105TH CONGRESS
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HOUSE OF REPRESENTATIVES
REPORT
105–50

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WITH RESPECT TO TAX LIMITATIONS

APRIL 10, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. CANADY of Florida, from the Committee on the Judiciary, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.J. Res. 62]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 62) proposing an amendment to the Constitution of the United States with respect to tax limitations, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution as amended do pass.

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The amendment is as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. Any bill, resolution, or other legislative measure changing the internal revenue laws shall require for final adoption in each House the concurrence of two-thirds of the Members of that House voting and present, unless that bill is determined at the time of adoption, in a reasonable manner prescribed by law, not to increase the internal revenue by more than a de minimis amount. On any vote for which the concurrence of two thirds is required under this article, the yeas and nays of the members of either House shall be entered on the journal of that House.

"SECTION 2. The Congress may waive the requirements of this article when a declaration of war is in effect. The Congress may also waive this article when the United States is engaged in military conflict which causes an imminent and serious threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law. Any increase in the internal revenue enacted under such a waiver shall be effective for not longer than two years.

"SECTION 3. Congress shall enforce and implement this article by appropriate legislation.".

PURPOSE AND SUMMARY

H.J. Res. 62, introduced by Congressman Joe Barton of Texas, would require a two-thirds vote for any bill that increases the internal revenue by more than a de minimis amount. The supermajority requirement would be waived when a declaration of war is in effect or when both Houses pass a resolution, which becomes law, stating that, "the United States is engaged in military conflict which causes an imminent and serious threat to national security." The amendment authorizes Congress to enforce and implement the article through legislation.

The Tax Limitation Amendment is intended to make it more difficult to raise taxes—it will make it more difficult for the Federal government to take more of the people's money. The Tax Limitation Amendment will require the Congress to focus on options other than raising taxes to manage the federal budget. It does not foreclose the possibility of raising taxes, but requires a broad political consensus to achieve that goal.

According to testimony received during the hearing of the Subcommittee on the Constitution, in 1941, federal taxes were only 6.7 percent of the Gross Domestic Product (GDP). Since the late 1960's, federal taxes have approached twenty percent of GDP. Federal Taxes went from 5% of a family's income in 1934 to 19% in 1994. A Tax Limitation Amendment will force Congress to carefully consider how best to use current resources before demanding that taxpayers dig deeper into their hard-earned wages to pay for increased federal spending.

BACKGROUND AND NEED FOR THE LEGISLATION

The Federal government seems to have forgotten a fundamental fact—the money we spend belongs to the people. It is only fitting that when we increase our demand of those earnings, with the force of law and its punishments, we do so with careful consideration and broad consensus. A supermajority requirement as found in the Tax Limitation amendment is a needed mechanism to impose fiscal discipline and constrain the growth of government.

The amendment would not require a two-thirds vote for every tax increase in any bill. For example, a bill that both lowered and increased taxes, if it were revenue neutral, would not be subject to the two-thirds vote. In addition, the supermajority requirement would be waived when a declaration of war is in effect or when both Houses pass a resolution, which becomes law, stating that, "the United States is engaged in military conflict which causes an imminent and serious threat to national security." The amendment authorizes Congress to enforce and implement the article through legislation.

I. Application of the amendment

The amendment in the nature of a substitute adopted by the Committee ties application of the amendment to changes to the internal revenue laws. The amendment applies to any "bill, resolution, or other legislative measure changing the internal revenue laws * * *". Any bill changing the internal revenue laws would require a two-thirds vote, unless it was determined that the bill's provisions, taken together, raised revenue by less than a de minimis amount.

Generally, the "internal revenue laws" covers taxes found in the internal revenue code—income taxes, estate and gift taxes, employment taxes, and excise taxes. This would cover the Internal Revenue Code and any future revenue laws even if they were not placed into the code.[1] The tax limitation amendment will cover personal and corporate income taxes, estate and gift taxes, employment taxes and excise taxes. The amendment would not apply to tariffs, user fees, voluntary payments or bills that do not change internal revenue laws, even if they have by more than a "de minimis amount."

II. The "de minimis" exception and implementing legislation

The amendment states that a determination must be made at the time of adoption of legislation, as to whether it raises the internal revenue by more than a "de minimis" amount. This determination shall be made "in a reasonable manner prescribed by law." In an April 7, 1997 letter to Chairman Henry Hyde, Chairman Bill Archer of the House Ways and Means Committee, which would have jurisdiction over the drafting of such legislation, discussed the meaning of the "de minimis" standard and implementing legislation:

[1] The Internal Revenue Code, Title 26 of the United States Code, is not explicitly referenced because Congress could avoid the application of the amendment by passing tax legislation and putting it elsewhere in the code or characterizing it in a different fashion.

> [T]he Constitutional amendment excepts from the 2/3 requirement tax legislation that raises no more than a "de minimis" amount of revenue. The amendment states that Congress may "reasonably provide" how this exception is applied. Details may be very important, but they do not belong in the Constitution. Instead, Congress would adopt legislation that implements the Constitutional amendment by defining terms and fleshing out procedures.
>
> It is up to this or a future Congress to design this "implementing legislation." However, it is my understanding and intent that such legislation will have the following characteristics:
>
> Revenue would be measured over a period consistent with current budget windows. For example, measuring the net change in revenue over a 5 year period would be appropriate.
>
> Estimation would be made employing the usual revenue estimating rules. As under the Budget Act, a committee of jurisdiction or conference committee would, in consultation with the Congressional Budget Office or the Joint Committee on Taxation, determine the revenue effect of a bill.
>
> A bill would be considered to raise a "de minimis" amount of revenue if increased Federal tax revenues by no more than 0.1 percent over 5 years.
>
> For purposes of determining whether a bill raises more than a "de minimis" amount of revenue, only tax provisions (i.e., provisions modifying the internal revenue laws) in the bill would be considered. Other provisions that increase Federal revenues or receipts (such as asset sales, tariffs, user fees, etc.) would not be taken into account in determining the revenue raised by the bill.

