Is the Committee of the Whole the House? Implications of *Michel* v. *Anderson* for District of Columbia Representation

by

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Abstract

In 1993 the House of Representatives adopted rules permitting Delegates to vote in Committee of the Whole. As a result of suit brought against those rules in *Michel* v. *Anderson*, Federal Courts in 1993 and 1994 permitted them to stand, but in a form that left Delegates' votes with little real effect in the legislative process. This paper examines implications of these rulings both for the representation of non-State areas in Congress and for the constitutional status of the Committee of the Whole. We first sketch the history of representation of non-State areas, noting the limitations of the role of Delegates for this purpose. We then turn to the operation of the Committee of the Whole, focusing on ways in which its procedural actions and capacities may be viewed as identifying it with or distinguishing it from the House proper. We compare this analysis with ones adopted in opinions and supporting briefs in *Michel* v. *Anderson*, especially the opinion of the District Court.

The opinions of both the District Court and Circuit Court of Appeals in effect "pierce the veil" of the Committee of the Whole, concluding that actions it takes must be considered those of the House proper, because they constitute an exercise of "legislative power" constitutionally reserved to the House and its Members. We argue, however, that the Courts' analyses overlook key elements of the procedures relating the House and the Committee of the Whole, especially the operation of (1) the separate vote on amendments in the House and (2) the motion for the previous question. Our analysis supports distinguishing, rather than identifying, the Committee of the Whole and the House. While the Courts' rationale may cast broad doubt on the constitutional propriety of the manner in which the Committee of the Whole functions, our alternative analysis avoids this consequence. Although our account is also broadly favorable to Delegate voting, reconciling it with accepted readings of the Constitution severely constrains the capacity of the office of Delegate to afford full representation for the District of Columbia.

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Introduction

An area of relative neglect in the field of congressional scholarship is that of Delegates to Congress from various territories and the District of Columbia, and their role in the operation of Congress and the representation of their constituents. To the extent that such research does exist, it occurs in the context of their initial creation, of the aftermath of the Spanish-American War, or some other historical event.[1] This inattention may arise because many consider Delegates not to be "real" congresspersons. Or it may be that these members of Congress are viewed as existing on the periphery of the national legislature with no real effect on policy, and therefore as unworthy of scholarly study.

This paper seeks to explore the issue of Delegate representation in Congress. Particular attention will be given to District of Columbia congressional representation and *Michel v. Anderson,* the 1993 Federal court decision on the constitutionality of a 1993 rule change allowing Delegates to vote in the Committee of the Whole. The paper will address the following questions:

- What is a Delegate to Congress, and how has the office evolved over this history of the House of Representatives?
- What are the functional differences between the Committee of the Whole and the House of Representatives that may support, or prevent, the participation of Delegates in the Committee of the Whole?
- What was *Michel v. Anderson* about and what are its implication for Delegate participation?

These questions are important to a systematic study of the dilemmas presented by the presence of Delegates, and of its implications for the representation of American citizens in non-state jurisdictions such as the District of Columbia. In the case of the District of Columbia, nearly 575,000 citizens lack congressional representation on par with the citizens of the states, a circumstance some consider at variance with a primary goal of representative democracy: the ability of the citizenry to have a say in how they are governed.

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[1] See Earl Pomeroy, *Territories and the United States, 1861-1890: Studies in Colonial Administration*, (Philadelphia: University of Pennsylvania Press, 1947); Jo Tice Bloom, Early Delegates in the House of Representatives, in John Porter Bloom, ed., *The American Territorial System* (Athens, OH: Ohio University Press, 1973), p. 65-76. Andorra Bruno, *Territorial Delegates to the U.S. Congress: A Brief History*, Congressional Research Service Report for Congress 97-143 GOV (Washington, D.C.: Congressional Research Service, 1997), p. 4-5. Many passages in the first section of this paper draw heavily on this last work.

The Role of Delegates to Congress

Background: What Is a Delegate to Congress?

While Article I of the Constitution outlines the parameters, specific duties, and responsibilities of the legislative branch, it is silent on the question of Delegates. Consequently, the role of the Delegate has been subject to interpretation, change, and debate since its creation by the Congress of the Confederation through the Northwest Ordinance of 1787.

A Delegate to Congress is a person elected to represent the interests of his or her constituency in the U.S. House of Representatives from a region other than a State. The rights of Delegates have evolved somewhat in the 200-plus years since the first was seated in the House of Representatives. A Delegate has always been accorded a right to debate, but not vote, on the floor of the House.[2] Since 1794, when James White, of the Territory South of the River Ohio, became the first Delegate to Congress, there has been at least one Delegate in every Congress, with the single exception of the Fifth Congress (1797-1799).[3]

The current handbook of House precedent and practice describes the role of delegates in these terms:

> **Sec. 1. In General**
> The Delegates and Resident Commissioners are those statutory officers who represent in the House the constituencies of territories and properties owned or administered by the United States but not admitted to statehood. The Virgin Islands, Guam, and American Samoa, as well as the District of Columbia, are represented in the House by a Delegate, while Puerto Rico is represented by a Resident Commissioner. The rights and prerogatives of a Delegate in parliamentary matters are not limited to legislation affecting his own territory.
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> **Sec. 2. In the House**
> The floor privileges of a Delegate or a Resident Commissioner in the House include the right to debate, make motions, and raise points of order; but he cannot vote in the House nor serve as its presiding officer. He may make any motion a Member may make, including the motion to adjourn, but not the motion to reconsider, which is itself dependent on the right to vote. He may make reports for committees and may object to the consideration of a bill. Impeachment proceedings have been moved by a Delegate.
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> **Sec. 3. In Committees**
> The House rules now extend to Delegates and the Resident Commissioner all the powers in committee held by constitutional Members of the House. They are elected to serve on standing committees in the same manner as Members of the House and possess in such committees the same powers and privileges as the other Members. They have the right to vote in committees on which they serve. Seniority accrual rights on committees have also been extended to the Delegates

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[2] 1 Stat. 50, Aug. 7, 1789. House Defendants' Memorandum in Support of Motion to Dismiss and in Opposition to Preliminary Injunction, Michel v. Anderson, Civil Action 93-0039 (HHG)(D.D.C. Feb. 2, 1993), at 18-19. (Hereafter cited as "Defendants' Memorandum.")

[3] This calculation also includes Resident Commissioners.

and Resident Commissioner. They may be appointed by the Speaker to any conference committee. The Speaker also now has the authority to appoint them to any select committee; an appointment that previously required the permission of the House.

Sec. 4. In Committee of the Whole
Under a rule adopted in 1993, when the House was sitting in Committee of the Whole, the Delegates and Resident Commissioner had the same powers and privileges as Members. In the same year, the Speaker was given authority to appoint a Delegate or Resident Commissioner as Chairman of the Committee of the Whole. These provisions were stricken from the rules as adopted in January 1995.[4]

Evolution of Delegates to Congress

Territorial Delegates to Congress originate with the Northwest Ordinance of 1787. The Ordinance, enacted under the Articles of Confederation, established a government for the territory northwest of the Ohio River.[5] Earlier provision for territorial representation in Congress appears in the Ordinance of 1784, but this Ordinance had never been put into effect.[6] Previous to that, correspondence in 1776 from Silas Deane to the Select Committee of Congress and in Thomas Paine's 1780 essay "Public Good" discussed territorial representation in Congress.[7]

Upon ratification of the U.S. Constitution, Congress gave effect to the Northwest Ordinance through reenactment in 1789, also extending the privileges authorized in the Ordinance to the inhabitants of the territory south of the Ohio River.[8] The reenacted Ordinance was slightly modified to adapt to the Constitution, allowing for the popular election of a territorial house of representatives who, along with an appointed legislative council, would elect a Delegate to Congress. This Delegate "shall have a seat in Congress, with a right of debating, but not voting, during this temporary Government."[9] Although the Ordinance clearly stated that the Delegate could not vote, it was silent on the full nature of the Delegate's duties, privileges, and obligations, and in particular did not distinguish between voting on the floor and in committee. This silence would leave the Delegates' role up to interpretation, which has occurred largely

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[4]Wm. Holmes Brown, *House Practice*, 104th Cong., 2nd sess. (Washington: GPO, 1996), p. 431-432 (Citations omitted). [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_house_practice&docid=hp-18], visited Mar. 26, 2001. Resident Commissioners and Delegates are virtually identical in their privileges. The major difference between the two officers is that Resident Commissioners are elected for four years, while Delegates are elected to two year terms.

[5]The Northwest Ordinance: An Annotated Text, in Robert M. Taylor, Jr., ed. *The Northwest Ordinance, 1787* (Indianapolis: Indiana Historical Society, 1987), p. 51-53. Bruno, *Territorial Delegates*, p. 1.

[6]Julian Boyd, ed., *The Papers of Thomas Jefferson*, v. 6 (Princeton: Princeton University Press, 1952), p. 613-615. Bruno, *Territorial Delegates*, p. 1.

[7]Archer Butler Hulbert, ed., *Ohio in the Time of the Confederation* (Marietta, Ohio: Marietta Historical Commission, 1918), p. 1-12. Bruno, *Territorial Delegates*, p. 1.

[8]1 Stat. 50, Aug. 7, 1789. This area is now known as the State of Tennessee.

[9]The Northwest Ordinance: An Annotated Text, p. 36-51. Bruno, *Territorial Delegates*, p. 1-2.

in the context of Article I, section 5, of the Constitution, stating that "each House may determine the rules of its proceedings."

Most Delegates who have served in the House of Representatives have represented territories on their way to statehood. However, 1970 marked the beginning of a period when Delegates were authorized to represent areas for which statehood was not on the horizon. In that year, the District of Columbia was authorized to elect a Delegate, who was elected and sworn in the following year.[10] (Congress originally authorized a D.C. Delegate in 1871, but revoked the position three years later.[11]) The Virgin Islands and Guam were authorized in 1972 to elect one Delegate each,[12] followed six years later by American Samoa.[13] Previous to 1970, Puerto Rico and the Philippines had been represented in Congress by a Resident Commissioner.[14]

Congressional Debates Regarding Delegates

The lack of specificity about the nature of the Delegate's duties led to disagreement when, on November 11, 1794, James White presented his application to the House of Representatives for seating in the Third Congress. According to Bruno, when a "House committee reported favorably on Mr. White's application and submitted a resolution to admit him, [it touched] off a wide-ranging discussion about the Delegate's proper role."[15]

Some of the debate regarding the role of the Delegate revolved around the question of where the Delegate should serve. The Ordinance – originally enacted by the unicameral Congress under the Articles of Confederation – specified a seat in Congress, but did not specify in which chamber the Delegate would serve. Participants on both sides of the debate used the Constitution to buttress their arguments. Some contended that there was nothing in the Constitution that should exclude Delegate White, and that he should

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[10]P.L. 91-405, 84 Stat. 845 at 848. Bruno, *Territorial Delegates*, p. 7.

[11]Authorization: 16 Stat. 419 at 426, Feb. 21, 1871. Revocation: 18 Stat. 116, June 20, 1874.

[12]P.L. 92-271, 86 Stat. 118. Bruno, *Territorial Delegates*, p. 8.

[13]P.L. 95-556, 92 Stat. 2078-2079. Bruno, *Territorial Delegates*, p. 8.

[14]The Philippines Islands were part of territory ceded to the United States by Spain under the Treaty of Paris of Dec. 10, 1898. The Act of July 1902 granted the Philippine Islands the right to elect two Resident Commissioners to the United States Congress; subsequently, Congress provided for "resident commissioners" from Puerto Rico as well. Resident Commissioners were not accorded the same status as nonvoting Delegates; they did not have the right to serve or vote on standing committees. Those from the Philippines, however, were granted floor privileges in the House with the right of debate on Feb. 4, 1908. Later, in 1935, when the Philippines became a self-governing commonwealth, in transition to full sovereignty, the number of Resident Commissioners was reduced from two to one. On July 14, 1946, the Philippines became fully independent and the office of Resident Commissioner was terminated. (Public Law 73-127).

[15]Bruno, *Territorial Delegates*, p. 2. See also *Annals of Congress*, v. 4, 3rd Cong., 2nd Sess., Nov. 1794, p. 873; and Everett Brown, The Territorial Delegate to Congress, in Everett Brown, *The Territorial Delegate to Congress and Other Essays*, (Ann Arbor: George Wahr Publishing Company, 1950), p. 4-5.

be seated in the House of Representatives forthwith.[16] Others countered that Delegate White was not a member of Congress and, therefore, was not entitled to a seat in either chamber; if he were to be seated at all, it should be in the Senate, as his election, by the territorial legislature, was similar to that of Senators.[17] Indeed, it was considered by some to be a pretense that a Delegate, selected by a territorial legislature, would be allowed to sit in the House of Representatives, which is filled by popular vote.[18] One member even argued that Delegate White should sit in both chambers.[19] A related proposal seeking Senate concurrence regarding Delegate admittance was rejected. The question was eventually settled by admitting Delegate White to a nonvoting seat in the House of Representatives.

