A Question of Power: Judicial Review of Congressional Rules of Procedure

Gregory Frederick Van Tatenhove
University of Kentucky

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A Question of Power: Judicial Review of Congressional Rules of Procedure

James I spoke of the mystery of the King's power. The institutions of a secular, democratic government do not generally advertise themselves as mysteries. But they are. What they do, how they do it, or why it is necessary to do what they do is not always outwardly apparent. Their actual operation must be assessed, often in sheer wonder, before they are tinkered with, lest great expectations be not only defeated, but mocked by the achievement of their very antithesis.*

INTRODUCTION

To note that the Supreme Court has affirmed the authority of the judiciary to review, for constitutional compliance, the acts of the other branches of government is to invoke an axiom tempered by a long history. Equally axiomatic, however, is the observation that over 200 years of constitutional debate and scrutiny have failed to define precisely the scope of that review. The debating halls are filled by those who would find in the Constitution a reserved and guarded role for the judiciary in voiding the acts of other branches, as well as those who would

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1 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

2 See, e.g., JUDICIAL REVIEW IN AMERICAN HISTORY: MAJOR HISTORICAL INTERPRETATIONS (K. Hall ed. 1987).

3 See, e.g., J. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 123 (1980) ("[T]he judiciary's constitutional role is limited to protecting those individual rights that are unambiguously expressed or that at least may in some persuasive way fairly be found within the broad philosophical confines of the basic charter."); L. Hand, THE BILL OF RIGHTS 15 (1958) ("[S]ince [the power of judicial review] is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it
find for the judiciary a broad mandate in the realm of constitutional interpretation. 4

What continues to be at issue, therefore, is no less than a determination of the boundaries that mark the federal judicial power—boundaries that cannot, of course, be considered in a vacuum. As Chief Justice Rehnquist has observed, "[t]he exercise of the judicial power also affects relationships between

sees, an invasion of the Constitution."); Kurland, Toward a Political Supreme Court, 37 U. Chi. L. Rev. 19, 45 (1969) ("Essentially because [the Court's] most important function is antimajoritarian, it ought not to intervene to frustrate the will of the majority except where it is essential to its function as guardian of interests that would otherwise be unrepresented in the government."); Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 135 (1893) ("In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since their question is a naked judicial one.") (emphasis in original); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959) ("A principled [judicial] decision, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").


Those who take the other view of the role of the Court are called the "activists"; and this was the label that the Harvard cabal used against Brennan, Black, Warren and myself. My view always has been that anyone whose life, liberty or property was threatened or impaired by any branch of government—whether the President or one of his agencies, or Congress, or the courts (or any counterpart in a state regime)—had a justiciable controversy and could properly repair to a judicial tribunal for vindication of his rights.

Id., Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 705 (1974-1975) ("It seems to me that courts do appropriately apply values not articulated in the constitutional text, and appropriately apply them in determining the constitutionality of legislation.").

5 "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. The boundaries of judicial review, however, necessarily include the limitations of art. III, § 2 which confine federal court jurisdiction to "cases" and "controversies." J. Nowak, R. Rotunda & J. Young, Constitutional Law § 2.12(a) (1986); see Allen v. Wright, 468 U.S. 737, 750 (quoting Vander Jagt, 699 F.2d at 1178-79 (Bork, J., concurring)), reh'g denied, 468 U.S. 1250 (1984):

All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.
the co-equal arms of the National Government." The result of our system of separate but equal governmental divisions is inherent tension.

This commentary begins by recognizing that at few intersections is this inherent tension greater than at the point where the judicial branch is asked to review the rules of procedure by which the legislative branch conducts its business. Part I discusses the nature of congressional rules of procedure by briefly exploring the constitutional and historical framework upon which these rules are founded. Part II surveys the judicial decisions written in response to a request to review the rules of Congress. Finally, Part III suggests that the judicial review of congressional rules of procedure should be exercised in only the most limited of circumstances. Indeed, focusing on arguments developed by former District of Columbia Circuit Court of Appeals Judge Robert Bork, this Comment concludes that an absence of jurisdictional power demands this result.

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7 Madison's commentary of 1788 continues to be relevant:
Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

The Federalist No. 37, at 242 (J. Madison) (E. Bourne ed. 1901). Note, however, that the judicial boundaries for Madison were much sharper than they are for the modern surveyor:

It is not unfrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves.

Id. No. 48, at 340.

8 For courts to reassign congressional committee seats would be no less intrusive than for Congress to enact a law forbidding the members of this court from conferring on the decision of cases or forbidding specified judges from sitting on cases of a particular type. If the courts would not accept such invasions of their sphere, they ought not attempt the invasion of Congress' sphere sought by appellants.

Vander Jagt, 699 F.2d at 1181-82 (Bork, J., concurring).

9 "Questions of jurisdiction are questions of power, power not merely over the
I. "Uniformity of Proceeding". Constitutional and Historical Authority for Congressional Rule-Making Power

Article I, section 5, clause 2 of the Constitution states that "[e]ach House may determine the Rules of Its Proceedings." In addition, article I addresses a number of specific legislative procedures including quorums,\(^\text{10}\) adjournments,\(^\text{11}\) and roll calls.\(^\text{12}\) Congress, therefore, has a body of rules consisting of those provisions specifically enumerated in the Constitution, as well as a set of standing rules adopted individually by the Senate\(^\text{13}\) and the House of Representatives\(^\text{14}\) pursuant to the authority of article I, section 5, clause 2. Furthermore, each chamber is

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\(^{10}\) "[A] Majority of each [House] shall constitute a Quorum to do business." U.S. CONST. art. I, § 5, cl. 1.

\(^{11}\) "[A] smaller Number [than a Quorum] may adjourn from day to day." \textit{Id.} "Neither House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." \textit{Id.} at art. I, § 5, cl. 4.

\(^{12}\) "[T]he Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." \textit{Id.} at art. I, § 5, cl. 3; "[T]he Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively." \textit{Id.} at art. I, § 7, cl. 2.

\(^{13}\) The Senate Rules are catalogued in the \textit{Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate}, S. Doc. No. 98-1, 98th Cong., 2d Sess. (1984) [hereinafter \textit{Senate Manual}]. As a continuing body the Senate does not adopt new rules at the beginning of each Congress. \textit{See Senate Rule V.} "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." \textit{Senate Manual}, at 5.


\textit{in all cases the most rational or not is really not of so great importance. It is much more material that there should be a rule to go by than what that rule is; that there may be a uniformity of proceeding in business not subject to the caprice of the speaker or the captiousness of the members.} \textit{House Rules and Manual}, at 115-16.
governed by statutory provisions which have the force of congressional rules, precedents of each chamber, and informal practices and customs.

The historical records of the constitutional convention indicate that the general grant of rule-making authority in article I, section 5, clause 2 generated no discussion. Even the debate surrounding the enumerated provisions pertaining to quorums, adjournments, and roll calls was brief and relatively uneventful.

Clearly, the lack of attention the framers gave to the congressional rules provisions reflects the necessity of granting the

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16 Recent Senate precedents have been collected by parliamentarian emeritus Floyd M. Riddick in Senate Procedure Precedents and Practices, S. Doc. No. 97-2 (1981). The early precedents of the House are found in A. Hinds, Hinds' Precedents of the House of Representatives (1907) and C. Cannon, Cannon's Precedents of the House of Representatives (1935). Recent House precedents have been compiled in Deschler's Precedents of the United States House of Representatives.


Congress is regulated not only by formal rules, but by informal ones that influence legislative procedure and members behavior. Folkways are unwritten norms of behavior that members are expected to observe. Several of the more important are "legislative work" (members should concentrate on congressional duties and not be publicity seekers), "courtesy" (members should be solicitous toward their colleagues and avoid personal attacks on them), and "specialization" (members should master a few policy areas and not try to impress their colleagues as a "jack of all trades").

