No. 15-543

IN THE

Supreme Court of the United States

MATT SISSEL,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF U.S. REPRESENTATIVE TRENT FRANKS, CHAIRMAN OF THE HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE, AND 45 OTHER MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Congressman Trent Franks is Chairman of the House Judiciary Subcommittee on the Constitution and sponsor of H. Res. 392, declaring that the Origination Clause ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills") was violated by the passage of the Patient Protection and Affordable Care Act ("ACA"). Chairman Franks held a hearing on the Origination Clause on April 29, 2014. He and his 45 co-*amici*[2] and co-sponsors of H. Res. 392 all have an institutional interest in preserving the exclusive power of the House to originate "Bills for raising Revenue," like the ACA. Congressman Franks and his co-*amici* filed *amici* briefs in this case below.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*), this Court upheld the penalty imposed under the individual mandate of the ACA as a "tax." In doing so, however, Chief Justice Roberts, for the Court, issued this important caveat: "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other

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[1] This brief is filed with the written consent of all the parties through letters of consent on file with the Clerk. All counsel of record received timely notice of *amici's* intent to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or its counsel made a monetary contribution intended to fund its preparation or submission.

[2] Congressional co-*amici* are listed in the Appendix.

requirements in the Constitution." *Id.* at 2598. One of the "other requirements" is, of course, the Origination Clause that requires that such taxes must originate in the House of Representatives.[3] In an unprecedented opinion, the D.C. Circuit ruled that ACA, designed to raise $473 *billion* in revenues through some 17 tax provisions, is not a "Bill[] for raising Revenue" under the Origination Clause because ACA's "primary purpose" was not to raise revenue but to improve health care and health insurance coverage. Petitioner App. ("PA") A-16-18.

This case raises an issue of exceptional importance—the separation of powers embodied in the Origination Clause—that merits review. As the dissent from denial of *en banc* review below put it, "The panel opinion sets a constitutional precedent that is too important to let linger and metastasize." PA C-34. The Fifth Circuit, in a related Origination Clause case, recognized that "the underlying merits of this appeal present issues of exceptional importance."[4]

The history of the Origination Clause, its purpose, and a proper reading of the relevant Supreme Court decisions, early federal court opinions, and State court decisions that interpreted their respective State Constitution Origination Clauses, all demonstrate that the court below fundamentally erred in devising

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[3] *Cf. United States v. Butler*, 297 U.S. 1, 69 (1936) ("resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible").

[4] *Hotze v. Burwell*, 784 F.3d 984, 999 (5th Cir. 2015), petition for certiorari filed November 12, 2015 (No. 15-622).

this novel "primary purpose" test.[5] If allowed to stand, the "cornerstone" of the Great Compromise of 1787 could easily be rendered a dead letter simply by the Senate labeling any revenue raising bill with a regulatory "primary purpose."

While the dissent properly concluded that the ACA is indeed a bill for raising revenue, it unfortunately and mistakenly concluded that the Senate could "gut and replace" a non-germane House bill (which does not even raise any revenue). That sweeping view of the scope of the Senate's amendment power under the Origination Clause would similarly eviscerate its meaning and be contrary to the historic understanding of the Senate's power, as even the panel recognized, and thus is a further reason why review by this Court is warranted.

The Origination Clause is not a relic so easily subverted and discarded, either by the panel's narrow view of what is a "revenue raising" bill or the dissent's expansive view of the Senate's amendment power, but a key Constitutional separation-of-powers provision upon which the Founders insisted to ensure that bills that raise taxes originate in that body of Congress closer to the People, the House of Representatives.

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[5] *See generally* Priscilla Zotti & Nicholas Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century*, 3 BR. J. AM. LEG. STUDIES 71 (2014) (Zotti & Schmitz).

ARGUMENT

I. THE D.C. CIRCUIT DECISION EVISCERATES THE EXCLUSIVE POWER OF THE HOUSE TO ORIGINATE "ALL BILLS FOR RAISING REVENUE," THEREBY THREATENING THE SEPARATION OF POWERS

In an unprecedented opinion, the court below concluded that what originated as the "Senate Health Care Bill" and raises $473 billion in taxes is subject to the Origination Clause "only if its *primary purpose* is to raise general revenues. . . ." PA A-16 (emphasis in original). The panel's concoction of its "hitherto unknown 'primary purpose' test"[6] is not, as the panel below suggested, "embodied in Supreme Court precedent." PA A-13. Rather, "[*i*]*t is immaterial what was the intent behind the statute*; it is enough that the tax was laid, and the probability or desirability of collecting any taxes is beside the issue."[7] If the unprecedented "primary purpose" test is allowed to stand, the Senate could easily circumvent the Origination Clause by ascribing another regulatory or legislative "purpose" to any revenue raising bill, thereby rendering the Origination Clause a dead letter.[8]

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[6] Steven Willis and Hans Tanzler IV, *The Wrong House: Why 'Obamacare' Violates The U.S. Constitution's Origination Clause*, Washington Legal Foundation Critical Legal Issues Working Paper Series, No. 189, p. 34 (Jan. 2015).

[7] *Hubbard v. Lowe*, 226 F. 135, 137 (S.D.N.Y. 1915), appeal dismissed, 242 U.S. 654 (1916) (emphasis added).

[8] Two of this Court's decisions that the D.C. Circuit relied on for its "primary purpose" rule cautioned against adopting any such categorical approach: "What bills belong to that class [of revenue bills under the Origination Clause] *is a question of such*

As Circuit Judges Kavanaugh, Henderson, Brown, and Griffith noted in their dissent from the denial of *en banc* review, "[t]he panel opinion sets a constitutional precedent that is too important to let linger and metastasize." PA C-34. These judges properly observed that, "the Act imposed numerous taxes to raise revenue. Lots of revenue. $473 *billion* in revenue over 10 years. It is difficult to say with a straight face that a bill raising $473 billion in revenue is not a 'Bill for raising Revenue.'" *Id.* at 33-34 (emphasis in original). Having concluded that the panel opinion's primary purpose test "to exempt the $473 billion Affordable Care Act from the Origination Clause is a textbook example of missing the forest for the trees" (PA C-56), the dissenting judges nonetheless wrongly concluded that "the relevant Supreme Court case law forecloses the germaneness requirement advanced by Sissel" (PA C-61), and, notwithstanding the Senate's "gut and replace" amendment, the "Affordable Care Act originated in the House." PA C-62.

Left unchecked by this Court, both the D.C. Circuit's novel construction of the Origination Clause and the dissenting opinion would blur the clear separation of powers drawn by the Origination Clause and would invite the Senate, as envisioned by our Founders, to "hatch their mischievious projects, for their own purposes, and have their money bills ready cut &

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magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897) (emphasis added); *Millard v. Roberts*, 202 U.S. 429, 436 (1906) (quoting *Nebeker*).

dried . . . ."[9] The interest of the people in the Origination Clause as a bulwark of liberty would thus be imperiled.

The Origination Clause embodies a foundational principle of American jurisprudence that offers a structural constitutional protection against abuses of power by the national government. Without its guarantee in the 1787 Convention and ensuing ratification debates, our Constitution would not exist, at least not in its present form: the restriction of the Senate from originating taxes was the "cornerstone of the accommodation"[10] of the Great Compromise of 1787 which satisfied the necessary number of states to ratify the Constitution. As such, the way ACA was enacted not only violates the House of Representatives' prerogatives under the Origination Clause, but more importantly does great violence to two of America's most foundational principles: the separation of powers within a national government of limited powers; and the guarantee of no taxation without representation.

Aside from the district court and D.C. Circuit panel opinions below, no American court has ever allowed taxes enacted into law in this manner and on this scale to become the law of the land. Doing so now would wholly disregard and effectively nullify the plain letter and spirit of the Origination Clause.

The intra-branch separation of powers issue in this case is no less important to protecting liberty than either the inter-branch separation of powers at the federal level or the separation of powers between the

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[9] James Madison, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 443 (New York, Norton & Co. Inc., 1969).

[10] *Id*. at 290.

national government and the States under the Tenth Amendment, which this Court vigorously protected in striking down the State Mandate Medicaid provisions of the ACA in *NFIB, supra*.[11]

As Justice Thurgood Marshall, speaking for the Court in its most recent Origination Clause decision, explained:

> This Court has repeatedly emphasized that "the Constitution diffuses power, the better to secure liberty." (internal quotes and citation omitted)
>
> * * *
>
> What the Court has said of the allocation of powers among branches is no less true of such allocations *within* the Legislative Branch. . . . As James Madison said in defense of [the Origination] Clause: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, p. 359 (C. Rossiter ed. 1961). *Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty.*

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[11] In striking down the State Mandate provision ACA by a vote of 7-2, the *NFIB* Court cited more than 20 times *New York v. United States*, 505 U.S. 144 (1992), which in turn relied *on United States v. Butler, supra*.

United States v. Munoz-Flores, 495 U.S. 385, 394-95 (1990) (second emphasis added). The exceptional importance of protecting this prerogative of the House is particularly acute where, as in the case of the rushed passage of the ACA,[12] one political party controlled both Houses of Congress. This control made any "blue slip" procedure by which a member of the minority may question the constitutional legitimacy of any Senate "gut and replace" amendment to a House bill a futile exercise.[13]

II. THE D.C. CIRCUIT'S "PURPOSIVE" TEST CONFLICTS WITH THE FRAMERS' INTENT, HISTORICAL PRACTICE, AND THE OPINIONS OF THIS COURT, LOWER FEDERAL COURTS, AND STATE COURTS

In denying the petition for rehearing *en banc*, the court below stated that "[b]ecause the Supreme Court has instructed us how to decide Origination Clause questions, this case presents no occasion for a comprehensive historical inquiry." PA C-29. While the lower court admittedly discussed some of the history surrounding the Origination Clause, *amici* submit that this case certainly deserves "a comprehensive historical inquiry" by this Court. Such an historical inquiry is particularly critical since this Court's Origination Clause jurisprudence, purportedly

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[12] As then Speaker Pelosi infamously exhorted her colleagues, "We have to pass the Bill so that you can find out what is in it" (https://www.youtube.com/watch?v=hV-05TLiiLU).

[13] Even if the opposition party to which *amici* belong had the power to defeat the ACA "because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments." 495 U.S. at 395.

relied on by the court below, unfortunately lacks such historical inquiry. Rather, that jurisprudence consistently and primarily rely on "Justice Story's views [which] form the basis of controlling precedent in this court and in the Supreme Court." PA C-30. But as *amici* argued below and will demonstrate *infra*, Justice Story's views, fully quoted and properly understood, support Petitioner's and *amici's* reading of the Origination Clause.

A. The History Of The Origination Clause

The dissenting judges correctly observed that, "[i]t is difficult to say with a straight face that a bill raising $473 billion in revenue is not a "Bill for raising Revenue." PA C-34. The panel opinion's "primary purpose" test "to exempt the $473 billion Affordable Care Act from the Origination Clause is a textbook example of missing the forest for the trees." PA C-56. Moreover, the "primary purpose" test is not supported by the history of the Origination Clause; quite the opposite is true.

Few clauses in our Constitution have such a rich and clear historical significance as the Origination Clause.[14] With its origins in the Magna Carta, the Commons of England fought to preserve and strengthen this right for 500 years before the principle was firmly solidified by the late 17th Century in English Parliamentary custom. No principle's neglect has been as responsible for undermining the legitimacy of English speaking governments as the neglect by kings, legislatures, and courts alike of the Origination principle.

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[14] *See generally* Zotti & Schmitz, *supra*.

The principle of imposing taxation only by the immediate representatives of the people was so firmly rooted in the English tradition, that its implementation on the American side of the Atlantic was nearly universal in colonial and early state legislatures.

Where Royal charters did not explicitly guarantee the early American colonists this prerogative, they seized it. Under the various names of "House of Delegates," "Burgesses," "Commons," or "Representatives," the colonists' lower houses—those closest to the people—were commonly vested with the exclusive right of originating taxes.

Our Founders—often the same individuals who worked to draft the state constitutions with Origination Clauses—enshrined this central procedural limitation on governmental power to originate "Bills for raising Revenue" in Article 1, §7, of our current Constitution.

The lower court's fixation on the preposition "for" in the Origination Clause ("Bills for raising Revenue") to support its "purposiveness" test is a crabbed and historically inaccurate understanding of the clause. The Colonists thought that anything that taxed them at all for any reason was a "money bill" and therefore subject to origination restrictions. All but one of the first 13 States included an Origination Clause provision in their respective constitutions, and only one of those pre-ratification constitutions had a "purpose" reference. The Massachusetts Constitution of 1780 was quite explicit and formed the basis of the imported final language of the federal clause:

> No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, *under any pretext whatsoever*, without the

> consent of the people, or their representatives in the legislature. * * * * All *money bills* shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.[15]

More compelling, by deleting the words "for purpose of revenue" in the final version of the Origination Clause, the Framers appear to have decided that the term "money bills" was a synonym for "bills for raising money" without the limiting "*for the purpose* of revenue" clause.[16]

B. Early Lower Federal Court Decisions

Early federal judicial opinions further demonstrate the Framers intended a broad meaning of "Bills for raising Revenue." For example, in *United States ex rel. Michael v. James*, 26 F. Cas. 577 (C.C.S.D.N.Y. 1875), the court opined:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, *either directly or indirectly*, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return. . . . It is this feature which characterizes bills for raising revenue. They draw money from the citizen; *they give no direct equivalent in return*. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.

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[15] Mass. Const. Art. XXIII & Art. VII (emphasis added).

[16] Madison NOTES, *supra*, at 442.

Id. at 578 (emphasis added); *cf*. *Hubbard v. Lowe*, 226 F. at 137 ("It is immaterial what was the intent behind the statute; it is enough that the tax was laid."). Even congressional supporters of ACA concede that the history of the clause demonstrates that it was intended by the Framers to be broadly construed.[17]

C. Early State Court Decisions

In addition to the federal district court in *Hubbard v. Lowe, supra*, at least two State courts have struck down state bills for raising revenue under almost identical Origination Clause language in their respective State Constitutions. For example, in *Perry County v. Selma Railroad*, 58 Ala. 546, 1877 WL 1433 (Ala.) (1877), the Supreme Court of Alabama struck down a State Senate-originated act "To amend an act entitled an act to establish revenue laws for the State of Alabama" under the Origination Clause of the Alabama Constitution of 1868, which, like its federal counterpart, provides "that all bills for raising revenue shall originate in the house of representatives, but the

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[17] "[T]he Origination Clause, in its final form, provided for an expansive category of bills that would need to originate in the House –that, all "bills for raising revenue," even those that *did not have as their purpose* the raising of revenue. . . ." Brief *Amici Curiae* of Congressman Sandy Levin, *et al.*, at pp. 10-11 (July 17, 2014) (emphasis added) filed in *Hotze v. Burwell, supra*. Senator Harry Reid, the chief sponsor of the "Senate Health Care Bill" (http://www.reid.senate.gov/press_releases/reid-unveils-senate-health-care-bill#.U2KlLcsU9lb) would certainly be surprised to learn that the ACA is not a bill for raising revenue inasmuch as he intentionally took what he mistakenly thought was a House revenue raising bill and then replaced it with the ACA and its half trillion dollars in new taxes in a sleight-of-hand maneuver he thought complied with the Senate amendment provision of the Origination Clause.

senate may amend or reject them as other bills." *Id*. at *7.

In its ruling, the Alabama Supreme Court explained:

> We think the only safe rule for interpreting clauses in the Constitution which command certain things to be done, or certain methods to be observed in the enactment of statutes, is to hold that when it is affirmatively shown by legal evidence that in the attempt to legislate, some mandate of the Constitution has been disregarded, such attempt never becomes a law. . . . These provisions clearly show that the law we are considering *was one to raise revenue*; and as the bill originated in the Senate, it is unconstitutional, and never had a legal existence. We must, therefore, dispose of these cases, as if that statute had never been attempted to be enacted.

Id. at *8 (emphasis added).

The Alabama Supreme Court was not hung up on the preposition "for" as was the court below; rather, it gave the phrase "all bills for raising revenue" its intended and natural meaning. *See also Thierman v. Commonwealth*, 123 Ky. 740, 97 S.W. 366, 368-69 (Ky. App. 1906) ("Mr. Justice Story, in *United States v. Mayo*, 26 Fed. Cas. 1231 [(C.C. Mass. 1813)], thus lays down the rule for determining a revenue bill: 'The true meaning of revenue laws in these clauses is such laws as are made for the direct and avowed purpose of creating and securing revenues or public funds for the services of the government' . . . . [I]n the case before us, the only construction that can be given the act in question is that it is an act for revenue, pure and

simple; and, originating, as it did, in the Senate, it was passed in violation of the plain provision of the Constitution.").

In 1882, the Court of Appeals of Kentucky addressed the meaning of Justice Story's reference to permissible "incidental" taxes as opposed to "taxes in the strict sense of the word" to clarify, as *amici* discuss further *infra*, that "user fees" in that case that "incidentally" raise revenue where "sums collected . . . from the litigant or persons for whom the services may be rendered *are in consideration of such services*, and those sums are not, in the strict sense, taxes levied on the citizen any more than increased postage is a tax levied on the sender of mail matter." *Commonwealth v. Bailey*, 81 Ky. 395, 1883 WL 7851, p. 4 (Ky. App. 1882) (emphasis added). Such fees are in sharp contrast to the taxes imposed for raising general revenues like the ACA.[18]

In every plain English language sense of the word both today and in 1789, ACA is a bill for raising revenue that "originated" in the Senate as Senator

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[18] *See* "Examination of Dr. Franklin before the House of Commons" relative to the Repeal of the American Stamp Act in 1766, in William Temple Franklin, MEMOIRS OF THE LIFE AND WRITING OF BENJAMIN FRANKLIN, p. xli (1818):

> Q. But is not the post-office, which they have long received, a tax as well as a regulation?
>
> A. No; the money paid for the postage of a letter is not of the nature of a tax; it is merely a *quantum meruit* for a service done. . . . They would certainly object to it, as an excise is unconnected with any service done, and is merely an aid; which they think ought to be asked of them, and granted by them, if they are to pay it; and can be granted for them by no others whatsoever, whom they have not empowered for that purpose.

Reid's self-described "Senate Health Care Bill." The only part of ACA that originated in the House was the House bill number H.R. 3590 – a chamber-specific bill designator that did not even exist in the early Congresses.[19]

D. The Court of Appeals Decision Is Inconsistent With Decisions Of This Court And Miscites Justice Story's *Commentaries*

As noted, the lower court's reliance on this Court's few Origination Clause cases, which instead of being based on historical practice and the intent of the Framers and Ratifiers, primarily rely on "Justice Story's views [which] form the basis of controlling precedent in this court and in the Supreme Court." PA C-30. But as *amici* argued below and demonstrate here, that heavy reliance on Justice Story as the definitive authority on the Origination Clause is seriously misplaced since all of the Supreme Court cases citing Story consistently fail to cite and discuss his complete statement on the subject, which supports Petitioner and *amici's* reading of the Clause.

Thus, the lower court relies primarily upon this Court's decision in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), and on Justice Story's *Commentaries* describing what constitutes a bill for raising revenue. PA C-30. That reliance is misplaced.

In *Munoz-Flores*, this Court was considering whether a nominal $25 assessment levied on persons convicted of federal crimes was a "Bill for raising Revenue." 495 U.S. at 385. The Court concluded that the assessment provision was not a "Bill for raising

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[19] *See* Zotti & Schmitz, *supra*, at 103, n. 111.

Revenue" because the fines were earmarked for a special Victims Fund rather than the General Treasury, and that only "incidentally" *if* there were any excess funds in the account and *if* those funds were deposited in the General Treasury, that fact alone would not subject the assessment provision to the Origination Clause. *Id.* at 399.

The D.C. Circuit panel seriously misconstrued the adverb "incidentally" used in *Munoz-Flores* in two major respects. First, the panel interpreted "incidentally" not as *Munoz* meant, namely, any excess revenue in a relatively small amount that may by happenstance or "incidentally" exceed the cap on the Victims Fund, and which such "surplus" may be deposited in the General Treasury. In fact, no "such an excess in fact materialize[d]." *Id.* at 399. Rather, the panel below transformed the adverb "incidentally" to mean "incidental to," in the sense of being "connected with" or "related to" the underlying subject matter of the legislative program. Second, by doing so, the panel below impermissibly held that since all of the taxes in the ACA were "incidental to" the underlying purpose of that law—even though all the taxes raised by the law are deposited in the General Treasury—then *mirable dictu*, all these taxes were not "revenue raising" subject to the Origination Clause. The Founders would be alarmed by this radical rule that could so easily eviscerate the Origination Clause.

The panel's confusion may have arisen from its recitation of the oft-repeated but miscited quote from Justice Story in *Munoz-Flores* and prior cases that the Origination Clause applies "to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills *for other purposes*, which may *incidentally* create revenue." 2 Joseph Story,

Commentaries on the Constitution of the United States, Sec. 877 (emphasis added). However, the ACA does indeed levy taxes in the "strict sense of the word." More importantly, the very next sentence of Story's quote that is repeatedly omitted in these few Origination Clause cases explains very clearly what he means by "bills for other purposes, which may incidentally create revenue":

> No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency, although all of them *might incidentally* bring, revenue into the treasury.

Id. (emphasis added). The Founders were not worried about these kinds of incidental revenue raising measures, which can be favorably compared to "user fees."[20] The nominal assessments in *Munoz-Flores* are akin to such "user fees" to be remitted by convicted criminals who (mis)use the criminal justice system; however, the $476 *billion* in taxes levied in ACA as general revenues, including those imposed on persons like Petitioner for *not* purchasing health insurance, are not.

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[20] *See, e.g.*, Benjamin Franklin MEMOIRS, *supra*, discussing Franklin's *quantum meruit* example with respect to paying for postage stamps.

E. The House Bill Was Not A Bill For Raising Revenue

As noted, the dissent incorrectly concluded that the Senate's "gut and amend" procedure satisfied the Senate's amendment power under the Origination Clause. But that conclusion presupposes that the original House bill was a "Bill for raising Revenue." It was not.

The Service Members Home Ownership Tax Act of 2009 (SMHOTA), H.R. 3590, was intended to *reduce* taxes by providing a tax credit to certain veterans who purchase houses. *See* PA D. The dissenting judges below mistakenly suggest that SMHOTA "contained revenue raising provisions." PA C-58, n. 10. There were no "revenue raising" provisions in SMHOTA. The bill provided for "tax credits" to veterans who purchase homes, a provision which reduces revenue, not raises it. Furthermore, as Section 6 of SMHOTA, entitled "TIME FOR PAYMENT OF CORPORATE ESTIMATE TAXES," makes clear, the corporate tax-related provision was merely a withholding modification that does not raise revenue or tax rates, but merely collects a small amount more than may otherwise be due, which amount may be refunded or adjusted once the corporation files its annual return.[21]

In short, because H.R. 3590 was not a bill for raising revenue, this Court—should it grant review and rule that the ACA does raise revenue subject to the Origination Clause—need not plumb the depths of the scope of the Senate amendment power under the clause. Instead, the Senate revenue raising

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[21] *See Baral v. United States*, 528 U.S. 431, 436 (2000) ("Withholding and estimated tax remittances are not taxes in their own right, but methods for collecting the income tax.").

"amendment" would have to stand alone as originating in that body, and thus violates the Origination Clause.

