# Testimony Regarding

# "The Original Meaning of the Constitution's Origination Clause"

## Before the U.S. House of Representatives
## Committee on the Judiciary
## Subcommittee on the Constitution and Civil Justice


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## The Meaning and Requirements of the Constitution's Origination Clause[1]

Good morning Mr. Chairman and other distinguished Members of the Subcommittee. Thank you for inviting me to testify again on a structural limitation on Congress's taxing power that was absolutely essential to the signing and ratification of the U.S. Constitution. The Origination Clause today is treated by some as an annoyance to be dispensed with by empty artifices. Yet the broader public should be thankful that many Members of Congress, especially in this Subcommittee, take the Clause seriously and seek to better understand its requirements.

It is terribly important for the House of Representatives to interpret and follow the Origination Clause according to its original public meaning, but as is explained further below, that does not lessen the importance of the courts enforcing its original public meaning as well. Part of the genius of the constitutional separation of powers is that individual liberty is better protected when each branch of government has an obligation to interpret and follow a written constitution, and that is the requirement of our U.S. Constitution.

There is also a dialogue between the branches on the proper interpretation of the Constitution. When one branch neglects its duty to enforce individual rights secured in the Constitution, including the right to be free from taxes that violate the Origination Clause, it is even more important for the other two branches to do what they can to better protect the neglected right. On this day, the legislative and judicial branches are actively debating the proper interpretation and application of the Origination Clause, so this hearing may not only inform Congress regarding its obligations, but it may also help inform the courts as well.

### Defending the Constitution Requires Opposition to ObamaCare's Taxes

The Pacific Legal Foundation (PLF) represents Matt Sissel in his constitutional challenge to the individual mandate tax in the ObamaCare law. After five and a half years of litigation,[2] including dueling opinions from judges in the D.C. Circuit Court of Appeals that have very different theories of the Origination Clause, the justices of the Supreme Court are set to consider whether to hear Sissel's constitutional challenge in their private conference this Friday.[3]

As this Subcommittee knows, the case turns on the meaning of the Constitution's requirement that all "Bills for raising Revenue" originate in this House.[4] Although today's hearing focuses on the Origination Clause more broadly, the strained arguments in *Sissel* are a paradigm example of what the Clause rejects. The *Sissel* case is also a great teaching mechanism for other reasons, including the case's stark facts, its unusual legal posture, the unprecedented legislation that required unconstitutional tactics to pass, and the able counsel and amici involved—including many members of this Subcommittee and House.

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[1] I wish to thank Shauneen Werlinger and Paula Puccio for their careful review and editorial assistance. PLF's litigation counsel for Matt Sissel (*see* note 2), Timothy Sandefur and Anastasia Boden, provided an enormous amount more through their years of research, court filings, and the production of the appellate briefs.
[2] *Sissel v. U.S. Dept. Health & Human Services, et al*., No. 15-543 (S. Ct.) (*Sissel*).
[3] The Supreme Court's docket entries for *Sissel* are available at http://goo.gl/6Y7sl6.
[4] U.S. Const. art. I § 7, cl. 1 (the Origination Clause).

*Sissel* also has the potential to establish a landmark ruling, further defining several issues related to that Clause. If Sissel's petition for certiorari is denied, however, other cases are pending that raise the same Origination Clause problem with ObamaCare and still others are sure to be filed. Given the admitted breadth and significance of the law by all parties, and that numerous judges have already debated key Origination Clause issues, the *Sissel* case presents an excellent opportunity for the Supreme Court to resolve those issues now rather than waiting and potentially causing further problems with implementing its ultimate ruling.

The Supreme Court's consideration of the *Sissel* case makes this hearing quite timely, but the House of Representatives must enforce its prerogatives and obligations under the Clause, regardless of how the courts rule. Strangely, a few cynics have questioned the sincerity of those who oppose ObamaCare for policy reasons and also express concern about the Origination Clause problem. Yet there is no inconsistency in opposing ObamaCare's wrongheaded policies and also decrying a constitutional defect in its method of enactment.

Indeed, the policy and constitutional defects with ObamaCare are related. The extremely narrow and unprecedentedly partisan vote margin for a major piece of social legislation led to a highly questionable legislative process which undermined the normal compromises that would have improved the bill. It also caused the Senate to adopt a parliamentary maneuver that violated the Origination Clause. It would be hypocritical to raise only one concern, even if they were unrelated. And finally, Members' highest obligation is not to voice policy objections but to support and defend the Constitution, as required by their oaths of office.

It simply isn't true that Origination Clause problems as dramatic and clear as those with the ObamaCare taxes are common and are routinely ignored. Members of Congress can speak for themselves, but my personal experience is that Members in both Houses who have expressed concerns about the Origination Clause's violation in ObamaCare would be equally, if not more, concerned about its violation in the context of bills they support. It is nothing short of ill-tempered calumny to assert that they are only concerned about the Origination Clause because they also oppose ObamaCare.

As for Matthew Sissel,[5] the federal courts may not issue advisory opinions, especially to those without a concrete injury that can be remedied by such opinions. Moreover, only those with "particularized" injuries have standing in federal court to challenge a law's defects. Accordingly, Sissel's personal injury is required for him to raise his constitutional challenge. Even though he has a personal stake in the outcome, the public still owes him a debt of gratitude. Matt has remained steadfast in standing up for his constitutional rights the past five years, in part because he knows that his victory would benefit all Americans.