Id.


19 See Farrand, supra note 18, at 180, 245-56, 305; Benton, supra note 18, at 667-72.

20 Farrand, supra note 18, at 180, 258, 260-62; Benton, supra note 18, at 681-84; C. Warren, supra note 18, at 426-28.

21 Farrand, supra note 18, at 180, 254-56; Benton, supra note 18, at 675-80; C. Warren, supra note 18, at 429-31.

22 Although the journals kept by James Madison of Virginia and James McHenry of Maryland document slightly different chronologies, apparently most of the debate on art. I, § 5 took place on August 10 and 11, 1787. Benton, supra note 18, at 656-84.
legislative branch authority to fashion rules by which it can administer its constitutionally delegated powers. In his landmark commentary, Justice Story observed the following:

No person can doubt the propriety of the provision authorizing each House to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power, and it would be absurd to deprive the councils of the nation of a like authority.

In recognizing congressional rule-making authority, the framers were doing nothing more than recognizing textually what was considered by many at the time to be an inherent ability The Constitution, therefore, recognizes that the legislative branch

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23 "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. Const. art. I, § 1.


25 Thomas Jefferson illustrated this assumption in his comments on the Residence Bill of 1790:

Every man, and every body of men on earth, possesses the right of self-government: they receive it with their being from the hand of nature. Individuals exercise it by their single will: collections of men, by that of their majority; for the law of the majority is the natural law of every society of men. When a certain description of men are to transact together a particular business, the times and places of their meeting and separating depend on their own will; they make a part of the natural right of self-government. This, like all other natural rights, may be abridged or modified in its [sic] exercise, by their own consent, or by the law of those who depute them, if they meet in the right of others: but so far as it is not abridged or modified, they retain it as a natural right, and may exercise it in what form they please, either exclusively by themselves, or in association with others, or by others altogether, as they shall agree.

2 The Founders Constitution 300 (P.B. Kurland ed. 1987) (quoting from 17 The Papers of Thomas Jefferson 195 (J. Boyd ed. 1950)).

In the preface to his Manual of Parliamentary Practice, Jefferson notes that "[f]or some of the most familiar forms no written authority is or can be quoted, no writer have supposed it necessary to repeat what all were presumed to know." House Rules and Manual, supra note 14, at 111-12 n.9. Cf. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1823) (early discussion on the capacity of the judicial branch to determine its rules of proceeding).
must have a near exclusive ability to determine its rules of procedure.26

These rules, which the Senate and the House adopted initially at the beginning of the first Congress,27 were descendants of the rules that governed the English Parliament.28 As noted

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26 The Supreme Court has noted the following:
[When the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms.

One might also include another “exception” to the rule that congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3 and § 5, cl. 2. However, this “exception” only empowers Congress to bind itself and is noteworthy only so far as it further indicates the Framers’ intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.


27 When the 30th of the 59 representatives elected to the First Congress reached New York on April 1, 1789, the assembled quorum promptly chose as Speaker of the House Frederick A. C. Muhlenberg of Pennsylvania. The next day Muhlenberg appointed a committee of 11 representatives to draw up the first rules of procedure, which the House adopted April 7. The first standing committee of the House—a seven-member Committee on Elections—was chosen April 13, and its report accepting the credentials of 49 members was approved April 18. By then, the House already was debating its first piece of legislation, a tariff bill.

CONGRESSIONAL QUARTERLY’S GUIDE TO CONGRESS 41 (3d ed. 1982).

28. Jefferson noted the relation of the parliamentary law to the early legislative procedure of Congress:

But to what system of rules is he to recur, as supplementary to those of the Senate? To this there can be but one answer: To the system of regulations adopted for the government of some one of the parliamentary bodies within these States, or of that which has served as a prototype to
in Holdsworth's history, they owed a great deal to the common law.

No doubt the procedural rules of the common law were gravely defective; but they had at least one merit—they discountenanced the very archaic legal ideas which so seriously hampered the representative assemblies of the continent. They were capable of a certain amount of development and adaptation; and the men who spent their lives working and developing them were the men who were best fitted to create a workable set of rules for the guidance of a representative assembly.\(^\text{29}\)

Even today, the House turns to "general parliamentary law" for guidance in adopting its rules at the beginning of each Congress.\(^\text{30}\)

most of them. This last is the model which we have all studied, while we are little acquainted with the modifications of it in our several States. It is deposited, too, in publications possessed by many, and open to all. Its rules are probably as wisely constructed for governing the debates of a deliberative body, and obtaining its true sense, as any which can become known to us; in the acquiescence of the Senate, hitherto, under the references to them, has given them the sanction of the approbation.


The most striking feature of the procedure of Parliament continued to be the influence exercised by the forms and conceptions of the common law. Firstly, we have seen that the whole fabric of Parliamentary procedure was regarded as a special law governing Parliament. It was the "lex et consuetudo Parliamenti," which governed the High Court of Parliament, just as the procedural rules of the common law, the civil law, or the canon law, governed the various courts which exercised jurisdiction in the English state. Secondly, this law was a customary law to be ascertained mainly by the precedents to be collected from the records of Parliament. It therefore possessed all the flexibility and adaptability of customary law; and this was no small advantage at this time of conflict. Thirdly, it was, like the common law itself, a permanent and independent body of customary law.


Since the rules are not self-enforcing, each house of Congress has the authority to amend its rules unilaterally, as well as suspend, waive, or even ignore them altogether. As one observer of the legislative process noted, "the legislative rules of Congress are essentially endogenous. If these rules are enforced rigorously and consistently, it is only because Congress chooses to do so."  

II. "ALL MATTERS OF METHOD" THE JUDICIAL DEFINITION OF CONGRESSIONAL RULE-MAKING POWER

A. Ballin to Yellin. Illusory Limits on the Judicial Power to Review Congressional Rules

While the propriety of congressional rules had been challenged on earlier occasions, the 1891 decision of United States

31 [T]he ways in which the House applies its rules are relatively predictable, at least in comparison with the Senate. Moreover, even the ways in which the House frequently waives, supplants, or supplements its regular rules with special, temporary procedures generally fall into a relatively limited number of recognizable patterns.

Underlying most of the rules that Representatives may invoke, and the procedures the House may follow, is a fundamentally important premise—that a majority of Members ultimately should be able to work their will on the floor.


The essential characteristic of the Senate's rules, and the characteristic that most clearly distinguishes its procedures from those of the House of Representatives, is their emphasis on the rights and prerogatives of individual Senators. The Senate's rules give greater weight to the value of full and free deliberation than they give to the value of expeditious decisions.

Precisely because of the nature of its standing rules, the Senate cannot rely on them exclusively. If all Senators took full advantage of their rights under the rules whenever it might be to their advantage, the Senate would have great difficulty reaching timely decisions. Therefore, the Senate has developed a variety of practices by which it sets aside some of its rules to expedite the conduct of its business or to accommodate the needs and interests of its members. In most cases, these alternative arrangements require the unanimous consent of the Senate—the explicit or implicit concurrence of each of the one hundred Senators.