F. Even If The Original H.R. 3590 Were A Bill For Raising Revenue, The "Senate Health Care Bill" Was An Impermissible Substitute Amendment

Even if H.R. 3590 were a bill for raising revenue, the conversion of that House bill into a "shell bill" by means of a total substitution of its text with the non-germane text of the "Senate Health Care Bill," was not a permissible "amendment" as our Founders understood that term, as even the panel recognized, contrary to the conclusion of the dissent. PA C-62. Moreover, this elevation of form over substance is contrary to how even the Senate has heretofore exercised its power to amend "Bills for raising Revenue." Any Senate amendment to a House bill that has the effect of raising revenue must be "germane to the subject-matter of the [House] bill,"[22] not just to one small provision in that bill as the dissent wrongly assumed. The historical practice of determining "germaneness" as well as Supreme Court precedent does not support the dissent's novel expansion of the Senate's limited amendment power.

The House has always recognized the principle that the Senate may not design new tax bills. Indeed, when the Framer's wrote the Origination Clause, it was clear that the scope of permissible amendments "as on other Bills"—regardless of whether or not the bill was for raising revenue—did not include amendments that

[22] *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911).

were not germane to the subject matter of the bill.[23] This was the established standard when the Founders during the Constitutional Convention penned the words "the Senate may propose or concur with Amendments as on other Bills."[24] In short, no non-germane substitute amendments at all were permitted in 1787 by the unicameral Continental Congress. Whatever later internal parliamentary practices that may have been adopted regarding the power of the Senate to amend House bills of whatever topic by non-germane "gut and replace" proposals, that subsequent practice surely cannot amend the Origination Clause with regard to what the Framers and the Continental Congress intended and was the legislative practice at the time. Accordingly, the courts must look only at that practice as it determines the scope of the Senate amendment power with respect to revenue raising bills such as the ACA. Put another way, the First Congress would never believe that the hard fought Origination Clause could be so easily circumvented by the Senate proposing a "gut and replace" amendment imposing huge taxes on its citizenry.

After the Constitution was ratified, under our newly established bicameral legislature, and designed as it was to prevent creative usurpations of the House's

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[23] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States §1072 (U.S.GPO, 1899) (*quoting* Continental Congress rule that "No new motion or question or proposition shall be admitted under color of amendment as a substitute for a [pending bill] until [the bill] is postponed or disagreed to.").

[24] *See* Zotti & Schmitz at 104-14.

right to "first ha[ve] and declare"[25] all new tax laws, the House insisted that any Senate amendments altering new tax measures must be germane to the subject matter of the original house revenue bill, not just that the word "tax" appears somewhere in the House bill. Indeed, this is the most direct and logical method to ensure that the Senate does not usurp the House's taxing power. The House's definition of this standard as applied to all legislative amendments has historically been quite clear and practicable:

> When, therefore, it is objected that a proposed amendment is not in order because it is not germane, the meaning of the objection is simply that it (the proposed amendment) is a motion or proposition on a subject *different from that under consideration*. This is the test of admissibility prescribed by the express language of the rule.[26]

The Supreme Court in *Flint v. Stone Tracy*, *supra*, followed this historical practice and rule, finding that the Senate's replacement of just one clause (the inheritance tax) among hundreds of other tax provisions in the Payne Aldrich Tariff Act with a corporate excise tax of equivalent revenue raising value was "germane to the subject-matter of the [House] bill, and not beyond the power of the Senate to propose."[27] The dissent below ignored the context of this germaneness rule to the point of rendering it wholly meaningless. The Senate's modest and

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[25] *See* 75 Thomas Bacon, *The Laws of Maryland* ch. XXV, 37-38 (1765).

[26] Asher Crosby Hinds, Parliamentary Precedents of the House of Representatives of the United States, §5825 (1907) (emphasis added).

[27] 220 U.S. at 143.

germane amendment sanctioned in *Flint* is substantially different, both qualitatively and quantitatively, from the Senate's wholesale "gut and replace" of H.R. 3590 with the Senate Health Care Bill that became ACA. The two cases stand as polar opposites on any conceivable spectrum of germaneness.

Moreover, the dissent incorrectly supported its mistaken view that *Flint* does not require a germaneness test by relying on "*Rainey's* later rejection of just such a requirement." PA C-62. *See* Cert. Petition at 28-29.

The House has historically enforced the germaneness standard with respect to all legislative amendments, both revenue and non-revenue bills alike, since its earliest days. Moreover, the constitutional issue before this Court only concerns Senate modifications that convert a totally unrelated House measure, revenue raising or not, to a new and massive revenue raising bill. The Origination Clause provides the rule of legislative procedure in those cases. The internal procedural rules of either chamber cannot circumvent this constitutional requirement.

The Senate's practice that its amendments to House bills need not be germane cannot possibly serve as the basis of the protection of the People's rights. It is totally at odds with normal Parliamentary procedure, both now and more importantly at the time that the Framers granted the Senate the power to amend "as on other Bills." This "paltry right of the Senate to propose alterations in money bills"[28] must be viewed, as discussed *supra*, in the light of how such

[28] Letter from James Madison to George Washington (Oct. 18, 1787), *in* 10 *The Papers of James Madison Digital Edition* 196 (J.C.A. Stagg ed., Univ. of Va. Press, 2010).

amendments were made, "as on other Bills," *at the time* of the Constitution's ratification. Neither the Framers nor the First Congress would have countenanced the wholesale manner in which the "Senate Health Care Bill" replaced the House Bill, and nor should this Court.

As the authors of the exhaustive historical research on the Origination Clause concluded, "If there were no germaneness requirement, then the Origination Clause would be wholly superfluous, and furthermore the word 'amend' in the Clause certainly does not mean 'replace' in any dictionary of plain English."[29]

CONCLUSION

What is most alarming and dangerous about this case, is that the Senators knew exactly what they were doing in circumventing the Origination Clause. As explained by Senator Reid's own Senior Health Counsel: "[B]asically, we needed a non-controversial House revenue measure to proceed to, so that is why we used the Service Members Home Ownership Tax Act. It wasn't more complicated than that."[30] From the perspective of these *amici* Members of the House of Representatives, it could not have been more contrary to the letter and spirit of the Origination Clause than that.

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[29] Zotti & Schmitz at 106-07.

[30] E-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid, to John Cannan (Apr. 21, 2011, 3:25 p.m.), in John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105:2 Law Library Journal, 131, 153, n.176 (2013).

For the foregoing reasons and those stated by Petitioner, this Court should grant the Petition.

Respectfully submitted,

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November 25, 2015

APPENDIX

APPENDIX

U.S. Rep. Trent Franks' Congressional Co-*Amici*

1. Rep. Brian Babin
2. Rep. Joe Barton
3. Rep. Rob Bishop
4. Rep. Marsha Blackburn
5. Rep. Jim Bridenstine
6. Rep. Mo Brooks
7. Rep. Steve Chabot
8. Rep. K. Michael Conaway
9. Rep. John Culberson
10. Rep. Ron DeSantis
11. Rep. Jeff Duncan
12. Rep. John Duncan
13. Rep. John Fleming
14. Rep. Paul Gosar
15. Rep. Bob Gibbs
16. Rep. Louie Gohmert
17. Rep. Andy Harris
18. Rep. Jody Hice
19. Rep. Tim Huelskamp
20. Rep. Walter B. Jones, Jr.
21. Rep. Jim Jordan
22. Rep. Steve King
23. Rep. Doug LaMalfa

24. Rep. Doug Lamborn
25. Rep. Bob Latta
26. Rep. Thomas Massie
27. Rep. Mark Meadows
28. Rep. Markwayne Mullin
29. Rep. Randy Neugebauer
30. Rep. Steve Pearce
31. Rep. Robert Pittenger
32. Rep. Bill Posey
33. Rep. David P. Roe
34. Rep. Todd Rokita
35. Rep. Matt Salmon
36. Rep. Mark Sanford
37. Rep. David Schweikert
38. Rep. Marlin A. Stutzman
39. Rep. Tim Walberg
40. Rep. Mark Walker
41. Rep. Randy K. Weber, Sr.
42. Rep. Brad R. Wenstrup
43. Rep. Lynn A. Westmoreland
44. Rep. Rob Wittman
45. Rep. Ted S. Yoho

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THE ORIGINATION CLAUSE: MEANING, PRECEDENT, AND THEORY FROM THE 12TH TO 21ST CENTURY

Priscilla H.M. Zotti*

and

Nicholas M. Schmitz**

ABSTRACT

Article 1, Section 7 of the Constitution requires that, "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." The history of the clause reveals a strong restriction that nobody except the direct representatives of the people familiar with their circumstances can constitutionally propose the laws drawing forth national revenues. Through a handful of cases in the 20th century, the Supreme Court adopted a deferential standard for judging Origination Clause challenges to Senate tax measures. This standard departed from both the original understanding of the Clause and the design of our mixed legislature. The Supreme Court has yet to rule on a large scale Senate tax which significantly challenges its 20th century interpretation. Additionally, it has not articulated a clear and encompassing standard for all potential Senate taxes that might come under challenge on Origination Clause grounds. A historical review of the origins, evolution, and modern interpretation of the constitutional dictate reveals that future challenges to Senate originated taxes may highlight the limits of the 20th century's permissive standard. Such challenges may force the Court either to modify its standard in favor of finding Origination Clause violations in Senate tax measures or else effectively nullify the Origination Clause requirement ratified in the Constitution. Currently, multiple cases challenging the constitutionality of the Affordable Care Act under the Origination Clause are pending before the Judiciary. If the Court in any one of these challenges does not enforce a germaneness requirement to Senate-originated taxes through amendment, then the Origination Clause will become wholly superfluous. Through focused analysis on the legal tradition of Colonial and State origination requirements, and the balance of evidence from the 1787 Convention and the ratification debates, we find significant historical evidence that such an interpretation of the Clause is not warranted.

CONTENTS

I. INTRODUCTION

> *The patriots of this province … were, for one hundred and fifty years, allowed to tax themselves, and govern their internal concerns as they thought best. Parliament governed their trade as they thought fit. This plan they wish may continue forever. But it is honestly confessed, rather than become subject to the absolute authority of parliament in all cases of taxation and internal polity, they will be driven to throw off that of regulating trade.*
>
> *John Adams, 1775* [1]

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The authors thank Professors Erik M. Jensen and Robert G. Natelson for their invaluable criticism and comments on earlier drafts. Above all, the authors recognize Andrew T.

In 2012, while striking down as unconstitutional the "State mandate" provision of the Patient Protection and Affordable Care Act, the Supreme Court upheld as constitutional the only other provision of that Act before the Court, the "individual mandate," which purports to require most Americans to maintain "minimal essential" health insurance coverage. The Court found this provision constitutional under Congress's power to tax: "In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax."[2] Both opponents and proponents of the law were surprised by the Court's unexpected reliance on the taxing power of Congress to resolve this landmark case. Most assumed the case would center squarely on the extent of Congress's power to regulate interstate commerce. For the last century of U.S. jurisprudence, cases and controversies challenging or defending an expansive interpretation of implied federal powers have been argued, won, and occasionally lost on predominantly commerce clause merits. The Court's unexpected decision calls for renewed scholarly analysis of factors impacting Congress's taxing power.

This article focuses neither on the merits of the aforementioned case nor on the broader scholarly analysis of Congress' power to tax. The taxation literature and precedent is already extensive. The focus of this article is confined to one of only a few[3] explicit constitutional structures impacting the power of Congress to tax: the Origination Clause of Art.1, Sec.7:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

As a specifically procedural restraint, the Origination Clause is unique among the several clauses impacting the constitutional viability of any "money bills." It is ironic that the Origination Clause has received relatively little scholarly and judicial attention over the past century given the ancient legal origins of the underlying principle, its dominant role in the American Revolution, the degree to which the issue saturated the Convention's debates in 1787, and the clause's theoretical implications to the separation of powers within the U.S. federal system. Justice Thurgood Marshall's 1990 opinion in *U.S. v. Munoz Flores* emphatically reaffirmed the

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Hyman's invaluable insights, comments, revisions, and sharing of sources on the topic. The views expressed are those of the authors and do not reflect the official policy or position of the Department of Defense or the U.S. Government.

[1] John Adams, 8: Novanglus (1775) in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS,* SELECTED AND WITH A FOREWORD BY C. BRADLEY THOMPSON 245-46 (Indianapolis: Liberty Fund, 2000).

[2] Nat'l Fed'n. of Ind. Bus. v. Sebelius, 567 U.S. ___, slip op. at 58 (2012).

[3] See U.S. CONST. art. I, § 9's prohibitions on capitation and direct taxes, as well as the prohibition on federal taxes and duties on States' exports. Additionally, the Sixteenth Amendment's impact on sources and apportionment is relevant.

Court's "duty to conduct such a review"[4] of Origination Clause challenges, thereby departing from 90 years of court deference to the legislative branch on the issue when controversies arise. The confluence of these factors as well as the scarcity of scholarly analysis of the judicial status of the Origination Clause post *Munoz-Florez*, makes the issue ripe for renewed scholarly review.

Additionally, the subject has gained significant relevance in the last year as a result of several pending lawsuits challenging the taxes of the Affordable Care Act on Origination Clause grounds. The leading case, *Matthew Sissel v. United States Department of Health and Human Services*, is currently on appeal awaiting oral arguments in District of Columbia Circuit.[5]

Scholarly analysis of the Origination Clause has been exceeding rare.[6] [7] [8] [9] Much of the research has been narrowly focused on particular court cases, or 20th century Court precedent in general. We know of no thorough, scholarly historical analysis of the origin and intent of the clause, and only two scholarly academic reviews in the aftermath of *Munoz-Florez*

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[4] United States v. Munoz-Florez, 495 U.S. 385, 409 (1990) (Scalia J. concurring).

[5] Docket Number 13-5202. Another Origination Clause challenge is pending in the United States Court of Appeals for the Fifth Circuit, *Hotze v. Sebelius*, Docket Number 14-20039.

[6] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §870-877 (Boston, Hillard, Gray, and Co. 1833) (hereinafter STORY).

[7] Noel Sargent, *Bills for Raising Revenue under the Federal and State Constitutions*, 4 MINN. L.REV. 330 (1919-1920). S*ee also* Marie T. Farrelly, *Special Assessments and the Origination Clause: A Tax on Crooks?*, 58 FORDHAM L. REV. 447 (1989). Farrelly provides a cursory summary of the history of Court precedent and an extensive analysis the clauses implications for the Victims of Crime Assistance Act of 1984 in the run up to *United States v. Munoz-Florez* (1990). *See also* Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 TULSA L.J. 165, generally and at 233 (1987). Medina conducts an exhaustive comparative study of both contemporary state and international practices on lower house fiscal prerogatives to conclude that as a result of narrow judicial interpretation/enforcement America "[gives] little actual precedence to revenue bills and accord[s] the more immediate legislative voice of the people less constitutional prerogative than other nations." *Id*. at 233 (hereinafter Sargent, Farrelly, or Medina respectively).

[8] James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, (Washington DC, CRS, Mar. 15, 2011). Saturno provides a contemporary and useful primer on the history, Court precedent, and parliamentary precedent surrounding the clause. The publication is particularly useful in exploring the history and mechanics of the House procedure of "blue-slipping" bills it finds objectionable on Origination Clause grounds.

[9] Ronald J. Krotoszynski, *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 INDIANA L.J. 239, (2005). Buried within this piece on a more general topic, Krotoszynski provides the definitive chronological summary of the evolution of the Origination Clause within the Constitutional Convention of 1787 (hereinafter Krotoszynski).

which both narrowly focus on precedent.[10] Likewise, we know of no comprehensive historical analysis. We attempt here to delve a little deeper into the origins and meaning of the clause as it was ratified.

Here we (1) Trace the historical evolution of the legal principle of origination; (2) Detail its development in the Constitutional Convention; (3) Analyze what the words meant to those who ratified it, and (4) Review significant Court precedent through *Munoz-Florez* that are relevant to current and future Origination Clause challenges.

From our analysis, this article concludes that throughout the 20th century the Court has developed a historically narrow standard for what bills are considered "Bills for raising Revenue" within the context of Art. 1, §7, and, if classed as a revenue raising bill, a standard that any Senate amendments must be germane to the subject matter of the House originated bill. While the somewhat passive evolution of this standard over the 20th century has survived as relatively uncontroversial given the small scale and the nature of the cases presented, the Court will have to revisit the standard if broader challenges are presented in order to preserve any substantive meaning and effect in the Origination Clause of the Constitution and our theory of mixed legislatures. In the absence of judicial review, the "Aristocratic Branch" of the federal legislature may continue to institutionalize creative legislative maneuvers for originating broader and more burdensome taxing measures in contravention of the Framer's fear that "If the Senate can originate, they will in the recess of the Legislative Sessions, hatch their mischievous projects, for their own purposes, and have their money bills ready cut & dried, (to use a common phrase) for the meeting of the H. of Representatives."[11]

II. HISTORICAL EVOLUTION: FROM MAGNA CARTA TO THE COLONIAL PERIOD

> *And just as the charter was claimed by the English Radicals as a natural birthright, so in America some of the principles came to be established as individual rights enforceable against authority in all its forms, whether legislative, executive or judicial ... Crown, governor or council, or later by state and federal government."*[12]

The legal influences on the American Origination Clause dates back to at least the 1215 AD *Magna Carta* forced upon King John at Runnymede by his Barons following their open insurrection against the Crown. Earlier influence from the British Constitutional tradition may be attribut-

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[10] Rebecca Kysar, *The 'Shell Bill' Game: Avoidance and the Origination Clause,* Brooklyn Law School Legal Studies Research Papers, 32 (May 2013) (hereinafter Kysar); *see also* Timothy Sandefur, *So It's A Tax, Now What? Some of the Problems Remaining After NFIB V. Sebelius*, 17 TEXAS REV. L. & POLITICS 203 (2013).

[11] JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, 443 (New York, Norton & Co. Inc., 1969) (hereinafter MADISON).

[12] J.C. HOLT, MAGNA CARTA 17 (2d ed. 1992) (hereinafter HOLT).

ed to the the much more succinct 1100 AD "Charter of Liberties of Henry I" in that the principle of the "common counsel" of the king was invoked as justification for the Crown's power in two of its clauses. However, the link between forms of taxation specifically and some degree of "popular" control was not made nearly as explicit in the 1100 Charter as in the 1215 *Magna Carta*. Of the 63 clauses in the 1215 *Magna Carta* two in particular form the constitutional genesis of the codification of origination limitations: chapters 12 and 14.[13] Chapter 12 specifies that "*No scutage or aid is to be levied in our realm except by the common counsel of our realm. . . .*" Chapter 14 extensively details who composed the "common counsel of the realm," procedural restrictions on when and how they were to be convened, and what constituted their consent.[14] At their cores, chapter 12 established the principle while chapter 14 specified the procedures and conditions of transparency thought necessary to safeguard the principle.[15]

It would be misleading, however, to reduce chapters 12 and 14 of the *Magna Carta* to a continuous strand of legal precedent inherited by the American colonists and reaffirmed in the U.S. Constitution. What was codified in 1215 was far from the absolute popular prerogative against general taxation that animated the maxim in the American Revolution against "taxation without representation." The 1215 clauses are less ambitious in several key respects, as discussed below.

First, "scutage" and "aid" were two narrow forms of taxation levied by the Crown in the 12th and 13th centuries. Scutage was a fee paid to the Crown in exchange for a release from military obligations in various military campaigns for which scutage was levied. Aid was a general term for various forms of feudal fees provided to the lord or Crown on occasions such as marriages, knighting, and ransoms. Far from limiting a general, centralized power of taxation without popular consent, chapter 12 aimed to deny the crown of these two specific forms of monetary extraction that had been particularly abused under the reign of King John:

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[13] The original Latin document was continuous without indexing. We use the common convention.

[14] "And to obtain the common counsel of the realm for the assessment of an aid (except in the cases aforesaid) or scutage, we will have archbishops, bishops, abbots, earls, and greater barons summoned individually by our letters, and we shall have summoned generally through our sheriffs and bailiffs all those who hold of us in chief, for a fixed date, with at least forty days' notice, and at a fixed place; and in all letters of summons we will state the reason for the summons. And when the summons has thus been made, the business shall go forward on the day arranged according to the counsel of those present, even if not all those summoned have come." *See* HOLT, *supra* note 12, appendix 6, at 455.

[15] WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, Ch. 14 (1914) (hereinafter MCKECHNIE): "This chapter, which has no equivalent among the Articles of the Barons, appears here incidentally: it would never have found a place in Magna Carta but for the need of machinery to give effect to chapter 12."

> It is a commonplace of our text–books that chapters 12 and 14, taken together, amount to the Crown's absolute surrender of all powers of arbitrary taxation, and even that they enunciate a doctrine of the nation's right to tax itself. Yet the very idea of "taxation" in its abstract form, as opposed to specific tallages and exactions, levied on definite things or individuals, is essentially modern. . . . A regular scheme of "taxation" to meet the ordinary expenses of government was undreamt of. It is too much to suppose, then, that our ancestors in 1215 sought to abolish something which, strictly speaking, did not exist. The famous clause treats, not of "taxation" in the abstract, but of the scutages and aids already discussed.[16]

Second, the principle of popular consent present in chapters 12 and 14 of *Magna Carta* was far less egalitarian than its ideological reincarnations in the 17th and 18th centuries. The "common counsel" in 13th century England required to consent to these forms of taxation was aristocratic to its core by modern standards.

Finally, it is important to note that chapters 12 and 14 were removed from *Magna Carta* in its subsequent reissuing by the Crown in in 1216, 1217, and 1225. One explanation offered by historians for this omission is that most of *Magna Carta* was actually a reaffirmation of ancient customs and privileges afforded to the Barons and clergy by the Crown. Far from being a wholly revolutionary document, most of the *Magna Carta* of 1215 was a forced confirmation by the Crown of abused privilege and custom, with the exception that chapter 12's requirement on scutage "had no legal basis."[17]

Even though it was removed in the reissued Charters, the idea and custom of obtaining popular consent through strict procedures before royal taxation remained rooted in the courts and counsel of the Crown. This was evident in Parliament's early refusal of various royal exactions in 1242 and 1255 on the grounds that the counsel's consent had not met the prerequisites in the 1215 *Magna Carta*.[18]

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[16] *Id.* Ch. 12.

[17] HOLT, *supra* note 12, at 318. *See also id.* at 301 ("here [scutage] the Charter stated not law but innovation" and at 317 "In the matter of aids, it simply reasserted the usual process of consent.") *See also* MCKECHNIE, *supra* note 15, chapter 12: "The total omission of this chapter in 1216 may have been partly occasioned by the consciousness that it contained an innovation unwarranted by custom: the reissue of 1217 said nothing of aids, and contented itself, in regard to the vexed question of scutages, with the vague declaration that for the future these should be taken as had been the custom under Henry II. In spite, however, of the omission of chapter 12 from all reissues of the Great Charter, it was customary for Henry's advisers to consult "the Common Council" before exacting a scutage or aid. This was done, for example, in 1222, when a Council granted an "aid for the Holy Land" of three marks for an earl, one mark for a baron, and twelve pence for a knight. The consent of a Council, indeed, was usually taken even for one of the three recognized feudal aids."

[17] MCKECHNIE, *supra* note 15, ch. 14.