[5] Sissel is an artist, entrepreneur, decorated veteran, and member of the Washington State National Guard. He's the owner of Matthew Sissel Fine Art, and he received the Bronze Star for his service as a combat medic in Iraq. Sissel is healthy and chose not to buy health insurance so he can use the savings from not paying costly premiums to invest in his business. He wants the freedom to manage his budget, including his medical expenses, without government interference. He will pay for his own emergency care, but he wishes health insurance companies could offer people like him "catastrophic only" health care coverage. ObamaCare prohibits those types of policies in order to force young, healthy people to buy unnecessarily inflated policies that subsidize costly government mandates.

**ObamaCare Legislative History and Origination Clause Problem**

The text of the Origination Clause provides:

> 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.[6]

ObamaCare, formally misnamed the "Patient Protection and Affordable Care Act" (PPACA), raises numerous problems under the Origination Clause. Another name for PPACA prior to signing was the "Senate Health Care Bill" because that is how Senate Majority Leader Harry Reid proudly, and at least accurately, labeled it.[7] The legislative history of the Senate healthcare legislation is as follows:

1. The House unanimously passed H.R. 3590, the Service Members Home Ownership Tax Act of 2009 (SMHOTA) and sent it to the Senate. It was six pages long. It included the word "tax" in the title because it *cut* taxes for certain veterans who frequently have to move, making it difficult for them to take full advantage of existing tax credits. It would have raised no tax whatsoever. It had nothing remotely to do with health care.

2. The Senate gutted the entirety of H.R. 3590, except for the designation "H.R. 3590," and poured a completely new, 2076-page bill into the empty shell with over 17 major tax increases, amounting to hundreds of billions of dollars in new taxes. One of those revenue increases was the Shared Responsibility Payment for not purchasing inflated health insurance, §5000A, that the Supreme Court majority declared to be a tax in 2012.

3. The Senate passed and returned this Senate Health Care Bill to the House, which rushed it through an abbreviated process to secure a vote. This was the bill that then House Speaker Nancy Pelosi famously quipped Congress would have to pass first to find out what was in it.[8] It was narrowly approved without a single Republican vote and with many House members objecting to the process of consideration.

4. President Barack Obama signed the legislation on March 23, 2010, which received the understandable but erroneous designation as a public *law*, "Pub. L. 111-148."

**Proceedings in *Sissel v. HHS*[9]**

Matt Sissel filed suit on July 28, 2010, arguing that ObamaCare's individual mandate exceeded Congress's authority under the Commerce Clause. His case was stayed pending resolution of *NFIB v. Sebelius* (*see* note 19), after which Sissel filed an amended complaint, alleging that the tax on going without health insurance violated the Origination Clause. The

[6] U.S. Const. art. I § 7, cl. 1.
[7] Brief of Rep. Franks, *et al*. as Amici Curiae at 12 n.3 & 15, *Sissel*, No. 15-543 (S. Ct. Nov. 25, 2015).
[8] *See*, e.g., Marguerite Bowling, *Video of the Week: "We have to pass the bill so you can find out what is in it,"* THE FOUNDRY (Mar. 10, 2010), http://goo.gl/2RRlz. In contrast, no one objected to the six-page SMHOTA tax cut bill.
[9] The procedural summary is taken largely from Sissel's Petition for Writ of Certiorari at 5-7 (S. Ct.), *available at* http://goo.gl/oSTfzQ. All of the case pleadings, opinions, and amicus briefs can be found at http://goo.gl/wcO0ss.

district court ruled on June 28, 2013 that although "those revenues are 'paid into the Treasury by taxpayers'" and "do not support a 'particular governmental program,'" ObamaCare was not a bill for raising revenue because it was "designed to expand health insurance coverage," and therefore, it was exempt from the Origination Clause. It further held that if ObamaCare were a bill for raising revenue, it satisfied the Origination Clause because the Senate's complete gut of H.R. 3590 and substitution of unrelated text was a valid "amend[ment]" of that bill.

A panel of the D.C. Circuit Court of Appeals affirmed on July 29, 2014 (after finding that Sissel had standing to challenge the individual mandate tax). It reasoned that "a measure is a 'Bill[] for raising Revenue' only if its primary purpose is to raise general revenues," and that the purpose of ObamaCare was to overhaul the nation's health insurance industry, not to raise money. Notwithstanding the fact that ObamaCare includes 20 major taxes, together estimated to generate at least $500 billion annually for the general federal treasury, it held that the Origination Clause did not apply. It did not initially address the district court's alternative ground.

Sissel moved for rehearing before the entire D.C. Circuit. On August 7, 2015, the court denied the *en banc* rehearing request over the strong dissent of four judges and with an expanded response from the original panel members.[10] In a 32-page dissent, Judge Brett Kavanaugh and his colleagues argued that there was "[n]o case or precedent" suggesting "that a law that raises revenues for general governmental use is exempt from the Origination Clause merely because the law has other, weightier non-revenue purposes." In their judgment, ObamaCare "easily qualifies as a 'bill for raising Revenue'" and the panel's analysis is dangerous and "would degrade the House of Representative's prerogative to originate revenue-raising bills." The dissenters argued that it was necessary to correct the panel's serious assault on the Constitution's taxpayer protections, even though they would have upheld the law on the theory that the Senate's complete gut-and-substitute maneuver constituted a valid amendment of a House revenue bill.

