
**WHEN GATEKEEPING WORKS:
THE IMPACT OF RESTRICTIVE RULES IN THE 117TH
CONGRESS**

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ABSTRACT

Throughout U.S. history, the rules in the House of Representatives have evolved in cycles—shifting power back and forth between House leadership and rank-and-file representatives. Recent decades have seen the rise in restrictive rules, which curtail the amendments members may offer on the House floor. While at first glance these rules seem undemocratic, this Note takes a deeper dive into the content of recent amendments which were screened out by restrictive rules during 2021. This analysis highlights several indicators that the rejected amendments were often dilatory. Finding restrictive rules to be a practical necessity, this Note suggests several possible reforms to bolster democratic participation.

INTRODUCTION

Congress is largely allowed to set its own rules.¹ In practice, this was a constitutional necessity—binding the legislature through detailed parliamentary procedures in the Constitution itself would rob Congress of the flexibility it needs to function efficiently as the country navigates new social and political contexts.² The flexibility of internally developed rules has created efficiencies, such as the ability to take votes electronically in the House of Representatives, an advancement which the founders likely could not have imagined.³ However, this flexibility also means that sitting congressional leaders have a strong incentive to craft rules that enlarge their power rather than serve the public interest.⁴ For example, efforts in the House of Representatives to reform committee assignments to better align with modern areas of legislation largely failed because leaders were unwilling to cede jurisdiction over areas that they already controlled, and special interests were unwilling to sacrifice painstakingly built relationships with key stakeholders.⁵

¹ See generally Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805 (2010) (discussing the merits and drawbacks of congressional self-policing).

² See *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). The Supreme Court in *McCulloch* noted:

A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all of the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

Id.

³ See *Electronic Voting*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/Electronic-Technology/Electronic-Voting/> (last visited Jan. 8, 2023).

⁴ See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 145–47 (5th ed. 2017).

⁵ See *id.*

The House of Representatives has adopted “standing rules,” which apply to the body’s ordinary proceedings, and “special rules,” which modify the standard procedure for considering individual bills.⁶ Over time, in an effort to promote effective lawmaking in the House in light of increased partisanship and other changes to the legislative process, House leaders have relied more and more on these special rules.⁷ One main function of special rules is to determine which amendments are eligible for consideration on the House floor.⁸ Increasingly, special rules are used to substantially restrict the number of amendments eligible for consideration, or to block all amendments entirely.⁹ These “restrictive rules” thrust power into the hands of a subset of elected officials, who act as gatekeepers of the House floor, preventing participation in amending activity by the rank-and-file of both parties.¹⁰ These leaders do not only make the procedural rules, but they often use these rules to significantly influence—and even dictate entirely—substantive legislative results.¹¹ With power consolidated in the hands of a select few House leaders, rank-and-file lawmakers and large swaths of the public—their constituents—lose their power to have their voices heard in the legislative process.¹²

Some have marked the rise of restrictive rules with disdain, viewing them as undemocratic or hyper-partisan.¹³ However, others have noted that, beginning with reforms in the 1970s, an increase in participation of all representatives in floor debate had led to a disorderly House floor, and a corresponding lack of legislative productivity.¹⁴ Those changes, compounded further by minority efforts to use open floor amendment proceedings to delay or obstruct the majority agenda, made restrictive rules a necessary tool for House leaders.¹⁵

Few analyses have seriously considered the content and sincerity of minority amendments in order to understand what is truly lost by the invocation of

⁶ See *About*, COMM. ON RULES, <https://rules.house.gov/about> (last visited Jan. 8, 2023).

⁷ See *infra* Section II.D. (discussing the influence of reforms in the 1970s on the increased use of special rules).

⁸ See *About: Special Rule Types*, COMM. ON RULES, <https://rules.house.gov/about/special-rule-types> (last visited Jan. 8, 2023).

⁹ See SINCLAIR, *supra* note 4, at 29.

¹⁰ See *About*, COMM. ON RULES, *supra* note 6 (“The Committee [on Rules] has the authority to do virtually anything during the course of consideration of a measure . . . [T]here is little that the Rules Committee cannot do.”).

¹¹ See Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1378–85 (2010) (outlining political science research showing that those with control over procedural rules are often able to control policy outcomes).

¹² See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1304 (2001); Doran, *supra* note 11, at 1429–31.

¹³ See Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. L.J. ON LEGIS. 321, 355–58 (1994).

¹⁴ See SINCLAIR, *supra* note 4, at 140–41.

¹⁵ See *id.*

restrictive rules.¹⁶ This Note looks closely at the amendments put forward by the minority party during 2021 to understand whether the use of restrictive rules in fact unfairly hampers legitimate participation by all House members.¹⁷ Ultimately, I conclude that the content of minority amendments suggests that many amendments are dilatory, such that restrictive rules are a necessary tool to prevent obstruction and allow for effective lawmaking in the House.¹⁸ Finally, though restrictive rules may burden minority participation, several reforms are possible to ensure both meaningful floor participation and full minority participation at other stages of the legislative process.¹⁹

Part I of this Note examines the constitutional underpinnings of House procedure, while Part II discusses the role of House rules, the process for making law, and the rise of restrictive rules. Subsequently, Part III explores the impact of restrictive rules on the participation of the minority in the current Congress and proposes several reforms to increase participation while retaining restrictive rules.

I. CONSTITUTIONAL UNDERPINNINGS

When it comes to the process of lawmaking, the Constitution provides only broad guidance.²⁰ The Constitution first sets up the legislative structure and processes for selecting legislators.²¹ The legislature has two houses—the Senate and the House of Representatives.²² Each state is allocated two senators, who represent the interests of their entire state, and one or more representatives, based on the state’s population, who represent smaller districts within each state.²³ Both senators and representatives are elected by popular vote.²⁴

The Constitution also provides brief guidance on how the two houses are to operate.²⁵ The basic process for creating law is familiar, but the public

¹⁶ See generally Doran, *supra* note 11, at 1363; DON WOLFENBERGER, BIPARTISAN POLICY CENTER, DATA TABLES (Dec. 2021), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/01/BPC-House-Rules-Data-117th-Congress-through-Dec.-2021.pdf>; WALTER J. OLESZEK, CONG. RSCH. SERV., R46597, THE “REGULAR ORDER”: A PERSPECTIVE 31–33 (2020).

¹⁷ See *infra* Part III.

¹⁸ See *infra* Section III.C.

¹⁹ See *infra* Section III.E.

²⁰ See generally U.S. CONST. art. I.

²¹ See generally U.S. CONST. art. I.

²² U.S. CONST. art. I, § 1, cl. 1.

²³ U.S. CONST. amend. XVII (apportionment of senators); *id.* amend. XIV, § 2 (apportionment of representatives).

²⁴ U.S. CONST. amend. XVII (direct election of senators); *id.* art. I, § 2, cl. 1 (direct election of representatives).

²⁵ See generally U.S. CONST. art. I.

understanding is not always entirely accurate.²⁶ Before becoming law, a bill must pass both the House and the Senate, and then be signed by the President.²⁷ The President may also veto the bill, requiring both houses to pass the bill again with a two-thirds majority in order for it to become law.²⁸ However, much of the internal functioning of Congress is left open to interpretation and adaptation.

Within the House of Representatives, the Constitution makes provision for a single officer: the Speaker of the House.²⁹ However, the Constitution does not specify the Speaker's duties.³⁰ Additionally, the Constitution empowers the House to create other offices and, by implication, define their functions.³¹ The Constitution further permits that "each house may determine the rules of its proceedings," and instructs each house to "keep a Journal of its proceedings, and . . . publish the same, excepting such parts as may . . . require secrecy; and the yeas and nays of the members . . . shall, at the desire of one fifth of those present, be entered on the Journal."³² Finally, the Constitution specifies that a majority of House members "constitute a Quorum to do Business," meaning that a majority of House members must be present for any lawmaking activity to occur.³³ While setting a broad framework for lawmaking, the Constitution ultimately leaves many crucial matters to the discretion of lawmakers.

II. RULES IN THE HOUSE OF REPRESENTATIVES

A. *The Rules Committee*

To build on this narrow constitutional guidance, the House created the first Rules Committee in April, 1789, to "prepare and report such standing rules and orders of proceeding as may be proper to be observed in this House."³⁴ Standing rules dictate the procedures for day-to-day operations in the legislative chamber, specifying in detail such items as the order for considering legislative business and the standards of decorum for representatives during debate.³⁵ Throughout the legislative process, members may object when these procedural rules are

²⁶ See *Schoolhouse Rock!: I'm Just a Bill* (ABC television broadcast Mar. 27, 1976) (outlining the traditional process for making law, which disregards the modern reality that, e.g., many bills proceed through multiple committees or none at all, face restricted debate on the floor, or are negotiated entirely by party leaders behind closed doors).

²⁷ U.S. CONST. art. I, § 7, cl. 2.

²⁸ U.S. CONST. art. I, § 7, cl. 2–3.

²⁹ U.S. CONST. art. I, § 2, cl. 5.

³⁰ See generally U.S. CONST. art. I, § 2, cl. 5.

³¹ See U.S. CONST. art. I, § 2, cl. 5.

³² U.S. CONST. art. I, § 5, cl. 2–3.

³³ U.S. CONST. art. I, § 5, cl. 1.

³⁴ H.R. JOURNAL, 1st Cong., 1st Sess. 6 (1789).

³⁵ See generally H.R., 117TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES (2021) [hereinafter HOUSE RULES]; see also *id.* r. XIV (defining the order of ordinary business); *id.* r. XVII (defining rules of decorum).

violated, a process known as raising a “point of order.”³⁶ These standing rules lay out the default process that a bill follows through the House.³⁷

Notwithstanding the “traditional” track for passing legislation laid out by the standing rules, most important legislation follows a somewhat different process.³⁸ Over time, the Rules Committee has taken on responsibilities for creating “special rules” or “special resolutions” which lay out the terms of debate for major legislation at the floor stage.³⁹ These special rules supersede various elements of the standing rules.⁴⁰

Most major legislation is brought to the House floor by a special rule that allows the measure to be taken up out of order. The Rules Committee reports such rules, which take the form of House resolutions—designated H. Res. A majority of the voting House membership must approve each one.

The rule sets the terms for a measure’s floor consideration. A rule always specifies how much time is to be allowed for general debate and who is to control that time. . . . A rule may restrict amendments, waive points of order (against what would otherwise be violations of House rules in the legislation or in how it is brought up), and include other special provisions to govern floor consideration.⁴¹

The next Section outlines the process for considering legislation in the House, highlighting the influence of both standing and special rules throughout that process.