[18] *Id.*

None of these limitations of *Magna Carta* are meant to diminish its historical significance or the credit due to the document in influencing subsequent constitutional structures codified in England and across the Atlantic. However, it is important to note that the historical context of chapters 12 and 14 are quite different from the ideals and principles debated in the formation of the British Bill of Rights and the Constitutional Convention in Philadelphia. How then did the custom proceed from 1215 to William Penn's animated conception that "[n]o Law can be made, no Money Levied, nor a Penny Legally Demanded (even to defray the Charges of the Government) without your own Consent"?[19]

By Richard II's reign (1377-1399) it was customary that the "Commons granted with the assent of the Lords."[20] The principle remained for several hundred years, but was not firmly solidified against the claims of the Lords until the late 17th century. In 1671 a battle between the Commons and the Lords erupted when the Lords attempted to reduce a tax on sugar that the Commons had originated. The Lord's recognized the principle that the Commons exclusively originate new taxes, but the Lords reasoned in this case that they were reducing revenue vice raising it. On July 3rd, 1678, the Commons passed a resolution that the Lords had no power to amend revenue measures. The Lords fought the Commons on this minor prerogative of at least reducing revenue until the 1690s when the Commons effectively won the exclusive right to manage all revenues.[21] It is notable that the prerogative the colonists brought with them from the British Parliament of the late 17th century included a lower House right to "all bills for purpose of taxation, or containing clauses imposing a tax."[22] This is a far broader category of legislation than the 20th century Ameri-

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[19] WILLIAM PENN, "England's Great Interest, in the Choice of this New Parliament Dedicated to All Her Free-Holders and Electors" (1679). Additionally see Penn's later instructional text to the Colonists, "The Excellent Priviledge of Liberty and Property Being the Birth-Right of the Free-born Subjects of England," 1687: "In England the Law is both the measure and the bound of every Subject's duty and allegiance, each man having a fixed Fundamental Right born with him, as to freedom of his person and property in his estate, which he cannot be deprived of, but either by his consent, or some crime, for which the law has imposed such a penalty or forfeiture."

[20] ROBERT LUCE, LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TREND OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS, 390 (1935) (hereinafter LUCE). For earlier assertions by Parliament in general of this taxation prerogative, s*ee* the 1627 "Petition of Right" against Charles I, 3 Chas.1 c.1 §8:

> "[T]hat no man hereafter be compelled to make or yield any gift loan benevolence tax or such like charge without common consent by Act of Parliament, and that none be called to make answer or take such oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusal thereof."

[21] LUCE, *supra* note 20, at 390. *See also* Sargent, *supra* note 7, at 334: "In the British Parliament, in 1678, it was settled that: (1) 'all bills for purpose of taxation, or containing clauses imposing a tax, must originate in the House of Commons and not in the House of Lords.'"

[22] *Id.*

can courts' concept of "incidental taxation" outside of the scope of "revenue raising bills."

A. EARLY COLONIAL EVOLUTION

The colonial history of popular procedural limitations on taxation is mixed. The royal charters issued during the 17th century have various degrees of restraint specified. Generally, charters granted before the 1660s have little popular involvement required by the charters' language. Charters granted in the latter half of the 17th century have more robust requirements and language with respect to taxation.

Colonial charter's granted during the first half of the 17th century under King James I and Charles I, generally afforded colonial governors broader and less popularly constrained methods of taxation. The Maryland charter of 1632 granted the Barron of Baltimore and his heirs power "to assess and impose the said Taxes and Subsidies" on the colonists subject only to the limitation that they be "reasonably assessed", and "upon just Cause and in due Proportion."[23] Likewise, the 1629 colonial charter of Massachusetts issued to the "Councell established at Plymouth" placed no popular restraint on taxation.[24]

Charters granted after the restoration of the House of Stuart between the 1660s and 1690s generally mandated some form of local, popular consent for taxation. For example, the **Carolina** charter of 1663 gave power to make and enact taxes provided the "advice, assent and approbation of the freemen of the said province, or the greater part of them, or of their delegates or deputies."[25]

The 1681 charter for Pennsylvania granted to William Penn used almost identical language and further required of "Laws . . . for the raising of money for the publick use of the said Province" the "advice, assent, and approbation of the Freemen of the said Countrey, or the greater parse of them, or of their Delegates or Deputies."[26] In the subsequent 1683 "Frame of Government in Pennsylvania," the constitution established that "no

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[23] The Charter of Maryland: 1632, available at http://avalon.law.yale.edu/17th_century/ma01.asp.

[24] The Charter of Massachusetts Bay : 1629 available at http://avalon.law.yale.edu/17th_century/mass03.asp.

[25] The Charter of Carolina - 1663, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES PART II, at 1384 (Washington, GPO, 2d ed. 1878) (hereinafter GPO). Interestingly, authority for legislative ordinance by the less popular direction of the assembly of eight specified in the charter was authorized "because such assemblies of freeholders cannot [always] be conveniently called." However, such legislative authority was limited from "extend[ing] to the binding, charging, or taking away of the right or interest of any person or persons, in their freehold, goods or chattels whatsoever." *Id*. at 1384-85. The 1663 Carolina charter also required on commerce taxation specifically that "the said customs [are] to be reasonably assessed, upon any occasion, by themselves, and by and with the consent of the free people there, or the greater part of them as aforesaid." *Id*. at 1510.

[26] Charter for the Province of Pennsylvania, *reprinted in* GPO, *supra* note 25, at 1510.

money or goods, shall be raised upon, or paid by, any of the people of the province by way of public tax, custom or contribution, but by law . . . ; and whoever shall levy, collect, or pay any money or goods contrary thereunto, shall be held a public enemy to the province and a betrayer of the liberties of the people thereof."[27] Furthermore, the modern difficulties of resolving the question of what constitutes a revenue raising bill would have been unproblematic under Penn's Frame of Government as it required that "not taxes should be levied but by a law for that purpose made."[28]

In 1688, James II gave New England "full power and authority by and with the advise and consent of our said Councill, or the major part of them, to impose assess and raise and levy rates and taxes as you shall find necessary . . . ."[29]

The 1691 Massachusetts charter added a requirement for the "advice and Consent of the Councill" in its grant of power "to impose and leavy proportionable and reasonable Assessment Rates and Taxes. . . ."[30]

However, even when origination or popular consent requirements were not mandated in the royal charters, many colonies simply wrote popular assembly origination requirements into their own governing laws. For example, Maryland passed a law binding its upper council and governor in 1650 entitled "An ACT against raising of Money within this Province, without Consent of the Assembly." The law required:

That no Subsidies, Aids, Customs, Taxes or Impositions, shall hereafter be laid, assessed, levied or imposed, upon the Freemen of this Province, or on their Merchandize, Goods or Chattels, without the Consent and Approbation of the Freemen of this Province, their Deputies, or the major Part of them, first had and declared in a General Assembly of this Province.[31]

This most early example of an origination requirement in the American colonies substitutes the more variable verb "originate" used in our Constitution with the more explicit specification that taxes must be "first had and declared in General Assembly." The law was likely introduced by Lord Baltimore to counter his critics and assuage the freemen of the colony

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[27] Frame of Government of Pennsylvania – 1683, *reprinted in* GPO, *supra* note 25, at 1524.

[28] 1 STORY, *supra* note 6, §§ 112, 123.

[29] Commission of Sir Edmund Andros for the Dominion of New England, Apr. 7, 1688 available at http://avalon.law.yale.edu/17th_century/mass06.asp.

[30] The Charter of Massachusetts Bay – 1691 available at http://avalon.law.yale.edu/17th_century/mass07.asp.

[31] FRANCIS BACON, THE LAWS OF MARYLAND, VOL. 75, 37-38 (1765) available at *Archives of Maryland Online*, http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000075/html/index.html.

that the method of their taxation would be void of any arbitrary, unpopular influence.[32]

New Jersey likewise wrote its own strict requirement into its laws in 1681: "That it shall not be lawful . . . to levy or raise any sum or sums of money, or any other tax whatsoever, without the act, consent and concurrence of the General Free Assembly."[33]

B. The Enlightenment and Revolutionary Influences

The liberalization of colonial charters generally paralleled shifts in political thought across the Atlantic. With the execution of King Charles I in 1649 and the deposing of James II in the late 1680s, the supremacy of popular rule was firmly established in the minds of British subjects and her colonists in the Americas. The British Bill of Rights of 1689 following the Glorious Revolution mandated, "[t]hat levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal."[34]

On the American continent the colonists experimented with representative government throughout the 17th and 18th centuries. Most colonial charters established only a royal governor and council subject to the Crown's influence. However, most of the colonies by the 18th century had instituted popularly elected lower houses similar to the House of Commons in Parliament. Under the various names of "House of Delegates," "Burgesses," "Commons," or "Representatives," these lower, popularly elected chambers were often given unique functions, privileges, and powers distinct from the colonial councils.

By 1776, many States had a lower-house with some advantage over the upper-house on monetary and taxing matters either by constitutional mandate, statute, or common practice. While origination restrictions were common in colonial legislatures prior to the revolutionary period, the primary revolutionary grievance of unprecedented, distant taxation measures without their local consent through Parliament's Sugar and Stamp Acts

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[32] JOHN L. BOZMAN, THE HISTORY OF MARYLAND FROM ITS FIRST SETTLEMENT IN 1633 TO THE RESTORATION IN 1660, VOL. 2, 401 (1837). *Also see* TIMOTHY RIORDAN, THE PLUNDERING TIME: MARYLAND AND THE ENGLISH CIVIL WAR, 316-25; 327-30 (Baltimore, Maryland Historical Society, 2004): Following a period of open insurrection by Protestants in Maryland against Lord Baltimore's Catholic government due in part to the spillover from the English Civil War, Lord Baltimore was under significant pressure to curry favor with the victorious Parliamentarians to sustain his rule as a Catholic proprietor. Among the many liberalizing policies he instituted between 1649 and 1650 were the establishing a bicameral legislature in Annapolis, the passing of the continent's second religious toleration act, and restrictions on taxation to the newly created popular assembly.

[33] THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 424 (Aaron Learning & Jacob Spicer eds., 1881).

[34] 1 Will. & Mary, Sess.2 c.2. § 4; British Bill of Rights § 4. (1688).

solidified the ideological convictions and constitutional structures in the various States after independence.

The advent of British social contract theory between Hobbes and Locke in 1651 and 1689 respectively with their emphasis on consent theory and property undoubtedly molded the Enlightenment reincarnation of origination requirements on both continents. For the colonists the objections in the late 18th century appealed to a curious mix of as much custom, common law, and privilege as to natural law and the deontological ethics of universal, inherent rights.

Prior to the 1760s the colonists had enjoyed not only the privilege of local ratification of any proposed taxing measures by the Crown and Parliament but more often than not the original design of the taxing measures themselves. As the Barons at Runnymede had become accustomed to the royal privilege and custom of ratifying any new aids levied to the Crown, so too did the colonists feel it had become their prerogative to design and approve of any new internal taxation on the Colonies. With the colonists, the case was even more explicit as many of the previously cited royal charters granted that authority while reserving more power to the Crown on matters of regulating colonial exports and commerce.[35]

With reverence for the prerogative, William Pitt ("the elder") protested in Parliament in 1765 on behalf of the colonists against the Stamp Act by arguing that the "distinction between legislation and taxation is essentially necessary to liberty. . . . The Commons of America, represented in their several assemblies, have ever been in possession of the exercise of this their constitutional right of giving and granting their own money. They would have been slaves if they had not enjoyed it."[36]

Many colonists likewise disagreed with the constitutional logic of Parliamentary supremacy in taxation when its effects materialized. In protest of the Sugar Act of 1764 the Virginia House of Burgesses (along with separate petitions from ten other colonies) sent its famous petition to the House of Commons citing the colonial logic of opposition to the internal tax:

> [T]he Council and Burgesses . . . in a respectful manner but with decent firmness, to remonstrate against such a measure . . . conceive it is essential to British liberty that laws imposing taxes on the people ought not to be

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[35] *See* WILLIAM DOUGLASS, A SUMMARY, HISTORICAL AND POLITICAL, OF THE FIRST PLANTING, PROGRESSIVE IMPROVEMENTS, AND PRESENT STATE OF THE BRITISH SETTLEMENTS IN NORTH AMERICA, 212 (1748) (hereinafter DOUGLASS) ("The vacating of all charter and proprietary governments is not the ultimate chastisement that may be used with delinquent colonies; the parliament of Great Britain may abridge them of many valuable privileges which they enjoy at present; . . . therefore the colonies ought to be circumspect, and not offend their mother-country; as for instance 1. In abusing that privilege which our colonies have in ratifying taxes and affecting of themselves;").

[36] William Pitt, *On an address to the Thrown, in which the right of taxing America is discussed*, Dec. 17, 1765 *reprinted in* THE TREASURY OF BRITISH ELOQUENCE 140-41 (Robert Cochrane, ed., London & Edinburgh, 1877) .

> made without the consent of representatives chosen by themselves; who, at the same time that they are acquainted with the circumstances of their constituents, sustain a proportion of the burden laid on them.[37]

The logic was echoed in the fundamental objection of the first act of coordinated American government in the Stamp Act Congress:

> 3d. That it is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives. . . .
>
> 5d. That the only representatives of the people of these colonies, are persons chosen therein by themselves; and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.

The First Continental Congress in October of 1774 reiterated the same philosophy in their declaration of colonial rights and grievances. The opening sentence of the declaration states,

> Whereas, since the close of the last war, the British Parliament, claiming a power, of right, to bind the people of America by statutes in all cases whatsoever, hath in some acts expressly *imposed* taxes on them, and in others, under various pretenses, but in fact for the purpose of raising revenue, hath imposed rates and duties payable in these Colonies, established a Board of Commissioners, *with unconstitutional powers*... .

Of particular relevance here to contemporary jurisprudence on Origination Clause issues is the colonists' insistence (theoretically justified or not) on semantically reducing Parliamentary taxation measures passed under "various [legislative] pretenses" to "revenue raising bills." There is a logical case that the various Parliamentary exactions of the 1760s and 1770s could easily have been construed as acts directly to fund/reimburse narrow and constitutional legislative purposes. Such an interpretation would make revenue raising "merely incidental" to the legislative purpose of providing for the local defense of the colonies. While the Sugar Act was known as a revenue raising act, Parliament's position was that it was "for defraying the expenses of defending, protecting, and securing the [colonies]." Likewise, the Stamp Act was justified under the specific purpose of reimbursing the British government for the local defense expenses it had burdened in support of the colonies during the Seven Years War. Additionally, it made little difference to the colonists that Prime Minister Grenville had solicited proposals from various colonial representatives (to include Benjamin Franklin) and MP's on the tax prior to its institutions. The argument for "virtual representation" was flawed in the colonists' minds as they insisted repeatedly in their grievances on their local representation

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[37] Virginia House of Burgesses, *Petition of the Virginia House of Burgesses to the House of Commons*, (Dec. 18, 1764) available at http://avalon.law.yale.edu/18th_century/petition_va_1764.asp.

familiar with the circumstances of their constituents. The colonists clearly construed (whether logically or illogically) legislative and statutory ambiguities over what constituted a revenue raising bills in favor of finding violations of Origination Clause principles and constitutional guarantees.

The declaration of the First Continental Congress goes on to elaborate on the constitutional philosophy backing their grievance:

> That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council; and as the English colonists are not represented, and from their local and other circumstances cannot be properly represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several Provincial Legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such a manner as has been heretofore used and accustomed.

Interestingly, the original draft of the document (before stylization and adoption) included the additional statement,

> That all the statutes before mentioned, for the purpose of raising a revenue, by imposing 'rates and duties' payable in these Colonies, establishing a Board of Commissioners, and extending the jurisdiction of Courts of Admiralty, for the collection of such 'rates and duties,' are illegal and void.[38]

John Adams in 1775 in Boston likewise dissented but in less tactful language. He vehemently disagreed with the constitutional authority of unrepresented taxation, and warned that the consequence for Parliament infringing on the colonist's right of self-taxation was not merely that the colonists would insist on its restoration, but also that Britain would lose even its legitimate sovereign authority to regulate colonial commerce as well:

> That there are any who pant after "independence," (meaning by this word a new plan of government over all America, unconnected with the crown of England, or meaning by it an exemption from the power of parliament to regulate trade,) is as great a slander upon the province as ever was committed to writing. The patriots of this province desire nothing new; they wish only to keep their old privileges. They were, for one hundred and fifty years, allowed to tax themselves, and govern their internal concerns as they thought best. Parliament governed their trade as they thought fit. This plan they wish may continue forever. But it is honestly confessed, rather than become subject to the absolute authority of parlia-

[38] First Continental Congress, *Original Draught of the Declaration of Rights and of Grievances, Made by the Congress of 1774*, in THE WORKS OF JOHN ADAMS VOL. II , 538 Appendix C (1850).

> ment in all cases of taxation and internal polity, they will be driven to throw off that of regulating trade. [39]

The rest is history. However, the primacy of this Revolutionary era ideological cause against unprecedented taxation measures procedurally implemented by distant counsels unfamiliar with the "circumstances of their constituents" impacted the constitutional structures of the early State constitutions with respect to revenue origination requirements.

III. INITIAL STATE CONSTITUTIONS PRIOR TO THE CONSTITUTIONAL CONVENTION OF 1787

A cursory textual survey of the various States' origination requirements between the Revolution and the ratification of the national Constitution are listed as follows:[40]

- Delaware's constitution required that,

> All money-bills for the support of government shall originate in the house of assembly [lower house], and may be altered, amended, or rejected by the legislative council. All other bills and ordinances may take rise in the house of assembly or legislative council, and may be altered, amended, or rejected by either.[41]

Delaware's rewritten constitution of 1792 accomplished an interesting modification of the Origination Clause similar to Maryland's 1776 constitution:

> All bills for raising revenue shall originate in the house of representatives; but the senate may propose alterations, as on other bills; and no bill, for the operation of which, when passed into a law, revenue may incidentally arise, shall be accounted a bill for raising revenue; nor shall any matter or clause whatever, not immediately relating to and necessary for raising revenue, be in any manner blended with or annexed to a bill for raising revenue.[42]

- Georgia's 1777 constitution established a unicameral legislature and thus had no need for origination restrictions. The State's 1789 constitution created a bicameral legislature and the 1798 constitu-

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[39] JOHN ADAMS, *8: Novanglus*, (1775) in *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS*, SELECTED AND WITH A FOREWORD BY C. BRADLEY THOMPSON 245-46 (Indianapolis: Liberty Fund, 2000).

[40] Of the 13 Original States, Connecticut and Rhode Island continued their charter's and common law practices as the organic laws of the state between the revolution and the ratification of the national constitution. Connecticut drafted a constitution in 1818 that did not include origination restrictions, and Rhode Island drafted its constitution in 1842 without origination restrictions.

[41] Delaware Constitution of 1776, *reprinted in* GPO, *supra* note 25, at 1274.

[42] Delaware Constitution of 1792, *reprinted in* GPO, *supra* note 25, at 1281.

tion added the origination restriction that "All bills for raising revenue or appropriating moneys shall originate in the house of representatives, but the senate shall propose or concur with amendments, as in other bills."[43]

- Maryland's constitution had one of the most instructive and nuanced origination requirements:

> X. That the House of Delegates may originate all money bills, propose bills to the Senate, or receive those offered by that body; and assent, dissent, or propose amendments. . . .
>
> XI. That the Senate may be at full and perfect liberty to exercise their judgment in passing laws-and that they may not be compelled by the House of Delegates, either to reject a money bill, which the emergency of affairs may require, or to assent to some other act of legislation, in their conscience and judgment injurious to the public welfare--the House of Delegates shall not on any occasion, or under any presence annex to, or blend with a money bill, any matter, clause, or thing, not immediately relating to, and necessary for the imposing, assessing, levying, or applying the taxes or supplies, to be raised for the of government, or the current expenses of the State: and to prevent altercation about such bills, it is declared, that no bill, imposing duties or customs for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill: but every bill, assessing, levying, or applying taxes or supplies, for the support of government, or the current expenses of the State, or appropriating money in the treasury, shall be deemed a money bill.
>
> XII. That no aid, charge, tax, fee, or fees, ought to be set, rated, or levied, under any presence, without consent of the Legislature.[44]

- The Massachusetts constitution of 1780 stipulated that,

> [N]o subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people, or their representatives in the legislature. . . . [and] all money-bills shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.[45]

Massachusetts likewise included similar language to other State's constitutions in the same document's declaration of rights: "no part of the property of any individual can, with justice, be taken

[43] Georgia Constitution of 1798, *reprinted in* GPO, *supra* note 25, at 389.
[44] Maryland Constitution of 1776, *reprinted in* GPO, *supra* note 25, at 822.
[45] Massachusetts Constitution of 1780, *reprinted in* GPO, *supra* note 25, at 959, 964.

from him, or applied to public uses, without his own consent, or that of the representative body of the people."[46]
This was no significant change for Massachusetts as the practice had been mandated in its colonial legislature: "The house of Representatives is fit upon several privileges . . . 2. That the council [upper house] may only concur or not concur. A tax or any other money-bill, but may make not amendment; the affair of supplying the treasury always originates in the House of Representatives."[47]

- New Hampshire's one page Constitution of 1776 required "That all bills, resolves, or votes for raising, levying and collecting money originate in the house of Representatives."[48] The more elaborate 1784 constitution specified that ". . . no part of man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people."[49] The same document, several clauses later, somewhat redundantly claimed that "No subsidy, charge, tax, impost or duty shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature, or authority derived from that body."[50] In outlining the specific separation of legislative powers, the 1784 constitution mandated that "All money bills shall originate in the house of representatives, but the senate may propose or concur with amendments as on other bills."[51]

- New York's constitution of 1777 established a bicameral legislature with indirect (by the lower house) elections of the upper house members. However, the Senate was generally proportionally representative of the populace based on a reoccurring census. The State had no explicit origination requirement in its 1777 constitution. The State's 1821 constitution explicitly clarified that there was no origination restriction in the State legislature: "Any bill may originate in either house of the legislature; and all bills passed by one house may be amended by the other."[52]

- North Carolina's constitution required that "the people of this state ought not to be taxed, or made subject to the repayment of any impost or duty, without the consent of themselves, or their

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[46] *Id*. at 958.
[47] DOUGLASS, *supra* note 35, at 492-93.
[48] Constitution of New Hampshire – 1776, *reprinted in* GPO, *supra* note 25, at 1280.
[49] New Hampshire Constitution of 1784, *reprinted in* GPO, *supra* note 25, at 1281.
[50] *Id*. at 1283.
[51] *Id*. at 1287.
[52] New York Constitution of 1821, *reprinted in* GPO, *supra* note 25, at 1342.

Representatives in General Assembly, freely given."[53] The constitution established a bicameral legislature, but did not privilege the lower house in taxation origination. However, both houses were annually elected by the people. Representation was weighted generally equally among the State's counties in both houses.