33 Although not the subject of judicial consideration, the following account of an
v. Ballin\textsuperscript{34} provided the Supreme Court with its first opportunity to articulate the scope of review applicable to congressional rules. The rule in controversy was House Rule XV which provided that the members present in the chamber but not voting would be "counted and announced in determining the presence of a quorum to do business."\textsuperscript{35} Prior to the adoption of this rule in 1890, conventional wisdom held that the constitutional quorum requirement\textsuperscript{36} could be satisfied only if a majority of members actually voted on the proposition before them. This meant that those opposed to a proposition could, even though present in the chamber, defeat a quorum by not voting.\textsuperscript{37}

In this context, the importers Ballin, Joseph & Co. argued, in response to an unfavorable decision by the Board of United States General Appraisers, that an act imposing certain import duties was invalid since it was approved by less than a majority vote and, therefore, allegedly in the absence of a constitutional quorum.\textsuperscript{38} Although addressing the alternative argument that

incident involving John Quincy Adams provides an excellent early illustration of the type of problems a congressional rule can present:

In 1836 John Quincy Adams challenged a House practice, begun in 1792, of refusing to receive petitions and memorials on the subject of slavery. Adams offered a petition from citizens of Massachusetts for the abolition of slavery in the District of Columbia. His action led to a protracted debate and the adoption of a resolution by 117-68 vote directing that any papers dealing with slavery "shall, without being either printed or referred, be laid upon the table and that no further action whatever shall be had thereon."

Adams, who considered adoption of the resolution to be a violation of the Constitution and the rules of the House reopened the issue in 1837 by asking the Speaker how to dispose of a petition he had received from 22 slaves. Southerners moved at once to censure Adams. The move failed, but the House agreed, 163-18, that "slaves do not possess the right of petition secured to the people of the United States by the Constitution." Further agitation led the House in 1840 to adopt, by a vote of 114-108, a rule that no papers "praying the abolition of slavery shall be received by this House or entertained in any way whatever." Four years later, however, the rule was rescinded by a vote of 108-80.

\textsc{Congressional Quarterly's Guide to Congress, supra note 27, at 46.}

\textsuperscript{34} 144 U.S. 1 (1891).

\textsuperscript{35} Id. at 5.

\textsuperscript{36} See supra note 10.

\textsuperscript{37} \textsc{The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92nd Cong., 2d Sess. 113 (1973)}.

\textsuperscript{38} In re Ballin, 45 F 170 (C.C. S.D.N.Y.) (rev'g the Decision of the Board of United States General Appraisers), rev'd, 144 U.S. 1 (1891).
the act should be given a different construction, the Supreme Court found the question of whether the legislation was legally passed of greater importance.

Writing for a unanimous Court, Justice Brewer noted that the judiciary had the power to consider whether a bill was validly enacted; and, when the judiciary makes this determination, the entries in the House journal "must be assumed to speak the truth." After referring to the journal, the Court accepted as fact that when the vote occurred a majority of members were present in the chamber although less than a majority actually voted. The Court was left to consider, therefore, whether Congress had properly exercised its rule-making authority in approving the Rule XV method of determining the constitutionally required quorum.

The Court refused to overturn the rule stating that "[n]either do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With

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40 Id. at 3.
41 "Whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who were called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind clear and satisfactory answer to such questions;"
42 "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgement require Secrecy."
U.S. Const. art. I, § 5, cl. 3; see supra note 12; see also Field v. Clark, 143 U.S. 649, 680 (1891):
[I]t is not competent for the appellants to show, from the journals of either House, from the reports of committees or from other documents printed by authority of Congress, that the enrolled bill contained a section that does not appear in the enrolled act in the custody of the State Department.
43 Bailin, 144 U.S. at 4.
44 Id.
45 Id. at 4-5.
the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings.\textsuperscript{46} Despite its conclusive language, the Court was unwilling to concede final authority to the legislative branch:

\begin{quote}
[The House] may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and enforced for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.\textsuperscript{47}
\end{quote}

The standard announced in \textit{Ballin}, therefore, recognized that Congress has the power to make its own procedural rules, but the courts have the power to determine whether they are constitutional. Rule XV was, in effect, reviewed by the Court and allowed to stand only after the Court was satisfied that it conformed to these criteria: (1) the rule complied with "constitutional restraints";\textsuperscript{48} (2) the rule violated no fundamental rights;\textsuperscript{49} and (3) there was a "reasonable relationship between" the rule's method and "the result sought to be attained."\textsuperscript{50} \textit{Ballin}, far from carving out an area in which judicial review is strictly limited, established an expansive role for the Court in reviewing legislative rules of procedure. This proposition was supported and even expanded by the Court's decision in \textit{United States v. Smith}.\textsuperscript{51}

\textsuperscript{46} \textit{Id.} at 5.
\textsuperscript{47} \textit{Id.} (emphasis added).
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} 286 U.S. 6 (1932).
The rule at issue in *Smith* allowed for the reconsideration of a Senate vote on an executive branch nomination after notification of confirmation or rejection had been sent to the president. The executive branch challenged this rule after the Senate adopted motions requesting President Hoover to return for reconsideration a confirmation resolution of one of his appointments to the Federal Power Commission. The President refused this request, and the Senate, despite the position of the executive branch, subsequently reconsidered and rejected the nomination.

The Court admitted that "[t]he question primarily at issue relates to the construction of the applicable rules, not to their constitutionality." Judicial review was predicated on the fact

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51 The pivotal provisions are ¶¶ 3 and 4 of Rule XXXVIII which read: 3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion. 4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending, unless otherwise ordered by the Senate.

*Id.* at 30-31.

52 *Id.* at 28.


I am advised that these appointments were constitutionally made, with the consent of the Senate formally communicated to me and that the return of the documents by me and reconsidered by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon the Executive functions by the removal of a duly appointed executive officer under the guise of reconsideration of his nomination.

President's Statement About Refusal to Resubmit Federal Power Commission Appointments to the Senate, *Pub. Papers* 13-16 (Jan. 10, 1931) ("I am advised by the Attorney General that these appointments were constitutionally made, [and] are not subject to recall.

54 *Smith*, 286 U.S. at 29.

55 *Id.* at 33.
that "the construction to be given to the rules affects persons other than members of the Senate. . ."\textsuperscript{57} Despite its recognition that, "[i]n deciding the issue, [we] must give great weight to the Senate's present construction of its own rules,"\textsuperscript{58} the Court held that the history and the precedents of the Senate, both before and after the incident in question, supported an interpretation of the rules that precluded reconsideration of the appointment by the Senate.\textsuperscript{59} In short, the Court substituted its interpretation of the Senate rules for that of the Senate.\textsuperscript{60}

Seventeen years later, the scope of review delineated in \textit{Ballin} and \textit{Smith} allowed the Court to decide \textit{Christoffel v United States}.\textsuperscript{61} The \textit{Christoffel} Court faced a fact pattern that arose out of the rules of a House committee acting in an investigatory capacity,\textsuperscript{62} not out of proceedings relating to floor debate.\textsuperscript{63} Once again, the rule in controversy pertained to the method by which the committee determined a quorum.\textsuperscript{64}

\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 48.
\textsuperscript{60} Id. at 37-48.
\textsuperscript{61} The Court's decision in Missouri Pac. Ry. Co. v. Kansas, 248 U.S. 276 (1919), provides an interesting contrast. Although concluding that the "question would be justiciable," id. at 279, the Court deferred to Congress' application of art. 1, § 7, cl. 2 requiring a two-thirds vote of each House to pass a bill over a presidential veto. Writing for the entire court, Justice White concluded that the "application of the rule was the result of no mere formal following of what had gone before but came from conviction expressed, after deliberation, as to its correctness by many illustrious men." Id. at 284.
\textsuperscript{62} See McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("We are of [the] opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."); see also STAFF OF JOINT COMM. ON CONG. OPERATIONS, 94TH CONG., 2D SESS., LEADING CASES ON CONG. INVESTIGATORY POWER (Comm. Print 1976).
\textsuperscript{63} \textit{Christoffel}, 338 U.S. at 85. Rule XII(1)(a)(1) provides: "The Rules of the House are the rules of its committees and subcommittees so far as applicable."
\textsuperscript{64} \textit{House Rules and Manual, supra} note 14, at 405.
At the beginning of the committee session, a call of the roll indicated that a quorum was present.\(^6\) Three hours later, the petitioner allegedly made perjurious statements\(^6\) for which he was later convicted.\(^6\) Evidence at trial suggested that less than a majority of the members were present when the statements were made. While agreeing "that the presence of a quorum was an indispensable part of the offense charged," the trial judge instructed the jury to find that a quorum existed as long as a majority of the committee was present at the beginning of the session.\(^6\) Justice Murphy, writing for the majority, held that this instruction was improper—that a quorum consisting of a majority of the committee members had to exist at the time the statements were made for the committee to constitute a "competent tribunal" under the District of Columbia perjury statute.\(^6\)