The original panel responded to the dissent with an expanded 29-page opinion of its own. It defended its newly-minted "primary purpose" exception to the Origination Clause and rejected the alternative holding of the district court and the dissenters who would uphold the law as a proper Senate "amendment." It correctly warned that such a holding would "treat[] the Origination Clause as empty formalism." Moreover, the panel members believed that the Supreme Court rejected such an approach in the controlling Origination Clause precedent, *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

On October 26, 2015, Sissel filed his petition for certiorari asking the Supreme Court to hear the case and reverse the D.C. Circuit. Sissel argues that the D.C. Circuit dissent and original panel members are both correct in pointing out the flaws of the opposing opinions. The government's responsive brief and Sissel's reply were filed at the end of December, and the justices are scheduled to consider the case in their private conference this Friday.

[10] *Sissel*, Concurring and Dissenting Statements on the Denial of Appellant's Petition for Rehearing En Banc (D.C. Cir. 2015), *available at* http://www.pacificlegal.org/document.doc?id=2012.

**The Original Meaning of the Origination Clause**

In my appearance before this Subcommittee on April 29, 2014, several sections in my written testimony discussed how the Framers built on fundamental principles of Anglo-American law and Enlightenment ideals to devise structural protections to better protect individual liberty. My prior testimony explained the original meaning of the Origination Clause based on an examination of British history relating to tax origination, colonial and early state practice, the Framers' separation of powers design, the Constitution's framing and ratification debates in which the Origination Clause played a critical role, and the text and context of the Clause itself.

That discussion is available for those who are interested,[11] but the key conclusions are summarized below, with a new point at the end that has been raised in recent weeks. Subsequent sections of today's testimony elaborate on key interpretive issues with additional textual observations and constitutional arguments, including many from the briefs in the *Sissel* case.

1. The fundamental principle of Anglo-American ordered liberty that the taxing power must originate in the people's house in the legislature is deeply rooted in British history and colonial American practice.

2. The purpose of the separation of powers, both in Enlightenment thought and in the drafting of the U.S. Constitution, was not to protect government officials' power for *their* sake, but to better protect individual liberty. Thus, structural limits on government officials' exercise of power that protect individual liberty, including the requirement that taxes must originate in the most accountable branch of Congress, cannot be waived by Congress—even if both Houses collude to do so.

3. The Framers were especially concerned with tyranny by democracy's "most dangerous branch," the legislature. This fear was heightened with regard to Congress's tax powers in the new national government, because unlike the Articles of Confederation Congress, the proposed Congress would have an effective and compulsory power to tax. That awesome power, though arguably necessary to correct a major weakness of the Articles government, would never have been agreed to without further checks and controls.

4. With regard to such taxing powers, the Framers were not content with requiring bicameral agreement between Houses with different constituencies within a given Congressional cycle. The original Constitution imposes other limitations and prohibitions on this most destructive of domestic powers.[12] The adoption of the Sixteenth Amendment did not change these rules for the type of taxes previously regulated. Moreover, such rules provide further evidence of the framing generation's distrust for granting too free a hand to those who wielded the power to tax.

[11] Testimony of Todd F. Gaziano to the House Judiciary Committee, Subcommittee on the Constitution and Civil Justice, regarding "The Original Meaning of the Constitution's Origination Clause" (April 29, 2014), *available at* http://www.pacificlegal.org/cases/Sissel-3-1374.

[12] U.S. Const. art. I § 9, cl. 4 (requiring taxes to be uniformly apportioned according to population); U.S. Const. art. I § 9, cl. 5 (prohibiting taxes on goods leaving a state).

5. Though U.S. Senators are directly elected now, the frequency of House elections and the smaller electoral districts was the very ground for expecting that U.S. Representatives would be more responsive to the liberties of the people. (Neither has the federal government argued nor has any court held that the Seventeenth Amendment alters the Origination Clause requirements, and for very good reasons.)

6. The term "Bills for raising Revenue" in the Origination Clause was understood broadly to include all "money bills" or other legislation to raise money for the general treasury, regardless of whether they have other purposes. That phrase should be read coextensively with the government's power to tax, except perhaps to exclude legislation that lowers taxes and two other narrow categories under existing court precedents.

7. Bills that create penalties or fines for the violation of a duty that Congress has a separate constitutional authority to impose are not "Bills for raising Revenue." This is the right result under the original understanding of the Origination Clause, but it is not an exception to it. Those penalties simply are not taxes, so it is not an exception to the rule that tax bills must originate in the House.

8. Under existing court precedents, bills that impose a special assessment, user fee, or similar monetary exaction for a particular program or dedicated fund and are not deposited in the general treasury, are not "Bills for raising Revenue" within the meaning of the Origination Clause. There is a better constitutional rationale for cases under this exception—and it's not related to the creation of special funding streams generally. A better justification for upholding those assessments is that they are necessary and proper to the execution of another enumerated power, or more than one enumerated power.[13]

9. The above exclusions and exceptions from the Clause's coverage do not affect Sissel's challenge to the individual mandate tax since it can satisfy neither one under any court precedent or other plausible rationale. First, the individual mandate tax goes into the general treasury and does not fund a special program. Second, the Supreme Court in *NFIB* clearly established that the individual mandate "tax" is not a constitutional penalty and is not authorized by any power of Congress apart from its power to tax.