The debate surrounding Delegate admittance also revealed a considerable divergence in the views taken of these *sui generis* members. For example, many who took a broad view of the role and prerogatives of Delegates favored requiring Delegate White to take an oath of office. Others, who viewed the office of Delegate with more skepticism, argued that he should not be allowed to take an oath. As Representative William Smith noted:

> The Constitution only required members and the Clerk to take the oath. The gentleman [Delegate White] is not a member. It does not even appear for what number of years he is elected. In fact, he is no more than an Envoy to Congress...He is not a Representative from, but an Officer deputed by the people of the Western Territory. It is very improper to call on this gentleman to take such an oath, any more than any civil officer in the State of Pennsylvania.[20]

Views of this kind tended to set the Delegate apart, somewhat, from his colleagues, thereby perhaps fostering a perception of illegitimacy that could have limited the effectiveness of this new member of Congress. While subsequent grants of committee assignments and other privileges have brought Delegates to near parity with their congressional colleagues, it may not be unreasonable to assert that these distinctions exist to this day. After all, "he is not a member; he cannot vote, which is the essential part."[21]

Expansion of Responsibilities

Because the Northwest Ordinance was silent on the duties, privileges, and obligations of Delegates, their responsibilities have undergone some fluctuation in the course of their history. The trend of this fluctuation, however, has been toward the expansion of the responsibility and authority of Delegates, until today they have almost the scope of full members of Congress. The primary expansion has occurred in relation to Delegate participation in congressional committees. Beginning in 1795, Delegates were

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[16] *Annals of Congress*, p. 884-891.

[17] Ibid, p. 885-887.

[18] Ibid.

[19] Ibid, p. 886.

[20] Ibid, p. 889-890. See Bruno, *Territorial Delegates*, p. 2-3.

[21] Ibid, p. 890.

members of select committees and conference committees, as well as the Committee of the Whole.[22] By 1841, Delegates' roles in the House were becoming institutionalized:

> With the single exception of voting, the Delegate enjoys every other privilege and exercises every other right of a Representative. He can act as a member of a standing or special committee and vote on the business before said committees, and he may thus exercise an important influence on those initiatory proceedings by which business is prepared for the action of the House. He is also required to take an oath to support the Constitution of the United States.[23]

Toward the close of the 19th Century, Delegates become more integrated into the congressional system. Beginning in 1871, Delegates were assigned to specified standing committees as "additional members" under a House rule which called for a territorial Delegate to serve on the Committee on the Territories and the D.C. Delegate to serve on the Committee for the District of Columbia.[24]

Despite the expansion of duties for Delegates during this period, there was still debate well into the 20th century about their role and legitimacy, especially their right to vote in committee. The question was complicated by the U.S. acquisition of territories following the Spanish-American War that were not viewed as pre-states. The issue of representation for these areas was partially settled by a series of Supreme Court decisions – known as the Insular Cases (1901-1922) – holding that the political status of territories represented by Delegates could be settled by legislation.[25] Nevertheless, a special committee

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[22]Bruno, *Territorial Delegates*, p. 4. Defendants' Memorandum, at 19-21. Brief of Appellees, *Michel* v. *Anderson*, No. 93-5109 (D.C.Cir. Aug. 25, 1993), at 7-8.

[23]U.S. Congress, House of Representatives, H. Rept. 10, 27th Cong., 1st Sess. Quoted in Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907), v. 2, Sec. 1301. (Hereafter cited in the form: II *Hinds* 1301.) Bruno, *Territorial Delegates*, p. 4-5. Also quoted in Defendants' Memorandum, at 21, in Reply Memorandum in Support of Application for Preliminary Injunction, *Michel* v. *Anderson*, Civil Action 93-0039 (HHG) (D.D.C. Feb. 5, 1993), at 8 (hereafter cited as Plaintiffs' Reply Memorandum); in Brief of Appellees, at 8-9; and in Reply Brief of Appellants, *Michel* v. *Anderson*, No. 93-5109 (D.C.Cir. Sep. 10, 1993), at 19.

[24]II *Hinds* 1297. Additional committee assignments were authorized in 1876, 1880, and 1887.

[25]See Bruno, *Territorial Delegates,* p. 6, and Abraham Holtzman, Empire and Representation: the U.S. Congress, *Legislative Studies Quarterly*, v. 11, May 1986, p. 253. According to Bruno:

> In the Insular Cases, the Supreme Court created a new classification of territorial status for newly acquired overseas lands following the Spanish-American War. Congress did grant representation to two of the territories it acquired from Spain–Puerto Rico and the Philippines. It did so, however, in a way that distinguished their situation from that of statehood-bound territories. Rather than authorizing Delegates, Congress provided for Resident Commissioners to the United States from Puerto Rico and the Philippines, who were to be entitled to official recognition as such by all departments.

Holtzman described the role of Resident Commissioners as follows:

> [N]o reference to Congress or the House of Representatives was made in the authorizing statutes.

(continued...)

of the House reported in 1932 that Delegates did not have the right to vote.[26] The special committee relied upon the earliest legislative language giving a Delegate a seat, but no vote, and concluded "from the foregoing it is apparent that a Delegate to Congress from a Territory is not a Member of the House of Representatives; nowhere in the Constitution nor in the statutes can the intention be found to clothe the Delegate with legislative power."[27] From that decision until 1970, the issue of Delegate voting in committee lay dormant. The Legislative Reorganization Act of 1970 (LRA) revived the issue.

As originally proposed, the LRA contained a provision addressing the House rule specifying the committees to which the Resident Commissioner from Puerto Rico and the Delegates from Alaska and Hawaii were to be assigned as "additional members." Insofar as related to Delegates, this provision had become obsolete with the admission of Alaska and Hawaii into the Union over a decade previously. The LRA proposed to delete all references to Alaskan and Hawaiian Delegates, while continuing language in Rule XII requiring the Resident Commissioner from Puerto Rico to serve as an "additional," non-voting, member of the Agriculture, Armed Services, and Interior Committees without accruing seniority. During floor consideration, the House adopted an amendment revising Rule XII to allow the Resident Commissioner to be elected to any standing committee and possess in such committees the same powers and privileges as the other Members. The amendment, initially agreed to by voice vote in the Committee of the Whole and ultimately enacted, was significant for three reasons. First, it gave the Resident Commissioner the power to vote in committee. Second, it allowed the Resident Commissioner to serve on any standing committee rather than merely those noted in the Rule. Third, it implicitly permitted the Commissioner to accrue seniority on committees.

While the Rule change gave new authority to the Resident Commissioner, it was silent on the question of Delegates. Consequently, no accommodations were made upon the arrival in 1970 of a Delegate from the District of Columbia or, in 1972, the Virgin Islands, and Guam. Their status was not settled until 3 January 1973, when the House amended Rule XII so that Delegates were given the same powers and privileges as the Resident Commissioner from Puerto Rico.[28] This amendment made Delegates eligible not

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[25](...continued)

> Apparently, it was Congress's intent that the mandate of these representatives be broader than service in the U.S. Legislature...This suggests a role for resident commissioners more akin to that of a foreign diplomat than that of a legislator. Nevertheless, the representatives from these two territories did serve in the House.

[26]Rep. Edgar Howard, The Right of a Delegate to Vote in Committee, *Congressional Record*, v. 75, Jan. 18, 1932, p. 2163-2164. Cited in Memorandum in Support of Application for Preliminary Injunction, *Michel* v. *Anderson*, Civil Action No. 93-0039 (HHG) (D.D.C. Feb. 5, 1993), at 19 (hereafter cited as "Plaintiffs' Memorandum") and in Brief of Appellants, *Michel* v. *Anderson*, No. 93-5109 (D.C.Cir. July 26, 1993), at 19.

[27]Howard, The Right of a Delegate to Vote, p. 2163-2164. Arguably, a decision by the Indian Affairs Committee to permit the delegate to vote in their committee would have violated House Rules as they then existed. There is no evidence, however, of any formal action taken by the Rules Committee or by any House leader against the proposal during its consideration.

[28]*Congressional Record*, v. 119, p. 17.

only to vote, but to accumulate seniority, on committees. From that point, Delegates have served on a variety of committees, and some have risen to chair subcommittees.[29]

Delegate Voting in Committee of the Whole

While Delegates may propose legislation and vote in committee, a major deficiency in their capacity for legislative activity relates to their voting on the House floor. The lack of a floor vote precludes the full participation of Delegates in the legislative process. Granting a floor vote would afford Delegates virtually every important power held by Representatives.

There has been one major attempt to grant Delegates the right to vote on the House floor. At the start of the 103rd Congress, the Democratic majority instituted a number of rule changes, including a controversial move to allow Delegates to vote in the Committee of the Whole. The change came in the wake of a September 1992 memorandum to the House Democratic Caucus by District of Columbia Delegate Eleanor Holmes Norton. Norton, a constitutional law professor at Georgetown University, offered the proposal arguing:

> [There is no] constitutional barrier to extending the vote in the Committee of the Whole to all the House delegates. Article I, Section 5, Clause 2 provides that "Each House may determine the Rules of its Proceedings." House rules have long interpreted this clause to permit delegates to vote in standing committees. Like the standing committees, the Committee of the Whole, into which the full House resolves itself, is a creature of the House rule-making power. Both are organizational expedients, nowhere mentioned in the Constitution, that are used to facilitate the legislative process. Voting by delegates in committees–whether subject-matter panels, such as Armed Services or Judiciary, or the largest of all, the Committee of the Whole–is permissible because committees do not pass final legislation and their actions are not binding on the House of Representatives.[30]

The Democratic Caucus concurred with Norton's argument and, at the outset of the 103rd Congress, offered a resolution to adopt the rules that included an appropriate amendment to Rule XII.[31] After a contentious debate, and on a strict party-line vote, the House adopted the resolution, thereby allowing Delegates, for the first time in U.S. history, the right to vote on the floor of the House of Representatives.[32]

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[29]Antonio Borja Won Pat, Delegate from Guam, chaired the House Interior Subcommittee on Insular Affairs. Walter E. Fauntroy, Delegate from the District of Columbia, chaired the House District Subcommittee on Fiscal Affairs and Health, and House Banking Subcommittee on International Development, Finance, Trade and Monetary Policy.

[30]Eleanor Holmes Norton, Law, Politics, and Voting by Delegates: Bringing Democracy to the House, *Legal Times*, Jan. 4, 1993, p. 22-23. See Bruno, *Territorial Delegates*, p. 10.

[31]Subsequent to the presentation of the Norton memorandum to the Democratic Caucus, the Delegates from Guam, the Virgin Islands, American Samoa, and the Resident Commissioner from Puerto Rico were included with the District in the Rule change.

[32]Bruno, *Territorial Delegates*, p. 9. Rules of the House, proceedings in the House, *Congressional Record*, v. 139, Jan. 5, 1993, p. 49, 50, 53-100.

A group of House Republicans, led by Minority Leader Robert Michel (R., Ill.), filed suit contending that this amendment to Rule XII was unconstitutional.[33] The grounds of their claim was that "these rules unconstitutionally vest the Delegates with legislative power, and that they dilute the legislative power of Members of the House."[34] The complainants also claimed that in modifying the Delegates' role by amendment of its rules, the House had violated the constitutional requirements of bicameralism and presentment of legislation to the President.[35] Ultimately, the Court upheld the rule allowing Delegate voting, provided that an immediate and automatic second ballot would occur in cases where Delegate votes provided the margin of decision on a particular question. Delegates would be prohibited from participating in the second ballot.[36]

The question was rendered moot, at least for the time being, when the Republicans took a majority of the seats in the House of Representatives following the 1994 general elections. Upon their ascension to majority status, the Republicans rescinded the amendment to Rule XII allowing Delegates to vote in the Committee of the Whole.[37]

The Dilemma of Delegate Participation

The problem faced by advocates of Delegate voting in Committee of the Whole was defined by the proposition that Delegates cannot constitutionally vote in the House. This proposition rests on the very first two substantive provisions of the Constitution. Article I, section 1, vests "All legislative powers herein granted ... in a Congress of the United States," consisting of "a Senate and a House of Representatives." Section 2 provides that "The House of Representatives shall be composed of members chosen ... by the people of the several States." Together, these two provisions imply that any legislative powers vested in the House are to be exercised collectively by those who compose it; that is, its Members. But Delegates do not represent States, and are not chosen by the people of States; accordingly, they fail to satisfy the constitutional definition for "Members" of the House. Therefore, according to this view, whatever they do may not amount to a participation in the exercise of "legislative powers."[38] In *Michel* v. *Anderson*, the Republican plaintiffs formulated these implications as "a simple limiting principle, grounded in the Constitution: when 'legislative power' is exercised only 'Members' from 'states' can participate."[39]

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[33]*Michel v. Anderson*, Civil Action 93-0039 (HHG) (D.D.C. 1993).

[34]*Michel* v. *Anderson*, 817 F. Supp. 126, 2 (D.D.C. 1993).

[35]Ibid.

[36]*Michel* v. *Anderson*, 817 F.Supp. 126 (D.D.C. 1993), 14 F.3d 623 (D.C.Cir. 1994). Bruno, *Territorial Delegates*, p. 9-10.

[37]Rules of the House, proceedings in the House, *Congressional Record*, v. 141, Jan. 4, 1995, p. 462, 268, 530. Bruno, *Territorial Delegates*, p. 11.

[38]Plaintiffs' Memorandum, at 28-29. Brief of Appellants, at 19.

[39]Memorandum of Plaintiffs, at 1, 24, 27. Reply Memorandum of Plaintiffs, at 13. Brief of Appellants, at 24-25. Reply Brief of Appellants, at 2, 14.

This proposition defines what may be called the dilemma of Delegate participation. In their effort to overcome it, supporters of representation for the District at no point set out to contest this reading of the Constitution; instead, they sought ways to promote their objective consistent with it. The failure of the constitutional amendment for congressional representation for the District, and the lack of success of the concurrent statehood movement, cast doubt on the feasibility of altering the constitutional constraints or rendering them inapplicable to the District. Although both approaches remain under discussion, the proposal to allow Delegates to vote in Committee of the Whole was developed as an alternative response to the dilemma of Delegate participation.

