 (D.C. Cir. 1984) (Scalia, J., concurring) (stating that standing involves separation of powers concerns and thus, standing was intertwined with the political question doctrine). As Justice Ginsburg noted in *Kurtz*:

> [T]he fundamental aspect of standing is that it focuses on the party [and] not on the issues he wishes to have adjudicated. . . . In other words, when standing is placed in issue in a case, the question is whether the person whose

plaintiff overcomes the hurdles discussed in the first two sections, the constitutionality of the House Rule is examined.

STANDING

The constitutional standing requirement in Article III limits the judicial power of the federal courts to the resolution of "cases and controversies."[10] Without a case or controversy there is no standing.[11] Thus, the party invoking federal jurisdiction bears the burden of proving standing by establishing that he has suffered an injury-in-fact — a "concrete and particularized, actual or imminent invasion of a legally protected interest."[12] In order to satisfy Article III and establish standing, a plaintiff must prove, at a minimum: (i) that he personally suffers some actual or threatened injury as a result of the alleged illegal conduct of the defendant;[13] (ii) that the injury can "fairly be traced to the challenged action;"[14] and, (iii) that the injury "is likely to be redressed by a favorable decision."[15]

Private Citizen Standing

The first issue that must be addressed is whether a private citizen can sufficiently allege an injury-in-fact from the enactment of the House Rule which will satisfy the Article III standing requirements.[16] In this instance, the injury to the private citizen

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standing is being challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

Kurtz, 829 F.2d at 1148-49 (Ginsburg, J. dissenting). As for the political question doctrine, "in contrast to 'standing' law . . . [the political question doctrine is] unconcerned with the identity of the plaintiff and instead focuses on whether the issue is one appropriate for judicial determination." *Id.* Because the two issues require separate analysis, the issues will be treated separately in this comment.

10. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982); *see also* U.S. CONST. art. III, § 2.

11. *Valley Forge*, 454 U.S. at 471.

12. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2134 (1992).

13. Gladstone v. Village of Bellwood, 441 U.S. 91, 99 (1979).

14. Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 41 (1976).

15. *Simon*, 426 U.S. at 38; *see also* Baker v. Carr, 369 U.S. 186, 204 (1961) (In order to be a proper party to litigate a claim, the claimant must "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.").

16. The injury must be a "particular concrete injury." United States v. Richardson, 418 U.S. 166, 177 (1974). The injury must also amount to "a claim of specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 14 (1972). Further, "where separation of powers concerns are present, the plaintiff's alleged injury must be specific and cognizable." *Valley Forge*, 454 U.S. at 474.

who challenges the House Rule is difficult to define. There are three different scenarios that could arise, and none of them seem to injure the private citizen. First, a proposed tax increase could receive over three-fifths of the vote in the House and pass. Second, a proposed tax increase could be voted down by a number of votes which would have constituted a majority but was not three-fifths. Third, a proposed tax increase could fail by a number of votes less than the majority.

In the first instance, where the legislation passes by receiving three-fifths of the vote, it is difficult for the private citizen to allege injury because the legislation would have passed in a simple majority vote. Therefore, the private citizen could not allege injury further than a normal taxpayer challenging a taxing and spending action of Congress.[17]

Under the second situation, where the tax increase gains a majority of the vote but not three-fifths, the private citizen would be claiming injury because the tax increase would have passed under the old rule but could not pass under the supermajority House Rule. The private citizen would essentially be arguing that by not raising his taxes, he was injured. Needless to say, not increasing taxes is more of a blessing than an injury.

Finally, the third situation, where the tax increase vote would fail under either the new or old rule, is similar to the first because the tax proposal would not have passed under either rule. Under any of the three situations, it is evident that a change in the House Rule does not cause an injury to the private citizen, and therefore, substantiating the first element of standing appears improbable.

The other two requirements of standing, causation and redress, would also not be satisfied by a private citizen challenging the House Rule.[18] As for causation, the private citizen would be challenging not an enactment or law of Congress but an internal rule.[19] Because this would be a challenge to an internal procedure, the passage of the House Rule or the enactment or failure

17. *See* Frothingham v. Mellon, 262 U.S. 447 (1923).

18. Causation is satisfied by establishing that "the consequence of the defendant's actions" or that the exercise of the courts' remedial powers would redress the injury. *See Simon*, 426 U.S. at 45.

19. *See Kurtz*, 829 F.2d at 1140. There is an issue however of whether the plaintiff may assert taxpayer standing because the House Rule clearly influences the taxing and spending power of Congress. As was held in *Flast v. Cohen*, private citizens may have standing to challenge "exercises of congressional power" that arise from Congress' taxing and spending power. *See* Flast v. Cohen, 392 U.S. 83, 102 (1968). However, the ability of a private citizen to show a distinct and concrete injury would be a major obstacle in asserting a claim against the House Rule.

of a bill to pass because of the House Rule is not causally linked to the private citizen's alleged injury. Further, because rescinding the House Rule by a court would not relieve a plaintiff of any alleged injury, and would not lend itself to judicial redress, but would merely affect congressional procedures, the element of redress cannot be sufficiently satisfied.

Because of his inability to exhibit a palpable injury, the only way a private citizen can exhibit a legally cognizable injury is through his legislator. The private citizen's injury must derive from his legislator's dilution of voting power.[20] This type of derivative standing has been approved by federal courts.[21]

Legislator Standing

Courts have asserted that legislators and private citizens should be treated similarly under the standing doctrine.[22] Because of the separation of powers concerns, however, few courts have actually done so.[23] Instead, courts have dismissed legislator suits under the principle of equitable discretion.[24] As noted previously, however, standing must be addressed separately from justiciability, therefore, the same principles applied to private citizens in the previous section must be applied to legislators to determine whether they have standing to challenge the House Rule.[25]

An analysis of legislator standing cases indicates that a legislator's standing is dependent upon whether he can sufficiently allege that his vote has been made less effective.[26] In

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20. *See* Michel v. Anderson, 14 F.3d 623, 626 (D.C. Cir. 1994).

21. *See, e.g., Michel*, 14 F.3d at 626. In *Michel* the court asserted, "[v]oters have standing to challenge practices that are claimed to dilute their vote, such as being placed in a voting district that is significantly more populous than others. It does not matter that their claim derives from their legislator." *Id.*

22. *See* Boehner v. Anderson, 30 F.3d 156, 159 (D.C. Cir. 1994); Riegle v. Federal Open Market Comm., 656 F.2d 873, 877 (D.C. Cir. 1981); Reuss v. Balles, 584 F.2d 461, 466 (D.C. Cir. 1978); Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977) ("[T]here are no special standards for determining Congressional standing questions.").