10. "Bills for raising Revenue" include *all* bills under the taxing power that raise revenue, regardless of whether that is their "primary purpose" or whether the bills are also regulatory—since almost all tax laws have regulatory purposes. A "primary purpose" element was rejected at the Constitutional Convention. The original text of the

[13] This rationale would better explain the cases cited by the parties that seemingly fit this exception. In all such cases, there was a program authorized by an enumerated power other than the tax power. Thus, those cases that satisfy the "special program fund" exception also would be justified because the fund was necessary and proper to the execution of the constitutional program at issue. In *Twin City National Bank v. Nebecker*, 167 U.S. 196, 202 (1897), Congress's levy on bank notes funded the coinage of money and might also be justified under the Commerce Clause. In *Millard v. Roberts*, 202 U.S. 429, 437 (1906), Congress was taxing property in D.C. to finance a railroad pursuant to its exclusive jurisdiction over legislation in the District. In *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990), Congress imposed fees on defendants convicted of certain federal misdemeanors for a crime victim fund pursuant to its power to establish penalties for federal offenses. In contrast, the Supreme Court held that the individual mandate tax is not necessary and proper to any other power of Congress other than its power to tax.

Origination Clause provided an arguable purpose element: "Bills for raising money *for the purpose of revenue* or for appropriating the same shall originate in the House of Representatives." (Emphasis added.) The final version deletes the phrase "for the purpose of revenue," making it clear that any bill that raises revenue is covered. The final language is closest to that of the Massachusetts Constitution of 1780, with the use of "all money-bills" instead of "Bills for raising Revenue" in the U.S. Constitution.

11. A "primary purpose" test was also rejected by most states that ratified the Constitution in their state constitutions. Ratifiers understood that a "primary purpose" element would have rendered the Origination Clause inapplicable whenever Congress wanted to evade it simply by declaring another purpose more dear than raising taxes. Rather than a slight "parchment barrier," that would have created the effervescence of a "verbal barrier." The ratification debates establish that the founding generation did not think they had erected an optional limitation so easily defeated with the right incantation.

12. Joseph Story's commentary on the Origination Clause also rejects the "primary purpose" test adopted by the lower court and urged by the administration to gut the Origination Clause. Justice Story distinguished between bills that levy a tax "in the strict sense of the word," which are those invoking the taxing power, and "bills for other purposes, which may incidentally create revenue," which are bills that may fix a penalty or fee pursuant to some other congressional power. To quote Sissel's reply brief in the Supreme Court, the individual mandate tax in ObamaCare "does not 'incidentally' raise revenue: it *only* raises revenue, because it *only* levies a tax 'in the strict sense'" that Story had in mind.[14]

13. Moreover, nowhere in the debates at the Convention is there evidence that the Senate amendment power was understood to include the power to introduce complete substitutes that had no relation to the House revenue bill. Indeed, the notes from the Convention indicate that the delegates thought the Senate's power would be rather modest. Madison's notes quote Elbridge Gerry as arguing that the "plan [the draft Constitution] will inevitably fail, if the Senate be not restrained from originating Money bills."[15]

14. As telling as the Convention's drafting history and debates are in rejecting both a primary purpose element and an open-ended construction of what "Amendments" the Senate could add to a House revenue bill, the state ratification debates are consistent, and they are even more important in establishing the original public meaning of the Clause. The understanding of the people is reflected in the explanations by delegates to state conventions regarding the degree of security the Origination Clause would provide taxpayers, and those statements were not challenged by others opposed to ratification. George Mason, the leading opponent of ratification in Virginia, conceded that the Origination Clause only allowed the Senate to make minor changes to correct errors that would prevent passage,[16] and as such, he never raised the Senate's role in amending tax

[14] *Sissel*, Reply Brief in Support of Petition for Writ of Certiorari at 8 (S. Ct.), *available at* http://goo.gl/QbH1E0.
[15] Brief of Senators Cornyn, Cruz, and Lee as Amici Curiae at 6, *Sissel*, No. 15-543 (S. Ct. Nov. 25, 2015) (quoting Madison, Notes on the Debates in the Federal Convention of 1787, at 445 (New York, Norton & Co., Inc., 1969)).
[16] Brief of Center for Constitutional Jurisprudence as Amicus Curiae at 20, *Sissel v. HHS*, 760 F.3d 1 (D.C. Cir. 2014) (No. 13-5202) (citing Farland, 2 Records of Federal Convention 273 (Aug. 13, 1787)).

bills as a reason for concern with the Constitution. Tellingly, the government has cited no instance where anyone read the Senate's amendment power broadly.

15. A revenue bill does not "originate" in the House if the only thing that originated in that body is a House bill number, followed by text that is unrelated to the bill that was enrolled by the House and transmitted to the Senate. (*See* elaboration, *infra*.)

16. A permissible amendment by the Senate to a House bill that raises revenue within the meaning of the Origination Clause must at least be germane to the original House bill under controlling judicial precedent and to give any meaning to the word "amendment." Perhaps more should be required than mere germaneness to restore the original understanding of the Clause, including that such amendment be limited to a correction or change that does not alter the basic House measure in significant ways.

17. Justice Joseph Story's Commentaries are even more conclusive on the scope of the Senate's amendment power. Story wrote that such amendments would allow "slight[] modifications" as might be "required … to make [the House bill] either palatable or just."[17] He also suggested that "an amendment of a single line might make it entirely acceptable to both Houses." *Id*. Thus, the founding era's most famous expositor of the Constitution explained that the Senate's scope of permissible amendments to a House revenue bill was limited to "slight modifications" that might amount to "a single line of text," not the gut-and-complete-substitute of 2076 pages of text.