- Pennsylvania's constitution of 1776 vested all legislative power in one popularly elected "House of Representatives of the freemen of the commonwealth." Therefore, an origination restriction against an upper chamber would have been pointless. However, the constitution specified that "no part of a man's property can be justly taken from him, or applied to public uses, without his consent, or that of his legal representatives."[54] The constitution also required that:

  > No public tax, custom or contribution shall be imposed, or paid by the people of this state, except by a law for that purpose; And before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be burthens.[55]

  In 1790 when Pennsylvania rewrote its constitution with legislative power divided between an upper and lower house, it added the origination restriction that "All bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments, as in other bills."[56]

- South Carolina's origination requirement in its 1776 Constitutions required that:

  > All money-bills for the support of government shall originate in the general assembly [lower-house], and shall not be altered or amended by the legislative council, but may be rejected by them. All other bills and ordinances may take rise in the general assembly or legislative council, and may be altered, amended, or rejected by either.[57]

  The "legislative council" was elected not popularly, but by vote within the general assembly. The same section of the State's 1778 version retains the exact same mechanism while changing the chambers' names to "House of Representatives" and "Senate" and adding the requirement "that no money be drawn out of the public treasury but by the legislative authority of the State."[58] In the

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[53] Constitution of North Carolina – 1776 *reprinted in* GPO, *supra* note 25, at 1410.
[54] Pennsylvania Constitution of 1776, *reprinted in* GPO, *supra* note 25, at 1541.
[55] *Id*. at 1547.
[56] Pennsylvania Constitution of 1790, *reprinted in* GPO, *supra* note 25, at 1550.
[57] Constitution of South Carolina – 1776, *reprinted in* GPO, *supra* note 25, at 1617.
[58] Constitution of South Carolina – 1778, *reprinted in* GPO, *supra* note 25, at 1623-1624.

1790 Constitution, they kept the lower-house origination requirement, but allowed that revenue raising bills "may be altered, amended, or rejected by the senate."[59]

- Vermont's constitution of 1777 stipulated that "no part of a man's property can be justly taken from him, or applied to public uses, without his consent, or that of his legal representatives," and that "[a]ll fines, licence money, fees and forfeitures, shall be paid, according to the direction hereafter to be made by the General Assembly."[60] The legislative power was unicameral in the 1777 constitution and therefore, an origination restriction would be pointless. After legislative authority was vested in an upper house, the 1863 amendment to the Vermont Constitution added the following origination requirement: "That all revenue raising bills shall originate in the house of representatives, but the senate may propose or concur with amendments, as on other bills."[61]

- Virginia's constitution had exclusive origination authority for ALL legislation in its lower house, and further barred any amendments to money-bills in its upper house:

  > All laws shall originate in the House of Delegates, to be approved of or rejected by the Senate, or to be amended, with consent of the House of Delegates; except money-bills, which in no instance shall be altered by the Senate, but wholly approved or rejected.[62]

Of the eleven available State constitutions immediately following the American Revolution, eight established bicameral legislatures (nine by 1790 with PA, and 10 by 1863 with VT). Of those nine with bicameral legislatures by 1790, seven had lower house Origination Clauses (NY and NC had no Origination Clause; however, North Carolina had annual senatorial elections). Of the seven with Origination Clauses by 1790, six allowed upper-house amendments to revenue raising bills (VA prohibited senate amendments.[63] SC had amended this in 1790 to allow senate amendments). On Origination Clause codification practices leading up to the ratification of the national Constitution, New York and Virginia repre-

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[59] Constitution of South Carolina – 1790, *reprinted in* GPO, *supra* note 25, at 1630.
[60] Vermont Constitution of 1777, *reprinted in* GPO, *supra* note 25, at 1860, 1864.
[61] Vermont Amendments to the Constitution of 1793, Art. III *reprinted in* GPO, *supra* note 25, at 1836, 1883.
[62] Virginia Constitution of 1776, *reprinted in* GPO, *supra* note 25, at 1909-10.
[63] Although, on Maryland's it may be argued that "From a provision aimed at riders it may be inferred that the Maryland Senate could not originally amend a money bill; in 1851 the power of either branch to amend any measure was definitely specified." *See* LUCE, *supra* note 20, at 415. For arguments sake we class Maryland's constitution as not explicitly forbidding senate amendments.

sented outliers at opposite extremes given the common practice of requiring that revenue raising bills originate in the lower house while allowing the upper house to amend such bills. Additionally, it is relevant to the Court's 20th century interpretation of Senate bills that incidentally raise revenue, that the only two State constitutions that speak to this standard are Maryland (1776) and Delaware (1792). In each case, the upper houses were permitted to amend and design bills that "incidentally" raised revenue, not to expand their involvement in the taxing power of the legislature, but to prevent the lower houses from mixing non-revenue raising measures into revenue raising bills thereby dishonestly circumventing the upper-house's input. Furthermore, in Maryland's case as the only pre-ratification constitution to mention the concept of incidental revenue, it is arguable that the Senate was not even permitted to originally amend a money bill.

Eleven years after independence, the delegates to the Constitutional Convention in Philadelphia had a wealth of State experiences in Origination Clause codification and legislative implementation to guide the national debate. (See Table 1 below for summary of State constitutions)

The experiences of the Colonies and early States under royal charters, statutes, State constitutions and various organic laws forms the body of common law explaining the context of our current constitutional system of law. The preceding examination of that legal tradition with respect to the origination principle on the American continent is meant to add to our interpretive understanding of both the Clause in our current Constitution and the basis upon which it rests.

The principle of origination of taxing measures only through popular, locally representative assemblies was well established in the Americas, and widely codified. Its contravention served as the primary cause for revolution against the government of England.

Table 1: Origination Requirements and Early State Constitutions

	Constitution	Bicameral Legislature	Origination in Lower	Upper House may amend	Revenue Raising Definition	Senate Disposition
Connecticut	NA/Charter					
Delaware	1776	Yes	Yes	Yes	1792 addition	
Georgia*	**1777**	**No**				
Maryland	1776	Yes	Yes	Yes	Yes (strict)	Electoral College
Massachusetts	1780	Yes	Yes	Yes		
New Hampshire	1776	Yes	Yes	Yes (1784)		
New York	1777	Yes	**No (explicit in 1821)**			Indirect elections
North Carolina	1776	Yes	**No**			Annual elections
Pennsylvania	1776	No (Yes in 1790)	Yes (1790)	Yes (1790)		
Rhode Island	NA/Charter					
South Carolina	1776	Yes	Yes	No (Yes in 1790)		
Vermont**	**1777**	**No**				
Virginia	1776	Yes	Yes	**No**		

*upper house added in 1789, origination restraint in 1798
**upper house added in 1863, origination restraint and amending power added in 1863

IV. PHILADELPHIA 1787

In the interest of conserving space, we provide only a brief executive summary of the developments respecting the Origination Clause within the Constitutional Convention of 1787. For a more detailed chronological summary of the Origination Clause's evolution in the Convention, the reader may view Krotoszynski's 2005 article.[64] Our reading of the Convention's journal and Madison's notes diverge very little from Korotoszynski's account of the development of the Clause.

[64] Krotoszynski, *supra* note 9, at 250-58.

When the Constitutional Convention opened on May 25th 1787, the fundamental topic of disagreement between the delegates that threatened progress towards amending the Articles of Confederation was over the nature of representation in the legislative branch. The smaller States were threatened by the Virginia plan's proposal of 29 May to proportion representation in the legislative branch according to population. George Read from Delaware threatened to "retire from the Convention" on the same day if the legislative principle of equal State representation under the Articles of Confederation was threatened. Charles Pinckney from South Carolina and Gouverneur Morris from Pennsylvania questioned whether altering the fundamental structure of the governing system under the Articles was even within the Congressional mandate for the Convention. The question was postponed in order to prevent "so early a proof of discord in the Convention as a secession of a State."[65]

On 11 June, Roger Sherman of Connecticut opened by proposing the now famous Great Compromise providing for proportional representation in the House and equal representation in the Senate. Sherman cited as his example that "The House of Lords in England . . . had certain particular rights under the Constitution."[66] The issue of taxation and representation according to property contribution immediately took the debate. Benjamin Franklin's arguments were read aloud to the convention by his fellow Pennsylvania delegate, James Wilson: "The greater States Sir are naturally as unwilling to have their property in the disposition of the smaller, as the smaller are to have theirs in the disposition of the greater."[67] When the vote was put to allow equality of suffrage in the Senate, it initially failed (5-6) with the larger States generally voting against it. The smaller States had narrowly lost their first bid for equal representation.

On 13 June Elbridge Gerry of Massachusetts first moved to "restrain the Senatorial branch from originating money bills. The other branch was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings. If the Senate should be allowed to originate such bills, they would repeat the experiment, till chance should furnish a sett of representatives in the other branch who will fall into their snares."[68] Pierce Butler from South Carolina disagreed in that there was no reason to mimic the tradition in the House of Lords and that it would lead to the "practice of tacking other clauses to money bills." Madison likewise disagreed arguing that the "the Senate would be the representatives of the people as well as the 1st branch." However, this was under the assumption that representation in the Senate was to be proportioned to population. South Carolina's delegate interrupted the debate on the wisdom of an origination restriction by pointing out

[65] MADISON, *supra* note 11, at 35-38 (May 29, 1787).
[66] *Id.* at 98.
[67] *Id.* at 101.
[68] *Id.* at 113.

that "the question [was] premature. If the Senate should be formed on the same proportional representation as it stands at present, they should have equal power, otherwise if a different principle should be introduced."[69]

In the face of the standoff, Benjamin Franklin interrupted with the first theoretical justification of the Origination Clause in his proposed compromise between the two groups:

> The diversity of opinions turns on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges of planks do not fit, the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.[70]

Franklin's ensuing compromise stated that in exchange for the small States getting equal representation in the Senate, that chamber would be restricted "generally in all appropriations & dispositions of money to be drawn out of the General Treasury; and in all laws for supplying that Treasury, the Delegates of the several States shall have suffrage in proportion to the Sums which their respective States do actually contribute to the Treasury."[71]

On July 2nd, the delegates met to vote on equality of representation in the Senate without reference to an Origination Clause or Franklin's proposed compromise. The resolution failed (5-5 with Georgia divided). With progress at a full stop, the members voted (9-2) to form a committee to detail a draft compromise following General Pinckney's argument that "He liked better the motion of Docr. Franklin (which see Saturday June 30). Some compromise seemed to be necessary: the States being exactly divided on the question for an equality of votes in the 2d. branch. He proposed that a Committee . . . be appointed to devise & report some compromise."[72]

The compromise committee worked through the 4th of July and on 5 July the delegates met again in convention to see the two part proposal they had produced:

> I. That in the 1st. branch of the Legislature each of the States now in the Union shall be allowed 1 member for every 40,000 . . . that all bills for raising or appropriating money, and for fixing the Salaries of the officers of the Governt. of the U. States shall originate in the 1st. branch of the Legislature, and shall not be altered or amended by the 2d. branch: and that no money shall be drawn from the public Treasury. but in pursuance

[69] *Id.* at 114.
[70] *Id.* at 226-27.
[71] *Id.* at 227.
[72] *Id.* at 232.

> of appropriations to be originated in the 1st. branch II. That in the 2d. branch each State shall have an equal vote.[73]

The larger States' representative on the committee had "assented conditionally" to an equality of votes in the Senate, given that the "smaller States have conceded as to the constitution of the first branch, and as to money bills."[74] It is of historical significance that the prime bargaining chips used on this ultimate issue of intransigence in the Convention was a strict Origination Clause The committee adjourned to consider the proposal the next day.

The Origination Clause was taken up for debate with various opinions on the necessity and wisdom of such a clause. Strong cases were made against the logic of an origination restriction on the Senate by Gouverneur Morris and James Wilson. George Mason and Franklin defended the necessity of the clause. According to Madison's records, the view that "generally prevail[ed]" was George Mason's argument that:

> The consideration which weighted with the Committee was that the 1st branch would be the immediate representatives of the people, the 2nd would not. Should the latter have the power of giving away the people's money, they might soon forget the source from whence they received it. We might soon have an Aristocracy.[75]

At the end of the debate on July 6th, the first draft of the Origination Clause without Senate amending power was voted for in the affirmative (6-3 with Georgia, New York, and Massachusetts divided). The following day, on July 7th the vote to allow equality of representation in the Senate for the small States was finally passed (6-3 with Georgia and Massachusetts divided). It had taken a month of heated debate that threatened to dissolve the Convention and the Union between the time of the proposal of the Virginia Plan and the actual compromise mechanism proposed by Benjamin Franklin including the Origination Clause that made progress possible. Specifically, it took the adoption of a strict Origination Clause against the Senate to convince enough of the larger States to allow equal representation in the Senate. The Origination Clause was the "cornerstone of the accommodation."[76]

On July 16th the whole of the compromise was reaffirmed (5-4) in its complete legislative context:

> [P]rovided always that representation [in the lower house] ought to be proportioned according to direct taxation; and . . . that all bills for raising or appropriating money, and for fixing the salaries of officers of the Govt. of the U. S. shall originate in the first branch of the Legislature of the U. S.

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[73] *Id.* at 237.
[74] *Id.* at 242.
[75] *Id.* at 250.
[76] *Id.* at 290 (Gerry).

> and shall not be altered or amended in 2d. branch [and] that in the 2nd branch of the Legislature of the U.S. each State shall have an equal vote.[77]

Despite significant resentment and protest by several of the larger States that State equality in the Senate had been conceded, the Convention was finally able to move on to substantive discussions on the rest of the Constitution on July 17th. On July 26th, the Convention adjourned in order to allow the Committee of Detail to prepare a first draft of the whole Constitution for debate and revision. On August 6th, the committee produced the first draft with identical Origination Clause language as that cited in the 16 July vote above.

On August 8th, with the ink still wet on the first draft of the Origination Clause, Charles Pinkney and Gouverneur Morris motioned for a vote to repeal the clause completely citing that the Senate was competent to originate revenue bills, and that the clause would be responsible for "clogging the Goverenment.[sic]" The hasty motion at the end of the day's deliberation's passed (7-4) with several of the smaller States voting for the repeal. The Convention adjourned for the day. As soon as the Convention opened the following morning, several representatives rose to express "dissatisfaction" with the clauses removal as its absence was "endangering the success of the plan, and extremely objectionable in itself."[78] The absence of the Origination Clause continued to be a sticking point with several of the delegates as debates continued.

On August 11th following Edmund Randolph's instance, a vote to reconsider the Origination Clause was taken up and passed (9-1). On the 13th, Randolph proposed to reinstate an amended Origination Clause with a narrower definition of revenue raising bills and a limited amending power in the Senate. The proposal read:

> Bills for raising money for the *purpose of revenue* or for appropriating the same shall originate in the House of Representatives and shall not be amended or altered in the Senate as to increase or diminish the sum to be raised, or change the mode of levying it, or the objects of its appropriation.[79]

The purpose of this amended clause as evidenced in the ensuing debate in the Convention was to prevent all potential bills that might "incidentally raise revenue"[80] from being exclude from Senate origination. To do this the lengthy compounded phrase "Bills for raising money for the *purpose of revenue* or for appropriating the same" was inserted with emphasis in the original added on the words "*purpose of revenue*." In Mason's mind this would remove Madison's objection that all federal powers might have "some relation to money." This is significant as the Supreme

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[77] *Id.* at 297-98.
[78] *Id.* at 414 (Randolph).
[79] *Id.* at 442.
[80] *Id.* at 443 (Mason).

Court and others[81] have since borrowed (knowingly or not) Mason's phrase, "incidentally raise revenue," in the body of Court precedent as the judicial standard for defining what is and is not considered a "revenue raising bill" in the context of the ratified Origination Clause of the Constitution. The Court has thrown out many past Origination Clause challenges against Senate originated taxes where revenue incidentally occurred in the Senate's pursuit of some other legitimate and enumerated "legislative ends" apart from taxing. However, two observations might cause the Court to pause if the framer's intent in the design of our mixed legislature is at all their guiding principle: First, the compound clause with emphasis on "*purpose of revenue*" was not adopted as proposed in Randolph's amendment. Second, in the very same paragraph, Mason clarifies that:

> The Senate did not represent the *people*, but the *States* in their political character. It was improper therefore that it should tax the people. . . . Again, the Senate is not like the H. of Representatives chosen frequently and obliged to return frequently among the people. They are chosen by the Sts for 6 years, will probably settle themselves at the seat of Government will pursue schemes for their aggrandizement – will be able by [wearying] out the H. of Rep. and taking advantage of their impatience at the close of a long Session, to extort measures for that purpose. . . . If the Senate can originate, they will in the recess of the Legislative Sessions, hatch their mischievous projects, for their own purposes, and have their money bills ready cut & dried, (to use a common phrase) for the meeting of the H. of Representatives. . . . the purse strings should be in the hands of the Representatives of the people.[82]

Additionally, the proposal here to relax the initial Origination Clause by allowing Senate amendments on bills not for the sole purpose of raising revenue would avoid the practice of the lower house "tacking foreign matter to money bills."[83] The addition of the Senate's amending power here was meant to alleviate fears that an aggressive House of Representatives might abuse an absolute origination prerogative on money bills by forcing the Senate to accept or refuse non-monetary statutes without their normal ability to amend or originate them.[84] The interpretation that the amending power was added to ensure the Senate had "some" taxing powers misses the actual and opposite concern the framer's had that an aggressive House might usurp the Senate's legitimate power over non-tax related statutes by

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[81] Additionally, Judge Joseph Story in his examination of what constitutes a revenue raising bill adopts the same understanding from the debates: "And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. (citing Elliot debates)" 2 STORY, *supra* note 6, §877 at 343.

[82] MADISON, *supra* note 11, at 443.

[83] *Id.* at 443-44.

[84] *See* 2 STORY, *supra* note 6, §872, 339-40. STORY acknowledges the same intent behind the tradition in the British Parliament.

proactively attaching non-taxing measures to House originated tax bills with the nefarious intent that the Senate could not alter them. James Wilson expressed the same concern that the House "will insert other things in money bills, and by making them conditions of each other, destroy the deliberative liberty of the Senate."[85]

Randolph's proposal met significant skepticism in the Convention from several delegates. James Wilson was still against State equality in the Senate and argued for a bicameral legislature in which both houses were proportionally representative of the national population and controlled the purse strings equally. He saw in any Origination Clause only "a source of perpetual contention where there was no mediator to decide."[86] Madison was supportive of the amended clause but foresaw extraordinary ambiguity in the language of the phrase "Bills for raising money for the *purpose of revenue*":

> The word revenue was ambiguous. In many acts, particularly in the regulations of trade, the object would be twofold. The raising of revenue would be one of them. How could it be determined which was the primary or predominant one; or whether it was necessary that revenue should be the sole object, in exclusion even of other incidental effects. . . . The words amend or alter, form an equal source of doubt & altercation. When an obnoxious paragraph shall be sent down from the Senate to the House of Reps it will be called an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases, the question will turn on the degree of connection between the matter & object of the bill and the alteration or amendment offered to it. Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?[87]

Madison was for allowing the Senate amending power at least "to *diminish* the sum to be raised. Why should they [the Senate] be restrained from checking the extravagance of the other House."[88]

However, despite the theoretical challenges raised against the origination and amendment mechanism for revenue bills, one of the most persuasive arguments for retaining some sort of Origination Clause was purely pragmatic and popular. The Convention was mindful of the looming difficulties of ratification. Elbridge Gerry urged that the Convention retain the clause as it was:

> [A] part of the plan that would be much scrutinized. Taxation & representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their

[85] MADISON, *supra* note 11, at 444.
[86] *Id.*
[87] *Id.* at 445-46.
[88] *Id.* at 445.

> purses. In short the acceptance of the plan will inevitably fail, if the Senate be not restrained from originating Money bills.[89]

John Dickenson echoed the same sentiment:

> [A]ll the prejudices of the people would be offended by refusing this exclusive privilege to the H. of Repress. . . Eight States have inserted in their Constitutions the exclusive right of originating money bills in favor of the popular branch of the Legislature. Most of them however allowed the other branch to amend. This he thought would be proper for U.S. to do.[90]

Randolph stated a similar popular concern:

> When the people behold in the Senate, the countenance of an aristocracy; and in the president, the form at least of a little monarch, will not their alarms be sufficiently raised without taking from their immediate representatives, a right which has been so long appropriated to them.--The Executive will have more influence over the Senate, than over the H. of Reps--Allow the Senate to originate in this case, & that influence will be sure to mix itself in their deliberations & plans.[91]

On August 15th a new amended version with clearer Senate amendment prerogative was proposed by Caleb Strong of Massachusetts which read:

> Each House shall possess the right of originating all bills, except bills for raising money for the purposes of revenue, or for appropriating the same and for fixing the salaries of the officers of the Govt. which shall originate in the House of Representatives; but the Senate may propose or concur with amendments as in other cases.[92]

However, the Convention decided to postpone the issue until the specific powers of the Senate had been decided.

On September 5th, the Committee of 11 assigned to submit revised proposals for all postponed issues put forth the following Origination Clause language before the Convention: "All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alteration and amendment by the Senate."[93] The language was taken up again on 8 September during the last day of substantive deliberation before the committee of style drafted the Constitution. Madison recorded no debate over the issue that day with the exception of the proposal to replace the phrase "and shall be subject to alteration and amendment by the Senate" with the language from Massachusetts's State constitution: "but the Senate may propose or concur with amendments as in other bills."[94] In both Madison's records and the Convention's journal, the only recorded vote was "On the

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[89] *Id.* at 445.
[90] *Id.* at 447-48.
[91] *Id.* at 448.
[92] *Id.* at 461.
[93] *Id.* at 580.
[94] *Id.* at 607.

question of the first part of the clause – 'All bills for raising revenue shall originate in the House of Representatives'."[95] The vote on this first clause passed (9-2) with only Maryland and Delaware voting against it. The vote on the entire clause with the amending power was never officially recorded, however, a footnote in Madison's records adds that "This was a conciliatory vote, the effect of the compromise formerly alluded to." Regardless, the final language drafted by the committee of style for the delegates' signatures included the amending power of the Senate.

V. THE MEANING OF WORDS

A. ORIGINAL PUBLIC UNDERSTANDING AND THE CHANGING JUDICIAL UNDERSTANDING:

While the debates within the Constitutional Convention are revealing of theory underlying the Origination Clause, of no less importance to the clause's legal interpretation is the understanding of those who ratified it. The Convention was, after all, a meeting of delegates authorized only to propose amendments to remedy the inadequacies of the Articles of Confederation, and its proceedings were cloaked in secrecy from the general public for many years afterward. To ascertain the meaning and intent of the words of the ultimately-ratified Article 1, §7, we review what the words themselves meant to the public at the time, and the debate over its adoption in various public newspapers and proceedings during the period of ratification. It turns out that the judicial understanding has changed considerably overtime, and thus has often not matched the original public meaning of the clause.

The modern judicial interpretation of the words "revenue" and "originate" in the Origination Clause is controversial, and worth examination. The language stipulating the nature of permissible Senate amendments in the clause - "as on other bills" - warrants some examination as well.

i. "Revenue Raising":

Consulting various period dictionaries for the definition of "revenue" from the late 18th though the early 19th century, one finds relatively uncontroversial meanings when compared with today's connotation. In 1773 and 1799, the word "revenue" was defined in Samuel Johnson's dictionary as "Income; annual profits received from lands or other funds."[96] Although federal "revenue" may be thought to encompass something more than just tax revenue, the Origination Clause was about raising tax revenue, as Elbridge Gerry explained in a letter published in 1788 in which he protested against the Senate being able to amend revenue bills:

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[95] *Id.* at 607.

[96] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: in which the words are deduced from their originals, and illustrated in their different significations by examples from the best writers: to which are prefixed, a history of the language, and an English grammar (4th ed.1773); (8th ed. 1799).