B. *The Life Cycle of a Bill in the House*

Though constitutionally, certain bills must begin in the House of Representatives, most bills may begin in either chamber, submitted by either a senator or a representative.⁴² The process in the House is similar regardless of whether a bill is initiated in the House or referred to the House after passage in the Senate.⁴³ In either case, the Speaker of the House first refers the bill to the committee or committees with jurisdiction over its subject matter.⁴⁴ The House

³⁶ See HOW OUR LAWS ARE MADE, H.R. DOC. NO. 110-49, at 22 (2007).

³⁷ See generally HOUSE RULES, *supra* note 35.

³⁸ See SINCLAIR, *supra* note 4, at 27.

³⁹ See *About*, COMM. ON RULES, *supra* note 6.

⁴⁰ See *id.*

⁴¹ SINCLAIR, *supra* note 4, at 27–28.

⁴² See H.R. DOC. NO. 110-49, at 3–4, 8. Note that the Constitution requires that revenue bills originate from the House. See U.S. CONST. art. I, § 7, cl. 1.

⁴³ See H.R. DOC. NO. 110-49, at 3.

⁴⁴ See *id.* at 9–10. Increasingly, the Speaker designates multiple committees to consider a measure, as bills often cover complex issues that bridge multiple committees. See SINCLAIR, *supra* note 4, at 12–16.

standing rules set out in painstaking detail the jurisdiction of each committee.⁴⁵ The designated committees, or their subcommittees, may hold public hearings, request reports from government agencies, and conduct committee meetings to consider and make changes to the legislation, known as “mark-up” sessions.⁴⁶ This phase of the legislative process “provide[s] the most intensive consideration to a proposed measure as well as the forum where the public is given their opportunity to be heard.”⁴⁷

Committees ideally serve as the center of deliberation for each bill.⁴⁸ As such, representatives often “seek[] election to the committee that has jurisdiction over a field in which the Member is most qualified and interested,” thereby placing themselves in a position to best be able to influence legislative outcomes.⁴⁹ Membership on committees is divided between the majority and minority party, with the majority leadership responsible for determining the ratio of majority to minority members on each committee.⁵⁰ Committee members acquire seniority based on their time serving on each committee, while committee chairs are elected by the majority vote of all members of the majority party.⁵¹

After considering a bill, the committee may vote to favorably report the measure to the whole House, or choose to “table” it indefinitely, letting the bill quietly vanish.⁵² The committee recommendation may support the bill as originally submitted, propose amendments, or put forward a substitute that summarizes all recommended changes.⁵³ Bills reported favorably from committee are placed on one of several House calendars.⁵⁴ Once placed on the appropriate calendar, by default, measures are considered in the order that they were reported from committee.⁵⁵ However, rather than wait for priority legislation to come up on the calendar, committee chairs often request that the Rules Committee issue a special resolution allowing the bill to be considered immediately, and setting any other unique terms of debate.⁵⁶ In these cases, the Rules Committee reports a special rule to the floor, subject to a simple majority

⁴⁵ See HOUSE RULES, *supra* note 35, r. X.

⁴⁶ See H.R. DOC. NO. 110-49, at 11–14.

⁴⁷ See *id.* at 9.

⁴⁸ See *id.*

⁴⁹ See *id.* at 10.

⁵⁰ See *id.*

⁵¹ See *id.*; SINCLAIR, *supra* note 4, at 140.

⁵² See H.R. DOC. NO. 110-49, at 14–15.

⁵³ See *id.*

⁵⁴ The House has four distinct calendars: the Union calendar, primarily for bills that directly or indirectly implicate the government budget; the House calendar, for all other public bills; the Private Calendar, for private bills or resolutions; and the Calendar of Motions to Discharge Committees, which includes bills that have been forced out of committee by a motion of a majority of House members. See *id.* at 19–20.

⁵⁵ See *id.* at 19–21.

⁵⁶ See *id.* at 21–22.

vote, which then modifies the standing rules as far as the particular bill is concerned.⁵⁷

House rules require that certain types of bills first go before the Committee of the Whole House on the State of the Union before being considered by the entire House.⁵⁸ The “Committee of the Whole,” as it is often called, includes all representatives as members, but the rules of debate are distinct from those required on the floor of the House.⁵⁹ Most importantly, the Committee of the Whole requires only one hundred members to do business, rather than the quorum of 218 members required on the floor of the House.⁶⁰ The debate processes on the floor and in the Committee, however, are similar.⁶¹ When a bill is “in order,” consideration proceeds in three stages: (1) debate; (2) amendments; and (3) voting on the bill.⁶²

First, House members debate the measure.⁶³ Special rules always include a specification of the total time available for debate.⁶⁴ Following the general debate, representatives may offer amendments to each successive section of the bill.⁶⁵ Under the standing rules, amendments are only limited by the germaneness rule: “no motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.”⁶⁶ However, special rules regularly adopt further restrictions on the number and type of amendments that may be considered.⁶⁷ By default, each representative offering

⁵⁷ *See id.* There is also a third option for bringing legislation to the floor. On certain days, the Rules allow for a motion to suspend the rules entirely. *See id.* at 23–24. Such a motion requires a two-thirds vote of the whole House to pass. *See id.* This motion dispenses with the requirement that a bill be in order on the calendar and normal requirements for debate and amendment. *See id.* However, under this procedure, bills must receive support from two-thirds of the House members to pass. *See id.* Thus, this suspension procedure is primarily used for noncontroversial measures. *See id.*

⁵⁸ *See id.* at 26–27; HOUSE RULES, *supra* note 35, r. XVIII(3). The Committee of the Whole must consider all bills on the Union calendar—those that implicate the federal budget by either increasing spending, changing taxes, or otherwise affecting government liability. *See* H.R. DOC. NO. 110-49, at 26–27; HOUSE RULES, *supra* note 35, r. XVIII(3).

⁵⁹ *See* H.R. DOC. NO. 110-49, at 26–27; HOUSE RULES, *supra* note 35, r. XVII.

⁶⁰ *See* H.R. DOC. NO. 110-49, at 26; U.S. CONST. art. I, § 5, cl. 1.

⁶¹ *See* H.R. DOC. NO. 110-49, at 29 (debate for bills not passed through the Committee of the Whole are debated under the terms of the special rule, or the one-hour rule, limiting the comments of an individual representative on a bill to one hour).

⁶² *See id.* at 26–29.

⁶³ *See id.* at 26.

⁶⁴ *See id.* at 26–27. Debate time is “usually divided equally between the chairman and the ranking minority member of the relevant committee,” with those two members then dividing their portion of the time among representatives who want to speak for or against the bill. *See id.* at 26.

⁶⁵ *See id.* at 27.

⁶⁶ *See* HOUSE RULES, *supra* note 35, r. XVI(7).

⁶⁷ *See infra* Section II.C.

an amendment may speak for five minutes to explain the amendment, followed by a five-minute rebuttal by a representative opposed to the amendment.⁶⁸ House members then vote on each amendment.⁶⁹ In this way, under the standing rules, debate to amend a measure may continue indefinitely until the majority votes to close debate on the section.⁷⁰ This process repeats for all amendments on each section of the bill.⁷¹

Finally, members vote on the bill. If the bill was debated before the Committee of the Whole, the Committee must vote to report the bill to the whole floor, with all of the amendments that were adopted.⁷² If the bill passes by majority vote, the Committee “rises” and dissolves back into the full House.⁷³ On the floor of the House, the Speaker “orders the previous question,” or requests a vote on the bill and the amendments.⁷⁴ If the bill passes by a majority vote, standing rules permit a member of the minority party to submit a motion to recommit the legislation to the original committee.⁷⁵ This is the minority’s final opportunity to prevent the bill from passing in its current form, and any attempts at major changes usually fail.⁷⁶ If the motion to recommit is unsuccessful, the bill goes to the Senate for consideration, or to the President for signature if it has already passed the Senate.⁷⁷ For the purposes of the remainder of this Note, the term “floor debate” will be used to refer to debate and amending activity in both the Committee of the Whole and on the floor of the House.

C. *Types of Modern Special Rules*

The life cycle of a bill outlined in Section II.B. understates the influence of special rules in controlling the process and content of legislation considered in

⁶⁸ See HOUSE RULES, *supra* note 35, r. XVIII(5)(a). Further, amendments to the amendment (secondary amendments) may be proposed, with five minutes again allocated to both the proponent and opponent of the amendment. See H.R. DOC. NO. 110-49, at 27.

⁶⁹ See H.R. DOC. NO. 110-49, at 27. Special rules also often provide *en bloc* authority to a designated representative, who may bundle the amendments together for expedited consideration. See SINCLAIR, *supra* note 4, at 36–37.

⁷⁰ See H.R. DOC. NO. 110-49, at 27. Notably, however, even after a motion to close debate is passed, the Committee of the Whole must consider all amendments which were printed in the *Congressional Record* at least one day before the bill came up for consideration, following the same format of five-minute speeches by a proponent and opponent for each amendment. See HOUSE RULES, *supra* note 35, r. XVIII(8)(b).

⁷¹ See *id.*

⁷² See H.R. DOC. NO. 110-49, at 28–29.

⁷³ See *id.* at 29.

⁷⁴ See *id.*

⁷⁵ See *id.* at 29–30; SINCLAIR, *supra* note 4, at 43. The motion to recommit comes in two varieties—a motion to recommit without instructions, which essentially kills the bill entirely, or a motion to recommit with instructions, which instructs the committee to make certain modifications to the bill. See SINCLAIR, *supra* note 4, at 43.

⁷⁶ See SINCLAIR, *supra* note 4, at 43.

⁷⁷ See H.R. DOC. NO. 110-49, at 36, 41.

the modern House, and the corresponding influence granted to the Rules Committee members, hand in hand with House leadership. Sinclair notes that “most major legislation is brought to the House floor by a special rule In the contemporary House, most rules are somewhat restrictive.”⁷⁸

The House Rules Committee identifies four types of special rules for considering legislation on the House floor: (1) open rules, which allow all germane amendments; (2) modified-open rules, which allow a broad scope of amendments, with limited restrictions; (3) structured rules, which specify the exact amendments that are eligible for consideration; and (4) closed rules, which bar all amendments not submitted by the committee reporting the bill.⁷⁹ While modified-open rules often simply restrict amendments to those which have been published before debate in the *Congressional Record*, structured rules allow the Rules Committee to cherry-pick which amendments are eligible for a floor vote.⁸⁰ Sinclair notes that “an average of 95 percent” of rules for major bills from 2003–2014 were either structured or closed—in other words, “restrictive.”⁸¹ The Rules Committee hasn’t reported an open rule since the 114th Congress in 2015–2016.⁸²

House Resolution 179 from the 117th Congress illustrates the effects of both a structured and a closed rule.⁸³ The resolution first laid out a structured rule for

⁷⁸ SINCLAIR, *supra* note 4, at 27–28 (emphasis added). Sinclair defines “major legislation” as those measures listed in *CQ Weekly* as major at the time of their consideration. *See id.* at 8.

