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Constitutional Law - Moore v. U.S. House of Representatives: A Possible Expansion of Congressmen's Standing to Sue

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CONSTITUTIONAL LAW—*MOORE v. U.S. HOUSE OF REPRESENTATIVES*: A POSSIBLE EXPANSION OF CONGRESSMEN'S STANDING TO SUE

In *Moore v. U.S. House of Representatives*,¹ the United States Court of Appeals for the District of Columbia Circuit addressed the question of whether individual congressmen have standing to sue the Congress. In *Moore*, members of the House of Representatives sought declaratory relief to invalidate the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).² The congressmen contended that TEFRA originated in the Senate in violation of the origination clause of the United States Constitution,³ which requires that bills for raising revenue originate in the House of Representatives. Although the District of Columbia Circuit ultimately denied relief on the basis of prudential considerations,⁴ it held, significantly, that the congressmen had standing to bring suit in federal court.⁵ Thus, the *Moore* court determined that the federal court had jurisdiction over the controversy but that, because of prudential concerns, that power should not be exercised.

Part I of this comment outlines the facts and holding of *Moore*. Part II examines the standing analysis which the court employed and concludes that the *Moore* court's finding of standing does not comport with traditional tests for standing. Finally, Part III discusses the court's decision to deny relief based on prudential considerations. This comment concludes that, contrary to the *Moore* holding, denial of relief should have been the consequence of constitutional command rather than judicial discretion.

I. *Moore v. U.S. House of Representatives*

In December 1981, the House of Representatives approved H.R. 4961, a bill which would amend the Internal Revenue Code to reduce tax revenues.⁶ The Senate substantially amended the bill and renamed it "The Tax Equity and Fiscal Responsibility Act of 1982" (TEFRA). As amended, the bill, rather than reducing tax revenues, proposed to significantly increase tax revenues. This change prompted Representative Rousselot, one of the plaintiffs in *Moore*, to propose a resolution in the House stating that the Sen-

1 733 F.2d 946, 948 (D.C. Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3372 (U.S. Nov. 13, 1984) (No. 84-389).

2 Pub. L. No. 97-248, 96 Stat. 324.

3 U.S. CONST. art. I, § 7, cl. 1.

4 733 F.2d at 956.

5 *Id.*

6 H.R. 4961, 97th Cong., 2d Sess., 127 CONG. REC. H9607-10 (daily ed. Dec. 15, 1981).

ate's amendments violated the origination clause of the Constitution.⁷ The House voted to table Rousselot's resolution.⁸ Each of the plaintiffs, eighteen members of the 97th Congress, voted against the motion to table.⁹ The House then voted to send the bill to a Senate conference without first referring it back to the House Committee on Ways and Means. Again, the plaintiffs were outvoted.¹⁰ In August 1982, TEFRA passed both the House and Senate;¹¹ all plaintiffs voted against its passage.¹²

The plaintiffs brought suit in federal district court against the House, the Senate, and certain officers of both bodies,¹³ seeking a declaratory judgment that TEFRA unconstitutionally originated in the Senate in violation of the origination clause. The district court dismissed the complaint, holding that the plaintiffs lacked standing, and alternatively, that in the court's remedial discretion, declaratory relief should be withheld.¹⁴ The court of appeals affirmed, agreeing with the district court's dismissal based upon prudential concerns. Significantly, however, the court of appeals held that the legislators had standing to sue in federal court.¹⁵

7 H.R. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. H4776 (daily ed. July 28, 1982). The resolution provides:

Resolved, that the Senate Amendments to the bill, H.R. 4961, in the opinion of the House, contravene the first clause of the seventh section of the first article of the Constitution of the United States, and are an infringement of the privileges of this House and that the said bill, with amendments be respectfully returned to the Senate with a message communicating this resolution.

8 *Id.* at H4776-77. A vote to table a resolution results in suspending consideration of the resolution.