23. *See Riegle*, 656 F.2d at 877; Synar v. United States, 626 F. Supp. 1374, 1381-82 (D. D.C. 1986).

24. *Riegle*, 656 F.2d at 882.

25. See note 9 for a discussion of the difference between standing and justiciability.

26. *See* Coleman v. Miller, 307 U.S. 433, 438 (1939); Risser v. Thompson, 930 F.2d 549, 550-51 (7th Cir. 1991); Moore v. United States House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984); Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (Bork, J., concurring); Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974); *but see* Marsh v. Chambers, 463 U.S. 783, 786 n.4 (1983) (agreeing without discussion that a Nebraska legislator had standing as a legislator and as a taxpayer

Coleman v. Miller,[27] twenty state senators challenged the constitutionality of a provision that allowed the lieutenant governor to cast a tie breaking vote in a constitutional amendment ratification.[28] The defendants challenged the senator's standing to assert the claim.[29] The Supreme Court disagreed with the defendants and asserted that the senators had standing.[30] The Court contended that if the senator's alleged constitutional violation was found to be accurate, their votes would have been "virtually held for naught."[31] Because the senators had a "plain, direct and adequate interest in maintaining the effectiveness of their votes," the Court held that they had standing to assert the claim.[32]

In *Kennedy v. Sampson*,[33] Senator Kennedy filed suit against the Administrator of the General Services Administration and the Chief of White House Records and alleged that the President's pocket veto of the Family Practice and Medicine Act violated Senator Kennedy's right to vote to override the veto.[34] In determining that Senator Kennedy had standing to assert the claim, the court contended that Senator Kennedy's injury was that his vote in favor of the bill in question had been nullified.[35] Therefore, because the effectiveness of his vote was diminished, the court held that Senator Kennedy had standing to assert his claim.[36]

In *Moore v. United States House of Representatives*,[37] eighteen members of the House of Representatives challenged the constitutionality of the Tax Equity and Fiscal Responsibility Act.[38] The representatives asserted that the law was unconstitutional

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to challenge the opening prayer at legislative sessions).

27. 307 U.S. 433 (1939).

28. *Coleman*, 307 U.S. at 436.

29. *Id.* at 438.

30. *Id.*

31. *Id.*

32. *Id.* Justice Frankfurter, who concurred in the judgment, but did not agree that the senators had standing, chastised the majority for determining that the state senators exhibited a particularized injury. *Id.* at 465 (Frankfurter, J., concurring). Justice Frankfurter asserted that "[b]y as much right could a member of Congress who had voted against the passage of a bill because moved by constitutional scruples urge before this Court our duty to consider his arguments of unconstitutionality." *Id.* He further contended that "[o]ne who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it." *Id.* at 467.

33. 511 F.2d 430 (D.C. Cir. 1974).

34. *Kennedy*, 511 F.2d at 433.

35. *Id.* at 436.

36. *Id.*

37. 733 F.2d 946 (D.C. Cir. 1984).

38. *Moore*, 733 F.2d at 948.

because it originated in the Senate and not in the House.[39] The court held that the representatives did have standing to challenge the constitutionality of the act.[40]

In determining that the plaintiffs had standing, the court contended that the representatives had to satisfy four requirements to assert their claim: "(1) the congressional claimants [have] suffered an injury in fact (2) to an interest protected by the Origination Clause, (3) which injury was caused by the defendants' actions, and (4) which injury could be redressed by a favorable decision of the court."[41] Under the first requirement, injury, the court concluded that because the representatives showed a "deprivation of an opportunity to debate and vote on the origination of [the bill] in the House" and "specific injury in their official capacities as members of the House by the nullification of their right to originate, by debate and vote, a bill for raising revenue," they satisfied the injury-in-fact requirement.[42] The court contended that the injury of vote diminution was adequately particular to legislators as compared to a generalized complaint of governmental impropriety.[43] The court further asserted that the fact that every member of the House could claim injury from the action did not defeat the legislator's standing.[44] The court maintained that the legislator need not be the "most grievously injured," but only was required to be "among the injured."[45]

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39. *Id.* at 948. *See* U.S. CONST. art. I, § 7, cl. 1 (the Origination Clause).

40. *Moore*, 733 F.2d at 954.

41. *Id.* at 950.

42. *Id.* at 951. The court further noted that because the plaintiffs were individual members of Congress, their rights that were injured were defined by the Constitution. *Id.*; *see also* Dennis v. Luis, 741 F.2d 628, 631 (3d Cir. 1984) (holding that eight members of the Virgin Islands legislature had standing because "the right to advise and consent has been vested only in members of the legislature, and since only members of the legislature are bringing this action, the allegation that this right has been usurped . . . [is] sufficiently personal to constitute an injury in fact"). The dissent, written by Justice Scalia, quarrelled with the majority on this point. *See Moore*, 733 F.2d at 959 (Scalia, J. dissenting). Justice Scalia contended that the representatives had no private right created by the Constitution in their offices. *Id.* He asserted that the powers of the office belonged to the people, not the representatives. *Id.* Therefore, a representative could not allege any injury. *Id.* Justice Scalia, however, combined his analysis of standing with an analysis of the separation of powers issue.

43. *Moore*, 733 F.2d at 951; *cf.* Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 780 (D.C. Cir. 1984); United Presbyterian Church v. Reagan, 738 F.2d 1375, 1382 (D.C. Cir. 1984); American Federation of Government Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982); Harrington v. Bush, 553 F.2d 190, 208 (D.C. Cir. 1977) (holding that a legislator's interest in the unlawful acts of government were only general grievances about the conduct of government, therefore were not sufficient to allege injury).

44. *Moore*, 733 F.2d at 952; *see also* Kennedy v. Sampson, 511 F.2d 430, 435-36 (D.C. Cir. 1974).