18. Whether a Senate amendment is germane to a House bill that raises revenue is justiciable in the courts. Not only did the Supreme Court and other courts implicitly and explicitly so hold, but the absence of a germaneness or similar requirement would render the Origination Clause meaningless. The High Court also has emphasized that the detailed procedures to enact a law set forth in the Constitution must be scrupulously followed. *See, e.g*., *INS v. Chadha*, 462 U.S. 919 (1983) (striking down over 160 one-house or committee veto laws). Finally, the Supreme Court has explained that the line-drawing issues involved in Origination Clause cases are not unique, and more importantly, must be policed to enforce the individual right at issue.

19. Whether an amendment is germane to another bill may sometimes involve close questions. There are various ways for the House and the courts to deal with such situations, ranging from applying a presumption for liberty to one that defers to Congress (those options are discussed later), but the Senate Health Care Bill gut-and-complete-substitute approach does not present a remotely close question. It is an extreme example of a non-germane "substitute" instead of a constitutional amendment.

20. A technical correction bill which changes the way an unconstitutional tax is calculated for some individuals does not cure the previous Origination Clause violation, even if the technical correction bill originates in the House.

[17] 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at 874 (Melville M. Bigelow ed., 5th ed. 1994), *quoted in* Amicus Brief of Center for Constitutional Jurisprudence at 20.

The following sections elaborate on the most important of these conclusions, including: that a "primary purpose" exception to the rule that taxes must originate in the People's House has no support in the Constitution's text, history, judicial precedent, or logic; that H.R. 3590 was not a bill "for raising Revenue" that the Senate could amend with other taxes; that even if H.R. 3590 were a bill for raising revenue, the Senate's complete gut-and-substitute maneuver was not germane to the House bill, and thus, not a constitutional "Amendment."

**A "Primary Purpose" Exception to Tax Origination in the House Is A-textual, A-historical, Judicially Unprecedented, and Would Effectively Gut the Origination Clause**

It takes an extraordinary misreading of the Constitution's text, drafting history, Justice Story's Commentaries, and judicial opinions to create the sweeping "primary purpose" exception to the Origination Clause. Judge Kavanaugh's lengthy dissent for himself and three other judges of the D.C. Circuit provides an excellent discussion of many such issues, but additional reasons are contained in Sissel's petition for certiorari and reply brief in the Supreme Court. The following excerpt is from Sissel's reply brief, pages 1-5, with most citations omitted.[18]

> The [D.C. Circuit panel] reason[ed] that because the PPACA as a whole had the "primary purpose" of overhauling the nation's health insurance industry, it was not a bill for raising revenue, and was exempt from the Origination Clause, regardless of how many taxes it might include, or how revenues from them are spent.
>
> As the Dissent below warned, this new test creates "a broad new exemption" under which even "commonplace bills" that have always been seen as bills for raising revenue are immune from the Origination Clause. This means the Senate could originate taxes by simply characterizing them as having "weightier non-revenue purposes." For example, the Senate could originate a gasoline tax by embedding it in a bill that serves broader environmental goals.
>
> The Opposition does not try to allay these concerns. Instead, it suggests that [courts] need not enforce the Clause because the House can refuse to adopt bills it considers unconstitutional. Yet *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990), rejected that argument, holding that the House's power to reject unconstitutional bills "[does] not justify the Government's conclusion that the Judiciary has no role to play in Origination Clause challenges."
>
> The Government also ignores the test described in *Munoz-Flores*, 495 U.S. at 399-400, which exempts legislation from the Clause only if it raises money for a specific program, and connects the program's payers and beneficiaries. Instead, it relies on statements in Senate rule books, that are not reliable guides for interpreting a constitutional provision that secures the House's prerogatives—and on an out-of-context reading of an extrajudicial statement by Justice Joseph Story: that the Clause applies only to "bills [that] levy taxes in the strict sense of the words, and . . . not . . . bills for other purposes, which may incidentally create revenue." Correctly understood, that statement supports Sissel's position, not the Government's….

[18] *Sissel*, Reply Brief in Support of Petition for Writ of Certiorari, *available at* http://goo.gl/QbH1E0.

> This case involves "a serious constitutional question about . . . one of the most consequential laws ever enacted." * * * [The] tax on people who do not purchase health insurance … is collected by the I.R.S. through the ordinary process of taxation, and the revenues are deposited into the general treasury for Congress to spend however it chooses. PPACA does not create a "particular governmental program" or "raise[] revenue to support that program," *Munoz-Flores*, 495 U.S. at 398, and there is no "connection between [the] payor and [any] program." *Id*. at 400 n.7. PPACA therefore does not qualify for the exception detailed in *Munoz-Flores*, *Nebeker*, and other cases.
>
> Nor did the court below hold otherwise. Instead, it established a new exception to the Clause—one wide enough to swallow the clause whole. Under that rule, any statute—no matter how lengthy, no matter how many subjects it relates to or taxes it includes—is exempt if its "primary purpose," is something broader than the raising of revenue.
>
> This test allows the Senate to easily evade the origination requirement through a simple labeling game. It also undermines the democratic values the Clause was meant to serve, by "upset[ting] the longstanding balance of power between the House and the Senate," encouraging lawmakers to describe proposed legislation in non-specific terms, and to embed controversial taxes in large, unreadable omnibus bills. The Origination Clause was adopted to ensure that the taxing power remained as close as possible to voters. The "primary purpose of the whole" test allows that power to be wielded by the branch of government least responsive to voters—the Senate, which is never wholly replaced, and whose members serve longer terms than the President—and in a manner that will reduce democratic accountability still further.
>
> That test also deputizes judges to determine the amorphous "primary purpose" of a challenged statute, a nearly impossible task when the statute involved is "a huge act with many provisions that are completely unrelated." That test therefore maximizes judicial discretion to determine Congressional purposes—a far more subjective approach than the objective test established in *Munoz-Flores*.
>
> The court below ignored the objective fact that Section 5000A levies a tax in the strict sense of the words [as Justice Story meant it], and established a test that invites judges to decide what Congress generally meant to do when it passed a bill over 2,000 pages long, containing provisions regarding all manner of different subjects…. The "primary purpose" test gives the Senate a simple means to evade the Clause, and invites judges to ignore what Congress did, to pursue what they think Congress meant to do.