⁷⁹ *About: Special Rule Types*, COMM. ON RULES, *supra* note 8. Under both closed and structured rules, amendments by the reporting committee are often included in “self-executing” provisions of the special resolutions, meaning that once the special rule passes the House, the amendments are automatically adopted. *See* H.R. DOC. NO. 110-49, at 22.

⁸⁰ *See* SINCLAIR, *supra* note 4, at 28. Generally, any representative may submit proposed amendments to the Rules committee, and committee leadership brings to the committee a proposed rule which incorporates a list of which amendments will be considered. *See Amendment Resources*, COMM. ON RULES, <https://rules.house.gov/amend/amendment-resources> (last visited Jan. 8, 2023). Representatives may further testify before the Rules Committee to request that their amendment be eligible for floor consideration. *Id.*

⁸¹ SINCLAIR, *supra* note 4, at 29.

⁸² *See* Kevin R. Kosar, *What Does the House Rules Committee Do? (with Don Wolfensberger)*, AEI: UNDERSTANDING CONG. (Mar. 1, 2021), <https://www.aei.org/podcast/what-does-the-house-rules-committee-do-with-don-wolfensberger>. Notably, the House’s new Republican majority kicked off the 118th Congress with a protracted battle to elect Speaker Kevin McCarthy, with far-right Republicans seeking expanded use of open rules on the House floor. *See* Bob Good, *I’m One of the Last Holdouts Against Kevin McCarthy—and I Won’t Back Down*, N.Y. TIMES (Jan. 6, 2023), <https://www.nytimes.com/2023/01/06/opinion/kevin-mccarthy-republicans.html>. As this Note goes to press, it remains to be seen what rule changes the House will in fact adopt and how those changes will shape procedure and results in the House.

⁸³ *See* H.R. Res. 179, 117th Cong. (2021) (enacted). Resolutions frequently provide for consideration of more than one bill. *See, e.g.*, H.R. Res. 838, 117th Cong. (2021) (enacted); H.R. Res. 716, 117th Cong. (2021) (enacted); H.R. Res. 667, 117th Cong. (2021) (enacted).

H.R. 1, an election and campaign finance reform measure.⁸⁴ The rule replaced the committee bill with a substitute and provided for one hour of debate split between the majority and the minority.⁸⁵ It also waived all points of order.⁸⁶ Further, the rule allowed for consideration of fifty-six amendments, in a precise order, for periods of time specified in the Rules Committee report.⁸⁷ Though fifty-six amendments may seem extensive, the Rules Committee record reflects 183 amendments submitted for consideration.⁸⁸ Notably, the rule did not exclude all amendments put forward by the minority party, nor did it include all amendments submitted by majority party members.⁸⁹ In this case, 104 amendments were put forward by minority-party Republicans and seventy-six by majority-party Democrats.⁹⁰ Excluding amendments withdrawn from consideration, the special rule prevented debate on all but 7% of Republican-submitted amendments, compared to 72% of Democrat-backed ones.⁹¹ House Resolution 179 also established a closed rule for consideration of the George Floyd Justice in Policing Act of 2021.⁹² That bill, stretching 136 pages, was to receive one hour of debate, after which it would receive an up-or-down vote, with no possibility of amendment on the floor.⁹³ In this case, representatives submitted fourteen amendments for consideration, but the restrictive rule limited floor debate to the bill as it was reported out of committee.⁹⁴

D. History of Special Rules

At its inception, the Rules Committee was only a Select Committee—created at the beginning of most sessions of Congress to establish standing rules and then immediately dissolved.⁹⁵ These Select Committees only had jurisdiction

⁸⁴ See H.R. Res. 179.

⁸⁵ See *id.* § 1.

⁸⁶ See *id.* § 1.

⁸⁷ See *id.* §§ 1–2. For a complete list of amendments made in order, see H.R. REP. NO. 117-9, at 6–10 (2021).

⁸⁸ See *H.R. 1—For the People Act of 2021*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-1> (last visited Jan. 8, 2023) [hereinafter *H.R. 1*, COMM. ON RULES].

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² H.R. Res. 179 § 5.

⁹³ See *id.* (the special rule); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021) (the text of the bill).

⁹⁴ See *H.R. 1280—George Floyd Justice in Policing Act of 2021*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-1280> (last visited Jan. 8, 2023) [hereinafter *H.R. 1280*, COMM. ON RULES].

⁹⁵ See SURVEY OF ACTIVITIES OF THE HOUSE COMMITTEE ON RULES FOR THE 116TH CONGRESS, H.R. REP. NO. 116-722, at 2–3 (2021). Some Congresses declined even to constitute a Rules Committee, relying instead on the work of past Congresses. See *id.*

over standing rules.⁹⁶ In 1880, the Rules Committee was permanently established as a standing committee, with the Speaker of the House as the chair.⁹⁷ Subsequently,

[i]n 1883, the modern Rules Committee began to emerge when the House upheld the right of the Committee to issue “special orders of business” or “special rules” providing for the consideration of legislation from other committees. By 1890, this new role had become the exclusive prerogative of the Rules Committee. . . . This is notable because, until the use of special rules, a two-thirds vote was required to . . . consider a bill out of order. A simple majority could now accomplish what previously required a super-majority. Special rules gained importance because they gave the House flexibility in its legislative agenda, which in turn, allowed for House leadership to respond to changing judgments about the nation’s needs at any given time.⁹⁸

In the 1890s, under Speaker-Chairman Thomas Brackett Reed, the Rules Committee codified new rules “outlaw[ing] certain obstructionist tactics on the House floor,” and began to regularly report special rules to schedule bills under modified terms of debate.⁹⁹ However, in 1910, a revolt against then-Speaker Joseph Cannon stripped the Speaker of the chairmanship of the Rules Committee and removed the power of the Speaker to directly appoint Committee Members, reducing the ability of the Speaker to tightly control the floor agenda.¹⁰⁰ Subsequently, between 1937 and 1961, the Rules Committee, “dominated by a conservative coalition of Southern Democrats and Republicans[,] . . . sometimes would refuse to report rules on bills that the majority leadership wanted on the floor”¹⁰¹ Despite ongoing efforts to wrest control from the Rules Committee, it wasn’t until a wave of new Democratic representatives were elected in the 1970s that the Rules Committee was realigned with the majority leadership.¹⁰²

The 1970s brought other major shifts to the House, which in turn influenced the activities of the Rules Committee.¹⁰³ Until the 1970s, House committee

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

⁹⁹ *See id.* Before rising to the role of Speaker, Reed was a member of the minority Republicans, who “mastered parliamentary rules in order to obstruct majority legislation and to increase minority influence.” *Speaker of the House Thomas Brackett Reed of Maine*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Historical-Highlights/1851-1900/Speaker-of-the-House-Thomas-Brackett-Reed-of-Maine/> (last visited Jan. 8, 2023). Reed was quoted as saying, “Rules should not be barriers . . . they should be guides.” *Id.*

¹⁰⁰ *See* H.R. REP. NO. 116-722, at 3.

¹⁰¹ *Id.* at 3–4.

¹⁰² *See id.* at 4.

¹⁰³ *See generally* SINCLAIR, *supra* note 4, at 140.

chairs were selected by seniority, and were empowered to appoint subcommittee chairs.¹⁰⁴ Individual members relied upon favor from the most senior, often most conservative, members of Congress to get favorable subcommittee assignments and leadership opportunities.¹⁰⁵ During this era, most bills were considered under open rules on the House floor, allowing rank-and-file members to propose any germane amendments on the floor for consideration.¹⁰⁶ However, given the distribution of power over subcommittee appointments, entrenched committee chairs had substantial leverage to prevent rank-and-file members from proposing floor amendments that the committee chairs opposed.¹⁰⁷ Starting in the 1970s, House rules changed such that committee and subcommittee chairs were selected by a vote of majority members, rather than being appointed based on seniority.¹⁰⁸ By reducing the power of entrenched committee chairs—often much more conservative than their rank-and-file counterparts—this reform allowed individual House members to influence legislation and put forth diverse ideas, both in committee and on the House floor, without fear of reprisal.¹⁰⁹

Before the 1970s, rank-and-file representatives also lacked staff, and thus usually lacked the resources to closely follow policy debate outside of their committee sphere.¹¹⁰ This meant that representatives primarily participated in the legislative process for bills within their committee jurisdiction.¹¹¹ However, the introduction of staff for all representatives allowed members to track what was coming to the floor and assert their influence better than before, further pulling power away from committee chairs and toward individual representatives.¹¹² The trend toward increased autonomy of individual members in turn led to increased activity on the House floor, with individual representatives able to offer more amendments and participate in more varied debate in that forum, whereas most legislative action had previously occurred in the committee setting.¹¹³

Further, the 1970s brought new transparency reforms, such as the Legislative Reorganization Act of 1970, which initiated broadcasts of committee hearings.¹¹⁴ These reforms led to increases in public knowledge about voting

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 139–40.

¹⁰⁶ *See id.* at 152–53 (charting the rise of restrictive rules over time).

¹⁰⁷ *See id.* at 139–40, 152.

¹⁰⁸ *See id.* at 140.

¹⁰⁹ *See id.* at 139–40, 147.

¹¹⁰ *See id.* at 140, 147.

¹¹¹ *See id.* at 147.

¹¹² *See id.* at 140, 147–48.

¹¹³ *See id.* at 147–48.

¹¹⁴ *See Historical Highlights: The Legislative Reorganization Act of 1970*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Historical->

and floor debates, and correspondingly increased the incentive for representatives to engage in that forum to send signals to their constituents and the nation at large about their policy commitments.¹¹⁵ Over time, both political parties discovered the power of using floor amendments to both stall forward motion on bills they opposed, and to force their opponents into public votes on difficult issues.¹¹⁶ This increased floor activity led to gridlock, and, over time, caused House leaders to lean on the Rules Committee to report restrictive rules and limit amending activity in order to allow the House to function at all.¹¹⁷ Closed and structured rules became the practice of choice, reducing messy floor debates and allowing the leadership to hold together compromises crafted in committee.¹¹⁸ Thus, just as power was amassing to individual representatives to engage in more policymaking, power accrued to the Speaker and the Rules Committee to moderate that influence.¹¹⁹ The use of restrictive rules has persisted to today, bolstered by increasing polarization between the political parties.¹²⁰

The present-day use of closed or structured rules to control debate is a key feature of agenda-setting by leaders on both sides of the aisle.¹²¹ Doran compares the use of restrictive rules in the Republican-controlled House during the 109th Congress to the Democrat-controlled House during the 110th Congress, finding “no appreciable difference between Republicans and Democrats” in their use of the closed rule for considering controversial measures.¹²² He further notes that closed or “effectively closed” structured rules made up 50% of reported special rules in the 109th Congress and 54% in the 110th.¹²³ Comparing the minority views included in the semi-annual *Survey of Activities of the House Committee on Rules* over the last several Congresses is almost comical, with both parties pointedly highlighting metrics that show the other party to be following a closed process in bad faith, then going on to follow the same tactics once they are in power.¹²⁴

Highlights/1951-2000/The-Legislative-Reorganization-Act-of-1970/ (last visited Jan. 8, 2023).