9 The plaintiffs were:

Edward Bethune, R-AR
Daniel B. Crane, R-IL
Billy Lee Evans, D-GA
James Jeffries, R-KS
James G. Martin, R-NC
W. Henson Moore, R-LA
Ron Paul, R-TX
James D. Santini, D-NV
Richard C. Shelby, D-AL

Laurence E. Craig, R-ID
Philip M. Crane, R-IL
Carroll Hubbard, Jr., D-KY
Elliot H. Levitas, D-GA
Lawrence P. McDonald, D-GA
Stephen L. Neal, D-NC
John H. Rousselot, R-CA
Richard T. Schulze, R-PA
Bob Stump, D-AZ

Telephone conversation with the clerk's office of the Court of Appeals for the District of Columbia Circuit (September 18, 1984).

10 H.R. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. H4786-87 (daily ed. July 28, 1982).

11 H.R. Con. Res. 398, 97th Cong., 2d Sess., 128 CONG. REC. S10946, H6635-36 (daily ed. July 28, 1982).

12 *Id.* at H6635-36.

13 Named as co-defendants in the suit were: Thomas P. O'Neill, Jr., the Speaker of the House; George Bush, the President of the Senate; Edmund L. Henshaw, Jr., the Clerk of the House; and William F. Hildenbrand, the Secretary of the Senate. *Moore*, 733 F.2d at 948.

14 *Moore v. U.S. House of Representatives*, 553 F. Supp. 267, 271 (1982).

15 *Moore*, 733 F.2d at 956.

II. The *Moore* Court's Standing Analysis

In determining that the congressmen had standing, the *Moore* court applied the four pronged test which the Supreme Court announced in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*¹⁶ Under *Valley Forge*, a plaintiff has standing when: (a) "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant;"¹⁷ (b) his injury falls within the "zone of interests" protected by the constitutional provision allegedly violated;¹⁸ (c) the injury "can be traced to the challenged action" of the defendant;¹⁹ and (d) the injury is "likely to be redressed by a favorable decision" of the court.²⁰ The *Valley Forge* Court recognized the complexity of standing, noting that "the concept cannot be reduced to a one-sentence or one-paragraph definition."²¹ The Court, however, declared, "of one thing we may be sure: those who do not possess Art. III standing may not litigate as suitors in the courts of the United States."²² Thus, if the plaintiff lacks standing, the court lacks subject matter jurisdiction because there is no "case or controversy" within the meaning of Article III of the Constitution.

In addressing the first prong of the *Valley Forge* analysis, the court of appeals concluded that the congressional plaintiffs had alleged a "specific injury in fact to a cognizable legal interest."²³ The court, however, recognized that suits brought by congressmen against coordinate branches of government present separation of powers concerns which may affect standing in the federal courts.²⁴ Therefore, the court required that the representatives' alleged injury be "specific and cognizable" in order to give rise to standing.²⁵ The court ruled that denial of the opportunity to debate and vote on the origination of legislation, in a manner prescribed by the Constitution, inflicted a "specific and concrete" injury on the plaintiffs.²⁶

Although the *Moore* court included separation of powers concerns as a factor in its search for a specific injury in fact to each

16 454 U.S. 464 (1982).

17 *Id.* at 472 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

18 *Id.* at 475.

19 *Id.* at 472 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

20 *Id.*

21 *Id.* at 475.

22 *Id.* at 475-76.

23 *Moore*, 733 F.2d at 951.

24 *Id.*

25 *Id.*

26 *Id.* at 952.

plaintiff, the court emphasized that standing and the political question doctrine are distinct tenets.²⁷ Specifically, the court cautioned against an encroachment into standing analysis by political question concerns. The court warned that such an intrusion would "greatly curtail the exercise of federal court jurisdiction over matters that touch upon a coordinate branch of government."²⁸

The court of appeals readily disposed of the remaining prongs of the standing test. In addressing the second prong, the court relied on its previous holdings that congressmen have standing to sue to assert violations of constitutionally prescribed procedure.²⁹ The *Moore* court concluded that an individual congressman's right to initiate legislation is within the "zone of interests" protected by the origination clause.³⁰