Justice Jackson, writing in dissent on behalf of Chief Justice Vinson and Justice Reed, rejected the latitude taken by the majority:

[What Congress may do by express rule it may also do by custom and practice. There is no requirement, constitutional or otherwise, that its body of parliamentary law must be recorded in order to be authoritative. In the absence of objection raised at the time, and in the absence of any showing of a rule, practice or custom to the contrary, this Court has the duty to presume that the conduct of a Congressional Committee, in its usual course of business, conforms to both the written and unwritten rules of the House which created it. "Each House may determine the Rules of its Proceedings."

Art. I, § 5, cl. 2. This Court accordingly can neither determine the rules for either House or Congress nor require those rules to be expressed with any degree of explicitness other than that chosen by the respective Houses.]

(Absence of a quorum was not available as a defense when the objection was not raised before the committee.).

\(^6\) Christoffel, 338 U.S. at 86.

\(^6\) Id.

\(^6\) "Every person who, having taken an oath or affirmation before a competent tribunal, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury."

Id. at 85 n.2 (quoting District of Columbia Code, § 22-2501, 31 Stat. 1329).

\(^6\) Id. at 86.

\(^6\) Id. at 89-90.
The House has adopted the rule and practice that a quorum once established is presumed to continue unless and until the point of no quorum is raised. By this decision, the Court, in effect, invalidates that rule despite the limitations consistently imposed upon courts where such an issue is tendered.\textsuperscript{70}

The holding of \textit{Ballin}, when considered in light of \textit{Smith} and \textit{Christoffel}, makes it quite clear, however, that "the limitations consistently imposed" are largely without force. Although now nearly twenty-five years old, the Supreme Court's most recent discussion of the scope of review of congressional rules,\textsuperscript{71} \textit{Yellin}

\textsuperscript{70} Id. at 91, 95.

\textsuperscript{71} Although beyond the scope of this Comment, the analogous issues raised by those more recent cases which explore the boundaries of the speech or debate clause ("for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Consr. art. I, § 6, cl. 1) cannot escape reference. See Davis v. Passman, 442 U.S. 228 (1979) (A congressional employee brought suit against a congressman for employment discrimination. While the majority did not reach the speech or debate clause issue, it did hold that the petitioner had a cause of action. Chief Justice Burger, joined by Justices Powell and Rehnquist dissented, arguing that the case presented serious separation of powers concerns.); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975) (Plaintiff brought suit to obtain an injunction against the issuance of a subpoena by a Senate subcommittee. The Court held that the issuance of the subpoena was "an integral part of the deliberative and communicative processes," of congressional business.); Doe v. McMillan, 412 U.S. 306 (1973) (A suit was brought by parents of children cited for disciplinary problems in a House subcommittee report. The Court concluded that the speech or debate clause barred relief from committee members and staff for introducing the material at committee hearings, for referring the report to the Speaker of the House, and for voting for publication of the report since these were all legislative acts.)

In Gravel v. United States, 408 U.S. 606, 625 (1972), \textit{reh'g denied}, 409 U.S. 902 (1972), action was taken against Senator Gravel to restrain publication of the Pentagon Papers. The Court held that private publication was unprotected and offered the following standard:

Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Another case of particular importance, although not always found under the speech or debate rubric, is Powell v. McCormack, 395 U.S. 486 (1969). Congressman Adam Clayton Powell, responding to a resolution excluding him from the 90th Congress for
v. United States, 72 continues to stand for this assertion. 73

Like Christoffel, the controversy in Yellin centered around the application of a House committee rule 74 to a witness subpoenaed pursuant to a committee investigation. In reversing a contempt of Congress conviction, the majority held that the committee failed to follow its own rule relating to the interrogation of a witness in executive session and, thus, violated the witness' right, granted by the rule, to be questioned in private. 75

mishandling House funds, brought an action to compel House members and employees to seat him as a duly elected Member of Congress. Writing for the majority, Chief Justice Warren concluded that "though this action may be dismissed against the Congressmen petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude petitioner Powell." Id. at 506. By determining that the action against Powell was an exclusion rather than an expulsion, the Court avoided reaching the question of whether it had the power to review House expulsion standards. Since Powell clearly met the constitutional requirements of age, residence, and citizenship, the Court saw no need to apply art. I, § 5, cl. 1, which provides that each House is "the Judge of the Elections, Returns and Qualifications of its own Members." Id. at 522. Thus, the Court had the final word on the application of explicit nondiscretionary constitutional requirements and only indirectly on internal congressional procedure. Of interest is Professor Wechsler's observation, articulated in another context a decade before Powell, that though presenting "issues of the most important constitutional dimension, the seating or expulsion of a Senator or Representative" is not a proper matter for review by the judiciary. Wechsler, supra note 4, at 8.

For discussions of the evolution of the speech or debate doctrine see Reinstein and Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113 (1973); Note, Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity, 60 Notre Dame L. Rev. 589 (1985).

73 Id. at 114.
74 The particular Committee Rule involved, Rule IV, provides in part:

"IV—Executive and Public Hearings:
A—Executive:
"(1) If a majority of the Committee or Subcommittee, duly appointed as provided by the rules of the House of Representatives, believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing.

B—Public Hearings:
(1) All other hearings shall be public."

Id. at 114-15 (emphasis added).
75 Id. at 123.
The logic of the majority holding was uncomplicated: "The Committee prepared the groundwork for prosecution in Yellin's case meticulously. It is not too exacting to require that the Committee be equally meticulous in obeying its own rules."76

As the dissent pointed out, however, this conclusion necessarily depends on the Court rejecting the interpretation of the rule Congress offered and concluding that the congressional committee had indeed failed to follow its own rule.77 Citing the restrictive language of Ballin78 and Smith,79 Justice White wrote on behalf of the dissent that "[w]hile the testimony is reasonably clear as to the Committee's construction and application of its own rule, if there were any doubt about the matter it is not our place to resolve every doubt against the Committee."80 Clearly, the distance that the dissenters were willing to wander into the procedural briar patch of the legislative branch was far shorter than that of the majority.81

Thus, while offering an obligatory nod to the merits of judicial restraint, the Supreme Court, without so much as a blush, has embraced an all-inclusive scope of review of congressional rules in a variety of contexts. In Ballin, the Court examined the constitutionality of a rule that construed the quorum requirement found in the text of the Constitution.82 In Smith, the Court justified going one step further in reviewing the application of an admittedly constitutional rule by noting the effect application of the rule had on a private party.83 Christoffel presented a similar factual scenario with the Court concluding that a facially constitutional rule was interpreted

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76 Id. at 124.
77 Id. at 143 (White, J., dissenting).
78 Ballin, 144 U.S. at 5.
79 Smith, 286 U.S. at 33.
80 Yellin, 374 U.S. at 146.
81 The role that the courts play in adjudicating questions involving the rules of either house must of necessity be a limited one, for the manner in which a house or committee of Congress chooses to run its business ordinarily raises no justiciable controversy. Even when a judicial controversy is presented, the function of the courts is a narrow one.
82 Ballin, 144 U.S. at 1; see supra notes 34-50 and accompanying text.
83 See supra notes 51-59 and accompanying text.
incorrectly. Finally, Yellin illustrates once again the Court's willingness to review congressional rules for compliance when a private party is involved.