¹¹⁵ See DONALD R. WOLFENBERGER, A BRIEF HISTORY OF CONGRESSIONAL REFORM EFFORTS 10 (Bipartisan Policy Center 2013).

¹¹⁶ See SINCLAIR, *supra* note 4, at 141, 152; Doran, *supra* note 11, at 1428–29.

¹¹⁷ See SINCLAIR, *supra* note 4, at 140, 152–53; Doran, *supra* note 11, at 1428–29.

¹¹⁸ See SINCLAIR, *supra* note 4, at 152–55.

¹¹⁹ See *id.*

¹²⁰ OLESZEK, *supra* note 16, at 8–10.

¹²¹ See Doran, *supra* note 11, at 1388–89, 1400.

¹²² *Id.* at 1386.

¹²³ *Id.* at 1387–89.

¹²⁴ Compare SURVEY OF ACTIVITIES OF THE HOUSE COMMITTEE ON RULES FOR THE 116TH CONGRESS, H.R. REP. NO. 116-722, at 123–25 (2021) (“Democratic leadership never failed to miss an opportunity to protect their members from difficult votes, gloss over defective committee processes, and subvert the sanctity of the legislative process to achieve their partisan agenda. . . . [W]e find it difficult to identify examples in which the Democratic

The highly partisan nature of special rule-making is not an accident: while on most committees a simple majority of members are representatives from the majority party, the Rules Committee is traditionally staffed with twice as many majority members as minority members.¹²⁵ Once a special rule has passed the Rules Committee, it needs only a majority vote to pass on the floor.¹²⁶ Thus, notwithstanding the standing rules, the majority party ultimately has control to set unique rules for debating any important legislation.¹²⁷ The Rules Committee “has the authority to do virtually anything during the course of consideration of a measure, including deeming it passed. . . . In essence, so long as a majority of the House is willing to vote for a special rule, there is little that the Rules Committee cannot do.”¹²⁸ Increasingly, this control is used to limit debate on the House floor to measures and amendments carefully selected by majority party leadership.¹²⁹ Though these rules seem procedural in nature, in practice, the Rules Committee, hand-in-hand with House leadership, has the power to shape both the internal House debate and the external public dialogue about a piece of legislation.¹³⁰

E. *A Note About the Senate*

One other notable influence on the use of restrictive special rules in the House is the practices in the Senate. Like the House, the Senate is constitutionally empowered to create its own rules, and first established a Select Committee on Rules in 1789, ultimately establishing a permanent Rules Committee in 1874.¹³¹ However, procedures in the Senate have developed quite differently from in the House:

Leadership allowed the Committee on Rules to enhance the credibility of the institution and promote regular order and Member participation.”), *with* SURVEY OF ACTIVITIES OF THE HOUSE COMMITTEE ON RULES FOR THE 115TH CONGRESS, H.R. REP. NO. 115-1130, at 113–14 (2019) (“During the 115th Congress, Republicans on the House Rules Committee continued their troubling trend of abandoning regular order, shutting down debate, and rigging the process to advance a highly partisan agenda. Speaker Ryan presided over the most closed Congress in our history. At every turn, Republicans on this Committee voted in lockstep to shut out the voices of Members from across the political spectrum, rejecting efforts by Democrats to create a more open and accommodating process.”).

¹²⁵ See *About*, COMM. ON RULES, *supra* note 6.

¹²⁶ See H.R. DOC. NO. 110-49, at 21–22. If the Rules Committee insists on bringing the special rule to the floor on the same day that it passes committee, it requires a two-thirds vote to pass. *Id.* at 22.

¹²⁷ *Id.* at 21.

¹²⁸ *About*, COMM. ON RULES, *supra* note 6.

¹²⁹ SINCLAIR, *supra* note 4, at 28–31.

¹³⁰ See *id.* at 29–30, 267–69.

¹³¹ See U.S. CONST. art. I, § 5, cl. 2; *About: History*, SENATE RULES & ADMIN., <https://www.rules.senate.gov/about/history> (last visited Jan. 8, 2023).

Senate rules give senators as individuals great power: A senator may hold the floor indefinitely unless the Senate invokes cloture, which requires [a three-fifths] majority; further, any senator may offer an unlimited number of amendments to almost any piece of legislation. . . . Current norms allow senators to use extended debate and floor amendments expansively. . . . Any one senator can block a unanimous consent request. The Senate is not a majority-rule chamber like the House. In the House, the majority can always prevail; in the Senate, minorities can often block majorities.¹³²

These Senate practices—in particular, the opportunity to invoke extended debate, known as the filibuster—give enormous power to individual senators.¹³³ Further, the Budget Act of 1974, which created a formal process for developing the annual federal budget, also established that certain bills would be limited to thirty hours of debate, and thus not subject to the possibility of a filibuster.¹³⁴ As a result, these budget bills are often used as mechanisms to pass large packages of policy-changing measures which could not otherwise garner sufficient support to overcome the filibuster.¹³⁵ However, even without the requirement of garnering sixty Senate votes to pass a measure, individual senators are often at the center of negotiations about the content of major bills, particularly when the majority holds the Senate by only a thin margin, as in the 117th Congress.¹³⁶ Compromises crafted between Senate leaders, House leaders, hold-out senators, and often the President are typically precarious, and may influence the use of closed rules in the House, even if amendments in the House could lead to greater support for the bill.¹³⁷ Thus, taken together, the filibuster and the budget process substantially affect what legislation can

¹³² SINCLAIR, *supra* note 4, at 47.

¹³³ *See id.*; *see also* H.R. DOC. NO. 110-49, at 40.

¹³⁴ *See* SINCLAIR, *supra* note 4, at 125, 128–30.

¹³⁵ *See id.* at 127–28, 130.

¹³⁶ *See, e.g.*, Lisa Mascaro & Farnoush Amiri, *Power of One: Manchin Is Singularly Halting Biden's Agenda*, ASSOC. PRESS (Dec. 16, 2021), <https://apnews.com/article/joe-biden-environment-voting-delaware-joe-manchin-efd6eb8e0836f0246529cd5e3e57f134> (discussing negotiations with Senator Joe Manchin over the Build Back Better Act); Perry Bacon Jr., *Why Joe Manchin Is So Willing and Able to Block His Party's Goals*, FIVETHIRTYEIGHT (Mar. 31, 2021, 9:53 AM), <https://fivethirtyeight.com/features/why-joe-manchin-is-so-willing-and-able-to-block-his-partys-goals/> (discussing the ability of any Senate Democrat to block the party agenda, with an emphasis on Joe Manchin's blocking of a presidential nominee and negotiation of changes to an economic stimulus bill); Hank Stephenson, *What's Kyrsten Sinema Up To? It's Pretty Obvious.*, POLITICO (Oct. 27, 2021, 4:30 AM), <https://www.politico.com/news/magazine/2021/10/27/kyrsten-sinema-ambition-loyalty-517224> (outlining the role of Democrat Kyrsten Sinema in blocking several progressive pieces of legislation).

¹³⁷ *See* Doran, *supra* note 11, at 1393–94; *see also* Press Release, Nancy Pelosi, Dear Colleague on Path Forward to Passing the Build Back Better Act Into Law (Dec. 19, 2021), <https://www.speaker.gov/newsroom/121921>.

successfully pass the Senate, and ultimately dictate what legislation must make it through the House unscathed by substantive amendments.¹³⁸

III. RESTRICTIVE RULES AS NECESSARY TOOLS TO COMBAT MINORITY OBSTRUCTION, WITH ROOM FOR REFORM

Increasing use of restrictive rules has allowed the House to pass many important bills, but arguably at the cost of meaningful participation by all representatives. During 2021, every bill debated on the floor under a special rule successfully passed in the House.¹³⁹ However, that efficiency came at a cost—the exclusion of 63% of amendments put forward for consideration, including 78% of amendments with minority backing.¹⁴⁰ If excluding amendments significantly truncated opportunities for lawmakers to advance the policy interests of their constituents, the efficiency of restrictive rules seems to undermine key aspects of representative democracy. However, if the excluded amendments represent nothing more than dilatory political tactics, or if they are ill-suited to the forum of floor debate, restrictive rules may be an important tool for lawmakers to effectively advance the interests of the American people in good legislation. Based on an evaluation of amendments put forward during 2021, I argue that restrictive rules are an effective tool for curbing the minority's dilatory efforts, but that reforms to enhance minority participation both on the floor and at the committee stage are warranted.

A. *Why Restrictive Rules Cause Concern*

The American representative system presupposes that individual legislators have power to influence legislative results.¹⁴¹ While politicians and public policy groups alike frequently emphasize the need for voter engagement with lawmakers, if individual members of Congress have no power to affect legislation, that citizen participation is meaningless.¹⁴² The constitutional structure, which implies that each representative gets one vote, indicates an original intent that lawmakers come to Congress on equal footing, able to advocate for the policies most beneficial to their constituents.¹⁴³ This applies

¹³⁸ See SINCLAIR, *supra* note 4, at 142, 152–55.

¹³⁹ See *infra* note 154.

¹⁴⁰ See *infra* note 154.

¹⁴¹ See generally Garrett & Vermeule, *supra* note 12.

¹⁴² See, e.g., *About Us*, WHEN WE ALL VOTE, <https://whenweallvote.org/about-us/> (last visited Jan. 8, 2023); Margaret White, *Voting: The Great Equalizer in a Polarized Society*, HILL (Sept. 12, 2020, 3:00 PM), <https://thehill.com/blogs/congress-blog/politics/516147-voting-the-great-equalizer-in-a-polarized-society>; Katherine Hamilton, *Does Calling Congress Really Work?*, REPRESENT US, <https://act.represent.us/sign/does-calling-congress-really-work> (last visited Jan. 8, 2023); see also Garrett & Vermeule, *supra* note 12, at 303–04 (noting the importance of both public involvement and open deliberation, specifically in the context of constitutional issues).