45. *Moore*, 733 F.2d at 952 (quoting Sierra Club v. Morton, 405 U.S. 727, 731-

Some courts, however, have been unwilling to allow legislators to have standing when the court believes that the legislator is merely avenging a political loss and not alleging an actual vote or power diminishment. For example, in *Davids v. Akers*,[46] sixteen state congressional plaintiffs from Arizona challenged the majority party's allocation of committee seats.[47] The minority party claimed that the disproportionate amount of seats given to the minority party discriminated against them.[48] The court was not persuaded that this political discrimination exhibited a legally cognizable injury.[49] The court contended, that:

> It is true that, like the elector, the member has one vote as a member of the House. Nothing in the record, however, suggests that his vote is different from that of each other member. He has no more right to have other members vote with him than an elector has to have other electors vote with him. Neither has a right to win. Each has a right to have his vote counted the same weight as every other vote. That, the member has. . . . [The plaintiffs] were voted down, but the Federal Constitution does not give them as a majority party, the right to win.[50]

Therefore, without the vote diminishment, the minority party was dismissed for lack of standing.[51]

In a factually similar case, *Jagt v. O'Neill*,[52] fourteen members of the United States House of Representatives sued the majority leadership alleging that they were discriminated against in the allocation of House committee and subcommittee seats.[53] The plaintiffs brought suit as: (1) Republican members of the House; (2) all members of certain committees; and (3) voters in districts represented by Republicans.[54] In contrast to the *Davids*

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32 (1972)). After a lengthy discussion regarding injury, the court briefly discussed the other three standing requirements and found them to be satisfied. *Moore*, 733 F.2d at 953-54. As to the causation requirement, the court noted that the "unwillingness of a majority of the members to reject [the bill] after the allegedly unconstitutional origination of the bill . . . cannot deprive the appellants — minority members of the House — of their right to participate in a constitutionally proscribed method of enacting . . . legislation." *Id.*

46. 549 F.2d 120 (9th Cir. 1977).

47. *Davids*, 549 F.2d at 122.

48. *Id.*

49. *Id.* at 126. The court, however, mistakenly analyzed the injury to the plaintiffs under a section discussing political questions and separation of powers.

50. *Id.* The court further noted that, "[t]o us, the picture of a Federal Judge undertaking to tell the Speaker of the Arizona House of Representatives how many Democrats, and perhaps even which Democrats, he is to appoint to the standing committees . . . of the House is startlingly unattractive." *Id.* at 123.

51. *Id.* at 127.

52. 699 F.2d 1166 (D.C. Cir. 1982).

53. *Jagt*, 699 F.2d at 1167.

54. *Id.* at 1167 n.1.

court, the court in *Jagt* held that the representatives did have standing to assert their claim.[55] The court asserted that because the representatives could show, as congressional voters, that their vote had been diluted, they had alleged a distinct injury capable of redress.[56]

Courts have also determined that the causation element exists for legislators to satisfy standing requirements. In *Riegle v. Federal Open Market Committee*,[57] a United States Senator challenged the constitutionality of the Federal Reserve Act.[58] The senator alleged that because members of the Reserve Bank voted as members of the Federal Open Market Committee, they were Executive Branch officers.[59] The senator claimed that the appointment of these officers without the senator's confirmation vote deprived him, as a senator, of a constitutional right to approve appointment of executive branch officials.[60] The court held that the senator did have standing to challenge the action.[61] The court asserted that because the remedial powers of the court could redress the injury that the senator alleged, he had shown enough causation to satisfy standing.[62]

The cases concerning legislator standing clearly exhibit that if a legislator wishes to challenge the House Rule, he must show injury through the effect of the House Rule on his vote. There is an open issue, however, of whether the legislator must show a nullification of his vote,[63] or need only show that his vote has been diluted.[64] The next issue, therefore, is whether the House Rule nullifies or dilutes a representative's vote.

The best scenario for a congressman to challenge the House Rule would require more than a majority but less than three-fifths of the House to vote in favor of a tax proposal.[65] In this

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55. *Id.* at 1170.

56. *Id.* The court explicitly noted that a legislator could be determined to have standing based solely on the dilution of his vote. *Id.* The court did not require that the legislator show that his vote had been "nullified." *Id.*; *cf.* Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir. 1979).

57. 656 F.2d 873 (D.C. Cir. 1981).

58. *Riegle*, 656 F.2d at 874.

59. *Id.* at 877.

60. *Id. See* U.S. CONST. art II, § 2, cl. 2 (the Appointments Clause).

61. *Riegle*, 656 F.2d at 878-79.

62. *Id.*

63. *See* Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (Bork, J., concurring) ("[A]n alleged diminution in congressional influence must amount to a disenfranchisement — a nullification or diminution of a congressman's vote — before a congressional plaintiff may claim the requisite injury-in-fact necessary to confer standing to sue.").

64. *See Jagt*, 699 F.2d at 1168.

65. The individual representative, of course, would have to vote for the reject-

case, the bill would have passed by a simple majority, but not under the new supermajority House Rule. Thus, the representative could claim that the change in the House Rule diminished his vote because it rendered what would have been a winning vote into a losing vote. Also, the requirement of a three-fifths majority to pass the resolution gives a negative vote one and one-half the force of an affirmative vote.[66] This change in voting procedure from majority to supermajority would clearly dilute a representative's vote and would be sufficient to establish injury.

The challenge to the House Rule would be more difficult, however, if the court required that the representative exhibit a nullification of his vote.[67] In contrast to *Kennedy* and *Riegle*, the House Rule does not deny a representative the right to vote on an issue.[68] Instead, the representative's vote has only been diluted. Thus, whether the court requires a nullification of the representative's vote is critical in the determination of a representative's injury.[69]

Along with asserting that the House Rule dilutes a representative's right to cast a full and effective vote, a legislator plaintiff could also allege that a congressional member has a right to vote as prescribed in Article I, section 7.[70] Thus, if Article I, section 7 requires that decisions on legislation by the House may only be made by a majority, the House Rule infringes on a House member's constitutionally prescribed voting rights.[71] Further, the representative could assert that a House Rule which requires a supermajority vote on revenue legislation also interferes with the representative's power to enact laws regarding

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ed proposal.

66. This argument was put forth by the plaintiffs in *Lance v. Board of Education* in challenging a West Virginia 60% voter requirement to issue bond indebtedness. *See* Lance v. Board of Education, 170 S.E.2d 783, 786 (W. Va. 1969), *rev'd*, Gordon v. Lance, 403 U.S. 1 (1971). This dilution was the basis of the plaintiff's argument that the 60% requirement violated the Equal Protection Clause. *Lance*, 170 S.E.2d at 786-87; *see also* Reynolds v. Sims, 377 U.S. 533 (1964).

67. *See* Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir. 1979).

68. *See Riegle*, 656 F.2d at 878; *Kennedy*, 511 F.2d at 433.

69. *See Crockett*, 720 F.2d at 1357 (Bork, J. concurring) ("Congressional plaintiffs here have lost no part of their right to vote" therefore they could not be said to have suffered any injury.).