Following the Supreme Court's lead, the more recent decisions by the lower federal courts generally echo this reluctance to recognize a jurisdictional limitation. In the final analysis, the courts more often than not have chosen to draw the boundaries of judicial review deep and wide rather than choosing a line of restraint.

B. Vander Jagt to Kurtz: "Standing" in the Way of Judicial Power

The theme of the District of Columbia Circuit decisions involving review of congressional rules has been one of concern about the separation of powers problems raised by judicial consideration. The opinions have most often given force to
this concern by paying homage, albeit more and more spar-
ingly, to the separation of powers concepts embodied in the
political question doctrine. Nevertheless, these decisions con-
tinue to assert a far-ranging jurisdictional authority to review
Congress’ in-house procedural rules.

The decision in Vander Jagt v. O’Neil presents the most
complete expression of the D.C. Circuit’s doctrine relating to
judicial review of congressional rules. In Vander Jagt, a group
of House members challenged the allocation of a dispro-
portionate number of House committee seats to Democrats. After
noting that “[t]his circuit has previously expressed its reluctance
to review congressional operating rules, though it has never
denied its power to do so,” the court examined at length the
scope of review articulated in Ballin and Smith. The court then
to interfere with the internal procedures of Congress. (citations omitted)), cert. dened, 441 U.S. 943 (1979); Harrington v. Bush, 553 F.2d 190, 214 (D.C. Cir. 1977) ("In deference to the fundamental constitutional principle of separation of powers, the judiciary must take special care to avoid intruding into a constitutionally delineated prerogative of the Legislative Branch."); Consumers Union of United States v. Periodical Correspondents Ass'n, 515 F.2d 1341, 1351 (D.C. Cir. 1975) ("[Thus case is] not justiciable by reason of the textually demonstrable commitment of such rules to the legislative branch of government.").

Prominent on the surface of any case held to involve a political question is found the 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 court’s undertaking independent resol-
ution without expressing lack of the 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 multifi-
larious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962); see infra notes 92-127 and accompanying text. Compare Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 601 (1976) ("The cases which are supposed to have established the political question doctrine required no such extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain.") with Redish, Judicial Review and the "Political Question", 79 Nw. U.L. Rev. 1031, 1032-33 (1984-85) ("[I]n a number of cases in which the Court purported not to invoke the political question doctrine, it was in fact applying most of the doctrine's precepts in rendering its deci-
sion.").

See infra note 95 and accompanying text.


Id. at 1167.

Id. at 1172-73.
concluded "that Art. 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."\textsuperscript{95} The court went on to admit candidly "that this raises some doubt about the intelligibility of the 'textually committed' aspect of the political question doctrine."\textsuperscript{96} Indeed, the opinion lends support to the premise that the doctrine is only of academic interest, observing that it is "far more useful to examine 'case-by-case' whether [it] would be unwise to intrude in 'political' controversies."\textsuperscript{97}

Significantly, the court did not find a threshold bar to justiciability in applying the standing doctrine\textsuperscript{98} to the plaintiffs

\footnotesize{\textsuperscript{95} Id. at 1173.  
\textsuperscript{96} Id.  
\textsuperscript{97} Id. at 1174.  
\textsuperscript{98} Although Justice Douglas had warned that "'[g]eneralizations about standing to sue are largely worthless as such .,'" Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 151 (1970), a traditional standing analysis has been characterized most often as requiring the following: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) an available judicial remedy. C. \textit{Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction} 2d \S 3531 (1984). Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), illustrates the terminology of modern standing theory:

\begin{quote}
Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," \textit{Gladstone, Realtors v. Village of Bellwood}, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," \textit{Simon v. Eastern Kentucky Welfare Rights Org.}, 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." \textit{Flast v. Cohen}, 392 U.S. at 97.
\end{quote}

\textit{Id.} at 472 (footnote omitted). In commenting on the close relationship between the "traceability" and "redressability" requirements, the Court has concluded that "[t]o the extent there is a difference, it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." \textit{Allen v. Wright}, 468 U.S. 737, 753 n.19 (1984). Important, too, is the Court's discussion of the Article III "case" and "controversy" genesis of the standing doctrine:

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This
either in their capacity as members of Congress or in their capacity as private-party voters. In his concurrence, Judge Bork argued against granting standing, stating that "whether the requirement is rooted in Article III or in judicial prudence the Supreme Court continues to regard the standing concept as informed by considerations of separation of powers." The majority disagreed, choosing to grant standing to the plaintiffs and then dismissing the action in an exercise of the court's remedial discretion.

First proposed by Judge Carl McGowan, the remedial discretion doctrine was adopted by the D.C. Circuit in *Riegle v Federal Open Market Committee* as a way of "translating separation-of-powers concerns into principled decision making." In essence, the doctrine counsels the court to

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inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society.


99 *See McGowan, Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 265 (1981) ("Invoking the court's discretion to deny an equitable remedy when the petitioner could get adequate relief from his fellow legislators seems to be the most satisfying way of resolving these cases."); see also *Note, The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526, 527 (1982) ("[Courts access for congressional plaintiffs [should] be primarily determined by traditional doctrines of standing, focusing on the injury to the plaintiff's status and rights as a legislator."); *Note, Congressional Access to the Federal Courts*, 90 HARV L. REV. 1632, 1634 (1977) ("By treating all congressional suits alike, the courts have also obscured the institutional problems peculiar to suits by individual congressmen to assert participatory rights."); *Comment, Standing Versus Justiciability: Recent Developments in Participatory Suits Brought by Congressional Plaintiffs*, 1982 B.Y.U. L. REV 371 (1982).

100 *Vander Jagt*, 699 F.2d at 1180 (Bork, J., concurring). In his dissent in *Barnes v. Kline*, 759 F.2d 21, 44 (D.C. Cir. 1985), Judge Bork further articulated his view that a standing decision necessarily encompasses separation of powers concerns:

"Standing" is one of the concepts courts have evolved to limit their jurisdiction and hence to preserve the separation of powers. Every time a court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts.

101 *Vander Jagt*, 699 F.2d at 1168.

102 *See supra* note 99.


104 *Id.* at 881.
dismiss suits brought by legislators "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute. . . ."105

While concurring in the result, Judge Bork raised fundamental questions about the rationale used by the majority to dismiss the suit:

Political question, like standing, is a doctrine that raises a jurisdictional bar to judicial power, while remedial discretion, as described in Judge Gordon's opinion for the majority, raises no bar and grants the judiciary unfettered discretion to hear a case or not, depending on the attractiveness of the idea.

My colleagues' disinclination to rest this case upon a jurisdictional ground—whether that of standing or political question—rests squarely upon the erroneous notion, expressed in Riegle and reiterated today, that there must be judicial power in all cases and that doctrines must not be adopted which might frustrate that power.106

Arguably, the Vander Jagt approach of factoring-in the separation of powers restraints as part of a strict remedial discretion analysis, rather than a standing analysis, results in a very narrow judicial role when the plaintiff is a member of Congress.107 Remedial discretion, however, as the name implies, provides not a jurisdictional mandate for the court but rather a choice. Furthermore, when the plaintiff is a private party, the separation of powers element of the remedial discretion doctrine is largely without force.108

In Gregg v Barrett,109 the court was presented with both congressional plaintiffs and private-party plaintiffs claiming

105 Id.
106 Vander Jagt, 699 F.2d at 1184 (Bork, J., concurring).
107 See supra note 99.
108 Judge Bork argues against this result: [S]eparation-of-powers considerations do not, strictly speaking, operate here on the basis of the plaintiffs' status as legislators. Rather, in keeping with the standing doctrine, my concern is with the separation-of-powers implications of the *harm* alleged: "diminution of influence" and the legislative process. Appellants complain of this single harm in both of their capacities. Vander Jagt, 699 F.2d at 1183 n.3 (Bork, J., concurring) (emphasis in original).
109 771 F.2d 539 (D.C. Cir. 1985).
that their first amendment rights were violated because the Congressional Record was not a verbatim transcript of congressional debate. In dismissing the complaint as to the congressional plaintiffs, Judge Mikva invoked the remedial discretion doctrine, noting that the Congressmen could persuade their colleagues to enforce either existing rules or approve a resolution requiring a verbatim transcript. The court, however, rejected the appellees’ argument that the private parties’ claim should be dismissed on grounds related to those articulated by the equitable discretion doctrine. Indeed, the Gregg opinion noted that “an important reason to withhold equitable relief for congressional plaintiffs is the possibility that other, private plaintiffs may bring suit in a context less laden with separation-of-powers concerns.”