Opponents of the tax limitation amendment have argued that the amendment will make it more difficult to close tax loopholes. The amendment does not bar measures to close tax loopholes. Legislation to close a tax loophole, which would have the effect of raising revenue, would only require a two-thirds vote if it raised revenue by more than a de minimis amount. That is, if the tax provisions in the bill, taken together, increased federal tax revenues by more than one-tenth of one percent of federal revenues over a five year period.

III. Prior legislative action

The House voted on a constitutional supermajority requirement to raise taxes twice in the 104th Congress. During floor consideration of H.J. Res. 1 on January 25 and 26, 1995, the Full House voted on the Barton Balanced Budget proposal which would have required a three-fifths majority of the entire House and Senate to increase tax revenue and would have allowed a simple majority to waive the requirement in times of war, or in the face of a serious military threat. On April 15, 1996, for the second time in the 104th Congress, the House voted to amend the Constitution to require a supermajority vote of each House to raise taxes. The Barton substitute, H.J. Res. 169, made in order under the Rule, required a two-third's majority in each House for any measure that increased

revenue by more than a de minimis amount. The House voted 243–177 in favor of the Barton Tax-Limitation amendment, thirty-seven votes short of the two-thirds majority needed to pass a constitutional amendment.

IV. State tax limitation laws

There are presently fourteen states that require a supermajority vote to raise taxes: Arizona, California, Colorado (only emergency taxes require a two-thirds vote otherwise voter approval is necessary), Louisiana, Missouri (taxes that exceed $50 million), Nevada, South Dakota and Washington all require a two-thirds vote for tax increases. Delaware, Mississippi, and Oregon require a three-fifths vote to raise taxes. Florida requires a three-fifths vote to raise corporate income tax rates. Arkansas (applies primarily to sales and alcohol beverage taxes) and Oklahoma require a three-fourths vote to raise taxes.

Professor Barry W. Poulson, Professor of Economics of the University of Colorado, testified before the Constitution Subcommittee that when these fiscal discipline mechanisms are incorporated into state constitutions "they are more likely to constrain the growth of government" than statutory provisions.[2]

Daniel Mitchell, McKenna Senior Fellow in Political Economy at the Heritage Foundation, testified before the Subcommittee on the Constitution that empirical data from states suggests that supermajority requirements are successful in limiting the growth of government and enabling a more rapid pace of economic growth and job creation. States with supermajority requirements had lower spending increases, faster economic growth, more jobs and a more tightly controlled tax burden than states without such requirements.[3]

V. Supermajority requirements and taxation

There is nothing undemocratic or unusual about supermajority requirements in our system of representative democracy. Supermajority voting requirements are routinely used for legislative business in both the House and the Senate. Since 1828, the House has allowed a two-thirds vote to suspend rules and pass legislation. Senate rules require a two-thirds vote for suspension of the rules and for the fixing of time for considering a subject. The Senate requires a three-fifths vote of all Senators to end debate or to increase the time available under cloture. Senate Budget procedures require that three-fifths of the full Senate must agree to waive balanced budget provisions or points of order to consider amendments that would violate the budget approved by Congress.

There are ten instances in which the Constitution already requires a supermajority vote. Seven of these were part of the origi-

[2] "Proposing an Amendment to the Constitution with Respect to Tax Limitations, 1997: Hearings on H.J. Res. 62 Before the Subcomm. On the Constitution of the House Judiciary Committee," 105th Cong., 1st Sess. (written statement of Dr. Barry Poulson).

[3] "Proposing an Amendment to the Constitution with Respect to Tax Limitations, 1997: Hearings on H.J. Res. 62 Before the Subcomm. On the Constitution of the House Judiciary Committee," 105th Cong., 1st Sess. (written statement of Daniel Mitchell).

nal Constitution and three were added through the amendment process.[4]

Opponents of the amendment point to the fact that one of the weaknesses that led to the demise of the Articles of Confederation was that they required a supermajority vote to raise federal revenue. It is true that the Framers did not impose a supermajority voting requirement to raise revenue. Their solution was far more severe—an explicit constitutional restriction on direct taxes found at Article I, Section 9, clause 4.[5]

As explained by Alexander Hamilton in Federalist No. 21, the taxing ability of the federal government was intentionally limited:

> It is a signal advantage of taxes on articles of consumption [today called tariffs, sales and excise taxes] that they contain in their own nature a security against excess. They prescribe their own limit, which cannot be exceeded without defeating the end proposed—that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty that, "in political arithmetic, two and two do not always make four." If duties are too high, they lessen the consumption, the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them.[6]

As Lawrence Hunter, President of the Business Leadership Council testified before the Subcommittee on the Constitution:

> In Madison's and Hamilton's original design, the taxing and spending authority of the Federal government was hemmed in by the dual constraints of exclusive reliance on indirect taxes (which "prescribe their own limit") working side-by-side with the powerful constraint on spending resulting from the limited delegation of powers to the Federal government. This limited delegation of powers severely restricted the objects and activities on which the Federal government could spend money. In other words, the original constitutional design constrained both the means by which Congress spent (taxation) and the ends on

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[4] There are ten instances in which the Constitution already requires a supermajority vote:
Art. I, § 3, cl. 6: Conviction in impeachment trials.
Art. I, § 5, cl. 2: Expulsion of a Member of Congress.
Art. I, § 7, cl. 2: Override a Presidential Veto.
Art. II, § 1, cl. 3: Quorum of two-thirds of the states to elect the President.
Art. II, § 2, cl. 2: Consent to a treaty.
Art. V: Proposing Constitutional Amendments.
Art. VII: State ratification of the original Constitution.
Amendment XII: Quorum of two-thirds of the states to elect the President and the Vice President.
Amendment XIV, § 3: To remove disability for holding office where one has engaged in "insurrection or rebellion."
Amendment XXV, § 4: Presidential disability.

[5] Art. I, § 9, cl. 4 of the U.S. Constitution states: "No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

[6] James Madison, Alexander Hamilton and John Jay, The Federalist Papers, XXI, (1787–8).

which Congress spent (defined by a limited delegation of powers).[7]

As ratified, the Constitution allowed no direct taxation of the income of citizens. For three-quarters of our history, the power of the U.S. government to tax was carefully constrained by explicit constitutional restraints. It was not until early in this century that the 16th Amendment swept away the Constitution's careful balance with respect to taxes. While in the 1780's, the federal government may have had a problem raising revenue, this is certainly no longer a problem today. As recently as 1940, federal taxes were only 6.7% of the Gross Domestic Product. Since the late 1960's federal taxes have approached 20% of GDP.