¹⁴³ See U.S. CONST. art. I, § 3, cl. 1; *id.* art. I, § 2, cl. 3.

equally to minority-party members, who have the same duty as majority members to represent their constituents in the House. Thomas Jefferson noted that parliamentary rules are critical to defend the minority against “those irregularities and abuses . . . which the wantonness of power is but too often apt to suggest to large and successful majorities.”¹⁴⁴ Though shifts in the political landscape may at times place any single representative in the majority or the minority, the House Rules should further the opportunities of all to participate in making policy. This goal appears, on the surface, to be undermined by restrictive rules.

Restrictive rules substantially limit the number and content of amendments that representatives may submit during floor debate.¹⁴⁵ In so doing, they restrict the power of most representatives to influence debate, and instead shift power to the Rules Committee, acting at the behest of House leaders, to determine the content of major legislation.¹⁴⁶ As Doran notes, some scholars argue that restrictive rules are undemocratic because they “allow[] managers to preempt floor amendments, to foreclose meaningful deliberation among the rank and file, and even to manipulate the floor agenda to secure passage of the managers’ policy preferences.”¹⁴⁷ While our constitutional system requires legislators to act as agents of their constituents by influencing legislative outcomes, restrictive rules abdicate control to House leaders, creating a double-agency relationship between the people and those who truly make policy.¹⁴⁸ However, restrictive rules also increase the ability of the House to get things done on the floor, reducing delays and obstruction by the minority.¹⁴⁹ Because representatives retain the power to reject special rules with which they disagree, the consistent passage of special rules suggests that representatives are making a reasoned trade-off between more amending power on the floor and the possibility for partisan chaos that might ensue from open-rule amending.¹⁵⁰

Doran argues that restrictive rules have “real ‘bite’” in stymying lawmakers’ sincere efforts to introduce amendments because (1) restrictive rules disallow a

¹⁴⁴ THOMAS JEFFERSON, JEFFERSON’S MANUAL OF PARLIAMENTARY PRACTICE 127 (1802).

¹⁴⁵ See Doran, *supra* note 11, at 1387–90.

¹⁴⁶ *Id.* at 1378–82 (outlining the agenda-setting power of leaders under the closed rule to advance their version of legislation even against more popular variations).

¹⁴⁷ *Id.* at 1425.

¹⁴⁸ *Id.* at 1430–31 (“If the rank and file did not delegate such extensive agenda control to managers, constituents attempting to influence their representatives’ legislative actions would stand in a simple principal–agent relationship with the members having direct control over the floor agenda. Instead, under the managerial structure in which the closed rule is embedded, constituents stand in a principal–agent relationship with members who in turn stand in a principal–agent relationship with the managers having direct control over the floor agenda.”); see also Jonathan Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 814 (2021) (“The rise of closed rules has cut off one channel for constituency-centered representation.”).

¹⁴⁹ Doran, *supra* note 11, at 1428, 1431.

¹⁵⁰ *Id.* at 1428–31.

large number of amendments; (2) the rules limit a significant number of amendments from both minority and majority members; and (3) members of both parties constantly protest restrictive rules when they are in the minority.¹⁵¹ Doran focuses primarily on the negative impact that restrictive rules have on members of the majority, as minority members are inherently at a disadvantage no matter the rules of debate.¹⁵² This Note will focus primarily on the impact of restrictive rules on the activity of the minority, who are excluded from participation much more severely than majority members by restrictive rules.¹⁵³ To understand whether restrictive rules have “real ‘bite’” for minority members, I ask: first, were excluded amendments legitimate sources of delay and obstruction, warranting restrictive action? Second, were representatives given opportunity to be heard in other ways throughout the lawmaking process?

In considering these questions, I reviewed data for virtually all measures which were considered under a special rule during 2021, the first year of the 117th Congress.¹⁵⁴ Further, I reviewed the amendment content of ten bills representing a spectrum of laws put forward during 2021.¹⁵⁵ Though this dataset represents a period in which only one political party held power, the consistent use of restrictive rules across party lines is well documented.¹⁵⁶ This Part will

¹⁵¹ *Id.* at 1398–1400.

¹⁵² *See id.* at 1397, 1399.

¹⁵³ *See infra* note 168 and accompanying text; *see also* THOMAS JEFFERSON, *First Inaugural Address* (Mar. 4, 1801), in *THE PAPERS OF THOMAS JEFFERSON*, Vol. 33, 148–52 (Princeton Univ. Press 2006) (“All too will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression.”).

¹⁵⁴ I aggregated this data based on the House Rules Committee’s publication of special rules and submitted amendments, supplemented by data on the floor activity of each bill from the *Congressional Record*, as indexed on congress.gov. The dataset excludes House consideration of Senate concurring resolutions and Senate amendments to House bills, most of which were self-executed. It also excludes a portion of H.R. Res. 504 which made in order H.R. 3684 for general debate, as that bill was later considered further under a structured rule. *See Legislation: Special Rules*, COMM. ON RULES, <https://rules.house.gov/legislation/special-rules> (last visited Jan. 8, 2023); CONGRESS.GOV, <https://www.congress.gov> (last visited Jan. 8, 2023). Data on file with the author.

¹⁵⁵ These bills include: For the People Act of 2021, H.R. 1, 117th Cong. (2021); Build Back Better Act, H.R. 5376, 117th Cong. (2021); Colorado Wilderness Act of 2021, H.R. 803, 117th Cong. (2021); Bipartisan Background Checks Act of 2021, H.R. 8, 117th Cong. (2021); National Apprenticeship Act of 2021, H.R. 7, 117th Cong. (2021); Family Violence Prevention and Services Improvement Act of 2021, H.R. 2119, 117th Cong. (2021); Farm Workforce Modernization Act of 2021, H.R. 1603, 117th Cong. (2021); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021); PUMP for Nursing Mothers Act, H.R. 3110, 117th Cong. (2021); Access to Counsel Act of 2021, H.R. 1573, 117th Cong. (2021). In choosing these bills, I attempted to cover a range of bill lengths, volume of submitted amendments, bill topics, and perceived controversy level.

¹⁵⁶ *See supra* notes 121–124 and accompanying text.

proceed to consider (1) an overview of the impact of restrictive rules on the minority during 2021; (2) key indicators that many minority amendments were dilatory; (3) other opportunities during the lawmaking process for minority members to participate; and (4) implications for reform.

B. *Overview of the Impact of Restrictive Rules on the Minority During 2021*

During 2021, the Rules Committee put forward forty-three closed rules, twenty-four structured rules, and no open or modified-open rules.¹⁵⁷ No rule passed out of the Rules Committee with more than nine votes—matching the nine Democratic members of the Committee—and no special resolution received more than 222 votes on the floor, the number of Democratic representatives.¹⁵⁸ Sixty-six of the sixty-seven bills for which a special resolution was issued ultimately passed the House.¹⁵⁹ Representatives submitted a total of 3,482 amendments for these sixty-seven bills.¹⁶⁰ Of those, minority Republicans submitted 1,954, or 56% of the total, while Democrats submitted 1,164 amendments, or 33% of the total.¹⁶¹ Bipartisan coalitions of lawmakers submitted an additional 364 amendments, or 10% of the total.¹⁶² Importantly, these are only those amendments received by the Rules Committee; for fourteen bills, lawmakers submitted no amendments.¹⁶³ One would expect that the consistent use of restrictive rules might deter lawmakers from submitting many amendments in the first instance.

During this period, the Rules Committee made in order for floor debate 14% of the amendments submitted by the minority, compared to 66% of majority amendments and 65% of bipartisan amendments.¹⁶⁴ This metric, on its face, suggests the incredibly biased exclusion of minority amendments. However, Republicans submitted 68% more amendments than Democrats.¹⁶⁵ On some bills, Republicans submitted more than three times as many amendments as their Democratic counterparts.¹⁶⁶ Because majority-party members have more

¹⁵⁷ See *supra* note 154.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* The final bill, H.R. 4505, was never called up for floor debate. See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See, e.g., H.R. 4502—[*Labor, Health and Human Services, Education, Agriculture, Rural Development, Energy and Water Development, Financial Services and General Government, Interior, Environment, Military Construction, Veterans Affairs, Transportation, and Housing and Urban Development Appropriations Act*], COMM. ON RULES, <https://rules.house.gov/bill/117/hr-PIH-approps-2021> (last visited Jan. 8, 2023); H.R. 842—*Protecting the Right to Organize Act of 2021*, COMM. ON RULES,

control over the content of the bill at the committee stage, and thus are more likely to be aligned with the committee version than lawmakers in the minority, some disparity in amendment submissions is expected.¹⁶⁷ However, the imbalance in submitted amendments does not fully account for the differential rate at which amendments were made in order. Minority-party members backed only 40% of the amendments made in order for floor debate, and only 21% were backed *solely* by Republicans—an outcome still somewhat skewed in favor of the majority.¹⁶⁸

Eighty-nine percent of amendments considered on the floor under structured rules during 2021 passed.¹⁶⁹ Among amendments submitted by only Republicans, 56% of those put to a floor vote passed.¹⁷⁰ Bipartisan amendments passed overwhelmingly, with only two voted down during 2021, a 99% success rate.¹⁷¹ The overall tendency of amendments to pass suggests a leadership philosophy of preserving floor time primarily for amendments that are expected to succeed. Modern floor amending, as framed by the Rules Committee, may not be about making major choices that fundamentally change a bill's direction, but rather about making minor changes that align with the spirit of the bill originally proposed.¹⁷² Where minority amendments do not align with the goals of the underlying bill, and are likely doomed to fail anyway, restrictive rules sift them out before the floor stage.¹⁷³

House Bill 803, the Colorado Wilderness Act of 2021, offers a good counterexample.¹⁷⁴ In that case, minority members backed 50% of all amendments debated on the floor.¹⁷⁵ Of twenty-nine amendments made in order, twelve were backed exclusively by Republicans.¹⁷⁶ However, eleven of those twelve

<https://rules.house.gov/bill/117/hr-842> (last visited Jan. 8, 2023); *H.R. 803—Colorado Wilderness Act of 2021*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-803> (last visited Jan. 8, 2023) [hereinafter *H.R. 803*, COMM. ON RULES].

¹⁶⁷ See SINCLAIR, *supra* note 4, at 17–18.

¹⁶⁸ See *supra* note 154.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See generally SINCLAIR, *supra* note 4, at 268–69 (discussing the role of floor debate in the deliberative process for a piece of legislation); Don Wolfensberger, *The Rules Committee by the Numbers*, HILL (Jan. 4, 2022, 1:00 PM), <https://thehill.com/blogs/congress-blog/politics/588185-the-rules-committee-by-the-numbers> (noting “the precept that major legislation should not be substantially rewritten on the House floor”).