The *Moore* court determined that the congressional plaintiffs satisfied the third prong of the *Valley Forge* test because the injury was "traceable to the challenged actions of the defendants."³¹ The plaintiffs' alleged injury, the unconstitutional denial of the chance to debate and vote on the origination of TEFRA, occurred exclusively within the legislative branch. Both the House and Senate enacted the disputed legislation. Thus, according to the court, the alleged injury was traceable to the defendants' actions. Finally, the *Moore* court held that the court's power to grant declaratory and injunctive relief provided sufficient capacity to redress the claimed injury, thereby satisfying the fourth prong of the *Valley Forge* test.³²

Moore's holding that the representatives had standing to sue the Congress may provide congressmen greater accessibility to the federal courts.³³ But, the court's decision to address a dispute con-

27 *Id.* at 953.

28 *Id.*

29 The court refers to *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979) and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

30 The "zone of interests" requirement, as its language suggests, is intended to be generously applied. The requirement seeks primarily to eliminate from adjudication cases in which the connection between the purpose of the protection and the interest asserted is too tenuous to justify judicial determination on that basis. Therefore, "the challenging party need only show that it is an intended beneficiary of the statute and not necessarily the primary one." *Constructores Civiles de Centroamerica v. Hannah*, 459 F.2d 1183, 1189 (D.C. Cir. 1972).

31 *Moore*, 733 F.2d at 954.

32 Redressability has been characterized as "the connection between the alleged injury and the action requested of the court." *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1248 (D.C. Cir. 1983). Further, the requirement is not that the injury will certainly be redressed but rather that it "is likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. at 472 (1981) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

33 For purposes of standing analysis, the court assumes the validity of the plaintiff's claim and, without addressing the merits, construes the complaint in the plaintiff's favor. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). Thus, the holding in *Moore* is not limited to

fined to the legislative branch, brought by lawmakers who debated and voted on the contested legislation, may circumvent the requirement that a plaintiff suffer a specific injury in fact. For example, in *Moore*, each plaintiff alleged a violation of his constitutional right to participate as a representative of the House in the *origination* of revenue raising legislation.³⁴ Yet, Congress settled this dispute to the satisfaction of a majority of its members in a manner consistent with its established procedures.³⁵ Furthermore, the *Moore* court recognized that suits brought by congressional plaintiffs against a branch of the government “pose separation-of-powers concerns which may affect a complainant’s standing.”³⁶ Perhaps this concern should be emphasized when an individual congressman alleges an injury to his office although the Congress finds no harm.³⁷ As noted in the concurring opinion in *Goldwater v. Carter*,³⁸ “[w]here Congress it-

the enactment of legislation in violation of the origination clause. Rather, the court required an injury to an “interest positively identified by the Constitution.” *Moore*, 733 F.2d at 951. As noted in the concurring opinion, the courts, following *Moore*, could resolve disputes between legislators concerning any constitutional provision that regulates legislative procedures. *Id.* at 958. For example, article I, section 5, clause 4 of the Constitution provides that “[n]either House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days.” And article I, section 4, clause 4 states that “[t]he Vice President of the United States shall be President of the Senate.” *Moore* permits a congressional plaintiff to allege a personal injury resulting from violation of either provision and have standing to sue the Congress in the federal courts.

34 Although the plaintiffs alleged that they were denied the opportunity to participate in the origination of TEFRA, the legislative history casts some doubt on their claim. First, H.R. 4961, although substantially altered by the Senate, did in fact originate in the House and was passed by the House on December 15, 1981. H.R. 4961, 97th Cong., 2d Sess., 127 CONG. REC. H9607-10 (daily ed. Dec. 15, 1981). TEFRA retained the House number in the Senate. Second, the plaintiffs voted against the motion to table Representative Rousselot’s resolution, which alleged that TEFRA unconstitutionally originated in the Senate. They voted against the motion to send TEFRA to Senate conference, and they voted against enacting TEFRA as legislation. See notes 8, 10, 12 *supra*. The district court noted: “Plaintiffs fully participated in the legislative process which culminated in the passage of the act they now challenge. They were simply outvoted.” *Moore*, 553 F. Supp. at 270.