Under our current system it is too easy to add to the already onerous tax burden Congress has placed upon the American people. The adoption of a supermajority provision will force Congress to give careful consideration to proposals to raise taxes, and will require a broad consensus in order to do so.

VI. Standing to sue under the tax limitation amendment

As a general matter, in order to bring a lawsuit in federal court a plaintiff must have standing. In order to open the door of the courthouse, a plaintiff must demonstrate that he (1) suffered an actual injury of the type for which a court may give relief (2) by some action of the defendant and that (3) the court will be able to redress the injury.

Prudential considerations, not rooted in the Constitution, also come into play. These rules require that (a) the defendant violated the plaintiff's legal right, not someone else's; (b) the plaintiff's injury is somehow differentiated from those of all other people in the country; and (c) the injury is of the type that the law or constitutional provision in question was designed to protect.

Ordinarily, a taxpayer has no standing to sue the government for carrying out an arguably unconstitutional program that is wasting the public's money. Most direct constitutional challenges to the exercise of the government's spending power are beyond judicial reach. The mere fact that the government does not act constitutionally does not provide a plaintiff with standing.

Under the amendment reported by the Committee, an increase in taxes does not automatically trigger a two-thirds vote. The amendment does not create a legal right to have taxes raised only where there is a two-thirds vote. Therefore, a taxpayer would not have standing to sue merely because his tax burden was increased. The amendment requires Congress to determine "at the time of adoption, in a reasonable manner prescribed by law" whether the tax provisions in the legislation, taken as a whole, increase the internal revenue by more than a "de minimis" amount. An evaluation will need to be performed as to whether the legislation as a whole increases taxes by more than a "de minimis" amount.

In other words, a bill raising some taxes and lowering others, would not necessarily trigger a two-thirds vote. A court would be

[7] "Amendment to the Constitution Requiring Two-thirds Majorities for Bills Increasing Taxes, 1996: Hearings on H.J. Res. 159 Before the Subcomm. On the Constitution of the House Judiciary Committee," 104th Cong., 2nd Sess. 75.

extremely reluctant to substitute its own judgement on the revenue effects of a particular piece of legislation for that of the Congress. Under current interpretations of "standing" rules, it is highly unlikely that a court would allow a taxpayer to challenge Congress' determination that a bill raised revenue by less than a de minimis amount.[8]

VII. Differences between the tax limitation amendment and the House rule

The House rule for the 104th Congress required a three-fifths vote for any bill "carrying a Federal income tax rate increase." The rule was waived several times during the 104th Congress. The proposed constitutional amendment requires a two-thirds vote for any bill changing the internal revenue laws that increases revenue by more than a "de minimis" amount.

At the beginning of the 105th Congress, the House rule was changed. Now, the Rule XXI(5)(c) requires a 3/5 vote for any bill that "amends subsection (a), (b), (c), (d), or (e) of section 1, or to section 11(b) or 55(b), of the Internal Revenue Code of 1986, that imposes a new percentage as a rate of tax and *thereby increases the amount of tax* imposed by any such section" (emphasis added).[9]

The House rule applies to amendments to certain sections of the Internal Revenue Code that increase tax rates even if the bill, taken as a whole, would reduce revenues.

In contrast, the Constitutional amendment would not necessarily require a two-thirds vote for a bill that changed the tax rates—if the overall effect of the tax provisions of the bill reduced federal revenues.

The tax limitation amendment allows changes to the tax code as long as they do not increase revenues by more than a de minimis amount. It will make it harder for Congress to raise taxes, but still leaves the flexibility to cut taxes, close loopholes and make revenue neutral changes to the tax laws.

HEARINGS

The Committee's Subcommittee on the Constitution held one day of hearings on H.J. Res. 62 on March 18, 1997. Testimony was received from seven witnesses: Representative John Shadegg; Honorable James Miller, Counselor, Citizens for a Sound Economy; Robert Greenstein, Executive Director, Center for Budget and Policy Priorities; Dr. Barry Poulson, Professor of Economics, University of Colorado; Dean Samuel Thompson, Dean, University of Miami School of Law; Professor Michael Rappaport, University of San Diego School of Law; Daniel Mitchell, McKenna Senior Fellow in Political Economy, Heritage Foundation.

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[8] The strongest case for standing would be made where Congress failed entirely to make the evaluation of whether a bill changing the internal revenue laws did indeed "increase the internal revenue by more than a "de minimis" amount. Even here, however, it is not entirely clear that a plaintiff whose taxes had been raised under such a scenario would have standing to sue under current requirements of this doctrine.

[9] As referred to in the House rule, Section (1)(a) covers the tax rate for married individuals filing joint returns and surviving spouses. Section (1)(b) covers heads of household. Section (1)(c) covers unmarried individuals. Section (1)(d) covers married individuals filing separate returns. Section (e) covers estates and trusts. Section 11(b) covers the amount of tax on corporations. Section 55(b) covers the tentative minimum tax.

COMMITTEE CONSIDERATION

On April 8, 1997, the Committee met in open session and ordered reported favorably the resolution H.J. Res. 62, with an amendment in the nature of a substitute, by a roll call vote of 18 to 10, a quorum being present. The Committee adopted an amendment in the nature of a substitute offered by Mr. Canady of Florida. The amendment in the nature of a substitute made two changes to the underlying text: it required that all votes taken pursuant to the amendment be taken by the yeas and nays and it conformed the text of H.J. Res. 62 to the language voted on by the House in 1996 by making clear that the amendment applies to any "bill, resolution, or other legislative measure changing the internal revenue laws * * *". The Committee also adopted an amendment offered by Mr. Scott of Virginia. The Scott amendment provided that the vote required under the amendment should consist of "two-thirds of those present and voting" rather than two-thirds of the whole number of each House as was required by H.J. Res. 62 as introduced.