70. *See* U.S. CONST. art. I, § 7. Article I, section 7 prescribes the method in which bills become law. *Id.*

71. *See* Dennis v. Luis, 741 F.2d 628, 630 (3d Cir. 1984); Risser v. Thompson, 930 F.2d 549, 554 (7th Cir. 1991); Clarke v. United States, 705 F. Supp. 605, 607 (D. D.C. 1988) ("[T]he law accords standing to legislators who have alleged an injury to their constitutional rights or duties."); United Presbyterian Church v. Reagan, 738 F.2d 1375, 1381 (D. D.C. 1984) ("A member of Congress may have standing where he alleges a 'specific and cognizable [injury] arising out of an interest positively identified in the Constitution.' ").

federal spending. These interferences with a legislator's constitutional right could also establish adequate injury-in-fact to satisfy the standing requirements.[72]

The more plausible theory on which to challenge the House Rule, however, is the dilution of the representative's voting power.[73] Assuming that the court determines that the dilution of the representative's vote is an adequate injury-in-fact to satisfy the standing requirements, the next issue is whether the court will decide the merits of the case, or will defer to the judgment of a co-equal branch. Thus, the issue is whether the political question and separation of powers doctrines require that a court refrain from adjudicating the merits of the case.

JUSTICIABILITY

Although courts have decided that legislators have satisfied the standing requirements of Article III in order to bring a claim, many courts have declined to address the merits of the claim because of the political question and separation of powers doctrines, or based upon the equitable or remedial discretion of the court.[74] Refraining from a decision based on remedial or equitable discretion is addressed first.

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72. Whether the assertion that these constitutional rights provided for congressman have been invaded enough to exhibit injury will depend on the court's willingness to find that right positively identified in the Constitution. As the District Court for the District of Columbia noted, however, an interest in a congressional right that could be interpreted as arising out of the Constitution was a "congressional interest in having all laws made in the manner proscribed under the general law making provision contained in Article I [section] 7." Synar v. United States, 626 F. Supp. 1374, 1382 (D. D.C. 1986).

73. A vote dilution argument clearly establishes the injury-in-fact in that the representative's vote has clearly been diminished. To argue that the representative's right to vote in accordance with Article I, section 7 would be a more difficult assertion in that Article I, section 7 fails to mention specifically how congressional voting should commence.

However, as the Court of Appeals for the District of Columbia noted:

> Never has it heretofore been suggested . . . that specific injury to a legislator in his official capacity is not a cognizable harm in the federal courts. In each congressional standing case before this court, the inquiry has properly focused on whether the harm to the legislator is definable and discernable in determining whether a congressional plaintiff has standing. . . . [W]e have held that an unconstitutional deprivation[] of a legislator's constitutional duties or rights, such as the nullification of a legislator's vote . . . may give rise to standing if the injuries are specific and discernible.

Moore, 733 F.2d at 952.

74. *See, e.g.*, *Riegle*, 656 F.2d at 882.

Equitable Discretion

Regardless of standing, many courts, especially in the District of Columbia circuit, have refused to adjudicate legislator claims relying upon a remedial or equitable discretion approach. The remedial discretion approach was employed by the courts in an effort to stave off the increasing number of suits brought by legislators who had failed to convince their colleagues in Congress to vote their way.[75] The approach was first adopted by the Court of Appeals for the District of Columbia in *Riegle v. Federal Open Market Committee*.[76]

In *Riegle*, the court asserted that remedial discretion should be exercised when "a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute."[77] The *Riegle* court contended that because the dispute was primarily with a representative's other colleagues, the court should not review congressional practices and procedures as to "affect the way Congress does business."[78]

The next issue, therefore, is whether a representative challenging the House Rule could survive a court's exercise of equitable discretion. It is asserted that the legislator plaintiff can survive equitable discretion if two steps are taken. First, after bringing the claim based upon vote dilution, the suit must be joined by constituents of the member's district.[79] By joining private citi-

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75. *See* Gregg v. Barrett, 771 F.2d 539, 543 (D.C. Cir. 1985). In *Gregg*, the court noted:

> [I]ndividual members of Congress seek to vent their frustration with their colleagues, or with the executive branch, or both, by appeals to the courts. It has become a growing phenomenon to see individual members of Congress challenge actions or failures to act as violations of the members' interests as legislators.

Gregg, 771 F.2d at 543; *see also* Moore v. House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984); Leach v. Resolution Trust Corp., 860 F. Supp. 868, 874 (D. D.C. 1994).

76. 656 F.2d 873 (D.C. Cir. 1981). The origin of remedial discretion was an article written by Judge Carl McGowan. *See* Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

77. *Riegle*, 656 F.2d at 881.

78. *Id.* The court noted, however, that:

> We would welcome congressional plaintiff actions involving non-frivolous claims of unconstitutional action which, because they could not be brought by a private plaintiff and are not subject to legislative redress, would go unreviewed unless brought by a legislative plaintiff. In this last situation, there are no prudential concerns which would outweigh the mandate of the federal courts to "say what the law is."

Id. at 882 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

79. As was noted in the section on private citizen standing, a private citizen's ability to exhibit the required injury to support standing is derivative from their

zens in the action, equitable discretion will not apply and the court can not dismiss the claim on that basis.[80]

The second step for the legislator plaintiff to avoid dismissal of his claim due to equitable discretion is to exhaust all other available redress through his colleagues. The legislator must attempt to amend the House Rule, or have it suspended before litigation can be brought. To amend or suspend the House Rule would require a unanimous vote of the House, and although suspension of House rules is a common occurrence in the daily legislative process, there is no guarantee that a rule may be suspended.[81] Further, if the Speaker refuses to entertain the motion, the point of order can be overturned by a majority of the House.[82] Thus, the minimum action by a legislator before judicially challenging the House Rule is to attempt to amend or suspend the House Rule and thus exhibit to the court that no method of redress remained available through his colleagues.

Provided that the legislator plaintiff can survive the equitable discretion of the court, the next issue that must be addressed is whether the court will avoid adjudication of the claim based on the political question doctrine.

POLITICAL QUESTIONS

In *Baker v. Carr*,[83] the Supreme Court set forth that a question was non-justiciable when there was:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a courts undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[84]

In his concurrence in *Goldwater v. Carter*,[85] Justice Powell sum-

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representative's dilution of voting power. *See* Michel v. Anderson, 14 F.3d 623, 626 (D.C. Cir. 1994).

80. *See Michel*, 14 F.3d at 628; *Gregg*, 771 F.2d at 546.