Sissel's reply brief at pages 6-9 also contains a careful, contextual, and dispositive reading of Joseph Story's comments on the Origination Clause that the government shamelessly distorts. Properly understood, Story's views strongly support the original public meaning of the Origination Clause in this testimony and render ObamaCare unconstitutional.

**The Service Members Home Ownership Tax Act Was Not a "Bill[] for raising Revenue" Within the Meaning of the Origination Clause**

Since a 2076-page bill with over a dozen large taxes (at least one of which is only constitutional as an exercise of Congress's tax power) is not immune from Origination Clause requirements, such a bill must satisfy two conditions. There first must be a bill that originates in the House that would "raise[] Revenue" within the meaning of the Clause. The SMHOTA bill does not qualify. Provisions that help establish "budget neutrality" under congressional budget rules are not the same as actual taxes or revenue within the meaning of the Constitution.

The first four sections of SMHOTA include the title and tax *reduction* provisions. The two sections of SMHOTA that help offset the tax reductions, and the only ones that could arguably be tax increases, are the last two provisions of the six-page bill amounting to about 10 lines of text. Section 5 increased filing penalties from $89 to $110 for corporations that failed to file certain tax returns. But that is plainly a penalty or fine, which is not a tax under the Supreme Court's construction of the Origination Clause.[19] Penalties for not filing tax returns are identical to penalties or fines for violating some other law Congress has the power to enact. In contrast, the individual mandate payment is the underlying tax—and the Supreme Court held it is not a constitutional penalty for anything else.

SMHOTA section six would have accelerated the amount of "estimated tax" that certain corporations have to pay. It may have a positive budgetary impact in a particular accounting period under congressional budget laws, but it is not an increase in the tax rate or total revenue. A helpful analogy in Chairman Franks's amicus brief in the D.C. Circuit is a bill changing the tax filing date from April 15 to April 1 for income tax earned in the previous calendar year.[20] That may have a positive budgetary impact for a particular accounting cycle and a negative one in another cycle, but it would not be a tax increase for any year.

Thus, there is no reasonable ground to argue that SMHOTA was a bill to raise revenue. The government relies heavily on the fact that SMHOTA did have tax provisions, which is insufficient, and they conflate positive budget impacts with taxes. That may confuse those who don't focus on the details or are reluctant to overturn a central provision of ObamaCare. Judge Kavanaugh's almost cryptic acceptance that SMHOTA was a bill for raising revenue within the meaning of the Origination Clause is not convincing because it does not address or resolve most of the key issues. The Supreme Court should hear the case in part to decide whether bills that cut taxes and only raise non-tax penalties and fees are bills that raise revenue under the Clause.

If such bills do qualify, then most bills in the House Budget Committee and the Ways and Means Committee would be identical for Origination Clause purposes, since both affect receipts, even if only one drafts tax bills. The elaborate jurisdictional distinctions that have developed between those committees over the decades would be without a constitutional significance. This House knows otherwise. Tax bills have a direct impact on citizens, and those that *increase* taxes raise special concerns. It is only those that raise taxes and originate in the House that the Senate can conceivably amend without running afoul of the Origination Clause. Because SMHOTA was

[19] Petition for Writ of Certiorari at 3, *Sissel* (S. Ct.); *NFIB v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) (*NFIB*).
[20] *See* Brief of Rep. Franks, *et al*. as Amici Curiae at 24, *Sissel v. HHS*, 760 F.3d 1 (D.C. Cir. 2014) (No. 13-5202).

not a bill for raising revenue, the Senate could not constitutionally "amend" it, even with a germane amendment, to institute a single new tax.

**Even if SMHOTA Were a Revenue Bill, the Senate Health Care Bill Is Not Remotely Germane to It, and Thus, Is Not a Constitutional Amendment to a House Passed Bill**

In *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1997), the Supreme Court recognized that a Senate "Amendment" must be germane to the revenue bill that originated in the House for it to be constitutional. That was a correct and necessary construction of the Origination Clause, without which the Clause would effectively be meaningless. The contrary construction of the Origination Clause (without a germaneness requirement) is analogous to expansive readings of the Commerce Clause that the Supreme Court rejected in *United States v. Morrison*, 529 U.S. 598 (2000) and *NFIB*. The Court in *Morrison* and *NFIB* properly dismissed an interpretation of the Commerce Clause that would render the enterprise of enumerated powers meaningless.[21]

If the Senate simply had to wait for any House bill, or even any House bill that actually raised revenue, and then could constitutionally substitute any tax bill of its imagination, then the Origination Clause would only be a waiting game. Even in the late Eighteenth Century, that wait would not have been very long. But in modern times, that interpretation of the Origination Clause would render it a dead letter. Constructions of constitutional clauses that render them empty, especially clauses that were actively discussed during the ratification debates, are an insult to the framing generation and any rational judicial system.