VOTES OF THE COMMITTEE

1. An amendment was offered by Mr. Nadler and Mr. Meehan that would eliminate the two-thirds requirement for bills that repeal or reduce exemptions, deductions or credits available to business entities. The amendment was defeated by a 10–16 rollcall vote.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Smith (TX)
Ms. Lofgren	Mr. Gallegly
Ms. Jackson Lee	Mr. Canady
Mr. Meehan	Mr. Inglis
Mr. Delahunt	Mr. Goodlatte
Mr. Wexler	Mr. Buyer
	Mr. Bono
	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Cannon
	Mr. Rothman

2. An amendment was offered by Mr. Conyers that would remove the two-thirds requirement on bills that would increase revenues by adjusting foreign tax credits or deferring taxes on unrepatriated foreign profits. The amendment was defeated by a 10–15 rollcall vote.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Frank	Mr. McCollum
Mr. Boucher	Mr. Gekas
Mr. Nadler	Mr. Coble

Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Ms. Jackson Lee	Mr. Inglis
Ms. Waters	Mr. Goodlatte
Mr. Delahunt	Mr. Buyer
Mr. Wexler	Mr. Bono
	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Cannon
	Mr. Rothman

3. An amendment was offered by Mr. Watt eliminating the two-thirds requirement. The amendment was defeated by a 8–17 rollcall vote.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Boucher	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Smith (TX)
Ms. Jackson Lee	Mr. Gallegly
Mr. Meehan	Mr. Canady
Mr. Delahunt	Mr. Inglis
	Mr. Goodlatte
	Mr. Buyer
	Mr. Bono
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Cannon
	Mr. Rothman

4. An amendment was offered by Ms. Jackson Lee that would eliminate the two-thirds requirement on any bill that raised revenues necessary to protect the solvency of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, or any successor funds. The amendment was defeated by a 9–16 rollcall vote.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Boucher	Mr. McCollum
Mr. Nadler	Mr. Gekas
Mr. Scott	Mr. Coble
Mr. Watt	Mr. Smith (TX)
Ms. Jackson Lee	Mr. Gallegly
Ms. Waters	Mr. Canady
Mr. Meehan	Mr. Inglis

Mr. Delahunt	Mr. Goodlatte
	Mr. Buyer
	Mr. Bono
	Mr. Chabot
	Mr. Barr
	Mr. Jenkins
	Mr. Cannon
	Mr. Rothman

5. An amendment was offered by Mr. Nadler that would eliminate the two-thirds provision for bills providing for more effective enforcement of the internal revenue laws. The amendment was defeated by a 9–17 rollcall vote.

AYES	NAYS
Mr. Conyers	Mr. Hyde
Mr. Boucher	Mr. Sensenbrenner
Mr. Nadler	Mr. McCollum
Mr. Scott	Mr. Gekas
Mr. Watt	Mr. Coble
Ms. Jackson Lee	Mr. Smith (TX)
Ms. Waters	Mr. Gallegly
Mr. Meehan	Mr. Canady
Mr. Delahunt	Mr. Inglis
	Mr. Goodlatte
	Mr. Buyer
	Mr. Bono
	Mr. Bryant (TN)
	Mr. Chabot
	Mr. Jenkins
	Mr. Cannon
	Mr. Rothman

6. Final Passage. Mr. Hyde moved to report H.J. Res. 62, as amended, favorably to the whole House. The resolution was ordered favorably reported by a rollcall vote of 18–10.

AYES	NAYS
Mr. Hyde	Mr. Conyers
Mr. Sensenbrenner	Mr. Boucher
Mr. McCollum	Mr. Nadler
Mr. Gekas	Mr. Scott
Mr. Coble	Mr. Watt
Mr. Smith (TX)	Ms. Jackson Lee
Mr. Gallegly	Ms. Waters
Mr. Canady	Mr. Meehan
Mr. Inglis	Mr. Delahunt
Mr. Goodlatte	Mr. Rothman
Mr. Buyer	
Mr. Bono	
Mr. Bryant (TN)	
Mr. Chabot	
Mr. Barr	
Mr. Jenkins	
Mr. Pease	
Mr. Cannon	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the resolution, H.J. Res. 62, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 10, 1997.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 62, proposing an amendment to the Constitution of the United States with respect to tax limitations.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephanie Weiner.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.J. Res. 62—Proposing an amendment to the Constitution of the United States with respect to tax limitations

H.J. Res. 62 would propose an amendment to the Constitution to require the approval of two-thirds of the members of Congress for the passage of any bill that would amend the Internal Revenue Code to increase revenues by more than a de minimis amount. The legislatures of three-fourths of the states would be required to ratify the proposed amendment within seven years for the amendment to become effective.

CBO estimates that enacting this resolution would have no direct effect on the federal budget. H.J. Res. 62 would not affect direct

spending or receipts, so there would be no pay-as-you-go scoring under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. This legislation contains no intergovernmental or private sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Stephanie Weiner. This estimate was approved by Rosemary Marcuss, Assistant Director for Tax Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(l)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article V of the Constitution, which provides that the Congress has the authority to propose amendments to the Constitution.

SECTION-BY-SECTION ANALYSIS

Section 1. This section provides that any bill, resolution, or other legislative measure changing the internal revenue laws shall require for final adoption a two-thirds vote in either House unless it is determined, in a reasonable manner prescribed by law, that the legislation raises revenue by less than a "de minimis" amount.

This section also requires a majority of two-thirds of those present and voting for passage of legislation that will increase internal revenue by more than a "de minimis" amount.

Section 2. This section waives the requirements of section 1 of H.J. Res. 62 when a declaration of war is in effect or when both Houses of Congress pass a resolution, which becomes law, stating that "the United States is engaged in military conflict which causes an imminent and serious threat to national security."

Section 3. This section requires Congress to enforce and implement the article through legislation.

DISSENTING VIEWS

The problems with H.J. Res. 62 are myriad and obvious: most fundamentally, it undercuts the very principle our nation was founded on—majority rule. By requiring a two-thirds supermajority to adopt certain legislation, the amendment diminishes the vote of every Member of the House and Senate, denying the seminal concept of "one person one vote."