Gregg, therefore, consistent with the holding in Riegle, recognized a clear role for the judiciary in examining congressional rules on behalf of private plaintiffs who qualify under the separation-of-powers-purged standing analysis. In the end, however, the Gregg court dismissed the private appellants’ claim, concluding that there is “no first amendment right to receive a verbatim transcript of the proceedings of Congress.”

Ironically, after embracing the jurisdictional authority to review House rules on behalf of a private party, Judge Mikva concluded the opinion by observing that “[n]otwithstanding the deference and esteem that is properly tendered to individual congressional actors, our deference and esteem for the institution as a whole and for the constitutional command that the institution be allowed to manage its own affairs precludes us from even attempting a diagnosis of the problem.”

The D.C. Circuit’s most recent response to a request to review a rule of Congress is found in Kurtz v Baker. The

110 Id. at 540.
111 Id. at 545.
112 Brief for Appellee at 36; Gregg, 771 F.2d at 539.
113 Gregg, 771 F.2d at 546.
114 Riegle, 656 F.2d at 881 (“While we discourage congressional plaintiffs in such circumstances, it is probable that a private plaintiff could acquire standing to raise the issue of unconstitutionality before a court.”).
115 Gregg, 771 F.2d at 546.
116 Id. at 549.
117 829 F.2d 1133 (D.C. Cir. 1987).
appellant in *Kurtz* brought suit when the chaplains of the House and Senate, pursuant to congressional rules,\(^\text{118}\) refused a request "to deliver secular remarks in both houses of Congress during the period each house reserves for morning prayer."\(^\text{119}\) While the district court reached the merits of the claim,\(^\text{120}\) the circuit court concluded that the appellant failed to meet the article III standing requirements.\(^\text{121}\)

As noted in Judge Ruth Ginsburg's dissent, the majority incorporates the separation of powers analysis into its doctrine of standing:

Although they acknowledge that Kurtz meets the core, injury-in-fact requirement, my colleagues nonetheless conclude that Kurtz lacks standing because he cannot show causation, *i.e.*, that his injury is "traceable to the chaplains' rejection of Kurtz' requests" for a guest speaker bid. The majority emphasizes that the chaplains lacked authority to grant Kurtz's requests in the face of the firm will of Congress, expressed in its internal rules, to open sessions with prayer; they then maintain, essentially, that Congress made and *only Congress* can unmake the rules determining that prayer will be the exclusive benediction upon the opening of legislative sessions. If this is indeed the pivotal point, then the majority—notwithstanding its use of a "standing" label—is deciding not

\(^{118}\) House Rule VII states that "[t]he Chaplain shall attend at the commencement of each day's sitting of the House and open the same with prayer." Rule XXIV provides that "[t]he daily order of business shall be as follows: First. prayer by the Chaplain."

\(^{119}\) Id. at 1143.

\(^{120}\) Id. at 1138.

\(^{121}\) [T]he complaint barely survives scrutiny under the first part, and thoroughly fails under the second part, of the test the Supreme Court has developed for determining Article III standing: (1) there must be concrete personal injury to the plaintiff, (2) such injury must be fairly traceable to the challenged conduct, and (3) the injury must be "likely" to be redressed if the relief sought is granted.

*Id.* at 1138.
who may sue, but an anterior question, viz, what issues are
legitimately open to third branch resolution.122

Notwithstanding the objections of Judge Ginsburg, this is pre-
cisely the function of the standing requirement123—to define the
limits of the court's article III jurisdictional power 124

In general, therefore, the D C. Circuit opinions recognize
that the judiciary cannot review the procedural rules of the
legislative branch without encountering a host of separation of
powers problems.125 Like the earlier decisions of the Supreme
Court,126 the court of appeals, until Kurtz, had refused to find
that it lacked jurisdictional power. Instead, the court reserved
the discretionary right to impose self-limitations on review. This
analysis was accomplished either by pulling from the shelf the
remedial discretion doctrine when presented with legislator
plaintiffs or by using more traditional prudential limitations
when asked by private-party plaintiffs to review the procedural
rules of Congress.127

III. "To Say What the Law Is". Recognizing an
Absence of Judicial Power

Although rendered meaningless by nearly one hundred years
of tolerance of judicial meddling in the realm of legislative
procedure, the proper role of the judiciary in this area, or more
accurately lack of role, was clearly stated by Justice Brewer in
U.S. v Ballin:128 "With the courts the question is only one of

122 Id. at 1148 (Ginsburg, R., J., dissenting) (citations omitted) (emphasis in origi-
nal).
123 See supra note 98 and accompanying text.
124 If the court were to order the chaplains to discontinue the program,
both houses would still have the power to invite guest chaplains to lead
them in prayer without the intervention of their official chaplains. While
such an order might provoke a conflict on a matter of constitutional
principle between the houses of Congress and this court, it would involve
a test of political will rather than of law because this court is without
authority to act outside the boundaries of Article III.
125 Kurtz, at 1144-45.
126 See supra notes 89-116 and accompanying text.
127 See supra notes 33-88 and accompanying text.
128 144 U.S. 1 (1891).
power. The Constitution empowers each House to determine its rules of proceedings.\textsuperscript{129} The decisions from \textit{Ballin} to \textit{Gregg v. Barrett}\textsuperscript{130} have refused to accept this premise and have provided the rhetorical baggage that reduces it to insignificance.

For example, the court in \textit{Vander Jagt v. O'Neill},\textsuperscript{131} ironically but justifiably citing \textit{Ballin}, stated that "[c]ourts and commentators have long recognized that it is crucial to distinguish questions about whether judicial power exists, from questions about whether judicial power should be exercised."\textsuperscript{132} This reasoning allowed the court to conclude:

[W]hile there are compelling prudential reasons why we should not interfere in the House's distribution of committee seats, it is nevertheless critical that we do not deny our jurisdiction over the claims in this case. As long as it is conceivable that the committee system could be manipulated beyond reason, we should not abandon our constitutional obligation—our duty and not simply our province—"to say what the law is."\textsuperscript{133}

In retort, Judge Bork agreed with the mandate of \textit{Marbury v Madison}\textsuperscript{134} but not with the result of the majority's analysis:

Of course, when a court finds a jurisdictional bar to its exercise of power, it does state what the law is. When, on the other hand, a court claims a discretion, whose contours are not suggested, to decide or not decide, the court refuses to say what the law is.\textsuperscript{135}

Indeed, Chief Justice Marshall recognized in \textit{Marbury}\textsuperscript{136} that boundaries to judicial power do exist. He wrote that "[q]uestions in their nature political, or which are, by the constitution and

\textsuperscript{129} Id. at 5.
\textsuperscript{130} 771 F.2d 539 (D.C. Cir. 1985); see supra notes 33-116 and accompanying text.
\textsuperscript{132} Id. at 1170.
\textsuperscript{133} Id. (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
\textsuperscript{134} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{135} Id. at 1185 (Bork, J., concurring).
\textsuperscript{136} Marbury, 5 U.S. (1 Cranch) at 170.
laws, submitted to the executive, can never be made in this court.\textsuperscript{137}

Separation of powers considerations,\textsuperscript{138} given force in the doctrine of standing,\textsuperscript{139} demand that the judiciary recognize

\textsuperscript{137} Id. Chief Justice Marshall reiterated this theme in a speech delivered to Congress:
If the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary.