> [A] new provision now in the Constitution was substituted, whereby the Senate have a right to propose amendments to revenue bills & the provision reported by the committee was effectually destroyed. It was conceived by the committee to be highly unreasonable & unjust, that a small State which would contribute but one sixty fifth part of any tax should nevertheless have an equal right with a large state, which would contribute eight or ten sixty fifths of the same tax, to take money from the pockets of the latter, more especially as it was intended, that the powers of the new legislature should extend to internal taxation….[97]

American usage of the word "revenue" in that era is also exemplified by the discussion in Federalist #12, written in 1787 by Alexander Hamilton:

> In so opulent a nation as that of Britain, where direct taxes from superior wealth must be much more tolerable, and, from the vigor of the government, much more practicable, than in America, far the greatest part of the national *revenue* is derived from taxes of the indirect kind, from imposts, and from excises. Duties on imported articles form a large branch of this latter description. In America, it is evident that we must a long time depend for the means of *revenue* chiefly on such duties.[98]

Hamilton's linkage of "revenue" with taxes (including both direct and indirect taxes) continued to be reflected in American usage. For example, Webster's American dictionary defined it in 1828:

> In modern usage, income is applied more generally to the rents and profits of individuals, and revenue to those of the state. In the latter case, revenue is: 2. The annual produce of taxes, excise, customs, duties, rents, &c. which a nation or state collects and receives into the treasury for public use.

Further, the same 1828 American dictionary explains: "Government raises money by taxes, excise, and impost." The combined words "revenue raising" were widely construed that way. Considering Hamilton's and Webster's use of the word "revenue," it should be no surprise that the public would have understood revenue bills as those that tax in all the various forms of taxation. Additionally, it appears that it made little difference whether there was some intended legislative purpose or government program for the tax revenues. Franklin, the initial proponent of the origination mechanism in the Convention, himself confirms this in his memoirs when he repeatedly references the grant to fund Branddock's Army in the French

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[97] Elbridge Gerry, *Massachusetts Centinel* (Jan. 23, 1788) *reprinted in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Vol. 6, 1269 (hereinafter DHRC). Two hundred years later, Gerry's state of Massachusetts was paying more federal taxes ($21.7 billion) than the ten lowest states combined ($21.4 billion). *See* Jim Luther, *Five Largest States Bear One-Third of Tax Burden, Group Says*, Associated Press (Apr. 29, 1986).

[98] THE FEDERALIST No. 12 (Alexander Hamilton).

and Indian War as a "bill for raising money."[99] This understanding is also confirmed through the subsequent public debates over the Origination Clause where the term tax is treated interchangeably with revenue raising. For example, in 1788 an essay was published defending the proposed Origination Clause, stating that, "The people cannot be taxed, but, by the consent of their immediate representatives."[100] (See Appendix A for an extended list of 20 examples of statements from the ratification debates regarding the Clause.)

The first edition of *Black's Law Dictionary*, published in 1891, defines revenue this way: "As applied to the income of a government, this is a broad and general term, including all public moneys which the state collects and receives, from whatever source and in whatever manner. 22 Kan. 712."[101] The compound "Revenue laws" is next defined as, "Any law which provides for the assessment and collection of a tax to defray the expenses of the government is a revenue law. Such legislation is commonly referred to under the general term 'revenue measures,' and these measures include all the laws by which the government provides means for meeting its expenditures. 1 Woolw. 173."[102] In 1910, the second edition of *Black's Law Dictionary* gives a definition for the compound term "Revenue Bills": "These are the group of bills that impose the federal taxes. These bills originate in the House of Representatives."[103] Likewise, one can look to the word's adjacent use in the Constitution under article 1, §9 immediately following two taxing prohibitions: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." For an even earlier understanding of what the American's of the period considered inclusive in Revenue legislation, we could also return to the First Continental Congress's explanation of the term's scope in their 1774 declaration of rights and grievances:

> [T]he British Parliament, claiming a power, of right, to bind the people of America by statutes in all cases whatsoever, hath in some acts expressly imposed taxes on them, and in others, under various pretenses, but in fact for the purpose of raising revenue, hath imposed rates and duties payable in these Colonies.

It is difficult to find any significant historical evidence that the early Americans considered the terms "revenue" and "revenue raising bills" to

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[99] *See*, BENJAMIN FRANKLIN, MEMOIRS OF THE LIFE AND WRITING OF BENJAMIN FRANKLIN, 116, 121 (H. Colbern, 1818). Franklin earned significant fame in his early career in the Pennsylvania lower assembly opposing on Origination Clause grounds the attempts of the governor and proprietors to amend their money bills.

[100] Civic Rusticus, *Virginia Independent Chronicle*, 30 Jan 1788 *reprinted in* DHRC, *supra note* 97, V.8 at 335.

[101] BLACK'S LAW DICTIONARY (A Dictionary of Law containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 1st Ed.), 1040 (St. Paul, Minn. West Publishing Co. 1891).

[102] BLACK'S LAW DICTIONARY 1040 (1st ed. 1891).

[103] BLACK'S LAW DICTIONARY (2d ed. 1910).

encompass only a narrow category of legislation. Their understanding seemed quite broad and inclusive of any act which might tax the people.

Despite this, the courts have since adopted multiple understanding of the term "revenue" and its compound. In the 19th century, the judicial interpretation seemed to coincided with the original understanding. For example, an 1875 federal Origination Clause case in New York stated:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return. In respect to such bills it was reasonable that the immediate representatives of the taxpayers should alone have the power to originate them.[104]

Likewise, in 1876, the U.S. Supreme Court held that a federal law authorizing post-offices to sell money orders did not raise revenue because the money was not obtained from levying taxes.[105] In 1887, the U.S. Supreme Court continued to closely link the word "revenue" with "taxation," when construing the word "revenue" as used in federal statutes:

> [T]he term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by § 8, Art. I, of the Constitution, "to lay and collect taxes, duties, imposts, and excises."[106]

Supreme Court jurisprudence on this subject would soon take a sharp turn, 21 years later, so that some taxes would not qualify as revenue.

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[104] United States v. James, 26 F. Cas. 577; Case No. 15464. (1875). This was an Origination Clause case, and the court held there was no violation of that clause, because charging money for postage stamps was not a tax.

[105] United States v. Norton, 91 U.S. 566 (1876). *Norton* mentioned the Origination Clause by way of analogy, but *Norton* was not an Origination Clause case. Rather, *Norton* involved interpretation of a statute written in 1804. See 2 Stat. 290, § 3 (Mar. 26, 1804). One might criticize *Norton* on the ground that all taxes are supposed to give taxpayers an equivalent in return, but the decision in *Norton* still seems well-justified since selling postal items to voluntary buyers rarely if ever amounts to taxation.

[106] United States v. Hill, 123 US 681 (1887). In 1844, Congress had allowed the Supreme Court to hear certain appeals regardless of the amount in dispute, but only if the appeal involved "the enforcement of the revenue laws of the United States." Act of May 31, 1844, 5 Stat. 658. Of course, the United States adopted the Sixteenth Amendment in 1913, which created a further means of raising revenue.

ii. "Originate"**:**

In the 17th century, the word "original" meant "a beginning or fountain; An Original is also a first, authentick, or true draught of a writing."[107] The term "draught (spelled "draft" nowadays) was defined in the period as "Delineation; sketch; outline."[108]

The term "origination" was defined in early America as simply "To bring into [or take] existence."[109] In all the illustrative examples of the terms use from surveyed period dictionaries, there is usually some resemblance between the original and the resulting amended product. In this sense, it might have been normal to say that men originated from their ancestors. However, while perhaps technically true, it would be unconventional to say that men originated from water; so did every living organism, and it is of no use to describe water as the origination when doing so would confuse the audience by its lack of resemblance to the product.

Even today, it would be strange to say in plain English that a Senate-amended bill that is completely unrelated in substance to its House "shell bill"[110] was in any sense "originated" by the House "shell bill." The origination would be in formal numbering only, and such numbering has no constitutional significance, as it did not even exist in 1787.[111]

The Framers and public were concerned about substantive taxes, not bill numbers/designators, and the Origination Clause attempts to alleviate

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[107] THOMAS BLOUNT, GLOSSOGRAPHIA, or, A dictionary, interpreting the hard words of whatsoever language, now used in our refined English tongue: with etymologies, definitions, and historical observations on the same. . . (4th edition, London, 1674) ("Pedigree, or birth; a stock or kindred ; a beginning or fountain ; An Original is also a first, authentick, or true draught of a writing"). Of course, the outdated spelling of "draught" was equivalent to the modern spelling "draft." The spelling "draught" was still used extensively in the colonial period in America as in Jefferson's "original Rough draught" of the Declaration of Independence.

[108] SAMUEL JOHNSON, *supra* note 96, (1773): "Delineation; sketch; outline. 'A good inclination is but the first rude draught of virtue; but the finishing strokes are from the will.'-South, 'I have, in a short draught, given a view of our original ideas, from whence all the rest are derived.'-Locke".

[109] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[110] A legislative vessel used by an amending chamber/body usually unrelated to the eventual product. Shell bills are amended by substitution by "strik[ing] all after the enacting clause". We find little evidence that such a practice was endorsed in Parliamentary procedure on the American continent, and significant evidence that it was prohibited by rules and custom in the late 18th Century. Recently, the use of shell bills has become more common in the U.S. Congress and has generally been at least passively tolerated.

[111] The number referencing system did not even exist until 1817 in the House and 1847 in the Senate. The House adopted a sequential numbering system in which bills were numbered consecutively for an entire Congress in the 15th Congress (1817), and the Senate began using the same numbering system in the 30th Congress (1847). Prior to that time, the Senate numbering system provided that sequential numbering started anew at the beginning of each congressional session. *About Bills, Resolutions, and Laws*, available at www.lexisnexis.com/help/cu/Serial_Set/About_Bills.htm.

that substantive concern. It certainly would leave more than a few persons scratching their heads if Congress were to call a House bill the first draft of the resulting bill even after the Senate had substituted totally its own unrelated measure in place of the House bill.

The Court has said that it seeks to avoid impugning the character of members of a coequal branch, by questioning whether a formally enrolled bill, passed by each house, and signed by the president originated where Congress said it did.[112] More recently, however, federal courts have made clear that that standard is far from absolute.[113]

During the Virginia ratification debate in 1788, James Madison said that allowing Senate amendments would make it unnecessary for the Senate to "reject the bill altogether." William Grayson replied that the Senate might claim power to reject the entire bill except one word, and add its own text instead, which Grayson said would be "the same, in effect, as that of originating."[114] Indeed, such an action by the Senate would be the same as originating, and Madison never suggested otherwise. On the contrary, Madison had taken the position that even changing a single paragraph of a bill could amount to an origination.[115] Doubtless, the House and Senate have ultimate responsibility for determining what is and is not an origination, except in the most extreme cases, but the Senate has a strong motive to conclude that an amendment is not an origination because such conclusion increases the Senate's power, and even the House has a motive to conclude that an amendment is not an origination (i.e. avoiding responsibility for taxes).

iii. Germaneness and the Phrase "as on other Bills":

The Origination Clause specifies in the context of revenue-raising bills that, "the Senate may propose or concur with Amendments as on other Bills." To ascertain the meaning of this phrase it is necessary to examine

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[112] Rainey v. United States, 232 US 310 (1914) ("Having become an enrolled and duly authenticated Act of Congress, it is not for the Court to determine whether the amendment was or was not outside the purposes of the original bill").

[113] *See Munoz-Florez*, 495 U.S. at 389 n.2 (1990) (the Court "reserved the question whether there is judicial power after an act of Congress has been duly promulgated to inquire in which House it originated").

[114] Virginia Ratification Convention, Eliott 3:375-378 (June 14, 1788).

[115] *See* Max Farrand, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, (Aug. 13, 1787), 273 (Yale U. Press 1937). Madison said:

> When an obnoxious paragraph shall be sent down from the Senate to the House of Reps it will be called an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases, the question will turn on the degree of connection between the matter & object of the bill and the alteration or amendment offered to it. Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?

Id. If Madison had thought that the Senate could constitutionally introduce whatever extraneous matter it wanted, then he would not have expressed these concerns, nor would he have later extolled the power of the House on revenue matters (in Federalist #58).

the custom of the period. There were some norms of legislative procedure for upper house amendments that the ratifying public expected when they agreed to the Constitution.

Not only on revenue bills, but on all legislative acts, non-germane amendments were seen as an anathema. A substitute amendment is the most non-germane form of amendment conceivable. A "substitute amendment" is appropriately defined this way:

> A motion, amendment, or entire bill introduced in place of the pending legislative business. Passage of a substitute amendment kills the original measure by supplanting it. The substitute may also be amended.[116]

The Senate was given amendment power primarily so that it could strip out non-germane provisions that the House might otherwise tack on to revenue bills. As Theophilus Parsons argued at the Massachusetts ratification convention, "had not the Senate this power, the representatives might tack any foreign matter to a money bill, and compel the Senate to concur, or lose the supplies."[117] Just as the Origination Clause inhibits tacking of foreign matter by the House, so too it places a limit on foreign matter tacked on by the Senate, by limiting the Senate to amendments rather than replacements, by forbidding the Senate to originate bills, and by requiring that Senate amendments be "as on other bills."

The U.S. District Court for the District of Columbia, in the *Sissel v. HHS* case, recently concluded that any germaneness requirement for Senate amendments of House-originated revenue bills is a loose requirement at best.[118] In her decision, Judge Howell relied on the fact that the Supreme Court approved of the Senate swapping a corporate excise tax for an inheritance tax in a revenue bill that the Senate had received from the House in *Flint v Stone Tracy* (1911). She wrote:

> Although a corporate income tax is germane to an inheritance tax insofar as they are both taxes, the similarities end there. Hence, if the Supreme Court imposed a germaneness requirement in *Flint*, the most that it would require would be that both the original House bill and the Senate amendment be revenue-raising in nature.[119]

Actually, in *Flint*, the original House bill contained much more than the inheritance tax that was removed by the Senate. As the Court said in *Flint*: "the tariff bill, of which the section under consideration is a part,

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[116] RAMESH CHOPRA, ACADEMIC DICTIONARY OF POLITICAL SCIENCE, at 283 (2005). Chopra ironically lists this definition right next to the definition of the word "subversive" ("Tending to undermine, disrupt or supplant something already established. As in lawlessnessm…").

[117] *See* DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS OF THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, 126 (Boston, Oliver & Munroe, 1808).

[118] Sissel v. U. S. Dep't of Health & Hum. Services, No. 10-1263, D.D.C. June 28, 2013) ("*Flint* established a very loose conception of germaneness").

[119] *Id.* at 21.

originated in the House of Representatives and was there a general bill for the collection of revenue."[120]

The Payne Aldrich Tariff Act of 1909, into which the disputed corporate excise tax was written by the Senate, began in the House as a comprehensive tariff revision bill wholly designed by the House of Representatives.[121] Along with the almost 900 tariff and excise schedules it affected, the House bill proposed an inheritance tax in the House's original version after the House itself had already considered a corporate excise tax as an interchangeable substitute for the inheritance measure. The Senate (in cooperation with President Taft) thought it preferable to supplant the inheritance tax with a corporate excise tax. This was one item in a bill of hundreds of alterations to the U.S. tax structure. The Senate amendment was clearly germane to the subject matter *of the bill* that the House sent to the Senate, even if the removed clause was not germane to the inserted clause. The bill that entered the Senate was on the same subject and nearly identical to the bill that left the Senate after amendment. This was the context of the germaneness ruling in the *Flint* Court. No lengthy explanation of this point by the *Flint* Court was necessary for anyone familiar with the Payne Aldrich Tariff Act.

If there were no germaneness requirement, then the Origination Clause would be wholly superfluous, and furthermore the word "amend" in the Clause certainly does not mean "replace" in any dictionary of plain English. The nature of the amendment performed by the Senate in the 1909 tax bill was infinitesimal compared to that undertaken in the legislative history of the Affordable Care Act which the District Court defended in *Sissel v. HHS*. To create the Affordable Care Act, the Senate replaced a

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[120] Flint v.Stone-Tracy, 220 U.S. 107,143 (1911).

[121] *See* Marjorie Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax,* 66 IND. L.J. 63, 82, 93 (1990): "on March 4, 1909, Taft called for a special session of the 61st Congress, to convene March 15th, to deal with tariff reform and with the revenue need reported by the Secretary of the Treasury.'" If tariffs could not provide enough revenue, he suggested that an inheritance tax should be enacted." *See also id.* at 96: "Two versions were considered: one taxing dividends, the other taxing net earnings. As to either version, some saw a corporate tax as double tax, either in the sense that corporations already paid state taxes, or in the sense that a holding company would pay a tax when it distributed dividends to its shareholders on earnings already taxed when its operating companies distributed dividends to it so Representative Sereno Payne of New York told the House on March 23rd that the Committee had rejected a tax on the net earnings of corporations because many corporations were in a precarious financial condition (due to the Panic of 1907), states already taxed corporations, and the bill would not raise enough revenue. Congressman Longworth, speaking in July after the introduction of the corporate excise bill, stated that the Committee had rejected the proposal because it did not think the revenue was needed and also because the Committee had decided already to propose an inheritance tax, as suggested by Taft at his inauguration. At any rate the revenue bill that the House sent to the Senate for consideration consisted of the tariff provisions plus an inheritance tax but not a corporate tax." *See also* Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WILLIAM & MARY L. REV. 447 (2001).

714-word bipartisan (i.e. adopted by a vote of 416-0) House bill providing tax relief for veterans who were first-time homeowners,[122] with a substituted 380,000-word bill including 17 new "Revenue Provisions" in its "Title X" section estimated to generate $437.8 billion in net total revenue between 2010 and 2019.[123] [124] [125] The Senate amendments in *Flint* and *Sissel* stand at opposite extreme ends of the spectrum. The Court in *Flint* only ruled on a case at one end of the spectrum in the 1911 case, and the other end of the spectrum is a matter of first impression.

The House of Representatives has not always enthusiastically defended its prerogatives under the Origination Clause, in part because avoiding responsibility for taxes is common behavior for members of Congress who must face the electorate every two years. Professor Kysar is thus technically correct in claiming that:

> [T]he House gradually abandoned its restrictive view of the Senate's amendment power. In fact, in 1909, no member of the House challenged the Senate's conversion of the House tariff bill into a new tax on corporate income, at issue in Flint.[126]

In addition to the political desire to avoid responsibility for taxation, the House's 1909 behavior may also be partly explicable by the fact that the House had already considered the corporate excise tax as an alternative to the inheritance tax, and so the Senate amendment was not quite as foreign as if the House had never considered the idea.[127]

In arguing against a germaneness standard, Kysar offers several legislative considerations for why the Court ought not to enforce a germaneness standard. Most of those considerations were already generously considered by the Framers and the public before giving the lower House the exclusive privilege of originating revenue measures while allowing the Senate to amend as on other bills. One particular consideration mentioned by Kysar is especially perplexing: the concern that "[a] strict germaneness requirement might prevent the Senate from excising an unrelated rider or otherwise threatening to retaliate against the House."[128] We do not understand how deletion of an unrelated rider could ever be non-germane; if it is "un-

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[122] Service Members Home Ownership Tax Act of 2009.

[123] *See* John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 1 LAW LIBRARY JOURNAL, 105:2 (2013). Cannan's article chronicles the unconventional legislative history of the Affordable Care Act, and the challenges such modern legislative procedures pose for researchers of the law.

[124] *See* Thomas.gov for legislative history of H.R. 3590 and its Senate Amendment 2786. Specifically §§ 9001-9017. Senate Amendment 2786 to H.R.3590 contained the vast majority of the substance of what would become the Affordable Care Act to include the majority of the bill's revenue provisions.

[125] *See* Joint Committee on Taxation, *Estimated Revenue Effects* . . . (Mar. 20, 2010) https://www.jct.gov/publications.html?func=download&id=3672&chk=3672&no_html=1

[126] Kysar, *supra* note 10, at 32.

[127] *See* Kornhauser, *supra* note 121, at 82 *et seq.*

[128] Kysar, *supra* note 10, at 27-28.

related" then its deletion cannot possibly broaden the scope of the remaining material in the bill. Moreover, no one has argued that the judiciary should be free to address any but the most egregiously non-germane Senate amendments, leaving the remainder of germaneness decisions with Congress.

In determining the meaning of the phrase "as on other bills" in the context of the Origination Clause, a very useful reference would be the parliamentary procedures for amending and substituting bills during that era. In 1781, the Continental Congress passed this measure:

> No new motion or proposition shall be admitted *under color of amendment as a substitute* for a question or proposition under debate until it is postponed or disagreed to.[129]

This rule remained in effect in 1787 and 1788, and of course everyone understood at that time that the new U.S. Senate would be the successor body to the Continental Congress, representing states instead of population. Obviously, this rule of the Continental Congress would not allow erasure of a very popular bill to make room for an entirely different bill.[130]

The first House of Representatives adopted the same rule as the Continental Congress in 1789. Though the Senate did not adopt that rule of its predecessor body, the House more than the Senate has responsibility for defending the House's prerogatives under the Origination Clause, and the House has sometimes done so via its germaneness rules. The language for this House rule remained until its slight alteration in 1822: "No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment." According to the parliamentary precedents of the House of Representatives, "When therefore , it is objected that a proposed amendment is not in order because it is not germane, the meaning of the objection is simply that it (the proposed amendment) is a motion or proposition on a subject different from that under consideration."[131] In the 1780s (when the phrase "as on other bills" was written and publicly debated), the parliamentary custom in the national legislative body that preceded our bicameral legislature was clearly against the practice of gutting legislation to switch over to an entirely new text even though the gutted legislation has not been postponed or disagreed to.

In 1880, a point of order was made against an amendment to a bill being considered in the House on these grounds:

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[129] ASHER CROSBY HINDS, PARLIAMENTARY PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, §1072 (U.S. Gov't. Printing Office, 1899) (emphasis added).

[130] The House adopted the Service Members Home Ownership Tax Act of 2009 by a vote of 416-0, before it was gutted in the Senate. In the end, "the tax credit extension" for service members passed by using another failed bill. *See* Cannan, *supra* note 123, at 153, n.179 and accompanying text.

[131] HINDS, *supra* note 129, at 568.

> First, that it is not germane to the subject matter of the bill under consideration; and secondly, that it is in substance the same as a bill heretofore reported by the Committee on Printing and now pending before the House.[132]
>
> The Chair sustained the point of order, ruling that:
>
> [E]ver since the 4th of March 1789, this House has had a rule which changed the common [British custom] parliamentary law in this respect, at least as to substitutes, and ever since 1822 as to amendments in any form. . . . after the bill has been reported to the House no different subject can be introduced into it by amendment, whether as a substitute or otherwise. . . Since the adoption of the rule . . . in every instance where an amendment proposed to introduce an entirely new subject it has been excluded.[133]

Likewise, on January 14th, 1898 a nearly identical parliamentary point of order was made against a substituted amendment and was sustained on the grounds that the subject was not germane to the bill under consideration.[134] In 1911, the House provided to its rules that,

> [N]o amendment shall be in order to any bill affecting revenue which is not germane to the subject matter in the bill, nor shall any amendment to any item of such bill be in order which does not directly relate to the item to which the amendment is proposed.[135]

The House has held non-germane countless substitute amendments which are too numerous to list here, and they have been amendments to Senate as well as House bills.[136]

Of course, neither the House nor the Senate existed at the time of the writing or ratification of the Constitution, so their (since) adopted customs are of limited value for understanding the phrase "as on other bills." That is especially true of the Senate, and not just because House prerogatives are at issue here; the Senate's rules have been at odds with the American custom of the day as the Senate became "almost if not quite the only parliamentary body in this country adhering in any degree to the English belief that an amendment need not be germane."[137]

In matters of the purse, the Constitution indicates that the Senate amending power on revenue bills is limited "as on other bills," meaning bills and amendment procedures understood by the Framers and public. Professor Kysar disagrees:

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[132] *Id.* at 568.
[133] *Id.*
[134] *Id.* at 569.
[135] LUCE, *supra* note 20, at 429.
[136] *See* HINDS, *supra* note 129, index under "Germane amendments: Decisions discussing at length the quality of germaneness in amendments … . Amendments must be germane ... See Amendments... It is not in order to move to recommit as bill ... which is not germane."
[137] LUCE, *supra* note 20, at 429.

