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House Rules

Is a supermajority requirement for tax hikes constitutional?

In 1995, on the first day of the 104th Congress, the House of Representatives amended House Rule XXI, which governs the consideration of bills, to require a three-fifths majority vote to pass any increase in income tax rates. Anyone who had doubts about the new Republican majority’s determination to rein in taxes, the action seemed to say, need not have.

But voices were raised immediately, and critics continue to decry the measure as unconstitutional. Some contend that by restricting the rights of the majority, such a requirement undergrads our entire system of government. Others look to the text of the Constitution and find no prohibition against adding a new supermajority requirement (to those already constitutionally mandated to impeach officials and ratify treaties, for example).

John O. McGinnis, a professor at Benjamin N. Cardozo Law School of Yeshiva University in New York City, and Michael B. Rappaport, a professor at University of San Diego School of Law, have published articles on supermajority-rule constitutionality and written about separation of powers. They argue that the rule change passes constitutional muster.

Opposing them is Susan Low Bloch, a constitutional law professor at Georgetown University Law Center who clerked with Justice Thurgood Marshall. She says such a change represents a threat to the balance of power among the branches of government.

Yes: Each chamber can adopt its own procedures

Although opponents of this three-fifths rule have brought a lawsuit challenging its constitutionality, we believe the rule is wholly constitutional.

The Constitution gives each house the authority “to determine the rules of its proceedings.” The three-fifths rule is a rule of proceeding because it governs the internal operations of the House of Representatives. Thus, the House may enact the three-fifths rule so long as it does not violate another provision of the Constitution.

Opponents of the rule fail to identify a constitutional clause that prohibits the three-fifths rule. The Constitution does not specify the proportion of legislators necessary to pass a bill. Rather, it simply states that bills must “pass” each house.

The silence of the Constitution on the type of majority required to pass a bill is not the result of inattention to the issue. Instead it reflects the framers’ intent to permit the houses of the legislature to decide the question. When the Constitution actually mandates a legislative majority, as it does for quorums, or a supermajority, as it does for treaties, it does so explicitly.

Other venerable rules, such as the filibuster and the committee system, support the constitutionality of this rule. Like the three-fifths rule, these rules temper the power of legislative majorities in order to advance other values such as legislative deliberation. If the filibuster and the committee system are constitutional, so is the three-fifths rule.

Opponents of the three-fifths rule often charge that it is antidemocratic, but the rule is entirely consistent with majority control. A majority of the House of Representatives voted for the rule, and a majority can waive or repeal it at any time. A legislative rule that could not be repealed by a majority would be unconstitutional because it would function like a constitutional amendment. But the three-fifths rule does not suffer from this defect.

Another argument that has been raised against the three-fifths rule is that it somehow aggrandizes the role of the House of Representatives in the legislative process. The three-fifths rule, however, completely conforms to the constitutional separation of powers.

First, it is even odd to describe the three-fifths rule as expanding the authority of the House; the rule limits the House’s power to pass bills. More fundamentally, the Constitution gives each house the power to refuse to pass legislation for virtually any reason. Thus, the Senate cannot complain if the House refuses to pass legislation the Senate proposes. Similarly, the Senate may not object to rules that make it harder for the House to pass such legislation.

In addition to being constitutional, the three-fifths rule is also good policy. For the last 50 years the republic has been beset by a difficult problem: Concentrated interest groups can successfully obtain benefits for themselves and place the costs on a legislatively ineffective popular majority.

The three-fifths rule should be celebrated as a modest attempt to restore the power of popular majorities without taking the more radical step of amending the Constitution.
The supermajority requirement undermines the constitutional principles of Article I and separation of powers. Rule XXI is not merely a rule of internal procedure; it determines when bills get presented to the Senate and the president.

Article I, § 7 provides that "every Bill which shall have passed the House ... and the Senate, shall, before it becomes a Law, be presented to the President of the United States." The presumption is that "passed" means "agreed to by a majority of a quorum." The question is whether either house can change that meaning and insist that "passed" requires more than a majority.

While the Constitution does not explicitly deny either house the power to require a supermajority, that is true of many limits we infer from the structure of the Constitution. Article I, § 7 is a carefully crafted mechanism that struck a balance between large and small states, the House and the Senate, and Congress and the president. By adopting the three-fifths rule, the House upsets this balance and unconstitutionally intrudes on the powers of the Senate and the president.

The framers knew how to say they wanted a supermajority and, in fact, said so in several contexts. Proponents of the supermajority rule argue that the framers may have meant this list to be simply the minimal list of occasions that require supermajorities, and that they intended to allow Congress to add to the list.

Considering the distorting impact that supermajority requirements can have on the other branches, I conclude that when the framers did not specify a supermajority for bill passage, they not only presumed a majority would be sufficient, they in fact intended not to allow either chamber to increase the number of votes required.

There is no limit on the supermajority rule. Thus, the House could require even more than a 60 percent majority for selected topics or even for all legislation. Even if most representatives and a majority of senators want a particular bill, the bill could not get presented to the president and could never become law. If the House can do this, it has the power unilaterally to enhance its power vis-à-vis the Senate and the president.

Furthermore, if the House can adopt a rule like this, so can the Senate. Article I, § 5 provides that "each House may determine the Rules of its Proceedings." Thus, the Senate could say: "No judge or cabinet official, once nominated by the President, shall be considered as confirmed except by a three-fifths vote."

If the Senate were allowed to adopt such a rule, it would be able singlehandedly to upset the carefully crafted rules concerning appointment of both executive officials and judges, and to unilaterally limit the power the Constitution gives to the president in the appointment process. The Senate would thus be able to aggrandize its own role and unconstitutionally distort the balance of powers established by the Constitution.

Defenders of the rule say: "Don't worry; a simple majority can repeal the rule." But I see nothing in their logic that stops the House from requiring that repeal of the supermajority rule itself requires a supermajority.

When a chamber of Congress by its rules goes beyond internal housekeeping and affects the relationship among the other institutional players, it aggrandizes its powers and unconstitutionally distorts the "single, finely wrought and exhaustively considered, procedure" carefully crafted by the framers.

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### Taxation Tally

Recent federal income tax rate increases and the votes by which they passed the House of Representatives:

- **Bill number:** H.R. 5835
- **Raised income taxes on high-income taxpayers by setting the top bracket at 31% instead of 28%.
- **Passed Oct. 27, 1990; 228-200.
- **Voting yes:** 181 Democrats and 47 Republicans.
- **Voting no:** 74 Democrats and 126 Republicans.

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Since the 63rd Congress (1912-1914)—the first with 435 members—17 Congresses have been ruled by a three-fifths majority of either major party.

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No: The framers had only a simple majority in mind

BY SUSAN LOW BLOCH

[Photograph of Susan Low Bloch with the caption: ABA PHOTO BY PETE SOUZA; GRAPHIC BY JEFF DIONESE]