The Role of the Committee of the Whole

Constitutional Procedural Requirements and the Practice of the House

The proposal for Delegate voting in Committee of the Whole was grounded on the argument that, for pertinent purposes, the Committee of the Whole was an entity distinct from the House itself. Consequently, constitutional restrictions on Delegate participation in the House would not apply to the Committee of the Whole. On this view of the controversy, Delegate voting in Committee of the Whole can be legitimate if and only if the distinction between the Committee of the Whole and the House is constitutionally appropriate. The legitimacy of this distinction was accordingly the central point in controversy in *Michel* v. *Anderson*.

In defense of the new rule, the House defendants in *Michel* v. *Anderson* argued that House practices in relation to the Committee of the Whole consistently treat it as distinct from the House proper, and that the long acceptance of these practices implies the propriety of the distinction.[40] Specifically, defendants showed that, in its practices on yea-and-nay voting, quorums, and the *Journal*, the House has throughout its history treated the Committee of the Whole as exempt from procedural requirements imposed on the House by Article I, section 5, of the Constitution.[41] In this light, the propriety of Delegate voting in Committee of the Whole could appear as a natural extension of the theory of the Committee of the Whole already implicit in House procedure.

Voting. A constitutional requirement of particular importance to the legislative process is that "the 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."[42] Under certain circumstances, current House rules permit this yea-and-nay vote to occur even without this level of support. Any Member may object to a voice vote on the grounds (when correct) that a quorum is not present. Then, instead of a quorum call to bring Members to the floor, followed by a new vote with a quorum present, the rule directs that a roll call vote occur automatically, and permits the result to show also the presence of the quorum.[43] No doubt ever appears

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[40]Defendants' Memorandum, at 28, 56.

[41]Defendants' Memorandum, at 7-17, 45-54. Brief of Appellees, at 11-16, 34-42.

[42]Art. I, sec. 5.

[43]Now House Rule XX, clause 6. In U.S. Congress, House, *Constitution, Jefferson's Manual, and*

(continued...)

to have been raised that this rule is consistent with the Constitution, for the rule cannot be used to deny a recorded vote in any case in which the Constitution would require it. Instead, it only allows Members' votes to be recorded in cases additional to those required by the Constitution; the Constitution does not *forbid* the recording of votes *not* requested by one-fifth.

In Committee of the Whole, however, House Rules permit a recorded vote only if the request is supported by 25 Members.[44] Whenever this number is more than one-fifth of the Members present, a request could attract the constitutionally required level of support and yet be denied. Further, this rule dates only from 1971; throughout the previous history of the House, recorded votes were not permitted in Committee of the Whole under any circumstances. Moreover, both before 1971 and since, the House has always observed the principle that in Committee of the Whole, "the constitutional yea and nay vote demanded by one fifth of the Members present ... may not be taken."[45] The Committee of the Whole could be exempt from the constitutional requirement only if, for these purposes, it does not count as the House.[46]

Quorums. The Constitution also specifies a majority of Members as the quorum requisite for the House to do business.[47] For its first hundred years, the House applied this majority quorum requirement both in the House proper and in Committee of the Whole. In 1890, however, it set the quorum of the Committee of the Whole at 100. This change was part of the "Reed Rules," instituted by the great Speaker Thomas B. Reed (R., Me., Speaker 1889-1891, 1895-1899) to overcome obstruction by the Democratic minority in the post-reconstruction period. The constitutional propriety of this change was strenuously contested, generating probably the most sustained public discussion of the status of the Committee of the Whole prior to the Delegate voting proposal of 1993.[48] Nevertheless, except for the two Congresses immediately following (1891-1895), the House has ever since maintained and observed the lower quorum requirement for the Committee of the Whole without court challenge, and apparently without question.[49]

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[43](...continued)
Rules of the House of Representatives, One Hundred Seventh Congress, H.Doc. 106-320, 106th Cong., 2nd sess., [compiled by] Charles W. Johnson, Parliamentarian (Washington: GPO, 2001), sec. 1025. (Hereafter cited as *House Manual*).

[44]House Rule XVIII, clause 6(e). *House Manual*, sec. 983.

[45]Deschler, Lewis, *Deschler's Precedents of the United States House of Representatives*, H.Doc. 94-661, 94th Cong., 2nd sess. (Washington: GPO, 1977), v. 5, ch. 19, sec. 1. (Hereafter cited in the form "5 *Deschler* ch. 19, sec. 1.") See *House Manual*, sec. 76.

[46]Defendants' Memorandum, 11-12, 15. Brief of Appellees, 13-16, 36-38.

[47]Art. I, sec. 5.

[48]The Rules, proceedings in the House, *Congressional Record*, v. 21, Feb. 21, 1890, p. 1210-1251.

[49]IV *Hinds* 2966. Defendants' Memorandum, at 48-54. Brief of Appellees, at 38-42. Reply Memorandum of Plaintiffs, at 6.

The *Journal*. The Constitution also requires "Each House" to "keep a Journal of its proceedings."[50] The *Journal* of the House records proceedings in Committee of the Whole, as for any other committee, only insofar as they are reported back to the House proper. Briefs for the House in *Michel* v. *Anderson* noted that the House has followed this practice from the First Congress, as did the Congress under the Articles of Confederation, the Continental Congresses, colonial and early state legislatures, and the British Parliament. The briefs infer that the Framers understood, and intended, that the Committee of the Whole would not count as the House in relation to this constitutional requirement.[51]

The treatment of voting and quorums in the *Journal* of the House appears to constitute a partial exception to its practice of not recording action in Committee of the Whole. Although the House regards recorded votes in Committee of the Whole as not occurring pursuant to the constitutional provision, the *Journal* sets forth their results in the same way as the Constitution requires for the yea-and-nay votes it mandates. Similarly, if a quorum fails to appear in Committee of the Whole, the Committee must rise and report the names of absentees to the House proper, and they are spread upon the *Journal*. Until 1979, the Rules required this action after any quorum call, even when a quorum did appear. Indeed, after the 1890 change in the quorum requirement, it initially became established that if a quorum failed in Committee of the Whole, the Committee could resume its sitting only after a quorum of the House was established in the House proper.[52]

Briefs of the Republican plaintiffs in *Michel* v. *Anderson* laid emphasis on the inclusion in the House *Journal* of record votes in Committee of the Whole.[53] Nevertheless, the House does not appear to have committed itself to the position that the Constitution requires votes and quorum calls in Committee of the Whole to be journalized in these ways; instead, it appears to follow these practices out of a kind of constitutional caution, in case matters related to recorded votes and quorums should be deemed constitutionally significant in spite of their arising in Committee of the Whole.

Rulemaking. The House has consistently presumed the Committee of the Whole not only to be exempt from the procedural requirements of Article I, section 5, just discussed, but also as incapable of exercising other procedural powers of internal regulation conferred by the same section. The argument of *Michel* v. *Anderson* gave little attention to implications of the way in which the House exercises these constitutional powers. Nevertheless, the practice of the House in relation to at least two of them, the rulemaking power and the power of discipline, further illuminates the distinction the body maintains between itself and the Committee of the Whole.

Although the Constitution empowers each house of Congress to "determine the rules of its proceedings," the Committee of the Whole adopts no rules of its own; instead, the Rules of the House,

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[50]Art. I, sec. 5. This official record of proceedings is not the *Congressional Record*, but a separate document, analogous to the minutes of an ordinary deliberative assembly; like them, it does not record debate, but only procedural actions.

[51]Defendants' Memorandum, at 8-9, 11, 13-14, 48. Brief of Appellees, at 11-13, 37.

[52]IV *Hinds* 2966, 2968-2971, 2977-2979. VI *Cannon* 671-674. VIII *Cannon* 2377, 2379. 5 *Deschler* ch. 19, sec. 26.4; ch. 20, sec. 7, 7.1, 7.2. These precedents cite occurrences from 1809 through 1966.

[53]Reply Memorandum of Plaintiffs, at 6. Reply Brief of Appellants, at 10.

adopted by the House proper, include provisions regulating proceedings in Committee of the Whole. In one respect, this practice treats the Committee of the Whole as more akin to the House than to the standing committees, for House Rules require the standing committees to adopt rules of their own. On the other hand, it also shows that the House treats the Committee of the Whole as a separate and subordinate entity, for only the House, and not the Committee of the Whole, makes rules for both. Not even by unanimous consent may the Committee of the Whole depart either from the rules set by the House, or from orders of the House on how to proceed in particular instances.[54] For example, the Committee of the Whole may not authorize itself to sit in closed session, nor to determine "the sufficiency or legal effect of committee reports."[55] Nor can a Chairman of the Committee of the Whole even "respond[] to inquiries regarding whether a time limitation may be rescinded or whether a two-thirds vote is required in the House."[56]

Similarly, the Committee of the Whole may not take actions that would have the effect of directing or altering the course of proceedings in the House proper. Also, a call of the House may not be moved in Committee of the Whole.[57] Further, under older precedents the Committee of the Whole was not permitted even to "report a recommendation which, if carried into effect, would change a rule of the House," such as by permitting a legislative amendment to an appropriation bill or altering the order of bills on the Private Calendar.[58]

Discipline. Finally, Article I, section 5, also empowers each house to "punish its Members for disorderly behavior." Authority beginning with the practice of Parliament, cited in *Jefferson's Manual*,[59] establishes that this power must be exercised by the House proper. In 1897, Speaker Reed overruled a point of order asserting that the Committee of the Whole could enforce order under its own authority.[60] The Committee of the Whole "may not punish a breach of order in the House .... It can only rise and report it to the House, who may proceed to punish."[61] Instead, to restore order, the Committee rises (that is, resolves itself back into the House proper), either on motion or informally;[62] "Extreme disorder arising in

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[54]This restriction reflects the understanding, apparently always implicitly accepted in both Houses, that the constitutional rulemaking power includes the authority to interpret and determine the meaning of the rules adopted. See Richard S. Beth, "Points of Order and the Conduct of Senate Business," paper presented at the Annual Meeting of the American Political Science Assn., 1990, p. 1-2.

[55]5 *Deschler* ch. 19, sec. 7, 7.17, 7.18 (1955, 1950).

[56]Ibid., ch. 19, sec. 7, 7.12, 7.13 (1973, 1946).

[57]VIII *Cannon* 2369 (1919).

[58]IV *Hinds* 4907-4908 (1890, 1896).

[59]Sec. 30. In *House Manual*, sec. 426.

[60]II *Hinds* 1350. The House has, however, referred incidents of disruption in Committee of the Whole to a committee, or even to the Committee of the Whole itself, for investigation and recommendation. II *Hinds* 1642, 1650, 1651 (1798, 1841, 1844).

[61]*Jefferson's Manual*, sec. 30. In *House Manual*, sec. 426. Quoted in II *Hinds* 1348.

[62]II *Hinds* 1652, 1350 (1852, 1897).

Committee of the Whole, the Speaker may take the chair 'without order to bring the House into order.''[63] Only in the House proper may the chair restore order by directing the Sergeant-at-Arms to bear the mace on the floor, for the mace is the symbol of the authority of the House itself.[64]

On the same principle, "Disorderly words spoken in Committee of the Whole are to be taken down as in the House, but are to be reported to the House, which alone can punish."[65] A Chairman of the Committee of the Whole cannot decide whether words spoken in debate are unparliamentary.[66] Nor may the Committee may debate that question,[67] or entertain a motion to expunge the words from the Record.[68] Instead, "unparliamentary words spoken in Committee of the Whole are taken down and read, whereupon the committee rises and reports them to the House."[69] If the House expunges the words from the *Record*, any motion to permit the Member to proceed in order must be entertained in the House proper and not in the Committee.[70] Nor may a Member raise a question of personal privilege in Committee of the Whole.[71]

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[63]II *Hinds* 1348, citing *Jefferson's Manual*, sec. 12 (in *House Manual*, sec. 331). But the rules permit the Chair of the Committee of the Whole to clear the gallery. House Rule XVIII, clause 1. In *House Manual*, sec. 970.

[64]II *Hinds* 1349 (1880). Precedents for such action are also cited from 1840, 1841, 1844, and 1860. II *Hinds* 1351, 1649-1651, 1657.

[65]II *Hinds* 1348, also quoting *Jefferson's Manual*, sec. 17 (in *House Manual*, sec. 369), in similar words.

[66]VIII *Cannon* 2533 (1930). Similarly, a resolution to refer such a question to the Committee on Rules was once ruled out of order on the grounds that the matter was for the House to decide. II *Hinds* 1259 (1883).

[67]VIII *Cannon* 2538 (1917).

[68]5 *Deschler* ch. 19, sec. 1, 2, 3.2, 17.3 (1941).

[69]II *Hinds* 1257 (1882). Precedents under this principle are cited from 1882, 1883, 1890, 1936, and 1941. II *Hinds* 1257-1259; 5 *Deschler* ch. 19, sec. 17, 17.2, 17.3, 21.5.

[70]VIII *Cannon* 2538 (1917).

[71]5 *Deschler* ch. 19, sec. 1.3 (1944).

The Exercise of Legislative Power

In the argument of *Michel* v. *Anderson*, supporters of the Delegate voting rule drew from these various practices of the House inferences to justify distinguishing Committee of the Whole from that of the House in its formal procedural status. Opponents of the rule made their case against this distinction by appealing to the past practice of the House, as well, but in a different way. They pointed out that never in its previous history had the House permitted Delegates to vote in Committee of the Whole. Similar objections had been raised in 1890 by opponents of the reduced quorum requirement in Committee of the Whole, when the minority report of the Committee on Rules noted that "since the organization of the government" a majority of the House had constituted a quorum in Committee of the Whole.[72] Supporters of the Delegate voting rule responded with the principle, enunciated in *U.S.* v. *Ballin,* that "It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time."[73]

The plaintiffs in *Michel* v. *Anderson*, however, also answered defendants' appeal to practice by denying that practice, in itself, can suffice to justify treating the Committee of the Whole as distinct from the House. They argued that the House practices described in the last section, on voting, the quorum, and the *Journal*, could not in themselves demonstrate whether the Committee of the Whole was constitutionally distinct from the House proper. They pointed out, as well, that no court had passed on the constitutionality of those practices.[74] Instead, they urged, the practice of the House can itself be justified only if distinguishing the Committee of the Whole from the House proper is constitutionally warranted in the first place. Yet exactly to the extent that the Committee of the Whole exercises "legislative power," that distinction cannot be constitutionally warranted.