The district court opinion in *Sissel* and some government briefs advance an alternative argument that would render "germaneness" an empty concept. According to that approach, all that might be required is that both bills be about taxes, or perhaps both have the word "tax" in them. This, too, would render the Clause a mere waiting game, and it is equally an insult to any legal system bound by a written Constitution.

**The Meaning of the Word "Amendment" Is Not Infinitely Malleable**

Whether germaneness or a more stringent inquiry is proper, both the courts and Congress must give some meaningful construction to the Origination Clause's limitation that the Senate may only propose "Amendments" to House revenue bills. Focusing on the common understanding of that word, the Senate Health Care Bill is simply not an "amendment" to a short military housing bill. The complete gut-and-substitute procedure employed by the Senate might be constitutional with regard to other bills (depending on the content of the original bill and the content of the complete substitute) but not as employed to pass ObamaCare.

At bottom, the only part of the Senate Health Care Bill and its 20 or so historically-large tax increases that originated in the House is the House bill number. One important historical fact helps explain why that is not enough. The use of such House designations and bill numbers did

[21] *See United States v. Morrison*, 529 U.S. 598, 610 (2000); *NFIB*, 132 S. Ct. at 2573.

not exist at the time of the Framing or for 30 years thereafter.[22] Accordingly, something is seriously wrong with the position that a legitimate "amendment" within the constitutional sense can retain nothing of the original bill but that numerical designation which did not exist and had no conceivable significance to those who ratified the 1787 Constitution.

The original panel members of the D.C. Circuit agreed that the term "amendment" was not infinitely malleable and that the Supreme Court had instructed courts to reasonably construe and police the requirements in the Origination Clause. As any faithful textualist understands, words must be given the ordinary meaning of those who enacted the text at issue. Accordingly, an "Amendment" may improve or augment the original, but it must retain some substantial portion of the original.

Ordinary English speakers would not think that the complete destruction of a house and the erection of a massive skyscraper at the same address was an "amendment" to the house. They would not think that a novel with the same catalog number as an earlier book on a different subject was an "amendment" to the earlier book, even if produced by the same publisher. Completely unrelated substitutes are not "amendments" in any reasonable meaning of that term.

Using these hypotheticals, consider also how English speakers from the late Eighteenth Century to the present would use the terms "originate" as applied to the following facts:

- If someone asked who "originated" the construction of the skyscraper on 222 Main Street, no one would plausibly respond that it was the homeowner who transferred his property to the skyscraper developer. Even if he knew it was possible his home would be destroyed, no one would say he "originated" it.

- If someone asked who "originated" the plot in the novel with the card catalogue number E-3303, no one would plausibly respond that it was the author of the children's math workbook that previously was designated catalogue number E-3303, even if the same institution produced both books, and the novel was only made possible because of the termination of the math workbook.

The ultimate Origination Clause inquiry (assuming there is a House revenue bill) is a content-based one. What is fairly asked in the Origination Clause context and the above inquiry about the origination of a literary idea is who originated the basic elements of the text (or tax scheme) at issue, not its numeric designation. If one asks whether Shakespeare originated the central plot design of "West Side Story," the answer might be yes, unless one answers that Shakespeare borrowed it from an Italian story. But it would be irrelevant to answer the content-based question by looking at the type of binding or catalogue number.

[22] As the Library of Congress relates: "The sequential numbering of bills for each session of Congress began in the House with the 15th Congress (1817) and in the Senate with the 30th Congress (1847)." *Available at* http://memory.loc.gov/ammem/amlaw/lwhbsb.html. *See also* Brief of Rep. Franks, *et al.*, *supra*, at 15 (S. Ct.).

**The Germaneness Requirement Is, and Must Be, Justiciable in the Courts**

Earlier in the *Sissel* litigation, the government argued that the "germaneness" of a Senate Amendment to a House revenue raising bill (assuming SMHOTA was one, which it is not) is committed to the political branches and would be improper for the courts to second-guess.

There are three problems with this defense. First, the government misreads language from *Rainey v. United States*, 232 U.S. 310, 317 (1914) that cautions courts from entering the germaneness fray, including reliance on an "enrolled bill" doctrine that is no longer good law. Lower courts after *Rainey* did not read that concern as a holding, prohibiting their consideration of the germaneness question. Indeed, many federal appellate courts have not only continued to examine the germaneness question but have expressly held it to be justiciable.[23]

Second, the government could advance an analogous argument in defense of a campaign-finance law the Congress thinks is not a restriction on free speech, and those First Amendment questions are a lot harder than the facts in *Sissel*. Like the guarantee of free speech, the Origination Clause guarantees a deeply-ingrained, *individual* right (which may rise to the level of a fundamental right that is essential to Anglo-American ordered liberty) and not just a political prerogative of House members to enforce or not as they choose. As the previous sections indicate, a bar on judicial enforcement of the germaneness question or even great deference to Congress would effectively render the Origination Clause an empty promise.

Third, even if the government's reading of *Rainey* were ever the law, the Supreme Court ruled in 1990 that the House cannot acquiesce in a violation of the Origination Clause; indeed, the courts have an obligation to resolve disputes about its violation.[24] The "non-justiciability" argument was forcefully advanced by the government in *Munoz-Florez*. The High Court did not expressly address the germaneness issue because it upheld the assessment on other grounds (the special assessment was not a tax subject to the Clause), but it did not disturb the Ninth Circuit's holding that the germaneness issue was justiciable. The rest of its opinion left little doubt that all issues relating to a violation of the Origination Clause were justiciable: "We conclude initially that this case does not present a political question and therefore reject the Government's argument that the case is not justiciable." *Id.* at 387.