¹⁷³ See Doran, *supra* note 11, at 1424 (noting that the majority can routinely defeat minority amendments).

¹⁷⁴ See generally *H.R. 803*, COMM. ON RULES, *supra* note 166.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

failed.¹⁷⁷ In this case, the structured rule allowed more minority participation than most restrictive rules, but that participation did not affect the substantive result.¹⁷⁸ A more narrowly tailored structured rule, which accounted for the likelihood of floor success, may have seemed less democratic, but would still have led to the same ultimate bill text. Of course, the very existence of the restrictive rule places great power in the hands of the gatekeepers: they must predict the outcome of floor votes, and they thereby shape the outcome of floor votes. The fact that leaders can predict the choices of the rank-and-file does not mean that House rules should empower leaders to deny their followers the opportunity to choose.¹⁷⁹ Ultimately, however, understanding the content of rejected minority amendments is crucial to understanding whether this gatekeeping function in fact impedes democratic participation.

C. Key Indicators That Many Minority Amendments During 2021 Were Dilatory

A deep dive into minority-backed amendments during 2021 reveals that many were likely dilatory.¹⁸⁰ Scholars have long connected the rise in restrictive rules to the need for increased managerial control after 1970s reforms led to increased amending activity on the floor.¹⁸¹ They argue that dilatory and politically motivated efforts by the minority party to obstruct the majority's legislative agenda, both by stalling at key points and by forcing the majority to face uncomfortable votes, made restrictive rules necessary.¹⁸² Further, minority amendments, even when submitted in good faith, may be a waste of precious floor time if they are consistently unable to garner the votes needed to pass.¹⁸³

¹⁷⁷ See 167 CONG. REC. H737-57 (daily ed. Feb. 26, 2021) (describing debate and voting on amendments); *H.R. 803, COMM. ON RULES*, *supra* note 166 (listing the party affiliation of each amendment proponent).

¹⁷⁸ See 167 CONG. REC. H737-57 (daily ed. Feb. 26, 2021) (describing debate and voting on amendments); *H.R. 803, COMM. ON RULES*, *supra* note 166 (listing the party affiliation of each amendment proponent).

¹⁷⁹ The Stamp Act, for instance, was oppressive, not because American colonists disliked paying a tax for tea, but because they were denied the opportunity to choose to tax their tea. See *On This Day: "No Taxation Without Representation!"*, CONST. CTR., <https://constitutioncenter.org/blog/no-taxation-without-representation#:~:text=The%20Stamp%20Act%20Congress%20met,lacked%20representation%20in%20British%20Parliament> (last visited Jan. 8, 2023).

¹⁸⁰ See *infra* notes 187–209 and accompanying text.

¹⁸¹ See SINCLAIR, *supra* note 4, at 140–41.

¹⁸² See *id.* at 140–41, 268–69.

¹⁸³ See Doran, *supra* note 11, at 1424–25. Doran notes that:

Regular use of the closed rule . . . does not materially change the position of the minority within a majoritarian institution. . . . [T]he majority could routinely defeat unwanted floor amendments offered by the minority even in the absence of the closed rule. In the

House precedents allow the Speaker to “rule . . . out as dilatory” motions that “are offered for the purpose of delaying the business of the House,” with the motive of the offering representative persuasive but not dispositive in determining whether amendments are dilatory.¹⁸⁴ It is impossible to directly ascertain the true motivations of each minority member in offering amendments.¹⁸⁵ Further, amendments can simultaneously reflect representatives’ sincerely held policy beliefs and represent efforts to obstruct majority efforts.¹⁸⁶

The continued use of restrictive rules begs the question—does the content of recent amendments support their exclusion as dilatory, or were the amendments sincere efforts by minority members to participate in the process of lawmaking? Patterns in the amendments offered during 2021 suggest that a meaningful share of minority amendments were dilatory.¹⁸⁷ Four major signals indicate that representatives submitted amendments for delay or obstruction: (1) the disproportionate volume of amendments submitted by a select few representatives; (2) the emphasis of many minority amendments on deletions of entire bill provisions; (3) the pattern of specific types of amendments subtly directed at undermining the bill; and (4) the number of amendments related to often-unrelated, hot-button issues.

First, the volume of amendments put forward by a small group of representatives suggests that many minority amendments were dilatory. One representative, Scott Perry, backed 223 amendments during 2021, 127 of which lacked any co-sponsors.¹⁸⁸ His total almost doubled the 113 amendments put

House, the floor position of the minority is weak because the majority has more members, not because the majority uses the closed rule.

Id.

¹⁸⁴ 8 CLARENCE CANNON, CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ch. 254, at 414–15 (1935).

¹⁸⁵ See STEVEN S. SMITH, CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE 12, 169 (Brookings Inst. Press 1989).

¹⁸⁶ For example, Representative Andy Biggs of Arizona twice submitted an amendment to H.R. 3110, the PUMP for Nursing Mothers Act, nullifying executive orders which put in place a vaccine mandate. See *H.R. 3110—PUMP for Nursing Mothers Act*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-3110> (last visited Jan. 8, 2023). The amendments were clearly not germane to the bill at issue, which expanded protections for new mothers who needed to breastfeed at work. See *id.*; HOUSE RULES, *supra* note 35, r. XVI(7). As such, the submission of the amendments seems more likely to be a political ploy or a distraction than a meaningful effort to make policy. However, it is simultaneously true that Representative Biggs holds strong beliefs about vaccine mandates and seems committed to enacting federal policy to prevent them. See Press Release, Andy Biggs, Representative, House of Representatives, Congressman Biggs Introduces Two COVID-19 Vaccine-Related Bills (Jan. 25, 2021), <https://biggs.house.gov/media/press-releases/congressman-biggs-introduces-two-covid-19-vaccine-related-bills>.

¹⁸⁷ See *supra* notes 154–155.

¹⁸⁸ See *supra* note 154.

forward by Representative Andy Biggs, who submitted the next-highest number of amendments.¹⁸⁹ Further, Perry submitted more than three times the number of amendments submitted by the most prolific Democrat, Representative Veronica Escobar.¹⁹⁰ Perry's amendments represent a full 11% of all Republican amendments submitted during 2021, while the top five amenders represent more than a third of all Republican amendments.¹⁹¹ Neither the Constitution nor the Rules suggest any limits on an individual representative's efforts to amend or influence legislation.¹⁹² However, if restrictive rules are to be criticized for restricting the ability of *all* members to participate, open rules may lead to the same result: a small minority of members recommending policy changes on the floor.¹⁹³

Second, a large volume of amendments focused on striking bill provisions, an indicator that amendments were intended to undermine, rather than enhance, a proposed bill. For example, Representative Scott Perry submitted more than thirty amendments, with no co-sponsors, to the Build Back Better Act, with each amendment striking a full section or subtitle of the bill.¹⁹⁴ Similarly, 38% of Republican amendments submitted for the For the People Act were deletions.¹⁹⁵ Deletions are an important method of amendment, and under House precedent they "can not [sic] ordinarily be ruled out of order as not germane."¹⁹⁶ However, taken together, such a critical mass of amendments to strike points at an intention to undermine the legislation, rather than "perfect" it, as amendments are designed to do.¹⁹⁷ Many such amendments are likely dilatory.

Third, many amendments included provisions that subtly undermined the implementation of a bill's key provisions, without specifically deleting them, suggesting an intent to obstruct rather than sincerely amend. One such common amendment adds a condition to the enactment of the bill or a portion of the bill. For example, eleven out of fifty-one Republican amendments submitted on House Bill 803 imposed some condition on implementation, such as "delay[ing] implementation of [the bill] until the U.S. supplies less than 30% of its critical

¹⁸⁹ *See id.*

¹⁹⁰ *See id.* Escobar ranked nineteenth overall among representatives for volume of amendments submitted. *Id.*

¹⁹¹ *See id.*

¹⁹² *See generally* U.S. CONST. art. I; HOUSE RULES, *supra* note 35.

¹⁹³ *Cf.* Tom Cole, *Keeping Democrats Accountable*, CONGRESSMAN TOM COLE (Jan. 14, 2019), <https://cole.house.gov/media-center/weekly-columns/keeping-democrats-accountable> (arguing that closed rules issued by Democrat-controlled Rules Committee prevent all members from participating in policymaking).

¹⁹⁴ *See H.R. 5376—Build Back Better Act*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-5376> (last visited Jan. 8, 2023) [hereinafter *H.R. 5376*, COMM. ON RULES].

¹⁹⁵ *Supra* notes 154–155; *H.R. 1*, COMM. ON RULES, *supra* note 88.

¹⁹⁶ CHARLES W. JOHNSON ET AL., *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 19–22 (2017).

¹⁹⁷ *See id.* at 19.

uranium needs from countries hostile to the U.S.”¹⁹⁸ Other amendments eliminate funding for given sections, either directly or by adding prerequisites to the grant of funds, without actually eliminating the underlying provisions.¹⁹⁹ Here again, conditional legislation and limits on appropriated funds are important policymaking tools.²⁰⁰ However, in the context of House polarization during 2021, the volume of amendments that, in practice, might gut major bill provisions suggests an effort to delay the legislative efforts of the majority.

Finally, the volume of amendments targeting “hot-button” issues suggests that many were dilatory. Though everyone’s “buttons” are arguably different, I include here amendments related to abortion, critical race theory, vaccinations, mask mandates, and immigration (when outside of the context of an immigration-focused bill), each of which arose several times. The Build Back Better Act included eleven such amendments, out of 112 submitted by minority members; the Family Violence Prevention and Services Improvement Act of 2021 included four, out of six.²⁰¹ Importantly, these amendments likely reflect the sincerely held policy views of their proponents, who may genuinely hope they pass.²⁰² However, when such views are those of the minority, they are virtually doomed to fail on a floor vote.²⁰³ Further, such amendments force majority opponents unnecessarily to take a public position on a divisive issue.²⁰⁴

¹⁹⁸ See *H.R. 803*, COMM. ON RULES, *supra* note 166 (amendment 28).

¹⁹⁹ See *H.R. 5376*, COMM. ON RULES, *supra* note 194 (summarizing that amendment 17 “prohibits funds from being distributed if the Department of the Treasury determines that this Act will result in an increase in interest rates above 5%” and amendment 81 “rescinds all appropriated funds in the bill”); *H.R. 1280*, COMM. ON RULES, *supra* note 94 (amendment 11 “strikes ‘such sums clause’ from programs to eliminate racial profiling by state and local law enforcement agencies”).