Opponents of the rule accordingly proposed to infer, as a reason for the previous absence of a rule to permit Delegate voting in Committee of the Whole, that the House always understood that such a rule would be unconstitutional.[75] They invoked the 1932 report of the special committee, earlier quoted, to deny that the House intended to "clothe the Delegate with legislative power."[76] They also quoted Representative Thomas S. Foley (D., Wash, later Speaker, 1989-1994), who reassured the House during debate on the 1970 Legislative Reorganization Act that provisions permitting Delegates to vote in committees could not lead to their voting in Committee of the Whole, on the grounds that such a further step would take a constitutional amendment.[77]

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[72]Views of the Minority, material inserted in House proceedings, *Congressional Record*, v. 21, Feb. 7, 1890, p. 1151.

[73]144 U.S. 1 at 5 (1892). Defendants' Memorandum, at 52. Brief of Appellees, at 40. *U.S.* v. *Ballin* is the leading early case bearing on the constitutional standing of congressional procedures. It addressed the propriety of provisions in the 1890 "Reed Rules" that permitted the presence of a quorum to be established by the Speaker's count, rather than only by a call of the roll.

[74]Reply Brief of Appellants, at 9-11. Reply Memorandum of Plaintiffs, at 16.

[75]Memorandum of Plaintiffs, at 18-23. Reply Memorandum of Plaintiffs, at 4-5. Brief of Appellants, at 18-22. Reply Brief of Appellants, at 11, 18-19.

[76]Memorandum of Plaintiffs, at 19. Brief of Appellants, at 19.

[77]Memorandum of Plaintiffs, at 19-20, 28. Reply Memorandum of Plaintiffs, at 18-19. Reply Brief

(continued...)

Any argument from practice, on this view, could be relevant only insofar as it tends to show whether the practice is itself warranted on grounds that what the Committee of the Whole does constitutes, or fails to constitute, an exercise of legislative power.[78] From this perspective, no showing simply that the House treats the Committee of the Whole as exempt from constitutional requirements can establish the case for Delegate voting. Instead, the key question about the Committee of the Whole must simply be whether or not it does, in fact, exercise legislative power.[79] Insofar as it does so, Delegates cannot constitutionally participate in it; to the extent it does not, there may be no bar to their participation. The opinion of the District Court in *Michel* v. *Anderson* astutely focused on this question as the determinative one; it was this proposition on which the argument of the case turned; and it is the implications thereof that this paper is principally concerned to examine.[80]

Is Action in Committee of the Whole Dispositive?

[77](...continued)
of Appellants, at 1 (note 3), 16-18. See 817 F.Supp. 126, 145-146, and 14 F.3d 623, 628-629.

[78]Reply Memorandum of Plaintiffs, at 6-7. Reply Brief of Appellants, at 9-11.

[79]Memorandum of Plaintiffs, at 25-28, 30, 32-33, 35. Brief of Appellants, at 29, 32.

[80] The plaintiffs in *Michel* v. *Anderson* rested their argument in part on other grounds as well. These grounds rested on the premise that, because Delegate voting in Committee of the Whole constituted a change in the powers of Delegates, it could only be accomplished by law, and not simply through the rulemaking power of the House. Action by law was required because, first, the office and powers of Delegate had been established by law to begin with, and could only have been so established. Memorandum of Plaintiffs, at 18-22, 30, 36-42, 39-44. Reply Memorandum of Plaintiffs, at 16-20. Brief of Appellants, at 23, 43-50. Reply Brief of Appellants, at 18-20. See Defendants' Memorandum, at 24, 34-45, 61, 65, and Brief of Appellees, at 20-28. Second, the change affected not only the internal proceedings of Congress, but also rights and relations of persons outside the legislative branch, and the Supreme Court had explicitly held that were such consequences were involved, statutory action was required. *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), 952, quoted in Memorandum of Plaintiffs, at 30, 42. Reply Memorandum of Plaintiffs, at 19. Brief of Appellants, at 27, 29-31, 48. Reply Brief of Appellants, at 19. Brief of Appellees, at 35.

These considerations are to some extent novel, and may have significant implications for the future judicial status of House procedural actions. However, they did not prove of central importance in the resolution of *Michel* v. *Anderson*. Although neither the briefs nor the opinions so noted, these arguments appear pertinent only if the more fundamental proposition is valid that the Committee of the Whole exercises legislative power. Unless voting in Committee of the Whole does in fact accord new powers to Delegates, it cannot it be relevant whether changes in Delegates' powers requires statutory action. Voting in Committee of the Whole, however, could entail new powers for Delegates only if that voting does, in fact, amount to participation in the exercise of legislative power. Similarly, authorizing Delegates to vote in Committee of the Whole would alter outside legal rights and relations only if that voting actually does have effects beyond the internal processes of the House itself. These external effects could occur only if Delegate voting indeed entails participation in the exercise of legislative power. This paper, accordingly, does not comprehensively examine these subsidiary arguments, but treats them as dependent on the main question of whether the Committee of the Whole does in fact exercise legislative power.

Dispositive Action as Legislative Power

To establish whether the Committee of the Whole exercises legislative power, both sides in *Michel* v. *Anderson* appealed to the premise that action constitutes an exercise of the legislative power only if it is dispositive, and the District Court, in particular, accepted this criterion in deciding the case. On this interpretation, a proceeding in the House must count as an exercise of legislative power if and only if its outcome is in some measure final, binding, or conclusive upon the decision of the House in the legislative process. Just as the parties in the case, as well as the District Court, concurred that only Members can participate in the exercise of legislative power, so also they implicitly accepted that the Committee of the Whole can exercise legislative power just to the extent that its action can be dispositive.[81]

On this premise, the proposition that the Committee of the Whole exercises legislative power would be supported by any showing of practices under which actions in Committee of the Whole may have determinative effects on legislation. The case developed by the Republican plaintiffs against the validity of Delegate voting appealed to the principle that institutional arrangements must be evaluated in terms of their substantive effects, not their nominal form.[82] They accordingly sought to establish that some actions of the Committee of the Whole must be regarded as dispositive, and therefore as constituting an exercise of legislative power. The House defendants argued, on the contrary, that action in Committee of the Whole can never be more than preliminary or advisory; it cannot result in determinate decisions, but only in recommendations, and in this sense it cannot amount to the exercise of legislative power.

Committees and the amendment process. The defendants rested their case against the dispositive capacity of the Committee of the Whole principally on arguments that its role in the legislative process was comparable to that of the standing committees. They showed how standing committees are creatures of the House, whose action on legislation was always preliminary and advisory, and never determinative of the decision of the House. They held that House procedures consistently treat the Committee of the Whole similarly to the standing committees, so that its action too could only be advisory or preliminary, and not dispositive. The constitutional status of the Committee of the Whole was accordingly to be assimilated not to that of the House proper, but to that of these other committees.

The strength of this argument is that it makes Delegate voting in Committee of the Whole appear as a simple extension of the existing House practice, revived in 1970, under which Delegates vote in standing

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[81]Memorandum of Plaintiffs, at 25. Defendants' Memorandum, at 50-52, 54-59. Reply Memorandum of Plaintiffs, at 12. Brief of Appellees, at 11-13, 27. 817 F.Supp. 126, 140-141, 147-148. In this respect, the question of what functions a Delegate can participate in raises questions of congressional delegation of power similar to those considered in *Nixon* v. *United States*, 113 S.Ct. 732 (1993), *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), and *A.L.A. Schechter Poultry Corp*. v. *United States*, 295 U.S. 495 (1935). Memorandum of Plaintiffs, at 11, 27-28, 30, 41-42. Defendants' Memorandum, at 34-35, 46. Reply Memorandum of Plaintiffs, at 11-12, 24. Brief of Appellants, at 29-30. Brief of Appellees, at 34-35.

[82]Memorandum of Plaintiffs, at 34-35. Reply Memorandum of Plaintiffs, at 11.

committees.[83] Supporters could appeal to the acceptance of Delegate voting in standing committees as implying the propriety of their doing so in Committee of the Whole as well; the rationale that already permits the former can be used to defend the appropriateness of the latter. As noted earlier, this argument not only underlay the defense of Delegate voting offered by advocates, but constituted the premise from which they had developed their proposal to begin with.

Assimilation of the status of the Committee of the Whole to that of other committees is supported particularly by the way House procedures treat amendments in the two cases. Standing committees are commonly described as amending bills in markup. Formally, however, congressional procedure treats amendments adopted in committee as recommendations only. Any "committee amendments" do not become incorporated into the text of the bill unless and until the House adopts them by vote on the floor. Congressional practice on the reporting of bills systematically reflects this formal status. It is for this reason, for example, that the print of a bill as reported sets forth committee amendments in a distinctive way (as, with proposed insertions in italics, and deletions in stricken-through type). Also, the written committee report on a bill begins (in appropriate cases) with a formula setting forth that the Committee reports the measure "*with amendments* and *recommends* that the bill *as amended* do pass" (emphasis supplied).[84]

The relation of amendments adopted in Committee of the Whole to the House proper is exactly parallel, and for the same reasons. Because the House treats the Committee of the Whole as a committee, it permits the Committee to exercise no power over the substance of the bill beyond that of recommendation. When the Committee of the Whole adopts amendments, it reports them to the House only as recommendations, and they become incorporated into the text of the bill only if and when adopted in the House proper. Speaker Charles F. Crisp (D., Ga.) epitomized the practice in 1894 by saying, "It

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[83]House Manual, sec. 676. Memorandum of Plaintiffs, at 19. Brief of Appellants, at 19, 46. Reply Brief of Appellants, at 1 (note 3), and 18.

[84] This treatment of committee amendments reflects an underlying parliamentary principle that a bill is, so to speak, the "property" of the chamber in which introduced, and accordingly can be altered only by action of that chamber itself. (This principle, in turn, might be held to imply that the amendment of a measure constitutes an exercise of "legislative power.") House committees' practice of reporting "clean bills" represents a response to this inability to amend. The clean bill is a new vehicle, with a new number, introduced (normally by the committee chairman) after an earlier bill is marked up. The amendments to the earlier bill, which the committee approved in its markup, are incorporated in the original text, as introduced, of the new, "clean," bill. The clean bill is deemed, *pro forma*, to have been referred to and reported from the same committee. By reporting the clean bill, rather than the earlier bill with committee amendments, the committee avoids having to secure separate House adoption of those amendments. (Senate Rules permit committees to achieve similar effects by reporting an "original bill;" that is, a bill which is introduced in the act of being reported.)

Another manifestation of the same principle is that, when one house considers a bill already passed by the other, and adopts further amendments to it, in a formal procedural sense those amendments by the second house remain only proposals; they do not become incorporated into the bill unless and until the other house concurs in them. It is for this reason that, when one house amends and passes a bill of the other, no engrossed version of the bill is printed, incorporating the amendments of the house acting second into the bill passed by the first as a single text. Instead, the amendments of the second house are engrossed as a separate document.

seems to the Chair that every amendment which has been agreed to by the committee [of the whole] must be reported from the committee to the House, and that it is in the power of any member of the House to have a separate vote on any amendments as reported.'[85] The status in the House proper of amendments adopted in the Committee of the Whole is thus formally identical with that of amendments adopted in markup by a standing committee.

Other procedural incapacities. In the same way, though standing committees are sometimes loosely said to "pass" bills, they formally, of course, only report the measures to the parent chamber, where, again, the committee action has the status of a recommendation. Analogously, the Committee of the Whole never votes on any question of passage, but only on a motion that the Committee "rise and report" to the House a recommendation that the measure pass.

Additional grounds for regarding the Committee of the Whole as incapable of dispositive action may be found in other restrictions the House places on procedural action there. The House defendants in *Michel* v. *Anderson* adopted, on this subject, the same argument first stated in the report of the Rules Committee accompanying the Reed Rules in 1890. That report defended the propriety of its changes in rules governing the Committee of the Whole by contending:

> That the action of that Committee [of the Whole] is purely preliminary and advisory is demonstrated by the fact that no proposition pending therein can be laid upon the table; that the previous question cannot be ordered therein; that a motion to reconsider can not be made; that the yeas and nays cannot be taken, and, finally, that it can not adjourn.[86]

Speaker Schuyler Colfax (R., Ind.) had used a similar argument in 1867 to justify the House in treating the Committee of the Whole as exempt from section 5 requirements: "All that takes place in Committee of the Whole is subject to revision in the House, and that is the reason why no journal is kept in the Committee of the Whole.'[87]

Summary. All these practices indicate that, when the House treats the procedural status of the Committee of the Whole as corresponding to that of the standing committees, rather than of the House proper, it does so on the basis of their common incapacity for dispositive legislative action. In 1826, Speaker John W. Taylor (D.-R., N.Y.) held that the Committee of the Whole is "but a committee of the

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[85]IV *Hinds* 4881. Compiled precedents of the House show that these practices have persisted without essential change throughout its history. IV *Hinds* 4871-4895, 4898, 4900-4903, 4905, 4922. V *Hinds* 5592, 6923. VIII *Cannon* 2419, 2422, 2427. The proceedings cited are well distributed from 1810 through 1930. House Rule 75 already provided in 1825 that "Upon bills committed to a committee of the whole House ... all amendments ... shall be duly entered by the Clerk on a separate paper ... and so reported to the House." U.S. Congress, House, *Journal*, 19th Cong., 1st sess., (Washington: Gales and Seaton, 1825), p. 789.