35 On July 28, 1982, the House voted to table Representative Rousselot’s resolution, which alleged that TEFRA unconstitutionally originated in the Senate. H.R. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. H4776-77 (daily ed. July 28, 1982). Also on July 28, the House voted to send TEFRA to conference with the Senate, after debate on the constitutionality of the Senate’s amendments to TEFRA. *Id.* at H4777-88. Finally, TEFRA passed both houses on August 19, 1982. H.R. Con. Res. 541, 97th Cong., 2d Sess., 128 CONG. REC. S10946, H6635-36 (daily ed. Aug. 19, 1982).

36 *Moore*, 733 F.2d at 951.

37 The concurring opinion, disagreeing with the court’s conclusion that the plaintiffs had standing, noted:

[W]e sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings . . . brings forth a result that harms private rights, it is no part of our constitutional province, which is “solely, to decide on the rights of individuals.”

Id. at 959 (Scalia, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

38 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979).

self, and not the Executive, renders an individual legislator's vote ineffective, the courts have no role."³⁹

Although the *Moore* court focused considerable attention on whether the plaintiffs had sustained "injury in fact,"⁴⁰ the court rather summarily disposed of the other *Valley Forge* criteria,⁴¹ including the zone of interests analysis.⁴² The court's disposition of this latter criterion may prove to be the most significant aspect of *Moore* in future litigation. Injury in fact analysis involves a determination that concrete harm has occurred.⁴³ Therefore, the nature of the inquiry is factual and necessarily dependent on the circumstances of the particular case. That the injury is within the zone of interests protected by the Constitution, on the other hand, looks to the nature of that injury. In finding that a particular type of injury is protected, the court directly adjusts the constitutional limits to its jurisdiction. Thus, by expressly stating that the "interests of individual legislators were within the zone of interests protected by constitutional provisions,"⁴⁴ the Court of Appeals for the District of Columbia Circuit has expanded congressional standing.⁴⁵

Though the nature of the injury protected in *Moore* may prove crucial in future litigation, the court did not delineate which of the plaintiffs' specific interests the Senate may have violated by allegedly originating TEFRA. Prior congressional standing cases enumerate three basic interests that congressmen have in a constitutionally prescribed procedure: the interest of congressmen

39 *Goldwater*, 617 F.2d at 712 (Wright, J., concurring).

40 *Moore*, 733 F.2d at 951.

41 *Id.* at 953-54.

42 *Valley Forge*, 454 U.S. at 475. As noted earlier, *see* note 30 *supra*, the zone of interests requirement has received generous application. But, the requirement has remained essential to the analysis, preventing standing where the interest asserted is either so common to people generally or so indirectly the result of constitutional infringement that the injury could not serve as a basis of judicial precedent. *See* *Flast v. Cohen*, 392 U.S. 83 (1968).

43 *Moore*, 733 F.2d at 951.

44 *Id.* at 953-54.

45 Both *Goldwater*, 617 F.2d 697, and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), upon which the court relies to establish a zone of interest, *see Moore*, 733 F.2d at 954 n.36, involved controversies between separate branches of government. *Moore* is distinguishable. *Moore* presents an action by congressmen against the Congress; therefore, the case does not involve the necessities for judicial determination reflected in the previous decisions. In *Moore*, alternative means of redress were available within the Congress itself. Congress as a body recognized the possible deviation from congressional priority but voted to table Representative Rousselot's resolution. *See Moore*, 733 F.2d at 949. Thus, without expressly saying so, the court has asserted jurisdiction beyond the precedential basis.

Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979), involved a suit by members of Congress challenging the President's unilateral termination of a mutual defense treaty with Taiwan allegedly in violation of the treaty's provisions.

Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), involved a suit by Senator Kennedy challenging an alleged "pocket veto" of S. 3418 in violation of article I, section 7 of the Constitution.

as representatives of individual citizens; the interest of congressmen as representatives of Congress as an institution; and the individual interests of congressmen as private plaintiffs asserting personal rights. Apparently, the last of these interests is the injury which the *Moore* court found.

One of the interests that the origination clause⁴⁶ protects is the right of citizens to have taxing authority restricted by the powers of popular vote.⁴⁷ Neither the district court⁴⁸ nor the court of appeals⁴⁹ denied that private plaintiffs would have standing to challenge TEFRA. In this respect, the congressmen may have been acting as representatives of the people. Prior to *Moore*, however, courts relied on prudential considerations to deny representative plaintiffs standing to sue.⁵⁰ Recognizing the risks of insufficient representation of the third party's interest and the possibility that the third party may not want the suit litigated, courts have required the plaintiff to show an independent basis for asserting standing to sue.⁵¹ This independent basis is usually concrete personal injury to the plaintiff. Therefore, a congressman's status as representative of the people alone should not be enough to establish standing. Though the injury to the public is within the constitutionally protected zone of interest, an individual congressman may not assert the public interest without personal injury.

46 U.S. CONST. art. I, § 7, cl. 1.

47 The origination clause derived from the fear of delegates of the larger states at the Constitutional Convention that if revenue raising power were placed in the Senate, the smaller states, because of equal representation, would have disproportionate control of the purse strings. The theory behind the clause is that national taxing authority should be placed in the legislative branch which is more responsive to popular opinion. The House of Representatives satisfied this goal in two respects. First, the House was selected more often and therefore more sensitive to public influence. Second, the House provided a better forum for debate—members were both more numerous and more representative of national popular vote. But, in the bargaining and compromise of the convention, the Senate was given almost unlimited power to amend or reject revenue bills. Therefore, the power remaining in the House over revenue bills consisted solely in their origination. Many argue that their power is still significant in that it effectively gives the House the power to "set the legislative agenda." That is, by originating revenue bills, the House effectively controls the structure and direction of legislative debate. See, Comment, *The Origination Clause, the Tax Equity and Fiscal Responsibility Act of 1982, and the Role of the Judiciary*, 78 NW. U.L. REV. 419 (1983). See generally C. WARREN, *THE MAKING OF THE CONSTITUTION* (1928).

48 *Moore*, 553 F. Supp. at 271-72.

49 *Moore*, 733 F.2d at 956.

50 "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); see *Frothingham v. Mellon*, 262 U.S. 447 (1923) (involving taxpayer standing).

51 See *Harrington v. Bush*, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977). The *Harrington* court recognized this approach to standing as "derivative" and in regard to asserting such a claim recognized that "it may make it substantially more difficult to meet the minimum requirements of Art. III . . ." 553 F.2d at 199 n.41 (quoting *Warth v. Seldin*, 422 U.S. 490, 504-05 (1975)).

A second possible basis for standing in *Moore* is that violation of the origination clause injured the Congress as an institution and thereby injured the congressional plaintiffs as members of that institution.⁵² Arguably, Congress is an intended beneficiary of the origination clause,⁵³ but the Congress elected not to enforce its right to strike down TEFRA.⁵⁴ Thus, this justification is also without merit.

Therefore, it appears that the court's decision was substantially based on personal injury to the congressmen. As previously discussed, however, it is difficult to conceptualize how this harm is within the zone of interests protected by the origination clause. As Judge Scalia argued in his concurring opinion, "the authority [under the origination clause] was conferred for the benefit not of the governors but the governed."⁵⁵ Thus, *Moore's* holding that the harm is within the zone of interests protected by the origination clause will create an unwarranted and unconstitutional expansion of federal jurisdiction in suits brought by congressmen.