81. Stanley Bach, The Nature of Congressional Rules, 5 J.L. & POL. 725, 738 (1989).

82. Bach, cited at note 81, at 740. However, the Speaker's "rulings are rarely appealed and are never overruled in contemporary practice." *Id.*

83. 369 U.S. 186 (1961).

84. *Baker*, 369 U.S. at 217.

85. 444 U.S. 996 (1979).

marized the political question doctrine into three "inquiries," namely, "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?"[86] These critical factors will be discussed separately to determine whether a court should refrain from hearing a challenge to the House Rule.

A Textual Commitment to a Coordinate Branch of Government

Whether there has been a textual commitment to a coordinate branch of government requires that the challenged constitutional power first be examined to determine if it is subject to judicial review.[87] Thus, the first inquiry is whether judging the constitutionality of the House Rule is a function of constitutional interpretation of a congressional power or is an interpretation of a constitutional provision. This determination is essential because if it is a congressional power that is being interpreted, the court will usually abide by the discretion of the coordinate branch.[88] However, if it is a matter of a conflict with a fixed term or provision in the United States Constitution, courts will adjudicate the claim.[89]

This principle is exemplified by analyzing two Supreme Court cases, *Nixon v. United States*,[90] and *Powell v. McCormack*.[91] In *Nixon*, the Court held that the constitutional grant to the Senate of the "sole power to try impeachments" made non-justiciable the question of whether the Senate could employ a committee to hear impeachment evidence.[92] In *Powell*, the Court held that despite Congress's constitutional power to determine the "Qualifications of Members of Congress," the House could not refuse to seat an elected congressman because Article I, section 2 of the Constitution defined the qualifications of a member and, therefore, the House could not add to them.[93]

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86. *Goldwater*, 444 U.S. at 998 (Powell, J., concurring).
87. Powell v. McCormack, 395 U.S. 486, 519 (1969).
88. *Powell*, 395 U.S. at 520.
89. *Id.*; *see also* Leach v. Resolution Trust Corp., 860 F. Supp. 868, 872 (D. D.C. 1994) (determining that the interpretation of "Congress" in the Congressional Savings Clause was statutory interpretation for the court and therefore not a political question intruding on the oversight function of Congress).
90. 113 S. Ct. 732 (1993).
91. 395 U.S. 486 (1969).
92. *Nixon*, 113 S. Ct. at 735-36. *See also* U.S. CONST. art III, § 3, cl. 6.
93. *Powell*, 395 U.S. at 548.

In upholding the validity of *Powell*, the court in *Nixon* noted that the *Powell* decision was justiciable because the definition of "Qualifications" was limited by the Constitution.[94] Thus, there was not a textual commitment to the House of Representatives to determine the qualifications of membership.[95] The Court distinguished the situation in *Nixon* because *Nixon* involved no separate Constitutional provision to determine the term "try" as provided in Article I, section 3, clause 6.[96] Therefore, the Senate had sole, unreviewable discretion to interpret the method of trying impeachments.[97]

Therefore, the issue is whether the Article I, section 5 provision allowing that "[e]ach House may determine the Rules of its Proceedings"[98] is a textual commitment to the legislative branch, or is limited by other constitutional provisions. In other words, does the Constitution specifically limit the rule making power of the House, in that, it may not make a rule changing the vote requirement for the passage of ordinary legislation? If the Constitution does provide that the business of the House in passing legislation may only be done by a majority, then the courts would be free to decide whether the House Rule is constitutional. This would not be a political question. If, however, the Constitution does not provide for only a simple majority to pass ordinary legislation in the House, then the court should be refrained from determining the constitutionality of the House Rule. This would be a political question.

To resolve this question of whether a challenge to the House Rule is justiciable, the scope of the authority conferred upon the House to determine its rules must be analyzed. The language of Article I, section 5, clause 2 is relatively straightforward. The clause simply provides that, "[e]ach House may determine the Rules of its Proceedings."[99] At first blush, this appears to be a clear textual commitment to another branch of government. Thus, any interpretation by the judiciary of an action of Congress based upon this constitutional provision would be unreviewable. However, this is not the case. The history of challenges against a

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94. *Nixon*, 113 S. Ct. at 739-40. *See also* U.S. CONST. art I, § 2.

95. *Nixon*, 113 S. Ct. at 740. Chief Justice Rehnquist contended that "[t]he decision as to whether a member satisfied these qualifications *was* placed within the House, but the decision as to what these qualifications consisted of was not." *Id.* (alteration in original).

96. *Id.* Article I, section 3, clause 6 provides that, "[t]he Senate shall have the sole Power to try all Impeachments." U.S. CONST. art I, § 3, cl. 6.

97. *Nixon*, 113 S. Ct at 740.

98. U.S. CONST. art I, § 5, cl. 2.

99. *Id.*

house rule provide that the claim against the rule is justiciable if the challenge is to the constitutionality of the rule.

This principle originated in *United States v. Ballin*.[100] In *Ballin*, the issue before the Supreme Court was whether a law had been effectively passed by a quorum of the House of Representatives as required in Article I, section 5, clause 1.[101] In determining that the law had been effectively passed, the court noted that the requirement that a majority of the House members be present to constitute a quorum was not subject to dispute.[102] However, the method of reaching a majority was a matter of interpretation solely designated to the legislative branch.[103] Thus, in *Ballin*, because the method for determining a majority did not violate the quorum requirement, and a majority was actually present at the time of the vote, the provision was legally passed.[104]

The *Ballin* court was explicit, however, in its assertion that House rules were subject to review if the rule violated a provision of the Constitution.[105] The Court stated:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or methods of proceeding established by the rule and the result which is sought to be attained.[106]

The Court reiterated, however, that the "wisdom or folly" of the rule was not subject to judicial consideration.[107]

The decision by the Supreme Court in *Ballin* has led to the principle that Article I, section 5, clause 2, does not bar all judicial inquiry into the constitutional validity of a rule,[108] but only

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100. 144 U.S. 1 (1892).

101. *Ballin*, 144 U.S. at 5.

102. *Id.*

103. *Id.* at 6. The Court contended that, "[t]he Constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain [the presence of a majority]." *Id.*

104. *Id.*

105. *Id.* at 5.

106. *Ballin*, 144 U.S. at 5.