[86]Report of the Committee on Rules, material inserted in House proceedings, *Congressional Record*, v. 21, Feb. 7, 1890, p. 1150. Defendants' Memorandum, at 51. Brief of Appellants, at 39-40.

[87]V *Hinds* 6936.

House;"[88] in 1881, Speaker John G. Carlisle (D., Ky.) affirmed that "the Committee of the Whole ... bears the same relation to the House as every other Committee does,"[89] and in 1896, a Chairman of the Committee of the Whole said that the "power of the Committee of the Whole ... is simply to transact such business as is referred to it by the House."[90] Perhaps the most lucid statement of this argument, however, remains the report of the Rules Committee on the Reed Rules, which concluded to the non-dispositive character of the Committee of the Whole, and the correspondence of its role to that of the standing committees, in much the same terms as were still used a century later:

> The Committee of the Whole, like a standing or select committee, has merely advisory powers and jurisdiction. Its action concludes nothing, and must be reported to the House, which accepts or rejects as it pleases. ... It has been a common practice for [a standing or select committee] to fix the number of its quorum, which is less than a majority .... So far, therefore, as the constitutional ... question is concerned, it has never been denied or questioned that it was entirely competent for the House to select any number as it might please as a quorum of the Committee of the Whole.
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> ...
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> The action of the Committee of the Whole being, therefore, purely advisory and concluding nothing, it is clear that this provision cannot be in contravention of the Constitution – which is silent on the subject .... [91]

In summary, the House defendants in *Michel* v. *Anderson* contended, the House had always understood the action of the Committee of the Whole as being preliminary, and its function in relation to amendments as being that only of reporting recommendations.[92] They drew attention to the description of the activity of the Committee of the Whole, in the 1841 report on the functions of delegates, as "*initiatory* proceedings by which business is *prepared* for the action of the House."[93] Under these conditions, they concluded, the new rule would not permit the Delegates any "decisive" or "determinative" role.[94]

The Committee of the Whole as Dispositive. The Republican plaintiffs in *Michel* v. *Anderson* nevertheless asserted that the Committee of the Whole is capable of dispositive action. Their line of argument called into question the likeness in role between the Committee of the Whole and the standing committees, implying instead that the functioning of the Committee of the Whole is bound up with that of

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[88]IV *Hinds* 4706.

[89]IV *Hinds* 4734.

[90]V *Hinds* 6923.

[91]Report of the Committee on Rules, *Congressional Record*, Feb. 7, 1890, p. 1150. Quoted in Defendants' Memorandum, at 16.

[92]Defendants' Memorandum, at 25, 29. Brief of Appellees, at 3-5, quoting Representative Louise M. Slaughter in debate on the proposed rule, Rules of the House, proceedings in the House, *Congressional Record*, v. 139, Jan. 5, 1993, p. 54. Brief of Appellees, at 43, quoting Jefferson's Manual, sec. 29, in *House Manual*, sec. 423.

[93]Defendants' Memorandum, at 64; Brief of Appellees, at 9; citing report as quoted in II *Hinds* 1301 (emphasis supplied).

[94]Brief of Appellees, at 4-5, quoting Slaughter, Rules of the House, *Congressional Record*, Jan. 5, 1993, p. 54.

the House itself. The plaintiffs began by citing the commonplace descriptions of the Committee of the Whole as but a "parliamentary fiction," "the House for practical purposes," "the House under another name," and accordingly "a committee only in name."[95] They noted with approval that counsel for the House himself, in his published treatise on congressional procedure, had described action in the Committee of the Whole as the "dominant phase" of the House's legislative work and the "heart of its operations."[96] Similarly, they cited Oleszek's characterization of the Committee of the Whole as the "core of decision making on the floor of the House"[97] This approach, too, reflected the 1890 debate on reducing the quorum in Committee of the Whole. The minority report of the Committee on Rules on that rules change noted that "since the organization of the government" a majority of the House had constituted a quorum in Committee of the Whole, and argued that:

> that is manifestly the true rule, because the committee is composed of all the members of the House.
>
> It is indeed the House itself deliberating as a committee. ...
>
> It has always been so universally conceded that a Committee of the Whole House was simply the House itself that it has never been considered necessary to prescribe in the rules what number of members should be necessary to constitute a quorum in such committee.[98]

To substantiate these descriptions, the plaintiffs in *Michel* v. *Anderson* appealed further to House practice. The heart of their argument on this point was a close inquiry of their own into proceedings in the House proper on amendments adopted in Committee of the Whole.[99]

Amendments Adopted. When the Committee of the Whole concludes its consideration of amendments to a bill, it rises and reports the bill, with the amendments it recommends, to the House. The House then routinely votes immediately on whether to agree to those amendments, usually adopting them all in a single action ("*en gros*") by voice vote. (Any Member, nevertheless, may obtain on demand a separate vote on any individual amendments, and by this means the House occasionally rejects an amendment adopted in Committee of the Whole.) No further debate occurs, and no new amendments may be offered. Instead, the House then proceeds to third reading and engrossment, which for present purposes is pertinent just as signifying the end of the amendment process. Thereafter, nevertheless, a

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[95]Memorandum of Plaintiffs, at 1-2, 11. Brief of Appellants, at 11.

[96]Reply Memorandum of Plaintiffs, at 2. Reply Brief of Appellants, at 1 (note 2), quoting Tiefer, Charles, *Congressional Practice and Procedure: A Reference, Research, and Legislative Guide* (Westport, Conn.: Greenwood, 1989), p. 386, 340.

[97]Memorandum of Plaintiffs, at 14; Brief of Appellants, at 13; quoting Walter Oleszek, *Congressional Procedures and the Policy Process*, 3rd ed. (Washington: CQ Press, 1989), p. 152.

[98]Views of the Minority, *Congressional Record*, Feb. 7, 1890, p. 1151.

[99]In support of their account, the plaintiffs drew on affidavits by Minority Leader Robert Michel and Rules Committee minority member (later Chairman) Gerald Solomon, both of them among the named plaintiffs, and on a report by Don Wolfensberger, then Minority Chief of Staff of the Rules Committee, Committees of the Whole: Their Evolution and Functions, inserted in House proceedings, *Congressional Record*, v. 139, January 5, 1993, pp. 72-76, in conjunction with consideration of the debate on the adoption of the House Rules including the Delegate voting rule. Memorandum of Plaintiffs, at 16. Brief of Appellants, at 14-16.

motion to recommit may then be offered, and this motion may in effect afford a final opportunity to amend, for it generally may include instructions that the committee re-report the bill forthwith with a specified amendment (or package of amendments).[100] The minority is entitled to priority in recognition to offer this motion (but, for just this reason, the House usually defeats it). The House then votes on final passage.

Plaintiffs asserted that, for the question of whether action in Committee of the Whole can be dispositive, the key feature of these proceedings is that no independent amending process occurs in the House proper. They accordingly emphasized that the routine practice of the House effectively precludes the offering of any new amendments after the Committee of the Whole reports.[101] As a result, it is typically only proceedings in Committee of the Whole that afford Members not serving on the reporting committee any opportunity to shape the content of a bill through the amendment process, or where their choice is significant.[102] Actions in Committee of the Whole "*define* and *limit*" what the House may enact[103] in a way that is "effectively ... *not subsequently reviewable*" by the House proper.[104] The choices made by the Committee of the Whole frame and limit the alternatives among which the House may choose, foreclosing other options.[105] In these ways, the decisions of the Committee of the Whole are "*controlling and pivotal*;"[106] they "effectively control" the legislative result, and to that extent finally determine legislative questions.[107] On this account, the decisions of the Committee of the Whole are not advisory, but "*final*;" it is effectively the Committee of the Whole that actually amends bills.[108]

Opponents of the 1890 quorum rule had used similar arguments to show the dispositive character of action in Committee of the Whole.[109] The estimable William S. Holman (D., Ind.)[110] pointed out that when the Committee of the Whole rises and reports, "all men know that the previous question in the House cuts off all further consideration, and the subservient majority at once passes the bill." As a result, he held, the new quorum rule would put the substance of legislation "at the mercy of a 'rump' committee of 100," and

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[100]See Defendants' Memorandum, at 58; Brief of Appellees, at 44.

[101]Memorandum of Plaintiffs, at 15-16. Reply Memorandum of Plaintiffs, at 3.

[102]Memorandum of Plaintiffs, at 13-14. Reply Memorandum of Plaintiffs, at 3. Brief of Appellants, at 12-14, 35. See also *Michel* v. *Anderson*, 817 F.Supp. 126, 141 (D.D.C. 1993).

[103]Brief of Appellants, at 11 (emphasis in original).

[104]Brief of Appellants, at 28 (emphasis in original). See also Memorandum of Plaintiffs, at 2, 30. Brief of Appellants, at 6, 27-29.

[105]Reply Memorandum of Plaintiffs, at 8-9, 12. Brief of Appellants, at 26-29.

[106]Memorandum of Plaintiffs, at 14; Brief of Appellants, at 14 (emphasis in originals).

[107]Memorandum of Plaintiffs at 35; Brief of Appellants, at 32. See also Memorandum of Plaintiffs, at 1, 14, 30, 34-35. Reply Memorandum of Plaintiffs, at 1, 12. Brief of Appellants, at 14, 22, 27-29, 35.

[108]Brief of Appellants, at 14 (emphasis in original); see also 22, 28-29. Reply Memorandum of Plaintiffs, at 1, 3, 8-9.

[109]The Rules, *Congressional Record*, Feb. 12, 1890, p. 1241.

[110]Author of the "Holman rule," which permits amendments to appropriation bills that change the underlying authorizing statute, as long as they "retrench expenditures."

indeed of 51 Members acting as a majority of its quorum.[111] On these grounds, opponents of the quorum rule concluded that Committees of the Whole are "simply other forms of the House itself,"[112] and actions taken there constitute business, so that the constitutional majority "quorum *to do business*"[113] must apply.

Amendments Rejected. The *Michel* v. *Anderson* plaintiffs further argued that the dispositive character of action by the Committee of the Whole appears even more definitively in relation to amendments it rejects. Normal House procedure permits action by the House proper only on amendments recommended by the Committee of the Whole. Because "House rules *preclude* further amendments to a bill once reported out of the Committee of the Whole,"[114] amendments defeated in Committee of the Whole cannot be reoffered in the House proper. The failure of the Committee of the Whole to report an amendment can effectively kill the provision without recourse,[115] so that decisions by the Committee of the Whole to reject amendments are "*final*."[116] This result occurs not only when the Committee of the Whole defeats the amendment outright, but also when its consideration is ruled out by a vote on an appeal of a ruling on a point of order, or when the Committee adopts a motion to rise and report before it can be offered.[117] Finally, the force of an amendment may be radically altered in Committee of the Whole through adoption of a second-degree amendment; in this case the Committee of the Whole reports to the House only the amended version, and the House never has an opportunity to vote on the version initially proposed.[118]

These considerations, too, were advanced, although in more summary form, by opponents of the quorum rule in 1890:

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[111]The Rules, *Congressional Record*, Feb. 11, 1890, p. 1210-1211; see also p. 1223. Views of the Minority, Ibid., Feb. 7, 1890, p. 1151. Brief of Appellees, at 39.

[112]Representative Joseph H. Outhwaite (D., O.), The Rules, *Congressional Record*, Feb. 14, 1890, p. 1337.

[113]Article I, section 5. Emphasis supplied.

[114]Brief of Appellants, at 27 (emphasis in original). See also Brief of Appellants, at 15-16. Memorandum of Plaintiffs, at 2. Reply Memorandum of Plaintiffs, at 1, 3.

[115]Memorandum of Plaintiffs, at 2-3. Reply Memorandum of Plaintiffs, at 1, 3. Brief of Appellants, at 28. Reply Brief of Appellants, at 15-16.

[116]Brief of Appellants, at 14 (emphasis in original). See also Reply Memorandum of Plaintiffs, at 1.

[117]Memorandum of Plaintiffs, at 31-33. Brief of Appellants, at 14, 28. For most legislation, this last possibility may usually lack importance, for the motion to rise and report normally cannot be offered until after each section of the bill in turn has been made open for amendment. Because of special procedures on appropriation bills, however, the restriction may operate significantly against "limitation amendments" prohibiting the use of funds for specified purposes. See Stanley Bach and Richard C. Sachs, "Legislation, Appropriations, and Limitations: the Effect of Procedural Change on Policy Choice," paper presented at the 1989 Annual Meeting of the American Political Science Assn., Atlanta, Ga.

[118]Memorandum of Plaintiffs, at 15, 31. Brief of Appellants, at 28.