> The Senate's power to amend has traditionally been quite broad. . . . The Senate has never had a rule against non-germane amendments and thus early congressional practice and American understanding of parliamentary practice leaves room for such freedom. Since the Senate possesses the power to attach non-germane amendments to non-revenue bills, the Constitution thus appears to prescribe its power to do so in the context of revenue bill.[138]

However, the Senate only possesses the power to attach non-germane amendments to non-revenue bills because it gave that power to itself after the Constitution was ratified. That decidedly non-American tradition which the Senate unilaterally adopted was at odds with the common legislative requirement of the time that amendments be germane. Of course, the Senate is entitled to make its own rules, but there are constitutional limits. No one disputes, for example, that the Senate cannot take a House-originated bill unrelated to revenue, and convert it by amendment into a revenue-raising bill:

> In 1864 when the House questioned the right of the Senate to provide a tax on incomes by amendment to a non-revenue bill, the Senate withdrew the amendment. In 1878 the House returned to the Senate a House bill about postroads to which the Senate had added revenue amendments, the House vote being 169-68. Speaking more emphatically with a unanimous vote, the House in 1905 sent back a bill relating to the taxation of bonds issued to aid isthmian canal construction. The Senate had stricken out all of the House bill after the enacting clause, and inserted somewhat similar provisions. A conference committee had restored the substance of the original House bill, but used the Senate language. Nevertheless the House insisted strictly on its prerogative.[139]

A Senate amendment gutting a House revenue bill should be no more immune from constitutional scrutiny than a Senate amendment converting a non-revenue bill into a revenue bill. Both transgress the Origination Clause.

At least since Jefferson's Manual of 1801 was largely adopted by the Senate in 1828, the Senate has repeatedly rejected points of order challenging non-germane amendments to non-revenue bills. A civil rights bill was introduced in 1872 via a substitute amendment, and controversy ensued even though no revenue was involved:

> Mr. SUMNER. . . I propose to move to strike out all after the enacting clause and insert what is generally known as the civil rights bill. . . I shall take the form of the bill which is now pending in the other house, which in substance and almost precisely in language is that on which the Senate acted. There are one or two verbal changes, but not important in principle or in any way affecting any principle of the bill. . . The VICE PRESIDENT. The Chair may say, in reply to the suggestion of the Senator from Connecticut [who had objected on grounds of the non-germaneness

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[138] Kysar, *supra* note 10, at 29.
[139] LUCE, *supra* note 206, at 418.

> of the substitute amendment], by which he enforces the point of order, that constitutional law and parliamentary law are often quite different. . . . but the Chair decides this question solely upon the parliamentary law applicable in this body. Now the Chair desires to add to this that by the parliamentary law as practiced in the House of Representatives, which is the parliamentary law as generally understood by Legislatures and parliamentary bodies in the United States, this amendment would be totally out of order.[140]

Several items in these proceeding are notable. First, the Senator proposing the substitute amendment (Sumner) here felt obliged to communicate that the bill was not wholly originated by himself and that it was "in principle" identical to a house bill under consideration. Second, the Chair admitted that the sole authority governing his decision dismissing the germaneness objection was the Senate's own rules and not constitutional considerations. And, third, the Chair admits that the Senate's unilaterally-adopted rule allowing non-germane amendments would be under "parliamentary law as generally understood by Legislatures and parliamentary bodies in the United States. . . totally out of order."

That entire 1872 Senate debate was over a rule governing a non-revenue raising bill, and therefore is subject to the Constitution's allowance in article 1, §5 that "[e]ach House may determine the Rules of its Proceedings." However, that rulemaking power is not unlimited, particularly where the Constitution specifies otherwise. The phrase "as on other bills" in the Origination Clause is just such a limitation. In the same sense, the Senate could not write a rule specifying when it could adjourn, or whether it had to keep a "Journal of Proceedings." The Senate cannot adopt or employ rules for amending revenue-raising bills against the constitutional requirement that the amendments must be "as on other bills."

Professor Kysar's claim that, "[t]he Senate has never had a rule against non-germane amendments" [141] is not quite accurate regarding the written Senate rules.[142] Nor is it accurate when we consider that individual Senators have often felt obliged by the Origination Clause to limit their

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[140] U.S. Senate Proceedings, in Blair & Rives, 66 *The Congressional Globe*, May 8 1872, Part 4 at 3181-83.

[141] Kysar, *supra* note 10, at 29.

[142] For example, the standing rules of the Senate today specify that on appropriations bills and amendments to appropriation bills there is a germaneness requirement:

> On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto … .

U.S. Senate Committee on Rules & Administration, *Appropriations and amendments to general appropriations bills*, (available at www.rules.senate.gov/public/index.cfm?p=RuleXVI). Likewise, the current Senate also has a post-cloture germaneness rule ("No dilatory motion, or dilatory amendment, or amendment not germane shall be in order"). See Rule XXII, U.S. Senate.

amendments to germane ones. Just to take one example, in 1879, Senator James Beck, Democrat of Kentucky, raised a point of order, saying: "the amendment seeks to originate a revenue bill bearing upon external taxation… and as it is proposed as an amendment to an internal-revenue bill it is not germane to the bill."[143] Senator Beck's point of order lost, on a vote of 22 to 16,[144] but the larger message is that many Senators have felt themselves bound by a constitutional germaneness rule, even if they were a minority and even if the written Senate rules did not reflect that constitutional rule.

Since 1879, the Senate has grown more accustomed to wholly disregarding House-originated bills and supplanting them with their own meaning. Towards the end of the 19th century, the standard began to change as "[l]ittle by little the Senate accustomed itself to almost ignoring what the House sent over in the way of a money measure, and the country came to expect that the Senate will do no more than take a House bill for the foundation of its own structure."[145] However, the U.S. Senate's recent parliamentary philosophy does not represent the typical American experience and understanding of upper house amending power. By the middle of the 20th century, the U.S. Senate was "almost if not quite the only parliamentary body in this country adhering in any degree to the English belief that an amendment need not be germane."[146] This philosophy embodied in Jefferson's Manual apparently derived from fear that presiding officers would be stifling (e.g. that they would exercise too much control over the content of bills). However, as the Congressman and scholar Robert Luce put it, "[Jefferson's] fears were unfounded, for often with little difficulty and rarely with harm nearly all American presiding officers now apply special rules requiring amendments to be germane."[147]

Even the U.S. Senate has formally recognized a germaneness requirement for some types of bills. They have historically instituted rules specifying that:

> No amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject-matter contained in the bill be received; nor shall any amendment to any item or clause of such bill be received which does not directly relate thereto. . .[148]

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[143] 8 Cong. Rec. 1478 (1879).
[144] *Id.* at 1482.
[145] LUCE, *supra* note 20, at 417.
[146] *Id.* at 429.
[147] *Id.*
[148] Congressional Serial Set, "Precedents of the Senate" at 60 (GPO 1914). Today a similar germaneness standard exists for Senate amendments to appropriation bills:

> On a point of order made by any Senator, no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; nor shall any amendment to any item or

Of course, the Senate did not exist before the ratification of the Constitution, so analyzing how the newly-formed Senate construed its own limitations may be of little avail in understanding what those who ratified the Constitution meant and consented to when considering the words "as on other bills." Recall that the Senate chair said in 1872 that his determinations were bound "solely upon the parliamentary law applicable in this body" and not by constitutional considerations. Additionally, the historical absence of House or judicial opposition to Senate usurpations does not give such usurpations any form of constitutional legitimacy. As one scholar argued in concluding his 1919 examination of the Clause:

> Should individuals and firms be protected against taxes adopted in an unconstitutional manner? It is not sufficient for the Court to declare that it is powerless to interfere, since the House has, perhaps under the stress of circumstances or unwittingly, assented to the Senate's abuse of its privilege. Neglect cannot fairly be considered as an admission that trespass is justified.[149]

We have explored the post-ratification Senate's unique traditions here primarily to dispel historical misconceptions that there was a complete absence of any germaneness standard. We have done so in disagreement with a recent claim voiced in an academic publication and relied on by district court judges that "[t]he Senate's power to amend has traditionally been quite broad. . . . The Senate has never had a rule against non-germane amendments and thus early congressional practice and American understanding of parliamentary practice leaves room for such freedom."[150] Our review of early congressional practice and American understanding of parliamentary practice contradicts this claim and its implication that such broad amendment discretion must therefore extend to revenue raising bills. Moreover, where we do review the Senate's early customs and traditions with respect to that chamber's conception of its role in the design of money bills, we find significant evidence that the Senate has since its formative days viewed its own role with respect to such legislation as extraordinarily limited by custom and constitutional design:

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clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency; and all questions of relevancy of amendments under this rule, when raised, shall be submitted to the Senate and be decided without debate; and any such amendment or restriction to a general appropriation bill may be laid on the table without prejudice to the bill.

U.S. Senate Committee on Rules & Administration, *Appropriations and Amendments to General Appropriations Bills* (available at www.rules.senate.gov/public/index.cfm?p=RuleXVI). Likewise, the current Senate also has a post-cloture germaneness rule ("No dilatory motion, or dilatory amendment, or amendment not germane shall be in order"). *See* Rule XXII, U.S. Senate.

[149] Sargent, *supra* note 7, at 351-52.

[150] Kysar *supra* note 10, at 29.

> As Haynes notes, "the Senate was not five months old when it denied to itself the power to originate a bill imposing an increased duty of tonnage." A committee chaired by Senator Butler was appointed on June 17, 1789 to work on a bill "to arrange and bring forward a system to regulate the trade and intercourse between the United States and the territory of other powers in North America and the West Indies." The committee reported the following on August 5th: "That it will be expedient to pass a law for imposing an increased duty of tonnage . . . but such a law being of the nature of a revenue law, your committee conceive that the originating a bill for that purpose, is, by the constitution, exclusively placed in the House of Representatives." The Senate approved this report.[151]

The Courts may certainly be justified in generally deferring to each House to "determine the Rules of its Proceedings," and to generally defend their own constitutional prerogatives. Such discretion is warranted on non-revenue-raising measures, and even for revenue-raising measures where the non-germaneness is less than extremely obvious. But when amendment practices are applied by the Senate to grant itself the power to effectively originate taxing provisions, the Constitution limits this practice – as much as it limits the Senate in transgressing any other constitutional limitations. Justice Thurgood Marshall, citing Federalist 58, said as much the last time the Supreme Court ruled on an Origination Clause claim:

> Provisions for the separation of powers within the Legislative Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty. . . . A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment.[152]

B. *FURTHER EVIDENCE FROM THE RATIFICATION DEBATES:*

We review a variety of sources from the ratification period from newspaper editorials to debates in the various legislatures.

We find only one definitive example of anyone raising the prospect of a Senatorial substitute amendment on a revenue bill in the thousands of collected public documents in The Documentary History of the Ratification of the Constitution. During the debates in the Virginia Legislature, one member objected to his understanding of the Origination Clause:

> Mr. Grayson objected to the power of the Senate to propose or concur with amendments to money bills. He looked upon the power of proposing amendments to be equal in principle to that of originating, and that they

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[151] DANIEL WIRLS & STEPHEN WIRLS, THE INVENTION OF THE UNITED STATES SENATE, 188-89 (2004). Internal citations omitted. Quotations cited internally in the original as: Haynes, 1938 at 432 and *Senate Journal*, Aug. 5, 1789 respectively.

[152] United States v. Munoz-Flores, 495 U.S. 385, 395; 397 (1990).

> were in fact the same. As this was, in his opinion, a departure from that great principle which required that the immediate Representatives of the people only should interfere with money bills; he wished to know the reasons on which it was founded. . . . . Mr. Grayson still considered the power of proposing amendments to be the same in effect, as that of originating. The Senate could strike out every word of the bill, except the word Whereas, or any other introductory word, and might substitute new words of their own.[153]

Madison himself responded to Grayson's fear that "amendment" was equivalent to "origination" by assuring him in a somewhat dismissive fashion that,

> The criticism made by the Honorable Member, is, that there is an ambiguity in the words, and that it is not clearly ascertained where the origination of money bills may take place. I suppose the first part of the clause is sufficiently expressed to exclude all doubts. . . . Virginia and South-Carolina, are, I think, the only States where this power is restrained [no Senate amendment's to revenue bills]. In Massachusetts, and other States, the power of proposing amendments is vested unquestionably in their Senates. No inconvenience has resulted from it.[154]

It is not astonishing that this explicit apprehension of the Senate using shell bills was contemplated by an Anti-Federalist member of the Virginia legislature. Virginia was one of the few exceptions among the States at the time in not having any experience with Senate amendments to revenue bills. George Mason, another Virginia Anti-Federalist (who was an actual member of the Constitutional Convention in Philadelphia), did not go so far as Mr. Grayson in stating his famous case against the Origination Clause. In Mason's passionate caution against the various grants of power contained in the new Constitution he warned that,

> The Senate have the Power of altering all Money-Bills, and of originating Appropriations of Money, & the Salaries of the Officers of their own Appointment in Conjunction with the President of the United States; altho' they are not the Representatives of the People, or amenable to them.[155]

It seems from Mason's warnings here that he distinguished a more extensive appropriation power in the Senate than taxing power by distinguishing "originating" from "altering" in each case. This seems to be the strongest case against article 1, §7 that Mason could conceive of. In reflecting on Mason's less ambitious attack on article 1, §7, Madison privately wrote to George Washington about Mason's objections regarding "the paltry right of the Senate to propose alterations in money bills."[156] If there is

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[153] Virginia Convention Debates, 14 June 1788 *reprinted in* DHRC, *supra* note 97, V.10 at 1268.
[154] *Id.* at 1268.
[155] George Mason's Objections to the Constitution of Government formed by the Convention, *reprinted in* DHRC, *supra* note 96, V.13 at 43.
[156] James Madison to George Washington, New York, 18 Oct. 1787 *reprinted in* DHRC, *supra* note 97, V.13 at 408 (also in V.8 at 76).

any doubt about how Madison presented the clause to the ratifying public, his famous reflections in Federalist 58 was in Madison's own description of the first half of the clause, "sufficiently expressed to exclude all doubts": "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government."[157]

This singular example of a member of the ratifying public contemplating a broad Senate tax origination power through substitute amendment if taken in a vacuum would be the strongest case that such a power was understood by the public. However, when weighed against the body of contrary statements, it appears as an anomaly wholly refuted. Given the vast number of references during the ratification period evincing a more limited understanding of the Senate's amending power, we will confine ourselves to documenting 20 examples in "Appendix A" without room for extended discussion of each.

While all of the examples contained in "Appendix A" of the public's understanding of the Clause may have slight variations of interpretation, none of them premeditate a Senate's wholesale construction of tax bills. This is astounding given the wide and creative variety of apprehensions voiced by opponents of the Constitution in the heated ratification debates. What was plainly understood by article 1, §7 was that the Senate would be constitutionally restrained from designing taxes by the first half of the clause, and the House could not get away with tacking foreign matters to money bills by the second half of the clause.

Such is the context of the clause "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." It was the primary bargaining chip used to bridge the disagreement between the large and small States that threatened progress on the Constitution. By privileging the proportionally representative House of Representatives on taxing measures, the Connecticut Compromise garnered enough support from the larger States to concede equal State representation in the Senate.

The Senate's power to amend revenue raising bills was added not as a compromise to those seeking to empower the Senate on taxing measures but as a means to avoid a disingenuous House of Representatives that might force the Senate to accept or refuse non-revenue related measures tacked onto revenue raising bills. However, its most fundamental role was as a pragmatic addition that was seen as alleviating popular prejudices against "taxation without representation" that divisive Senate originated tax bills might instigate.

The totality of the historical evidence from the ratification period indicates that almost no one expected that the clause would empower the Senate to legitimately originate taxes by unconventional (and illegal at the time) parliamentary amendment maneuvers. Furthermore, its plain under-

[157] THE FEDERALIST NO. 58 (James Madison).

standing was that it limited the upper branch from designing measures exerting control over the purse of the nation.

The Framers were fully aware of the enforcement and interpretive difficulties inherent in the clause. The controversies surrounding what constituted a "[b]ill for raising Revenue" were considered in the Convention, as well as the various evasive maneuvers each house might take to avoid the Clause's requirement in their faction's or chamber's interests, or in collusion with the executive branch. However, despite all of these considered difficulties, the Framer's decided to restrain the origination of all revenue raising bills (without the emphasis of "for the purpose of revenue") to the more popular and nationally representative chamber. They allowed the Senate amending power primarily to prevent the popular branch from abusing a strict origination privilege in the absence of Senate amending power.[158]

VI: SUPREME COURT PRECEDENT

Article I, Section 7, Clause 1, provides that: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." The preceding historical analysis indicates concerns for the institutional structure for revenue raising among the Framers. An analysis of judicial interpretation offers little in the way of interpretive clarity. The Supreme Court of the United States has only waded into Origination Clause matters on only a handful of times in its history.159 Lower courts have discussed origination with more frequency, but more often than not have deferred to the legislative branch by claiming that the law in question was not a revenue raising bill

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[158] We diverge from Krotoszynski's understanding of Senatorial taxing power as intended by the framers. *See* p. 259 of his 2005 article, *supra* note 10: "The only question presented for consideration was whether the failure to apportion Senate seats based on population made the Senate sufficiently similar to the House of Lords to justify strict limits on the body's ability to influence fiscal policies directly. Notwithstanding the objections offered by Gerry, Mason, and Randolph, the delegates concluded that the Senate's manner of selection and apportionment did not require limiting its voice in matters of taxing and spending." Gerry, Mason, and Randolph's views on origination issues were the ones that "generally prevailed" in the Convention according to Madison himself. Additionally, apportionment was not the only reason why the Senate was deemed unfit to tax the people. Term lengths, indirect elections, and the ratio of representatives to constituents were equally if not more often cited.

[159] *See* case file from legallanguage.explorer.com. This is similar to a Shepard's citation search in Lexis-Nexis. The Supreme Court has decided only six substantive Origination Clause cases: *Rainey v. United States*, 232 U.S. 310 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Millard v. Roberts*, 202 U.S. 429 (1906); *Twin City Bank v. Nebecker*, 167 U.S. 196 (1897); *United States v. Norton*, 91 U.S. 566 (1875); and *United States v. Munoz-Flores*, 495 U.S. 385 (1990). Several other Supreme Court cases mention the Origination Clause, but only in passing. *See, e.g. Skinner v. Mid-America Pipeline Co.*, 490 U. S. 212 (1989), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___(2012) (Scalia, J., dissenting).

or that the Senate's amendment at issue was germane to the subject matter of the House-originated revenue raising bill.[160]

What seems to capture the Supreme Court's attention is the question, "what is a revenue raising bill?" On a few occasions, the Court's decision hinges on defining what makes a bill a revenue raiser. When concern is raised in Congress about tripping the Origination Clause language, the House and Senate have dealt with the provision by using a process called "blue slipping" in the House and in the Senate by a "question . . . submitted directly to the Senate," to indicate that a violation of the Origination Clause has taken place.[161] These internal norms should be considered in light of their relationship to constitutional triggers of the Origination Clause.

Historically, revenue raising bills (1) impose taxes upon the people – direct or indirect, (2) lay duties impost or excises for the use of the government, and (3) give the person from whom the money is extracted no equivalent in return unless commonly felt by the benefit of good government.162 In order for the Origination Clause to apply, the raising of money must be the bill's primary purpose rather than an incidental effect of the legislation, and the resulting funds must be for expenses or obligations of government generally rather than a single specific purpose. In the cases heard to date, the Supreme Court has narrowly interpreted "raising revenue" so that a statute that generates monies for a specified legislative function/program is not deemed to be a revenue raiser under the Origination Clause.163 There must be "no purpose by the act, or by any of its provisions, to raise revenue to be applied in meeting the expenses and obligations of the government."[164]

In *United States v. Norton*,[165] the Supreme Court decided on a Congressional act that created a postal money order system. An Act of Congress entitled "An Act to establish a postal money order system" did just that. Despite the fact that the revenue raised from the postal money order system went into the general Treasury, the Court focused on the intent of Congress to establish a money order system rather than the incidental effect of generating revenue. The litigation involved a clerk, Norton, who was employed in a New York money order office and who had been indicted for embezzlement. The primary focus of Norton's legal challenge was the statute of limitations. A violation of federal law attached a two year statute of limitations. However, if the statute had been determined to be a revenue raising provision, the statute of limitations for prosecution

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[160] *Id.*
[161] *See* James Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement*, Congressional Research Service, 9-10, Mar. 15, 2011 (http://www.fas.org/sgp/crs/misc/RL31399.pdf).
[162] *See United States ex rel.* Michels v. James, 26 Fed Case, 577, 578 (C. C. N.Y. 1875).
[163] Krotoszynski, *supra* note 9, at 248.
[164] *Twin City Bank v. Nebecker,* 167 U.S. 196 (1897).
[165] 91 U.S. 566 (1875).

would have extended to five years. The Court ultimately ruled that the statute was not a revenue raising law. The Court in Norton discounted the revenue raising component to the Act, generating money that went to the general Treasury, instead focusing on Congress' goal of establishing a money-order system:

> The Constitution of the United States, Art. I, Sec. 7, provides that "All bills for raising revenue shall originate in the House of Representatives." The construction of this limitation is practically well settled by the uniform action of Congress. According to that construction, it "has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue." Story on the Const., sec. 880.[166]

In *Twin City v. Nebeker* (1897)[167] the Court focused on a provision of the National Banking Act of 1864. The goal of the legislation was to create a national currency. In doing so, the Act imposed certain taxes on bank notes in circulation. The Act at issue was passed on June 3, 1864. The bill began in the House of Representatives but the provision to include a tax was added by Senate amendment and was later agreed upon by the House. The Court held that a fee imposed on banks based on the average amount of notes in circulation was not a revenue raising bill, hence did not trigger the Origination Clause. The litigation focused on the National Banking Act, whose primary purpose was to establish a national currency. The Court reasoned that the primary goal was not to raise revenue and the resulting funds were wholly incidental to the Act's purpose and were not for use by the government generally. The opinion written by Justice John Marshall Harlan handily disposed of the problem of origination in a 9-0 decision. The Supreme Court ruled that, "the case is not one that requires either an extended examination of precedents or a full discussion as to the meaning of the words in the Constitution 'bills for raising revenue'."[168] Simply put, the tax imposed was incidental to the object of creating a national currency. The tax was a means for creating a currency system pursuant to Congress's Art. 1, §8 power to "To coin Money, [and] regulate the Value thereof," not for raising revenue for the government. The Court never reaches the merits of the case, whether or not the tax imposed by the Treasurer of the United States was unlawful: "An act of Congress providing for a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on notes . . . is clearly not a revenue bill . . . . The tax was a means for effectually accomplishing the great object of giving the people a currency. . . . There was no purpose by the act, or by any of its provisions, to raise revenue to be ap-

[166] *Id.* at 568-69.
[167] 167 U.S. 196 (1897).
[168] *Id.* at 202.

plied in meeting the expenses or obligations of the government."[169] Taken together, *Norton* and *Nebeker* focus more on the intent of Congress to carry out one of its enumerated powers over the money generated and its use. Showing deference to Congress' legislative action and purpose, *Norton* and *Nebeker* narrow the Origination Clause aperture, discounting the rich history of the Framers.