As for the concern expressed in *Rainey*, most House and Senate rules are not proscribed by the Constitution and most don't directly affect the individual rights of the people, and thus, the House and Senate are free to amend those types of rules almost any way they choose, so long as they don't violate due process or some other constitutional guarantee. The content or operation of these types of rules is not justiciable in the courts, pursuant to the power of each House to determine their own internal rules of procedure[25] and the political question doctrine.

However, the Supreme Court has made it clear, and rightfully so, that the House and Senate cannot vary from the "single, finely wrought and exhaustively considered, procedure" of

[23] *See* Petition for Writ of Certiorari at 28-31, *Sissel*, No. 15-543 (S. Ct.) (citing applicable cases).
[24] *United States v. Munoz-Flores*, 495 U.S. 385, 391, 393 (1990).
[25] U.S. Const. art. I § 5, cl. 2.

bicameral passage and presentment to the President set forth in Article I § 7, cls. 2-3.[26] A violation of those constitutional procedures for the passage of legislation is justiciable. Nor can the House or Senate engage in artifices to avoid those constitutional requirements. The House may pass a rule that "deems" a bill to have been so read for the third time, since that does not implicate any constitutional provision. But the House could not pass a rule that "deems" a mere majority vote to be a 2/3 vote for purposes of overriding a presidential veto. The 2/3 requirement is a substantive one with a meaning that can't be satisfied by fake formalisms. The courts must remain open to adjudicate a violation of a rule of procedure established in the Constitution.

Nevertheless, this House has a right and obligation to enforce the Clause as well because the origination of money bills is *also* a prerogative of this body, and because it has a strong interest as the People's House to protect the liberties of the tax-paying public. Moreover, it will more acutely suffer the voters' rebuke if it does not enforce this protection of liberty. As Chairman Franks's amicus brief in the D.C. Circuit notes, the result of the 2010 congressional elections is a perfect example of how the voters will react if the Origination Clause is violated. There was no more dramatic turnover of House control since the 1938 election, more than 70 years before. And the party that lost control and those numerous seats was the one that voted overwhelmingly for one of the nation's largest tax increases, in violation of at least the Origination Clause.

Yet, because the Origination Clause is ultimately a protection of individual liberty, it would not matter if the current House endorsed the Origination Clause violation or if it did so with regard to a petty bill that no significant number of voters would care deeply about. Any citizen adversely affected would have standing to sue, and the courts would be required to hear and decide the case. They should have no hesitation doing so in the face of vociferous arguments that the House has a blue slip procedure that should have been employed.

In *Sissel*, the government also argues that the 2076-page Senate Health Care Bill was germane to the six-page military housing bill because both involved taxes. Ordinary Americans know the contrary is true, and when they hear such an argument they rightly suspect the administration has something to fear from careful Supreme Court review. If the substitution of ObamaCare is germane to SMHOTA, then the Origination Clause is a dead letter.

The reported statement from Senate Majority Leader Harry Reid's counsel indicates how cavalierly some functionaries view the Origination Clause requirement. In her view, the Senate need only wait for the House to pass one tax measure and then anything goes: "[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."[27] As an aside, hijacking a non-controversial bill and substituting a highly controversial one is more offensive to the constitutional principles at stake, not less. But with due respect to Ms. Leone, it is more complicated than she believes it to be to circumvent the Constitution's protections of individual liberties. The courts and this House should ensure that is so.

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[26] *Chadha*, 462 U.S. at 951.

[27] Brief of Rep. Franks, *et al*. as Amici Curiae at 23, *Sissel*, No. 15-543 (S. Ct.) (quoting e-mail from Kate Leone, Senior Health Counsel, Office of Sen. Harry Reid).

**Should the Courts Defer to Congress on Germaneness In Close Cases?**

The extreme gut-and-complete-substitute process used to strip a military housing tax credit bill and enact massive, unrelated healthcare tax increases is not a close case under the Origination Clause. Even in much closer cases, it is not clear that courts should defer to the House's and Senate's presumed judgment regarding germaneness for several reasons. There are at least three plausible standards of review the courts could adopt on the germaneness issue:

- The text and purpose of the Origination Clause protect an individual right, analogous to individual rights guaranteed in the First Amendment. Thus, the courts and Congress should apply a presumption in favor of liberty and require the government to prove the constitutionality of the law that reasonably has been placed in doubt.
- The courts could show no deference or presumption either way.
- The courts could fashion a rule of congressional deference in close cases, particularly if the matter was debated in the House and voted on by its Members who would suffer more direct injury for a violation of the Origination Clause.

This last option leaves minority interests unprotected should House Members conclude that they would be unlikely to suffer electoral consequences for "soaking the rich." Thus, the first and second alternatives have a firmer constitutional foundation.

## Conclusion

In Robert Bolt's play, *A Man for All Seasons*, St. Thomas More rebukes his son-in-law Roper for his willingness to bend the law for what he believes, and might even be, a just end. He explains to Roper that he should give the devil due process of law lest the thick forest of law be rendered a wasteland when the tables were turned and the devil came after him.[28] Those who twisted the legislative process to pass the President's signature healthcare law violated the House origination requirement to achieve what they considered a great end. Even if their goal was noble, our written Constitution and the protection of individual rights it guarantees is far more important.

[28] Robert Bolt, *A Man for All Seasons* (Bloomsbury, New York, 1960).