> [T]here is no reason why a quorum of the committee should be less than a quorum of the House, except the fact that ordinarily the action of the committee is not final and conclusive upon the matters referred to it. But while the affirmative action of the committee is not final its negative action is practically so in most cases. If an amendment offered in the committee is agreed to it will be reported to the House for its consideration, but if the committee rejects an amendment it is not reported to the House and the committee action is of course final.[119]

In effect, the *Michel* v. *Anderson* plaintiffs concluded, the routine practice of the House on measures reported from Committee of the Whole renders dispositive the action of the latter on amendments. These conditions demonstrate, they urged, that the exercise of legislative power may not be understood as limited to the act of final passage of legislation. Amendatory decisions must also constitute an exercise of legislative power, and especially, the rejection of amendments, not only their adoption, must be so classed.[120] Opponents of the Delegate voting rule concluded that, because it is the Committee of the Whole that effectively takes these decisions to amend and to reject amendments, participation in those decisions may not be extended beyond those constitutionally entitled to exercise the legislative power: specifically, the Members of the House, and not Delegates.[121]

Piercing the Veil

District Court. The opinion of District Judge Harold H. Greene rendering the initial judgment in *Michel* v. *Anderson* relied on the principles so far developed: first, that the criterion of the constitutional status of the Committee of the Whole, and thereby of the propriety of Delegate participation there, is whether its actions constitute an exercise of "legislative power;" and second, that the criterion of the exercise of legislative power is whether the action taken is dispositive.[122] His opinion proceeds by way of a carefully reasoned application of these principles to the place of the Committee of the Whole in the legislative process. This argument in effect "pierces the veil" of the Committee of the Whole, concluding it, for pertinent purposes, functionally assimilable to the House of Representatives proper.[123]

Judge Greene's analysis largely accepts the plaintiffs' view of how the Committee of the Whole functions. He initially affirms that, while "the Committee of the Whole ... has broader responsibilities than

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[119]Views of the minority, *Congressional Record*, Feb. 7, 1890, p. 1151. Quoted in Brief of Appellees, at 39.

[120]Memorandum of Plaintiffs, at 2, 28, 32, 35. Reply Memorandum of Plaintiffs, at 1, 10-12. Brief of Appellants, at 28, 32.

[121]Memorandum of Plaintiffs, at 25, 32, 35. Reply Memorandum of Plaintiffs, at 11-12. Brief of Appellants, at 29, 32, 42. Reply Brief of Appellants, at 2, 13-14.

[122]*Michel* v. *Anderson*, 817 F.Supp. 126, 140-141, 147-148 (D.D.C. 1993). Cited in Brief of Appellants, at 6.

[123]The term "piercing the veil" usually refers to a judicial determination that a corporate body be taken as a "legal fiction," having no standing separate from its members or some other entity, such that that other entity may be held liable for acts of the body.

the standing ... committees ... , ... it is obviously not the House of Representatives itself."[124] Yet he accepts that once the Committee of the Whole reports a bill to the House, "no new amendments may be offered, and no previously rejected amendments may be introduced," and that "[a]mendments that are defeated or precluded from consideration in Committee of the Whole may not be heard again by the House."[125] The only potential exception he addresses is the ability of the minority to offer a single package of additional amendments in the motion to recommit, which he finds too "cumbersome and difficult to achieve" to afford an adequate remedy.[126]

As a result, Judge Greene concludes, "For practical purposes, most decisions are final insofar as the House of Representatives is concerned when they are made by the Committee of the Whole."[127] Action in the House proper is frequently "perfunctory," even "formal and ceremonial rather than substantive."[128] The opinion adopts the formulation of the Wolfensberger memorandum that the Committee of the Whole is "the same House under a different name and using different procedures."[129] Judge Greene accordingly considers it "a committee only in name," and finds that it "is the House for most practical purposes."[130]

For these reasons, the "Court does not share the defendants' view that the Committee of the Whole is a purely advisory body without the ability to exercise conclusive legislative authority."[131] Rather, a rule permitting Delegates to vote in Committee of the Whole would "invest them with legislative power in violation of Article I ...."[132] As a result, "If the only action of the House had been to grant the Delegates ... the authority to vote in Committee of the Whole, its action would have been plainly unconstitutional. In view of the central place occupied by the Committee of the Whole in the House of Representatives, such a grant of authority would have improperly given [the Delegates] legislative power."[133]

The District Court accordingly held the 1993 rules change constitutionally admissible only because it granted no such unconditioned power. Under the "savings clause" of the rule, any vote in Committee of the Whole in which the Delegates were decisive must immediately be repeated in the House without the

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[124]817 F.Supp. 126, 143. Quoted in Brief of Appellees, at 18.

[125]Ibid., 141; see also 133.

[126]Ibid., 144, 132-133 (note 12).

[127]Ibid, 141, quoted in Brief of Appellants, at 26-27; and in Reply Brief of Appellants, at 1 (note 1).

[128]817 F.Supp. 126, 131, 141, citing Solomon affidavit cited in Brief of Appellants, at 28.

[129]817 F.Supp. 126, 133, quoting Wolfensberger, Committees of the Whole, *Congressional Record*, Jan. 5, 1993, p. 75.

[130]817 F. Supp 126, 141. Second passage quoted in Brief of Appellants, at 15 and 26-27, and in the opinion of the Circuit Court of Appeals, *Michel* v. *Anderson*, 14 F.3d 623, 625 (D.C.Cir. 1994).

[131]817 F.Supp. 126, 144.

[132]Ibid., 141. Quoted in Brief of Appellants, at 6, and in the opinion of the Circuit Court of Appeals, 14 F.3d 623, 625.

[133]817 F.Supp. 126, 147.

Delegates participating.[134] As a result, "a delegate's votes can never make the difference between winning and losing."[135] The Court quoted with approval the remark of Rep. Robert Walker (R., Pa.), during the floor debate on the new rule, that Congress was telling the Delegates "when your vote counts, it doesn't count; but when it doesn't count, it counts."[136] Under these conditions, Judge Greene held, the votes of the Delegates can have no impact on the final result, and so cannot constitute an exercise of legislative power:[137] "The right to vote is genuine and effective only when .... there is a chance that ... the vote will affect the ultimate result. The votes of the Delegates in the Committee of the Whole cannot achieve that. ... It follows that the House action had no effect on the legislative power, and did not violate Article I."[138]

This branch of Judge Greene's holding, like the first, rests on the principle that dispositive action constitutes exercise of the legislative power. The reason Delegate voting in Committee of the Whole would be inadmissible, in the absence of the "savings clause," is that actions of the Committee of the Whole are dispositive; the reason Delegate voting with the "savings clause" is admissible is that the revote mechanism nullifies any possible dispositive effect.

Circuit Court of Appeals. Although the Circuit Court of Appeals affirmed the District Court's judgment, it declined to rely on the lower court's reasoning that, if the Committee of the Whole exercises legislative power, and Delegates participate in the Committee of the Whole, then Delegates participate in the exercise of legislative power. The opinion of the Court, by Circuit Judge Laurence H. Silberman, bypasses the question of whether the rule permits Delegates to participate in the exercise of legislative power. It does so by formulating the question instead as whether it permits them simply to exercise legislative power, then dismissing this question as irrelevant. It argues that "No one congressman or senator exercises Article I 'legislative power.' Therefore, it is not meaningful to claim that the delegates are improperly exercising Article I legislative authority."[139] Instead, "the crucial constitutional language ... is ... Article 1, [section] 2: 'The House of Representatives shall be composed of Members....' That language precludes the House from bestowing the characteristics of membership on anyone other than those "chosen ... by the People of the several States."[140]

Having set up this "membership standard," however, Judge Silberman does not proceed to work out any general criterion for identifying "aspects of membership,"[141] but appeals instead to practice and to

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[134]Ibid, 142-144. Cited in Brief of Appellants, at 6.

[135]817 F.Supp. 126, 143.

[136]Ibid, 142 (note 20), see also 143-144, 147-148. Representative Bob Walker (R., Pa.), Rules of the House, remarks in the House, *Congressional Record*, v. 139, Jan. 5, 1993, p. 81. Quoted in Defendants' Memorandum, at 31. See Brief of Appellants, at 5-7, 33.

[137]817 F.Supp 126, 147. See Brief of Appellees, at 2, 4, 29.

[138]817 F.Supp. 126, 148. Cited in Brief of Appellees, at 29.

[139]14 F.3d 623, 630.

[140]*Michel* v. *Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994).

[141]Cf. Kingsley Amis, *Lucky Jim* (New York: Viking, 1958 (c1953)), p. 181: "'Well, to her that's an aspect in a way, you see, just an aspect – a very interesting aspect, of course, but no more than an

(continued...)

hypotheticals. The opinion reviews the history of the authority of Delegates in the House, especially their voting in standing committees, accepting historic practice as presumptively proper.[142] It also asserts as evident that the House could hardly adopt a rule permitting the mayors of the 100 largest cities to vote in standing committees, prohibiting certain Members from voting in Committee of the Whole, or permitting Delegates to vote in the full House even with a revote provision.[143]

This less sharply refined analysis nevertheless leads the Circuit Court to the same conclusions about the constitutional status of Delegate voting as the District Court. Although the Circuit Court declines to accept fully the case made by opponents of the rule for the conclusive character of action by the Committee of the Whole, it acknowledges "the close operational connection between the Committee of the Whole and the full House,"[144] and that the Committee of the Whole "shapes, to a very great extent, the final form of bills that pass the House."[145] It accordingly holds that "the Committee of the Whole is so close to the full House that permitting the Delegates to vote there is functionally equivalent to granting them membership in the House."[146] Given the effect of the "savings clause," however, the Circuit Court concludes that "insofar as the rule change bestowed additional authority on the delegates, that additional authority is largely symbolic and is not significantly greater than that which they enjoyed serving and voting on the standing committees. ... [W]e do not think this minor addition to the office of delegates has constitutional significance."[147]

This line of argument leaves unclear how the analysis in terms of a "membership standard" might bear on the validity of Delegate voting, other than in accordance with some criterion like the one relied on by the District Court. The Circuit Court offers no means for determining whether any rule or practice of the House qualifies as "admitting" persons to "membership," or treating them as "Members." Moreover, it is unclear how such practices could be identified, except in terms of whether the House was authorizing persons to take actions that only Members may take. In other words, unless "membership" is understood as in some sense connected with participation in institutional functioning, it seems a question merely of label, with constitutional implications that are only indeterminate. By relying on the principle that individual Members do not *exercise* legislative power, the Circuit Court opinion obscures questions of when, why, or whether Members *participate in* the exercise of legislative power.

When is Legislative Action Dispositive?

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[141](...continued)
aspect,' and here he hesitated as if choosing the accurate term, 'a sort of aspect of the development of Western European culture, you might say.'" The authors thank Prof. Roger Lathbury of George Mason University for invaluable assistance in locating this quotation.

[142] 14 F.3d 623, 631.

[143] Ibid., 630; see also 626.

[144] Ibid., 632.

[145] Ibid., 624.

[146] Ibid., 631.

[147] Ibid., 632.

Dispositive Power. The criterion used by the District Courts, that persons participate in the exercise of legislative power if their actions contribute to dispositive determinations of outcomes of the legislative process, can yield much the better illumination of the issues at stake. Pursuing this analysis, nevertheless, permits distinctions, and suggests implications, beyond those reached by the rulings in *Michel* v. *Anderson*. These may usefully be approached starting from the conclusion, reached by the Circuit Court in its hypothetical, that the Constitution would preclude the House from permitting the 100 mayors to vote on the floor. Suppose, by contrast, a House rule that merely authorized the 100 mayors – or, to cite other examples advanced by plaintiffs, the Canadian Parliament, or the Clerk of the House[148] – to propose legislation to the House. Inasmuch as such action (at least by citizens) would presumably be authorized in any case by the right of petition, it is hard to conceive that such a rule could be construed as subject to any constitutional objection. Certainly such action would not determine, for it would hardly at all constrain, the action of the House, and so could constitute no participation in the exercise of any dispositive legislative power.

Even if the rule also stipulated the automatic formal introduction of any such proposed legislation, and its referral to committee, such a rule would still not oblige the House to take any particular action with respect to the measure. It thus hardly seems that such an authorization could be construed as admitting any non-Members to the exercise of any legislative power. If any such construction were maintained, it would cast doubt on the long-standing current practice under which the Delegates have been exercising just this right of introducing legislation.

What, then, if the House by rule further obliged itself to give floor consideration to any bill introduced by the stipulated group of non-Members, even to consider it without entertaining any amendments? The House would still retain plenary ability to defeat the bill or lay it on the table (which counts as a final negative disposition). In addition, the mandate of the hypothetical standing rule would not preclude the House from considering, at any time, any other measure on the same subject, containing whatever provisions it chose. Perhaps most significantly, the House could always adopt a special rule modifying or overriding the requirement of its general rule, including by stipulating that amendments be in order notwithstanding the general requirement. To this extent the general rule need never in practice bind the action of the House in an individual case.

In fact, a number of contemporary statutes contain provisions intended to ensure floor consideration, without amendment, of specified measures whose substance is determined by outside entities. Such provisions of statute, which have the effect of procedural rules in each house, are fundamental features of expedited, or "fast track," procedures. These statutory expedited procedures commonly regulate consideration of resolutions of disapproval (or approval) whose enactment the statute requires in order to forestall (or permit) some action that the statute authorizes the President or other authority to propose.[149] In practice, however, it is not uncommon for the House to consider these measures

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[148]Reply Memorandum of Plaintiffs, at 13. Reply Brief of Appellants, at 14.

[149] The present Congress has actively addressed or utilized several of these statutory procedures, notably including the "fast track" for trade agreements (22 U.S.C. 2191-2193), the procedure for congressional approval of a permanent nuclear waste repository (42 U.S.C. 10135), and the Congressional Review Act for disapproval of proposed agency regulations (5 U.S.C. 801-802), used in 2001 against President Clinton's proposed regulation on ergonomics (P.L. 107-5, 115 Stat. 7). Other (continued...)

not under the procedures prescribed by the statute, but instead pursuant to the terms of a special rule modifying those requirements.