107. *Id.*

108. *See* Yellin v. United States, 374 U.S. 109, 114 (1963) ("It has long been settled, of course, that rules of Congress . . . are judicially cognizable."); Wheeldin v. Wheeler, 373 U.S. 647, 663 (1963) (Brennan, J., dissenting); Michel v. Anderson, 14 F.3d 623, 627 (D.C. Cir. 1994); Morgan v. United States, 801 F.2d 445, 449 (D.C. Cir. 1986) ("It is true, as the appellants point out, that this court has found no absolute prohibition of judicial review in the clause, adjacent to the Elections Clause, which stated that '[e]ach House may determine the Rules of its Proceedings.' "); Jagt v. O'Neill, 699 F.2d 1166, 1172-73 (D.C. Cir. 1982); CNN v. Anderson, 723 F. Supp.

prohibits another branch of government from instructing Congress on what rules it may adopt.[109] Further, if a private citizen is joined in the action claiming that their representative's vote has been diluted, courts will adjudicate a claim because the constitutionality of the rule affected persons outside of members of Congress.[110]

In challenging the House Rule, the claim passes the textual commitment obstacle of *Baker v. Carr*. The determination of whether the House Rule violates the Constitution does not require judicial inquiry into Congress's interpretation of their own rules. Rather, it involves a justiciable challenge to the conflict between the supermajority requirement and the constitutional history of requiring only a simple majority to pass ordinary legislation. Thus, this decision by the judiciary on the House Rule does not violate the political question doctrine or the separation of powers as it has been interpreted by the courts.[111] The next issue, therefore, is whether other aspects of the political question doctrine bar adjudication of the claim.

Judicially Manageable Standards

The political question doctrine further requires that a court have manageable standards to address a challenge to the House Rule. In this situation, the court need only look to the Constitution to determine whether the House Rule should stand. As the District Court for the Northern District of Illinois noted in *Dyer v. Blair*:[112]

835, 837 (D. D.C. 1989).

109. *Jagt*, 699 F.2d at 1173 ("Article I simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity."); Exxon Corp. v. Federal Trade Comm'n, 589 F.2d 582, 590 (D.C. Cir. 1978) ("Although the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members . . . where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress."); *CNN*, 723 F. Supp. at 838.

110. *See* United States v. Smith, 286 U.S. 6, 33 (1932) (asserting that if a rule affects a person other than members of the Senate "the question presented is of necessity a judicial one"); *see also Yellin*, 374 U.S. at 143; Metzenbaum v. Federal Energy Regulatory Comm'n, 675 F.2d 1282, 1287 (D.C. Cir. 1982).

111. There is an additional argument, however, that the term "passed" in Article I, section 7, clause 2 is unreviewable judgment of Congress. *See* U.S. CONST. art I, § 7, cl. 2 (providing that, "[e]very Bill which shall have passed the House of Representatives"). This provision, however, does not exhibit a textual commitment to Congress to determine how bills should "pass." Thus, the argument is without merit and would not bar adjudication of a claim against the House Rule.

112. 390 F. Supp. 1291 (N.D. Ill. 1975).

> It is primarily the character of the standards, not merely the difficulty of their application, that differentiates between those which are political and those which are judicial. The mere fact that a court has little or nothing but the language of the Constitution as a guide to its interpretation does not mean that the task of construction is judicially unmanageable.[113]

A determination on the constitutional validity of the House Rule would not require the court to fashion a new House Rule or tell the House what the new House rule should be. The court's only duty would be to "say what the law is" and rule accordingly.[114]

Interbranch Conflict and Embarrassment

A further argument in favor of classifying the litigation as a political question would be that judicial resolution of this issue would only produce a potentially embarrassing confrontation between coordinate branches of government.[115] However, "[s]uch a determination falls within the traditional role accorded courts to interpret the law and does not involve a 'lack of respect due [a] coordinate [branch] of government.' "[116]

Judicial Intrusion into Broad Congressional Authority

A final argument in favor of dismissing the action based on the political question doctrine would be that the Article I, section 5 grant of power is a source of broad authority for Congress, and intrusion into this broad authority results in a non-justiciable question. This argument was best addressed by the dissent in *Nixon v. United States*,[117] which countered:

> This assignment of power [Art. I, § 5, cl. 2] like the assignment of power to Congress to regulate interstate commerce or to provide for the general

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113. *Dyer*, 390 F. Supp. at 1302.

114. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* United States v. Rostenkowski, 1994 U.S. Dist. LEXIS, at *18 (D. D.C. October 14, 1994) (holding that there were "judicially discoverable and manageable standards" for interpreting the meaning of the term "official" in the House rule restricting paid congressional employees to those with "official duties").

115. *See Baker*, 369 U.S. at 217.

116. *Dyer*, 390 F. Supp. at 1301 (quoting *Baker*, 369 U.S. at 217). The *Dyer* court further noted that "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given to the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Dyer*, 390 F. Supp. at 1301.

117. 938 F.2d 239 (D.C. Cir. 1991).

> welfare, may be exercised only within constraints of the Constitution. The Senate could not, for example, constitutionally pass a "rule" allowing conviction and removal of impeached officials by a majority vote and the fact that the Senate's action had been taken pursuant to its "rule making" authority would provide no shield against judicial invalidation.[118]

Because judicial determination of whether the House Rule is valid is not barred by the political questions doctrine, the final task is to discuss the constitutionality of the House Rule.

CONSTITUTIONALITY

Gordon v. Lance

In the debates before the passage of the House Rule, some legislators supported the constitutionality of the House Rule alleging that the "Supreme Court blessed the constitutionality of supermajority restraints on the taxing and spending propensities of government in *Gordon v. Lance*."[119] Because of this reliance, *Gordon v. Lance* must be addressed first.

In *Gordon v. Lance*,[120] the West Virginia Constitution and state statutes provided that political subdivisions of the state could not incur bond indebtedness or increase tax rates unless sixty percent of the voters approved of the action in a referendum election.[121] A bond indebtedness was then proposed and placed on the ballot.[122] At the referendum election, 51.55% of the voters were in favor of the bond indebtedness.[123] Because the votes only consisted of a majority and not the required supermajority, the referendum was voted down.[124] Some citizens of West Virginia who voted in favor of the referendum brought suit and alleged that the sixty percent requirement violated the Equal Protection Clause.[125] The West Virginia trial court dismissed the voters claim, but the Supreme Court of West Virginia reversed and held that the sixty percent requirement violated equal

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118. *Nixon*, 938 F.2d at 256 (Edwards, J., dissenting).

119. 141 CONG. REC. H64 (daily ed. January 4, 1995) (statement of Representative Saxton) (quoting Bruce Fein, *Solomon's wise House discipline; Tax increase limitations*, WASHINGTON TIMES, December 20, 1994, at A16).

120. 403 U.S. 1 (1971).