III. The *Moore* Court's Remedial Discretion Analysis

Although the *Moore* court found that the congressional plaintiffs had standing to challenge the constitutionality of TEFRA, it nevertheless chose to abstain from awarding declaratory relief to the congressmen.⁵⁶ The basis of the court's abstention was the doctrine of remedial discretion.⁵⁷ The court indicated that "when a congressional plaintiff's dispute is primarily with other members of Congress and when private plaintiffs would have standing to challenge the allegedly unconstitutional conduct, the doctrine of remedial discretion counsels judicial restraint in affording the congressional plaintiff declaratory or injunctive relief."⁵⁸ This comment concludes, as noted earlier, that the congressional plaintiffs in *Moore* lacked standing. A proper review of the use of equitable discretion, however, must proceed under the assumption that the plaintiffs had standing to sue the Congress.

The *Moore* court's use of equitable discretion to abstain from awarding declaratory relief is significant because it will hinder congressional plaintiffs in seeking a remedy for their violated rights. In

⁵² At a minimum, Congress has an interest in the origination clause inasmuch as the clause promotes an orderly process for legislating revenue bills.

⁵³ Plaintiffs also asserted injury as members of the House Ways and Means Committee. The Constitution, however, provides no specific protection for this committee as a body and protest must be on other grounds.

⁵⁴ See *Moore*, 733 F.2d at 960 (Scalia, J., concurring).

⁵⁵ *Id.*

⁵⁶ *Moore*, 733 F.2d at 956.

⁵⁷ *Id.*

⁵⁸ *Id.*

using the equitable discretion doctrine, the *Moore* court followed its decision in *Riegle v. Federal Open Market Committee*⁵⁹ and its subsequent related decisions in *Vander Jagt v. O'Neill*⁶⁰ and *Crockett v. Reagan*.⁶¹ In *Riegle*, *Vander Jagt*, and *Crockett*, the District of Columbia Circuit held that when legislative remedies are available to a congressional plaintiff, the court must dismiss the case on the basis of prudential concerns.⁶² Thus, because the *Moore* court found that the plaintiffs could vindicate their rights through the enactment, repeal, or amendment of TEFRA,⁶³ it affirmed dismissal of the case on the basis of prudential concerns. The *Moore* court, however, overstated the availability of such a remedy. To obtain legislative redress, congressional plaintiffs must persuade the majority of their colleagues to amend or repeal the bill at issue. This task is almost insurmountable since congressional plaintiffs typically represent a small minority of all the congressmen. Because legislative redress is likely to be unsuccessful for the congressional plaintiffs, they are left with a violated right and no remedy. The law of equity was created to avoid such a situation, not produce it.⁶⁴

The standards to employ in determining whether to abstain, on the basis of equitable discretion, in a congressional plaintiff case were first set forth in *Riegle*.⁶⁵ The *Riegle* court developed a two-prong standard, holding that when (1) the congressional plaintiffs can attain legislative redress, and (2) a private plaintiff may bring a similar action, prudential concerns counsel for dismissal of the congressional plaintiffs' action.⁶⁶

In analyzing the subsequent application of the *Riegle* standards, it is apparent that the District of Columbia Circuit has failed to consistently apply such standards. *Vander Jagt* and *Moore* exemplify this inconsistency. In *Vander Jagt*, fourteen Republican members of the House of Representatives sued the Democratic leaders of the House. The Republican members contended that the Democrats had systematically discriminated against them by providing them with fewer seats on House committees and subcommittees than they were proportionally due.⁶⁷ The court dismissed the entire case despite the fact that the Republicans had sued in their individual capacities as voters.⁶⁸ In noting the court's inconsistency with

59 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

60 699 F.2d 1166 (D.C. Cir.), cert. denied, 104 S. Ct. 91 (1983).

61 720 F.2d 1355 (D.C. Cir. 1983).

62 *Moore*, 733 F.2d at 956.

63 *Id.* at 955.

64 *Id.* at 962 n.9 (Scalia, J., concurring).

65 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

66 *Id.* at 882.

67 699 F.2d at 1167.