²⁰⁰ See generally *Cargo of the Brig Aurora v. U.S.*, 11 U.S. 382, 388 (1813) (“[W]e can see no sufficient reason, why the legislature should not exercise its discretion . . . either expressly or conditionally, as their judgment should direct.”); VICTORIA L. KILLION, CONG. RSCH. SERV., R46827, *FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS’S SPENDING POWER* 14 (2021).

²⁰¹ See *H.R. 5376*, COMM. ON RULES, *supra* note 194; *H.R. 2119—Family Violence Prevention and Services Improvement Act of 2021*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-2119> (last visited Jan. 8, 2023) [hereinafter *H.R. 2119*, COMM. ON RULES]. I include from the Build Back Better Act amendments 79 and 80 (abortion); 93 (critical race theory); 1, 90, 91, 97, 100, and 104 (immigration); and 64 and 88 (vaccination). From the Family Violence Prevention and Services Improvement Act of 2021, I include amendments 12, 14, and 15 (abortion); and 16 (vaccination).

²⁰² See CANNON, *supra* note 184, at 415 (evidence of motive persuasive in determining whether amendment should be excluded as dilatory).

²⁰³ See Doran, *supra* note 11, at 1424 (“[T]he majority could routinely defeat unwanted floor amendments offered by the minority even in the absence of the closed rule.”).

²⁰⁴ See SINCLAIR, *supra* note 4, at 33–34. Sinclair notes:

Majority party members vote for [restrictive] rules not only because the expectation of supporting your party on procedural votes is now very strong but also because the amendments at issue are often the ones the member believes to be bad public policy but

These represent topics most likely to stir up media attention, galvanize party support, and score political points, though they are used as mere distractions from the bills at hand.²⁰⁵ Particularly in the era of social media, when soundbites of televised hearings can easily go viral, restrictive rules may be a necessary check on members' desire to use the House floor as a vessel for campaigning rather than lawmaking.²⁰⁶ In theory, many of these amendments could be challenged under the House germaneness rule.²⁰⁷ However, as they are often proposed on large-scale reconciliation or budget authorization bills covering many divergent topics, the germaneness rule may not block them in practice.²⁰⁸ Given their polarizing effect and near-zero prospects for floor success, these "hot-button" amendments, too, are primarily dilatory in nature.

In sum, the over-representation of a select few representatives in submitted minority amendments, as well as consistent patterns of amendments to strike bill sections, amendments to block implementation, and amendments emphasizing controversial issues, suggest that many minority amendments are dilatory. Critically, many rejected amendments lack any of these hallmarks. Many amendments showcase sincere efforts to alter and improve the proposed legislation.²⁰⁹ However, the amendments also highlight striking differences in the policy preferences of the two political parties.²¹⁰ For instance, the

politically difficult to vote against. (For Democrats, amendments on such hot-button issues as abortion and guns are often problematic; for Republicans, amendments that increase spending on or benefits under popular domestic programs are problematic.)

Id.

²⁰⁵ See OLESZEK, *supra* note 16, at 26–27.

²⁰⁶ See Patrick Van Kessel et al., *Congress Soars to New Heights on Social Media*, PEW RSCH. (July 16, 2020), <https://www.pewresearch.org/internet/2020/07/16/congress-soars-to-new-heights-on-social-media/>; see also Luke Broadwater & Catie Edmonson, *A.O.C. Unleashes a Viral Condemnation of Sexism in Congress*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/07/23/us/alexandria-ocasio-cortez-sexism-congress.html>; Adrian Belmonte, *Rep. Katie Porter Describes How Her Famous Whiteboard Became 'a Teaching Tool'*, YAHOO! FIN. (Apr. 27, 2022), <https://finance.yahoo.com/news/rep-katie-porter-why-she-uses-whiteboard-180539689.html>.

²⁰⁷ See HOUSE RULES, *supra* note 35, r. XVIII(5)(a).

²⁰⁸ See generally Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 (1999).

²⁰⁹ See, e.g., *H.R. 1*, COMM. ON RULES, *supra* note 88 (describing amendment 113, which "[a]dds the Prioritization of Election Mail, which requires the USPS to prioritize election mail over all other types of mail"); *H.R. 1603—Farm Workforce Modernization Act of 2021*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-1603> (last visited Jan. 8, 2023) (describing amendment 10, which "[r]emoves caps on year-round H-2A visas, simplifies the wage rate calculations, and makes other changes to ensure agricultural producers have adequate access to a legal workforce"); *H.R. 1280*, COMM. ON RULES, *supra* note 94 (describing amendment 9, which "[e]stablishes grant programs to promote the use of less than lethal force technologies and de-escalation techniques by law enforcement officers").

²¹⁰ Compare, for instance, amendments 2, 4, 38, 40, 41 and 49, submitted by Democrats, all of which add new regions to be designated as public lands, with amendments 5, 6, 8, 11,

amendments offered on House Bill 803, which designated major portions of Colorado as public lands, suggest what most everyone already knows—that Republicans and Democrats simply view environmental and public lands issues very differently.²¹¹ The use of a structured rule in that case—which rejected forty amendments backed by minority members—may reflect the view of House leaders that a floor debate between 435 members was not the right forum to hash out those differences at great length.²¹² Though restrictive rules do bar a large portion of minority amendments from floor consideration, a shift toward more open rules, without other major changes, seems unlikely to affect ultimate bill outcomes, but might allow these obstructive amendments to wreak havoc on the House floor. Though imperfect, restrictive rules are justified and necessary to sift out the many dilatory amendments put forward by the minority.

D. *Overall Participation of Minority Representatives in the Lawmaking Process*

Though restrictive rules necessarily reduce the minority’s opportunity to submit their own floor amendments, minority members retain opportunities to participate in other ways. In some cases, during 2021, the Rules Committee excluded from floor consideration amendments that had already been proposed and rejected in committee.²¹³ Additionally, while closed rules naturally excluded *all* amendments, including those of the minority, twenty-two out of

12, 17, 19, 20, 22, 26, 27, 28, 32, 43, 50, 56, and 60, submitted by Republicans, which either directly reduce areas designated for protection or add conditions to the expansion of federal lands. *See H.R. 803*, COMM. ON RULES, *supra* note 166.

²¹¹ Compare Exec. Order No. 14008, 86 Fed. Reg. 7619, at 7627 (Jan. 27, 2021) (laying out the goal of “conserving at least 30 percent of our lands and waters by 2030”), with *H.R. 803*, COMM. ON RULES, *supra* note 166 (describing amendment 18, backed by four Republican representatives, which sought to nullify part of Executive Order 14008, and several other amendments which sought to prevent the additions of public lands via the Colorado Wilderness Act).

²¹² *See H.R. 803*, COMM. ON RULES, *supra* note 166; *see also* Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1869 (2011) (“With 435 coequal members, an open-amendment process in the House can be extremely time-consuming at best and hopelessly chaotic at worst.”).

²¹³ Compare *H.R. 447—National Apprenticeship Act of 2021*, COMM. ON RULES, <https://rules.house.gov/bill/117/hr-447> (last visited Jan. 8, 2023) (amendment 11), with *H.R. REP. NO. 116-567*, at 43 (2020) (amendment offered by Representative Fred Keller). Compare *H.R. 2119*, COMM. ON RULES, *supra* note 201 (amendments 12, 14, and 15), with *H.R. REP. NO. 117-126*, at 31–32 (2021) (amendments offered by Representatives Julia Letlow and Mary Miller). In many cases, virtually the same bill had been reported from committee and passed the House in a previous Congress, and as such, hearings and mark-up were not held again. Compare 167 CONG. REC. H275 (daily ed. Feb. 2, 2021) (noting the reporting of a special rule to consider H.R. 447, which was not considered in committee), with 166 CONG. REC. H5728 (daily ed. Nov. 9, 2020) (noting the discharge of H.R. 8734 from the Judiciary Committee with an accompanying report).

twenty-four structured rules reported during 2021 allowed at least one Republican or bipartisan amendment.²¹⁴ Further, on the floor, minority members could modify bills by debating and voting on amendments, with many blocks of amendments passing on voice vote or receiving in excess of 300 votes, both suggesting solid bipartisan support.²¹⁵ Similarly, minority members retained the ability to support or oppose the bills themselves, regardless of the rules under which they were debated. Of sixty-six bills debated under closed or structured rules during 2021, fifty passed with at least one Republican vote, while twenty-three had at least ten minority votes.²¹⁶ Even with restrictive rules, these numbers suggest important opportunities for minority members to participate.

Additionally, bipartisan amendments were overwhelmingly successful during 2021.²¹⁷ The Rules Committee made in order 65% of bipartisan amendments, and 99% of debated bipartisan amendments passed.²¹⁸ Though the majority naturally has a great deal of power to enable participation by all members, minority members also have a role to play in reaching across the aisle. Minority members who want their voices to be heard would do well to develop bipartisan support for their amendments at the outset.

Outside of the floor setting, however, other data suggests that minority power to participate is declining. The minority often noted during 2021 that bills were reported without full hearings or mark-up, or with the text of the bill given to committee members at the last minute.²¹⁹ The minority members didn't make that up—51% of special rules were for measures that had not been reported by a committee.²²⁰ While in some instances these bills had been considered and passed during earlier Congresses, the lack of full hearing and mark-up with existing committee membership signals a lack of participation by all members.²²¹ Frequently, unreported bills seem to originate from perceived

²¹⁴ *Supra* note 154.

²¹⁵ *See, e.g.*, 167 CONG. REC. H1300-02 (daily ed. Mar. 10, 2021) (passing on voice vote *en bloc* amendments to H.R. 8); 167 CONG. REC. H997-99 (daily ed. Mar. 2, 2021) (passing on voice vote *en bloc* amendments to H.R. 1); 167 CONG. REC. H4260-61 (daily ed. July 29, 2021) (passing 371 to 55 *en bloc* amendments to H.R. 4502).

²¹⁶ *See supra* note 154.

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ *See* H.R. REP. NO. 117-130, at 53, 120 (2021) (describing rapid processes in Agriculture Committee and Committee on Education and Labor for reviewing the Build Back Better Act); *Rules Committee Meeting on H.R. 447*, COMM. ON RULES, at 2:19:25 (Feb. 2, 2021), <https://rules.house.gov/video/rules-committee-meeting-hr-447> (highlighting data from the previous session of Congress on amendments made in order and skipped mark-up sessions).

²²⁰ *See* WOLFENBERGER, *supra* note 16, at 10.