121. *Gordon*, 403 U.S. at 2.

122. *Id.* at 3.

123. *Id.*

124. *Id.*

125. *Id.* The plaintiffs contended that the 60% requirement diluted their vote because a negative vote had "one and one-half the force of an affirmative vote and that, therefore, two negative votes have the force of three affirmative votes." Lance v. Board of Education, 170 S.E.2d 783, 786 (W. Va. 1969), *rev'd*, Gordon v. Lance, 403 U.S. 1 (1971).

protection.[126]

The Supreme Court reversed the West Virginia court.[127] Because the voters alleged an equal protection violation, the Court began its analysis by addressing cases of vote dilution and abridgement.[128] The Court then asserted that the voters in this case could not claim that they had been denied access to the ballot.[129] The Court acknowledged that action by the legislature under supermajority rules made the passage of legislation more difficult,[130] and that supermajority rule allowed a minority to have disproportionate power over a majority.[131] However, the Court asserted that "there is nothing in the language of the Constitution, our history, or our cases that requires that a majority prevail on every issue."[132] The Court concluded, therefore, that as long as the supermajority provision did not discriminate against an identifiable class, it could not violate equal protection.[133]

Whether *Gordon* is dispositive on the constitutionality of the House Rule is subject to debate. Certainly, there is strong language in the opinion suggesting that majority rule is not the sole method of procedure in a constitutional framework.[134] The Court, however, did clarify the scope of its holding.[135] The Court noted:

> We intimate no view on the constitutionality of a provision requiring unanimity or giving veto power to a very small group. Nor do we decide whether a State may, consistently with the Constitution, require extraordinary majorities for the election of public officers.[136]

This language by the Court is important for two reasons. First,

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126. *Lance*, 170 S.E.2d at 791. The court asserted that the 60 percent requirement diluted the plaintiff's vote and violated the Equal Protection Clause requirement of "one person, one vote." *Id.* at 790-91.

127. *Gordon*, 403 U.S. at 8.

128. *Id.* at 5 (citing Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) and Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

129. *Gordon*, 403 U.S. at 5.

130. *Id.* at 5-6. The voters alleged that because the bond indebtedness was not approved, the schools in the Roane County area had been unimproved since 1946 and had fell below the state average in size and facilities. *Id.* at 3.

131. *Id.* at 6.

132. *Id.*

133. *Id.* at 7. Justices Brennan and Marshall dissented and agreed with the West Virginia Supreme Court who decided that the 60% requirement diluted the citizen's votes. *Id.* at 8 (Brennan, J., and Marshall, J., dissenting).

134. *See Gordon*, 403 U.S. at 6.

135. *Id.* at 8 n.6.

136. *Id.*

it exemplifies that in *Gordon*, the Court was focusing specifically on whether a supermajority requirement in a referendum election was constitutional. Because the Court is clearly focusing on referendum and popular elections, it difficult to argue that the *Gordon* decision is dispositive of the constitutionality of a House Rule requiring a supermajority to pass simple legislation.[137]

Second, the language indicates that the *Gordon* Court was not persuaded by the plaintiff's argument that the supermajority requirement in a referendum election gave unconstitutionally disproportionate power to a minority of citizens.[138] However, the Court reserved the right to invalidate statutes that would place a minority in a superior position to the majority.[139] This language is critical because the concern of placing veto power in the hands of "very small group" was the exact concern the Framers of the Constitution envisioned when determining that supermajority requirements not be included in the Constitution.[140]

Another point of distinction between the challenge of the House Rule and the challenge to the referendum election in *Gordon* is the basis upon which the claim would be brought. In *Gordon*, the citizens who lost the referendum election brought suit based upon an alleged violation of the Equal Protection Clause.[141] Therefore, the analysis by the Supreme Court was based exclusively on interpretation of vote dilution and abridgment jurisprudence.[142] If a claim is brought by a private citizen challenging the House Rule, the allegation of vote dilution would be similar. The private citizen would be alleging that through their representative, their influence has been diminished because his influence was diminished. However, if the suit is properly brought by a legislator, the issue would be markedly different.

If the legislator alleged that his vote in Congress had been diminished or nullified, the Court would not analyze the issue under the Equal Protection Clause. This is because the legislator's alleged injury would be based on a right to vote established in the Constitution, not a Fourteenth Amendment right of access to the voting process. Thus, the cases involving discrimina-

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137. *See* 141 CONG. REC. H64 (daily ed. January 4, 1995) (statement of Representative Saxton) (quoting Fein, cited at note 119, at A16).

138. *Gordon*, 403 U.S. at 6.

139. *Id.* at 8 n.6.

140. *See* THE FEDERALIST No. 59, at 396-97 (James Madison) (Jacob E. Cooke ed., 1961).

141. *Gordon*, 403 U.S. at 3.

142. *Id.* at 5 (citing Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) and Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

tory bars to voting would not be applicable, and the issue would be the ability of Congress to alter through a rule, the constitutional procedures for passing simple legislation.

Although the *Gordon* Court does appear to reserve judgment on the entire supermajority issue and its constitutionality,[143] the Court did recognize that supermajority requirements existed in the states at that time.[144] It is clear that the Court did not look with disdain on these state supermajority requirements; however, it is also clear that the discussion by the Court centered on the state's interest and the state's discretion.[145] This discussion would be irrelevant under a challenge strictly based on the United States Constitution and the appropriate starting point for a court's analysis in a challenge to the House Rule would be with the intent of the Framers of the United States Constitution. The Framer's intent, therefore, is the next step in the analysis of the constitutionality of the House Rule.

Framer's Intent

To determine whether the House Rule is constitutional, the discussion must begin with the intention of the Framers of the Constitution. During the original constitutional debates, the recurring question that the Framers discussed was not whether a majority should decide an issue, but when it should be required that a supermajority decide an issue.[146] Alexander Hamilton acknowledged that the "[f]undamental maxim of republican government . . . [is] that the sense of the majority should prevail."[147] The Framers feared that any supermajority requirement in ordinary legislation would place the majority at the will of the minority.

In the Federalist, James Madison wrote:

> It has been said that more than a majority ought to have been required

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143. *See Gordon*, 403 U.S. at 8 n.6.

144. *Id.* at 6.

145. *Id.* The Court noted:

> The constitutions of many States prohibit or severely limit the power of the legislature to levy new taxes or to create or increase bond indebtedness, thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered less "important" than matters of treaties, foreign policy, or impeachment of public officers is more properly left to the determination by the States and the people than to the courts under the broad mandate of the Fourteenth Amendment.