In addition, there is no definition of "internal revenue laws" or "de minimis amount." It is unclear how or when the revenue estimates required under H.J. Res. 62 are to be made. The amendment would make it nearly impossible to plug tax loopholes and eliminate corporate tax welfare, or even to increase tax enforcement against foreign corporations. The amendment would also make it nearly impossible to balance the budget, or develop a responsible plan to restore Medicare or Social Security to long-term financial solvency. Further, if H.J. Res. 62 were to be adopted, it would be extraordinarily difficult to reauthorize excise taxes and related fees supporting such important programs as superfund, highway construction, and air safety. For these and the reasons set forth below, we dissent from H.J. Res. 62.

I. Amendment disregards constitutional principle of majority rule

The framers of the Constitution wisely rejected the principle of requiring a supermajority for basic government functions.[1] James Madison vehemently argued against requiring supermajorities, stating that under such a requirement, "the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority."[2]

Adopting a supermajority tax requirement would repeat the very mistakes made in the 1780's under the Articles of Confederation, when we required a vote of 9 of the 13 states to raise revenue. It is because this system worked so poorly that the founding fathers

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[1] It is significant to note that because of population patterns, Senators representing some 7.3% of the population could prevent a bill from obtaining a two-thirds majority. See U.S. Department of Commerce, U.S. Census Bureau, Press Release CB–96–244, 1996 Population Estimates, Dec. 30, 1996.

[2] The Federalist Paper No. 58, at 393 (James Madison) (The Belknap Press of Harvard University, 1961). Last Congress, at the Constitution Subcommittee hearing, Judiciary Chairman Hyde (R–IL) concurred with this concern:

> I am troubled by the concept of divesting a Member of the full import or his or her vote. You are diluting the vote of Members by requiring a supermajority of them to do something as basic to government as acquire the revenue to run government. It is a diminution. It is a disparagement. It is a reduction of the impact, the import, of one man, one vote.

"Proposing An Amendment to the Constitution of the United States to Require Two-Thirds Majorities for Bills Increasing Taxes: Hearings on H.J. Res. 159 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary," 104th Cong. 2d Sess. 107 (1996).

sought to fashion a national government that could operate through majority rule.[3]

Supporters of H.J. Res. 62 have sought to justify the departure from majority rule by pointing to other provisions in the Constitution requiring a two-thirds vote, such as approving a treaty or convicting in a congressional impeachment trial.[4] But supporters neglect to note that none of these supermajority requirements pertain to the day-to-day operations of the government—limiting such congressional authority is an invitation to gridlock.

Moreover, the fact that fourteen states have adopted some form or another of a supermajority vote requirement for tax increases also bears little relation to the current debate. First, it is inappropriate to compare a state's revenue needs with the more comprehensive obligations of the federal government (such as economic policy and disaster assistance). In addition, many of the state requirements apply to particular types of taxes and do not apply to all or even the principal means of raising state tax revenue. For example, in Florida the supermajority requirement only applies to corporate income taxes; exempt from the requirement is the sales tax on the purchase of goods—the primary source of the state's revenues.[5]

In addition, arguments by proponents that seven states who have had a supermajority tax requirement in place for a number of years[6] have enjoyed more rapid economic growth are also misleading.[7] A recent study by the Center on Budget and Policy Priorities found that such analysis was "simplistic" and "flawed."[8] This study found that by some measures, supermajority states had lower economic growth and more tax increases than other states. For example, when measured between 1979 and 1989,[9] four of the seven states had lower than average economic growth measured by state gross domestic product, five of the seven states experienced lower than average growth when measured by changes in per capita income, and six of the seven states had higher than average increases in state and local revenues as a percentage of residents' income. Obviously, there are many factors which impact state growth

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[3] "Proposing An Amendment to the Constitution with Respect to Tax Limitations on H.J. Res. 62 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary," 105th Cong. 1st Sess. (1997) [hereinafter 1997 Judiciary Hearing] (Statement of Robert Greenstein, Executive Director, Center on Budget and Policy Priorities).

[4] U.S. Const. art. I § 2, cl. 2., art. I, § 3, cl. 6.

[5] See 26 Fla. Stat. Ann. V. § 1(e) (West 1970). California sometimes acts simultaneously on taxes and spending cuts, through the annual budget process, which considerably diminishes the supermajority's impact on tax increases. See Congressional Quarterly, Economic & Finance, April 20, 1996, at 1033. It is also important to note that the total tax receipts collected by the federal, state, and local governments in the United States—31.5%—is lower than all of the other major industrialized countries. See Gregg A. Esenwein, "U.S. Library of Congress, Congressional Research Service Report for Congress, The U.S. Fiscal Position: A Comparison with Selected Industrial Nations," (CRS Report 96-386 E, March 1, 1996). Moreover, federal tax revenue, as a percentage of gross domestic product, was 19.3% in 1995—and has remained more or less constant since 1960. See Gregg A. Esenwein, "U.S. Library of Congress, Congressional Research Service Report for Congress, The Size and Distribution of the Federal Tax Burden: 1950–1995" (CRS Report 96–386 E, April 30, 1996).

[6] Arkansas, California, Delaware, Florida, Louisiana, Mississippi, and South Dakota.

[7] See 1997 Hearings, supra note 3 (statement of Daniel J. Mitchell, The Heritage Foundation).

[8] Iris J. Lav & Nicholas Johnson, Center on Budget and Policy Priorities, "Do States with Supermajorities Have Smaller Tax Increases or Faster Economic Growth than Other States?" (April 10, 1997).

[9] Two years at similar points in the economic cycle.

other than supermajority tax requirements, including a state's educational system and the skill of its workforce.

II. Amendment would lead to large cuts in Social Security and Medicare and increased deficits

H.J. Res. 62 would likely lead to large reductions in Social Security and Medicare benefits. As the Washington Post noted in a recent editorial:

> When the baby boomers begin to retire not that many years from now, the country will be in an era of constant fiscal strain. To avoid destructive deficits, there will have to be tax increases and/or spending cuts. By making it harder to increase taxes, the amendment would compound the pressure on the major spending programs: Social Security, Medicare, Medicaid and the rest. Is that what Congress really wants to do? The pressure on those programs is great enough as it is.[10]

H.J. Res. 62 would also effectively rule out measures to raise Medicare premiums for higher income individuals' levels as well as even modest measures to shore up Social Security and Medicare (such as by slowing the erosion in the share of employee compensation subject to the payroll tax). Indeed, when the Republican budget reconciliation bill reached the House floor in the fall of 1995, it became clear that its proposed increase in Medicare premiums for those at higher income levels constituted a tax increase.[11] Similarly, expanding Social Security's coverage to include state and local government employees—which was recently proposed by the Advisory Council for Social Security—would also result in a revenue increase and be subject to the two-thirds requirement.[12] Despite the obvious and clear cut threat H.J. Res. 62 represents to Social Security, when Ms. Jackson-Lee offered an amendment to exempt legislation necessary to preserve the Social Security Trust Fund's solvency from the constitutional amendment, the Majority rejected it on a party-line vote.