68 *Id.* at 1168.

Riegle, Judge Bork, in his concurring opinion in *Vander Jagt*, indicated:

If they were applying *Riegle*, my colleagues would dismiss the action by plaintiffs in their capacities as legislators because legislative redress is available and a similar action could be brought by a private plaintiff. But they could not dismiss the entire action since there are private plaintiffs before us: the congressmen also sued in their capacities as voters and as representatives of the classes of all voters represented in the House by Republicans.⁶⁹

Rather than rely on the principled rationale of *Riegle*, the *Vander Jagt* court withheld declaratory relief due to "the startlingly unattractive" idea of telling the Speaker of the House of Representatives what he must do to comply with the Constitution.⁷⁰ Such a rationale lacks the "general applicability" which Judge McGowan argued was necessary to properly use equitable discretion.⁷¹

Moore continues the inconsistent application of the equitable discretion doctrine. In *Moore*, the court indicated it could withhold "declaratory relief regardless of the availability of other forms of relief."⁷² This approach varies from that outlined by the United States Supreme Court in *Younger v. Harris*⁷³ where the Court stated that "courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."⁷⁴

Although the majority in *Moore* indicated that the congressional plaintiffs did have other available judicial remedies, the court did not elaborate.⁷⁵ Whatever adequate remedies at law the congressional plaintiffs may have had in *Moore* were denied when the court dismissed the case. Furthermore, given the substantial barriers to legislative redress, it is apparent that the plaintiffs have suffered ir-

⁶⁹ *Id.* at 1183 (Bork, J., concurring).

⁷⁰ *Id.* at 1176.

⁷¹ See McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 251 (1981). McGowan contends that the standing doctrine is difficult to apply in congressional plaintiff cases due to the doctrine's inability to reflect separation of powers concerns that are inherent in such cases. He argues that the political question doctrine is incapable of resolving congressional plaintiff cases due to its inherent deceptiveness and its general disfavor among judicial and academic authorities. He further contends that the ripeness doctrine is inappropriate in congressional plaintiff cases because, like the standing doctrine, it fails to consider the separation of powers concerns prevalent in congressional plaintiff cases. *Moore*, 733 F.2d at 955.

⁷² *Moore*, 733 F.2d at 955.

⁷³ 401 U.S. 37 (1971).

⁷⁴ *Id.* at 43-44.

⁷⁵ *Moore*, 733 F.2d at 954. It should be noted that Judge Scalia contends in his concurring opinion that the plaintiffs do not have any other available judicial relief. *Id.* at 962 n.9. If so, the majority has extended the use of equitable discretion well beyond its originally intended use.

reparable injury because the court refused to grant declaratory relief. Thus, the *Moore* court failed to apply the equitable discretion doctrine developed in *Younger* and later extended in *Riegle* to congressional plaintiff cases. The District of Columbia Circuit should have provided clear and concise principles, capable of consistent application, for employing equitable discretion in congressional plaintiff cases.

IV. Conclusion

In holding that the congressmen had standing to sue in the federal courts, the *Moore* court has made the federal courts more accessible to congressional plaintiffs. By alleging an injury to the right to debate and vote in Congress, a potential congressional plaintiff will meet the requirement of standing and thus confer jurisdiction upon the federal court. *Moore*, perhaps unintentionally, allows congressional plaintiffs to overcome the difficult jurisdictional requirement, leaving only the less difficult equitable discretion hurdle. In essence, congressmen will not have to convince the court that it has jurisdiction. After *Moore*, congressmen need only convince a court that it should *exercise* its jurisdiction. It appears, however, that the *Moore* court circumvented the requirement that the congressional plaintiffs suffer a concrete and specific injury within the zone of interests protected by the origination clause. The court in *Moore* should have dismissed the case not because of prudential concerns, but rather because the plaintiffs lacked standing, a prerequisite to federal court jurisdiction.

Jeffrey L. Elverman
Thomas E. Lange
David C. Link