In *Millard v. Roberts*,[170] the Court upheld the constitutionality of property taxes that were imposed to fund a railroad terminal in the District of Columbia. The taxes, imposed to improve the rail system, were not levied to raise revenue but for the program put in place. Using the same logic as *Nebeker*, the Court ruled that the taxes were not for raising revenue but only for the stated purpose in the Act, hence those taxes did not raise questions under the Origination Clause. *Millard*, also a unanimous decision, relied heavily on the logic of *Nebeker*, as the Court quoted it extensively. *Millard* thus reaffirmed the understanding of the Origination Clause from *Norton* and *Nebeker*.[171]

The concept of "incidentally create[d] revenue" introduced in 1875 as *dictum* in *Norton* and then applied to the holding in *Nebeker* 22 years later deserves an expanded examination here. It is one of the most often cited and least scrutinized concepts in Origination Clause jurisprudence. It has had a profound impact upon the judicial interpretation of the Origination Clause because, where relied upon, it dramatically narrows the Court's understanding of what constitutes a revenue-raising bill to exclude "bills for other purposes which may incidentally create revenue."[172]

However, the standing authority of the concept of "incidentally create[d] revenue" introduced judicially by *Norton* and *Nebeker* Court is not beyond question. In 1915, a federal court in New York struck down an Act of Congress as violative of the Origination Clause in *Hubbard v. Lowe*,[173] even though the tax at issue was not designed for raising general revenue, but rather was meant to discourage certain people from making certain cotton futures contracts. The *Hubbard* case was the only case in

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[169] 167 U. S. 196, 202 (1897).

[170] 202 U.S. 429 (1906).

[171] Millard v. Roberts, 202 U.S. 429 (1906). During the next decade, the Court acknowledged in two separate cases that the challenged tariff bills were revenue bills, but upheld the power of the Senate to amend them. *See Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Rainey v. United States*, 232 U.S. 310 (1914). Following *Millard* in 1906, the Court did not have occasion to follow the logic of *Nebeker* regarding incidental revenue until 1990, but that 1990 case did not involve any tax as had *Nebeker* and *Millard*. *See United States v. Munoz-Flores*, 495 U.S. 385 (1990) (monetary "special assessment" on persons convicted of a federal misdemeanor).

[172] Twin City v. Nebeker, 167 U.S. 196, 203 (1897).

[173] Hubbard v. Lowe, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed mem.*, 242 U.S. 654 (1916). The law in question (the Cotton Futures Act) was reenacted following proper procedures on August 11, 1916. Solicitor General Davis therefore moved for dismissal of his appeal, and the Court obliged, calling the case "disposed of without consideration by the court." 242 U.S. 654 (1916).

U.S. history where a federal court invalidated a statute for violating the Origination Clause. The judge in *Hubbard* specifically dismissed the reasoning of the U.S. Supreme Court in *Nebeker*, saying that it (along with similar lower court decisions) required "a good deal of mental strain,"[174] and the judge instead cited a later U.S. Supreme Court decision for the proposition that the motive or purpose of Congress is not relevant to judges.[175] The court reasoned that taxes create revenue, so the Origination Clause applies, whatever the particular purposes and motives of Congress might be.

By the 1930s, the courts' interpretation about incidental revenue-raising was still somewhat mixed, with "[s]ome hav[ing] excluded incidental revenue; some hav[ing] extended the constitutional provision to cover all revenue."[176] In recent decades, courts and conventional legal opinion have relied heavily on *Nebeker's* conception of incidental revenue, especially when taxation is not involved, and when Congress is incidentally raising revenue pursuant to non-tax powers.[177]

But what was the authority for the Court's adoption of the concept of "incidentally create[d] revenue" introduced in *Nebeker*? *Nebeker* and its progeny (including *Millard)* involved taxes that the Court has exempted from the word "revenue" in the Origination Clause. While such a narrowing of the word's original meaning (See preceding examination of the early American understanding of the scope of "Revenue raising Bills") may at first seem somewhat inexplicable, it appears that the Court in *Nebeker* was attempting to follow the relevant discussion in Justice Joseph Story's 1833 Commentaries, which in turn may be viewed in the context of the Constitutional Convention of 1787, and the Maryland Constitution of 1776. This chain, however, has several weak links.

The concept of incidental taxation is specified nowhere in the Constitution, and it was both discussed and rejected at the 1787 Convention. The Court's reliance on that concept in *Nebeker* and *Millard* can be traced back through Joseph Story's writings on the subject, through three usages of the term in the Constitutional Convention, and possibly back to Maryland's usage in its Origination Clause of 1776. Some might argue that there is a broad conceptual gulf between bills that intend solely to tax people, and bills that happen to tax people. Such a distinction between incidental revenue and revenue proper does not appear to be historically justified, especially if the revenue comes from "strict taxes" rather than other sources. To the populace paying the resulting taxes, the distinction seems

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[174] *Hubbard,* 226 F. 135, 140.

[175] *See* McCray v. United States, 195 U.S. 27 (1904) (congressional motives are not relevant to judges); *United States v. O'Brien*, 391 U. S. 367, 383 (1968) (same principle).

[176] LUCE, *supra* note 20, at 406.

[177] *See* United States v. Munoz-Flores, 495 US 385 (1990). *Munoz-Flores* involved a monetary "special assessment" on persons convicted of a federal misdemeanor, so no tax was involved, and moreover Congress was seeking the funds in support of its power to punish misdemeanors involving the immigration laws.

wholly irrelevant. Moreover, an exception for "incidental" taxes turns the Origination Clause into a "formal accounting" gimmick, because the Senate can always pair up taxing and spending provisions so as to avoid the Clause.[178]

The opinion in *Nebeker* cited Story's Commentaries at §880[179] which used the "incidental" revenue language while citing the 1787 Convention ("2 Elliot's Debates, 283, 284").[180] However, the Convention delegates were at that time rejecting – not accepting – a proposal by Edmund Randolph to eliminate the origination requirement for revenue-raising that was not "*for the purpose of revenue*."[181] Regarding that rejected proposal, Randolph, Mason and Madison all referred to the proposal as excluding "incidental" revenue-raising from the requirements of the Origination

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[178] *Munoz-Flores* at 407-408 (Stevens, J., concurring).

[179] According to §877 of volume 2 of Story's Commentaries from the original 1833 edition:

> [T]he history and origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may *incidentally create revenue*. No one supposes that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency, although all of them might incidentally bring revenue into the treasury.

2 STORY, *supra* note 6, §877 (emphasis added). Notice that none of the four examples given here by Story (in the last two quoted sentences) involves any tax whatsoever.

[180] At 2 Elliot's debates, 283, 284 we find no relevant material to the topic of incidental taxation. We assume Story was referencing other relevant material from August 1787, elsewhere in that same volume.

[181] On July 26, 1787, the Convention adjourned to await a draft Constitution from the Committee of Detail, which was tasked with reflecting the agreements that had already been struck. On August 6, the draft arrived, including this: "All bills for raising or appropriating money, and for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate." That draft was voted down, and the Convention adjourned to think it over. On August 11, Randolph proposed "a clause specifying that the bills in question should be for the purpose of Revenue, in order to repel ye. objection agst. the extent of the words *'raising money,'* which might happen *incidentally*…." (emphasis added). Then on August 13, George Mason endorsed Randolph's proposal: "This amendment removes all the objections urged agst. the section as it stood at first. By specifying *purposes of revenue,* it obviated the objection that the Section extended to all bills under which money might *incidentally* arise" (emphasis added). James Madison disagreed: "In many acts, particularly in the regulations of trade, the object would be twofold. The raising of revenue would be one of them. How could it be determined which was the primary or predominant one; or whether it was necessary that revenue shd: be the sole object, in exclusion even of other *incidental* effects" (emphasis added). Thus, the Randolph proposal (excluding incidental revenue by using the words "*purpose of revenue*") was never included in the Constitution, and the August 6 language "bills for raising" was adopted.

Clause.[182] Additionally, that proposal failed. That failed proposal was quite different from the one ultimately ratified in the Constitution (which does not specify that the scope of "Bills for raising Revenue" only includes those for the "*purpose of revenue*"). To the extent that Story may have been relying upon the 1787 deliberations for the notion that incidental taxes are exempt from the requirements of the Origination Clause, Story must have been mistaken, and the *Norton* and *Nebeker* Courts equally mistaken to follow suit.

Both Randolph and Mason were willing to exclude incidental revenue-raising from the requirements of the Origination Clause. Madison opposed them due to the impracticality of determining which congressional purposes were incidental and which were not. Therefore, the Origination Clause as it stands now does not attempt to distinguish between congressional purposes. As Judge Hough reasoned when he struck down the Cotton Futures Act in 1916: "It is immaterial what was the intent behind the statute; it is enough that the tax was laid, and the probability or desirability of collecting taxes is beside the issue."[183]

Even if the Framers' debate in the Convention does not support the judicial concept of "incidentally create[d] revenue," it is hypothetically possible that Randolph's ill-fated proposal may have been inspired by Maryland's then-unusual treatment of the subject in its State constitution (the Delaware Constitution of 1792 also employed the concept but postdates the timeframe). Maryland's 1776 constitution specified:

> [T]hat no bill, imposing duties or customs, for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill: but every bill, assessing, levying, or applying taxes or supplies, for the support of the government, or the current expenses of the state, or appropriating money in the treasury, shall be deemed a money bill.

If this was the basis of the (rejected) Randolph proposal, one would expect the Maryland delegates to have contributed extensively to this debate. Daniel Carroll (the cousin of Charles Carroll of Carrollton who drafted much of the Maryland Constitution alongside Samuel Chase), was present but only offered that the distinction would cause trouble: "The most ingenious men in Maryland are puzzled to define the case of money bills, or explain the Constitution on that point; tho' it seemed to be worded with all possible plainness & precision. It is a source of continual difficulty & squabble between the two houses."[184] At any rate, there is little evidence that the concept of "Bills for raising Revenue," adopted by the 1787

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[182] *Id.*

[183] *Hubbard v. Lowe,* 226 F. 135, 137 (S.D.N.Y. 1915), *appeal dismissed mem.*, 242 U.S. 654 (1916).

[184] *Id.*at 449 (Statements offered by Daniel Carroll, one of Maryland's delegates in Convention).

Convention and ratified by the public, actually imported Maryland's understanding and experience more than it did the other dozen States' respective understandings. It is much more reasonable to presume that the Origination Clause imported the understanding of all the other States which had no such limited conception of the scope of "Bills for raising Revenue," and made no mention of "incidentally create[d] revenue." Any influence that the Maryland provision may have had on the 1787 Convention ended with the Convention's rejection of the Randolph proposal. Even if we were to take Maryland's use of the concept of "incidentally create[d] revenue" as a source of continuing influence, it was limited to three specific categories of bills only, and it is not clear that the upper house in Maryland could even originally amend a money bill.

Even if the concept of "incidentally create[d] revenue" remains judicially relevant, the Court has never made clear what the term means. The legal scholar and judge must return to the authority cited by the *Nebeker* Court (Judge Joseph Story) to justify the concept's adoption and what he meant by it at that time. The term "incidental" was defined in the late 18th century as "[i]ncident; casual; happening by chance; not intended; not deliberate; not necessary to the chief purpose."[185] In Joseph Story's time it was defined as "1. Happening; coming without design; casual; accidental; as an incidental conversation; an incidental occurrence. 2. Not necessary to the chief purpose; occasional."[186] However, in the parlance of constitutional law, the word "incidental" often referred more specifically to implied powers that result from expressly enumerated powers. Thus, when Story (in disagreement with another scholar of his time, St. George Tucker)[187] was distinguishing "incidental" revenues from other revenues, Story's examples all involved no taxes whatsoever. Instead, Story pointed only to funding sources incidental to the non-tax powers of Congress: "selling public lands, or public stock," or bills "establishing the post-office, and the mint, and regulating the value of foreign coin." These examples speak solely to funding that is necessary and proper for executing specifically-enumerated powers other than the taxing power, which suggests that Story probably had no intention of exempting "incidental" taxes (in the strict sense of the word) from the coverage of the Origination Clause (i.e. he was misconstrued by the Court in *Nebeker* and ensuing opinions utilizing his

[185] SAMUEL JOHNSON, *supra* note 96, (1773).
[186] NOAH WEBSTER, *supra* note 109, (1828).
[187] STORY, Commentaries, §877 (citing ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, 261 (1803). Judge Tucker wrote that "acts for establishing the post-office" should have originated in the House. We do not endorse Tucker's position, to the extent that he suggested that the Origination Clause could apply to revenue other than taxes.

concept of "incidentally create[d] revenue" to exempt tax measures from "raising Revenue" status and thus Origination Clause scrutiny).[188]

Even if Story's passage is given an interpretation that aggrandizes Senate power (which we believe unwarranted), still there is no support in that passage for the Senate to originate bills that balance the budget, or that extract revenue to pay for the general expenses of government, or that impose taxes unconnected to any enumerated power other than the taxing power. Likewise, even if we were to accept Justice Harlan's 1897 decision in *Nebeker* (citing Story) as correct and still binding – despite the opinion in *Hubbard v. Lowe* deeming *Nebeker* to no longer be controlling – still Harlan was careful to note in *Nebekar* that, "[t]here was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the Government."[189]

While the three cases *Norton*, *Nebeker*, and *Millard* indicate a narrowed Court view of the scope of the term "Bills for raising Revenue," focusing on Congress' intent when legislating, the ensuing Origination cases considered the procedural problem of House-Senate origination, amendments, and germaneness. In 1911 the Court decided *Flint v. Stone Tracy Company*.[190] Argued in 1910, reargued in 1911 and decided in the same year, the Court ruled 7-2 regarding a tax bill. The House of Representatives passed a comprehensive tax bill which included an inheritance tax. When the bill was taken up in the Senate, the upper house inserted a corporate tax in place of the inheritance tax. The bill was later passed as amended, however the corporations, Stone Tracy and fourteen others, claimed the tax to be unconstitutional based on the Origination Clause. The Supreme Court ruled that the Senate amendment to insert the corpo-

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[188] Story also very probably did not mean for courts to inquire into whether Congress really wanted to raise money by imposing taxes. In connection with protective tariffs, Story wrote:

> If it be said, that the motive is not to collect revenue, what has that to do with the power? When an act is constitutional, as an exercise of a power, can it be unconstitutional from the motives with which it is passed? If it can, then the constitutionality of an act must depend, not upon the power, but upon the motives of the legislature … . No government on earth could rest for a moment on such a foundation. It would be a constitution of sand, heaped up and dissolved by the flux and reflux of every tide of opinion.

2 STORY, *supra* note 6, § 1086. This was the same point made by Judge Hough in *Hubbard v. Lowe*, under the Origination Clause. *See Hubbard v. Lowe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed mem.*, 242 U.S. 654 (1916).

[189] Twin City Bank v. Nebeker, 167 U.S. 196 (1897) at 203. The money was to pay for printing new currency that would be utilized by the banks themselves, and so that levy was arguably not traceable solely to the power to tax.

[190] 220 U. S. 107. In *Flint v. Stone Tracy* fifteen respondents challenged the Corporation Tax law of August 5, 1909. The case was hotly contested, during the era of the adoption and ratification of the Sixteenth Amendment. Oral arguments were heard on March 17th and 18th 1910 and again on January 17, 18 and 19, 1911.

rate tax for the inheritance tax was germane to the comprehensive House tax bill and therefore lawful:

> "The bill having properly originated in the House, we perceive no reason in the constitutional provision relied upon why it may not be amended in the Senate in the manner which it was in this case. The amendment was germane to the subject-matter of the bill, and not beyond the power of the Senate to propose."[191]

The corporate tax at issue before the Court in the bill had in fact been first considered in the House of Representatives in committee as part of the larger tax bill. However, the House committee drafting the bill

> "had rejected the proposal because it did not think the revenue was needed and also because the Committee had decided already to propose an inheritance tax, as suggested by Taft at his inauguration. . . . the revenue bill that the House sent to the Senate for consideration consisted of the tariff provisions plus an inheritance tax but not a corporate tax."[192]

The Senate's amendment of replacing the inheritance tax favored by the House with the corporate tax was a minor amendment to a comprehensive bill involving two alternatives already declared and considered in the House. The Court used this particular legislative action as an example of a Senate amendment to a revenue raising bill that was germane to the subject matter of the bill and therefore within the Senate's amending power according to the Origination Clause. The Senate's logic in reintroducing the corporate tax in the bill was to remove the criticism that the inheritance tax would be a "double-tax" (alongside the existing state inheritance taxes), and that another tax measure was necessary to replace the inheritance revenue measure originally favored by the House.[193] Thus the amendment was made in the Senate and the Court ruled it "germane to the subject matter of the bill" thereby establishing the standard for how far the Senate can amend a revenue raising bill.[194]

In *Rainey v. United States*,[195] the Court again supported the power of the Senate to amend a House revenue raising bill. At issue this time was a Senate amendment imposing a tax on foreign-built pleasure yachts. The

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[191] 220 U. S. 107, 143.
[192] Kornhauser, *supra* note 121, at 96. (citing 44 CONG. REC. 4717 (July 31, 1909)).
[193] *Id.* at 98.
[194] Interestingly to the legislative history of the bill and the modern House practice of blue-slipping, the House attempted to blue-slip a 1910 Senate amendment to amend the corporate tax at issue on origination grounds: "In 1910 the Senate added an amendment to the appropriation bill, H.R. 22643. . . On April 1, 1910, the House discussed this amendment at length. Congressman Bartlett of Georgia immediately moved to return the bill to the Senate 'with the request that the amendment be stricken from the bill, because it invades the constitutional privilege of the House to originate bills for the raising of revenue.' After much discussion the resolution was rejected." *Id.* at 127.
[195] 232 U.S. 310 (1914).

Senate's revenue amendment to the House's revenue bill was upheld, squarely adopting the lower court ruling. The Supreme Court did not address germaneness, declining to address the legislative purpose of the bill.

Both *Flint v. Stone Tracy* and *Rainey v. United States* leave unanswered the question of whether or not the Supreme Court has jurisdiction on Origination Clause grounds once an Act has been passed by both Houses of Congress. Questions of the scope and mechanics of the Origination Clause go unasked until the 1980s.[196] The Supreme Court took up the Origination Clause after 76 years of silence in *United States v. Munoz-Flores*.[197]

In 1985 German Munoz-Flores was charged and convicted of a misdemeanor for aiding illegal immigrants in circumventing the immigration process. He was sentenced to probation and ordered to pay a "special assessment" of $25 per count. The assessment was based on a federal statute, 18 U.S. C. 3013, in which courts imposed a monetary assessment for those convicted of a federal misdemeanor to be paid into the Crime Victims Fund, stipulated by the Crime Victims Act of 1984. Munoz-Flores appealed the assessment, arguing that the Crime Victims Act of 1984 violated the Origination Clause of the U.S. Constitution. Munoz-Flores reasoned that the Act was a revenue raising measure that originated in the Senate thereby violating the Origination Clause. The trial judge denied Munoz-Flores' motion and the District Court affirmed that decision. However the Court of Appeals for the Ninth Circuit reversed the decision on Origination Clause grounds while raising the political questions doctrine.

The Supreme Court heard oral argument on February 20, 1990. It focused on several questions: (1) was Origination Clause litigation a nonjusticiable political question; (2) if the Court did rule on the matter and ultimately strike an Act of Congress based on an Origination Clause violation, was this disrespectful to the legislative branch; and (3) is the statute a revenue raising bill? The Court answered all three of these questions in the negative. The Court ultimately ruled that the Crime Victims Act was not a revenue raising measure, and therefore did not violate the Origination Clause.

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[196] Lower courts have followed the Supreme Court's decisions, finding very few violations of the Origination Clause. Lower courts have addressed whether or not the Origination Clause invokes the political questions doctrine, making the question outside of judicial review. There is a lively discussion of TEFRA, the Tax Equity and Fiscal Responsibility Act of 1982 in the lower courts. *See, e.g.* Texas Ass'n of Concerned Taxpayers, 772 F2.163 (5th Cir. 1985). The U. S. Supreme Court denied certiorari, docket 85-1262, cert denied 476 U.S. 1151, May 27, 1986. Also *see* Mulroy v. Block, 569 F. Supp. 256 (N.D.N.Y. 1983), aff'd, 736 F.2d 56 (2d Cir. 1984), cert. denied, 469 U.S. 1159 (1985). One of the most prominent lower court cases discussing the Origination Clause in general and germaneness in particular is *Hubbard v. Lowe* (S.D.N.Y. 1915).

[197] 495 U.S. 385, (1990). Again as noted above, lower courts discussed the interpretation of the Origination Clause even though the Supreme Court did not.

Marshall dismissed the political question claims following the logic of *Baker v. Carr*.[198] Courts can craft standards pertaining to bills for raising revenue and for where a bill originates: "Surely a judicial system capable of determining when punishment is 'cruel and unusual' when bail is 'excessive' 'when searches are unreasonable,' and when congressional action is 'necessary and proper' for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges."[199]

Marshall addressed the government's argument that if the Court invalidated a law on Origination Clause grounds it would be disrespectful to the Congress. He explained that the judiciary is duty bound to review the constitutionality of congressional enactments. A purview of the judiciary, long recognized and held, Marshall dismissed the government's argument out of hand. Justice Stevens in concurrence made the claim that Congress can better determine whether or not a bill violates the Origination Clause. Stevens argued that a bill that originates unconstitutionally can still be law if passed by both Houses of Congress and signed by the President. He reasoned that the House can easily defend its origination power by not agreeing to Senate amendments or voting in favor of legislation. Scalia in a separate concurrence also agreed that judicial deference to the legislative branch is preferable since Congress as a coequal branch can make Origination Clause determinations. Both Scalia and Stevens agreed that there is no Origination Clause violation since the Crime Victims Act is not a revenue raiser, but they differed from Marshall and the majority that courts should determine Origination Clause violations.

The Court concluded in *Munoz-Flores* that, "[t]he special assessment statute is not a 'Bil[l] for raising Revenue' and, thus, its passage does not violate the Origination Clause. This case fell squarely within the holdings of *Twin City Bank v. Nebecker* and *Millard v. Roberts* that a statute that creates, and raises revenue to support, a particular governmental program, as opposed to a statute that raises revenue to support government generally, is not a 'Bil[l] for raising Revenue'"[200]:

> The provision was passed as part of, and to provide money for, the Crime Victims Fund. Although any excess was to go to the Treasury, there is no evidence that Congress contemplated the possibility of a substantial excess, nor did such an excess in fact materialize. Any revenue for the general Treasury that § 3013 creates is thus incidental to that provision's primary purpose.[201]

To date, the only Supreme Court decision to articulate the Judicial Branch's role in Origination Clause challenges is *United States v. Munoz-Flores* in 1990. The Court clarified the modern role of courts in Origina-

[198] 369 U.S. 186 (1962).
[199] 495 U.S. 385, 396 (1990).
[200] 495 U.S. at 386-87.
[201] *Id.* at 387.

tion Clause claims: "A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it passed by both Houses and signed by the President than would a law passed in violation of the First Amendment."[202] Here, *Munoz* departed quite dramatically from the old Court standard regarding Origination Clause challenges expressed in *Field v. Clark Boyd* (1892)[203] that the judiciary is bound to respect Congress's indications of a Bill's origination source via its formally enrolled status.