\textsuperscript{138} Understanding separation of powers objectives is a prerequisite to understanding the concept's effect on standing methodology. Separate powers, implicit in the structure of the Constitution, have been described "as a keystone for guaranteeing the liberty of the people." Choper, supra note 3, at 263. With reference to a lineage that includes Locke, Montesquieu, and Blackstone, Professor Choper has summarized the views of the founding fathers on the consequences that are avoided by maintaining a system of divided powers:

While a number of the founding fathers—including Washington, Adams, Jefferson, Jay, and Wilson—urged acceptance of the [separation of powers] principle on the grounds of government efficiency, Madison's statement that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" could as well have come from Montesquieu's pen. Washington voiced the same sentiment in his Farewell Address, cautioning against "the exercise of the powers of one department to encroach upon another" because "the spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a red despotism." John Adams wrote that "it is by balancing each of these powers against the other two, that the efforts of human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the constitution." And Jefferson was equally confident in his opinion that concentration of powers "in the same hand [either Congress or the President] is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single one; 173 despots would surely be as oppressive as one."

Id. at 264-65 (footnotes omitted).

\textsuperscript{139} See supra note 98 and accompanying text. The mere assertion that separation of powers notions are part of standing theory says nothing about how they influence standing methodology. The Court's lack of guidance in this area has led one commentator to observe that "[p]recisely how separation-of-powers analysis advances doctrinal application of the standing inquiry may be difficult to fathom." L. Tribe, American
Once and for all an absence of power to review in every instance the procedural rules of Congress. A startling limitation on the court's ability to have the last word in the realm of constitutional interpretation? Not necessarily, for as Judge Bork has observed, "it is of course precisely the function of the Article III limitations on jurisdiction, through such doctrines as standing and political question, to ensure that nonfrivolous claims of unconstitutional action will go unreviewed by a court."  


For Judge Bork, the integration of separation of powers principles as a part of standing methodology is accomplished by focusing on two inquires aimed at the two major components of the standing test— injury in fact and causation. First, a court must ask if recognition and protection of an injury would unduly enhance the role of the judiciary in relation to other branches. Thus, Judge Bork concluded in Vander Jagt v. O'Neill that "[c]ourts may take cognizance only of injuries of certain types, and the limitations are often defined less by the reality of the litigant's "adverseness" than by the courts' view of the legitimate boundaries of their own power." Vander Jagt at 1177.

Second, in reviewing causation a court must go beyond an "estimation of probabilities" and examine the effect granting standing would have on the spread of judicial authority. "[C]ausation in this context," argues Judge Bork, "is something of a term of art, taking into account not merely an estimate of effects but also considerations related to the constitutional separation of powers as that concept defines the proper role of courts in the American governmental structure." Haitian Refugee Center v. Gracey, 809 F.2d 794, 801 (D.C. Cir. 1987) (standing denied to nonprofit membership corporation organized to assist Haitian refugees and two members who challenged a federal program to interdict undocumented aliens on the high seas).

When a plaintiff asserts what is in the Court's view a "generalized grievance," separation of powers concerns counsel that the Court consider disposing of the case on prudential rather than article III grounds, reserving for the legislative branch the opportunity to determine ultimately the best forum for resolving the controversy.  


[Standing] is a crucial and inseparable element of [separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance. [Courts] need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large.

Id. Note, "More Than an Intuition, Less Than a Theory": Toward a Coherent Doctrine of Standing, 86 Colum. L. Rev 564, 593 (1986) ("Standing to raise constitutionally grounded claims should be approached by first recognizing rights derived directly from the Constitution as legally cognizable, and then examining whether the right so derived accrues to the people in gross or in personam.").

140 Vander Jagt, 699 F.2d at 1183 (Bork, J., concurring) (emphasis added).
Thus, in Vander Jagt the injury alleged—diminution of influence—defined the issue which the legislator plaintiffs successfully requested the court to examine.\textsuperscript{141} A threshold separation of powers analysis, however, counsels against recognizing this as a judicially cognizable injury for the purpose of granting standing. Furthermore, in contrast to the dynamics of the remedial discretion doctrine, standing, permeated by separation of powers concerns, has a similar jurisdictional effect when the plaintiff is a private party.\textsuperscript{142} Kurtz v Baker,\textsuperscript{143} moreover, illustrates that even when a judicially cognizable injury is found, the separation-of-powers-aware standing test may foreclose jurisdiction.\textsuperscript{144}

Assuming, arguendo, that a particular rule falls within the set of those questions effectively outside the reach of the judiciary does not necessarily require the conclusion that the rule is above scrutiny for constitutional compliance. To suggest that members of Congress could adopt rules in contravention of the Constitution ignores the fact that all public officers are required by article 6, clause 3 "to support this Constitution."\textsuperscript{145} Of

The function of the article III case-or-controversy limitations, including the standing requirement, is, however, precisely to ensure that claims of unconstitutional action will go unreviewed by a court when review would undermine our system of separated powers and undo the limits the Constitution places on the power of the federal courts.

\textit{Barnes, 759 F.2d at 60} (Bork, J., dissenting).

\textsuperscript{141} \textit{Vander Jagt, 699 F.2d at 1168.}

\textsuperscript{142} See \textit{Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987).}

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id. at 1143} ("Article III requires a chain of causation less ephemeral than a coin tossed into a wishing well."); see \textit{Allen v. Wright, 468 U.S. 737, 762 n.26 (1984)} ("We rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement.").

\textsuperscript{145} Indeed, the notion that Congress can be trusted with the final word on the constitutionality of its procedural rules is not without precedent. Consider the comments of Professor Black in the judicial impeachment context:

We are used to confiding (or to imagining we confide) all constitutional questions to the courts. Congress, rests under the very heavy responsibility of determining finally some of the weightiest of constitutional questions, as well as a great many important and difficult questions of procedure. For this purpose, and in this context, we have to divest ourselves of the common misconception that constitutionality is discussable or determinable only in the courts, and that anything is constitutional which a court cannot or will not overturn. We ought to under-
course, taken to its logical extreme this argument supports the clearly untenable view that by virtue of article 6, clause 3, all statutes should be given the unquestioned presumption of constitutionality.

The problem that judicial review of statutes does not present, however, is that of impermissible control by one branch over the internal procedures of another.\(^\text{146}\) The importance of allowing the legislative branch to craft the procedural framework by which it conducts its business without intrusion from the other branches of government is not difficult to understand. If article I, section 5, clause 2 had granted to the executive or the judiciary the authority to impose procedural rules on Congress, it would have created not a check on power but rather a control of one branch by another. A similar spectre is presented by allowing an assertion of power by the judiciary, limited only by self-restraint, to impose its interpretation of those rules on Congress.\(^\text{147}\)

The ability of Congress to interpret the Constitution has been the focus of recent scholarly debate.\(^\text{148}\) The case for rec-
recognizing congressional competence to make final constitutional determinations about its rules is particularly compelling. As Judge Bork noted, asserting judicial power to review procedural rules raises "the very real problem of a lack of judicial competence to arrange complex, organic, political processes within a legislature so that they work better." Congress is in a much better position to gather the information necessary to make prudent determinations about the effect of adopting one appli-

of the Constitution." Fisher, Constitutional Interpretation by Members of Congress, 63 N.C.L. Rev 707, 708 (1985). He supports this contention by observing that "Congress, by the very nature of our political system, shares with the executive and the judiciary the duty of constitutional interpretation." Id. Fisher further contends that "[t]he oath of office, the finding of facts for constitutional law, the resolution of 'political questions,' and the congressional staff reforms of recent decades are some examples that reinforce both congressional authority and competence," in the area of constitutional interpretation. Id.