²²¹ *Compare* 167 CONG. REC. H275 (daily ed. Feb. 2, 2021) (noting the reporting of a special rule to consider H.R. 447, which was not considered in committee), *with* 166 CONG. REC. H5728 (daily ed. Nov. 9, 2020) (noting the discharge of H.R. 8734, essentially the same bill, from the Judiciary Committee with an accompanying report the previous year).

emergencies, and to center around closed-door leader negotiations between the House, Senate, and President.²²² In such cases, restrictive rules are just one part of a broad strategy to pass legislation quickly while holding together various party factions.²²³ However, though restrictive rules are needed to control minority obstruction on the floor, the total exclusion of the minority elsewhere in the process raises cause for alarm.

E. *Implications for Reform*

A deeper understanding of the amendments rejected under restrictive rules points to several avenues for reform: (1) imposing a requirement that minority amendments make up a set portion of amendments considered under structured rules; (2) guaranteeing floor consideration to all amendments with bipartisan support; and (3) increasing emphasis on thorough consideration in committee.

First, House leaders could require that some proportion—perhaps 50%—of amendments made in order have minority support. Effective bipartisan participation should not be measured by comparing the proportion of submitted minority amendments made in order (e.g., 14% of submitted Republican amendments during 2021) to the proportion of submitted majority amendments made in order (e.g., 66% of submitted Democratic amendments during 2021), as during 2021, Republicans submitted 68% more amendments than Democrats overall.²²⁴ If the rules required the majority to make in order the same percentage of minority amendments as majority amendments, the minority would be inappropriately incentivized to submit far and away more amendments than the majority, in an effort to delay and force uncomfortable votes, or simply to make the majority look like obstructionists. Thus, the more helpful approach would be to mandate that 50% of amendments considered on the floor have minority support (including both exclusively minority-backed amendments and bipartisan ones). Current practice is not too far off from that goal—during 2021, 40% of amendments considered were backed by at least one member of the minority party.²²⁵ If formalized as a rule, a requirement that 50% of amendments made in order have minority backing could lead to a perverse incentive, driving majority leadership to limit majority amendments in an effort to stifle the minority. However, under such a regime, majority members would have sufficient incentive to reject such stifling rules that balance might be achieved between majority and minority opportunity to amend.²²⁶ Alternatively, such an approach could lead to more efforts by the majority to amend outside of the

²²² See OLESZEK, *supra* note 16, at 26–29.

²²³ See *id.*

²²⁴ See *supra* note 154.

²²⁵ See *id.*

²²⁶ See Doran, *supra* note 11, at 1384–85 (discussing the role of rank-and-file majority members in ratifying special rules).

floor, behind closed doors, undermining the goal of bipartisan participation.²²⁷ As such, there may not be a perfect “ideal” level of allowed amendments—and perhaps 40% is an appropriate equilibrium.

A second reform would require that the Rules Committee make in order all amendments with bipartisan backing. Currently, when made in order, bipartisan amendments pass overwhelmingly.²²⁸ However, the Rules Committee excluded about a third of bipartisan amendments during 2021.²²⁹ Existing Rules Committee protocol provides that amendments co-sponsored by at least twenty Republicans and twenty Democrats receive “preference to be made in order for debate on the House Floor.”²³⁰ Few amendments can make it over this hurdle, which does not even guarantee consideration on the floor.²³¹ A guarantee that amendments with even some bipartisan support receive a floor vote would allow trailblazing members a path to the floor, even when the House Speaker did not favor an amendment, shifting power back to all representatives.²³² Further, such a change would encourage members of both parties to seek bipartisan common ground, as such action would meaningfully increase the likelihood of their ideas reaching the floor.²³³ Here, however, are still opportunities for abuse, as minority members may be able to gain bipartisan support on amendments that undermine broad compromises and, thus, the success of important legislation. For example:

²²⁷ See WOLFENBERGER, *supra* note 115, at 10 (discussing the unintended consequences of House reforms, including increased back-room negotiations); see also Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1974 (2020). Gould states:

One clear trend in the contemporary Congress is the frontloading of the legislative process, which has shifted parliamentary decision-making away from the floor and toward the advisory process. In the House, where the majority-party leadership carefully plans out floor proceedings in advance, leadership solicits parliamentary advice and works through any possible roadblocks well before legislation reaches the floor. The House Rules Committee uses closed or structured rules . . . to avoid most procedural disputes over amendments.

Gould, *Law Within Congress*, *supra*.

²²⁸ See *supra* note 171 and accompanying text.

²²⁹ See *supra* note 164 and accompanying text.

²³⁰ *Rules Committee Protocol*, COMM. ON RULES, <https://rules.house.gov/rules-and-resources/rules-committee-protocol> (last visited Jan. 8, 2023).

²³¹ See generally *supra* note 154. Most amendments garner only a few co-sponsors, if any. *Id.*

²³² Compare *H.R. 1*, COMM. ON RULES, *supra* note 88 (listing bipartisan amendment 55, which requires members of Congress to place investments in a blind trust to avoid conflicts of interest, which was not made in order), with Dan Mangan, *House Speaker Nancy Pelosi Opposes Banning Congress Members from Owning Individual Stocks: ‘We’re a Free Market Economy,’* CNBC (Dec. 15, 2021, 4:19 PM), <https://www.cnbc.com/2021/12/15/house-speaker-nancy-pelosi-opposes-banning-stock-buys-by-congress-members.html> (describing Speaker Nancy Pelosi’s opposition to limitations on stock trading by members of Congress).

²³³ See *supra* note 164 and accompanying text (noting that during 2021, majority amendments were made in order only 66% of the time).

the popular interpretation of the addition of “sex” to Title VII is that “it was the result of a deliberate ploy by foes of the bill to scuttle it.” . . . “[B]itter opponents of the job discrimination title . . . decided to try to load up the bill with objectionable features that might split the coalition supporting it.”²³⁴

However, that attempt failed, and Congress ultimately adopted the more progressive version of the bill, sex included.²³⁵ It seems the rare exception where a bipartisan amendment could truly operate as a poison pill for a bill. Ultimately, a guarantee that bipartisan amendments be made in order may be a modest but positive reform to restrictive rules.

Finally, because restrictive rules are often necessary to channel floor activity and prevent minority delays, reformers should focus instead on improving deliberation at the committee stage. As Barbara Sinclair notes:

The power of Congress, especially that of the House, in the political system depends on its specialized, expert committees. The issues and problems with which the federal government deals are too numerous, diverse, and complex for any one person to master. For a relatively small body such as Congress to hold its own vis-à-vis the executive branch and outside interests, it must divide labor and rely on its members’ expertise in their areas of specialization.²³⁶

Modern “unorthodox” congressional practices “were a response to the decline in the committees’ autonomy and power”; however, these same practices “have further eroded the committees’ influence, at least to some extent.”²³⁷ Sinclair documents a string of “seemingly special political circumstances,” beginning in the mid-1990s, during which House leaders repeatedly skipped the deliberative process in committees.²³⁸ Wolfensberger notes that during 2021, 51% of bills considered under a special rule were unreported by committee.²³⁹ Other scholars agree that “[s]ince the mid-1990s the minority party has to a large extent been excluded from decision making at the prefloor [sic] . . . stage on the most highly visible major legislation in the House.”²⁴⁰ Though a deep exploration of the role

²³⁴ Jo Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 MINN. J.L. & INEQ. 163, 164 (citations omitted) (noting the popular interpretation of the passage of Title VII among political scientists, but also refuting the notion that sex made it into the bill by accident).

²³⁵ See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703(a)(1), 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2(a)(1) (1991)).

²³⁶ See SINCLAIR, *supra* note 4, at 264–65.

²³⁷ *Id.* at 264.

²³⁸ *Id.* at 265–67.

²³⁹ See WOLFENBERGER, *supra* note 16, at 10–12. This represents a sharp increase from past Congresses; Wolfensberger notes that unreported bills made up between 21% and 37% of bills considered under special rules between 2005 and 2020. See *id.* at 10.

²⁴⁰ SINCLAIR, *supra* note 4, at 267; see also Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1796, 1800, 1807–09 (2015) (“More

of committees is beyond the scope of this Note, reforms that might encourage a thorough and deliberative committee-stage process are numerous. Abbe R. Gluck highlights the role of overlapping committee jurisdiction in driving complex issues out of committees and into the hands of coordinating leaders who lack necessary policy expertise.²⁴¹ Accordingly, renewed efforts to reduce House committees' jurisdictional overlap may be in order to allow the traditional one-committee referral process to produce legislation without unorthodox intervention.²⁴² Further, whereas public scrutiny as to committee deliberation may reduce the willingness of parties to negotiate openly, decreased transparency may allow committees to more effectively strike the compromises necessary for successful legislation, without requiring leadership intervention.²⁴³ Ultimately, the history of congressional reform has been cycles of power flowing back and forth between committees and party leadership.²⁴⁴ Though restrictive rules necessarily give power to House leaders to shape floor debate, the House must shift some power back to the rank and file in committees to deliberate, debate, and craft the legislation that is reported to the floor.

CONCLUSION

Restrictive special rules have arisen for a reason—out of the need of majority leaders in the House to craft some order on the House floor, despite increased polarization and interest in floor participation. A review of the minority's efforts to submit amendments shows that many submitted amendments are dilatory, and likely a waste of time for the full body of the House. Given the incentives of the minority to delay and obstruct, restrictive rules are a necessary tool for House leaders and the Rules Committee. Despite these restrictions, minority members retain meaningful opportunities to participate in floor debate, particularly when they engage in bipartisan efforts. However, the use of restrictive rules amplifies the need for bipartisan participation elsewhere. Congress should consider modest reforms to both moderate the potency of restrictive rules and to ensure minority participation at the committee stage. Such reforms include a requirement that minority amendments make up a set percentage of amendments debated on the floor; a guarantee that bipartisan amendments be made in order by the Rules Committee; an effort to reform House committee jurisdiction to increase the power of committees; and a re-evaluation of committee transparency rules to foster good faith participation by all lawmakers in

than 40% of enacted statutes did not go through the committee process in *either* chamber, but proceeded directly from the floor or where shepherded through by party leadership or the White House. . . . Legislation bypassed committees much more in the 1990s and 2000s than in the preceding decades.”).

²⁴¹ See Gluck et al., *supra* note 240, at 1826–27, 1831, 1838, 1844–45.

²⁴² See *id.* at 1826–27, 1831, 1838, 1844–45 (2015); see also SINCLAIR, *supra* note 4.

²⁴³ See generally Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 29–38 (2018).

²⁴⁴ See *supra* Section II.D.

negotiating public policy. The Rules Committee's gatekeeping function is likely to persist long into the future—but with reasonable changes, that role need not exclude the good faith participation of representatives across party lines.