This departure from precedent in *Munoz* thus presents an opportunity to re-evaluate the deeper historical record and the few substantive Origination Clause Court decisions that exist, all of which indicates the need for a more careful consideration of this often overlooked constitutional provision.

The Court may be presented with its first post-*Munoz* Origination Clause case in this coming year in the *Sissel v. HHS* challenge against the Affordable Care Act. The district court judge in that case rejected the plaintiff's Origination Clause challenge, ruling that the tax under consideration in the Affordable Care Act did not make it a "Bill for raising Revenue." [204] Further, the judge argued that even if the ACA were considered a "Bill for Raising Revenue" as the Constitution understood that category of legislation, the bill formally originated in the House and was germanely amended by the Senate.[205] However, all three of these claims seem at least disputable. Based on our preceding research, the case appears far less conclusive than the district court judge made it out to be. First, it appears that the 17 Senate introduced taxes of the ACA very well may place it within the category of legislation intended by the original meaning of the phrase "Bills for raising Revenue." Second, it is not clear that the vestigial bill number, "H.R.3590", (when separated from any of the original bill's substance) is sufficient to satisfy that the bill originated in the House of Repre-

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[202] *Id*. at 397.

[203] 143 U.S. 649.

[204] Sissel v. U. S. Dep't of Health & Hum. Services, No. 10-1263, slip op. at 14 (D.D.C. June 28, 2013) : "Congress's preference would be for the individual mandate to raise zero revenues, and thus the provision cannot fairly be characterized as a 'Bill[] *for* raising Revenue.'"

[205] *Id*. at 22: "[E]ven assuming the individual mandate was a 'Bill[] for raising Revenue,' that bill 'originated in the House of Representatives' as H.R. 3590 and was later duly amended by the Senate in a manner consistent with the Origination Clause." However, the plaintiff in the case maintains that the Court's decision in NFIB alters the constitutional analysis of the ACA's taxing provisions: "If the charge for not buying insurance is seen as a federal tax, then a new question must be asked," said Pacific Legal Foundation Principal Attorney Paul J. Beard II. "When lawmakers passed the ACA, with all of its taxes, did they follow the Constitution's procedures for revenue increases? The Supreme Court wasn't asked and didn't address this question in the NFIB case." http://www.pacificlegal.org/cases/Tax-raising-Affordable-Care-Act-started-in-wrong-house-of-Congress

sentatives according to the Constitution's requirement. This does not appear justified under our historical review, and it is further questionable under Court precedent post-*Munoz*. Third, the history of the Clause does not seem to authorize (and the Supreme Court has never condoned) the use of the "gut and amend" parliamentary maneuver as within the Senate's power to amend revenue raising bills. (See preceding section of the "Original Public Understanding" of germaneness and the phrase "as on other Bills" in the context of *Sissel* v. HHS) For these among many other factors unique to the particular legislation and its legislative context beyond the scope of this paper, the case may present a unique Origination Clause challenge in the history of limited opportunities the Court has had to address the Clause. What appears to be in the government's favor in this case is the somewhat deferential standard the Court often took to Senate revenue measures in the 20th century prior to *Munoz*. What is not in the government's favor is the historical meaning of the Clause as we read it, and the distinctness of the current case from those in past Origination Clause rulings. The meaning of the Clause and the specific context of those cases as described above should be carefully considered before either extending to or distinguishing past Court precedent from a legislative project as enormous and significant as the ACA.

VII. The Court's Standard, Implications, and Theoretical Challenges

While the Court has provided a narrow standard for what bills are considered revenue raising bills within the context of Article 1, §7, and if classed as a revenue raising bill, a general standard that any Senate amendments must be germane to the subject matter of the House originated bill, it has never addressed the questions of purpose and scale.

According to the Court's precedent through the cases presented to date, bills to which revenue raising is merely an incidental effect in the pursuit of some other legislative ends are not considered revenue raising bills. This standard was born out of a series of cases in which the taxes/fees imposed by Congress were of relatively small size and of narrow application as they attempted to exercise an enumerated constitutional power. In *Norton* the Congress was attempting to provide for a post system. In *Twin City v Nebeker* the Congress was attempting to provide for a currency. In *Millard*, the Congress was attempting to develop the District of Columbia. In *Flint*, the House was exercising its comprehensive taxing power and the Senate offered germane amendments to one element of that tax bill. In *Munoz*, Congress was attempting to enforce immigration law through criminal penalties. What if the Senate originated a taxing bill containing revenue raising provisions that were not a "means for effectively accomplishing" some enumerated "great object" as existed in all of the previous cases? Could the Senate originate a tax simply to exercise the taxing power and thereby claim that the revenue generation was merely incidental to the Congresses legitimate exercise of the taxing power? This seems to be the

unique and judicially novel question posed by the *Sissel* case given the *NFIB* ruling.

What is particularly problematic to this judicial standard is that it provides the Senate a blank check to originate any and all taxes it can couch as necessary to execute some other enumerated power. In theory, under this standard the entire federal budget and all receipts of the IRS could be designed and controlled through Senate originated bills. So long as the bills are compartmentalized and written to execute purposes other than revenue rising. Every tax could be labeled a "revenue offset" to the appropriation's purpose contained in the Senate bill. This would circumvent and nullify any substantive meaning of Article 1, §7 of the Constitution.

While the Court has historically given the Senate considerable leeway to originate bills that do in fact tax people in small amounts for limited ends, it has never clearly addressed the questions "for what reasons," and "how much" the Senate can tax. If the answer to those two questions is "any reason" and "any amount," then there is no Origination Clause. The Court's judicial interpretation of the clause throughout the 20th century remained relatively uncontroversial as the only cases it has upheld under Origination Clause scrutiny involved either germane amendments to large scale House originated tax bills, or else, relatively minor taxes that were truly incidental to a limited and clearly enumerated Senate legislative function.

VIII: Conclusions

The principle behind the Origination Clause was well established on the American continent during the 17th and 18th centuries. The perceived circumvention of the principle through various taxing measures instituted by Parliament in the 1760s was the primary ideological and legal argument for the Revolution. Of the nine States with bicameral legislatures by 1790, seven had lower house Origination Clauses. Most of them allowed upper house amendments of revenue raising bills. However, the belief that the mechanism of Senate amending power was meant by the Framers and the public they represented to allow the Senate "some" taxing power, misses the historical context and concerns of the clause. More often than not, the intent of adding a power for the Senate to amend money bills was to prevent an arrogating lower-house from tacking non-revenue raising measures onto revenue raising bills with the nefarious intent of circumventing the Senate's legitimate input on the attached non-revenue raising matters. Ironically, the Court's modern interpretation of the Origination Clause has favored Senatorial taxing power and enabled the opposite and equivalent abuse to be carried out by the Senate: The Senate now tacks "money bills" to unrelated House bills to circumvent the House's constitutionally delineated prerogative of originating new taxes. The opposite primary fear intended to be avoided through an origination requirement was evidenced in the British experience with exclusive origination in the House of Commons as well as in States such as Maryland and Delaware. All added clear

amendment clauses as well as limitations on what constituted a "revenue raising bill" in order to prevent an abusive lower house. However, none of these were an attempt to "share" original taxing power with the upper house. To "originate" seems to still have meant the same understanding that was specified in the Maryland law of 1650 that all taxing measures must be "first had and declared in General Assembly." By avoiding judicial activism on Congressional legislation, the Court seems to have passively permitted constitutional deviation from the Senate's intended role throughout its 20th century precedent, thereby upsetting the intended role of the House of Representatives in controlling the purse strings of the people. If the Court were to uphold a new challenge containing a broader taxing measure on a larger scale than those previously upheld by the Court, it would highlight the difficulties of the Court's standard and its divergence from the meaning of the Origination Clause.

In the Constitutional Convention, the Origination Clause was the primary bargaining chip used to bridge the disagreement between the large and small States that threatened progress on the Constitution. Politically, it was a concession made by the smaller States to limit the power of the Senate in exchange for allowing them to retain equal representation in that branch under the new Constitution. Philosophically and ideologically, it was a paramount expression and safeguard of democratic liberalism and popular sovereignty. While there were select concerns about it in the debates, both parties seemed to agree that the public would not support ratification of the Constitution if the popular clause were omitted. The public understanding of the clause was conveyed during the period of ratification by James Madison:

> The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government. They in a word hold the purse; that powerful instrument by which we behold in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse, may in fact, be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[206]

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[206] THE FEDERALIST NO. 58 (James MADISON). That Madison is specifically referencing taxation here and not merely appropriations is evident from FEDERALIST NO. 45: "the present Congress have as complete authority to REQUIRE of the States indefinite supplies of money for the common defense and general welfare, as the future Congress will have to require them of individual citizens" Likewise, this plain understanding is evident from early House records: *see* Journal of the House, March 8th 1792: "Resolved, That the Secretary of the Treasury be directed to report to this House his opinion of the best mode for raising the additional supplies requisite for the ensuing year". *See also* 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 356 (1911): James Madison speaking in the House of Representatives on 15 May, 1789:

Not much has changed since the ratification of the Constitution in terms of our theory of mixed legislatures. However, several key developments might give the Court pause:

1. *Direct election of Senators*: The 17th amendment could be argued to mitigate concerns over a lack of strict enforcement of the Origination Clause. The original indirect election of Senators was cited as one among several reasons why the House was more appropriate than the Senate for proposing taxing measures. However, all other "aristocratic" characteristics of the Senate (term lengths, non-proportional representation, non-local representation, etc.) remain the same today.
2. *Apportionment of taxes by population*: The 16th amendment could be argued to aggravate concerns and favor a strict enforcement of the Origination Clause. Joseph Story argued in the context of the appropriateness of the Senate's amending power that "above all, as direct taxes are, and must be, apportioned among the states according to their federal population . . . there seems a peculiar fitness in giving to the senate a power to alter and amend, as well as concur with, or reject all money bills."[207] Whether labeled "direct" or "indirect", the federal government no longer attempts to apportion any taxation according to the census.
3. *Ratio of Representatives to constituents*: Today's America is of a far greater scale than that of 1787. With over 300 million Americans today, each congressman represents about 700,000 constituents. The framers sought to limit this ratio in the second half of the proposed Origination Clause "concession" to one representative for no more than 40,000 constituents. Although this requirement did not make it into the final draft of the Constitution, it was the first of the 12 proposed amendments for the bill of rights. It is the only un-ratified one today. The House of Representatives, let alone the Senate is far less representative of the "local knowledge" of the concerns and circumstances thought appropriate to exercise the power of proposing new taxes. This would aggravate concerns in favor of a strict enforcement of the Origination Clause.

Finally, and although not drawn out in this analysis, there are fundamental issues with Senate originated tax measures that strike at our Constitution's basic theory of representation and the taxing power. As Madison

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"The constitution, as had already been observed, places the power in the House of originating money bills. The principal reason why the constitution had made this distinction was, because they were chosen by the People, and supposed to be best acquainted with their interests, and ability. In order to make them more particularly acquainted with these objects, the democratic branch of the Legislature consisted of a greater number, and were chosen for a shorter period, so that they might revert more frequently to the mass of the People."

[207] 2 STORY, *supra* note 6, § 873, at 341.

noted in the Convention while reflecting on the consequences of granting the smaller States equal representation in the Senate, "[t]he majority of the States might still injure the majority of the people. . . . They could extort measures repugnant to the wishes & interests of the Majority [and] . . . could *impose* measures adverse thereto."[208] For this along with the many other reasons already mentioned, the Senate was never intended to write taxes and was explicitly forbidden from doing so in the Constitution.

Our analysis has reviewed the historical meaning and intent of the clause, Supreme Court precedent, and bicameral and federal theory considerations for future Court adjudication of Origination Clause challenges. From all three perspectives, there is reason for the Court to strengthen their enforcement of the Origination Clause. Specifically, if the Court does not enforce a germaneness requirement to Senate tax additions through amendment, then the Origination Clause will become wholly superfluous. If there is no germaneness standard to Senate tax additions then there is no substantive distinction between general legislative powers and the power to tax. The founders and the ratifying public understood such a distinction and expected it through article 1, §7. If this "distinction between legislation and taxation" is no longer protected and viewed as "essentially necessary to liberty"[209] in the American tradition, then the nature of our Constitutional system of law has changed significantly since the voicing and codification of this establishing principle. The Senate was never entrusted with and was constitutionally forbidden from the original exercise of the taxing power.

Throughout the 20th century the Court developed a narrow standard for what bills are considered "revenue raising bills" within the context of Article 1, §7, and if classed as a revenue raising bill, a general standard that any Senate amendments must be germane to the subject matter of the House originated bill. While the somewhat passive evolution of this standard over the 20th century has survived as relatively uncontroversial given the small scale and the nature of the cases that gave rise to it, the Court will have to revisit the standard if broader challenges are presented in order to preserve any substantive meaning and effect of the clause in the Constitution, the Revolutionary principle, and our theory of mixed legislatures. The recent string of cases challenging the Senate origins of the vast majori-

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[208] MADISON, *supra* note 11, at 224.

[209] William Pitt, *On an address to the Thrown, in which the right of taxing America is discussed*, 17 Dec., 1765 reprinted in THE TREASURY OF BRITISH ELOQUENCE (compiled by Robert Cochrane, London and Edinburgh, 1877) at 140-141. *See also* United States v Munoz-Flores, 495 U.S. 385,395, 397 (1990):

Provisions for the separation of powers within the Legislative

Branch are thus not different in kind from provisions concerning relations between the branches; both sets of provisions safeguard liberty. . . . A law passed in violation of the Origination Clause would thus be no more immune from judicial scrutiny because it was passed by both Houses and signed by the President than would be a law passed in violation of the First Amendment.

ty of the Affordable Care Act's taxes, including *Sissel v. HHS*, may force the Court into the uncomfortable position of deciding between the survival of the signature healthcare reform law and the survival of some minimal degree of substance in and force behind the Constitution's Origination Clause.

Appendix

Statements from the Ratification Debates Evincing the Public Understanding of the Clause:

- "They [the Senate] may restrain the profusion of errors of the house of representatives, but they cannot take the necessary measures to raise a national revenue."[210]
- "Without their [House of Representatives] consent no monies can be obtained, no armies raised, no navies provided. They alone can originate bills for drawing forth the revenues of the Union, and they will have a negative upon every legislative act of the other house. So far, in short, as the sphere of federal jurisdiction extends, they will be controllable only by the people, and in contentions with the other branch, so far as they shall be right, they must ever finally prevail. Such, my countrymen, are some of the cautionary provisions of the frame of government your faithful Convention have submitted to your considerations."[211]
- ". . . and in the House of Representatives must all money bills originate."[212]
- "Let U.S. examine how far the peculiar constitution of our federal Senate will give U.S. the advantages of the second legislative branch without subjecting U.S. to the dangers usually apprehended from such bodies."[213]
- "Answer [to objections of tyranny in laying and collecting taxes]: Who are the members that constitute this [House of Reps.] body – the *people* or their representatives? Can they do any act that they themselves are not bound by; and if they lay *excessive taxes*, the people will

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[210] An American Citizen II: On the Federal Government *Philadelphia Independent Gazetteer*, 28 Sept. 1787 *reprinted in* DHRC, *supra* note 97, V.13 at 265: *Reprinted* 21 Oct. 1787 under title: "On the safety of the people, from the restraints imposed on the Senate." V.2. at 143.

[211] Trench Coxe, An American Citizen III, *Independent Gazetteer*, 29 Sept. 1787 *reprinted in* DHRC, *supra* note 97, V.2. at 145.

[212] One of the People, PENNSYLVANIA GAZETTE, 17 Oct. 1787 *reprinted in* DHRC, *supra* note 97, V.2 at 191.

[213] A Democratic Federalist, *Independent Gazetteer*, 26 Nov. 1787 *reprinted in* DHRC, *supra* note 97, V.2 at 294-95.

have it in their power to return other men (vide section 7th of 1st [Article] for the origination of *revenue bill*)."[214]

- "The two branches will serve as checks upon the other; they have the same legislative authorities, except in one instance. Money bills must originate in the House of Representatives."[215]
- "Some of the powers of the Senators are not with me the favorite parts of it, but as they stand connected with the other parts, there is security against the efforts of that body. It was with great difficulty that security was obtained, and I may risk the conjecture, that if it is not now accepted, it never will be obtained again from the same states. Though the Senate was not a favorite of mine, as to some of its powers, yet it was a favorite with the majority of the Union, and we must submit to the majority, or we must break up the Union. "[216] (Referencing the deal of the Great Compromise)
- "The Senate are incapable of receiving money, except what is paid to them out of the public treasury. They cannot vote to themselves a single penny, unless the proposition originates from the other house."[217]
- "Sir, there is another principle that I beg leave to mention. Representation and direct taxation, under this Constitution, are to be according to numbers."[218]
- "Wars are inevitable, but war cannot be declared without the consent of the immediate Representatives of the people; there must also originate the law which appropriates the money for the support of the army, yet they can make no appropriation for longer than two years."[219]
- "Passing over my lesser matters, I proceed to section 7, which is in these words 'All bills for raising revenue. . . but the SENATE may propose or concur with amendments as on other bills.' I would here only observe that the Commons of Great Britain will not suffer the House of Lords to make the least alteration in a money bill; however,

[214] The Pennsylvania Convention Debates, 28 Nov. 1787 *reprinted in* DHRC, *supra* note 97, V.2 at 411.
[215] The Pennsylvania Convention Debates, 1 Dec. 1787 *reprinted in* DHRC, *supra* note 97, V.2 at 451.
[216] Proceedings and Debates of the [Pennsylvania] Convention, 4 Dec. 1787 *reprinted in* DHRC, *supra* note 97, V. 2 at 480.
[217] *Id*. at 490.
[218] (James Wilson) Proceedings and Debates of the [Pennsylvania] Convention, 4 Dec. 1787 *reprinted in* DHRC, *supra* note 97, V.2 at 497.
[219] Proceedings and Debates of the [Pennsylvania] Convention, 10 Dec. 1787 *reprinted in* DHRC, *supra* note 97, V.2 at 528-39.

the Crown has found means to corrupt a sufficient number of the Commons to draw forth the blood and treasure of the nation."[220]

- [in response]"that this proves that the framers of the Constitution were no servile imitators of the British theory of government, nor under the special influence of Mr. [John] Adams's sentiments, for the 'British House of Commons will not suffer the House of Lords to make the least alteration in a money bill.' . . . The body of the people must be convinced that the purse of the nation will be as safe in the hands of their Representatives in Congress as of their representatives in the state assemblies."[221]

- "The admission however of the smaller States to an equal representation in the Senate, never would have been agreed to by the Committee or by myself as a member of it without the provision 'that all bills for raising or appropriating money & for fixing the salaries of the officers of Government' should originate in the house of Representatives & 'not be altered or amended' by the Senate '& that no money should be drawn from the treasury' 'but in pursuance of such appropriations'."[222]

- "It is objected, that it is dangerous to allow the senate a right of proposing alterations or amendments in money-bills – that the senate many by this power increase the supplies and establish profuse salaries – that for these reasons the lords in the British parliament have not this power, which is a great security to the liberties of Englishmen. I was much surprised at hearing this objection, and the grounds upon which it was supported. . . . But every supposed control the senate by this power may have over money-bills, they can have without it, for by private communications with the representatives, they may as well insist upon an increase of the supplies, or salaries, as by official communication."[223]

- "The 7th section of the first article in the proposed constitution says, 'All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.' This is putting a power into the hands of the Senate with more safety than can generally be done – it is giving them the power of doing good, almost without the possibility of doing harm; for it would be folly to suppose that the House of Representatives, or any other body of men, could form a bill so completely perfect in all its

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[220] Letter from Massachusetts and Letter from New York, *Connecticut Journal*, 17 Oct. 1787 *reprinted in* DHRC, *supra* note 97, V.3 at 377.
[221] Letter from New York, 24 Oct. 1787 *reprinted in* DHRC, *supra* note 97, V.3 at 385.
[222] Elbridge Gerry, Defense of Elbridge Gerry's Actions in the Massachusetts Convention on 19 Jan. 1788 *reprinted in* DHRC, *supra* note 97, V.6 at 1269-70.
[223] Massachusetts Convention Debate, 23 Jan. 1788 *reprinted in* DHRC, *supra* note 97, V.6 at 1327.

parts as to admit of no amendment. A revenue bill will now have a double chance of attaining to perfection. The House of Representatives will discuss, form and send it up – the Senate will have it in their power to deliberate, debate upon it, and propose amendments, if necessary; but they can go no further."[224]

- "The senate has the power of originating all bills, except *revenue bills*, in common with the house of representatives. . . From this exclusion of the *senate* with respect to *money bills*, it is plain, that this body does not possess such extensive legislative power, as the house of representatives."[225]
- "3d. 'The senate have the power of altering money bills;' and why not? Because the Lords in England, an hereditary aristocracy, have not, of late years, been permitted by the commons to exercise this power, shall the senate, a rotatory body, chosen by the representatives of the people, be deprived of this essential right of legislation? The people cannot be taxed, but, by the consent of their immediate representatives."[226]
- "In this the Constitution is an improvement upon that of England: There all money bills must not only originate but must be perfected in the House of Commons: Here though the Senate cannot originate such bills, yet they have the power of amending them, and by that means have an opportunity of communicating their ideas to the House of Representatives upon the important subject of taxation."[227]
- "So able an advocate as you for the new constitution may also assign a good reason why Delaware, that pays but a sixty seventh part of the general expenses, should vote on a money bill in the senate equally with Virginia that pays a sixth part of the same expenses? Perhaps you may satisfy U.S. that another convention cannot be obtained to remedy the defects that are so apparent in the proposed system."[228]
- "Two years are the utmost time for which the money can be given. It will be under all the restrictions which wisdom and jealousy can sug-

[224] Brutus *Virginia Journal*, 6 Dec. 1787 *reprinted in* DHRC, *supra* note 97, V.8 at 214-15.
[225] Valerius [to Richard Henry Lee], *Virginia Independent Chronicle*, 23 Jan. 1788 *reprinted in* DHRC, *supra* note 97, V.8. at 316.
[226] Civic Rusticus, *Virginia Independent Chronicle*, 30 Jan. 1788 *reprinted in* DHRC, *supra* note 97 V.8 at 335.
[227] A Native of Virginia: Observations upon the Proposed Plan of Federal Government, Apr. 2 1788 *reprinted in* DHRC, *supra* note 97, V.9 at 668.
[228] Brutus, *Virginia Independent Chronicle*, 14 May 1788 *reprinted in* DHRC, *supra* note 97, V.9 at 802.

gest, and the original grant of the supplies must be made by the House of Representatives, the immediate representatives of the people."[229]

[229] An American Citizen IV: On the Federal Government Philadelphia, 21 Oct. 1787 *reprinted in* DHRC, *supra* note 97, V.13 at 435.