Id.

146. *See* 5 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 262 (1941).

147. THE FEDERALIST No. 22, at 139 (Alexander Hamilton).

> for a quorum, and in particular cases, if not all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconvenience in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would no longer be the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifice of the general weal, or in particular exigencies to exhort unreasonable indulgences. Lastly, it would facilitate and foster baneful practice sessions; a practice which has shewn itself even in the states where a majority only is required; a practice subversive of all the principles of order and regular government; a practice which leads more directly to public convulsions, and the ruin of popular governments, than any other which has yet been displayed among us.[148]

Alexander Hamilton also feared the power of the minority to disrupt democratic rule and asserted:

> To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number. . . . [I]ts real operation is to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice or artifice of an insignificant, turbulent or corrupt junto, to the regular deliberations and decisions of a respectable majority. In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of the greatest importance, there is commonly a necessity for action. . . . If a pertinacious minority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings. . . . It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness - sometimes border upon anarchy.[149]

At the debates in the federal convention, the Framers discussed periodically the need for a supermajority vote only in certain instances.[150] One telling discussion involved Article 7, section 6 of the Articles of Confederation.[151] Article 7, section 6

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148. THE FEDERALIST No. 59, at 396-97 (James Madison).

149. THE FEDERALIST No. 22, at 140-41 (Alexander Hamilton).

150. ELLIOT, cited at note 146, at 349 (discussing and approving of the legislative override of a presidential veto by two-thirds of each branch and approving a provision that two-thirds of the Senate approve judges nominated by the executive).

151. *Id.* at 489.

provided that:

> [N]o act of the legislature for the purpose of regulating the commerce of the United States with the foreign powers, among the several states, shall be passed without the assent of two thirds of the members of each house.[152]

The delegates to the convention rejected the section in question.[153] They asserted that not only could the provision cause embarrassment, it would also place the majority at the will of the minority.[154] Further, Madison noted that the two-thirds requirement was not needed with the further checks and balances of government.[155] He believed that an abuse of power was not probable with the independence of the Senate and the negative of the Executive Branch.[156]

Both in the discussions of the Constitution and in the debates of the federal convention, the Framer's intent was to alter majority rule only in certain, limited instances. The passage of ordinary legislation by a supermajority vote is in conflict with the Framer's intent to permit the majority to speak for the will of the people and not be subject to an obstinate minority.[157]

Textual Indications of Majority Rule

When the Constitution requires that a measure be enacted only by a supermajority, a supermajority is positively provided.[158] Further, there are other contextual clues of ma-

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152. *Id.*
153. *Id.* at 492.
154. *Id.* at 489-90.
155. ELLIOT, cited at note 146, at 490-91.
156. *Id.* at 491.
157. *Id.* at 262.
158. Two-thirds of the members present in the Senate are required to convict in an impeachment proceeding. U.S. CONST. art. I, § 3, cl 6. Two-thirds of the members of the House or Senate are required to expel a member. U.S. CONST. art I, § 5, cl. 2. Two-thirds of the members of each house are necessary to override a Presidential veto. U.S. CONST. art. I, § 7, cl. 3. Two-thirds of the members of the Senate concur in the making of all treaties. U.S. CONST. art. II, § 2, cl. 2. Two-thirds of both houses are needed to propose constitutional amendments, and the legislatures or conventions of three-fourths of the states must ratify such. U.S. CONST. art. V. If a Presidential election is decided in the House, a quorum consists of a member or members from two-thirds of the states. U.S. CONST. amend. XII. Two-thirds of the members of the Senate constitute a quorum for the selection of the Vice President. U.S. CONST. amend XII. A vote of two-thirds of each house may remove the disability imposed on persons having engaged in rebellion or insurrection. U.S. CONST. amend. XIV, § 3. A two-thirds vote of both houses is required to determine that the President continues to be unable to discharge the powers and duties of his office. U.S. CONST. amend. XXV.

jority rule. For example, it would appear odd for the authors of the Constitution to require the Vice President of the United States to break a tie in the Senate if they envisioned a time when majority vote would not be sufficient.[159]

Also, the procedures for passing a bill indicate a textual commitment to majority rule. Article I, section 7 of the Constitution provides that after a bill has passed the House and the Senate, it is to be presented to the President.[160] If the President refuses to sign the bill or vetoes the legislation, the veto may be overridden by two-thirds of both houses of Congress.[161] Again, this clearly evidences an intent by the Framers that simple legislation should be passed by a majority of the House. In the same section of the Constitution, the authors required two-thirds of the membership to approve of an override and purposely omitted a two-thirds requirement to perform simple legislative duties. It would have been redundant for the authors of the Constitution to include the two-thirds provision in the override vote if they imagined a time when a majority would not be enough. Clearly, they did not.

It is only fair to note, however, that there is no express constitutional provision which requires a majority in passing simple legislation. All intent of the Framers must be gleaned from other provisions of the Constitution and the debates surrounding its enactment. However, again, it is asserted that the lack of express language regarding the passage of legislation is not because the Framers envisioned a more flexible voting process. Instead, the language is absent because they worked under the assumption that majority rule was the fairest form of government. To reiterate that in every provision would have insulted the constitutional framework they sought to create.

CONCLUSION

The rules of the House of Representatives are internal procedures that should remain solely under the authority of the legislative branch. The Congress must be able to conduct its day-to-day legislative duties as it deems necessary. However, the Article I, section 5 power to determine the "Rules of its Proceedings"[162] does not grant Congress the power to enact legislative rules which contravene the United States Constitution. Because Sec-

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159. *See* U.S. CONST. art I, § 3, cl. 3. Section 3, clause 3 provides that the, "Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." *Id.*

160. U.S. CONST. art. I, § 7.

161. *Id.*

162. U.S. CONST. art. I, § 5.

tion 106 of the Contract with America explicitly conflicts with the Constitution and the intent of the Framers, it should not be protected merely because it is a procedural rule.

This comment exhibits that House rules with constitutional implications can be and have been challenged in federal court. Both legislators and private citizens through their legislator can satisfy the Article III requirements of standing to assert a claim, and further, once standing is satisfied, the House Rule should not be spared by the political question doctrine. In this instance, the determination of whether the House Rule violates the Constitution is pure constitutional interpretation without any intervention by the court instructing the House on what rule to enact. Regardless of the politics surrounding the House Rule, constitutional interpretation is designated to one branch of the government, and in this instance, the determination of whether Section 106 of the Contract with America is constitutional may be and should be heard in federal court.

Christopher J. Soller