Another dangerous byproduct of H.J. Res. 62 would be increased deficits. As the Center on Budget and Policy Priorities testified:

> The proposed constitutional amendment * * * would effectively preclude [action to balance the budget]. The amendment would make it virtually impossible to amass the two-thirds majority required to pass large deficit reduction packages that include both reductions in federal programs and measures to raise revenue. As a result, the amendment would erect serious new barriers to long-term deficit reduction.[13]

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[10] "Show Vote on Tax Day," Wash. Post, April 9, 1997, at A20.

[11] See infra note 32.

[12] See Center on Budget and Policy Priorities, "Proposed Constitutional Amendment Would Make It More Difficult to Address the Long Term Social Security and Medicare Crisis" (March 30, 1997).

[13] 1997 Judiciary Hearing, supra note 3 (statement of Robert Greenstein). Between 1982 and 1993, five pieces of legislation that raise significant revenue were enacted. The Tax Equity and Fiscal Responsibility Act of 1982, passed the House by a vote of 226–207. The 1987 Social Security rescue plan was passed by a vote of 282–148. The Omnibus Budget Reconciliation Act of 1987, a product of bipartisan negotiations that contained both spending cuts and revenue increases, passed by a 237–181 vote and the Omnibus Budget Reconciliation Act of 1993 passed

It is for these reasons that perhaps the nation's most credible advocate of deficit reduction—the bipartisan Concord Coalition—strongly opposes a supermajority tax requirement. In their view, "enactment of [a tax limitation] constitutional amendment would be detrimental to the budget process. * * * No area of the budget—on either the spending or the revenue side—should receive preferential treatment such as requiring supermajority votes." [14]

III. Amendment will make it difficult to close tax loopholes

H.J. Res. 62 will make it nearly impossible to eliminate tax loopholes, thereby locking in the current tax system at the time of ratification. As Dean Samuel Thompson, one of the nation's leading tax law authorities, observed at our hearing:

> The core problem with this proposed Constitutional amendment is that it would give special interest groups the upper hand in the tax legislative process. Once a group of taxpayers receives either a planned or unplanned tax benefit with a simple majority vote of both Houses of Congress, the group will then be able to preserve the tax benefit with just a 34% vote of one House of Congress.[15]

The potential revenue loss to the Treasury Department from such loopholes is staggering. A recent Congressional Budget Office study found that over half of the corporate subsidies the federal government provides are delivered through "tax expenditures." [16] Such expenditures are estimated to cost the federal government $455 billion in fiscal year 1996 alone—triple the current budget deficit and a full two and one-half times as much as all means-tested entitlement programs combined.[17]

In addition, H.J. Res. 62 would make it inordinately difficult to make foreign corporations pay their fare share of taxes on income earned in this country. Congress would even be limited from changing the law to increase penalties against foreign multinationals who avoid U.S. taxes by claiming that profits earned in the U.S. were realized in offshore tax havens. Estimates of the costs of such tax dodges are also significant. A 1992 IRS study estimated that foreign corporations cheated on their tax returns to the tune of $30 billion per year.[18]

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by a slender 218–216 vote. Last Congress, both the "blue dog" and the Republicans' proposed balanced budget bills included tax increases. Id.

[14] Letter from Warren B. Rudman, Co-Chair & Paul E. Tsongas, Co-Chair, The Concord Coalition Citizens Council to Members, U.S. House of Representatives (April 11, 1996).

[15] 1997 Judiciary hearing, supra note 3 (statement of Samuel Thompson, Dean, University of Miami School of Law).

[16] "Congress of the United States, Congressional Budget Office, Federal Financial Support of Business" (July 1995). "Tax expenditures" are provisions of the tax code that selectively reduce the tax liability of particular individuals or businesses. Id. See also Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 1998: Chapter 3—Federal Receipts (Feb. 6, 1997) [hereinafter President's budget].

[17] Citizens for Tax Justice, "The Hidden Entitlements," May 1996.

[18] The IRS also found that on average, foreign companies report only 40% of what comparable American companies reported in taxes. See "Department of the Treasury's Report on Issues Related to the compliance with U.S. Tax Laws By Foreign Firms Operating in the United States: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm." 102d Cong., 2d Sess. 7 (1992) [hereinafter 1992 Ways and Means hearing] (statement of Representative Pickle, Chairman, Subcommittee on Oversight).

The problem is particularly acute in the auto and electronics industries. For example, of foreign automotive company tax returns reviewed in a recent Congressional study, 28% showed no taxes due, even though these firms reported sales of nearly $27 billion. One foreign auto com-

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Adoption of H.J. Res. 62 would also make it more difficult to adopt legislation repealing or limiting foreign tax credits or the deferral of taxes on unrepatriated foreign profits.[19] According to the OMB, this loophole costs the United States nearly $22 billion dollars annually, and the foreign deferral provision will deprive the Treasury of $2.4 billion in revenues in 1998, and a total of $14 billion between 1998 and 2002.[20]

Not only do these loopholes cost the Treasury desperately needed funds—they cost our workers jobs.[21] Despite these concerns, the Republicans rejected amendments offered by Mr. Nadler and Mr. Conyers which would have exempted the elimination of corporate loopholes in general, as well as the foreign tax credit and deferral loopholes in particular, from the requirements of the two-thirds majority. Republicans also rejected an amendment offered by Mrs. Jackson-Lee which would have exempted foreign taxpayers from the requirements of a two-thirds vote.