149 No one doubts that Congress, like the Court, can reach unconstitutional results. As Justice Brennan said in 1983: "Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the pressure of business, do not always pass sober constitutional judgment on every piece of legislation they enact." Yet if we count the times that Congress has been "wrong" about the Constitution and compare those lapses with the occasions when the Court has been "wrong" by its own later admissions, the results make a compelling case for legislative confidence and judicial modesty. In a recent evaluation, George Anastaplo said that "in the great crisis over the past two hundred years, when Congress and the Supreme Court have differed on major issues, Congress has been correct."

Justice Brandeis once remarked that "the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." The judiciary's record of the past two centuries supports his perception: it is a process of trial and error. At times the Court will admit its errors of constitutional interpretation and reverse a previous decision. Some members of the Court have the intellectual integrity to adopt Justice Jackson's attitude: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." Others, under the spell of stare decisis, will stick doggedly to errors of the past. It is particularly at such times that Congress, the President, and the public have a duty to exercise independent judgment and prevail upon the Court to revisit and rethink anachronistic holdings. Often constitutional adjustments can be accomplished without recourse to litigation, either through statutory change or executive-legislative accommodations.

Fisher, Judicial Supremacy or Coordinate Construction? 43-44 (article based on the author's paper Does the Supreme Court Have the Last Word in Constitutional Law? (presented October 17-19, 1986, at the University of Dallas)).

150 Vander Jagt, 699 F.2d at 1182 (Bork, J., concurring).
cation or interpretation of a procedural rule over another.¹⁵¹

A limited scope of judicial review allows a more fundamental protection to work in these cases as well—a protection which recognizes the dilemma inherent in a constitutional democracy: judicial review allows unelected judges to thwart the will of the majority ¹⁵² Justice Scalia has noted that "[t]he degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon when and at whose instance they are permitted to address them."¹⁵³ Thus, if the doctrine of standing is understood to include a separation of powers element, according to Justice Scalia, it "restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself."¹⁵⁴

¹¹¹ See Fisher, Judicial Misjudgments About the Lawmaking Process: The Legislative Veto Case, PUB. ADMIN. REV. 705, 710 (Nov. 1985) ("Through its misreading of history, congressional procedures, and executive-legislative relations, the Supreme Court has commanded the political branches to follow a lawmaking process that is impracticable and unworkable.").

¹² When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling their judgment, and normally doing so in a way that is not subject to "correction" by the ordinary lawmaking process. Thus, the central function and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.


¹³ See supra Scalia, note 139, at 891 (emphasis in original).

¹⁴ Id. at 894 (emphasis in original).

Even if the doctrine of standing was once meant to restrict judges "solely, to decide on the rights of individuals," what is wrong with having them protect the rights of the majority as well? They've done so well at the one, why not promote them to the other? The answer is that there is no reason to believe they will be any good at it. In fact, they have in a way been specifically designed to be bad at it—selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man in the street might subsist) removed from all accountability to the electorate. That is just perfect for a body that is supposed to protect the individual against the people; it is just terrible (unless you are a monarchist) for a group that is supposed to decide what is good for the people. It may well be, of course, that the judges know what is
The democratic process, therefore, must be allowed to work.¹⁵⁵

**CONCLUSION**

Professor Berle has suggested that once the Supreme Court has expanded its judicial power no room to retreat exists: "Power cast aside without provision for its further exercise almost invariably destroys the abdicating power holder—as, for example, Shakespeare's King Lear found out when he improvidently abandoned his power, and was promptly crushed."¹⁵⁶ It is far too dramatic to conclude, however, that judicial recognition of less power to review congressional rules of procedure results in an impermissible void or an abdication that damages the court.¹⁵⁷

Indeed, correctly determining where the judicial review boundary ends simultaneously plots the line that marks the power of the legislative branch.¹⁵⁸ While the surveyor's tools must be carefully chosen, we should not hesitate to adjust the boundaries when required.

The doctrine of standing, then, necessarily informed by separation of powers considerations, should serve as the surv-

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¹⁵⁵ Id. at 896-97 (emphasis in original).

¹⁵⁶ Critics might suggest that this view is untenable since it could thwart the review of an unquestionably unconstitutional rule. Theoretically, for example, a majority of House or Senate members could approve a rule which applies racial criteria to the selection of congressional officers. In response to similar criticism, however, Professor Ely has refused to accept the necessity of playing the "what if" game with regard to what can only be characterized as highly unlikely hypotheticals: "[I]t can only deform our constitutional jurisprudence to tailor it to laws that couldn't be enacted, since constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can." J. Ely, * supra* note 152, at 183.

¹⁵⁷ Although offered in a different context, perhaps the words of Edmund Burke more closely communicate the spirit of the problem: "Those who have been once intoxicated with power, and have derived any kind of emolument from it, even though but for one year, can never willingly abandon it." Letter to a Member of the National Assembly (1791), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 111 (1979).

¹⁵⁸ See * supra* note 6 and accompanying text.
This analysis would result in the judiciary being denied emphatically the power to review, for either constitutionality or compliance, rules which affect purely internal functions of the Congress. Even when congressional procedural rules reach out and directly affect third parties who are admittedly injured, the court would be largely without power to review.

While the weight of authority rejects this jurisdictional restraint, *Kurtz v. Baker* has begun the process of redrawing the lines—a process the importance of which Judge Bork has long recognized: "Major alterations in the constitutional system can be accomplished through what seem to be minor adjustments in technical doctrine." In the end, therefore, this

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159 See *supra* notes 98, 138-39 and accompanying text.

160 See *supra* notes 34-50 and accompanying text. The conclusion by Congress, therefore, that the constitutional quorum requirement can be satisfied by counting nonvoting members of the House who are present in the chamber is a nonjusticiable issue. Recognition of the claimed injury, being adversely affected by legislation passed in an allegedly unconstitutional procedural manner, would unduly enhance the role of the judiciary. Thus, the first prong of the standing analysis is not met. Neither is the injury "fairly traceable" to the assertedly unlawful conduct when considered with reference to separation of powers principles. See *supra* notes 98, 138-39 and accompanying text.

161 For example, House rules require a separate vote on Senate amendments to general appropriations bills that, if originating in the House, would have been in violation of House rules. See *House Rules and Manual*, *supra* note 14, at 570. Although the House regularly ignores this rule, its failure to comply is clearly not justiciable. Once again the separation of powers doctrine given voice in standing methodology requires this result. Cf. *supra* notes 72-81 and accompanying text.

162 Thus, a majority vote of the House that results in the allocation of disproportionate committee assignments to the political parties is not reviewable by the courts. As already noted the injury resulting is not justiciable cognizable. See *supra* notes 92-108 and accompanying text.

163 See *supra* notes 51-81, 117-24 and accompanying text.

164 When third parties allege injuries in their own right, the standing analysis does not per se result in the absence of jurisdiction. Particularly in the case of a witness before a congressional investigatory committee, a threshold recognition of standing may not invoke separation of powers concerns. As already argued, if a concrete injury is alleged and causation established, the court must still consider the potential for encroachment into the rightful territory of the other branches. This concern is conceivably, although not necessarily, less in the investigatory context. See *supra* notes 138-39 and accompanying text.


"question of power" must be answered in favor of the legislative branch.

Gregory Frederick Van Tatenhove**

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