If the ability to determine the form of a measure on which Congress must act is held to constitute an exercise of dispositive legislative power, the constitutionality of these expedited procedures might be called into doubt. Yet the situation in which these procedures place the House resembles, in certain key respects, that in which it acts on measures reported from Committee of the Whole.[150]

Negative dispositive power. As already observed by opponents of the reduced quorum rule in 1890, however, action may be dispositive not only by resulting in the passage of legislation, but also by securing its defeat. In this sense, it appears that even preliminary action may be dispositive if it has the effect of precluding the House from even considering a legislative proposition. For example, the Senate may consider a treaty only if the President has submitted it for advice and consent;[151] no Senator can bring it before the Senate if the President does not. By declining to submit a treaty to the Senate, accordingly, or by withdrawing it from that body, the President can absolutely prevent its entering into effect. This capacity clearly seems to involve the exercise of a negative dispositive power by a non-Member of Congress. In this instance, however, such a power poses no constitutional problem, for action on treaties may be considered not strictly part of the legislative power, and, in any case, these arrangements are provided for by the Constitution itself. Similarly, House Rule XII clause 5,[152] today forbids the House from considering any measure establishing a commemorative week or month. This prohibition appears to constitute an exercise of legislative power, in that it works a prior negative disposition of certain proposals. Yet it too raises no constitutional question, for the exercise of legislative power is that of the House itself in adopting the rule.

Suppose, however, that a rule authorized some persons other than Members of the House to impose an equivalent kind of veto on House consideration of certain legislative proposals. Such a rule might plausibly be regarded as an unconstitutional delegation of dispositive legislative power. Even in this case, nevertheless, the key question might be whether the House in practice retained the capacity to override any such veto in the individual case. If, for example, the House readily resorted to the adoption of special rules permitting itself to consider, amend, and vote on measures that had been prohibited pursuant to the general rule, would be more difficult to argue that the general rule had the effect of vesting any dispositive power outside the membership of the House.

Summary. This analysis suggests that the power to determine the agenda of a body may amount to dispositive power only to the extent that the body has no alternative to those determinations. Agenda power, in this sense, may be either positive or negative, corresponding respectively to what students of Congress have recently analyzed as "proposal power" and what they have commonly styled "gatekeeping

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[149](...continued)
expedited procedure statutes that have received public attention include the former Executive Reorganization Act (5 U.S.C. 902-912), the District of Columbia Home Rule Act (P.L. 93-198, sec. 604; 87 Stat. 774 at 816-817), and the Defense Base Closure Act (10 U.S.C. 2908).

[150]The opinion of the Circuit Court of Appeals picks up this point. 14 F.3d 623, 631-632.

[151]Constitution, Art. II, sec. 2.

[152]*House Manual*, sec. 823.

power." On the view developed here, proposal power will be dispositive only to the extent that the body does not remain free in practice to chose whether, and on what terms, to consider the measures proposed. Similarly, gatekeeping power will be dispositive only to the extent that the body in practice retains no other avenues to shape and act on the measures withheld from consideration. Proposal power will not amount to the exercise of legislative power if it does not deprive the body of the effective ability to alter or reject the measures proposed, or to consider alternative measures; nor will gatekeeping power if it does not deprive the body of the effective ability to consider and act on the measures proposed. The analysis proposed here, accordingly, appears to remain consistent with that of the District Court in *Michel* v. *Anderson*, holding that the activity in which Delegates may not participate would extend only to that which brings about a conclusive disposition on the part of the House, either positive or negative, of any specific legislative proposals.

The Separate Vote and the Previous Question

Proceedings in the House. This analysis of Judge Greene's criterion of dispositiveness, however, suggests the relevance of some features of the relation to the House of the Committee of the Whole that received little attention in the decision of *Michel* v. *Anderson*. Although both sides addressed whether outcomes reported from the Committee of the Whole were determinative of the decision on the House, the briefs laid little emphasis on the procedures by which those outcomes may become decisions of the House, and the opinions even less. Closer consideration of those procedures reveals that the House treats the Committee of the Whole more like a standing committee than the argumentation of *Michel* v. *Anderson* admits, and casts doubt on whether the body exercises dispositive power.

The only procedural mechanism to which participants gave sustained attention in this context is the motion to recommit with instructions. Plaintiffs contend, and the opinions accept, that this device is too restrictive to offer effective relief from the dispositive force of actions taken in Committee of the Whole.[153] Plaintiffs also observe that the House sometimes uses the mechanism of a separate vote in the House on amendments adopted in Committee of the Whole to reverse decisions made in Committee of the Whole. They do so, however, only in order to argue that the similar requirement for a *de novo* vote in the House, when the Delegates' votes are decisive in Committee of the Whole, potentially gives the Delegates legislative power. They argue that, in several ways, the participation of the Delegates in the first vote could lead to a final decision different from that which would have occurred if a single vote, without Delegates participating, were conclusive: (1) politicking between the original vote and the revote could yield a contrary outcome, (2) Delegates could use their influence to prevent or, conversely, force the occurrence of, a record vote (and thereby a possible revote); and (3) Delegates could gain influence over how an amendment is drafted, or whether it is offered, in the first place.[154] The Court, however, did not accept that such events would amount to participation by the Delegates in the exercise of legislative power, but

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[153]Reply Memorandum of Plaintiffs, at 12-16. Reply Brief of Plaintiffs, at 1, 16 (note 16). Defendants' Memorandum, at 3, 58. 817 F.Supp. 126, 132-133. 14 F.3d 623, 632 (note 5). Cf. Defendants' Memorandum, at 58; Brief of Appellees, at. 44.

[154]Memorandum of Plaintiffs, at 16-18, 31. Reply Memorandum of Plaintiffs, at 3, 23. Brief of Appellants, at 16-17, 25-26, 32-38, 40-43. Reply Brief of Appellants, at 14-17.

likened them instead to the influence that could be exercised by various groups of non-Members at many points in the legislative process.[155]

Positive Dispositive Action and the Separate Vote. When the Committee of the Whole reports, as Tiefer points out, "technically no amendments have yet been adopted,"[156] and both he and defendants note that the House always permits a separate vote on any amendment adopted in Committee of the Whole on demand of any Member.[157] This "separate vote" is entirely distinct from the automatic immediate revote in the House, established by the 1993 rule, that occurs only when the votes of Delegates are decisive in Committee of the Whole. The separate vote in the House on amendments recommended by the Committee of the Whole has always been possible under House rules, is never waived or overridden, and is routinely available in practice, because the House formally operates on the principle that the Committee of the Whole, like other committees, can only recommend. As a result, these votes do in fact occur in practice, and by this means the House sometimes reverses the recommendations of the Committee of the Whole.

Nevertheless, the summary that plaintiffs routinely offer of the legislative process on bills considered in Committee of the Whole acknowledges no intervening steps between reporting and final passage.[158] Nor do their briefs elsewhere address the implications of the separate vote in enabling the House proper to reject amendments reported from the Committee of the Whole. The opinions in *Michel* v. *Anderson* accept plaintiffs' affidavits asserting that the House in practice votes on bills reported from Committee of the Whole only in the form reported. As the House defendants only intimate,[159] however, the uniform practice of the separate vote seems definitively to eliminate any dispositive force of decisions in Committee of the Whole to recommend amendments. Neither the plaintiffs' briefs nor the opinions offer any

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[155]817 F.Supp. 126, 142-145. Cited in Brief of Appellants, at 7, 33-35. Defendants' Memorandum, at 59-60. Brief of Appellees, at 18, 30-34.

[156]Tiefer, Congressional Practice and Procedure, p. 451, quoted in Defendants' Memorandum, at 26-27.

[157]Defendants' Memorandum, at 25-26, 57-58. Brief of Appellees, at 43. The only potential exception to this practice may occur when the Committee of the Whole considers a bill with an amendment in the nature of a substitute – that is, a substitute version of the full text of a bill, typically recommended by the reporting committee. In such a case the Committee of the Whole typically acts on amendments to the substitute, then concludes its deliberations by adopting the substitute as amended. The only amendment it reports to the House, therefore, is the substitute as amended, and accordingly, the rules then permit the House to vote only on adopting or rejecting that single proposition. No separate vote is in order on any amendment adopted to the substitute, because the Committee of the Whole recommended none of them separately to the House. Wolfensberger, Committees of the Whole, *Congressional Record*, Jan. 5, 1993, p. 75. In such cases, however, the special rule for consideration of the bill may often restore the possibility of a separate vote on each amendment to the substitute that was adopted in Committee of the Whole.

[158]Memorandum of Plaintiffs, at 12-15. Brief of Appellants, at 12-14.

[159]Defendants' Memorandum, at 58. Brief of Appellees, at 43..

explanation of how, in spite of the separate vote mechanism, these decisions of the Committee of the Whole can nevertheless be considered dispositive.[160]

Negative Dispositive Action and the Previous Question. The point nevertheless remains, as astutely urged by the *Michel* v. *Anderson* plaintiffs, that the Committee of the Whole appears able to bring about the final negative disposition of propositions by its decisions to reject amendments, or even its mere failure to report them. Plaintiffs contend for the existence of this negative dispositive power by emphasizing that when the Committee of the Whole reports, no new amendment may be offered in the House, nor may any amendment rejected in Committee of the Whole be reoffered. Yet they do not explain how this situation arises, other than to assert that House rules preclude further amendment in the House proper.[161] The House defendants respond that "Plaintiffs never cite the supposed House rule that 'precludes' amendment. … There is not even a cite for there being any precedent or Parliamentarian's interpretation …."[162]

House Rules, in fact, actually reflect an implicit premise that a measure reported from the Committee of the Whole could be debated and amended *de novo* in the House proper, just as could a measure taken up there directly upon report from a standing committee. In this respect again, accordingly, the House fundamentally treats products of the Committee of the Whole in the same way as it does those of standing committees. In its earliest days, the House commonly engaged in further debate and amendment of measures reported from Committee of the Whole before voting on them.[163] The only reason this *de novo* consideration does not occur in contemporary practice is that the House routinely orders the previous question on a measure as soon as the Committee of the Whole reports it.[164] Ordering the previous question terminates the process of debate and amendment. The motion for the previous question is not in order in Committee of the Whole – according to the 1890 report of the Rules Committee, already quoted, precisely because of the dispositive effects of the motion – but in the House proper, it may be used both on measures taken up initially under the general Rules and those reported from Committee of the Whole.

Of the measures the House today considers in Committee of the Whole, most are considered pursuant to the terms of a special rule, reported from the Rules Committee and adopted by the House, which provides for taking up the measure and sets terms for its consideration. These special rules routinely include a stipulation that as soon as the Committee of the Whole reports to the House, "the previous question shall be considered as ordered."[165] Some measures are considered in Committee of the Whole otherwise than pursuant to a special rule, and accordingly are not subject to such a requirement, but, when

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[160]817 F.Supp. 126, 132-133, 141. 14 F.3d 623, 631. Memorandum of Plaintiffs, at 15-16. Reply Memorandum of Plaintiffs, at 12-13. Brief of Appellants, at 15-16. Reply Brief of Appellants, at 12-13.

[161]Memorandum of Plaintiffs, at 14-16. Brief of Appellants, at 14-16, 27.

[162] Brief of Appellees, at 42.

[163]Defendants' briefs instance House consideration of the Bill of Rights and of legislation initially establishing the executive departments. Defendants' Memorandum, at 12-13. Brief of Appellees, at 14-15. See Memorandum of Plaintiffs, at 9-10. Reply Memorandum of Plaintiffs, at 14-15.

[164]Defendants' Memorandum, at 58. Brief of Appellees, at 43-44.

[165]See stylized example in Wolfensberger, Committees of the Whole, *Congressional Record*, Jan. 5, 1993, p. 75. Reply Memorandum of Plaintiffs, at 3, acknowledges this function of special rules.

the Committee of the Whole reports such a measure back to the House, the Speaker routinely at once declares that "Without objection, the previous question is ordered."[166] In recent practice objection is never heard; probably few Members are even aware of the occurrence.

By these means the uniform practice of the House does indeed preclude consideration in the House proper of further amendments to a measure reported from Committee of the Whole. It does so, however, only because of separate determinations made by the House itself with respect to each measure individually. For measures considered without a special rule, the House takes these individual decisions *pro forma*, and for those considered under a special rule, it does so in advance of consideration. In the second case the House is determining to accept the decision of the Committee of the Whole to reject amendments before it knows what those amendments will be. In both cases, nevertheless, the determination is made separately for each individual bill, and the House could, in principle, in each instance retain its ability to reconsider amendments, or consider new ones, after the report of the Committee of the Whole. It would do so either by an objection to the automatic ordering of the previous question, or by amending the special rule for the purpose (alternatively, by defeating it and adopting a revised one). It is only because the House chooses, at least passively, not to invoke this opportunity that the House proper never engages in the reconsideration of amendments rejected in Committee of the Whole or not reported therefrom, or in the consideration of new ones.

The *Michel* v. *Anderson* defendants develop this point in their final brief to the Circuit Court of Appeals, where they say:

> As to … amendments [not recommended by the Committee of the Whole] … House Members, by ordering "the previous question," determine when no amendments can be offered in the House. This is a House vote (i.e., without Delegates) to impose the "previous question" either by motion or as part of the language of a [special rule for considering the bill.][167]

The Republican plaintiffs acknowledge in passing that the prohibition on new or renewed amendments in the House proper is established through special rules, but present this function as harmonious with their view of the dispositive power of the Committee of the Whole. Footnotes in their briefs for both courts emphasize that "The purposes of the [special] rule are ... *to preclude any additional ... amendments in the House after the Committee of the Whole has reported*."[168] The initial brief for the District Court elaborates:

> * Special rules commonly adopted by the Rules Committee preclude any further debate or amendment in the House on bills reported out of the Committee of the Whole.

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[166]Defendants' Memorandum, at 57-58. Brief of Appellees, at 42-44.

[167]Defendants' Memorandum, at 57-58. Brief of Appellees, at 43-44.