In rejecting these arguments, the Majority attempted to argue that under H.J. Res. 62, a two-thirds majority wouldn't necessarily be required if the elimination of the loophole was linked to other tax cuts, so the overall bill was revenue neutral. Although it is not entirely clear the amendment would operate in such a fashion,[22] even if it did, this interpretation would prevent using the funds raised from the elimination of such loopholes for any reason other than providing for tax cuts. For example, such revenues couldn't be used for deficit reduction, disaster assistance, education, Medicare, or Social Security. There is simply no legitimate policy reason to link a bill raising taxes on foreign corporations or eliminating abusive loopholes with any additional federal tax changes.

Incredibly, under H.J. Res. 62, even measures that raised revenue by improving tax enforcement would require a two-thirds majority vote.[23] As a result, new anti-fraud provisions or even a pro-

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pany had $3.4 billion in sales over two years and paid no taxes. Of the foreign electronics companies reviewed in the study, 40% paid no United States income tax whatsoever, though they reported sales of almost $30 billion. One electronics firm sold $2.4 billion of products over eight years and paid no taxes. Another company had sales of more than $9.4 billion in the U.S. and paid $156 in taxes. Id.

[19] The foreign tax credit allows U.S. based multinational corporations to reduce their taxes in this country by one dollar for every dollar of taxes they pay overseas. 26 U.S.C. §§ 27, 33. This favorable treatment contrasts sharply with the treatment of nearly every other business expense—whether it be wages or taxes paid to state or local governments here in the U.S. The foreign deferral provision allows U.S. corporations to pay no income taxes on the profits of their foreign subsidiaries unless and until such profits are remitted to the U.S. parent. 26 U.S.C. §§ 11(d), 882, 901, 951. If profits are never dividended to the parent, taxes never become due in the U.S., amounting to an interest free loan from U.S. taxpayers.

[20] See Internal Revenue Service, Statistics of Income Bulletin, "Data Release: Corporate Foreign Tax Credit, 1992: An Industry and Geographic Focus," Winter 1995-96; see also President's budget, supra note 16 at 73.

[21] Since 1979 we have lost almost 3 million manufacturing jobs in this country. See U.S. Department of Labor, Bureau of Labor Statistics, Current Employment Statistics Program, April 4, 1997. During the most recent downturn we lost 26,000 manufacturing jobs per month—the equivalent of shutting down one Fortune 500 company every 30 days. Id. At the same time the number of jobs with U.S.-based manufacturing companies abroad has skyrocketed. For example, there are nearly 40,000 foreign workers working for U.S. corporations in Singapore alone. Recently, the Wall Street Journal reported that nearly half of the export jobs in China are linked to U.S. and other multinational-based companies. See Joseph Kahn, "Foreigners Help Build China's Trade Surplus," Wall St. J., April 7, 1997, at A1.

[22] 1997 Judiciary Hearing, supra note 3 ("It is not clear from the text of H.J. Res. 62 whether it would only apply to a bill that leads on an over-all basis to an increase in tax.") (statement of Dean Thompson).

[23] The Republicans rejected an amendment offered by Mr. Nadler which would have exempted improved enforcement from the provisions of H.J. Res. 62.

gram of stepped up enforcement against foreign multinationals who avoid U.S. taxes would be subject to a supermajority requirement.

IV. Amendment will endanger excise taxes which fund public safety and environmental programs

There are many important public safety programs funded by excise taxes whose extension would be subject to a supermajority vote. Many such excise taxes are dedicated to purposes such as transportation trust funds, Superfund, and compensation for health damages.[24] H.J. Res. 62 would also apply to excise taxes on alcohol, tobacco, and pensions, as well as a variety of environmental taxes.[25]

Former White House Counsel Lloyd Cutler explained the difficulties a supermajority tax requirement could cause in the context of extending such excise taxes:

> Today a simple majority of the Senate and House could restore the [expired airline ticket tax] * * * But under the proposed amendment, it would take 67 of the 100 senators and 290 of the 435 congressmen to restore this tax which, having expired on December 31, 1995, would clearly be a "new" tax covered by the amendment.[26]

Recognizing the burdens H.J. Res. 62 would place on Congress' ability to extend such basic excise taxes which protect our health and safety, Ms. Lofgren offered an amendment exempting them from H.J. Res. 62—it was also rejected by the Majority.

V. Amendment is vague and could transfer significant authority to the courts

H.J. Res. 62 will present a variety of new and complex interpretational difficulties. Most notably, there is no definition of the term "internal revenue laws," a new term of art with no legislative antecedent.[27] For example, although the amendment's authors contend there is a clear distinction between "taxes" (which they believe fall within the concept of "internal revenue") and "user fees" (which they believe are not "internal revenue"), in practice, this is a distinction without any meaningful difference. As former Republican OMB Director Darman has acknowledged, "[i]f it looks like a duck and walks like a duck and quacks like duck, it is a duck, [and] euphemisms like user fees will not fool the public."[28]

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[24] See James V. Saturo & Louis Alan Talley, "U.S. Library of Congress, Congressional Research Service Report for Congress, Tax Limitations Proposals: An Assessment of the Issues and Options Together With the Major Tax Acts, Votes, and Revenue Effects" (CRS Report 97-372 E, March 20, 1997); see also 1997 Judiciary Hearings, supra note 3 (statement of Representative Rangel, Ranking Member, House Comm. on Ways and Means).

[25] See generally 26 U.S.C. Chapters 31–36, 42–47, 51–54.

[26] A Proposed Constitutional Amendment To Require A Two-Thirds Vote to Increase Taxes: Hearings on S.J. Res. 49 Before the Subcomm. on the Constitution, Federalism and Property Rights of the Committee on the Judiciary, 104th Cong., 2d Sess. (1996) (statement of Lloyd Cutler).

[27] Proponents' arguments that the courts can resolve the meaning of such open-ended terms in the same way they have "equal protection" and "due process" also miss the point. The courts are the most appropriate body to protect such individual rights and liberties from government excesses in these areas. But judging the policy value of tax legislation is an inherently political judgment. Such laws shouldn't require court involvement to begin with.