[168]Memorandum of Plaintiffs, at 13 (note 3). Brief of Appellants, at 12 (note 11). (Emphasis in originals.)

> * Accordingly, amendments that are defeated in the Committee of the Whole through various devices cannot be reintroduced in the House. The Committee's action on such amendments is final.[169]

The final brief to the Circuit Court of Appeals drops this characterization of the procedure, but still implicitly argues that it is the prohibition itself that is material, not its source:

> Appellees … make much of the fact that the Rule precluding further amendments in the Full House once the Committee of the Whole has reported a bill is not a standing rule, but is part of the [special rule]. … They do not explain what difference that makes. It is the House's *invariable* practice to adopt a Rule precluding further amendments in the House ….
>
> Furthermore, it makes no constitutional difference whether the House gives the Delegates outcome-determinative votes through a majority vote of the House to adopt a standing rule or through a majority vote of the House to adopt a rule governing a bill.[170]

This contention, however, brings the question to its crux: does it in fact make a difference if the actions of the Committee of the Whole become final decisions through individual acts of the House rather than through the operation of a general rule? Can practice, if sufficiently consistent and uniform, be taken as dispositive in its effects?

Can Practice Alone Constitute Power as Dispositive? The opinion of the District Court explicitly accepts the assertions of opponents of the Delegate voting rule that decisions of the Committee of the Whole on amendments are dispositive, and that of the Circuit Court is implicitly compatible with that view. Neither, however, addresses the point that any dispositive force of these determinations appears to rest entirely on separate actions of the House proper, choosing to accept the determinations of the Committee of the Whole in each individual case. Is it in fact appropriate to infer that practice, even "*invariable* practice," in dealing with recommendations, can confer a dispositive character on those recommendations?

If the general rules of the House failed to provide any mechanism under which amendments reported from Committee of the Whole could receive separate votes, or under which new amendments, and those not reported from Committee of the Whole, could be considered, it could reasonably be maintained that such rules conferred dispositive power on the Committee of the Whole. Even though the House could still recover its ability to review such determinations in any specific case by adopting a special rule providing for such a procedure, it could well be argued that such action would only redress the situation in some fraction of individual instances. The general grant of authority to the Committee of the Whole would seem to vest at least *prima facie* legislative power in that organ, and thereby render it constitutionally assimilable to the House.

But suppose, on the other hand, that the House routinely declined to order the previous question on measures reported from Committee of the Whole, and instead always debated those measures anew, separately considering and voting on each amendment recommended, allowing amendments rejected in

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[169]Reply Memorandum of Plaintiffs, at 3; cf. at 14. Formally, special rules are only proposed by the Rules Committee; they must be adopted by the House.

[170]Reply Brief of Appellants, at 12-13. Emphasis in original.

Committee to be reoffered, and entertaining and voting on new amendments. And suppose that, by invariable practice, the House under these conditions always ratified the decisions of the Committee of the Whole, both on recommended and rejected amendments? No such regularity of practice, surely, could in itself found an inference that the House had delegated its legislative power of decision to the Committee of the Whole. No more could the House be accused of delegating its legislative power to the 100 mayors, even if it routinely passed every bill they recommended, as long as it did so by individual consideration and vote in each case.

Instead, the proper criterion of whether action is dispositive appears to be whether the body could, under regular procedures and in practice, reverse the action in any individual case. Overall, it appears that the mechanisms of the separate vote and the previous question permit the House to meet that test. The separate vote unquestionably operates to that effect in the ordinary practice of the House; and standing procedures seem at least to make it actually available to the House, on each individual occasion, to decline the previous question. The presence of these practical possibilities reflects the implicit premise of House procedure that the Committee of the Whole indeed has the powers only of a committee.

The use of special rules to direct that the previous question be ordered after the Committee of the Whole reports might be considered a borderline case. By this means the House agrees to accept the negative dispositions of the Committee of the Whole in advance of knowing even what the propositions so disposed of may be. Furthermore, the dependence of House procedure on control by an organized political majority renders it difficult, in practice, to defeat or amend a special rule so as to remove this preconclusive provision. Nevertheless, the amendment or defeat of a special rule is unquestionably within the practical capacity of the House, and indeed occasionally happens even under contemporary conditions. Also, when the House, by directing that the previous question will later be considered as ordered, binds itself in advance not to reconsider amendments not reported from the Committee of the Whole, it does so not by a comprehensive act purporting to limit its own general powers, but as a separate decision addressing each individual situation.

Implications

Implications for House Practice

The analysis presented here accepts the premises of Judge Greene's judgment in *Michel* v. *Anderson*, but further develops and applies those premises in a direction that urges a contrary conclusion. These common premises are that (1) "legislative power" is exercised when action taken is dispositive of a decision of the House in the legislative process; (2) participants in such action are participants in the exercise of "legislative power;" (3) the Constitution vests "legislative power" in the House of Representatives (and Senate); (4) the Constitution makes the House of Representatives to be composed solely of Members elected from states (and thus not of Delegates). On these premises, only Members, and not Delegates, may participate in the exercise of legislative power by the House; that is, in action that is conclusive upon its legislative decisions. Contra the doctrine of *Michel* v. *Anderson*, nevertheless, this paper concludes, from an examination of the relation of the House proper to the Committee of the Whole in terms of these principles, that the practice of the House precludes the action of the Committee of the Whole from being dispositive of the action of the House. Accordingly, Delegates ought not be considered as constitutionally barred from participating in that action.

This conclusion rests on an analysis of the nature of dispositive action which concludes that mere regularity of practice cannot constitute a delegation of dispositive power. Only in the absence of the practical possibility of reviewing and altering a preliminary decision would it become appropriate to regard that preliminary decision as having become dispositive. On the other hand, as the plaintiffs in *Michel* v. *Anderson* successfully asserted,[171] for a body to have dispositive power requires more than simply its capacity to accept or reject a proposition put before it. Dispositive power may include the ability to specify the form in which a body must accept or reject a proposal, and the ability to prevent a body from taking up and adopting a particular proposal. It is on this principle that certain uses of proposal power and gatekeeping power must also be accounted dispositive. To have dispositive power, on this view, a body must also be able to amend and modify the proposals put before it, and must exercise control over what proposals will come before it. Finally, however, just as a body does not yield its dispositive power over legislation simply by permitting another organ to place recommendations before it, so it does not yield its dispositive power simply by permitting another organ to propose arrangements for its agenda.

The cogency of this concept of dispositive power is supported by consideration of some further implications of a contrary position. To begin with, one reason most amending activity in the House occurs in Committee of the Whole is that many other House procedures either do not provide for, or do not protect the occurrence of, a full amendment process. For example, when measures are considered in the House directly upon report of a standing committee, the House always can, and ordinarily does, order the previous question before any Member can offer any amendment. Second, whenever the Speaker chooses to recognize a Member for a motion to pass a bill on suspension of the rules, the House must consider and vote on the bill in the form presented to the House. No amendments may be considered except those stated in the motion, and these usually reflect the recommendations of the standing committee that handled the bill. Third, under the Corrections Calendar procedure introduced by the new Republican majority in 1995, the Speaker may place any measure on that Calendar, then call it up on his own motion, and amendments are in order only if offered by one of the bill managers, who represent the majority or minority of the standing committee that handled the measure.[172]

If uniform practice is sufficient to confer dispositive power, and if proposal and gatekeeping power without effective control by the plenary body in individual cases amount to dispositive power, these proceedings seem to devolve legislative power on the Speaker and the standing committees, as much as House Rules governing the Committee of the Whole do on that organ. Such a conclusion would renew questions, addressed only in passing in *Michel* v. *Anderson*, whether Delegates can constitutionally vote in standing committees or occupy the chair.[173]

Similar considerations might be applied to the action of conference committees appointed to resolve differences between House- and Senate-passed versions of a bill. Rules require the House to act on the

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[171]Memorandum of Plaintiffs, at 2, 28, 32, 35. Reply Memorandum of Plaintiffs, at 10-12. Brief of Appellants, at 28, 32.

[172]Additional examples of House procedures with potentially dispositive effects are considered in Brief of Appellees, at 23-24.

[173]Memorandum of Plaintiffs, at 20 (note 4). Defendants' Memorandum, at 17. Reply Memorandum of Plaintiffs, at 18. Brief of Appellees, at 3. *Michel* v. *Anderson*, 817 F.Supp. 126, 140 (note 35). Contrast Brief of Appellants, at 19.

compromise version recommended by the conference committee without entertaining amendments. The conference report may even contain provisions on new subjects that originated in the Senate version and were never previously considered by the House, or, if the House adopts a special rule for the purpose recommended by the Rules Committee, ones that originated with the conferees themselves. The House retains the recourse only of recommitting the proposal to the conference committee, or defeating it and resolving the matter by proposing amendments to the Senate version of the bill, and it invokes these only occasionally. If action by the Committee of the Whole has such a dispositive capacity that Delegates cannot participate in it, it is not easy to see why Delegates should not on similar grounds be excluded from conference committees. Yet the argumentation of *Michel* v. *Anderson* hardly acknowledges any such question.[174]

Further, the opinions of both Courts in *Michel* v. *Anderson* emphasize not only that non-Members must be excluded from action of the body, but also that no Members may be so excluded. Judge Greene instances the impropriety of a rule that would preclude African American Members or women, from voting on the floor; plaintiffs argue that Republicans could not be so excluded.[175] In the decades around the turn of the last century, by contrast, a key element of the system of majority party control of the House floor, developed to its highest point under Speaker Joseph ("Uncle Joe;" "Czar") Cannon (R., Ill., Speaker 1905-1911) was the binding caucus of the majority party. Together with the agenda power of the Speaker at the time, this device at least in principle enabled a majority of the majority Republicans to ensure the carrying of any proposal on which their vote in caucus could bind the party's members and that the Speaker would place before the House. At the time, this proceeding was theoretically justified as a proper exercise of the powers of the majority in a two-party system, which in turn was held up as a quasi-constitutional foundation of the American system. None of the argumentation of *Michel* v. *Anderson* considered whether such arrangements unconstitutionally vested dispositive power elsewhere than in the House as a plenary body, and thereby divested some Members of their participation in the exercise of legislative power.

Finally, the decision in *Michel* v. *Anderson* renews questions raised by the debate over the Reed Rules in 1890. The decision held that, absent the automatic revote in the House when Delegate votes were decisive, a rule allowing Delegates to vote in Committee of the Whole would unconstitutionally vest dispositive legislative power in that organ. As shown throughout this paper, this judgment rested on the propositions that the Committee of the Whole is capable of exercising dispositive power, that it accordingly exercises the legislative power of the House, and that it is therefore constitutionally assimilable thereto. If the Committee of the Whole is functionally equivalent to the House for these purposes, on what rationale can it be held exempt from the constitutional requirement for a majority quorum, or the mandate to take a recorded vote on the demand of one fifth of Members present? How can it be proper to exclude proceedings in Committee of the Whole from the *Journal*?[176] Does the rationale adopted in the decision

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[174]Defendants' Memorandum, at 20, and Brief of Appellees, at 23-24, 35-36, note that Delegates have served on conference committees, but without pursuing these implications. The opinion of the Circuit Court of Appeals, 14 F.3d 623, 632, alludes to them in passing.

[175]817 F.Supp. 126, 144-145. 14 F.3d 623, 630. Reply Memorandum of Plaintiffs, at 11. Reply Brief of Appellants, at 13-14.

[176]As students of Congress, we believe that the journalization of proceedings in Committee of the

(continued...)

of *Michel* v. *Anderson*, in short, constitutionalize the Committee of the Whole in a way that casts doubt on the entire historic practice of the House, which uniformly presumes it to be, and treats it as, a distinct, subordinate, preliminary, advisory organ similar to the standing committees? This potential implication of the decision of the case affords a final reason to adopt the alternative view developed here.

Implications for Delegate Voting

On the basis of a further development of the same criteria to which the opinions of the Courts appealed in deciding *Michel* v. *Anderson*, especially the District Court, this paper ultimately finds no reason to conclude that the place of the Committee of the Whole in the legislative process of the House constitutes a bar to the participation of Delegates there. Even if no mechanism had been provided for revotes in the House on questions on which Delegate votes are decisive, the analysis developed here implies that House procedures would consistently permit decisions of the Committee of the Whole to be regarded as preliminary or advisory. This conclusion, however, saves the prospect of Delegate voting just to the extent that it divests those votes of potential dispositive force. It justifies Delegate participation in Committee of the Whole, in other words, only to the exact extent that the Committee of the Whole cannot exercise the constitutional legislative power of the House of Representatives.

In other words, not only was Representative Walker correct in describing the 1993 rule as permitting Delegate votes to count only when they did not count, and not to count when they did count,[177] but the same description would necessarily have to apply to any device for Delegate participation if it was to be constitutionally admissible. Although this analysis contradicts the conclusion of the District Court about the constitutional role of the Committee of the Whole, it entirely accepts the principles on which the District Court reached that conclusion. It admits any form of Delegate voting, or other action by Delegates, only to the extent that the form fails to afford Delegates any participation in the actual exercise of legislative power. Thus, although it appears to offer justification for Delegate voting in Committee of the Whole, it fails to overcome the underlying dilemma of Delegate participation. It accordingly suggests that prospective efforts to address the congressional representation of the District of Columbia, and other similarly situated entities, might most productively focus on other avenues of redress.

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[176](...continued)
Whole would greatly facilitate certain kinds of legislative research, but we remain unwilling to seek this benefit at the cost of constitutionalizing the Committee of the Whole.

[177]817 F.Supp. 126, 142 (note 40). See also Memorandum of Plaintiffs, at 59-60 and Defendants' Memorandum, at 31, 59.