[28] See "Hearing on Nomination of Richard Darman to be the Director of the Office of Management and Budget Before the Senate Comm. on Governmental Affairs," 101st Cong., 1st Sess. (1989). The amendment's authors allowed for a loophole of potentially massive dimensions when

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Another definitional problem arises from the fact that it is unclear how and when the so-called "de minimis" increase is to be measured, particularly in the context of a $1.5 trillion annual budget. Would we look at a one, five or ten-year budget window? What if a bill resulted in increased revenues in years one and two, but lower revenues thereafter? It is also unclear when the revenue impact is to be assessed—based on estimates prior to the bill's effective date, or subsequent determinations calculated many years out. Further, if a tax bill was retroactively found to be unconstitutional, the tax refund issues could present insuperable logistical and budget problems.[29] An additional problem in the amendment's drafting can be seen in the requirement that Congress provide for a law setting forth procedures to determine "in a reasonable manner" whether any tax legislation conforms to new supermajority requirement—yet another new constitutional term of uncertain meaning.

All of these ambiguities point to one of the most serious problems inherent in H.J. Res. 62—uncertainty regarding the branch of government vested with responsibility for interpeting and enforcing the amendment's requirements. If H.J. Res. 62 is read to authorize judicial interpretation and enforcement, courts would be drawn into fundamental policy disputes best left to the Congress.[30] But if judicial enforcement is unavailable, those seeking redress for improperly imposed tax increases would be left without a meaningful remedy, undermining the public's faith in the Constitution. It is doubtful the public would be satisfied with Congress' selecting an unelected bureaucrat, such as the head of the Congressional Budget Office or Joint Tax Committee, to police these matters. Yet when Mr. Scott and Mr. Watt sought to clarify enforcement responsibility—by more clearly providing for enforcement by either the courts or Congress—Republicans rejected both such approaches.

VI. Republicans have frequently waived their own house rules requiring a three-fifths majority vote to increase taxes

The unworkability of H.J. Res. 62 is illustrated by the fact that the Republicans have frequently ignored their own House Rule preventing tax rate increases from taking effect unless approved by three-fifths of the House.[31] Last Congress, the Majority ignored or waived this three-fifths requirements for tax increases on six sepa-

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they stated that efforts to adjust the Consumer Price Index—which would reduce indexing for tax brackets—would not constitute a change in "internal revenue." (Transcript at 39 ("under the [revised] language [reducing the CPI] would not [require a two-thirds vote], because that would not be a change to the internal revenue laws.") Under this interpretation, legislation such as that offered by William Roth (R–DE), Chair of the Senate Finance Committee, reducing CPI adjustments by 1.1% per year—and which CBO has estimated would increase income taxes by $22.8 billion per year in 2002 and more than double that by 2006—would not constitute an increase in "internal revenue." See S. 2, 105th Cong. 1st Sess. (1997).

[29] Jim Miller, OMB Chief under President Reagan, testifying on behalf of the Citizens for a Sound Economy, stated that the "de minimis" requirement should be taken out. See 1997 Judiciary Hearing, supra note 3.

[30] In the event judicial review is invoked, H.J. Res. 62 would also raise difficult questions concerning standing. For example, it would be unclear whether a taxpayer whose taxes were raised would be able to show sufficient harm to constitute a "case or controversy" or whether it would be necessary for a Member or a whole House of Congress to bring the legal challenge. See Balanced Budget Constitutional Amendment: Hearing before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess. 229 (1995) (statement of Walter Dellinger, Asst. Att'y Gen., Office of Legal Counsel, Dep't of Justice).

[31] Rule XXI 5(c), 104th Cong., 1st Sess. (January 4, 1995).

rate occasions.[32] As Rep. Charles Stenholm (D–TX) noted in a Washington Post editorial opposing a similar proposal last year:

> [T]he final blow to any hope that the vote [on the supermajority tax requirement] might be for real comes from the dismal adherence Republicans have made to their own internal House rule requiring a three-fifths vote to raise taxes. After much fanfare during the organization of the 104th Congress, the House leadership has waived its own effort to restrain itself in every potential instance except one.[33]

In an attempt to avoid these problems, at the beginning of the 105th Congress, the House Rule was significantly narrowed to limit its application to increases in particular tax rates specified under the Internal Revenue Code, rather than tax rate increases generally.[34] Such experiences highlight the unworkability of setting forth special procedural rules concerning tax laws and tax rates and these problems would be greatly compounded in a constitutional context.

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[32] On April 5, 1995, during the consideration of H.R. 1215, the Contract with America Tax Relief Act, there was a parliamentary ruling that the new House rule did not apply to the bill even though H.R. 1215 would have repealed the current 50 percent exclusion for capital gains from sales of certain small business stock. The net effect of H.R. 1215 was to increase the maximum rate of tax on those gains from 14 percent (50 percent inclusion times 28 percent top rate) to 19.8 percent. All seem willing to concede now that the ruling was erroneous. (Even Speaker Gingrich in a June 27, 1995 letter, responding to an inquiry by Messrs. Gibbons, Moakley, and Gephardt, conceded that the ruling did not seem "either satisfactory or overly compelling.")

On October 26, 1995, the House rule was waived for the consideration of H.R. 2491, the FY 1996 budget reconciliation bill and its conference report. The bill contained several tax rate increases.

On October 19, 1995, the House rule was waived for the consideration of H.R. 2425, the Medicare Preservation bill (which would have imposed additional taxes on withdrawals from MedicarePlus Medical Savings Accounts and premium increases on high-income Medicare beneficiaries).

On March 28, 1996, the Republicans waived the House rule for consideration of H.R. 3103, the Health Coverage Availability and Affordability bill (imposing additional taxes on withdrawals from Medical Savings Accounts).

On May 22, 1996, the House rule was waived for consideration of the Small Business Protection Act.

On July 31, 1996, the House rule was waived for the Personal Responsibility and Work Opportunity Reconciliation Act of 1995 (possible increases in the earned income tax credit program).

[33] Charles Stenholm, "An Amendment Without a Prayer", Wash. Post, April 15, 1996, at A21.

[34] Rule XXI 5(c), 105th Cong., 1st Sess. (Jan. 7, 1997).

CONCLUSION

We are surprised that a Republican Party which has a difficult enough time putting forth any coherent agenda or adopting any meaningful legislation somehow believes that they can accomplish more by making it even more difficult to enact legislation. Yet this is precisely what H.J. Res. 62 would do. In our view, it's time the Republican Party assumed responsibility for legislating, and stopped blaming the Constitution for their own political problems.

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